



# **EXHIBIT U 13**

**TSHEDISO JOHN  
MATONA**



**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,  
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

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# 01





**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,  
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF  
STATE**

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**AFFIDAVIT**

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I, the undersigned

**TSHEDISO JOHN MATONA**

Do hereby state under oath in English:

I am an adult male with ID No. 6203145604082. I am employed as a Head of Secretariat at the National Planning Commission with work address Government Avenue, Pretoria.

My contact details are:

Office: Union Buildings, Room 237, East Wing  
Cell: 0823760448  
E-mail: tmatona@gmail.com

My qualifications include:

- Masters in Development Economics, University of East Anglia, UK, 1994
- Bachelor and Honours in Social Science, University of Cape Town, 1990-1992
- Certificates in Management and Infrastructure Development, Harvard University School of Government, 2003 & 2011
- Certificates in International Trade Policy and Law, World Trade Organisation, Geneva, Switzerland (1993), and Maastricht University, Netherlands (1997)

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1. The facts herein contained are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

### **MY APPOINTMENT AS CHIEF EXECUTIVE OF ESKOM HOLDINGS (SOC) LTD**

2. I was appointed on 1 October 2014 as Chief Executive of ESKOM Holdings (SOC) LTD ("Eskom"), a state-owned public company, and as an Executive Director of its Board. My recruitment was conducted by the Board of Directors of Eskom during 1994, through a job advertisement, shortlisting and interview process, which in turn recommended my appointment to the Minister of Public Enterprises. The latter then secured the approval of the Cabinet for my appointment.
3. I was suspended on 11 March 2015.

### **CHALLENGES FACING THE RESPONDENT**

4. Upon my appointment, I had observed that Eskom faced several major challenges, including the following:
  - 4.1. Leadership instability at the top executive level;
  - 4.2. Financial distress;
  - 4.3. A shortage of electricity supply which constrained ability to reliably meet demand and rendered the power system prone to increasing incidents of load shedding;
  - 4.4. Delays in the then ongoing construction of new power plants which had caused overruns in the cost of these projects;



- 4.5. The failure to undertake consistent and regular maintenance of the existing power plants;
  - 4.6. Over-indebtedness, compounded by constraints to recovering debts;
  - 4.7. Human resources challenges, including low employee morale; and
  - 4.8. Poor public perception of the company.
5. Having been previously employed as the Director General of Public Enterprises, the ministry which oversees Eskom, I was already aware of the above-mentioned challenges, but was able to gain a deeper insight into and obtain greater detail of them from the time of my appointment.
  6. I was also aware that the above-mentioned challenges have been on the agenda of past Boards of Directors of Eskom, and certainly that of the immediate past Board, which has taken numerous resolutions and decisions, and implemented numerous initiatives, to address them. One such initiative was the establishment of 'special Board subcommittees', such as the Emergency Task Team to address the company's financial challenges, and the Board Build Program subcommittee to address delays in the construction of new power plants.
  7. I was also aware that the Board had, in addition to established reporting procedures between Eskom and both the Ministers of Public Enterprises and Finance, written several letters of correspondence to the Minister of Public Enterprises concerning many of the above-mentioned challenges.
  8. In December 2014 the Minister of Public Enterprises appointed a new Board of Directors. It was my understanding that this new Board's responsibility was, amongst other things, to address the above-mentioned challenges and to guide and support the Eskom's management structures, and the Chief Executive in particular.

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## THE 'WAR ROOM'

9. In or about December 2014, the government, through a Cabinet decision that was publicized in the media, established an initiative referred to as the 'War Room', with the objective of working with Eskom to address the country's electricity challenges, including those particular to Eskom.

10. The 'War Room' had adopted a five-point plan, consisting of

- 10.1. Immediate measures (to improve maintenance and operational practices);
- 10.2. Co-generation (of power by the private sector);
- 10.3. Gas for power generation and additional sources of supply;
- 10.4. Other independent power producers (IPP's); and
- 10.5. Demand-side management initiatives.

11. Eskom had participated actively and consistently in the 'War Room' since its inception, led by myself and supported by other executives.

12. Eskom had submitted extensive volumes of information to the 'War Room' and made several presentations detailing management's plans to address the challenges faced by the company.

13. Moreover, the 'War Room' had taken decisions to undertake independent studies on particular aspects of Eskom's challenges, and had also appointed several independent advisors in this regard.

14. It had been resolved, in the 'War Room', that in addition to communication by Eskom on the state of the power system, the then Deputy President and/or the Minister of Public Enterprises would detail the government's approach to the country's electricity



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challenges, as well as the way forward from the then situation. This had however, not happened by the time of my suspension.

## **MY ACTIVITIES SINCE APPOINTMENT AS CHIEF EXECUTIVE OF THE RESPONDENT**

15. Since my appointment Eskom, I had undertaken the following:

- 15.1. In November 2014 I had stabilised the Executive Committee, comprising Group Executives, by appointing to permanent positions those executive who had occupied 'acting' roles, and reassigned functions amongst them;
- 15.2. In December 2014 I had convened an ExCo 'getaway', at which we conducted strategic planning and adopted a turnaround strategy for the company, with the intention of sharing it with the new Board at a similar 'getaway' scheduled for the end of March 2015;
- 15.3. I had held meetings with the company's major stakeholders, for example, the General Secretaries of major trade unions, Eskom's major customers (such as the Energy Intensive Users Group), organised business groupings (such as Business Unity South Africa and the various Chambers of Commerce) and investors at which I communicated Eskom's challenges and plans to address them;
- 15.4. I had presented the company's audited half-yearly results (until end September 2014) as well as on the state of the power system at a major media event held in November/December 2014;
- 15.5. I had addressed executive and other staff forums at both Megawatt Park (the site of Eskom's head office in Sunninghill, Gauteng) and at some power plants, with a view towards visiting all the power plants and other operating units;
- 15.6. I had made a presentation to the new Board at its induction at the beginning of 2015 on the company's challenges and our proposed turnaround strategy; and





15.7. I had participated actively and consistently in the 'War Room' since its launch by Cabinet in early December 2014, and led several presentations and presented reports to it.

16 It was furthermore my intention to report on my activities as Chief Executive, as well as the plans of ExCo (including the turnaround strategy) and the 'War Room', to the new Board at its first scheduled meeting on 26 February 2015, however this meeting was postponed and had yet to be reconvened at the time of my suspension.

#### MY SUSPENSION

17 I was suspended by way of a notice signed by Mr. Zola Tsotsi, Chairperson of the Board of Directors of Eskom, dated 11 March 2015.

18 The events leading to my suspension are as follows:

##### 25 February 2015

18.1 The new Board had scheduled their first meeting for Thursday 26 February 2015, and the agenda for that meeting included two items which I was to present on, namely the Chief Executive's report and a presentation on the initiatives of the 'War Room';

18.2 However, on the evening of Wednesday 25 February 2015 Eskom's company secretary informed me that the scheduled meeting had been "postponed", purportedly at the request of the Minister of Public Enterprises;





8 March 2015

18.3 On Sunday evening, 8 March 2015, the company secretary alerted me to an email containing a notice to convene an urgent Board meeting at 9am on 9 March 2015, issued by the Chairman of Eskom;

18.4 Attached to the notice of 8 March 2015 was a proposed resolution to be discussed at the scheduled meeting, which resolution called for an independent enquiry into the affairs of the company. I was not privy to any discussions in relation to this resolution, and I had no knowledge about the circumstances in which a 'decision' was reached about the resolution or the proposed inquiry. In fact, the resolution had not been drafted by Eskom's company secretary, as is the normal practice, and I do not know who had drafted it. I was surprised that an independent enquiry was being proposed in light of the fact that the 'War Room' that had recently been established was already seized with the same;

9 March 2015

18.5 At the meeting of 9 March 2015, the Chairperson informed the Board that he had Cabinet support for the enquiry called for in the proposed resolution, and called on Board members to adopt it. However, he was met with disagreement by certain members of the Board, who were unwilling to adopt the resolution, on the grounds that there had not been sufficient information provided to motivate the resolution;



18.6 Furthermore, the Board members argued that if the proposed resolution was attributed to the Minister of Public Enterprises, then it was best that the Minister be on record and address the Board in this regard;

18.7 The Chairperson closed the meeting, and undertook to convey the Board members' sentiments to the Minister of Public Enterprises;

#### 8 March 2015

18.7 On 10 March 2015 I received another notice from the company secretary which stipulated that the Chairperson had reconvened the Board meeting for Wednesday 11 March 2015. The notice indicated that the Minister of Public Enterprises was to attend the meeting;

18.8 The agenda for the scheduled meeting contained some of the items from the cancelled meeting of 26 February 2015, including the two items which I was to have presented, as well as the proposed resolution discussed in part at the meeting of 9 March 2015;

#### 11 March 2015

18.9 When the meeting of 11 March 2015 was convened, and prior to the arrival of the Minister, I presented my Chief Executive's report. Little, if any, discussion ensued in relation thereto;

18.10 When the Minister arrived between 10h30 and 11h00, the Chairperson requested that all members of management leave. I understood this



instruction to be directed to the other members of management, excluding the financial director and myself because we are executive directors of the Board. So I and the financial director did not leave. However, the Minister explicitly requested us to leave;

18.11 As I was clearing my things to leave the meeting, the Minister raised – seemingly in passing – an incident which had occurred in my tenure involving ‘bugs’ which had been planted in the boardroom of the Respondent;

18.12 Without much discussion about the ‘bugs’, I left the meeting as instructed by the Minister. I understand that the Minister left the meeting at some point during the day;

18.13 Sometime around 17h30 - 18h00 the company secretary, who had also been asked to leave the meeting, asked me to return to the meeting. At that point many of the Board members had left and only the members of the Board subcommittee on human resources: people and governance (‘the Board subcommittee’) had remained;

18.14 The Chairperson –

18.14.1 informed me that the Board had resolved to institute the independent enquiry, and he asked me to recuse myself as Chief Executive so as not to influence that enquiry, which he indicated would last about 3 (three) months; and



18.14.2 requested me to propose ways in which I could assist in ensuring that the enquiry would proceed without me influencing it;

18.15 Given that the Board had already made this decision, the circumstances in which this decision was conveyed to me shocked me. In the circumstances I pertinently asked the Chairperson whether I was being suspended, and if I should report for work the next day. He said that they were not saying that I should not report for work the next day, and avoided the terminology of a 'suspension'.

18.16 At that point, another Board member, Ms Venete Klein, asked me why they should not be doing what they were doing and in approaching the matter in this way she reversed the 'obligation' to explain precisely why the Board had reached its decision to conduct the enquiry and consequently to remove me from my post. I was, as one can imagine, confused by the discussion and I indicated to them that a recusal was different from a suspension. A recusal indicated a temporary absence from a meeting or an event, for a very brief and perhaps intermittent purpose with no aspersion of wrongdoing, and that a suspension involved a longer term absence from work with the view that the employer would conduct an enquiry into allegations of wrongdoing against me.

18.17 In response to Ms Klein I provided the following three reasons why there was no need for such an enquiry:



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18.17.1 that the issues which the enquiry would seek to investigate predated my tenure as Chief Executive of Eskom;

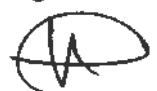
18.17.2 that the new Board has not had sufficient time to properly consider the issues that faced Eskom or to engage with me about the activities I have undertaken during my short tenure; and

18.17.3 that the "War Room" initiative was seized with the same issues as those proposed for the enquiry to investigate;

18.18 I was then asked to leave the meeting, once again. When I returned after about 30 (thirty) minutes, I was handed the letter containing the notice of my suspension, which is attached hereto and marked "?"

19 The reasons for my suspension contained in the notice of suspension are as follows

*"Due to the nature of this enquiry and the importance of it being free of any influence from leadership in the organisation, pending the completion of an investigation into these matters you should be placed on suspension . . . In order for the investigation to proceed as expeditiously as possible, it would not be appropriate for you to remain at work whilst such investigation is in place."*





## THE PUBLIC IMPORTANCE OF MY ROLE AND THE IMPACT OF MY SUSPENSION

- 20 In the urgent challenge in the Labour Court against my suspension, I argued the following, among others:
- 21 As Chief Executive of South Africa's power utility, I occupied a critical role in the country. The stable and efficient provision of electricity throughout South Africa is vital to both its social and economic well-being, and Eskom is the pivotal institution in ensuring that such processes are run smoothly and effectively. I did not need to belabour this point as it was obvious and I did not anticipate that there would be any dispute on this aspect.
- 22 I had never been accused of dishonesty and there are no allegations pending against me that I had been made aware of about any dishonesty on my part. Rather, I had always retained respect in my position and had always given my heart and soul to my job, having conducted my role independently and impartially as a servant of my employer and the broader public.
- 23 My suspension came at a critical time when Eskom requires stable and efficient management to ensure that electricity shortages are addressed in the swiftest manner possible, in order to maintain confidence throughout both South African society and our wider economic context. It is clear that my suspension prejudices the broader reputation and functioning of Eskom.





- 24 My activities since appointment and until my suspension are described above, and were all undertaken at the helm of the organisation to ensure its effectiveness and administration.
- 25 The damage to Eskom due to my suspension was highlighted by the downgrade of the company's long-term credit rating by Standard & Poor to 'junk' status, as announced on 19 March 2015. This was expressly attributed to Eskom having suspended myself and other senior employees, which was said to have 'led [Standard & Poor] to have less confidence in the company's corporate governance arrangements as well as in its stand-alone credit profile'. This downgrade was detrimental to Eskom, and further emphasized the wide-ranging effect of my unlawful suspension.
- 26 My application was thus extraordinary not only because of the public interest it involved but also because of the principles of good public administration and the egregious breach of my rights under the Labour Relations Act (LRA), common law and Constitution. These rights include my right not to be unfairly suspended which is protected by the LRA, my right to dignity and my right to reputation.
- 27 I prided myself in the fulfillment of my duties; my position involved a great deal of responsibility and indeed job satisfaction. I had suffered palpable prejudice as a result of my suspension, including to my reputation, advancement and fulfillment. Moreover, my integrity and dignity has been assailed with no cause, in circumstances in which no allegations of misconduct are pending against me. My



suspension has no defined limit, save for a reference to it being 'pending completion of the enquiry', and is thus for all purposes indefinite.

28 I submitted that these negative effects of my suspension warranted that the matter be dealt with on an urgent basis.

29 I also mentioned that, prior to joining Eskom, I had held various senior positions in government, including that of Director-General of the Department of Trade and Industry for approximately 5 (five) years, as well as Director-General of Public Enterprises for approximately 4 (four) years. I had by then 20 (twenty) years of public service experience. The suspension had therefore had been prejudicial to my reputation.

### **BASES FOR THE CHALLENGE TO MY SUSPENSION**

30 I had challenged my suspension on the basis that it was unsubstantiated, arbitrary, unlawful and unfair, as explained below.

### **SUBSTANTIVE AND PROCEDURAL FAIRNESS**

31 The suspension was both substantively and procedurally unfair. All of the events set out above supported my contentions.

The principle of 'fairness' in the context of suspensions requires first that the employer has a justifiable reason to believe, at the very least *prima facie*, that the



employee has engaged in serious misconduct; second, that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some other relevant factor that that would place the investigation or the interests of the affected parties in jeopardy; and third, that the employee is given the opportunity to state a case before the employer makes a final decision to suspend the employee. It is apparent from the letter of suspension that no justifiable reason for my suspension has been proffered by the Respondent apart from a decision to conduct an enquiry in general terms without any allegations of wrongdoing on my part.

- 32 As mentioned earlier, I was confronted with what was effectively a *fait accompli*, the Board having decided to suspend me without according to me a meaningful opportunity to consider the proposed suspension and make submissions thereon. To the extent that my representations were sought by the Board subcommittee, they were sought in respect of a decision that had already been made by the Board itself. The exercise in requesting my views on the enquiry was academic, superfluous and constituted 'window dressing'. In fact, the Board subcommittee denied that I was being suspended prior to my receiving the letter containing the notice of suspension. It is thus clear that my suspension was procedurally unfair.
- 33 Moreover, the absence of any allegation of misconduct on which to base the suspension renders it arbitrary, unlawful and thus unfair. There is no legal basis on which to suspend an employee in order to prevent their interference in a planned



enquiry, how much more so where no proof of their intention to interfere is provided, nor any basis for a reasonable apprehension of such interference is established.

- 34 My suspension was therefore both procedurally and substantively unfair, and accordingly unlawful in the circumstances.

## EXCHANGE OF CORRESPONDENCE

- 35 On 18 March 2015 my attorneys of record sent a letter to Eskom requesting them to uplift my suspension.

- 36 On 20 March 2015 Eskom's attorneys of record sent a response. A copy of that letter is marked "?". I dealt with some aspects of the allegations in the letter below.

36.1 In essence the Eskom's representative replied that they deny the allegations of unlawfulness as related to my suspension, and averred that the suspension was 'both fair and lawful' as -

*'it was necessary to suspend [me] in order to ensure that the contemplated enquiry is concluded as speedily as possible and is not jeopardized by [my] continued presence at work'.*

In effect therefore, Eskom did not deny that the reason for my suspension did not amount to an allegation of misconduct, in the absence of which the suspension is unlawful.



36.2 With regard to my not having been afforded an opportunity to make meaningful representations on the possibility of suspension, Eskom contended that

*'If [I] indeed required additional time to make meaningful and considered representations to the committee, then [I] was well within [my] rights to address that with the committee and to request additional time. However, [I] did not do so and as a result, the committee made its final decision to suspend [me] based on the representations which were made'.*

On the contrary, and as detailed above, when the suggestion of my 'recusal' (i.e. suspension) was first made I asked to be able to consider it overnight. However, this request was denied. I was therefore forced to make representations on issues pertinent to the enquiry and on why I should not be 'recused', without an adequate opportunity to think through the nature and effect of any suspension. In any event, by the time I met with the Board subcommittee, the Board had already decided to conduct the enquiry and to suspend me. It is for this reason that I averred that my suspension was procedurally unfair.

37 My application to Labour Court sought an urgent relief on the basis of the impact the suspension had on my dignity, and reputation, as well as on public administration, the economy and the wider reputation of state-owned enterprises, and in circumstances where there was no allegation of any form against me.





## THE LABOUR COURT HEARING AND JUDGMENT

- 38 The matter was heard on 26 March 2015 under Judge J Whitcher, and an Ex Tempore Judgment was delivered on 27 March 2015.
- 39 Judge Whitcher established that *prima facie* my suspension was unfair. She, however did not order the suspension to be lifted, as my application requested, but rather referred the matter to the CCMA.
- 40 At the first CCMA hearing on 13 April 2015, Eskom, represented by then Chairperson of the Board Dr Ben Ngubane, requested a postponement to enable the Eskom Board to consult the shareholder on what Eskom could concede or offer in the CCMA conciliation process.
- 41 Eskom requested one or two other subsequent postponements, during which time they approached me and requested to negotiate directly with me.
- 42 In my interaction with Eskom Board representatives, Dr Ben Ngubane, Mr. Romeo Khumalo, and Ms. Venete Klein, it was clear that the option of my return to my job at Eskom was off the table, the only issue being the terms of my separation from the company.
- 43 I had also come to the conclusion that the Board did not see me as part of its plans for the company going forward. I feared that if I were to return to my job at Eskom, I would not enjoy the support of the Board. I had also come to appreciate that I could





not financially sustain the legal process I would have had to go through to win back my job, while in contrast Eskom was funding the Board's defense of the matter.

- 44 I agreed to separate with Eskom with 12 month's pay of the Eskom Chief Executive's salary at the time.

## **OTHER MATTERS DURING AND AFTER MY TIME AT ESKOM**

### My meeting with T-Systems

- 45 Upon assuming my job as Eskom Chief Executive, an IT company called T-Systems is one of several companies that wrote to me requesting an introductory meeting with me. T-Systems was a key stakeholder of Eskom, and had been contracted to provide IT services to the power utility.
- 46 I later learnt that T-Systems was one of the bidders in a tender for IT services that Eskom was in the process of finalising. My meeting with T-Systems took place in late October or early November 2014, after the conclusion of the tender process that had been overseen by the Eskom Board Tender Committee, and predated my arrival at Eskom. As Chief Executive, I was not a member of the Eskom Board Tender Committee.
- 47 I had also learnt that Eskom needed to temporarily retain the services of T-Systems as the incumbent supplier after termination of their contract at that point, in order to manage the transition to the next IT services dispensation at Eskom.



48 In the meeting with T-Systems, the executives of the company had contended that T-Systems bid in the abovementioned Eskom IT tender process had not been properly or fairly considered, as they believed the bid offered Eskom great value and cost savings.

49 I informed them that in my position as Chief Executive I was unable to influence procurement processes, and insofar as they perceived any form of bias against their bid, I advised them to seek legal advice.

My meeting with then President Jacob Zuma

50 In and around June or July 2015, subsequent to my separation with Eskom, I received a telephone call from the office of then President Jacob Zuma, conveying the President's request to meet with me.

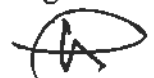
51 The meeting happened a week or so later in the President's office, and it was just between myself and the President. It was a brief meeting, no more than 20 minutes, on an early afternoon.

52 The President opened the meeting by asking how I was doing. I responded that I was ok - as ok as can be in the circumstances I found myself in at that time. I told him that I was in the process of contemplating my future in the aftermath of my separation with Eskom.



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- 53 The President went further to say that as far as he was concerned my suspension at Eskom was not in any way a reflection on my person or professional character. He indicated that what he could see in what happened is that I was caught in the middle of a 'spaghetti'. He didn't explain this further. One sense I got from this description was something to do with competing interests. Another sense was that he might have been referring to operational issues at Eskom (given that at the time when I had just joined Eskom there had been a bout of high loadshedding).
- 54 The President further said, he and the government still held me in high regard. He indicated that my exit from Eskom did not need to result in the loss of my expertise and services in the state. He encouraged me to consider returning to public service when an appropriate opportunity availed.
- 55 I informed the President that my suspension had left me feeling disappointed and betrayed by a state that I had served with commitment and sacrifice for all my professional life. I had felt forlorn and on my own in the months following my suspension and separation with Eskom. I told him I appreciated the goodwill he expressed, and indicated that I would reflect on what he had said. He concluded by saying he would contact me again in the subsequent due course, but that did not happen.
- 56 I did not have any discussions with the President as to his involvement in my suspension or the reasons behind the suspension, other than expressing my disappointment and disapproval in the manner in which I was treated pertaining to



my suspension. I did not discuss with the President whether he had any hand in my suspension or the reasons thereof.


- 57 I had in the meantime been looking for a job, and around August 2015 I responded to an advertisement for the position of Head of Secretariat in the National Planning Commission. I was interviewed by a panel of Cabinet Ministers and subsequently recommended for appointment to Cabinet around September 2015, in accordance with the applicable process.

**END**

After completion of the above statement, the following questions were put to me, and my answers were recorded accordingly:

1. Q. Do you know and understand the contents of this statement?  
YES
2. Q. Do you have any objections in taking the prescribed oath?  
NO
3. Q. Do you consider the prescribed oath as binding in your conscience?  
YES

I believe the statement gives a fair account of the events that happened.



Signature of Deponent

17 MARCH 2020


Date

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at PRETORIA on the 17 day of MARCH 2020, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

  
 21014874  
 DANIEL MOELANG

**COMMISSIONER OF OATHS**

<b>SOUTH AFRICAN POLICE SERVICE</b>
UNION BUILDINGS STATIC GUARD SERVICES
<b>2020 -03- 17</b>
PROTECTION AND SECURITY SERVICES PRETORIA
<b>SOUTH AFRICAN POLICE SERVICE</b>

I hereby certify that the above statement was taken by me and that the deponent has acknowledged that he/she knows and understands the contents of this statement. This statement was sworn solemnly before me and deponent's signature and thumbprint was placed thereon in my presence.	
to <u>PRETORIA</u>	on <u>2020-03-17</u> at <u>15:10</u>
 21014874 DANIEL MOELANG (SIGNATURE) COMMISSIONER OF OATHS	
DANIEL MOELANG VOLLE VOORNAAM EN VAN IN DrukSKRIJF FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS	
<u>01 JOUBERT AVE ACADIA</u> RESIDENSADRES (STRAATADRES) BUSINESS ADDRESS (STREET ADDRESS)	
<u>PRETORIA</u> SERGANT RANG/RANK	
SA POLISIE SA POLICE	



JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE  
CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING  
ORGANS OF STATE

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AFFIDAVIT

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I, the undersigned

TSHEDISO JOHN MATONA

Do hereby state under oath in English:

I am an adult male with ID No. 6203145604082. I am employed as a Head of Secretariat at the National Planning Commission with work address Government Avenue, Pretoria.

My contact details are:

Office: Union Buildings, Room 237, East Wing

Cell: 0823760448

E-mail: [tmatona@gmail.com](mailto:tmatona@gmail.com)

My qualifications include:

- Masters in Development Economics, University of East Anglia, UK, 1994
- Bachelor and Honours in Social Science, University of Cape Town, 1990-1992
- Certificates in Management and Infrastructure Development, Harvard University School of Government, 2003 & 2011
- Certificates in International Trade Policy and Law, World Trade Organisation, Geneva, Switzerland (1993), and Maastricht University, Netherlands (1997)



1. The facts herein contained are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.
2. I was appointed on 1 October 2014 as Chief Executive of ESKOM Holdings (SOC) LTD ("Eskom"), a state-owned public company, and as an Executive Director of its Board.
3. I was suspended on 11 March 2015 by way of a notice signed by Mr. Zola Tsotsi, Chairperson of the Board of Directors of Eskom. The events around my suspension are outlined in my previous affidavit signed on 7 March 2020.
4. I separated with Eskom around May 2015, and had no contact with the company after I was suspended, save over the terms of the separation.

#### **Mr Laher's suspension**

5. In November 2014 I received a letter from Mr Mongezi Ntsokolo who was then Chairman of Eskom's "Excops", a subcommittee of the company's executive committee responsible for procurement matters.
6. The subject of the letter was "Failure to follow procurement processes by the Chief Information Officer" (CIO), who at the time was Mr Laher, and contained several allegations of the CIO's non-adherence to Eskom's procurement processes. In the

letter, Mr Ntsokolo indicated he had been mandated by Excops to escalate the matter to my office.

7. After considering Mr Ntsokolo's letter, I referred it to the acting Group Executive for human resources, Ms Elsie Pule, to assess the matter and advise.
8. Ms Pule subsequently advised me that her assessment was that there were grounds to institute disciplinary action against Mr Laher, and that she would deal with Mr Laher's manager. I accepted her advice and thereafter had nothing further to do with this matter.

#### **Sumitomo Corporation and Eskom**

9. My recollection of this matter is the conversations I had on it with Eskom's Chairman at the time, Mr Zola Tsotsi, and separately with Mr Matshela Koko.
10. Mr Tsotsi had requested to meet me, in which meeting he complained of Mr Koko's conduct on a matter pertaining to Sumitomo Corporation. According to my recollection, this was my first interaction with Mr Tsotsi in relation to this matter and I do not recall Mr Tsotsi's account of its details. I however recall that he was most irked about the fact that Mr Koko had gone so far as to suspend Mr Sakhasimbe over the matter. He considered the suspension of Mr Sakhasimbe baseless and inappropriate, and demanded that it be reversed.
11. I indicated to Mr Tsotsi that I would have to establish Mr Koko's version of the matter, and I subsequently had a meeting with Mr Koko in this regard.
12. In my meeting with him, Mr Koko showed me a copy of a letter signed bearing Mr Tsotsi's signature in which Mr Tsotsi made a commitment on Eskom's behalf for a



payment by Eskom to Sumitomo Corporation. I do not recall what exactly the letter was committing Eskom to pay for, except that the subject had to do with transformers.

13. Mr Koko informed me that there was no basis for Mr Tsotsi to commit Eskom in this way because at the time there was no contract between Eskom and Sumitomo on the subject in question. He further indicated that he had established that the letter had been prepared for Mr Tsotsi by Mr Sakhasimbe. In Mr Koko's view Mr Sakhasimbe had no right to do so, as Eskom had no contractual obligation to Sumitomo. He offered this as the grounds for his suspension of Mr Sakhasimbe.

14. I informed Mr Koko of Mr Tsotsi's unhappiness about Mr Sakhasimbe's suspension, and Mr Tsotsi's demand that the suspension be lifted.

15. From my discussion with Mr Koko's account, and if his statement was true that Eskom did not have a contract with Sumitomo Corporation on the matter in question, I reached a view that that the letter signed by Mr Tsotsi was, prima facie, irregular and his demand for the reversal of Mr Sakhasimbe's suspension was unrealisable.

16. I indicated to Mr Koko that I would revert to Mr Tsotsi on the matter. Soon after my meeting with Mr Koko, I was suspended from Eskom.

**END**

After completion of the above statement, the following questions were put to me, and my answers were recorded accordingly:

1. Q. Do you know and understand the contents of this statement?

YES

2. Q. Do you have any objections in taking the prescribed oath?

NO

3. Q. Do you consider the prescribed oath as binding in your conscience?

YES

I believe the statement gives a fair account of the events that happened.

[Signature]

Signature of Deponent

17 AUGUST 2020

Date

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Centurion on the 17 day of August 2020 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

[Signature]  
COMMISSIONER OF OATHS



# 02







## REPUBLIC OF SOUTH AFRICA

## THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

## JUDGMENT

Case no: J602/15

In the matter between:

**TSHEDISO MATONA****Applicant**

and

**ESKOM HOLDINGS SOC LTD****Respondent**

Heard: 26 March 2015

Delivered: 27 March 2015

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*Ex Tempore Judgment*

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WHITCHER J

- [1] The Applicant, the Chief Executive of the Respondent, seeks urgent relief to uplift his suspension pending the outcome of an unfair labour practice dispute he has referred to the CCMA challenging the fairness of his suspension.
- [2] The Applicant must satisfy the requirements for urgent interim relief by showing:

- (i) A *prima facie* right (although open to some doubt) to the final relief that will be sought in due course at the CCMA. This means the Applicant need only show that there is some merit in his claim that his suspension was unlawful and/or unfair. In other words he has prospects of success in his unfair labour practice claim at the CCMA.
- (ii) An apprehension of irreparable harm, if the application is not granted;
- (iii) That the balance of convenience favours him; and
- (iv) The absence of any other satisfactory remedy.

[3] The Applicant's contract of employment stipulates that if the Company suspects that the Executive is guilty of the conduct which may, if proved, justify dismissal, or has committed a breach of any of the terms of this Agreement, it may, pending a duly constituted enquiry into the alleged conduct in question, suspend the executive on full pay for a reasonable period.

[4] The Applicant's contract also stipulates that his contract is subject to the rights that arise from the LRA. According to case law this means that the justifiability of a suspension invariably rests on the existence of a *prima facie* reason to believe the Applicant committed serious misconduct and before making a final decision to suspend, the employer must have afforded the Applicant a fair and reasonable opportunity to make representations as to why he should not be suspended, even if the suspension is on full pay. The Applicant has the right to be provided with relevant information to make meaningful representations. When dealing with a holding operation suspension as opposed to a suspension as a disciplinary sanction, the right to a hearing may legitimately be attenuated. That is so where the precautionary suspension is on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimized and where the period of suspension is for a limited duration.

[5] *Did the Board have a prima facie reason to believe that the applicant committed serious misconduct?*

- [6] It must be noted here that the Board at the time of the suspension is not expected to have existing concrete and conclusive proof that the Applicant committed acts of serious misconduct. The purpose of an enquiry is to ascertain whether their *prima facie* view is correct and whether there is sufficient evidence to institute disciplinary charges. The only requirement is that the Board must have a *prima facie* reason to believe that the Applicant committed serious misconduct? The Applicant must have done something which gave them reason to *suspect* such misconduct.
- [7] The Board of Directors claimed in its answering affidavit that the Applicant and EXCO had provided unreliable and inconsistent information to the War Room and the Board, they were not coming up with concrete plans and strategies to deal with Eskom's problems, they were not dealing with Eskom's problems with the urgency they require, it appeared that they were not properly managing the Philosophy Maintenance Programme and the prices for the Medupi and Kusile Projects seem to have significantly increased. On this basis the Board formed the view that there "may" have been wrongdoing or negligence on the part of the applicant and EXCO in performing their jobs and therefore resolved to conduct an independent enquiry.
- [8] The Applicant suggested that the Board fabricated these reasons for the purposes of defending this application because the Board did not offer this explanation for its decision to suspend him before or at the time of his suspension. The Board also did not mention these reasons in his suspension letter.
- [9] The reasons for his suspension contained in the notice are as follows:
- "Due to the nature of this enquiry and the importance of it being free of any influence from leadership in the organization, pending the completion of the investigation into these matters you should be placed on suspension....in order for the investigation to proceed expeditiously as possible, it would not be appropriate for you to remain at work whilst such investigation is in place".*

- [10] In my view, the timing of providing the reasons is not sufficient evidence to conclude that the Board fabricated the reasons. All this shows is that the Board was not forthcoming with the Applicant as to the real reasons for the enquiry and why they believed he should be suspended pending the outcome of the enquiry.
- [11] Thus on the face of things the Board did have a *prima facie* reason to believe that the Applicant committed misconduct. But do these allegations amount to serious misconduct? In the context of the problems facing Eskom, they do.
- [12] *Was the Applicant afforded a fair opportunity to make representation on his suspension prior to the decision to suspend?*
- [13] As found earlier on, the Board was less than frank with the Applicant regarding the true nature of the enquiry and that the Applicant was in fact being investigated for possible misconduct in respect of specific issues. The significance and implication of this is that, as submitted by the Applicant, he was not provided with relevant information to make meaningful representations as to why he should not be suspended. It is also clear from the timing and sequence of events on 11 March that he was not afforded reasonable time to make representations as to why he should not be suspended. On 11 March 2015 the Chairperson of the Board informed the Applicant that the Board had resolved to institute the independent enquiry and he asked the Applicant to recuse himself as the Chief Executive so as not to influence the enquiry, which he indicated would last 3 months. According to the Applicant the discussion that ensued centred on whether there was a need for such an enquiry in light of the existence of the “War Room” whose task, in the Applicant’s view was to enquire into the affairs of the Respondent. The Applicant was asked to leave the room and when he was called back after 30 minutes he was handed a notice of suspension.
- [14] The sequence of events and timing of the suspension notice strongly suggests that the Board had made up its mind to suspend the Applicant irrespective of his representations.
- [15] *Was it necessary to suspend the applicant pending the enquiry?*



- [16] The next issue is whether, despite the Board's view that the Applicant may have been involved in wrongdoing, it was necessary to suspend him and prevent him from working. According to the Respondent's policy, the decision to suspend an employee must be considered if and when *one* of the following factors is involved: (i) an element of dishonesty in the alleged misconduct; (ii) possibility of tampering with evidence; (iii) possibility of interfering with the investigation process; (iv) the possibility of intimidating witnesses.
- [17] Clearly, the only way for the Board to arrive at an informed decision in this regard is if they had some information about the Applicant to make them believe he may act in one of the ways set out above and after giving him an opportunity to make representation on these matters. This was not done and the Board has provided no material to show that they had good reason to believe that the Applicant was likely to interfere with or intimidate witness or to tamper and interfere with the investigation. The Board indicated that they would be relying on other officials to provide the relevant information during the investigation.
- [18] In all these circumstances, there is *prima facie* evidence that the suspension of the Applicant was unfair.
- [19] The Applicant has thus established a *prima facie* right to the final relief that will be sought in due course at the CCMA.
- [20] Considering the dispute of fact surrounding the circumstances of the suspension I was not in a position to find that the Applicant established a clear right, and in these circumstances the further requirements for urgency become relevant. The Applicant must therefore show irreparable harm, lack of an alternative remedy and that the balance of convenience favours granting the order.
- [21] The Applicant contends that given his senior status the suspension harms his dignity, his reputation and his right to work. He also submits that his continued suspension will cause irreparable harm to the operations of the Respondent and the economy. The Applicant contends that the balance of convenience favours



granting the interdict because there are no serious charges pending against him and there is no reason for him to interfere with the investigation and enquiry.

- [22] I agree with the submissions of the Respondent that the Applicant has not established irreparable harm and the absence of appropriate alternative remedies.
- [23] The Applicant acknowledged the availability of the CCMA remedy, for he is exploiting that mechanism, as he should. Arbitration proceedings at the CCMA are the ideal forum – and the process and forum selected by the legislature – to deal with the factual issues in dispute in relation to suspension and to assess its fairness in a careful and considered manner. What the Applicant has to show is why that alternative remedy is not adequate. There is no indication by the Applicant that the CCMA process will take an unduly long time. On the contrary, it can reasonably be expected to be resolved in a relatively brief period of time. Moreover, the CCMA referral form makes provision for the Applicant to inform the CCMA of any special circumstances of his case. These could include representation for an expedited hearing on the basis that the matter is of public interest and it is in the public interest that the matter be expedited.
- [24] In my view the Applicant did not establish the prospect of irreparable harm if he is not given relief by the Labour Court in the intervening period. The Applicant is still being provided with remuneration and his title has not been removed. The allegations about damage to his reputation do not hold serious weight. Any perceived possible damage can properly be addressed through the CCMA process and the Respondent's investigation enquiry which the Respondent has undertaken to complete within three months.
- [25] Most decisively is the fact that the news and speculation about his reputation is already in the public domain. Comments that impact on the Applicant's reputation have already occurred. An order uplifting the suspension will not solve or make these issues go away because the CCMA and proposed enquiry must still make

the final determination on the matter. In other words, the vindication or otherwise of the Applicant is still an ongoing matter and has not been finally resolved.

[26] The balance of convenience does not favour forcing a working relationship between the Applicant and the Respondent until the CCMA has finally resolved the matter.

[27] In the circumstances the Order of this Court is as follows:

- (i) The application is struck from the roll.
- (ii) There is no order as to costs.

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Whitcher J

Judge of the Labour Court of South Africa

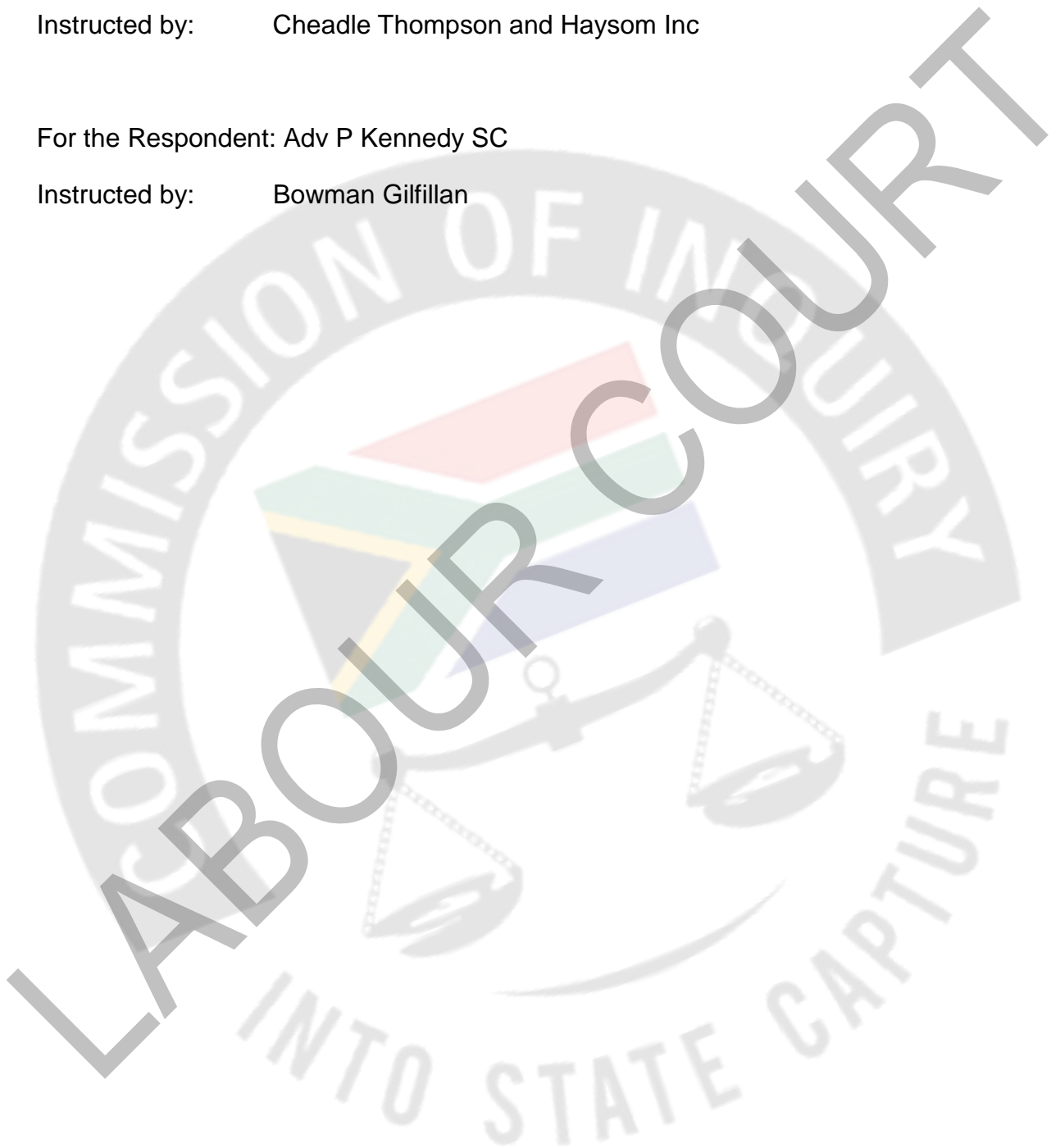
APPEARANCES:

For the Applicant: Adv A Redding SC

Instructed by: Cheadle Thompson and Haysom Inc

For the Respondent: Adv P Kennedy SC

Instructed by: Bowman Gilfillan



# 03







**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA



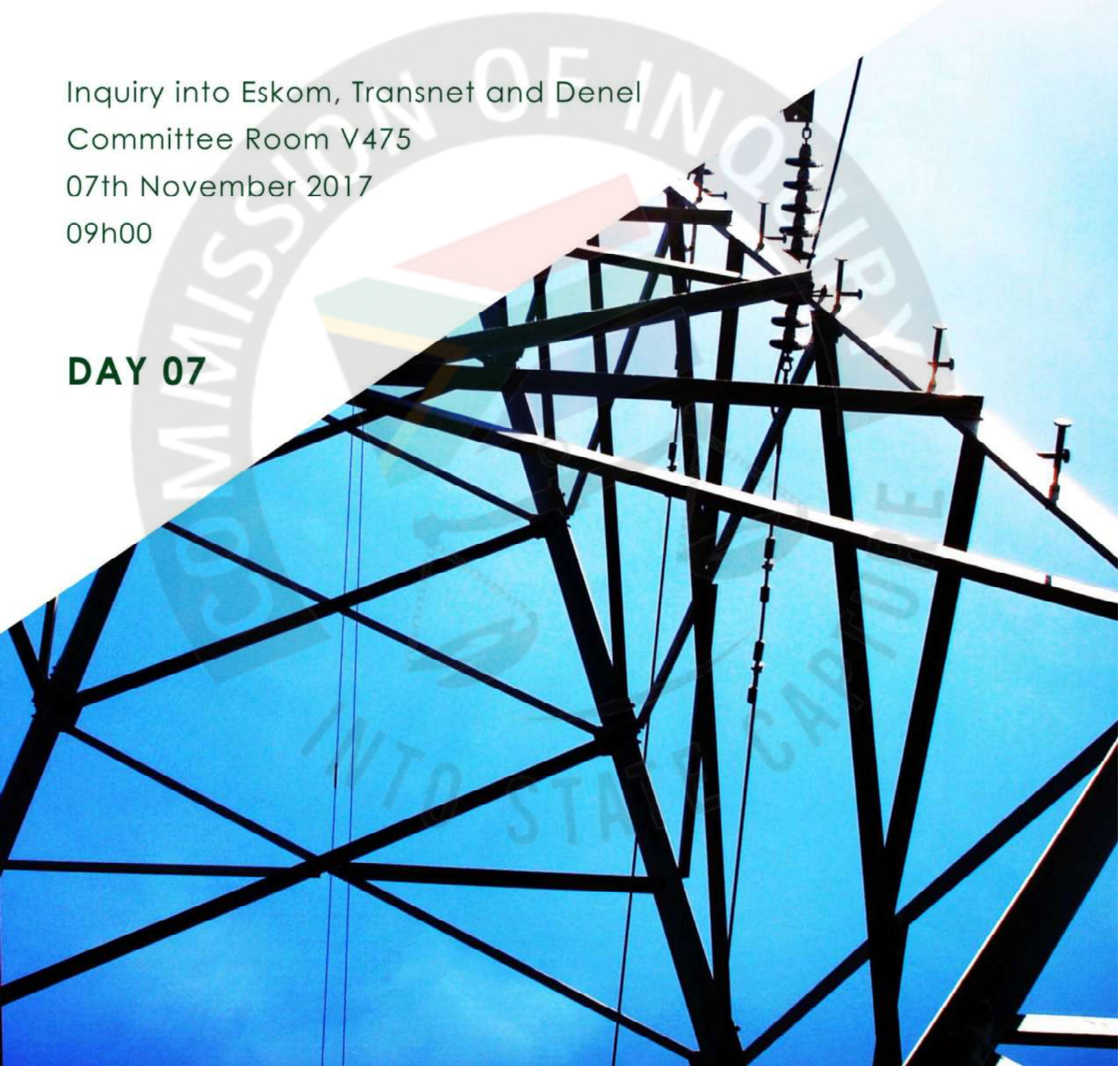
**public enterprises**

Department:  
Public Enterprises  
REPUBLIC OF SOUTH AFRICA

# PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES

Inquiry into Eskom, Transnet and Denel  
Committee Room V475  
07th November 2017  
09h00

**DAY 07**





07<sup>th</sup> November 2017 – Parliament RSA

[00h03:10 - START OF AUDIO]

Morning Session

**Ms L Mnganga-Gcabashe** - [Standing in for Acting Chair Ms Daphne Rantho] Good morning Honourable Members, our guest, you are all welcome. The committee secretary earlier on indicated that there were delays of some Members of this committee due to accident in one of our roads. I experienced that as well, but at least I was here in time. But some people who were behind us I think they were even further delayed. So I think for now we can start, but let me extend apology from the chairperson, the acting chairperson of the enquiry, Honourable Rantho. I'm standing in for her; my name is Lungi Mnganga-Gcabashe. Any more apologies that you recorded?

**Committee Secretary** - The apologies I received is from Mr Kwankwa, he is a member of another portfolio committee, and Mr Singh I think he's abroad. And Dr Luyenge... another committee member.

**Ms L Mnganga-Gcabashe** - Thank you very much. We today, as I think Members have in their packages; we have a witness interaction with Mr Matona. Mr Matona...I believe he is already here. Welcome Sir. I believe that you said that you'd like to take an oath. Thank you, I'll read the oath to you and you will respond at the end. 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 satisfactorily 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 take the oath or affirmation, but you've already chosen the oath. Which do you prefer...I think you've already answered the question. Now we are getting to the oath. You will say, "I swear that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth. You may respond Sir.

[00h07:43]

**Mr Tshediso Matona** - [on mike] [inaudible]... so help me God.

**Ms L Mnganga-Gcabashe** - Thank you very much. Advocate you may lead us, thank you.

**Advocate Vanara** - Thank you Chair, good morning to yourself the Honourable Members and the guests of the committee and colleagues. But I must also apologise, I was one of the victims of the accident, but that is not an excuse. Mr Matona can you please for the record state your full names.

**Mr Tshediso Matona** - Tshediso Matona.

**Advocate Vanara** - Can you give the committee your experience in the public sector, particularly your role as DG in the two departments you occupied before joining Eskom Group CEO.

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**Mr Tshediso Matona** - Thank you, thank you Advocate. I joined public service right from the onset of our democracy in the Department of Trade and Industry. I was responsible at the time for international trade policy, international trade negotiations. I rose through the ranks of that department. I held various other senior positions including as a trade representative of the Department of Trading Industry, the government of South Africa to the World Trade Organisation. I then in 2005 was appointed Director General of the Department of Trade and Industry. I served in that position for the entire first term, 5 years, until about the end of 2010. I then moved from the DTI to department of Public Enterprises. Shortly after Minister Malusi Gigaba was appointed the Minister there, I moved there to head up that department. That department at that stage did not have a Director General, so I went in to fill that position and I was with the department until 2014; so beginning of 2011 until about August / September 2014.

[00h11:03]

So a brief high-level sense that's really been my career in the public service. So I've been in the service for now that is easily 20...23 years.

**Advocate Vanara** - We would focus ideally during your tenure partly as a DG of DPE, Department of Public Enterprises, and mainly in your short stint at Eskom. During your tenure as the DG at DPE, amongst the other responsibilities you would have had is the support of the office of the Minister; is it correct?

**Mr Tshediso Matona** - Correct, that's what Directors General are there for, they support Ministers.

**Advocate Vanara** - Let's then zoom to the appointments of board, the non executive directors to boards at the SOEs within that portfolio. Can you share with the committee the process of appointing non-executive directors to these various boards?

[00h12:50]

**Mr Tshediso Matona** - Thank you. The Department of Public Enterprises is probably a unique department relative to other government departments in that it has as the exclusive, perhaps only mandate of that Department; the exercise of shareholder oversight on behalf of the State over, I think at the time there were about 9 companies, 9 State-owned companies. It had been a fairly recent department; it is in fact a post 1994 department. It started initially the time the intention was to actually privatise some of the companies that were put under the Department of Public Enterprises. The largest one of course being, you know, Eskom, Transnet, Denel, South African Airways, South African Express, the South African Forestry Company – SAFCOL, the diamond mining company- Alexkor, and then a recent company that was established during our democracy an infrastructure broadband company called Infracom. Of course the mandate changed so there was no intention any longer to privatise these companies, which meant that the department had to develop a system and a regime through which the shareholder will exercise oversight. So by the time I arrived there 2011, I found that the department had established systems, policies, procedures for many of the requirements of shareholder oversight. Largely to do with, you know, call it governance, but I think also to provide strategic direction to those companies. That system at its foundation at a basic level took the cue from the Companies Act; because these are companies they're also governed by a general legislation with regards to companies, which is that the Companies Act. They are of course a special category of companies within the Companies Act, but they're governed by that. Because our state-owned companies they also governed by the Public Finance Management Act, 'PFMA.' So that was that system and then beyond that the department had developed tools through which, for example, companies could be assisted with compiling what are called 'Memorandum of Incorporation', and those well basically set out the procedures and rules

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through which the company will be managed, the appointment of officials of the company regulating various things relating to finances and regulating governance within the company. The MOU clearly had to be consistent with the foundation laws which I've just referred to. So that was the system that existed at the time. You will know that in terms of the PFMA these companies are required to report on a quarterly basis. In terms of the Companies Act they're required to hold an Annual General Meeting and typically, you know, an Annual General Meeting is the opportunity that from time to time becomes available for the board to be rotated. If a board has completed its term of office it's rotated at the Annual General Meeting, or as a case may be, you know, the board may be extended or reappointed for another term. So those were the kind of systems that were in place, but was also a database. The department kept a database of possible candidates to boards based on particular skills that are required across the sectors in which these companies under the department operated. So for example there would be the people with aviation skills, people with manufacturing skills for Denel, people with the skills in the energy sector, and so on. And of course other disciplines, you know financial management skills, accounting skills and that type of thing. So there would be a database. This database gets updated from time to time as warranted by circumstances. So that's in a sense the system that governed DPE.

[00:19:26]

**Advocate Vanara** - We'll get back to the shareholder oversight over these companies. But at the moment I want us to focus on the appointment of board members, specifically, the non-executive directors. You referring to a database with the potential candidates to serve in various boards, how is this database developed and compiled?

**Mr Tshediso Matona** - So during the time I was there, there was an opportunity to actually update that database, and what we did was to put out in media in the newspapers a call for nominations. A call for nominations of people who are suitably qualified to service as directors and non executive directors of companies under the portfolio of the Department. Usually in the past, I was told, they would do it per sector. But at the time we did a broad call indicating the sectors in which we were requiring skills. So, and then of course people respond ...responded to that to that call for nominations and therefore their names are then included in the database. And as and when the opportunity arises for the board to be appointed, we draw from that list of names.

**Advocate Vanara** - The Integrity of individuals serving at these various boards is critical, I'm sure you'll agree?

**Mr Tshediso Matona** - Absolutely.

**Advocate Vanara** - In the compiling of this database with potential candidates to serve in these various boards, what was a safety net, if any, that was built into the system to ensure that people with questionable characters do not find their ways to serve in these different boards?

[00h22:12]

**Mr Tshediso Matona** - So if a name was pulled out of the database as a potential candidate for a board, then there is a requirement, I think it's actually a statutory requirement in terms of also the Companies Act, that that person be of impeccable standing, impeccable integrity. And so of necessity, therefore, it is...we are required to conduct a probity, what is called a probity check. Then that's a check confirming, for example, the person's qualifications, whether a person has a criminal record, or has any judgements against them for



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tax purposes and things like that. So that test is conducted for each and every one of the individuals who could potentially be appointed into a board. So that is a system that applied at the time I was there.

**Advocate Vanara** - Would potential conflict of interest be one of the criterias to be applied in this probity check?

**Mr Tshediso Matona** - It would be hard on the face of it to identify the potential conflict. However, let's say for example we pull out a name and it so happens that my brother is the CEO of the company, I think in that instance that's a clear conflict. But the most of these conflicts, you know, you couldn't pick them up at that level at least, you know, in terms of conflict of interest. What we did do was to require the persons to disclose which other boards they sat on. And the purpose of that was to ensure that we did not appoint people that were over extended and that would not have the time to devote to the company to which they were being the appointed. So, yeah, at that stage in the process it's not possible to always pick up conflicts...issues conflict.

[00h25:11]

**Advocate Vanara** - I accept your response to certain extent, perhaps let me zoom specifically. Eskom in particular we know now had long contracts, long coal supply agreements with various service providers. You served at Eskom, you should be aware of that by now.

**Mr Tshediso Matona** - Yes.

**Advocate Vanara** - Therefore, someone who is applying to serve in the board of Eskom who owns a mine supplying coal to Eskom, would sadly be a red flag, isn't that so?

**Mr Tshediso Matona** - I think so.

**Advocate Vanara** - And your probity check should be able to pick up on those kinds of individuals?

**Mr Tshediso Matona** - Yes, it should.

**Advocate Vanara** - The appointment of executive directors, including yourself, at Eskom what was the process followed in terms of the MOI?

[00h26:48]

**Mr Tshediso Matona** - So that the process, for example, for the appointment of the CEO and the Chief Financial Officer who are as you are aware, Directors, prescribed officers as they are referred to; that process is conducted by the company and it is conducted by the board. So one of the responsibilities that a board has is whenever there is a vacancy or there's a need to appoint a CEO or CFO to commence the process. And in doing this because the process ultimately will include the shareholder, it will include concurrence of the shareholder, so they are required to notify the shareholder representative of their intention to fill any of those vacancies. And typically the shareholder will give the board the go-ahead to conduct the process. And that process usually entails advertising the position and then conducting interviews and then making the appointment. So there are guidelines about that process. So for each of those positions the board is required to identify three names, possible names, and this is because sometimes if you go with one name, then the person may sometimes change their mind and say 'I'm not available'. So, typically, the recommendation is that: supply three names with an indication of your preferred candidate to the shareholder. The shareholder will then consider that recommendation and more often than not unless there's something really

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unbecoming, the shareholder gives the go-ahead. And of course that process concludes with that name being submitted to cabinet for cabinet to endorse that appointment. So typically all of these appointments to boards of both executive and non executive directors are also considered and approved by cabinet.

[00h29:51]

**Advocate Vanara** - If I follow your testimony, is that there's a recommendation from the board with at least 3 names for the Minister's consideration. The Minister then makes a decision, that decision gets to be considered by cabinet. Correct?

**Mr Tshediso Matona** - Correct.

**Advocate Vanara** - So if the Minister appoints number three instead of number one, that would be within his or her right to do so?

**Mr Tshediso Matona** - Yes, so theoretically if three names are provided, then any one of those names. You know, of course those three names would have to meet the minimum requirements of the position, number one. Number two, the Minister is required to advise the board and motivate, you know, why he or she doesn't go along with the preferred candidate that the board may have identified. They have to furnish an explanation in an argument for that sort of decision. But usually in most cases the shareholder will go along with the recommendation of the board.

**Advocate Vanara** - And what happens if the Minister turns down all three names recommended to him or her?

**Mr Tshediso Matona** - That would be an extreme circumstance which I have not encountered, at least in the time that I was at the Department. So typically the Minister will go along. In the event that the Minister does not agree with any of the three names, they have to be good reasons, you know, the Minister I will have to furnish good reasons why. Because by the time it gets to the Minister, all the requirements, interview requirements, statutory requirements, probity checks are done so, you know, all the boxes are ticked by the time it gets to the Minister. So it would be very exceptional that the Minister would not go along with any of the three names, and as I said, I have not encountered that scenario.

**Advocate Vanara** - The rationale for my questions, I'm probing the competency of the Minister in this regard. Is he or she the appointing authority in respect of these two executive directors; the group chief executive and the finance director?

[00h33:16]

**Mr Tshediso Matona** - It's an interesting legal question that we grappled with because up to the point where the board has completed the process and came to a decision then in a private sector company, the private company, the process would be complete, the board has that authority. In the case of State-owned companies, however, there is this other requirement that the shareholder needs to concur and that is the exercise of the shareholder rights. It's a fairly recognised practice, it's a fairly common practice; all appointments of that nature serving cabinet. So, you know, it's a moot point, you know, who actually is appointing authority in that instance. My sense is that the more important process, I think, is a process that the board conducts, as it were.



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**Advocate Vanara** - In 2016 you'd already left Eskom, there has been an amendment to the MOI. They don't want to assume the reasons for the amendment, but it would seem that this issue was clarified once and for all. Have you ever had sight of this MOI 2016?

**Mr Tshediso Matona** - No, I'm not aware of that.

[00h35:32]

**Advocate Vanara** - Let's get back to the shareholder oversight. Whilst you were at DPE, how did the then Minister of Public Enterprises, correct me if I'm wrong, Honourable Malusi Gigaba, whom you served...with whom you served; how did the Minister, as a shareholder, with the assistance of the Department headed by yourself, exercise the shareholder oversight over these SOEs, more specifically I'd like you to zoom to the issues at Eskom.

**Mr Tshediso Matona** - Sorry I didn't I don't understand what you mean when you say the issues at Eskom?

**Advocate Vanara** - The Minister has shareholder exercise oversight responsibilities over the State-owned enterprises falling within his or her portfolio, which you have enlisted. I would like you to share with the committee how the Minister, duly supported by the Department which you headed at the time, discharged that responsibility in general to the SOEs, but more specifically to Eskom. And I want you to highlight what were the pertinent issues at Eskom that you had to deal with.

**Mr Tshediso Matona** - So, I think the first order of business in the Minister's exercise of oversight is with regard to the appointment of a board. Or the establishment of the fact that there is a board, is it a competent board, is it doing well, and if not how does the Minister then intervene in that instance. So, the establishment of an appropriate governance structure centred on the board, I think, is a primary responsibility of the Minister. Beyond that, as I indicated, there are a number of instruments through which the Minister exercises oversight, so the company has to conclude a shareholder compact which sets out the deliverables that the Minister as the shareholder representative expects of the company. That compact is negotiated between the Minister as a shareholder representative and the board. Typically that's where we as a department we support the Minister in scrutinizing the shareholder compact and to make sure that the provisions therein are sufficient and they help the Minister and government realise whatever objective, strategic objectives, that are set for that particular company. And then on a quarterly basis the company reports against the commitments that it has made in terms of the shareholder compact. It'll...the company will elaborate the contents of the shareholder compact in a corporate plan, which actually is an implementation plan for commitments made in a shareholder compact.

[00h40:14]

So we, so on a quarterly basis the company reports to the Department and the Department officials who incidentally are also persons with the requisite skills, so you would have people with financial management skills, financial analysts, you'd have sector experts, you know, in for example, aviation who will scrutinise these reports and advise the Minister accordingly. And sometimes if we feel that there's insufficient information, you know, we can require additional information, so there's backwards and forwards between officials of the Department and Executives of the company until we get to a point where we then say, 'well actually, you know, we are happy,' then we submit the report to the Minister for the Minister to take note or direct as the Minister deems fit. So typically that's the business of oversight. All of this culminates into an Annual General Meeting where the annual performance and the annual results of the company are then

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presented. In that context there may be new strategic decisions that are taken by the direction of the company. So that's more or less what actually applies.

[00h42:00]

**Advocate Vanara** - Let's zoom then to Eskom. The, this evidence before the committee that the finances of Eskom around 2014 were not at the best position, we know there were...there was load shedding. Can you share with the committee what was Eskom's plan to deal with those challenges? Remember you're still DG of Public Enterprises.

**Mr Tshediso Matona** - Certainly, the main thing in the course of 2014 that confronted Eskom and therefore confronted the shareholder was the financial performance of the company. So the books were not balancing, so to speak, the books were not balancing and there are a number of letters in that regard. I think that the revenues, Eskom revenues were under pressure partly due to early signs of economic slowdown at the time. I think we...the economic slowdown was starting to become apparent in the course of that year. There was the issue around the tariff whether the tariff was sufficient to sustain Eskom's balance sheet. There were issues around debt, the debt that Eskom had with largely the municipalities, which was rising quite rapidly at the time and there were challenges of collection of that debt. The long and short is that Eskom was in serious financial constraints and so the shareholder became involved directly with that issue, dealing with that issue, trying to establish specific details around that issue. And I remember that I was, as a director general, I interacted quite a lot with the National Treasury at the time, so we were both the Department of Public Enterprises and National Treasury jointly looking at this, jointly looking at this problem. We also interacted with NERSA as the regulator who provided very valuable advice and information about Eskom to us. The long and short of it is that in the course of that year there was a decision to provide Eskom an injection, a financial injection to the tune of, I think it was 23 billion rand that was decided. That was a package which had other things for example; the conversion of the loan, national treasury's loan to Eskom into equity. So that seemed to be, that seemed to deal with the financial challenges of Eskom. What had in parallel emerged were operational challenges; the ability to supply electricity without interruption. So in the course of 2014 there were incidence of load shedding were starting to occur, you know, they were a bit isolated. I think they accelerated towards the end of that year and that's when I had just arrived at Eskom in October; I think it was, when I arrived there. As soon as I arrived there load shedding accelerated and as it, as it turns out load shedding that the load shedding is primarily or performance, generation performance, let me put it that way, is the responsibility of the company. The company needed to sort that problem out and we embarked on a number of strategies to deal with that problem. I can go into what I established to be some of the factors that accounted for that problem.

[00h49:05]

**Advocate Vanara** - Ok, we will get to how you perceived and how you dealt with the problems on your arrival at Eskom, but at the moment I want us just to deal with the challenges that were there and how the shareholder ably assisted by the department which you headed, assisted the company to weather the storm. If you're done you'll just give an indication so that we proceed.

**Mr Tshediso Matona** - No I am done.

**Advocate Vanara** - You then leave the department the 1st of October 2014, you join Eskom as group chief executive. What do you find on joining the company? Remember you were looking at these problems from

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an external point of view, now they become your problem; they're primarily your responsibilities. What do you find? And how do you deal with these problems?

**Mr Tshediso Matona** - So on the financials, we had a, through the financial injection, the financial package, we had a handle a bit on the finances of the company. I think the main issue was going to be what the, what the tariff trajectory for Eskom was going to be that would ensure that the company has some measure of financial stability. And that was an issue that was in a sense beyond the company; I think it was an issue that involved policy, governed policy, electricity pricing policy. There had already been at a certain stage in the past a decision to allow Eskom a cost reflective tariff, a tariff that enabled the company to recoup all of its cost, but that policy had not quite been implemented, as it were.

[00h50:43]

So there were policy issues which, as far as I can see, have not fully been bedded down as it were. So, but by and large we could see some direction about where the financial issues of the company were going. Operationally, the problem was this supply interruptions, load shedding and that was the, really the burning platform upon which I arrived at Eskom and that was a thing that I put my head down to work upon day and night trying to resolve that problem. It eventually started to impact on the finances of the company, to the extent for example; that at the time for peaking power Eskom relied to a very great degree on diesel, you (00h52:26) know, to supply from the peaking plants, here in the Western Cape, at the two peaking plants here in the Western Cape. That created massive pressure on the financing, the finances of the company. I can't remember the numbers but that diesel cost... was fairly, fairly large. That was a stopgap, so it was clear that that sort of performance could not be sustained but it was, it was, a stopgap to create a room that was required for Eskom to conduct maintenance. Because the big problem, underlying problem, that accounted for the interruptions in supply were the breakdown in the generating units of Eskom and these units were breaking down because they were simply old. They had, maintenance had been deferred for too long a period. The story which I had when I got there was that, in 2010 for purposes of the World Cup a decision had been taken to defer maintenance of these generation plants, and then I think a few years thereafter where elections, I think, I think local elections, again a decision had been taken to defer maintenance. And so, you know, there had been a culture that had set it of deferring maintenance, simply because the executives at Eskom feared load shedding and resisted having to load shed for as long as it was possible. But of course by the time I got there it was not possible anymore to avoid load-shedding because these units were just, you know, packing up, you know, one after the other. So that was a period of troubleshooting to a very large extent. So we did the troubleshooting but the main thing was to actually reinstate a discipline of maintenance then, and I believe that, you know, Eskom fell in line. So the plans that we put in place started to, the rewards of those plans started to show soon after I had left but the actual programme of recovering on the maintenance had started in that, during a short few months when I was, when I was there.

[00h55:30]

**Advocate Vanara** - In December of that year the board got to be overhauled with only two non-executive directors remaining from the previous board. And you testify that the normal sequencing of events which seems to be in line with the shareholder impact, the corporate plan, the quarterly reports, ending up with the AGM, which I'm advised is around July/August, beginning July/ August. In this instance and it is your testimony that that would be the normal time to change the board. In this instance it got to be changed in December of 2014, are you aware of any reasons why this board was changed in December? During a relatively quiet period as opposed to the normal period which is immediately after the AGM?



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**Mr Tshediso Matona** - At the time when that change of board occurred, I must say I could not align it with a cycle, you know, the governance cycle as you just described, so that was not really a, an issue that I focused on. The thing which I recall at the time was the main thing was that the chairperson of the board at the time was an outgoing chairperson. So there was an issue that the chairperson of the board would be changed. So I can't quite, the work, that was not really a big issue for me because as you now recall I'm now on the other side, so I'm not really part of the departments calendar and cycles about how things are done. So unfortunately I can't, I can't help you there.

[00h58:24]

**Advocate Vanara** - The, the chairperson of the previous board what by previous board, I mean a board before the December 2014, was Mr Zola Tsotsi. Is that correct?

**Mr Tshediso Matona** - Correct and that's the person I'm referring to here.

**Advocate Vanara** - When you say he was to be changed, well what do you mean? Was he going to be removed as a chair of the board? Or was he going to be taken out of the board?

**Mr Tshediso Matona** - He was going to, he was going to be rotated; that's the language. So he, I remember having a conversation with him where he indicated that there are signs that he is going to be removed as chairperson of the board, so and that's really the extent of my engagement with that process of the change of board at the time. And there was no indication as to when that was going to happen because I don't think in that instant the shareholder required to inform, you know, for example; me as a CEO that I'm by the way I'm going to change your board, that wasn't done. So when that change happened I experienced it pretty much like everybody else.

**Advocate Vanara** - But the chair, Mr Tsotsi, remained as the chair of the board that was subsequently appointed?

**Mr Tshediso Matona** - Yes, he did.

**Ms L Mnganga-Gcabashe** - Advocate remaining 5 minutes, I have to manage time this side because there's a second witness that is coming. Thank you.

**Advocate Vanara** - That's fine Chair. Just tie this up. You've been with the board for at least 2 full months before the new board was elected. You'd now worked with board members, non-executive directors, were you exposed to any tensions in that board? If so, can you explain what those tensions related to?

[01h01:10]

**Mr Tshediso Matona** - Certainly. So by the time I arrived at Eskom, there was significant tension you could call it, you could call it turmoil, but there was serious in-fighting within the...within the board. It was in-fighting over a range of issues likely to do with procurement, so, so there were all these fights about various procurements and then I think there was also the issue of the 43 million that the acting CEO, who I took over, had signed off to The New Age. So there were a few of these things that, you know, divided the board and almost rendered that that board dysfunctional in many ways and I think therefore that could have been one of the reasons why the shareholder, you know, chose to rotate that board. Ja, so I am aware about some of those things that, they were brewing already by the time I got there.



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**Advocate Vanara** - My last question. You'd only been 5 months into the job when you got to be suspended and you never returned to Eskom. Can you share the circumstances surrounding your suspension and eventual departure at Eskom?

[01h03:24]

**Mr Tshediso Matona** - Yes, well the suspension came as a complete shock to me. Particularly, suspension by a board that had just only taken office, a board that still needed to familiarise itself with the business and the issues of the company. And when...I call it a pretext of an investigation or call it, 'the state of affairs,' of the company was given, I could not buy that because I believe that the problems of the company had been well established at the time. So we knew where the problems were financially, we knew where the problems were operationally, and in fact we were working on resolving those problems. So I could not see how and a new investigation could shed any light. So I expressed my disagreement with the initiation of a new report, least of all an investigation that required my removal from the company without any basis whatsoever as to why I should... I needed to be removed. And of course at the time I didn't know that, you know, that the same thing was being proposed for the other executives, that, you know, the four of us should move away from the company to allow this investigation to proceed. So, I nevertheless was handed a letter of suspension. I believed that action was wrong, I challenged it. I went to the Labour Court and sought an urgent relief. I said to the judge that she must find that that suspension was unfair, which she did, and that she should reinstate me back at Eskom; that was my...the relief I sought. She did not go that far, she did not reinstate me, instead she referred the matter to CCMA and said CCMA must deal with the merits and demerits of the issue. Suffice to say that in the CCMA process when things got there, I found that Eskom had no... or at least the board, this very board excluded any possibility of my return as an outcome of that arbitration, call it arbitration. So in fact I was made an order to leave the company. I could have fought further the issue, I could have challenged further, except that I realised that I would have bankrupted myself because I would have had to pay out of my pocket. So, I chose to walk away. I chose to leave that sorry and sordid episode behind me and move on with my life and that's what I did.

**Advocate Vanara** - Before I hand over to the Chair, just one follow up to that. You parted ways with Eskom without you having been found guilty of any wrongdoing and that you were paid whatever was due to you, and one thing that was made clear to you is that you are not coming back to Eskom; is that correct?

[01h08:26]

**Mr Tshediso Matona** - Yes, yes, so it was that even if I were to go back, it was clear that it wouldn't work. It wouldn't work, by the suspension I think the trust, the relationship of trust between myself and the board had been dealt a mortal blow. So it wouldn't work. I was just pleased that out of principle, that out of principle I challenged that, because I believe it was wrong, because it was wrong, very wrong.

**Advocate Vanara** - Thank you for your indulgence Chair.

**Ms L Mnganga-Gcabashe** - Thank you Advocate. I'm taking hands, Honourable Gordhan, Honourable Mazzone, Honourable Swart, Honourable Marais, Honourable Rawula. I'm taking the last hand now, after this I'm not going to take any hands. Honourable Shivambu, Honourable Gungubele; in that order. In that order Members, thank you. You can take a sip of water, eh.

**Honourable Gordhan** - Thank you Chair and welcome to Mr Matona who I've known for a very, very long time, so it's good to have him here. In the board meeting of the 11th of March 2015 according to the

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documents before us, which is the minutes of a board meeting, there's an intriguing reference here to a bugging device that the Minister was complaining about. Who was bugging whom?

**Mr Tshediso Matona** - So let me talk about bugs at Eskom. At a certain stage it became clear that developments within the company deliberations of the board were leaking to the media. And so there was a decision that periodically the boardroom would be swept of devices, and so in the time I was there I insisted to such sweeping of the boardroom. On that day I don't know where the Minister was coming from as she walked into that board meeting because she raised the issue of a bug and almost in an accusatory manner, kind of told me that I'm aware of bugs in the boardroom, to which I said 'by the way Minister I periodically sweep these boardrooms,' and I could not quite make sense of that. Of course she didn't...that interaction did not go as far as establishing who was bugging who, but it was...it was an issue about bugs, and she raised that issue.

**Honourable Gordhan** - You have any speculation to share with us?

**Mr Tshediso Matona** - No, I couldn't, I couldn't speculate, unfortunately.

**Honourable Gordhan** - Or do you want to write your own book about this matter before you share it with us? [Laughter]...

**Mr Tshediso Matona** - There is a mystery of the bug as it relates to that meeting; Honourable Gordhan I can't shed any more light on that.

**Honourable Gordhan** - No, that's fine. In the period 2011 to 2014 you were DG as you pointed out at DPE. Now it's during this period that Minister Gigaba was given that job and it's also during this period that according to the academics the process of state capture began when he first, let's call it radically changed the Eskom board. You described earlier on the process that is normally followed, how did Gupta connected people get onto the board if there was such rigour in the Department in the appointment or identification of potential directors.

[01h14:24]

**Mr Tshediso Matona** - I don't know whether the probity checks that had been done for that for that process, in fact I think, I can't be sure Honourable Gordhan. One of the boards had already been appointed when I got there. It could be the Eskom, could be Transnet, but I know that by the time I got there, some of these board had been appointed. So, you say 'Gupta connected'...the probity check would not pick up those sorts of associations of an individual to those sorts of interests or other interests for that matter not just Gupta interests. I don't think those probity checks are designed to pick that sort of thing up.

[01h15:24]

**Honourable Gordhan** - At that time.

**Mr Tshediso Matona** - At that time, certainly at that time. I must hasten to also add that the Minister has the prerogative of the final list that the Minister takes to cabinet. So typically sometimes you find that the Department would make a particular set of recommendations for particular names, you know, that this is our recommendation to the Minister. The Minister may, in some instances Minister may not, in some instances the Minister may take some of the names that we propose and any others, you know, and names from whatever consultations that the Minister undertakes.

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**Honourable Gordhan** - With your experience in the bureaucracy or in the public sector, how would this committee establish whether what you have just described had in fact happened i.e. that officials had proposed list 'A' and what went to cabinet was in fact list 'B'. How do we establish that? Which documents do we ask for?

**Mr Tshediso Matona** - You would need to ask for the submissions of the Department to the Minister; you would need to ask for those documents.

**Honourable Gordhan** - So Chair, can the secretary of the committee note that and ask for those documents please, so that we can figure out what's going on. Let's move quickly to the load shedding period. The War Room as you described it that was set up and I just want you to confirm that in your view what led to the eventual load shedding in 2014 was in fact what you call the deferring of maintenance for too long a period.

**Mr Tshediso Matona** - Certainly.

**Honourable Gordhan** - And that what you did was put a discipline in place that began to overcome that problem.

**Mr Tshediso Matona** - Certainly. Honourable Gordhan you remember that there were weekly War Room meetings and I was reporting on an ongoing basis about what the maintenance plan was, and we had also resolved to maintain a posture of transparency by announcing and informing the public about the state of Generation so that people could plan their lives, businesses could plan their lives.

[01h18:17]

**Honourable Gordhan** - Ok, I want to come back to transparency in a moment, but you also said that by the time you were forced to leave in March 2014, a) the discipline had been implanted and b) the period subsequent to that saw the benefits of the discipline that you put in place. For which now Mr Molefe takes a lot of credit.

**Mr Tshediso Matona** - Certainly, that is my belief and it's a belief of the fellow executives who've worked very, very hard on recovering Generation performance.

[01h18:50]

**Honourable Gordhan** - Now, you recall that in the War Room period the issue of diesel supply and diesel usage became a big issue; both for the reason that large amounts of money was spent on diesel, but secondly the mystery that surrounded the suppliers of diesel and the contracts that were awarded to them. And one of the most intriguing things at the time, Chair, it was very hard to find out who were the suppliers of diesel and at what price; am I right?

**Mr Tshediso Matona** - You are right, you are right. That was a very, very contentious and contested issue at the time.

**Honourable Gordhan** - Why?

**Mr Tshediso Matona** - I think that issue illustrated some of the basic laws of procurement at Eskom. And what do I mean by that? It seems that emergency situations had been used as a reason to deviate from what normal procurement would, you know. I have some understanding for it because you needed quick turnaround to procure the fuel so you can keep the lights on, but I think it created a major risk in regard to



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who were given these contracts and why they were...why those particular individuals and not others. A normal procurement would create a level playing field so that anybody could compete. So yeah, that was a big problem at the time.

**Honourable Gordhan** - Is it possible that during that period either board members themselves or families of board members or people connected to board members received contracts to supply diesel?

**Mr Tshediso Matona** - I can't be absolutely certain. I know that those were some of the allegations that were being made at the time. I remember reading some of these things in the newspapers.

**Honourable Gordhan** - Ok let's go back to your points about the appointment of the CEO, and you describe the process; three names, the suggested or preferred candidate and so on and so on. When you were forced to leave Mr Molefe came on as an acting CEO and later confirmed as a CEO, are you aware of the process that was followed for Mr Molefe's appointment. Would the same process as you described have taken place?

[01h14:24]

**Mr Tshediso Matona** - To the best of my recollection I could not ...I don't recall that position being advertised as would have been the requirement in law. I am not too certain as to whether the shareholder has the prerogative to install a CEO in that manner. It's unprecedented, so I am not familiar with what actually happened, whether that went to cabinet or not. So I wouldn't be able to assist you there because I was not there at the time and I wasn't looking for that particular job anyway.

**Honourable Gordhan** - [Laughter]... you wouldn't get it even if you were looking for it. So Chair this is another area where Mr Vanara and his team should look into it. Let's move quickly, before the Chair stops me, to the financial status of Eskom. This is all very interesting stuff, Chair. In your affidavit that's been supplied to us in relation to your suspension, so-called, on page 13 you said that your suspension could lead to a downgrade and that in fact Standard and Poor did downgrade Eskom to junk status on the 19th of March 2015. You also express the view and that at the time S&P did say that this downgrade to junk status was linked to your suspension. Well, what lessons are we learning about the recklessness of some of the decisions made both by politicians and by boards, and the kind of financial impact that it has on big entities like Eskom, and perhaps in today's context the country itself.

**Mr Tshediso Matona** - Well, I think I don't know of any other incident in the past where a...and I'm going to call this one a 'misgovernance', event triggered a downgrade in the manner that it happened at Eskom. Because remember this is the time when we also talking to investors and we also giving investors this assurance that we got a handle on the company. So investors when they give you money they want to know, you know; do you have a plan, do you know what you're going to do, and can you give them any confidence of stability. So we had done that, so it is natural therefore that when a traumatic event of that nature happens that investors would take fright. So investors took fright at the time and that's why they did the downgrade. I should think that to the extent that some of these things are happening and have been happening since then. We saw for example how some of the investors, PIC for example insisting on certain governance changes. So there is a relationship and I think they're important lessons in that regard.

[01h25:44]

**Honourable Gordhan** - Chair, last point and I hope you might allow me to come back a little later if there is time, is on page 11 of your document of your affidavit, you make reference to a particular board member Ms Klein and how she... according to your assertion, turned the whole question of your recusal /suspension your



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problem by just asking you to justify why you should not recuse yourself, and eventually why you should not be suspended. What does this tell you about Ms Klein and her approach as a board member? And then with that, I mean, can you share with us on reflection, why that, why did the board do what it did, i.e. take such extraordinary measures to suspend and eventually ask you to leave your position as CEO?

**Mr Tshediso Matona** - In retrospect my sense is that whole interaction was being managed in a manner that would create a defence for the board that they gave me an opportunity to make representations, but it was a farce in my view and I could see at the time that, you know, the outcome is pretty much predetermined. And I saw this because when I came back into the meeting there was a letter of suspension already in front of the chairperson. So that was, you know, a matter of course that I was then suspended in that, in that, manner. I was a bit dazed and confused by that so I, you know, all kinds of things were playing themselves in my head because also some of the information started to surface. You recall that the chair Mr Zola Tsotsi made certain pronouncements about those events at Eskom at the time. I read an article that made reference to the fact that I was suspended because I had refused to do certain things, I had refused for example to keep Collin in the company beyond the agreed time because there was an overlap, there was a month to say, you know, "You're acting, outgoing acting overlap with me." but the proposal had been made that I should keep him on in some capacity which I simply refused. And my reasoning at the time was the fact that there were all of these allegations in the media about Collin, the 33 billion TNA thing and something to do with Cosatu and I was, you know, I did not feel comfortable to make that sort of extension of his stay in the overlap which I also couldn't understand. The board couldn't resolve it because I'd say well if the board so decides, you know, the board must take a decision, but clearly it was... it was a matter that the board could not, if you like impose on me. So there was a newspaper story that made reference to that. I think in the final analysis I concluded that this coming board did not see me fitting into whatever, whatever its plans are, you know. Typically when a new Minister joins a department I ask the Minister, "Minister, do you see me as part of the future?" So I can then be able to make my decisions. I recall an episode like that in the past so in the sense therefore I kind of concluded that this board did not see me as part of its plans going forward. Beyond that I can't, I'm as curious to establish as much information as could be established and I wouldn't want to enter into any speculations as it were, except what I've just referred to. Thank you.

[01h31:12]

**Honourable Gordhan** - Thank you Chair.

**Ms L Mnganga-Gcabashe** - Honourable Mazzone.

**Honourable Mazzone** - Thank you, thank you Chairperson. Chairperson Mr Matona and I go back to you when I first joined this committee in 2011 so I too have known him for, for, some time... [O mike conversation inaudible]... more as, sorry what was that?... Oh a joke, ok. Sometimes you need a bit of a joke when you, when you, see what we're dealing with Mr Matona. Mr Matona, I don't, you know, whenever we know witnesses coming I always go back and I check things that I made in the past and I noted with almost a little bit of a giggle that when you were appointed CEO one of the lines in my statement was; "He'd certainly had been a good director general. So let's hope he carries on..." you know, this sort of, I think I said "...Independence that he shown against the board when you're CEO." And from what I can see there, there is a certain independent rebellion that you were trying to lead in certain things that resulted in in your what is very clear your unpopularity amongst certain members of the, of the board. And certainly a lack of maybe the word popularity isn't good but perhaps the word favourability in terms of extending your contracted CEO with the Minister.

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[01h32:45]

In your opinion, I mean, I don't think that it's coincidental but that might be my opinion, do you think it's coincidental that that the time that you were appointed and the time that you were suspended, so basically we're looking at a period of roughly 4 years because you started in 2010 as DG then you, then you, move into your space as CEO. At that same time Brian Dames works in a particular period of time, he works from a period of 2010 to 2014 very similar to you and Paul O'Flaherty and financial directors Caroline Henry and to certain extent Tsholofelo Molefe they also work it in that time period. Did you think it's simply coincidental that they too resigned? And we've had testimony from Mr Dames who said that it simply became an untenable situation at Eskom for which he was not willing to operate in anymore. Do you think it's coincidental that that your suspension and your time period at Eskom relates to their time period at Eskom?

**Mr Tshediso Matona** - In all fairness I haven't created that link between my arrival then and events surrounding my departure. I had I hadn't really made the link between that and the circumstances in which those executives left. Except to say that something I established upon my arrival at Eskom was precisely the fact that governance was strained, governance was under strain for a variety of reasons and that, in that environment some of those executives perhaps chose to leave but I, but I don't have facts.

**Honourable Mazzone** - Now, what you said has led me very much into what my second question was. I imagine that when you take over an entity such, well as the CEO position of an entity the size of Eskom, you have almost an exit interview with a previous CEO and, you know, those that have served before you. Now we've also been told that a variety of governance issues were leading to people feeling very uncomfortable and and very unwilling to carry on working at Eskom. Could you give us a few examples of the governance issues that you were aware of that were making things difficult to work at Eskom?

[01h35:38]

**Mr Tshediso Matona** - I've already referred to the state of in-fighting within the board when I arrived there and then as I said it was over procurement matters as it were. You know, I remember the, I remember the T-Systems tender, there was also the Areva / Wesinghouse steam generator, also bid rights there and of course The New Age thing, also the bid rights there. But the general sense that I had there was that the moral and ethical fabric of the company is something that really needed attention. I recall an engagement ahead with the head of internal audit who also expressed similar concerns, you know. There were several officials on suspension and the number was increasing for various misdemeanours, so to speak. And we had then resolved at the time to say we will engage the services of forensic auditors just so that they are on hand to tap into, in trying to...if you like diagnose the governance environment and perhaps recommend, make recommendations about interventions. So clearly that, the governance area required attention, required intervention.

**Honourable Mazzone** - And when you say the... that auditors were called in, are you referring to the PwC audit that was done? Or do you know which audit was...were any audits done, and did you know of any audit outcomes?

**Mr Tshediso Matona** - There were specific audits at the time. I mean one of them was around the 43 million TNA payment where there was an audit that actually found wrong doing in that instance and a few specific isolated ones. What we were doing in this instance was not because there was any specific enquiry; just to have on the panel of service providers, I think it was Ernst & Young at the time that we were targeting to

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have to assist us with kind of diagnosis of the ethical and governance environment and then making recommendations as to how to respond.

[01h38:45]

**Honourable Mazzone** - Ok. Now Mr Matona I remember you appearing before this committee and it was around the time that Eskom had agreed to pay 12 million rand for The New Age breakfasts; you were DG at the time. Did you have concerns at the time of regarding, you know, 12 million rand being paid for business breakfasts when it was quite obvious that the company was in financial distress? And to link my two questions together, were you ever put in a position where you had no choice but to agree to certain things for example this 12 million rand being used to pay for business breakfasts? Because later it was found that that the CEO Collin Matjila, he actually, he overextended his reach by agreeing to extend that by three years, so clearly there was a problem there. Were you aware of the problem with this New Age breakfast while you were DG?

**Ms L Mnganga-Gcabashe** - Before you answer. Mr Matona there is a request that you don't come too close to the mike...

**Mr Tshediso Matona** - Oh.

**Ms L Mnganga-Gcabashe** - ... because it affects the recording.

**Mr Tshediso Matona** - Ok.

**Ms L Mnganga-Gcabashe** - Thank you. And you may proceed.

**Mr Tshediso Matona** - Ok. The decisions about sponsorships are entirely the derivative of the company. So, you know, all of the state-owned companies, you know, have one cause or another that they sponsor. In the case of Eskom, obviously the extent to which they can, to which they could still sponsor or provide sponsorship was a problem. And so I think our posture in the department of the time was, and I think the same thing to SAA, that you cannot afford, you cannot afford these sponsorships. So you have to manage your finances prudently because sponsorships are discretionary spending. If you are in financial difficulties, you know, your room for discretion of that nature is completely eroded. So that would be, that would've been the policy posture that we had hoped in that regard.

[01h41:10]

**Honourable Mazzone** - And then the T-Systems, that, that scandal broke around the time that you were working at Eskom too. Could you just very briefly explain to us what your involvement, if any, there was with T-Systems? At the time we know that, you know, and there's been evidence showing that many people showed a serious amount of concern about the T-Systems, can you, can you just brief us as to what your particular feelings were regarding the T-Systems? And linked in that clearly there was a lack of adherence to what should have been prudent and transparent procurement issues.

**Mr Tshediso Matona** - I think some of it, some of those things will need to be judged on facts. What I remember was that that issue had already...was already serving at board, the outgoing board had already and in fact I think a decision was eminent. So I didn't feel that it was something that I needed to involve myself with because the board was already dealing with it, they were considering various recommendations that have been made, so to a very large extent I had absolutely nothing to do with it. I did however, upon



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request of the T-Systems, I did meet up with them but it was a *no* because I didn't want to expose myself to being lobbied, you know, it was only a *no* after a decision had been made that I granted them a meeting. But they had been requesting a meeting with me for a while. And I think that all they wanted to do was to express their concern about the process, the way they had been dealt with and so in that, in that instance, you know, I advised them that, you know, they could exercise their legal rights. I mean if you, if you think you have been unfairly in the procurement process and as we've seen for example with the Areva matter, you know, exercise your rights, you know, so there was nothing I could do to influence any, what was decisions at that stage.

[01h43:35]

**Honourable Mazzone** - Chair then my final question for now, if you'll allow me. Very straight forward and blatant for lack of a better word; were you ever requested by anybody, be it the Minister, be it by a CEO under whom you served, be it by any of your board members, were you ever requested to meet anybody like Salim Essa, Duduzane Zuma, any of the Gupta family, or anyone high in government who tried to influence you in decision-making, regarding any kind of decisions you took during your time as CEO or your time as DG at Eskom?

**Mr Tshediso Matona** - No, no.

**Ms L Mnganga-Gcabashe** - Mr Matona do you need a few seconds to stretch? You've been sitting for almost 2 hours now. Just to stretch, 2 seconds. Just to stand and stretch.

**Honourable Member** - 2 seconds?

**Ms L Mnganga-Gcabashe** - [Laughter]... 2 seconds. Just to stand and stretch, stretch... [Laughter] Just walk a little bit... [Laughter]... We are not taking a break, we are just stretching.

[Off mike until 01h47:55]

**Honourable Swart** - [Off mike inaudible]... that meeting of the 11th of March 2015, the board meeting, where you indicated in your papers in the Labour Court that there was a prime meeting that was postponed the day before and when you arrived you presented your chief executive's report but little, if any, discussion ensued therein. Then the Minister arrived and told you to excuse yourself and the financial director. Did you find that strange? And why would you be asked and the financial director to leave a board meeting? And does that not impact on your fiduciary duties as well? Thank you.

