

SOE 2

From: Business Man<infoportal1@zoho.com>
Sent: Monday, 29 June 2015 10:55 AM
To: Duduzani.Zuma@gmail.com
Subject: Fwd:Richard C.V
Attachments: qualifications.pdf; mogokare CV.doc

evening sir'

please find attached my C.V and supporting documents.

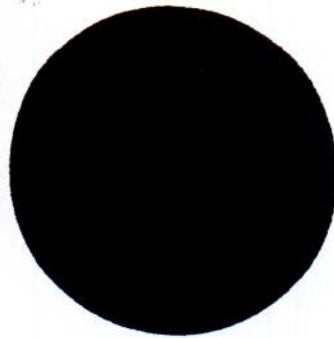
regards

Richard

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This message has been scanned for viruses and dangerous content by MailScanner [<http://www.mailscanner.info/>], and is believed to be clean.

CURRICULUM VITAE



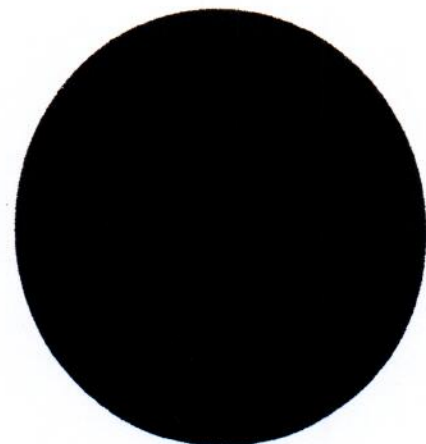
OF



**Mogokare Richard
Seleke**

6893 Pearl Bush Street
Karen Park
Pretoria North

Personal Cell no: 071 602 0661
Nationality: RSA,
Work contact no: 051 400 4731
Email: selekam@detea.fs.gov.za
Home cell no: 082 568 1236



CURRICULLUM VITAE

1. *PERSONAL INFORMATION*

(i) ***Mr Mogokare Richard Seleke***

(ii) ***Residential Address:***

- 1) House no: 1046
Mmabatho
2735
- 2) 6893 Pearl Bush Street
Karen Park
Pretoria North
- 3) **Postal Address:**
P.O. Box 5784
Mmabatho
2735

2. QUALIFICATIONS

- Bsc honours degree in Agricultural Economics and Management.
- Post Graduate Diploma in Economics and Management.
- B Degree Agriculture.
- Further Studies towards Masters in Economics.

Short courses:

- Population analysis and planning.
- Local Economic Development and Planning.
- Project Planning and Management.
- Monitoring systems development and evaluation techniques with exposure to service excellence methodologies.
- Labour Relations
- Financial planning and Analysis

3. KNOWLEDGE

- Economic Development and SMME Environment
- General management principles and practice.
- Development planning and systematic analysis.
- Organisational development and personnel management.
- Business evolution and process management.
- Public service management and thinking(Policies)
- Research for development.
- Programs Planning, Monitoring and Evaluations.
- Policy analysis and advisory support within the political environment
- Cabinet and parliamentary systems
- Accountability processes and mechanisms

4. ABILITIES

- Lead, Manage and Motivate People in both the Public and private sectors.
- People, process and systems management
- Effective and Professional Communication (Oral and Narrative)
- Analyse and Use data for Strategic Planning, Monitoring, and Evaluations for public and private decisions support.
- To manage organisational decision making processes.
- Participate in broader forums and input in policy development processes.
- Participate in Departmental Executive Committees for strategic decision making(OVERSIGHT, DEXCO, and ITCA and MINMECS)
- Represent the department in broader government committees, meetings and engagements at an international level.
- Participate in International engagement supporting the Minister and the Director General.
- Lead stakeholder engagements in workshops, conferences and meetings.
- Participate in boards of companies as non-executive member.

5. EXPERIENCE AND EXPOSURE

Summary:

- Joined the public service in 1997(18 years' experience)
- Worked in both academia (Lecturer) and (Scientist) and public service
- Senior management of the National department.
- Interacted in engagements relevant to agriculture with senior officials within the Presidency, Treasury, DPSA, Rural Development and Public entities.
- Advised and Supported the Minister and the Director General.
- Head of Department, Economic Development, Small Business, Tourism and Environmental Affairs in the Free State Province.
- Board member of Transnet South Africa, including employee benefit trustee

5.1 CURRENT POSITION: HEAD OF DEPARTMENT; ECONOMIC DEVELOPMENT, SMALL BUSINESS, TOURISM, AND ENVIRONMENTAL AFFAIRS. (Free State Province)

Key functions to ensure;

- Implementation of strategic goals and objectives of the department.
- Speeding-up the realisation of relevant government priorities.
- Realisation of departmental budget vote
- Ensure strategic management of the department.
- Represent department in the MINMECS and other strategic meetings
- Human capital and financial management.
- Advice the MeC and premier on matters of economic development.

5.2 DEPUTY DIRECTOR GENERAL: ECONOMIC DEVELOPMENT AND TOURISM

Key functions to ensure;

- Strategic management of the economic development Branch.
- Develop strategies and interventions for economic development.
- Undertake research to inform policy development
- Develop interventions for small medium and micro enterprises
- Supervise staff and budget management.

5.3 Deputy Director General; Fisheries Management (May 2010 to February 2011)

Responsibilities: Overall management of the Branch (strategic leadership and people management) 7 chief directors and 22 directors with over 1000 staff complement.

