



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA



**public enterprises**

Department:  
Public Enterprises  
REPUBLIC OF SOUTH AFRICA

# PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES

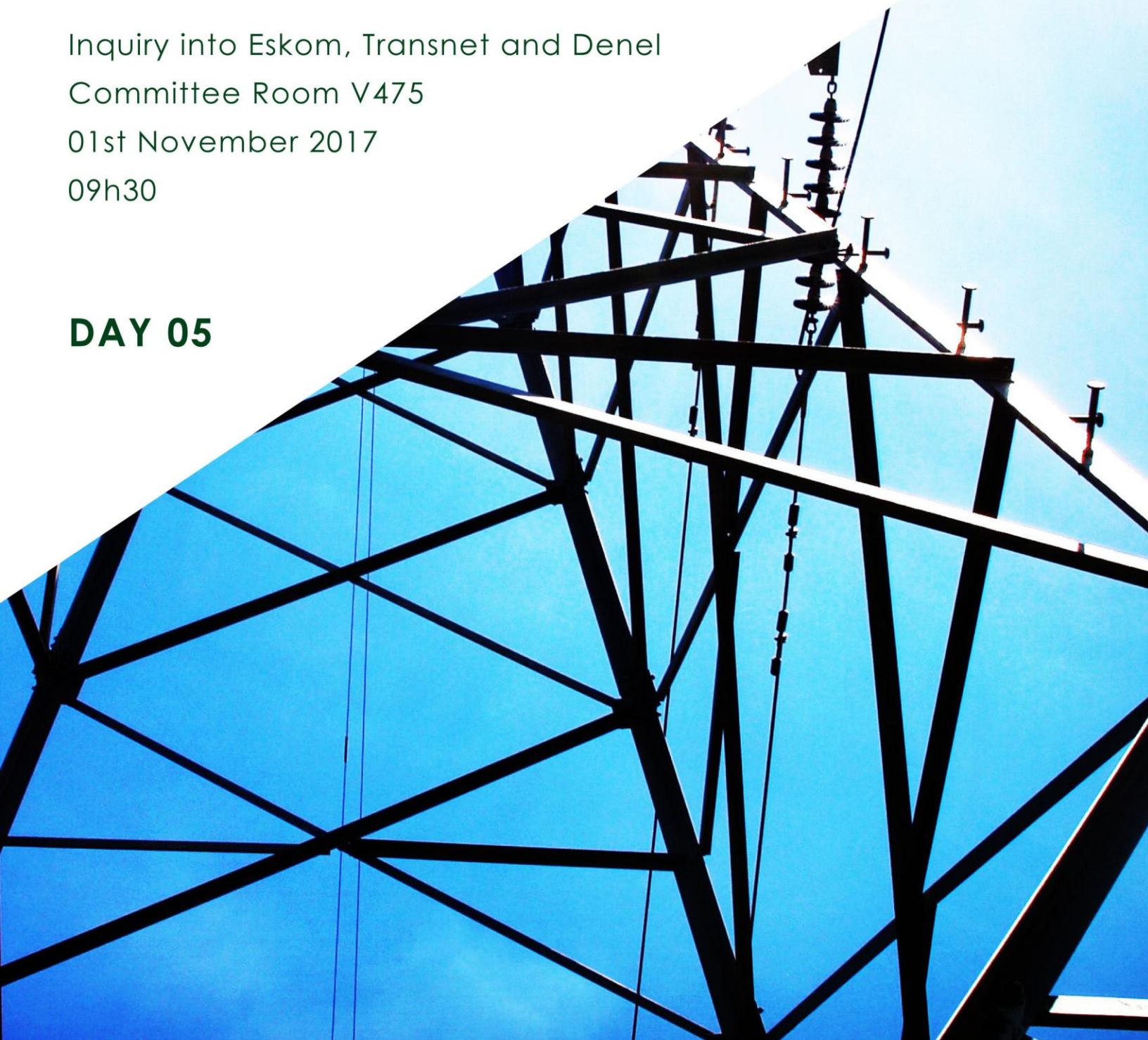
Inquiry into Eskom, Transnet and Denel

Committee Room V475

01st November 2017

09h30

**DAY 05**



**Ms Daphne Rantho** - ...minutes, as they are still sorting out this noise there that is happening on top of us, can we meet outside please.

**Ms Daphne Rantho** - Good morning Honourable members,... [Not English]. Good morning Honourable members, we are going to start with our meeting now or with our enquiry now. I welcome everybody in this room. I'm not going to call you by your names or by your organisations, but everybody is welcome. We have an agenda in front of us, I think we have apologies, can we get the apologies first.

**Unknown speaker** - Thank you Chair, just the following apologies; Mr Kwankwa due to illness is unable to attend the meeting and then also an apology from Mrs Nobanda who is delayed Chair, but she will be joining us. Those are the apologies Chair.

**Ms Daphne Rantho** - Thank you very much and apologies have been accepted. Honourable members, today we are going to get... our witness is already here, he is going to give us evidence on corporate governance in Eskom how Optimum Coal mine was purchased. He's going to be a little bit detailed; I hope we are going to be as patient as possible so that we get what we want from him, what we invited him for. Today we're getting a presentation therefore we are not going to be led by the evidence leader; we will just give over to our witness to present...is the witness going to present? The witness is going to testify and the evidence leader will lead him to testify. We are not going to have a certain time will give them enough time the evidence leader to lead the witness up to where he will indicate that he is finished. Hopefully we agree on that members. Now I will give over to the evidence leader, are you ready? Oh, he is going to speak under oath, the evidence that he's going to give here he is going to give us under oath. I will therefore read the oath to him and then he will then sign the oath after that. I just hope he is going to hear me clearly because there is this noise that is happening and I'm told it is sorted. I just hope that was the last check that or the last whizz that went on top of this roofing. Ok, it's fine. I'm speaking to you now, Sir. In accordance with section 16 of the Powers Privileges and Immunities of Parliament and Provincial Legislatures Act 2004, as a witness to this oversight enquiry, please be informed that by law you are required to answer fully and satisfactory all the questions lawfully put to you. Or to produce any document that you are required to produce in connection with the subject matter of the enquiry. Notwithstanding the fact that the answer or the document could incriminate you or expose you to criminal or civil proceedings or damages. You are, however, protected in that evidence given under oath before a house or committee may not be used against you in any Court or place outside parliament, except in a criminal proceeding concerning a charge of perjury or a charge relating to the evidence or documents required in these proceedings. Please be aware that in terms of section 17 sub section 2 of the Powers Privileges and Immunities of Parliament and Provincial Legislatures Act, a person who wilfully furnishes a house or a committee with information or makes a statement before it which is false or misleading commits an offence and is liable to a fine or imprisonment for a period not exceeding 2 years. You are required to take an oath or affirm that the evidence you are about to give is truthful, you may choose to...oh, you said you're going to take an oath,...then this is the oath "I swear that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth, So Help Me God." Can you raise your right hand?

**Mr Piers Marsden** - I swear that the evidence I shall give shall be the truth the whole truth and nothing but the truth, So Help Me God.

**Ms Daphne Rantho** - Thank you very much. Then I will now give...you signed, did you sign there?

**Mr Piers Marsden** - I've just signed.

**Ms Daphne Rantho** - Ok, then I will now give over to the evidence leader.

**Honourable Vanara** - Thank you Chair and good morning to yourself, the Honourable members and the guests of the committee. Mr Marsden for the record, can you just state your full names and provide the committee with your academic background and your working experience.

**Mr Piers Marsden** - My name is Piers Michael Marsden, I am a chartered accountant with 15 years of experience working in the insolvency industry. I have a post-graduate qualification diploma in insolvency. I'm a registered senior business rescue practitioner at the CIPC and I have done many business rescue assignments.

[00h09:00]

**Honourable Vanara** - The committee has requested your assistance in relation to a transaction which was the purchase of Optimum Coal Holdings from Glencore by Tegeta or actually just ask you to explain to the committee what was your involvement with Optimum Coal Holdings, when that involvement started, where it ended, the capacity in which you were involved in, where you alone in the assignment that you were with. Also take that further to one of the subsidiaries of Optimum Coal Holdings which is Optimum Coal mine, when you got involved with the mine and in which capacity you got involved, and whether or not you still involved with that relationship. Thank you.

**Mr Piers Marsden** - Thank you and good morning and to the Chair, Honourable members and guests; thank you for your time. In answer to the question, this is a matter that really came to my attention a couple of weeks before the business rescue application was lodged, which date with the 4th of August 2015. Myself and a colleague, Peter Van Den Steen, who has given me a letter of support and authority to appear here and he is supportive of my actions and attendance here today, were effectively communicated by the board of Optimum Coal Holdings as well as Optimum Coal mine pursuant to a resolution passed on the 31st of July 2015, effectively where those two legal entities passed a resolution for the voluntary business rescue. I was formerly appointed by the CIPC on the 4th of August 2015, at which point my involvement with the entities began. The business rescue process, and I'm not sure if anybody in the committee has any experience or requires me to go into any detail around any specifics of business rescue, but as an overriding process it is designed to facilitate the rehabilitation of companies and essentially to place the management and operational control of those legal entities into the hand of an independent third-party; in this example myself and Mr Van Den Steen.

[00h11:52]

Pursuant to our appointment we understood and tried to gain a better understanding of the financial position as well as operational position of the various entities. From a structural point of view and to the extent it's necessary; I do have an organogram which would assist the members to understand the legal process and where the items fit. But at a simplistic level Optimum Coal Holdings is, as the name suggests a holding company, and it had a number of different subsidiaries wholly-owned, Optimum Coal mine being the principal focus but included within the other subsidiaries was Optimum Coal Terminal, which had the significant rail allocation through the Richards Bay coal terminal, the Koornfontein mine, as well as a number of other subsidiaries which had various mining and prospecting rights. Affective from my appointment we understood very quickly that Eskom was going to be a fundamental player in the process; they were at the

time the only customer for Optimum Coal mine which had a long- term coal supply agreement with Eskom, and as much publicised was a loss making coal supply contract. There is an extensive history prior to my involvement, which I won't bore the committee with, it is detailed quite extensively in the public protector's report. But it did involve a long-term supply agreement; a hardship cooperation agreement signed to try and find some level of agreement between the parties, and ultimately that sort of resulted in a situation where it had been approved at various levels within Eskom, but at the highest levels of Eskom the agreement effectively failed. A penalty was applied on Optimum Coal mine and as a result of that the company was financially distressed and that was the reason why the board of directors applied for business rescue.

[00h13:44]

**Honourable Vanara** - Sir.

**Mr Piers Marsden** - Yes.

**Honourable Vanara** - You speak about the penalty; are you aware of the amount of the penalty and what the penalty was for?

**Mr Piers Marsden** - Absolutely, the amount of the penalty and really there are two components to the penalty; the first component in the amount of about 2.1 billion rand related to historic coal deliveries where product had been delivered to Eskom allegedly out of specification, and if my memory serves me correct, the specification was largely around the sizing of the product. The real concern, however, was the forward-looking review of the penalty i.e. if the penalty were to be applied retrospectively then looking forward and if Eskom were taking the view that they were going to apply those principles, the mine would be even further loss- making given that it would effectively not receive value for the product that it had delivered. So understanding the Eskom was a critical part of any plan to resuscitate the business, for the period of the next effectively two months, a variety of engagements were held not only with Eskom but with also other affected parties in the business rescue process. Those issues included discussions around the supply, the ongoing supply of product, various pre-litigation items, various proposals made by myself and my fellow practitioner with regards to the supply to Eskom going forward, discussions around the loss-making contract and a variety of administrative actions effectively that we were doing as part of our business rescue process. Essentially this was designed to ensure that we could avoid liquidation.

[00h15:35]

There were substantial numbers of people employed principally at Optimum Coal mine, but of course if its holding company went into business rescue which it had; it could also have an impact on the other subsidiaries being Koornfontein where there was significant employment. As a result of that we had extensive negotiations with Eskom around proposals, around the supply around proposals in terms of ongoing adjustments or amendments to the coal supply agreement. There was a termination of supply which was then effectively resuscitated and supply continued by mutual agreement for the duration of the business rescue proceedings. That proceeded for the month of August and essentially for the month of September as well, and we concluded an interim arrangement in the middle of September 2015 whereby the parties agreed to work together to try and find a solution to the onerous contract. In or around the 5th of October it became apparent to us that a negotiated settlement around the coal agreement was unlikely to happen. In fact, we received written confirmation from Eskom that our proposals had been rejected in terms of restructuring in the entity in its current format with its current shareholding. We then decided to pivot and effectively see if we could change the paradigm by introducing a potential purchaser for the mine. And in ...on the 7th of

October on or about the 7th of October, we signed a binding term sheet with a third party. We had received numerous unsolicited requests to buy the mine, but we had at this point in time only just decided to move into the second phase. Prior to that we were trying to negotiate a settlement and included in those unsolicited offers was an advance made by KPMG on behalf of Tegeta. On the 7th of October however, we decided to sign with a third party, which agreement effectively had as one of the heart and core parts of the agreement was that that third-party needed to find some solution with Eskom to enable us to overcome the problem of the onerous supply agreement. Towards the middle and latter part of October that transaction failed. We again implored Eskom to try and find a solution and to resolve the impasse which would have seen not only the saving of several thousand jobs but also the continued supply of product to Eskom.

**Honourable Vanara** - Sorry, Mr Marsden.

**Mr Piers Marsden** - Yes, of course.

**Honourable Vanara** - You're referring to a third-party, you're referring to unsolicited proposals to purchase the mine that you turned down. Are you at liberty to share who these parties were that made these unsolicited proposals to you.

[00h19:00]

**Mr Piers Marsden** - I'm pretty sure I'm not at liberty to, so I'm happy to disclose it. I think that the agreement that was signed, the term sheet that was signed, was with a company called Phembani. There were a variety of other unsolicited offers and none of which we had accepted. The only one we accepted was the Phembani offer, but the unsolicited offer did include entities like the state owned mining company, as an example. Towards the latter half of October, sorry, sorry...

**Honourable Vanara** - The Phembani supplier...or proposal which you'd signed a term sheet, why did it not proceed, why did the transaction not proceed?

**Mr Piers Marsden** - At the time we were not given detailed reasons. Further on in the process we received a letter from Phembani confirming that they had not been able to get sufficient answers from Eskom in terms of a proposed transaction.

**Honourable Vanara** - So as business rescue practitioners of Optimum Coal Holding and Optimum Coal mine, you were prepared to sell the Optimum Coal Holding with its subsidiaries to Phembani, but that Eskom did not agree to the transaction. Do I get that correctly?