**Mr Tshediso Matona** - This, certainly, I think that that request for me and the financial director to recuse ourselves kind of started to say to me that something was amiss, something was, something was wrong. It is not unusual, however, that a director, or in our case executive director, asked to recuse ourselves in board meetings, it is not unusual because this is when the board wants to meet in what is called 'in committee', when the board wants to meet in committee. Executives are often recused. So the principle of being asked to be recused is not an issue. It was, it was, the fact that it just came from the blue, it just came from the blue, I had no sense whatsoever that, I knew the Minister was coming but I had no sense that she would arrive and to ask us to recuse ourselves. And of course in that instance we, we duly complied with her.

**Honourable Swart** - And you were then later in that day issued the letter of suspension?

**Mr Tshediso Matona** - Correct.



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[01h50:06]

**Honourable Swart** - With the view that you'd interfere with an enquiry or something that was going to take place? And was that the reasoning? And that enquiry, was that the Dentons enquiry? Are you aware... I'm just trying to pick up is that the Dentons enquiry that was then instituted?

**Mr Tshediso Matona** - Yes. That was, what eventually became the Dentons enquiry. I remember that was, that the chair had to in fact appoint another party to conduct the enquiry but had not followed procedure, procurement procedure, so that fell through and then Dentons were then appointed. And by the way, one of the things which was indicated was that we would be interviewed for that, for that enquiry. I was actually never afforded an opportunity to speak to the investigators. Of course as you may recall when they first released one of the versions of that report, they issued a media statement indicating that there had not been any wrongdoing that had been found against me and the other, the other executives. But I don't, I was not even given previously favoured with a copy of the report. I still have not seen the Dentons report.

[01h51:39]

**Honourable Swart** - Thank you. But they were appointed on the 20th of April to the 18th of June, which was in that period. And we now know, the Committee members have got a copy of that report and it's quite a scathing and damning indication of Eskom at the time and their procurement, and it deals with a number of issues and yes it does...it did indicate that there's no wrongdoing on your part, mainly because you were there for such a short period. But what it does it indicate, for example, is significant breaches of the Public Finance Management Act in procurement. And that's what you raised as well in your earlier evidence, that there were significant issues relating to procurement. And if you take just one example, the diesel purchases, which seems to have been closed with secrecy - where they indicate significant breaches of the Public Finance Management Act as well as, page 97: "A potential wastage due to not arranging discounts with ad hoc suppliers, which may be in the order of 200 million rand over the past 2 years." Now that is significant and it does raise a lot of questions. And it also mentions in its reports: "The diesel costs may have been a result of Eskom having to mitigate load shedding but it does not make commercial sense to not seek to renegotiate the legacy contracts of diesel. And it is also concerning that 30 months can pass without a meaningful approach to drive down the cost of ad-hoc diesel supplies." We know diesel was a big issue. And it says: "Taken together with the proliferation of red flags over the bona fides of the diesel procurement process, Eskom's management of this expenditure requires closer scrutiny." We now know that nothing was done with that report under the subsequent board and then it was, in fact, their next chairman, and it will be good for him to explain why he sat on that report. And when it did eventually come out, a lot of the issues came out. But I think I just wanted to put that part on record and that it appears that that was the enquiry that was then instituted. What I'd like to just quickly with you in the limited time, I'd like to just raise the issue of your involvement and your knowledge of the Glencore-Oakbay purchase of Opium Mines and that Tegeta issue. Because we know in July already of 2013, Glencore issued their hardship clause on their Opium mine and then price negotiations began. And they were still on-going with your previous CEO. Mr Matjila. And when you were appointed then in October of 2014, they seem to have been progressing well. Now the next CEO that is then appointed after you, Mr Brian Molefe, immediately stops what seem to have been, and evidence is that from the business rescue practitioner, that the negotiations with Eskom were on-going and were progressing well with a renegotiated price. But then, when Mr Molefe was appointed, he refused to sign a new agreement with Glencore, which forced Opium into business rescue and that was in May of 2015, which was shortly...you were there until March 2015. What was your role as CEO in overseeing

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that process of the Opium negotiations on price and were you satisfied with the progress that had been made?

[01h55:16]

**Tshediso Matona** – Yes, I did deal with that matter and at the time I dealt with it, already the negotiations had been underway between Glencore and Eskom. So to a large extent, I was only just familiarising myself with the issues at the time. It was a complex matter. So I had given an audience to the Glencore executives who were responsible and obviously they were lobbying. Obviously they were lobbying! The Eskom negotiators on the other hand felt that they were willing to consider at different price, it was just a matter of where that threshold should be that would deliver a win-win. So I was quite eager for a solution to be found because what Glencore was saying to us at the time that: “Well if you can't find joy, you know, or an outcome, you know, that is reasonable,” they would have to shut down and that would obviously affect, you know, security of supply, you know, to that...the plant...I think it was Hendrina, the station that they supplied. So it was in our interests that a solution be found but a solution that was not at the expense of Eskom. So the Eskom negotiators felt that Glencore wanted Eskom to pay a disproportionate amount of the risk and the pain that was necessitated by the circumstances in which Glencore found themselves. I left the matter in that space. There was not...no conclusion yet by the time I left.

**Honourable Swart** - Were you surprised when you subsequently heard of the steps that Mr Molefe took, as your successor, to immediately cut-off all negotiations with Opium, with Glencore, impose a penalty and put other pressure that we now have evidence of, which you might not have had? Were you quite surprised about that and what do you think was the motivation for that?

**Tshediso Matona** - I couldn't speculate about motivation. Certainly, and of course, you know, what I do know is what I read in the newspapers. I do recognise, however, that it was a shift. It was a shift in terms of approach from where I left the matter and what my successor actually, eventually, you know...the posture and the direction in which he managed the issue. Clearly there was a significant shift. The reasoning for it, what information was before him that led him in that direction, I couldn't quite tell and I couldn't pre-judge.

**Honourable Swart** - Have you been following in the media the subsequent developments around the Tegeta and the purchase of Opium where we've heard of the evidence of the business rescue practitioner, who indicated that had they been offered those same terms at the beginning, as the business rescue practitioner, with a reduced penalty - 2 billion penalty down to 500, with being able to sell coal not to Hendrina, but to Arnot, which was the export coal at a significant increased price, that that would have resolved the issue from the word go. And that was that the negotiation and the resulting deal with Tegeta, which we know is Oakbay, which we know is Gupta-related. Would...is that...was that a surprise to you?

[01h59:46]

**Tshediso Matona** - I followed all of those...I mean I followed the story. I followed the story in the Public Protector's report and I've been following all of those...all of those things. As I said, in relation to where I left the matter and what subsequently happened, clearly there's significant shift. And, on the face of it, I...and without actually delving into the details of this - I did not know what information was in front of my successor in adopting the position that he did. I couldn't, you know, and it seems to me that it's a matter that requires probing. I can hear what you're saying about, you know, what the rescue practitioner said, you know. It seems to tie-in with where the matter was when I left it, because we were negotiating for a price. A price...a win-win price for Eskom and for Glencore.

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**Honourable Swart** - So you've read the Public Protector's report and only a small part of that has been taken on review relating to the Presidential powers. The factual findings have not been taken on review by Eskom or anyone else! And the Public Protector found that the board substantially benefited the Tegeta Mines in this whole process - that the whole process was to benefit Tegeta Mines. Would you have any reason to disagree with that finding?

**Tshediso Matona** - No. I mean, it is what it is. It is in the...until... [Overtalk]

**Honourable Swart** - [Overtalk] ...it's taken on review...

**Tshediso Matona** - ...Yes unless somebody comes with a different version of events [Overtalk]...

**Honourable Swart** - [Overtalk]... Correct.... [Overtalk]... sorry to interrupt - our time is limited. But the more significant issue also found serious breaches of the Public Finance Management Act in this whole process as well. And you've already alluded to issues surrounding that as well. So I'm sure you'd agree that this is a matter that should be dealt with urgently and one can't necessarily wait for a Commission of Enquiry. If there are findings of breaches of the Public Finance Management Act, then surely criminal investigation should be taking place at this stage or at the time when that report, a year ago was forwarded to both the Hawks and the NPA, in terms of the Public Protector's Act. And a year later we see no action in that regard. Is that a concern to you?

[02h02:24]

**Tshediso Matona** - Look...obviously any misdemeanour or allegations of the sort that we have seen, deserve action. They deserve to be taken up. I'm still hopeful that we will get to that point as it were. But you're right, I mean you know...I could not as a practitioner of governance accept that misdemeanour, or allegations of that nature can simply just, you know, be circulated in the way that they are without any consequence. So hopefully there will be consequence.

**Honourable Swart** - One last small question and that is the meeting that Minister Zwane participated in in Switzerland. Now your experience as a Director General - would you find that extraordinary for a Minister to go and visit and negotiate coal mining contracts overseas? Would that be something that would be against the norm of a Cabinet Minister engaging in that practice?

**Tshediso Matona** - I wouldn't necessarily say so. And this is not a comment on the merits and the facts as they pertain to that particular instance, because I think what really matters is what has gone down in that instance. But Ministers interact with all kinds of stakeholders. So Ministers, when they travel, they'll interact with business people, they'll interact with government, their counterparts. So the fact that a Minister has met a particular company, in and of itself, is not an issue. The issue is - what was that meeting about? And I have always taken that issue to be really about what was that meeting about?

[02:04:30]

**Honourable Swart** - [Overtalk]... Sure and if the prima facie evidence is that it is about rationalizing the sale of Glencore's Optimum to Tegeta then it could be a concern obviously?

**Tshediso Matona** - I noticed that it has been...I noticed that it has been flagged as a concern. I don't think I'm in a position to judge without full access to the facts.

**Honourable Swart** - [Overtalk]... Okay. Thank you very much Chair. Thank you.



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**Ms L Mnganga-Gcabashe** - [O -mike]... Honourable Marais.

**Honourable Marais** - Thank you Chair. I see we running out of time but I will do a very short thank you very much. I just want to do a straight question on Mr Matona and ask you were you at any stage under pressure to approve decisions that you feel uncomfortable as from the board's side?

**Tshediso Matona** – Yes, I've indicated that there was an instance in which the situation had been made for me to retain Collins Matjila in the company and I refused. I refused that situation.

**Honourable Marais** - Is that the only one that you can recall or was there a second one?

[02h05:49]

**Tshediso Matona** - I...no...that's the only one. That's the only one I can recall.

**Honourable Marais** - Do you at any stage in your time as running the leadership of Eskom take any instructions from a third party?

**Tshediso Matona** - No.

**Honourable Marais** - What was your relationship with the Minister itself?

**Tshediso Matona** - The Minister of Public Enterprises?

**Honourable Marais** - Yes.

**Tshediso Matona** - Oh yes I overlapped with the Minister for a few months, so she was my Minister. So I had a relationship with her.

**Honourable Marais** - [Overtalk]... No... But what was...Was it fine, did you have any trouble with the Minister, or did you get on well?

[02h06:35]

**Tshediso Matona** - Ja I got on well with Minister.

**Honourable Marais** - And the chairman of the board?

**Tshediso Matona** - I got on well with Zola Tsotsi...if you're talking about Zola Tsotsi?

**Honourable Marais** - Yes.

**Tshediso Matona** - Yes. I got on well with Zola Tsotsi.

**Honourable Marais** - The most serious thing always with being a CEO and running such a large company, is the issue of tenders and procurement. That is very contentious. Did you in your period running as the CEO feel that you being pressurised in any direction, a certain direction when it comes to tenders?

**Tshediso Matona** - Fortunately in the five months that I was there I did not have to deal with any specific procurement. The procurements that were underway had already been started by the time I arrived there. And if anything they were...they were reaching closure so to speak. I have of course referred to what I saw as contestations and in-ghing about those tenders. So I did not have to deal with any procurement in my personal capacity as the...as the CEO of the company.



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**Honourable Marais** - Thank you.

**Ms L Mnganga-Gcabashe** - You're welcome. Honourable Rawula it's your turn.

[02h08:00]

**Honourable Rawula** - Thanks Chair. [O -mike] Thank you Chair. Chair let me also appreciate Mr Matona for coming to the enquiry. One...standing from a distance, Mr Matoma you've indicated that you were Director General of Public Enterprise. And one will think that Eskom is an entity like other entities that falls under Public Enterprise. Now my curiosity will be like I'm saying that I could be saying this from standing from a distance will be that of being a Director General of the Public Enterprise, is far more senior than any leadership in the entity. I want to check what has been their interest and also if in your response you can also indicate from the time you were the Director General up to the time you were the CEO, what has been your experience on the interaction with the Gupta family?

**Tshediso Matona** - I have had no interactions with the Gupta family that had anything to do with my position as a Director General. So I can't...unless you are referring to anything specific, I can't help you there. But I've had no dealings with the Guptas in relation to my position as a Director General.

**Honourable Rawula** - I'm saying being the Director-General, now your interest going to see...to be the CEO of Eskom as an entity - what could have informed that interests? Because one assumes that from a distance, being Director General, you are far more senior than the entity leadership?

**Tshediso Matona** - So the opportunity to become the CEO of Eskom was a purely career issue on my part. You know I have...I have spent all my working life in the public sector. Needless to say I have a history of political activism so I'm very committed to our country; I'm very committed to the development and progress of our country. I've had a fairly successful, enriching career in departments that I have served under. The DTI gave me enormous exposure to our economy, to business, to what we should do, you know, what solutions we should deploy for various problems – unemployment, growth. And so going to Eskom was an extension of that career. I understood the company, I understood the challenges of the company. I thought that I could actually make a difference, I could actually assist with dealing with the issues, the challenges that confronted Eskom. I was, as it turns out, approached by the company that Eskom had appointed to run this, you know, this recruitment. I thought about it. I went through the motions. I applied, I was interviewed, I was...and of course I was appointed. And that was the process that I've described, you know, all the way to cabinet. I must add, you know, that my tenure as Director General in all the departments, has been associated with clean audits. I have had clean audits in every one of the years that I've been a Director General! And I'm very proud of that! So I'm a stickler when it comes to matters of governance. But that's really the career, you know, to go into another area, tackle a new challenge and make a difference. That's really what my motivation was in ending up at Eskom.

[02h13:13]

**Honourable Rawula** - Now during the enquiry, one of the revelations that has come through is that there was a lot of monies that were used by Eskom through consultancies, which were management consulting. I think one of those entities... one of those companies was Trillian, which was...which was subcontracted for management services, basically as a consultant. And I'm noting that on your appointment one of the discoveries that you have pointed out, were issues of leadership instability. And if you look at page 6, you are saying that you had your meeting where, to stabilize the executives. Now I want to check if that meeting

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where you were looking at stabilizing the executives, has that yielded any fruits and those fruits, what was their relation in terms of the fact that Eskom has been contracting Trillian Management Services? Because one assumes that if you've got competent management, you'll then relieve the company from the consultant services of...in particular in management. Now I just want to check whether the instability that you are referring to in terms of leadership, was it the source of the consultants that we had and as a result of your arrival has that then yielded any results, which then relieve Eskom from the consultancies?

[02h14:52]

**Tshediso Matona** - So I think there are two issues in relation to your question. I think the issue of management and leadership stability as an issue, I think it was something that I had to deal with, something that I needed to do. By the time I arrived at Eskom, a few people are acting in their positions. So I had to actually confirm them in their positions. I'm thinking, for example, of your Dan Marokane, Matshello Koko was acting as well in that...in his position, and maybe one or two others. So there had to be stability of management and so that's an issue on its own, you know, that we can engage with. Any organisation that...going, dealing with the challenges that Eskom was dealing with, needed to have a stable leadership and stable management. The issue of consultants is a separate issue, in that, yes, one of the things I found was that Eskom had...within it actually embedded consultants – what I call embedded consultants. Just about every one of the major consultancies were at Eskom. And they were each producing report after report after report, which is why I said earlier on that there was no shortage of, you know, information about the problems of the company. The issue of curtailing consultants and consultant spend had come up. So part of the financial turnaround of the company involved cost-cutting, identifying areas where to cut costs. And the consultants...the use of consultants was one such area. So there had already in fact been decisions and that they were starting to be implemented at the time when I was there. Obviously, as you know, the engagement of Trillian, are matters that happened after I'd left, so I can't quite comment on the rationale and the wisdom of those appointments.

**Honourable Rawula** - Chair I'm trying to couple my question to save time. My next question would be - I see under your suspension where you indicate the events that led to...I just want to check, because there's inconsistency in terms of the calling of meetings. There's one meeting that has been called by the Board, I think starting from 26th even up to the 29th one. And then there's one meeting where you were requested...given a notice to convene the meeting. I just want to check what...who is legitimately charged to convene meeting. The second other question that I want to ask in relation to that - the meeting was to deal, amongst other issues, which was additionally, which was the resolution that relates to the enquiry, you see, which you were not privy to. Did you find...did you perhaps later find that the terms of reference of the enquiry? I hear now from the question that it was to deal with Denton. But I just want to check at what stage did you then find out the terms of reference for the enquiry?

[02h19:00]

**Tshediso Matona** - So the meeting that was called Sunday evening, I think it was through the Company Secretary. So usually board meetings are called by the company secretary. The company secretary's the one who will send out notices. So there was this notice that I picked up Sunday evening of that week, and attached to it was some kind of a resolution, a proposed resolution talking about an enquiry. So the idea of an enquiry emerged at that time. So the meeting was...was a fairly urgent meeting for the next morning. In that meeting of the next morning, the chairperson, Zola Tsotsi, had a hard time explaining the rationale for that enquiry. And I think eventually...eventually he made reference to the Minister, saying that this was

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some...the Minister supported this. To which other board members said: "Well in that case then the Minister must come and address us directly!" And that's how the meeting concluded. A day or so passes and then another meeting is called, and it is in that meeting that the Minister arrived. And of course the events that I have subsequently spoken to and that are in my affidavit, the affidavit I led in my action against Eskom.

**Honourable Rawula** - Now that considering that the Board had a difficulty with the meeting and the meeting only proceeded after the meeting...the Minister attended. So the meeting could only take the decision on the presence of the Minister. Now from your own experience as a DG and as a person that has been a practitioner, would you consider that the Minister had acted arbitrary or has she abused her own power with the intention to push the Gupta-linked people? Or what has been then your view after you've realised that, the Minister despite the resistance of the Board, but the Minister had insisted that the meeting must sit and the enquiry must be passed? Would you consider that the Minister had abused her power or acted arbitrary to favour the people that he had interest with?

[02h22:01]

**Tshediso Matona** - No there was...There was nothing unusual in the Minister requesting a meeting with the Board or the Minister being part of a board meeting. In an instance where the Minister wants to convey a particular message to the Board, the Minister would duly call a meeting of the board to convey the particular message. So there was nothing unusual about...at least as far as I was concerned about the Minister calling a board...or attending a board meeting as such. What was actually discussed in that meeting, the...and what the Minister said, what were the nature of those deliberations of that meeting, I'm not privy to, because remember that I was...I had been asked to recuse myself. So I don't know what the Minister actually said to the Board. I discovered that the Minister did leave the meeting at some point in the course of the morning, so I can't quite tell how long the Minister was there for and what was actually the substance of the discussions between the Minister and the Board.

**Honourable Rawula** - My last question Chair. It's my last one. Mr Tsotsi you have indicated during the... [Laughter on -mike] Yoh...sorry! Mr Matoma... yoh my apologies. You have indicated that there was no wrongdoing proven on your side. So that means your labour rights were infringed, because you've taken the matter to Labour Court and the Labour Court then referred the matter to CCMA just to establish the merits. And during that space of time Eskom then offered a hand-shake. Now what would you attribute the pressure to, to a point that even your own labour rights could be contravened? What would you attribute...because it means you were an obstruction to whatever project that was sought to be achieved? So would you then attribute such a pressure to the influence of outside forces such as the Guptas, where you had to even have your rights being contravened just because of you were obstructing whatever project that the Minister and whoever that she was linked with, which in the main, which is proven now, that it was the Guptas. What would you attribute your removal, even to a point of being given money just to walk out even though you have not done any wrongdoing? What has been your own view?

[02h25:06]

**Tshediso Matona** - I couldn't without any factual information blame it upon the Guptas and say, you know, it is the Guptas. Obviously the name of the Guptas in relation to Eskom is out there. It's possible that that was the source of all of those things that happened. I can't be sure. I am equally interested in what this enquiry will establish as anybody else. What I can point to is matters of, if you like inconsistency or curious...curious events, such as, you know, the fact that the new board arrives and the first order of business of the board is to suspend me and 3 other executives! That much I'm aware of! I have not been able to interrogate or



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ques on any of those board members as to exactly where this came from. You will recall that the chairperson of the Board at the time, who you unfortunately mistaken me for, and I forgive you (laughter on -mike), Mr Tsotsi, made pronouncements - made pronouncements in the media. So a lot of these things are things, which I would know in the media. I read in the media, you know. Why he did that and I'm sure you're aware of that, I'm sure the Committee is aware of that? So I would hesitate to make any speculation whatsoever about exactly what the motives, it might have been. Thank you.

**Ms L Mnganga-Gcabashe** - You're welcome. Honourable Shivambu, it's your turn now.

[02h27:25]

**Honourable Shivambu** - Thank you very much Chair. I think before I come to the questions we should as a committee resolve to communicate to the people whose names are being mentioned here that a time will come for them to come and give their side of the story, I think that is the principal agreement that we had when we started with the inquiry. Cause I noticed in some of the newspaper reports that Brian Molefe, Matshela Koko are saying this process is not fair because they're being mentioned and all of those things, and they do not have an opportunity to present their side of the story. I think we should seek category as the committee that a time will come for them to come and explain their side of the story in terms of the issues that arise here. We are not that stupid as the committee to just write reports without giving them an opportunity to present their side of the story. I think that is one of the things we must clarify up front, so that people drive an unnecessary, wasteful public campaign against this process that we are engaged in now. Now you are appointed in 2014 as the GCEO of Eskom. And then in December a new board is appointed by Minister Lynne Brown. And you said earlier that the manner in which the Department of Public Enterprises appoint board members was that you've got a database of those people who get appointed into boards. Are you aware if any of those new board members that were appointed by Mr Brown were in the database of the Department of Public Enterprises?

[02h29:18]

**Mr Tshediso Matona** - No, I'm not aware.

**Honourable Shivambu** - I think that as part of this process Chair we should go and check if the Department of Public Enterprises had the names of the people who were appointed in December. And in which meeting suspended you; is the first meeting of the new board that they suspended you upon their arrival, or they had other engagements before they suspended you?

**Mr Tshediso Matona** - Yes, so they were going through interactions largely so. So they were appointed December. January, February they were getting inducted into the business. They hadn't necessarily held a full board...they hadn't really held a full board meeting, a normal board meeting except for the one that... the two close meetings that I referred to in my affidavit. Those in a sense are the first formal board meetings you could argue.

**Honourable Shivambu** - So the process is that people get appointed in December and when they're being inducted in terms of what is Eskom, where does it come from, what are the challenges, then they decide to suspend you and other executives in Eskom, is that what happened?

**Mr Tshediso Matona** - Yes.



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**Honourable Shivambu** - And then after that then they start the process, what did the letter that suspended do you say? What was the reason, like who signed it, and what did it say you're suspended for?

**Mr Tshediso Matona** - I actually have a copy of the letter, but it referred to the need for an enquiry and the fact that whilst the enquiry is underway... so it says that I was advised on the nature and extent of the enquiry and that I was afforded an opportunity to make representations to report subcommittee, which I obviously contested, I mean, it was an ambush so to speak. So I couldn't have made reasonable representations for the board to eventually come to a conclusion that justified in suspending me. And that in view of the serious nature of the concerns, the challenges facing the company, the company regrets to inform you that it is decided to suspend me on full pay without any loss of benefits to be calculated from today pending the completion of the enquiry. In order for the investigation to proceed, as expeditiously as possible it would not be appropriate for you to remain at work while such an investigation is in place. You will be advised of the outcome of the enquiry as soon as possible. So it was all about this enquiry. Yup.

[02h32:41]

**Honourable Shivambu** - That's fine. And then you said there were in fights with regards to procurement in boards. Which board meetings had these in fights, and you specifically said that they were in fights around procurement on AREVA, on T-Systems, and The New Age breakfast. What was the nature of the fight, who was saying what there, what was the bone of contention, what were the issues that were being raised in the process of fighting around that particular procurement?

**Mr Tshediso Matona** - So there is a board tender committee to which the CEO is not a member. So that was an arrangement, you know, the Eskom governance structures are such that there is a body at executive level where senior executives they consult the procurement. And so they will deal with technical...all technical issues with regard to procurement. Then they feed into a board tender committee, I think that's what it's called. So these matters were already at that board tender committee level and the issues in contestations, in debate were the merits upon which one or the other recommendation or award, or who should be awarded tender, those are the issues, you know, in the case of T- Systems, you know, whether it should be T-Systems or somebody else, in the case of the AREVA disconnection, the nuclear issue, whether it should be AREVA or Wesinghouse. So typically those would be the sort of issues, but I, you know, I can't be completely precise because I wasn't sitting in those things. But, you know, I could pick up, you know, via some of the officials who were present in those meetings, in those debates that those are the issues. And so some of them were getting drawn out, so there was no...there could never be any confusion, so those processes they were just going on and on because of this, these sort of differences and in fights within the board.

**Honourable Shivambu** - Did you confirm earlier that the letter was signed by Mr Zola Tsotsi

**Mr Tshediso Matona** - Yes.

**Honourable Shivambu** - Because he ultimately left and then Mr Ben Ngubane came into Eskom as Chair. And the dominant narrative which he had always presented when he came to this committee was that the load shedding which has started in November 2014 was ended by Brian Molefe. Is that the case, like you think that Brian Molefe, if you had remained there yourself as Eskom GCEO, you going to fail to stabilise Eskom and end the load shedding.

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**Mr Tshediso Matona** - If I never thought that I couldn't achieve the objective of ending load shedding, I would have left Eskom on my own. I'm not the one to take on impossible jobs. It was a difficult job, it was challenging, but the solutions were there. We could see the light as to where we should be going in resolving that issue. And we were making gains, we were making steady gains by the time I left by the way, we had commissioned the first unit of Medupi Power Station. It had been commissioned because we had applied pressure to the contractors that were building that station to say we are no longer going to entertain any delays whatsoever. And so we put them really on terms, and so we were able to deliver that. So I'm confident that I would have turned around the situation at Eskom, it was only a matter of time. Unfortunately, I was not given that opportunity.

[02h37:34]

**Honourable Shivambu** - So this narrative that load shedding could only be ended by Brian Molefe is nonsense. It's...is that the case because every time we saw was that this Golden Boy of the Guptas who's going to stop...stabilise Eskom. So you're saying that you could have done it even if there was no Brian Molefe there?

**Mr Tshediso Matona** - I repeat myself; I was confident that I would overcome that problem. Remember, Brian Molefe, and I don't want to take anything away from Brian, you know, Brian and I are colleagues, we all grew up in the public service, we joined more or less at the same time, so I...someone that I do and I have regard to; but he could not have done that alone. He arrived there, found a team, found plans, found the team fighting this war and as sure, you know, he achieved the objective. So I don't think Brian would himself claim to have any exceptional capabilities, you know. Someone told me actually Brian acknowledged the work that had been done before he arrived. So there's no issue there. And I don't want this to come on the wrong way, I'm not...this is not a competition between myself and Brian, I think he arrived at his....[overtaking inaudible]...he arrived at a particular point in time and dealt with the issue that he dealt with at that point in time. I was there during my own time and I dealt with the issues that I dealt with in my time and I don't think that there is any basis for comparison.

**Honourable Shivambu** - And then you said that your reasons for departure was because you did not want to be bankrupted by huge legal costs fighting Eskom people who had that mind to get rid of you and everything else there. Are you able to disclose the amount of the settlement that you had with Eskom?

**Mr Tshediso Matona** - It was never a secret, as a matter of fact because it was actually not a golden handshake; it was a handshake, but there was no gold in it. I got equivalent of 12 months of my salary, so just about a year. I tried to negotiate for better and sometimes when I saw some of the numbers coming after I'd left, I feel like maybe I should have fought a little bit harder for more.

[02h40:51]

**Honourable Shivambu** - I saw a news report that says that Mr Jacob Zuma later on apologised to you, is that the case, did he apologize what did he say happened and what were the circumstances in terms of the whole developments around Eskom?

**Mr Tshediso Matona** - That's what a newspaper wrote that the President apologised, that's not actually quite factual. So the President didn't call me and say 'sorry, I'm sorry about what... about what happened'. And I'm at a bit of a difficulty disclosing the contents of a meeting of that nature as it were. So if you indulge me, I will not be able to do so. While I can say is that I have been part of this government, I have...the President has

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been my leader, my manager. So I interact with the President, I interact with Ministers, and from me to me I do have meetings with the President, I do have meetings with Ministers, here is Minister Gordon here he knows we have had meetings as part of the normal functioning of government. So at the time I was at home and I think it was about what career options are there for me. So I just want to say that having served in this government for a long time almost from the beginning it was difficult, difficult to fight against my own government. Even as painful as it was what had happened, but the idea of me fighting an institution that I have helped to build, you know. So I've invested a lot in this government in terms of where we've come from up to this point, and this government has invested a lot in me and so it was about how we leverage on that, really.

[02h43:28]

**Honourable Shivambu** - But now in hindsight, last question; don't you think that it would have been much more noble to fight for proper governance and stability of Eskom. If you look back at what has happened to Eskom now, if my numbers are not wrong, I think it has a guaranteed debt of R350 billion, which if the lenders withdraw will collapse the enterprise. There is a lot of irregularities, the State at some stage we intervened, I think about 29 billion. The State had to dispose of its stake in Vodacom in order to bail out Eskom. There's lots of wrong things happening in Eskom, don't you think in hindsight that it would have been noble to fight for governance like for against those who were flouting governance principles and rules. In protection of the same thing that you're saying you are patriotic to, don't you think that it would have been much more noble to fight against what I think what will literally characterize as one of the manifestations of 'State Capture'.

**Mr Tshediso Matona** - Of course I was always going to fight, the nature of the fight obviously didn't have to be necessarily through the courts. I believe that for as long as I live in this country and for as long as it turns out I continue to be a public servant I will work for the good of this country and overcoming some of these challenges. I did not know at the time that I will end up in a position of influence such as the one I have right now as secretary of planning, where I'm able to deal with the same issues from a different vantage point; from a point of saying how do we as a country reset, how do we press the reset button in relation to some of the things that we're reading about. So there will...there is always an opportunity that will present itself for a good person, for a revolutionary. There will always be another opportunity to fight. So as they say sometimes, you know, leave it for tomorrow, retreat in order to come back tomorrow when you are a little bit stronger; because whilst I was alone it felt a bit lonely at the time, perhaps now is no longer the case, perhaps now is no longer the case. Perhaps the range of interests and the range of forces that can actually make a difference is now there, so I think we have the real possibility to turn things around, to turn the corner.

[02h47:08]

**Honourable Shivambu** - No thank you very much Chair and Mr Matona. Just quickly as a parting shot is that ... [overtalking unintelligible]

**Ms L Mnganga-Gcabashe** -...Your last question.

**Honourable Shivambu** - ...most people who fold their arms, particularly freedom fighters who fold their arms, it has been proven particularly from liberation movements; things degenerate, it starts one by one and before you know it the whole country would have degenerated because you've got that hope in tomorrow, that tomorrow will be better than today. It's not always the case. Sometimes an opportunity may be deprived



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forever for you to go back and when you look back the country will be gone completely. That is one of the things I'm sure in a different discussion we'll have.

**Ms L Mnganga-Gcabashe** - Thank you, Honourable Gungubele it's your turn.

**Honourable Gungubele** - Thank you, thank you Chair. Mr Matona, there are few questions I'm going to raise, but I just want to pose this question. The challenges or the trends that Eskom was degenerating, at what point did you observe them, or if you ever observed them? If you ever observed them, because there's a point where you were a DG, Eskom being one of the entities, like the other Member said, later you got closer to Eskom as CEO. The question is, is there a time where you generally looked at Eskom and saw that things were not moving in the right direction? If you did observe that, at what time; is the time when you were a DG or when you were CEO?

**Mr Tshediso Matona** - I think it was a bit when I was a DG.

[02h49:00]

**Honourable Gungubele** - [Inaudible]... something with regard to that period.

**Mr Tshediso Matona** - So, you know, we occasionally in that position dealt with instances where, you know, executives of state-owned companies would engage in practices that I don't think anybody would be proud of, which speak to responsibility, the extent to which they exercise the responsibility for due care of assets that they had responsibility over. So, in a general sense... [Interrupted]

**Honourable Gungubele** - So what I want you to because you were primarily a technical employee rather than a political one...

**Mr Tshediso Matona** - Ya.

**Honourable Gungubele** - ...there must be specific if you observe, your eyes are not like mine. You know as a politician's it's enough for me to say 'jobs are not being created', but for you it's bigger than that in terms of detail. At a point where you observed that things were moving in the right direction, if you can just pick up one specific thing which made you, in concrete terms, which made you to think like that.

**Mr Tshediso Matona** - So, you know, it's a few isolated things, you know. One day we wake up with a big Sunday Times story about money's that had been spent on a Christmas Party, like lavish, you know, expenditure and look at it and you say you know this we can't be proud of this. So it starts to speak... [Interrupted]

**Honourable Gungubele** - Sorry, sorry in terms of, forgive for appearing to be rude. Those are observations from newspapers and so on, I'm moving from a point that says as a DG who had a technical responsibility all those people reporting to you internally from your direct responsibility as a DG, what is it that you observed, if there was no Sunday newspaper?

**Mr Tshediso Matona** - Let me just say that the governance space turned out to be a bit murky so we...so we...it was only when I got... [Interrupted]

[02h51:22]

**Honourable Gungubele** - Can you be specific there. Let me give you an example.



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**Mr Tshediso Matona** - Ya, ya.

**Honourable Gungubele** - If you're a chief director sometimes there are directors reporting to you. There are various types of report based on monitoring, your MNEs, based on your KPIs that you've put in place, based on regular reports, you know governance imperatives –regular... particular regular reports being given and being of particular quality and so on. Surely in that space, that is where your primary responsibility was and I'm saying for you to be convinced that things are moving in the right direction, Sunday Times can give a wrong report, I just want you to speak like someone who was a technical head, who said, I was there I looked at the technicalities of the environment and at that point that development gave me an idea as I was looking at the reports being given to me; one specific example.

**Mr Tshediso Matona** - So typically for example, something which starts to give you a sense is irregularly, irregular expenditure or what the Auditor-General...

**Honourable Gungubele** - [inaudible] ... where it was happening?

**Mr Tshediso Matona** - In Eskom, in fact all state-owned companies.

**Honourable Gungubele** - Which year?

[02h52:42]

**Mr Tshediso Matona** - Over the years, over the years. Every year watch that number of irregular expenditure, it fluctuates. And so some times when you go into it you actually find that it's because of lapses in regard to procurement in the governance of procurement. So from the shareholder oversight point of view that would be the thing that really is worrisome. But as I said when I went to Eskom the one thing that was burning at the time was this TNA thing that had, you know, ripped that board apart, they were divided over the issue, arguing over it. An inquiry was done; I think it was SNG, which established that actually there was...  
[Interrupted]

**Honourable Gungubele** - What were the results of the inquiry?

**Mr Tshediso Matona** - So the board...that I was part of that board now so we were dealing with this thing and our view was that there has to be consequences, and so we were actually in the process of engaging legal assist...legal advice as to what are the options that the board has in terms of corrective action in respect of that issue. There was also of course the IRBA matter that was there because the auditors had also picked it up as an issue.

[02h54:12]

**Honourable Gungubele** - You know I am trying to take this line Makoko, yoh... Makoko now! You were Tsotsi now I'm calling you Koko, that's a mistake. You know I'm raising these issues, there are guys who are still coming here, who some were directly responsible who keep on saying; "What we are doing here is nonsense, it doesn't make sense." Now it's important that you were there so that we, I have a sense that as a DG that time, as a technical head that time, you did play your role in more concrete terms. Now, the other question I have is... it may sound like an abstract question, actually it's linked I think to one of Honourable Shivambu's. What tough, during your era as a CEO what tough choices were put before you?

**Mr Tshediso Matona** - Sorry, as a CEO what tough choices?

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**Honourable Gungubele** - Honourable Shivambu was asking a question; wasn't there a fight which you were supposed to put? You answered it in a particular way. And I'm saying now in that very vein, what, facing those challenges as a CEO, what tough choices did it put before you, in the interest of this country.

**Mr Tshediso Matona** - Sorry, I'm not sure if I understand the question, so I'm going to respectfully ask you to...

**Honourable Gungubele** - Did you either fight or submit? I'm asking in that context. In your situation, were you put in that situation where you had to make these tough choices?

**Mr Tshediso Matona** - In the, in the aftermath of my suspension, if that's you were talking about? Absolutely, absolutely test that. Sorry, I think you want to explain your question because I...

**Honourable Gungubele** - Let's leave that question. Were you ever approached at some stage by the Minister that Matona to say to you; a certain lady who is at head of finance, Tsholofelo Molefe, is refusing to give businesses to Gupta linked companies. Where you ever approached for that purpose?

**Mr Tshediso Matona** - No.

[02h56:43]

**Honourable Gungubele** - I'm deliberately interrogating your, your managerial responsibilities, your managerial imperatives because in 2010 you were already a DG of Public Enterprises. Am I correct?

**Mr Tshediso Matona** - Yes.

**Honourable Gungubele** - During that period, Gupta would have approached Brian Dames with regard to the Lethabo, supplying coal to the Lethabo power station, and of course Lethabo power station was already secure, had a secured contract of long-term and [unintelligible] prices. Were you aware of that?

**Mr Tshediso Matona** - No, I don't know if that's, I don't know if that's the one that...I knew that by the time I arrived at Eskom there was some negotiation with a...for a coal supply by a company linked to the Gupta's that was in the...

**Honourable Gungubele** - Which company was that?

**Mr Tshediso Matona** - I can't remember, I can't remember but all I know is that there were, there were price issues, there were quality issues, there were compliance issues that were making that difficult for Eskom at the time.

**Honourable Gungubele** - Let me come quickly to say; were you aware of... the approach by Guptas to supply coal [unintelligible] to Eskom, which threatened the nature of contracts which were in existence at that time, just generally were you aware of that?

**Mr Tshediso Matona** - I was aware that there was a contract that was under negotiation. I was not aware what the implication of that contract would have been for other suppliers. So I, you know, again it is a... process and a negotiation that I was not necessarily directly part of, part of.

[02h58:50]

**Honourable Gungubele** - What was your date of resignation in March? Of your departure in March?

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**Mr Tshediso Matona** - The... I think it is the 15<sup>th</sup>? I may be wrong 11... 11, I'll tell you now... Oh actually it's in the letter... the 11<sup>th</sup> of March.

**Honourable Gungubele** - There is a record of signing of contract with Brakfontein Coal Mine by Gupta to supply coal to Eskom in March. Surely if it was signed in March, the negotiation must have been taken place for some time? For instance those negotiations would have started in May 2014, where your technical guys would have actually dismissed in terms of unsuitability. Again 2014 September, again your guys would have, your technical guys would have dismissed because of non-compliance with environment and so on. And you get appointed around October and finally this thing gets signed in March. It means it took place also during your CEO period. Do you want to share anything you know about it with us? As a CEO now.

**Mr Tshediso Matona** - Yes, so, so the, the executive who was engaged with that negotiation, technology commercial and technology actually turned out to be Matshela Koko. So he was... [Overtalking]

**Honourable Gungubele** - ... Reporting to you?

**Mr Tshediso Matona** - ... He was reporting to me. So he, because it had been, it had been going on so he kept me in the loop, he kept me in the loop about what was, what was going on and what were the issues. And as I've indicated there were, there were three issues; there was a price issue, there was a quality issue and there were compliance issues. And I and I said to him; "Well, if you can't fix those things, fix those things if you can. If you can't fix those things then there's no contract."

[03h01:14]

**Honourable Gungubele** - I'm aware that these negotiations post your departure, would have led immediately after, especially after the appointment of alleged Gupta linked board, those negotiations led to this this mine supplying 75000 tons per month, later 100 000, later 200 000, 200 000 tons per month, longer contract than other suppliers and at a higher price. Time, post the time you departed. There's a question I'm going to ask that's why I'm asking this.

**Mr Tshediso Matona** - I read about that.

**Honourable Gungubele** - You don't know whether that is truth or not?

**Mr Tshediso Matona** - No. it's what I've, what I've... [Overtalking]

**Honourable Gungubele** - But that's a fact now in terms of the [unintelligible] Oh. The point I'm asking is, you know why I'm asking this, is that from your responsibility as a principal manager for governance imperatives, was it not proper if a contract is negotiated in May? Your scientists say; "It's not suitable further in September." you were not there I know. Your scientists say; "It's not suitable." Natural there must be facts why they are saying that. At what point as a CEO were you supposed to say; 'stop this negotiations'? Because surely they will lead into this situation post your departure.

**Mr Tshediso Matona** - I don't think I had a sense of when that negotiation had been coming from. So I knew, I know it was ongoing at the time so I had no sense of where it was, you know, how far it goes back. But it was clear that it was not going to be possible because you, if the rules say 'you can only contract with mines that comply' and your technical requirements say that 'you can only use coal of a particular specification' and if the price is not right, then as I said, I was comfortable that there would be no deal unless those issues were addressed, and it was an ongoing negotiation so I wasn't party to the negotiation.

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[03h03:36]

**Honourable Gungubele** - The significant amount of monies involved. Don't you think they dictated your closeness to those contracts? So is that from risk management, you were able to deal with it before it leads to where it is now?

**Mr Tshediso Matona** - No I, I don't think so. I think eventually these things seep up at a board level. So... the thing about the structures that Eskom had put in place is that they, they removed the CEO from the coal phase of procurement negotiations. Because you are going to have your turn in the approval, at the right structure, at the right level which is at board level so you need not necessarily be involved with the processes. Let me say that that was the structure that existed there. In some ways in retrospect I'm happy that because I could I didn't have to arbitrate these procurements directly myself, but I had concern about being completely removed and not be, not necessarily having direct line-of-sight of these processes. And I was contemplating, you know, what is the best way of managing that, perhaps maybe changing that so that I have some, some roles. So other than from just getting updates about how each negotiation is going, I was not hands-on on those, on those... [Overtalking]

**Honourable Gungubele** - You know what, what worries me about your management. I'll be very difficult towards closure. Deliberately, not that I suspect you for anything. You see, I want to be convinced that you were attracted to this situation with your leadership because one in his naughty way of thinking will say; after this fight between yourself and the board, what led to your reappointment in government; where was this leniency and this considerate behaviour by government come from? I'm deliberating so that you can actually acquit yourself, if you so care. I'm saying to you the bailout came around February, am I correct?

[03h06:30]

**Mr Tshediso Matona** - Yes.

**Honourable Gungubele** - You were a CEO since October, the previous year? [Mr Matona nods his head in answer] Surely there are underlying factors which led to the bailout? And there is this negotiation of this major contract and each time your officials reached a view of unsuitability in May and September. There must have been a record? This is not an ordinary contract. I don't think, I'm not sure it's not unreasonable to expect that a CEO must have known this threat in terms of risk management?

**Mr Tshediso Matona** - Not as it related to this specific contract, not as it related to this specific negotiation. Sure, risk management is dealt with at board level. There is a, there is a structure in the board, I think the audit and risk committee of the board, that has got the responsibility to identify risks and again in that context some of these things surface not necessarily as direct negotiations. So, so the fact that I was not dealing with this matter in the context of a procurement process did not necessarily mean that I did not have a chance or there was no other opportunity to deal with it from a risk management point of view.

[03h07:55]

**Honourable Gungubele** - Do, do you believe that as a role you could have played during your time to prevent this from happening? I accept that you had to leave in March, but during your time look at the nature and the weight of these developments.

**Mr Tshediso Matona** - So to prevent what from happening specifically?



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**Honourable Gungubele** - [Off mike inaudible]... alarms on me, that's the point I want to make to you. Because this things happened during your CEO period and they led to what it is now; higher price than the previous suppliers; longer contract to the supplier than normally used to be done, you can go on all the advantages and even the volumes. And these nego a ons took place during your period and I'm saying don't you think in fairness there is you, your closer link with the detail could have led to you sounding an alarm?

**Mr Tshediso Matona** - Yes, certainly, I mean if I had been directly involved and had access to, to all of the informa on when it started, when these nego a ons started, what are the issues? You know, if I had, if I was closer at hand probably I would have put an end to them as it as it were. So what I, what I knew was that the nego a ons were s ll ongoing. And by the way this was one of several other nego a ons, so Eskom is constantly in nego a ons so, you know, there would be no upfront grounds why one would target a par cular nego a on. It is in the me that I was there I did not see that there was any need for me to intervene because it was clear; if it doesn't meet our price, it doesn't meet our quality, if it doesn't comply, it ain't happening.

**Honourable Gungubele** - My last ques on to close is that, yes it's my last... I'm saying I want to put this ques on to you, in what way is that, if I listen to your answers and you are repor ng to me either being a board or a Minister. You are saying, to expect you as my CEO to be the pass measure of this possible problem would be unfair and if you so agree, should I a ach this to systems that are poor? Or maybe to gaps in your management as a CEO?

[03h10:41]

**Mr Tshediso Matona** - Look, I was opera ng within a speci c ins tu onal framework that, which I found there and I ... [off mike question inaudible]... Say that again?

**Honourable Gungubele** - [Off mike question inaudible]...

**Mr Tshediso Matona** - No, it simply excluded the CEO from direct engagement arbitra on of procurement. And by the way, this applies to departments as well. DGs don't arbitrate directly; they allocate speci c func on to relevant people in accordance with the prescript as it were. Of course you take respon- you take accountability for the outcomes and you take accountability if things go wrong, no doubt about that. But you don't, you ain't sitting there arbitrating procurement as a CEO or a DG that, that has been my experience... [Overtalking]...

**Honourable Gungubele** - ... So at a, so at a CEO level... [Overtalking inaudible]... Oooh eish, there's this response.

[03h11:47]

**Ms L Mnganga-Gcabashe** - ... [Laughter] We are really pressed with time. Really, really... Thank you very much Members and thank you very much Mr Motana for... Matona thank you, thank you, thank you very much for a ording us this me to come before the por olio commi ee and we are very much apprecia ve of that and your contribu on that you have made in this commi ee surely is going to assist the commi ee in understanding the work, the workings of Eskom during your tenure. And once again thank you very much and have a safe journey. At this juncture Members we are pressed for me, we are going to be having our second session that we will be interac ng with Ms Johnson. I believe that she's around? Please ma'am, please come forward and take a seat. And....

07<sup>th</sup> November 2017 – Parliament RSA

**Honourable Gordhan** - ... Chair, while we're waiting for Ms Johnson can I?...

**Ms L Mnganga-Gcabashe** - ... Yes?

**Honourable Gordhan** - Can I suggested that arising from our interaction with Mr Matona that we, through the evidence leader, put Mr Tsotsi and Ms Klein on notice, number one. Number two, obtain the diesel contracts or copies thereof if need be at the outset subpoena them so our time is not wasted. Number three, the memos referred to by Mr Matona on board appointments I believe the Minister has been requested to give them to us, we don't have them. Can we subpoena those please, as well? And the Denton, and the Dentons Report as well. Thank you.

[O mike conversations inaudible]

**Ms L Mnganga-Gcabashe** - ... Noted, noted. I will deal with that. Are you ready ma'am? Or... Oh ok.

**Honourable Mazzone** - Chair.

**Honourable Member** - Chairperson.

**Honourable Mazzone** - Chair.

**Ms L Mnganga-Gcabashe** - I thought when we sum-up towards the end after the second interaction then we'll come back to those... Yes Honourable Mazzone?

[03h13:55]

**Honourable Mazzone** - Chair just so we have it on record, it must be the unredacted Dentons report because we have the redacted one which has 90% of the pages blanked out. So it must be the unredacted original Dentons report, please.

**Ms L Mnganga-Gcabashe** - I thought the Honourable Gordhan was agreeing with you at the end? Do you still want to?...

**Honourable Shivambu** - Just quickly in terms of the timing, I'm supposed to go to plenary now at 2. I'll go, for how long are we going to go with this presentation? And the whole question process? And everything else there?

**Ms L Mnganga-Gcabashe** - Yes we are, but I, we... we are supposed go to the house. But Members really I indicated earlier on that we are pressed with time, we have two interactions, we have two witnesses but Members took their own time and I did not want to subordinate them. But this time really we are going to be very strict. Thank you. I get an indication now-now Members you are delaying me further. I get an indication... [Overtalking inaudible]... Ok. Now I'm getting an indication that we can do this one within the hour. So we'll be able to finish, thank you. Can we proceed now?

**Honourable Shivambu** - No, that's fine. Then you'll accept my apology because I'm a chief whip I must prepare for a plenary so...

**Ms L Mnganga-Gcabashe** - No, that's fine.

[Overtalking inaudible]

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**Honourable Shivambu** - .... But also an apology for the whole week because I'm attending a Marxism conference... [Laughter]....

**Ms L Mnganga-Gcabashe** - Your apology's accepted... [Laughter]... Write it down thanks. Thank you very much Ms Johnson and we apologise for the delays. I understand that you've been here for quite some time and there was an accident, I don't know whether you were here earlier when we...? Oh you did, thank you very much. You heard our apologies; hence we were calling you right now. There is a..... I believe that... you have... I believe you have opted to have an oath and I'm going to read that to you and I also believe that you do have a copy that indicate to you how to respond at the end. If not on, I hope, I think the copy is on the way..... Members do you want to stretch a few seconds? [Overtalking off mike inaudible]... You, ok. Sorry about that.

[Off mike conversations inaudible]

[03h16:37 - END OF AUDIO]

[03h40:02 - END OF DISK 01]

[00h00:00 - START OF DISK 02]

**Honourable Swart** - ... due to litigation that and you as an engineer with a wonderful background surely that's a matter of concern to you, as well for people living in Cape Town, that those boilers to this day today have still not been replaced.

**Ms Johnson** - So the steam generators are a path to be replaced, I believe. But I'm also now following from the public domain, Honourable Member. So, I do think that they have managed the operations around the steam generator, but from the public information that's out there that Eskom has said that if beyond 2025 you would have to shut down, so shut down Koeberg if you do not replace the steam generators in time. So that is the key challenge.

**Honourable Swart** - Wasn't that 2017/2018?

**Ms Johnson** - So that is for alignment with everyone else are the operating plan, absolute hard shutdown 2025 and that you'll find in the Koeberg public and safety information that... the forums they have to discuss it where they've shared that information in the public space.

**Honourable Swart** - And thank you from our side for coming to give evidence, we really appreciate it. Thank you so much.

**Ms Johnson** - Thank you.

**Ms L Mnganga-Gcabashe** - ...Honourable Rawula.

**Honourable Rawula** - Thank you very much Chair. I think my... my questions on New Age have partly been covered, but I want to put it here that Eskom engages to sponsorship of a breakfast event of 1.2 million and I [unintelligible] mention you saying that the organisation was not in a financial position given the financial difficulties at the time, but they went ahead, which is a Gupta company by the way, and you yourself the second bullet you indicate that you had to come up with the rationale which basically according to your response, you had to cook the books because of the pressure. That's what you say because there was no rationale, but the instruction is that you must do it. So you had to 'cook the breakfast' you see, to make sure

# 04





**REPORT OF THE PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES ON THE  
INQUIRY INTO GOVERNANCE, PROCUREMENT AND THE FINANCIAL  
SUSTAINABILITY OF ESKOM, DATED 28 NOVEMBER 2018**

The Portfolio Committee on Public Enterprises has conducted an oversight inquiry into governance, procurement and the financial sustainability of Eskom as per its resolution of 21 June 2017. The Portfolio Committee reports as follows:



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## 1 Part A: Overview of the Portfolio Committee on Public Enterprises Oversight Inquiry into Eskom

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### 1.1 Background to the Inquiry

The Portfolio Committee on Public Enterprises (“the Committee”) held a meeting with the Eskom Board on 23 May 2017 to receive a briefing on the following:

- the process followed in the reappointment of the former Group Chief Executive Officer (GCEO), Mr Brian Molefe;
- the determination of retirement package by the Board to the former GCEO;

This followed widespread concern from the Committee and the public about the Eskom Board’s ability to provide effective leadership to the national electricity utility.

The Committee noted that there was *prima facie* evidence that Eskom’s primary mandate as a national power utility had been compromised owing to weakened governance and management structures and systems, which ultimately contributed to the Board’s inability to discharge its fiduciary responsibilities.

There appeared to have been flouting of governance rules, laws, codes and conventions. This collective conduct, inter alia:

- rendered Eskom potentially financially unsustainable due to irregular procurement, mismanagement and non-compliance with existing policies;
- saw the purging of highly qualified, experienced and skilled senior staff members in violation of human resource management policies and procedures. In some instances, these purged staff members were replaced, without due consideration for, or compliance with, established recruitment policies.
- facilitated the resignation, reappointment and retirement package for Mr Molefe, in violation of the Eskom Pension Fund rules.

On 21 June 2017, the Committee unanimously resolved to institute an inquiry into the matter of Mr Molefe’s retirement package and reappointment as Eskom GCEO. The Committee also received a letter from the National Assembly House Chairperson: Committees, Oversight and ICT requesting it to investigate the allegations of state capture reported in the media and in the “#GuptaLeaks” emails. The Committee instituted the oversight inquiry in line with the mandate of Parliament as articulated in section 55 of the Constitution read together with Rules 167 and 227(1)(b)(iv) and (c) of the National Assembly.



## 1.2 Terms of Reference

The inquiry will investigate governance, procurement and the financial sustainability of Eskom. The inquiry will look into amongst others:

- i. Appointment of board members and executive management
- ii. Early retirement/reappointment of Mr Brian Molefe
- iii. Alleged procurement irregularities:
  - a) Eskom's alleged role in ensuring Tegeta was able to buy Optimum Coal Holdings
    - a. Eskom's award of an estimated R11.7 billion worth of coal-supply contracts at inflated prices to Tegeta Exploration and Resources (Pty) Ltd between 2015 and 2016.
  - b) Eskom's conclusion of a R43 million contract with the Gupta's media company, TNA (Pty) Ltd.
  - c) Eskom's payment to Trillian Capital Partners (Pty) Ltd of over R400 million for management consulting and advisory services.
- iv. Allegations of impropriety regarding Eskom's Acting CEO, Matshela Koko
- v. Financial stability of Eskom
- vi. Any other related matter

The Committee inquiry would assess compliance into the following legislation:

- (a) Public Finance Management Act, 2002
- (b) Eskom Conversion Act, 2012
- (c) Companies Act, 2008
- (d) Pension Funds Act
- (e) Any appropriate legislation applicable to the inquiry

## 1.3 Committee membership

- i. Thirteen members of Parliament were selected to serve on the Committee, six from the African National Congress ("ANC"), two from the Democratic Alliance ("DA"), one from the Economic Freedom Fighters ("EFF"), one from the African Christian Democratic Party ("ACDP"), one from the Inkatha Freedom Party ("IFP"), and one from the United Democratic Movement ("UDM").

- ii. The following members were selected to serve on the Committee<sup>1</sup>: Hon. D. Rantho, MP (ANC); Hon. M. Tseli, MP (ANC); Hon. M. Gungubele, MP (ANC); Hon. P. Gordhan, MP (ANC); Hon. Z. Luyenge, MP (ANC); Hon. G. Nobanda, MP (ANC); Hon. N. Mazzone, MP (DA); Hon. E. Marais, MP (DA); Hon. M. Dlamini, MP (EFF); Hon. N. Shivambu\*, MP (EFF); Hon. N. Singh, MP (IFP); Hon. N. Kwankwa, MP (UDM); and Hon. S. Swart, MP (ACDP).
- iii. Hon L. Mnganga-Gcabashe, MP (ANC) was elected as the Portfolio Committee Chairperson after the Inquiry had commenced and participated in the proceedings as a member of the Committee.

#### **1.4 Process of the Inquiry**

The Committee unanimously elected Hon Z. Rantho, MP as its Chairperson on 15 November 2016 and adopted the process and approach that the inquiry would follow. The Committee conducted its hearings in compliance with the requirements of fairness and in terms of its mandate provided for in sections 56, 58 and 59 of the Constitution of the Republic of South Africa, Act 108, 1996 (“the Constitution”) and as further set out in the rules of the National Assembly.

As required by the Constitution, the Committee conducted its processes in an open and transparent manner with its meetings open to the public. Witnesses were summonsed to appear before the Committee in terms of sections 14, 15 and 16 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No 4 of 2004 (“the Privileges Act”).

Adv. Ntuthuzelo Vanara was appointed as evidence leader to assist the Committee to gather evidence and to lead witnesses during the inquiry.

#### **1.5 Conditions that the Committee worked under**

- 1.5.1 Parliament and by extension the Committee, have both the power and the duty to hold the Executive and State organs to account and to ensure that their constitutional and statutory obligations are properly executed. This responsibility is an incident of the rule of law and the constitutional values of accountability, responsiveness and openness.
- 1.5.2 The Committee has carried out its oversight work despite facing some hostility and attempts aimed at obstructing it.
- 1.5.3 There were several attempts by persons and organisations to undermine the authority and function of the Committee. These attempts included baseless legal challenges, attempts to delay and subvert investigations by providing irrelevant or incorrect information, public smear campaigns targeting the Committee and its members and threats to the personal security of Committee members, witnesses and their families.

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<sup>1</sup> The asterisks denote alternate members

- 1.5.4 Letters to this effect were received from: Black First Land First (2) (who called the Inquiry a “witch hunt”), Mr Brian Molefe’s lawyers (1), Eskom (3), Gupta family’s lawyers (2), Mr Atul Gupta’s Lawyers (1), Dr Baldwin “Ben” Ngubane (1), Mr Duduzane Zuma (1), Mr Matshela Koko’s Lawyers (1), Minister Lynne Brown (2), Minister Malusi Gigaba (1).
- 1.5.5 Threats to personal safety and security were made by anonymous parties against:
- Inquiry Chairperson, Ms Zukiswa Rantho, including an anonymous threat made to her child that “your mother is making life difficult for us”;
  - Committee member, Ms Natasha Mazzone, whose car and documents were tampered with; and
  - Evidence leader Advocate Ntuthuzelo Vanara.
- 1.5.6 Witnesses appearing before the Committee, including Ms Suzanne Daniels and Mr Abram Masango, also testified to having been intimidated.
- 1.5.7 Attempts were allegedly also made by the erstwhile State Security Minister Bongani Bongo to offer a bribe to Advocate Vanara with a blank cheque to try to derail the work of this Committee.
- 1.5.8 Despite the fact that invitations were duly served on the following persons requesting them to testify in the Inquiry, Ms Dudu Myeni, and Messrs Duduzane Zuma, Rajesh “Tony” Gupta, Atul Gupta and Ajay Gupta failed to appear in Parliament without sufficient cause.

## **1.6 Laws, Regulations and Standards applicable to Eskom**

Eskom's corporate governance refers to the company's implementation of rules, norms, processes, systems, and institutions that direct the way that it is managed, reports and is held accountable, with reference to key legislation, regulations, national and internal policies, and good governance standards. The Constitution in section 195 prescribes the following for public institutions: a high standard of ethics, economic efficiency, support for developmental objectives, fairness, public participation, accountability, transparency, and good human resource management with workforces reflective of the diversity of South Africa. These principles and values are significant because they provide a benchmark against which the actions and outcomes related to Eskom's governance must be tested. Section 217(1) sets out specific requirements for public procurement, which also govern Eskom's procurement.

The key legislation pertaining to Eskom's governance includes:

- Companies Act 71 of 2008 ("Companies Act ")
- Public Finance Management Act 1 of 1999 ("PFMA")
- Eskom Conversion Act 13 of 2001 ("ECA")

In addition to this legislation, Eskom is obligated to uphold the Code of Conduct for Public Servants (“Code of Conduct”), and the Department of Public Enterprises’ Protocol on Corporate Governance

(“Protocol”), which is aligned to the King Code on Corporate Governance (“King Code”). As noted in paragraph 2.1 of the Protocol:

*Corporate governance embodies processes and systems by which corporate enterprises are directed, controlled and held to account. Corporate governance in South Africa was institutionalised by the publication of the King Report on Corporate Governance in November 1994, which report has subsequently been superseded by the King Code of 2002. The purpose of the King Report is to promote the highest standards of corporate governance in South Africa. The Code of Corporate Practices and Conduct contained in the King Report applies, inter alia, to SOEs and agencies that fall under the PFMA.*

Eskom has reported in the *Eskom Integrated Report, 31 March 2017* (“IR 2017”) that it complies with the *King Report of Corporate Governance for South Africa 2009* (“King III”) and is working towards compliance with the *King Report of Corporate Governance for South Africa 2016* (“King IV”). The Terms of Reference (“TOR”) 2016/2017 for all Eskom Board subcommittees, including the Audit and Risk subcommittee, and Tender subcommittee (“BTC”) already make reference to King IV. There is little substantive difference between King III and King IV. However, one important point is that King IV unambiguously focuses not only on whether specific rules were technically implemented, but on the outcomes of such implementation, on the ethics, culture, performance, legitimacy and quality of stakeholder relationships. All subcommittee TORs state:

*The Committee shall, in fulfilling its mandate, apply the relevant King Code [King IV] principles and explain the practices that demonstrate the application of these principles.*

Both King III and King IV go beyond legal compliance, to recommend principles and practices to achieve good governance, including high levels of transparency and accountability to society, broadly. Given this internal alignment and burden of compliance to King IV, it is useful to view corporate governance at Eskom and in Eskom's interactions with relevant ministry and department, in light of this document and its principles.

Eskom’s internal policies and procedures, as well as Treasury regulations and practice notes are aligned to the broader legal and governance environment to which it must comply. These documents, including the Shareholder’s Compact and the Memorandum of Incorporation (“MOI”), provide further specific prescriptions. The Shareholder’s Compact and MOI, respectively, are meant to be updated periodically.

Regardless of the role or responsibility delegated, any Eskom official who witnesses wrongdoing in terms of procurement or other aspects of management must report this wrongdoing. Concerning procurement, Section 45 (c) of the PFMA places a burden of responsibility on all Eskom officials, who:



*Must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure, and fruitless and wasteful expenditure and any other revenue due.*

While particular Eskom officials, or Ministers and officials within the department, may not be directly responsible for acts of wrongdoing, they may still be accountable for these acts and for responsive remedial action. It is of critical importance to note that King IV takes a specific view on accountability, viewing it as: “*The obligation to answer for the execution of responsibilities*”. Furthermore, it clarifies, “*Accountability cannot be delegated, whereas responsibility can be delegated without abdicating accountability for that delegated responsibility*”. In terms of accountability for governance in Eskom, King VI is unambiguous that the Eskom Board – comprising executive and non-executive directors - must answer for its administration and performance, regardless of which other actors have a delegated role or responsibility:

*The governing body is the structure that has primary accountability for the governance and performance of the organisation. Depending on context, it includes, among others, the board of directors of a company, the board of a retirement fund, the accounting authority of a state-owned entity and a municipal council.*

Eskom executives and the Board are accountable to the Minister of Public Enterprises who represents the interests of government, the sole shareholder of Eskom. This relationship is governed by the MOI and by the Shareholder's Compact which must be entered into between the Minister and Eskom. The Minister has the power to hold Eskom and individuals within Eskom to account in line with the MOI, the Shareholder's Compact, the PFMA and the ECA.

The Minister of Public Enterprises is, along with the Board, accountable to Parliament, which executes its oversight role by reviewing financial and non-financial performance and critically assessing various reports, including the integrated report, annual financial statements and the audit reports of the Auditor-General. Financial performance is reviewed by the Standing Committee on Public Accounts ("SCOPA"), and broader performance is overseen by the Portfolio Committee on Public Enterprises. The Committee may also consider the broader social and economic impacts of Eskom's level of performance.

## 2 Part B: Summary of Evidence

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### 2.1 Overview of Committee's Inquiry into Eskom

The Inquiry commenced on 17 October 2017. The Committee invited academics and civil society organisations to provide an overview of the allegations of weakened corporate governance, corruption, and capture of some State-owned companies (SOCs) by external parties. The Committee received presentations from Professors Ivor Chipkin and Anton Eberhard representing the State Capacity Research Project, Bishop Malusi Mpumlwana representing the South African Council of Churches (SACC), and Mr Ted Blom representing the Organisation Undoing Tax Abuse (OUTA).

Evidence presented before the Committee at the commencement of the Inquiry, including submissions from some of the aforementioned organisations, shows how Eskom's governance structures and procedures were incapacitated, corrupted, or otherwise undermined over time. The clearest expression of this corruption has been a slew of questionable and irregular procurement decisions and practices, together with the burgeoning costs associated with the utility's capital expenditure programme and operational expenses. Of additional concern to the Committee was the noticeable exodus of competent personnel from Eskom's executive. Eskom received a qualified audit for its 2016/17 Annual Financial Statements. The Interim Financial Statements for November 2017 were released in January 2018 due to Eskom's financial constraints. These further reinforced the understanding that the weakening of corporate governance and corruption at Eskom had negatively impacted the SOC's ability to carry out its core functions, including the Board's ability to effectively discharge its fiduciary duties.

This section presents a summary of evidence considered by the Committee under five broad themes, namely:

- The Tegeta contracts
- Eskom and the Trillian saga
- Eskom and the TNA contract
- Eskom's arrangement of Brian Molefe's resignation and pension
- Eskom's governance

In each of the five themes; the list of witnesses, documents considered, applicable legal and regulatory framework, summary of oral evidence and the Committee's observations are presented.

## 2.2 Witnesses called to testify

These were the witnesses called to testify to the Committee:

- Mr Brian Dames, Former Eskom CEO
- Mr Sibusiso Luthuli, Eskom Pension and Provident Fund CEO
- Ms Mantuka Maisela, Eskom Pension Fund Chairperson
- Ms Mosilo Mothepu, Former Trillian Financial Advisory CEO
- Mr Piers Marsden, Business Rescue Practitioner for Optimum Coal Holdings
- Ms Bianca Goodson, Former Trillian Management Consulting CEO
- Mr Tshediso Matona, Former DPE Director-General and Eskom CEO
- Ms Erica Johnson, Former Eskom Group Executive Enterprise Development
- Ms Tsholofelo Molefe, Former Eskom CFO
- Ms Suzanne Daniels, Former Eskom Company Secretary and currently Head of Legal and Compliance (on suspension)
- Mr Khulani Qoma, Eskom General Manager in the Office of the Chairperson
- Dr David Fine, Senior Partner, McKinsey London Office
- Ms Devapushpum Naidoo (Viroshini), Former Eskom Board member from 12 December 2014 to 1 July 2016
- Ms Venete Klein, Former Eskom Board member from 12 December 2014 to May 2017
- Mr Brian Molefe, Former CEO of Eskom
- Mr Zola Tsotsi, Former Eskom Board Chairperson (June 2011 to March 2015)
- Mr Zethembe Khoza, Eskom Interim Board Chairperson
- Mr Anton Minnaar, Eskom HR Executive Manager
- Dr Pat Naidoo, Eskom non-executive Board Member
- Mr Sean Maritz, Former Eskom Acting CEO 2017 - 2018
- Ms Lynne Brown, Former Minister of Public Enterprises
- Mr Anoj Singh, Eskom CFO (on suspension)
- Mr Matshela Koko, Former Eskom Acting CEO, and Executive for Generation (on suspension)
- Mr Lucky Montana, Former PRASA CEO
- Mr Mxolisi Mgojo, CEO of Exxaro Resources Limited
- Mr Rajie Murugan, G9 Consulting Services CEO
- Mr Ben Martins, Former Deputy Minister of Public Enterprises
- Mr Abram Masango, Eskom Group Executive: Capital Projects (on suspension)

- Dr Baldwin (Ben) Ngubane, Former Eskom Board Chairperson 2015 – June 2017
- Mr Malusi Gigaba, Former Minister of Public Enterprises

### 2.3 Documentation presented to the Committee

Included in the documentation presented to or called for by the Committee for the purposes of the Inquiry were:

- A Report of the Public Protector, the *State of Capture*, Report 6 of 2016/7 14 October 2016
- Report in terms of Section 34(1)(a) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 by Piers Marsden and Peter van den Steen, signed on 1 July 2016 (Marsden “Section 34 Report”)
- Question for written reply, Question No. PQ 2701, “Ms N W A Mazzone (DA) to ask the Minister of Public Enterprises”, 2 December 2016
- Full Statement by McKinsey On Eskom, 17 October 2017-12-07
- Eskom Statement, “Eskom takes action to recover funds unlawfully paid to McKinsey and Trillian”. 5 October 2017
- Report in respect of the investigation into the status of the business and challenges experiences by Eskom, instituted by the board of Eskom Holdings (SOC) Ltd in terms of a resolution passed on 11 March 2015, 2 July 2015 (“Dentons Report”)
- The PWC report for National Treasury before the Committee, titled, “Preliminary Review into Eskom Coal Procurement Processes National Treasury (Project Ref: 02-53-01-2017)” (“NT PwC Report”)
- “Report for Mr TMG Sexwale, Chairperson Trillian Capital Partners (Pty) Ltd on Allegations with regard to the Trillian Group of Companies and Related Matters” (“Budlender Report”) by Adv. Geoff Budlender, 29 June 2017
- Bowmans “Interim Report back to Eskom Holdings SOC Limited on an investigation of alleged irregularities in connection with the procurement of services from and payments to McKinsey and Company Africa (Pty) Ltd and Trillian Capital Partners (Pty) Ltd”. 2 August 2017 (“Bowmans Report”)
- Statement by Ms Mosilo Mothepu, “Public Enterprises Portfolio Committee: Inquiry into Eskom, Denel, Transnet and South African Airways (state-owned company) SOC and Trillian Capital Partners (TCP)”. October 2017
- Statement by Ms Bianca Goodson, “Bianca Goodson’s Statement”. 19 October 2017
- Submission prepared by Suzanne Margaret Daniels, Group Executive: Legal and Compliance, “Portfolio Committee on Public Enterprises: Oversight Inquiry into Governance, procurement and financial sustainability of Eskom”. 8 November 2017



- Statement of Khulani Qoma, Eskom General Manager in the Office of the Chairperson “Eskom’s implosion: deliberate, well-orchestrated & shame-free; entire leadership culpability”. 10 November 2017
- Statement by Devapushpum Naidoo (Viroshini), “Portfolio Committee on Public Enterprises Oversight Enquiry into Governance, Procurement and Financial Sustainability of Eskom.” November 2017
- Statement by Venete Klein, Eskom Board member from 12 December 2014 to May 2017. November 2017
- Brian Molefe’s statement of resignation as GCEO of Eskom, 11 November 2016
- Presentation by Minister of Public Enterprises Lynne Brown to the Parliamentary Inquiry into Eskom, 22 November 2017
- Statement of Mr Anoj Singh, “Written Narrative of Evidence to be Presented by Anoj Singh, Financial Director of Eskom, at an Oversight Inquiry into Corporate Governance of State Owned Enterprises, by the Portfolio Committee on Public Enterprises of the Parliament of South Africa, on 5 December 2017” Vol. 1-3
- Written submission of Mr Matshela Koko
- G9 Group, Presentation to the Parliamentary Portfolio Committee of SOE’s: The Trillian Investigation, 27 February 2018 (“G9 Report”)
- Submission by Mr Abram Masango for the Portfolio Committee on Public Enterprises, 27 February 2017, Vol. 1-4

## 2.4 The Tegeta Contracts

### 2.4.1 Background to the Investigation

The Public Protector’s *State of Capture* report, published in October 2016 contains evidence suggesting serious procurement irregularities around Eskom’s relationship with Tegeta Exploration and Resources Pty Ltd. (“Tegeta”). The report provided an illustration of a network of companies, personal relationships and regulatory interventions through which Tegeta was able to access highly lucrative contracts, acquire and profitably operate Optimum Coal Holdings (“OCH”), which it bought from Glencore Plc (“Glencore”). Among those implicated in the Tegeta transaction were former Eskom CEO Brian Molefe, former Eskom executive for Group Technology & Commercial Matshela Koko, previous Board Member Pat Naidoo, and non-executive directors, including Dr Baldwin S. “Ben” Ngubane (“Dr Ngubane”), who would go on to become Chairperson of the Eskom Board. This report revealed to South Africans the extent of the malfeasance and corruption that had been going on at other SOCs in general and Eskom in particular. The report was cited by Mr Molefe as the reason for his public resignation as Eskom GCEO, “in the interests of good governance”.

There was evidence of undue preferential treatment of Tegeta with respect to operational licensing and procurement terms. However, at the centre of the controversy was a highly suspicious “prepayment” for coal from Optimum Coal Mine (“OCM”) made by Eskom in favour of Tegeta. At the time of the payment OCM was in business rescue. Upon viewing a media report on the Tegeta contract in 2016, the business rescue practitioners appointed to oversee the business rescue process at OCM and OCH filed a report in terms of Section 34(1)(a) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004. The business rescue practitioners reported that payments made by Eskom for coal from OCM had never been received by OCM or OCH. What this implied was that Eskom’s payments in favour of Tegeta were used to enable Tegeta to purchase OCH when it otherwise would not have had the money to do so. The nature of events leading up to and following the acquisition of OCM have been identified as unusual and may involve contraventions of Section 217(1) of the Constitution, the Public Finance Management Act (“PFMA”), the National Environmental Management Act (“NEMA”), NEMA Regulations, the Minerals and Petroleum Resources Development Act (MRPDA), the Prevention and Combating of Corrupt Activities Act of 2004, the Prevention of Organised Crime Act of 1998, as well internal Eskom procurement rules and norms.

#### 2.4.2 Witnesses were called to testify

Witnesses called to testify on this matter:

- Mr Piers Marsden (“Mr Marsden”), Business Rescue Practitioner (“BRP”) overseeing OCH (and Optimum Coal Mine or “OCM”) rehabilitation
- Ms Suzanne Margaret Daniels (“Ms Daniels”), Former Company Secretary and currently Head of Legal and Compliance (on suspension) at Eskom
- Mr Khulani Qoma (“Mr Qoma”), Eskom General Manager in the Office of the Chairperson
- Ms Venete Klein, Eskom non-executive Board member from 12 December 2014 to May 2017
- Ms Devapushpum (Viroshini) Naidoo, Eskom Board member from 12 December 2014 to 1 July 2016
- Mr Brian Molefe, Former Eskom CEO April 2015 - November 2016
- Ms Lynne Brown, Minister of Public Enterprises 2014 - March 2018
- Mr Zethembe Khoza, Eskom Interim Chair
- Dr Pat Naidoo, Eskom Board Member
- Mr Sean Maritz, Eskom Acting CEO 2017 - 2018
- Mr Anoj Singh, Eskom CFO from April 2015 (currently suspended)
- Mr Matshela Koko, Former Eskom Acting CEO, and Executive for Generation
- Mr Mxolisi Mgojo, CEO of Exxaro Resources Limited
- Dr Baldwin (Ben) Ngubane, Former Eskom Board Chairperson 2015 – June 2017

### 2.4.3 Documentation presented to the Committee

Included, amongst others, in the documentation presented to or called for by the Committee for the purposes of the inquiry:

- Addenda to Coal Supply Agreement between Optimum Collieries and Eskom:
  - First Addendum to Hendrina Coal Supply Agreement between Eskom Holdings Limited and Optimum Coal Holdings Proprietary Limited and Optimum Coal Mine Proprietary Limited
  - Second Addendum to the Hendrina Coal Supply Agreement amongst Eskom Holdings SOC Limited and Optimum Coal Holdings (Proprietary) Limited and Optimum Coal Mine (Proprietary) Limited
  - Third Addendum to the Hendrina Coal Supply Agreement amongst Eskom Holdings SOC Limited and Optimum Coal Holdings (Proprietary) Limited and Optimum Coal Mine (Proprietary) Limited
- Letter between Optimum Coal Mine and Eskom dated 23 April 2013
- Letter between Optimum Coal Mine and Eskom dated 3 July 2013
- Statement of ABSA Bank Ltd
- A Report of the Public Protector “*State of Capture*”, Report 6 of 2016/7 14 October 2016 (“Public Protector “State of Capture” Report”)
- Report in respect of the investigation into the status of the business and challenges experiences by Eskom, instituted by the board of Eskom Holdings (SOC) Ltd in terms of a resolution passed on 11 March 2015, 2 July 2015 (“Dentons Report”)
- The PWC report for National Treasury before the Committee, titled, “Preliminary Review into Eskom Coal Procurement Processes National Treasury (Project Ref: 02-53-01-2017)” (“NT PwC Report”)
- Report in terms of Section 34(1)(a) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 by Piers Marsden and Peter van den Steen, signed on 1 July 2016 (Marsden “Section 34 Report”)
- Eskom Briefing Note: Government Guarantee
- Submission prepared by Suzanne Margaret Daniels, Group Executive: Legal and Compliance, “Portfolio Committee on Public Enterprises: Oversight Inquiry into Governance, procurement and financial sustainability of Eskom”. 8 November 2017
- Statement of Khulani Qoma, Eskom General Manager in the Office of the Chairperson “Eskom’s implosion: deliberate, well-orchestrated & shame-free; entire leadership culpability”. 10 November 2017

- Statement by Devapushpam Naidoo (Viroshini), Eskom Board member from 12 December 2014 to 1 July 2016, “Portfolio Committee on Public Enterprises Oversight Enquiry into Governance, Procurement and Financial Sustainability of Eskom.” November 2017
- Statement by Venete Klein, Eskom Board member from 12 December 2014 to May 2017. November 2017
- Brian Molefe, “STATEMENT” of resignation, 11 November 2016
- Presentation by Minister of Public Enterprises Lynne Brown to the Parliamentary Inquiry into Eskom, 22 November 2017
- Submission by Board of Eskom Holdings SOC Limited (Registration Number 2002/015527/30) to the Portfolio Committee on Public Enterprises Inquiry into Corporate Governance at State Owned Companies. 5 December 2017. (“Submission by Board of Eskom to the Committee”)
- Written Statement of Mxolisi Mgojo, the Chief Executive Officer of Exxaro Resources Limited.

#### 2.4.4 Overview of Events

##### 2.4.4.1 *Optimum Coal Mine’s Coal Supply Agreement with Eskom*

Optimum Collieries owned by BHP Billiton Energy Coal South Africa Ltd (“BECSA”) was contracted by Eskom on 4 January 1993 to provide coal to Hendrina Power Plant under a Coal Supply Agreement (“CSA”). On 8 April 2008, the CSA was ceded to OCM when Optimum Collieries was sold to OCH owned by Glencore Plc. The parties entered into a new agreement with Eskom noted in the first CSA addendum. Two additional addenda, which set out to amend the price and quality specifications of coal delivered by OCM, were agreed to by OCH and Eskom on 12 April 2011 and 11 February 2013, respectively. According to the aforementioned CSA and addenda, Eskom was paying OCM R150 per ton.

##### 2.4.4.2 *Optimum Coal Mine invokes the “hardship clause” contained in the CSA*

OCM experienced difficulties in providing coal in accordance with these agreements. Disputes between OCM and Eskom arose as a result. On 3 July 2013, OCM invoked the hardship clause set out in the CSA, citing a loss of R166.40 per ton on coal supplied to Eskom (approximately R120 million per month). Eskom and OCM initiated negotiations to draft a fourth addendum to the CSA. The parties entered a Cooperation Agreement on 23 May 2014, beginning a settlement process with the aim of concluding a new CSA by 1 January 2015.

The CSA negotiations were protracted. On 25 March 2015, OCM was informed that the Eskom Executive Procurement Committee (“EXCOPS”) had approved the terms of the fourth addendum. The



fourth addendum went on to the Board Procurement Sub-Committee on 15 April 2015, where it was tabled for approval at an Eskom Board Meeting on the 23 April 2015.

#### **2.4.4.3 Events leading up to OCM and OCH entering into Voluntary Business Rescue**

Mr Brian Molefe was seconded from Transnet to the role of Acting CEO at Eskom on 17 April 2015. Instead of approving the fourth addendum, as expected, the Eskom Board resolved to refer the decision to Mr Molefe. The Public Protector's *State of Capture* report noted that the purpose of this Board resolution was unclear. On 18 May 2015, Mr Molefe informed the Chief Executive Officer ("CEO") of OCM that Eskom rejected the fourth addendum and the preceding negotiations. Mr Molefe formally terminated the settlement process between Eskom and OCM on 10 June 2015.

On 1 July 2015, Glencore received a letter from KPMG indicating that one of their clients, later revealed to be Oakbay Investments (Pty) Ltd ("Oakbay"), owned by the Gupta family, had made an offer to buy OCM for R2 billion. Shortly after receiving this information on 16 July 2015, Eskom informed OCM that they would be levying a penalty in the amount of R2, 176,530,611.99 (~R2.17 billion) on OCM for failing to meet quality specifications set out in the CSA for coal supplied between 1 March 2012 and 31 May 2015. The R2.17 billion claimed by Eskom was an unusually high penalty, the calculation of which has since been demonstrated to be out of line with the applicable mechanism in the coal supply agreement.

On 31 July 2015, the Board of Directors of OCM put the company under voluntary business rescue. Mr Marsden and Mr Petrus Francois van den Steen (Mr Van den Steen) were appointed joint Business Rescue Practitioners ("BRPs") on 4 August 2015.

#### **2.4.4.4 The negotiation of the sale of OCM/OCH to Tegeta/Oakbay**

Between August and October 2015, the BRPs attempted to negotiate the terms of the CSA with Eskom. Mr Marsden described the negotiations with Eskom as acrimonious. Over this period, various entities (other than Oakbay or Tegeta) indicated an interest or made an offer to acquire a shareholding in OCM from OCH. Notably, bidders included Pembani Development Trust and Endulwini Consortium. Eskom, however, refused to entertain their bids or simply refused to negotiate.

On 23 October 2015, within the context of the above environment the BRPs formally confirmed to Oakbay that they were willing to discuss the sale of OCM. On 13 November 2015, the BRPs confirmed to Eskom that Oakbay had commenced with a due diligence processes to acquire OCM.

During the weekend of 21 to 22 November 2015, several stoppage notices were issued in terms of Section 54 of the Mine Health and Safety Act, 1996 to various mines owned by OCH's parent company, Glencore. These stoppages were allegedly issued under the direction of Mr Mosebenzi Joseph Zwane, then Minister of Mineral Resources.

On 24 November 2015, Eskom indicated that they would not support an offer by Oakbay to purchase only OCM. Instead, Eskom proposed an offer for Oakbay to procure OCM as well as all of OCH's other subsidiaries. The reason provided by Eskom was the dependence of OCM on revenue and guarantees from other OCH concerns, Koornfontein Mine and export allocations from Richards Bay Coal Terminal.

At the end of November, the Oakbay-owned Tegeta made an offer to purchase OCH shares for R1 billion. Tegeta's other major shareholders include Mabengela Investments (Pty) Ltd (Mabengela) (owned by Mr Duduzane Zuma) and Elgasolve (Pty) Ltd (Elgasolve) (owned by Mr Salim Essa), an associate of the Gupta family). Glencore rejected this offer. Following these events, Minister Zwane flew to Switzerland at the end of November 2015 and allegedly met with Glencore CEO Ivan Glasenberg together with Salim Essa and Rajesh 'Tony' Gupta.

In December 2015, Tegeta again approached Glencore with an offer to purchase the OCH shares for R2.15 billion. On 10 December, a Sale of Shares and Claims Agreement was entered into between Glencore, OCH, Oakbay, and Tegeta for the sale of all OCH shares to Tegeta for an amount of R2.1 billion. At the time that this agreement, which required Eskom's support, was signed, multiple Eskom Board Members had various conflicts of interest relating to the sale. This agreement did not finalise the transfer of ownership, however, as it was subject to the fulfilment of suspensive conditions, including approvals by (a) The Lenders and the Security Agent, (b) The Competition Authorities, and (c) The Minister of Mineral Resources in terms of section 11 of the MRPDA. On 10 December 2015, Tegeta and OCM had entered into a Post-Commencement Finance Agreement whereby Tegeta agreed to provide funding for OCM's operating expenses, despite the outstanding approvals.

#### ***2.4.4.5 Eskom facilitates Tegeta's Purchase of OCH Shares and increased operating revenues***

Tegeta had until 8 April 2016 to fulfil the suspensive conditions for the sales agreement. The purchase price was required to be paid three business days later, on 13 April 2016, from Tegeta to Werksmans Attorneys in its capacity as escrow agent. Between 10 December 2015 and 13 April 2016, and from 13 April 2016 onwards, Eskom undertook several decisions to Tegeta's financial advantage. The first decision was a guarantee to buy coal at a specified price and quantity. On the same day that the parties entered into a Sale of Shares and Claims Agreement, on 10 December 2015, Eskom also issued the highly irregular guarantee in the amount of R1.68 billion to Tegeta for an 'in principle' agreement to supply coal.

A 40-year contract between Eskom and Exxaro Resources Limited ("Exxaro"), to supply coal to Arnot power station, was reported to have expired in December 2015. A contract to supply coal to the Arnot power station, which was left with a substantial supply deficit, would be awarded to Tegeta in 2016. However, to create this lucrative opportunity, several unusual or irregular decisions were made. Firstly,

Tegeta was not one of the companies that had responded to the Request for Proposals ("RFP") for the CSA that was issued in August 2015. Secondly, according to Dentons Report, this contract was only due to expire in December 2023. Thirdly, according to Eskom CE Mr Molefe and CFO Mr Anoj Singh, Eskom had been paying Exxaro R1132 per ton. According to the Dentons Report, however, the price at April 2015 was only R686.07. It appears that the representations by Mr Molefe and Mr Singh about this contract are incorrect or inconsistent with other records. This misrepresentation was used to justify contracting Tegeta coal supply to Arnot. As noted by the *State of Capture* report:

*In light of the extensive financial analysis conducted, it appears that the sole purpose of awarding contracts to Tegeta to supply Arnot Power Station, was made solely for the purposes of funding Tegeta and enabling Tegeta to purchase all shares in OCH.*

In January, Eskom reduced the required coal quantity specifications for coal delivered by OCM to below its loss-making contract to supply coal to the Hendrina Power Station (~R150 per ton). From January 2016, Eskom further awarded Tegeta more lucrative coal supply contracts for supply to Arnot Power Station.

- On 13 January 2016, Tegeta contracted OCM for 100,000 tons of coal to be supplied and delivered to Arnot (~R467 per ton) equal to ~R46.7 million.
- On 22 January 2016, Tegeta then offered to supply Eskom with 250 000 tons for three (3) months (~R539 per ton) equal to ~R404.2 million for three months.
- On 18 February 2016, Tegeta contracted OCM for 400 000 tons of steam coal to be supplied and delivered to the Arnot Power Station equal to ~R186.8 million.

OCM was increasingly diverting coal away from Hendrina (through which Tegeta earned R150 per ton of coal) to Arnot (through which Tegeta earned R467 per ton). Additionally, the difference between the rand value that Tegeta paid OCM and Eskom paid Tegeta equals ~R72 per ton. Effectively, Tegeta extracted a transactional "middleman" fee from this arrangement without adding any value (with Eskom's full knowledge). The National Treasury PWC Report, 28 March 2017, found that the contract with Tegeta was at a "*price which is significantly above the price it could have acquired it at in terms of the existing CSA with OCM*".

Coal supplies from OCM to Hendrina have, for all intents and purposes, the same quality and value as those from OCM to Arnot, and do not conform to the quality specifications of Arnot Power Stations. Eskom's disclosures stating otherwise are inaccurate. It is clear that the CSA's between Tegeta and Eskom for coal supply to Arnot Power Station are highly questionable and likely unlawful.

Tegeta went on to secure all necessary approvals for the OCM sale. On 10 February 2016, the Eskom Board Tender Committee resolved that they would consent to the sale of OCH shares to Tegeta along with the cession of the CSA – on condition that the other sale agreement requirements had been met.



On 22 March 2016, Tegeta obtained approval for the sale from the Competition Tribunal of South Africa. On 29 March 2016, the company secured the approval of the Department of Mineral Resources, thus making the sale agreement unconditional. It should be noted, that this kind of approval from the DMR usually takes between one and three years. This process, however, was concluded in a matter of months. On 30 March 2016, the fourth addendum to the Hendrina Power Station CSA was signed, confirming the cession of the agreement to Tegeta.

Between the period 29 January and 13 April 2016, before Tegeta had legal ownership of OCH, Eskom made significant and highly irregular payments to Tegeta amounting to R1 161 953 248.41. The *State of Capture* report states that at least R910 000 000.00 was used by Tegeta to purchase OCH (42% of the total price). Despite these payments, Tegeta was still short ~R600 million. Mr Nazeem Howa (Mr Howa), a director of Tegeta, met with the BRPs to ask for assistance in obtaining a bridging loan from the Consortium of Banks on 11 April 2016. Tegeta's request was denied. The BRPs informed Mr Howa of this at around 15:00.

On the same day, 11 April 2016, Tegeta offered Eskom 1 250 000 tons of coal from OCM for a five-month period (~R429 per ton) which would equal R611 250 000 delivered cost. A submission to the Board Tender Committee was made on 11 April 2016, which included a prepayment of R586 787 500.00 (excluding VAT) to be made to Tegeta to enable them to meet additional coal requirements at Arnot Power Station. The Public Protector in *State of Capture* reports that Ms Ayanda Nteta (Ms Nteta), Mr Edwin Mabelane (Mr Mabelane), and Mr Matshela Koko (Mr Koko) signed and approved the submission. An impromptu Board Tender Committee meeting was convened to discuss the submission at around 21:00, via teleconference, and the pre-payment to Tegeta was approved.

The Public Protector's *State of Capture Report* revealed that Eskom GCE Molefe had been in frequent telephonic contact with Mr Atul Gupta, a shareholder of Tegeta, between August 2015 and March 2016 (with a total of 58 calls), and was in the vicinity of the Gupta residence (19 times) between 5 August and 17 November 2015. Mr Molefe was also in contact with Tegeta Director, Ms Ronica Ragavan (Ms Ragavan), around this time.