- Manage the integration of fisheries function into the department of agriculture, forestry and fisheries.
- Develop alternative livelihoods for the coastal communities.
- Formulate a developmental agenda for fisheries and management of stakeholders.
- Represent government in regional and international engagements
- Support the director General in the capacity of his Deputy Director General.

5.2 Chief Director, Policy Development and Planning in the Department of Agriculture, Forestry and Fisheries (Pretoria)

Responsibilities:

- To develop new and review existing policies in line with government priorities.
- Facilitate the refinement of organisational strategy implementation and decision making processes through:(Strategic support system and Programme Performance Reporting)
- Developing a governance system through management committees and forums.
- Participated in broader government forums and input in policy development processes.
- Lead the Planning and coordination of Outcomes relevant for the Department of Agriculture Forestry and Fisheries
- Develop programs and implementation plans including budget reprioritisation systems.

Challenges:

- Policy development is currently residing with the line directorates.
- Programme development is uncoordinated
- Project management is an event
- Provincial guidance is limited
- International programs are not well defined
- Regional programs are implemented as adhoc.

Achievements:

- Developed, shaped and managed a small scale fishery policy.
- Reformulated rights transfer policy
- Developed a guideline for policy development

5.4 POSITION: Director: Monitoring and Evaluation in the Department of Agriculture (Pretoria) 2005

Responsibilities:

- Manage the human resources of the Monitoring and Evaluation directorate.
- Manage the financial resources of the Monitoring and Evaluation directorate and its budget.
- Manage the development of appropriate information systems that support the monitoring and evaluation of the delivery programs.
- Manage the development of appropriate information systems that support the monitoring and evaluation of the departmental strategy.
- Ensure sound relations and networking with Local, Provincial departments of agriculture and relevant stakeholders involved in the development and monitoring of agricultural policies and programmes.
- Manage the evaluation of sectoral and organisational performance.
- Monitor service delivery and the execution of the sectoral strategic plan in relation to the departmental strategic plan.

Challenges:

- Having to start a new Directorate with limited resources including staff.
- New area of discipline in the public service, minimal reference organisations.
- Multidimensional roles, including intergovernmental cooperation.
- New staff, minimal M&E capacity, more of leading and supervision, hands on management.
- Strict deadlines and timelines in terms of organisational performance and programs monitoring reports.
- Weak planning systems making monitoring to be very difficult

Achievements:

- Transformed internal departmental system of reporting, Monitoring reports are a basis for quarterly reviews.
- Fully functional monitoring and evaluation personnel structure with all critical positions filled within the first three months.

5.5 POSITION: Chief Planner: Special programs analysis, later transformed into Impact assessments at the National Department of Housing (2001- 2004)

Responsibilities:

- Analysis of the departmental special programs with specific reference to performance and service delivery.
- Human settlement redevelopment programme analysis.
- Integrated sustainable rural development (ISRDP).
- Urban renewal programme (URP).

Challenges:

- Housing backlog data was difficult to determine, sources of information were not well developed.
- Migration information was making it difficult to project future housing demands.
- Housing policy was undergoing further refinements.
- Provincial housing plans for ISRDP and URP were inadequate making it difficult to report on progress.

Achievements:

- Developed a System or methodology to analyse housing contribution to integrated sustainable rural development and Urban renewal.
- Impact assessment of human settlement redevelopment projects in the nodal areas (Research report was produced).
- Represented the department at the ISRDP& URP coordinating structures.

5.6 POSITION: Agricultural Economist with the North-West Provincial Department of Agriculture and conservation. (1998-2000)

Responsibilities:

- Programme and projects planning.
- Development and evaluation of projects business plans.
- Feasibility analysis and projects monitoring.
- Participation in policy development processes.

5.7 POSITION: Lecturer, at Taung College of agriculture. (Two years of Service, 1997 - 1998)

Responsibilities:

- Lecturing of Agribusiness Management courses (1st to 3rd year levels).
- Develop the course materials and consultations with students.
- Participate in the college management committees.
- Offering community service by participating in local development initiatives.

RERERENCE:

1. Mr Langa Zitha
Director-General, Department of Agriculture, Forestry and Fisheries
Tel: 012 319 7300
Cell: 083 286 7215
2. Mr Peter Thabethe
Provincial Government of Free-State Rural Development
Tel: 051 861 8510
Cell: 082 829 3911
3. Mr Rodney Dredge
Chief Director Monitoring and Evaluation – Department of Agriculture Forestry and Fisheries
012 319 6047
082 804 3039
4. MeC Mosebenzi Zwane
Economic Development, Tourism and Environmental Affairs.
0726614458



University of North-West

This is to certify that

MOSOKAPE RICHARD SELEKE

having complied with the requirements
of the Act and Statutes was admitted to the

Degree

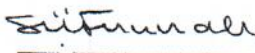
of


Bachelor of Agriculture

at a Congregation of the University
held on

19 APRIL 1997


Registrar


Dean


Vice-Chancellor





University of North-West

This is to certify that

MOGOKARE RICHARD SELEKE

having complied with the requirements
of the Act and Statutes was awarded the

POSTGRADUATE DIPLOMA
in

AGRICULTURAL ECONOMICS AND MANAGEMENT

at a Congregation of the University
held on

18 APRIL 1998

REGISTRAR

DEAN

VICE-CHANCELLOR





UNIVERSITY
OF NORTH-WEST



Certificate

This is to Certify that

R. SELEKE

Attended the In-Service Training Course
in POPULATION AND SUSTAINABLE
DEVELOPMENT