**Mr Piers Marsden** - Just one minor correction; at this point in time we were very much in discussions around Optimum Coal mine, Optimum Coal Holdings was in itself a holding company and as such did not have any liabilities other than the bank debt which was stayed as a result of the moratorium. So at this point in time it was very much a discussion around Optimum Coal mine and the sale of that asset. But other than that you are correct. We had signed a term sheet to sell Optimum Coal mine subject to of course the usual commercial agreements to Phembani.

**Honourable Vanara** - Were there any specific reason that Eskom gave to you as to why it would not agree to the sale of Optimum Coal mine to Phembani.

**Piers Marsden** - No, I was given no reason.

**Honourable Vanara** - In your interactions with Phembani, were they given any specific reason by Eskom as to why they wouldn't agree to the sale of the mine, Optimum Coal mine, to Phembani.

[00h21:51]

**Mr Piers Marsden** - I was not privy to the discussions between Eskom and Phembani, so unfortunately I'm not qualified or able to answer that.

**Honourable Vanara** - I thought you said you'd received confirmation from Phembani that Eskom did not agree to the sale of the mine, or did I misunderstand you?

**Mr Piers Marsden** - No, you're correct, I had received a letter as I said not at this point in time from a chronological point of view, but later once we had concluded a transaction with Tegeta we did receive a letter from and Phembani effectively suggesting that they perhaps had not been given an opportunity to do a similar type of transaction. But they did not detail any of their discussions with Eskom. So towards the latter part of October 2015, we once again implored Eskom to reconsider given the potential liquidation that would have had disastrous impacts on employment as well as the ongoing supply. And with various correspondence essentially we realised that we had better engage with further parties and essentially we were left with Tegeta as the remaining offer or for the assets. They requested us to facilitate a meeting between themselves that is Tegeta and Eskom to see if a deal could be crafted, and had a meeting on the 24th of November chaired by Eskom. Effectively Eskom's position was laid out pretty clearly in terms of what a transaction could look like that they would be supportive of. That essentially involved a transaction not only of Optimum Coal mine but effectively the transaction that was ultimately concluded which is a transaction that included both Optimum Coal mine, as well as the profitable Koornfontein mine and the profitable Optimum Coal terminal. And on that basis Eskom was prepared effectively to look at a transaction. So effectively moving our gaze from being focused exclusively at Optimum Coal mine to a much higher gaze effectively involving the sale of Optimum Coal Holdings entire set of subsidiaries including Optimum Coal terminal as well as Koornfontein Mine. The rationale for that being that effectively there was a profitable side of the business and a loss making side of the business and Eskom's view, quite correctly I think, was that the one business needed to support the other business and they did have a guarantee effectively from Optimum Coal Holdings. So they believed that the business would only be sustainable if it included both the good and bad sides of the business.

[00h25:00]

**Mr Piers Marsden** - That effectively kicked off a number of discussions with Tegeta in terms of which we had received as I mentioned that meeting was on the 24<sup>th</sup> of the 11<sup>th</sup>, we received a verbal offer to the tune of a billion rand from the Tegeta Consortium, we had a meeting with the banking Consortium who had security over the assets and who would be another important party and making sure that the business rescue process was concluded. This would have seen them taking a substantial write-off on their debt and as a result they rejected the original offer on or around the 26<sup>th</sup> of the 11<sup>th</sup>. Following a number of discussions effectively late in November perhaps on the 1st of December Glencore decided that they would rather support Optimum and discharge the business rescue. A meeting was held at Eskom at which this decision was made subject to of course being able to restructure the bank debt to the tune of about two and a half billion rand and a meeting was then subsequently held in early December with the bank to let them know this fortuitous piece of news and the fact that ultimately it would resolve a restructure of their debt but Glencore supporting the business going forward. Then in early...on the 4th or 5th of December 2015 we received an amended offer from the Tegeta Consortium which effectively was the deal that was ultimately concluded. That deal was



concluded on the 10th of December 2015. It included a substantially increased purchase price and it had an effective date of 1 January but with four conditions precedent to the transaction which needed to be met by the 31st of March 2016. One of those conditions precedent was the Competition's Tribunal giving their consent to the transaction which was handed down on the 22nd of February. The second was a letter of comfort or a guarantee from the purchaser effectively demonstrating their ability to deliver on their purchase price, in that regard we received a letter on the 4th of March 2016 which was one of the specific items requested and is included in your packs, sorry, just to highlight the sale agreement is also in your pack as specifically requested. So that dealt with although not entirely to the satisfaction of the banking Consortium but that effectively saw that condition precedent waved. And then on the 30th of March we received the last two which was Eskom's release letter and consent to the transaction as well as the Section 11 consent from the Department of Mineral Resources. Thereafter the business rescue plan was published, it published on the 31st of March, and a meeting was held on the 8th of April 2016 to approve the plan which subsequently happened and the plan was approved.

[00h28:12]

Essentially what this meant was that the purchaser had 4 days in which to deliver the funds and the seller had the same amount of period to effectively deliver the shares and to deliver the change of director's resolution the administrative documents effectively to an escrow agent to enable the transaction to close. That was on the 8th of April. On the 11th of April and I don't know if I can just briefly touch this because I'm sure this is going to be the subject of much questions, but on the 11th of April is effectively the subject matter of the section 34 that we have effectively lodged. So I'm going to maybe skip over that we can come back to that in perhaps more detail. So the 11th of April we had a variety of meetings but ultimately on the 14th of April the transaction closed and Tegeta became the new shareholder of Optimum Coal Mine, Koornfontein, as well as Optimum Coal Terminal. At that point in time Optimum Coal Holdings having divested itself of all of its assets effectively was discharged from business rescue, however, Optimum Coal Mine still in business rescue continued to trade as such until the 31st of August when we discharged it from business rescue as a result of it no longer being financially distressed. That is effectively the end of my involvement with Optimum, the 31st of August 2016.

**Advocate Vanara** - 31st August 2016 or 2017?

**Mr Piers Marsden** - 16

**Advocate Vanara** - Can we then get back to the 11th of April 2016. There were developments on the day, can you just take the committee through those developments?

**Mr Piers Marsden** - If the evidence leader doesn't mind if I could maybe direct, it's probably easier for me to read directly from the statement in terms of the statement that was issued to the Director of Priority Crime Investigations. It'll I think perhaps help me for my words a little bit better and that is in the pack that was that was specifically requested. I've given quite a bit of the background...

**Ms Daphne Rantho** - Thank, sorry, sorry Mr..... Marsden. In our packs, Advocate, the information is not numbered. There are dividers in between but the information is not numbered. Can you Advocate or Mr Marsden give us the top part of that document that he is going to read out of so that we all go to that document. Thank you.

[00h31:12]

**Mr Piers Marsden** - Absolutely, so it is the, in my folder the blue one I'm not sure if it's the same in yours, but essentially it has the SAPS logo at the start so...

**Advocate Vanara** - Ja, Chair I did inspect the annexures and I one of the documents that is missing is the section 34 statement which I have asked the committee secretary to just make a copy for the committee members. Because I don't know whether it was because of haste or what... No it is! It is here, under the pink file but on top you'll see there's a copy of the South African Police logo.

[Talking off mike inaudible]

**Advocate Vanara** - Yes, under the South African Police logo there you'll see...

**Ms Daphne Rantho** - In our packs it is there but it's not in the same, maybe the colour of the divider would not be the same for all the packs.

[Talking off mike inaudible]

**Ms Daphne Rantho** - I saw it. The others are not green.

[00h32:47]

[Talking off mike inaudible]

**Ms Daphne Rantho** - I said to the colours of the divider will not be the same because mine is yellow and Mondli's is green and yours might be pink, so... and the others might be blue.

[Talking off mike inaudible]

**Ms Daphne Rantho** - I think the easiest way is to say that the divider it's number 5, its divider number 5 in our packs.

**Honourable Gungubele** - What I like about it, it's non-racial. It's got many colours. [Laughter]

**Ms Daphne Rantho** - It's not five to you PG, its page 6. [Laughter]... Alright, ok.

[Talking off mike inaudible]

**Mr Piers Marsden** - May I proceed Chair?

**Ms Daphne Rantho** - You can proceed, thank you very much [overtalking] and thank you for your help Advocate.

**Mr Piers Marsden** - So if I could ask you to page through effectively the first couple of pages which simply are administrative and get to the page effectively titled 'Director for Priority Crime Investigation Anti-Corruption Desk'. Points 1 effectively through 9 are covered in terms of the background that I've given so I'm gonna pick up from point number 10 which is the "sale agreement with subject to the fulfilment of certain suspensive conditions. The suspensive conditions were fulfilled and or waived on the 8th of April thereby rendering the sale agreement unconditional. The purchase price was required to be paid by Tegeta to the attorney's as escrow agent on the third business day after the date in which the sale agreement became unconditional." The 8th was a Friday so effectively taking us to the 13th of April. "I received a phone call from Mr Howa of



Tegeta on the 11th of April 2016, effectively two days before payment was due under the sale agreement requesting a meeting at the offices of Tegeta in Sandton on such date.”

[00h35:45]

“That meeting was held on that date at approximately 10 in the morning. At such meeting I was advised by Howa that Tegeta was 600 million short in respect to the purchase price and he requested myself to approach the bank Consortium to request a bridging loan in the amount of 600 million rand to finance the shortfall on the purchase price. The purchase price was in the amount of about 2.15 billion that was required effectively from the purchaser. At 1:30 on the 11th of April I arranged a meeting with the Consortium of Banks, the meeting was attended by representatives of the Consortium of Banks as well as Glencore at which meeting the Consortium of Banks requested me to advise Mr Howa that the banks were not prepared to finance the shortfall of the purchase price. I took this message effectively back to Mr Howa after deliberation it was at approximately 3 o'clock on the 11th of April and, as I mentioned earlier, on the 14th of April the amounts were paid and the purchase price had been discharged. The deal therefore closed. On the 12th of June 2016 and the 19th of June 2016 Carte Blanche aired a feature on this transaction which precipitated the release of various press articles. A full-length interview with Howa was also made available on the Carte Blanche website on the 20th of June. We reviewed the episodes and the interview in the week of 20th of June and we reviewed the articles. Pursuant to the episode interview and articles, we learnt for the first time that Eskom had made a prepayment to Tegeta for the purchase of coal from Tegeta in an amount of 586 million. The coal, for which the prepayment was made by Eskom, appears to have been or is to be procured from Optimum Coal Mine for Tegeta and delivered by Optimum to Eskom's Arnot Power Station. We have come to learn from the episodes that the prepayment was approved by a committee of Eskom representative at a meeting at 9 o'clock in the evening on the 11th of April 2016. This meeting was held on the same day and which the request for the bridging finance for 600 million rand was made to and rejected by the Consortium of Banks.”

[00h37:49]

“Pursuant to the interview Howa remarked that the prepayment has been made on the basis that OCM was in business rescue and required money for its liquidity and for the start-up of equipment. We confirm that the prepayment was not made to OCM and the OCM provides a 30-day payment term to Tegeta for the delivery of coal. We are mindful of section 34 (1) and our obligation to report any suspicious activity.

We do not intend to draw any conclusions from the aforesaid but wish to draw the attention of the Hawks to the circumstances of which we are aware as a matter of caution. We reserve our rights to provide supplementary documents and the content of this letter is private and confidential.”

**Advocate Vanara** - You then wrote to the Directorate for Priority Crime Investigations...

Oh sorry, this letter that you've just read was addressed to them? I see it's signed by your core business rescue practitioners, correct?

**Mr Piers Marsden** - It's signed by both of us. Correct, yes.

**Advocate Vanara** - You, in page 3 paragraph 23 you saying you're reporting what you perceived to be a suspicious activity. What was the basis of your suspicion?

**Mr Piers Marsden** - I think everything has timing in context, mindful of our meeting that had happened prior to the discharge of the purchase price on the 11th of April. We were led to believe by Tegeta that they were 600 million short on the purchase price that they needed in order to close the transaction and the timing of the prepayment was on the very same day in fact at 9 o'clock in the evening for an amount relatively similar. So the amount was for 586 million as far as I can remember and so we believe that the timing of that was something that required further investigation. So, both the quantum and the timing required further investigation.

[00h40:05]

**Advocate Vanara** - Perhaps it will be opportune at this stage just to indicate to the committee, who are the shareholders of Tegeta?

**Mr Piers Marsden** - There is a detail effectively included in both the competitions filing as well as in the public protectors report, so please don't hold me if I'm a couple of percentage points off but certainly, Oakbay and the Duduzane's company I think it's called Mabengela are the majority shareholders but if you give me a couple of minutes I'll be able to find who the details shareholders are..... This is on page 112 of the public protector's report. Effectively the percentage shareholding of Tegeta is Oakbay 29.05%; Mabengela 28.53%; Fidelity 12.91% ; Accurate 8.0 1% and Elgasolve 21.5%

**Advocate Vanara** - Just on that page; who owns Oakbay?

**Mr Piers Marsden** - Obviously I have no personal knowledge of who owns it but clearly it is the investment arm of the Gupta family.

**Advocate Vanara** - The 586 million rands which you refer to on page 2 of your letter to the DPCI, paragraph 19.1 as a prepayment to Tegeta. Read that with paragraph 21 of the same letter on page 2 where you're referring to the remarks made by Mr Howa. In light of the two, in whose account would 586 million have had to be paid to?

[00h43:03]

**Mr Piers Marsden** - So we had no knowledge of the 586 million rand, we were not in control certainly of Tegeta. However, as mentioned post the close of the deal, Optimum Coal Mine remained in business rescue from April until 31st of August 2016. As a result we were certainly in control of that legal entity and Optimum Coal Mine did not receive the 586 million rand subsequent to the close of the transaction Optimum Coal Mine entered into a sale agreement with Tegeta for the supply of coal to the Arnot Colliery. But at the time of the prepayment certainly that payment was not made to Optimum Coal Mine and in fact on the date that the payment was made, if the public protector's numbers are correct, the payment was made to Tegeta which was not the shareholder of the mine at the time either, it merely had a right to acquire the mine.

**Advocate Vanara** - In your view as the business rescue practitioner of Optimum Coal Mine where should the 586 million have been deposited? Into whose account should that money have been deposited?