On 13 April 2016, the agreement between Tegeta and Eskom regarding the 1 250 000 tons of coal was entered into with a higher per ton price of ~R523 (ostensibly linked to higher calorific value or "CV"), and a prepayment amounting to R578 559 718.75 (R659 558 079.38 incl. VAT) was confirmed. The following day, on 14 April 2016, Tegeta paid R2 084 210 261.10 toward the purchase of all shares held by OCH – even though just three (3) days prior they had notified the BRPs that they were R600 million short. Tegeta then signed contracts with OCM for coal to be supplied at a price of R467 per ton, earning Tegeta a middleman fee of R56 per ton for adding no value.

#### 2.4.5 Procurement irregularities



**2.4.5.1 Eskom is a major public entity in terms of Schedule 2 of the Public Finance Management Act 1 of 1999 ("PFMA").**

Eskom's procurement must be guided by section 217 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), the PFMA, The Preferential Procurement Policy Framework Act, 2000 ("PPPFA"), *Amendment of Treasury Regulations in terms of Section 76*, published under Government Notice R225 *Government Gazette* 27388 on 15 March 2005 ("the Treasury Regulations"), as well as Eskom's internal SCM policies and procedures.

**2.4.5.2 Eskom imposition of a R2 176 530 611.99 (~R217 billion) penalty on OCM**

Ms Suzanne Daniels testified that she discovered in 2016, that the amount of the penalty imposed on OCM, while owned by Glencore was incorrect:

*... [I asked for] the rationale for the R2.2 billion, and I was presented with a spreadsheet...what I noticed was that there were various amounts, you know, it wasn't consistent. My first question to the primary energy team and the lawyers was, "How did you arrive at this R2.2 billion?", and I call a meeting because I was quite familiar with the Optimum agreement. Based on my experience, it was actually the first matter I dealt with at Eskom when I start there, because BHP Billiton had ceded the contract to another party, so I knew the contract quite well...The previous time when we had to negotiate the qualities, the very penalty regime that was in place, I was part of the negotiation team that did so. So, the numbers that I was seeing and the manner in which it was calculated were not in line with that methodology...When I had the meeting with the team, it consisted of the Finance Group, the contract manager, the coal supply manager and the legal team. And my question was simply, 'how did you get to 2.2 billion?' I was quite shocked at the answer. The answer that came back was, 'no this is not actually 2.2 billion.'... As ludicrous as it sounds, the answer was, "There was an error in the spreadsheet, and we used the incorrect formula". So, a billion rand disappeared off that claim.*

According to Ms Daniels, the person who drew up the spreadsheet had since taken up a position at Glencore. Ms Daniels came to the conclusion that the penalty should have been calculated at R722 million.

Mr Marsden explained that the fine was forward-looking, and had implications for the viability of OCM. For this reason, any plan to avoid liquidation needed to have Eskom's support to find a workable solution. He states:

*"...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."*

#### 2.4.5.3 *Eskom signed an unusual and irregular R1.68 million guarantee to Tegeta on 10 December 2015*

Eskom does not ordinarily grant any guarantees. Government (represented by the Minister of Finance and the Minister of Public Enterprises) provides guarantees to assist Eskom with its CAPEX program. Eskom needs to apply to government to have a liability guaranteed. The value of such a guarantee may not exceed R30 billion per annum. Government has sole discretion to grant this guarantee. The beneficiary of such a guarantee is granted a first-demand guarantee between itself and the DOE. In terms of Article 15.3 of the 2016 MOI, Eskom may not issue a guarantee, indemnity or security or enter into any transactions that bind or may bind Eskom to a future financial commitment unless it complies with section 66 of the PFMA.

A pre-purchase agreement with Tegeta's "proposed owners" for OCH, was unanimously approved by the Board upon circulation of a submission titled, "Urgent Request to approve the Pre-Purchase of Coal from Optimum Coal (Pty) Ltd". The agreement was also reviewed by the Board Investment and Finance Sub-Committee ("IFC") on 9 December, chaired by Mr Pat Naidoo ("Mr Naidoo"), with Ms Venete Klein ("Ms Klein") and Mr Zethembe Khoza ("Mr Khoza") ostensibly constituting a quorum, and with Eskom CFO, Mr Anoj Singh in attendance. Ms Daniels, Eskom Company Secretary, was instructed by the Board Chairperson Dr Ngubane to prepare necessary documentation and convene the requisite Board meetings. The Board unanimously approved the submission in a round robin. Mr Mark Pamensky (Mr Pamensky) recused himself and Mr Molefe was on sick leave.

On 10 December 2015, Ms Caroline Henry (Ms Henry), Senior General Manager (Eskom Treasury) prepared a memorandum, "Guarantee in favour of Tegeta Exploration and Resources Proprietary Ltd (TER)", reportedly to avoid having to pay out R1.6 billion in cash. This action was taken allegedly to prevent a situation in which Eskom paid cash to Tegeta.

Eskom CFO Singh approved this on the same day, without PFMA approval. As Eskom's accounting authority, the board is empowered to issue guarantees in terms of section 66 of the PFMA. However, this is highly unusual. Furthermore, PFMA approval was required as the guarantee was above Eskom's R1.5 billion materiality threshold. In other words, it should have been approved by the Minister. The guarantee was in place until 31 March 2016. Ms Daniels testified,

*In terms of the resolution of the Board, he [Mr Singh] was authorised to take all the necessary steps to give effect to the above [guarantee], including the signing of any documentation. In this particular instance, with the issuing of a 1.6 billion guarantee, we would have required PFMA approval.*

*She continues, "So in this instance, while the guarantee was probably a better commercial transaction [than a cash payment], it was still irregular".*

In her testimony, Minister Brown offered elucidated on the matter:

*The basis that the transaction did not meet the threshold of the Significant and Materiality framework agreement, I did not receive a request for approval of this deal in terms of section 54(2) of the PFMA. It was a matter within the authority of the Board of Eskom and its executives, in line with the governance framework within Eskom. As the Shareholder I am not privy to contract negotiations, but after the media picked up that Eskom had radically reduced the penalty that forced Glencore to sell the mine in the first place. I asked DG Seleke to write to Eskom to request details of the arbitration settlement.*

Ms Klein testified,

*"...What we got as a round-robin resolution was for the purchase of coal. There was nothing about a guarantee in there". Dr Ngubane confirmed that the Board had authorised a cash prepayment and not a guarantee. He states, "The Board learnt from the press in July 2017 that management had, in fact, converted what was meant to be a prepayment for coal into a guarantee."*

Mr Molefe's testimony does not appear to find fault with the guarantee. He states,

*Eskom did not lose one cent, by March that guarantee was cancelled without being utilised. So, I got briefed about it when I returned, but it was never utilised. I can't say I stopped it. It was never utilised, and in March it lapsed.*

The guarantee may, however, have played an instrumental role in Tegeta's ability to conclude and finance its acquisition of OCM/OCH, regardless of whether the parties called upon the guarantee.

#### ***2.4.5.4 The Eskom Board Tender Committee ("BTC") approved a cash prepayment to Tegeta on 11 April 2016***

Mr Marsden testified, subsequent to rejecting an unsatisfactory offer from Tegeta, that he received an amended offer to purchase OCH on 4 or 5 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... 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."*



Mr Marsden testified that he was approached by Oakbay CEO, Mr Howa, on 11 April 2016 who reported that Tegeta was R600 million short of the purchase price, and asked Mr Marsden to negotiate with the Consortium of major banks on behalf of Tegeta for a loan of this amount. By the close of business, no bank had agreed to help meet the shortfall.

Following these events, at 19:30 on 11 April 2016 Ms Daniels was instructed in her capacity as Company Secretary, by Chairperson of Eskom Board Tender Committee (“BTC”), Mr Khoza, to establish an “unusual” emergency BTC meeting for the supply of coal to Arnot Power Station. The meeting was deemed necessary, despite Ms Daniels' protest that (a) a BTC meeting had been scheduled for 13 April and (b) the Arnot “emergency” had been ongoing for three months. Ms Daniels states,

*I actually questioned the efficacy of having a meeting at that late an hour, as I, at the time that he called me I had actually received no documentation for that meeting if it were to happen that evening and also that barely 48 hours later we were going to have a scheduled board tender Committee meeting on the 13th of April. I raised these issues with him, his response was the operations required the meeting because there was an emergency and I actually said to him that to the best of my recollection I, you know, as I attend all board and board Committee meetings to the best of my recollection at the time the emergency was actually declared about 3 months ago so there really was no, you know, there was no, it didn't really meet the requirements of the emergency.*

Mr Koko notes in his statement, (para 100):

*A coal emergency for Arnot Power Station was declared by Eskom's Primary Energy Division Tactical Command Centre on 23 December 2015. The minutes of the meeting at which this occurred is document MMK 26 in the accompanying bundle.*

As Ms Daniels notes,

*the emergency had been ongoing for more than three months at this stage. Mr Mabelane, Eskom Chief Procurement Officer, provided the Supply Chain Management ("SCM") documentation, including an (a) procurement submission and (b) “Modification Report”, ostensibly explaining the deviation from submission.*

Tegeta (through short-term CSA's with OCM) had been supplying Arnot with coal since January 2016, along with nine (9) other suppliers (according to a media statement released by Eskom on 11 June 2016). However, six (6) of these companies had been redirected to supply other power stations in April 2016. Of the remaining four (4) companies, only Umsimbithi Mining and Tegeta (OCM) were discussed for increased supply in the submission to the BTC.



The BTC meeting commenced at 21:00 on 11 April 2016, via teleconference. Present at the BTC meeting were: Zethembe Khoza, Nazia Carrim, Viroshini Naidoo, Chwayita Mabude, Edwin Mabelane, Ayanda Nteta and Matshela Koko. Ms Naidoo testified that she, in her capacity as a Board member, was not aware that the “emergency” need for coal supply security would not be impacted by dealing with the matter on 13 April 2016, in the scheduled Board meeting. Ms Naidoo indicated that she believed management to be responsible for any mistakes related to the coal prepayment.

The BTC resolved to add an addendum to the short-term CSA between various suppliers and Eskom for additional coal to be supplied to Arnot Power Station for a period of five (5) months, while Eskom would conclude a permanent contract. The resolution ostensibly allowed for Tegeta (OCM) and Usimbithi to be contracted to supply additional coal to Arnot Power Station for at least five (5) months. Eskom CFO Singh was ostensibly authorised to approve the extensions as well as a prepayment in the amount of R659 558 079.38 to Tegeta. Usimbithi did not require additional funds to meet production requirements. The resolution also authorised Group Executive for Generation, Mr Koko, to act on behalf of Eskom to conclude the deal, including signing any necessary contracts.

Ms Daniels was excused from the Board meeting scheduled for 13 April 2016 to prepare the necessary documentation in order to ensure that the payment to Tegeta, resulting from the 11 April resolution, could be processed on that day. Referring to the timing of the payment to Tegeta coinciding with the deadline for payment for OCH, Ms Daniels states:

*“It now makes sense as to why I was allowed to be excused from the meeting of the 13th to go and finish the agreement because the actual payment took place on the 13th of April”.*

Absa Bank confirmed in their statement that the bank was contacted by Mr Singh to facilitate the guarantee. Eskom deposited funds into an assigned account in the amount of the guarantee, to be held by Absa.

#### **2.4.5.5 Eskom’s conduct in relation to Exxaro and Tegeta’s CSA to supply coal to Arnot**

Exxaro Chief Executive, Mxolisi Mgojo (“Mr Mgojo”), testified before the Committee and made two central assertions.

*Firstly, “Eskom has unlawfully pushed Exxaro out of the coal supply space, and contracted with a third party(ies) at a considerably higher cost to the fiscus.” The third party to which this sentence refers is Tegeta. Secondly, Exxaro’s experience and understanding of Eskom’s policies and practices around prepayments for coal directly contradict Eskom’s conduct in relation to Tegeta.*

Mr Koko made a claim, before the Committee, that to make up the 2.1-million-ton coal shortfall at Arnot power station,

*“Only two of the Arnot suppliers, Tegeta and Umsimbithi Mining (Pty) Limited, were able to source and supply the volumes required and meet the delivery time and quality requirements.”*

According to Exxaro, however, this statement is false. Mr Mgojo explained that the Exxaro-owned Arnot mine’s decreased coal supply was due to Eskom’s failure to procure the land that would be mined by Exxaro from 2011, onwards. His statement continues: (para 38)

*“Because of Eskom's failure to acquire the Mooifontein land, from 2011, the mine was only able to deliver to Arnot power station approximately 1.6 million of the agreed 4.02 million tons of coal per year.”*

Decreased volumes led to increased costs, which were communicated to Brian Molefe, GCEO at the time. Cost increases were reportedly worsened by Eskom’s failure to fund the “replacement of critical equipment”. These concerns, for which the Committee was presented with documentary evidence, were raised continually with Eskom’s management (including Brian Molefe and Ms Kiren Maharaj, then Divisional Executive of Eskom’s Primary Energy Division) who would later site escalating costs in terminating Exxaro’s contract to supply Arnot. In contrast with former Minister Zwane’s enthusiastic and possibly irregular assistance of Tegeta in relation to OCM, no correspondence was received when Exxaro wrote to the Minister to ask for intervention. This lack of response was particularly concerning to the company, given the economic consequences and, notably, 1500 job losses associated with the termination of Exxaro-owned Arnot’s CSA. Mr Mgojo’s statement notes other instances of Eskom failing to meet its contractual obligations, leading to commercial difficulties for the company. On the matter of Arnot, he concludes:

*Eskom’s non-performance of its contractual obligations has thus prevented Exxaro from delivering the quantity of coal required by the Arnot CSA and increased the cost of coal. Its termination of the CSA then ended the supply of coal provided by Exxaro. This reduction in supply provided the rationale for Eskom to supplement its reserves with coal supplied by third-party commercial mines.*

Speaking to the issue of Tegeta’s prepayment for coal from Arnot, Mr Mgojo’s statement explained that “cost-plus” power stations:

- are usually built near mining reserves (as is the case with Arnot);
- require CSAs that oblige Eskom to cover the capital and operating expenditure ("capex" and "opex") for mines;
- oblige the mining right holder (e.g. Exxaro) to supply coal to Eskom, exclusively; and

- oblige Eskom to carry environmental rehabilitation costs.

Mr Mgojo noted that cost-plus mines have significant benefits to Eskom, notably, security of coal supply, reduced costs, and that,

*"Eskom has transparency regarding the price of coal sold from a cost-plus mine". He continues, "The margin charged on the coal at the cost-plus mines is usually less than 5% compared to more than 20% at a commercial mine".*

This margin is also relatively stable. By comparison, commercial CSAs are more expensive to Eskom; however, the risks associated with these concerns is also wholly carried by the supplier/mining right holder.

With Exxaro out of the way, what appears to have been preferential treatment of Tegeta, to supply Arnot power station, could commence. Mr Anoj Singh's testimony before the Committee regarding Eskom's prepayment arrangements must be read against Mr Mgojo's. Mr Singh writes:

*Para 107: Prepayment of this nature is not unique and was done in the past and will continue to be done going forward as they form part of the following arrangements*

- *It was part of the mandate approved by the BTC in 2008;*
- *Long-term 40-year supply contracts with cost-plus mines.*

*Para 109: Pre-payment to cost-plus mines in the past amounted to R11.3 billion and over the next five years are projected to be an additional R17.5 billion.*

Mr Singh claimed that such a prepayment arrangement had been made with Exxaro in the past. Mr Matshela Koko's written statement is consistent with Mr Singh's interpretation, noting that a prepayment, "was not out of the ordinary in Eskom's operations". Mr Molefe's testimony was concurrent with his two colleagues':

*By the end of July in August, all the coal that had been bought in terms of that contract had been delivered. So we bought coal for 576 million and the coal was delivered. There is no question that we'd lent money and so on. It was a prepayment. Prepayment was very normal in this business; it had been done over and over again...*

However, for cost-plus CSAs, Mr Mgojo states,

*"The funding of such capital projects does not, however, contemplate any pre-payment. Should a capital project be required at this type of mine, the assessment and approval of this project would flow through Eskom and its coal supplier's respective governance structures. Rather than*

*a prepayment lump sum,” Mr Mgojo states, “Funding is then released in partial payments for work approved and done.”*

Unambiguously contradicting the testimonies of Mr Singh, Mr Koko, and Mr Molefe, Mr Mgojo states unequivocally that,

*As far as Exxaro is aware, Eskom does not make pre-payments to any other major miner in the industry. The so-called pre-payment to Tegeta for coal, of which Exxaro learned through the media, is the only instance to our knowledge where such so-called pre-payment was made.”*

The Eskom Board stated that the recommendation presented to the Board in favour of a prepayment for coal supplied by Tegeta to Arnot from OCM,

*“was approved and signed on 11 April 2016, by Ms Ayanda Nteta, Mr Edwin Mabelane and Matshela Koko”.*

The prepayment was ostensibly justified in terms of Supply Chain Management Policy 32-1034 Rev 2 of 2014 ("SCM 32-1034"). The Board's testimony corroborated the timelines and facts regarding the approval of the prepayment covered in Ms Daniels' testimony. The Board did, however, criticise the *State of Capture* report, stating:

*...the Public Protector speculates that the conduct of Eskom Board, in buying coal from TEGETA, was solely for the benefit of TEGETA. She bases her speculation on the analysis of payments made by Eskom to TEGETA in respect of coal supply. TEGETA was supplying coal to Eskom and Eskom was not entitled to tell TEGETA how to spend the money Eskom was paying to TEGETA.*

Ms Naidoo, who was a member of the Board that approved prepayment against this CSA, testified that the prepayment was unusual and not financially sound. She also testified on the matter of the pricing of Tegeta's CSA:

*In terms of the Tegeta transaction, I was very uncomfortable about that transaction because we were in financial problems and we couldn't afford as a business to prepay somebody.*

*...And especially if you're a corporate entity like Eskom where you are, in my understanding, the biggest purchaser of coal, you should be declaring the prices. And I mean that's the one thing I could not understand why the agreements were sometimes one-sided.*

*...But here you've got, you entering into contracts and agreements with people constantly where you're at the back end of the negotiation and it didn't make sense to me that we would be prepaying anybody that matter, when we, you know, we were buying volume and we didn't need to do that.*



**2.4.5.6 Eskom decided to make a prepayment to Tegeta for coal supplied from an entity it did not own**

Any payments made by Eskom for coal supplied by OCM ordinarily would have been made to the BRPs. Instead, the money was paid directly to Tegeta, which only had a right to purchase OCH. Mr Marsden explained that,

*there was an agreement between OCH and Tegeta while OCH was in business rescue, and "Optimum Coal Mine never supplied coal to Eskom. We supplied coal to Tegeta on 30-day payment terms. So, the prepayment was a transaction between Tegeta and Eskom".*

The sale by Tegeta of coal to Eskom that had been bought from OCM (which was then owned by Tegeta), must be distinguished from the prepayment to Tegeta for coal that Tegeta did not own and to which it had no legal right. At the time of the prepayment, Tegeta merely had the right to purchase OCM/OCH. They would not have been entitled to receive any payments in favour of either of these legal entities. Mr Marsden, speaking on the matter of the prepayment for coal in favour of OCM, testified that he or his colleagues received no payment:

*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.*

Mr Koko defended the prepayment to Tegeta, stating that paying OCH would have been irregular:

*During the interview [on Carte Blanche] Ms Govender asked me whether Eskom had prepaid Optimum (for coal). I responded that it did not. That response was quite correct. Eskom did not prepay Optimum for coal. The agreement that the BTC approved on 11 April 2016 was for prepayment for coal to Tegeta, which was an entity distinct from Optimum, for coal that Tegeta was able to secure and source from Optimum.*

It may be that paying OCH to supply coal in the absence of a contract would be irregular. However, this does not, as claimed by Mr Koko, amount to any justification for Eskom to pay Tegeta for another legal entity's property. If anything, Mr Koko's explanation compounds the irregularity of the prepayments which were made to Tegeta.

Despite the fact that the relevant submission to the Board spoke of Tegeta, Ms Naidoo, in her testimony, claimed the following:

*“My understanding was that we were actually getting the coal from the rescue practitioner; we were paying the rescue practitioner. That is why I asked the question, [...] if we pay the rescue practitioner is there a possibility you would lose our money?”*

When asked why she would agree to a prepayment to the BRPs, when the documentation before the Board only mentioned Tegeta, Ms Naidoo responded, *“Because I was of the impression at that time that Tegeta was in control of the mine.”*

Despite having publicly denied the prepayment, Mr Koko’s statement is crystalline in the matter of Tegeta’s cash prepayment approved on 11 April 2016:

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

#### **2.4.5.7 Eskom's imposition of penalties related to OCM**

According to Ms Daniels, by the time that she was involved in determining the quantum of the penalty to be imposed on OCM/OCH after it had been transferred from Glencore to Tegeta,

*“At most we [Eskom], would be able to prove around 700 million.... about R248 million of that penalty had already been paid [by Glencore]”.*

During arbitration with the supplier, Ms Daniels notes:

*“The supplier actually was quite disingenuous. It came back and said, ‘We owe you R239 million of which we’ve paid it, so we don’t owe you anything.’”*

Ms Daniels testified

*that she was able to negotiate up to R500 million, at which point she engaged the Board, to determine whether to proceed with a claim against Tegeta of R700 million, which she believed to be a more appropriate claim.*

Ms Daniels continues:

*The board tender Committee gave me a mandate to settle the claim without coming back to them, and the words were, ‘no less than 500 million.’ [...] This was proposed by Dr Naidoo, Pat Naidoo, who was a member of the BTC at the time, and supported by the other members. So, there I went with a mandate to settle. While I had said 700 I came out with a mandate not less than 500 million. I instructed the attorneys, ‘Push as hard as you can; [...] I am not going to be able to explain to South Africa 500 million, or less. So, I’m not going to take that chance.’ We ended up settling at 577 million and of which 248 million had already been paid.*

Mr Khoza confirmed the matter of the R500 million adjusted penalty to the Committee, but claimed that this amount was based on the advice of Eskom officials,

*"With the long debate then I think the resolution [...] of the board tender was said you can settle nothing less than 500 because they said they can justify up to 500".*

#### **2.4.5.8 Tegeta used "Other People's Money" ("OPM") to buy OCM/OCH**

The *State of Capture* Report found that the timing of payments from Eskom in favour of Tegeta allowed Tegeta to purchase OCM/OCH. Eskom's guarantees and payments gave the appearance to investors that Tegeta had the resources to buy the mine when this was not the case. When asked about the timing and purported urgency of the 11 April BTC meeting, Mr Khoza replied,

*"The urgency of the coal at the time because the technical team in terms of coal declared that there will be a shortage of coal three months ago".*

This response did not explain why the meeting was called just two days before 13 April 2016, both the day that Tegeta needed to deliver the purchase price for OCM/OCH and the date for a scheduled Board meeting, which could have accommodated the matters of the 11 April meeting. In his statement, Dr Ngubane denied that Eskom played any improper role in facilitating the purchase of OCM/OCH by Tegeta.

#### **2.4.5.9 Events Following Tegeta's Acquisition of OCH relating to the Mine Rehabilitation Trusts**

In April 2016, a Tegeta director, Ms Ragavan attempted to access the OCM rehabilitation fund through Standard Bank, even though OCM was still under the management of the BRPs. Withdrawing money from mine rehabilitation funds ("environmental trusts") for private purposes is not allowed under NEMA or MRPDA. The BRPs wrote to Tegeta on 24 April 2016, to inform them about the incident and referred them to the relevant legislation. The Department of Mineral Resources, under Minister Zwane, approved the transfer by Tegeta of the Koornfontein and Optimum Mine Rehabilitation Trust Funds to the Indian Bank of Baroda. Tegeta transferred the Koornfontein Trust funds amounting to R280 million to the Bank of Baroda in May 2016, and the Optimum Trust funds amounting to R1.47 billion in June 2016. Despite having been informed of relevant legal requirements regarding the environmental trusts, various large debits and credits have been noted on both accounts. These appear to be irregular and unlawful.

#### **2.4.6 Governance Issues**

#### ***2.4.6.1 Eskom Board members involved in the round robin resolution of 9 December 2015***

The Public Protector's *State of Capture* report identified Board Members who had direct or indirect interests or relationships with Tegeta and its shareholders. These include:

- Dr Ngubane, Eskom Chairperson, had previously shared a directorship with Mr Salim Essa (director of Elgasolve, a Tegeta shareholder);
- Mr Pamensky has/had various interests in entities related to Tegeta and shareholders of Tegeta;
- Ms Devapushpum Viroshini Naidoo's ("Ms Naidoo") spouse is a director of Albatime, which provided funding to Tegeta for the purchase of OCH, and was an advisor to Minister Zwane, who allegedly requested Eskom to undertake procurement negotiations for OCM with Tegeta, as noted in correspondence between Mr Koko and the Department of Mineral Resources from 6 December 2017);
- Ms Nazia Carrim's (Ms Carrim) spouse is related to Mr Salim Essa;
- Mr Romeo Khumalo (Mr Khumalo) shared a directorship with Mr Salim Essa; and
- Ms Mariam Cassim (Ms Cassim) was previously employed by the Gupta owned company, Sahara Computers.

#### ***2.4.6.2 Board members at the BCT meeting of 11 April 2016***

Board Members and Eskom executives invited to the late-night BTC meeting of 11 April 2016 included:

- Mr Zethembe Khoza (linked in the #Guptaleaks and testimony before the Committee to the Gupta family);
- Ms Karim's spouse is related to Mr Salim Essa;
- Ms Naidoo's spouse is a director of Albatime, which provided funding to Tegeta for the purchase of OCH, and was an advisor to Minister Zwane, who allegedly requested Eskom to undertake procurement negotiations for OCM with Tegeta, as noted in correspondence between Mr Koko and the Department of Mineral Resources from 6 December 2017);
- Ms Chwayita Mabude (Ms Mabude, who was removed from the Eskom Board in June 2017 following revelations of her alleged connections to the Guptas in the #Guptaleaks emails);
- Mr Edwin Mabelane;
- Mr Ayanda Nteta;
- Mr Matshela Koko (who seemingly lied on television about having signed off on the Tegeta prepayment)



Ms Naidoo declared her interest in a number of Eskom Board meetings and recused herself from the BTC decision on Tegeta.

#### **2.4.6.3 The role of Eskom Board members concerning the Eskom guarantee and the Tegeta prepayment for coal**

Eskom's Board members are required to act in good faith and for a proper purpose, in the best interests of the company, and with the degree of care, skill and diligence that may reasonably be expected of them. Eskom directors also have a duty not to allow the company to trade recklessly, with gross negligence or fraudulently. The accounting authority for Eskom is its Board in terms of section 49 of the PFMA. In terms of section 49 and 51, the board must take disciplinary steps against any employee who contravenes the PFMA; or commits an act which undermines the financial management and internal control system of the public entity; or makes or permits an irregular expenditure or a fruitless and wasteful expenditure. Concerning Tegeta, the Board twice approved transactions that appear to be in contravention of the PFMA, including delegating Eskom executive CFO Singh and Mr Koko to conclude these transactions.

In the presentation by Eskom's Board to the Committee, represented by Mr Khoza, Dr Naidoo and Mr Sean Maritz ("Mr Maritz"), the Board's position was to deny a role in the sale of OCM/OCH to Tegeta:

*"I wish to point out that Eskom was not involved in the purchase of Optimum Coal Holding by Tegeta and is therefore is unable to assist the Committee in this regard as this was a commercial transaction between two private companies".*

The Board also defended the use of a prepayment in favour of Tegeta, citing previous examples of 'prepayments'. As explained above, these alleged examples, however, related to cost plus mines and were not prepayments.

Referring to Ms Daniels' statement before the Committee, the Board suggested that Ms Daniels had failed to inform them of the Eskom guarantee in favour of Tegeta. The Board's statement unambiguously claims,

*"At no stage was the board aware of Tegeta or that it was given a guarantee".*

This was contradicted by the Eskom executive directors that they did inform the Board in its quarterly board meeting documents. Mr Molefe was also aware of the guarantee.

#### **2.4.6.4 Recommendation made to Eskom to take action against Mr Koko**

Mr Qoma noted in his testimony and statement that Mr Koko had lied publically about his role in facilitating the prepayment for coal to Tegeta. He noted that, in his professional opinion, Koko and Minister Lynne Brown's behaviour had serious reputational consequences for Eskom. Mr Koko was not disciplined for his public misdeed. Instead, he was appointed as Acting CEO:

*The Minister was somewhat oblivious of the septic boil caused by the revelations of the State of Capture. Her appointment of Koko served to fast-track Eskom's reputational downward spiral. Then and in hindsight, this decision remains abhorrent and exposes Minister Brown's weak leadership. A grave reputational spiral that resulted is directly attributable to this and other irrational decisions by the Minister.*

Mr Qoma testified that he recommended that action be taken against Mr Koko and Mr Singh. However, none was taken:

*I tried strenuously to persuade Dr Ngubane to rid Eskom of certain executives who were destroying Eskom's reputation; Koko was one of them. While he agreed with me, he never acted. There was a patently clear reluctance to act against Mr Anoj Singh and Koko at Board.*

#### 2.4.6.4.1 *The Eskom Board undermined the Dentons investigation*

The Eskom Board had commissioned the Dentons Report. Mr Qoma testified that he recommended that the report be made public and that, following his recommendation in February 2017, the Board agreed and invited the media to a report launch. However, according to Mr Qoma's testimony, the Board's actual response was indicative of a broader pattern of lack of transparency at Eskom:

*In the intervening period, the Board decided to seek a legal opinion on the release of the report, which advised against the release of the report. Instead, it recommended a redacted version via a PAIA process. This was a classic way of managing reputational risks through legal opinions – a dangerous path. My professional protestations fell on deaf ears resulting in a huge backlash when this decision was announced in the press conference (on 7 February 2017).*

Mr Qoma pointed out that the Board had limited the scope of the Dentons investigation to,

*“purposely avoid any action against individuals who were behind the governance lapses”.*

#### 2.4.6.5 ***Incidences of possible undue influence***

##### 2.4.6.5.1 *Eskom placed pressure on Glencore and potential OCM buyers, in favour of a Tegeta purchase*

Business rescue proceedings resulted in OCH and OCM falling under the legal administration of BRPs, who were appointed on 4 August 2015. Mr Marsden explained that OCM and OCH being placed into business rescue had resulted from Eskom's failure to renegotiate OCM's CSA and the imposition of the coal quality penalty,

*"Ultimately those negotiations failed at a very senior level within Eskom, and a penalty was then applied".*

According to Mr Marsden, it became apparent to him in early October 2015 that a negotiated settlement around the CSA was unlikely to happen – the BRPs had received a letter from Eskom that their proposals had been rejected,

*“in terms of restructuring in the entity in its current format, with its current shareholding”.*

In a change of strategy, the BRPs then signed a term sheet with a third-party - Pembani Group - for the sale of OCM. Under conditions with Eskom which were described by Mr Marsden as “acrimonious”, Pembani was unable to conclude contractual negotiations with Eskom.

#### 2.4.6.5.2 Preferential treatment of Tegeta by Eskom

Mr Marsden testified that he received unsolicited offers to buy OCM, including an unsolicited bid from Gupta-owned Oakbay (a Tegeta shareholder), delivered by KPMG on 1 July 2015. Close to four months later, on 24 November, Mr Koko chaired a meeting between Eskom, Tegeta, and the BRPs, at which Mr Marsden was requested to bundle all assets under OCH to be sold together, “to keep good with bad” as OCM was still operating at a loss of ~R120 million per month and was facing a backdated penalty of R2.17 billion.

It should be noted that under CEO Molefe, Eskom's dismissal of the fourth addendum to the CSA in May 2015, which was the product of lengthy and complex negotiations, termination of the CSA negotiation process in June 2015, and reinstatement of an inflated, backdated penalty in July 2015, likely led to OCH and OCM being put under voluntary business rescue. Furthermore, it may have created the conditions under which the BRPs had to negotiate the sale of OCM, and then OCH.

In contrast to Eskom's dealings with Glencore and Pembani, Tegeta was offered favourable treatment by Eskom, including a guarantee, short-term CSA's to supply coal to Arnot Power Station, and ~R600 million prepayment. These financial arrangements gave the appearance of viability and having adequate resources to purchase OCH, when, in fact, Tegeta did not have the necessary funds without these agreements with and payments from Eskom. Furthermore, the National Treasury PwC report finds that Tegeta was offered preferential pricing for coal supplied to Arnot. One of two other coal supply contracts that Eskom cancelled with third parties provided the cheapest coal on SOC's books at R132 per ton.

The National Treasury PwC report also found a contradiction between the Board's claims that Eskom CEO Molefe had no influence over procurement decisions of the Board, given his role in the OCM CSA negotiation process, and his levying of the backdated penalty.

#### 2.4.6.5.3 Key Eskom executives were compromised during Tegeta negotiations

The testimonies provided by Ms Daniels and Mr Qoma, respectively, suggest that Mr Koko, who played a central role in securing and finalising the Tegeta prepayment, was compromised by his relationship

with the Gupta family and Tegeta shareholders. In her testimony, Ms Daniels described a meeting initiated by Mr Koko on 9 March 2015 at which she encountered Mr Essa at his offices in Melrose Arch. Here, she reports,

*Mr Essa asked, “What needs to be done if you want to suspend people?” She adds that Mr Essa informed her in the presence of Mr Koko that “Mr Matona [then Eskom CEO], Ms Molefe [then Eskom CFO], Mr Marokane and Mr Koko” would be suspended and that the Board would communicate this, along with an investigation into Eskom. The suspensions and investigation described and foretold by Mr Essa subsequently took place. Furthermore, Mr Qoma presented testimony in which he expressed grave concern at the reinstatement of Mr Koko following the television interview in 2016 in which he was caught in a lie, denying that he signed the prepayment in favour of Tegeta for coal for Arnot Power Station.*

#### **2.4.6.6 Possible preferential treatment of Tegeta by the Ministry and Department of Minerals and Resources (“DMR”)**

The National Treasury PwC Report found that “Minister Zwane may have provided Tegeta with an unfair advantage by assisting in the negotiations for the sale of all shares held by OCH when travelling to Switzerland”. The Ministry approved the sale agreement between Glencore, Optimum Coal Holdings, and Oakbay and Tegeta. Approval was completed in just three and a half months when the process usually takes between one (1) and three (3) years. This requires further investigation.

The Committee was presented with information by Ms Daniels that included written correspondence from Mr Koko, then Eskom Executive Generation, to the Director-General for the Department of Mineral Resources, Dr Thibedi Ramontja, on 6 December 2015. In the correspondence titled, “Optimum Coal Mine Propriety Limited coal supply to Hendrina Power Station”, Koko admonishes Glencore for their threats of liquidation of OCM, and calls for the DMR to intervene to resolve the situation by mid-December of 2015:

*The upcoming adversity facing Eskom will require some form of intervention on the part of the Department of Mineral Resources to assist Eskom in leveraging the necessary key authorities to assist in assuring resolution to the coal supply situation and certainly going forward. I would request your assistance in this regard. Should you require any further information please do not hesitate to contact me. Yours sincerely. Matshela Koko, Group Executive Generation.*

The reply from the DMR included the assurance that the approvals for the transfer of OCH to Tegeta were being prioritised, and further irregularly includes a suggestion to provide Tegeta with a prepayment for coal supply:

*We would also request for Eskom to play an active role in providing support for the project to proceed. In return for the new owners honouring the current contract up to 2018 and for driving*



*transformation, we would like to propose that consideration be made for some prepayment to be made for up to 1 year of coal supply, understanding the upfront capital injections to be made to ramp up production to meet coal supply requirements from these mines.*

Mr Khoza, representing the Eskom Board, noted that this correspondence had motivated the Board's decision on the guarantee issued by Eskom to Tegeta:

*On the 8th of December, a round robin resolution was submitted to the board by management. The round robin was accompanied by a submission which contained the motivation for the round robin. The submission was titled 'Pre-purchase of coal from Optimum Mine Limited'. [...]*

Mr Koko, in his capacity as the Group Executive for Generation, on the 6th of December, wrote a letter to the Department of Mineral and Resources. The letter dealt with the security of supply to Hendrina Power Station referring to Optimum the second paragraph of the letter read as follows:

*"In rather dramatic fashion the company was placed under business rescue and Eskom was faced with an intermittent veil threats of liquidation while at the same time the business rescue practitioner purported sort construction...constructive engagement within the parties."*

Mr Koko's tone appears to be in line with observations by Mr Marsden of the "acrimonious" relationship between Eskom and Glencore executives, respectively. No explanation was offered as to why the Minister was being called upon to intervene in an Eskom supplier contract with a private party. According to Mr Khoza's testimony, the instruction to consider a guarantee for OCM came directly from the Director General of the Department of Mineral Resources. Mr Koko acknowledged in his statement that the round robin resolution resulted from this correspondence.

The Board's resolution (included in Ms Daniel's submission to the Committee) with respect to the guarantee in favour of Tegeta directly references this correspondence:

*The request from the Department of Mineral Resources is hereby noted. The group chief executive together with the group executive for Generation and Chief Financial Officer are hereby authorised to negotiate and conclude a pre-purchase of coal agreement with the proposed owners of Optimum Coal Mine. This agreement shall be subject to the necessary regulatory approvals having been obtained by Eskom and the supplier respectively as and when necessary. The Chief Financial Officer is hereby authorised to take all the necessary steps to give effect to the above including the signing of any consents or any other documentation necessary or related thereto.*

Dr Ngubane's statement did not find fault with the Minister of Mineral Resource's intervention to avoid what he described as a "national crisis". He stated that efforts were being made to ensure OCM's financial viability and prevent job losses. However, the same effort had not been made for the mine's

owners at that time, Glencore, or for other Eskom coal suppliers (such as for the Exxaro owned Arnot coal mine).

#### 2.4.7 Additional Matters

##### 2.4.7.1 *No action by the National Prosecuting Authority (“NPA”)*

Mr Marsden referred to his report filed with the Directorate of Priority Crime Investigation (DPCI) under Section 34 the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004). Mr Marsden reported that he signed two affidavits, one three months after the payment in 2016 and one in June 2017, following contact from an investigator in May 2017. Despite the publicity and seriousness of his allegations, a new investigator only contacted Marsden in November 2017 and the NPA has taken no public action in relation to the subject matter of Mr Marsden's report.

##### 2.4.7.2 *Evidence presented of links between the Ministry of Public Enterprises, Eskom Executive, the Eskom Board and the Gupta family*

Mr Qoma testified that Mr Khoza, informed him, at a meeting 17 June 2017 in his home, that “Minister Brown is captured”. Allegedly, Mr Khoza also told him that four new Board members would be announced at the AGM on 23 June and that these individuals had been selected by the Gupta family.

Mr Qoma also testified that Dr Ngubane had, during his tenure as Chairman of the Board, attempted to suspend Mr Koko in response to a letter listing alleged infractions. He testified that this was stopped by the Guptas, via Minister Brown:

*Just before Dr Ngubane called Koko in to suspend him, he (Khoza) sneaked out to alert a G-brother of the imminent suspension. He said, in turn, a G-brother instructed Minister Brown to cancel the suspension, which Dr Ngubane dutifully cancelled. That’s how he explained the extent of Minister Brown’s capture to me. Dr Ngubane has confirmed to me the key elements of Khoza’s narrative, and more particularly, that he indeed received a call from Minister Brown to not go ahead with the suspension.*

Mr Qoma took, “G brother” to mean a ‘Gupta brother’.

#### 2.4.8 Observations

2.4.8.1 *It appears that the events that led to OCH being placed under business rescue were the result of irregular and possibly unlawful exercise of public power for the benefit of Tegeta.*

- i. The escalation of the fourth amendment to the Hendrina CSA by the Eskom Board to Acting CE Molefe is out of line with convention and is questionable.

- ii. The motivation for Mr Molefe rejecting the fourth amendment; undermining and terminating the prior negotiations is unclear and questionable, especially when considering the surrounding circumstances.
- iii. The timings of Eskom's imposition of a R2.17 billion penalty, as well as Eskom's valuation of the penalty, were irregular, possibly unlawful and financially prejudicial against OCH.

*2.4.8.2 The role of the Ministry of Mineral Resources in the Tegeta/OCH transaction is unusual and potentially improper.*

- v. If former Minister Zwane's trip to Zurich did include meetings that assisted in the negotiation of the sale of OCH/OCM to Tegeta, this would be improper (as would any benefits he could have received for this).
- vi. The reasons for and timing of various Section 54 mine stoppages at Glencore mines at the time of the negotiation process are highly questionable.
- vii. The facilitation of the approval by the Minister of transfer of OCH to Tegeta was done in a very short period of time, which is unusual.

*2.4.8.3 Eskom executives and the Board acted in an unusual and potentially improper way in their dealings with Tegeta.*

- viii. Eskom's guarantee of R1.6 billion to Tegeta, facilitated by CFO Mr Singh and approved by the Board, is highly questionable and potentially unlawful.
- ix. Eskom Board members' relations with the Gupta family-owned businesses at the time of negotiations and when the sale agreement was reached were likely to raise conflicts of interest that should have resulted in their recusal from approval processes.
- x. Mr Molefe's relationship with Ms Ragavan and the Guptas further complicate his stance towards OCH/OCM while Glencore owned the entity.

*2.4.8.4 The speed of Tegeta related approvals for the purchase of OCM and OCH, as well as Eskom's decisions to enter into the CSAs for Arnot, suggest preferential treatment in contravention with Supply Chain Management ("SCM") policies and the PFMA*

- xi. The speed with which Tegeta received the necessary approvals from the Competition Tribunal of South Africa (2 months) and the Department of Mineral Resources (3.5 months) is unusual.
- xii. It is unclear why Eskom acted against its financial interest, in allowing Tegeta to extract a profit by selling coal to Eskom at a higher price than Tegeta was able to obtain such coal from OCM.
- xiii. The prepayment in favour of Tegeta was highly unusual and outside of SCM processes.

- xiv. The purchase of OCH shares by Tegeta probably would not have been possible without Eskom's prepayment.
- xv. The CSA between Eskom and Tegeta for coal supplied to Arnot was secured outside of required SCM processes.

#### *2.4.8.5 Tegeta's management of the environmental trusts is possibly illegal.*

- v. The motivation for the Department of Mineral Resources' approval of the transfer of the funds to a bank external to South Africa is unclear.
- vi. According to relevant legislation, namely NEMA and MRPDA, the holder of a mining right is prohibited from using the Rehabilitation Trust Fund for purposes for which it is not intended. However, it appears that a number of large debits and credits were made against the Koornfontein and Optimum Rehabilitation Trust Funds.

## **2.5 Eskom and the Trillian Saga**

### **2.5.1 Background**

In December 2016, Minister Lynne Brown categorically denied in a written response to Parliament that Eskom had any contracts or had conducted any business with the Trillian Capital Partners (Pty) Ltd (2015/111759/07) ("Trillian Capital"). In July 2017, however, it emerged that Eskom had paid Trillian in the region of R600 million ostensibly for 'consulting' work that had been sub-contracted by the global management consulting firm, McKinsey & Company ("McKinsey"), as its BBBEE partner. Eskom's relationship with Trillian Capital had grown out of existing contracts between Eskom and McKinsey, where McKinsey had previously sub-contracted to Regiments Capital Pty Ltd ("Regiments"). McKinsey and Trillian were paid R1.6 billion for work that substantially deviated from standard procurement processes and was never approved by National Treasury. The payments to Trillian were made between April 2016 and 31 March 2017, with no contract between Eskom and Trillian Capital.

Investigations into Eskom's relationship with and payments to Trillian suggest that there may have been numerous contraventions of Section 217(1) of the Constitution, the Public Finance Management Act ("PFMA"), the Companies Act 71 of 2008 ("Companies Act"), the Prevention and Combating of Corrupt Activities Act of 2004, the Prevention of Organised Crime Act of 1998, Eskom's Memorandum of Incorporation 2016 ("MOI"), and other internal Supply Chain Management ("SCM") and governance policies and procedures.

### **2.5.2 Witnesses were called to testify**

Witnesses called to testify on this matter:

- Ms Mosilo Mothepu, Former Trillian Financial Advisory CEO



- Ms Bianca Goodson, Former Trillian Management Consulting CEO
- Ms Tsholofelo Molefe, Former Eskom CFO
- Ms Suzanne Daniels, Eskom Former Company Secretary and currently Head of Legal and Compliance (on suspension)
- Mr Khulani Qoma, Eskom General Manager in the Office of the Chairperson
- Dr David Fine, Senior Partner, McKinsey London Office
- Ms Devapushpum Naidoo (Viroshini), Eskom Board member from 12 December 2014 to 1 July 2016
- Ms Venete Klein, Eskom Board member from 12 December 2014 to May 2017
- Mr Zethembe Khoza, Eskom Interim Board Chairperson
- Dr Pat Naidoo, Eskom non-executive Board Member
- Mr Sean Maritz, Eskom Acting CEO 2017 - 2018
- Ms Lynne Brown, Minister of Public Enterprises
- Mr Anoj Singh, Eskom CFO (on suspension)
- Mr Matshela Koko, Former Eskom Acting CEO, and Executive for Generation (on suspension)
- Mr Rajie Murugan, G9 Consulting Services CEO
- Mr Abram Masango, Eskom Group Executive: Capital Projects (on suspension)

### 2.5.3 Documentation presented to the Committee

Included, amongst others, in the documentation submitted to or called for by the Committee for the purposes of the inquiry were:

- A Report of the Public Protector “*State of Capture*”, Report 6 of 2016/7 14 October 2016 (“Public Protector “State of Capture” Report”)
- Report in terms of Section 34(1)(a) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 by Piers Marsden and Peter van den Steen, signed on 1 July 2016 (Marsden “Section 34 Report”)
- Question for written reply, Question No. PQ 2701, “Ms NWA Mazzone (DA) to ask the Minister of Public Enterprises”, 2 December 2016.
- Media Statement by Trillian Capital Partners, 23 October 2016
- Full Statement by McKinsey On Eskom, 17 October 2017-12-07
- Eskom Statement, “Eskom takes action to recover funds unlawfully paid to McKinsey and Trillian”. 5 October 2017
- “Report for Mr T M G Sexwale, Chairperson Trillian Capital Partners (Pty) Ltd on Allegations with regard to the Trillian Group of Companies and Related Matters” (“Budlender Report”) by Adv. Geoff Budlender, 29 June 2017

- Statement by Ms Mosilo Mothepu, “Public Enterprises Portfolio Committee: Inquiry into Eskom, Denel, Transnet and South African Airways (state-owned company) SOC and Trillian Capital Partners (TCP)”. October 2017
- Statement by Ms Bianca Goodson, “Bianca Goodson’s Statement”. 19 October 2017
- Submission prepared by Suzanne Margaret Daniels, Group Executive: Legal and Compliance, “Portfolio Committee on Public Enterprises: Oversight Inquiry into Governance, procurement and financial sustainability of Eskom”. 8 November 2017
- Statement of Khulani Qoma, Eskom General Manager in the Office of the Chairperson “Eskom’s implosion: deliberate, well-orchestrated & shame-free; entire leadership culpability”. 10 November 2017
- Statement by Devapushpum Naidoo (Viroshini), “Portfolio Committee on Public Enterprises Oversight Enquiry into Governance, Procurement and Financial Sustainability of Eskom.” November 2017
- Statement by Venete Klein, Eskom Board member from 12 December 2014 to May 2017. November 2017
- Presentation by Minister of Public Enterprises Lynne Brown to the Parliamentary Inquiry into Eskom, 22 November 2017
- Statement of Mr Anoj Singh, “Written Narrative of Evidence to be Presented by Anoj Singh, Financial Director of Eskom, at an Oversight Inquiry into Corporate Governance of State-Owned Enterprises, by the Portfolio Committee on Public Enterprises of the Parliament of South Africa, on 5 December 2017" Vol. 1-3.
- Written submission of Mr Matshela Koko
- G9 Group, Presentation to the Parliamentary Portfolio Committee of SOE’s: The Trillian Investigation, 27 February 2018. (“G9 Report”)
- Submission by Mr Abram Masango for the Portfolio Committee on Public Enterprises, 27 February 2017, Vol. 1-4

#### 2.5.4 Trillian Capital is established

Trillian Capital is a financial services and advisory firm established in 2015. Trillian Holdings (Pty) Ltd, which is 100% owned by Mr Salim Essa, owned a 60% shareholding in Trillian Capital at the time of the events in question. Zara W (Pty) Ltd ("Zara W") (2011/104773/07) owned 25%, and employees and other shareholders owned 15%. Trillian Capital has five subsidiaries:

- 1) Trillian Management Consulting (“TMC”)
- 2) Trillian Financial Advisory (“TFA”)
- 3) Trillian Asset Management (“TAM”)
- 4) Trillian Securities (“TS”)

## 5) Trillian Property (“TP”)

Trillian was first established as a company by Clive Angel, Stanley Shane and Marc Chipkin.

### 2.5.5 Trillian’s relationship with Regiments

In its current form, Trillian Capital grew out of a split in Regiments. This split has been the subject of two separate High Court applications between Regiments directors, Dr Eric Wood, Litha Nyhonyha and Maganheran Pillay. In the first case Dr Wood is suing Mr Nyhonyha and Mr Pillay, seeking to declare them delinquent directors under the Companies Act; and in the second, Mr Nyhonyha and Mr Pillay seek the same relief in relation to Dr Wood. Mr Nyhonyha and Mr Pillay argue that they never agreed to sell a majority stake in the company to the Guptas. With Wood citing other issues, the parties agreed to end their relationship, each taking a share of Regiments' assets and work. These negotiations were, however, never concluded. Dr Wood resigned on 29 February 2016, retaining a shareholding in Regiments. Regiments had two divisions, Regiments Management Consulting and Regiments Financial Advisory. When Dr Wood moved to Trillian Capital, he moved with several employees from the Regiments Financial Advisory Division. On 1 March 2016 he was appointed as CEO.

### 2.5.6 Cession of Regiments’ contracts with state-owned companies to Trillian

There were legal disputes ongoing between the three Regiments directors as to who is entitled to the company’s work and clients. By the time Dr Wood moved over to Trillian, Regiments had been working with and had been paid by state-owned companies, including both Transnet and Eskom. Regiments had been working as the "supplier development" partner of McKinsey, undertaking financial advisory work. Despite the disputes between Regiments’ directors, Regiments’ work appears to have been ‘ceded’ to Trillian by both state-owned entities.

### 2.5.7 Trillian payment to Tegeta

The *State of Capture* report found that Trillian Capital “Contributed to the purchase price of OCH”, a deal which was concluded in April 2016. The report details contributions in the following amounts: TA contributed R 95 639 309.00; TAM contributed R 74,784,000.00; and Trillian Capital contributed R65 000 000.00.

### 2.5.8 McKinsey and its supplier development partnership with Trillian

The Budlender Report references a memorandum signed by Vikas Sagar and Alex Weiss of McKinsey, and Clive Angel and Eric Wood of Trillian, "McKinsey-Trillian partnership principles for the Eskom turnaround", dated 15 December 2015. Concerning the relationship between TMC and McKinsey, McKinsey executive, Lorenz Jungling, wrote,

*“The programme does not have a detailed long term plan that will make this explicit. Besides, regardless of TMC resources allocated to projects, TMC will still get their 30%”.*

The only reasonable inference from this is that the contribution expected by McKinsey from Trillian was not defined and that there was no specified relationship between remuneration and output or quality.

Despite having worked with Trillian for Eskom since January 2016, after completing a risk review process, McKinsey formally rejected Trillian as a supplier development partner in March 2016. Only after having faced severe public criticism, McKinsey published a formal statement in October 2017 in which it stated:

*In our eagerness to be responsive to the challenges Eskom faced, we mobilised our teams too quickly and began working alongside employees from Trillian in late 2015, before we later rejected a partnership with them in March 2016. Whilst our risk processes ultimately worked, we should have completed them sooner. We should not have begun to work alongside Trillian before we had completed our due diligence and without a contract in place. Had we fully understood Trillian's ownership structure at the time, we would not have considered working with them.*

It further stated:

*We have set aside our full fee for the Turnaround Programme for repayment [to Eskom].*

#### **2.5.9 Sunday Times allegations from 23 October 2016**

A whistle-blower who was later revealed to be Ms Mosilo Mothepu, former CEO of Trillian Advisory, disclosed information regarding misconduct on the part of the company, as well as its executives. These included allegations of irregularities in Trillian's relationships with and work for state-owned companies, including Eskom. The article also alleges that Trillian executives had used their knowledge of the dismissal of Finance Minister Nhlanhla Nene on 9 December 2015, and appointment of Des van Rooyen as Minister of Finance, for their private commercial benefit. Ms Mothepu cooperated with the Public Protector for the “State of Capture” report. It has also emerged that Regiment's principal, Mohammed Bobat, was appointed as an advisor to Minister Des van Rooyen during his brief tenure as Minister of Finance, and after that, as Minister of Cooperative Governance and Traditional Affairs (COGTA).

Trillian responded by denying all the allegations, attempting to discredit Ms Mothepu, and stated,

*“The Gupta family has no shareholding or other interest whatsoever in Trillian Holdings. It has no link to Trillian Holdings or to any of the other constituent members of the Trillian group of companies”.*

However, it has since been revealed that Mr Essa also owned 21.5% of Tegeta (owned by Gupta-owned Oakbay Investments) through his company Elgasolve. The Budlender Report also found that the *State of Capture* allegations that Trillian contributed to the purchase price for OCH to be “likely”.

#### **2.5.10 McKinsey's contract with Eskom, under which Trillian was paid**



A technical investigation by Oliver Wyman, a New York-based international consultancy firm, in December 2016 recommended an independent legal review of contractual relationships between McKinsey and Eskom. The investigation raised noteworthy concerns with the contract, which allowed McKinsey to charge fees in excess of market rates. In fact, it is not clear whether the contract ever entered into force, because necessary conditions were not met before the Conditions Precedent expired on 31 March 2016. Despite this, both McKinsey and Trillian continued to work with and receive payments from Eskom.

#### 2.5.11 The Minister denies any payments from Eskom to Trillian

Following media reports, on 2 December 2016, Hon. Ms NWA Mazzone, MP submitted a question to the Minister of Public Enterprises, Lynne Brown:

- (1) What amount did Trillian Capital Partners receive in service fees for allegedly negotiating the settlement of a massive insurance claim involving the explosion of a boiler at the Duvha power plant; (2) Did Eskom appoint the specified company to source a new supplier to replace the exploded boiler at the Duvha power plant; if not, why not; if so, what (a) were the fees payable to the specified company in this regard and (b) are the further relevant details;*
- (3) (a) Which other contracts of engagement have been concluded between Eskom and the specified company and (b) what are the costs involved in each case?*

The Minister provided the following written response:

- (1) No amount was paid to Trillian Capital Partners for the Duvha power plant insurance claim. Eskom did not appoint Trillian Capital Partners to negotiate the settlement for the Duvha Power Plant insurance claim.*
- (2) No, Eskom did not appoint Trillian Capital Partners to source a new supplier to replace the exploded boiler at the Duvha Power Plant. There was no need to appoint any external party to assist with sourcing.*
- (2)(a) Not applicable*
- (2)(b) No other additional relevant detail relating to the above is applicable.*
- (3)(a) None*
- (3)(b) Not applicable*

#### 2.5.12 Budlender investigation, November 2016 – June 2017

In November 2016, Advocate Geoff Budlender was appointed by Mr TMG Sexwale, Chairperson of Trillian Capital Partners (Pty) Ltd, to investigate allegations about the Trillian Group of Companies. These allegations focused on the cession of work from Regiments, Trillian's alleged political connections, links to the Gupta family and associates and Trillian's role in Tegeta's acquisition of OCH.

In his report, Adv. Budlender found that Trillian executives withheld information and deliberately attempted to undermine his investigation. Adv. Budlender was eventually provided with three Trillian invoices to Eskom, all marked 'paid'. The invoices amount to R266 136 534.00, inclusive of VAT.

Trillian entity	Date	Amount	Description	For the attention of:
TMC	14 April 2016 (paid 14 April 2016)	R30,666,000.00 (incl. VAT)	ESK2016-MC01 “Professional Fees: Pro-rate share of Eskom Corporate Plan Deliverable”	Anoj Singh
TMC	10 August 2016 (paid 13 August 2016)	R122,208,000.00 (incl. VAT)	ESK2016-MC02 “Professional Fees: Financial Advisory for the following Eskom initiatives: Project Surge, Private Sector Participation, Online Vending Services, Hitachi, Duvha, Short-term Funding Facility, Long-term Funding Facility”	Prish Govender
TMB	10 August 2016 (paid 13 August 2016)	R113,262,534.00 (incl. VAT)	ESK2016-MC03 “Professional Fees: Management Consulting for the Following: Programme Management Office, Procurement, Primary Energy, Claims, Generation”	Prish Govender

No tender was submitted for this work. There was, however, one tender submitted for financial advisory services over a three-year period, which was marked as “awaiting client decision”. Adv. Budlender was assisted by Ms Mothepu and the former CEO of TMC, Ms Bianca Goodson.

#### **2.5.13 Trillian’s role in the Duvha Boiler Tender in March 2017**

The Chinese firm, Dongfang, was awarded a tender through a process that sidelined other bidders despite Dongfang’s proposal being considerably more expensive. Media reports in the *Business Day* reported that Trillian had provided the “risk assessment” that contradicted Eskom executives’ assessments and resulted in Dongfang's selection. A court interdict halted the bid in June 2017.

##### ***2.5.13.1 Eskom denies paying Trillian in May 2017***

In May 2017 Eskom Spokesperson, Mr Khulu Phasiwe, confirmed that Trillian was a registered Eskom supplier. He also said that no payments had been made to the company and that “no services were used”.

##### ***2.5.13.2 Salim Essa announces the sale of shares in Trillian***

On 26 July 2017, Mr Essa announced he would sell his majority shareholding in Trillian to one of the company’s partners.

##### ***2.5.13.3 Eskom admits to releasing false information on Trillian in August 2017***

Eskom initially publically maintained that its dealings with Trillian were all in order, citing an investigation conducted by Oliver Wyman. However, in August of 2017 the power utility admitted that these aforementioned statements were incorrect.

#### **2.5.14 G9 Investigation and the relationship between Eskom and Trillian**

G9 Group was commissioned by Eskom Assurance and Forensic to undertake an investigation in response to an internal whistle blower's report. The anonymous report raised the alarm about a payment made to Trillian Management consulting. In particular, the complaint alleged that Trillian was paid within one day rather than 30 days, as is standard practice for service providers.

A confidential interim report produced by G9 confirmed that Eskom had deviated from procurement processes, and found that there was *prima facie* evidence of criminal conduct in relation to Trillian, including of fraud and money laundering, and that this was cause for criminal investigation. Media reports on leaked documents described alleged plans by McKinsey and Trillian to extract revenues from Eskom of up to R9.4-billion for successive services.

On 29 September 2017, remedial action was taken within Eskom and Anoj Singh (“Mr Singh”) was suspended. His suspension was followed on 2 October by that of Prish Govender (“Mr Govender”), Edwin Mabelane (“Mr Mabelane”) and Charles Kalima (“Mr Kalima”). Charges related to alleged unauthorised expenditure, irregular expenditure, financial misconduct, misrepresentations of procurement matters to the board and failing to uphold their fiduciary duties.

### 2.5.15 Procurement irregularities

Regiments' work for Eskom began in 2014 and was procured outside of proper procurement processes, and the applicable legislative and regulatory requirements.

Ms Tsholofelo Molefe (Ms Molefe) testified that she, in her capacity as CFO and her colleagues prepared a “Business Productivity Programme for Cost-Saving Initiatives” to address Eskom’s financial challenges. After presenting this to the Board, chaired by Mr Zola Tsosti in April 2014, the plan was rejected, and she was tasked with preparing a new plan to be presented to the Minister in June 2014. The Sunday following their presentation to the Board, Ms Molefe attended a meeting called by Collin Matjila, then Eskom's interim CEO. Salim Essa arrived at the meeting and proposed that Regiments could assist with this work. Ms Molefe testified,

*“Salim was then asked to tell us what, which company would help us, and he indicated that Regiments Capital would be the company that had done good work in Transnet, in SAA previously in terms of balance sheet optimisation.”*

At the time that Mr Essa made representations on behalf of Regiments, he did not own any shares in the company, and it is highly suspicious why he undertook to play this role and was granted the opportunity to do so.

The following Monday, a second meeting was held at Eskom’s offices and attended by Ms Molefe, Mr Matjila, Eskom employee Steve Lennon, and Regiments’ Director Eric Wood, along with one of his colleagues. At this meeting, Regiments indicated that they would be working with McKinsey, as they had done at Transnet. According to Ms Molefe’s testimony, she informed Matjila that the work in question would need to be procured through Eskom’s emergency procurement processes, given the urgency of the work. He then rejected her suggestion and stated,

*“I can see you are uncomfortable with this matter. If you are not comfortable, I will sign the agreement with Regiments.”*

Ms Molefe informed Matjila that he could approach the Board to amend procurement delegations so that a contract could be established, which he allegedly refused.

*We, in my discussion with Collin I said if it's an emergency you need to tell them to give it to us in less than 5 days and, however, what happened is that they came back to us within 14 days, if I remember a very well, because one of the things I raised when they sent their proposal. In fact, they did not send a proposal they sent a draft agreement of what the nature of the services they would provide is, what the pricing and the terms would be and that was sent within 14 days. I then went, I actually wrote an email to Mr Matjila because they sent me the agreement and I said to him it is on this basis that this does not constitute an emergency. They have taken 14 days, in*



*terms of our procurement process, if I recall, we could request suppliers or service providers to give us responses within 14 days on, 14 days on an urgent basis and therefore this did not constitute an emergency. He then...I sent him an email, and I said I copied the head of legal then Mr Neo Tsholanku, and I said I suggest that Mr Neo Tsholanku gives us his opinion on how we move on this matter, I then forwarded the agreement to them. He then called me in the evening and reprimanded me for putting such messages on email and asked for a meeting. We then had a meeting the following day, and he felt that he was not being supported, he's got a mandate from the shareholder and the board that certain things that need to happen urgently and we don't have time for wasting, we don't have time to waste with our long-winded procurement processes.*

While Ms Molefe drafted a supplier agreement as instructed by Matjila, in her capacity as CFO, she refused to sign this agreement with Regiments. She put this in writing, addressing concerns to Matjila, the Chairperson of the Eskom Board, Mr Zola Tsotsi, and three non-executive directors of the Board, Mr Mafika Mkhwanazi, Dr Boni Mehlomakulu and Ms Bejabulile Luthuli. Among Ms Molefe's concerns were the process, uncompetitive pricing of Regiments' proposal, and the contents and assumptions therein. Ms Molefe sought the opinion of primary energy experts within Eskom, who also took issue with the proposal.

In her correspondence, she quoted from a memo prepared by Eskom's internal legal counsel, Adv. Neo Tsholanku ("Mr Tsholanku"), referring to section 217 of the Constitution. Tsotsi called a meeting in response to Ms Molefe's email. According to Ms Molefe's testimony, Tsotsi allegedly pressured her saying, "We are wasting time and long-winded procurement processes; and, heads are going to roll." The aforementioned Board members supported Ms Molefe's concerns, but, she indicated that Tsotsi's comments, "Suggest to me that he had no regard for those procurement regulations". The Board did not approve the contract, which had an escalating fee structure, relative to savings delivered to Eskom, and reaching in the region of R500 million. The Board did, however, without a competitive process, approve a high-level desktop review of the proposed initiatives, which was delivered for R800 000.00. When asked what value, if any, was delivered to Eskom, Molefe answered,

*"I would say very little...There must have been ten or 15 initiatives that they put on the table. A number of them, we said that they were not viable."*

#### **2.5.16 Regiments the "Supplier Development" ("SD") partner of McKinsey at Transnet and Eskom**

Dr David Fine testified that the relationship between Regiments and McKinsey began at Transnet. McKinsey was informed that Transnet's existing SD partner, Letsema, was conflicted on a specific project. Transnet then introduced and recommended Regiments to McKinsey, and the partnership commenced in 2013, initially led by Nivan Pillay. Eric Wood took over from Pillay, following a

compromising media report in 2014. By mid-2015, McKinsey was convening weekly meetings to address challenges with Regiments because, as noted by Dr Fine, "the quality of work had declined".

Despite these reported concerns, at this time, McKinsey and Regiments extended their relationship. As testified by Ms Mothepu,

*"The understanding of my reappointment at Regiments [in June 2015] was to lead the Eskom team. Regiments had together with McKinsey submitted a proposal to Eskom and Regiments was supposed to be McKinsey's supply development partner."*

She goes on to describe the relationship between Regiments, McKinsey and Eskom:

*The MSA (Master Service Agreement), was supposed to be between McKinsey and Eskom. Now McKinsey was supposed to as the main contractor earn 70% of the fee and Regiments was supposed to receive 30% of the fee, and this was on if you go to paragraph 3.1.1, I'll just read it; that McKinsey and Regiments Capital had submitted a joint proposal in the first quarter of 2015 where McKinsey and Regiments were supposed to assist Eskom with management consulting services which included cost savings on procurement, generation, primary energy and the establishment of Eskom's Top Engineering Program...Now, Regiments was supposed to lead its own financial advisory transactions with Eskom called 'balance sheet optimisation and cash unlocking initiatives'. Now, because Regiments are financial advisory experts, the fees would be a 95% to Regiments and 5% to McKinsey, and that 5% was an administration fee. It was anticipated because the main contractor was McKinsey, Eskom would pay them directly, and then McKinsey will pay Regiments as a subcontractor.*

Whereas Ms Mothepu suggested this was a subcontracting relationship, Dr Fine stated that as a matter of policy the relationship between McKinsey's SD partner and Transnet or Eskom was direct. This was done ostensibly to allow BBBEE points to accrue to the SOC and not to McKinsey.

Although Regiments had worked with Eskom before, Ms Mothepu testified that her work, through Regiments, commenced at Eskom when Anoj Singh was appointed (the acting) CFO in July 2015. This work followed more informal assistance with a plan for his first 100 days, which, Mothepu testified, was undertaken in various venues around Johannesburg (and not at Eskom's offices). They only started to meet at Eskom offices after he was formally appointed as CFO.

#### **2.5.17 Regiments' relationship with McKinsey**

The relationship between Regiments and McKinsey, made it possible for work to be ceded to Trillian under questionable circumstances. When Trillian was established as a company, it had no apparent initial relationship to Regiments. However, it appears that Essa and Wood's relationship provided a basis for Trillian to take over Regiments' public sector work, even before Essa had no formal financial link to Regiments. As noted above, Essa and Wood had already, together, successfully lobbied Matjila

and Tsotsi for access to work from Eskom for Regiments in 2014, before the relationship described by Ms Mothepu.

Essa, with Wood, formally acquired Regiments' advisory business in 2015, absorbing staff, work and clients under Trillian, which was being established late in 2015. Ms Goodson describes her introduction to the company at this time,

*“My very first introduction to Trillian was through an organisation called Integrated Capital Management, and the individual particularly was Mr Clive Angel... he told me that Integrated Capital Management...was a very small company that was tasked with effectively building or establishing Trillian.”* In addition to Angel, there were two other directors, Mark Chipkin and Stanley Shane.

Trillian Capital was being established with several subsidiaries, as noted above. Ms Goodson would be the CEO of Trillian Management Consulting, a role she occupied from 1 January 2016 – 25 April 2016, having resigned on 19 March. Ms Goodson testified that during this time, she had one employee, her COO, and while she reported to Angel, she understood that Salim Essa was her ultimate boss. When she joined, she was told that Mark Pamensky, who would later join Eskom's Board, would be the head of Trillian Properties, although this did not materialise.

Although Wood was involved in Trillian from the beginning, he moved across formally in March 2016 with his staff, as described by Ms Mothepu:

*“I left regiments on the 29th of February but it was not a resignation, it was a section 197 [transfer] in terms of the Labour Relations Act when Mr Wood and Salim Essa bought Regiments Advisory, and I was transferred from Regiments Capital to Trillian Financial Advisory.”*

The announcement for this acquisition and transfer was made in December 2015, and Trillian only acquired significant staff capacity at this stage on 1 March 2016.

Ms Goodson testified that her role was specifically to build the human resources capacity for Trillian Management Consulting. It was not to seek work, and she was informed that a work stream had already been established with South African SOCs, as she states,

*I was informed very early on that work was secured, so my function would not be to sell work and to go and find work but would it be to be able to build up the human capital and the expertise and the IP within the organisation to fulfil that work.*

Ms Goodson testified that she was informed that Salim Essa was instrumental in procuring work:

*Clive [Angel] then also explained to me that Salim was somewhat operational in the sense that Salim was very involved in the business. He wasn't one of those shareholders that sort of just left it to the CEOs. He would help get us business; Clive made it clear that the relationships that our*



*major shareholder had enabled many opportunities and Salim was the boss, and Salim made the final decisions.*

The work that was secured, however, and as with the Regiments contract with Eskom, fell outside of legally prescribed procurement processes, as set out below.

Dr Fine explains in his testimony how McKinsey came to work with Trillian:

*So, in late 2015 when we raised our concerns about the partnership with Regiments, Mr Vikas Sagar said that the Regiments partnership was splitting and that they were going to separate. The investment banking and property business as I understood it at the time was going to stay with Regiments, and the consulting business was actually going to come out of Regiments and be formed into a company called Trillian. My understanding at the time was that the explanation given by Mr Eric Wood who was going to go with Trillian was that the partners were not all convinced that the consulting business was a priority, that the Regiments people did not want to invest further in this consulting business, and therefore by taking it out of Regiments and starting a new company he would have access to the investment resources and investors to start a truly large and significant black-owned consulting firm in South Africa. At the time that did also sound like an attractive proposition, because we had worked well at the point in time and we want to build strong black-owned consultancies in South Africa, we think that's important. And so, we did consider Trillian.*

McKinsey formally terminated their relationship with Regiments in a letter to Transnet on 26 February 2016, ostensibly because of media reports linking former employee, Mr Mohamed Bobat to the Gupta family. While Dr Fine testified that Trillian was being considered, pending a risk review process, he admitted that in early 2016 he knew that McKinsey and Trillian already had a substantial relationship with Eskom.

#### **2.5.18 McKinsey's contracts with Eskom**

The contracts under which Trillian worked, are questionable and may not be valid. Ms Daniels explains the structure of contracts and relationships between McKinsey, Trillian, and Eskom, in paragraph 127 of her statement:

*It is common cause that payments to McKinsey and Trillian were made in 2016 and 2017 under two contracts which had been entered into in 2015 (the First Contract, dated September 2015) and 2016 (the Second Contract, dated January 2016) between Eskom and McKinsey. There are no separate contracts with Trillian for this period.*

Daniels statement goes on in paragraph 138-139:



*The Second Contract was entered into on 7 January 2016 between Eskom and McKinsey, signed by Dr Alex Weiss (McKinsey) and Edwin Mabelane. It is called a “Service Level Agreement”. It however also appears to be called the “Master Services Agreement” in certain documents. It authorises approximately R540 million in down-payments.*

Different actors have variably represented the status of the "Master Service Agreement" ("MSA"). Work carried out by McKinsey and Regiments, and McKinsey and Trillian that fell under the Second Contract was ostensibly carried out 'at risk', in advance of any contract being approved by Treasury, as was required because of the deviation from transparent and competitive procurement processes. Ms Mothepu explained,

*We were told that the MSA was being approved by [the] Board, it's being negotiated, it's just a matter of time for it to be approved, and we...Matshela Koko, I remember at one meeting said that he had approached National Treasury to approve the deviation of appointing McKinsey and he had gotten a legal opinion.*

Dr Fine stated that McKinsey worked “in good faith”, believing that there was a valid contract between McKinsey and Eskom for all work invoiced. He appeared to be referring to the First Contract, and it is unclear how a company as sophisticated as McKinsey could have believed that its work was being conducted under the First Contract. McKinsey had sent Eskom eight invoices for approximately R80 million under the First Contract, from 30 October 2015 to January 2016, a period of just three months. Ms Klein's statement raises questions concerning the work that was done and the invoices delivered, as she indicates that the work was intended to be carried out over eight months:

*At the meeting of 10 September 2015, the Board resolved:*

- *to appoint McKinsey as the sole partner for the financial and strategic matters of:*
- *Cash flow and profitability targets for the Financial Year 2016;*
- *Updating the business cases for the Medupi and Kusile [power plants];*
- *Development and dissemination of the new design to cost strategy;*
- *Adapting Eskom's governance model to ensure delivery of the new strategy;*
- *that McKinsey should be contracted on a fixed cost basis with a total contract value of R101 733 124.80 for a period of 8 months*

The Acceptance Letter for the contract was sent by Eskom and signed by Matshela Koko in his capacity as Group Executive: Technology and Commercial, and by Sagar and Weiss of McKinsey.

Mr Rajie Murugan (“Mr Murugan”) of G9 Consulting Services presented the findings of the organisation's investigations into the relationship between Eskom and Trillian (hitherto confidential),

whose scope included an evaluation of the relationship between Eskom and McKinsey, and McKinsey and Trillian. There were also two issues concerning both contracts mentioned in Ms Daniels' testimony: 1) the contract was procured under a "sole source" bidding processes; 2) the remuneration structure was questionable.

As to the question of sole sourcing, the G9 report makes it clear that no evidence was forthcoming of any form of market research or other justification for a sole sourcing arrangement (p76):

*"In respect of Eskom Senior Management, they followed the same route when they engaged McKinsey on the MSA project. This means a Sole-Source and a flouting of policies and processes to engage McKinsey."*

Reviewing recordings of the MSA steering Committee, on which McKinsey and Trillian were represented, G9 observed that Treasury was not satisfied with the sole sourcing arrangement, and there were several other issues that remained unresolved. G9 concludes, *"These are, in our view, the actual reasons why the MSA should not have commenced in the first instance."*

Nonetheless, as the Committee heard from Ms Goodson, Ms Mothepu and Ms Daniels that work under the MSA did commence. Before McKinsey's termination of its relationship with Trillian, it functioned as the *de facto* legitimising vehicle for Trillian's access to Eskom work and payment. G9, in stark contradistinction with Dr Fine's statements, observes that McKinsey's acceptance of Trillian's extraction of fees is problematic (p88), *"...even if there was no criminal intent or conduct on the part of McKinsey, it cannot subjugate its role to one of an innocent by-stander or displace responsibility to Eskom"*. It is highly improbable that a company as sophisticated as McKinsey could, in good faith, have acted on the assumption that a contract based on a sole sourcing arrangement and on the applicable remuneration structure was lawful. In any event, McKinsey's potential use of Trillian to extract rents from Eskom may constitute criminal conduct.

#### **2.5.19 Lack of approval by Treasury for MSA**

Treasury approval was never secured for the MSA, and steps were taken to obfuscate this fact. Further to the matter of the remuneration model for the MSA, the G9 investigation found that while Treasury approval was sought for both the sole sourcing methodology and the remuneration model, no such approval was given (p55, 116). G9 notes (p53) that Mr Aziz Laher ("Mr Laher"), the Eskom Compliance Manager and PFMA specialist had alerted Mr Mabelane, Mr Govender and Mr Singh to the fact that the MSA required Treasury approval. Emails to this effect were included in a submission by the most recent Eskom Board, prepared by Bowman Gilfillan on 14 March 2017. Mr Tsholanku, Eskom's former Head of Legal who was described in Ms Molefe's testimony as a voice of caution, had also done the same, as had Mr Dale Sicard ("Mr Sicard") (p53).

G9 interviewed Mr Dave Gorrie (“Mr Gorrie”) who was one of the senior Eskom managers that sought confirmation of procurement arrangement. Mr Gorrie stated that Treasury approval had been secured for the single source method and remuneration model, offering the following email from Mr Solly Tshitangano of Treasury as evidence thereof:

*Practice Note 3 of 2003 is still applicable until replaced by new instructions after the promulgation of the new Treasury Regulations. The retainer/contingency fee principles are not clearly outlined in the practice note, if you intend applying them, you need to do some further work to ensure that you do not compromise the principles of Section 217 of the Constitution and other legislation.*

It is unclear how this email from Treasury could, in any way, evince that Treasury had approved the single source method and remuneration model.

Despite the concerns raised by the Treasury over the sole sourcing methodology and the remuneration model, G9 states that Mr Mabelane was of the opinion that all necessary approvals had been secured (p62-64):

*He was confident that Eskom had received Treasury approval; and that all the gate-keepers such as Finance and Legal were agreeable to the Project in the form that it was constituted and executed.*

Mr Govender, who was Project/Contract lead on the MSA contract, also maintained that all approvals had been both sought from Treasury and had been met, but his position became more nuanced in subsequent interviews with G9 (p64-65):

*He [Mr Govender] confirmed in his first interview that Treasury approval for a deviation had been sought and received. However, in his last interview he indicated that the approval was not required and that what he and his team wished to be confirmed, was whether Practice Note 3 of 2003 was still valid.*

Given the response that Mr Gorrie received from Treasury, the claims by Mr Mabelane and Mr Govender show, at best, a gross misunderstanding, and at worst, deliberate falsification.

#### **2.5.20 Payment to Trillian**

Trillian was paid for work under arrangements negotiated between McKinsey and Eskom, but without a contract in place between Trillian and Eskom. Ms Daniels explained the relationship between Trillian's invoices and the contracts mentioned above in paragraph 132:

*Trillian Management Consulting (Pty) Ltd issued an invoice (referenced as MC01) to Mr Anoj Singh on 31 January for R26 900.00 excl. VAT. It appears that this invoice was sent to Eskom on 12 February 2016.” The invoice does not, however, reference the First Contract explicitly.*

The G9 report clarified:

*Our analysis of the NEC contract found no mention of Trillian as a sub-contractor or as an SD&L partner. I did make mention of a requirement for 30% of the contract to be sub-contracted. Whether this is a standard clause in the NEC which was not removed or an agreed clause by McKinsey is not clear.*

*Having said that, there is some recognition by McKinsey that a portion was to be paid over to Trillian. This is in the form of a letter by Mr Vikas Sagar of McKinsey dated 09 February 2016, where h[e] requests [t]hat Trillian be paid directly... There is no other letter from McKinsey instructing Eskom to pay Trillian on the MSA contract.*

The G9 report also found no evidence that, “McKinsey monitored, supervised or signed off on Trillian invoiced, even though McKinsey only invoiced for their 70% share.” In other words, Trillian's work was not conducted as would be expected for a SD&L arrangement and its arrangement with McKinsey was irregular.

The cover letter for this invoice, to which Ms Goodson's testimony also refers, states that this work is for “the support of the CFO office on the Eskom Procurement Turnaround and defined Benefit Obligations.” Although the letter bears the signature of Ms Goodson, she testified under oath that her signature was used without her knowledge or consent. Furthermore, Ms Daniels stated that whereas McKinsey had issued a letter authorising Trillian to invoice Eskom directly, on the condition that McKinsey confirmed amounts claimed relative to work done, no such confirmation was received.

Daniels continues in paragraph 136-137 of her statement:

*This invoice was signed for payment by Prish Govender and Edwin Mabelane on 8 April 2016. The invoice was date 31 January was paid on 12 April 2016. Upon payment, it was recorded on the Eskom SAP system as being paid under the First Contract and Trillian was indicated as a sub-contractor to McKinsey, under the First Contract.*

G9 undertook interviews with Eskom officials to establish how payments could be made in favour of Trillian in the absence of proper contracts. It is clear that a purchase order number (which was necessary under Eskom's control mechanisms for any such payment to take place) was created without complete documentation (p47-49). Mr Albert Mokoatedi (Mr Mokoatedi) who created the purchase order number, provided G9 with an affidavit and was interviewed by G9. He claimed that the Acting General Manager, Ms Masedi Skosana (Ms Skosana) and Manager, Mr Andile Mdakane (Mr Mdakane) had



discussed the fact that there were no supporting documents for the creation of a purchase order number. When documents did arrive at the request of Mr Mdakane to Ms Skosana, they were not signed. Mr Mokoatedi, in his affidavit, stated, *“The creation of the Purchase Order in this instance may be irregular and not consistent with policies and/or legislation.”*

G9’s interview with Ms Nokwanda Gambushe (Ms Gambushe), Senior Advisor, shed further light on how Trillian came to be paid without any valid contract in place (p 52, contents confirmed in an affidavit presented to G9):

*She [Ms Gambushe] confirmed that on the 19<sup>th</sup> December 2016, Mr Charles Kalima came to her and provided her with a Board Submission document and Board Minutes to create a contract on the SAP system. She indicated that this was not the norm. She stated that this was not the norm.*

*He stated to her that the contract must be created in favour of Trillian; although it was not clear to her in terms of who Trillian was and what it was doing. The submission only referred to McKinsey's BBBEE Partner. She complied with the request from her General Manager.*

#### **2.5.21 Trillian paid for work that was not done by its employees**

Ms Mothepu testified that Regiments' director and CEO of Trillian Capital, Dr Eric Wood (Dr Wood), established the precedent of invoicing public sector entities without proper agreements being in place and for work not undertaken. This pattern was established while Dr Wood was still at Regiments, in the company's dealings with Transnet:

*So, Eric Wood, while we were still at Regiments proposed an SPV structure and he asked me to go see the Transnet engineering team to essentially propose this SPV structure and how it will financially benefit Transnet. And he asked my team and I to put a proposal, so that is what we did. And then he asked me to ask the...Tebogo Leballo, the finance director to generate a R10 million invoice, and I said no but you can't, I'm not going to do that because well we haven't been appointed and we haven't done any work. So, I gave Mr Clive Angel a copy of the proposal and he sent it to Mr Tham Jiyane on the 22nd of February 2016...no sorry, that was on the 17th of February, so he says Dear Mr Jiyane attached please find, hold on... so, on the 17th of February, pardon me, he sent the proposal to Mr Tham Jiyane, and then on the 22nd of February he sent the R10 million invoice. I would like to place it on record that February Trillian Financial Advisory had no employees Mr Marc Chipkin was the sole director, no work had been done for that invoice.*

This pattern of irregular and potentially unlawful conduct continued at Trillian. On 14 April 2016, TMC was paid R30.7 million by Eskom for a ‘corporate plan’. 14 April 2016 was the same day that Tegeta was required to transfer money to assist Tegeta to purchase OCH. Ms Goodson testified that this invoice was issued for work that was not undertaken by TMC:

*“Up until the point of the 1st of March 2016, Trillian Management Consulting had two employees. There was me and there was my COO. We didn't do billable work.”*

Ms Goodson testified that senior McKinsey employees created the clear impression that Trillian was not required to do work in order to be paid,

*“So, there was one leadership meeting particularly with McKinsey where, and I have minuted it and it is part of my annexures, where one of the very senior partners made very harsh remarks about, ‘well just take your 30% and go’.”*

Ms Goodson’s testimony is referring to the comments of Mr Jungling.

#### **2.5.22 Regiments, Trillian and McKinsey paid for work that may not have been appropriate or required**

In line with concerns noted by Ms Molefe and on the limited value and quality of Regiments’ work, Ms Mothepu testified that it was clear that Eskom had extensive human resources with the necessary skills to carry out much of the work that was being done.

Dr Fine defended the fee charged by McKinsey for work done at Eskom. However, he did concede that the fees charged were "large" and that McKinsey's work may not have been appropriate:

*I'm not going to stay here and deny that it's [large]. I'm not saying we haven't done large programs elsewhere, [...] what worries me more is in retrospect, and I look at the performance of Eskom, firstly, were we working on the right issues? Was Eskom using us in the right way on the right topics? Because the liquidity is compromised now, and the [prices] have gone [up]. Number 2, I don't think I think that that amount of resource on the ground, I don't think that when I look at Eskom, they could absorb that amount of change, and so, in retrospect, you know, I'm not going to sit here and try to defend that number...*

The issue of McKinsey's payment and whether Eskom received value for money was also considered in the G9 investigation. The remuneration model for McKinsey was based on modelled hypothetical cost savings that were attributed to McKinsey's intervention by McKinsey itself. As the remuneration model has remained an unresolved concern, G9 (p113-114) notes that the risk-based remuneration model was used to justify fees at approximately R1.2 billion more than the R243,405 million that McKinsey would have been able to charge at the high end of DPSA consultant rate scales for the equivalent six months. The hypothetical savings were calculated as a mathematical exercise by McKinsey. It is unclear how Eskom officials could lawfully justify the McKinsey remuneration, especially given the financial difficulty experienced by Eskom at the time, without interrogating the veracity of these alleged savings.

#### **2.5.23 Trillian’s BBBEE credentials questionable**

Trillian's BBBEE credentials were not credible, and senior McKinsey staff were complicit in this arrangement. Trillian, like Regiments, was meant to function as an SD partner to McKinsey. As stated by Ms Goodson: "My opinion is that what I was told that Trillian would become, which was a leading black-owned Proudly South African Management Consulting company, I believe that that was a lie." About her concerns, Ms Goodson provided testimony that consulting work was sub-contracted to two Dubai-based companies, E-gateway (which had a contract in place with Trillian), and Cutting Edge (which had no contract in place with Trillian). Ms Goodson provided an example of how this sub-contracting was functioned:

*So, informed by my background in mining, I understood the Duvha replacement project to be very much a EPC-type project where the boiler needed to literally be replaced. So it wasn't a management consulting role. It wasn't a management consulting-type project in any way - it was a EPC project. However, the relationship with Trillian and the Duvha project, was E-Gateway. E-Gateway, Javed specifically, said to me that they are working with...they are doing the Duvha replacement. I saw what I thought was a contract; it's also a part of my annexures, where there's a specific Chinese company - I think it's Hypeg - that was actually...had the relationship with Eskom. I don't understand the relationship between E-Gateway and that organisation at all. But I do know that E-Gateway asked for an audience with Edwin Mabelane to discuss Duvha, that they were bringing people in from Dubai and from India to work on the Duvha project. They...Trillian needed to be...or was requested to be their BEE partner for this work – Trillian Management Consulting Specifically. And Trillian Management Consulting needed to help them get their team members visas. So, I was involved in helping E-Gateway do this work, but Trillian Management Consulting was not going to do the work.*

Ms Goodson had additional concerns about the contradiction between her mandate to set up a black-empowered consultancy and the extensive use of non-South African consultants. In this regard, Ashok Narayan mediated the relationship between Cutting Edge and Trillian. Narayan is a known Gupta associate who has been linked to Homix; a letterbox company allegedly used to move money for, amongst other things, the acquisition of Optimum Coal Holdings by Tegeta.

Dr Fine's testimony, describing the cession of work from Regiments to Trillian, concurs with Ms Goodson:

*In early 2016, I became aware that there was a substantial working relationship between McKinsey and Trillian...The first concern was we had Eric Wood, a white South African, starting a black advisory firm. It wasn't clear to me, where were these other owners?*

The G9 report notes that (p31), "Trillian was registered at Eskom as an EME [Exempted Micro Enterprise] and as a 0% Black owned company in April 2016." Given that Trillian was set to earn 30%



of the MSA contract, and noting its alleged contribution to the purchase price for Optimum Coal Holdings, it is difficult to posit a rationale for an EME classification. This EME status was also used by Mr Wood in his motivation for Trillian to be paid as a matter of urgency in a shorter timeframe than the standard 30 days.

#### **2.5.24 Eskom directors, executives and employees flouted policies and rules in order to contract with and pay Trillian**

The G9 Report (p35, 81) paints a picture of the corporate culture at Eskom in which instructions from Executives and senior manager superseded regulations and rules.

Eskom's directors are required to act in good faith and for a proper purpose, in the best interests of Eskom, and with the degree of care, skill and diligence that may reasonably be expected of them. Additionally, Eskom directors have a duty not to allow the company to trade recklessly, with gross negligence or fraudulently. It appears that the Eskom directors grossly failed to comply with these requirements.

Section 45 (c) of the PFMA further places a burden of responsibility on all Eskom officials, who

*Must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure, and fruitless and wasteful expenditure and any other revenue due.*

Should any employee witness any of the abovementioned actions, it falls to them to report this. This is not, however, what appears to have happened. The Budlender Report, the Wyman Report and the G9 report all found evidence of procurement regulation, policies and procedures being subverted by Eskom officials. The G9 report identifies specific individuals to whom particular acts of wrongdoing can be directly attributed. These individuals whose behaviour was found to be unusual and irregular include:

- Anoj Singh (p129-130), to whom Regiments and Trillian officials, including Mr Wood and Ms Goodson, appeared to have unusually direct access;
- Mr Mabelane (p131-132) and Mr Govender (p132-133), whose signatures enabled Eskom's payment of Trillian invoices, and who appear to have misrepresented facts to G9 consultants;
- Mr Kalima (p134), who was instrumental in paying Trillian by loading the company onto the SAP system.

There are also findings against Ms Masedi Skosana (p130) for failing to raise the alarm regarding Trillian's payment; and Ms Maya Naidoo (p130) for her role in enabling Trillian while serving on the Steering Committee.

Noting McKinsey's culpability, G9's analysis does conclude, *"The manipulation, misrepresentation and calculated introduction of Trillian, is most likely to have emanated from an Eskom Official, rather than*



*a McKinsey one.*" This latter statement is in line with Dr Fine's account, notwithstanding the particular actions of his colleagues, Mr Sagar (who had since resigned), and Mr Lorenz Jüngling. This finding, however, was contradicted by Mr Mabelane, as reported by G9, who maintained that McKinsey had introduced Trillian as their SD&L partner (p63). It should be noted that Regiments had been introduced to McKinsey at Transnet by Transnet officials and that the same officials had been brought in to work with Eskom via Salim Essa. Given that these same officials then became part of Trillian, it is difficult to draw clear lines which would support the idea that McKinsey had introduced Trillian as an unknown entity to Eskom and its officials. In either case, McKinsey would not be absolved of liability if they still unlawfully exploited their relationship with Trillian to access benefits from Eskom.