At the University of North-West
In the Population Training and Research Unit
(POPUNIT)

From October 2001 to April 2002

MODULES:

► IPDP2

Director: POPUNIT

Dean:
HUMAN AND SOCIAL SCIENCES

Date issued: 26/08/02





University of North-West

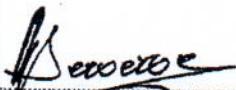
This is to Certify that

MOGOKARE RICHARD SELEKE

having complied with the requirements
of the Act and Statutes was admitted to the

Degree
of
Bachelor of Science Honours
(Agricultural Economics)

at a Congregation of the University
held on
23 APRIL 1999


Registrar


Dean


Vice-Chancellor



Recognition

DIRECTORATE: POLICY, PLANNING, INFORMATION, COMMUNICATION AND CO-ORDINATION

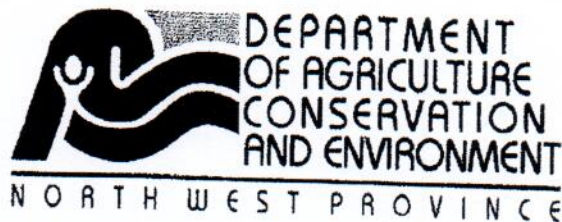
AWARDED TO:

Mogokare Richard Seleke

FOR PROFESSIONAL SERVICE,
BEING THE GLUE
THAT HELD US TOGETHER

DATE:

15 December 2000



Dr. L. M. Malambo
Director: Policy, Planning, Information
Communication and Co-ordination

Mr. A. Wills
Deputy Director General
Dept. Agriculture, Conservation and Environment

Email relating to Richard Seleke

From: Business Man<infoportal1@zoho.com>
Sent on: Monday, June 29, 2015 10:54:59 AM
To: Duduzani.Zuma@gmail.com
Subject: Fwd:Richard C.V
Attachments: qualifications.pdf (628.04 KB), mogokare CV.doc (75.5 KB)

evening sir'
please find attached my C.V and supporting documents.
regards
Richard

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This message has been scanned for viruses and dangerous content byMailScanner [<http://www.mailscanner.info/>] , and is believed to

Attachment 1 : "qualifications.pdf"**Metadata**

Producer : KONICA MINOLTA bizhub 751
Create Date : 2012:03:09 10:16:32+02:00

Comment :

This attachment contains all his qualifications scanned in. It is one thing to state that his CV is "lying around" but this scan document created years before the CV was last edited makes this much more likely that the owner of this email is the owner of the scanned qualifications.

Attachment 2 : "mogokare CV.doc"

Last Modified By : Richard
Revision Number : 3
Total Edit Time : 14.0 minutes
Last Printed : 2015:05:08 11:02:00
Create Date : 2015:05:08 11:06:00
Modify Date : 2015:06:20 19:59:00
Hyperlinks : <mailto:cdpm@daff.gov.za>

Comment :

It can be seen from the metadata that "Richard" was the last to save this document. Also note he did this days before the email was sent. What is also very relevant is the hyperlink found in the document which refers to the cdpm@daff.gov.za email address. This is the Department of Agriculture, Forestry and Fisheries. A hyperlink is a link which allows the reader to click on it to execute some function. In this case, a "mailto" link was found in the document. This "mailto" link which is not visible in the document any more suggest that the template used to create this CV contained a link to this department which again supports the belief that this document was last modified and sent by Mr Seleke himself.

From: Business Man<infoportal1@zoho.com>
Sent on: Sunday, March 22, 2015 4:09:36 PM
To: Ashu <ashu@sahara.co.za>
Subject: Fwd: 转发 :
Attachments: Final CSR 2015 workings.xlsx (15.57 KB)

==== Forwarded message =====

From : zhangminyu<zhangminyu54642@qq.com>
To : "Business Man" <infoportal1@zoho.com>
Date : Wed, 07 Jan 2015 21:40:24 -0800
Subject : 转发 :

==== Forwarded message =====

Dear Sir

FYI

Regards !

----- 原始邮件 -----

发件人: "Bansal Rupesh";<replyrb@googlemail.com>;
发送时间: 2015年1月6日(星期二) 晚上9:34
收件人: "zhangminyu"<zhangminyu54642@qq.com>;
主题: (无主题)

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359, 100 and 95 PROJECT WORKINGS

HEADS	359 Project	100 Project	95 Project	TOTAL
Each Loco Value	ZAR 50.48m	ZAR 44m	ZAR 28.28m	
PROJECT VALUE	ZAR 18122.32 m	ZAR 4400 m	ZAR 2686.60m	ZAR 221522.32 m
Total receivables will be from CSR for the whole Projects (20% for 95 and 21% for 359 & 100)	ZAR 3805.6872 m	ZAR 924 m	ZAR 537.32m	ZAR 5267.0072 m
CSR PAID till today (6th Jan 2015) including all transfers. (NOTE: CSR Paid at different times when it was due and CSR applied various Forex rate ZAR/USD at the time of payment, JJT/CGT received all in USD)	USD 107203921		USD 16699902.89	USD 123,903,822.89
Receivables from CSR	21% is Total Receivables (2% Advance Success Fee & 19% Receivables on actual basis when it is due from CSR)		20% is total receivables	ZAR 5267007200
"JJT/CGT" and Expenditures	Out of 2% Success Fee = (1% Success Fee for JJT and 1% expenditures) Out of 19% CSR receivables, JJT receives 15% and expenditure is 85%		Out of 20% receivables = (CGT Receives 15% and expenditures 85%)	
HENCE Receivables FIGURES WILL BE FOR WHOLE PROJECT	Expenditures ZAR 3862577880 JJT = ZAR 867109320		Expenditures = ZAR 456722000 CGT = ZAR 80598000	Total Expenditures = ZAR 3908250080 JJT/CGT = ZAR 947707320