**Mr Piers Marsden** - I think first of all the rationale for the money would need to be interrogated in the first place. Optimum Coal Mine was in business rescue, so clearly was financially distressed. We had, however, negotiated better payment terms on the Hendrina contract. This coal supply agreement was between Tegeta and between Eskom was not between Optimum and Tegeta. It was of course back-to-back subsequent to the prepayment in terms of an agreement between Optimum and Tegeta. So in terms of a very Optimum Coal

Mine point of view we never supplied the coal to Eskom we supplied the call to Tegeta on 30-day payment terms. So the prepayment was a transaction between Tegeta and between Eskom and the issue that we had we took with regards to the various interviews was that the rationale given for the prepayment was twofold. First of all that the company was in business rescue as I've mentioned we didn't get that, second of all that equipment was required in order to mobilize and increase production. We were currently in control of that mine and whilst there was a modest amount that was required in order to restart a second dragline it certainly wasn't anywhere near the quantum of 596 million rand. I hope that's answered your question.

**Advocate Vanara** - You were probably not aware but I am aware that there was a 1.6 billion guarantee from Eskom which assisted in the facilitation of the payment of the purchase price. Are you aware of that amount of money?

[00h46:39]

**Mr Piers Marsden** - Just from the press.

**Advocate Vanara** - So in terms of the payment of this particular transaction, you as business rescue practitioners, and I've had a look at the contract relating to this purchase of shares and rights, you are one of the parties to this agreement. From your explanation it would appear that you were in the dark as to the source of funding for this transaction, is that correct?

**Mr Piers Marsden** - The ultimate source is incorrect. When we concluded the transactions one of the conditions precedent was that the purchaser demonstrate to us that they had the financial ability to conclude this transaction. We were effectively given a letter of comfort from their bankers that they did have the funds available in order to conclude this transaction. So we relied on that letter in terms of concluding a transaction. The ultimate source of the funds that discharged the purchase price only became known to us and effectively predicated this section 34 declaration.

**Advocate Vanara** – Clearly, and this is very apparent from your statement to the DPCI and I assume that it's a package that informs your suspicion around the activities on the 11th of September. That there's a meeting between yourself and Mr Howa in the morning, in the afternoon around 3 you report back to him that the banks whom you'd approached have considered his request unfavourably, and midnight on the same evening there is a board tender committee meeting which you had, at the time, no knowledge of not surprising because you are not a board member of Eskom. At night on the 11th the PTC approves this 586 million rands. Now those are the facts. What I'm interested in pursuing with you is the following; Mr Howa was not a board member at Eskom, is that correct?

**Mr Piers Marsden** – Yes, I believe so.

[00h50:19]

**Advocate Vanara** - The purchasers were not and still are not directors or board members of Eskom board.

**Mr Piers Marsden** - As far as I understand, that's correct.

**Advocate Vanara** - That the meeting gets to be convened by whoever and surely that meeting must have been convened by members of the board or relevant members of the board tender committee and that board committee then deals with the prepayment which later forms part of paying the purchase price. If I were to put it to you then and I would like your comment on this hypothesis is that Mr Howa must have

control over the people that convened that board tender committee that evening of the 11th of April 2016. What will be your response to that?

**Mr Piers Marsden** - I think that the timing and the quantum certainly look suspicious, but the hypothesis is something I think above my pay grade in terms of whether they have control. We certainly raised the issue, it certainly doesn't look fantastic, I think if you look at in the context of the public protector's report particularly the communication between Mrs Raghavan and Mr Molefe at that point in time there is certainly something that requires further investigation.

**Advocate Vanara** - Maybe the word hypothesis scares you, maybe let's use common sense. There must have been a relationship which you and I seated here now cannot explain, but this relationship from the purchasers because surely if they are to get 586 million from Eskom; you see if the banks that you had approached were to give Mr Howa the 600 million it would have been because you are approached, you went to the bank and the banks would have agreed to loan the 600 million, is that correct?

**Mr Piers Marsden** - Certainly, that was the request that was made of me.

**Advocate Vanara** - Now you and I seated here might not know the role players but it would appear that somebody must have initiated this special, odd meeting on the same day that evening for that meeting to take place.

[00h55:00]

**Mr Piers Marsden** - I would imagine that meetings like that do require notice and certainly the commendable work ethic to meet in the evening but I have no knowledge around what required time frames, notices, Eskom's internal meetings have. It may have been called earlier or I have no knowledge of that.

**Advocate Vanara** - But we know... I know... and let me not say we know, let me say I know that before your meeting and your response to Mr Howa on the 11th of April 2016 there was no special board tender committee convened. Not certainly to look at the prepayment of the amount you requested or you've stated in the statement. So, that you can accept from me. So I'm saying if the 586 million paid the purchase price, those in need of the 586 million would have had to approach Eskom in one way or the other for them to get the 586 million in the same manner in which you are requested to approach the banks.

**Mr Piers Marsden** - That appears to be correct. I think that the convening of the meeting I have no knowledge of so to the extent I'll rely on your statement. It does seem an extraordinary large amount of money to not only approve but to pay out within a relatively short amount of time.

**Advocate Vanara** - And at this stage you and I might not know who approached who but we know that somebody convened this meeting, and one of the and the sole issue on that agenda was this particular matter. So, it's an issue how the meeting was convened and what was to be discussed and all those things. I'm not going to bother you with those. Eskom board, particularly the board tender committee members will have to deal with those.

[00h57:48]

But what I'm interested in, just using common sense; the meeting then gets to be convened and we know now the money was paid, contributed to the purchase price. Would you then say directly or indirectly Eskom contributed to the purchase price for the purchase of the mine?

**Mr Piers Marsden** - Certainly, that's the conclusion that the former public protector reached and it seems pretty unequivocal in terms of the flow of funds as detailed in her report.

**Advocate Vanara** - You reported this to the police, I'm just looking at the date that's what I'm trying to find,... when was this reported to the police?

**Mr Piers Marsden** - The First of July 2016.

**Advocate Vanara** - It's now over a year and 3 months. Have you heard anything from the Directorate for Priority Crime Investigation, regarding this matter?

**Mr Piers Marsden** - I thought you might ask that. We've received an acknowledgement of receipt immediately on the 1st of July as we reported it, immediately as we reported it in 2016 received an acknowledgement that it had been received. In May between the 18th and 23rd of 2017 I was contacted by a warrant officer for further particulars which culminated in a 34 (3) affidavit that I signed almost identical to the one that you're looking here, yes in May of 2017 between the 18th and 23<sup>rd</sup>. Those interactions culminated in me signing a further 34 (3) affidavit in July 2017 with a warrant officer, and then as recently as Thursday of this week I received a further email from what appears to be the new investigator requesting a further interview, and I've been here but I hope to see him in the next couple of days.

[01h00:42]

**Advocate Vanara** - So the first meeting was to record your letter in a different format in a form of an affidavit, do I understand you correctly?

**Mr Piers Marsden** - That's correct.

**Advocate Vanara** - And that was just over 8-9 months after you had lodged your letter?

**Mr Piers Marsden** - Correct. So the discussions commenced, my earliest record is the 18-05-2017. There were a variety of documents that we required to ensure that we were dealing with the correct parties.

And ultimately there was a meeting held and a further affidavit signed in July 2017, the original application 1st July 2016.

**Advocate Vanara** - Given the developments around the 11th and looking at the shareholders of the purchasers. Do you have any reason to believe that the prepayment of 580 something million had anything to do with who owned the purchaser?

**Mr Piers Marsden** - I've got no knowledge of that. I wouldn't be able to comment.

**Advocate Vanara** - So your only concern about the transaction are the events on the 11th of April... 2016... which you became aware of how much later.

**Mr Piers Marsden** - I think that is the principal item that we were concerned around. Throughout the transaction we encountered a particularly acrimonious relationship that we effectively inherited when we started business rescue with regards to Eskom. And it was quite difficult to engage with them on a meaningful basis in terms of trying to find a solution for the business rescue of both the Coal Mine and Coal Holdings. This could have been ascribed to playing hardball this could've been ascribed to many commercial

rationale, but it certainly was not an easy transaction. We had formidable players in the game both from Eskom, the DMR and Glencore, so it was a particularly difficult transaction.

[01h04:17]

**Advocate Vanara** - Let's go back to the 2 point odd billion fine. What happened to the fine at the time that you were business rescue practitioners and at the time of the sale, and according to your knowledge at the time that you closed the business rescue practice.

**Mr Piers Marsden** - So the fine was one of the principal reasons for the company entering into business rescue for both Optimum Coal Mine which was effectively had the long-term supply contract but Optimum Coal Holdings had also signed a guarantee for the obligations of Optimum Coal Mine hence, the reason for Optimum Coal Holdings going into business rescue as well. One of the advantages of business rescue is that it effectively puts a stay on legal proceedings and the view that we took throughout the business rescue process was to effectively use that shield of the business rescue process to avoid having to litigate on that particular matter. I think that the fine itself is an item that was subject to much technical dispute and would've required extensive arbitration not only from a legal point of view but also from a technical point of view to determine the veracity and or the quantum of the claim. In terms of the purchase, that liability remained with the legal entity, so Optimum Coal Mine as a legal entity itself was acquired by Tegeta and effectively that issue was kicked down the road post the end of the business rescue. So throughout the business rescue process we effectively used the stay on legal proceedings to not deal with it in terms of arbitration and or litigation.

[01h06:22]

**Advocate Vanara** - Before you decided to sell the mine and later the holding company with all its subsidiaries, this issue of the fine which had brought the company into the situation that it found itself in, which as you have reflected the subject of a lot of technical discussion negotiations between the shareholder which then you came into the picture with Eskom. What was the attitude of Eskom towards the fine?

**Mr Piers Marsden** - Throughout the process Eskom's attitude and I think it important once again to reiterate the component of the fine is twofold. The 2.1 relates to the historic coal that had been used, perhaps more relevant is looking forward and that if Eskom were to apply the strict criteria going forward you would, for the remainder of the contract, you would have a quantum far in excess of the 2 billion as well. So it was a fundamental issue and certainly each purchaser and if we go back to some of the items we've covered already, the fundamental issue was that there needed to be satisfactory resolution not only to the 2.1 billion fine but also in terms of the contract going forward and the couple of billion rand that could ultimately come out of that. Eskom's position I think it's been laid quite clearly down in the press as well as in various correspondence that we have in that their expectation was that the fine needed to be settled, and they were pretty unequivocal around that.

**Advocate Vanara** - Surely you must have engaged with the shareholder, that is Glencore, when you took over, particularly around the issue of the fine because that brought a lot of burden and strain on the business. What was the attitude on the fine?

[01h08:48]

**Mr Piers Marsden** - I think the fine itself is an item that could have been arbitrated on. I think that there were many legal protections included in the agreement and those mechanisms had been applied prior to the

business rescue; the hardship clause, the agreement, the cooperation agreement signed between Optimum and Eskom prior to the business rescue, and ultimately their view on the fine was that it's a bit like going to a restaurant and eating a steak and when you finished it asking if you don't have to pay for it because you didn't like it, you know, there's a certain view around the fact that the product was actually utilised. I think if products out of specification you say take your product back rather than consume it. So the issue around the fine and certainly Glencore would have had the stomach to continue to fight that and arbitrate on it. The real issue is around the ongoing obligations; if the attitude persisted around insisting on those particular items there would be very little liquidity in the business because effectively your customer wouldn't be paying for the product supplied. So that is perhaps the more relevant component of the fine. With regard to the attitude, I always believed that the former shareholders believed that the fine itself could be argued and there may be a component of it that was valid but the vast majority of it could probably in an arbitration be resolved.

**Advocate Vanara** - And that position was put to Eskom and that notwithstanding Eskom was adamant that the fine, the historical fine, had to be settled.

**Mr Piers Marsden** - Eskom wished to arbitrate in the business rescue process. We believe that we certainly didn't have the liquidity to mount a substantial arbitration. So we used effectively the business rescue to not get into the matter, but of course we did have discussions with Eskom around the resolution of the fine and as stated many times in the press as well as in various correspondence that we have there remained adamant that that fine should be paid in totality.

[01h11:10]

**Advocate Vanara** - What will then be your take, and because there will be evidence led before the committee at some stage and you would not be around and I would like to forward you an opportunity to comment on that state of affairs particularly with the knowledge that you possess around the negotiations on the fine. That subsequent to the, sale, the successful sale of the mine and the holding company with the other subsidiaries, that fine in excess of 2 billion rands which Eskom was adamant that it had to be paid, that fine had been reduced to less than 600 million, what will be your take on that?

**Mr Piers Marsden** - I think really two aspects to my response; first of all I think the speed at which it was resolved was a surprise and we believe that it would involve extensive arbitration, argument, counterargument, technical evaluation, legal argument. So that's the first comment. The second comment is that I think we always believed that there was an element of the fine that in detailed legal and technical discussion would be overturned. So that's really my only comments on it.

**Advocate Vanara** - Earlier on you testified that what was to be sold was Optimum Coal Mine and later on Eskom insisted on the sale of the entire holding company together with the subsidiaries, and you then said at the time it made sense to you. Does it make sense to date?

[00h13:19]

**Mr Piers Marsden** - Just to maybe rehash why I thought it made sense to me. I think that the other mine within the group Koornfontein was reliant on Eskom to be a customer for the Komati Power Station and it



would seem unusual for Eskom to suffer a loss on the one hand and contribute on the other. So, certainly our view given that Eskom had the holding company guarantee was that that made prudent financial sense from Eskom's perspective to ensure that 'their in the money contract balanced their out the money contract.' So certainly that made a lot of sense and from an OCT perspective the rail allocation is clearly a valuable asset. In terms of where it currently sits, and once again I lose all the visibility on the 31st of August, so I have no personal knowledge of the current state of affairs, but it certainly does appear as if the other parts of the group have either been sold or are in the process of being sold. I can't comment whether those deals have concluded or not, but that kind of goes in the face of the rationale in terms of which those profitable assets are needed to support Optimum Coal Mine to fulfil its obligations until the end of December 2018, in terms of the loss-making agreement.

**Advocate Vanara** - So effectively if the Richards Bay, is the mine that is or the subsidiary that the Richards Bay subsidiary of the Optimum Coal Holding which is making money, which makes sense for Eskom to say 'we need to balance, we need to get both the money making and where we're bleeding'... If the Richards bay component is sold what will be the effect of that selling be on Eskom's financial position vis-a-vis the situation where that the Richards Bay subsidiary is part and parcel of this holding company?

**Mr Piers Marsden** - So Eskom has a guarantee effectively from Tegeta which replaced OCH in the structure. I think post December 2018, if Optimum Coal Mine had delivered in 100% compliance with the agreement there would be no financial effect. If it were to be sold prior to that and those funds were then allowed to be discharged to shareholders or whomever and as a result of that Optimum was not able to deliver, Eskom would not have the ability to look towards the profitable assets for the performance of the shareholder for its subsidiary. So it's all around timing, to the extent that those assets are dispersed of and Eskom does not act on its guarantee for the obligations of Optimum Coal Mine. Potentially it may be in a bad position but this is all speculation.