#### 2.5.25 The role played by Matshela Koko

Matshela Koko ("Mr Koko") denied facilitating Trillian's interaction with Eskom in his testimony before the Committee. This version of events was presented despite evidence of interfacing with Trillian officials and signing the Acceptance Letter for the MSA contract that was sent by Eskom in his capacity as Group Executive: Technology and Commercial, which was also signed by Sagar and Weiss of McKinsey. In response to a question as to whether he facilitated Trillian's contract and payment, Mr Koko stated, *"I'm on record that I've said no"*. In his statement submitted to the Committee, Mr Koko explains his position on the MSA:

*Para 162: I do not know how Trillian got involved with McKinsey. However, representatives of Trillian, acting on McKinsey's behalf, started participating in functions executed by McKinsey as from some time at the beginning of 2016.*

*Para 163: Trillian apparently submitted an invoice for R30.6 million directly to Eskom early in February 2016. I was not aware of it at the time, but became aware on 10 February 2016 during a meeting that I had with Ms Bianca Goodson, then Trillian's CEO.*

*Para 169: I was not involved in the approval of the now controversial payments that Eskom made to Trillian. I did not approve any such payments and first learnt that direct payment had been made to Trillian through the press.*

These statements directly contradict Ms Daniels' statement. The Trillian contract was only one example of the flouting of procurement rules that have been associated with Mr Koko's career at Eskom. Mr Abraham Masango ("Mr Masango") filed a whistle-blower's report covering, among other things, the conduct of Mr Koko. Mr Masango testified before the Committee, that he was suspended in order to discredit him as a witness during Mr Koko's disciplinary hearing.

#### 2.5.26 Governance issues

#### **2.5.26.1 Trillian advising on procurement for which it was competing**

Dr Fine testified that Trillian was conflicted in the work it was undertaking on procurement for the Duvha Boiler. Eskom's governance systems failed to identify and remedy this conflict:

*In annexure G, you see that there was another issue that arose with Trillian and which gave us grave concern, which is that they were supposedly part of a Consortium bidding for the Duvha Boiler and at the same time were working alongside us in Eskom advising Eskom on procurement. And we wrote to them twice expressing our very deepest concern and asking for them to respond, which they never did, which was also the basis by which we terminated our relationship...potential relationship with Trillian.*

#### **2.5.26.2 Record keeping by Eskom officials for procurement under the MSA contract**

The G9 report notes that not only were procurement rules flouted by Eskom officials, but detailed documentation appears to have either been “misfiled, missing or withheld” (p12). Available records, “could hardly be seen to be acceptable documentation and source material to sustain a R1.4 billion payment” (p76). Furthermore, G9 notes that the MSA was never signed and that this was commonly understood to have been the case. Ms Lulama Njaza (“Ms Njaza”) was the custodian of the Master Files for the MSA project (p46). However, Ms Njaza did not have a copy of the MSA contract and, “was surprised that one [a signed agreement] exists.”

#### **2.5.26.3 False information provided by Eskom executives about Eskom's relationship with Trillian**

The statement issued by Minister Brown to Hon. Mazzone, MP on 2 December 2016, was based on information provided by Anoj Singh. Mr Qoma's statement notes this, and additionally points out that the Minister did not immediately discipline Singh for this action:

*A response Singh provided to Minister Brown in relation to a question about McKinsey/Trillian ended up causing the Minister to mislead parliament due to the misrepresentation embedded in it. As a result, the DA raised a complaint with parliament and reported the Minister to the Public Protector. In spite the embarrassment that came with this shameful moment, Minister Brown didn't take action against Singh and/or Board. She put her head down and played for time. She only feigned ignorance when Eskom was forced to apologise publicly for having misrepresented the firm's report. You don't need to guess who was behind this misrepresentation.*

Minister Brown, in her statement to the Committee, alleges that Eskom executives deliberately falsified information and made material misrepresentations of fact:

*Soon after the pension debacle the media published information that Eskom had paid millions of Rands to a company called Trillian. This information directly contradicted the response Eskom had given me when the matter was raised in a Parliamentary question in December 2016. (The payments had not come to me for approval, so I was reliant on Eskom for accurate information.) It became clear that I had been manipulated into lying to Parliament, I demanded an explanation from Eskom's CFO Mr Anoj Singh. I subsequently instructed the Board to institute an investigation into the matter.*

*I believe that Eskom deliberately lied to me about the Trillian matter...*

*When I appointed an interim chairperson and brought new blood onto the board following the resignation of Dr Ben Ngubane, my first instruction to the board was to institute investigations into Mr Singh, in respect of Trillian, and Mr Koko.*

#### **2.5.26.4 Trillian used by members of the Eskom Board BTC to influence procurement for the Duvha Boiler**

Eskom not only paid Trillian sizeable amounts but also attempted to use Trillian reports to justify and explain critical procurement decisions. Trillian provided Eskom with a "risk assessment" of bids which had been submitted for the supply of a new boiler at Duvha.

#### **2.5.26.5 Multi-million Rand payments to Trillian**

Eskom Board members claimed that they had no knowledge of multi-million Rand payments to Trillian, whereas the Board Tender Committee ("BTC") played a critical role in Trillian's financial gain. The BTC was required to approve arrangements with McKinsey, Regiments and Trillian. The G9 report states that executives attempted to use this fact to evade responsibility. While the report does not support the executives' position, it does place a degree of responsibility with the BTC. The report notes (p87): "All submissions and approvals were obtained at the BTC level." Ms Naidoo and Ms Klein denied responsibility in their statements to the Committee.

Ms Naidoo stated that the Board did not approve payments to Trillian. She refers to a Tender meeting on 21 October 2015:

*At the meeting, we had a lengthy discussion on the PFMA issue and also whether this was not like the B2B Programme which was implemented by the previous board and failed to achieve the results it was intended for. On the PFMA issue, Mr Neo Tsholanku the Head of legal advised the Tender Committee that the Agreement will be a "condition precedent" to the compliance of PFMA and National Treasury regulations. I refer the Committee to listen to the recording of the minutes of the 21 October 2015, where Mr Tsholanku confirms this.*

*The submission in October was presented by EXCOPS (McKinsey Annexure D). This was the last time the McKinsey matter came to the Board. And on the basis of the minutes Management had to ensure that the Agreement complied with all regulations, including National Treasury and PFMA.*

*There was never an agreement that came to me as a board member for Trillian, Regiments or for McKinsey sub-contracting to any other company, as of 1 July 2016 when I left Eskom. The first time I heard of Trillian doing work for Eskom was in the newspapers and the parliamentary enquiry.*

Ms Venete Klein concurs with this view, stating:

*I was not aware that Eskom had done any work with Trillion, and I was therefore not uncomfortable when I read in the media that Eskom had apparently indicated to the Minister that Eskom had not paid any amount to [Trillian]. [Trillian] had never been mentioned as part of the McKinsey contract when same was presented to the Board for approval.*

Ms Klein states that the matter was raised with Mr Singh at a meeting of the Board on 29 November 2016. He explained that the payments were authorised because McKinsey had the right to sub-contract work, under the Master Service Agreement (The Second Contract in Ms Daniels' statement). Ms Klein continues, "Management had revisited the MSA with McKinsey, being concerned about procurement on a single source basis," and "The MSA [Master Service Agreement] with McKinsey was subsequently terminated." She states that other work that was undertaken by Trillian, including risk assessments, were not brought to the Board for approval.

#### **2.5.26.6 Role of Eskom executives in Trillian transactions and other procurement irregularities**

The Board failed to sufficiently address the alleged role of Eskom executives in the impugned Trillian transactions and other procurement irregularities and has failed to address the role of Trillian itself.

Section 51 (e) of the PFMA stipulates that the accounting authority for public entities (in the case of Eskom, it is the Board):

Must take effective appropriate disciplinary steps against any employee of the public entity who –

- (i) Contravenes or fails to comply with a provision of this Act;
- (ii) Commits an act which undermines the financial management and internal control system of the public entity; or
- (iii) Makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

By the time that remedial action was taken against Eskom executives implicated in the Trillian saga, many of the relevant facts had been well documented in the media, raised in parliament, and the Board



had had access for several months to incendiary content of the Budlender Report, a report by Oliver Wyman consultants (“Wyman Report”), and the G9 Report. The G9 report notes (p106-107) that the Board BTC was presented with a draft Wyman Report on 13 December 2016, which raised similar concerns over the G9 report over the MSA with McKinsey (and by implication, *de facto*, with Trillian). This report was not acted upon by the Board.

The G9 report’s findings that implicate Mr Singh, Mr Mabelane, Mr Govender and Mr Kalima in wrongdoing concerning Eskom's engagement with McKinsey and Trillian were, similarly, not acted upon by the Board. Mr Qoma’s statement explains:

*All the current processes, including Koko, Singh, Govender, Mabelane and Kalima, are seen as having been imposed on the leadership. They all resulted from sustained pressure from the media. The consequent internal processes have also been grudging and retarded to say the least. Consequently, Matshela Koko, Anoj Singh, Prish Govender, Edwin Mabelane and Charles Kalima have collectively been earning salaries against zero RoI for more than 547 days.*

Mr Qoma points to the actions of the Board and the Minister, in this regard:

*On 16 August 2017, Khoza allegedly instructed the rescission of the suspension of Mabelane and Kalima. These individuals were instrumental in the McKinsey/Trillian transaction. This well-published anomaly didn’t concern the Minister either, as Khoza proceeded in his role without any known probe in this regard.*

Mr Qoma explains that his impression is, in fact, that addressing the Trillian issue is what led to the suspension of Ms Daniels:

*On 6 October 2017, Eskom issued a statement confirming that it had suspended the head of Legal Ms Suzanne Daniels for over-spending on a team outing. The timing of this suspension resulted in a negative public perception since it came just after Ms Daniels had compiled a report implicating senior managers in the Trillian/McKinsey matter and submitted this report to Minister Brown who confirmed that she had received the report. It therefore created the perception that she was facing the repercussions of having compiled the said report.*

In addition, in terms of Section 34 of the Prevention and Combating of Corrupt Activities Act of 2004, an offence of fraud, bribery, corruption and/or theft involving an amount of R100 000 or more must be reported to the Directorate for Priority Crime Investigation ("DPCI") by any person who holds a position of authority and knows or ought reasonably to have known or suspected that any other person has committed such offence. A person in a position of authority includes a member of the board of directors of a company. It is highly likely that various Eskom directors and other persons in positions of authority committed offences under Section 34 of the Prevention and Combating of Corrupt

Activities Act of 2004 for their failure to report various instances of fraud, bribery, corruption and/or theft.

#### **2.5.26.7 *Alleged obstruction of G9's forensic investigation***

Eskom's Board allegedly obstructed G9's forensic investigation. Mr Murugan was accompanied and introduced by Advocate Dumisa Ntsebeza (Adv. Ntsebeza) in presenting the findings of G9 to the Portfolio Committee. Adv. Ntsebeza made the following comments, which indicated that several Eskom officials had been unsupportive of the G9 investigation: *"What struck me of those investigations is how the Eskom's leadership would abruptly terminate the mandate of the investigation at very critical moments"*. He also noted his shock at the extent of corruption, which the investigation was poised to uncover, *"There would have been exposure of the most corrupt practices of leadership at Eskom"*. Mr Murugan noted that several officials had been "evasive" during interviews. He also noted that the scope had been tightly defined and controlled by Eskom and that there were several notable indications of wrongdoing that warranted further investigation.

The G9 Report notes that before the interim findings of the investigation could be presented to the Board on 30 August 2017 (p28-29):

*Although, as far as we understand, our mandate and lines of reporting are to Executive Management, we observed that the Interim Board had become operationally involved; and after one verbal feedback to the Audit and Risk Committee, this investigation was left floundering and without directives, communication or interaction. We find this odd; but we are obliged to comply and await further instructions. As we confirm later in this report, we have been informed to "suspend" or "terminate" [our] investigations.*

The Board to which the G9 Report refers was led by Interim Chair, Mr Zethembe Khoza ("Mr Khoza"). There was no apparent justification for this suspension, other than the fact that members of the Interim Board and several Eskom executives were implicated in ongoing suspicious acts related to Trillian. The G9 report noted that implicated persons should recuse themselves from all matters related to the investigation. Mr Murugan noted that Mr Khoza might be one of those implicated persons. Mr Murugan testified to the Committee that Mr Khoza made some direct threats, *"He would make statements like 'you know people could get killed for doing these types of investigations'."*

#### **2.5.27 Incidences of undue influence**

##### **2.5.27.1 *The role of the Minister in facilitating and approving Eskom's relationship with Trillian***

Ms Daniels testified that Minister Lynne Brown's personal assistant conveyed the Minister's alleged preferences for Eskom's procurement decisions for companies, including Trillian:

*I've never really had direct instructions, but one occasion does stick in my mind. Ms Kim Davids, the PA to Minister Brown, she came up to me at one of these chairpersons' forums and said 'Ma'am,' (she calls... we call Minister Brown Ma'am) ... 'Ma'am has been receiving complaints from suppliers and, you know, she's going to send a letter that you need to give them work.' And then I asked who is the suppliers, and the one that she mentioned was Trillian. I was incredulous at that time because, already, Trillian was in the news, you know [...] and I said 'how would a Minister do that?' I was also surprised that a PA was telling me what to do. And the second one was...she called me and said Ma'am suggested to use Nkonki for the Koko investigation; Nkonki is the auditors.*

#### **2.5.27.2 Introduction of Salim Essa to Eskom executives by Ministerial staff**

Ms Molefe testified that she had been contacted by Nhlanhla Msomi, then Chief of Staff of the former Minister of Public Enterprises, Mr Malusi Gigaba, when she was appointed Financial Director of Eskom. The reason given for this correspondence was to discuss Eskom's transformation strategy. At Mr Msomi's request, Ms Molefe took a meeting with Eskom BBBEE suppliers to discuss their dissatisfaction with Eskom's procurement processes, which they felt were unfair. At this meeting, only Salim Essa was present. She states,

*He [...] then indicated that there are [...] black suppliers that are complaining that Eskom is not providing them with contracts and they would like to meet and just lay their complaints. I indicated to him that I no longer chair the Procurement Committee. We do have a Chief Procurement Officer and I believe that those issues should be directed there. However, I do not have issues with meeting with people and then directing them to do the right levels. He then said to me that he will make arrangements for me to meet the suppliers that are complaining. When I meet the supplier, it was Salim Essa and when I asked him what company he works for he, he did not divulge the company. He said there are various companies that have been trying to do business with Eskom and they have been turned back.*

#### **2.5.27.3 Trillian's relationship with McKinsey: access to major contract with Public Entities**

McKinsey, specifically directors Vikas Sagar and Alexander Weiss (later suspended), were complicit in and benefitted from Trillian's questionable relationship with Eskom. Sagar and Weiss are alleged to have shared sensitive information with Mr Essa on 11 key projects in Eskom that could have generated R9.4 billion in consulting fees over a 4-year period.

As testified by Goodson:

*So, there was one leadership meeting particularly with McKinsey where, and I have minuted it and it is part of my annexures, where one of the very senior partners made very harsh remarks*



*about, 'well just take your 30% and go'. I escalated that issue to Clive... I noted that in quite a significant note and subsequently presented it back to Salim. Salim then said, 'ok, we're going to fix this'. Because clearly, the supplier development understanding was... it was going nowhere...Salim looked at me, just smiled and he said, 'Bianca, don't worry, it's sorted'. The next morning Vikas [Sagar] phoned and Vikas apologised.*

#### **2.5.27.4 Salim Essa's relationship with Eskom executives**

The testimony of Ms Molefe, as noted above suggests that Salim Essa had a highly unusual level of direct access to Eskom executives. Ms Goodson's testimony, as noted in section 2.5.27.3 confirms this interpretation.

#### **2.5.27.5 Trillian executives' alleged prior knowledge of major political appointments: The Minister of Finance**

Trillian CEO, Eric Wood, and other employees allegedly had prior knowledge of the dismissal of Nhlanhla Nene as Minister of Finance and the appointment of Des van Rooyen, by former President Zuma. Ms Mothepu's testimony clarifies:

*This is a date I think I will never forget, the 26th of October 2015. We were still at Regiments, I normally had informal meetings with Eric in the morning and then he called me into his meeting in his office and he told me that Minister Nhlanhla Nene will be fired. For me, I didn't understand the significance of what he was telling me, there have been many reshuffles of ministers before. I didn't understand why he was telling me because we never dealt with National Treasury or the Minister of Finance, so I didn't ask him 'how do you know' 'why are you telling me'. I just said, "Oh ok". Later on, in that morning he emailed me a document, a Word document, that essentially outlined the initiatives that the new minister was going to approve. There were about 12 of them and the potential fees that, I would say, Regiments at the time was going to earn. Now six Weeks later the nation, of course, is shocked at midnight when indeed the former minister is fired. So, in the morning I tell him, "Oh you were right" and he said, "Yes, I was" and he told me that a certain colleague of mine his name is Mohammad Bobat, was appointed the advisor to the new minister and his role essentially was to channel all the work from whether it's state-owned companies or a National Treasury to Trillian or Regiments because this was in December. So, Mr Bobat was given the courtesy of a driver going to Pretoria every morning, there, Eric had appointed a PR company to write the new minister's speeches. They started working on the finance minister's speech but unfortunately, on the Sunday he was replaced, so he never got a chance to deliver it, so they had to write COGTA speech.*

Whatever channel was delivering highly sensitive political information to Trillian executives remained open. Mothepu continues,



*On the 16th of March, I was in my office. I used to share an office with the financial director Tebogo Leballo and Bianca [Goodson] was there as well and then he told me that Minister Pravin was going to be removed and I couldn't hear him, and he because he was whispering because we had an open plan, and then he wrote it down on my book which I still have.*

Goodson confirmed having seen this note and listed it as one of the factors leading to her resignation.

#### **2.5.27.6 Trillian's alleged access to COGTA Minister and procurement information**

Ms Goodson testified that Trillian had direct access to Minister Des van Rooyen in his capacity as COGTA Minister. She testified that this access was used to commercial benefit for Trillian, and was facilitated by former Regiments employee, Mohammed Bobat. Section 8 of her statement clarifies this relationship:

*8.1 In the first week of January 2016, I received a call from Angel saying that TMC will be working at CoGTA and supporting Bobat.*

*8.2 I found the instruction strange as TMC at that point in time, only had 2 FTEs namely; myself and a COO;*

*8.3 I received a phone call from Wood on 8 January 2016 informing me of a meeting at Regiments Capital on 11 January at 09h00 that I had to attend.*

*8.4 The purpose that this meeting was to discuss and play for the dinner with Gary Pita [...], the meeting with Anoj Singh [...], and the meeting with Mr van Rooyen [...]. At that meeting, I was instructed to compile a business profile for TMC that would be presented to the Minister.*

*8.5 The meeting with the Minister was arranged by Bobat and attended by Wood, De Wit, Hartmann, Bobat, Whitley, the Minister and myself.*

This meeting led to the development of an unsolicited proposal, based on information provided by Bobat:

*8.11 The unsolicited proposal prepared for CoGTA was informed by information sent to me by Bobat. I would find a white envelope on my desk when I arrived at the office in the morning and shortly after, would receive a call from Bobat clarifying the contents thereof. One such envelope contained the Back to Basics 2015-2016 Annual Performance Plan, which would be the source of the proposal scope.*

#### **2.5.28 Additional matters**

#### 2.5.28.1 *Purchase of Optimum Coal Holdings by Tegeta*

Neither Ms Goodson nor Ms Mothepu had first-hand knowledge of Trillian's contributions to the purchase price for OCH. Ms Goodson did, however, confirm that she opened a bank account in the company's name, at the Bank of Baroda. The Bank of Baroda has been identified in the "State of Capture" report as the bank through which payments to Tegeta from several companies were made.

#### 2.5.28.2 *Alleged use of knowledge of Ministerial appointments for commercial benefit*

Eric Wood may have used his knowledge of Ministerial appointments to benefit commercially in his personal capacity. Ms Mothepu raised another matter that has not been confirmed. However, in light of alleged incidences of undue influence, noted above, it merits further investigation. She states:

*I'm told, but it's unconfirmed sources, that Eric Wood being a trader, traded on this information [on the replacement of Minister Nene]. So, in November, he bought dollars because he knew that the removal of a finance minister was going to affect the rand. And the day [...] when the announcement was made, while our investments and the rand was crashing, he reversed the trade and apparently made hundreds of millions of Rands... I can't confirm this but this is what I'm told.*

#### 2.5.28.3 *Media reports allege toxic culture and improper relationships*

It was reported that Eskom employees observed an unusual level of familiarity between Trillian director, Eric Wood, and Eskom executives when Mr Wood began to spend time in the executive suites at Eskom's Megawatt Park. Amabhungane, on 11 October 2017, quoted one of their sources from within Eskom as saying,

*"This is when we realised Wood was brought in through the back door to partner with McKinsey, without our knowledge."*

There were also concerning reports, captured in the G9 Report, that Eskom officials had been pressurised into deviating from procurement policy in order to enable a lucrative exchange for Trillian with the entity.

#### 2.5.28.4 *McKinsey's role in facilitating Trillian's payment*

Despite eventually rejecting Trillian as a supplier development partner, McKinsey director, Vikas Sagar, sent correspondence to Eskom's Prish Govender on 9 February 2016, authorising Trillian to invoice Eskom for "subcontracted" work under the "Professional Services Contract" dated 29 September 2015 (pending further written confirmation that was never delivered).

### 2.5.29 Observations

#### ***2.5.29.1 Cession of work from Regiments to Trillian***

- i. The cession of work from Regiments to Trillian appears to be unusual, irregular and to involve the granting of benefits to influence the performance of powers, duties or functions improperly.
- ii. The relationship between Trillian, its employees, its owner, and Eskom executive appears to have been unusual and improper.

#### ***2.5.29.2 Eskom's payments to Trillian between 2015 and 2017***

- iii. Trillian worked and was paid outside of SCM processes and in the absence of contracts and proper approvals, which would be in contravention of Section 217(1) of the Constitution, the PFMA, Eskom's internal policies and the principle of legality.
- iv. It appears that Trillian invoiced Eskom for work done by Regiments on 10 August 2016 on the Duvha Boiler claim and the Online Vending Strategy, and on 13 April 2016 for work done on the Eskom Corporate Plan in December 2015 or January 2016. Eskom does not appear to have any lawful basis for any such payments to Trillian.
- v. Trillian and McKinsey were paid for work that was not "value for money", as Eskom officials could do this work internally, or the fee structure employed was above market rates.

#### ***2.5.29.3 Trillian's relationship with Eskom***

- vi. Several Eskom executives and other officials played questionable roles in enabling Trillian's access to and payments from Eskom.
- vii. No evidence was made available that showed that the Eskom Board had used its oversight powers to intervene in Trillian's unusual procurement arrangement and payments.
- viii. The Eskom Board appears to have allowed the Trillian controversy to unfold in the public sphere for several months before taking any action in relation to Eskom's impugned conduct or any precautionary or disciplinary action against compromised executives. There appear to be numerous breaches of the duties of Eskom Board members to act in the best interests of Eskom and act with degrees of skill which may reasonably be expected from such persons.

#### ***2.5.29.4 Prior knowledge of appointment of Cabinet ministers***

- ix. Trillian Executives apparently had prior knowledge of Finance Minister Nhlanhla Nene's dismissal, as well as the appointment of Minister van Rooyen in December 2015.
- x. If it is true that Trillian executives had prior knowledge of Minister Nene's dismissal and the appointment of Minister van Rooyen, this would be highly improper and warrant further criminal and other investigation as to the circumstances by which this knowledge was acquired.
- xi. If Trillian used this knowledge for commercial benefit, it also would also be improper and possibly illegal.

#### ***2.5.29.5 Trillian's and shareholder Salim Essa's involvement in Tegeta's purchase of OCH***

- xii. Trillian Capital appears to have contributed to the purchase price of Optimum Coal Holdings (Pty) Ltd ("OCH") on 14 April 2016 through Bank of Baroda transfers to Tegeta, which would make it party to a questionable and potential illegal transaction, for the apparent benefit of Oakbay shareholders, including the Gupta family and Duduzane Zuma.

#### ***2.5.29.6 Trillian's role in Eskom's procurement decisions***

- xiii. Trillian's role in the selection of Dongfang in the Duvha Boiler tender process is questionable and requires further investigation, including for potentially serious criminal conduct. McKinsey's involvement in this process also requires clarification.

## **2.6 Eskom and the TNA Contract**

### **2.6.1 Background to the Investigation**

Oakbay Investments Pty, a company co-owned by the Gupta family and Duduzane Zuma, sold its shares in TNA Media (Pty) Ltd, publishers of The New Age (TNA) and ANN7 in August of 2017. TNA Media was a lucrative business which had significant government and state-owned company contracts, including subscriptions, advertising and corporate sponsorships that stood at R75 million by 2012, merely two years after its launch. The number is surprising, given that South African Audience Research Foundation recorded TNA Media's daily readership at just 153,000 for the 2013/14 financial period. Comparable news outlets drew in far less investment, under the million-rand mark. Over the past two years, evidence has emerged, which shows how TNA Media came to access state contracts, with Eskom's now well-known R43 million corporate breakfast sponsorship being just one example.

The TNA contract has raised questions about external influence by private actors over Eskom's procurement, while Collin Matjila was an Eskom board member, Board Tender Committee Chair, and Acting GCEO. Evidence before the Committee places him at the centre of this controversy. Investigations into Eskom's relationship with, and payments to, TNA suggest that there may have been contraventions of Section 217(1) of the Constitution, the Public Finance Management Act ("PFMA"), the Companies Act 71 of 2008 ("Companies Act"), the Prevention and Combating of Corrupt Activities Act of 2004, the Prevention of Organised Crime Act of 1998, Eskom's Memorandum of Incorporation 2016 ("MOI"), and other internal Supply Chain Management ("SCM") and governance policies and procedures.

A preliminary analysis of these events suggests:



- a. The New Age sponsorship contracts were secured under highly unusual or irregular conditions, including circumventing procurement processes, operating without the proper approvals, being compensated for services incommensurate with fees and the circulation of the publication.
- b. The Oakbay group of companies owned by the Gupta family appears to have influenced the appointment and decisions of key leadership at Eskom, and the fulfilment of the TNA Media contract.
- c. The New Age contract was used as a mechanism to transmit money to most notably, Oakbay Investments (Pty).

### 2.6.2 Witnesses were called to testify

Witnesses called to testify on this matter:

- Ms Tsholofelo Molefe, Former Eskom CFO
- Mr Tshediso Matona, Former Eskom CEO
- Ms Erica Johnson, Former Eskom Executive
- Ms Devapushpum Naidoo (Viroshini), Eskom Board member from 12 December 2014 to 1 July 2016
- Ms Venete Klein, Eskom Board member from 12 December 2014 to May 2017
- Mr Zethembe Khoza, Current Eskom Interim Chair
- Mr Sean Maritz, Acting Eskom CEO
- Dr Pat Naidoo, Eskom Board Member
- Mr Lucky Montana, Former Prasa CEO
- Mr Zola Tsotsi, Former Chairman of the Eskom Board

### 2.6.3 Documentation presented to Committee

Included in the documentation presented to or called for by the Committee for the purposes of the inquiry were the following documents:

- The Public Protector's "*State of Capture*" report; Report 6 of 2016/7 14 October 2016 ("Public Protector 'State of Capture' Report")
- #Guptaleaks emails:
  - Salim Essa, Email dated, March 22, 2014 (CV to Tony Gupta and Srikant Singhala)
  - Salim Essa, Email dated, March 22, 2014 CV to Duduzane Zuma & Sahara employee)
- Submission by Erica Johnson, "A submission prepared for the Portfolio Committee on Public Enterprises". 7 November 2017

- Statement by Venete Klein. 21 November 2017
- Statement by Zola Tsotsi, “Statement to Portfolio Committee on Public Enterprises”. 21 November 2017
- Eskom Statement, “Eskom takes action to recover funds unlawfully paid to McKinsey and Trillian”. 5 October 2017

#### 2.6.4 The New Age is launched in 2010

TNA Media was established in June of 2010, with the first issue of *The New Age* print and online newspaper published by December. The Board comprised Nazeem Howa, CEO of Oakbay Investments, and Gary Naidoo. The business model relied heavily on government advertising spend and subscriptions, with limited private sector spend. The *State of Capture* report notes that TNA had even secured business with provincial governments and with state-owned companies, of which the most notable deals were with SAA and Eskom. Between 2011 and 2014 TNA Media secured sponsorships with Eskom for ten corporate breakfasts which amounted to R12 million. This amount was more than other similar events for more established media houses. These deals were procured during Collin Matjila's tenure as Board Tender Committee (BTC) chairman (2011-2014).

#### 2.6.5 Collin Matjila ascended to CEO in March 2014

The #Guptaleaks emails released in 2017 showed possible Gupta influence in the appointment of Collin Matjila, formerly head of NERSA, to the role of Acting CEO following the departure of Brian Dames. Salim Essa apparently forwarded Mr Matjila's CV to Rajesh 'Tony' Gupta and Srikant Singhala (Atul Gupta's son). He apparently forwarded the mail to Duduzane Zuma and a Sahara employee just six days prior to his appointment. He would remain in his acting role from April 2014 – Oct 2014. By the time Mr Matjila was appointed, he was already followed by controversy, having overseen questionable procurement for the Koeberg Power Station's steam generator, and having been involved in suspicious transactions as CE of Cosatu's investment company, Kopano Ke Matla.

#### 2.6.6 TNA Media's contracts at Eskom balloon

Once acting CEO, Mr Matjila approached the Eskom Board with another deal to sponsor TNA breakfasts, amounting to R14 million over one year. TNA Director Mr Howa appears to have sent the initial proposal directly to Sahara executive, Ashu Chawla. Addressed to Chose Choeu (Eskom Corporate Affairs Executive), the proposal requested the expansion of TNA's contracts with Eskom: *“It is with pleasure that we submit the following proposal for the period 1 April 2014 to 31 March 2015 for sponsorship of 12 Business Briefings for a total investment of R14 400 000.00, excluding VAT and agency commission.”* These were broadcast on SABC, sponsored by state-owned entities and attended by persons from the business fraternity.

Over the following weeks, this deal ballooned to R43 million over a three-year term. The deal was met with internal opposition from Eskom executives, the Board and legal counsel, and many persons attempted to halt it or improve Eskom's benefit from it. However, the deal was secured as structured by Mr Matjila, outside of the formal procurement procedures that would have stopped it. Eskom's procurement policies are unambiguous: all procurement over R5-million requires Board Tender Committee approval. Acting beyond his delegated authority, Mr Matjila concluded this imprudent contract on 30 April 2014. Following correspondence with TNA's Wiedaad Taliep, Choeu confirmed that Matjila had signed the contract for R43 million. At this time, Eskom also procured a bulk subscription to the New Age for R4 096,000 (4000 copies, plus delivery) with no discount for a bulk order.

#### **2.6.7 No action was taken against Collin Matjila**

The Board commissioned a forensic review of the TNA breakfast deal, which confirmed the irregularity of the contract as well as Mr Matjila's culpability in the matter. In October 2014, Eskom's appointed auditors, SizweNtsalubaGobodo, deemed the deal to be a "reportable irregularity" in the entity's interim financial results. It was revealed that several Board members, including Zola Tsotsi and Chwayita Mabude, had attempted to avoid publishing this information. The deal was especially contentious, given Eskom's dire financial position at the time. The release of the results preceded a critical bond-raising roadshow. It was reported in the media that the deal had divided Eskom's Board. Several members were motivating for Mr Matjila to be disciplined in response to the forensic review's recommendations that the Minister was required to remove him and lay criminal charges against him.

Minister Lynne Brown, having commenced her tenure as Minister in 2014, did not enforce the auditor's recommendations. Two Board members serving on the Audit and Risk subcommittee, Ms Bejabulile Luthuli and Ms Yasmin Masithela, tendered their resignations as a result of this governance failure. Not long after, Minister Brown made wholesale changes to the remaining Board on 11 December 2014, in which only Mr Tsotsi and Ms Mabude survived. There were no legal consequences for Mr Matjila. The new Board approved the TNA deal, despite glaringly obvious evidence of its illegality.

#### **2.6.8 R43 million multi-year sponsorship deal with The New Age**

Collin Matjila constructed the dubious multi-year R43 million sponsorship deal with The New Age newspaper while Eskom was grappling with financial constraints. The Committee heard from former Eskom Group Executive Enterprise Development, Erica Johnson, that upon commencing his short but impactful term as Acting CEO, Collin Matjila was insistent on contracting with TNA Media. In her statement, she says:

*In April 2014, Colin Matjila became the Interim CEO of Eskom, moving from his board role to an executive position. Within that month, he requested a sponsorship contract for one year with*

*the New Age at the cost of R1.2million per breakfast event. The Head of Corporate Affairs and the Head of Legal were dealing with the contract.*

*I was involved in terms of the rationale for the contract. We tried very hard to meet the Interim CEO's request – despite it being a difficult time financially, we tried to justify the contract on the grounds that we needed to engage key decision-makers and opinion-shapers and shift the understanding around Eskom's' long-term sustainability.*

Additionally, Mr Matjila developed the contract so that the terms were in TNA's favour, allowing the scope to balloon from one to three years, and removing Eskom's exit clause. The exit clause was particularly relevant because executives were in the process of devising strategic responses to financial constraints, which may have impacts for procurement decisions. Former Financial Director, Ms Tsholofelo Molefe, informed the Committee in detail of these cost-saving measures underway, under the oversight of Chairperson of the Board, Mr Zola Tsotsi. Ms Molefe says Mr Matjila was unmoved by this rationale:

*...As the month of April progressed, the Interim CEO, changed the request from 1 year to 3 years and removed the standard exit clause in the contract. As the corporate team, we wanted an exit clause to ensure that the new permanent CE, expected in October 2014, could have the space to drive their own conversation on the company's strategic priorities without being constrained by a three-year binding breakfast program. Despite attempts to persuade Mr Matjila, he was adamant about the three-year time period and the removal of the exit clause in the contract.*

Ms Molefe explained that the TNA contract fell under the budget for Corporate Affairs, managed by Mr Chose Choeu, who reported to Ms Johnson. Ms Molefe explained that she did not sign off on the contract. The TNA sponsorship came at a time when Eskom had no formal policy on sponsorship but was in the process of developing one:

*When the matter came to their attention they obviously had to look at whether we had budget for that or not, whether there was a need in the company to be able to do such a deal. They had that discussion with me to say, "We've been asked to do this we don't think we have budget for it, and one of the problems we have is that we have not had a policy in the past on this matter. We're in the process of drafting a policy for the board to approve so that we could decide, from a sponsorship and other perspective, what it is that the company could do and not do. When we looked at the budget we found that we had very little budget, in fact we had cut budget quite extensively and probably had, if I recall, 12 million left of the budget for the year. And thereafter, we had decided that we would not do anymore sponsorship given the financial challenges that the company was going through.*

## 2.6.9 Procurement of TNA's services



TNA's services were procured outside of proper procurement processes, and this was inconsistent with the applicable legislative and regulatory requirements. Ms Johnson informed the Committee of Eskom's requirements for the TNA contract, stating that two executive signatures were required. However, given that Ms Molefe refused to sign off on the contract as amended by Mr Matjila, he signed off on it himself. She says, *"The FD (Financial Director) at the time refused to sign it. The interim CEO went ahead and signed the contract."*

Ms Molefe confirmed Ms Johnson's version of events. She informed the Committee that her relationship with Mr Matjila changed when he moved from Chair of the Board Tender Committee (BTC) to Acting CEO in April 2014. At the time, Ms Molefe was the head of the executive procurement Committee. She reported that the two employees would work closely to present major procurement decisions for Board approval. As alleged by Ms Molefe, Mr Matjila ascended to Acting CEO with a clear procurement agenda and particular companies in mind for Eskom contracts, including Regiments Capital and TNA Media. She explained the irregularities with the TNA process in detail. Firstly, Ms Molefe's testimony implicates certain Eskom officials in the signing of the contract:

*The next time I saw it [the TNA contract] was [...] it had already been signed and it had been signed by Mr Matjila himself. It had been witnessed by two of our executives Mr Freddy Ndou and Mr Chose Choeu. In fact, it was Mr Chose Choeu who sent it to me and it had already been signed on the other side by the third party, the TNA officials. So, when I then received it, I [...] sent an email response to them to say, "[...] I'm not sure if you are aware that Mr Matjila cannot sign a contract of R43 million on his own, because [...] it should have gone through a process of approval...*

Ms Molefe also informed Mr Matjila of the irregularity of his actions in approving the TNA deal. In the course of her correspondence with other Eskom officials, she encountered opposition to Mr Matjila's actions from Eskom's legal department and from the Board. She informed the Committee:

*... I copied Mr Matjila on the matter to say... Mr Matjila then called me to say, "I'm aware of what I have signed; I have a mandate", the same story that he told me with Regiments Capital. And I said to him, "Look, you do not have the delegation of authority as the Chief Executive to sign a contract of this size. My suggestion is that we present this to the board so that the board can decide whether they want to ratify the contract or not". He said to me that he is not going to do anything like that. I then spoke to our legal counsel at the time, Mr Mohamed Adam, regarding it and he had informed me that he was aware of it, he had been pushing back on it [...] because the contract was signed in such a way that it had no exit clause. So, it was a three-year contract for R43 million, with no exit clause...He was concerned about the legal implication for Eskom as well, and [...] he had already had a discussion with the chairperson of the audit Committee on the matter. On the same day, I happen to have a meeting with the chairperson of the investment*

*Committee, Mr Mafika Mkhwanazi, on the matter...He did not sit in the audit Committee, if I recall, but he did indicate that he is aware of it and the board will be starting an investigation, has requested that the company secretary consult with Gobodo Forensic Investigation to start the investigation on the matter.*

## 2.6.10 Governance issues

### 2.6.10.1 Eskom Chairperson, Zola Tsotsi, delays interim financial statements

Ms Johnson told the Committee that the TNA deal was flagged internally: *"This [irregularity] was then picked up in October/November 2014 after our half-yearly audit as an irregular activity."* Ms Molefe confirmed this and added that, as there were "obvious" indications of wrongdoing by Mr Matjila, he stepped down as Acting CEO. The auditors reported these findings in the company's interim financial statements. Ms Molefe testified to the urgency of having these financials signed off, given that she was about to develop a prospectus and undertake due diligence to raise international bonds, *"We would obviously then have a public announcement on the results and then we would go out to the International market to raise funding"*. The Board scheduled a meeting to approve the financial statements, including the advice of the external auditors. According to Ms Molefe, Mr Tsotsi intervened:

*However, what happened on the day of the Committee, which was a few days before the results announcement, Mr Zola Tsotsi called me to say that he is going to cancel the meeting... And I asked him why, because he knows that we need to [...] sign this result so that we can go to the market. He said that it's because of pressure from outside, but he did not divulge what pressure that was.*

*I then called all the board members and explained to them how important it was that they sign off on these financials before the results announcement, because we cannot have the results announcement if the auditors have not signed off and therefore they must approve the financials. So the board members were aligned with my thinking, they supported ...The meeting did take place ... without Mr Zola Tsotsi.*

According to Ms Molefe, the Board approved the financials. However, because Mr Tsotsi had cancelled the meeting, the approval was nullified. Mr Tsotsi allegedly delayed announcing the financials in order to discuss them with the Minister. Ms Molefe continues,

*"But he [Mr Tsotsi] was not aware that I was having a meeting with the Minister myself at the time...I then called the board members... and they did approve the financials".*

### 2.6.10.2 Procurement irregularities identified by Eskom's auditors

According to Ms Molefe, legal action against Mr Matjila was recommended by Eskom's auditors. However, he was not dismissed but instead redeployed to his previous role as a member of the Board.

As a member of the Board, certain internal disciplinary measures were not available, and Ms Molefe explained,

*Because Mr Matjila was no longer a member of the executive Committee, there was very little recourse in terms of disciplinary measures. Therefore, they needed to explore whether they want to take criminal charges against him, or whether they wanted to claim the amount that had been procured with TNA...and also report the matter to the Minister.*

It is, however, clear that other disciplinary measures were available. In addition, in terms of section 34 of the Prevention and Combating of Corrupt Activities Act of 2004 an offence of fraud, bribery, corruption and/or theft involving an amount of R100 000 or more must be reported to the Directorate for Priority Crime Investigation (DPCI) by any person who holds a position of authority and knows or ought reasonably to have known or suspected that any other person has committed such offence. A person in a position of authority includes a member of the board of directors of a company. It is highly likely that in failing to report the matter involving the TNA contract to the DPCI, Eskom directors and other persons in positions of authority committed offences under section 34 of the Prevention and Combating of Corrupt Activities Act of 2004.

Former Eskom board member, Ms Venete Klein, told the Committee that she refused to sign the Board's report on the New Age deal. According to her statement and testimony, the TNA contract was discussed during November and December 2014, prior to her appointment. She told the Committee that Chairperson, Zola Tsotsi remained deliberately neutral on the TNA matter until March 2015, at which point the Board reached the conclusion that no action would be taken against Mr Matjila, who had stepped down by then. Ms Klein clearly stated that she did not believe that the board was acting in Eskom's best interests:

*My first and only engagement on the issue came about on 2 March 2015, when a resolution proposing to ratify the expense incurred in this regard and resolving not to take any action against Mr (Collin) Matjila (as he was no longer a member of the board) was circulated for approval by way of round robin.*

*I categorically refused to sign the resolution as I did not agree with its contents, particularly as Mr Chose Choeu was still employed by Eskom at the time, and I believed that action needed to be taken against him.*

*My position in relation to the proposed round robin resolution regarding the TNA matter is reflected in the minutes of the board in-Committee meeting of 19 March 2015. These minutes record that the chairman of the board indicated that he would speak to me regarding this issue, which never happened.*



*Despite my disagreement, the round robin was accepted as (to my knowledge) I was the only board member who refused to support and/or sign the resolution.*

*In addition to the aforesaid, it was noted by the board that the contract with TNA was of a commercial nature, and therefore could not simply be rescinded by Eskom at its own volition.*

*It was accordingly agreed that all future contracts of that nature should have an early termination clause included for Eskom's benefit. A resolution to this effect was ratified at the Board meeting of 28 May 2015.*

*My main consideration in taking the position that I did in relation to the TNA matter was that, owing to the information at hand, I did not believe that the approach proposed in the round robin resolution was in the best interests of Eskom.*

Mr Zethembe Khoza, Dr Pat Naidoo and Mr Sean Maritz made representations to the Committee on behalf of Eskom's Board. The submission to the Committee did not reflect any of the complexity indicated by Ms Johnson, Ms Molefe and Mr Tsotsi. The submission states:

*The Board through its Committees, established that Matjila had acted ultra vires and committed Eskom to a sponsorship fee that was not budgeted for in that financial year.*

SizweNtsalubaGobodo (SNG) was instructed to carry out a forensic review of the sponsorship deal. SNG confirmed that Matjila had exceeded his powers by committing Eskom to an amount of R 3 600 000.00 (three million, six hundred thousand rand) without consulting the Executive Committee ("Exco") of Eskom and committing Eskom regardless of the absence of budget from which the fee would be paid in that financial year. SNG characterised this expenditure as irregular expenditure.

SNG, further, found that the sponsorship agreement between Eskom and TNA Media did not have an exit clause for Eskom, despite the fact that the legal department of Eskom had recommended that an exit clause be inserted to protect Eskom. Ledwaba Mazwai Attorneys confirmed the findings of SNG.

The submission fails to indicate that criminal investigations were recommended and confirms, "The Board decided not to take any action against Mr Matjila because he was no longer an employee of Eskom." Inexplicably, given legal recommendations by the auditors, as well as the media furore in which the credibility of Eskom's executives, Board and the Minister were called into question, the submission offers "legal and reputational consequences" as reasons for ratifying the TNA contract in 2015.

#### **2.6.10.3 Ministerial oversight**

In line with media reports from 2014 and 2015, the Minister's involvement is unclear. Minister Brown appears to have played no active role in remediating the TNA contractual arrangements. Ms Molefe



stated, *“I’m aware that the chairman of the audit Committee tried on several occasions to engage with the Minister of Public Enterprises, but I’m not sure what transpired after that... To my knowledge...all attempts with the Minister had failed, and that’s all that she said”*. The *“Presentation by Minister of Public Enterprises Lynne Brown to the Parliamentary Inquiry into Eskom”* on 22 November did not address the TNA deal, nor did she speak to this matter during her testimony.

#### **2.6.10.4 External influence on the Eskom Board and procurement processes**

Collin Matjila’s links to the Gupta-related companies including Sahara, were raised with the Committee. Ms Molefe testified that in 2014, Mr Matjila connected her to Salim Essa after an initial meeting set up by Chief of Staff of Minister Brown, Mr Nhlanhla Msomi:

*“So when I met him [Salim Essa] for the second time, I was being introduced to him then by Collin Matjila. That’s when I realised that I have, I have, met him before here”*.

Mr Tshediso Matona, who succeeded Mr Matjila as Eskom CEO, explained that the reshuffle of the Board in December 2014 was in response to the TNA deal, which was one of the issues that rendered it, in his words, “dysfunctional”:

*...By the time I arrived at Eskom, there was significant tension you could call it, you could call it turmoil, but there was serious infighting within the...within the board. It was infighting over a range of issues likely to do with procurement, so, so there were all these fights about various procurements and then I think there was also the issue of the 43 million that the acting CEO, who I took over, had signed off to The New Age. So, there were a few of these things that, you know, divided the board and almost rendered that that board dysfunctional in many ways and I think therefore that could have been one of the reasons why the shareholder, you know, chose to rotate that board.*

In other words, while, no remedial action was taken on the TNA contract, it appears to have been used as part of the rationale for Minister Brown’s December 2014 Board reshuffle, which introduced several new Board members to Eskom.

With regard to the relationship between Minister Brown, Rajesh Gupta and Salim Essa, Mr Tsotsi stated,

*“There is a clear association between Minister Brown and the Gupta family,” he said.*

Elaborating on Minister Brown’s December 2014 Board reshuffle, Mr Tsotsi told the Committee,

*“Tony Gupta and Salim Essa were present,” at a meeting to which the Minister had invited him.*

He stated that,

*“Salim Essa would draw up his idea of board allocations up and send it to the Minister.”*

This list would reportedly state which Board members would on which subcommittees, including the BTC, which ratified procurement decisions. Mr Tsotsi continues,

*“I got a list and I changed the list on the basis of what I thought it should be. I sent it to the minister to get her concurrence. She changed it back to what it was when she originally sent it.”*

Mr Tsotsi also implicated President Zuma, whom he says the Guptas referred to as “Baba”. According to Mr Tsotsi, the Guptas’ relationship with “Baba” was the source of the family’s power:

*“When I had the occasion to discuss something with him, and when I was not able to give it to him, he turned around and he said he must report me to Baba (President Jacob Zuma) ... The impression he gave me was that he had a very close relationship with Baba and that he could do anything.”*

Mr Tsotsi indicated that the Guptas had made requests for changes in Eskom leadership and access to procurement. The TNA deal was one of the contracts they had requested. Mr Tsotsi maintained that he had not assisted the Guptas in any of these matters.

Referring to Mr Tsotsi’s attempts to delay releasing Eskom’s interim financial statements with the auditors’ findings on the TNA deal, Ms Molefe stated, however,

*“When I asked him why he wants to cancel the board meeting to sign off the financials he indicated that he's under pressure from people outside.”*

Who these external people were is not clear.

#### ***2.6.10.5 Evidence of TNA’s penetration of the broader network of SOCs***

Former Prasa CEO, Mr Lucky Montana, appearing before the Committee testified that Prasa officials saw the TNA Business Breakfasts as an opportunity to promote their work. He explained that in his negotiations with Mr Howa of TNA Media, it was necessary to ask then-Transport Minister Ben Martins to intervene. Reportedly, his R3 million budget would only secure Prasa limited airtime. Unable to reach a satisfactory deal, Mr Montana instructed his staff to cancel the sponsorship of the TNA Business Breakfast.

### **2.6.11 Observations**

#### ***2.6.11.1 TNA Media was paid amounts that were incommensurate with the value they offered Eskom.***

- i. Given the limited circulation of the New Age, it does not seem clear why Eskom would direct so much of its advertising spend to this organisation between 2011 and 2014.

**2.6.11.2 It appears Collin Matjila acted improperly in the awarding of the R43 million TNA business breakfast contract.**

- ii. Collin Matjila went against the advice of his colleagues to push through a deal which had highly questionable value for Eskom.
- iii. Collin Matjila acted outside of the scope of his powers and subverted SCM processes in order to ensure that Eskom and TNA entered into a contract, which was very likely in contravention of Section 217(1) of the Constitution, the PFMA, and Eskom's internal policies.

**2.6.11.3 The Minister failed to take remedial action.**

- iv. The Minister's lack of any remedial intervention following the forensic review of the TNA contract is highly questionable, especially in light of the recommendation for criminal investigations.

**2.6.11.4 It appears that the Board did not act in the best interests of Eskom.**

- v. Eskom's directors are required to act in good faith and for a proper purpose, in the best interests of Eskom, and with the degree of care, skill and diligence that may reasonably be expected of them. In addition, Eskom directors have a duty not to allow the company to trade recklessly, with gross negligence or fraudulently. It appears that the Eskom Board members failed in these duties.
- vi. It is unclear why the new Board appointed in December 2014 ratified the TNA deal, and how this could be justified.
- vii. It is unclear why the two consecutive Boards did not implement the findings of SizweNtsalubaGobodo, and it appears that there was a failure to fulfil fiduciary duty in each respective instance.

## **2.7 Eskom's arrangement of Brian Molefe's resignation and pension**

### **2.7.1 Background to the Investigation**

On 11 November 2016, Brian Molefe, then CEO of Eskom, publically tendered his resignation with effect from 1 January 2017 following the release of the Public Protector's *State of Capture* report which provided evidence of Mr Molefe's connection to the Gupta family, as well as his potential role in facilitating the Gupta-owned businesses' questionable transactions with Eskom, primarily through Tegeta Exploration and Resources (Pty) Ltd. (Tegeta). While questioning the veracity of the *State of Capture* report and the credibility of the outgoing Public Protector, Thuli Madonsela, he stated:

*"I have, in the interests of good corporate governance, decided to leave my employ at Eskom from 1 January 2017. I do so voluntarily: indeed, I wish to pay tribute to the unfailing support I*

*have had since I took up office from the chairman, the Board, and with those with whom it has been my privilege to work. Together we brought Eskom back from the brink.”*

Despite this public resignation, the South African media exposed how Molefe went on to receive a pension valued at R30.1 million following just 16 months of service at Eskom. The pension arrangement ostensibly relied on a letter sent by Board chairperson at the time, Ben Ngubane. This letter posited that Molefe had “retired”, rather than resigned. After pension pay-outs to Mr Molefe commenced in February 2017, conflicting narratives emerged in the media about the termination of Mr Molefe's employment. Mr Molefe became a Member of Parliament from 23 February 2017 till 14 May 2017. The Minister of Public Enterprises was called to account to the Committee over the peculiarity and possible illegality of Molefe's pension pay-out. Eskom attempted to resolve the matter by appointing Molefe once again as CEO. However, further political pressure resulted in his dismissal on 31 May 2017. The decision did not originate within Eskom but was made by an Inter-Ministerial Committee established by former President Jacob Zuma, and implemented by Minister Brown. On 25 January 2018, the High Court of South Africa, Gauteng Division, Pretoria ("Pretoria High Court") ruled that Molefe would have to return his pay-out to Eskom, calling it a “deliberate scheme”.

A preliminary analysis of these events suggests:

- a. Brian Molefe did not retire, but resigned, publically. Eskom's claims to the contrary appear to have been deliberately misleading and an unlawful attempt to benefit Brian Molefe.
- b. Brian Molefe was never eligible to be enlisted as a member of the Eskom Pension Fund, which only manages funds for permanent employees of Eskom. These rules were well established and known at the time of his secondment to Eskom.
- c. Brian Molefe's conditions for early retirement and subsequent pension pay-out were determined in 2015, well in advance of his resignation in November 2016.
- d. The role of the Minister of Public Enterprises in facilitating Brian Molefe's pension pay-out and reappointment is in question, and contradictory evidence has been presented before parliament.
- e. Eskom's Board and Chairperson appear to have played a critical role in facilitating Mr Molefe's pay-out.

#### **2.7.2 Witnesses were called to testify**

Witnesses called to testify on this matter:

- Mr Sibusiso Luthuli, Eskom Pension and Provident Fund CEO
- Ms Mantuka Maisela, Eskom Pension Fund Chairperson
- Mr Khulani Qoma, Eskom General Manager in the Office of the Chairperson



- Ms Suzanne Daniels, Eskom Former Company Secretary and currently Head of Legal and Compliance (on suspension)
- Ms Venete Klein, Eskom Board member from 12 December 2014 to May 2017
- Mr Brian Molefe, Former Eskom CEO April 2015- November 2016
- Ms Lynne Brown, Minister of Public Enterprises
- Mr Anton Minnaar, Eskom Executive Support Manager
- Mr Zethembe Khoza
- Dr Pat Naidoo

### 2.7.3 Documentation presented to the Committee

Included in the documentation submitted to or called for by the Committee for the purposes of the inquiry:

- Letter from Ben Ngubane addressed to Minister Lynne Brown, “Retirement Arrangements – Brian Molefe”. 25 November 2015
- A Report of the Public Protector “*State of Capture*”, Report 6 of 2016/7 14 October 2016 (“Public Protector “State of Capture” Report”)
- Committee Meeting notes, “Minister of Public Enterprises and Eskom Board on reappointment of Brian Molefe as GCEO”. 23 May 2017
- Brian Molefe, “STATEMENT” of resignation, 11 November 2016
- Public Enterprises Minister Lynne Brown, Statement to the Portfolio Committee on Public Enterprises, 23 May 2017
- Submission: Eskom Pension and Provident Fund, “Retirement Pay-out: Brian Molefe”. 20 October 2017
- Submission prepared by Suzanne Margaret Daniels, Group Executive: Legal and Compliance, “Portfolio Committee on Public Enterprises: Oversight Inquiry into Governance, procurement and financial sustainability of Eskom”. 8 November 2017
- Statement of Khulani Qoma, Eskom General Manager in the Office of the Chairperson “Eskom’s implosion: deliberate, well-orchestrated & shame-free; entire leadership culpability”. 10 November 2017
- Statement by Venete Klein, Eskom Board member from 12 December 2014 to May 2017. November 2017
- Statement of Anton Minnaar, Eskom Executive Support Manager. 5 December 2017.
- Submission by Board of Eskom Holdings SOC Limited (Registration Number 2002/015527/30) to

- The Portfolio Committee on Public Enterprises Inquiry into Corporate Governance at State Owned Companies. 5 December 2017. (“Submission by Board of Eskom to the Committee”)
- Presentation by Minister of Public Enterprises Lynne Brown to the Parliamentary Inquiry into Eskom. 22 November 2017
- Gauteng High Court Judgement: Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018).

#### 2.7.4 **Brian Molefe is seconded to Eskom from Transnet in April 2016**

Following the resignations of Eskom CEO, Brian Dames and CFO, Paul O’Flaherty, Eskom Chair, Zola Tsotsi, suspended four top executives in the first quarter of 2015. The newly appointed CEO, Tshediso Matona was among those suspended. Minister Brown then seconded Brian Molefe and Anoj Singh from Transnet to address apparent management issues and enduring load-shedding challenges at Eskom. Mr Molefe was appointed as acting CEO in May, and then was appointed on a five-year fixed term contract in October. Minister Brown also replaced Mr Tsotsi with Dr Baldwin (Ben) Ngubane who presided as Chairperson of the Board for Molefe’s entire appointment, resignation, retirement, unpaid leave, reappointment and dismissal.

#### 2.7.5 **Ben Ngubane lays the groundwork for Molefe’s pension**

Correspondence between Dr Ngubane and Minister Brown, dated 25 November 2015 lay out the conditions for Mr Molefe’s retirement benefits. The letter requested her input to finalise the terms of Mr Molefe’s contract. Three conditions were stipulated in the letter:

- Early retirement: Mr Molefe is allowed to retire after his five-year contract, as if he were 63 years of age, regardless of his actual age.
- Waiving penalties: penalties prescribed by the EPPF for early retirement should be waived.
- Eskom’s liability: the costs resulting from any penalties should be borne by Eskom.

Three people in Minister Brown’s office received this correspondence: the DPE registry officer, the department’s chief director of governance and Minister Brown’s former personal assistant, Kim Davids. In her affidavit submitted to the Pretoria High Court, and subsequent representations to parliament, Minister Brown denies any knowledge of this letter and its contents.

#### 2.7.6 **Molefe resigns in November 2016**

Molefe’s very public resignation on 11 November 2016 was met with equally public expressions of sadness from Eskom and Minister Brown. Ms Brown told the media,

*“Mr Molefe has been instrumental in developing Eskom’s turnaround strategy which is beginning to yield positive results and it is disappointing that he will not be present to see it to complete fruition.”*

Court proceedings have revealed that processes to secure Board approval for Mr Molefe’s early retirement began shortly after his announcement. Furthermore, the date for his resignation, 1 January 2017, is significant because it was after his fiftieth birthday. Had the resignation come into effect any earlier, his plans for retirement would have been frustrated by EPPF rules. Mr Molefe’s request for early retirement was submitted on the day of his resignation and approved by the Board ten days later on 21 November 2016.

#### **2.7.7 Molefe is sworn in as an MP, and his pension benefits are initiated**

After leaving Eskom, Mr Molefe was sworn in as a Member of Parliament in February 2017. Following administrative processes, the EPPF paid Molefe one-third of his total pension in a lump sum and commenced monthly pension payments. News of the pension, valued at R30 million after just 16 months of service drew the ire of several sectors of society. Formal petitions were levied by, among others, Corruption Watch. On the face of it, the pension appeared to be highly unusual, irregular and possibly illegal. The Eskom Executive, Board, and Minister Brown found themselves in the firing line as lines of accountability were wrought from the obfuscated and contradictory versions of events that were put forward by key actors.

#### **2.7.8 Molefe is reinstated as Eskom’s CEO following the Board’s petition to Minister Brown**

By May 2017, Molefe’s pension had become politically untenable. Minister Brown had maintained her ignorance of the arrangement throughout. She publically stated that she had operated under the assumption that Mr Molefe had resigned and not retired. Minister Brown called a meeting with the Eskom Board on 19 April 2017, after which the Board was asked to resolve the pension matter in one of four ways: “consensual rescission” in which Molefe returns the pension and returns as CEO; “non-consensual rescission”; rescinding Mr Molefe’s retirement and offering standard benefits under a resignation agreement; rescinding Mr Molefe’s retirement with a payment in settlement of dispute.

Eskom's Board agreed with Brown's assessment in their reappointment of Molefe that they characterised as a "reinstatement". They sent Ms Brown a letter stating,

*“As this is simply a reinstatement of his employment, counsel has advised that neither you nor Cabinet’s formal approval is required for Mr Molefe to resume his duties as an employee. However, given our relationship and to avoid any misunderstanding your approval is nevertheless requested.”*

Mr Molefe was informed the early retirement agreement was rescinded on 3 May 2017, and was invited to “return” as CEO having been formally considered to have been on “unpaid leave”. On 12 May,

Minister Brown announced that she had accepted the Board's request on the basis that it made better financial sense than paying out a R30 million pension. By 14 May, Mr Molefe stepped down as a Member of Parliament.

#### **2.7.9 Minister Brown and Dr Ngubane's answers to the Portfolio Committee on Public Enterprises, 23 May 2017**

The Portfolio Committee on Public Enterprises invited the minister and Board to explain the circumstances of Mr Molefe's resignation, retirement, pension, leave and reappointment. Minister Brown and Eskom Chair, Dr Ngubane were both called upon to make representations to parliament. Here, Minister Brown maintained her position of ignorance regarding Mr Molefe's pension and defended her affirmation of his 'reappointment'. As justification, she cited Eskom's Memoranda of Incorporation (MOI), which is required by the Eskom Conversion Act, 13 of 2001, Section 6 (2), to be published by the Minister. Subsequent versions of these MOIs may be materially different, as noted by the Minister:

*"Eskom is governed by various pieces of legislation, including the Eskom Conversion Act 13 of 2001. Section 6 (2) of the Act requires me, from time to time, to publish memoranda and articles of association. Two different Memoranda of Incorporation are relevant to Mr Molefe's situation: One passed and adopted before his arrival at Eskom, and the other during his tenure.*

*Material differences between the two documents included that the 2014 version did not require the Minister to be noted as a party to the employment agreement of the Group Chief Executive (noting the Minister was required in the 2016 version); and the 2014 document did not provide the Minister with the power to remove the Chief Executive (as the 2016 version does).*

*The executive employment contract concluded by Mr Molefe and Dr Ngubane in March 2016 was concluded in terms of the 2014 agreement. It didn't have to be shown to me.*

*When Mr Molefe quit Eskom in November 2016 I was under the impression that he had resigned. I was not aware that he had applied for early retirement. This I only learned in April 2017, after reading in the media that Mr Molefe was receiving a R30m pay-out from Eskom, and asking Eskom's Board to make a more prudent deal."*

In short, as she maintained that she was legally obligated to keep a distance from Mr Molefe's conditions of employment, the Minister stated that she was therefore not liable for any of the ensuing controversy. Furthermore, although she reported that she had been kept in the dark over Molefe's pension, having read about it in a *Sunday Times* report in April, she confirmed that, in her view, the Board had acted within their rights to negotiate Mr Molefe's reappointment. Dr Ngubane confirmed



Minister Brown representations, giving no indication of any problem in relation to the role played by Eskom in the facilitation of Mr Molefe's pension. He admitted that "We bought him ten years".

#### **2.7.10 An inter-ministerial committee finds fault with Molefe's pension arrangement, and Molefe is dismissed from Eskom in June 2017**

Former President Jacob Zuma established a Cabinet Inter-Ministerial Committee on 1 June 2017, comprising Finance Minister Malusi Gigaba, Justice Minister Michael Masutha, Brown and Energy Minister Mmamoloko Kubayi. The Committee found that Eskom had mistakenly paid Mr Molefe his pension and proposed that, despite evidence suggesting otherwise, the "Mistakes were made in good faith". The Committee found that both the pension payment and the reappointment of Mr Molefe should be rescinded. Minister Brown implemented the Committee's findings, sending instructions to the Eskom Board to revoke all pension and appointment arrangements.

#### **2.7.11 Ben Ngubane resigns from Eskom in June 2017**

Both Minister Brown and Dr Ngubane have maintained that their respective actions were legal and were taken in "good faith". However, the Eskom Chair resigned with immediate effect on 12 June 2017.

#### **2.7.12 Challenge to the legality of Molefe's pension in November 2017**

A legal application against Mr Molefe's pension was launched in the Pretoria High Court. Minister Brown filed explanatory affidavits stating that Eskom had appointed Mr Molefe under conditions that differed from those contained in the letter sent to her office by Dr Ngubane. She stated:

*"In the meanwhile on 15 November 2015 the board addressed a letter to the minister in which it proposed a pension arrangement for Molefe different from that captured in the letter of appointment."*

She also said that the pension arrangements were approved by the Board on 9 February 2016 without her knowledge or approval. The Board approved the conditions for early retirement for Eskom executives.

#### **2.7.13 The Pretoria High Court rules against Molefe and Eskom in January 2018**

A full bench of judges in the Pretoria High Court found against Molefe, who was ordered to return the pension funds and pay legal costs within 10 days. The judgement stands in stark contrast with the findings of the Inter-Ministerial Committee. Far from "good faith", the court found, "a deliberate scheme" had been devised by Eskom with the involvement of Mr Molefe to afford him pension benefits to which he was not entitled. Key facts found by the court are as follows:

*Paragraph 4-5: It transpired later that on the same day [as his resignation], Mr Molefe submitted a request for early retirement. The request was granted in the letter dated 24 November 2016, and under it, an early retirement agreement was concluded with Eskom effective on 1 December*

*2016. The agreement permitted Mr Molefe to proceed on retirement from age 50, with Eskom making up the shortfall regarding the ten-year service requirement in terms of the rules of the Pension Fund.*

The Minister was never informed that Mr Molefe had applied for early retirement and that such an agreement had been concluded.

*Paragraph 18: On 11 November 2015, Mr Molefe signed an open-ended contract of employment with Eskom accepting his appointment as Group Chief Executive Officer with effect from 1 October 2015. He subsequently received notification from the Minister through Dr Ngubane that his conditions of employment would be altered from an open-ended contract to a fixed term contract.*

The judgement goes on to state that, despite having full knowledge of Mr Molefe's fixed term appointment, Dr Ngubane had contrived the early retirement plan in response to Mr Molefe's concerns about this employability at the age of 54, at which time his employment at Eskom would lapse. Molefe's contractual negotiations concluded with him signing a five-year contract on 7 March 2016, which ran from 1 October 2015 until 30 September 2020. Under this contract, Mr Molefe was not eligible for membership of the EPPF, which is reserved for permanent employees only.

Despite Minister Brown's argument that Eskom's 2014 MOI governed her lack of intervention in Dr Molefe's appointment in 2016 and reappointment in 2017, the Pretoria High Court found otherwise. The Court found:

*Paragraph 56: "There is a strong inference to be drawn from the above factors that the early retirement agreement was deliberate scheme devised by Eskom with the involvement of Mr Molefe to afford him pension benefits he was not entitled to. The scheme permitted Mr Molefe to proceed to early retirement at age 50 by buying him extra pensionable service. The scheme was started soon after Mr Molefe's permanent employment and was deployed after he had publicly stated that he was voluntarily leaving Eskom's employ."*

*Paragraph 65: Mr Molefe voluntarily resigned and did not retire.*

*Paragraph 73: Minister Brown, of the view that there was no legal basis for Mr Molefe's pension, was under no obligation to fulfil its conditions. Subsequently, she was also under no obligation to "exchange" his reinstatement for repayment of monies unlawfully received.*

*Paragraph 82: "We also find that Mr Molefe was never entitled to receive any pension benefits from Eskom Pension Fund and any payments made in lieu of such benefits were patently unlawful."*

The High Court's judgement calls into question the governance practices and motives of the Eskom Executive and Board, as well as the Ministry:

*Paragraph 80: The allegations are highly relevant to Mr Molefe's suitability to be reinstatement as GCEO. They are a dead weight that he must carry until he is cleared. In the absence of new facts that arose in the interim to lift the dead weight that motivated the need for Mr Molefe to resign in the first place, the allegations in the Public Protector's report cannot just be ignored by the Minister or Eskom. The Minister and Eskom acted irrationally in ignoring the damning allegations in the Public Protector's report.*

#### 2.7.14 Governance issues

##### 2.7.14.1 Eskom's executive misleads the EPPF to enlist Mr Molefe as a member

The first parties to be called by the Committee to deal with the matter of Mr Molefe's pension were the EPPF CEO, Sibusiso Luthuli and Chairperson of the Board, Mantuka Maisela. Mr Luthuli and Mrs Malisela made a joint representation to the Committee, adding detail to the story that had been unfolding in parallel through investigative journalism and legal proceedings. The Committee was told that legal action had been taken by the EPPF to reclaim monies which had been disbursed to Mr Molefe. The fund's rules were reiterated, and it was noted that only permanent employees of Eskom and its subsidiaries are eligible.

Mr Luthuli explained in detail that there was a longstanding convention on how to load new members onto the Fund's system with detailed information exchanged monthly between Eskom and the EPPF in a "lack file". Mr Luthuli stated,

*"Eskom knows the rules, they know how the rules should be applied and, you know, and we rely on them to make sure that the rules are applied because they have the source documentation which we as a fund unfortunately do not have."*

Being aware of these rules and well-established conventions, when the EPPF received Mr Molefe's information, it clearly indicated his eligibility in line with the Fund's rules:

*This code says PPX and in our agreement with Eskom according to us, PPX means that you are permanent, and you are an executive, at an f-band level at Eskom. So, when we didn't...when he first came in in September and we did our recons we checked that; to say is he permanent, he's on permanent fix term, he is an executive? So, we can tick the box to say that we've satisfied ourselves that what Eskom is giving us they are confirming that this member is an eligible member...*

Mr Luthuli indicated that the perception of Mr Molefe's eligibility was reinforced at a meeting on 29 September 2015 between a Mr Nzibande, client manager for the EPPF, and Mr Anton Minnaar and Mr Brian Molefe from Eskom. This meeting dealt with the matter of the management of Mr Molefe's previous pension contributions while he was an employee at Transnet. Mr Luthuli went on to explain that the EPPF relies on the accountability and governance within Eskom to fulfil its role:

*I think it's important that I also highlight that as a fund we operate on a good faith relationship with the employer. This good faith relationship with the employer is quite crucial and very important because without this good faith relationship it will become very difficult for the fund to be able to verify certain information. For example, in the instance of members that are joining the fund, the fund does not have access to documents for a member that joins the fund. We never get to see an employment contract, we never get to see the terms and conditions under which the member has been appointed by the employer.*

Ms Venete Klein testified that the uncertainty surrounding Mr Molefe contract with Eskom originated with the contract that was drafted internally, overseen by Ms Suzanne Daniels:

*On the 9th of November Dr Ben [Ngubane] hands Brian Molefe a contract, it's called a fixed term contract, which Brian signs and in that it talks about his pension benefits, his medical aid benefits, etc. It's pretty important to note the date, that's on the 9<sup>th</sup>. It talks of a fixed term. There's no term in it, which means a term could be 10 years, 15, 20...there is no term. It's considered if you ask the people in Eskom what does it mean...it meant a full-time job, not a 5-year job. I have in this week received an email that was sent from the Department to Ms Daniels dated the 4th of November, remember Dr Ben had already gotten Mr Molefe to sign this fixed term contract with no contract...with no term on it, on the 09th. On the 4th of November, the letter that we had been waiting for confirming the tenure of 5 year[s] arrives with Ms Daniels. On the morning of the 9th of November Ms Daniels writes to the executive of remuneration asking him to do the contract with what Minister has said, for 5 years. The difficulty is the letter or the contract that gets given to by Dr Ngubane to Mr Molefe does not state a term.*

In summary, although the contract was always designated, "fixed term", the lack of specification of a term in the version signed by Mr Molefe on 9 November, despite Ms Daniels' knowledge that the Minister had approved a five-year term, may have led to the impression for some people that the term was "permanent". Ms Daniels, in her testimony before the Committee, acknowledges receipt of a letter from Minister Brown, limiting Mr Molefe's term to five years.

Mr Minnaar confirmed the failure of the contract to expressly specify a term in the correspondence from the Minister of which he had sight. He also explained that he had already uploaded Mr Molefe as an employee by this time on Eskom's SAP system:



*"I was advised by Secretariat to appoint Mr Molefe. The appointment was done on SAP and Eskom communication of the Minister did her announcement on 28th September 2015."*

Mr Molefe confirmed this version of events:

*The pension payment from Eskom Pension Fund: In April 2015 I was seconded from Transnet to Eskom as Group Chief Executive Officer in an acting capacity. On the 2nd of October 2015 I received a letter from the Minister of Public Enterprises appointing me as Chief Executive Officer of Eskom and ex officio member of the Eskom board. The letter did not have a limitation on the period of employment.*

Mr Molefe was therefore employed under three different arrangements during his tenure. Despite all evidence to the contrary, noted above, Mr Minnaar made the controversial and possibly perjurious statement,

*"It is clear in my view, that we appointed him as a permanent employee. We have never been advised differently." He, in his capacity an experienced professional, maintained that he believed that Molefe was, paradoxically, a permanent employee with a term.*

#### **2.7.15 Dr Ben Ngubane and Anton Minnaar lay the groundwork to facilitate Brian Molefe's early resignation and pension pay-out**

The Committee was presented with evidence that suggested that Mr Molefe's early retirement was a deliberate and carefully planned action. Mr Luthuli testified:

*...There was various correspondence where Mr Minnaar, I think as early as November 2015 was requesting the fund to do calculations in respect of Molefe's overall pension payments and any early retirement costs in the event that Mr Molefe where to retire 5 years later when he was aged 54 and what will be the cost implications if the penalties were waived. We calculated those benefits, you know, then at different days and different times there were these requests that came through via email to say now calculate what happens from the age of 55, what happens at the age of 63, and all of this took place around about November 2015 where we then calculated, did various calculations. And I think in one of the emails that was sent to us we were put under pressure as the fund to say, you know, we need this information urgently because it was saying that calculate these numbers as information is required to finalize the issue with the minister. So, we don't know what minister they were referring to because it didn't say what minister, but it just said we need this information to finalize the issue with the minister.*

Ahead of Mr Molefe's resignation, Mr Luthuli informed the Committee that the matter of Mr Molefe's early retirement was addressed in written correspondence between Mr Minnaar and the EPPF between August 2016 and December 2016:

*I think specifically on the 18th of August 2016 we received again a request from Minnaar, Anton Minnaar, at Eskom now requiring the fund to do early calculation for early retirement costs if Molefe were to be retired at the age of 50, with penalties being waived and additional years of service being bought up to the age of 63. Again, the fund calculated those benefits and then gave the information back to Mr Minnaar. I think at the time, the cost of the benefit we had calculated it in August to be around 25.9 million.*

Ms Daniels confirmed receipt of this information within Eskom.

Ms Klein testified that in response to Mr Molefe being moved from an indefinite fixed-term contract to a five-year fixed term, she and other Board members discussed ways of ensuring a financially beneficial retirement for Mr Molefe. At a meeting of the People and Governance Committee on 9 February 2016, Ms Klein testified that Mr Minnaar presented the method by which Mr Molefe would be retired from Eskom:

*He said well there is a rule that says if you've been in the organisation for 10 years and you are 50 years old the organisation would then pay for certain things, pay for certain waivers of penalties etc. that had been done before. So, we said ok. Looking at that then after 5 years Mr Molefe would be 55 then that same rule could apply except he wouldn't be there for 10 years. So we discussed it and we took it to P&G where Mr Minnaar came and did the presentation to P&G to explain to us that this had been done on numerous occasions for other CEOs and told us about the rule in 1992 or 1999 where Jan Maree actually said any CEO who leaves gets an additional 5 years in pension.*

None of this was applicable to Mr Molefe because he was at no point a permanent employee of Eskom. Mr Molefe also explained to the Committee:

*Also in early October 2015 I received and signed the executive employment contract," that is attached in page 35 to 49, "from Eskom which specified the commencement date of my employment as the 1st of October 2015 and the contract specified that employment was to continue for an indefinite period," clause 3.1 of the contract which is on page 39 of the documents. "In November 2015 my membership of the Eskom Pension Fund was finalised. I also transferred proceeds from my Transnet Pension Fund to the Eskom Pension Fund which was about 4.3 million rand. The Eskom pension fund loaded my membership in their system as 'PPX' meaning that I was a permanent employee. On the 1st of November 2015 the Minister wrote a letter to Dr Ngubane informing him of a cabinet decision to employ all the parastatal executives." This is an edit that I would like to, but I just said there 'all the parastatal executives, but its parastatal executive directors, which is the parastatal's executive directors, which is Eskom's executive directors on 5 year contracts.*

It appears that by the time that Mr Molefe was uploaded on the EPPF system, Eskom was already aware or should have been aware that he was not eligible for membership of the fund. In his testimony to the Committee, which preceded the High Court judgement, Mr Molefe maintained his correctness in becoming a member of the EPPF:

*So, at the date when I became first became a member of the pension fund I was an eligible employee, but I don't know if your point, therefore, is that in March when I signed that contract that applied retrospectively my membership of the Pension Fund should have been revoked retrospectively.*

The Submission by Board of Eskom Sections 6.13-6.14 to the Committee notes:

*6.13 On the 7th of March 2016 a formal employment contract was drafted and signed by both Eskom and Mr Molefe. This contract was based on a five year fixed term and on the basis of the resolution dated 9th of February 2016, in terms of which early retirement would be permissible upon termination of the fixed term contract. On the 6th of September 2016 it was decided to increase the long term incentive award for Mr Molefe to two times the annual pensionable earnings as the amount was relatively low based on the benchmark against similar long term incentive awards to Chief Executive at this level.*

*6.14 On the 24th of October 2016, the Eskom People and Governance Committee approved the additional award in the form of an increase of Molefe's long-term incentive to two times the annual pensionable earnings.*

Under normal circumstances, EPPF members may:

- Retire at 55.
- Retire at 50, if they have worked for Eskom for 10 years, with penalties paid, reducing total benefits.

On 11 November 2016, the day of his resignation, Mr Molefe requested early retirement, as noted by Ms Daniels *"in line with the EPPF rules as read with the resolution of the People and Governance subcommittee dated 9 February 2016"*. On this day, Eskom as well as the Minister issued official statements confirming that Mr Molefe had resigned. Ms Daniels testified that Dr Ngubane approved the early retirement request on 24 November 2016. His decision was motivated with reference to the EPPF rules, and the Board resolution of 9 February 2016.

Mr Khoza testified that the Board was not called upon to vet or sanction the approval, which was sent to Mr Molefe. The letter was read to the Board's People and Governance subcommittee, but not approved, *"It was read to this particular meeting, it was not a submission"*. Mr Khoza also testified that the Board did not have sight of Mr Molefe's request for early retirement of 11 November 2016.



Mr Luthuli testified that on 19 December 2016, Mr Nzibande was called to a meeting with a Ms Marinda Botha who works in Mr Minnaar's office, to collect documents dealing with Mr Molefe's retirement and exit from the EPPF. These documents included:

- A form completed by Mr Molefe and Eskom that, "ticked the relevant boxes to say Mr Molefe is being retired using early retirement".
- A letter signed by Dr Ngubane, in his capacity as Eskom Chairperson of the Board.

The letter was clear regarding the terms for retiring Mr Molefe:

*"Mr Molefe, your application for early retirement has been approved and we are invoking rule 28 as well as rule 21 (4)". So, there was no ambiguity in terms of which rules Eskom wanted the fund to apply, in terms of rule 28 and rule 21(4). And then it further stated that any penalties would be waived. It further stated that they would, you know, purchase additional service for Mr Molefe of 13 years, which then took him to age 63 because he was turning age 50 in December.*

The conditions indicated to the EPPF in December 2016 brought the content of Dr Ngubane's letter to the Minister from November 2015 to fruition. Rule 28 was invoked to enable early retirement. However, because Mr Molefe did not have the required 10 years of service to apply this rule, Eskom invoked Rule 21(4), which allows Eskom to pay in additional contributions, effectively buying years of service on behalf of an employee. Having worked for 16 months, Eskom needed to purchase eight years and eight months of service. None of this does apply to employees, such as Mr Molefe, who never qualified for EPPF membership. Eskom purchased Mr Molefe 156 months of contributions, added to his 16 months. Mr Minnaar confirmed his role in structuring the conditions for Mr Molefe's early retirement.

In his testimony, Mr Khoza stated that there was an investigation into the destruction of documentary evidence regarding Mr Molefe's pension:

*There is an investigation that was investigated in terms of destruction of the documents [...] a person that was doing the investigation to check all the documents [...], including that particular incident, and that document had found that [...] Minnaar [...] did not act properly and also from the company secretary it [said] as well that they did not follow the process. There was an investigation that found that out.*

#### **2.7.16 The EPPF's methodology for calculating Molefe's pay-out**

The EPPF, having earlier made the assessment that Mr Molefe's early retirement pension benefit would be in the region of R25.9 million, recalculated this benefit based on the received information noted above. This information included Mr Molefe's increased annual salary of R5.6 million, as well as the age of his spouse, who is more than five years younger than him (a factor that affects benefits). These factors, as well as the waiving of all penalties by Eskom, saw Mr Molefe's benefit increase to R30.1



million. He requested one third (less tax) be paid in a lump sum, while the rest would be paid in monthly payments, commencing in February 2017, backdated to January 2017. The lump sum amounted to R7.9 million (less tax). Mr Molefe also opted to take one third of his Transnet contributions in cash, which amount to R1.7 million (less tax).

#### 2.7.17 Eskom's Board failed in their oversight of executives in the matter of Molefe's pay-out

Ms Venete Klein testified that the Eskom Board and in particular the People and Governance Committee, never approved the Molefe pension. She argues that they noted the possibility of retiring Mr Molefe after five years but did not resolve to approve such retirement. Ms Daniels' statement clarifies this matter. The minutes for the Board meeting of 9 February 2016 request, with reference to "the current rule that staff of over 50 years of age with at least ten years' service were entitled to retire as per the Eskom Pension and Provident Fund Rules":

*"The Eskom rules to be amended in respect of executive directors with fixed term contracts to make up for shortfall in years waive the penalties and refund the pension and provident fund the actual cost relating to additional services"*

In terms of the motivation for Molefe's pension, Ms Klein offered the following, which echoes the sentiment articulated by Minister Brown, Dr Ngubane and Mr Minnaar: *"The entire board, including me, was in awe of what Mr Molefe had been able to deliver, especially as he had done so with substantially the same executive team who had previously not known how to turn the load shedding situation around."* She did not agree that the Board had failed in any way but passed responsibility on to Ms Daniels and Mr Minnaar.

The Submission by Board of Eskom Sections 6.15-6.17 to the Committee notes:

*6.15 On the 7<sup>th</sup> of March 2016 a formal employment contract was drafted and signed by both Eskom and Mr Molefe. This contract was based on a five-year fixed term and on the basis of the resolution dated 9<sup>th</sup> of February 2016, in terms of which early retirement would be permissible upon termination of the fixed term contract. On the 6<sup>th</sup> of September 2016 it was decided to increase the long term incentive award for Mr Molefe to two times the annual pensionable earnings as the amount was relatively low based on the benchmark against similar long term incentive awards to Chief Executive at this level.*

*6.16 On the 24<sup>th</sup> of October 2016, the Eskom People and Governance Committee approved the additional award in the form of an increase of Molefe's long-term incentive to two times the annual pensionable earnings.*

*6.17 On or about the 13th of April 2017, the Chairperson of the People and Governance Committee was made aware by a Journalist that alleged payments in the amount of R30 000*

*000.00 were made to Mr Molefe from the Eskom Pension and Provident Fund. This is the first time that Eskom became aware of a potential leakage of confidential information regarding Molefe's early retirement.*

Despite the fact that there was no reply on the matter of Molefe's pension, having deemed the matter to have been of material relevance for the Minister, the Board still discussed the matter as laid out in the letter from Dr Ngubane to the Minister, dated 25 November 2015. This Board meeting took place on 23 February 2016.

Mr Khoza's testimony before the Committee indicated that Board approval of Mr Molefe's pension rested on EPPF approval. However, this directly contradicts Mr Luthuli's view that EPPF approval rests on Eskom's understanding of the rules and provision of accurate information.

The EPPF Rules were never amended as suggested. However, it was not up to Eskom to amend the rules, but the EPPF to do so. No such request was submitted to the EPPF.

#### **2.7.18 Due diligence failure**

The matter of Mr Molefe's pension was never raised with the EPPF Board, who contacted Mr Luthuli upon reading the Sunday Times media report. Mr Luthuli explained:

*So currently there is a board that is in place, the board that is in place came into effect on the 1st of June 2016. Once the board exercises control and governance over the fund, it's however not practical that the board can attend to day-to-day activities. So the board has then, the fund as a management team which then attends to these day-to-day activities in terms of running and managing the fund and executing on board resolutions and board decisions and board mandates. The management team is led by myself as the chief executive of the fund as well as the principal office of the fund. I then have an Exco that assists me in terms of the day-to-day running of the fund.*

He also stated that he, as CEO, was not required to sign off on the pension because of formal delegations in place. He reported that Mr Nzibande was called into a meeting with Eskom, but that rather than meet with Mr Minnaar at Eskom's offices, he met with a Mr Adil Patel and Ms Venete Klein in Midrand. The veracity of the EPPF's calculation of Mr Molefe's pension was questioned and tested by Sizwe Ntsaluba Gobodo, auditors appointed by Eskom. The calculation was found to be technically correct, on the assumption that Mr Molefe was eligible for EPPF membership. However, it remained highly irregular, a consideration that was missed by the EPPF's governance structures. At an EPPF Board meeting, on 19 April 2017, the EPPF management was required for the first time to explain how Mr Molefe's pension had been arranged.

The EPPF requested a legal opinion from Norton Rose on their process for approving Mr Molefe's pension. Mr Luthuli explains:

*What they [Norton Rose] then raised, was if you read rule 28, especially route 28 (3), it does indicate that this should be done at the discretion of the board. So they then indicated that this should have actually been presented to the pension fund board to apply its discretion. So by virtue of it not having been presented to the pension fund board, it then meant that this retirement was actually ultra vires...*

In other words, the delegation that allowed EPPF managers to sign off on Mr Molefe's pension without CEO or Board approval was not proper. Committee members did raise the responsibility of the Board to report possibly corrupt actions under the Prevention and Combating of Corrupt Activities of 2004. In terms of section 34 of the Prevention and Combating of Corrupt Activities Act of 2004 an offence of fraud, bribery, corruption and/or theft involving an amount of R100 000 or more must be reported to the Directorate for Priority Crime Investigation ("DPCI") by any person who holds a position of authority and knows or ought reasonably to have known or suspected that any other person has committed such offence. A person in a position of authority includes a member of the board of directors of a company. Responding to a question on corporate governance, with specific reference to the failure of the Eskom Board to take disciplinary action or to lay criminal charges against members of the management team who were implicated in corruption, Ms Maisela replied:

*To answer your question, management did not deliberately make the decision. They made the decision on the basis of the delegation of authority given to them. So, as a board we did not discipline anybody because there was a whole full paper trail of why management did that and they had done it in the past based on the delegation of authority that was given to them.*

#### **2.7.19 Eskom executives obfuscate status of Brian Molefe's termination of employment and subsequent reappointment**

Ms Suzanne Daniels wrote a letter to the EPPF, dated 12 May 2017, requesting that the pension payments to Mr Molefe be ceased. She testified that she, Dr Ngubane, Ms Klein and Mr Minnaar had been instructed by the Minister on 19 April 2017 to "re-evaluate the 'pension payment'". On 28 April, Ms Daniels states, Eskom received unspecified legal counsel indicating that Mr Molefe's pension arrangement was not lawful.

Eskom sent a letter to Mr Molefe, dated 3 May 2017, requesting that he "resume his duties", implying that his retirement had not taken effect, and setting aside his very public resignation.

At a Board meeting with the Minister on 9 May 2017, Minister Brown testified that, "[The Board] said the [pension] agreement had been based on what they termed a shared misunderstanding". Minister Brown reported that Eskom presented her with four options for rescinding Mr Molefe's pension, expressing a preference for his reinstatement. She states,

*I applied my mind to the matter, accepting the Board's bona fides that it had obtained advice from senior counsel and also accepting the correctness of this advice. Since the meeting, however, officials from the Department requested a copy of this opinion and have been repeatedly rebuffed by the former Company Secretary Ms Daniels, and the Board.*

The second letter from Eskom to Mr Molefe dated 11 May 2017 restated the rescinding of retirement benefits as well as a request for him to resume his duties.

Mr Luthuli continues:

*"Again, we then got a letter telling us that he had been re-employed at Eskom and then indicating that the period that he had left up to the period of re-employment would be taken as unpaid leave and then we must stop paying the pension."*

Mr Molefe explained:

*The reinstatement agreement did not seek to reinstate me. The fact that my pension arrangements or my pension agreement was void ab initio means that my contract of employment was still in existence and that is what the legal advice that we obtained. And so the reinstatement agreement just regulated the manner in which I would return to Eskom on the date that had been specified by the Chairman of the board.*

Mr Khulani Qoma testified as to his professional assessment of the reputational risk of Mr Molefe's return to Eskom in Section 3.14 of his statement:

*When it became apparent that Molefe was returning to work following Mzilikazi Wa Africa's R30m story, I registered my reputational protest, albeit feeble protest. It was feeble due to the fact that I didn't record it in writing; a part I regret sincerely. I deluded myself in thinking that Minister Brown would not grant authorisation to the patently wrong decision.*

#### **2.7.20 Eskom offers to pay for legal counsel for the EPPF**

Eskom sent correspondence, dated 25 July 2017, to the EPPF, stating that it would cover any legal expenses incurred by the Fund in preparing to make its representation to the Committee. Eskom writes,

*You are reminded that you have a right to your own legal counsel during this process. Eskom is agreeable to paying your reasonable legal fees connected with the enquiry. However, this is subject to Eskom obtaining the necessary written consent from its insurers in this regard. You should also note that in terms of Eskom's management liability insurance policy, the insurer who will be paying your legal fees connected with the Parliamentary enquiry, is entitled to recover those costs.*

Ms Maisela, as Chairperson of the EPPF Board, responded,



*“At the current time the Fund is not in a position to accept such offer as it does not wish to be placed in a position of a potential conflict of interest”.*

Ms Maisela stated to the Committee that she deemed Eskom’s offer to have been inappropriate.

#### **2.7.21 Minister Brown’s role is called into question following the revelation of correspondence with Ben Ngubane**

Mr Molefe’s appointment under his fixed term contract as CEO did indeed take place three months before the adoption of the 2016 MOI. Although, as noted above, this is irrelevant to Minister Brown’s lack of remedial action in relation to Mr Molefe’s pension, nor is it sufficient in explaining her rationale for allowing Mr Molefe’s reappointment.