Expenditures	<p>(A) SUCCESS FEE: 1% (USD 21005903) expenditures.</p> <p>(B) 85% of remaining Receivables = USD 55413297.75 expenditures done</p>	<p>85% of receivables = USD 14194917.45 expenditures done</p>	<p>Total Expenditures = USD 90614118.20</p>
JJT/CGT	<p>(A) SUCCESS FEE: 1% (USD 21005903) retained by JJT</p> <p>(B) 15% of remaining balance = USD 9778817.25 retained by JJT</p>	<p>15% of receivables = USD 2504985.43 retained by CGT</p>	<p>JJT/CGT = USD 33289705.68</p>
<p>PLEASE NOTE</p>			
<p>1. JJT/CGT in total have to receive ZAR 5267007200. CSR has made several payments using applicable forex rates to transfer ZAR into applicable USD.</p>			
<p>2. Request CSR to inform that in total how many ZAR CSR has transferred and applicable exchange rate for which (JJT/CGT) received in total USD 123,903,822.89 till now.</p>			
<p>3. The above ZAR amount which was used to transfer USD 123,903,822.89, this can be deducted from total receivables ZAR 5267,007,200. This figure will give the balance dues total from CSR.</p>			
<p>4. The above balance "X" amount in ZAR to be paid by CSR in Future to JJT/CGT and JJT/CGT have to account 85% towards expenditures.</p>			

SOE 7

From: Business Man <infoportal1@zoho.com>
Sent on: Friday, August 7, 2015 12:54:32 PM
To: Ashu <ashu@sahara.co.za>
Subject: Fwd: Letter 7 August 2015.pdf
Attachments: Eskom Letter 7 August 2015.pdf (563.71 KB)

Sir please note section 92 license suspension has been lifted. They confirm their business rescue practitioner has given permission and therefore they will resume mining tomorrow.

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SOE 8

MATUSON
ASSOCIATES

Eskom Holdings SOC Limited
Megawatt Park
Maxwell Drive
Sunninghill

7 August 2015

Attention: Brian Molefe: Acting Chief Executive Officer
Vusi Mboweni, Acting Head: Primary Energy
With a CC: Johann Bester: General Manager - Fuel Sourcing
Matshela Koko: Group Executive – Tech and Commercial

**OPTIMUM COAL HOLDINGS (PTY) LTD (IN BUSINESS RESCUE) AND OPTIMUM COAL MINE (PTY) LTD
(IN BUSINESS RESCUE)**

As you are aware, Peter van der Steen and I have been appointed as joint business rescue practitioners in respect of Optimum Coal Holdings (Pty) Ltd ("OCH") and Optimum Coal Mine (Pty) Ltd ("OCM" and together with OCH, the "Companies").

We have spent the last few days since our appointment investigating the affairs of the Companies in order to determine their financial position and how best to rescue the Companies.

As part of this investigation, we have reviewed the terms of the Coal Supply Agreement between Eskom and OCM in respect of Hendrina power station as well as the correspondence between Eskom and OCM over the last two years in respect of such agreement.

It is clear that Eskom will be a key stakeholder in the business rescue proceedings of the Companies.

Accordingly, we would like to set up an urgent meeting with Eskom in order to discuss the Coal Supply Agreement between Eskom and OCM and other relevant issues. We would propose that we hold this meeting as a matter of urgency and will make ourselves available at your earliest possible convenience. We have a creditors meeting next week Thursday and would like to have commenced engagement before then.

Please can you let me know your availability as soon as possible. We look forward to hearing from you.

Yours faithfully



Piers Marsden

**Joint Business Rescue Practitioner for Optimum Coal Holdings (Pty) Ltd (In Business Rescue) and
Optimum Coal Mine (Pty) Ltd (In Business Rescue)**

SOE 9

From: Wdrsal <wdrsal@gmail.com>
Sent on: Thursday, November 5, 2015 10:04:44 AM
To: Ashu Chawla <ashu@sahara.co.za>
Subject: Fwd: MEMORANDUM FROM COUNSEL - ESKOM RIGHTS RELATING TO OPTIMUM BUSINESS RESC...-2.pdf
Attachments: Untitled attachment 51688.pdf (492.15 KB), Untitled attachment 51691.htm (168 Bytes)

Begin forwarded message:

From: Business Man <infoportal1@zoho.com [mailto:infoportal1@zoho.com] >
Date: 05 November 2015 at 0:06:31 GMT+4
To: "Western " <wdrsal@gmail.com [mailto:wdrsal@gmail.com] >
Subject: Fwd:MEMORANDUM FROM COUNSEL - ESKOM RIGHTS RELATING TO OPTIMUM BUSINESS RESC...-2.pdf
Eskom legal counsel opinion sir

===== Forwarded Message =====

From : matshela2010@yahoo.com [mailto:matshela2010@yahoo.com]
To : "infoportal1@zoho.com [mailto:infoportal1@zoho.com] "
Date : Wed, 04 Nov 2015 23:46:41 +0400
Subject : MEMORANDUM FROM COUNSEL - ESKOM RIGHTS RELATING TO OPTIMUM BUSINESS RESC...-2.pdf

===== Forward Message =====

TO: ESKOM HOLDINGS SOC LIMITED
IN RE: OPTIMUM COAL MINE (PTY) LTD (IN BUSINESS RESSCUE) // ESKOM HOLDINGS SOC LIMITED
ATTENTION: GROUP EXEC – TECH & COMMERCIAL

MEMORANDUM

INTRODUCTION

1.