[01:17:00]

**Honourable Vanara** - No further questions Chair.

**Ms Daphne Rantho** -Thank you very much to the evidence leader and Mr... Marsden, my apologies for keep on forgetting the surname. Members, we are about to ask questions, but what I would want to get clarity on Mr Marsden is the meeting of the 11th of April. In your statement you are saying that meeting was a meeting of a representative of Eskom, you are not specific in saying its Eskom board, the executive of Eskom, you are saying it's a representative; is it possible that those representatives are people that had an interest in the transaction, or people who would not even know what this transaction was about. Can I just get clarity on that?

**Mr Piers Marsden** -Thank you Chair. The meetings that I attended on the 11th were with Mr Howa at Tegeta and a follow on meeting with the banking consortium. I was not present nor do I know who attended the Eskom, or for that matter what type of committee it is at Eskom. So unfortunately I have zero knowledge about who attended that, what a quorum was or whether they voted in favour; I've simply got no knowledge on that.

**Ms Daphne Rantho** - But you know there was a meeting in the evening of that day.

**Mr Piers Marsden** - I became aware of it as a result of the Carte Blanche show.

**Ms Daphne Rantho** - Members, I wanted to ask questions first before you come, because sometimes you're not giving me a chance to ask questions. Just give me, I've got only two that I think, and a comment that I think would be fair. Mr Howa remarked on OCM rescue according to your statement, does this mean the banks did not give the guarantee, did not give the money or did not agree on rescuing OCM, but Eskom was of the opinion or was adamant in saying OCM regardless of what is happening need to be rescued, and Eskom would even go beyond their principles and their policies and just pay OCM so that it gets rescued at that moment.

**Mr Piers Marsden** - I certainly can't speak on behalf of the banks, there were three of them. I think that their view was merely there as lenders. They had a substantial debt obligation owed of about R2.5 billion; it is certainly not their obligation to rescue the business, that's my job. However, what it does require is their consent to any plan that been proposed. So the plan that was ultimately proposed which was the sale of the entities to Tegeta, they were in support of it subject of course to receiving the proceeds. And those proceeds were scheduled to be R2.15 billion not R2.15 billion less R600 million. So clearly their view was that their support was contingent on receiving the full purchase price, hence their unwillingness to effectively bridge that shortfall. With regards to Eskom once again, I can't pretend to speak for Eskom but certainly one of the key considerations for Eskom throughout this process was the continued supply of coal to the Hendrina power station. So the ability to have that supply guaranteed must certainly have factored into their thinking, amongst I'm sure many other factors.

[01h23:01]

**Ms Daphne Rantho** - Were you not a suspicious when the investigating officer after such a long time now all of a sudden wants to meet you. Were you not suspicious what would happen, I'm asking this because this enquiry has been publicised and the witnesses, some of the witnesses were known by everybody outside there, that there are witnesses that are coming, even the witness that will come to give evidence on the issue of the Optimum Coal mine and the transactions thereof were also out there, they were known; where you not suspicious of why would the officer now all of a sudden have an interest in responding to what you have long done or the charges that you laid long ago; were you not suspicious of that?

**Mr Piers Marsden** - I think I was grateful to have somebody to engage with in terms of trying to move the ball forward. I have not met the individual, obviously I was preparing for this, but I hope to meet him in the next couple of days.

**Ms Daphne Rantho** - Ok, those were just my concerns that I wanted to raise. Members, Member Natasha, Member Mondli, Member Mose, Member Swart, Member Dlamini, and Member Rawula, Member Luyenge...I know his surname

**Honourable Mazzone** - Thank you Chair. Mr Marsden my name is Natasha Mazzone. Tegeta was a pretty unknown entity at the time that it entered into the bigger scheme of things. At the time did you know that it was a Gupta affiliated and the fact that Duduzane Zuma was one of the shareholders of Tegeta mine? When did you become aware of that?

**Mr Piers Marsden** - No, we knew from the start.

**Honourable Mazzone** - From the start. So in your business rescue practice, was this the first time you done a business rescue proposal for a mine? Or had you done mines and coal mines and that kind of thing in the past.

**Mr Piers Marsden** - I've done similar mining matters.

**Honourable Mazzone** - So did it come as a surprise to you as it did the rest of us that Tegeta this very unknown entity suddenly became such a big role player.

**Mr Piers Marsden** - I think certainly it was a concern we had, and certainly the way that the deal was structured involved insuring that they had the financial ability to conclude on the transaction, so it was a concern of ours.

**Honourable Mazzone** - How did you know that they had the financial ability to conclude on the deal?

**Mr Piers Marsden** - We received a letter, I think it is included in your pack, from a banking institution confirming that on closure of the transaction, the funds were available.

**Honourable Mazzone** - Now obviously you're a business rescue practitioner and you know your stuff and there's no doubt about that, so certainly it becomes extremely concerning when you find out that a company like Eskom who's well-known to be in a financial state of distress institutes a prepaid amount, and not a small amount, a huge amount of money that obviously, I mean it's beyond dispute that it's obvious it's been thrown in the mix to break up a deal that you've been busy brokering. What do you do at that point and who do you turn to at that specific point.

**Mr Piers Marsden** - So we became aware of that post the closing of the deal, so we turned to the DPCI in terms of this report.

**Honourable Mazzone** - In the negotiations, when the business rescue was brought to you, the amount of R2.15 billion is the penalty; now we've dealt with Eskom for long enough to know that Eskom does everything in its power not to enact penalty clauses against companies for some unknown reason. I find it very strange and I want your opinion; did you think that it's strange that after such a long period of time of accepted what they now say is substandard quality coal from Optimum that all of a sudden this penalty clause was enacted.

**Piers Marsden** - I have no personal knowledge of what happened prior to business rescue, but clearly I have had sight of documents, and there appears to have been a long history to this in terms of a 25 year long supply agreement and it had built into it what you would expect in an agreement of that nature with hardship clauses. And there was a substantial amount of effort that had gone in Optimum under the control of its previous shareholders and Eskom in terms of trying to find a solution to that particular issue that culminated essentially in a cooperation agreement being signed between the parties prior to business rescue. And I'm sure the evidence leader has the exact committees within Eskom, but it certainly had a high degree of support within Eskom prior to business rescue. Ultimately those negotiations failed at a very senior level within Eskom and a penalty was then applied. In terms of what happened I simply have the documents to refer to, I can't pick up the atmosphere at meetings that I wasn't at. But certainly there appears to have been a breakdown in those negotiations that ultimately culminated in the business rescue.

**Honourable Mazzone** - Now in terms of substandard coal, why would we want substandard coal, why would it be in Eskom's interest to ensure that this company is bought out and that the substandard coal continues to be supplied to Eskom.

**Mr Piers Marsden** - I think to be fair to Eskom, their view has always been that it needs to be within specification, so not only must it be delivered at the price it must be delivered within specification. So I don't think it was ever their intention to state that we would accept substandard coal.

**Honourable Mazzone** - In the lead up to your dealings with putting together this business rescue, you say to us that you received unsolicited approaches; is this normal that during a business rescue you receive unsolicited approaches to purchase a company?

**Mr Piers Marsden** - Absolutely, it happens all the time.

**Honourable Mazzone** - So it does happen all the time; it's normal. And in your unsolicited bids, did you have personal interaction with these companies, so in other words and I'm going to ask it quite bluntly, did the Guptas or Duduzane Zuma themselves ever approach you directly?

**Mr Piers Marsden** - Not directly, they were working via their auditors at the time, but certainly we had unsolicited approaches from them and I understand that approaches prior to business rescue were also made.

**Honourable Mazzone** - So just for clarity so that we have it on record; the name of the auditors?

**Mr Piers Marsden** - KPMG.

**Honourable Mazzone** - KPMG. So LPMG was representing the Guptas and Duduzane Zuma and they approached you for an unsolicited purchase of the mine.

**Mr Piers Marsden** - That's correct.

**Honourable Mazzone** - Right, thank you. My last question Chair. The acrimonious relationship that you said existed in Eskom; now I can imagine that that must be a terribly difficult position to find yourself in because, I think, business rescue is hard enough as it is, let's be honest it is very difficult. You said it was a complicated issue that dated back a long time before you had arrived. You're trying to save a company; why do you think that this acrimonious relationship existed, because to me it sounds like it was a fabricated acrimonious relationship because it suited certain individuals to have an acrimonious relationship.

**Mr Piers Marsden** - I don't think I can comment on that it was prior to there. When I got there it was a relatively acrimonious relationship. I can't comment as to how that started or when it started or whether it was fabricated.

**Honourable Mazzone** - Can you tell me specifically between which parties this acrimonious relationship existed?

**Mr Piers Marsden** - So I think between the senior executive of Eskom and between the senior executive of the former shareholders of Optimum Glencore.

**Honourable Mazzone** - ...and it's just all in line with this question. Do you think there was a deliberate attempt by Eskom to ensure that the business rescue that you'd put on the table failed so that Tegeta would be able to come in and purchase the mine?

**Mr Piers Marsden** - I think that is a very difficult question. I think that certainly we ran out of options in terms of what is available. Within a business rescue generally you try and restructure the affairs of the company

and retain the structure as it is. As I detailed at the start that process of about two months was challenging in terms of just trying to get constructive discussion going around restructuring it. The next phase was to try and approach buyers to see if you could change the paradigm and say well if there is an unfair or an acrimonious relationship between the existing shareholders, if we change that dynamic i.e. get a new shareholder, would that change the dynamic? And I think that we saw a number of suitors not able to come to terms with Eskom which left us effectively with one party.

**Honourable Mazzone** - Chair my very last point on this. In this business rescue structure that you put forward and with your knowledge of the South African financial laws, what laws in your opinion, and this isn't your personal opinion, in your professional opinion; what laws do you think have been breached in the way the business rescue and the purchase of Optimum by Tegeta, what laws do you think have been breached or broken.

**Mr Piers Marsden** - I am a chartered accountant, so I'm certainly not a lawyer so I do not believe I am qualified to answer that question.

**Honourable Mazzone** - Ok, thank you Chair.

**Ms Daphne Rantho** - Mr Gungubele.

**Honourable Gungubele** - Thank you Chair. Thank you Mr Marsden for your availability. I think Honourable Mazzone has raised some issues that I wanted to raise, but there's one point I want to further follow. This question about the penalty because of the quality of coal and if I'm correct to date or post Optimum Tegeta period, I'm not sure what your answer is, because the question was; if we were penalised for the state of coal that you were presenting that time, your supply; what has changed in the coal post-penalty that you are receiving?

**Mr Piers Marsden** - All coal is created equal. I think that you are able to beneficiate coal, and once again I'm not a technical person but certainly in my limited knowledge, you are able to beneficiate to... [Visual and audio missing]... specifications. Throughout the period of the business rescue we as I mentioned previously, had an interim agreement with Eskom... [Visual and audio missing]... their stringent quality criteria for the period of the business rescue, post the business rescue, I can't comment.

**Honourable Gungubele** - Let's... [Visual and audio missing]

**Mr Piers Marsden** - Yes I think so.

**Honourable Gungubele** - What was the purpose of the [unintelligible]

**Mr Piers Marsden** - We entered into an interim agreement largely around to amend the payment terms. So we were traditionally paid on 30 days but given in business rescue we needed a bit more liquidity, we amended that to 7 days and they agreed, and I'll have to get the exact details of the wording of it, but they agreed something to the tune of not enforcing penalties with regards to substandard coal. Of course we tried to deliver coal within specification and it really depends on the seam at that point in time.

**Honourable Gungubele** - Do you have... [Visual and audio missing]... deficit during the charging of penalty and compared to the time the requirements were less stringent?

**Mr Piers Marsden** - Not on me, but I would have that information available.

**Honourable Gungubele** - Did you have it?

**Mr Piers Marsden** - Yes.

**Honourable Gungubele** - So during your less stringent period... [Visual and audio missing]... penalty...

**Mr Piers Marsden** - ... [Visual and audio missing]... So the quality of the coal was of sufficient quality in terms of the calorific value in terms of the ash and the moisture, it was really around the percentage... [Visual and audio missing]...

**Honourable Gungubele** - Does it mean they were not meeting those pre...those status?

**Mr Piers Marsden** - Certainly, that was the allegation levied by Eskom in terms of that.

**Honourable Gungubele** - Your own assessment, was that the situation?

**Mr Piers Marsden** - I think it's not a static position, I think the quality of coal changes. So certainly there would have been periods where it would not have been in specification, but there would have been periods where it would have been in specification. It's really continuous basis samples to ensure...

**Honourable Gungubele** - ... [unintelligible]...

**Mr Piers Marsden** - It's not a simple question.

**Honourable Gungubele** - Ok, let's come to Phembani. Phembani, you seemed to have reached an agreement with Phembani to buy; what was the attitude of Eskom?

**Mr Piers Marsden** - So we had signed certainly a term sheet, I was then not party to their discussions with Eskom, but it appears and the communication that we got was that they were not able to come to terms with Eskom and as a result our transaction with them failed.

**Honourable Gungubele** - But the first interface was between yourselves as rescuers with Phembani.

**Mr Piers Marsden** - That's correct.

**Honourable Gungubele** - And you assessed Phembani.

**Mr Piers Marsden** - That's correct.

**Honourable Gungubele** - And you thought that Phembani was competent to buy.

**Mr Piers Marsden** - That's correct.

**Honourable Gungubele** - Was it not important to find out Eskom, why their position in spite of your assessment.

**Piers Marsden** - I think Eskom had made their position to us pretty clear in terms of the renegotiation of the contract and the payment of the penalties; and their position was that unless a party came to the table that would take the contract as it was warts and all and would commit to the penalty, they would not want to engage further. So we certainly did get Eskom's view on why that is; you'd have to ask Phembani in terms of why they withdrew, but I suspect it as a result of them not being able to meet those criteria.

**Honourable Gungubele** - In your view, do you think Eskom unfairly increased stringent of measures, or what exactly happened, knowing what Eskom told you.

[01h23:00 - NO FEED UNTIL 1h39:03]

[01h39:11]

**Mr Piers Marsden** - I think they were applying what they believe to be their legal position, I can't comment as to whether that's common practice or not, but certainly, but certainly they took a pretty hard Line attitude towards the enforcement of the agreement.

**Honourable Gungubele** - And what was their attitude towards Tegeta?

**Mr Piers Marsden** - I think....

**Honourable Gungubele** - ...later?

**Mr Piers Marsden** - I think their attitude was that on the basis that Tegeta could meet their requirements they would be prepared to engage with them.

