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Zondo commission – Koko challenges Zondo to probe inquiry’s “favourite” Eskom witnesses

Former Optimum Coal Mine (OCM) CEO Clinton Ephron and his boss Glencore CEO Ivan Glasenberg misled the state capture commission in their submissions when they claimed that Eskom bullied them in 2015 when it refused to up the price it paid for coal, leading OCM to apply for business rescue.

This assertion was made by former acting Eskom GCEO Matshela Koko, who returned to the commission on Wednesday. He was head of commercial and technology at the time.

Koko accused a team in the primary energy division (PED) of Eskom, responsible for coal sourcing, of colluding with OCM and misleading the board over the true nature of the situation with penalties owed to it by OCM, among other issues. He challenged commission chairperson Deputy Chief Justice Raymond Zondo to conduct lifestyle audits on the PED team, just as he had undergone one.

OCM first notified Eskom that the company would struggle to supply coal of the agreed quality to Hendrina power station in Mpumalanga, through a PED team including Johan Bester, Gert Opperman, Vusi Mboweni and Edwin Mabalane. The coal supply agreement (CSA) between the two parties specified the extent to which OCM was obligated to maintain the standard of coal compatible with Eskom’s needs, while the power utility in turn had a responsibility to regularly test if this standard was met. Failure by Eskom to notify OCM of supplied sub-standard coal within 14 days could mean that it would forfeit its ability to impose penalties later.

Koko said the notice from OCM was clear on the company’s inability to meet the standards set by the CSA, and according to Bester, who was acting head of generation then, prompted Eskom to review a decision at that time to impose penalties on the company. In 2019 Bester was one of the first witnesses to testify before the commission on the events of 2014 and 2015, when Eskom broke ranks with Glencore and motivated for the sale of OCM to Gupta-owned Tegeta Exploration in December. Koko called him one of the commission’s “favourite witnesses”, saying he was not probed in detail on some of the evidence he gave, which fuelled the narrative of Koko and CEO Brian Molefe being captured.

According to Koko, Bester was selective with the truth on the decision to stop demanding penalties. “This is not a reason for Eskom not to deduct penalties. So if Eskom decided not to deduct penalties, it’s unlawful. It’s an unlawful activity and it’s in contravention of clause 50 and 51 of the PFMA,” Koko said, adding that the PED team had previously suspended the penalties due to Eskom, without authority.

The provision for Eskom to impose penalties for poor quality coal on the part of OCM is in the CSA, and is there to protect it from being short-changed. What Bester and Ephron did not tell the commission in their submissions was that the co-operation agreement, that OCM had sought with Eskom to alleviate its financial challenges in 2014, could not override the CSA.

Ephron testified that when OCM realised that it was heading towards financial hardship in 2014, it approached Eskom in good faith, in an effort to enter into an agreement that the power utility would

adjust the price it paid for coal at the time. The agreement was finalised in May 2014, and would have seen OCM get some relief amid untenable operational costs.

But the move in itself was unlawful, said Koko, as board approval was not sought as per a clause in the CSA. "You needed a commercial transaction form. The commercial transaction had to be approved by the PTC [procurement tender committee] that approved the CSA of Optimum and that was the PTC of the board and it's not in place ... so the cooperation agreement is irregular, chair."

By only settling the matter with executives, OCM was in breach of the CSA, he said, adding that Bester himself said the only time the board was alerted to the co-operation agreement was in August 2014, three months after it was signed.

The PED told the board at that time that if Eskom were to demand penalties, the most it could ask for was R16-million, and not the R2.1-billion that was eventually imposed in 2015. "These are the people that we're dealing with, but your investigators are not picking it up, but they want to judge my behaviour," said Koko.

He told the commission that he suspected that the PED team involved in negotiations was in cahoots with Glencore. It was the only explanation he could arrive at, as penalties against OCM should have been imposed for the period between March 2012 and May 2015, according to Eskom records indicating the period over which the coal quality dropped below standard. The accumulated value for that period was R2.1-billion, which is what Eskom ultimately demanded from OCM.

Glencore tried to take Eskom for a ride, Koko said, and its executives believed they could do so since they had a powerful politician in the form of then deputy president Cyril Ramaphosa on their board.

"Since Mr Ramaphosa and Glencore took over Optimum on the 26th of March 2012, a host of irregular activities unfollowed (sic) that include non-payment of penalties to the tune of R2-billion, that Eskom was entitled to."

When Brian Molefe joined Eskom in April 2015, Koko asked him to consider Eskom taking over the running of OCM with the help of a contracted miner, and edging OCM out, but internal legal advice cautioned against this move. The option open to Eskom then was to terminate the co-operation agreement, and go into negotiations with OCM.

It was at this point that Opperman's team was mandated to offer OCM a new pricing model, of R296 per tonne, while the company had sought R285. Koko explained that the rationale was for the team to use the take-it-or-leave-it approach with OCM. Instead, they came back with a revised price from OCM of R442 per tonne, which was rejected on the basis that it would cost Eskom R5.5-billion more for coal, a cost it could not afford.

When this revised offer was rejected, it led to OCM going into business rescue, which meant some of the powers Eskom had in the CSA would also be waived, as it was no longer dealing with OCM beyond this point. It did not stop Molefe negotiating with Ephron, but even so, the relationship with OCM could not be salvaged. In August 2015, the business rescue practitioners, through their lawyers, notified Eskom that the coal supply from Hendrina would be suspended.

It was not true that Eskom was hard on OCM; if anything, it was Glencore that should have conducted a due diligence on its ability to produce good quality coal. For their part in putting Eskom first before the interests of Glencore, Koko and Molefe were vilified by former public protector Thuli Madonsela in her state capture investigation. Madonsela, he added, failed to pursue the actions of the PED team and their possible ties to OCM, Koko said.

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