- 1.1. Consultant is ESKOM HOLDINGS SOC LIMITED ("Eskom").
- 1.2. We have been requested to provide Eskom with a memorandum regarding the assertion of its rights in terms of the Coal Supply Agreement, as amended ("CSA"), into which Eskom entered with OPTIMUM COAL MINE (PTY) LTD (in Business Rescue) ("OCM"), under a cession and assignment agreement.
- 1.3. The CSA is the primary agreement which regulates the supply and delivery of coal to Eskom's Hendrina Power Station ("Hendrina"), by

OCM, at prescribed quantities, qualities and price and was set for a fixed period ending in 2018.

- 1.4. This memorandum intends to consider the status of the CSA and the predicament Eskom finds itself in, pursuant to the recent events set out herein below.

BACKGROUND

2.

- 2.1. On 4 August 2015, the directors of OCM commenced business rescue proceedings citing that the company is financially distressed in accordance with chapter 6 of the Companies Act, 71 of 2008 ("the Companies Act") and nominated Piers Marsden and Petrus Francois van den Steen as its joint business practitioners in terms of section 129(3)(b) of the Companies Act (hereinafter referred to as "the business rescue practitioners");
- 2.2. On 17 August 2015, a meeting was convened between the business rescue practitioners and the representatives of Eskom in terms of which the business rescue practitioners:

2.2.1. reported that it was proving very difficult for OCM to continue on the terms of the existing CSA with Eskom and that it could not continue to produce coal under such terms, as it was unable to pay the cost of production;

2.2.2. discussed the alternatives available to OCM, which they were exploring as a possible outcome of the business rescue process as the following, to:

2.2.2.1. sell OCM as a going concern, subject to a successful renegotiation of the CSA with Eskom to relax the terms. (Their view was that the existing terms of the CSA would render the mine unattractive to any willing buyer); or

2.2.2.2. cease all operations and place OCM under care and maintenance until negotiations with Eskom are completed;

2.2.2.3. partially or completely discontinue coal supply to Eskom and re-open the export division of the mine and continue

business on the export side. (They were of the view that this will result in a great alleviation of losses); or

2.2.2.4. place OCM under liquidation, which in their view would result in zero recovery for creditors;

2.2.3. stated that they were contemplating serving Eskom with a notice to entirely, partially or conditionally suspend the CSA in terms of Section 136(2) of the Companies Act and that, in accordance with the same subsection, they also have the further right to cancel the CSA by way of an application to court, if Eskom does not cooperate.

2.3. On 20 August 2015, the business rescue practitioners, through their attorneys of record, delivered a letter to Eskom advising it that, they:

2.3.1. had reached a decision, in terms of section 136(2)(a) of the Companies Act, to entirely suspend the CSA, including all of OCM's obligations in terms of the agreement, with immediate effect, including, but not limited to, its obligation to supply coal to Eskom, for the duration of the business rescue proceedings;

2.3.2. were amenable to supplying coal to Eskom during the business rescue proceedings on terms which are acceptable to OCM and proposed an offer to supply coal to Eskom on terms set out in a draft agreement, attached to the letter and titled the "Interim Agreement";

2.3.3. drew up the Interim Agreement based on principles negotiated between OCM and Eskom's negotiating team pursuant to the Co-Operation Agreement; and

2.3.4. were giving Eskom time to consider the offer contained in the Interim Agreement, for acceptance, until 17h00 on Monday 24 August 2015.

PURPOSE OF THE MEMORANDUM

3.

3.1. On 21 August 2015, a meeting was convened between Eskom and its legal representatives to discuss the legal position Eskom finds itself in and the options available to it in light of:

- 3.1.1. the suspension of the CSA, with immediate effect, including the suspension of the supply of coal to Eskom pursuant to the section 136(2)(a) of the Companies Act; and
 - 3.1.2. the offer contained in the Interim Agreement attached to the letter of suspension.
- 3.2. Pursuant to the discussions held, we were instructed to guide Eskom with regards to the following matters:
 - 3.2.1. the prospects of successfully launching an application to remove the business rescue practitioners;
 - 3.2.2. the enforceability of the CSA during the business rescue proceedings, due regard being had to the suspension of the CSA by the business rescue practitioners;
 - 3.2.3. the effect of Eskom's refusal to negotiate with the business rescue practitioners pertaining to the terms of the Interim Agreement and the options available to Eskom in light of the section 136(2)(a) notice to suspend the supply of coal by the business rescue practitioners; and

- 3.2.4. the possibility of Eskom acquiring the mining rights of OCM so as to secure for itself a continuous supply of coal.

RECENT EVENTS

4.