**Honourable Gungubele** - Requirements as stated with Phembani?

**Mr Piers Marsden** - Requirements as stated in terms of the contract, yes.

**Honourable Gungubele** - I'm saying as stated with Phembani.

**Mr Piers Marsden** - I'm not party to their conversations with Phembani, but the...

**Honourable Gungubele** - But they told you the reasons? If I heard you were saying Eskom told you the reasons why they could not get into a deal with Phembani.

[01h39:48]

**Mr Piers Marsden** - Eskom didn't, Phembani told us. Eskom had stated...

**Honourable Gungubele** - I thought you were saying Phembani did not share this with you but Eskom told you.

**Mr Piers Marsden** - So Eskom never spoke to us with specific reference to Phembani, they simply said any party that you bring in terms of a corporate transaction would need to meet these criteria.

**Honourable Gungubele** - They told you the criteria?

**Mr Piers Marsden** - They did indeed.

**Honourable Gungubele** - They did?

**Mr Piers Marsden** - They did.

[01h40:15]

**Honourable Gungubele** - Is it the same criteria they gave to Tegeta?

**Mr Piers Marsden** - Yes, that's correct.



**Honourable Gungubele** - Paragraph 6, what was the basis of that agreement?

**Mr Piers Marsden** - Sorry Honourable member in terms of the statement...

**Honourable Gungubele** - ...in 10 December 2015. You are saying in your last sentence; the business rescue practitioners were party to these agreements, what was the basis of that agreement.

**Mr Piers Marsden** - So, the agreements are once again everybody's...

**Honourable Gungubele** - If I'm correct, we're dealing with Tegeta now.

**Mr Piers Marsden** - Correct.

**Honourable Gungubele** - In that paragraph.

**Mr Piers Marsden** - That is correct.

**Honourable Gungubele** - What was the basis of that agreement? I'm asking this question because later there were problems.

[01h41:00]

**Mr Piers Marsden** - Understood. So this is the agreement that effectively gives effect to the sale transaction. So this is an agreement that we've signed in our capacities as the business rescue practitioner of Optimum Coal Holdings detailing the mechanisms for the sale of these businesses to Tegeta. So this is the effectively the sale of share and claims agreement that is...

**Honourable Gungubele** - Selling it to Tegeta?

**Mr Piers Marsden** - Selling it to Tegeta. That's correct.

**Honourable Gungubele** - Am I correct to say you would have assessed the condition of all the parties in particular the prospective purchaser, in this instance, were you happy with the situation of the prospective purchaser which was Tegeta?

**Mr Piers Marsden** - I think what we catered for within that agreement is that any uncertainty that we had needed to be dealt with before that condition became...

**Honourable Gungubele** - What were the uncertainties here?

**Mr Piers Marsden** - I think that we had dealt with, as I said, our constituents as a business rescue practitioner were all effectively conditions precedent to the agreement. So it required...sorry I just want to finish...the bank consortium where required to effectively approve of the transaction, Eskom where required to approve of the transaction, and the competitions commission were required to approve of the transaction, and the Department of Mineral Resources were required. So we had done an element of due diligence, but before the transaction closed it did require the sign-off of all of those parties.

**Honourable Gungubele** - Am I correct to say there must be a document detailing the sale of agreement, and those, if I'm correct, those suspensive conditions; do you have a document that details that?

[01h43:14]

**Mr Piers Marsden** - The Honourable member it's in the pack as well, so I'm happy to go to that. It was one of the specific documents that we...

[Overtalking]

So once again Chair, the colours, I'm not sure where it is. It appears to be right at the back of my pack, so kind of the last one. It's got a 'Werksmans Attorney' in the top right corner and it is styled 'Sale of Shares and Claims Agreement'. I think it's the last one Honourable member. So if I can take you to effectively paragraph number 3 of that agreement details the suspensive conditions that are required in order to take this to a final and binding agreement. If I can take you to the relevant ones.

**Ms Daphne Rantho** - Sorry Mr Marsden, can you give him a chance to get to the agreement.

**Mr Piers Marsden** - My apologies Chair.

[Overtalking]

**Ms Daphne Rantho** - It's page 16 to everyone.

[01h44:19]

**Mr Piers Marsden** - So I'm actually going to go to page 17 to highlight these particular issues. So in clause 3.1.3 the proposed transaction is approved by:

3.1.3.1 the lenders and security agent

3.1.3.2 to the competitions authority

3.1.3.3 the Minister of mineral resources and then

3.1.4 effectively deals with Eskom's consent.

**Honourable Gungubele** - Do you have the financial suspensive condition there?

**Mr Piers Marsden** - So I'll get it to you shortly. It's embedded in the 3.1.3.1 whereby the lenders in order to give their consent to the transaction, remember ultimately they were going to be the recipient of the funds, required in order to meet that condition, required a proof of funding. If I can just maybe then take you, and it explains why the letter is not addressed to myself as the practitioner, also included in your pack ultimately is that letter, and that's why it's addressed to the bank consortium as opposed to myself; it was required in order to meet that particular condition. So that is quite near the front it's the second or I think it's the third portion of your folder and it's a letter from the Bank of Baroda addressed to the banking consortium.

**Honourable Gungubele** - We go back then to Phembani, I want to ask you this question. Having come...having been satisfied with the ability of Phembani were there similar suspensive conditions; was Phembani meeting all the requirements, to what degree were they meeting it as compared to Tegeta?

[01h46:16]

**Mr Piers Marsden** - So, a couple of points on that issue. We never got to the stage with Phembani of having a comprehensive legal agreement signed; we simply had a term sheet signed. And certainly the conditions that would have been included in the term sheet would have had very similar issues to these in terms of

particularly being able to deal with the consent required from Eskom in terms of 3.1.4. Another important consideration is that Phembani were at that point in time looking at OCM as opposed to OCH, so they were differences between the transactions.

**Honourable Gungubele** - In your view as business with the academic experience and practice that you have, what was more cost-effective for Eskom, was it the rescue of Optimum or dealing with a new and alternative supplier?

**Mr Piers Marsden** - I think you'd have to ask that question to Eskom and I suppose it would be a little bit like gazing into a crystal ball because there's a short-term cost, there's a medium-term cost and there's a long-term cost, and the story is not fully played out yet. I think that the contract to supply Hendrina which is the effectively the onerous contract, only expires at the end of December 2018. And I suppose we can only fully quantify which was the best alternative if and when that contract is completed in entirety.

[01h47:53]

**Honourable Gungubele** - My last two questions is to do with the...actually, in the prepayment just for my clarity, who is the payee when was a payer here?

**Mr Piers Marsden** - From what I understand in the public protectors report the payer was Eskom and the receiver...I'm getting my names wrong... Eskom paid it, and Tegeta got it, not OCM.

**Honourable Gungubele** - And then the time Tegeta got it you said at that time they were not owners of the company or the mining.

**Mr Piers Marsden** - That's correct. You know going to that critical period around the 11th of April and the approval and...[Interrupted]

**Honourable Gungubele** - Do you remember at what point was ownership executed; ownership transfer executed?

**Mr Piers Marsden** - So the closing date of the transaction, I'm sure the evidence leader can correct me if I'm incorrect, but it was either the 14th or 15th of April. So the last remaining... [Interrupted]

**Honourable Gungubele** - It was after the 586 million?

**Mr Piers Marsden** - That is my understanding, correct.

**Honourable Gungubele** - Ok let's come now to the.... [Inaudible] of my last question is. The police met, gave you a...you received acknowledgement on the July 2016 and then affidavit May 2017 and then another affidavit 2017 July if you, using your own assessment, what does material distinctions between the requirement of May and that of July in 2017?

**Mr Piers Marsden** - The affidavits that I signed in terms of the original application and the further affidavit in July 2017 is almost negligible, they're almost identical.

**Honourable Gungubele** - In other words... [Inaudible]...have got no material difference.

**Mr Piers Marsden** - That's correct.

[01h50:04]

**Honourable Gungubele** - Didn't it frustrate you?

**Mr Piers Marsden** - A little bit yes.

**Honourable Gungubele** - What did it make you to think of the law enforcement agency with regard to this matter?

**Mr Piers Marsden** - I think I would have expected even if my suspicions were incorrect at least the opportunity to present the position. I merely had suspicions when I made the application, certainly not any accusations, but I think it would have been incumbent on me I would have expected at least to have some clarity from me from the various authorities.

**Honourable Gungubele** - Lastly, how did that this thought aggravate with the recent email and new investigator?

**Mr Piers Marsden** - As I said previously, I remain here to assist the authorities in whichever capacity I can to the extent that my suspicions are unfounded, I would sleep well at night to the suspicion...to the event that they are. You know that's really for there... [Interrupted]

**Honourable Gungubele** - ... [Inaudible]... as a South African citizen, not just as a business rescuer which is your profession.

**Mr Piers Marsden** - Yes... [Interrupted]

**Honourable Gungubele** - I move from a point that you are a South African in and the future of your children is in this country. Here is an affidavit of July 2017, no material difference...of May 2017 no material difference July in 2017 recently an email and the new investigator; I'm talking to you as a South African, how does this make you feel?

**Mr Piers Marsden** - Oh, I would prefer to have slightly more efficient services.

[01h51:50]

**Honourable Gungubele** - Thank you Chair.

**Chair stand in** - You're welcome. Honourable Tseli, it's your turn.

**Honourable Tseli** - Morning Mr Marsden. The meeting of the 11th of April 2016 that you said approved the 586 million; did you have any interest of knowing who those representatives of Eskom who were part of that meeting?

**Mr Piers Marsden** - I would now, but I was unaware of it at the time obviously. I was not, sorry Honourable member, I was not present at the meeting and I was not aware that the meeting was happening so I could hardly have been expected to have an interest I think.

**Honourable Tseli** - The meeting of the 24th of November which was followed by the other meeting in December and you are saying it was chaired by Eskom? I'm interested in knowing who was chairing that meeting from Eskom.

**Mr Piers Marsden** - The meeting of the 24th of November?

**Honourable Tseli** - And the other one of December, I forgot the date, the one following the meeting of the 24th of November.

**Mr Piers Marsden** - The 24<sup>th</sup> was chaired by Matshela Koko. I'm not sure of the meeting, if you can give me the date I could... The 24th of the 11th 2015.

**Honourable Tseli** - Yeah you spoke about the one of the 24th and you said the December meeting, remember the date? The one that I was talking about? Ja, you just said the December meeting.

**Mr Piers Marsden** - I'm not sure which meeting you refer to. We signed the agreement in December but there would not have been a meeting for that. The specific meeting that I think you're referring to is the one on the 24th of November at which point Eskom declared that they need to keep the good with the bad and that was chaired by Matshela.

**Honourable Tseli** - Ok, I want to go back to the Tembani issue that Honourable Mgwelo was saying, yes, that Mr Mgwelo was talking about. How do you know that the proposal has been rejected?

[01h54:15]

**Mr Piers Marsden** - They let us know sometime in October that they would not be able to fulfil the transaction and that was done informally and they withdrew from it. At the meeting on the 8th of April the following year which was the meeting to approve the plan, Phembani was a minority shareholder in Optimum. They gave me a letter effectively in a one-liner detailing the fact that they were not given a similar opportunity and effectively, you know, mentioning their displeasure at the process.

**Honourable Tseli** - The 5...the 600 million shortfall, you were requested to go back to the banks by Mr Howa to raise this particular aspect and I'm trying to look at paragraph 17, where you were requested to inform Mr Howa that the bank cannot not release the 600 million. Why was Mr Howa not part of that meeting?

**Mr Piers Marsden** - I think that the bank Consortium wanted to engage with me as the business rescue practitioner. I think that they would not have wanted the potential purchaser in the room and certainly they caucused both with me and without me at that meeting as well. So I was effectively acting as a practitioner and in my capacity scheduled the meeting at the request of the purchaser.

**Honourable Tseli** - So that's standard practice? That a person who needs money is not supposed to be there?

**Mr Piers Marsden** - I'm not sure it's standard practice post the conditions being met to renegotiate an agreement.

**Honourable Tseli** - Your letter the one that you've directed to the anti-corruption desk paragraph 10... the conditions, I'm interested in knowing the conditions that you're talking about. What were those conditions?

[01h57:00]

**Mr Piers Marsden** - Those were the conditions in the agreement that we just went through with the Honourable member; in terms of the bank consent, the competition's approval, the consent of the DMR and the consent of Eskom to the transaction, as well as the adoption of the business rescue plan. So those were the suspensive conditions that were required to be met before a deal could be finalised.

**Honourable Tseli** - Ok, I think that the very last one, Honourable Chair, no I think I raised this one earlier. I was talking about the Eskom representatives who were part of the meeting that approved the prepayment of 586 million; I think I raised that one earlier. Ok, no, thanks Chair.

**Chair stand in** - You're welcome, Honourable Swart it's your turn.

**Honourable Swart** - Thank you Chair, thank you Mr Marsden. Just a number of issues; the meeting on the 11th of April obviously you wouldn't have been at that board meeting when it..., but that was the concern that you set out in your letter to the Hawks that that prepayment didn't come to where it should have come. But that meeting, in terms of the public protector's report, in which you have had sight of, those board members would have known that the prepayment was actually to buy shares and not for any pre-production requirement for OCM, which was, which would have been the normal business practice and that was a finding of the public protector in all probabilities, would you tend to agree with that? Although you don't have personal knowledge but that given the fact that those board members were fully involved with the background of OCM with the financial implications and now suddenly they've been asked to approve a prepayment for pre-production mining which is the normal thing but whilst they know that it's actually not that, it is in fact to buy the shares. And that is the reason why you also filed that complaint with the Hawks.

**Mr Piers Marsden** - Once again I have no knowledge that meeting, I'm not even sure who was present or attended, I don't know if it's a board or a subcommittee. So I certainly don't know what knowledge they would have had around the transaction when it was closing, what was due and payable. I'm unfortunately just, I'd love to help, I just don't have any knowledge.