Evidence presented by Mr Luthuli is consistent with the findings of the Pretoria High Court and suggests close collaboration between Mr Minnaar and Dr Ngubane, who was the author of the letter to Minister Lynne Brown, “Retirement Arrangements – Brian Molefe”, dated 25 November 2015. Testifying before the Committee, Mr Minnaar defended his actions, stating that Mr Molefe had earned his pension by defeating load shedding. Mr Minnaar explained why he had drafted the letter, which bore Dr Ngubane’s signature:

*On 20 November as well the issue of early retirement was discussed with the people and governance committee members. I informed the chairperson of the people and governance committee that it would be important to get Ministerial input on this issue before we finalise the issues on retirement. I drafted the letter to the Minister, the one that’s being referred to, from our side to the chairperson of the people and governance committee for review for inputs and discussed. That letter was later signed by the chairperson of the board and it was given to the Minister and they accept it as well. I think the reason why we raised it is the first time that we actually worked with a 5-year term contract and contracts got major implications. And from our understanding it was permanent and I thought it would just being important that the Minister is aware of the retirement arrangements that we’re trying to calculate for Mr Molefe as he’s been moving over and over so he didn’t have time to actually build up a pension either.*

Ms Klein confirmed that the Board never received any responses from the Minister on this matter. Mr Molefe, however, in his testimony notes that at least two people in the Minister’s office were aware of the letter, including Ms Davids:

*The letter of the 25th of November 2015, which specified this new pension arrangement was sent by the Eskom company secretary Ms Suzanne Daniels to Ms Kim Davids the Minister’s PA, Orcilla Ruthnam and Z Mbalazi at the Department of Public Enterprises. The letter was emailed at 20 hours 33 on the 25th of November 2015 by Ms Daniels,” and the proof of that is on page 57 of the documents. “At 21:05 on the 25th of November 2015 Ms K Davids acknowledged receipt*

*of the letter and undertook to bring the letter to the Minister's attention," and this acknowledgement is on page 57 of these documents. "On the 26th of November 2015 Kay Mhlongo sent an email to Ms S Daniels confirming that the letter will be brought to the Minister's attention," and that is on page 59. "Also Orcilla Ruthnam noted the letter," and her email is on page 60 of these documents.*

Mr Qoma testified:

*Had the Sunday Times not broken the well-orchestrated corporate Ponzi scheme, Molefe would have received his generous pay-out for his unrivalled Gupta performance. This scheme has Minister Brown's fingerprints all over it. When this was broken by the Sunday Times, she pretended as though she didn't know about it when she received a letter with a subject line "Retirement Arrangements – Brian Molefe" on 25 November 2015. As usual, Minister Brown feigned ignorance when the Sunday Times published the story in this regard. She had more than enough time to stop this Ponzi scheme before it became a festering wound that it currently is. It has caused immeasurable damage to Eskom as a brand. We all need to pause to thank the Sunday Times for saving this country so much money; not Minister Brown who was clearly complicit in the entire fiasco.*

Minister Brown addressed the Committee on 22 November 2017, speaking to the issues surrounding Mr Molefe's appointment, pension and related matters. She states:

*It is regrettable that the inquiry did not take the opportunity to obtain more details from Ms Daniels, wearing both her hats as head of legal and company secretary, on the subject of Mr Molefe's pension benefits and departure from Eskom.*

*You might have compared her version to that given to the Portfolio Committee on 23 May 2017. It would have been particularly useful to obtain the legal opinion Eskom claims to have used to reinstate Mr Molefe. After requesting to see the opinion on numerous occasions, I can only conclude that it is phantom.*

In support of her claim of ignorance in relation to Eskom's actions regarding Mr Molefe's pension, Minister Brown, she stated:

*On 8 March 2017 I sent a letter to Eskom requesting a resolution recording Molefe's resignation and the formal appointment of Mr Koko as the Acting CEO. The Department was duly furnished with Mr Koko's appointment letter but no resolution on Molefe's resignation or retirement.*

Minister Brown maintained that she was deliberately misled by Eskom executives, including Ms Daniels:

*Then, my dealings with Eskom have taught me, there is stuff I thought I knew because someone had misinformed me – and some stuff that is difficult to know because it is being actively concealed.*

*Over the past eight or nine months – as more allegations have been leaked into the public domain – it has become increasingly apparent that I could no longer rely on information that Eskom was supplying me.*

*It began with the Brian Molefe pension matter. Until then, the questions that I asked Eskom had received plausible answers. But when I intervened to ask the Board to come to a more appropriate arrangement it opened a can of worms.*

## **2.7.22 Incidences of undue influence**

### **2.7.22.1 Ben Ngubane's relationship with Brian Molefe**

Dr Ben Ngubane's relationship with Mr Molefe appeared to afford him special treatment. Mr Qoma presented an interpretation of Brian Molefe's pension pay-out in which he saw it as compensation for value generated for the Gupta family, rather than for Eskom and for South Africa. He also testified that his interaction with Dr Ngubane had led him to question whether his relationship with Mr Molefe was proper:

*...On the evening of his dismissal (on 2 June 2017), Dr Ngubane asked to be accompanied to Molefe's house to provide him with moral support. About thirty minutes were spent with him, with Dr Ngubane leaving a few minutes earlier to, as he said, head to his meeting with the President. Certainly in my career, I hadn't seen a situation when an employer fires an employee and the follow him to his home to console same. There a general lack of duty of care. This also manifested when Dr Ngubane pushed for the employment of Carl Niehaus to assist me with Board messages, on 19 May 2017. With increasing pressure in the ensuing days, I pushed back by raising the risks associated with the decision given Niehaus' infamy. I saw a reputational risk and wasteful expenditure in the decision.*

## **2.7.23 Observations**

### **2.7.23.1 Eligibility of Brian Molefe for a pension pay-out from the EPPF**

- i. While Brian Molefe may have initially moved to Eskom on the assumption that he would be a permanent employee, the fact that he was appointed on a fixed term contract was fully known by the Eskom Board and the Minister.

- ii. Mr Molefe was never eligible for membership of the EPPF, and the Eskom Board and the Minister knew this. It is not clear why the Board and the Minister went along with this arrangement.

**2.7.23.2 Ben Ngubane and Anton Minnaar played key roles in facilitating Molefe's pension payment**

- iii. Mr Molefe's pension would not have been possible without the actions of Anton Minnaar and Ben Ngubane, who had full knowledge of the conditions of his employment.

**2.7.23.3 High Court rules Eskom Board's decision on Brian Molefe's pension was not in good faith**

- iv. The Pretoria High Court's findings that Eskom did not act "in good faith", but rather, "deliberately" implies its actions were not a mistake.

**2.7.23.4 Minister acted irrationally in ignoring the damning allegations in the Public Protector's report**

- v. As the shareholder representative of the government, Minister Brown should have intervened in the matter of Mr Molefe's pension once she became aware of the said matter.
- vi. It is unclear what Minister Brown's rationale was for confirming the reappointment of Mr Molefe in 2017, given that she relied on the prescripts of the then defunct 2014 MOI to defend her previous lack of intervention.

**2.7.23.5 Eskom's Board appears to have failed to protect the Company's interests in favour of Molefe's**

- i. No evidence was presented to the Committee that indicated that the Board was proactive in its oversight concerning Mr Molefe's pension, despite the terms of his contract being new and unusual in the context of Eskom's operations. In line with the Pretoria High Court's judgement in relation to the governance failure by the Minister and Chair regarding the reappointment of a severely compromised individual as CEO, it appears that this irrationality extends to the Board as a whole. Eskom's Board acted against the interests of the company, whether known by Minister Brown, and/or in blatant disregard of their accountability to the Minister.

**2.7.23.6 Given that R30 million is incommensurate with a 16-month employment term, it begs the question of what value was exchanged for this sum.**

- ii. Mr Molefe's pension, Dr Ngubane's role in securing it, and the implication of both parties in the *State of Capture* report, present a set of facts that suggest that, while Mr Molefe created questionable value for Eskom, he appears to have been instrumental in creating excessive value



for companies such as Tegeta Exploration and Resources Pty Ltd (“Tegeta”) and Trillian Capital Partners (Pty) Ltd (2015/111759/07) (“Trillian Capital”).

## **2.8 Eskom’s Governance**

### **2.8.1 Evidence of Breaches in Corporate Governance**

The performance and governance of Eskom have been in decline for some time with notable shifts occurring periodically. Responses to questions asked in parliament regarding corporate governance matters and corruption at Eskom (notably, former Minister Lynne Brown's answers on Trillian), and Eskom official statements have misled parliament and the South African public as to maladministration and performance in the SOC. However, since the publication of the Public Protector’s State of Capture Report, several other internal and external reports (Budlender Report, Dentons Report, NT PwC Report, Bowmans Report, G9 Report etc.), along with the #Guptaleaks emails have shed light on the degree of divergence in the form and substance of governance from those benchmarks set out in applicable laws, regulations, standards and codes.

### **2.8.2 Mr Malusi Gigaba is appointed Minister of Public Enterprises**

In November 2010, former Minister Malusi Gigaba (“Minister Gigaba”) was appointed as Minister of Public Enterprises. He declined to approve the Eskom Board’s procurement decision to award Westinghouse a tender to replace Koeberg nuclear power station’s six steam generators. When the procurement process was undertaken again in 2012, the bulk of the contract was, following proper procurement decisions, determined by the Eskom Executive Procurement Sub-Committee (“EXCOPS”) to be awarded to Westinghouse.

Minister Gigaba overhauled the Board in June of 2011, with only two members remaining from the previous board, Bernie Fanaroff, and Boni Mehlomakulu. Mr Zola Tsotsi (“Mr Tsotsi”) was appointed Eskom chairperson together with Queendy Gungubele, Neo Lesela, Bejabulile Luthuli, Chwayita Mabude, Yasmin Masithela, Collin Matjila, Mafika Mkwana (concurrently Chairperson of Transnet), Phenyane Sedibe and Lily Zondo as non-executive Board members. The new Board oversaw several incidences of procurement, including overriding the EXCOPS decision on Westinghouse noted above.

### **2.8.3 Minister Lynne Brown appointed Minister of Public Enterprises in May 2014**

Former Minister Lynne Brown (“Minister Brown”) appointed eight new Board members in December 2014, six of whom were revealed in the Public Protector’s *State of Capture* report to have connections to the Gupta family. It was alleged in the course of the Inquiry that Gupta family associate, Mr Salim Essa, became a conduit for the exercise of external influence over Board appointments. It was allegedly that Mr Essa played an intermediary role between the Guptas and Minister Brown. Mr Tsotsi resigned on 31 March 2015, allegedly following a draft Board announcement of this fact being sent from Mr

Nazeem Howa (“Mr Howa”). Dr Baldwin “Ben” Ngubane (“Dr Ngubane”) who had previously served as a Board member at the SABC and Land Bank was then appointed as Chair of Eskom.

It was the newly appointed Board (appointed by Minister Brown in 2014) that oversaw Eskom’s interactions with and procurement from Tegeta and Trillian. The Board oversaw some questionable procurement decisions, including the resolution taken on 9 December 2015 regarding an unprecedented prepayment to Tegeta ahead of its acquisition of OCH, documented in the *State of Capture* report.

It is a matter of paramount importance that the Shareholder, duly represented by Minister Brown, has access to accurate information provided by the Board on both routine and critical issues. However, Minister Brown has claimed that Eskom executive and non-executive directors misled her on the matter of Brian Molefe's ("Mr Molefe") pension, as well as payments to Trillian.

Minister Brown introduced new Board members in June 2017, including Pulane Molokwane, Simphiwe Dingaan, Banothile Makhubela, and Sathiaselan Gounden. These changes followed the removal of Chwayita Mabude following revelations of alleged links to the Gupta family, as well as other resignations. On 11 March 2017, Cabinet appointed an Interim Board that was chaired by Mr Khoza (Interim Chair). The interim Board compromised the following non-executive directors: Dr Pat Naidoo, Giovanni Leonardi, Dr Pulane Molokwane, Simphiwe Dingaan, Dr Banothile Makhubela and Sathiaselan Gounden, and two new board members, Professor Malegapuru Makgoba and Professor Tshepo Mongalo.

## **2.8.4 The form, function and purpose of offices and Board Committees**

### *2.8.4.1.1 The Board Tender Committee*

From 2010, the Board Tender Committee (BTC) approved various critical decisions, these included those that were necessary to carry out the Koeberg procurement, the TNA breakfast deal, the Tegeta transactions, and Trillian and McKinsey transactions. Board Members and Eskom executives were invited to an unscheduled late-night BTC meeting of 11 April 2016.

### *2.8.4.1.2 The Audit and Risk Committee*

Tasked to manage Eskom's significant exposure to various risks, the Audit and Risk Committee failed to sufficiently flag or manage the financial and governance risks that led to Eskom's credit rating downgrades in 2017 and 2018. Furthermore, in July 2017, Eskom received its first qualified audit.

### *2.8.4.1.3 Executive Committee on Procurement*

The Executive Committee on Procurement was gradually displaced in authority by the BTC. Executive decisions were overturned, new contenders for procurement contracts introduced and deviations from mandated procedures and processes were introduced.

### *2.8.4.1.4 The office of the Group Executive: Technology and Commercial*

According to Eskom's Procurement Policy, Clause 3.5 - 3.6, the Board delegated significant centralised power to the group executive: Technology and Commercial, with authority for all approvals related to procurement and supply chain management ("SCM") activities. The Risk/Governance Department also falls under the same executive, tasked to implement checks and balances on various aspects of the procurement and supply chain processes to manage compliance.

#### *2.8.4.1.5 Internal assurance*

Eskom's internal assurance function was used to cover up possible irregularities. For example, in September 2016, Eskom's assurance and forensics department found that Eskom followed the correct procurement processes for the prepayment to Tegeta and that all policies and procedures were followed.

#### *2.8.4.1.6 Eskom gradually closes channels of accountability*

Whereas Eskom's public communications had previously been used to convey matters of public interest and importance aligned to national policy, this function was used to announce matters that should have first gone through the Minister's office (e.g. Mr Molefe's pension), and to misrepresent facts concerning significant financial transactions, including those in respect of Tegeta and Trillian. Minister Brown claims to have been misled by executives and Board members on both of the above matters.

### **2.8.5 Board and Executive Management interference in large procurement processes**

#### *2.8.5.1.1 Ministerial oversight*

According to Eskom's MOI, the chairperson of Eskom's Board is appointed by and accountable to the Shareholder, duly represented by the Minister. During her tenure, Minister Brown appointed three chairs. She also oversaw the appointment of six different CEOs. Eskom's financial position deteriorated from an already weak starting point, and it received its first qualified audit.

#### *2.8.5.1.2 Board oversight*

Board members failed to prevent unusual or irregular expenditure, and may have misrepresented information on relevant transactions to Minister Brown, Parliament and the South African public. Particular failures concerning managing investigations of wrongdoing and instituting credible and legitimate disciplinary processes are detailed below.

### **2.8.6 Patterns of stunted investigations related to the State of Capture Report and other reports**

In 2015, the Dentons probe, which investigated possible governance failures and other issues at Eskom, was prematurely terminated seven weeks after it began (it was initially envisaged as at least a three month or 12-week process). The Board then instructed Dentons to remove all the names of implicated individuals and anything that Dentons could not (or had not yet had enough time to) corroborate in finalising the report. The Board also ordered that all copies of the interim report presented to the board at the end of June be destroyed. The report was then shared with Minister Brown.

### 2.8.7 **Internal disciplinary processes were delayed and may have been manipulated to improper ends**

Mr Matshela Koko (Mr Koko) was promoted to Acting CEO, following Mr Molefe's dismissal in 2017. Mr Koko was suspended in July 2017, but returned on 15 December 2017, having been vindicated in an Eskom disciplinary process. On 29 September 2017 the Chief Finance Officer (CFO) Mr Anoj Singh ("Mr Singh") was suspended. His suspension was followed on 2 October 2017 by that of Mr Prish Govender ("Mr Govender"), Mr Edwin Mabelane ("Mr Mabelane") and Mr Charles Kalima ("Mr Kalima"). These suspensions differ in procedural rapidity and outcome with those that saw the removal of Mr Matona, Ms Molefe, and Mr Marokane in March 2015. It is critical to note that the Bowmans report recommended the suspension of key individuals, including Mr Singh and his colleagues suspended on 29 September and 2 October, respectively, on 2 August 2017.

The investigations undertaken by G9 did not proceed unhindered as the recommendation to suspend the implicated executives was not implemented. The G9 report also details the evasive and either negligently or deliberately falsified accounts of facts that they were forced to contend with from Eskom executives and senior managers during their investigation.

### 2.8.8 **Media reports allege improper relationships between Eskom officials and external parties**

There have been several allegations of improper relationships between the Gupta family, its associates, Eskom officials and Cabinet ministers. It was alleged that the Guptas organised and funded the travel to Dubai or India for several individuals, including Mr Koko and Mr Singh. When confronted with evidence from the #Guptaleaks, both Mr Koko and Mr Singh denied that their trips were paid for or organised by the Guptas, while Minister Brown denied any knowledge of her personal assistant's trip to Dubai which was allegedly paid by the Guptas.

### 2.8.9 **Collapse of systems of oversight and accountability**

The matters of procurement that preceded allegations of state capture certainly impacted on Eskom's reputation. However, these allegations differ in scale and reach from those that began to emerge with the publication of the *State of Capture* report and #Guptaleaks, as well as other reports, such as the Dentons Report, Bowmans Report (Trillian), Budlender Report (Trillian), PWC Report (Tegeta/coal) and G9 Report (Trillian). The damage to Eskom's integrity was made evident in its appointment of Mr Khulani Qoma ("Mr Qoma"). He explained the motivation for his appointment to the Committee:

*Consequent to Ms Thuli Madonsela's [...] State of Capture report, [the] Eskom Board, through Mrs Venete Klein, approached me to come in as reputation adviser and a spokesperson for the Board of Directors of Eskom. I understood my role to be highly strategic and proactive for the optimal fulfilment of the stated objectives. I would therefore scan and interpret the material environment to derive early warnings and concrete stakeholder/reputational plans.*



However, Mr Qoma points to the actions of Minister Brown that prevented him from doing the job he was appointed to do. He referred, specifically, to the television interview in which Mr Koko denied having signed any prepayment to Optimum Mine:

*Notwithstanding the appearance on Carte Blanche, where he was caught out publicly lying, and other serious allegations of corruption, Minister Brown appointed Koko as acting GCE. Expectedly, media and commentators protested this reckless appointment. It was an irrational decision with a scarce demonstration of the requisite duty of care. The Minister was somewhat oblivious of the septic boil caused by the revelations of the State of Capture. Her appointment of Koko served to fast-track Eskom's reputational downward spiral.*

#### **2.8.10 Eskom Board's promotion of compliance with applicable laws and adopted, non-binding rules, standards and codes (such as King IV)**

Representatives of the Eskom Board appearing before the Committee all failed to articulate their individual and collective accountability for the poor performance and weak governance at Eskom. These representatives included: Ms Venete Klein ("Ms Klein"), Ms Devapushpam (Viroshini) Naidoo ("Ms Naidoo"), Mr Zethembe Khoza ("Mr Khoza") who was the Eskom Interim Board Chairperson, Dr Pat Naidoo ("Dr Naidoo") and Mr Sean Maritz ("Mr Maritz"), who was Eskom Acting CEO between 2017 – 2018.

#### **2.8.11 Board appointments**

Board appointments made from 2010 onwards, introduced individuals into the Board that failed to master either the competences or the ethics required to prevent the governance and procurement failures that have characterised Eskom's administration between 2011 and 2017, and which led to the company receiving its first qualified audit in 2017.

#### **2.8.12 Checks and balances of power on Eskom's Board**

The Board Tender Committee (BTC) appears to have acted at times with a high degree of independence, pushing through unusual transactions such as the Tegeta guarantee and pre-purchase. Furthermore, the Board has been unable to respond to questions about the involvement of the GCEO in procurement decisions. In his capacity as GCEO, Brian Molefe intervened in the Optimum Coal Mine contract renegotiation. In his capacity as GCEO, Mr Matjila signed procurement arrangements that were outside of his delegation.

#### **2.8.13 Clarity of roles within Eskom's executive structures**

It appears to be an illogical arrangement that the Group Executive: Technology and Commercial is simultaneously responsible for signing off on major procurement decisions, and, as pointed out in the G9 Report, oversees the audit and risk functions of the business, including the management of whistle-

blowers' reports. In effect, this combines procurement and oversight within the same procurement line function.

Other functions necessary to ensure regulatory compliance appear to have been functionally undermined. The G9 Report states that Eskom's group compliance manager, Mr Aziz Laher ("Mr Laher"), warned his colleagues that the contracts entered into with McKinsey, under which Trillian was engaged and paid, could not go ahead without National Treasury's approval. This took place in December 2015. Mr Neo Tsholanku ("Mr Tsholanku") issued an internal legal opinion, which did not suit the aims of Eskom managers, Mr Edwin Mabelane ("Mr Mabelane") and Mr Prish Govender ("Mr Govender"), who were leading negotiations with McKinsey. Being unconvinced of Mr Tsholanku's opinion, they made a call to consult Eskom's external legal counsel. The external counsel's opinion was consistent with Mr Tsholanku's view. It was not the first time that Mr Tsholanku's legal advice within Eskom was undermined. Ms Molefe testified that Mr Matjila similarly disregarded Mr Tsholanku's opinion regarding the contract with Regiments:

*I sent him an email and [...] I copied the head of legal, then Mr Neo Tsholanku, and I said I suggest that Mr Neo Tsholanku gives us his opinion on how we move on this matter, I then forwarded the agreement to them. He then called me in the evening and reprimanded me for putting such messages on email and asked for a meeting. We then had a meeting the following day, and he felt that he was not being supported. He's got a mandate from the Shareholder and the Board that certain things that need to happen urgently and we don't have time for wasting. We don't have time to waste with our long-winded procurement processes.*

The long-winded processes in question are those mandated by the PFMA, the Eskom MOI and SCM procedures, and Treasury regulations and practice notes. In other words, these processes were not optional.

#### **2.8.14 Eskom's risk management**

Mr Zethembe Khoza ("Mr Khoza"), the Interim Chairperson of the Eskom Board, prefaces Eskom's IR 2017 with the following,

*The execution of our strategy is dependent on three key enablers, namely governance that drives accountability, successful stakeholder management and effective risk mitigation strategies, particularly to respond to lower than budgeted tariffs.*

The research, statements, testimony and evidence presented to the Committee stand in stark contrast with this aspirational vision, with Mr Khoza himself implicated in questionable and possibly illegal actions detailed below. The organisation's strategic objectives are specified on page 15 of the IR 2017:

1. *Provide reliable and predictable electricity in line with regulatory methodology, while striving for cost containment and improved operational efficiencies* □
2. *Ensure and maintain a financially viable and sustainable company* □
3. *Reduce Eskom's impact on the environment through identifying, implementing or supporting options for low carbon-emitting generation and transportation opportunities*
4. *Consolidate our socio-economic contribution to ensure alignment to national transformation imperatives to unlock growth, drive industrialisation, create employment and support skills development* □

It is unclear how widespread unauthorised, unusual or irregular spending, together with inflated prices for coal and other services (such as the TNA breakfast sponsorships) support the realisation of these objectives - and the Board is required to account for these actions - as well as the adverse consequences for Eskom and South Africa. These consequences include the credit rating downgrades of Eskom. No representative of the Board has accounted for these consequences before the Committee.

The G9 report, presented to the Committee by Mr Rajie Murugan ("Mr Murugan") includes information that indicates that the report was undermined by several executives, who were evasive and failed to support the investigation. Mr Murugan referred specifically to the actions of Mr Khoza (p28-29):

*Although, as far as we understand, our mandate and lines of reporting are to Executive Management, we observed that the Interim Board had become operationally involved; and after one verbal feedback to the Audit and Risk Committee, this investigation was left floundering and without directives, communication or interaction. We find this odd; but we are obliged to comply and await further instructions. As we confirm later in this report, we have been informed to "suspend" or "terminate" [our] investigations.*

Mr Qoma also indicated that where actions were eventually taken against specific individuals, these actions were overturned. Mr Qoma pointed to the actions of the Board and the Minister, in this regard:

*On 16 August 2017, Mr Khoza allegedly instructed the rescission of the suspension of Mabelane and Kalima. These individuals were instrumental in the McKinsey/Trillian transaction. This well-published anomaly didn't concern the Minister either, as Khoza proceeded in his role without any known probe in this regard.*

At the time that G9 was undertaking their investigation, other reports, namely the Dentons Report and the Bowmans Report had already met unfruitful ends. The Bowmans Report, which investigated Eskom's contracts with McKinsey under which the SOC also engaged with Trillian was made available to the Committee. It makes its damning findings explicit (see sections 2.8.6 and 2.8.7). It is unclear how the conclusions could be ignored by any engaged, responsible, ethical or accountable Board.

The pattern of stymied investigations followed by a lack of consequences for implicated persons appeared to have been ignored or actively supported by members of Eskom's Board. This cannot reasonably be seen as effectively managing the entity's exposure to reputational, financial, or legal risk.

#### 2.8.15 Maintaining fair and transparent remuneration practices

The Minister maintained that she was not aware of the specifics of Brian Molefe's financial terms of employment, and further that she was not obligated to be made aware. Even if this was technically true, it is not exemplary of King IV's expectation for fair and transparent practices regarding remuneration. The fact that the amount for the pension was entirely out of line with historical precedents, given the brevity of Mr Molefe's service to Eskom demanded redress, which was not forthcoming from Minister Brown. Despite eventually being dismissed; no one was held accountable for Mr Molefe's payment. Despite Minister Brown's argument that Eskom's 2014 MOI governed her lack of intervention in Mr Molefe's appointment in 2016 and reappointment in 2017, the Gauteng High Court found otherwise. The Gauteng High Court Judgement: Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018), Court found:

*Paragraph 56: There is a strong inference to be drawn from the above factors that the early retirement agreement was deliberate scheme devised by Eskom with the involvement of Mr Molefe to afford him pension benefits to which he was not entitled. The scheme permitted Mr Molefe to proceed to early retirement at age 50 by buying him extra pensionable service. The scheme was started soon after Mr Molefe's permanent employment and was deployed after he had publicly stated that he was voluntarily leaving Eskom's employ.*

*Paragraph 65: Mr Molefe voluntarily resigned and did not retire.*

*Paragraph 73: Minister Brown, of the view that there was no legal basis for Mr Molefe's pension, was under no obligation to fulfil its conditions. Subsequently, she was also under no obligation to "exchange" his reinstatement for repayment of monies unlawfully received.*

*Paragraph 82: We also find that Mr Molefe was never entitled to receive any pension benefits from Eskom Pension Fund and any payments made in lieu of such benefits were patently unlawful.*

#### 2.8.16 Board's performance in line with applicable laws, regulations, standards and codes

The practices whereby the Board has defended its actions have been questionable, and it has not been clarified during the process of the Inquiry, what the processes have been whereby the performance of the Board has come to be assessed internally.



The G9 investigation found evidence of poor record-keeping whereby documentation that is required by law to legitimise major procurement was either misplaced, never filed, never signed, or never existed. The Bowmans Report (para 3.3.9), referring to the Trillian payments, found, “Limited ‘supporting’ documentation is provided for these two Trillian invoices”. Whereas contracting processes that follow proper procedures also require extensive evidence of any potential supplier to meet the legal and professional requirements to meet Eskom’s procurement needs, such documentation requirements are undermined by the parallel negotiation processes that appear to have taken place for the Regiments, TNA, Trillian, McKinsey, and Tegeta contracts. Minister Brown also stated,

*I believe that Eskom deliberately lied to me about the Trillian matter. It was not a matter that came to me at any stage for approval.*

#### 2.8.17 Eskom's public reporting

There has been evidence of falsification of information, whether deliberate or by negligence or having been misled, on the part of Minister Brown, Eskom executives (notably Mr Koko, Mr Singh, Mr Molefe, and Dr Ngubane). Minister Brown has accused Eskom executives of lying to her. Both Minister Gigaba and Minister Brown have laid responsibility for unusual or irregular procurement at the feet of the respective Boards they appointed, suggesting a breakdown in communication, transparency and accountability. Mr Qoma shed light on the relationship between Eskom and the media, citing concerning attitudes that he attributed to Mr Molefe, Mr Koko and Minister Brown:

*Molefe had left a sewer of bad media relations in his wake. He treated as enemies those journalists or commentators who aggressively disagreed with him/Eskom. For instance, Chris Yelland of EE Publishers had been blacklisted and so he was blocked to Eskom's Twitter account and media releases and related collateral. Corporate Affairs had keenly gone along with this ludicrous action.*

*In response to my position on the matter, Koko said blocking Yelland had lowered his stress levels by a substantial percentage, and he didn't desire to entertain the matter. I then engaged Chairman Dr Ben Ngubane, who in turn authorised the lifting of the blacklisting. When Molefe returned following the R30m fiasco, Corporate Affairs sought to restore the blacklisting by raising it with Molefe. It was said that since his unblocking, Eskom's Social Media outlook had taken a huge knock. I chimed to tell Molefe that Dr Ngubane had approved the unblocking and that it was ill-advised to blacklist journalists in a democracy. He let it pass.*

*Mr Sikonathi Mantshantsha's (Financial Mail) pursuit of the Dentons report revealed Eskom's aversion to playing open cards with South Africans, as in the face of damaging media criticism, the Board stubbornly refused to release the report. While they eventually agreed to release it, a last minute decision was made to release a heavily redacted report. This decision further eroded*

*trust between the Board and the media. I don't remember Minister Brown making a public pronouncement, as part of her trademark, demanding the Board to release the report. The Board's motive in this regard only became apparent post-facto. When convenient, Minister Brown makes operational announcements but revert to "It's an operational matter" when it doesn't suit her motives.*

*I was told that Minister Brown apparently complained about my lack of understanding of government communication. This was a petty comment by a clueless Minister who dabbles in spaces that barely require her. I also figured that her spokesperson, Mr Colin Cruywagen, had probably complained to her about my disinclination to take his generally irrational instructions about how to handle specific media challenges. My experience working with him hasn't left an impression of a person who knows much about reputation management. I therefore tended to frustrate him with questions which were out of reach for him.*

Minister Brown was not in agreement, suggesting that representatives of the media were trying undermine SOCs:

*Like a rare stellar event, disparate forces including members of the ruling party, opposition parties, business and media are in alignment to try and influence these events. State-Owned Companies are their chosen battleground.*

Minister Brown has also, by her own account, found out about major alleged irregularities and transgressions (including the Tegeta transactions, the Trillian payments, and Mr Molefe's pension) from the media.

In an effort to hold Eskom executives and the Board members accountable for the entity's poor performance and implication in state capture allegations, as part of the Inquiry process, the Committee requested several documents from the Eskom board. However, several of the requested documents were only brought forth following the appointment of several new Board members in December 2017 in a submission by the most recent Eskom Board, prepared by Bowman Gilfillan on 14 March 2018. It is unclear why the previous Board was unable to produce the documents, as requested.

Given all the evidence now before the Committee, it is unclear how Eskom's IR 2017 can make the claim that the entity aligns its practices to the King Code. Furthermore, there is an absence in the integrated Annual Report of a clear and direct response to the various aspects of King III which, taken together with a more generalised lack of transparency, has compromised the ability of the relevant Ministers, the Committee, Parliament and the South African public to adequately and comprehensively assess the entity's performance.

#### **2.8.18 Eskom executives and the Board actions to hold service providers accountable**

Eskom executives had a range of high-value contracts with Gupta-connected entities -TNA, Tegeta and Trillian - all implicated in potentially illegal transactions. Both the Bowmans Report and the G9 Report call on the Eskom Board to initiate criminal investigations into possibly fraudulent activity within Trillian. Not only did Eskom's due diligence mechanisms fail to exclude procurement interactions with these entities, the Board also failed to undertake remedial and disciplinary actions against officials in this regard. It is clear that interactions with each of these entities were not in favour of Eskom, government, or the South African people.

Regarding TNA, Ms Erica Johnson (“Ms Johnson”) stated that she and other executives expressed concern over Eskom’s contract with TNA. However, Mr Collin Matjila (“Mr Matjila”), pushed for this contract. She testified to the Committee:

*I was disturbed by it [the terms of the contract with TNA]. I think what we really wanted to do was to have a chance to, I mean, to try and work with a new CEO. And I think earlier people said, you know, if you have a new boss, if you have to see, do you fit around the table still? Are you part of the team? And that is what we were working with Mr Matjila, to try and meet his needs to see where he wanted to go, as you would give people the benefit of the doubt. But I think clearly once the three-year contract, the exit clause, the fact that the finance director refused to sign it and that he then proceeded to sign it by himself, I think shows you that as a team we were saying that this was not how we wanted to run contracts. So, we were making a statement.*

Ms Tsholofelo Molefe (“Ms Molefe”), who was the finance director to whom Ms Johnson refers above made similar observations regarding Mr Matjila’s insistence on contracting with Regiments, which was connected to Mr Salim Essa (“Mr Essa”). Minister Gigaba did not adequately promote or enforce compliance with applicable laws and adopted, non-binding rules, standards and codes (such as King IV)

Minister Gigaba’s testimony before the Committee, in defence of his Board appointments, relied on recounting the “normal” procedure he followed. However, what he failed to address was the outcome of that procedure for which he, in his capacity as Minister, was responsible:

*Relating to governance, I would like to outline for the Committee the general process followed by the DPE, during my tenure, in appointing the SOC Boards, Board Subcommittees and Executives. I would also like to deal with the extent to which the DPE Ministers are involved in Procurement. What I am about to set out is the normal practice. There is usually some deviation relating to the processes in various SOC's depending on their MOIs.*

*In respect of Board appointments, the process commences in the run-up to the AGM of the relevant SOC. Prior to the AGM, the Minister is presented with a motion relating to certain Board appointments, which will become part of the resolutions taken at the AGM [...] When the*



*Department conducts skills audits, and discovers that there are skills gaps on the Boards, the Department also recommends candidates to fill those positions. The names of candidates are sourced widely. When the Department recommends candidates to the Minister, it does so by providing a rationale for the proposed appointment, and the Minister is also provided with the resumes of the candidates. Once the Minister has applied his mind to these candidates, and given his approval, the preferred candidate's profile then serves before the relevant Cabinet Committee, and only then does it serve before Cabinet. Cabinet approves all Board appointments, including executive directors who are ex-officio board members.*

In terms of motivating his overhaul of the Eskom Board, Minister Gigaba stated the following:

*After having had sight of the presentation, I was of the view that the board needed rotation, in order to comply with good corporate governance, with respect to two issues. Firstly, was the rotation of board members who had served for a lengthy period. Second, was revising the mandate of the Executive Chairman to be a Non-Executive Director and Chairman, to avoid overlap between the role of Board Chairperson and CEO of the entity.*

Minister Gigaba did not consider how his choice of Board appointees fared in their roles, notably Ms Mabude was removed by Minister Brown in 2017 and Mr Matjila both of whom were linked to the Gupta family businesses in the #Guptaleaks emails. Minister Gigaba also did not address how the integrity of Board members was assessed at appointment and during their tenure. The Minister also spoke to the constitution of Board subcommittees, given that the role of the BTC in the Board he appointed has been questioned, especially in relation to the Koeberg steam generators' procurement and TNA.

*I then also deem it necessary to set out how sub-Committees are constituted, in order to dispel any notion of interface by me in the establishment of allegedly problematic sub-Committees at Eskom, Denel and Transnet. All sub-Committees are the business of, and are recommended by the Board. This is consistent with the Companies Act. The only Committee that comes to the DPE Minister's attention is the audit and risk sub-Committee, because the SOC's memorandums of incorporation (MOIs) provide that, at the AGMs, the Boards must present for my approval the members and the Chair of the audit and risk subcommittee. It is standard practice and common courtesy for the Chair of the relevant SOC to send a letter to the DPE, after the AGMs, setting out how the relevant sub-Committees are constituted but those letters hardly ever reach the Minister's attention – primarily because the Minister has no practical interest in who is on what Committee. This is because, if the Minister wishes to interact with an SOC, that Minister will either meet the Chair or call a special general meeting – the Minister does not engage with sub-Committees because sub-Committees are the domain of the Board.*



While it is unreasonable to extend responsibility for the procurement approvals of the BTC to Minister Gigaba given that these responsibilities are duly delegated to the Board, the Minister was unable to account for these actions or to explain how his actions at the time were constitutive of good governance, rather than merely legal or not illegal. Minister Gigaba's testimony also stands in contradiction to Minister Brown's, who indicated that the Minister does have a practical interest in the constitution of board sub-Committees.

In terms of procurement and in relation to his actions rejecting the EXCOPS decision for the Koeberg steam generators tender, Minister Gigaba stated, *"There is no scope for interference. When the Minister considers the approval, he simply considers the business case before him, and either approves or rejects the request on that basis alone."* Although Mr Koko defended the procurement process that ensued post Minister Gigaba's intervention, he did state, however, *"This was a contract that was adjudicated at Koeberg and was awarded and it went for a PFMA application and Minister Gigaba declined it."* In other words, contrary to Mr Gigaba's testimony, Mr Koko claimed that his intervention was critical in determining the outcome of the procurement process.

Minister Gigaba definitively denied facilitating any relationship between the Gupta family and SOCs. Regarding TNA, Minister Gigaba stated that he issued written instructions to route requests for sponsorships through the Department of Public Enterprises ("DPE") to prevent such a costly arrangement. However, he places sole responsibility for these arrangements with the Board.

Although Minister Gigaba denied any connection to the Gupta family, Ms Molefe testified that it was through an individual in Minister Gigaba's office that she came to interact with Mr Essa.

#### **2.8.19 Minister Brown's role in enforcing compliance with applicable laws and adopted, non-binding rules, standards and codes (King VI)**

Minister Brown's tenure as Minister of Public Enterprises coincided with major incidences of unauthorised, unusual or irregular expenditure. Minister Brown also did not intervene in the reappointment of Mr Molefe to the position of CEO following his resignation, illegal pension pay-out, and the serious allegations of wrongdoing that were alleged in the *State of Capture Report*.

Minister Brown oversaw the actions of Eskom's Board, including the following: the unlawful Molefe pension pay-out, the Tegeta deal covered in the *State of Capture* report, and the Trillian payments. She pleaded ignorance at various points in her dealings with Parliament and with the media about Eskom's inner workings, despite her Ministerial responsibility to assess its performance. Mr Qoma, appointed to remedy the damage done to Eskom's reputation in his statement to the Committee stated:

*Minister Brown's 'I was lied to', 'I didn't know' strategy is a public admission of incompetence. A worthy leader creates capacity for due diligence so as to increase prudent leadership. But she routinely tells the citizens that she was lied to or something to that lousy effect.*

The groundwork was laid for Mr Molefe's illegal pension by Dr Ngubane and Mr Anton Minnaar. There is evidence that three people in Minister Brown's office received correspondence from Dr Ngubane confirming pension arrangements for Mr Molefe: the DPE registry officer, the department's chief director of governance and Minister Brown's former personal assistant, Ms Kim Davids. In her affidavit submitted to the North Gauteng High Court, and subsequent representations to parliament, Minister Brown denies any knowledge of this letter and its contents. In terms of her lack of involvement in Mr Molefe's terms of employment Minister Brown stated, "The executive employment contract concluded by Mr Molefe and Dr Ngubane in March 2016 was concluded in terms of the 2014 agreement. It didn't have to be shown to me." Minister Brown also stated:

*When Mr Molefe quit Eskom in November 2016 I was under the impression that he had resigned. I was not aware that he had applied for early retirement. This I only learned in April 2017, after reading in the media that Mr Molefe was receiving a R30m pay-out from Eskom, and asking Eskom's Board to make a more prudent deal.*

Given this sequence of events, it is not clear why it was deemed an acceptable outcome by Minister Brown that Mr Molefe should be appointed as CEO, subject to the reversal of this decision by an Inter-Ministerial Committee rather than Minister Brown's own judgement of the situation. It is pertinent to refer to the Gauteng High Court's judgement, which calls the governance practices and motives of the Eskom Executive and Board as well as the Ministry into question:

*Paragraph 80: The allegations are highly relevant to Mr Molefe's suitability to be reinstatement as CEO. They are a dead weight that he must carry until he is cleared. In the absence of new facts that arose in the interim to lift the dead weight that motivated the need for Mr Molefe to resign in the first place, the allegations in the Public Protector's report cannot just be ignored by the Minister or Eskom. The Minister and Eskom acted irrationally in ignoring the damning allegations in the Public Protector's report.*

Following Minister Brown's enforcement of the findings of the abovementioned Inter-Ministerial Committee, she then sent an instruction to the Board to appoint Mr Koko:

*On 8 March 2017, I sent a letter to Eskom requesting a resolution recording Molefe's resignation and the formal appointment of Mr Koko as the Acting CEO. The Department was duly furnished with Mr Koko's appointment letter but no resolution on Molefe's resignation or retirement.*

Minister Brown's appointment of Mr Koko, like her appointment of Mr Molefe, happened despite mounting *prima facie* evidence of his involvement in highly questionable procurement decisions.

Mr Qoma and Mr Zola Tsotsi (“Mr Tsotsi”) testified before the Committee that they believed Minister Brown had directly or indirectly (through an instruction delivered or reported by another DPE or Eskom employee) to be connected to the Gupta family.

Mr Qoma also testified that Dr Ngubane during his tenure as Chairman of the Board, attempted to suspend Mr Koko in response to a letter listing alleged infractions. He testified that this was stopped by the Guptas via Minister Brown.

Dr Ngubane was able to confirm that Minister Brown called him on that particular day, ahead of his decision to move against the suspension of Mr Koko, but asserted that the call had not been about Mr Koko but Eskom business.

Mr Tsotsi stated in his testimony that he had in fact been called into a meeting with a Gupta brother and Mr Salim Essa (“Mr Essa”) at Minister Brown’s residence:

*At some point, I can’t recall exactly when it was shortly after the Minister came on board, I think she, sorry... shortly after the new board came on board, it was in the beginning of December. And the Minister called me to her home and when I arrived there she was with two individuals, one Tony Gupta and the other was...*

The other person Mr Tsotsi allegedly met was Salim Essa. In his written statement, Mr Tsotsi also alleges that at the same time that Minister Brown was questioning his leadership, Mr “Tony” Gupta approached him:

*The very same afternoon, I was approached by Tony Gupta (Tony) who requested that we meet. At the meeting, Tony told me “Chairman, you are not helping us with anything. We are the ones who put you in the position you are in. We are the ones who can take you out!” My response was “Do what you have to do, and let me carry on with the job that the Cabinet appointed me to do!” So ended that meeting.*

## 2.8.20 Observations

### 2.8.20.1 Minister Gigaba’s overhaul of the Eskom Board and appointment of one made up of almost entirely new members

- i. It appears that Minister Gigaba’s overhaul of the Eskom Board introduced patterns of instability.
- ii. It is not apparent that the Board appointed by Minister Gigaba had been sufficiently vetted in terms of integrity, collective skills and experience to govern Eskom and execute their fiduciary responsibility.

- iii. The actions of the Board on Minister Gigaba's apparent instructions to reverse a procurement decision taken by the previous Board seem to blur the lines of its accountability for its decisions and oversight by the Minister as the Shareholder.

#### ***2.8.20.2 Minister Brown's responsibility and accountability***

- i. It is not apparent that the successive Boards appointed by Minister Brown had been sufficiently vetted in terms of integrity, collective skills and experience to govern Eskom and execute their fiduciary responsibility.
- ii. Minister Brown's oversight over the actions of the executive and non-executive directors was inadequate, leading to gross breaches in fiduciary duty and potentially illegal acts.

#### ***2.8.20.3 The Board's responsibility to uphold fiduciary duty and their oversight of Eskom, its executives and its financial and non-financial performance***

- iii. Eskom's Board oversaw the systematic erosion of rules governing the entity's procurement and allowing for massive unauthorised, improper or irregular expenditure.
- iv. Eskom's Board failed to support the investigation of improper procurement undertaken by various committees and officials.
- v. Eskom's Board has failed to hold executive directors to account, for example, on the reappointment of Mr Molefe in the midst of his pension controversy and his implication in the *State of Capture* Report.

#### ***2.8.20.4 The BTC appears to have been particularly conflicted and compromised***

- vi. Eskom's BTC, playing a particularly influential role in determining procurement decisions, has disregarded the conflicts of interest of its members, notably concerning transactions with Trillian and Tegeta.
- vii. Eskom's BTC functioned as a mechanism to undermine the expertise of the EXCOPS in taking good procurement decisions in the best interests of Eskom.

#### ***2.8.20.5 It is apparent that Eskom executives undermined governance procedures, rules and norms to facilitate a number of unusual or irregular financial transactions***

- viii. Eskom executives failed to uphold their fiduciary responsibility, participating in decision making processes that led to unauthorised, improper or irregular expenditure.

#### ***2.8.20.6 Eskom officials have undermined transparency and therefore lines of accountability within the SOC***

- ix. Incidences of inaccurate information on Eskom's performance being communicated by the Minister to parliament and in other forums, notably in official statements and in statements



made by executives to the media, evidence a deterioration of transparency required to maintain accountability.

***2.8.20.7 Independent investigations into unusual or irregular activities appear to have been undermined***

- x. Public reports together with reports leaked to the public demonstrate that Eskom's Board had sound knowledge and *prima facie* evidence of wrongdoing in the organisation, which were not acted upon as required by the MOI.

***2.8.20.8 Internal disciplinary processes may have been manipulated to improper ends***

- xi. Internal disciplinary procedures have shown a lack of consistency in form and outcome for different individuals.
- xii. The reappointment of Mr Molefe and appointment of Mr Koko as GCEO in the face of *prima facie* evidence of wrongdoing were never satisfactorily explained, nor do they appear to be reasonable or defensible.

***2.8.20.9 Improper relationships appear to have allowed for external influence over Eskom's operations and spending***

- xiii. Evidence of improper relationships, understood together with unauthorised, improper or irregular expenditure detailed in the *State of Capture Report* and elsewhere, show that these relationships are *prima facie* connected to and are likely to have influenced those decisions.

## **2.9 Conclusion**

The Inquiry has confirmed possible contraventions of the Eskom Conversion Act, the Public Finance Management Act, internal and external governance requirements (e.g. King IV), as well as other relevant legislation, regulations and internal processes. It is also patently clear that there was undue influence by private individuals and companies over the appointment of Eskom Board members as well as some procurement decisions.

### 3 Part C: Findings

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#### 3.1 Eskom served the interests of private firms and individuals

##### 3.1.1 Evidence paints a disturbing picture of capture and repurposing of Eskom

The Committee heard evidence which illustrated the extent to which public procurement processes at Eskom and the exercise of public power had been used to serve the interests of private businesses and individuals. The abuse of public resources to benefit these private interests stands in direct contradiction to Eskom's constitutional obligation to ensure that its procurement processes are equitable, transparent, fair, competitive and cost-effective. The Eskom Board failed dismally in its responsibility to ensure that Eskom complied with the applicable laws and SCM processes. In addition, various Eskom Board members were conflicted in their dealings with some of the private businesses and may have acted unlawfully together with senior management to benefit a network that sought to achieve the capture of Eskom.

Evidence was placed before the Committee that various Eskom directors and senior employees acted inconsistently with their responsibilities in terms of various legislation, including the PFMA. It appears that such persons abused their positions and may have exploited confidential information for personal gain or to benefit other persons improperly. As set out above, key Eskom personnel failed to act with fidelity, honesty, integrity and in the best interests of Eskom. Various responsible persons, including Eskom Board members, failed to investigate allegations of corruption, improper conduct, or failure to comply with the supply chain management system and failed to take appropriate steps in relation to such allegations. Evidence before the Committee also showed how persons entrusted with key public powers acted inconsistently with their responsibilities.

The corruption at Eskom has undoubtedly contributed to the substantial loss of public funds and in various instances resulted in severe job losses in some companies competing with the Gupta family-owned companies, hampered transformation and may have caused environmental damage.

##### 3.1.2 Leadership of Eskom Board and Executives

Judging whether individuals or entities have displayed ethical and effective leadership can be done with reference to the definition provided by King IV:

*Ethical leadership is exemplified by integrity, competence, responsibility, accountability, fairness and transparency. It involves the anticipation and prevention, or otherwise amelioration, of the negative consequences of the organisation's activities and outputs on the economy, society and the environment and the capitals that it uses and effects.*

Based on the evidence before the Committee, it is patently clear that individual and collective actions taken by the Board and executives at Eskom have allowed successive unusual or irregular procurement,

undermined investigations into wrongdoing, and failed to hold individuals accountable for potentially illegal actions. These actions amount to a failure to uphold their fiduciary responsibility.

### **3.2 Brian Molefe’s resignation, reinstatement and “early retirement”**

- 3.2.1 The Committee welcomes the January 2018 judgment by the High Court in Pretoria which rejected Brian Molefe’s assertion that he never resigned from Eskom but took “early retirement”. The Committee acknowledges the court’s judgement that reviewed and set aside the decision of the Board of Eskom to accept Molefe’s “early retirement” as well as the decision of former Public Enterprises Minister Lynne Brown to reappoint Molefe as GCEO.
- 3.2.2 The Committee welcomes the court order that Molefe must pay back the estimated R11-million he had already received as part of the total R30.1-million pension pay-out as it gives clarity to all the parties concerned with regard to the rules of the Eskom Pension and Provident Fund.

### **3.3 Access to information**

- 3.3.1 The Committee finds that despite the various mandatory reporting and disclosure obligations, Eskom’s operations have been shrouded in inordinate secrecy, which has undermined Eskom’s internal governance and controls, as well as the oversight function of the Ministry of Public Enterprises and Parliament.
- 3.3.2 The various Eskom Boards failed to ensure reasonable protection of Eskom’s records as required by section 50 of the PFMA, and failed to keep full and proper records of the financial affairs of Eskom as required by section 40 of the PFMA.
- 3.3.3 The existence, terms of reference, activities, reports and outcomes of various investigations into a wide range of impugned Eskom conduct have all too often remained hidden from oversight and scrutiny.
- 3.3.4 The Committee heard evidence of multiple instances that suggest that Eskom staff, the Eskom Board (executive and non-executive directors), actively obstructed various oversight and investigative processes, or used these processes to cover up malfeasance at Eskom.
- 3.3.5 Minister Brown, the Department of Public Enterprises, the Eskom Board, and Eskom officials submitted or relayed misleading and/or false information to Parliament.
- 3.3.6 Eskom’s spokespersons and executives provided false information in relation to contracts and payments to Gupta-linked companies, including Tegeta and Trillian.
- 3.3.7 Eskom officials provided incomplete and incorrect information during internal and independent investigation processes. This severely hampered Eskom’s governance mechanisms and controls, and covered up what appears to be unusual, unauthorised, irregular and unlawful procurement.
- 3.3.8 The documentation formalising the relationship between Eskom and the Ministry for Public Enterprises was inadequate. In some instances, the Ministry of Public Enterprises failed to

provide elucidatory documentation relating to its historic engagement with the Eskom Board and senior staff, as well as in the undertaking of key functions (e.g. appointment of Board members and executives).

- 3.3.9 Evidence suggests that unclear or unheeded lines of accountability within Eskom acted to inhibit access to information by the relevant oversight functionaries.
- 3.3.10 Minister Brown claimed, before Parliament, that Eskom officials lied to her regarding at least two critical matters, including the illegal pension payment to Mr Brian Molefe, and irregular, wasteful and otherwise unlawful payments to Gupta-linked Trillian.
- 3.3.11 It was common in Eskom for procurement related documents to contain misleading, inaccurate information, or documents not signed which form the basis for various irregular and unlawful actions by Eskom.
- 3.3.12 In an effort to hold Eskom executives and its Board members accountable for the entity's poor performance and its implication in corruption and private corporate capture allegations, the Committee made multiple requests for information from Eskom, but was not forthcoming. Some Eskom executives and board members deliberately attempted to frustrate the Committee's ability to access information to which it was lawfully entitled. In addition, when Eskom did share information, such information was often incomplete and illegible. Many of the requested documents were only furnished by Eskom on 14 March 2018.
- 3.3.13 The previous Board's failure to disclose such documents to parliament may constitute a criminal offence in terms of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004.

### **3.4 Inconsistent and contradictory evidence provided to the Committee**

The Committee finds the evidence that was presented by some witnesses who had occupied senior leadership positions at Eskom inconsistent and contradictory. The evidence of the following witnesses failed to illuminate the extent of corporate capture, absence of ethical leadership and management, flouting of governance rules, laws, codes and conventions that govern Eskom. The flouting of these laws and applicable policies; as well as irregular procurement rendered Eskom potentially financially unsustainable.

- Dr Baldwin (Ben) Ngubane, Former Eskom Board Chairperson 2015 – June 2017
- Mr Zola Tsotsi, Former Eskom Board (June 2011 to March 2015)
- Mr Zethembe Khoza, Eskom Interim Board Chairperson
- Ms Devapushpam Naidoo (Viroshini), Former Eskom Board member
- Dr Pat Naidoo, Eskom non-executive Board Member
- Mr Brian Molefe, Former CEO of Eskom
- Mr Anton Minnaar, Eskom HR Executive Manager



- Mr Sean Maritz, Former Eskom Acting CEO
- Mr Anoj Singh, Former Eskom CFO
- Mr Matshela Koko, Former Eskom Acting CEO, and Executive for Generation

### **3.5 Failure to maintain clear lines of accountability in the Eskom Board and management**

- 3.5.1 The Committee finds that from about 2011, Eskom's Board failed to maintain clear lines of responsibility and accountability. Board members were allowed to interfere in the business of management (especially through the seemingly unbounded mandate of the Board Tender Committee - BTC), and often usurped the roles of group executives. This undermined the tenets of good governance established through the Public Finance Management Act, 1999 and the Companies Act, 2008, and other relevant legislation and protocols. It resulted in official lines of communication being circumvented, and a deep informational inequality among Board members. Key decision-making authorities, such as the Eskom Executive Procurement Sub-Committee ("EXCOPS") and Eskom's internal legal support services were deliberately sidelined in order to introduce and act on external opinions to benefit certain private companies.
- 3.5.2 The Committee has found that Eskom Board members, and other persons who held positions of authority at various times, failed to report acts of fraud, bribery, corruption and/or theft, despite their reporting obligations under the Prevention and Combating of Corrupt Activities Act, 2004. Such persons knew, or reasonably ought to have known, or suspected, that such offences had been committed and their failure to report such conduct may constitute criminal conduct (section 34 of PRECCA). Specifically, such failures relate to the following contracts:
- Koeberg steam generators replacement;
  - Duvha boiler replacement;
  - TNA Breakfast sponsorship;
  - McKinsey, Regiments, and Trillian consulting & advisory contracts and services,
  - Tegeta coal supply (and related) contracts and agreements.
- 3.5.3 Many Eskom officials failed to take effective and appropriate steps to prevent, within their areas of responsibility, unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure, as required by section 45 (c) of the PFMA. In some cases, evidence heard by the Committee suggests that this failure was the result of a culture of fear and intimidation, as well as the abuse of public powers by a group of Eskom officials and Board members.
- 3.5.4 Evidence before the Committee suggests that Eskom's internal assurance function was used to cover up possible irregularities that would fail to stand up to external scrutiny. This is exemplified in Eskom's assurance and forensics departments findings related to the Tegeta

prepayment and McKinsey/Trillian contracts and payments. These have since been proven to be flawed by independent reviews and the evidence considered by the Committee.

3.5.5 The Committee is concerned that even when external and independent reviews, investigations and reports regarding unusual, unauthorised, or irregular expenditure, or otherwise unlawful actions were brought before the Board, such investigations were often curtailed, subverted or undermined, including the following:

- The Dentons Investigation;
- National Treasury's investigation into select coal contracts (focusing on Tegeta);
- The Oliver Wyman investigation on the McKinsey/Trillian Contract;
- The Bowmans investigation on the McKinsey/Trillian Contract; and,
- The G9 investigation on the McKinsey/Trillian Contract;

3.5.6 The Committee is of the view that the findings of these external and independent reviews, investigations and reports, were deliberately withheld, censored and/or ignored by the Board. The Committee confirms that it has never been furnished with a full list of such investigations and recommendations, despite requesting all reports submitted to the former Eskom Board.

3.5.7 Evidence presented to the Committee suggests that a number of Eskom Board members and executives were not held accountable for the collapse of good governance and the poor financial performance of Eskom. This applies in particular to the following people, who largely escaped censure despite having been named in various investigations, including the Parliamentary Inquiry, as possibly having acted in ways that undermined good governance and the company's financial performance:

- Mr Collin Matjila;
- Ms Chwayita Mabude;
- Mr Zola Tsotsi;
- Dr Baldwin "Ben" Ngubane;
- Mr Zethembe Khoza;
- Mr Mark Pamensky;
- Mr Anoj Singh;
- Mr Brian Molefe;
- Mr Matshela Koko;
- Mr Sean Maritz;
- Mr Edwin Mabelane;
- Mr Prish Govender;
- Ms Ayanda Nteta; and
- Mr Charles Kalima.

### 3.6 The developmental role of Eskom

3.6.1 The Committee is gravely concerned, based on witness testimony to the Inquiry, that the policy of transforming Eskom and using its considerable procurement budget to empower emerging, black businesses was used as a pretext to corrupt the procurement processes at Eskom in order to serve the interests of a network of companies and individuals linked to the Gupta family in particular.

Such actions included:

- The acceptance of apparently fraudulent BEE certificates for Tegeta and Trillian, in terms of which Tegeta and Trillian were designated as exempted micro-enterprises,
- The rampant failure to interrogate the sub-contracting of Eskom contracts, including payments to Trillian - of which 77% was subcontracted to non-South African consultants and possible shell companies (including e-Gateway Consultants in Dubai and T-Systems);
- The misuse of formal or informal policies relating to transformation to the benefit particularly of Gupta-owned companies.

3.6.2 In general, the Committee finds that Eskom's implementation of transformation related policies has not been uniform or transparent. In some instances, it has failed to deliver a fair and equitable distribution of contracts which were supportive of transformation objectives. It has also exposed Eskom to escalating costs and considerable risk that stand in direct opposition to the broader goal of authentic transformation and development.

### 3.7 The Eskom Contracts

3.7.1 Based on the evidence presented to the Inquiry, the Committee finds that the Koeberg steam generator tender process was irregular, and there is evidence to suggest there was corruption or otherwise unlawful conduct. Specifically, the Committee is concerned by the highly unusual circumstances which saw Eskom award a steam generator tender to Area in 2014, at a premium of R1billion and at the further cost of increased nuclear safety risks.

3.7.2 Based on the evidence before the Committee, we find that the Duvha boiler refurbishment tender process was irregular, involved alleged corruption. Specifically, the Committee is concerned by:

- Regiments' possible involvement in the insurance claim process.

- The highly unusual circumstances which saw Eskom award the refurbishment contract to Chinese firm Dongfang electric, at R1 billion premium, despite various compliance issues. Concern was raised in the Committee about the report which recommended that the Duvha contract be awarded to Dongfang, despite the material concerns raised by Eskom's executive staff and independent reviewers.

3.7.3 Based on the evidence before the Committee, we find that the TNA breakfast contract was unauthorised and irregular, and there is evidence to suggest that it may have involved corruption; specifically, as it pertains to:

- Eskom's relationship with TNA between 2010 and 2014, which involved newspaper subscriptions and the contracting of 10 breakfast shows.
- Eskom's business with TNA between 2014 and 2017, relating to the TNA breakfast show sponsorship – which cost Eskom a total of R 43 million – and the continuation of the newspaper subscriptions.
- The Eskom board and Ministry of Public Enterprises' failure to take action in light of the recommendations of a forensic audit into the R 43 million contract conducted in 2014.

3.7.4 The Committee finds that certain services rendered by, contracts entered into, and/or payments made to McKinsey, Regiments and Trillian (including those relating to the Top Engineers Programme) were unauthorised, irregular, and there is evidence to suggest that it may have involved corruption. Specifically, we refer to:

- A R800 000.00 contract with Regiments, awarded without competitive process in 2014.
- McKinsey's supplier-development 'partnerships' with Regiments and Trillian, and the related irregular, fruitless and wasteful, corrupt and otherwise unlawful benefits provided by Eskom to McKinsey and Trillian.
- Eskom's award of various contracts and payments of substantial quantum of funds without following the requisite tender processes.
- All payments made by Eskom to Trillian, especially those made without a contract.
- All advisory functions undertaken by Trillian, whether paid or not, including support provided to the CFO's office and the high-level report on the Duvha tender process.
- The Eskom board and Ministry of Public Enterprises' failure to action the recommendations of various investigative reports in relation to the impugned contracts.



3.7.5 Based on the evidence before the Committee, we find that Eskom's relationship with Tegeta was questionable and that various related contracts and payments were unauthorised, irregular, and/or were otherwise unlawful. In particular:

- Eskom's involvement in the sale of Optimum Coal Holdings to Tegeta, including the termination of the CSA negotiation and the settlement process with Optimum Coal Mine (OCM) (May-June 2015), the levying of an irregular and unusual fine against OCM (July 2015), various actions of Eskom executives in the negotiation process - including in communication with the Ministry and Department of Mineral Resources (prejudicing other interested parties), a coal pre-purchase agreement in the amount of R1.6 billion - and an ostensibly associated guarantee thereof (9-10 December 2015), the premature cancellation of existing contracts for supply of coal to Eskom's Arnot power station (prejudicing Exxaro and other coal suppliers and creating the opportunity to award coal supply contracts for Arnot power station to Tegeta (December 2015, January-April 2016)), a prepayment amounting to R659 million (April 2016), Eskom's decision to pay Tegeta inflated prices for coal produced by OCM prior to Tegeta acquiring ownership of OCM, and Tegeta's transfer of shares and contracts to Shiva Coal.
- The Eskom Board's mismanagement of various investigative reports into these issues, including those conducted by National Treasury.

3.7.6 The companies that were mentioned by witnesses during the course of the Inquiry as having played various roles in the impugned contracts with Eskom were the ones listed below:

- Trillian
- Tegeta
- Oakbay
- E-Gateway Consultants
- Mabengela
- Elgasolve
- Shiva Coal
- Zara W
- Regiments
- Bank of Baroda
- Albatime

### 3.8 Loss of institutional capacity

3.8.1 Over the past decade, the calibre of Eskom's Board and Executive has steadily decreased. This weakening of capacity was both the result and an enabler of the various instances of unlawful actions perpetrated at Eskom.

3.8.2 Evidence before the Committee shows how Eskom's internal policies and procedures were applied in bad faith to victimise or side-line long standing, competent and/or law-abiding executives, senior staff and experts, including those listed below. The Committee heard how Eskom took indiscriminate and unsubstantiated actions against inter alia:

- Mr Brian Dames;
- Mr Steve Lennon;
- Mr Paul O'Flaherty;
- Ms Erica Johnson;
- Ms Caroline Henry;
- Mr Dan Marokane;
- Ms Tsholofelo Molefe;
- Mr Tshediso Matona;
- Ms Kiren Maharaj;
- Mr Johann Bester;
- Mr Sal Laher;
- Mr Kennan Lakmeharan;
- Mr Abram Masango;
- Mr Johnny Dladla;
- Mr Mark van der Riet;
- Ms Charlotte Ramavhona;
- Adv. Neo Tsholanku;
- Mr Aziz Laher.

3.8.3 The Committee heard from multiple witnesses who made allegations of phone tapping, other forms of surveillance, and even the use of death threats to intimidate and silence them. A culture of fear and mistrust had flourished at Eskom, and unethical decision-making has thrived.

### 3.9 The responsibility to uphold good governance

3.9.1 The Committee heard evidence which shows official governance structures were undermined within Eskom and with respect to its.

- 3.9.2 While the Minister, Board, and Executive each have explicit areas of accountability, the Inquiry has exposed a set of external persons who appear to have played a role in the internal decision making processes at Eskom.
- 3.9.3 A comprehensive list of individuals who were reported to the Committee to have conducted themselves unethically and possibly criminally is presented below. The substantial evidence collected by the Committee's fact-finding Inquiry makes it necessary to provide a public list, so as to assist the relevant authorities (including possibly the Directorate for Priority Crime Investigation, the Special Investigating Unit and other law enforcement agencies) to focus their investigations on the evidence presented to the Committee.

*3.9.3.1 Ministry Advisors and Public Enterprises Employees*

- Mr Siyabonga Mahlangu
- Mr Thamsanqa Msomi
- Ms Kim Davids (PA to Minister of Public Enterprises)

*3.9.3.2 Eskom Board Chairpersons*

- Mr Zola Tsotsi
- Dr Ben Ngubane
- Mr Zethembe Khoza

*3.9.3.3 Eskom Non-Executive Board Members*

- Ms Chwayita Mabude
- Mr Mafika Mkwanaazi
- Mr Mark Pamensky
- Ms Devapushpum Viroshini Naidoo
- Ms Nazia Carrim
- Mr Romeo Khumalo
- Ms Mariam Cassim

*3.9.3.4 Eskom Staff & Executives*

- Mr Collin Matjila
- Mr Brian Molefe
- Mr Anoj Singh
- Mr Matshela Koko
- Mr Edwin Mabelane
- Mr Charles Kalima
- Mr Prish Govender

- Ms Ayanda Nteta
- Mr Sean Maritz
- Mr Abram Masango
- Ms Suzanne Daniels
- Mr Vusi Mboweni

*3.9.3.5 Companies and persons who, according to the evidence before the Committee, may have benefited unduly from contracts with Eskom:*

- Mr Eric Wood
- Mr Vikas Sagar
- Mr Alexander Weiss
- Mr Clive Angel
- McKinsey & Company
- Regiments
- Trillian
- Tegeta Exploration and Resources (Pty) Ltd

### **3.10 Lacklustre performance of the Shareholder**

- 3.10.1 There were inconsistencies in the accounts on the relationship of the Shareholder with Eskom by former Public Enterprises ministers Malusi Gigaba and Lynne Brown. This was also manifest in their understanding of the scope of their powers, oversight capabilities and their approaches to accountability.
- 3.10.2 Minister Gigaba's testimony seemed to indicate he had adopted an interventionist approach, while he vehemently denied being involved in Eskom's procurement processes.
- 3.10.3 In spite of there being ample evidence of wrongdoing being raised frequently about Eskom in Parliament and in the public domain, Minister Brown often failed to take appropriate action, responsibility or accountability for a large set of impugned decisions taken by the Board and management of Eskom.
- 3.10.4 While the two former ministers pleaded ignorance regarding the irregular, and possibly criminal acts committed by the Executive and non-executive Board members they appointed; the King Code stipulates clearly that while ministers and officials within the department may not be directly responsible for acts of wrongdoing, they may still be accountable for these acts. King IV takes a specific view on accountability, viewing it as: *"The obligation to answer for the execution of responsibilities"*. Furthermore, it clarifies that, *"Accountability cannot be delegated, whereas responsibility can be delegated without abdicating accountability for that delegated responsibility"*. In terms of accountability for governance in Eskom, King VI is



unambiguous that the Eskom Board – comprising executive and non-executive directors - must answer for its administration and performance, regardless of which other actors have a delegated role or responsibility:

*The governing body is the structure that has primary accountability for the governance and performance of the organisation. Depending on context, it includes, among others, the board of directors of a company, the board of a retirement fund, the accounting authority of a state-owned entity and a municipal council.*

3.10.5 The Committee finds that the Executive arm of government represented by the two former ministers – Gigaba and Brown – was grossly negligent in carrying out its responsibility as the sole Shareholder of Eskom.

3.10.6 On the basis of the evidence presented in the Inquiry, the Committee finds that the legislation and policies that regulate the Shareholder's relationship with Eskom may have left room for interpretation that led to the inconsistencies mentioned above.

### **3.11 Questionable awarding of Contracts**

The Inquiry has revealed that the corruption of procurement processes at Eskom would not have been possible, if not for the guise of integrity and legitimacy that some erstwhile reputable entities afforded certain Eskom decisions. Such entities benefited greatly from the tainted contracts and enjoyed advantageous relationships with the implicated companies.

#### **3.11.1 McKinsey's Partnership with Regiments & Trillian:**

- McKinsey partnered with Regiments and Trillian under questionable circumstances;
- McKinsey employees worked alongside Trillian ahead of any completed due diligence, which was only undertaken in response to media reports (initiated by Dr David Fine);
- McKinsey authorised Eskom payments to Trillian despite having no contract with the company;
- McKinsey benefited from an unusual sole proprietor status for various financial and strategic matters;
- McKinsey was allowed to determine - with the programme Steerco - what fees it and Trillian would earn on an irregular, unjustifiable and unlawful risk based remuneration model which had not been approved by Treasury;
- McKinsey was paid ~R 1 billion for a contract that should have never been actioned as it seemingly never entered into force (a number of conditions were not met before the Conditions Precedent expired on 31 March 2016) and there is some question as to whether it was duly authorised;

- Numerous reports (Oliver Wyman, G9, Bowmans) raised questions over the value for money of the deals McKinsey was involved in - specifically, that McKinsey was allowed to charge fees in excess of market rates;
- McKinsey's role and the roles of its senior employees, Vikas Sagar, Alex Weiss and Lorenz Jungling are highly questionable, and warrant further investigation, including for potentially serious criminal conduct.

3.11.2 The Committee welcomes the payment to Eskom of the amount of R902million McKinsey earned for the contract, which was never approved by the Treasury. The commitment to pay back this amount was made by a representative of McKinsey in the Inquiry. The Committee also welcomes the confirmation of the payment of R99.5million in interest from McKinsey to Eskom.

### **3.12 Mr Koko's disciplinary hearing**

Evidence before the Committee calls into question Mr Matshela Koko's disciplinary process. Such requires further investigation by the Eskom Board, including on the roles played by, and information before, Cliffe Dekker Hoffmeyr & Nkonki.

### **3.13 Confirmation of State of Capture report's findings and observations**

3.13.1 Many of the findings and observations of the Public Protector's *State of Capture* report have time and again been corroborated by the evidence before and the testimony of witnesses that appeared before the Committee.

3.13.2 Critically, the Committee was informed that there were various meetings at which confidential Eskom business was reportedly discussed between ministerial and departmental support staff, Eskom board members, executives, and senior staff, and various interested private sector agents, including:

- A meeting at former Minister Brown's residence (denied by Minister Brown), attended by a Gupta brother, Mr Salim Essa, and Mr Tsotsi (who claimed he was unaware that a Gupta brother and Mr Essa would be present);
- Mr Koko reportedly called numerous meetings that were attended by Eskom senior officials (Ms Daniela, Mr Masango, and others) and Mr Essa in the second week of March 2015;
- Meetings were arranged by Mr Matjila, between Mr Essa and Eskom executives - including Ms Tsholofelo Molefe (who claimed she was unaware that Mr Essa would be present);

- Meetings were arranged by Mr Msomi between Mr Essa and Eskom executives - including Ms Tsholofelo Molefe;
- Mr Tsotsi confirmed that he met with Mr Rajesh “Tony” Gupta.

3.13.3 Evidence reviewed by the Committee also indicates that confidential information was shared by Eskom officials with various private business persons.

3.13.4 A number of witnesses that appeared before the Committee confirmed that they had met with or engaged members of the Gupta family and their associates under dubious circumstances, numerous Eskom board members, executives, and senior officials. When confronted with documentary evidence regarding trips to Dubai which suggests that such trips were funded and organised by the Gupta family and their associates, witnesses (Mr Koko and Mr Singh) denied that such trips were funded by companies that did business with Eskom.

3.13.5 The Committee finds that there was a corrupt relationship between the Gupta family, their associates and key State functionaries, various gratifications were provided and accepted in order to influence Eskom board members and employees to act unlawfully and to induce Eskom to enter into a number of business contracts.

3.13.6 The external persons who, according to evidence obtained from witnesses in the Inquiry, may have unduly influenced Eskom decisions included:

- Mr Salim Essa
- Mr Rajesh ‘Tony’ Gupta
- Mr Ajay Gupta
- Mr Atul Gupta
- Mr Duduzane Zuma
- Mr Nazeem Howa
- Mr Ravindra Nath
- Ms Ronica Ragavan
- Mr Kuben Moodley
- Mr Ashu Chawla

3.13.7 In addition, the Committee heard evidence of meetings where parties with no legitimate mandate to actively interfere in Eskom’s operational matters allegedly did just that. According to one witness (Mr Tsotsi), at a meeting called by Ms Dudu Myeni (and attended by Mr Nick Linnell and Mr Tsotsi himself) at former President Jacob Zuma’s Durban residence on 8 March 2015, former President Zuma intimated that it was his wish that an independent inquiry into Eskom be undertaken and that a number of executives be suspended. As a consequence of this meeting, Mr Tsotsi claimed that he presented the President’s wishes at an urgent board meeting the following day, even though he was aware that the President was not in a position to give

lawful instructions to the Board. When the Board voiced concerns about the unlawful interference in its functions, Minister Brown intervened in support of the inquiry and the suspensions.

- 3.13.8 The Committee has uncovered substantial and compelling evidence that a number of corporate entities amassed substantial illicit private gains – many of which have reportedly been funnelled out of South Africa through shell companies and private accounts in Dubai and Hong Kong. The Committee heard evidence which shows how these contracts and agreements were reached through the weakening of governance structures at Eskom, coordinated with actors in government, private sector and in the Eskom board, executive and management. The weakening of corporate governance at Eskom has severely undermined the financial stability of the State-owned company and has eroded its public standing.
- 3.13.9 The Committee finds that in general, the various laws, regulations, codes, frameworks, and other agreements that together constitute the basis of Eskom’s governance infrastructure had been distorted, circumvented, misused, applied in a non-uniform and non-transparent manner, and have thus ultimately failed to support Eskom in fulfilling its developmental mandate. The applicable governance framework has failed to protect Eskom from external interference and corporate capture, leading to the financial and governance crisis the utility now finds itself in.

### **3.14 Weakening of Institutions**

- 3.14.1 The Committee notes the many examples of institutional and oversight failure that have allowed private interests to benefit unduly from business with Eskom over the past decade with great concern. It is disconcerting that it seems the relevant authorities have not yet acted, in light of the allegations that have been brought to their through disclosures, the press, the courts, Auditor General and Parliament.
- 3.14.2 With knowledge of various submissions made to the Directorate for Priority Crime Investigation (DPCI or “the Hawks”) relating to Eskom, the Committee is concerned that such reports appear not to have been given urgent attention.
- 3.14.3 The Committee is concerned about the specific instances where the DPCI (and quite possibly the National Prosecuting Authority) failed to act expediently on various submissions or matters formally brought to their attention.
- 3.14.4 Evidence before the Committee indicates that many of the transactions Eskom entered into which were the subject of the Inquiry, as well as the seemingly improper relationships between public officials and private actors, involved bribery and corruption, money laundering and other financial crimes of the most serious kind.
- 3.14.5 It remains unclear why law enforcement agencies seem to have delayed conducting investigations or instituting action in relation to widespread allegations of criminal conduct by individuals at Eskom, Tegeta and their associates.



## 4 Part D: Recommendations

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### 4.1 Change of leadership and management at Eskom and commencement of Zondo Commission

#### 4.1.1 Notwithstanding the fact that:

- (a) a new Board of non-executive directors was appointed to lead Eskom while the process of the Inquiry was still ongoing,
- (b) some of the implicated Executive Directors have been suspended or resigned, and
- (c) many other implicated persons are no longer directly associated with Eskom; the Committee is of the view that:
  - i. Appropriate remedial action for wrongdoing must be pursued by the relevant authorities against all the implicated individuals and companies.
  - ii. The Board and executives of Eskom are expected to continue seeking to uncover and act on other incidences of corruption and state capture that may have been perpetrated by private individuals and firms in collaboration with officials and/or former Board members, but not identified by the Committee's Inquiry. These must be brought to the attention of the relevant authorities for criminal and other investigations.

4.1.2 The Committee acknowledges the commencement of the Judicial Commission of Inquiry into allegations of state capture led by Deputy Chief Justice Raymond Zondo. Most of the matters the Portfolio Committee's Inquiry into Eskom dealt with are also found in the terms of reference of the Zondo Commission. This implies that the work done by the Committee could serve as a basis for further investigation by the Zondo Commission in order to uncover the full extent of wrongdoing in Eskom.

4.1.3 The recommendations below refer to specific findings outlined in **Part C** of this report.

### 4.2 The resignation, reinstatement and "early retirement" of Mr Brian Molefe

4.2.1 The Committee recommends, that the Eskom Board must review the rules and procedures of the Eskom Pension and Provident Fund to ensure that incidents of the nature of the payments made to Mr Molefe in lieu of benefits for which he did not qualify, which the High Court described as "*patently unlawful*", will never happen again.

### 4.3 Concerning the difficulties the Committee encountered when it was seeking access to information from Eskom,

4.3.1 The culture whereby Eskom's operations have been shrouded in inordinate secrecy, which has cast a shadow over and undermined its internal governance and controls, as well as the oversight function of the Ministry and Department of Public Enterprises and Parliament must be changed.

4.3.2 The Eskom Board must ensure reasonable protection of Eskom's records in terms of section 50 of the PFMA and keep proper records of the financial affairs of the company in line with section 40 of the PFMA.

4.3.3 The Committee recommends that adequate steps must be taken by government to strengthen the legislative and policy framework applicable to Eskom, and documentation formalising the relationship between Eskom and the Ministry and Department of Public Enterprises. This will help to deal with weaknesses that include inadequate governance and oversight systems and a lack of clarity on the role of Eskom's executive authority.

#### **4.4 Witnesses in senior leadership positions at Eskom who presented conflicting evidence to the Committee**

4.4.1 The committee recommends to the National Assembly that the witnesses mentioned below must be requested to present themselves to the Zondo Commission of Inquiry in order for them to shed more light on the allegations of corruption and state capture at Eskom during their tenure:

- Mr Zola Tsotsi, Former Eskom Board Chairperson (June 2011 to March 2015)
- Dr Baldwin (Ben) Ngubane, Former Eskom Board Chairperson 2015 – June 2017
- Mr Zethembe Khoza, Eskom Interim Board Chairperson
- Ms Devapushpum (Viroshini) Naidoo, Former Eskom Board member
- Dr Pat Naidoo, Eskom non-executive Board Member
- Mr Brian Molefe, Former CEO of Eskom
- Mr Anton Minnaar, Eskom HR Executive Manager
- Mr Sean Maritz, Former Eskom Acting CEO
- Mr Anoj Singh, Former Eskom CFO
- Mr Matshela Koko, Former Eskom Acting CEO, and Executive for Generation

4.4.2 These include the officials who failed, without sufficient cause, to answer fully and honestly all the questions put to them under oath or affirmation, particularly those who misrepresented Eskom's internal policies in an attempt to legitimise conduct which has been found by internal investigations (including the Bowmans' and the G9 Reports) to involve unusual, unauthorised and/or irregular expenditure; and those who told falsehoods and selective facts to justify unusual, unauthorised, irregular and/or otherwise unlawful expenditure.

4.4.3 The former Board members who for months frustrated the efforts of the Committee to access crucial document and only furnished them on 14 March 2018 must be held accountable for the conduct that appears to be criminal.

4.4.4 The Speaker of the National Assembly with the assistance of Parliament's Legal Services Unit, should be requested within 60 days from the adoption of this report by the National Assembly,

to refer any individuals who may have misled the Committee during their evidence to the relevant authorities for further investigation.

#### **4.5 Concerning governance,**

- 4.5.1 The Committee recommends that investigations currently underway at Eskom and/or undertaken by other institutions including all reports presented to management or the Board prior to final Board approval must be presented to the Portfolio Committee. This recommendation is based on the detailed findings that reveal the failure of successive Eskom Boards to fulfil their statutory responsibilities set out in the Companies Act 2009 and the Public Finance Management Act 1999, as well as failure to adhere to the King Code on Corporate Governance and other regulations.
- 4.5.2 The Committee recommends to government to request the National Treasury to review and strengthen the regulations on procurement, pertaining to State-owned companies, particularly those with large procurement budgets such as Eskom.
- 4.5.3 A full review of Eskom's policies and procedures, as well as the policies and procedures of the Ministry of Public Enterprises to assess their compliance with relevant legislation, for all material concerns, including procurement and procedures for the appointment of Executives and Board members. This is meant to prevent the recurrence of corruption and corporate capture that the Committee's Inquiry has illuminated.
- 4.5.4 Government's policies of using the large procurement budgets of SOC's to contribute towards the necessary economic transformation and empowerment of small black-owned companies must be implemented in a uniform and transparent manner at Eskom.
- 4.5.5 The Eskom Board must prevent the recurrence of contracts that have exposed the company to escalating costs and considerable risk that stand in direct opposition to the broader goal of authentic economic transformation and development.

#### **4.6 Concerning the contracts identified in the findings,**

- 4.6.1 Criminal investigations into possible cases of fraud, corruption, and/or other unlawful conduct must be pursued by the South African Police Service, Directorate for Priority Crime Investigation (DPCI), Special Investigative Unit (SIU), National Prosecuting Authority (NPA) and other law enforcement agencies.
- 4.6.2 In order to ensure that Eskom is set on a fundamentally new growth and development trajectory, whereby its decisions serve the interests of the company and the people of South Africa; the Board must undertake to review all the short, medium and long-term contracts of private service providers with Eskom. The Department must oversee this review and within a period of 12 months after the adoption of this report by the National Assembly, report back to the Portfolio

Committee on Public Enterprises. This recommendation must be captured in the legacy report of the Committee so that the 6<sup>th</sup> Parliament can oversee its implementation.

- 4.6.3 The Committee recommends to Parliament to request the Financial Intelligence Centre to assist Eskom in terms of its mandate to identify the proceeds of crime, combat money laundering, supervise and enforce compliance with the FIC Act; share information with law enforcement authorities, supervisory bodies, intelligence services, the South African Revenue Service, and other local and international agencies.
- 4.6.4 Eskom must seek to recover the proceeds of corruption, and report to the relevant authorities any violations of the law.

#### **4.7 Regularising previous decisions**

In light of the overwhelming evidence of external interference and non-compliance with the relevant legislation and applicable supply chain management procedures in relation to Trillian, Regiments and McKinsey, the Committee recommends that the Eskom Board must take reasonable steps to regularise previous decisions involving Trillian, Regiments, McKinsey and other companies that may pose a financial or legal risk.

#### **4.8 Financial management**

- 4.8.1 The Committee recommends that the new Eskom Board should urgently engage the Auditor-General to address all possible irregular, fruitless and wasteful expenditure, as well as to initiate disciplinary steps against any officials as required by section 51(1)(e)(iii) of the PFMA, who made and/or permitted irregular, fruitless and wasteful expenditure.
- 4.8.2 The new Board should institute an independent forensic investigation into questionable and irregularly-awarded contracts referred to in this report or any other matter which it deems necessary.
- 4.8.3 The Committee recommends that upon conclusion of the forensic investigations into all financial irregularities (e.g. irregularly awarded contracts, as well as suspicious transactions, entered into) appropriate steps must be taken against any current and/or former employees and Board members who are found to have been complicit in the wasteful expenditure as a result of these irregular activities. The Committee recommends that the new Board should ensure that a comprehensive progress report relating to all pending investigations, including those related to the Eskom's financial sustainability, is compiled and submitted to Parliament.

#### **4.9 The loss of experienced leadership and staff with integrity**

- 4.9.1 The Board of Eskom must improve the entity's Human Resources management in order to attract and retain staff and managers who are capable and not prone to corruption and capture by private interests.



- 4.9.2 The Eskom executive management must reverse the culture whereby internal labour relations policies and procedures have been applied in bad faith to victimise or side-line long standing, competent and/or law-abiding executives, senior staff and experts.
- 4.9.3 The Board must ensure that disciplinary measures are taken against professionals such as scientists and engineers who acted unethically, and who through their wilful and/or grossly negligent actions, caused financial losses and reputational damage to Eskom.

#### **4.10 The undermining of the principles and structures that ensure good governance**

- 4.10.1 The Inquiry has exposed a set of executives and senior staff that appear to have been part of a network that actively participated in irregular, corrupt and/or otherwise unlawful contracts and processes at Eskom. Lifestyle audits of implicated individuals must be conducted, reports to relevant professional associations, where necessary reports to legal, regulatory, and investigative authorities.
- 4.10.2 The list includes Ministry Advisors and Public Enterprises employees, Eskom non-executive Board Members, Eskom staff & executives, external persons who unduly influenced Eskom decisions, companies and persons who benefited unduly from contracts with Eskom.
- 4.10.3 The Committee recommends criminal investigations into possible cases of fraud, corruption, and other unlawful conduct with respect to the actions of the listed individuals and firms; and the possibility of financial crimes.
- 4.10.4 South African law enforcement agencies must review or conduct independent audits of implicated companies (specifically those that had dealings with Eskom), and, where necessary, institute the following action(s) - blacklisting, recovery of unlawful proceeds, and reporting to relevant authorities.
- 4.10.5 Eskom must make applications in terms of section 162 of the Companies Act 71 of 2008 (“the Companies Act”) to have any former Board member who acted within the immediately preceding 24 months, and implicated in fraud, corruption, and/or other unlawful behaviour, declared delinquent directors.

#### **4.11 Strengthening oversight capacity and clarifying the role of the Shareholder**

- 4.11.1 In the light of the findings of the Inquiry into Eskom, the Committee recommends to the Department of Public Enterprises and Cabinet that they should review the legislative and regulatory framework governing State-owned companies. This review must include a consultative process that is inclusive of a broad range of stakeholders and also takes into account the evidence of corruption and state capture uncovered in recent years by the Public Protector, the Eskom parliamentary Inquiry and other bodies.
- 4.11.2 The Executive must introduce the Shareholder Management Bill that was supposed to be introduced to Parliament in the 2017/18 financial year as promised by former minister Lynne

Brown in her last budget speech. This piece of legislation is essential for strengthening oversight and defining the roles of SOCs and the Shareholder.

- 4.11.3 The Department must ensure that there is clear and shared understanding of the provisions in the Shareholder's Compact and the Memorandum of Incorporation ("MOI") of Eskom among all stakeholders, and update these where necessary.
- 4.11.4 The Committee recommends that the two former Public Enterprises ministers Gigaba and Brown must make presentations to the Zondo Commission in order to share insights into the roles they played as Shareholder representatives during the period of corruption and corporate capture that flourished at Eskom.

#### **4.12 Strengthening the powers of Parliament to hold individuals and institutions accountable**

- 4.12.1 The Committee recommends to Parliament to develop mechanisms through which individuals and institutions that refuse to appear before parliamentary portfolio committees after being duly summonsed in terms of section 56 of the Constitution, sections 14, 15 and 16 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No 4 of 2004 and Rule 167 of the National Assembly Rules, could face consequences.
- 4.12.2 The Committee recommends to the National Assembly Speaker to institute action against Ms Dudu Myeni, Mr Duduzane Zuma, Mr Rajesh "Tony" Gupta, Mr Atul Gupta, and Mr Ajay Gupta, all of whom failed to honour their invitations to appear before the Inquiry. The Committee further recommends to the National Assembly that the Judicial Commission of Inquiry into allegations of state capture headed by Deputy Chief Justice Raymond Zondo should be requested to summons these individuals to appear before it.

#### **4.13 Report to Zondo Commission**

The Portfolio Committee recommends to Parliament to hand over this report, together with the documentation and the entire record of evidence collected in the course of the Inquiry to the Zondo Commission of Inquiry for further investigation.

#### **4.14 Monitoring and implementation**

Feedback needs to be provided on the implementation of these recommendations by all organs of state mentioned in the report to the Portfolio Committee on Public Enterprises on a quarterly basis, starting from mid-March 2019.

**Report to be considered.**

# 05



## Statement on the Cabinet meeting of 10 December 2014

11 December 2014

From the outset, Cabinet would like to clarify the misperception that President Jacob Zuma has refused to answer questions in Parliament. Cabinet also noted efforts by Deputy President Cyril Ramaphosa to interact with political parties in the National Assembly following chaotic scenes recently.

The Constitution of the Republic of South African stipulates that the President is accountable to Parliament. The President has continuously fulfilled his role of accounting to Parliament. He has been answering written and oral questions posed to him by the members in both the National Assembly and the National Council of Provinces (NCOP).

The President went to orally answer questions in the National Assembly on 21 August 2014. Unfortunately Honourable Members disrupted him whilst answering the 3rd of 6 questions posed to him. It is the Honourable Members who, through their own disrespectful behaviour, who disrupted the President as he was answering questions. Those who prevented the President from orally answering questions in the National Assembly have no moral grounds to twist the facts and suddenly claim that it is the President who does not want to orally reply to Honourable Members' questions. The National Assembly has since censured those Honourable members who disrupted The President.

Further, Cabinet is not aware of any Order Paper in the National Assembly which had scheduled the President to answer oral questions after the disruption of his oral replies. Therefore it cannot be true that the President has refused to answer questions in the National Assembly.

Cabinet remains concerned over the disruptive effect the recent power outages are having on the daily lives of South Africans and its impact on households and businesses across the country. Cabinet adopted a five-point plan to address the electricity challenges facing the country. The lack of sufficient capacity to meet the country's energy needs remains a challenge and all attempts are being made to ensure that we overcome the tight energy situation. To meet the country's future energy requirements government is implementing an energy mix which comprises of coal, solar, wind, hydro, gas and nuclear energy. In future biomass, wind power, solar power and hydro-power will contribute 11.4 Gigawatts of renewable energy to the grid. Since 1994, five million more households were connected to the grid. In 2004 this increased to 12 million households. This happened without additional power stations being built. This increase of households was set off the existing grid. Cabinet has adopted a five point plan.

Today Eskom will sign an MoU with the Strategic Fuel Fund and Transnet Ports Authority so that the country can be assured of a regular supply of diesel. The focus will be given to improve the strategic maintenance and operational efficiency to ensure that the level of efficiency is increased from the 72% currently to the target of 80%. Eskom will present a detailed finance plan to manage its cash flow beyond 2015. This plan will be presented to the IMC by December 2014. Simultaneously government will finance the funding model.