- 4.1. On 20 August 2015, Eskom was served with a notice in terms of section 145(1) of the Companies Act informing it that Optrix Security Company (Pty) Ltd ("Optrix") had launched an urgent application to perfect its security held through a general notarial bond over the moveable assets of OCM, as security for the latter's indebtedness to Optrix, as a condition to Optrix (and/or the consortium of banks) providing OCM with post-commencement funding for its immediate working capital requirements.
- 4.2. Initially, our instructions were to defend the matter. Subsequent to numerous exchanges of correspondence, an agreement was reached between the legal representatives of Eskom and those of Optrix to the effect that Optrix would only seek an interim order, returnable on a later date, which was accordingly done.
- 4.3. A copy of the draft order made an order of Court on 21 August 2015 is attached to this memorandum.

REGULATORY FRAMEWORK & DISCUSSION

Role of business rescue practitioner and the prospects of success of an application to remove BRP in terms of Companies Act

5.

- 5.1. Part B of chapter 6 of the Companies Act provides for the regulation of business rescue practitioners on a dual basis, in the main. It involves the appointment of suitably qualified practitioners in accordance with the qualifications set out in section 128 and the monitoring of business rescue practitioners in their performance of business rescues.
- 5.2. A business rescue practitioner is defined in section 128(1)(d) which provides that a "business rescue practitioner" is "a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings...".
- 5.3. In terms of Section 40, the statutory role accorded to a business rescue practitioner, during the period of the business rescue proceedings is, *inter alia*, to exercise full management control of the company in substitution for its board and pre-existing management; act as an officer of the court; and to possess the responsibilities, duties and liabilities of a director of

the company, as set out in sections 75 to 77 of the Companies Act (naturally meaning that a business rescue practitioner has to act in the best interests of company and that he owes a fiduciary duty to the company in the exercise of his duties).

5.4. Accordingly, "business rescue" is defined in section 128 as:

"proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:

- (i) the temporary supervision of the company, and of the management of its affairs, business and property;*
- (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession;*
- (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company".*

5.5. Sections 130(1)(b) and 139(2) provide for the removal of a business rescue practitioner and stipulate that same can only be effected by means of a court order by an affected person.

5.6. Section 130(1)(b) provides for the setting aside of the appointment of a business rescue practitioner, on application, at any time, after the adoption of a company resolution, to undergo business rescue proceedings and until the adoption of the business rescue plan on the grounds that s/he "does not meet the qualification requirements of section 138; is not independent of the company or its management; or lacks the necessary skills, having regard to the company's circumstances".

5.7. Section 139(2) states that a business rescue practitioner may be removed by an order of court on the following grounds:

"Incompetence or failure to perform the duties of a business rescue practitioner of the particular company; failure to exercise the proper degree of care in the performance of the practitioner's functions; engaging in illegal acts or conduct; if the practitioner no longer satisfies the requirements set out in section 138(1); conflict of interest or lack of independence; or the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time."

5.8. Accordingly, any application to remove and/or set aside the appointment of a business rescue practitioner is statutorily limited to the grounds cited

in sections 130 (setting aside) and 139 (removal) of the Act and substantiating same in a substantive application.

- 5.9. It is apparent from the above that the removal and/or setting aside of an appointment of a business rescue practitioner cannot be effected without judicial intervention and deliberation, for such an appointee is provided with the powers, responsibilities and rights of a director and is accorded the status of an officer of the court.
- 5.10. Business rescue practitioners are statutorily enjoined with fiduciary duties and are deemed to be acting with *bona fides* and in the best interests of a company undergoing business rescue proceedings. An application for their removal as business rescue practitioners, would require far more than mere speculation or bold allegations so as to discharge the onus on an applicant of proving any of the grounds set out in the Companies Act.
- 5.11. No compelling facts or reasons are presently known to us that would merit the removal of the business rescue practitioners. The practitioners appear to be acting in the best interest of the company. The fact that the company's interests and those of one or more of its creditors are not aligned, does not warrant the removal of the practitioners.

Eskom's legal rights as per the CSA, during the business rescue proceedings and under the CSA's suspension by the business rescue practitioners;

5.12. Section 133(1)(a) and (b) of the Companies Act provide that:

"during business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except:

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable..."

5.13. Section 136(2) of the Act allows a company, through the business rescue practitioner, to temporarily or permanently extricate itself from onerous contractual provisions that are preventing it, or may prevent it, from becoming a successful concern.

5.14. The subsection provides that during business rescue proceedings, the business rescue practitioner may: (a) suspend (entirely, partially or conditionally) for the duration of the business rescue proceedings, any obligation of the company that: (i) arises under an agreement to which the company was a party at the commencement of the business rescue

proceedings, and (ii) would otherwise become due during those proceedings; or (b) apply to a court to cancel (entirely, partially or conditionally), on any terms that are just and reasonable in the circumstances, any obligation of the company in terms of that contract.

5.15. We are instructed that Eskom has a claim against OCM, pursuant to the penalty provisions of the CSA, in the sum of approximately R2.4 billion, comprising penalties and/or payment deductions in respect of the quality of coal supplied and delivered by OCM to Eskom over a specified period. As a result of the moratorium mandated by section 133 of the Act, Eskom is not permitted (save with the permission of the practitioner or the leave of the court) during the business rescue proceedings to proceed with any legal proceedings, including an enforcement order against OCM, for the recovery of the aforementioned penalties/payment deductions.

5.16. The obligations of OCM in terms of the CSA have, as pointed out above, been suspended, in their entirety, with immediate, by the business rescue practitioners with effect from 20 August 2015. This includes the immediate suspension of the supply of coal during the business rescue proceedings to Eskom.