[01h59:34]

**Honourable Swart** - I do understand that. But obviously you being very involved in this whole process, you're negotiating with the boards, you know what is in their knowledge, you know but and so I'm not asking you to speculate but to me it's very clear that they would've known at that stage and that is a finding of the public protector but that's let's just leave it at that. What I also want to pick up and this is, you see, you've also got to think outside of purely being a business rescue practitioner of what is in the public domain at that at the time as well. When you come in, you're looking at the whole history of Optimum Mines, you're looking at Glencore and now we know subsequently that there've been, whilst you were also the business rescue practitioner you were appointed in August of 2015 and in September of 2015 or in August of 2015 you might not have known it there, but Mr Molefe and Mr Ngubane are alleged to have met with the then minister Mr Ramatlhodi to suspend all Glencore's mining licences. A massive, again the implication for me is that there is pressure from Eskom against Glencore that he refuses to do. The Minister is then fired and a new minister is put into position, a new minister that we now know is more Gupta aligned and in the time that you were the business rescuer which you would now have knowledge you might not have had knowledge of Mr Minister Ramatlhodi. But in September the new Mines Minister apply section 54 stoppages at all the Glencore mines including Optimum which is the one under business rescue. So were you, you should have been aware of that and was it a concern of yours? Why is this additional political pressure now on Optimum mine from outside? .... Please.

[02h01:35]

**Mr Piers Marsden** - Thank you very much, once again I can't comment around Glencore mines but it's certainly within the Optimum Coal mine. We did receive a stoppage notice it wasn't a 54 I think it was a 92 right at the start of the business rescue process. So literally within 2 or 3 days of being appointed that

stoppage relating to a technical infringement and we were able to get the stoppage uplifted within a couple of days. Certainly heard all the stories around pressure being exerted on Glencore, once again not within my personal knowledge unable to comment on it.

**Honourable Swart** - And we also know that Tegeta started to get involved and they were doing small mining activities; Brakfontein and those mining activities increased and there was a problem with their quality. Would that have any bearing with your involvement with Tegeta, their history with Eskom as well, and the fact that some of their stockpiles were rejected? Did you have knowledge of those Tegeta mines prior to this whole engage... Let me just be more specific; whilst you were business rescue practitioner, you were approached by Tegeta, you know that Tegeta is already involved with Eskom and other mines and there have been problems with those mines, was that an issue?

**Mr Piers Marsden** - Certainly it came into our consideration. I think that we took really a couple of things out of it. First of all I think Optimum had an excellent management team in place and would operate under our control, so they certainly would not have any ability to influence that. The second aspect was important to us in terms of they were an existing Eskom customer and we thought that as a result of that Eskom would have knowledge of them so to the extent we brought a transaction they would at least be an approved vendor if I can use that terminology.

[02h03:27]

**Honourable Swart** - So we are aware that there is political involvement, we're also aware in terms of the public protector's report of Mr Molefe meeting with the Gupta's. Now that might not have been in your knowledge at that stage but was it not strange to you why the negotiations on the coal service agreement that seemed to be proceeding well and when Mr Molefe comes in it suddenly stopped. And there's suddenly this acrimonious attitude with a company that's been at a long-term contract of 25 years and has suddenly you as... in business rescue, did you not find this strange and again tying up with pressure that we know the public protector has said that the conduct of the Eskom board was solely to benefit of Tegeta in awarding contracts to them.

**Mr Piers Marsden** - So I certainly think we walked into a pretty difficult hornet's nest in terms of the relationships and obviously no commentary around the prior engagement knowledge but certainly it became quite apparent us and quite clear that a transaction that involved a simple reshuffling of the contract with Glencore as a shareholder was unlikely to meet approval of Eskom. I think that the hard stance that the executive of Eskom took at the point was at the time something that certainly could stand up to commercial muster. I mean somebody pushing back against Glencore is unusual, somebody insisting on enforcing on a contract that in the short term would have been to the benefit of Eskom to get coal at the short-term supply, the manoeuvring of Eskom to have the good and the bad part of the business included in the transaction made commercial rationale to us. Somebody was playing hardball and I don't think that there's an issue with that, in fact I think it probably had some commercial sense to it. I think where the picture starts to get a little bit more murky is post the facts that have come out post the event.

[02h05:44]

**Honourable Swart** - If I understand you correctly that the negotiations were done and there was commercial sense to that, but why would it then be necessary to have a meeting in Switzerland with the minister of mining, you obviously don't have knowledge about that; mining, the Gupta's and Glencore to almost put...



and a minister acting in that capacity which is unheard of. If it was commercially sound why would that be necessary at all?

**Mr Piers Marsden** - So I think it had some commercial sense from Eskom's point of view is kind of why I dictated those items. Correct I didn't know, I don't know what happened in Switzerland, I certainly know that an offer that was capable of being concluded arrived relatively shortly after that meeting. I'm not sure what a ministers' portfolio is meant to be, it does appear to be unusual, but I don't have a lot of knowledge of that particular meeting.

**Honourable Swart** - Well it's again a political interference in this issue which is very clear. Can I just ask you what I'm trying to understand is, you've got OCM is in dire straits, there's a penalty added which actually puts them straight into business rescue, the 2.1 Billion. But had that negotiation taken place on the hardship agreement continued and had that penalty been settled, and then we now subsequently know that the loss-making contract was for the supply of Hendrina, and we now know that the Hendrina power station was reduced and in fact the OCM coal sold to Tegeta went to Arnot at a radically increased price. Had you had that option surely even prior to business rescue there would be no reason for business rescue at all.

**Mr Piers Marsden** - I think that option was tabled prior to business rescue in terms of effectively switching some of the export products to the supply to Arnot. Once again I think we were looking for any options from Eskom and in the first 60 days, as I detailed at the start, we made a number of different proposals to Eskom in terms of the continued supply product to Hendrina, and once again going to the prepayment issue, the coal that was applied via Tegeta to Arnot came from the Optimum Coal Mine. So certainly that would have been an option if that was available, but we were not able to conclude any of those.

[02h08:20]

**Honourable Swart** - But that is what is happening at the moment as we now know subsequently. So that is how the Tegeta/Oakbay/Gupta's have managed to change a loss making mine into a profitable mine by moving the coal which was what you proposed in the beginning, which wasn't accepted. So it seems it's very clear why the public protector came out with her damning findings that Eskom did not act in the best interests in terms of various provisions of the Public Finance Management Act as a public company as well. And we know the cost of coal has in fact escalated significantly, so, Chair, I just wanted to point out one other thing and that is the Phembani deal; that contract is referred to in the public protectors report as well, and there was an issue there that during the negotiations, according to the public protector, that related to the consideration of the penalty and the consideration of the coal supply agreement, exactly the same terms that Tegeta got to look at that, but I think that the distinction that you make is that they were only looking at the one element not the whole total. So it seems very clear to me that this whole deal was structured both from a political perspective and from an Eskom perspective to make sure that Tegeta received the benefit and received the mines at the end of the day and then as soon as they got the Mines to then make sure that OCM was a profit making company. Would you be in agreement with that?

[02h10:14]

**Mr Piers Marsden** - I think that's the conclusion that public protector came to.

**Honourable Swart** - Thank you, thank you Chair.

**Chair stand in** - You're most welcome. Honourable Dlamini it's your turn.

**Honourable Dlamini** - Thank you Chairperson. Mr Marsden, I just want to get the dates correctly. You say you received the term sheet, or you signed a term sheet with Phembani. That is the first company that you engaged with? Is that correct?

**Mr Piers Marsden** - That is correct Honourable member.

**Honourable Dlamini** - Ok, fine. And then when did you start speaking to Tegeta?

**Mr Piers Marsden** - So they had approached the company prior to business rescue. They approached us prior to us accepting the Phembani transaction and then we really started to engage with them once the Phembani deal had fallen over.

**Honourable Dlamini** - So their formal engagement, it was only when Phembani deal came and then it said it's not going?

**Mr Piers Marsden** - We had a variety of other interactions with them, we'd obviously signed non-disclosure agreements as well as provided high level information on the asset. I think I remember a site visit done in September with the mine. But in terms of actually moving towards closing a transaction and formal engagements, you're correct, that only happened once the Phembani deal had fallen over.

[02h11:52]

**Honourable Dlamini** - Is that the norm? That I come to you and then we'll make an offer and then we sign the term sheet and then on the other side you are doing a site visit with someone who wants to make a counter offer on what I'm doing?

**Mr Piers Marsden** - It's certainly not normal and once we'd signed the term sheet was exclusivity in that. So, the second we signed the term sheet until the term sheet failed, there would have been no interaction between the parties.

**Honourable Dlamini** - So how did you, why did you do this site visits and all these other informal engagement with Tegeta?

**Mr Piers Marsden** - It was a question of timing. So the site visit was prior to the signing of the term sheet, so there would have been engagement with a number of parties prior to it, we would have selected the bidder that made the most sense to us, at that point in time we would have and it was included in the agreement exclusivity so we would have stopped all of the discussions until such time as that term sheet ultimately failed.

**Honourable Dlamini** - Ok. You mentioned the, there was a shortfall 600 million and then you are saying you were made aware either through the Carte Blanche program that Eskom paid 585 to Tegeta, and the reason for that I think you said through the interview, if I got you correctly, the reason for that was that they wanted to recapitalize the operations, improve the cash flows as well as a operation? Is that correct? Where did you get this information? So that I can capture you correctly.

[02h13:27]

**Mr Piers Marsden** - So you're quite correct. The reasons that Mr Howa gave in his interview with Carte Blanche was exactly as you've stated, that the company was in business rescue needed cash quicker and the second item being the mine had a number of draglines; large equipment that is used in the mining process,

that needed to be recommissioned. They were on site they didn't have to buy them but they needed to be recommissioned in order to increase the production such that they could supply in terms of the agreement or such that we could supply Tegeta in terms of the agreement. But the amount of cash required for that is in a region of about 10 million rand. It wasn't more than that.

**Honourable Dlamini** - Right, then that that's what happened on the interview by Mr Howa. When did you hand over this mine in full operation? You're saying in 31st August. Which year, this year?

**Mr Piers Marsden** - Of last year 2016.

**Honourable Dlamini** - Right. In terms of your knowledge did that money come through to do exactly what the interview was or the owner of the mine saying 'we requested 585 from Eskom so that we can come and recapitalize the mines'. Did that money come there while you were still involved in the operation?

**Mr Piers Marsden** - The money did definitely not come to the mine in the period that I was until the 31st of August.

**Honourable Dlamini** - And then, did you report to the authorities? Is it part of your?....

[02h14:57]

**Mr Piers Marsden** - When we became aware that a prepayment have been made we reviewed the bank statements and obviously that money has not flowed directly to the mine. We had supplied as the mine coal to Tegeta and we had obviously received certain payments from Tegeta for the supply of the mine. But that is on a 30 day account based on deliveries. The prepayment amount as that certainly did not come to the mine.

**Honourable Dlamini** - So Nazeem Howa on that record that you got from a 'colour-blind' was lying?

**Mr Piers Marsden** - It would seem so.

**Honourable Dlamini** - And that is included on your statement with the Hawks?

**Mr Piers Marsden** - That's correct.

**Honourable Dlamini** - Ok. Lastly, you're saying the 585 was paid to Tegeta and then it's the Bank of Baroda that wrote to the other banks to say... [Speaking off mike inaudible]... the money was paid on the agreed date before the cut-off date of the deal? By the Bank of Baroda... The 2.1 billion.

**Mr Piers Marsden** - So just to, you're correct but I just want to break it down into a couple of items. So we had received a letter of comfort from the Bank of Baroda that Tegeta had sufficient funds in order to discharge the 2.15, so that's correct. We then on the closing date, so the 11th can they said they were short, we said no or the bank said no, the money then arrived on I think the 14th of the 15<sup>th</sup>, that money was paid into the escrow accounts and the money did flow from a think of Bank of Baroda account, I think they use a Nedbank platform, but it did flow and the purchase price was discharged in full. We only became aware of the source of those funds when all of this stuff came to the fore, and that's why we made the submission.

[02h17:00]

**Honourable Dlamini** - Finally, what is Nazeem Howa's role in the company? Is he a CEO or what is his role on this Tegeta Holdings now?

**Mr Piers Marsden** - So he was our principal point of contact throughout the discussions, I stand under correction, but I believe he was the chief executive officer of Oakbay Holdings.

**Honourable Dlamini** - Ok, thank you. That was my last question.

**Ms Daphne Rantho** - Honourable Rawula.

**Honourable Rawula** - Thanks Chair, Chair we know the view of the public protector regarding the refusal of Telkom to work with Phembani- of Eskom to work with Phembani and we have our own view which are very clear that is because of the money was not linked to the Gupta's and they needed to structure a deal specifically that will prefer the Gupta's, which in the main are Tegeta... Now we want to hear your view as a business rescue practitioner, I mean you were there from the beginning of the contract. You had an interest to make sure that you are able to carry out your job as business rescue practitioners. What were your experiences in relation to Phembani and how they were executing their own duties? Before we interrogate the actual view of Eskom of refusing to work with them, what was your own experience? Tell us.

[02h18:53]

**Mr Piers Marsden** - So I think we had relatively limited engagement with Phembani. I think they were known to the company, being a minority shareholder. I think that they are a very well-known organisation and certainly the term sheet that was signed would have resolved the business rescue of OCM. We were not involved for very long with them because relatively quickly, within I would say less than a month, they pulled out of the transaction. They didn't give us detailed reasons at that point in time. We only received a letter from them, and that was in October of 15, we only received a letter from them in...on the 8th of April 16 as to the specifics for their withdrawal. So we did not have intimate knowledge of their discussions with Eskom. We knew what the preconditions were in terms of what was a deal that was acceptable to both us and to Eskom, and I really can't comment on how those discussions went between themselves and Eskom. All I know is that our deal fell away and I was only informed of the rationale for that when we'd concluded the next deal.

**Honourable Rawula** - Just follow up on it...Ok fine, you may not have been involved but when you started working with them what was your own assessment in terms of their own capacity to do the work? Did you ever have reservations or qualms in terms of their own capacity to carry out the work as per mining in terms of the contract?

**Mr Piers Marsden** - No they're very well-known organisation, financially stable, deep experience in the mining industry. I had no concerns around their ability conclude a transaction.

**Honourable Rawula** - And indeed they had no links with Guptas...the Phembani?

**Mr Piers Marsden** - Not that I'm aware of.

**Honourable Rawula** - Okay let's pass it. The...I think it's paragraph 9 of the affidavit here. It refers to the purchase price, which is 215 billion. I want to check - the payment process of that amount - what was envisaged way - was it supposed to be paid in staggered ways as per the purchase or in terms of the contract, it was...it would have been expected once-off or just... talk us through - what was supposed to be the approach of payment?

[02:h21:36]

**Mr Piers Marsden** - Thank you. I think it's laid out in detail in the agreement but I'll give it to you in a short version. When all the suspensive conditions had been met - so that's the DMR, Competition Commission, proof of funding, etc, effectively they had 3 days to deliver the full purchase price. So it was certainly not intended to be 'op skuld' (Afrikaans – 'on credit') it was not intended to be deferred. It was very, very clear that the full purchase price needed to be delivered within 3 working days of that final condition being met.