Cogeneration options will be pursued with the sugar paper and pulp industries to harness waste energy to the extent of 1000 megawatts. There are significant opportunities for the importation of gas. A coal independent power producer programme will be launched by the end of January 2015 with generation capacity of 2 500 megawatts. We are therefore appealing to the public to help our country to reduce the demand of energy which means switching off electricity when not in use. We will have some relief from the 15th December 2014 when manufacturing and industrial processes close for the year. A technical team war room for the implementation of the five point plan is constituted with immediate effect. The five point plan addresses the strain our electricity system faces. The plan covers:

- (I) the interventions that Eskom will undertake in the period over the next 30 days,
  - (II) harnessing the cogeneration opportunity through the extension of existing contracts with the private sector;
  - (III) accelerating the programme for substitution of diesel with gas to fire up the diesel power plants;
  - (IV) launching a coal independent power producer programme; and
  - (V) managing demand through specific interventions within residential dwellings, public and commercial buildings and municipalities through retrofitting energy efficient technologies.
- Cabinet is concerned about the performance of some of the State-owned companies, in particular South African Airways (SAA), the South African Post Office and Eskom. These State-owned entities play a critical developmental role within the South African economy. The President has assigned the Deputy President Cyril Ramaphosa to oversee the turnaround of three state-owned companies, namely South African Airways (SAA), Eskom and the South African Post Office. Working with the relevant Ministries, the SAA will be transferred from the Department of Public Enterprises to the National Treasury. The Presidency will closely monitor the implementation of the turnaround plans of these three critical state-owned companies that are drivers of the economy.

## **1. Implementation of Key Government Programmes**

1.1. Cabinet welcomes the positive outcomes of the President's State Visit to the People's Republic of China from 4 to 5 December 2014, which is a true reflection of the deepening bilateral, trade and investment relations between South Africa and China.

South African businesses are urged to take advantage of the new economic opportunities that our relationship with China offers. Last week's adoption of the China-South Africa 5-10 Year Framework on Cooperation entrenches implementation of the agreements entered into since the conclusion of the Beijing Declaration in 2010 and expands on the Comprehensive Strategic Partnership.

1.2. Cabinet lauds the Department of Basic Education, Provincial Education Departments, principals, teachers and learners for their perseverance as we conclude another busy academic year.

The Minister of Basic Education Angie Motshekga will announce the outcome of the 2014 National Senior Certificate (NSC) examinations on 5 January 2015 with results being released to candidates on 6 January 2015.

Cabinet encourages learners who qualify for higher education studies to explore all available opportunities. Those learners who have not yet been accepted at an institution of higher learning at the time of the release of the NSC results should make use of the Central Applications Clearing House (CACH) service in January and February 2015. This service makes a register of potential candidates that meet institutions' minimum admission requirements to all Post-School Education and Training (PSET) institutions in South Africa.

The service also offers career advice and assists prospective applicants with possible alternatives. The service can be accessed through the call centre on: 0800 356 635 or through an SMS with name and identity number to 49200.

1.3. Cabinet welcomes the release of the 2014 Annual National Assessments (ANA) last week which shows an upward trend in performance of all grades except Grade 9. The ANA remain a powerful tool to assess the health of our education system and where immediate interventions are required as identified for the Grade nine learners in mathematics.

1.4. Cabinet thanks all South Africans, civil society and the media for their participation in this year's 16 Days of Activism campaign under the theme: 'Count me in: Together moving a non-violent South Africa forward'.

The call to all South Africans to 'Count me in' seeks to ensure the longevity of established partnerships by translating our activism during this period into everyday actions throughout the year so that we can eliminate the scourge of violence against women and children.

1.5. South Africa will mark National Reconciliation Day on 16 December 2014 under the theme: 'Social Cohesion, Reconciliation and National Unity in the 20 Years of Democracy' at the Ncome Museum in the uMzinyathi District Municipality, KwaZulu-Natal.

1.6. Cabinet conveys its gratitude to all South Africans and the international community that commemorated the anniversary of the passing of the country's first democratically elected President Nelson Mandela on 5 December 2014.

We must stay true to Madiba's legacy by continuing his unwavering dedication to democracy, selflessness, reconciliation, service to humanity and striving for a better life for all. It is through these values and dedication to the service of humanity that we remain inspired to become a united and prosperous nation.

## **2 Key Cabinet decisions.**

2.1. Cabinet approved that the 2013/14 performance report of the Research and Development (R&D) Tax Incentive programme be tabled in Parliament.

Government offers R&D tax incentive in terms of Section 11D of the Income Tax Act, 1962 in order to encourage private sector R&D activities. South Africa offers 150% deduction on approved operational expenditure incurred on R&D activities and is recognized to be amongst the countries that offer the more generous tax incentive for R&D.

The incentive which has been in place since November 2006 saw 810 companies participating, as at February 2014. From 2005/06 to 2012/13 companies reported an estimated R44.1 billion R&D expenditure, and National Treasury estimated that just over R3,2 billion was claimed in R&D tax deduction from SARS. 2013/14 saw 44.2% Small and Medium Enterprises (SMEs companies with an annual turnover of less than R40 million) participating in the R&D tax incentive.

2.2. Cabinet was updated on progress made with the MeerKAT project, the collateral benefits that have accrued to the local communities and South Africa, and the international negotiations underway relating to the hosting of the SKA project.

The construction of the MeerKAT telescope – the pathfinder to the eventual SKA – is progressing well, with significant opportunities for the local South African industry. A number of cutting-edge technology developments are being driven by South Africa, especially in the area of high performance computing. Local communities in the Northern

Cape have also benefitted through the many social investment partnerships.

On the international front, the hosting agreement, the funding model for the SKA and the procurement policy are being discussed and finalised. Negotiations are also continuing on the establishment of an inter-governmental treaty organisation.

Cabinet approved a joint task team between the Ministers of Science and Technology and Higher Education and Training to identify the required human resources as well as to ensure that academic and other research institutions are aligned to the development and needs of the MeerKAT, SKA and similar projects.

Cabinet also approved collaboration between the Ministers of Science and Technology and Small Business Development should opportunities arise for empowering and capacitating Small and Medium Enterprises in light of the potential economic impact.

2.3. Cabinet approved for Statistics South Africa to conduct stakeholder consultations in preparation for the amendment of the Statistics Act, Act 6 of 1999.

Consultations between the organs of state and other relevant organs are necessary to facilitate the development of the series of data collections needed for the National Development Plan.

2.4. Cabinet was briefed on the compliance of Members of the Senior Management Service (SMS) with the Financial Disclosure Framework, which is monitored by Parliament.

Of the 5 425 SMS members in national departments who were required to submit their financial disclosures forms for the 2012/13 financial year, the Public Service Commission (PSC) received 4 413 (81%) by the due date of 31 May 2013.

Cabinet highlights that a culture of zero tolerance for non-compliance should be entrenched in the day to day functioning of the State.

2.5. Cabinet was briefed on the 2013/2014 audit outcomes of the Public Finance Management Act (PFMA) compliant institutions and on the tabling status of their annual reports and financial statements.

There has been an improvement in compliance by institutions on the timeous tabling of their 2013/2014 annual reports and financial statements. For the year under review 417 PFMA compliant institutions were required to table their annual reports and financial statements by 30 September 2014, 379 institutions (91%) met the deadline which is a 7% improvement from the 353 in the previous year.

Cabinet approved that Accounting Officers and Accounting Authorities submit to their relevant Executive Authorities corrective steps that would be taken to address concerns raised in their audit reports.

Cabinet supports the need for Executive Authorities to monitor the progress made to address concerns raised in Audit Reports and to receive regular updates thereon.

2.6. Cabinet approved a range of steps to reform the Supply Chain management (SCM) system. These include: (a) supply chain management performance criteria to be included in the performance agreements of Accounting Officers as from 1 April 2015; (b) Accounting Officers to conduct a capacity review of SCM staff and to take remedial action where required; (c) Accounting Officers to brief Executive Authorities quarterly on the SCM performance in their department, municipalities or entities.

Cabinet also approved for the Office of the Chief Procurement Officer to accelerate the SCM reform by modernising the function in the public service. The Office of the Chief Procurement Officer has embarked on a strategy to simplify, standardise and automate procurement.

The National Treasury will conduct consultations with the National School of Government



with a view to develop a curriculum on training and standardisation of professional qualifications.

2.7. Cabinet approved the submission of South Africa's Periodic Report (2002-2013) on the United Nations (UN) International Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment to the UN Human Rights Council.

Compilation and submission of this report demonstrates governments' commitment to the global effort to protect and promote human rights. South Africa fully complies with the Convention in that it has criminalised torture, and Courts may now prosecute torture in terms of statute and not common law.

The Report provides South Africa with an opportunity to assess its compliance or lack thereof with international obligations. The fight against torture is in line with South Africa's key priority of ensuring safer communities which is in line with the National Development Plan.

2.8. Cabinet noted the draft White Paper on the Police. The 2014 White Paper on Police emanates from a review of the 1998 White paper on Safety and Security. The review reassessed how the practice and understanding of crime prevention has developed in South Africa post 1994.

The White Paper responds to the National Development Plan Vision 2030 by articulating the need and framework for a professional police service that is skilled, accountable and community-centered. In addition the police service is required to operate in an integrated manner within the Criminal Justice System in executing its constitutional mandate.

2.9. Cabinet approved that the draft Youth Policy 2014-2019 be made available for public comment. The draft policy is a progression from the first 2009-2014 Youth Policy. Youth development is at the core of South Africa's development agenda; the National Development Plan has a youth lens aimed at nurturing a demographic dividend.

The 2014-2019 policy ensures that the youth dividend is realised. Implementation of the policy will intentionally enhance the capabilities of young people to transform the economy and society by addressing their needs for holistic development, particularly those outside the social, political and economic mainstream.

2.10. Cabinet also approved publication of the draft National Disability Rights Policy in the Government Gazette for public comment. This serves to: update the White Paper on an Integrated National Disability Strategy, integrates both the obligations in the United Nations Convention on the Rights of Persons with Disabilities and the provisions of the Continental Plan of Action for the African Decade of Persons with Disabilities with South African legislation, policy frameworks and the National Development Plan 2030.

2.11. Cabinet approved the proposed vision for the Border Management Agency of South Africa as a basis for the business case and enabling legislation as work in progress.

Cabinet also approved that a pilot site be established and a proper legal framework be put in place.

A two-phased approach will be used to establish the Agency:

- Transition Phase (January 2015-December 2016) –used to start legislative drafting and its enactment and to make government initiatives in the borderline environment more visible. There will also be a continuation with current collaborative efforts at Ports of Entry under formalised multiparty agreements to strengthen the Border Control Operational Coordinating Committee's management authority.



- Agency Phase (January 2017 and beyond) – entails implementation of legislation to operationalize the Agency as a Public Entity in the Ports of Entry environment and to provide for the expansion of its mandate and functions to include the air, land (Border Guard) and maritime (Coast Guard) border environment.

The experiences of the transitional phase (including the pilot) will better inform the final proposals.

2.15 Cabinet approved the relocation of the lead agency role for the Border Control Operational Coordinating Committee from the South African Revenue Service to the Department of Home Affairs.

2.16 Cabinet was briefed on the results of a pilot audit on transformation in a sample of National Sport Federations. This provided the extent to which sport bodies in South Africa have transformed over the last two decades since the targets for transformation in sport were set. The results will be used by the Department of Sport and Recreation to provide focused support to those federations that need administrative support.

The purpose of the study was to establish a draft framework for evaluating the transformation in the different dimensions of the transformation charter; performance levels, demographics, access, skills and capabilities, governance, employment equity, and preferential procurement. Based on the lessons learnt from the first pilot study, the second phase of the audit began in March 2014. The scope of this audit covers all 16 priority sport codes.

2.17 Cabinet declared an annual National Recreation Day on the first Friday of October each year. This will provide an opportunity to all South Africans to actively be involved by participating in recreation activities that will improve their health and well-being. A healthy and active citizenry is a key factor in realising the National Development Plan. To fully exploit the potential of recreation, the National Recreation Day needs solidarity, joint activities and cross-sectoral initiatives. To this end Cabinet also approved the establishment of a National Steering Committee.

### **3. Bills**

3.1. Cabinet approved publication of the second draft of the Financial Sector Regulation Bill and its submission to Parliament as well as the release of the Draft Market Conduct Policy Framework for public comment. The draft framework will enable the public to be better informed when commenting on the Bill.

3.1.1. The Second draft Financial Sector Regulation Bill, 2014 follows comments received on the first draft which was approved by Cabinet in December 2013. The aim of the Bill is to make the financial sector safer by implementing the ‘twin peaks’ regulatory system, which is a comprehensive and complete system for regulating the financial sector, prioritising the customer and protecting their funds.

The ‘twin peaks’ approach to financial regulation underpins a comprehensive regulatory system, with two aims: (a) to strengthen the financial stability and soundness of financial institutions by creating a dedicated ‘Prudential Authority’ (within the South African Reserve Bank) and (b) to protect financial customers and ensure that they are treated fairly by financial institutions by creating a dedicated Financial Sector Conduct Authority, which also supervises how financial services conduct their business.

The Bill will provide the Financial Sector Conduct Authority and the Prudential Authority’ jurisdiction over all financial institutions and provide them with a range of supervisory tools to fulfil their mandates.

This goes beyond two regulators as it sets up an underlying and harmonised system of licensing, supervision, enforcement, customer complaints (including ombuds), appeal mechanism (tribunal) and consumer advice and education.

3.1.2. The Draft Market Conduct Policy Framework drives fair treatment of customers in the financial sector, which is a key lesson for South Africa from the 2008 Global Financial Crisis. While South Africa's financial sector has proven to be resilient, government has recognised that the sector could be delivering better outcomes for financial customers and the economy.

There have been a number of well-known market conduct failings in South Africa's financial sector, and government has intervened to address these. However, the persistence of systematic market conduct challenges has highlighted the need for a more comprehensive and holistic approach to addressing the problem of poor conduct across the financial sector in its entirety.

3.2. Cabinet approved submission of the Plant Breeders Rights Amendment Bill to Parliament. The Bill amends the Plant Breeders' Rights Act, 15 of 1976. The Bill aims to strengthen the protection of intellectual property rights relevant to new varieties of plants. Such protection contributes to economic growth as it has a positive impact on the competitiveness of South Africa's agricultural sector.

Some of the key amendment proposals include: extending protection to all plant genera and species; addressing matters of infringement of plant breeders' rights through the appropriate fines and penalties and defining the limits and the beneficiaries in the application of farmer's privilege; and empowering the Minister to establish a Plant Breeders' Rights Advisory Committee to advise the Registrar on matters related to plant variety protection.

3.3. Cabinet approved the submission of the Plant Improvement Amendment Bill to Parliament.

Plant improvement in South Africa is regulated by the Plant Improvement Act, 1976 (Act No. 53 of 1976) which has been amended a few times, the last being in 1996. The amendments align the scope and provisions of the Act to the Constitution and other related legislation in the agricultural sector.

The Bill enhances sustainable crop production in South Africa by regulating the quality of plants and seed.

The significance and role of plant improvement legislation lies in recognising the importance of quality plant propagating material to support sustainable production as well as participation in the global market by setting quality standards for plants and seeds and the types of business dealing with plants and seed.

3.4. Cabinet approved submission of the Performing Animals Protection Amendment Bill to Parliament.

The Bill amends section 2 and 3 of the Performing Animals Protection Act 1935 (Act No. 24 of 1935) which were declared unconstitutional insofar as they relate to Magistrates deciding on and issuing licenses to persons intending to train and exhibit animals and to persons who use dogs for safeguarding.

The Bill proposes to remedy the defect identified by the Constitutional Court by transferring the functions of issuing of licenses for performing animals from the Judiciary to the Executive.

This is within the context of the Animal Protection Act, 1962 (Act No. 71 of 1962) which consolidates the laws relating to the prevention of cruelty to animals.

#### 4. Cabinet's Position on Current Issues

4.1. Cabinet calls on all South Africans to join the fight against Ebola by participating in the African Union SMS resource mobilisation campaign. The African Union Commission has so far raised more than 20 million dollars in donations through its hashtag "#AfricaAgainstEbola" campaign, but more is still needed. By sending a 'Stop Ebola' SMS to 40797 South Africans will not only be donating R10.00 but will also fuel the hope and determination that Ebola can and will be stopped.

4.2. Cabinet wishes all a restful, peaceful year-end holiday and urges South Africans to put Ubuntu/Botho in practice by assisting those in our communities that are unable to support themselves and to show compassion as a nation that cares for, and respects each other. All parents to take care of their children during this period. Victims of abuse must speak out, report abuse and contact the 24 hour command centre 0800 428 428.

Cabinet calls on all South Africans to take every precaution during the upcoming festive season, stay away from the abuse of alcohol and drugs, and to enjoy the holiday period in a safe and responsible manner. All South Africans have a part to play in curbing incidents of crime, accidents and abuse, which tend to increase during this period.

Cabinet reiterates that traffic officials will have a zero tolerance approach to lawlessness on our roads during this festive season. We urge all road users to adhere to the speed limit; ensure vehicles are roadworthy; not to drive intoxicated and to wear safety belts. Pedestrians are urged to ensure that when using the roads they do not endanger their well-being or that of motorists.

Government will play its part by leading a range of campaigns such as Healthy Lifestyles and Arrive Alive in a bid to partner with communities to promote responsible and safe behaviour.

4.3. Cabinet is saddened by the tragic killing of South African teacher Pierre Korkie who was in Yemen as well as that of Werner Groenewald, and his two children, Rode and Jean-Pierre who died in an attack in Afghanistan. Cabinet conveys its condolences to their families and friends.

4.5 The work to identify the remaining 11 South Africans who died tragically in the Nigerian building collapse continues and government is intensifying efforts to ensure their remains are brought home without undue delay.

4.6 Cabinet conveys its condolences to the Gigaba family on the loss of their father, Reverend Jabulani Gigaba. He was the father to the Minister of Home Affairs, Mr Malusi Gigaba. Cabinet also conveys its condolences to the family and friends of Sisi Mabe, who was the Speaker of the Free State Legislature.

4.7 Cabinet congratulates the national soccer team Bafana Bafana and coach Ephraim "Shakes" Mashaba on qualifying for the Africa Cup of Nation 2015 in Equatorial Guinea which begins on 17 January 2015, and calls on all South Africans to support the national team as they fly our flag high.

4.8 Cabinet noted the launch of the Human Settlements Youth Brigade on 1-2 December 2014 by the Departments of Human Settlements, Small Business Development, and the National Youth Development Agency (NYDA) at the National Human Settlements Youth Summit. The Summit deliberated on the empowerment programmes of the departments targeting young people and how they can participate in the delivery of houses. At the end of the Summit all stakeholders signed the National Human Settlements Youth Accord which



serves as a statement of intent towards creating a holistic and integrated approach to human settlements delivery through youth mobilisation, development and participation in a form of National Human Settlements Youth Brigades. The intention is to mobilise young people behind the target of 1.5 million housing opportunities and aims to recruit and train about 10 000 Youth Brigades in the next five years.

## 5. Upcoming events

5.1 On 12 December 2014, the President of South Sudan, His Excellency Salva Kiir Mayardit will pay an official visit to South Africa where he will be hosted by President Jacob Zuma in Cape Town.

## 6. Appointments

Cabinet approved the following appointments subject to the verification of qualifications and the relevant clearance:

### 6.1. To the Council for Scientific and Industrial Research Board:

- a) Dr Ramatsemela Masango (Chairperson);
- b) Prof Thokozani Majozi;
- c) Prof Mamokgethi Phakeng;
- d) Dr Philip Hugh Goyns;
- e) Dr Ayanda Noah;
- f) Dr Antonio Llobell;
- g) Ms Phindile Baleni;
- h) Adv Ghandi Badela;
- i) Mrs Mokgadi Maseko; and
- j) Mr Joel Netshitenzhe.

### 6.2. To the Air Services Licensing Council:

- a) Dr. Malindi Neluheni (Chairperson);
- b) Ms. Kenosi Selane (Vice Chairperson);
- c) Adv. Frans Johannes van der Westhuizen;
- d) Mr. Bheki Innocent Dladla; and
- e) Ms. Sibongile Rejoyce Sambo.

### 6.3. To the International Air Services Council:

- a) Adv. Phetole Patrick Sekhule (Chairperson);
- b) Dr. Xolani David Gwala (Vice-Chairperson);
- c) Ms. Deshnee Govender;
- d) Adv. Lufuno Tokyo Nevondwe; and
- e) Ms Fulufhelo Velda Mphuti

### 6.4. To the Board of the Land Bank and Agricultural Development Bank.

- a) Prof Abdus Salam Mohammad Karaan (re-appointment);
- b) Ms Susan Ann Lund (re-appointment);
- c) Mr Mabotha Arthur Moloto (Chairperson);
- d) Ms Njabulo Zwane; and
- e) Ms Dudu Hlatshwayo.

### 6.5. To the Transnet SOC Ltd Board (Non-Executive Directors):

- a) Ms Linda Carol Mabaso (Chairperson);
- b) Mr Stanley David Shane;
- c) Mr Mogokare Richard Seleke;
- d) Dr Gideon Mahlalela;
- e) Ms Potso Elizabeth Bridgette Mathekga;



- f) Ms Zainul Abedeen Nagdee;
- g) Mr Vusi Matthew Nkonyane;
- h) Mr Peter George Williams;
- i) Mr Brett Gerard Stagman;
- j) Ms Yasmin Forbes (reappointment); and
- k) Ms Nazmeera Moola (reappointment).

6.6. To the Eskom SOC Ltd Board (Non-Executive Directors):

- a) Mr Zola Andile Tsotsi (reappointment and Chairperson);
- b) Ms Chwayita Mabude (reappointment);
- c) Mr Norman Tinyiko Baloyi;
- d) Dr Pathmanathan Naidoo;
- e) Ms Venete Jarlene Klein;
- f) Ms Nazia Carrim;
- g) Mr Romeo Kumalo;
- h) Mr Mark Vivian Pamensky;
- i) Mr Zethembe Wilfred Khoza;
- j) Dr Baldwin Sipho Ngubane; and
- k) Ms Devapushpum Viroshini Naidoo.

6.7. Geoff Qhena has been re-appointed as the Chief Executive Officer for the Industrial Development Corporation. The rest of the IDC Board Members will be announced by the Minister Patal in the next few days.

6.8 Public Service / Other appointments:

- b) Appointment of the Chief Executive Officer of the Land Bank, Mr TP Nchocho with effect from 1 January 2015 on a five year contract to 31 December 2019.
- c) Appointment of the Chief Executive Officer of the Public Investment Corporation (PIC), Dr Daniel Mmushi Matjila with immediate effect, for a period of five years until 30 November 2019.
- d) Reappointment of Mr Murray Michell, the Director of the Financial Intelligence Centre (FIC) for a further period of two years, from 1 January 2015 to 31 December 2016.
- e) Extension of the contract of the Director-General of the Department of Home Affairs, Mr Mkuseli Apleni for a further period of five years, from 1 April 2015 to 31 March 2020.
- f) Appointment of the Chief Operations Officer of the Department of Rural Development and Land Reform, Mr Marks Charles Thibela.
- g) Appointment of the Chief Financial Officer of the Department of Rural Development and Land Reform, Ms Rendani Sadiki.

**Conclusion**

Cabinet would like to wish everyone happy holidays and let's come back energized in 2015 collectively ensure we deliver on the mandate of the government. Together, we move South Africa forward.

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## Paul O'Sullivan: Ex-Eskom chair Tsotsi provides State Capture's "smoking gun"

22nd November 2017 by Alec Hogg



**L**ONDON – Former Eskom chairman Zola Tsotsi dropped a proverbial State Capture bomb in South Africa's Parliament this morning. His statement to the investigating committee unpacks how he was bullied by the Guptas and State Enterprises minister Lynne Brown, and implicates president Jacob Zuma in an identical manner to that what was previously explained by whistle-blowing ANC politicians Vytjie Mentor and Mcebisi Jonas. The former Eskom chairman Tsotsi says Zuma was in the room when the chair of his foundation and former chair of SAA Dudu Myeni instructed Tsotsi to toe the plunderers' line or be dismissed. Forensic investigator Paul O'Sullivan has been closely following events and unpacks the relevance of Tsotsi's statement, which was made under oath. He reckons this is the "smoking gun" which will bury the Guptas and their puppets, and, he avers, very possibly end the Zuma presidency. The audio of the interview with O'Sullivan is followed by Zola Tsotsi's full statement as it was delivered to Parliament this morning. Dynamite. – Alec Hogg

Oops, we couldn't find that track.

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**Joining us on the line from Johannesburg is Paul O'Sullivan. There have been dramatic things going down in Parliament this morning. Paul, you've been following the story closely given the work that Forensics for Justice does. Just give us an insight into Zola Tsotsi, the former chairman of Eskom and the evidence that he led today. Was any of this expected?**

No, absolutely not, Alec, and in my opinion, it's a bombshell that's been dropped ^ because the statement that he read out in Parliament today is the first evidence,



what I call the 'smoking gun' of the involvement in the President in State Capture. What Zola Tsotsi had to say left a lot of people with mouths wide open. It's just shocking and it's unbelievable. I think it could signal the fall of President Zuma.

**Just explain, when you say, 'the smoking gun,' how so?**



Paul O'Sullivan

Well, what he explained today was not known until today. It was probably known by a small group of people, but effectively what happened was he was appointed as the Chairman of Eskom back in, I think, 2014. Now, when he was appointed he was working with the then minister, which was Gigaba and he had a cordial working relationship with Gigaba. As we know, soon after Gigaba handed over to Lynne Brown in May 2014. So, he then had to cultivate a relationship with Lynne Brown, which he was trying to do and he thought he was getting there. Until all of a sudden in February 2015, he got a phone call and he had to go and see Lynne Brown. This was now probably 2 or 3 days before that fateful State of the Nation Address where the Secret Service used signal jamming technology to stop people recording what was going on, while they threw the EFF members out of parliament. As you know, both the signal jamming and the throwing out of parliament of the EFF by plain clothed police officers was declared unlawful.

^

So, you had the situation where he gets a call from Lynne Brown and he goes to see her, and she makes it pretty clear to him that he doesn't appear to be doing his job properly and if he doesn't she's going to find somebody else. She accused him of interfering with the mechanics of Eskom so, he then told her if scrutinising the executive decisions at Eskom and calling them to account for the decisions amounted to interference with management, and he was happy to continue doing so. She then told him that if he doesn't change his ways she'll find somebody else to do the job. So, he left that meeting and at the very same afternoon he met with Tony Gupta and the meeting was initiated by Tony Gupta.

“  
Read also: [How SA was stolen: NPA, police in bed with Gupta crooks – O'Sullivan team](#)

Tony Gupta told him in no uncertain terms that he, as chairman of Eskom, was not helping them, the Guptas, with anything. He then went on to say, 'we are the ones who put you in the position you are in – we are the ones who can take you out.' That meeting was then short and sweet, and he left there. Then he was supposed to have a board meeting on the 26th February 2015, with the whole board of Eskom. The night before the board meeting he got a call from Zuma and Zuma told him that he was trying to get hold of the Director General and the Minister and he could not, and he wanted to cancel the board meeting so, there you have the first 'smoking gun' if you like. The interference in the running of a state entity by the president and lo and behold an hour later he got a call from the acting-Director General to say that the Minister has asked that the meeting be postponed, i.e. the board meeting. So, put out by this she asked what the reasons were for the postponement and he was told that the Minister had not given any. He then communicated the postponement of the board meeting to other

members. So, then a week or 10 days later, on the 7th March, he got a call from Dudu Myeni, the chairman of SA Airways, and she told him that he had to report to the presidential residence in Durban, which he did.

**Sorry Paul, just to understand this and put it into context. Now, Dudu Myeni is the chairman of SA Airways. She's got nothing to do with Eskom. The chairman of Eskom was charged with running the state utility and he's having board meetings shuffled around and changed so, he can't really run that. Now he's been told by Dudu Myeni to report to a meeting. That must have been unusual to him.**

Absolutely unusual to him but remember by this stage he was already put out by the fact that the meeting he had with Lynne Brown and the coincidence was not lost on him but a couple of hours after she had threatened to replace him, he got a call from Tony Gupta, and Tony Gupta did exactly the same. He threatened to replace him so, there is absolute evidence of interference in the running of Eskom. But when he gets this call from Myeni she doesn't disclose to him on the phone why the president wants to see him. She said, she wasn't prepared to discuss it on the phone. So, off he goes to Durban and he arrives at the presidential residence and he's met by Dudu Myeni. Her son, Thabane now, Thabane Myeni is the son of Dudu Myeni but his father is well known to be Jacob Zuma himself, but with them was another gentleman a guy called Nick Linnell.

“ See also: <http://www.presscouncil.org.za/Ruling/View/dudu-myeni-vs-zululand-fever-2267>

Now, I've done a lot of research into Nick Linnell. He's a 'Mr Fix-It' for Dudu Myeni. In fact, he's been attached to her side since 2010. In 2011, when she was

called out for arrant decisions at the Water Board in Richards Bay. Nick Linnell was the one that took the media on at the press ombudsman and attempted to get them a wrap over the knuckles for the story they wrote about Dudu Myeni, and it backfired but what he did was he left an audit trail that he was acting for Dudu Myeni, and we'll come back to Nick Linnell in a minute. So, he was introduced to him as a lawyer and then, according to his statement he says, 'Myeni then proceeded to outline the purpose of the meeting.' Namely, that the situation of Eskom's financial stress and poor technical performance warrants an enquiry into the company to be instituted.

“ See also: <http://ewn.co.za/2015/04/02/First-on-EWN-SAA-chair-accused-of-receiving-kickbacks>

She further elaborated that in the course of the said enquiry, three executives, namely the acting CEO, Tshediso Matona, the group executive for group capital, Dan Marokane, and group executive for commercial, Matshela Koko were to be suspended. He was shocked by this. He didn't know what to say but while he's having the discussion Myeni is explaining to him that there'll be no prejudice by the executives. She doesn't explain why she's getting involved in the running of Eskom and shortly after this the president himself entered the room.

### **So, Zuma comes in as well?**

Yes, Jacob Zuma himself, walked into the room so, there you've got Jacob Zuma, Myeni, this guy Nick Linnell, who purports to be an attorney but we know he's not. He was an attorney in the then Rhodesia. He's now 66 years' old and he has no business being involved in all these state-owned entities. So, you've Myeni, Nick Linnell, and Myeni and Zuma's son, Thabane, sitting there and the president asks,



‘what are they are going to discuss?’ Myeni then repeats the whole process and explains that these three executives have to be suspended. Now, for the first time in all the investigations that have been going on we now have the mention of Zuma himself in State Capture, which has been absent so, this is a watershed moment in the investigations into State Capture. But it goes a step further. After explaining, with the president present, and Myeni seemed to be running the meeting, she then stated that Nick Linnell had assisted her with a similar situation at SA Airways and she was making him available to assist Zola with the suspension of the Eskom executives.

“ See also: <http://city-press.news24.com/News/SAAs-R167K-a-month-adviser-20150809>

**A lot of this stuff, Paul, sounds like what happened when you first of all had Vytjie Mentor with her engagement with the Guptas and having Zuma in the room next door. Then subsequent to that what Mcebisi Jonas said happened with him and his engagement with the Guptas. It seems like in this case though, it wasn't a Gupta doing the messaging it was Dudu Myeni.**

Yes, Dudu Myeni herself. Now, we've long known that Dudu Myeni is joined at the hip with Zuma. She was his mistress at one stage and we also know that Thabane is the son of both of them, and she's attempted desperately to conceal that but she's failed miserably. What she's now going to have to do, and I'm hoping that parliament will issue her with a summons as part of the Eskom enquiry, and bring her to parliament and get her to explain why she was interfering in the affairs of Eskom and why she was doing so with the blessing of Jacob Zuma. Now, I think we've mentioned before that Dudu Myeni is also the founder and chairman of the ^

Jacob Zuma Foundation. It's worth noting that I have alleged that the Jacob Zuma Foundation has been used for money laundering by virtue of the fact that payments have been made to the Jacob Zuma Foundation and those payments have not been accounted for. Now, curiously for the last 3½ or 4 years the Jacob Zuma Foundation has not filed audited accounts.



File Image: Duduzile Myeni speaks during a visit to the SAA's offices by President Jacob Zuma in Johannesburg on May 6, 2016. Photographer: Waldo Swiegers/Bloomberg

So, you're just left wondering what the role of Dudu Myeni is in all this nonsense and I'm hoping that we'll get her into court sooner rather than later, and get her to explain this. Forensics for Justice – on our website you can see the docket that we've opened against Dudu Myeni and it's quite a substantial docket with oodles of prima facie evidence. We're now going to be adding a supplemental statement to that docket asking for her to be charged with additional counts of corruption in respect of her relationship with Zuma, and how they bullied this chairman of Eskom. When the chairman of Eskom did not go along with their plan a few weeks later he was fired.

^

**The interesting part about all of this, as you say, is that there is a 'smoking gun' now, but by the same token, how do we know that Zola Tsotsi, the chairman, is actually telling the truth? That's got to be the crux to all of this.**

Well, he gave his evidence under oath, Alec, and he prepared a statement, which I've sent to you and I think you should publish it on your website. Although the statement itself is not signed, he gave his evidence under oath. I think that, at the end of the day, the best way to unpack this is to subpoena this woman to parliament and let her explain to parliament what her relationship is with Zuma and more importantly, this guy, Nick Linnell. Now, Nick Linnell is the 'Mr Fix-It' for Dudu Myeni. Every time she gets into trouble Nick Linnell has been running around trying to put out fires and that includes at the Water Board in Richards Bay, at SA Airways, and as we now know, here he's been assisting her in bullying the chairman of Eskom and he pulled it off. He makes it clear that Nick Linnell actually drew up the suspension letters, which he then served on those three individuals.

**You say he's not a lawyer. What exactly is he, apart from being a Mr Fix-It?**

He was a lawyer in Zimbabwe, at that stage it was Rhodesia, and he in fact was a magistrate in Rhodesia.

**So, he has legal training of some sort?**

Oh yes, he absolutely has legal training but he's not registered with the Law Society. I've checked and he's not registered so, he shouldn't be going to meetings and referring to himself as a lawyer. Now, the other point of concern is this. She engaged his services whilst she was running the Water Board and she paid for his services from that Water Board. She then engaged his services and paid him R167 000 a month without any employment contract and without any procurement processes being followed whatsoever at SA Airways. What did he do? He worked together with Dudu Myeni instructing a law firm, ENSafrica, in bringing false



charges against the then CEO of SA Airways, Monwabisi Kalawe. In fact, the law firm didn't only do that. They went after all the executives that she wanted to remove from SA Airways so that she could have her dirty hands on the tender processes of SA Airways. As you know, OUTA brought an application to stop her from paying R256m to BnP Capital last year and it just goes on and on.

I think we now have, what I consider to be a 'smoking gun' and we're going to be adding another supplementary statement. I've already written two weeks ago, to the National Director of Public Prosecutions and I've requested a certificate that they don't intend to prosecute Myeni because they're just sitting on the docket that I opened now, in January 2016, and they have to make a decision. If they don't make a decision by the new year, we are going to launch an application in the High Court to force the National Prosecuting Authority to make a decision and issue the certificate because we believe we have enough to prosecute Dudu Myeni privately, and we will do so.

**Paul, just to dwell a little on the National Prosecuting Authority. There have been reports in the last day or so that they're starting to stir into action. That a 'crack' team has been put together to investigate State Capture, etc. What's your reading on that?**

Well, I am aware that the Hawks are busy with it and it makes sense that there would have to be prosecutors guiding the Hawks because on a complex investigation like that, you can't have a situation where the police do the investigation without guidance from the National Prosecuting Authority. So, on these larger investigations, complex frauds and corruption, etc, they tend to be prosecutorial led investigations. So, the initial parts of the investigations would be carried out by the police, in this case the Hawks. They would then take their findings to the National Prosecuting Authority because at the end of the day they're the people that are tasked with drawing up the charge sheet and prosecuting the cases. They would then sit with the investigating team and say,

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'okay, you know what else we need – we need this.' We need a statement from this person explaining, etc, and so on and so forth. When they've got all that together they then make a decision as to whether or not they should prosecute. I think I've made it clear that I see the low-hanging fruit. Until today, the real low-hanging fruit was Brian Molefe. I now see there's two apples hanging on the low part of the tree. The one is Brian Molefe and the other is Dudu Myeni, and I'm hoping that they'll both be picked very soon.



Why no arrests, Hawks? More of Zapiro's magic available at [www.zapiro.com](http://www.zapiro.com).

**Just to follow up after Zola Tsotsi, you had the Minister Lynne Brown, who he implicated in quite a deep way, coming onto the stand and herself saying, 'she would like to see investigations, etc,' this was in parliament. If she's been so deeply implicated in it why is she saying this?**

Well, I think you know there's no 'smoking gun' against her as yet. She seems to be on the periphery of everything, but she would have to explain why she called Zola

Tsotsi for a meeting a few days before the State of the Nation Address in CT in 2015, and demand from him to stop interfering in the executive running of Eskom and if he did not do so she would replace him. It just doesn't sound like pure coincidence that 2 or 3 hours later he gets an unsolicited call and a meeting with Tony Gupta, and he pretty much said the same thing. So, somewhere it needs to be unpacked and if it can't be unpacked in parliament then it can be unpacked in a criminal trial and these people can be put on the stand and forced to explain what's going on.

“  
Read also: Paul O'Sullivan promises a Selebi repeat for Brian Molefe: "I'll put him in jail."

**It's extraordinary developments to the North of us, in Zimbabwe and in SA as well. There has to be some wash-over of this effect but the SA Parliament, certainly in this case, appears to be hellbent on bringing the truth to the surface. Do you think that's an accurate assessment or do you think that, as we've heard it all before we heard a similar story, as I mentioned with Vytjie Mentor and with Mcebisi Jonas, that this whole thing might just disappear?**

I think it's a bit further down the line now than that that it can just disappear. So, there has to be some sacrificial lambs at least and I would like to see the full gamut of these people being dragged before court and prosecuted. Certainly, we have enough, in my opinion, to indict a number of people, including Brian Molefe, including the suspended CFO of Eskom.

**Anoj Singh.**

Yes, including Dudu Myeni – they all have to explain their role.

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**What about Jacob Zuma though? If one were to see the elective conference vote in his ex-wife, as some people say will occur, could this whole thing then be swept under the carpet?**

It's possible because at the end of the day we all know that it's not supposed to happen but we all know it does happen, and I'm talking about executive interference in the criminal justice system. So, you do have people giving instructions to prosecutor, senior prosecutors and senior police officials and that needs to stop. I suppose you could say, maybe the National Director of Public Prosecutions has realised that the writing's on the wall if he doesn't start doing something soon. I imagine it will be too late if he waits until after the elective conference and maybe someone like Cyril Ramaphosa gets in because he'll be toast.

**So, how do you see things developing from here, Paul?**

Well, I've said it before, Alec. If the elective conference results in an ethical and good person becoming the new president of the ANC, then I think they have 18 months before the next elections and I think the ANC will win the next elections. If, on the other hand, a Zuma-ite or a Gupta-ite gets appointed as president of the ANC then we'll have another 18 months of looting and then the ANC will lose the 2019 elections.





Watchdogs. More of Zapiro's brilliant work available at [www.zapiro.com](http://www.zapiro.com).

### **And those 18 months of looting can they not be stopped in any way?**

I think that will happen, Alec. Civil society has become more and more alert to these things and steps are being taken, even right now so, we're going to see more and more civil cases putting stops to this looting. I think what's happened is people are talking a lot more now, despite the conduct aimed at attacking whistleblowers. Look at what's happened to me. I've been arrested I don't know how many times and dragged off planes and have my offices searched illegally, all of it illegal, but I think those days are coming to an end soon and if they don't come to an end soon then the courts will force it to come to an end.

**Just to close off with. This parliamentary enquiry, from the outside and given the history of how the State Capture process has been able to roll, how was it even possible for it to occur?**

Well, let's not worry about how it was possible. It happened and it would appear to me that the people running the enquiry are decent people. We can't tar everybody. We can't tar every single ANC MP as a criminal. That would be impossible. Some of them are good people and their hearts are in the right places. They just allowed themselves to be persuaded, for want of a better expression, as to how they should vote in certain issues, which should have been free votes but they weren't. I think that at the end of the day, even the ANC MPs themselves are starting to realise that this thing is getting out of hand. I do not see a situation

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where Jacob Zuma, regardless of who gets in, in December. I do not see a situation where Jacob Zuma will still be the president of this country by Easter next year.

**You do however, or you did say that you expected to see arrests before December. Are you still sticking with that?**

I'm saying, I'd like to see those arrests before December. I think, looking at the progress that's taken place on the investigations, it may not now happen but I'm not ditching it. I'm focusing on seeing at least one arrest before December. When I say, 'before December,' I think I've said before Christmas so, let's work on the end of the year.



**Yes, and the final point. It's interesting to see that the SABC is now livestreaming this from parliament. That's quite a different SABC to the one that used to be around not long ago, under Hlaudi's reign.**

Yes, it's nice because the SABC have got no money for programs and it doesn't cost any money to live stream from parliament so really, I guess, it's free entertainment. But at the end of the day, I think the SABC is now pretty much uncaptured and we're going to see other institutions becoming uncaptured. I think it's fair to say that Eskom are in the process of becoming uncaptured. The same will happen at Transnet and Prasa, and SA Airways we know is already uncaptured. So, yes, I think the future does look good. I'm always very positive about the future. I believe that justice will prevail, and that good always triumphs over evil.

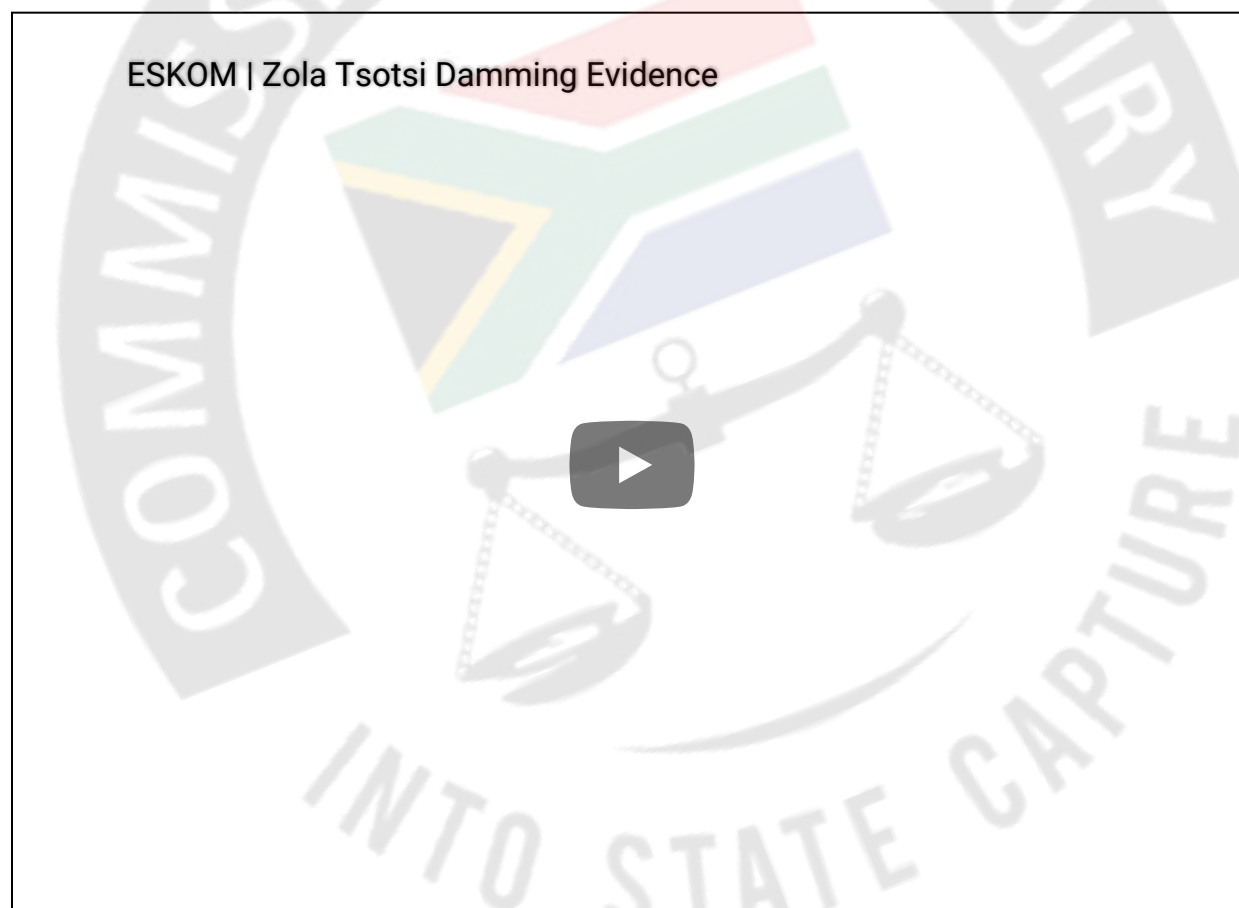
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**Paul O'Sullivan, talking to us from Johannesburg.**

**Statement by former Eskom chairman Zola Tsotsi to Parliament's Portfolio Committee on State Enterprises**

I feel privileged to have been afforded the opportunity to appear before this committee so that I may make my contribution towards the unravelling of the issues that have contributed to current state of affairs at Eskom.

The lapses in good corporate governance that have been occasioned by poor decision making have opened up the company to exploitation by unscrupulous rent seekers.



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Those of us who have been and continue to be at the forefront of these events, including any who may have even peripheral knowledge thereof, have both the responsibility and moral obligation to voluntarily provide this knowledge to this Committee and the nation.

In accordance with the information I received that Eskom will make available any documentation I may require in support of my preparation for my appearance before this Committee,

I regret to say that, despite numerous requests, Eskom did not avail me a single document. I have therefore had to rely on my memory of the pertinent events during my tenure at Eskom. This is unfortunate as it limits my ability to support the work of this committee. Be that as it may, I am here committed to presenting my recollections to the best of my ability.

### 1. The TNA Contract



1.1 On my arrival at Eskom in 2011, there was an existing TNA (The New Age – a newspaper which was part of Gupta Media) contract which was in progress. It was due to expire in about June 2014. At the time of its expiry, Collin Matjila was Acting Chief Executive.

1.2 Mr Matjila acceded to the request that the contract be renewed. In so doing, he failed to apply a provision in the delegation of authority that enjoined him to deal with sponsorship through a Committee that was put in place to deal with such

matters thus by-passing the process and acting outside of his delegation of authority. The finance Director among others in his management team raised objections to his actions, contending that he used the wrong delegation of authority, and that the correct one would require him to make the decision on sponsorship as part of a Committee.

1.3 Mr Matjila disputed this position and proceeded to sign the contract. A whistle blower reported this action to the chairperson of the Audit and Risk Committee, stating that the acting CE had flouted procurement regulations. The ARC chairperson then brought the matter to the attention of the Board which duly delegated the ARC to institute an audit inquiry into the matter.

1.4 The ARC appointed Sizwe Ntsaluba Gobodo who produced a report with a finding that Mr Matjila had interpreted his delegation of Authority incorrectly by using a wrong process to award the TNA contract, thereby infringing the provisions of the PFMA in that his authorised expenditure would then be irregular.



Collin Matjila. Photo taken from  
<http://www.destinyman.com>

1.5 Mr Matjila then requested the Board to seek a legal opinion in this matter, to which the Board agreed.

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1.6 The legal opinion was provided by the firm of Ledwaba Mazwai Attorneys who upheld the SNG findings that Mr Matjila had acted outside of his delegated authority and recommended that the Board discipline the Acting CE

At this point, Mr Matjila was no longer with the company as the substantive CE Mr Matona was then in office, so the Board could not institute disciplinary action after the fact. Further, the lawyers advised that cancellation of the contract would result in expensive litigation and serious losses to the company.

They also afforded the Board advice that meant accepting the contract, i.e, ratifying it meant accepting responsibility for Mr Matjila's breach. After deliberations the Board accepted this advice as an irregular expenditure finding was too ghastly to contemplate. The board then resolved to let the contract run the remaining few months of the extension.

## **2. IT Procurement**

2.1 I had established a practice of having regular weekly briefing meetings with the Chief Executive. At the time of the procurement of the IT services, Mr Matjila was Acting CE. It was in one of these meetings that I was, for the first time, informed that there was an IT services procurement process in progress to replace T-Systems contract.

2.2 I next learnt from the report of the Board Tender Committee (BTC) to the Board that the process had hit an impasse in that the negotiations with the preferred bidders were unsuccessful. Consequently the recommendation to the BTC was to extend the T-systems contract for a further 2 years.

2.3 To the best of my recollection, circumstances of the suspension of Mr Sal Laher were never raised at the Board, neither before nor after the suspension.

## **3. The Duvha Boiler**

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3.1 The procurement process of the Duvha Boiler was started after my time at Eskom. I therefore have no knowledge of this matter.

“ Just gets worse and worse! Zola Tsotsi says Salim Essa gave him list people to appoint to Eskom Board positions. He gave different list to Minister Brown for approval but list that came back to him from Minister was same as Essa's. [#EskomInquiry](#)

— Anton Eberhard (@AntonEberhard) [November 22, 2017](#)

#### 4. Suspension of four executives

4.1 In order to do justice to the matter of the circumstances surrounding the suspension of Messrs Matona, Koko, Morokane and Molefe, please indulge me to sketch some of the events that occurred prior to this, which events take us to the time of the appointment of the new Board in early December 2014.

4.2 During the first 6 or so weeks the new Board members were busy with inductions and only started to get to grips with Eskom's business towards the end of January 2015.

4.3 In the period from the arrival of Minister Brown at Public Enterprises Department in May 2014 till the new Board was in place, I had been trying to cultivate a working relationship with the Minister and aspired to achieve one similar to how I related with the previous Minister Gigaba.

“ Tsotsi's evidence crucially places President Zuma as directly involved in meddling with SOE's and places witnesses “at the scene” [#EskomInquiry](#)

— Annika Larsen (@AnnikaLarsen1) November 22, 2017

4.4 It became patently clear to me that I was not succeeding in this regard when the Minister called me to a meeting a day or two before the State of the Nation Address (SONA) in February 2015. At this meeting, she stated as follows:

“Chairman, I have received complaints from management and Board members that you are interfering in management. Please refrain from doing so, because if you don’t, I shall have to find someone else to do your job!” My response was “Minister, most Board members hardly know what I look like, let alone not having worked with me yet. As for management, if scrutinising their decisions and behaviour and calling them to account constitutes interference with management, then I will happily continue doing so. If you had acceded to my request that we have regular briefing sessions, even this meeting would not have been necessary” where upon the Minister responded by saying, “Chairman, you go and do what you have to do, I will go and do what I have to, there is no reason for you and I to talk about anything.” That is how the meeting ended.



Tony Gupta

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4.5 The very same afternoon, I was approached by Tony Gupta (Tony) who requested that we meet. At the meeting, Tony told me "Chairman, you are not helping us with anything. We are the ones who put you in the position you are in. We are the ones who can take you out!" My response was "Do what you have to do, and let me carry on with the job that the Cabinet appointed me to do!" So ended that meeting.

4.6 It is at this time that I felt that some sinister clouds are gathering because the coincidence of the two events was not lost on me. Our first Board meeting was scheduled for 26 February 2015. On the evening of the eve of the meeting day, I received a phone call from the President of the Republic of South Africa (the President) who informed me that he had tried to get hold of the Minister and Deputy Minister to no avail. The President said he was able to locate the Acting Director General and asked if she has spoken to me, which at that point she had not. The President then informed me that the Board meeting will not be taking place and that the Acting DG will call me to ask me to postpone it.

Shortly thereafter I received a call from the Acting DG to say that the Minister has asked that the meeting be postponed. When I asked for the reasons for the postponement, I was told that the Minister had not given any. I then had the postponement communicated to the Board members.

4.7 The totality of these events had generated some apprehension in me about things to come. Hardly a week later, I was called by Dudu Myeni. She said that I should avail myself for an audience with the President, and declined to discuss any details over the phone.

4.8 On or about 7 March 2015, I arrived at the Durban Presidential residence and was met by Dudu Myeni, her son Talent, and a certain Mr Nick Lennell, who was introduced to me as a lawyer. Ms Myeni then proceeded to outline the purpose of the meeting, namely, that the situation of Eskom's financial stress and poor



technical performance warrants that an inquiry into the company be instituted. She further elaborated that, in the course of the said enquiry, three executives namely, Acting CE Tshediso Matona, Group Executive for Group Capital Dan Marokane, and Group Executive for Commercial Matshela Koko, are to be suspended.

“ So many questions arising from #EskomInquiry. Why was #DuduMyeni meddling? What agency did Tony Gupta have? What exactly is Minister Lynne Brown's relationship with Tony Gupta? If Tsotsi's testimony is true, heads must roll.

— Mandy Wiener (@MandyWiener) November 22, 2017

4.9 I found this matter altogether shocking and proceeded to question the need for suspending these executives as I saw this as a recipe for inducing instability in the company. She retorted that even the War Room was experiencing frustration with the decline in performance of the Company, and that the enquiry was essential. In her view, the suspension of the executives will not create difficulties because it will be explained that they are not accused of wrongdoing, but are being asked to allow space for the enquiry to proceed unencumbered by their presence. Shortly hereafter the President entered. After some pleasantries, he requested to know what was up for discussion, whereupon Ms Myeni repeated what she had previously stated. The President then enquired if I knew who the executives are who were to be suspended, to which I responded that I would prefer that I consult the HR Rules of the company to check if there is provision for recusal rather than suspensions to achieve the same objective. Ms Myeni stated that Mr Lennell had assisted her with a similar situation at SAA and is being made ^

available to assist. Mr Lennell then proposed that he draft a resolution for me to present to the Board setting out the rationale for the enquiry. The meeting ended.

4.11 I convened a Board meeting on 09 March 2015 where I presented the proposed resolution. The Board expressed its discomfort with this approach and instead proposed that the Minister be invited to engage on this matter with the Board.

4.12 The Board meeting with the Minister in attendance was convened on 11 March 2015. The Minister gave her support for the inquiry as well as for the suspensions of the 3 executives. The Board then resolved to proceed with both the inquiry and suspensions of the 3 executives. It also mandated the Audit and Risk Committee (ARC) to prepare the Terms of Reference for the inquiry, as well as the People and Governance Committee (P&G) to effect the suspensions.

4.13 At the inception of the P&G Committee meeting following the Board meeting, two astonishing events occurred. Firstly, Dr. Ben Ngubane stated that the name of the Financial Director must be added to the list of executives to be suspended. I immediately raised furious objections. For one, this executive's name was not among the names approved by the Board. More importantly, suspending the FD is going to generate shock waves even internationally especially with our investors and lenders because the FD is seen as the custodian of their investments. Dr. Ngubane responded that the Minister had instructed that the FD's name be added. I immediately called the Minister to raise my concerns and objection, but she rebuffed me.

“

I'm glad Zola Tsotsi is now talking. He told me those things about @SAPresident in two meetings in February, off the record #EskomInquiry

— SikonathiMantshantsh (@SikonathiM) November 22, 2017

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4.14 The second astonishing event had to do with the appointment of the executives who had to act for those suspended. Hardly an hour after the end of the Board meeting which decided on the suspensions, Ms Chwayita Mabude was announcing the names in the P&G of the executives who were going to act. I immediately protested that nobody in the Committee, Ms Mabude included, other than myself, would have known which executives were suitable replacements. Once again Dr, Ngubane stated that these names came from the Minister.

4.15 Mr. Lennell assisted P&G in drafting the suspension letters, which were then individually handed out. I was at pains to assure all the executives that had there been any provision for their recusal other than suspension, we would have preferred to apply it, and also that their suspension does not mean they have been found guilty of any wrongdoing.

4.16 The following morning, 12 March 2015 at 10h00, I addressed a press conference wherein I announced the suspension of the 4 executives and the Company's intention to institute an inquiry.

4.17 The afternoon of the same day I was to have the most unpleasant and humiliating experience in all my tenure as Chairman. The head of Eskom Treasury informed me that our investors and lenders from across the world will be calling in to ask for an explanation of the actions of suspending the executives. Indeed I was on line with around 52 individuals trying to defend what essentially was an indefensible position.

“

This should make the headlines: At parliament's #EskomInquiry ex Chairman Tsotsi outlines how President Zuma, Dudu Myeni, Minister Lynne Brown & Board members Ben Ngubane & Chwayita Mabude

^

conspired to force his resignation & that of 4 executives (paving the way for more looting)

— Anton Eberhard (@AntonEberhard) November 22, 2017

4.18 Hardly a week went by and I was faced with having to defend myself against accusations from several board members that I was not consulting the Board in the preparatory work on the inquiry. The Board engaged a law firm to trump up charges against me that I am not fit to be a director of the Company. On 23 March, in the dead of night, I was given an ultimatum by the Board to resign or be charged with lack of fitness to be a director. I resigned under duress.

4.19 The termination of the services of the executives who left Eskom occurred after I had left.

In conclusion, I would like to state here that corruption is the scourge that is denying our people the opportunity of a decent and prosperous livelihood. It is the duty of all of us to rid our society of this evil. I therefore applaud the initiative taken by this Honourable House to get to the bottom of maladministration at State Owned Enterprises. I wish the committee well in this endeavour.

Thank you.

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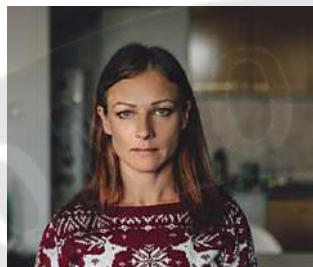
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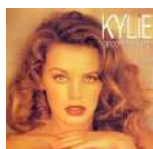


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## NPO opens criminal case for capture of Eskom

🕒 21:15 07/12/2017 👤 Angelique Serrao

**news24**

Johannesburg - Non-profit organisation Forensics for Justice has opened a criminal case against a range of top government executives and Gupta associates in relation to the alleged capture of the Eskom board.

In a sworn statement executive director of Forensics for Justice, Sarah-Jane Trent, opened the case against former chair of SAA Dudu Myeni, Minister of Public Enterprises Lynne Brown, President Jacob Zuma, Nicholas Linnell, Tony Gupta, Salim Essa, Ben Ngubane and Thalete Myeni, using a statement made by ex-Eskom chair Zola Tsotsi at the parliamentary enquiry into the capture of Eskom.

The statement said that Linnell in 2011 was hired by Myeni to "fix" publicity issues following "her gross misconduct" at the Mhlathuze Water Board. He was again hired by Myeni in 2014 and 2015 for a number of different jobs at SAA. According to Tsotsi's testimony he was also hired by Eskom to assist in getting rid of certain board executives.

Trent said that Linnell claims to be a lawyer, yet he does not appear to be on the South African law society registers.

She said that Linnell in 2015 had been paid more than R850 000 by SAA with no procurement processes being followed and that this made the payments fruitless and wasteful expenditure. Trent said he was purporting to carry out background checks and investigations into forensic consultant Paul O'Sullivan and suspended SAA CEO Monwabisi Kalawe.

"I have checked with the Private Security Industry Regulatory Authority (PSIRA) and it is apparent that Linnell is not registered with PSIRA to carry out investigative work, which is a criminal offence," the statement said.

In 2015 City Press reported on Myeni hiring Linnell as SAA's Mr Fix-It at an average cost to the airline of R167 000 a month.

The story indicated that invoices seen by City Press suggested that Linnell was reviewing forensic reports, writing media statements, drafting letters to ministers and lobbying police for a high-level investigation into O'Sullivan.

### UK investigation

This week British parliamentarian Lord Peter Hain called for an investigation into any bank accounts held in London by South Africa's state-owned entities.

In a speech presented in the House of Lords before a money laundering bill committee, the Parliamentarian mentioned the "shadowy figure" of Nick Linnell who he also described as a "Mr-Fix-It", who in the 1970s operated in Rhodesia (now Zimbabwe).

"It has now emerged that South African Airways, through dubious unauthorised payments to Mr Nick Linnell working hand-in-glove with the remnants of South Africa's notorious apartheid police, have deliberately targeted well-known anti-corruption activists," Hain said in his speech.

Hain said this resulted in unlawful arrests, detention and torture to stop them from exposing systemic state-sponsored corruption.

"There should be an immediate investigation, by the City of London Police, the Metropolitan Police and the financial regulatory authorities, into all bank accounts held in London by any South African state-owned company," he said.

Trent's statement looked into some of the evidence made by Tsotsi in the parliamentary enquiry, which alleged that:



- Tsotsi was unlawfully pressurised to do the bidding of Tony Gupta by threatening him with the loss of his position as Eskom chairperson
- Linnell was unlawfully appointed in an advisory capacity to the board chair of Eskom
- Linnell was allowed to unlawfully prepare letters of suspension for the purpose of unlawfully targeting certain executives at Eskom.

Tsotsi also testified that a meeting took place at Brown's house where Gupta and Essa were present, which Brown denied.

READ: Tsotsi drops Myeni/Zuma meeting bombshell at Eskom Inquiry

"It is clear to me now, and must be clear to the whole country, that the suspects acted with a common purpose in creating an enabling environment so that Gupta family businesses could capture Eskom for their own nefarious reasons, including fraud and corruption on a massive scale," the statement said.

The suspects, acting with a common purpose, did unlawfully and intentionally intimidate and manipulate Tsotsi and in so doing brought about the unlawful suspension and subsequent removal of some Eskom executives, she said.

Brian Molefe, Anoj Singh and Ben Ngubane then took control of Eskom "and proceeded to criminally strip the assets of Eskom, to the benefit of the Gupta controlled companies".

Trent said the suspects acted in a criminal enterprise and should be charged with racketeering and theft of Eskom's assets.

She also requested additional investigations into the alleged conduct of State Security Minister Bongani Bongo and the current chair of Eskom, Zethembe Khoza.

Bongo is alleged to have called the evidence leader in the parliamentary enquiry, Advocate Ntuthuzelo Vanara, and offered him an open-cheque bribe to derail the parliamentary enquiry.

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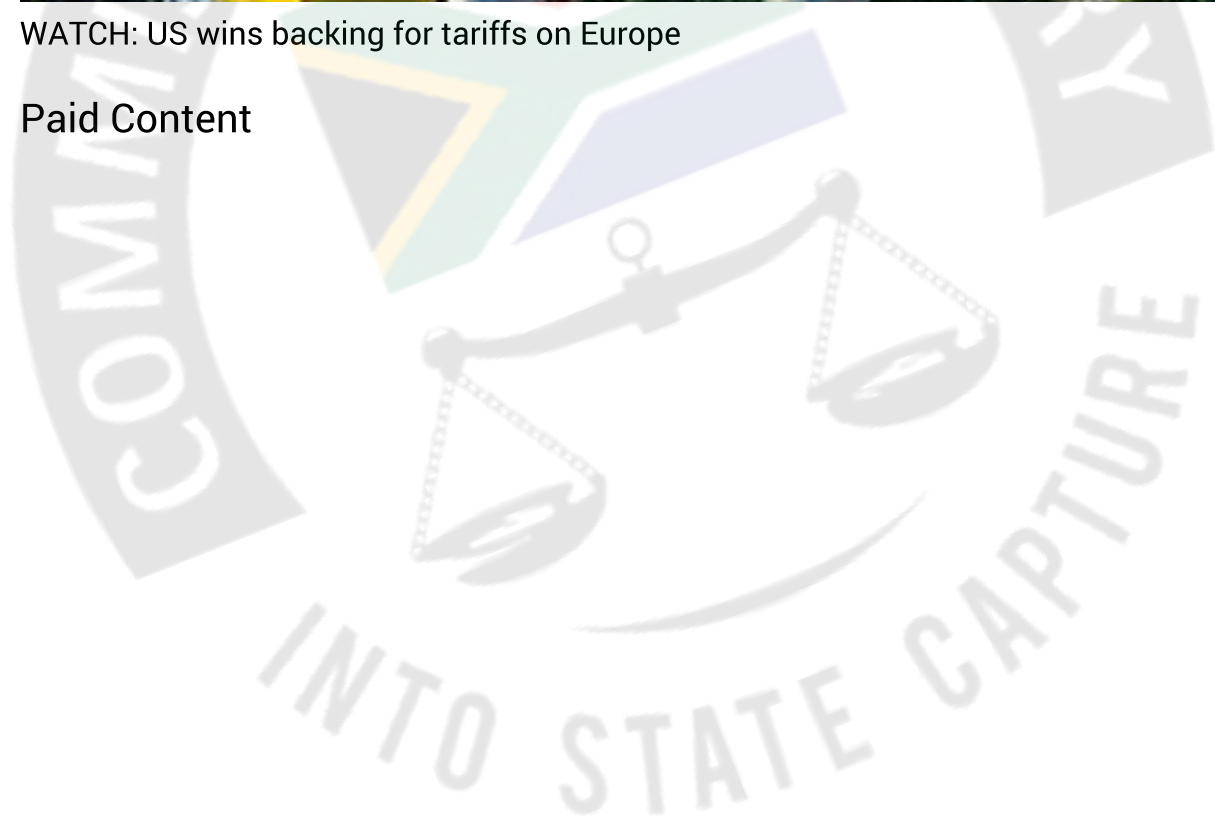


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Tuesday, 18 August  
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LIVE  
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## As it happened - #StateCapture: Eskom has a culture of fear - former Eskom executive

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Tshediso Matona. (Photo: Gallo)

Last Updated 07 Nov 14:10

LIVE NEWS FEED

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07 Nov 14:10



**Eskom has a culture of fear - former Eskom executive**

Eskom's former Group Executive Enterprise Development Erica Johnson admitted that a culture of fear took shape during her last months at Eskom.

She admitted to ANC MP Pravin Gordhan that the culture had only intensified after she had left.

Johnson said a number of incidents struck fear into Eskom employees. When the head of energy was suspended, she became concerned.

"He was a hardworking person, and after a dispute of a certain conversation, he was suspended," she said.

One more incident that concerned Johnson happened in her last month of Eskom, when she became aware that general managers were not willing to engage openly, and was keeping quiet on critical matters.

"I would be sitting at tender board committee and not one member would say anything. The silence in the company was a concern."

She acknowledged that the climate of fear was persisting at Eskom, before she was dismissed.

The hearings adjourned for the day.

07 Nov 13:58

**Ex Eskom boss Matjila pushed hard for The New Age breakfast briefing - former Eskom executive**

Eskom's former Group Executive Enterprise Development Erica Johnson said former interim CEO Collin Matjila had ordered her team to develop The New Age business breakfasts, which amounted to R1,2m per breakfast.

The power utility's R43m contract to sponsor The New Age's (TNA's) breakfast briefings caused a stir in 2014. The paper was owned by the Gupta-family at the time.

Democratic Alliance MP Natasha Mazzone asked Johnson why Eskom had opted for The New Age, and not a top quality news agency.

Johnson said the request came directly from Matjila. "It wasn't something we requested, it was a direct request from Majila and he didn't give a specific reason. We just had to ensure it was justified and effective."

Johnson said she had tried to work with Majila.

"R1,2m is a lot of money," she said.

"It ate up a huge portion of our corporate budget. We were being engaged with Mathila, and we tried to work with him to understand. If we could get people to understand all the challenges Eskom faced, it might be money worth spent. It would've been helpful to have a better stakeholder understanding."

She admitted that she was disturbed by Matjila's request. "We were working with Majila to meet his needs, to see where he wanted to go."

But then Eskom finance director refused to sign the New Age contract, and Matjila took upon himself to sign the contract, Johnson said.

We as a team decided this was not the way we wanted to operate."

When asked whether she thought Matjila was captured, Johnson replied the term was not yet part of the colloquial at that time. "I know he certainly wanted that contract."

### **Eskom R43m New Age deal stirs controversy**

07 Nov 13:58

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### **Eskom R43m New Age deal stirs controversy**

07 Nov 13:22

#### **I couldn't raise alarms - Matona**

Former Eskom CEO Tshediso Matona concludes his testimony by defending himself and his lack of action while critical coal contracts, which were later linked to the Gupta-family, were negotiated.

When asked why he didn't raise the alarms earlier, he said as a CEO he was not involved in the procurement issues, until it was handed to him for further approval. He was suspended before it came before him.

He also said there were several negotiations of contracts going on at the time.

"Why would I target a specific negotiation," he asked.

"I was operating within a specific institutional framework. It excluded the CEO from directly arbitrating procurement. DG's don't arbitrate directly," he said.

Matona was dismissed without further questions and Eskom's former Group Executive Enterprise Development Erica Johnson was called.

07 Nov 12:35

#### **Zuma did not say sorry – former Eskom CEO**

Former Eskom CEO Tshediso Matona said President Jacob Zuma did not apologise for the way the Eskom treated him.

He was suspended amid the Dentons investigation and then cleared of all wrongdoing. But the damage was done and Brian Molefe stepped into the leadership at Eskom.

EFF MP Floyd Shivambu asked Matona if Zuma apologised, as reported in the Mail & Guardian in 2015.

"That is what the newspaper wrote," he told the Eskom inquiry. "That is not quite factual. He did not call me to say sorry about what happened. It is difficult to disclose the contents of a meeting of that nature. I was at home and it was about what career options there are for me.

"Having served in this government from the begging, it was difficult to fight against my own government. Even as hard it was fighting the institution I tried to build. This government has invested a lot in me."

Matona was then appointed as the National Planning Commission's secretariat.

Then, Shivambu asked Matona if his successor, Brian Molefe, ended load shedding?

"If I ever thought I could not end load shedding on my own, I would have left Eskom on my own," responded Matona. "It was a challenging job, but the solutions were there and we could see the light.

"We were making steady gains. By the time I left, we had commissioned the first unit at Medupi because we applied pressure on contractors, saying we would not entertain any more delays.

"I am confident the situation in a matter of time, but unfortunately I was not given the opportunity."

Then, Shivambu interjected: "Therefore the narrative that Brian Molefe was the only one to stop load shedding is not correct. You are saying we could have done it without Brian Molefe?"

Matona repeated: "I was confident that I could achieve. He could not have done that alone. He found a team fighting this war and the plans.

"He achieved the objective, so I don't think Brian would himself claim these exceptional capabilities. He acknowledged the work that had been done before he was there. This is not a competition between Brian and I."

Asked about his payout, he said: "It was handshake, but there was not gold in it.

"It was an equivalent of my year's salary. I tried to negotiate for better. Sometimes, when I saw the numbers, maybe I thought I should have fought harder."

07 Nov 11:59

**Two questions of note:**



**1. Were you ever pressurized by the board?**

"Yes, I indicated that there was an instance where a suggestion had been made for me to retain CEO Collin Matjila and I refused that suggestion."

**2. Did you ever meet the Guptas?**

"I have had no interactions with the Gupta family."

07 Nov 11:38

**Former Eskom chairperson Zola Tsotsi looks on as former Eskom CEO Tshediso Matona speaks during a press conference in January 2015 when they were still in their respective roles. (Photo: Gallo)**



07 Nov 11:21

**Eskom suspended me because I did not fit into their plans - Ex-CEO**

Former Eskom CEO Tshediso Matona said he believes he was suspended because he did not fit into the board's plans for the future of Eskom.

Former Finance Minister Pravin Gordhan asked Matona to explain the board meeting where he was told he was suspended.

"That whole interaction was being managed in a manner that would create a defence for the board that it gave me an opportunity to make representations. It was a farce in my view.

"I could see at the time that the outcome was pre-determined. There was a letter of suspension in front of the chairperson. It was a matter of course that I was suspended.

"I was a bit dazed and confused. All kinds of things were playing in my head. Some of the information started to surface. The chair, Mr Zola Tsotsi, made certain pronouncements.

"I read I had been suspended for refusing to do certain things," he said. "I had refused to keep the former acting CEO Collin Matjila on at Eskom, which I did not want to do as there were allegations regarding his tenure.

"The board did not see me fitting into whatever its plans were. Typically when a new minister joins a department, I would ask if they saw me as part of the future. I recall an episode like that. I concluded that Eskom board did not see me as part of their plans in the future."

Regarding the Dentons Report, which was the result of the investigation that occurred when he was placed on suspicion, he said: "I was never afforded an opportunity to speak to the investigators.

"When they first released one of the versions of that report, it was found that there was no wrongdoing against me or other executives. "I was not favoured a copy of the report. I have still not seen the Dentons Report."

07 Nov 11:10

### **Diesel contracts during load shedding 'illustrated basic flaws of procurement at Eskom'**

Former Finance Minister Pravin Gordhan asked Former Eskom CEO Tshediso Matona about diesel contracts during load shedding, when they needed to power peaking plants to keep the lights on.

Eskom spent R1bn a month on these costs.

"It was a contested issue at the time," said Matona. "It illustrated the basic flaws of procurement at Eskom.

"It seemed that emergency situations had been used as a reason to deviate from what normal procurement would be.

"I have some understanding because you need quick turnaround to keep the lights on, it created a major risk about who got the contracts and why those particular individuals.

"A normal procurement would have prevented this."

07 Nov 11:07

**Let me talk about bugs at Eskom - former CEO**

Former Finance Minister Pravin Gordhan asked Former Eskom CEO Tshediso Matona about an Eskom board meeting on 11 March 2015 where the bugging of the board room had come up.

“Let me talk about bugs at Eskom,” he responded.

“Developments within the company – especially deliberations of the board – were leaking to the media. So, there was a decision that periodically the board room would be swept of devices.

“In the time that I was there, I instituted two such sweeping of the board room.

“On that day, I don’t know where the minister was coming from, because she raised the issue of a bug in an accusatory way,” he said.

“I told her that I periodically sweep these rooms. That interaction did not go as far as who was bugging who.”

07 Nov 11:05

**Former Eskom CEO Tshediso Matona. (Photo: Gallo)**



07 Nov 10:59

### **I decided to leave that sorry and sordid episode – Ex-Eskom CEO**

Former Eskom CEO Tshediso Matona explained that after he was suspended in 2015, he eventually decided to walk away from the sordid episode at Eskom.

He was suspended by former Eskom chair Zola Tsotsi into the maladministration of Eskom just seven months after he started. He had been the former director general of Public Enterprises before that.

“I expressed a disagreement with the initiation of a new report and an investigation that required my removal from the company without any basis whatsoever for why I should be removed.

“I was handed a letter of suspension and believed that action was wrong. I believed it was wrong and went to the Labour Court and sort my reinstatement. It was sent to the CCMA.

“When things got there, I found that the Eskom board had excluded any possibility of my return as an outcome of that arbitration. In fact, I was made an offer to leave the company.

“I could have fought further and challenged the issue. I realised I would have bankrupted myself as I would have had to pay out of my pocket.

“I chose to walk away and leave that sorry and sordid episode behind me and move on with my life. The relationship of trust between myself and the board had been dealt a mortal blow.

“I was just pleased that out of principle I had challenged that because I believed it was wrong. It was very wrong,” he said.

07 Nov 10:45

### **Matona takes credit for Eskom's plant maintenance revival**

Former Eskom CEO Tshediso Matona has taken credit for getting Eskom's plant maintenance programme up and running. He was chief executive for seven months in 2014 to 2015.

His successor, Brian Molefe, has been celebrated for his plant maintenance programme, but Matona indicated that he had done the hard work to get this programme going.

“Eskom relied on a great deal on diesel to use the peaking plants,” he said. “That created massive pressure on the finances of the company. It was a stop gap to create the room for Eskom to conduct maintenance,” he told Parliament.



“The big problem that accounted for generation and supply was the breakdown of the units at Eskom. They were simply tired. Maintenance had been deferred for too long.

“The story which I heard when I got there was that in 2010, for purposes for the World Cup, a decision had been taken to defer maintenance for these plants. Due to local elections, a decision had been taken to defer maintenance.

“There had been a culture of deferring maintenance, simply because the executives at Eskom feared load shedding and resisted having to load shed for as long as possible.

“When I got there, we could no longer defer maintenance. The main thing was to reinstate a discipline of maintenance. Eskom fell in line. The rewards of those plans started to show soon after I left.

“The actual programme of doing maintenance started in the few months that I was there,” he said.

07 Nov 10:35

### **Just as Eskom was coming right, load shedding hit - Matona**

The financial performance of the company was the major challenge facing the Department of Public Enterprises in 2014, said Tshediso Matona, the former Public Enterprises director general and Eskom chief consecutive.

He first explained the situation when he was director general.

“Eskom revenues were coming under pressure, partly due to early signs of economic slowdown. It was starting to become apparent in the cause of that year.

“There was the issue around the tariff regarding whether it was sufficient to balance the financials,” he said.

“There were challenges around debt and collection. The long and short was that Eskom was in serious financial straits. That shareholder became directly involved around that issue.

“As director general, I interacted with National Treasury quite a lot at the time. We were jointly looking at this problem. We also interacted with Nersa as the regulator, who provided very valuable information and advice.

“There was a decision to provide Eskom with a financial injection to the tune of R23bn,” he said.

“That package included the conversion of a loan to equity. That seemed to deal with the financial challenges.

"In parallel, new challenges emerged to supply electricity without interruptions. Incidences of load shedding started to occur in 2014."

Two months after he was appointed Eskom CEO, the Majuba Power Station coal silo collapsed, intensifying load shedding.

"It accelerated towards the end of the year, when I arrived as CEO. As soon as I arrived there, load shedding intensified," he said.

"Operational performance is the responsibility of the company," he said. "We embarked on a number of strategies to solve that problem."

07 Nov 10:28

### **Matona explains the role of the minister in Eskom oversight**

Inquiry evidence leader advocate Nthuthuzelo Vanara asked former Eskom CEO Tshediso Matona to explain the process of appointing a chief executive at Eskom.

Matona said that the Eskom board would put together a list of three names for the Minister of Public Enterprises to select from for chief executive officer and chief financial officer. This normally gets Cabinet approval before being made final. The vacancy would normally be advertised for three months before a selection is made, he said.

"Up the point to where the board has completed the process and come to a decision (in a private sector company, the process would be complete as the board has that authority), the shareholder needs to concur and that is the exercise of the SOE rights. It is a fairly common practise," he said.

"The minister's right is the appointment of a board," he said. "If the board is not doing well, the minister must decide how to intervene. A proper governance structure centred on the board is the primary responsibility of the minister."

"As a department, that is where we normally support the minister."

Eskom would give the department quarterly reports on its progress on the plans it laid out. All this culminates in the Annual General Meeting where the annual financial results are presented, he said.

"It is in this context that new strategic decisions are taken with regard to the company," he said.

07 Nov 10:13

**Former Eskom CEO Tshediso Matona. (Photo: Gallo)**



07 Nov 10:07

### **Who is former Eskom CEO Tshediso Matona?**

Matona was Eskom CEO for seven months from 2014 to 2015, when he was suspended by chairperson Zola Tsotsi, pending an investigation.

After he was cleared, he resigned. President Jacob Zuma apparently apologised to him for the bad treatment he received. Later in 2015, he was appointed as secretary for national planning in the Department of Planning, Monitoring and Evaluation.

He was CEO when the silo collapsed at Majuba Power Station, which saw the start of load shedding.

Before being CEO, he had a 20 career in the public service sector.

According to Eskom's website, Tshediso Matona is a long-serving professional public sector executive, on the level of Director-General (DG), akin to CEO, with close to 20 years of management and technical experience in Government.

As DG of the Department of Trade and Industry (2006-2010) and then DG of the Department of Public Enterprises (DPE, 2011 to 2014), he has deep policy and strategy

knowledge and expertise in the economic, industry and business sectors: and strong, proven strategic and leadership capabilities.

He has been at the centre of Government policy-planning, and has led execution of its major strategic programmes, in the fields of International Trade, Industrial Development and Investment Facilitation, Enterprise Development, Economic Regulation, Broad-based Black Economic Empowerment, Infrastructure Development.

He has played a key leadership role as the Coordinator of Departments and DGs in the Economic and Infrastructure Clusters in Government, where he interacted at Cabinet-level and with the President, Deputy President and Ministers.

Also, in his role as DG, he has regularly interfaced with Industry, Business, and Organized Labour leaders and stakeholders, as part of relationship-building and consensus-building around key Government policies and programmes.

As DG of DPE, he is the Head an organization of over 200 staff and professionals (with a budget often in excess of R1,5bn, depending on transfers), and is responsible for supervising strategic, technical, financial and legal expertise required for the Minister's oversight of 8 major State Owned Companies (SOC) that include Eskom, Transnet, Denel, Safcol and Infraco. At DTI, he headed a 1200-staff organization with a budget of around R9bn.

07 Nov 09:58

**Previously at #StateCapture Inquiry:** Members of Parliament grilled the Eskom Pension and Provident Fund about why they allowed Eskom's request that saw ex-CEO Brian Molefe given a R30m pension payout.

#### **MPs grill Eskom's pension fund over Molefe**

07 Nov 09:55

**Previously at #StateCapture inquiry:** Between 2010 and 2014, the Eskom board was "gutted" and members with little experience in the power sector were put in place, said Professor Anton Eberhard, author of the Eskom Inquiry booklet, prepared for parliament's inquiry.

#### **Unpacking looting at Eskom**

07 Nov 09:53

**Previously at #StateCapture inquiry:** Former Trillian Management Consulting CEO Bianca Goodson told Parliament that she joined Trillian to build it into a new black-owned and run management consultant firm, but that she was deceived by the Gupta-linked firm."I



was lied to blatantly by Trillian, which I thought would be a proudly black consulting firm,” she said.

### **I was lied to blatantly by Trillian - whistleblower**

07 Nov 09:53

**Previously at #StateCapture inquiry:** Former Eskom CEO Brian Dames and Outa's head of energy Ted Blom testified before Parliament's state capture inquiry focusing on Eskom on Wednesday.

### **StateCapture: 'Bring the crooks to book'**

07 Nov 09:00

#### **Former Eskom CEO Tshediso Matona testifies in Parliament**

Former Eskom CEO Tshediso Matona is set to testify in Parliament's state capture inquiry being conducted by the public enterprises committee.

The hearing, which has been criticised by former Eskom CEO Brian Molefe for being unfair, has seen five individuals provide testimony.

First, Professor Anton Eberhard gave an overview of state capture at Eskom. Then former Eskom CEO Brian Dames provided an overview of his time at the power utility from 2008 to 2014.

Eskom's pension fund chief followed to explain Molefe's R30bn pension payout.

He was followed by two Trillian whistle blowers, who testified about their role in working with Eskom.

See the above links for full coverage.

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Eskom Board and Chief Executive Tshediso Matona agree to part ways amicably

2015/05/18

**Monday, 18 May 2015:** Eskom and its Chief Executive, Mr Tshediso Matona, have mutually agreed to part ways on an amicable basis. It is expressly noted that no misconduct or wrongdoing is alleged by Eskom against Mr Matona.

Mr Matona believes that the agreement to part ways is in the best interest of Eskom, to allow the Board to pursue its plans for the company under the current leadership.

With the separation, the inquiry initiated by the Board into the state of affairs at Eskom will continue as planned, and Mr Matona's suspension falls away. The separation is also by no means an anticipation of the outcomes of the inquiry, the latter whose objective is to enable the organisation to deal with its challenges.

Having considered his contribution at Eskom, and his vast professional and leadership experience, Eskom is of the view that Mr Matona can still play a vital role for South Africa, whether within commercial business or the Public Service sector.

Eskom thanks Mr Matona for his contribution during his term at Eskom.

**ENDS**

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## Joining the dots: Eskom and the state capture story

By Spreadsheet Ranger, September 19, 2017 in News and Current Affairs

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Posted September 19, 2017

The Eskom Inquiry may have been postponed, but the momentum that is gathering against the forces of state capture cannot be stopped, say academics Anton Eberhard and Catrina Godinho.

SOUTH Africans have witnessed the rallying of civil society, investigative journalists, academia, public leaders and concerned citizens who have come together to expose an overwhelming and growing body of evidence around the mechanics of state capture. The pending Eskom Inquiry is set to take that to a new level.

The Eskom Inquiry may have been postponed, but the momentum that is gathering against the forces of state capture cannot be stopped.

Speaking at the UCT Graduate School of Business (GSB) on Tuesday, former finance minister Pravin Gordhan reminded us that there is can be no middle ground on the issue. South Africans need to get more involved in exposing the issues around state capture and mobilising against them. Our shared heritage is one of struggle in the face of injustice and this story of injustice is one that has the potential to not only undo the legacy of the ANC, but also the promise of a democratic South Africa.

As academics, we have heeded this call. On Tuesday we launched our first piece of work addressing these issues, a reference booklet designed to support the Eskom Inquiry. The booklet details how the governance of Eskom was repurposed and rent-seeking opportunities centralised to allow a politically-connected elite to unlawfully benefit from procurement deals.

This work is part of a larger academic initiative – the State Capacity Research Project – convened by Prof Mark Swilling, which clearly shows that we are not dealing with random or isolated incidences of corruption, but the actions of an organised and well-connected syndicate that is systematically extracting large sums of money from the South African fiscus.

With annual revenues nearly three times that of Transnet and six times SAA's, Eskom is by far the most economically important and largest state-owned company in South Africa. This has made the utility particularly vulnerable to corrupt interests and it is therefore also a good place to start the process of delving more deeply into the mechanics of state capture.

With the benefit of hindsight, it is easy to see how the story at Eskom unfolded. Shortly after Zuma ascended to the presidency in 2009, he expressed an unusual degree of interest in board and management appointments to Eskom and Transnet.

Public enterprises minister Barbara Hogan, who resisted dubious board appointments, was swiftly replaced by Malusi Gigaba. Seemingly more yielding, one of his first moves was to overturn a procurement decision that the Eskom executive and board had signed off on - the replacement of Koeberg steam generators.

Soon after, Gigaba gutted the Eskom board and agreed to new appointments - most of whom had no corporate or electricity sector experience. This was in stark contrast to the previous board which, led by Reuel Khosa, had provided relatively stable and strong leadership in Eskom over the preceding decade.

8/18/2020

Joining the dots: Eskom and the state capture story - News and Current Affairs - Platinum Wealth: The JSE and ZAR X Financial and Inv...

Eskom's CEO at the time, Brian Dames, came under extreme pressure from Gigaba and was eventually replaced by Collin Matjila as acting CEO in March 2014, against then Eskom chairman Zola Tsotsi's advice. Subsequently published #GuptaLeaks emails revealed that just days before the appointment was made, Gupta lieutenant Salim Essa circulated Matjila's CV to Tony 'Rajesh' Gupta and Duduzane Zuma.

President Zuma's second term generated more aggressive governance changes to further grease the wheels of rent-seeking at Eskom. Lynne Brown replaced Gigaba as Minister of Public Enterprises in May 2014.

Matjila had already signed the controversial R43 million deal with the Gupta's New Age newspaper, and further used his time as acting CEO to sabotage the Koeberg steam generator tender and an IT contract that could have saved Eskom a billion rand - instead favouring T-Systems, a company lobbied for by Gupta associate Salim Essa.

Ending Matjila's run on the utility, Brown appointed the former DG of Public Enterprises, Tshediso Matona, CEO in October 2014. Unfortunately for him, she also appointed a new board that December – full of Gupta associates.

In January 2015, Matona launched a tender for the provision of forensic and anti-corruption consultation services for Eskom – later awarded to Dentons law firm – which proved to be his downfall. March that year saw the shock suspension of four executives – including Matona – followed by the ousting of Tsotsi as Eskom's chair just a few weeks later. This was clearly not the move of a fledgling board and appears to have been orchestrated from the highest level.

President Zuma not only personally called the DG of Public Enterprises to put this in motion (Brown was in Dubai at the time), but also summoned Tsotsi to his Durban residence where Dudu Myeni relayed the President's instructions.

Ben Ngubane, a favourite of the President, was then appointed board chairman, despite previous efforts by the ANC to prevent this. Brown also agreed to second Brian Molefe, along with his right hand man Anoj Singh, from Transnet.

Dentons' contract was terminated just two months after their investigation began and the ever self-proclaimed victim of misinformation, Minister Brown, withheld the report – containing the names of guilty parties and damning evidence of their wrongdoing – from parliament and the public.

Brown also kept the report from the Eskom war room and Deputy President Ramaphosa, who had been charged by cabinet with restoring electricity supply security and improving governance at state-owned companies. This greatly undermined this critical work.

The governance of Eskom thus captured and repurposed, the next period witnessed the scaling up of grand corruption, with the Guptas now brazenly managing the complex enterprise of brokering and money laundering.

The most boldfaced examples include Eskom's facilitating and financing of the Gupta's acquisition of Glencore's Optimum.

First, coal major Glencore was driven into 'business rescue' by Gigaba. And while it was being shaken down, the Gupta's Tegeta benefited from an Eskom guarantee (R1.6bn), a hefty and unusual pre-payment (R600m), and additional lucrative coal contracts – effectively enabling it to buy Optimum. It is a story that has been well told by investigative journalists notably at Amabhungane, who have done excellent work in connecting the dots of state capture.

Another well understood story is that of how Eskom funnelled at least R500m to the advisory firm Trillian – majority owned by Essa. An independent review – which Eskom lied about and ignored – flagged these deals as irregular. But Trillian was not only used as a conduit to transmit money to Gupta-connected networks, it was also used to legitimise irregular Eskom processes, including the awarding of the multi-billion-rand tender for the refurbishment of Duvha power station boilers to Dongfang (since interdicted by the courts).

More remains in the shadows and further instances of Gupta-favoured coal contracts and the squeezing out of major coal-miners will undoubtedly be revealed in Parliament's inquiry.

This will confirm what we know already; Eskom is in trouble. Burgeoning costs, arguably propelled by rent-seeking and corruption, have resulted in electricity tariffs increasing by more than 400% over the past decade, while electricity services have deteriorated. The effects of this on the SA economy and prospects for economic development and transformation hardly need to be spelled out.

Ultimately, any project to repurpose Eskom's governance to facilitate systematic corruption in the power sector undermines and threatens the utility's financial viability and its ability to power South Africa's economy and improve the welfare of all its citizens.