- 5.17. Effectively, this means that all and any obligations that OCM had, as a party to the CSA, towards Eskom prior to the commencement of the business rescue proceedings are, during the business rescue proceedings, unenforceable by Eskom.
- 5.18. Although, for the purposes of cancelling the CSA, the business rescue practitioners cannot do so at a whim, they are statutorily enjoined to approach a court with a substantive application in terms of section 136 of the Act. In the event of such a cancellation, Eskom would, in terms of section 136(3) of the Act, be entitled to assert a claim for damages consequent upon such cancellation. (However, in the light of the present financial state of OCM, the extent of the damages that Eskom would be able to recover from OCM would be negligible.)
- 5.19. The letter suspending the CSA dated 19 August 2015, sent by the business rescue practitioners to Eskom, cites the failure by Eskom to effect payment of the amount of R29 826 301.71 for the month of July 2015, as per its letter dated 14 August 2015, as one of the reasons why the supply of coal was suspended with immediate effect.
- 5.20. Whilst the CSA has been suspended in its entirety, Eskom's obligation to pay such amount remains as the indebtedness in question arose prior to the suspension of the agreement. Eskom would however be entitled to

deduct from the amount payable any penalties that it may contractually be entitled to enforce.

Effect of Eskom's election in re: the Interim Agreement and options available to it

5.21. The business rescue practitioners have presented Eskom with an offer contained in the Interim Agreement, for the duration of the business rescue proceedings, attached to the letter of suspension dated 20 August 2015.

5.22. The material terms of the Interim Agreement are, *inter alia*, as follows:

5.22.1. the Interim Agreement would be extant until the date on which the business rescue proceedings end or a long term agreement is concluded between OCM and Eskom which would supersede the Interim Agreement;

5.22.2. OCM would supply Eskom and Eskom would purchase from OCM, 400 000 tons of coal per month (+/-10% at OCM's option), prorated per day for part months; and

5.22.3. Eskom would pay OCM R22.32 per GJ (moisture free) for coal delivered under the agreement.

5.23. The only binding agreement (albeit that it is presently suspended) that regulates the contractual relationship between Eskom and OCM is the CSA. The proposed Interim Agreement has no binding effect on Eskom and Eskom is under no obligation to accept its terms.

5.24. Eskom is entitled to preserve its rights in terms of the CSA (subject to the practitioner's entitlement, with the leave of the court, to cancel the agreement) and cannot be forced into an agreement that dictates the quality and price of the coal it ought to receive, even under the business rescue proceedings.

5.25. Eskom has the option to either accept or reject the proposed Interim Agreement or to negotiate terms more favourable to it and to make a counter offer to the business rescue practitioners.

OPTION 1: ACCEPTANCE

5.26. In the event that Eskom accepts the terms of the Interim Agreement offered by the business rescue practitioners for the duration of the business rescue proceedings:

5.26.1. Eskom would secure immediate coal supply, albeit that it would pay a significant premium for same in comparison to the underlying CSA;

5.26.2. Eskom would effectively be forfeiting its right to enforce any penalties against Optimum arising from the CSA for the duration of the Interim Agreement.

OPTION 2: REJECTION

5.27. In the event that Eskom rejects the terms of the Initial Agreement offered by the business rescue practitioners:

5.27.1. Eskom will have no contractual right (given the suspension of the CSA) to force Optimum to continue to supply it with coal;

5.27.2. Will be required to source and alternative coal supply, at a significantly higher cost when compared to the CSA tariff (but, so we understand, at a cost comparable to the tariff offered in terms of the Interim Agreement);

5.27.3. Eskom would be entitled to hold Optimum liable for the damages that it would suffer consequent upon the suspension (and ultimately, the cancellation) of the CSA. (We have however already pointed out that it is doubtful whether Eskom would ultimately be able to recover any meaningful damages from OCM, given its precarious financial position).

5.28. The rejection of the Interim Agreement will no doubt, in the fullness of time, also lead to the cancellation of the CSA. Eskom has no right to enforce the CSA (and thus no right to force OCM to continue to supply it with coal at the rates stipulated in the CSA). Again, in the event of the cancellation of the CSA, Eskom would be left with a largely meaningless claim for damages with all of the other consequences identified above.

OPTION 3: NEGOTIATION

5.29. Eskom may want to explore the possibility of negotiating the terms of the Interim Agreement with the business rescue practitioners on terms more favourable to it.

- 5.30. The most contentious of the clauses contained in the Interim Agreement are the ones dealing with the quality and price of the supply and delivery of coal by OCM to Eskom. Further, the fact that the Interim Agreement does not contain a clause dealing with penalties is likewise of concern. All the issues forming the various disputes between parties, emanating from the CSA, turn on these three fundamental aspects.
- 5.31. Pending the finalisation of the negotiations on a new agreement, be it the Interim Agreement as renegotiated and/or any other agreement to regulate the relationship between the parties, Eskom may want to consider entering into an interim arrangement and/or agreement with the business rescue practitioners in order to deal with its most pressing issue, namely uplifting of the suspension on the supply and delivery of coal to Hendrina.
- 5.32. In considering such an interim agreement/arrangement, Eskom would no doubt be expected to make payment of the outstanding invoice of OCM for the month of July 2015.