**Honourable Rawula** - And you have already mentioned...I won't ask you about the suspensive conditions that you referred to - but did they have any bearing to the price?

**Mr Piers Marsden** - No the price was agreed up front.

**Honourable Rawula** - Okay that's fine. Now in terms of the pre-payment. My interest -was the pre-payment laid out in the contract or was it a practice? Was it something that was expected or it was a new development in terms of the contract? Was it something that was there in the contract that a pre-payment is one of the components of your contract?

**Mr Piers Marsden** - The pre-payment is not mentioned anywhere in the agreement. We had no knowledge of it until it became public information. We signed a variety...a number of different coal supply agreements - and when I say 'we' - as in representing Optimum Coal Mine. We supplied agreements with Tegeta for the supply of product. They then had an agreement, I would presume with Eskom. So I would not have had sight of that second step. I would only have within my knowledge the coal agreement that was between Optimum Coal Mine and Tegeta. Embedded in that agreement there was certainly no pre-payment. In fact the payment terms were for the months January to April...middle of April, based on effectively c.o.d and thereafter once the transaction had concluded, we gave 30 days from statement terms to Tegeta for the supply of that product.

[02h23:47]

**Honourable Rawula** - And tell me was this the first payment as it was expected from Tegeta? Was it the first payment? Was it the second payment?

**Mr Piers Marsden** - The purchase price?

**Honourable Rawula** - No the payment that is said to be 586. Was it supposed to be the first payment or was it going to be the second payment? Was there a payment before it?

**Mr Piers Marsden** - Once again I cannot talk to the agreements that Tegeta had with Eskom. Prior to that we had indeed supplied Tegeta from Optimum Coal Mine and they had paid us for that product. I don't know what their payment terms were with Eskom. But there certainly was an agreement with them and Eskom prior to that pre-payment.

**Honourable Rawula** - Now paragraph 13 says you were approached by Mr...I think it's Mr Howa that approached you as business rescue practitioners that you must go and approach the banks due to the shortfall. Now I want to know because...you'll school me - you were the business rescue practitioners of OCM that was expecting the payment. Why would you be the ones, why would you be expected to be the ones that make the loan from the banks to make up for the shortfall when it is OCM that is expecting the payment?

[02h25:10]

**Mr Piers Marsden** - I think a very good question. I didn't explain the relationship with the banks which would explain that. So you're quite right. OCH was the recipient of the funds. So in other words OCH disposed of its shares and interest in the underlying subsidiaries. But the banks had security over the assets of the company. So the funds were paid into escrow, held on behalf of the company, but then the company had to pay those funds to bank in order to discharge their obligations. It's a bit like selling your house with a home loan - unfortunately the bank you know, gets the first dibs.

**Honourable Rawula** - Ok now you decided to write to the authorities you have written to, because you had your suspicions of corruption. Now can you tell us in detail what your suspicions were and in terms of the role-players in the whole episode, what were your own views which you suspected that there's foul play? Give us the names of those people and their own interest? What exactly was your suspicion?

**Mr Piers Marsden** - Some I think, as detailed in the report, there's really...an issue that was suspicious to us, was the timing of, and we had knowledge of the fact that the company or Tegeta purported to be 600 million rand short and in the evening of that very same day a very similar amount is advanced as a pre-payment. So it's really around the quantum, i.e. they said they were short 600 - 586 million rand was paid, and the timing of the transaction. So those were the items that arose our suspicion. In terms of a conclusion that we draw from that - I do not have sufficient access to internal Eskom rationale, when was the meeting called, who attended it, what was discussed, what was on the agenda? I'm literally unqualified to make that call, hence I said it is worthy of investigation and handed to the investigative body that is meant to follow up on those questions that I can't answer.

**Honourable Rawula** - Now will it be a reasonable suspicion from us seated here that Mr Howa, as an executive of Tegeta, who claims to have paid the 586 million to OCM, which OCM claims to have not received - will we be justified to have that...to say that our suspicions that him and his fellows in Tegeta having embezzled? Will you be justified?

**Mr Piers Marsden** - I think what would be justified is an investigation.

**Honourable Rawula** - Okay. Lastly my point now that OCM has not received their money and you are business rescue practitioners, and I want to believe that you are charging a fee, and I want to believe that your interest is that you have not been paid, is that the case?

**Mr Piers Marsden** - So we were being paid but we are being paid 30 Days on delivery based on actual tonnage that was delivered, So effectively from post-closing on the 14th of 15th of April, we were supplying coal to Tegeta and we were providing them 30 day terms. In addition to that the company was still supplying Eskom to Hendrina. So the company did have cash flow. So yes I was paid in terms of that as well.

[02h28:58]

**Honourable Rawula** - So how much are you owed now?

**Mr Piers Marsden** - I'm not owed anything.

**Honourable Rawula** - Okay. Thanks Chair. I was establishing the interest.

**Ms Daphne Rantho** - Alright. Honourable Luyenge... [Overtalk]

**Mr Piers Marsden** - I'm happy to address the issue of fees. From a practitioner you are tariffed in terms of the Act based on the size of the company. It's an hourly-based rate.

**Ms Daphne Rantho** - Honourable Luyenge.

**Honourable Luyenge** - Thank you Chairperson. Thank you Mr Mardin for the presentation that you have made and maybe the responses that you have given already by now have actually lessened my questions. There is a hypothetically view generally in the country.... [Overtalk]

**Ms Daphne Rantho** - Honourable Luyenge, it's Mr Marsden.

**Honourable Luyenge** - Mr Mars... [Non-English] [Overtalk] [Laughter]

**Mr Piers Marsden** - Don't ask me to say the Honourable Member's name. So I'm going to let it slide... [Overtalk][Laughter]

**Honourable Luyenge** - [Laughter]... a similar problem. No thanks Chair. Thanks Chair. Now I'm well-learned, better learned than yesterday. There is a hypothetical view generally in the country that there is a looting of state resources, in particular in the state-owned enterprises and Eskom is part of that. And for us at this level we require enough and sufficient evidence that will prove that this hypothesis is really a fact. And in us executing that particular duty, we want people like yourselves who are bold enough with enough and sufficient evidence to assist us and assist the process of unearthing corrupt practices in the SOE's. Over and above the information that you have shared, would you be able maybe at a later stage, as and when it happens that this process is taken to another level and there is proof there is more evidence needed, will you be prepared to assist with that process or will you have such documentation or further information even over and above documentation?

[02h31:54]

**Mr Piers Marsden** - I'm absolutely a South African citizen and I think that there is a desperate need to colour in all of the aspects of this particular issue. I think, as I stated before, there certainly is in my view, sufficient documentary evidence to warrant further investigation. And I would avail myself to the best of my abilities and to the full extent of information my position in that process.

**Honourable Luyenge** - KPMG as an organisation it's an old organisation with...at least it is a well-known organisation. Was it for the first time that you come across them or you work with them this time in as far as this is concerned?

**Mr Piers Marsden** - No I've worked with KPMG previously.

**Honourable Luyenge** - Is it normal that when they interact with you they declare as to whom they represent?

**Mr Piers Marsden** - Generally yes.

[02h33:11]

**Honourable Luyenge** - In this case did they declare themselves as representatives of the Guptas or Mr Duduzane Zuma?

**Mr Piers Marsden** - At the initial meeting, they wished, and this is prior to business rescue, from my understanding of the documents, they were acting on behalf of a non-disclosed entity. In all of my engagement with them, we knew and they had disclosed who they were representing.

**Honourable Luyenge** - Did they declare or your heard information that they represent those individuals. Did they officially declare that: "We are representing the Gupta's"?

**Mr Piers Marsden** - I'm not sure if I received a formal correspondence in that regard but certainly they would have arrived at meetings with the representatives on them. So it wasn't a big jump.

**Honourable Luyenge** - I don't think I'm satisfied in that kind of a response. Because I want something that says: "We are this company and we are representing so-and-so". Did they say that to you?

**Mr Piers Marsden** - I will have to check my documentation. It's likely that we will have something. In terms of which we were engaging with them on a number of different issues. So certainly we would have some documentary evidence that they were representing Oakbay.

[02h34:37]

**Honourable Luyenge** - The prepayment - 586 million. I mean it's unusual. But we'll get used to these figures.... [Laughter off-mike] No Chairperson I've never seen this. I don't think I say...In fact I don't think I want this amount of money...

**[Off mike and unidentifiable speaker]** - ... Now you know how I felt when I saw the 30 million.

**Honourable Luyenge** - Chairperson what I want to establish here...if there are instances that huge amounts of monies can be prepaid in this country and you are not sure as to whether that was done in good faith anyway. Can I check did this payment actually happen on...happened on an application? Was there anyone who applied for a prepayment on the basis of 1,2,3,4? Or was it just a part and parcel of a generosity that was coming from elsewhere?

**Mr Piers Marsden** - Once again, no knowledge of the prepayment or the lead up or the build-up to how it was given effect to.

**Honourable Luyenge** - After having a smelt a rat because you seem to have actually in the process you smelt a rat, and then you took some steps and approached certain law enforcement agencies. Did you get corporation from them or did they actually followed the information that you were providing them, or did they only took what you said and recorded it and then they never came back to you?

**Mr Piers Marsden** - So they've largely got the information or the affidavit that I submitted originally. I have not...I have had an interview with a warrant officer, I signed the second affidavit which is in a format very similar to the first, I've not been asked to provide additional documentation or have further follow-up interviews. Aside from the one I received two days ago.

[02h37:40]

**Honourable Luyenge** - So are you happy with that? Because my own understanding is that when you wake up at your home, you approach them, you want to be heard and you would want action to be taken, if not taken you are informed as to why an action would not be taken.

**Piers Marsden** - I think as mentioned previously I certainly would have liked a degree of urgency around issues to the extent that my suspicions were then invalid; great, the issues resolved. To the extent that they were not, I would have liked to see more significant progress made. I think we also had a lengthy discussion with the public protector around this issue as well. So you know we've tried as best as possible to ensure that



our understanding is as complete as possible, and I'm sure it will develop with forums like this and hopefully others that develop.

**Honourable Luyenge** - So maybe lastly Chair. Who is the most legitimate source that you think that the thickness of things you would say now this is the road I'm going to use. A legitimate one, one that will be regarded as being a prima facie kind of an evidence that will come, then if us as parliament do nothing about that then you will cry foul.

**Mr Piers Marsden** - I think this forum is certainly constituted to try and get as much as possible. Not that I'm a lawyer and I understand, but certainly you have the ability to request documents and subpoena people, and I think that this would certainly add to the knowledge already in the public domain in terms of trying to get some traction on as I said trying to colour in the missing pieces of the puzzle. And certainly forums like this would have the credibility in terms of trying to find the smoking gun, if I kind of trying to understand what it is that you're looking for. And I think only by comprehensively setting out the time in the context from a variety of different forums, will ultimately the questions be answered.

**Honourable Luyenge** - Do you know maybe how long had Glencore been doing business with Eskom?

**Mr Piers Marsden** - Other than very long, I'm not sure. And I'm sure they continue to do business in the other operations. But certainly they are very big supplier to Eskom in the other operations and my understanding is they continue to do business with Eskom.

**Honourable Luyenge** - So there is no smelling of a rat around them also.

[02h41:12]

**Mr Piers Marsden** - Not to my knowledge, no.

**Honourable Luyenge** - I rest my case, Chair. Thank you.

**Ms Daphne Rantho** - Thank you very much. Mr Marais.

**Honourable Marais** - Thank you Chairperson. I just have clarity questions, if you don't mind Mr Marsden; questions of clarity. One important date in this whole saga is the date of the 11th April 2016 when there was a meeting that evening in Eskom as well; to your general knowledge on whose watch, who was the CEO of Eskom at that point in time?

[02h41:51]

**Mr Piers Marsden** - I believe it was Mr Molefe.

**Honourable Marais** - And do you know who was the CFO at that point?

**Mr Piers Marsden** - I believe it was Mr Anoj Singh, but I'm sure you could verify that.

**Honourable Marais** - That's why I'm just asking to your general knowledge. At that point in time do you know who has the chairman of the Eskom board?

**Mr Piers Marsden** - I think it was Dr Ngubane.

**Honourable Marais** - Thank you sir.

**Ms Daphne Rantho** - Mr PG. Honourable PG.

**Honourable Gordhan** - Thank you Chair, thank you for baptising me differently. Perhaps the first point Mr Marsden is just a comment, so if you want to add to it you're welcome. But you've been quite helpful to reinforce what is already out there as you correctly point out in the public protector report in the various documents that are now in the public domain. So if we take Mr Marais' point, Mr Swart's point, Mr Kahlua's point I think as well, and put them together it's fair for this committee to actually come to a fairly strong hypothesis that there's a direct link between the appointment of Mr Molefe as CEO, the appointment of Mr Anoj Singh as acting or real CFO, the presence of Dr Ngubane as a chairperson of the board, the meeting with the former Minister Ramatlhodi, the subsequent appointment of Mr Zwane, the visit to Switzerland, the opportunity that this Oakbay...or rather Optimum saga presented when there might have been a lapse in the quality; and that's the part that you can comment on. And then you get all of these transactions concocted in order to seize this opportunity to transfer mining operation from one set of owners to another set of owners. So, I think it's helpful for the public to know that those are dots that are connectable and that the evidence leader should bring on more witnesses that would help to connect more of the lines that then completes this hypothesis and confirms it in some way. So that's the first point. The second is if you could help me to understand; the Bank of Baroda says we've got 2.15 to pay over for the transaction, am I right?

**Mr Piers Marsden** -That's correct.

[02h44:53]

**Honourable Gordhan** - But just prior to that 585 was the missing amount out of the 2.15.

**Mr Piers Marsden** - So there's a slight timing difference. The Bank of Baroda letter is issued in March, so the 4th of March 2016. The discussion around the R600 million shortfall is on the 11th of April; so a month and a bit afterwards.

**Honourable Gordhan** - And when was the 2.15 paid over?

**Mr Piers Marsden** - It was payable I think on the 14th of April.

**Honourable Gordhan** - And is it your assumption that the 585 was necessary to make up the 2.15.

**Mr Piers Marsden** - It's the conclusion that the public protector came to in her report.

**Honourable Gordhan** - That it was a contribution to that.

**Mr Piers Marsden** - Absolutely.

**Honourable Gordhan** - But you then said that that amount that money went into the Tegeta account but not the Optimum account.

**Mr Piers Marsden** - So it went into, if I follow the public protector's analysis, it was paid to Tegeta and then Tegeta effectively paid that into the escrow account or an aggregate amount for the discharge of the purchase price.