Parliament's Inquiry is positioned to further illuminate how Eskom has come to where it is today, and hold those responsible to account. Hopefully it will also recommend improvements to governance, not just at Eskom but at all of our state owned companies. Whatever the outcome, South Africans are going to be watching the process closely.

*Anton Eberhard is a professor and Catrina Godinho a PhD candidate at the UCT Graduate School of Business.*

Source: <http://www.fin24.com/Opinion/joining-the-dots-eskom-and-the-state-capture-story-20170915>

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# years

Aug 3, 2019  Uncategorized

Jabu Mabuza is the 10<sup>th</sup> CEO at Eskom, in 10 years. The chairperson was appointed acting CEO of the power utility by Public Enterprises Minister Pravin Gordhan this week. He is expected to hold the fort for the next three months while the search for a permanent CEO continues.

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Former CEO Phakamani Hadebe resigned in May this year, due to the "unimaginable demands" of the job which had a negative impact on his health, Fin24 previously reported.

At a briefing on Eskom's financial results on Tuesday, Hadebe described the challenges plaguing Eskom.

"The past 18 months have been challenging...The mandate that was given to the board [in January 2018] was very simple: Deal with Eskom's weak financial position, declining revenue and governance failures which threaten the sustainability of the company. It was financial oversight, revenue issues



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Mpho Makwana | November 2009 – June 2010

Makwana was appointed in an acting capacity in November 2009, after former CEO Jacob Maroga resigned. Maroga later went on to challenge Eskom, but did not win the court battle.

Makwana served as acting chairperson and CEO simultaneously, while the power utility finalised its recruitment of a new CEO, according to a biography on Makwana available on Eskom's website.

Makwana had previously served as non-executive director of the board of directors at the utility from July 2002. He had also served on a few of the board's committees including the audit and remuneration committees.

His term as Eskom board chairperson lasted for a year (between June 2010 and June 2011).

His term as acting CEO ended when Brian Dames was appointed permanent CEO in July 2010.

Makwana is known for leading the team that kept the lights on during the 2010 FIFA World Cup.

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Dames was appointed CEO of Eskom in July 2010. He had started his career at Eskom in 1987, as a graduate in training at the Koeberg Nuclear power station. He held various positions at Eskom preceding his appointment as CEO. This includes nuclear physicist at Koeberg, power station manager at coal-fired plants, general manager at the nuclear division. He was also a chief executive at Eskom's subsidiary – Eskom Enterprises.

Dames left the power utility in March 2014, this after resigning in December 2013 over personal reasons. In an interview with Biznews, he said he wanted to spend more time with his family.

He is known for stabilising Eskom following the first bout of load shedding in 2007 and for keeping the lights on during his tenure.

Dames is now the CEO of African Rainbow Energy & Power (AREP) – which focuses on clean energy solutions such as renewables, hydropower and gas. Dames stepped down from the President's Sustainability Task team late last year over a perceived conflict of interest. The chairperson of AREP is Patrice Motsepe, President Cyril Ramaphosa's brother-in-law.

At an AREP briefing, on the sidelines on the African Energy Indaba in February 2019, Dames said he accepted the position on the presidential task team in the first place because he is a "proud South African" and wanted to help fix the situation at Eskom, but having reflected on the ethical issues raised he decided it was best to hold "the highest standards of ethics" and decided to step down.

Dames is also on the boards of Nedbank, Roshcon and Rotek Industries.





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Collin Matjila | April 2014 – September 2014

Matjila served as acting CEO following Dames' resignation, before passing the baton just months later to permanent CEO Tshediso Matona.

His name however cropped up in the Gupta Leaks. News24, amaBhungane and Daily Maverick reported in June 2017 that Matjila's CV was circulated among the Guptas and their business associate Salim Essa and Duduzane Zuma shortly before his appointment.

During his short term as acting CEO, Matjila reportedly disregarded legal advice and approved a three-year, R43m New Age business breakfast sponsorship. The Guptas owned the New Age newspaper, which has since closed down.

At Parliament's inquiry into Eskom in November 2017, Eskom's former finance director Tsholofelo Molefe testified that Matjila had broken procurement rules at Eskom to favour deals with Gupta-linked businesses. Dames, who appeared before the inquiry a month earlier also testified that Matjila approved the business breakfast deal. Fin24 previously reported.

Since leaving Eskom, Matjila formed Kanana Investments, which focuses on property, energy and agribusiness. He also co-founded the Rural Development Alliance Group which is a 100% black-owned company which provides agricultural solutions in SA and Africa.



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Tshediso Matona | October 2014 – April 2015

Matona had close to 20 years experience in government before joining Eskom in October 2014. Matona, was the Director General (DG) of the Department of Trade and Industry between 2006 and 2010, and was the DG of the Department of Public Enterprises from 2011.

According to Eskom's biography on Matona, during his time at the public enterprises department he was "intimately involved" in monitoring Eskom's business and developments in its industry and had been working with Eskom and National Treasury and the Department of Energy to overcome the power utility's challenges.

During his time at Eskom a silo collapsed at Majuba Power Station, which resulted in the resurfacing of load shedding.

Eskom board chairperson Zola Tsotsi suspended Matona in March 2015, reportedly because he and Eskom management allegedly provided unreliable and inconsistent information to a war room, led by then Deputy President Cyril Ramaphosa. The war room was mandated to deal with the power crisis.

Matona was cleared following the completion of an investigation into the matter, but he resigned and left Eskom in May 2015.



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Later in 2015, he was appointed as secretary for national planning in the Department of Planning, Monitoring and Evaluation.

Matona is now the interim chairperson of state diamond mining company Alexkor.

Brian Molefe | April 2015 – November 2016

Molefe was seconded from Transnet to serve as Eskom CEO from mid-April 2015. Cabinet in September 2015 approved Molefe's permanent appointment which came into effect on October 1, 2015.

Molefe had previously been involved in state entities such as Telkom, the Airports Company of South Africa, the National Empowerment Fund, among others.

Although Molefe managed to keep the lights on at Eskom, he is known for being implicated in former Public Protector Thuli Madonsela's report, State of Capture. He subsequently, in November 2016 resigned from Eskom in the interests of "good corporate governance".

Matshela Koko was appointed acting CEO while a search for a permanent CEO started.

However, Molefe's journey at Eskom did not end there. Eskom agreed to an early retirement pension payout of R30m for Molefe, he received R11m of the designated amount. After learning this, former Public Enterprises Minister Lynne Brown intervened and asked the board to find another solution. The board decided to reinstate Molefe, to which Brown agreed as it would be a better alternative for the SA fiscus.

But as a result of public backlash that followed an inter-ministerial committee was appointed to investigate Molefe's reappointment. By the end



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Molefe would later go on to challenge Eskom for rescinding his reappointment at the courts. The matter is now going to the Constitutional Court, as Molefe is holding out to keep the R30m benefit, [Fin24 reported](#).

Molefe has been implicated in several testimonies before the State Capture commission, related to wrongdoing at state entities Transnet and Eskom.

Matshela Koko | December 2016 – May 2017

Koko joined Eskom in 1996, as an engineer-in-training. He later became head of generation before stepping up as acting CEO after Brian Molefe resigned.

Koko was tasked with turning around the power utility. This involved trying to recover debt owed by municipalities, often [involving the courts](#).

Koko's record however is not without blemish as the Sunday Times reported [Impulse International](#), a firm where his stepdaughter was a director, benefited with R1bn worth of contracts awarded by Eskom over a period of 11 months.

This resulted in Koko's suspension and a disciplinary hearing followed. He was cleared of wrongdoing late in December 2017, and returned to Eskom on January 8 – as head of generation.

In early 2018, [fresh charges](#) were made against Koko, related to "gross negligence" and "serious acts of misconduct". Koko was suspended again. He then [resigned in February 2018](#).

Most recently Matshela's company Matshela Energy received a licence to produce 100 MW of solar energy in Zimbabwe. He has vowed to stop load shedding in Zimbabwe, as he claimed he did in SA.





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Johnny Dladla | June 2017 – October 2017

Amid the Brian Molefe fiasco, Eskom appointed Johnny Dladla as acting CEO from mid-June 2017.

Dladla had 22 years of experience within Eskom, he spent five years as a chief executive of Eskom Enterprises.

Then in October 2017, Eskom's board removed Dladla and replaced him with Sean Maritz. At the time, Eskom said its board decided to rotate current executives in the CEO role.

It emerged in the parliamentary inquiry into Eskom that Dladla may have been removed by former board chair Zethembe Khoza because he was cooperating with investigators looking into a deal between Eskom and Gupta-linked Trillian.

Dladla had suspended the contract between Eskom and McKinsey, involving Trillian and commissioned a probe into officials implicated in it, [Fin24](#) previously reported.

Dladla returned to his role as CEO of Eskom Rotek Industries. But he resigned in October 2018 to pursue other business interests.

Sean Maritz | October 2017 – January 2018



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2017. He replaced Johnny Dladla. At the time, Eskom said its board decided to rotate current executives in the CEO role.

Shortly after his appointment as acting CEO, Maritz came under fire in media reports for not declaring conflict of interest. The Sunday Times reported Maritz hired a friend and fellow church member at a salary of about R100 000 a month without declaring the friendship to Eskom. Two Eskom executives had also accused Maritz of allegedly deleting evidence implicating Gupta companies in controversial deals with Eskom, according to the report.

In January 2018, reports surfaced that Maritz signed off on a R400m payment from Eskom to a Hong Kong bank account, against all legal advice. The payment was believed to be made to secure a R25bn loan from China's Huarong Energy Africa to build or refurbish power stations last year.

Maritz was suspended and resigned in March 2018, before his disciplinary hearing could take place.

In March 2019 at the Zondo Commission of inquiry into State Capture, it was revealed by Eskom Treasurer Andre Pillay that former board chairperson Zethembe Khoza put pressure on Maritz to sign off on the loan agreement.

According to Maritz's LinkedIn profile, he has been working as an independent consultant since March 2018.

Phakamani Hadebe | January 2018 – July 2019

Hadebe was appointed interim CEO in January 2018, marking the first in a series of sweeping board changes Public Enterprises Minister Pravin Gordhan made in several state entities. Cabinet approved his permanent appointment in May 2018.



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During his tenure, President Cyril Ramaphosa in December 2018 appointed a Sustainability Task Team which recommended that Eskom be unbundled into three entities.

A Technical Review Team was also appointed earlier this year to combat load shedding after Eskom was forced to implement up to Stage 4 load shedding nationwide.

With the support of government and the board, led by chairperson Jabu Mabuza, Hadebe and his team managed to hold off load shedding for the winter months.

July 31, 2019 was Hadebe's last day at Eskom and he can leave knowing that the power utility successfully recovered R1.3bn irregularly paid to McKinsey. Ten other companies have been identified as owing Eskom money – approximately R72bn.

It is not known what Hadebe will do next, but he does have a history in banking, having been CEO of Corporate and Investment Banking at Barclays Africa. He was also previously CEO of the Land and Agricultural Bank, which he successfully helped turn around during his five year tenure.

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The EFF has said Mabuza's dual role goes against sound governance principles. The Institute of Directors of Southern Africa has also warned that Mabuza's appointment falls short of the the King Code's guidelines for corporate governance.

Mabuza has a long track record of holding positions on the board of companies in both the public and private sector. He was previously chairperson of Telkom, chairperson of South African Tourism and Business Leadership South Africa. He is chairperson of the Casino Association of South Africa, president of Business Unity South Africa and leader of the CEO Initiative.

He was appointed chairperson of the Eskom board in January 2018 and had to see the power utility through many challenges, some of which still remain.

The power utility's financial challenges remain a sore thumb and Finance Minister Tito Mboweni has recently tabled a special appropriations bill, allocating R59bn to the entity over two years so that it can meet its financial obligations. It recently posted a net loss of R20.7bn for the 2018/2019 financial year.

Mabuza and the new eskom CEO – when announced – will work with newly appointed Chief Reorganisation Officer Freeman Nomvalo to carry out the recommendations of the presidential task team. Eskom is presently on the hunt for, what Bloomberg has called the 'toughest CEO job in SA'.

Article by Lameez Omarjee, Fin24





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Eskom scrapped a tender that would have saved R1-billion



## Eskom scrapped a tender that would have saved R1-billion

Underhanded lobbying, delaying tactics and internal squabbling scuppered the power utility's economical and innovative IT plan

24 April 2015 - Lionel Faull, Sam Sole & Stefaans Brümmer

Executive meddling has led to Eskom canning a tender the cash-strapped utility had hoped would save it almost R1-billion in information technology (IT) costs. Instead, it retained the original, “overpriced” service provider.

Much of the blame has been laid at the feet of the former acting chief executive, Collin Matjila, who is accused of interfering in the tender from the moment he took office a year ago. His short tenure was marred by repeated meddling in procurements.



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Eskom scrapped a tender that would have saved R1-billion



*Collin Matjila (Hanlie Konig and Simphiwe Mbokazi)*

This key contract, worth R2.5-billion over the past five years, was for all of Eskom's IT support.

Eskom executives have told amaBhungane that meddling in the utility's commercial division, which is responsible for all procurement, is costing it billions in failed projects and lost opportunities.

The government will inject R23-billion into Eskom this year, but the utility's debt was R265-billion, according to its last financial statements.

The German multinational, T-Systems, inherited the IT contract when it bought the state-owned IT company Arivia.kom in 2010.



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Eskom scrapped a tender that would have saved R1-billion

**Poor performance**

But several Eskom sources described T-Systems' performance as poor. One said its service was "terrible" and "cost Eskom a fortune". Even a T-Systems insider confirmed that the relationship had been "really rocky". "Eskom told us many times what we needed to fix, but we didn't," the insider said.

But T-Systems said in a statement this week it had "consistently improved service quality since 2010, resulting in a 99%-plus service level achievements during the latter part of the initial term, at market related prices".

Matjila did not respond to detailed questions.

The T-Systems contract was due to expire in December last year. Eighteen months before that, in June 2013, Eskom's chief information officer, Sal Laher, proposed that the utility could save about R900-million if it moved core IT work in-house, and put out a tender for non core work.

Laher said Eskom should use the time during the remainder of T-Systems' contract to advertise a tender and secure a better deal.

At that stage, Matjila was a board member but chaired the board's crucial tender subcommittee, which has the final say on procurement decisions.

This committee unanimously approved the IT procurement plan in August 2013.

A source who attended the meeting said Matjila appeared delighted with the plan.

Eskom issued a request for proposals in December 2013 and 11 companies, including T-Systems, made a bid for the tender.

**Top bidders shortlisted**

When Matjila took over as acting chief executive in April last year, the bids had been evaluated and three candidates shortlisted. Eskom's executive procurement committee approved the shortlist and gave the IT division permission to negotiate – but not to conclude – a deal.

One step remained: the board tender committee needed to endorse the executive committee's recommendation to negotiate.

T-Systems was not among the shortlisted bidders and faced the prospect of losing its biggest contract in South Africa. If that had happened, a T-Systems manager told amaBhungane, two-thirds of its staff would have faced retrenchment.

Meanwhile, early in 2014, T-Systems received a boost from Transnet, which awarded it a similar, although less lucrative, IT tender.

**Flamboyant friend**

T-Systems made the bid for the Transnet contract as part of a consortium with state IT infrastructure company, Broadband Infraco.

A T-Systems source said, while working with Infraco, T-Systems executives became acquainted with Salim Essa, an Infraco director.

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*Salim Essa (Hanlie Konig and Simphiwe Mbokazi)*

Essa is a flamboyant businessperson, with wide-ranging business interests, who apparently loves to invite colleagues for cigars at his Melrose Arch offices after sealing a deal.

His associates include the Gupta family and Duduzane Zuma, his partners in an engineering firm that manufactures steel components intended for, among others, Transnet locomotives.

Essa's wife is also a co-shareholder with the Guptas and Zuma in the mining company, Shiva Uranium.

Another of Essa's associates is none other than Matjila, whom he advised about deals entered into by Kopano ke Matla when Matjila was its chief executive. Kopano is the trade union federation Cosatu's investment arm.

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Another T-Systems source said, when it became clear that T-Systems risked losing the Eskom deal, Essa approached it and offered to help lobby Eskom to retain the contract. Essa “wiggled his tits”, the source said, offering to lobby for T-Systems.

In return, said the source, Essa requested a fee.

### **Board not charmed by Essa**

The source said the approach was discussed by management, but was “never consummated” because of opposition by the T-Systems board.

The first T-Systems source confirmed hearing about Essa’s approach through the company’s grapevine, although the source claimed to have no direct knowledge of it.

Essa did not respond to SMSes, an email and calls to his offices.

T-Systems, in its response, ignored questions about Essa and said only that it was “confident that due process has been followed”.

It is unclear if Essa did lobby Eskom on T-Systems’ behalf.

However, several of the sources said T-Systems submitted unsolicited offers, mainly discounted prices, to Eskom at various stages of the process, apparently in the hope that a sufficiently attractive offer would persuade the utility to retain it for the two-year extension period.

As soon as Matjila occupied the Eskom hot seat in April last year, a senior Eskom executive said he did a complete flip-flop on his earlier unequivocal support for the IT tender.

A T-Systems insider also said relations with Eskom changed after Matjila’s arrival and T-Systems soon had his ear.

### **Executives meet Matjila**

“[Previous Eskom chief executive] Brian Dames hated us, but I know of at least two meetings where our top executives were able to meet Matjila after he became CEO. This was a big change,” the T-Systems insider said.

An Eskom source said Matjila immediately asked for the IT contract to be removed from the tender subcommittee’s April meeting agenda, “because he didn’t believe the cost-saving of R1-billion was correct”.

“This was strange because he had chaired the tender subcommittee the previous August when it unanimously approved a decision based on those savings calculations,” the source said.

The contract was again removed from the agenda the following month.

Meanwhile, Matjila requested an internal audit of the tender cost estimates. The findings, presented to Matjila in May, concluded that the savings were “reasonably calculated” with a “high possibility” of being correct.

### **Audits and delays**

The source said “audit after audit” then followed, adding delay to delay, as Matjila queried one aspect of the tender after another and commissioned external auditors to interrogate each one.



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Matjila did not respond to calls and SMSes sent this week to a cellphone number his wife confirmed was his.

According to another insider, Laher took the contract to the audit and risk subcommittee of the board in July last year, warning it that further delays would jeopardise the guaranteed savings commitments Eskom had secured from the three shortlisted bidders.

The insider said two committee members met Matjila to hear his concerns.

“Matjila was unable to offer a single tangible reason for why the contract should not proceed,” said the insider.

### **Instructions to suspend**

Next, Matjila summoned Laher’s boss, Erica Johnson, and demanded that she suspend Laher on six charges. This was independently confirmed by three Eskom sources.

“The charges were ludicrously trumped up,” said a source sympathetic to Laher, “and Johnson immediately showed this was the case. Laher was cleared.”

Johnson, who has left Eskom, declined to comment.

As acrimony boiled, a heated executive committee procurement committee meeting in September resolved to re-audit the cost savings estimate.

The audit finding – which amaBhungane has seen – “guaranteed Eskom a R966-million saving on the new IT contract”.

Matjila’s stint as interim chief executive finished at the end of September and was succeeded by a permanent appointee, Tshediso Matona, who was later suspended.

### **Matjila close to procurement process**

An executive colleague of Matjila’s commented: “In all my years at Eskom, none of the previous chief executives would ever come near procurement the way Matjila did, because it’s a matter of integrity.”

The IT contract was finally tabled at the tender subcommittee in late October – six months after the intended date.

Furious board members demanded to know why the openly squabbling Eskom executives had brought a complex contract to them just two months before T-Systems’ contract was due to end. Some board members also knew of the many audits that had slowed the process, and the subcommittee resolved to investigate the delay.

But it also mandated Eskom’s IT division to negotiate with the shortlisted bidders.

On October 31, Laher sent T-Systems a letter formally dispensing with its services.

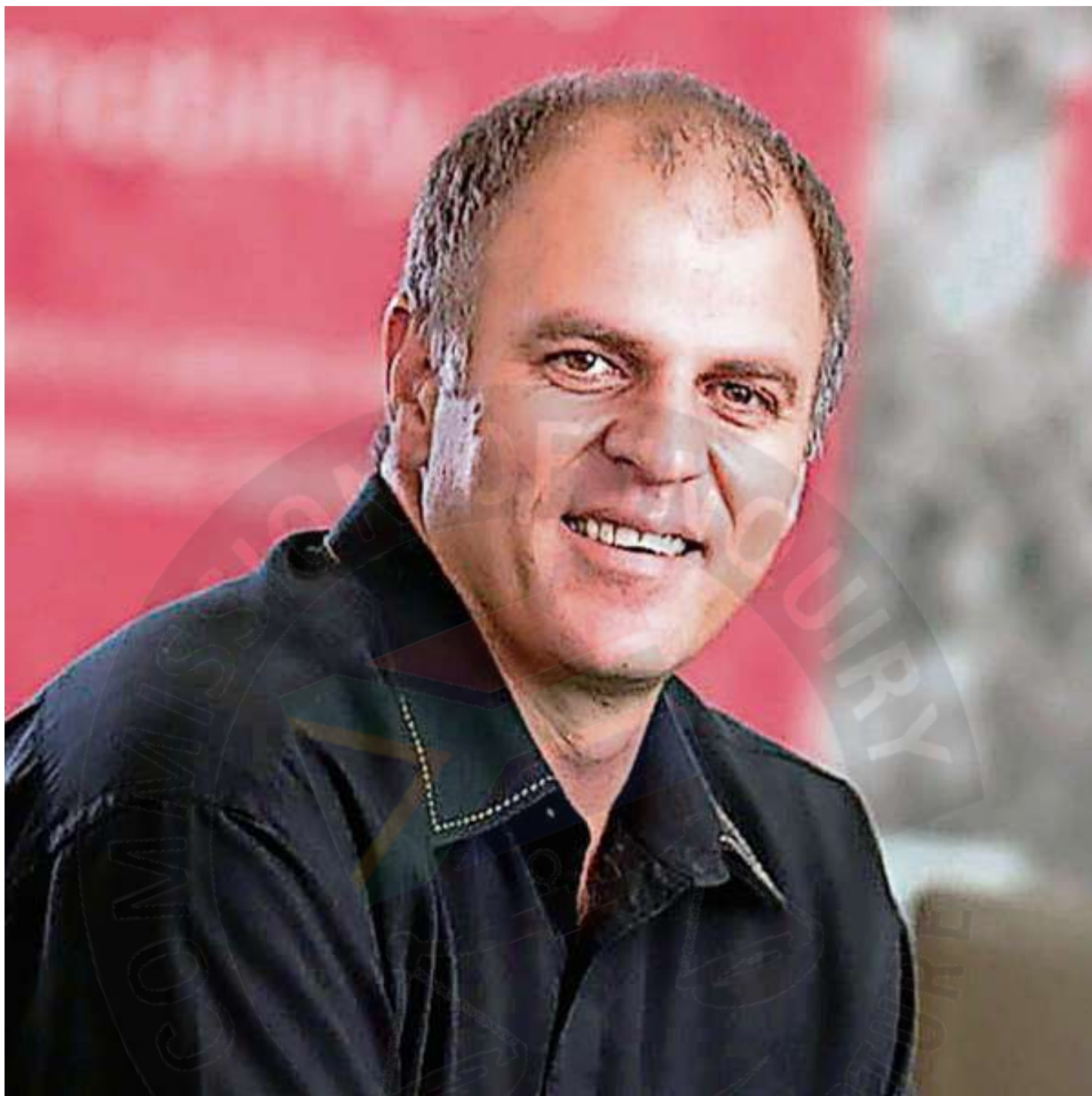
This apparently sent shockwaves through T-Systems and staff morale plummeted.

T-Systems managing director Gert Schoonbee met Matona and apparently “conveyed unhappiness” about losing the bid.



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Eskom scrapped a tender that would have saved R1-billion



*Gert Schoonbee (Hanlie Konig and Simphiwe Mbokazi)*

In mid-November, as the debilitating wave of load-shedding began, senior Eskom decision-makers began to question the wisdom of moving to a new IT service provider at such a precarious time.

Laher was then suspended. Although the allegations against him have not been disclosed, it is understood they are different from those Matjila made several months previously.

Although a source broadly sympathetic to Matjila claims Laher overstepped the mark on “other matters”, Laher’s allies at Eskom believe he was suspended “on spurious grounds to get him out of the way” of the IT contract.

A new board met in January this year and decided to retain T-Systems.

8/18/2020

Eskom scrapped a tender that would have saved R1-billion

ITWeb reported that the three shortlisted bidders – Dimension Data, Wipro and HCL – received letters on April 1 informing them the tender had been cancelled.

Laher's suspension was lifted the following week and he briefly returned to work before reaching a settlement and resigning.

He declined to be interviewed, saying: "I want to have nothing to do with, or to say anything about Eskom. I am bound by the confidentiality clauses in my settlement."

### Services insourced

But it appears that at least part of Laher's 2013 strategy has come to pass, although it is unclear how much Eskom has been able to save. T-Systems said "a large part of the services provided by T-Systems during the initial term [2010-2014] were insourced by Eskom in December [last year], resulting in a number of T-Systems employees becoming Eskom employees".

Although this implies that Eskom now pays T-Systems less, it also means that Eskom has assumed a bigger wage bill.

T-Systems did not say it had offered Eskom any discount on the work it retained, only that "Eskom requested that the remainder of the services would continue to be delivered by T-Systems as part of the 'disengagement process' defined in the contract".

AmaBhungane understands the disengagement process refers to the two-year extension period, although T-Systems said they were "still in negotiations" with Eskom.

The utility said "savings are being realised" with T-Systems, but did not provide figures.

Eskom also said it followed "strict" procurement processes, adding that it was "highly unlikely that any individual or group of individuals could influence the awarding of contracts".

*\* Got a tip-off for us about this story? Click [here](#).*

The **M&G Centre for Investigative Journalism** (amaBhungane) produced this story. All views are ours. See [www.amabhungane.co.za](http://www.amabhungane.co.za) for our stories, activities and funding sources.

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8/18/2020

Eskom scrapped a tender that would have saved R1-billion



8/18/2020

Tsotsi and Eskom executive at war over tender



## Tsotsi and Eskom executive at war over tender

Animosity boils over after battle for control of crucial commercial procurement division

27 March 2015 - AmaBhungane team

An extraordinary slanging match erupted this week between Eskom board chairperson Zola Tsotsi and a suspended senior executive over a messy R60-million electrics supply deal, exposing how procurement disputes are destabilising the troubled utility.

The saga has led to the suspension of a senior general manager in Eskom's commercial division and appears in part to underlie Tsotsi's targeting of two of the four top executives he suspended two weeks ago.

The two are technology and commercial head Matshela Koko and chief executive Tshediso Matona.

After Tsotsi told amaBhungane he believed Koko's commercial division was "rotten" and that Koko was resisting a forensic inquiry, Koko hit back saying that the board chairperson "regularly interferes ... in procurement".

All procurement at Eskom is channelled through Koko's commercial division. "Commercial is the glittering prize at Eskom. Control commercial and you control all tenders," said an Eskom executive unconnected to this battle.

Matona and Koko are said to be good friends with several sources confirming that they studied together at university.

A source sympathetic to Koko said that after he suspended a senior commercial general manager, Malesela Sekhasimbe, for allegedly working in cahoots with Tsotsi, Tsotsi lobbied Matona to unsuspend Sekhasimbe and to split the technology and commercial portfolio between Koko and Sekhasimbe.

The source said the planned split was aimed at divesting Koko of the commercial portfolio, and to hand it to Sekhasimbe.

### **'Sound operational reasons' basis for portfolio split**

But Tsotsi has denied that he lobbied Matona, saying that there have been discussions at Eskom for at least a year about splitting the portfolio, that this was based on "sound operational reasons", and that Matona was "already looking into it".

Tsotsi also denied asking Matona to unsuspend Sekhasimbe: "I would not have asked the chief executive to intervene. What I did do was to express unhappiness that my name had been dragged into a suspension hearing of an employee."

The electrics supply deal dispute centres on a claim by Japanese conglomerate Sumitomu in April last year that it had manufactured some transformers for Eskom that were awaiting collection and payment.



8/18/2020

Tsotsi and Eskom executive at war over tender

AmaBhungane has seen the Sumitomu correspondence with Eskom, which is addressed to Tsotsi directly and not the commercial division.

It is common cause that Tsotsi last August replied to Sumitomu, committing Eskom to paying the amount demanded – about R60-million.

But Tsotsi and an Eskom commercial division source sympathetic to Koko this week gave diametrically opposed versions as to how that came about.

The source sympathetic to Koko said Tsotsi in turn asked Koko to “deal with” Sumitomo’s demand, “by which he [Tsotsi] meant: sign off on this purchase”.

### **He said, He said**

Tsotsi, however, told amaBhungane that he had been obliged to deal with an aggrieved Sumitomu because Eskom had asked the Japanese company to build transformers, but then would not sign purchase orders for them.

“Sumitomu were frustrated, they wrote to me, and I asked Koko and Eskom’s legal department to sort it out,” Tsotsi said.

According to a document seen by amaBhungane, Eskom’s legal department advised commercial that there was no binding commitment to Sumitomu to buy the transformers and that Eskom would have to order them first.

Eskom did not need transformers and could not afford them, added the source sympathetic to Koko.

Because the supply agreement with Sumitomu was expiring shortly, the commercial division proposed extending it – as long as Eskom’s various tender committees granted approval – so as to absorb the Sumitomu equipment over a longer period of time.

Koko delegated the matter to Sekhasimbe, said the pro-Koko source, on the understanding that Sekhasimbe would follow the legal department’s advice and Eskom’s supply chain processes.

The source said that Koko was shocked to discover, some six months later, that Sekhasimbe had prepared a letter of commitment to pay Sumitomu, and that Tsotsi had already signed it back in August last year.

Tsotsi is a nonexecutive chairperson, said the source, and had exceeded his powers in signing the letter because he does not have delegated authority.

But Tsotsi, in turn, claimed that it was in fact Koko who had drafted the commitment letter and brought it to him to sign, and not Sekhasimbe.

“Sekhasimbe is a junior and I would never have dealt with a junior, going over his manager’s head like that,” Tsotsi said.

Koko suspended Sekhasimbe on misconduct charges on March 2, linked to the allegation that Sekhasimbe had overstepped the bounds of his delegated authority by taking the letter to Tsotsi to sign.

Koko was himself suspended – together with Matona and two other executives unconnected to the dispute – 10 days later.

Sekhasimbe declined to comment on the circumstances of his suspension because he said his lawyer had advised him to “allow the process to unfold without any hindrance”.

A Sumitomu representative in Johannesburg said that the company had still not been paid, but referred further questions to the company’s head office in Tokyo.

8/18/2020

Tsotsi and Eskom executive at war over tender

Tsotsi told amaBhungane that he has butted heads with Koko for the past year because he believes the commercial division is “rotten” and should be subjected to a forensic inquiry. But Koko is opposed to any inquiry, Tsotsi alleged.

Koko had initially declined to comment on the Sumitomu matter pending the resolution of his suspension.

But late on Thursday Koko said he felt compelled to respond to Tsotsi’s remarks: “Records show that Mr Tsotsi dealt with Mr Sekhasimbe directly and gave him instructions on the matter. As chairman, he ought to have known that he cannot sign a commitment to bind Eskom without approval from a tender committee authorising him to do so and following the governance processes.

“We have it on record that the chairman regularly interferes on transactional level in procurement and welcome the upcoming enquiry. It would provide the opportunity to deal with these matters. It is only when matters are not resolved to his liking, then he labels it ‘rotten’.”

Matona did not respond to calls and SMSes.

*\* Got a tip-off for us about this story? Click [here](#).*

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8/18/2020

Tsotsi and Eskom executive at war over tender



8/18/2020

New Eskom CEO Matona is 'weak', say ex-colleagues



## New Eskom CEO Matona is 'weak', say ex-colleagues

The embattled parastatal needs a fighter at its helm, critics say

22 August 2014 - Lionel Faull & Sam Sole

### NEWS ANALYSIS

Former parastatal senior executives fear that newly appointed Eskom chief executive Tshediso Matona is “weak”, and predict he will struggle to assert his authority at the troubled electricity utility.

Their concerns suggest Matona may be a yes man who will do what he is told, rather than someone who can chart a bold new course at Eskom.

Public Enterprises Minister Lynne Brown announced Matona’s appointment on Wednesday. He is currently the director general of public enterprises, but will assume his new position on September 1.

Matona’s most pressing challenges at Eskom will include:

- Resolving an [intractable tender dispute at Koeberg](#);
- Bringing the first unit of Medupi power station online within six months, while keeping the country’s lights on in the interim;
- Addressing the gaping hole in Eskom’s balance sheet;
- Securing funding for Eskom’s wider new-build programme; and
- Steering Eskom through intense policy deliberations about its future place in South Africa’s energy landscape.

### Needs a fighter

Two former executives who spoke to amaBhungane on condition of anonymity have both interacted with Matona extensively because the parastatals they worked for reported to Matona as the department’s chief accounting officer. Both had a tense relationship with the department.

One observed that Matona “was not a fighter” and expressed concern that he had been parachuted into one of the most challenging jobs in the country.

One executive recalled working with Matona under the previous minister, Malusi Gigaba. “You had an activist minister who behaved like a director general, and Matona just wasn’t able to fight his corner in that environment. In such conditions, you have to fight for your own space. He’s an astute guy, solid, reasonable, very well educated. But at the time, I could see he was not fighting his corner.”

The other echoed these observations about Matona: “He was weak as a director general. He could never do the things that needed to be done. He couldn’t manage his own office, let alone Eskom. Given that he was not a strong candidate, you have to question the motivation for this appointment.”



8/18/2020

New Eskom CEO Matona is 'weak', say ex-colleagues

Matona was unavailable to comment, but department spokesperson Colin Cruywagen said: "People are entitled to their opinions, but he has just achieved a clean audit and met 82% of departmental targets."

### Hope for a surprise

A respected energy expert who has not worked directly with Matona expressed concern about his perceived lack of managerial experience of a large, complex organisation: "Eskom employs 47?000 people and has an annual revenue of R140-billion. I would have thought a basic requirement would have been a chief financial officer with experience managing a large corporate entity."

"I can't see someone who ran a government department having the necessary experience to run Eskom. You needed someone with very sharp private sector experience," the energy expert said.

But he added: "Maybe Matona will surprise us. There are parallels here with Maria Ramos, who went from director general in the treasury to running Transnet very successfully."

Announcing Matona's appointment, Brown said that he would continue work he had started at the department: "Mr Matona has been closely involved in providing oversight to Eskom and the other state-owned companies in the department's portfolio for the past three years."

"In recent months he has played a key role in the interdepartmental task team comprising of the departments of public enterprises, energy and national treasury, which have been working with Eskom ... to formulate a solution to the immediate challenges facing Eskom."

*\* Got a tip-off for us about this story? Click [here](#).*

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8/18/2020

New Eskom CEO Matona is 'weak', say ex-colleagues



8/18/2020

Eskom chiefs put on ice by gatvol board - The Mail &amp; Guardian

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## ESKOM CHIEFS put on ice by gatvol board

**Qaanitah Hunter** 12 Mar 2015



*Lynne Brown is determined to find a long-term solution to the energy crisis*

Deputy President Cyril Ramaphosa and Public Enterprises Minister Lynne Brown pulled the plug on Eskom's top four executives this week.

Frustration over Eskom's confused and confusing response to its electricity generation and cash-flow crises led to the Cabinet "war room" and the utility's board suspending Eskom's chief executive and his three key lieutenants.

Ramaphosa and Brown drove the drastic move to suspend the four to clear the way for an independent inquiry into the utility, many sources have confirmed.

Ramaphosa is in charge of the war room that the Cabinet set up in December to try to turn the troubled Eskom around, and Brown is the government's shareholder representative in Eskom.

The war room comprises ministers, directors general and officials from public enterprises, energy, the treasury and co-operative governance and traditional affairs.

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A well-placed war room source said Ramaphosa and Brown finally lost patience with “the quality of the information the war room has been receiving from Eskom”.

“You’re kind of in the dark,” said the well-placed source, who asked not be identified. “You depend on the Eskom board and executive, but the information they give you is just not credible. One day you’ll be told one thing, the next day another.

“We don’t know how to react, because the information changes the whole time.”

### **Frustration**

Eskom board chairperson Zola Tsotsi made the dramatic announcement about the suspensions on Thursday, and named the suspended quartet as the chief executive, Tshediso Matona, the finance director, Tsholofelo Molefe, the head of group capital, Dan Marokane, and the head of technology and commercial, Matshela Koko.

In a statement released shortly afterwards, Brown said she had met the board on Wednesday evening and expressed her “concerns, fears and frustration” on a raft of issues.

These included “the instability at power plants; the financial liquidity of the utility; the lack of credible information; the unreliable supply of electricity and its dire impact on our economy; progress with the build programme; overruns at Medupi and Kusile; delays of the investigation into incidents at Majuba and Duvha; and the issue of coal and diesel pricing”.

Eskom sources at board and executive level said Molefe and Marokane had raised the ire of the war room for their handling and communication of Eskom’s financial problems, as had Koko for the utility’s new build, maintenance and procurement problems.

Matona, who has only been chief executive for six months, was also suspended because he had apparently failed to demonstrate decisive leadership, including guiding his executives, said the sources.

The war room source warned that Tsotsi had been lucky to escape the chop. “He’s presided over Eskom for more than four years now and is on very shaky ground. If this exercise fails, his head will roll.”

An Eskom executive confirmed that the war room had finally lost patience with the executives.

“Since December, it has had enough time now to see what is and isn’t working at Eskom, and they have been endlessly frustrated by Eskom’s response, and these four executives in particular,” they said.



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Eskom chiefs put on ice by gatvol board - The Mail &amp; Guardian

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**“Blowing a gasket“**

Eskom’s executives met on Monday and Tuesday this week for a strategic planning session.

The war room was waiting for an update from this session, but the first sign that something was amiss was when a media briefing by Brown about the war room’s progress was scheduled – then cancelled – on Tuesday.

The Eskom board met on Wednesday, with Brown in attendance.

According to a source with knowledge of the meeting, the two executive board members – Matona and Molefe – were asked to leave, after which Brown “blew a gasket” and demanded that the board take decisive action.

After she left, the board resolved to suspend Matona and his fellow executives to make way for the inquiry.

Tsotsi called a hastily arranged press conference on Thursday morning, at which he announced the inquiry and suspensions.

Hinting at why the executives were suspended, Tsotsi said the inquiry “will be given unfettered rights of access to all information deemed necessary for this probe to be successful”.

This chimes with the war room source’s explanation that the quality of information from Eskom had been a problem.

Details of the inquiry’s composition are still sketchy, but a board source told the *Mail & Guardian* that Ramaphosa’s office had appointed a co-ordinator even before talks of a shake-up at the power utility started on Monday.

Nick Linnell, a business turnaround consultant, confirmed on Thursday that he had been appointed to the role.

He declined to comment further.

Spokespersons for Ramaphosa, Brown and Eskom were all unavailable at short notice.

*Lionel Faull is an investigator with amaBhungane, the M&G Centre for Investigative Journalism*

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These are unprecedented times, and the role of media to tell and record the story of South Africa as it develops is more important than ever.

# 06





Mr Tshediso TJ Matona  
Chief Executive  
Eskom Holdings SOC LTD  
P.O. Box 1091  
Johannesburg  
2000

Date:  
11 March 2015

Enquiries:

Dear Mr Matona

#### NOTICE OF SUSPENSION AS ESKOM CHIEF EXECUTIVE

1. I refer to the meeting of today, 11th March 2015, wherein we discussed the company's concerns regarding the serious state of the company and the Board resolution to conduct an independent inquiry into the possibility that the power delivery may be compromised by either intentional or negligent conduct. Due to the nature of this enquiry and the importance of it being free of any influence from leadership in the organisation, pending the completion of an investigation into these matters, you should be placed on suspension without any loss of benefits and pay.
2. I confirm that you were advised of the nature and extent of the enquiry and that you were afforded an opportunity to make representations to the Board subcommittee why you should not be suspended pending the outcome of the enquiry.
3. You were advised that the Board subcommittee was considering placing you on precautionary suspension because of concerns that might pose a risk to the influence-free requirement of the enquiry.
4. These concerns have been discussed with you.
5. I confirm that you made various representations in respect of your possible suspension. We have considered them thoroughly.
6. We have concluded that, in view of the serious nature of the above and after having considered your representations, the company regrets to inform you that it has decided to suspend you on full pay without any loss of benefits to be calculated from today pending completion of the enquiry.

Head Office  
Megawatt Park Maxwell Drive Sunninghill Sandton  
PO Box 1091 Johannesburg 2000 SA  
Tel +27 11 800 2030 Fax +27 11 800 5803 [www.eskom.co.za](http://www.eskom.co.za)

Eskom Holdings SOC Ltd Reg. No 2002/015527/30

In the event that the employee refuses to sign:

Declaration of witness: I confirm that I have witnessed that this letter has been handed and explained to the above named employee.

Signed \_\_\_\_\_ Position \_\_\_\_\_ Date \_\_\_\_\_





# 07



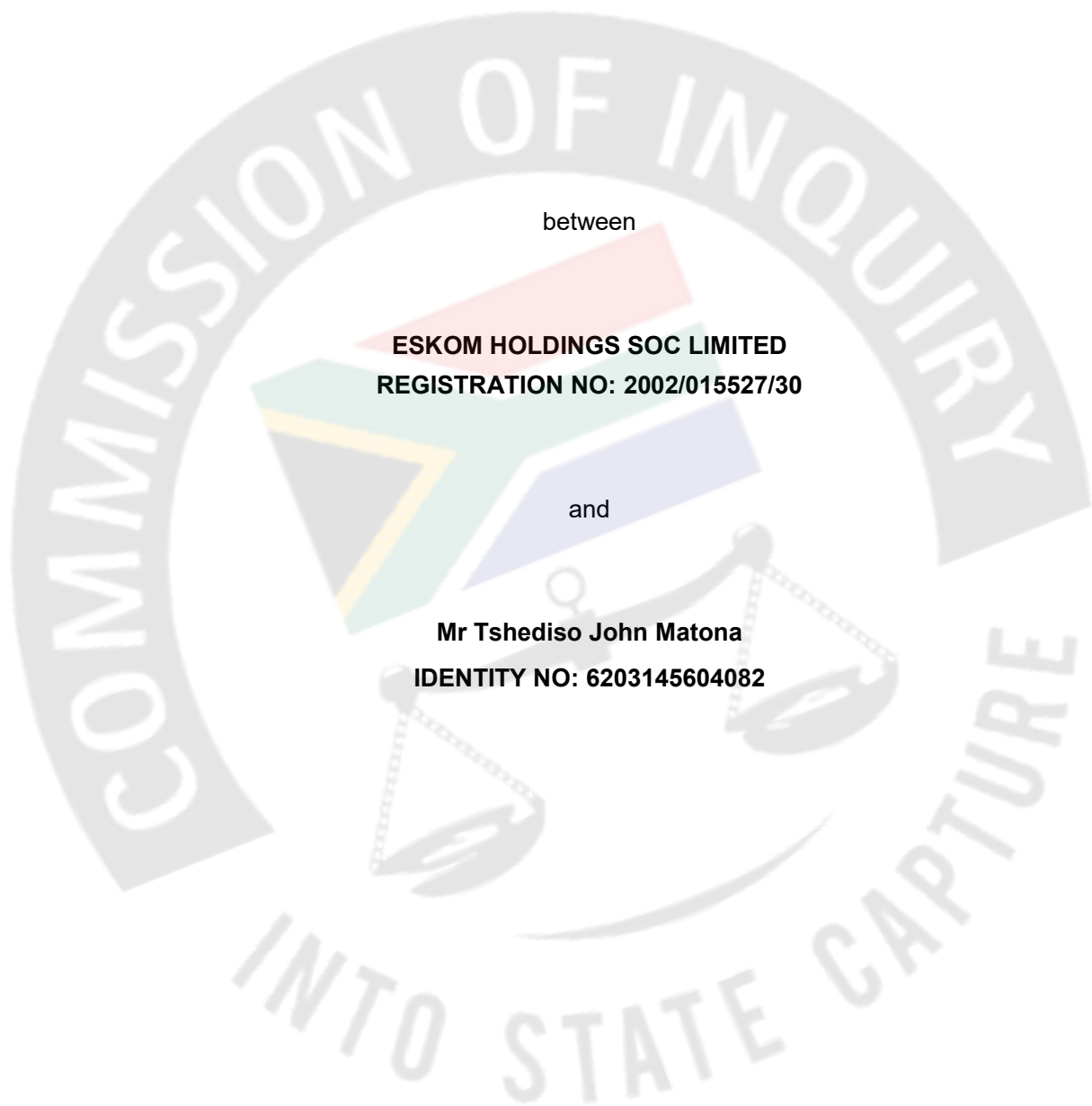
## SETTLEMENT AGREEMENT

between

**ESKOM HOLDINGS SOC LIMITED**  
**REGISTRATION NO: 2002/015527/30**

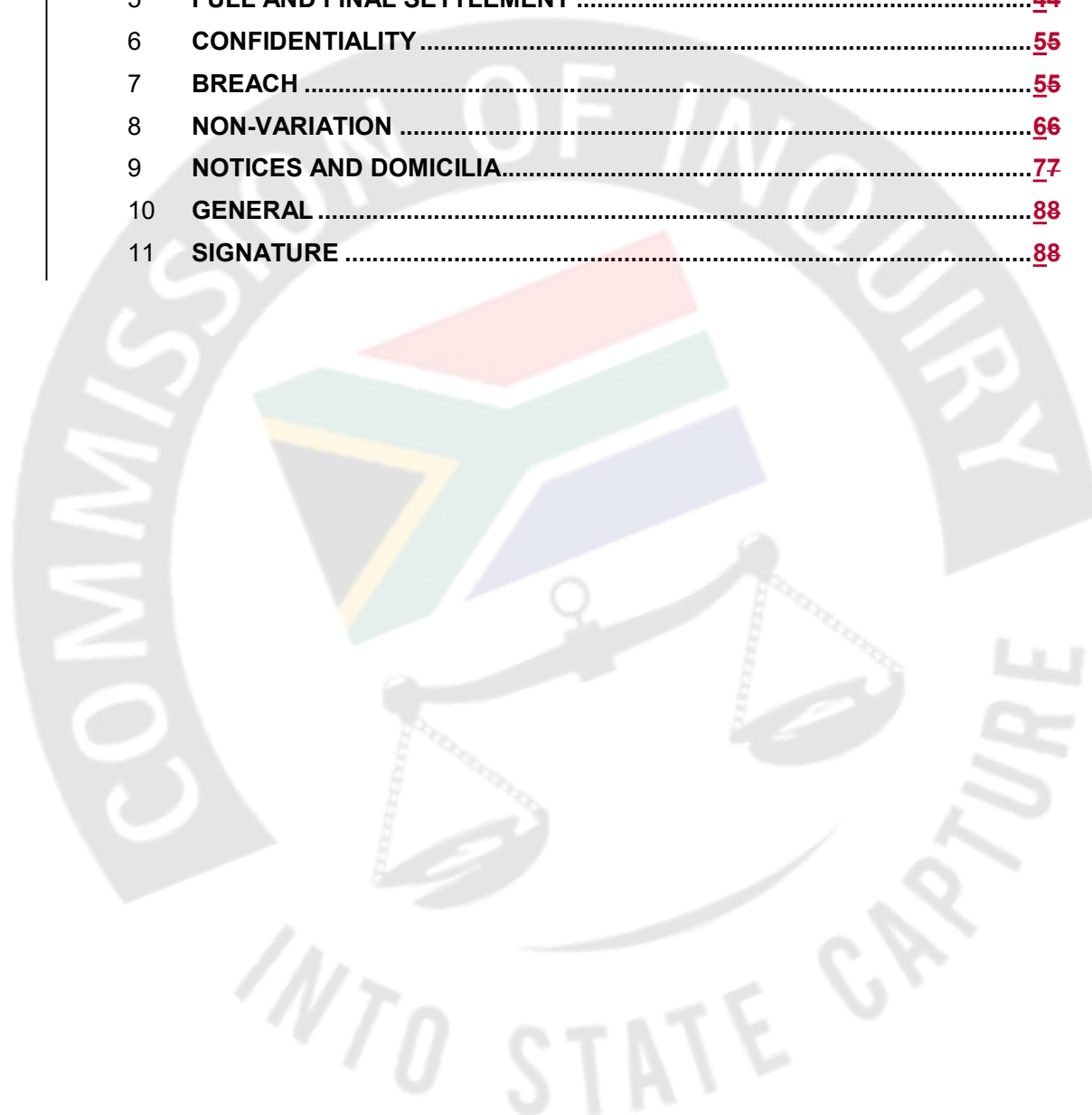
and

**Mr Tshediso John Matona**  
**IDENTITY NO: 6203145604082**



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**WHEREBY THE PARTIES AGREE AS FOLLOWS:****1 INTERPRETATION**

- 1.1 The headings to the clauses of this Agreement are inserted for reference purposes only and shall in no way govern or affect the interpretation hereof.
- 1.2 Unless inconsistent with the contents, the expression set forth below shall bear the following meanings:
- 1.2.1 **"Agreement"** means this agreement;
- 1.2.2 **"Eskom"** means Eskom Holdings SOC Limited, a company incorporated in terms of the Company laws of the Republic of South Africa, with registration number 2002/015527/30, with its principal place of business at Megawatt Park, Maxwell Drive, Sunninghill, Sandton, Johannesburg;
- 1.2.3 **"Mr TJ Matona"** means Mr Tshediso John Matona, the Chief Executive of Eskom, an adult male employee with identity number 6203145604082, currently residing at 372 Jutlander road, Beaulieu, Midrand;
- 1.2.4 **"the Parties (Party)"** means Eskom and Mr TJ Matona, who are parties to this Agreement;
- 1.2.5 **"the Signature Date"** means the last day of signature of this Agreement by either of the Parties.
- 1.2.6 **"the Termination Date"** means 31 May 2015.

**2 RECORDAL**

- 2.1 Mr TJ Matona is employed by Eskom as Chief Executive in terms of a written contract of employment ("the Employment Contract").



- 2.2 The Parties have mutually agreed to terminate the Employment Contract and the Employee's employment with Eskom subject to the terms and conditions recorded in this Agreement.

### 3 TERMS AND CONDITIONS

- 3.1 By mutual agreement Mr TJ Matona's employment will terminate on the Termination Date.
- 3.2 Eskom agrees that Mr TJ Matona will not be required to serve the requisite notice period and both Parties waive the notice period.
- 3.3 The Parties have agreed on the arrangements herein to give effect to the mutual settlement in full and final discharge and in settlement of all and any monies owing to the Employee, whether arising in terms of statute, delict, contract or otherwise. The terms of these arrangements are set out in further detail in clause 4 below.
- 3.4 Mr TJ Matona agrees that upon his termination of employment and exit, he will be subject to Eskom's normal exit management processes.
- 3.5 Eskom will give to Mr TJ Matona on or before 15 June 2015 –
- 3.5.1 a certificate of service which will be in accordance with section 42 of the Basic Conditions of Employment Act, No. 75 of 1997;
- 3.5.2 a favourable reference regarding his employment with Eskom, and will not issue any other references to third parties without his consent and agreement regarding the contents thereof.

### 4 PAYMENT AND BENEFITS

- 4.1 Mr TJ Matona will receive his normal monthly salary payments up to the Termination Date.
- 4.2 Subject to clause 4.4 below, Eskom will pay Mr TJ Matona a total

separation payment of R6 000 000.00 (six million rand) ("the Separation Payment") which equates to one year's total annual cost-to-company remuneration package. The Separation Payment is fully inclusive of any notice pay or outstanding leave pay owed to Mr TJ Matona.

- 4.3 Eskom understands that had Mr TJ Matona worked for a further 10 months as a Director-General in the employ of the Government of the Republic of South Africa ("the Public Services"), where he had been employed prior to his employment with Eskom, he would have been eligible for certain benefits from the Government Employee Pension Fund ("the GEPP") provided to employees employed at that level within the Public Services for a period of 10 years or more, as per the rules of the GEPP. Eskom has agreed that Mr TJ Matona must not be prejudiced by his current circumstances and that Eskom must take all steps necessary - to ensure that Mr Matona receives the relevant benefits from the GEPP as if he had been gainfully employed in the Public Services for a further 10 months as a Director-General - including but not limited to the following:

- 4.3.1 Eskom, with the co-operation of the Department of Public Enterprises, must use its best endeavours to persuade the GEPP to allow Mr TJ Matona to qualify for retirement benefits that he would have received had he been employed at that level within the Public Services for a period of 10 years or more;
- 4.3.2 Eskom undertakes to make payment of the amount of the contributions that would have been provided to the GEPP by Mr TJ Matona and/or his employer under such circumstances, equating to, but not exceeding, this period of 10 months' pension fund contributions on behalf of Mr TJ Matona (i.e. the amount that would have been paid to the GEPP had Mr TJ Matona been an employee at a Director-General level within the Public Services for this further period of 10 months, in order for him to qualify for these benefits);
- 4.3.3 In the event that the GEPP determines that this arrangement is not permissible in terms of its rules, this undertaking by Eskom will fall away

and will be of no force and effect. Under such circumstances, the remaining provisions of this Agreement shall continue to be of full force and effect.

4.4 Eskom will apply for an income tax directive from the South African Revenue Services as regards the income tax to be deducted from the amount stipulated in clause 4.2 above. This tax directive will be obtained by Eskom within 21 calendar days of the Signature Date.

4.5 The amount stated in clause 4.2 above less such amount that Eskom is required to deduct in respect of tax will be paid electronically into Mr TJ Matona's banking account within 14 calendar days of receipt of the original tax directive.

## **5 FULL AND FINAL SETTLEMENT**

5.1 Each and all the payments made and agreed to herein are in full and final settlement of all and any claims of any nature whatsoever that both Parties may have and/or may have had against each other whether arising from contract, delict, statute or otherwise and the Parties accordingly waive any claims or rights they may have in this regard

5.2 Without derogating from the generality of the foregoing, it is specifically recorded that the payment of these amounts is made without any admission of liability by either Mr TJ Matona or Eskom, whether arising out of contract, delict, the common law, statute, or otherwise and neither Party shall have any other claim against the other for, among others:

5.2.1 breach of the Employment contract or any employment legislation, including but not limited to the Labour Relations Act, 1995 as amended, the Basic Conditions of Employment Act, 1997 as amended and the Employment Equity Act, 1998 as amended; and

5.2.2 any alleged unfair dismissal, any alleged automatically unfair dismissal, any alleged unfair labour practice, any alleged unfair discrimination or

any other claim; and

5.2.3 any other amount not set out in this Agreement.

5.3 All surviving clauses of Mr TJ Matona's Employment Contract that are not extinguished by this Agreement will continue for the period specified therein and Eskom reserves the right to make any claims or request any refund for, among others, any over payments, breach of confidentiality, loss of any equipment, intellectual property, or company property not returned.

## **6 CONFIDENTIALITY**

The Parties agree that the terms and conditions of this Agreement and the circumstances surrounding it shall be kept strictly confidential and will not be disclosed to any third party, body or association, in the absence of the written permission of the other, save where the disclosure of this information is required by the operation of law and/or in order to enforce the provisions of this Agreement.

## **7 STATEMENTS**

Mr TJ Matona shall not make any written or oral statements injurious to, or of a disparaging nature about Eskom or any of Eskom's employees and Eskom shall likewise not make any written or oral statements injurious to, or of a disparaging nature about, Mr TJ Matona.

## **8 BREACH**

8.1 Should Mr TJ Matona commit any breach of his obligations as set out above, notwithstanding any previous waiver on Eskom's part of its rights, the termination of Mr TJ Matona's employment shall continue to be of full force and effect but Eskom shall be entitled, in its absolute discretion, to elect to:

- (i) claim damages from Mr TJ Matona arising out of his breach; or



- (ii) demand immediate repayment by Mr TJ Matona of the gross amount of the Separation Payment paid to him;

provided that Eskom shall not be entitled to exercise any right arising from any breach by Mr TJ Matona unless he has been afforded 10 (ten) days after receipt of a written notice calling upon him to remedy such alleged breach and, despite such notice and the elapse of 10 (ten) days, the breach has not been remedied.

- 8.2 Should Eskom commit any breach of its obligations set out above, then the termination of Mr TJ Matona's employment shall continue to be of full force and effect but Mr TJ Matona shall be entitled to institute a claim for damages against Eskom in respect of such breach; provided that Mr TJ Matona shall not be entitled to exercise any right arising from any alleged breach by Eskom unless Eskom has been afforded 10 (ten) days after receipt of a written notice calling upon it to remedy such alleged breach and, despite such notice and the elapse of 10 (ten) days, the breach has not been remedied.

## **9 NON-VARIATION**

- 9.1 No variation, modification or waiver of any of the provisions of this Agreement or consent to any departure therefrom shall in any manner be of any force or effect unless confirmed in writing and signed by the Parties and such variation, modification, waiver or consent shall be effective only in the specific instance and for the specific purpose and to the extent for which it was made or given.
- 9.2 No failure, delay, relaxation or indulgence on the part of either Party in exercising any power or right conferred on such Party in terms of this Agreement shall operate as a waiver of such right, nor shall any single or partial exercise of any such power or right preclude any other or further exercises thereof or the exercise of any power or right under this Agreement.

## 10 NOTICES AND DOMICILIA

- 10.1 Each Party chooses the address set out opposite its name below as its address to which all notices, legal processes and other communications must be delivered for the purposes of this Agreement:

**Eskom**

Megawatt Park,  
Maxwell Drive, Sunninghill  
Johannesburg  
2001

P.O Box 1091  
Johannesburg  
2001

Marked for the attention of Mr. A I Minnaar

**Mr TJ Matona**

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- 10.2 Any notice or communication required or permitted to be given in terms of this Agreement shall be valid and effective only if in writing and delivered by hand.
- 10.3 Any Party may by written notice to the other Party change its chosen address to any physical address, provided that the change shall become effective on the 14<sup>th</sup> day after the receipt of the notice by the addressee.

## 11 GENERAL

11.1 Apart from any provisions of the Employment Contract which by their nature shall survive its termination, this Agreement constitutes the whole agreement between the Parties and any representation not contained herein shall be of no force and effect between the Parties.

11.2 All the terms set out in this Agreement are material.

11.3 Mr TJ Matona acknowledges that he concluded this Agreement of his own free will and without duress. In addition, Mr TJ Matona acknowledges that he has carefully read and reviewed the contents of this Agreement, that he has had the opportunity to take legal advice in relation to its contents, and acknowledges that he fully understands all of its terms and conditions and all the consequences of entering into this Agreement.

## 12 SIGNATURE

Signed on behalf of the Parties, each signatory hereto warranting that he/she has due authority to do so.

**SIGNED at** \_\_\_\_\_ **on** \_\_\_\_\_ **2015.**

***For and on behalf of***  
***ESKOM HOLDINGS SOC LIMITED***

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name of Signatory

\_\_\_\_\_  
Designation of Signatory

**SIGNED at** \_\_\_\_\_ **on** \_\_\_\_\_ **2015.**

***For and on behalf of***  
***Ms TJ Matona***

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name of Signatory





**ANNEXURE A*****Official communication***

Eskom and its Chief Executive, Mr MJ Matona, have mutually agreed to part ways on an amicable basis. It is expressly noted that no misconduct is alleged by Eskom against Mr TJ Matona. Mr Matona believes that the agreement to separate is in the best interests of Eskom, to allow the Board to pursue its plans for the company under the current leadership.

Having considered his contribution at Eskom, and his vast professional and leadership experience, Eskom is of the view that Mr Matona can still play a vital role for South Africa, whether within commercial business or the Public Service.

Eskom thanks Mr Matona for his contribution during his term at Eskom.



# 08



IN THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES, (NATIONAL ASSEMBLY), [CORPORATE GOVERNANCE IN ESKOM]

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STATEMENT

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I, the undersigned,

**NICHOLAS HUGH LINNELL**

State that;

1. I am a director and shareholder in CT&A Project Management Pty Ltd (trading as *The Project Office*) and employed there since 2001/2. We provide business improvement services across a number of disciplines.
2. I hold BL. LLB law degrees from the University of Zimbabwe and a B.Com (Honours) degree from University of Cape Town. I have been engaged in business activities within corporates and in consulting services for 35 odd years.
3. I was approached on or about 7<sup>th</sup> March 2015 by Dudu Myeni for who I had provided consulting services at Mhlathuze Water and SAA. The request was to attend a meeting with the President and the Chairperson of Eskom, in Durban on the 8<sup>th</sup> March. The purpose was to discuss the feasibility of undertaking an inquiry into Eskom.
4. Context
  - 4.1. At that time the country was experiencing rolling power outages and there were commentaries suggesting they would get worse before they got better. These included views that a complete outage was possible and that should that happen it would potentially take weeks to begin to bring the network up again. During such a period there would be no

power at all. Business has since estimated that these failures cost the economy billions and billions of Rands. The troubles at Eskom must also have weighed on the minds of the rating agencies.

- 4.2. There were continuing media articles alleging corrupt or improper commercial activities at Eskom with some executives being publically named.
- 4.3. Public statements by Minister (Brown) that she was not receiving credible information from Eskom must have further concerned stakeholders.
- 4.4. There was a national crisis at this time.
- 4.5. There were public calls for an in depth enquiry into Eskom.
5. I attended the meeting in Durban on Sunday 8<sup>th</sup> March 2015. When I arrived at the Presidency Mr Tsosti, the then Chairman of Eskom and Ms Dudu Myeni were already there. We discussed the intended enquiry, how it would take place and what it would seek to achieve. After a period we joined the President.
6. The President was clearly familiar with the purpose of the meeting and we provided a summary of what was proposed (arising from the earlier discussions referred to above). This included a number of key principles.
  - 6.1. For the enquiry to have credibility it needed to be open, independent and comprehensive. It needed to be free from internal interference.
  - 6.2. It needed to be quick as lengthy previous enquiries in other state entities led to greater harm than good.
  - 6.3. It needed the capacity and capability of the best investigators across commercial, financial and technical disciplines. It was therefore not suitable for one entity to conduct it.
  - 6.4. It needed to be seen to be credible. Sound communications with stakeholders and the public were necessary.
  - 6.5. I cannot now recall whether my proposal for a retired judge to oversee the enquiry was mentioned during this discussion. However it was always my contention that that was necessary and it was included in the Terms of Reference and media release.
  - 6.6. The Board and the Minister (Brown) must be in agreement and supportive and seen to be so.
  - 6.7. I discussed implications of board and PFMA approvals (see memorandum referred to below which included seeking approval of Ministry of Finance)



6.8. The matter of suspension of top executives was discussed. The rationale supporting suspensions was that;

6.8.1.If investigators were going to have the freedom to follow the evidence there needed to be an environment free from fear or intimidation. These conditions do not have to be “active” to exist and the passive presence of key people can inhibit openness. These were precautionary suspensions and those included would be counselled on that point as would the media release.

6.8.2.The risk to the business of suspensions of key people would be managed by appointment of capable subordinates. A strong communication strategy would convince stakeholders and the public that this was a positive not negative approach. The enquiry would be limited to 3 months.

6.9. My own role would be to act as a coordinator and interface with the Board.

7. The President listened to these views and asked one or two questions then he agreed. He undertook to speak with the Minister and Mr Tsosti would speak with the Board.
8. As the matter was urgent I would travel to Johannesburg the following day and be available to the board as and when required.
9. Overnight I drafted a proposed Board memorandum, proposed resolutions and an aide memoire on suspensions. I forwarded these to Mr Tsosti. (**Attached**). I assume this was subsequently circulated to the Board. This included;
  - 9.1. Detailed background to the importance of events and the seriousness of the state of Eskom.
  - 9.2. Process of consensus and approval between the President, The Board, the Minister (Brown) and Ministry of Finance (funding approval). This is important as it clearly is inclusive, transparent and required the approvals of Finance and DPE.
10. On that Monday 9<sup>th</sup>, I sort legal advice from leading labour attorneys (in my own capacity) on the labour issues and obtained opinion from them.
11. I went to Megawatt Park in anticipation of being called by the Board. I took with me a senior labour lawyer to deal labour law matters if requested by the Board . We were however later told the Board was not in agreement and we left. In part I considered that that might be the end of the matter.
12. On Wednesday 11<sup>th</sup> I was again called by the Chairman to Megawatt Park. On this occasion I was called into the board meeting.
13. Clearly the matter had already been discussed and agreed to. I was asked to introduce myself and there were a number of questions. These included the proposed suspensions. We also discussed how the communication aspect of these should be managed. It was important to be

discussed the process of the discussions with the four executives identified and the media and communication strategy. It was critical to take the public into the board's confidence and say what the Board was doing and why. Experience dictates that transparency is critical to credibility.

14. During that meeting I had the impression that the Minister of Public Enterprises had immediately prior to that moment addressed the Board on the matter. I was not privy to those discussions nor the Chairman's presentation.
15. After that meeting there was a press conference attended by a number of the Directors at which the Chairman stated publically that there would be an in-depth enquiry, it would be speedy and was urgent. My appointment as coordinator was announced.
16. The media announcement created significant interest which was not negative. This is important in the context of the following week's ratings announcement.
17. After the press briefing I met with Ms Mabude (chosen to lead the Board committee overseeing the enquiry) and we discussed the scope and principles of terms of reference. I suggested matters such as the need for an independent whistle-blower facility to allow people to give anonymous tip-offs and meeting the executive team. Their input would be critical but more importantly their trust in the process was critical. I also met with the Senior General Manager: Assurance and Forensic Office of the Chief Executive and discussed the approach and IA involvement.
18. That same afternoon, Ms Mabude and Mr Naidoo (Board Recovery and Build Programme Review Committee (BRBPR) chair) and I met with the Executive (about 30 executives). Mr Naidoo introduced me as having been appointed by the board to coordinate the enquiry. I was asked to provide a brief overview of the enquiry and the purpose of the interaction with them – to obtain suggestions for the scope. It was agreed that they would provide the – I think head of legal, with all their suggestions and these would be forwarded to me to have included in the proposed scope.
19. I then left Megawatt Park. The enquiry firmly in progress with Board approval, the executive and the public informed.
20. Following that I received a number of communications from Eskom including an invitation from Mr Naidoo, a director, to join the Board Recovery and Build Programme Review Committee (BRBPR) workshop the following week. His communication with that committee included reference to the Board's intention to commit to a "deep dive" investigation.
21. I also received an invitation to attend a Board A&R subcommittee (delegated board authority to oversee the enquiry) meeting to be held on the 19th and then again on the 23rd March.
22. On the 12<sup>th</sup> March Minister Brown released a media statement endorsing the Board's decision to hold an in depth enquiry.

23. There was no doubt that at this time that the enquiry was in motion.
24. I was about that time required to provide my proposed draft terms of reference to Malesela Phukubje the company secretary by Sunday 15th 6pm.
25. Over the next few days I made enquiries with legal and accounting firms seeking those which had capacity, capability and no prior conflicts (previous advice to Eskom).
- 25.1. I met with ENS and received from them a written “CV”. I considered them for the commercial forensic investigation stream.
- 25.2. I had telephonic discussions with Grant Thornton for the financial stream. Other leading accounting firms had previous advisory experience with Eskom.
- 25.3. I canvassed potentially names for the retired judge role with a highly respected lawyer and compiled a list with a preferred candidate. This candidate would without any doubt have been welcomed by all stakeholders and the public as providing the right oversight (It would not be fair to identify this candidate as he was never in the end approached or aware of the possible role).
- 25.4. I spoke with industry experts as to potential candidates for the technical stream. While this never developed further there was the formation of two teams for this area (it being hugely complex and difficult to scope). One team would be an overseas technical entity and the other, a group of acknowledged South Africa technical experts (group of “wise men/women”). The advantage would be that they would have “local” knowledge and be able to assist with directing focus for the overseas entity.
26. I emailed the draft terms of reference to Ms Mabude and the company Secretary on Sunday 15th at 7.05pm (**attached**). [Just before or after this I received a company proposed terms of Reference from the Company Secretary which I did not use but serves a point of comparison to that proposed by myself].
27. There were a number of important issues included in my proposed terms of reference.
- 27.1. It was detailed and comprehensive in it’s scope – it was to be an in depth enquiry.
- 27.2. It proposed the appointment of a retired judge – it would have credible independent oversight;
- 27.3. It referenced the streams of enquiry that would be undertaken by different entities - it was unlikely that one entity could have the cross skills necessary for such a comprehensive enquiry.
28. On the evening of Monday 16th I had a discussion with Ms Mabude regarding the terms of reference which I had submitted. That discussion was brief. I was concerned that Ms Mabude

now refused to allow me access to the input received from the executives (see para 18 above). There was a notable cooling of enthusiasm. That conversation ended with an agreement that I would meet Ms Mabude the following morning at around midday (17th).

29. At 4.50 am on the 17th March I received an email from a Mr Thulo Selele copied to the Company secretary informing me that I was no longer required to attend the BRBPR meeting as the A&R subcommittee would now be handling the inquiry. The time of this email struck me as peculiar. It was also contrary to the previous evening's parting understanding with Ms Mabunde. My perception was there had been an intervening event.
30. Upon making some enquiries concerning this abrupt change of events I received information (hearsay) that a number of members of the board and some of the suspended executives had attended an late night private meeting during the night of Monday 16th. I assumed that this was linked to the early morning email.
31. On Wednesday 18th at 9.21am I forwarded a further draft of the terms of reference and proposed media release to the Chairman of Eskom and Ms Mabunde. I strongly recommended that the media statement be released urgently – by midday same day (18th) as it was important to maintain a positive endorsement through the press – public and stakeholder opinion was critical.
32. I never received any response to this email from the chairperson of A&R (Ms Mabunde).
33. However the Chairman contacted me and informed me that he had spoken to Ms Mabunde and she had undertaken to come to his house as soon as she was able to discuss the documents sent. He asked that I also attend.
34. By midmorning there was no further response and I called the chairperson and suggested I visit him as the media were asking for comment and without it the company was beginning to receive negative publicity. What was intended to be a positive intervention was evaporating. I was keen to have information in the public domain and receive informed commentary the following day.
35. The Chairperson informed me that the Minister had called him and instructed him to ensure a media report was issued due to the poor press – it was now a week after the announcement and there had been no further media release and the public was already sceptical of Eskom. He agreed to the release and instructed me to forward it directly to the company secretary and manager in his office. The instruction was that it follows the normal process and be copied to all directors and the minister.
36. Later I realised it was never released and upon enquiry by me to the Chairman I was informed by Mr Tsosti that the Minister of DPE and certain directors had objected to the press release and he had told the company secretary not to release it.



37. He also informed me that the Minister's office stated (hearsay) that protocol does not allow the Board to appoint a retired judge without the President's authority. I stated that to my knowledge that is not true. Effectively this aspect of the TOR was being rejected.
38. Later that evening (Wednesday 18th) I received a call around 6pm from the Chairman asking me to come to his house as the Chair of A&R had arrived. The three of us met and we first reviewed the media statement. In effect the Ms Mabunde wanted all the references to the scope and approach including the retired judge and the use of three independent forensic teams to be excised.
39. I provided reasons why I disagreed with that view and none of these reasons were challenged by Ms Mabude. The response was simply "the committee does not want this". When I asked for reasons why the committee would have a different view Ms Mabude did not provide any. At this time the Chairman intervened as he did not like the adversarial tone that the discussion had taken on.
40. Ms Mabude then suggested that I attend a meeting of A&R the next day – Thursday 19th in the evening and present my arguments to them. I subsequently received a formal meeting invite to that planned meeting.
41. However it was subsequently cancelled and my attendance not required. Instead an urgent board meeting was called, I think for the Friday 20<sup>th</sup>.
42. I was later informed that Mr Tsosti was to appear before the board for a disciplinary hearing arising from his actions to set up the enquiry. I was asked by his legal representatives to provide a statement of my and Mr Tsosti's roles which I did. The content of much of this statement here is taken from that contemporaneous statement provided around the 20<sup>th</sup> March.
43. I have in my possession original documents and emails that support this statement and which will also provide timing and dated versions of documents referred to.
44. I subsequently saw a press release from Eskom stating that I had been removed alongside Mr Tsosti.
45. Notwithstanding the termination of the enquiry, the Board did not reinstate the suspended executives despite their suspension having been explicitly linked to the enquiry.
46. Subsequent information
- 46.1. Subsequent to the aborted enquiry there was public demand for an investigation into Eskom. This resulted in the Board appointing a legal firm, Dentons to undertake an enquiry. Later (much) Eskom released parts of their report. The questions ought to be posed – Why was a second enquiry mandated given the first was aborted; Why specifically was Dentons appointed; What were their agreed terms of reference and if they were narrower than the first enquiry proposed why were they narrower; What were their

findings and more particularly what did they not find that subsequently has come to light through the Gupta leaks and other investigations.

46.2. I have seen Ms Davids (Eskom legal advisor) evidence before the Committee with reference to her meeting with a member of the Gupta family on the 9<sup>th</sup> March 2015. She stated that Gupta informed her of the proposed enquiry and suspensions (prior to the board decision of the 11<sup>th</sup>). I can state that at no time was any Gupta or (to my knowledge) any related person ever party to discussions in which I was involved. However by 8<sup>th</sup> and certainly the morning of the 9<sup>th</sup> the board and the Minister had met to discuss the enquiry and proposed process. It was therefore open knowledge to many people within Eskom by that time (9<sup>th</sup>). Why the Gupta's were aware at all is worth querying.

46.3. The question has been posed whether the suspension of the executives on the 10<sup>th</sup> directly resulted in the downgrade of Eskom the week following the suspensions. This question ought to be put to Standard and Poors as only they would know. However an article by Dirk De Vos in the Daily Maverick on the 23<sup>rd</sup> March 2015 reviewed Eskom's situation and its mounting debt and troubles. Eskom was clearly a dangerous place. He stated that the suspensions did play a role. However that ought to be tested as it had been anticipated prior to the suspensions. However to the extent that it did play a role in the downgrade, the further question ought to be asked – was it the suspensions *per se* or the events thereafter – the muddled handling of their suspensions, the poor media releases, absence of stakeholder engagement in what was intended, the subsequent cancellation of the enquiry but continued suspension of the executives.

#### 47. Conclusion

47.1. A valid question must be why was I appointed in the manner that why was I appointed that by those did so. I don't know that answer although I have asked myself many times.

47.2. I can however state that the reasons given me at that time for the enquiry were sound and supported by most informed persons at that time – it was necessary. In itself there is nothing untoward about that. If there was ulterior motive as I have often pondered, it is confusing that it was so quickly aborted.

47.3. From my first engagement my position was I would do it if it was open, independent (and seen to be so), having proper credible oversight, with skilled and credible resources. That was never challenged and it must have been with that in mind that I was proposed and appointed. Why the charade if it was never intended to be.

47.4. The trigger to abort the enquiry must have been the circulation of my written, detailed terms of reference and proposed approach. That was the death knell.

47.5. The reasons given for its termination then, warrant testing.

Signed on 21<sup>st</sup> November 2017 at Cape Town

Nicholas Linnell



## ESKOM SOC

9<sup>TH</sup> MARCH 2015

### Memorandum

The Company has implemented rolling restricted supply to all areas for a number of months. Notwithstanding the integration of Medupi unit 1, continued maintenance and unscheduled shut downs have and will inevitably cause ongoing planned and unplanned outages. The CEO is on public record as having forecast that these will continue for as much as 5 years.

Medupi and Kusile are years behind schedule and tens of billions over budget.

Lost revenue as a result of lost sales arising from supply not meeting demand runs into billions.

Escalating funding shortfalls have increased the interest carrying cost beyond prudential limits.

Eskom has been obliged to seek increasing funding from treasury. The forward forecast anticipates that funding shortfalls will continue.

The Company has also been subjected to public embarrassment relating to tender and other expenditure disputes -some of which have become litigious. These compound current negative perceptions of Eskom.

The impacts of these failings are numerous and the consequential risk extends far beyond the Company to all South Africans. Economic capacity is being severely restricted across all sectors and curtailed foreign and domestic investments postponed or cancelled outright. These in turn create a spiral effect with increasing unemployment and pressure on the fiscus.

The past response by Eskom has been to offer the public little insight to the causes and little guidance to the future. Public announcements are often uninformative or silent. The perception is that there has been a tendency to deny and defend. As a consequence neither business nor the man-in-the -street has any notion of what the future holds. That perception extends to a belief that - "neither does Eskom". This Board is duty bound to establish the facts and to address the causes and implications.

Until this moment the Board has been entirely reliant on the Executive for information pertaining to these challenges. It is abundantly clear that this in itself is part of the problem. This Board has no independent and objective insight into the extent that some of our failings might be caused or exacerbated by management failure. Given the abnormal risks facing the Company and its obligations to the public, this board must know the facts - as unpalatable as they might be.

The Board is also in an unenviable position as it is known that the Executive relationship with the shareholder can at times be more engaging than it is with the Board. While this Board can have no quibble with close shareholder relationship this may not be a substitute for proper and sound corporate governance.



Given the severe risk of further outages and little independent understanding of the facts, there it is critical that the Board act immediately - to establish first-hand the causes of these challenges

It is recommended that the Board urgently authorise and mandate an independent, external enquiry to establish the facts of the current difficulties. This enquiry must be unfettered by management and the Board and other policy stakeholders. It must be seen to be credible and objective. It must have a mandate to be penetrating and unhindered.

The Board must ensure that it creates the space and environment within the company and amongst stakeholders for the investigators to fulfil this mandate unimpeded and without influence.

The resolution before the Board provides the authority for such an enquiry.

In order to facilitate the urgent and independent execution of this resolution, a further resolution provides the delegation of the selection, mandating and contracting (including terms of reference) and oversight of the enquiry to a board subcommittee. While this subcommittee remains accountable to the full Board, the subcommittee should have the Board's delegated authority to take all such steps and measures as the subcommittee deems necessary to ensure the fulfilment of the mandate, as the board would itself have.

There is therefore an urgent and pressing need for the Board to gain first-hand an unabridged review of the facts and their impact.



**ESKOM SOC****DECISION RECORD OF THE BOARD  
9TH MARCH 2015****Resolution**

1. That this Board resolves that there are exceptional circumstances demanding the necessity for an urgent meeting of the Board of Directors. Ordinarily notice of at least 7 days is required. Due to these exceptional circumstances (recorded in the memorandum) this Board resolves to accept short notice and to receive and consider the notice and resolutions of this meeting.
2. That this Board resolves that an external and independent enquiry be set up to investigate and determine the facts relating to the current technical, commercial and structural status and any acts and/or omissions that have contributed to the current deficiency of generating and distribution capacity of Eskom.
3. That the Board resolves to appoint a Board subcommittee comprising Zola Tsotsi, Chairperson of the Board, Ms Chwayita Mabude, Chairperson of Audit and Risk Committee and Zethembe Khoza, Chairperson of People and Governance Committee, mandated with delegated authority of the Board to determine the terms of reference of the enquiry; the selection, mandating and contracting of the independent investigators; and the oversight of the enquiry. The subcommittee shall have the Board's delegated authority to take all such steps and measures as the subcommittee deems necessary to ensure the unfettered fulfilment of this mandate, as the board itself would have such power and authority, and further, without limitation, to ensure that the environment within the Company does not hinder or create a perception of hindering the enquiry and to take all such necessary steps to ensure such.
4. That the Board authorises the Chairperson in consultation with the Minister and the Minister of Finance to approve expenditure sufficient and necessary to fund this enquiry.
5. That this enquiry shall be required to present its final report to the Board, the Minister and the Presidency no later than the 30<sup>th</sup> June 2015.
6. That the subcommittee shall have the authority to deviate from the requirements of Eskom's Procurement Policies and Procedures as is necessary given the target to complete the investigation within 3 months (urgency) and to appoint such persons or entities to conduct the enquiry that are independent of Eskom and free of any influence or suspicion of influence of any party that might have any effect on the enquiry, save that the subcommittee shall if required provide reasons to the Ministry of Finance for any such deviations.



Members:	Signature:
1. Zola Tsotsi	
2. Tshediso Matona	
3. Tsholofelo Molefe	
4. Ms Chwayita Mabude	
5. Norman Tinyiko Baloyi	
6. Dr Pathmanathan Naidoo	
7. Venete Klein	
8. Nazia Carrim	
9. Romeo Kumalo	
10. Mark Vivian Pamensky	
11. Zethembe Khoza	
12. Dr Baldwin Sipho Ngubane	
13. Devapushpum Viroshini Naidoo	



DRAFT

## TERMS OF REFERENCE FOR A FACT FINDING INQUIRY

AT

ESKOM HOLDINGS (SOC) LIMITED

### TERMS OF REFERENCE

#### 1. PREAMBLE

The Board has received complaints and concerns raised by various sources, both internal and external to Eskom with regards to inter alia sufficiency and reliability of supply of electricity; escalating build project costs; escalating maintenance costs; high costs of primary energy and the inordinately high costs of the bond programmes that Eskom has participated in recently. In addition the Board has recognised the need for independent assessment of the state of the company's capability and performance. The Board has appointed an inquiry coordinator who shall be responsible for the implementation of the inquiry as mandated in the terms of reference.

To this end, the Board of Directors have resolved to institute an independent inquiry into all of these concerns. Having so resolved, the Board of Directors delegated the authority to institute the inquiry to the Board Audit and Risk Committee which shall oversee the process. Included in the authority to institute this inquiry is also the authority to:

- To consider and approve the terms of reference as proposed by the project coordinator;
- To consider and appoint a retired judge to oversee the independence of the inquiry from amongst a panel recommended by the inquiry coordinator;
- To consider and appoint services providers for the three separate areas of inquiry from a panel proposed by the inquiry coordinator;
- To receive and consider the interim and final reports and provide comments to the inquiry teams as necessary;
- To ensure that the scope of work as defined in the terms of reference are delivered within prescribed time lines;
- To approve a budget for the execution of the inquiry;

#### 2. OBJECTIVE/PURPOSE

To provide the Board and Shareholder with an assessment of the current state of Eskom and in particular to determine the reasons for the current lack of, and inconsistency/unreliability of supply of electricity to customers; to determine the causes of engineering

failures, delays and cost overruns; to review primary energy sources, costs and quality of supply; to review the financial solvency, liquidity and the cost of funding of Eskom; and to provide recommendations with regard to possible actions.

The inquiry must be free of all influence or interference and shall be so structured as to ensure that independence is seen to exist.

### 3. APPROACH

The inquiry shall be subject to the oversight of a retired judge to ensure that the inquiry is free of influence and is objective.

The inquiry will be managed by a project coordinator who shall be responsible for the delivery of the mandate and who shall propose to the subcommittee terms of reference and a short-list of possible service providers to execute the mandate, to be approved by the subcommittee.

The inquiry shall focus separately on technical, commercial and financial facets of the Company. Each will be performed under separate inquiry teams selected having regard to their particular skills and independence.

### 4. TIMING

The inquiry shall commence on the 23rd March 2015 and shall provide its final report and recommendations to the Board not later than 19th June 2015

### 5. RESOURCES

- 5.1. The inquiry teams shall have access to all documentation and other data belonging to the Company as deemed by the inquiry teams to be necessary and shall be permitted to interview and receive information from any employee and supplier as necessary.
- 5.2. Each team and the inquiry coordinator shall have access to all premises of the Company at all reasonable time and upon reasonable notice;
- 5.3. The internal audit department will provide assistance as agreed from time to time with the Head of Internal audit department.
- 5.4. The Board subcommittee shall provide appropriate and necessary assistance to the inquiry teams as requested from time to time.
- 5.5. Board and board committee agenda packs and minutes shall be available to each team on request.
- 5.6. The Company shall provide a meeting room sufficient to house 6 persons and shall provide access as required to interview rooms.
- 5.7. All prior inquiries and reports in connection with matters included in this scope shall be made available to the inquiry.
- 5.8. The inquiry shall be permitted to establish an independent reporting "hot-lines" enabling internal and external people to provide anonymous input to the inquiry.
- 5.9. The respective teams comprising the inquiry shall meet on a fortnightly basis to ensure coordination.

## 6. SCOPE OF INQUIRY

The scope below may be limited in consultation with the Board subcommittee having regard to the budget and time available save that this may only be limited on the basis of what the teams' deem in their discretion to be "material" in the circumstances of the information available.

### 6.1. Technical

- 6.1.1. In respect of all generating plants' (+/-87), benchmark maximum output capacity, planned capacity and actual output for the immediate past 36 months;
- 6.1.2. Review current status of all generating plants and provide opinion on the causes and contributory factors for sub optimum output (in excess of 33 require major repair);
- 6.1.3. Review all major incidents at plants and their causes and any avoidable factors not acted upon (including communications between plant and executive);
- 6.1.4. Review maintenance requirements of all generating plants assessing actual vs planned maintenance and review all contracts and service level agreements and compliance to the same as well as costs relative to plan. Have particular regard to all unplanned failures and review in context of maintenance conducted/not conducted;
- 6.1.5. Review all 3<sup>rd</sup> party electricity supply available to the grid (including proposals received but not acted on) and compare to actual supply connected to the grid for the past 36 months. Provide an opinion on the technical reasons and cost implications for not having connected when possible. Review all information including correspondence, negotiations and contracting with regard to that supply and reasons for less than optimum connected supply. In addition, consider the available potential of supply from foreign countries and determine any reasons for supply (from time to time) less than that potential and consider any reasons thereof;
- 6.1.6. Specifically enquire into the principal causes of failure at Majuba and Duvha and make recommendations as necessary. In so doing have regard to management reports and independent insurance/assessor reports and determine the degree of transparency of reporting to the Board and have regard to the reasons for any late submissions of these reports to the Board.
- 6.1.7. Conduct high level reviews of the new builds at Medupi and Kusile and determine the principal causes and contributory factors to the overruns of cost and time.
  - 6.1.7.1. The degree of depth of this report to be agreed between the subcommittee and the inquiry team bearing in mind the time available.
  - 6.1.7.2. To determine whether appropriate contingency plans were in place and acted upon at the earliest possible instance;
- 6.1.8. In collaboration with the Financial and Commercial inquiry teams to the review the supply of primary energy (coal, diesel, gas, water) to all plants over the past 36 months and determine whether supplies met specification, quality and delivery requirements (also have regard to any incorrect specifications provided).



- 6.1.9. Review the causes of disruption of power to two Rand Water pumps at Rand Water in September 2014 paying special attention to any lack of proactive or reactive management response i.e. were there warning and how effectively did we react;
- 6.1.10. To consider the impact of weather on the performance of any of the plants and to provide an opinion as to whether these risks could have been mitigated;
- 6.1.11. To review risk management and contingency plans to determine that such are sufficient to negate any generation risk, and at times of plant failure and whether such were implemented effectively.

## 6.2. Commercial

- 6.2.1. Review all procurement and other contracts for capital projects, primary energy supplies and operational services (exceeding R1 million or such figure as varied with agreement with the subcommittee) for the past 48 months and determine adherence to supply chain policy and business case approvals. Have special regard to any contracts and payments made but not matched to specification (cost, time and quality). Have regard to any rolling or renewed contracts that have cumulative value above the threshold;
- 6.2.2. Review all contracts related to Medupi and Kusile from inception. Review these in context to the original business case and adherence to tender and supply chain requirements. The focus to be on commercial matters and not technical. The team to coordinate their inquiry with the Technical and financial teams.
- 6.2.3. Review employee and contractor contracts and payments made to employees and contractors and identify any that bear *prima facie* concern.
- 6.2.4. Undertake electronic assessment of all company email correspondence, identifying certain key words to be proved by the subcommittee, for the last 24 months, and where appropriate undertake interviews with internal and external parties to probe where indicated.
- 6.2.5. Review a random sample of internal correspondence between project leaders and plant/project management on Medupi, Kusile, Majuba and Duvha and identify whether plant management foresaw problems and communicated risk upwards. Review management reactions;
- 6.2.6. Similarly (plants as per above) review all correspondence between suppliers and company in which disputes are debated. Interview suppliers as necessary.
- 6.2.7. Review new posts created over past 36 months and provide a schedule of position and TCC.
- 6.2.8. Review all executive and Board reports pertaining to new builds and summarise material implications and decisions.
- 6.2.9. Review contracts and recruitments of employees with TCC >R1.5m per annum for last 24 months;
- 6.2.10. Review a sample of senior employee suspensions, disciplinary hearings and dismissals (and reinstatements) of employees last 36 months (filter those earning >R1 000 000 p.a.).
- 6.2.11. Review summaries of internal audit reports over the last 36 months and management responses and any action taken on material risks identified;
- 6.2.12. Review internal audit programs – schedule of audits and risk analysis and review Internal audit reports of the same and review actions taken;



- 6.2.13. Review draft external audit reports for the past 3 years (2012-2014) and identify risks noted and not in final reports and determine reasons for such
- 6.2.14. Interview sustainability executive for insight to risks not identified;
- 6.2.15. Review correspondence from insurers of major claims submitted (to be objectively assessed by the team) and premium adjustments for those and reasons for them for past 36 months.
- 6.2.16. To review the organismal model and consider the implication on the performance of the company and make recommendations as required.
- 6.2.17. To consider the implementation of any policy decisions and their impact on the performance of the Company. To coordinate with Financial and Technical inquiry teams to ensure appropriate consideration by each.
- 6.2.18. Review company policies to determine compliance of good governance, transformation and conflict of interest.
- 6.2.19. Review whistle-blower reports for past 36 months and provide an opinion of the satisfactory follow-ups thereof.