ACQUISITION OF THE MINING RIGHTS

- 6.1. The CSA affords Eskom the right to acquire the mining venture of OCM on terms regulated by the CSA. The CSA has however been suspended, and so too Eskom's contractual right to acquire the mine. In the event of a cancellation of the CSA, Eskom will have no enforceable contractual right to acquire the mine.
- 6.2. Absent a contractual right to acquire the mine, Eskom is in no better position than any removed third party to acquire the mine. The following options are available to Eskom:
 - 6.2.1. it can make an offer to acquire the mine on commercial terms from the business rescue practitioners;
 - 6.2.2. it can propose a business rescue plan than provides for a compromise of the claims of creditors and the acquisition of the mine; or
 - 6.2.3. it can propose an arrangement and/or a compromise under section 155(2) of the Act.

Should consultant be minded to explore any of the aforementioned options, then we would propose that the various options be explored in a supplementary memorandum and/or discussion.

CONCLUSION

7.

- 7.1. In our view, there is no factual basis that would satisfy any of the grounds set out in the Companies Act upon which an application for the removal or setting aside of the appointment of the business rescue practitioners could be based.
- 7.2. With regards to the status of CSA and the respective rights and claims of both Eskom and OCM, all obligations under the CSA are suspended, pending the cancellation of the agreement by application to court; or the termination of the business rescue proceedings by notice. In the event of a cancellation, Eskom would unlikely be able to recover any meaningful damages from OCM due to its precarious financial position.
- 7.3. As indicated above, Eskom is under no obligation to accede to the terms of the Interim Agreement; however, it ought to consider proposing a

counter-offer on terms which it is willing to entertain and in respect of which it could possibly obtain a mandate from its board of directors.

- 7.4. This is more so, in light of the instructions provided to us to the effect that, amongst other factors, Eskom currently has no supply of coal; has not considered and/or identified an alternative supply to Hendrina and only has stockpile levels to last it 2 to 3 months (which would have to be transported by road hauling for the short term).

KW LÜDERITZ SC
S LINDA

SOE 11

From: Wdrsa1 <wdrsa1@gmail.com>
Sent on: Saturday, November 7, 2015 4:46:27 AM
To: Ashu Chawla <ashu@sahara.co.za>
Subject: Fwd: Eskom 30th October 2015..pdf
Attachments: Eskom 30th October 2015..pdf (155.71 KB), Untitled attachment 00204.htm (168 Bytes)

Begin forwarded message:

From: Business Man <infoportal1@zoho.com [mailto:infoportal1@zoho.com] >
Date: 04 November 2015 at 23:36:35 GMT+4
To: "Western " <wdrsa1@gmail.com [mailto:wdrsa1@gmail.com] >
Subject: Fwd:Eskom 30th October 2015..pdf

===== Forwarded Message =====
From : matshela2010@yahoo.com [mailto:matshela2010@yahoo.com]
To : "infoportal1@zoho.com [mailto:infoportal1@zoho.com] "
Date : Wed, 04 Nov 2015 22:39:37 +0400
Subject : Eskom 30th October 2015..pdf

===== Forward Message =====
Please give the Boss. The fight begins



Just Coal (Pty) Ltd

Reg No: 2012/218327/07 Vat No: 48101 65516

165 Cowen Ntuli Street
PO Box 22928
Middelburg, 1050

Tel: (013) 282 5742
Fax: (013) 282 5761
E-mail: info@justcoal.co.za

Eskom Holdings SOC Ltd
Primary Energy Division

Mr Martin Makoni
Coal Supply Unit Manager

Dear Mr Makoni

We refer to your letter dated 30th October 2015,
Term of Coal Supply Agreement (4600057172) – Ref 724981

We would like to inform you that we do not accept the termination date as the 31st October 2015. We don't see the merits nor the ethics of your decision.

I would like to bring to your attention in brief, the delays that lead to Just Coal not being able to deliver the said goods within the contracted period.

- 23rd April 2015 - SRN signed by Just Coal
- 29th April 2015 - CSA signed by Just Coal
- 4th May 2015 - CSA signed by Eskom
- 18th May 2015 - CSA signed by both parties mailed to Just Coal
- 21st May 2015 - Just Coal commenced delivery
- **1st May – 31st October 2015 Contractual period**

Delays experienced that slowed down deliveries

- Signed CSA was produce on the 18th May 2015
- Commencement date remained 1st May 2015
- Congestion at Power Station
- We were asked to deliver to different Power Stations by Eskom's Technical
- These Power Stations were experiencing the same problems of congestion
- Although drivers are Rotran inducted, Matla and Arnot Requires a mine induction
- As an example of time delay, **23rd October 2015 Eskom's Zero Harm Message**. Non deliver for this day alone amounted to between 15kt – 19kt.

Mr Makoni, the above is self-explanatory. Your Technical team was well aware of the delays. They did, I believe all they could to assist Just Coal to deliver the coal within the Contracted period, however with the reasons given above, achieving this was not possible.

With this said, it is not Just Coal that did not deliver but it was Eskom that could not receive.

Member: Ramesh Singh (Joe)



Just Coal (Pty) Ltd

Reg No: 2012/218327/07 Vat No: 48101 65516

165 Cowen Ntuli Street
PO Box 22928
Middelburg, 1050

Tel: (013) 282 5742
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E-mail: info@justcoal.co.za

Your decision as it stands will have a costly negative financial impact on our business. We will continue to produce and make the contractual coal available for delivery.

Kindly reconsider your decision.

Our rights remain strictly reserved

Yours Sincerely

Joe Singh
Joe Singh Group Chairman

30th October 2015