**Honourable Gordhan** - So, to put it in simple terms the 585 was used to make up the 2.15.

**Mr Piers Marsden** - It appears; absolutely it appears that way.

**Honourable Gordhan** - Ok, that then brings us to Mr Swart's point about whether you're buying shares or you're buying future production, because the then CEO made a big case of that publicly that this is about buying future production. This is actually buying company stock shares in the company. Is that correct?

**Mr Piers Marsden** - Correct. At the time of the payment it wasn't even the owner of the mine; it simply had the right to acquire the mine.

[02h46:40]

**Honourable Gordhan** – Then just to shift to a different focus. So here's a mine that is contributing or selling coal to the Hendrina power station, is that correct?

**Mr Piers Marsden** - That's correct.

**Honourable Gordhan** - Are we right, I think several of my colleagues raised the point that this coal from this mine is now being sold to the Arnot power station.

**Mr Piers Marsden** - That's correct.

**Honourable Gordhan** - And whereas, let's say coal was being sold at X Rands to Hendrina it is now being sold at X + Rands to Arnot?

**Mr Piers Marsden** - Correct.

**Honourable Gordhan** - Do you have the amounts, approximately?

**Mr Piers Marsden** - 2 X or 3X may be better than X+, but ya. Slightly different qualities of coal so I mean there is, it's not completely like for like in that the power stations each have a unique coal specification, but essentially it's the same product.

**Honourable Gordhan** - Because it's from the same mine?

**Mr Piers Marsden** - It's from the same mine, it's just washed and treated slightly differently to upgrade the coal to a certain degree for Arnot.

**Honourable Gordhan** - Who benefits from this?

**Mr Piers Marsden** - So the mine, Optimum Coal mine, effectively benefited from the ability to sell product, round numbers 500 per ton to Tegeta who then on sold it to Arnot as opposed to supplying 450 round numbers, to Hendrina.

**Honourable Gordhan** - So effective the new owners benefit from the additional amount.

**Mr Piers Marsden** - Correct.

**Honourable Gordhan** - And does that necessarily... is that the amount that was required to make Optimum financially viable? Or is this beyond that amount.

**Mr Piers Marsden** - It really depends on the mix in the volumes but certainly it would contribute towards making it financially sustainable, if you are able to sell product at a higher price.

[02h48:40]

**Honourable Gordhan** - Sustainable or super profitable?

**Mr Piers Marsden** - I think the context of Optimum would always be sustainable. The issue really arises in terms of the good and bad side of the business. So if you looking at a net purchase price; it takes the profit on this side of the business and the negative of this side of the business, if you're able to remove the negative I think the profit arises not necessarily in that legal entity but in the overall picture.

**Honourable Gordhan** - I think you were hinting earlier on that what was originally the profitable side of the business i.e. Koorfontein, if I got the pronunciation right, and the terminal at Richards Bay, those are now being disposed of.

**Piers Marsden** - It's been in the press whether it's been concluded or not I've got no knowledge of.

**Honourable Gordhan** - So we can get the evidence leader to bring us the evidence to tell us. But if that is being disposed of, the question of balancing profitability doesn't come into the equation.

**Mr Piers Marsden** - Correct.

**Honourable Gordhan** - The standalone mine is now profitable otherwise they wouldn't be in that business. And you would not have done your job of rescuing the business.

**Mr Piers Marsden** - Correct.

**Honourable Gordhan** - Ok. Last point. From cost of coal to the quality of coal, what's changed during this whole period? You know this whole saga started because the 'quality' was poor and that was public discourse about the supply of Optimum Coal to Eskom; and Optimum is still, under a different set of owners, supplying the coal. What's changed?

**Piers Marsden** - So a number of things could have changed, clearly I have no knowledge beyond August 2016.

**Honourable Gordhan** - And up to 2016?

**Mr Piers Marsden** - But a couple of items could have changed. I think that there was an issue in the methodology around how the coal was sampled which was effectively giving an error on product. It is essentially the same coal but you could wash and / or screen to beneficiate the coal to get it back within standard specifications. Really obviously reduce your yield but certainly there would be technical methodologies that could be used to take the same product coming off the same seam to upgrade it to a different product. But once again that's hypothetical.

**Honourable Gordhan** - Ok, Thank you.

[02h51:09]

**Ms Daphne Rantho** - Honourable Shivambu.

**Honourable Shivambu** - Thank you Chairperson. I want to raise again the concern I raised yesterday that we are dealing with crime that is taking place now. It's not ended perhaps we may need to take certain decisions in terms of what should happen. I don't want to ask questions, I just want to make some quick observations in terms of what has happened. Tegeta is owned by Oakbay and Mabengela Investments which is almost 100 percent owned by Duduzane Zuma, and then they want to buy Optimum Coal Holdings from Glencore which is broadly a company with Ivan Glasenberg in Switzerland, based there. Then they first approach Ngoako

Ramatlhodi who is the minister of mineral resources that time to say that, 'utilise the legislative instruments to push Optimum Coal Holdings out of business, or into a risky situation'. And then Ngoako Ramatlhodi says, 'no.' And there is an undisputed newspaper report that says when Ngoako Ramatlhodi went to see President or well Mr Jacob Zuma, he met Duduzane Zuma was sitting with Mosebenzi Zwane outside there, in the same meeting. And Zwane is the person who gave the Estina Dairy Farm to the Gupta's in the Free State in Vrede to do business which was illegal there. Zwane is the person who signed a letter inviting the Gupta's; which ultimately to the Waterkloof landing of the airplane there. Few months later he gets appointed as a minister of mineral resources, and his first stop is in Switzerland to talk with Glencore about the whole Optimum Coal Holdings which they then syndicate a fund to buy it. They use part of their money, they take money from Trillian; like yesterday's evidence and even the Budlender evidence last raised that they took R260 million from the Baroda account which Trillian had where Salim Essa is involved and Eric Wood and all of those people, and then when there was a shortfall of 585 million, whatever amount, then they go to Eskom to say we are asking for prepayment. And then that group of Brian Molefe, Anoj Singh, Ben Ngubane, Matshela Koko, approve that prepayment to complete the syndicate fund to purchase Tegeta mine. And then increase the allocations of the tons that Tegeta can supply to Eskom on a monthly basis, so that they can make maximum profit with ease. And when all of that is brought to the public discourse and it's being exposed now, they sell Tegeta to themselves; to a shelf company somewhere in Dubai. And they continue to supply coal to Eskom, they continue to supply coal to Eskom, through a deal that is patently illegal; through a deal that is decidedly illegal, like through an illegal cobbling up of a deal that there's prima facie evidence that it's illegal. And when we raise this, and when you go to the police, when you go to the NPA, they say no were going to work on it, we're working on it. The Hawks now working on it who are investigating it in the broader context; let's wait for commission of enquiry. But this is illegality that is going on now. Tegeta is still the recipient of millions of rands of payments from Eskom as we speak, which is directly benefiting the same people who claim to have disposed of it. They've not disposed of it. They've just put it in a different form. What do we do, I think that is the question that we should respond to. If the SABC enquiry of report is anything to go by in terms of the legal standing, we perhaps should make some immediate resolutions and check if parliament can't take some immediate resolution to hold some of the ongoing crime that is being committed now. And if it is subject to judicial review, it's fine, we'll go to court as parliament to defend that we had to do something because all the other institutions which otherwise were supposed to stop the crime which is ongoing now, are not doing anything. And what are the implications of all of these things. The implications are on ordinary people who are now going to be forced to pay 20% more for electricity because of the mismanagement of Eskom. Because Eskom is asking for 20% increase on tariffs and that has got a direct impact even on what ultimate look will be a recovery of the economy. There's a shortfall of more than 50 billion in terms of what is required for the state to operate optimally, and we're increasing electricity under those circumstances.

[02h57:30]

We have to do something. I don't think that are my hands are completely tied. We should look into tabling a preliminary report, make concrete recommendations, and if whoever is affected things that who have acted outside the law, must subject us to judicial review, and then we'll then take it from there. I'm more than convinced that a regional court of law will appreciate that parliament has been able to act in a rational way to stop the corruption that is ongoing; the industrial looting scale that is ongoing in South Africa currently. Because you can ask questions and we must not delay this thing; we are going to collapse South Africa, we are going to collapse the entire fiscus in our watch without even having done anything. And when history looks back and say 'what did you do', we'll say 'were just talking amongst ourselves and asking each other

questions when the crime was ongoing.' I think that we have got an opportunity to do something and then let's discuss how do we table a preliminary report. Wishfully next week chairperson, in the next sitting of the National Assembly, in the next ordinary sitting we must table a preliminary report in terms of our observations and would take concrete resolutions of certain things must be stopped so that we are able to stabilise the situation. Thank you.

[02h58:54]

**Ms Daphne Rantho** - Thank you Honourable Shivambu, Honourable Nobanda.

**Honourable Nobanda** - Thank you Chair, I only have one... Mr Marsden, what's your understanding between the cost plus mine concept and the prepayment arrangement? Thank you.

**Mr Piers Marsden** - I think that's a very good question and an often misinterpreted. Optimum is not a cost plus mine, it has a long-term supply agreement signed I think in 1993. So I think the concept of a cost plus mine and a prepayment are quite linked, but Optimum is not a cost plus mine, it has to deliver a fixed price of coal escalated on a bunch of metrics.... Pardon me? [Off mike question inaudible]... So prepayments have, in my understanding, have generally been used in the context of cost plus mines, my understanding, I'm not an expert on Eskom is procedures but from what I read that is a term that is generally associated with a cost plus mine where Eskom is required to fund development and production. Optimum is an established mine on a different type of contract. Beyond that it's not really in my domain.

**Ms Daphne Rantho** - ... Honourable Natasha.

**Honourable Mazzone** - Thanks Chair. Chair I just want to get something straight because yesterday when the evidence was given to us yesterday the name of Mark Pamensky came up continuously. Now Mark Pamensky was on the board of directors of Eskom and he's also on the board of directors of Oakbay and he also was a partner in a company called Blue Label. Now someone that used to be a partner at Matuson, Gary Kaplan, was also partner at Blue Label. Now I've just checked on your letterhead that you've given to parliament and I see that Gary Kaplan is no longer a partner at Matuson and Associates. So I did a little bit of research on my phone and I saw that Gary actually resigned when the Gupta emails were leaked. Is there any chance that given the fact that someone in Matuson is so connected to someone at Oak Bay and someone at Eskom, that there's any connection in terms of the purchasing of Tegeta? Because it's just it's a little bit fishy the way it's coincidental that he was on your on your letterhead and then he wasn't. So I'm confused and I'm concerned at the same time.

**Mr Piers Marsden** - Sure, I'm happy to answer that. It's not nearly as dramatic as that. We employed Gary's son and our organisation we thought it was inappropriate to have his son employed. He was a non-executive director of our company, he's a lifelong friend of Les Matuson and Blue Label was,...I think he resigned from Blue Label maybe 15-20 years ago. So it is an unusual circumstance but it's not as dramatic as you suggest.

[03h02:18]

**Ms Daphne Rantho** - And no other person that wants to do a follow up question, I am closing the meeting now... [Off mike inaudible]... Oh, Honourable PG.

**Honourable Gordhan** - .... They make you hungry first, you see. Thank you Chair. Can you help me clarify; a) whether you interrogated the quantum of the fine? And if you found it to be legit, meaning that it had some rational mathematical basis for it. Is it possible that the fine should have been 70 million vs. 2.1 million? And

secondly, how did that fine disappear eventually. I don't think anyone of us has quite interrogated that. And there's an interesting relationship between the quantum of the fine and the quantum of the sale amount because they're both about 2.1, three questions.

**Mr Piers Marsden** - So with regards to... I've lost the first question again, sorry honourable member.

**Honourable Gordhan** - The quantum of the fine and it's with the... [Overtalking inaudible]

**Mr Piers Marsden** - Oh, yes sorry. [Overtalking inaudible]... did we interrogate the fine. Sorry about that. Yes, we certainly did. We spent quite a lot of time investigating it and we prepared a very extensive report around it. It had a variety of different categories in terms of the claim. Certainly some of it would have been arguable that the fine should have been levied. There was coal that was out of specification. Some of it would have been argued the other way that it wasn't. In terms of the settlement that happened post the 31st of December... the 31st of August, so once again judging on the press reports around the settlement, I think Mr Vanara may have mentioned, did somebody mentioned 600 million rand? I'm not sure if that's the number that's been agreed or not, it's not a publicly available document but it could have been in that quantum. But it would be very hard to assess, it would have been down to technical analysis, down to evidence of experts in the matter. Then with regards to the last point on the similarities between the purchase price; the purchase price was actually a bit more than the 2.15. That was the contribution that had to be made by Oakbay. Glencore also contributed a percentage of the purchase price in order to meet certain other obligations, so the purchase price about 2.6. So I think that's purely a coincidence.

[03h04:51]

**Ms Daphne Rantho** - Mr Marsden, do you think that these monies that have been, I don't know, should I say that were played with within the entities of public enterprises. Do you think we'll ever be able to get them back? How? What is your suggestion? How can we get those monies back? Because they belong to the community of South Africa, they belong to the poor people.

**Mr Piers Marsden** - I certainly hope so. I think that going to the Honourable member's suggestion, I think urgency and timing are always critical in these items and the chances in most situations of ultimately recovering from parties, if they have done wrong, decreases over time. So the sooner that action is taken I think the better the prospects of success are.

**Ms Daphne Rantho** - Thank you very much and thank you, thank you Honourable members for your questions. Thank you Mr Marsden for availing yourself and thank you for the information you gave us. We know that you gave us information that is out there but you took a decision of coming to the enquiry and binding yourself with the information and what you know as a person who was partly involved. To us as this committee we have gained a lot out of what you have given us as much as we had time to read some of the things that you have you talked to. But coming from a person who was part of it, it is giving us a much clearer picture of what was happening. We really appreciate your time and we hope that you will, after this, you will live your normal life you, you will not get involved in things that are unlawful, and you know what the consequences are of getting involved in unlawful things. You are here now and I know that in your entire life and when you were setting up your business you never thought that you will ever come to a Committee of Parliament and come and give evidence in the Committee of Parliament. But you did that because you never know what tomorrow holds for you. Thank you very much and we really appreciate you coming to this committee and the committee enquiry.

And the community is adjourned.

[Off mike conversations inaudible]

***Ms Daphne Rantho*** - Can the members, the mighty party caucus stay a bit and so that we go through some few things.

[Off mike conversations inaudible]

[03h09:48 - END OF AUDIO]