### 6.3. Financial

- 6.3.1. Review the approved financial statements of the Company as at 30<sup>th</sup> September 2014 and provide a summarised “red flag” report on material concerns. Review the current management report forecast for the year ending March 2015 and provide similar comments and in particular to any variations not anticipated in September 2014.
- 6.3.2. Review material funding facilities/contracts /bonds of any nature and provide an opinion of the terms relative to the market and the company’s risk.
- 6.3.3. Review all steps taken by the Company to recover unpaid “government/municipal” debt (debtors) currently estimated at R4.7 billion. Provide commentary on the impact on the financial standing of the company on such unpaid debt.
- 6.3.4. Review all non- government trade debtors (customers) and provide a similar review and in particular to steps taken to secure payment;
- 6.3.5. Conduct (together with Commercial team) a review of all primary energy supplies over the past 36 months and determine the cost implications of any contracts “not for value”;
- 6.3.6. Determine the lost revenue and/or penalty cost implications of all non-implemented 3<sup>rd</sup> party electricity supply opportunities.
- 6.3.7. Determine the net wasted cost (and reasons therefore) of payments made to primary energy suppliers for materials not received but paid for over the past 36 months.
- 6.3.8. Review all non-government major electricity-user sales contracts (together with their business cases) and determine the value of lost revenue over time and, together with commercial, provide an opinion on the proprietary/commercial wisdom of such contracts at the time.
- 6.3.9. Review all contracts and payment of pre-sold electricity “buy-backs” and access the cost/benefit of such decisions.
- 6.3.10. Together with Technical teams provide an estimated cost to the company of the cost (increased costs) and time (lost revenue) overruns at Medupi and Kusile;
- 6.3.11. To consider asset management policies and practices;

6.3.12. To provide a high level financial protection for the next 3 years.

#### 6.4. Coordination

6.4.1. The inquiry coordinator shall:

6.4.1.1. Draft terms of reference for the scope of the inquiry.

6.4.1.2. Consider suitable persons to fill the positions provided for in this terms of reference and to make recommendations to the subcommittee;

6.4.1.3. shall ensure that each of the teams have access to each other so as not to create overlaps and gaps;

6.4.1.4. have responsibility for the delivery of the scoped work of each inquiry team and of the final consolidated report;

6.4.2. The coordinator shall access to the interim work of each team and to provide comment and guidance to each team as he deems appropriate.

### 7. REPORTING

7.1. Each inquiry team to provide the inquiry coordinator with a weekly and monthly summary of their activities and material (including preliminary) findings for presentation to the subcommittee;

7.2. The program coordinator to recommend possible reinstatement of suspended executives as soon as inquiries are complete and risks mitigated.

7.3. At the end of the inquiry, present to the Board Committee a report.

7.4. The final report to include a summary of material finding and recommendations.

### 8. APPOINTMENT OF AN INDEPENDENT SERVICE PROVIDER

In the exercise of its authority as delegated by the Board, the Audit Committee has appointed.....to assist with  
..... team of the inquiry.

### 9. FEES

9.1. The respective service providers will negotiate and agree the fees that Eskom will pay to the service provider.

Signed at \_\_\_\_\_ on this the day \_\_\_\_\_ 2015

For and on behalf of Eskom

Signature

\_\_\_\_\_

Name of Signatory

\_\_\_\_\_

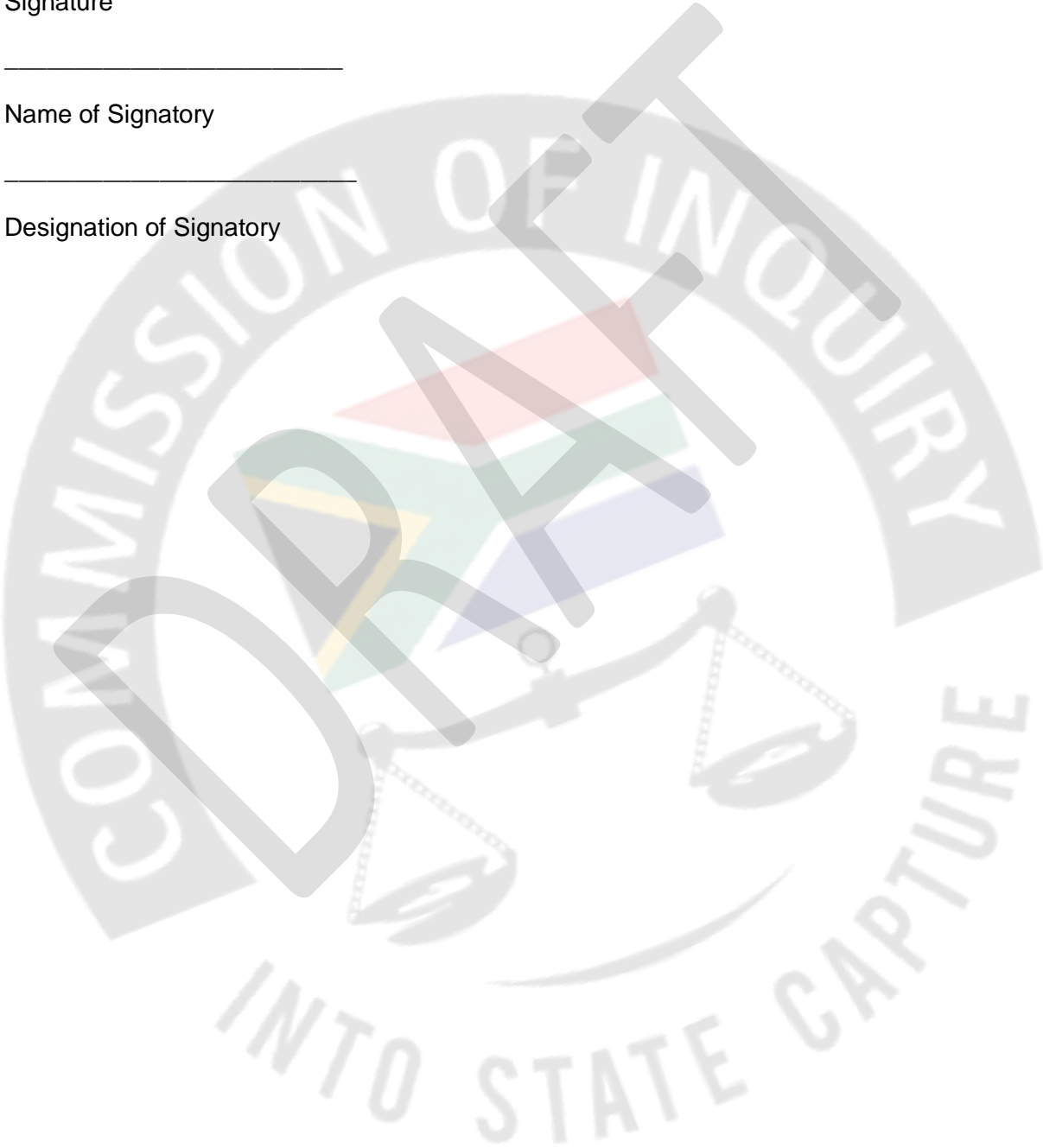
Designation of Signatory

For and on behalf of  
[Service Provider]

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name of Signatory

\_\_\_\_\_  
Designation of Signatory



## ESKOM SOC

### PRESS RELEASE

#### THE BOARD ENQUIRY

On Wednesday 11<sup>th</sup> March 2015, the Chairperson of the Board Mr Zola Tsotsi released a media statement and held a media conference announcing the Board's decision to mandate an inquiry in the current state of the Company.

Understandably there has been considerable interest in the inquiry and much expectation created. There have also been numerous media reports variedly reporting the enquiry and this has led to some confusion.

The purpose of this communication is to provide the public with further details on the inquiry and to lessen the space for further confusion.

Firstly, this initiative that has been taken by the Board has the complete support of our shareholder Minister Lynn Brown.

The purpose of the inquiry is:

*"To provide the Board and Shareholder with an assessment of the current state of Eskom and in particular to determine the reasons for the current lack of, and inconsistency/ unreliability of supply of electricity to customers; to determine the causes of engineering failures, delays and cost overruns; to review primary energy sources, costs and quality of supply; to review the financial solvency, liquidity and the cost of funding of Eskom; and to provide recommendations with regard to possible actions.*

The board further resolved that the inquiry must be free of all influence or interference and shall be so structured as to ensure that independence is seen to exist.

To that end the Board delegated the oversight of the inquiry to the Board Audit and Risk Committee. However so as to ensure that even this was not perceived as having influence, the terms of reference provide for a number of important checks and balances.

1. The appointment of a retired judge to ensure that the inquiry is free from influence and bias.
2. The appointment of industry and professional experts in specific fields to undertake the work defined in the scope of the inquiry.
3. The appointment of a person outside the company who shall coordinate the various aspects and be accountable to the board subcommittee for the timely delivery of the objectives.

The subcommittee has considered the proposed terms of reference and scope of the inquiry prepared by the inquiry coordinator and has asked that these be put to a number of professional persons or entities that we believe have the capacity and expertise to complete this mandate in the time allowed.



Once the various professional teams have been appointed the Board will provide the public with details of the following:

1. The appointed retired judge;
2. The professional teams appointed;
3. The terms of reference.

In appointing the professional teams we will have regard to fact that the public must have confidence in the people undertaking this task. That they are competent and that the possibility of interference would be improbable. We shall do this as it is right and to ensure complete transparency and confidence in the process.

Some speculation has arisen as to the overlap of the Board's inquiry and what might appear parallel initiatives. The ministerial "war room" has a very specific mandate to consider the strategic issues and to seek ways of eliminating structural bottlenecks. The "energy committee" is looking at a very specific part of the future energy needs and options. The board's inquiry focuses a fact gathering exercise – the product of which will be shared with both these committees. However the board's inquiry is focused on internal matters that have affected our performance and identify some key remedial actions that might be identified.

As a Board we are certain that this is in the best interest of the Company and the nation. We cannot readily recognise any concerns as to why this should not happen. For some time both the Government and the public had demanded such an inquiry. We now have it.



## IN THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

## PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES, (NATIONAL ASSEMBLY), [CORPORATE GOVERNANCE IN ESKOM]

SUBMISSION BY NICHOLAS HUGH LINNELL

## SCHEDULE OF DOCUMENTS

	Document	pages
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3.	Email to Chairman Tsotsi dated 9 <sup>th</sup> March 2015 enclosing proposed board memorandum and resolutions	15-21
4.	Email string providing brief to ENS and ENS in principle response and opinion	22
5.	Suspensions memorandum sent to Mr Tsotsi as approved by ENS labour attorney	23-28
6.	Email and attachments to Ms Myeni 18032015 as intermediary updating progress	29-41
7.	Email to Mabude and Tsotsi with TOR and Media release 18032015	42-56
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IN THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES, (NATIONAL ASSEMBLY), [CORPORATE GOVERNANCE IN ESKOM]

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AFFIDAVIT

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I, the undersigned,

NICHOLAS HUGH LINNELL

do hereby make oath and say;

1. I provided a number of written statements the Evidence Leader in November 2017. The purpose of this affidavit is to depose my statement under oath and to place it as a single document. I stand by the factual content of those statements as read together.
2. I am a director and shareholder in CT&A Project Management Pty Ltd (trading as *The Project Office*) and employed there since 2001/2. We provide business improvement services across a number of disciplines.
3. I hold BL LLB law degrees from the University of Zimbabwe and a B.Com (Honours) degree from University of Cape Town. I have been engaged in business activities within corporates and in consulting services for 35 odd years.
4. Context
  - 4.1. During the period leading up to the events covered in this deposition in early 2015, the country was experiencing rolling power outages and there were commentaries suggesting they would get worse before they got better. These included views that a complete outage was possible and that should that happen it would potentially take weeks to begin to bring the network up again. During such a period there would be no power at all. Business has since estimated that these failures cost the economy billions and billions of Rands. The troubles at Eskom must also have weighed on the minds of the rating agencies.
  - 4.2. There were continuing media articles alleging corrupt or improper commercial activities at Eskom with some executives being publically named.





- 4.3. Public statements by Minister (Brown) that she was not receiving credible information from Eskom must have further concerned stakeholders.
- 4.4. There was a national crisis at this time.
- 4.5. The powers-that-be could not even publically agree whether the situation could be termed a "crisis" or not a "crisis".
- 4.6. There were public calls for an in depth enquiry into Eskom.
5. I was contacted on 6<sup>th</sup> March 2015 by Ms Dudu Myeni and asked to travel the same day to Pretoria to attend an urgent meeting with the President.
6. At that time I was well known to Ms Myeni who had been a client of mine from time to time over a number of years on various projects in her representative capacity at Mhlathuze Water Board and South African Airways. At this time I was engaged in a major project at SAA, similar but on a smaller scale to what would become the subject of this deposition.
7. On arrival at the Presidency sometime after midday I met with Ms Myeni. No one else attended that meeting.
8. While the SAA matter might also have been discussed, in the context of this deposition, Ms Myeni informed me that the President was concerned about the state of Eskom and wanted an in-depth investigation into its affairs. She had recommended to the President that I would be suitable for that role.
9. Ms Myeni proceeded to brief me on the background for an enquiry. Included in this discussion was reference to some documentation that Ms Myeni had.
10. The President did not join that meeting as I understood he was unexpectedly otherwise engaged.
11. To the best of my recollection it was then agreed that I would need to travel to Durban on Sunday the 8<sup>th</sup> March to meet with the President to complete this briefing and mandate.
12. I left with an understanding that I would be asked to conduct the enquiry into Eskom and I ought to prepare for that.
13. Prior to the 6<sup>th</sup> March I did not know who the Chairman of Eskom was nor had I ever met or heard mention of Mr Tsotsi.
14. During the following day, Saturday 7<sup>th</sup> March Mr Tsotsi either called me or I was provided his contact number but I requested from him company documents and policies which would be required for proposing the enquiry and its terms. During that exchange it was evident he would also be at the meeting in Durban on the Sunday 8<sup>th</sup> March 2015.





15. I attended the meeting in Durban on Sunday 8<sup>th</sup> March 2015. When I arrived at the Presidency Mr Tsosti and Ms Dudu Myeni were there. In attendance was also Ms Myeni's son and another person introduced as "Jabu". At that time I knew nothing of Jabu's role at large.
16. While Ms Myeni's son played no active role in the meeting, Jabu provided information about the state of Eskom including allegations of wrongdoing and reasons for business failure, some of which was in the public domain.
17. To the best of my recollection Jabu had a number of documents that dealt with alleged events at Eskom. These were largely from unidentified sources and unverified content. These were things that an investigation would identify and were background in context, but in part some of the allegations did provide some value in scoping an approach to the investigation.
18. When preparing for this enquiry in November 2017 (nearly 3 years later), I located one document loaded to my computer on that same 8<sup>th</sup> March titled "Eskom Energy crisis 2". I reviewed the properties of this document to identify its source. It pertained to the Westinghouse/Areva/Koeberg matter and appeared to be a document written months earlier.
- 18.1. The properties indicate that the document was originally created on a computer whose Microsoft licence was registered to the company "Toshiba". The document was last amended and saved on a computer named as "Univer Capital".
- 18.2. I conducted a google search for "Univer Capital" and identified a LinkedIn association for a "Jabu Maswanganye" referred to a Director of Univer Capital Johannesburg. CIPC has no record of a company by that name.
19. The group at the meeting referred to above discussed the intended enquiry, how it would take place and what it would seek to achieve.
20. After a period we joined the President.
21. The President was clearly familiar with the purpose of the meeting and we provided a summary of what was proposed (arising from the earlier discussions referred to above). This included a number of key principles.
- 21.1. For the enquiry to have credibility it needed to be open, independent and comprehensive. It needed to be free from internal interference.
- 21.2. It needed to be quick as lengthy previous enquiries in other state entities led to greater harm than good.
- 21.3. It needed the capacity and capability of the best investigators across commercial, financial and technical disciplines. It was therefore not suitable for one entity to conduct it.

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- 21.4. It needed to be seen to be credible. Sound communications with stakeholders and the public were necessary.
- 21.5. I cannot now recall whether my proposal for a retired judge to oversee the enquiry was mentioned during this discussion. However it was always my contention that an independent role was necessary.
- 21.6. The Board and the Minister (Brown) must be in agreement and supportive and seen to be so.
- 21.7. I discussed implications of board and PFMA approvals.
- 21.8. The matter of suspension of top executives was discussed. The rationale supporting suspensions was that;
- 21.8.1. If investigators were going to have the freedom to follow the evidence there needed to be an environment free from fear or intimidation. These conditions do not have to be "active" to exist and the passive presence of key people can inhibit openness. These were precautionary suspensions and those included would be counselled on that point as would the media release.
- 21.8.2. The risk to the business of suspensions of key people would be managed by appointment of capable subordinates. A strong communication strategy would convince stakeholders and the public that this was a positive not negative approach.
- 21.8.3. The enquiry would be limited to 3 months.
- 21.9. My own role would be to act as a coordinator and interface with the Board.
22. The President listened to these views and asked one or two questions then he agreed. He undertook to speak with the Minister and Mr Tsotsi would speak with the Board.
23. As the matter was urgent I would travel to Johannesburg the following day and be available to the board as and when required on the Monday 9<sup>th</sup> March 2015.
24. That evening I drafted a proposed Board memorandum, proposed resolutions and forwarded these to Mr Tsotsi. The email also provided process guidance notes for Mr Tsotsi for the board meeting. This note emphasised the need to inform the board of the President's role and the key requirements of the proposed enquiry. **(Attached Reference pages 15-21.)**
25. Between Monday 9<sup>th</sup> March and 11<sup>th</sup> March, I took formal legal advice on the proposed suspensions. This included the opinion that the proposed suspensions were not inconsistent with the Eskom disciplinary code or prevailing case law. **(Attached Reference page 22).**
26. I prepared an aide memoire detailing the process of the suspension discussions together with draft suspension letter which were reviewed, amended and finalised by the senior labour



attorney consulted and these were forwarded in writing to Mr Tsotsi on the 11th March.  
(Attached Reference pages 23-28)

27. I went to Megawatt Park in anticipation of being called by the Board. I took with me the senior labour lawyer consulted and his associate to deal labour law matters if requested by the Board. We were however later told the Board was not in agreement and we left. In part I considered that that might be the end of the matter.
28. On Wednesday 11<sup>th</sup> I was again called by the Chairman to Megawatt Park. On this occasion I was called into the board meeting.
  - 28.1. Clearly the matter had already been discussed and agreed to. I was asked to introduce myself and there were a number of questions. These included the proposed suspensions.
  - 28.2. We also discussed how the communication aspect of these should be managed. It was critical to take the public into the board's confidence and say what the Board was doing and why. Experience dictates that transparency is critical to credibility.
  - 28.3. During that meeting I had the impression that the Minister of Public Enterprises had immediately prior to that meeting addressed the Board on the matter. I was not privy to those discussions or the Chairman's presentation.
  - 28.4. It was quite clear to me that the board approved the enquiry and processes to implement that were discussed and agreed.
29. After that meeting there was a press conference attended by a number of the Directors at which the Chairman stated publically that there would be an in-depth enquiry, it would be speedy and was urgent. My appointment as coordinator was announced.
30. The media announcement created significant interest which was not immediately negative but there was a credibility risk in the media narrative. This is important in the context of the following week's ratings announcement.
31. I met with Ms Mabude (chosen to lead the Board committee overseeing the enquiry) and we discussed the scope and principles of terms of reference. I suggested matters such as the need for an independent whistle-blower facility to allow people to give anonymous tip-offs and meeting the executive team. Their input would be critical but more importantly their trust in the process was critical. I also met with the Senior General Manager: Assurance and Forensic Office of the Chief Executive and discussed the approach and IA involvement.
32. Ms Mabude and Mr Naidoo (Board Recovery and Build Programme Review Committee (BRBPR) chair) and I met with the Executive (about 30 executives). Mr Naidoo introduced me as having been appointed by the board to coordinate the enquiry. I was asked to provide a brief overview of the enquiry and the purpose of the interaction with them – being to obtain input for the

scope. It was agreed that they would provide this input to, I think head of legal, and these would be forwarded to me to have considered in the proposed scope.

33. The enquiry was firmly in progress with Board and Minister's approval, the executive and the public informed and the enquiry in motion.
34. Following that I received a number of communications from Eskom including an Invitation from Mr Naidoo, a director, to join the Board Recovery and Build Programme Review Committee (BRBPR) workshop the following week. His communication with that committee included reference to the Board's intention to commit to a "deep dive" investigation. This is relevant to the recognition that the enquiry was underway.
35. I received an invitation to attend a Board A & R subcommittee (delegated board authority to oversee the enquiry) meeting to be held on the 19th and then again on the 23rd March.
36. On the 12<sup>th</sup> March Minister Brown released a media statement endorsing the Board's decision to hold an in depth enquiry.
37. I was about that time required to provide my proposed draft terms of reference to Malesela Phukubje the company secretary by Sunday 15th 6pm.
38. It was my view that it would be impossible to have a single entity undertaking the whole enquiry and that streams were necessary with separate entities having the best skills and capacity undertaking aspects best suited for them. They ought not have done advisory work for Eskom that might conflict the enquiry.
39. Over the next few days I made enquiries with legal and accounting firms seeking those which had capacity, capability and no prior conflicts (previous advice to Eskom).
  - 39.1. I met with ENS and received from them a written "CV". I considered them for the commercial forensic investigation stream.
  - 39.2. I had telephonic discussions and email communication with Grant Thornton for the financial stream. Other leading accounting firms had previous advisory experience with Eskom.
  - 39.3. I canvassed potential names for the retired judge role and compiled a list with a preferred candidate. This candidate would without any doubt have been welcomed by all stakeholders and the public as providing the right oversight. That candidate was never approached nor been made aware of his candidature as subsequent events interrupted that process.
  - 39.4. I spoke with industry experts as to potential candidates for the technical stream. While this never developed further there was the formation of two teams for this area (it being hugely complex and difficult to scope). One team would be an overseas technical





entity and the other, a group of acknowledged South Africa technical experts (group of "wise men/women"). The advantage would be that they would have "local" knowledge and be able to assist with directing focus for the overseas entity.

40. I emailed the first draft terms of reference to Ms Mabude and the company Secretary on Sunday 15th at 7.05pm.
41. On the evening of Monday 16th I had a discussion with Ms Mabude regarding the terms of reference which I had submitted. That discussion was brief. I was concerned that Ms Mabude now refused to allow me access to the input received from the executives (see above). There was a notable cooling of enthusiasm. That conversation ended with an agreement that I would meet Ms Mabude the following morning at around midday (17th).
42. At 4.50 am on the 17th March I received an email from a Mr Thulo Selele copied to the Company secretary purporting to inform me that the Board Audit, Risk and Compliance Committee would now be handling the Forensic Fact Finding Enquiry (I assumed to be referring to the enquiry I was preparing for). I was informed that I was no longer required to attend meeting previously arranged.
43. The time (4.50am) of this email struck me as peculiar. It was also contrary to the previous evening's parting understanding with Ms Mabude. My perception was there had been an intervening event.
44. Upon making some enquiries concerning this abrupt change of events I received information that a number of members of the board and some of the suspended executives had attended a late night private meeting during the night of Monday 16th. I assumed that this was linked to the early morning email cancelling my appointment.
45. Although recognising the factual implication of that notification, I did not regard that notice as being a formal communication and continued preparing the terms of reference and interfacing with the chairman.
46. On Wednesday 18th I forwarded to the Chairman of Eskom and Ms Mabude, a final draft of the terms of reference, the proposed media release and a version of a draft TOR recommended to me from the company secretary (for purposes of comparison to that submitted by myself) (Attached Reference pages 42-56).
- 46.1. The terms of reference included the appointment of a retired judge – it would have credible independent oversight;
- 46.2. It provided for independent professional streams to the enquiry with entities having particular skills for each stream.
- 46.3. It was comprehensive in its terms – it was an in depth enquiry.



47. In the covering email, I strongly recommended that the media statement be released urgently – by midday same day (18th) as it was important to maintain a positive endorsement through the press – public and stakeholder opinion was critical.
48. The media release ensured transparency and made similar reference to:
- 48.1. a retired judge;
  - 48.2. informed the public that the terms of reference would be communicated publically;
  - 48.3. the enquiry would commence the following Monday, on the 23<sup>rd</sup> March.
49. At the same time. 18<sup>th</sup> March 2015, I also emailed a report to Ms Myeni, being the intermediary of the President. This included copies of the same terms of reference and the proposed media release being sent to the Chair and Ms Mabude. It also included a briefing document updating on progress which included reference to the considerations of a retired judge. **(Attached Reference pages 29-41).**
50. I emailed the same terms of reference to both ENS and Grant Thornton, both being considered for the respective commercial and financial streams. **(Attached Reference pages 57 and 58)**
51. I never received any response to this email from Ms Mabude.
52. However the Chairman contacted me and informed me that he had spoken to Ms Mabude and she had undertaken to come to his house as soon as she was able to discuss the documents sent. He asked that I also attend.
53. By midmorning there was no further response from Ms Mabude and I called the chairperson and suggested I visit him as the media were asking for comment.
54. Communication was now urgent and without clarity the company was beginning to receive negative publicity. What was intended to be a positive intervention was evaporating. I was keen to have information in the public domain and receive informed commentary in the press the following day.
55. The Chairperson informed me that the Minister had called him and instructed him to ensure a media report was issued due to the poor press – it was now a week after the announcement and there had been no further media release and the public was already sceptical of Eskom.
56. The Chairman agreed to the media release and instructed me to forward it directly to the company secretary and manager in his office. The instruction was that it should follow the normal process and be copied to all directors and the minister but it be released immediately. **(Attached Reference pages 59-62).**





57. Later I realised it was never released and upon enquiry I was informed by Mr Tsosti that the Minister of DPE and certain directors had objected to the press release and he had told the company secretary not to release it.
58. He also informed me that the Minister's office stated (hearsay) that protocol does not allow the Board to appoint a retired judge without the President's authority. I stated that to my knowledge that is not true. Effectively this aspect of the TOR was being rejected.
59. Later that evening (Wednesday 18th) I received a call around 6pm from the Chairman asking me to come to his house as the Ms Mabude had arrived. The three of us met and we first reviewed the media statement. In effect the Ms Mabude wanted all the references to the scope and approach including the retired judge and the use of three independent forensic teams to be excised.
60. I provided reasons why I disagreed with that view and none of these reasons were pointedly challenged by Ms Mabude. The response was simply "the committee does not want this". When I asked for reasons why the committee would have a different view Ms Mabude did not provide any. At this time the Chairman intervened as he did not like the adversarial tone that the discussion had taken on.
61. Ms Mabude then suggested that I attend a meeting of A&R the next day – Thursday 19th in the evening and present my arguments to them. I subsequently received a formal meeting invite to that planned meeting.
62. However that meeting was subsequently cancelled and my attendance not required. Instead an urgent board meeting was called, I think for the Friday 20<sup>th</sup>.
63. Following that meeting with Ms Mabude and the Chairman on the 18<sup>th</sup>, I immediately on the 19<sup>th</sup> March communicated in writing to both ENS and Grant Thornton that there was a hold on the enquiry until further notice. In the case of ENS I included reference to my own frustration and purpose at that time. (Attached Reference pages 63 -4 and 65 -67)
64. I was later informed that Mr Tsosti that members of the Board had met with the Minister on Friday 20<sup>th</sup> March concerning Mr Tsotsi's role in the enquiry and that he was to appear before a Board disciplinary hearing.
65. I was subsequently asked by his legal representatives to provide a statement of my and Mr Tsosti's roles in the matter for his disciplinary hearing, which I did. The content of that statement to his legal representatives is substantially identical to this affidavit as it was a contemporaneous record of events and formed a useful reference in preparing this document.
66. On the 21<sup>st</sup> March I drafted a letter for Mr Tsotsi to be addressed to Minister Brown complaining about the Board's role in terminating the enquiry. The purpose was twofold – it addressed the Board's attempt to remove Mr Tsotsi (said to be directly related to setting up the enquiry) and it



addressed the Board role to terminating the enquiry as contemplated. (Attached Reference pages 68-71).

67. Earlier that week I had advised Mr Tsotsi to also brief the Chairperson of the Portfolio Committee on Public Enterprises (the same committee undertaking the current enquiry) on the obstruction to the enquiry. On the 22<sup>nd</sup> March 2015 I forwarded to the then Chairperson of the Portfolio Committee on Public Enterprises the terms of reference as rejected by the Board and drew her attention to what I considered the Board's role in terminating the enquiry. (Attached reference page 72)
68. I subsequently saw a press release from Eskom stating that I had been removed from the enquiry.
69. I now wish to deal with aspects that appear to have concerned the Committee and which directly impact my involvement in this matter.
70. My role
- 70.1. At the time I believed that the President had the intention of mandating an enquiry as contemplated above and that he had the legitimacy of doing so;
- 70.2. This perception of mine has since been indirectly confirmed by the Constitutional Court and the Public Protector which have held that the President is constitutionally obliged to exercise his executive authority over the Executive, in furtherance of effective governance of state affairs. I believe his intervention as understood by me would have befitted that obligation;
- 70.3. The reasons for the enquiry given me at that time were in my view sound and much was in the public domain at the time;
- 70.4. In my correspondence to the Board on the 8<sup>th</sup> March, proposing the approach, I referred to the President's intervention and support for the enquiry.
- 70.5. When I attended the Board meeting on the 11<sup>th</sup> March the Board knew full well that the President had instructed this intervention. It was also evident that so did the Minister.
- 70.6. I believed (and remain so) that the suspensions as contemplated were reasonable, justified and lawful and I took formal legal opinion prior to their suspension that that was so.
- 70.7. I provided a progress report to Ms Myeni as intermediary of the President on the 18<sup>th</sup> March, which included the terms of reference, the media release and the list of preferred retired judges.



70.8. I drafted the letter to Minister Brown making clear the Board's obstruction with the enquiry as contemplated.

70.9. I also informed the Chairperson of the Parliamentary Committee of Public Enterprise of the same obstruction.

70.10. I caused the instruction to release the media statement. Had it been released as intended it would have brought the public into the confidence of the scope and purpose of the enquiry and would have been committed the Board to its full execution.

70.11. From my first engagement my position was that I would do it if it was open, independent (and seen to be so), having proper credible oversight, with skilled and credible resources. That was never challenged until rejected by the Board. That position was contemporaneously, then privately, disclosed to the ENS representative in an email appended here.

70.12. I am of the opinion that all these actions, contemporaneous to events during the first two weeks of March 2015, demonstrate that I had a bona fide and reasonable belief and intent to conduct a befitting enquiry for the benefit of the company.

#### 71. The suspensions

71.1. The precautionary suspensions were considered during the meeting of the 8th March. Precautionary suspensions would have been a standard approach that I would have considered.

71.2. At the time public allegations of mismanagement and wrongdoing were rife and the escalating power outages were a major economic concern.

71.3. I rationalised that if these conditions existed then the top management to whom all activities and people ultimately report ought to have had knowledge of them.

71.4. This has subsequently been borne out in the Public Protector Report and the GuptaLeaks that already at this time very serious acts of misconduct had occurred and were continuing. In fact the first Tegeta contract was agreed and formally executed prior to the suspensions.

71.5. I would have considered key areas of the business that the enquiry would focus on and also whether anyone in those areas may have a propensity to interfere or have such a presence as to create a perception of potentially impeding the investigation.

71.6. I would not have known the identity of the individuals beforehand but at the meeting of the 8th we had identified the roles and names of three executives and these were named by me in the board briefing document that I drafted and sent to the chairman that same evening (8th).



71.7. Mr Matona (CEO), Mr Marokane (Group Capital) and Mr Koko (Commercial and Technology) were named in the suspension briefing memorandum that I forwarded to Mr Tsosti prior to the Board meeting on the 11th March. I cannot recall when the 4th executive was added. Ms Molefe had not been part of my initial proposal.

71.8. I believe that staff below these executives, generally have knowledge of activities but feel inhibited with the perceived or real presence of senior executives to come forward. An example of this type of fear and direct interference has since been alleged during the disciplinary hearing of Mr Koko.

71.9. While there was unverified information that the three might have had previously been perceived to impede an investigation of their areas of responsibility, it was made clear that no direct aspersions or allegations were intended or contemplated at that stage. That was the task of the investigation.

71.10. The executives were to be individually counselled regarding that point and this was publically stated to staff and the through the media. The suspensions were precautionary to allow the investigation to proceed quickly and free from any perceived influence while acknowledging that if wrongdoing was found then some accountability rests with top management.

71.11. These suspensions were proportionate to the severity of the crisis and were inextricably linked to the investigation and in accordance with the law and the Eskom disciplinary policy (see later)

## 72. Subsequent events related to the suspensions;

72.1. On the 17<sup>th</sup> April 2015 (one month after my removal and prior to the appointment of Dentons), Minister Brown announced the appointment of Mr Molefe as acting CEO.

72.2. Minister Brown is reported in the media to have commented that she wished Mr Molefe would remain for at least a year and should Mr Matona come back they would look for another position for him.

72.3. Such an intended move would have been in conflict with the legal justification contemplated in my recommendations at the time of the suspensions.

72.4. The board entered into exit settlement agreements with three of the executives at an early stage after their suspensions and certainly prior to the Denton's first interim report (June 2015).

72.5. Given that Dentons reportedly showed no wrongdoing by the three, it needs to be questioned why they were not then reinstated rather than exited.



- 72.6. The one executive that the Board did reinstate has since faced a disciplinary enquiry for alleged wrongdoing.
- 72.7. The question has been posed whether the suspension of the executives on the 11th March directly resulted in the downgrade of Eskom the week following the suspensions.
- 72.8. The risk of the downgrade was contemplated at the time.
- 72.9. However it warrants further enquiry whether it was the suspensions *per se* that triggered the downgrade or by the hiatus and confusion caused by cancellation of the enquiry the week immediately before the downgrade.



NICHOLAS HUGH LINNELL

I certify that:

- I. The Deponent acknowledged to me that:
- A. He knows and understands the contents of this declaration;
  - B. He has no objection to taking the prescribed oath; and
  - C. He considers the prescribed oath to be binding on his conscience.
- II. The Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God."
- III. The Deponent signed this declaration in my presence on the 9<sup>th</sup> day of March 2018



7079909-1  
BAATJIES AJ W/O

COMMISSIONER OF OATHS



Signed on 09<sup>th</sup> March 2018 at Cape Town





15

**Nick Linnell**

**From:** Nick Linnell <nickl@theprojectoffice.com>  
**Sent:** Sunday, 08 March 2015 6:37 PM  
**To:** 'ztsotsi@liquifire.biz'  
**Subject:** Board memorandum and resolutions 9th March 2015.docx  
**Attachments:** Board memorandum and resolutions 9th March 2015.docx

Dear Chair

Please find a copy of the memorandum and proposed resolutions. If you are happy I would suggest that you require the company secretary to adapt to any format standards used by Eskom.

Could you also review the substance of the this to ensure that you feel it makes the point adequately.

This document would be circulated together with a notice of an urgent meeting for the Board to attend at 9am or 10am(if you believe it will give members more time to attend).

It is critical that the company secretary communicates this notice both in email and verbally confirming that he has delivered the notice to each director.

At the meeting it will be important to record the directors who are not present, whether they received the notice. We need to have at least 7 members present.

Once you get the green light please call each director providing them with context

1. The President has engaged both you as chairman and the minister regarding the current status of Eskom. It is his view that the effect on the economy is massively understated.
2. He believes that the Board is obliged to address the weaknesses and challenges facing the company. In order to do that the board must be certain that it has the accurately facts to hand. Once it has these facts it should act decisively and with conviction. The current manner in which this crisis is managed is untenable.
3. An independent enquiry is possibly the best approach as that has the capacity to act urgently and potentially has an independent and objective approach. It will also be seen to be more transparent.
4. You have also had a conversation with the Minister who has concurred with the initiative proposed by the President and formulated by yourself and the approach proposed. As this affects the national interest you request the Board to address this positively as the eyes of the nation are on us.
5. The proposed approach requires that a small board committee oversee the enquiry team. This investigation team must have the unfettered access to all information without any influence of the executive. There must not be any counter-productive influences.
6. You would like an indication of their support.
7. Stress the matter is extremely sensitive and no communication may be made to any outside party and most particularly the press.

Please call me if you need more information

Kind regards

Nick

Nick Linnell



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cell: 083 488 1000

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The Project Office



Company Registered Office 22 Melkhout Crescent | Plattekloof 3 | 7500  
Directors: N H Linnell | M Green  
Postal Add PO Box 15813 | Panorama | 7506



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**ESKOM SOC****9<sup>TH</sup> MARCH 2015****Memorandum**

The Company has implemented rolling restricted supply to all areas for a number of months. Notwithstanding the integration of Medupi unit 1, continued maintenance and unscheduled shut downs have and will inevitably cause ongoing planned and unplanned outages. The CEO is on public record as having forecast that these will continue for as much as 5 years.

Medupi and Kusile are years behind schedule and tens of billions over budget.

Lost revenue as a result of lost sales arising from supply not meeting demand runs into billions.

Escalating funding shortfalls have increased the interest carrying cost beyond prudential limits.

Eskom has been obliged to seek increasing funding from treasury. The forward forecast anticipates that funding shortfalls will continue.

The Company has also been subjected to public embarrassment relating to tender and other expenditure disputes - some of which have become litigious. These compound current negative perceptions of Eskom.

The impacts of these failings are numerous and the consequential risk extends far beyond the Company to all South Africans. Economic capacity is being severely restricted across all sectors and curtailed foreign and domestic investments postponed or cancelled outright. These in turn create a spiral effect with increasing unemployment and pressure on the fiscus.

The past response by Eskom has been to offer the public little insight to the causes and little guidance to the future. Public announcements are often uninformative or silent. The perception is that there has been a tendency to deny and defend. As a consequence neither business nor the man-in-the-street has any notion of what the future holds. That perception extends to a belief that - "neither does Eskom". This Board is duty bound to establish the facts and to address the causes and implications.

Until this moment the Board has been entirely reliant on the Executive for information pertaining to these challenges. It is abundantly clear that this in itself is part of the problem. This Board has no independent and objective insight into the extent that some of our failings might be caused or exacerbated by management failure. Given the abnormal risks facing the Company and its obligations to the public, this board must know the facts - as unpalatable as they might be.

The Board is also in an unenviable position as it is known that the Executive relationship with the shareholder can at times be more engaging than it is with the Board. While this Board can have no quibble with close shareholder relationship this may not be a substitute for proper and sound corporate governance.



Given the severe risk of further outages and little independent understanding of the facts, there it is critical that the Board act immediately - to establish first-hand the causes of these challenges

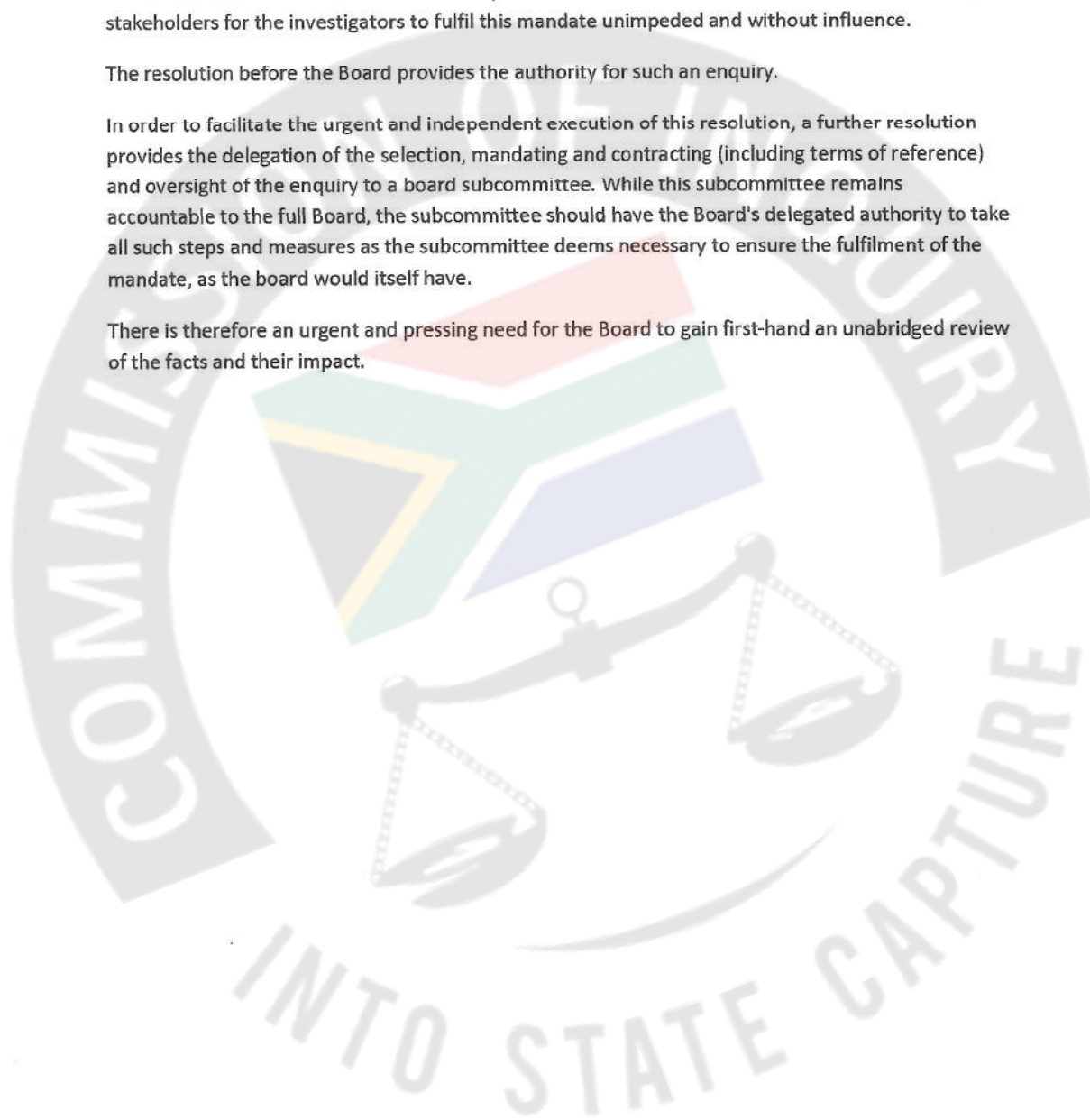
It is recommended that the Board urgently authorise and mandate an independent, external enquiry to establish the facts of the current difficulties. This enquiry must be unfettered by management and the Board and other policy stakeholders. It must be seen to be credible and objective. It must have a mandate to be penetrating and unhindered.

The Board must ensure that it creates the space and environment within the company and amongst stakeholders for the investigators to fulfil this mandate unimpeded and without influence.

The resolution before the Board provides the authority for such an enquiry.

In order to facilitate the urgent and independent execution of this resolution, a further resolution provides the delegation of the selection, mandating and contracting (including terms of reference) and oversight of the enquiry to a board subcommittee. While this subcommittee remains accountable to the full Board, the subcommittee should have the Board's delegated authority to take all such steps and measures as the subcommittee deems necessary to ensure the fulfilment of the mandate, as the board would itself have.

There is therefore an urgent and pressing need for the Board to gain first-hand an unabridged review of the facts and their impact.



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## ESKOM SOC

DECISION RECORD OF THE BOARD  
9TH MARCH 2015

## Resolution

1. That this Board resolves that there are exceptional circumstances demanding the necessity for an urgent meeting of the Board of Directors. Ordinarily notice of at least 7 days is required. Due to these exceptional circumstances (recorded in the memorandum) this Board resolves to accept short notice and to receive and consider the notice and resolutions of this meeting.
2. That this Board resolves that an external and independent enquiry be set up to investigate and determine the facts relating to the current technical, commercial and structural status and any acts and/or omissions that have contributed to the current deficiency of generating and distribution capacity of Eskom.
3. That the Board resolves to appoint a Board subcommittee comprising Zola Tsotsi, Chairperson of the Board, Ms Chwayita Mabude, Chairperson of Audit and Risk Committee and Zethembe Khoza, Chairperson of People and Governance Committee, mandated with delegated authority of the Board to determine the terms of reference of the enquiry; the selection, mandating and contracting of the independent investigators; and the oversight of the enquiry. The subcommittee shall have the Board's delegated authority to take all such steps and measures as the subcommittee deems necessary to ensure the unfettered fulfilment of this mandate, as the board itself would have such power and authority, and further, without limitation, to ensure that the environment within the Company does not hinder or create a perception of hindering the enquiry and to take all such necessary steps to ensure such.
4. That the Board authorises the Chairperson in consultation with the Minister and the Minister of Finance to approve expenditure sufficient and necessary to fund this enquiry.
5. That this enquiry shall be required to present its final report to the Board, the Minister and the Presidency no later than the 30<sup>th</sup> June 2015.
6. That the subcommittee shall have the authority to deviate from the requirements of Eskom's Procurement Policies and Procedures as is necessary given the target to complete the investigation within 3 months (urgency) and to appoint such persons or entities to conduct the enquiry that are independent of Eskom and free of any influence or suspicion of influence of any party that might have any effect on the enquiry, save that the subcommittee shall if required provide reasons to the Ministry of Finance for any such deviations.





**Resolution 1**

| Approved

☐

Not Approved

☐**Resolution 2.**

| Approved

☐

Not Approved

☐**Resolution 3.**

| Approved

☐

Not Approved

☐**Resolution 4**

| Approved

☐

Not Approved

☐**Resolution 5**

| Approved

☐

Not Approved

☐**Resolution 6**

| Approved

☐

Not Approved

☐**Conditions / Follow-up Actions:**




Members:	Signature:
1. Zola Tsotsi	
2. Tshediso Matona	
3. Tsholofelo Molefe	
4. Ms Chwayita Mabude	
5. Norman Tinyiko Baloyi	
6. Dr Pathmanathan Naidoo	
7. Venele Klein	
8. Nazia Carrim	
9. Romeo Kumalo	
10. Mark Vivian Pamensky	
11. Zethembe Khoza	
12. Dr Baldwin Sipho Ngubane	
13. Devapushpum Viroshini Naidoo	




22

**Nick Linnell**

**From:** Fritz Malan <fmalan@ensafrica.com>  
**Sent:** Wednesday, 11 March 2015 11:09 AM  
**To:** Nick Linnell  
**Subject:** RE: suspension briefing notes f (Eskom).docx

Hi Nick,

I am looking at your briefing note on the suspension and have almost finalised my (limited) comments. I am happy that the proposed approach is not inconsistent with paragraph 3.4 of the disciplinary code or the prevailing case law on suspension. I will also look at the letter of suspension and comment. I do not have the resolution you refer to in my possession – could you mail me a copy?

Kind regards,  
 Fritz

**From:** Nick Linnell [mailto:nickl@theprojectoffice.com]  
**Sent:** 11 March 2015 09:25 AM  
**To:** Fritz Malan  
**Subject:** suspension briefing notes f (Eskom).docx

Hi Fritz

My information is that the Board meets this morning and a decision will be out by say 11am. The suspension discussions will follow immediately thereafter

Could you:

1. Review the resolution provided the other day and be satisfied that the subcommittee will have the power to suspend
2. Review the attached – and turn upside down if you need. This forms an aide memoire to the subcom in these discussion.
3. We need to do it right
4. Review the letter of suspension and correct as necessary
5. Advise on any other risk as you feel fit

Many thanks  
 Nick

**Fritz Malan**  
 director  
 employment  
 tel: +27 11 269 7600  
 cell: +27 83 258 8832  
 email: [fmalan@ENSAfrica.com](mailto:fmalan@ENSAfrica.com)  
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level 2 ISO9001 rating  
 Edward Malan Sonnenbergs Incorporated registration number 2506/010103/21

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## Briefing notes for pre-suspension hearing – aide memoire

### Background

1. The suspension is not a disciplinary tool. It is known as a precautionary suspension as its purpose is to ensure that the investigation is carried without interference or influence from the employee. In this case the Company believes that the presence of the employee might jeopardise any investigation. It does not indicate any judgement on any allegations and does not infer any guilt.
2. Any labour measure must adhere to the basic principles of fairness. This requires:
  - 2.1. The employee must be informed of the allegations against him within a reasonable period of time prior to the hearing (see later)
  - 2.2. The employee must understand the nature of the allegations against him
  - 2.3. He must have an opportunity to hear the allegations and test them
  - 2.4. He must have the opportunity to counter them and provide his version
  - 2.5. The employer must consider both versions and make a decision based on the facts and law without any prejudgement. It cannot have made up its mind beforehand.
3. A pre-suspension hearing is exactly that – it is a hearing to decide whether to suspend or not. It must follow the principles above;
4. The hearing is an internal hearing. The employee is not entitled to any outside representation. He may not invite his lawyer.
5. The employee must attend the hearing if instructed to do so. He cannot refuse
6. An outcome of the meeting may if appropriate and satisfactory to the employer result in the employee agreeing to take paid leave at his/her own volition to limit any risk to his/her reputation – which is not an intended outcome for the employer. This may then be communicated as a decision either of the employee or an agreement with the employee to step aside for the period of investigation to enable the investigation to proceed without any perception of potential influencing of the investigation by the employees.

### Pre-suspension hearing

1. The Chairperson to lead the discussion. All three members of the subcommittee must be present.
2. Either a detailed note or a recording of the conversation should be made.
3. Inform the individuals that the Board has considered the need for an enquiry to investigate the organisation as a whole and the causes of its current circumstances and identify any acts/omissions associated with serious negligence or wilful acts/omissions that contributed to this.
4. Restate points above points 2-6 under "Background"
5. Inform the each that this session now constitutes a hearing to determine whether he should be suspended or not pending the completion of the investigation. Stress that no decision has been taken to suspend – it is a proposal and would only be decided after having heard his input.
6. If so determined then this would be a precautionary suspension.



- 6.1. It would not indicate fault or wrongdoing - that would be left to the investigation to consider.
- 6.2. Any precautionary suspension would be on full pay and benefits
  - 6.2.1. Stress that these are only allegations and that the Board has not come to any conclusion as to their truth or otherwise.
- 6.3. The proposal to place him/them on paid suspension is not made lightly but it is suggested in the interests of fairness to both him/them and the Board and in the interests of the Company.
7. Explain to the individual(s) that:
  - 7.1. The Board has considered that there may be a risk to the investigation being properly conducted with the employees (each treated individually not as a group) at work and there is a risk of interference – whether deliberate or not. The Board believes that the presence of the employees, and particularly given the positions which they occupy, might jeopardise the investigation into the alleged misconduct or pose a potential risk to the Company.
  - 7.2. A major principle of this enquiry is that it is independent and free from influence (active or passive) of any persons who may be implicated and who has the situational influence to inhibit the enquiry and fact gathering.
  - 7.3. The board is considering suspension of certain employees and need to consult with each to determine whether this is an appropriate approach.
  - 7.4. Stress in this situation suspension does not imply guilt or wrong doing. It is precautionary in nature.
  - 7.5. The subcommittee is of the view that the following persons might reasonably be considered for precautionary suspension:
    - 7.5.1. Tshidiso Matona  
Chief Executive  
372 Jutlander Road  
Beaulieu
    - 7.5.2. Dan Marokane  
Group Executive  
Group Capital  
4 Sunset Villas  
5 Vickey Avenue  
Morningside  
2196
    - 7.5.3. Matshela Koko  
Group Executive  
Commercial and Technology  
325 Spoonbil Way  
Zanadu Residential Estate  
Hartbeespoort
  - 7.6. The “allegations” or requirements that need to be addressed are:

- 7.6.1. The totality of the enquiry is to determine whether there have been any wilful, or negligent or corrupt/wrongful acts or omissions on the part of any employee or service provider that has given rise to or contributed to any failure of Eskom to distribute the energy output that Eskom is capable of producing and distributing;
- 7.6.2. The three are heads of critical service delivery departments and in the case of the CEO of the organisation as a whole. In the event that any wrongful conduct or mismanagement is established it is probable that some of these are established in departments under their control and that they will have ultimate accountability in relation to such wrongful conduct or mismanagement.
- 7.6.3. It is important that they not be present at work during the investigation as it is a possibility and there is likelihood or a perception or fear held by employees that their careers might be at risk if they provide information that might reflect badly either on the organisation, its leadership or the individual executives concerned.
- 7.6.4. In the event that serious and material wrong-doing by the three executives, or conduct which they ought to have been aware of in their areas of responsibility and failed to detect it (negligent), or were wilful in participation or cover up of is uncovered by the enquiry serious additional business risks may have accrued to the organisation during the period of the investigation. In any of these conceivable circumstances the executives might reasonably be also be expected to suppress or cause others to suppress the exposure of such information.
- 7.6.5. Should they be in office there is a reasonable risk that their presence will inhibit the gathering of evidence, the freedom of people to come forward and provide information and also inhibit suppliers from freely sharing information pertinent to the investigation.
- 7.6.6. There are also specific instances in relation to the ToR of the investigation that illustrates the risks involved.
- 7.6.6.1. In respect to the CEO there is an allegation that he has covered up certain alleged wrongdoings of Mr Marokane and Mr Koko. If correct this demonstrates a propensity to cover up matters of wrongdoing
- 7.6.6.2. In the case of Mr Dan Marokane an allegation that he interfered with security investigating wrongdoing that occurred on the company premises involving Mr Koko. At the time Mr Marokane was acting CEO. This is an allegation which has come to light and requires investigation and will form part of the ToR. In the event that it is true it demonstrates his ability and propensity to interfere with an investigation.
- 7.6.6.3. In respect of Mr Koko there is an allegation that also requires investigation and shall form part of the ToR that he wrongfully suspended Mr Sekhasimbe for ulterior motives which might include an attempt to cause a division between the Chairperson and the Board. This if true would show a propensity to wrongfully use his position to achieve an improper outcome.
- 7.6.6.4. These instances lend weight to the risk of executives interfering in this investigation.



8. Ask him to consider what you have said and invite him to give reasons why a precautionary suspension would not be in the interests of Eskom in the light of the need to conduct an enquiry.
9. Tell him that should he require some more time he is welcome to give it some thought before you resume and you suggest 1 hour and set a time to continue. Ask him not to leave the office. You leave him there and you come back.

**On resumption of the meeting**

1. On resumption, note that this is a continuation of the earlier session and summarise what has happened:
  - 1.1. The Board wishes to investigate allegations of serious misconduct.
  - 1.2. The matter by its nature but also is serious due to his pivotal role in leading the organisation and it is urgent as the company must urgently address its future.
  - 1.3. He has had an opportunity to consider the allegations and to consider reasons for the board not to suspend him.
  - 1.4. Stress the Board has not yet made any decision to suspend.
2. Ask him for reasons why he feels that he ought not to be suspended.
  - 2.1. These must relate to the suspension and not the enquiry
  - 2.2. If he wants to argue that he is not guilty of anything then reassures him that a suspension would not imply any fault and is precautionary.
  - 2.3. Whatever reasons are given by him should be considered and he must be told whether they are acceptable or not.
    - 2.3.1. The issue is only is there a reasonable risk of him interfering with the investigations.
    - 2.3.2. If you are able to respond to any of his reasons you should do so
  - 2.4. After this discussion is exhausted, ask him whether he has anything more to say.
  - 2.5. If not, ask him to wait outside for a time while the Board considers the matter.
  - 2.6. After considering, if you as a Board subcommittee remain convinced that there is a reasonable risk of interference then you may suspend.
  - 2.7. Call him back in and inform him of your decision.
  - 2.8. Hand him the attached suspension letter and ask him to sign.
  - 2.9. Stress the following:
    - 2.9.1. Suspension shall be until further notice
    - 2.9.2. He shall continue to receive full pay and benefits
    - 2.9.3. He may not contact or be in contact with any employee of the Company and may not enter any company premises unless expressly authorised to do by the Chairperson.
    - 2.9.4. He may not contact any persons who might reasonably be considered a potential witness.

Letterhead of Eskom

Mr [insert]

11<sup>th</sup> March 2015

Dear Mr [insert]

YOUR SUSPENSION AS [insert]

1. I refer to the meeting of today, 11<sup>th</sup> March 2015, wherein we discussed the company's concerns regarding the serious state of the company and the Board resolution to conduct an independent inquiry into the possibility that the power delivery may be compromised by either intentional or negligent conduct. Due to the nature of this enquiry and the importance of it being free of any influence from leadership in the organisation, pending the completion of an investigation into these matters, you should be placed on suspension without any loss of benefits and pay.
2. I confirm that you were advised of the nature and extent of the enquiry and that you were afforded an opportunity to make representations to the Board subcommittee why you should not be suspended pending the outcome of the enquiry.
3. You were advised that the Board subcommittee was considering placing you on precautionary suspension because of concerns that might pose a risk to the influence-free requirement of the enquiry.
4. These concerns have been discussed with you.
5. I confirm that you made various representations in respect of your possible suspension. We have considered them thoroughly.
6. We have concluded that, in view of the serious nature of the above and after having considered your representations, the company regrets to inform you that it has decided to suspend you on full pay without any loss of benefits to be calculated from today pending completion of the enquiry.
7. In order for the investigation to proceed as expeditiously as possible, it would not be appropriate for you to remain at work whilst such investigation is in place. You will be advised of the outcome of the enquiry as soon as possible.
8. At that time the subcommittee will consider the enquiry report before considering the matter further.
9. You are instructed to remain in telephonic contact with me during the period of your suspension. We expect you to be contactable in the event that it is necessary for you to attend at the company premises during normal working hours for the purposes of assisting with such investigation. You are further directed not in any manner to approach any member of the company staff, its clients or any third party with whom the company presently has or has had





- dealings in the past (including the media) without obtaining my prior written permission. You are also directed not to attend at the company's premises during the period of your suspension.
10. The company will regard any contravention of the above instructions in a serious light and further disciplinary steps may be instituted against you in respect of such contravention. You are in addition requested to hand over all work tools issued to you including but not limited to access cards, cell phone, laptop and the like. You are not to make use of the company's information technology hardware and software such as intranet and internet facilities during your suspension.
  11. You are requested to surrender your company access card, office keys, laptop and any other company property, documents, computer disks and the like in your possession, with immediate effect.
  12. Should you feel uncertain about any aspect of the contents of this letter, you are requested to contact me telephonically.

Yours faithfully

\_\_\_\_\_

Duly authorised:

For and on behalf of the Board

Zola Tsotsi  
Chairperson

I acknowledge receipt of this notification:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_

Insert name

Signature \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_

Zola Tsotsi

In the event that the employee refuses to sign:

Declaration of witness: I confirm that I have witnessed that this form has been handed and explained to the above named employee.

Signed \_\_\_\_\_ Position \_\_\_\_\_ Date \_\_\_\_\_

*RS*

*L*

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**Nick Linnell**

**From:** Nick Linnell <nickl@theprojectoffice.com>  
**Sent:** 18 March 2015 07:19 AM  
**To:** 'skillsdm@mweb.co.za'  
**Subject:** Update  
**Attachments:** Draft Terms of reference - Eskom 18032015.docx; Media release 18032015.docx; Eskom briefing.docx

**Tracking:**                      **Recipient**                      **Read**  
   'skillsdm@mweb.co.za'                      Read: 2015/03/18 12:38 PM

Hi D

Please find

1. Briefing document
2. Terms of reference – to be confirmed
3. Media statement – to be confirmed

Chat now

Regards

nick

Nick Linnell

email: [nickl@theprojectoffice.com](mailto:nickl@theprojectoffice.com)

cell: 083 488 1000

tel: 021 447 0154

fax: 086 272 1456

[www.theprojectoffice.com](http://www.theprojectoffice.com)

The Project Office

Company Registered Office 22 Melkhout Crescent | Platteklouf 3 | 7500

Directors: N H Linnell | M Green

Postal Add PO Box 15813 | Panorama | 7506

## Eskom

### Briefing

#### 1. Background

- 1.1. A week ago on the 11<sup>th</sup> March the board approved the commissioning of an independent inquiry into the status of the company.
- 1.2. Since then there has been some difficulty in settling the terms of reference and appointing the key service providers. This now appears to be resolved
- 1.3. During the week there has been much media speculation. In principle most people are pleased that government has taken this action but sections of the press have looked to find some conspiracy.

#### 2. Current position

2.1. Terms of reference. These have been agreed with the chairman of the board and are presently being sent to the member of the oversight committee (A&R committee). Following some obstruction over the past few days we anticipate this will be cleared.

##### 2.2. The members of the inquiry team.

2.2.1. We will appoint an independent retired judge to ensure that no conflict of interest or undue influence is introduced. It will be a reactive role where any allegations of improper influence that arise will be referred to him to assess and report to the Board and shareholder. Suggestions:

- 2.2.1.1. Former Chief Justice Sandile Ngcobo (preferred)
- 2.2.1.2. Justice Zak Yacoob
- 2.2.1.3. Justice Myberg
- 2.2.1.4. Justice Robert Nugent
- 2.2.1.5. Justice Meyer Joffe

##### 2.2.2. Professional service providers

- 2.2.2.1. Commercial forensics – preferred – Edward Nathan Sonnenbergs
- 2.2.2.2. Financial- preferred Grant Thornton
- 2.2.2.3. Technical - under consideration

### 3. Media

3.1. We propose to release the attached press release. It will spell out the process, the independence and the fact that media releases will provide full details. This more clearly acknowledges the current failings at Eskom

### 4. Timetable

4.1. 18<sup>th</sup> March – press release

4.2. 18<sup>th</sup> March confirmation of Terms of Reference

4.3. 19<sup>th</sup> March appointment of professional teams and further media statement

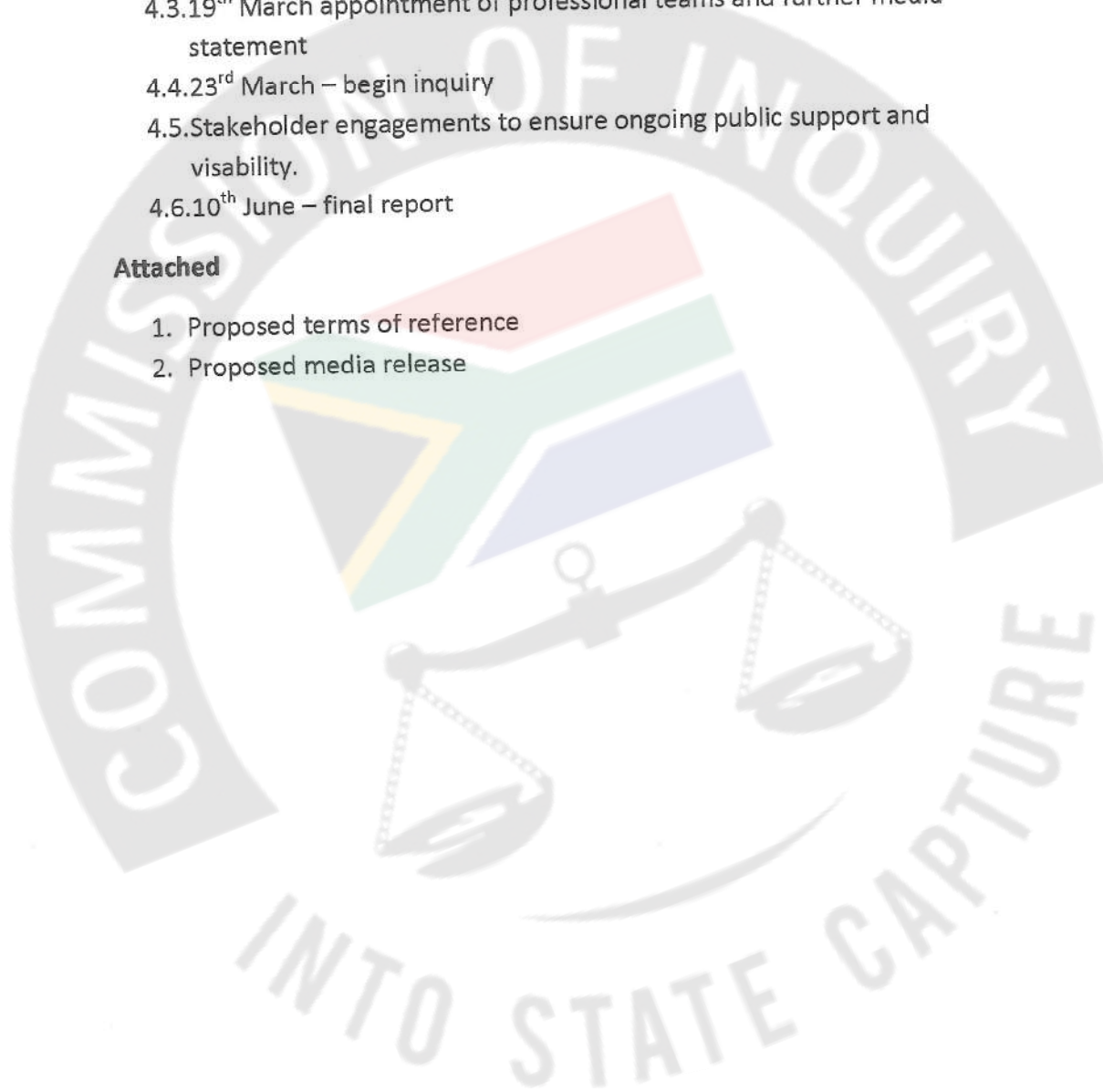
4.4. 23<sup>rd</sup> March – begin inquiry

4.5. Stakeholder engagements to ensure ongoing public support and visibility.

4.6. 10<sup>th</sup> June – final report

#### Attached

1. Proposed terms of reference
2. Proposed media release



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A handwritten mark or signature, possibly initials, located at the bottom right of the page, to the right of the first mark.



DRAFT

## TERMS OF REFERENCE FOR A FACT FINDING INQUIRY

AT

ESKOM HOLDINGS (SOC) LIMITED

### TERMS OF REFERENCE

#### 1. PREAMBLE

The Board has received complaints and concerns raised by various sources, both internal and external to Eskom with regards to, inter alia, sufficiency and reliability of supply of electricity; escalating build project costs; escalating maintenance costs; high costs of primary energy and the inordinately high costs of the bond programmes that Eskom has participated in recently.

These together with the Board's own review, make it clear that the Company has failed to fulfil its mandate of providing electricity to meet the needs of business and the public. To the extent that we have failed, this must be fixed. We accept this reality and resolve to urgently and effectively work towards restoring the service and the performance (financial and operational) of Eskom to where it is expected to be.

We are committed to rooting out all misconduct and inefficiency. We will pursue these twin challenges with vigour. We will determine what is wrong, what needs to be done and we will begin to fix it. Misconduct will be stopped and some inefficiency will be righted immediately. Some of the major infrastructural and systemic issues may take time but the process of improvement will start immediately and will be sustained. We are committed to this improvement. It is our mandate.

To achieve this we need to be clear about where to start. To identify what is wrong and what it will require to fix. We recognise that this must be seen to be believed. The process and our actions must be transparent.

The Board has therefore recognised the need for independent assessment of the state of the company's capability and performance. To ensure this proceeds quickly and without hindrance or interference we have taken a number of steps.

The Board of Directors has delegated the authority to institute the inquiry to the Board Audit and Risk Committee which shall oversee the process. The Board has appointed an inquiry coordinator who shall be responsible for the implementation of the inquiry as mandated in the terms of reference. The terms of reference will provide for sound and transparent governance and these will be made public.



Included in the authority to institute this inquiry is also the authority to:

- To consider and approve the terms of reference as proposed by the project coordinator;
- To consider and appoint a retired judge to oversee the independence of the inquiry from amongst a panel recommended by the inquiry coordinator;
- To consider and appoint services providers for the three separate areas of inquiry from a panel proposed by the inquiry coordinator;
- To receive and consider the interim and final reports and provide comments to the inquiry teams as necessary;
- To ensure that the scope of work as defined in the terms of reference are delivered within prescribed time lines;
- To approve a budget for the execution of the inquiry;

## 2. OBJECTIVE/PURPOSE

To provide the Board and Shareholder with an assessment of the current state of Eskom and in particular to determine the existence of misconduct and inefficiency; the reasons for the current lack of, and inconsistency/ unreliability of supply of electricity to customers; to determine the causes of engineering failures, delays and cost overruns; to review primary energy sources, costs and quality of supply; to review the financial solvency, liquidity and the cost of funding of Eskom and the poor operational performance and to provide recommendations with regard to required actions.

The inquiry must be free of all influence or interference and shall be so structured as to ensure that independence is seen to exist.

## 3. APPROACH

The inquiry shall be subject to the oversight of a retired judge to ensure that the inquiry is free of influence and is objective.

The inquiry will be managed by a project coordinator who shall be responsible for the delivery of the mandate.

The inquiry shall focus separately on technical, commercial and financial facets of the Company. Each will be performed under separate inquiry teams selected having regard to their particular skills and independence.

## 4. TIMING

The inquiry shall commence on the 23rd March 2015 and shall provide its final report and recommendations to the Board not later than 19th June 2015.

## 5. RESOURCES

5.1. The inquiry teams shall have access to all documentation and other data belonging to the Company as deemed by the inquiry teams to be necessary and shall be permitted to interview and receive information from any employee and supplier as necessary.

5.2. Each team and the inquiry coordinator shall have access to all premises of the Company at all reasonable time and upon reasonable notice;



- 5.3. The internal audit department will provide assistance as agreed from time to time with the Head of Internal audit department.
- 5.4. The Board subcommittee shall provide appropriate and necessary assistance to the inquiry teams as requested from time to time.
- 5.5. Board and board committee agenda packs and minutes shall be available to each team on request.
- 5.6. The Company shall provide a meeting room sufficient to house 6 persons and shall provide access as required to interview rooms.
- 5.7. All prior inquiries and reports in connection with matters included in this scope shall be made available to the inquiry.
- 5.8. The inquiry shall be permitted to establish an independent reporting "hot-lines" enabling internal and external people to provide anonymous input to the inquiry.
- 5.9. The respective teams comprising the inquiry shall meet on a fortnightly basis to ensure coordination.

## 6. SCOPE OF INQUIRY

The scope below may be limited in consultation with the Board subcommittee having regard to the budget and time available save that this may only be limited on the basis of what the teams deem in their discretion to be "material" in the circumstances of the information available.

### 6.1. Technical

- 6.1.1. In respect of all generating plants' (+/-87), benchmark maximum output capacity, planned capacity and actual output for the immediate past 36 months;
- 6.1.2. Review current status of all generating plants and provide opinion on the causes and contributory factors for sub optimum output (in excess of 33 require major repair);
- 6.1.3. Review all major incidents at plants and their causes and any avoidable factors not acted upon (including communications between plant and executive);
- 6.1.4. Review maintenance requirements of all generating plants assessing actual vs planned maintenance and review all contracts and service level agreements and compliance to the same as well as costs relative to plan. Have particular regard to all unplanned failures and review in context of maintenance conducted/not conducted;
- 6.1.5. Review all 3<sup>rd</sup> party electricity supply available to the grid (including proposals received but not acted on) and compare to actual supply connected to the grid for the past 36 months. Provide an opinion on the technical reasons and cost implications for not having connected when possible. Review all information including correspondence, negotiations and contracting with regard to that supply and reasons for less than optimum connected supply. In addition, consider the available potential of supply from foreign countries and determine any reasons for supply (from time to time) less than that potential and consider any reasons thereof;
- 6.1.6. Specifically enquire into the principal causes of failure at Majuba and Duvha and make recommendations as necessary. In so doing have regard to management reports and independent insurance/assessor reports and

determine the degree of transparency of reporting to the Board and have regard to the reasons for any late submissions of these reports to the Board.

- 6.1.7. Conduct high level reviews of the new builds at Medupi and Kusile and determine the principal causes and contributory factors to the overruns of cost and time.

6.1.7.1. The degree of depth of this report to be agreed between the subcommittee and the inquiry team bearing in mind the time available.

6.1.7.2. To determine whether appropriate contingency plans were in place and acted upon at the earliest possible instance;

- 6.1.8. In collaboration with the Financial and Commercial inquiry teams to the review the supply of primary energy (coal, diesel, gas, water) to all plants over the past 36 months and determine whether supplies met specification, quality and delivery requirements (also have regard to any incorrect specifications provided).

- 6.1.9. Review the causes of disruption of power to two Rand Water pumps at Rand Water in September 2014 paying special attention to any lack of proactive or reactive management response i.e. were there warning and how effectively did we react;

- 6.1.10. To consider the impact of weather on the performance of any of the plants and to provide an opinion as to whether these risks could have been mitigated;

- 6.1.11. To review risk management and contingency plans to determine that such are sufficient to negate any generation risk, and at times of plant failure and whether such were implemented effectively.

## 6.2. Commercial

- 6.2.1. Review all procurement and other contracts for capital projects, primary energy supplies and operational services (exceeding R1 million or such figure as varied with agreement with the subcommittee) for the past 48 months and determine adherence to supply chain policy and business case approvals. Have special regard to any contracts and payments made but not matched to specification (cost, time and quality). Have regard to any rolling or renewed contracts that have cumulative value above the threshold;

- 6.2.2. Review all contracts related to Medupi and Kusile from inception. Review these in context to the original business case and adherence to tender and supply chain requirements. The focus to be on commercial matters and not technical. The team to coordinate their inquiry with the Technical and financial teams.

- 6.2.3. Review employee and contractor contracts and payments made to employees and contractors and identify any that bear *prima facie* concern.

- 6.2.4. Undertake electronic assessment of all company email correspondence, identifying certain key words to be proved by the subcommittee, for the last 24 months, and where appropriate undertake interviews with internal and external parties to probe where indicated.

- 6.2.5. Review a random sample of internal correspondence between project leaders and plant/project management on Medupi, Kusile, Majuba and Duvha and identify whether plant management foresaw problems and communicated risk upwards. Review management reactions;



- 6.2.6. Similarly (plants as per above) review all correspondence between suppliers and company in which disputes are debated. Interview suppliers as necessary.
- 6.2.7. Review new posts created over past 36 months and provide a schedule of position and TCC.
- 6.2.8. Review all executive and Board reports pertaining to new builds and summarise material implications and decisions.
- 6.2.9. Review contracts and recruitments of employees with TCC >R1.5m per annum for last 24 months;
- 6.2.10. Review a sample of senior employee suspensions, disciplinary hearings and dismissals (and reinstatements) of employees last 36 months (filter those earning >R1 000 000 p.a.).
- 6.2.11. Review summaries of internal audit reports over the last 36 months and management responses and any action taken on material risks identified;
- 6.2.12. Review internal audit programs – schedule of audits and risk analysis and review Internal audit reports of the same and review actions taken;
- 6.2.13. Review draft external audit reports for the past 3 years (2012-2014) and identify risks noted and not in final reports and determine reasons for such
- 6.2.14. Interview sustainability executive for insight to risks not identified;
- 6.2.15. Review correspondence from insurers of major claims submitted (to be objectively assessed by the team) and premium adjustments for those and reasons for them for past 36 months.
- 6.2.16. To review the organisational model and consider the implication on the performance of the company and make recommendations as required.
- 6.2.17. To consider the implementation of any policy decisions and their impact on the performance of the Company. To coordinate with Financial and Technical inquiry teams to ensure appropriate consideration by each.
- 6.2.18. Review company policies to determine compliance of good governance, transformation and conflict of interest.
- 6.2.19. Review whistle-blower reports for past 36 months and provide an opinion of the satisfactory follow-ups thereof.

### 6.3. Financial

- 6.3.1. Review the approved financial statements of the Company as at 30<sup>th</sup> September 2014 and provide a summarised “red flag” report on material concerns. Review the current management report forecast for the year ending March 2015 and provide similar comments and in particular to any variations not anticipated in September 2014.
- 6.3.2. Review material funding facilities/contracts /bonds of any nature and provide an opinion of the terms relative to the market and the company's risk.
- 6.3.3. Review all steps taken by the Company to recover unpaid “government/municipal” debt (debtors) currently estimated at R4.7 billion. Provide commentary on the impact on the financial standing of the company on such unpaid debt.
- 6.3.4. Review all non- government trade debtors (customers) and provide a similar review and in particular to steps taken to secure payment;
- 6.3.5. Conduct (together with Commercial team) a review of all primary energy supplies over the past 36 months and determine the cost implications of any contracts “not for value”;

- 6.3.6. Determine the lost revenue and/or penalty cost implications of all non-implemented 3<sup>rd</sup> party electricity supply opportunities.
- 6.3.7. Determine the net wasted cost (and reasons therefore) of payments made to primary energy suppliers for materials not received but paid for over the past 36 months.
- 6.3.8. Review all non-government major electricity-user sales contracts (together with their business cases) and determine the value of lost revenue over time and, together with commercial, provide an opinion on the proprietary/commercial wisdom of such contracts at the time.
- 6.3.9. Review all contracts and payment of pre-sold electricity "buy-backs" and access the cost/benefit of such decisions.
- 6.3.10. Together with Technical teams provide an estimated cost to the company of the cost (increased costs) and time (lost revenue) overruns at Medupi and Kusile;
- 6.3.11. To consider asset management policies and practices;
- 6.3.12. To provide a high level financial protection for the next 3 years.

#### 6.4. Coordination

##### 6.4.1. The inquiry coordinator shall:

- 6.4.1.1. Draft terms of reference for the scope of the inquiry.
- 6.4.1.2. Consider suitable persons to fill the positions provided for in this terms of reference and to make recommendations to the subcommittee;
- 6.4.1.3. shall ensure that each of the teams have access to each other so as not to create overlaps and gaps;
- 6.4.1.4. have responsibility for the delivery of the scoped work of each inquiry team and of the final consolidated report;
- 6.4.2. The coordinator shall access to the interim work of each team and to provide comment and guidance to each team as he deems appropriate.

#### 7. REPORTING

- 7.1. Each inquiry team to provide the inquiry coordinator with a weekly and monthly summary of their activities and material (including preliminary) findings for presentation to the subcommittee;
- 7.2. The program coordinator to recommend possible reinstatement of suspended executives as soon as inquiries are complete and risks mitigated.
- 7.3. At the end of the inquiry, present to the Board Committee a report.
- 7.4. The final report to include a summary of material finding and recommendations.

#### 8. APPOINTMENT OF AN INDEPENDENT SERVICE PROVIDER

In the exercise of its authority as delegated by the Board, the Audit Committee has appointed.....to assist with  
..... team of the inquiry.



## 9. FEES

9.1. The respective service providers will negotiate and agree the fees that Eskom will pay to the service provider.

Signed at \_\_\_\_\_ on this the day \_\_\_\_\_ 2015

For and on behalf of Eskom

Signature

\_\_\_\_\_

Name of Signatory

\_\_\_\_\_

Designation of Signatory

For and on behalf of

[Service Provider]

\_\_\_\_\_

Signature

\_\_\_\_\_

Name of Signatory

\_\_\_\_\_

Designation of Signatory

Failure of the mandate

Financial and operational failure

Root out misconduct and inefficiency

What wrong what needs to be done and

083 3885480 Bernard van der Walt

Bjorn



## ESKOM SOC

### PRESS RELEASE

#### THE BOARD ENQUIRY

On Wednesday 11<sup>th</sup> March 2015, the Chairperson of the Board Mr Zola Tsotsi released a media statement and held a media conference announcing the Board's decision to mandate an inquiry in the current state of the Company.

Understandably there has been considerable interest in the inquiry and much expectation created. There have also been numerous media reports variedly reporting the enquiry and this has led to some confusion.

The purpose of this communication is to provide the public with further details on the inquiry and to lessen the space for further confusion.

#### The status quo

Firstly, as a Board we acknowledge that the company has not fulfilled its mandate to the South African public. Maladministration, operational and financial inefficiencies and poor decision-making are evident for all to see. We are determined that these will be rooted out.

What has failed must be fixed. What is wrong must be put right. Where misconduct and inefficiency exists it will be rooted out. Organisational weakness will be corrected. If these are not done with determination and effectiveness the status quo will continue. We will work towards restoring the service and the performance (financial and operational) of Eskom to where it is expected to be.

Some of the major infrastructural and systemic issues may take time but the process of improvement will start immediately and will be sustained. We are committed to this improvement. It is our mandate.

#### The inquiry

To achieve this we need to be clear about where to start. To identify what is wrong and what it will require to fix. We recognise that this must be seen to be believed. The process and our actions must be transparent.

The Board has therefore recognised the need for independent assessment of the state of the company's capability and performance. To ensure that this proceeds quickly and without hindrance or interference we have taken a number of steps.

The Board of Directors has delegated the authority to institute the inquiry to the Board Audit and Risk Committee which shall oversee the process. The Board has appointed an inquiry coordinator who shall be responsible for the implementation of the inquiry as mandated in the terms of





reference. The terms of reference will provide for sound and transparent governance and these will be made public.

**The purpose of the inquiry is:**

*“To provide the Board and Shareholder with an assessment of the current state of Eskom and in particular to determine the existence of misconduct and inefficiency; the reasons for the current lack of, and inconsistency/ unreliability of supply of electricity to customers; to determine the causes of engineering failures, delays and cost overruns; to review the cost and quality of primary energy supply; to review the financial solvency, liquidity and the cost of funding of Eskom and the poor operational performance and to provide recommendations with regard to required actions.*

*The inquiry must be free of all influence or interference and shall be so structured as to ensure that independence is seen to exist.*

**The scope and structure**

The Board delegated the oversight of the inquiry to the Board Audit and Risk Committee. However so as to ensure that even this was not perceived as having influence on the inquiry, the terms of reference provide for a number of important checks and balances.

1. The appointment of a retired judge to ensure that the inquiry is free from influence and bias. The eminent person will not run the inquiry but will have oversight of its governance.
2. The appointment of industry and professional experts in specific fields to undertake the work defined in the scope of the inquiry. These entities/people will be credible and capable.
3. The appointment of a person outside the company who shall coordinate the various aspects and be accountable to the Board subcommittee for the timely delivery of the objectives.

The subcommittee has approved the terms of reference and scope of the inquiry and has put to a number of professional entities that we believe have the capacity and expertise to complete this mandate in the time allowed. These will be selected carefully so as to avoid any risk of conflict of interest.

The Board will provide the public with details of the terms of reference and those persons engaged to undertake the inquiry. We shall do this before the end of Friday 20<sup>th</sup> March. The inquiry will begin on Monday the 23<sup>rd</sup>.

The Board has attracted some criticism regarding this inquiry from various sectors. We believe that is more due to a failure to adequately engage our many and varied stakeholders. For this inquiry to have credibility we need to convey what it is we are doing to every stakeholder and to continuously seek their views and opinions.

If we do this right only good will flow from it.

Some speculation has arisen as to the overlap of the Board's inquiry and what might appear parallel initiatives. The ministerial "war room" has a very specific mandate to consider the strategic issues and to seek ways of eliminating structural bottlenecks. The "energy committee" is looking at a very specific part of the future energy needs and options. The board's inquiry focuses a fact gathering exercise – the product of which will be shared with both these committees. However the board's

inquiry is focused on internal matters that have affected our performance and identify some key remedial actions that might be identified.

This initiative has the complete support of our shareholder Minister Lynn Brown.

Finally we need to refer to the request to certain senior executives to step aside during this inquiry.

This inquiry is about identifying what is wrong with this organisation. We need to create the space for the inquiry teams to have unfettered access to the company, its people, its systems and its suppliers. In any organisation, its executive has situational influence just through their presence – they would not be leaders otherwise. We have asked them to acknowledge this and we believe that they do. The speculation around their absence from the business is without cause. This inquiry is not about them but about this organisation as a whole. It has a single purpose to restore this company's ability to meet its mandate. What is found to be wrong along the way will be put right.



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**Nick Linnell**

**From:** Nick Linnell <nickl@theprojectoffice.com>  
**Sent:** Wednesday, 18 March 2015 9:22 AM  
**To:** Chwayita Mabude (MabudeC@eskom.co.za); ztsotsi@liquifire.biz  
**Subject:** Board enquiry  
**Attachments:** Media release 18032015.docx; Draft Terms of reference - Eskom 18032015.docx; Legal Dept input DRAFT TORS INQUIRY 15 MARCH 2015 (3).docx

**Importance:** High

Dear Chair and Chwayita

Yesterday I worked further on the terms of reference and the sourcing potential professional service providers. Late last evening I also received from Neo Tsholanku a draft of his ToR. I have attached both my draft and his for your consideration.

I also spent much time yesterday reviewing the media commentary on the enquiry and clearly there is public concern about a lack of information and also of a concern that this will not be independent (see Business Day).

As I understand it from her public comments, the Minister has endorsed the enquiry, has stated that it must be comprehensive and that it must be seen to be independent. Anything short of that now will lack credibility.

The attached draft terms prepared by myself provides for a comprehensive enquiry with very clear independence. It includes independent oversight from a retired judicial officer. It provides for the appointment of credible service providers.

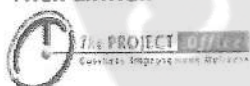
Attached also is a draft media release. It is my suggestion that this and the terms of reference are approved before midday. Failing that there will be further media scrutiny tomorrow which will be to the detriment of the company.

I believe we have a small window in which to put the company's clear purpose and approach before the public.

I am available at any time to meet with you to discuss this morning.

Kind regards  
 Nick

**Nick Linnell**



email: [nickl@theprojectoffice.com](mailto:nickl@theprojectoffice.com)

cell: 083 488 1000

tel: 021 447 0154

fax: 086 272 1456

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The Project Office

Company Registered Office 22 Melkhout Crescent | Platteklouf 3 | 7500

Directors: N H Linnell | M Green

Postal Add PO Box 15813 | Panorama | 7506



DRAFT

## TERMS OF REFERENCE FOR A FACT FINDING INQUIRY

AT

ESKOM HOLDINGS (SOC) LIMITED

### TERMS OF REFERENCE

#### 1. PREAMBLE

The Board has received complaints and concerns raised by various sources, both internal and external to Eskom with regards to, inter alia, sufficiency and reliability of supply of electricity; escalating build project costs; escalating maintenance costs; high costs of primary energy and the inordinately high costs of the bond programmes that Eskom has participated in recently.

These together with the Board's own review, make it clear that the Company has failed to fulfil its mandate of providing electricity to meet the needs of business and the public. To the extent that we have failed, this must be fixed. We accept this reality and resolve to urgently and effectively work towards restoring the service and the performance (financial and operational) of Eskom to where it is expected to be.

We are committed to rooting out all misconduct and inefficiency. We will pursue these twin challenges with vigour. We will determine what is wrong, what needs to be done and we will begin to fix it. Misconduct will be stopped and some inefficiency will be righted immediately. Some of the major infrastructural and systemic issues may take time but the process of improvement will start immediately and will be sustained. We are committed to this improvement. It is our mandate.

To achieve this we need to be clear about where to start. To identify what is wrong and what it will require to fix. We recognise that this must be seen to be believed. The process and our actions must be transparent.

The Board has therefore recognised the need for independent assessment of the state of the company's capability and performance. To ensure this proceeds quickly and without hindrance or interference we have taken a number of steps.

The Board of Directors has delegated the authority to institute the inquiry to the Board Audit and Risk Committee which shall oversee the process. The Board has appointed an inquiry coordinator who shall be responsible for the implementation of the inquiry as mandated in the terms of reference. The terms of reference will provide for sound and transparent governance and these will be made public.





Included in the authority to institute this inquiry is also the authority to:

- To consider and approve the terms of reference as proposed by the project coordinator;
- To consider and appoint a retired judge to oversee the independence of the inquiry from amongst a panel recommended by the inquiry coordinator;
- To consider and appoint services providers for the three separate areas of inquiry from a panel proposed by the inquiry coordinator;
- To receive and consider the interim and final reports and provide comments to the inquiry teams as necessary;
- To ensure that the scope of work as defined in the terms of reference are delivered within prescribed time lines;
- To approve a budget for the execution of the inquiry;

## 2. OBJECTIVE/PURPOSE

To provide the Board and Shareholder with an assessment of the current state of Eskom and in particular to determine the existence of misconduct and inefficiency; the reasons for the current lack of, and inconsistency/ unreliability of supply of electricity to customers; to determine the causes of engineering failures, delays and cost overruns; to review primary energy sources, costs and quality of supply; to review the financial solvency, liquidity and the cost of funding of Eskom and the poor operational performance and to provide recommendations with regard to required actions.

The inquiry must be free of all influence or interference and shall be so structured as to ensure that independence is seen to exist.

## 3. APPROACH

The inquiry shall be subject to the oversight of a retired judge to ensure that the inquiry is free of influence and is objective.

The inquiry will be managed by a project coordinator who shall be responsible for the delivery of the mandate.

The inquiry shall focus separately on technical, commercial and financial facets of the Company. Each will be performed under separate inquiry teams selected having regard to their particular skills and independence.

## 4. TIMING

The inquiry shall commence on the 23rd March 2015 and shall provide its final report and recommendations to the Board not later than 19th June 2015.

## 5. RESOURCES

5.1. The inquiry teams shall have access to all documentation and other data belonging to the Company as deemed by the inquiry teams to be necessary and shall be permitted to interview and receive information from any employee and supplier as necessary.

5.2. Each team and the inquiry coordinator shall have access to all premises of the Company at all reasonable time and upon reasonable notice;

- 5.3. The internal audit department will provide assistance as agreed from time to time with the Head of Internal audit department.
- 5.4. The Board subcommittee shall provide appropriate and necessary assistance to the inquiry teams as requested from time to time.
- 5.5. Board and board committee agenda packs and minutes shall be available to each team on request.
- 5.6. The Company shall provide a meeting room sufficient to house 6 persons and shall provide access as required to interview rooms.
- 5.7. All prior inquiries and reports in connection with matters included in this scope shall be made available to the inquiry.
- 5.8. The inquiry shall be permitted to establish an independent reporting "hot-lines" enabling internal and external people to provide anonymous input to the inquiry.
- 5.9. The respective teams comprising the inquiry shall meet on a fortnightly basis to ensure coordination.

## 6. SCOPE OF INQUIRY

The scope below may be limited in consultation with the Board subcommittee having regard to the budget and time available save that this may only be limited on the basis of what the teams' deem in their discretion to be "material" in the circumstances of the information available.

### 6.1. Technical

- 6.1.1. In respect of all generating plants' (+/-87), benchmark maximum output capacity, planned capacity and actual output for the immediate past 36 months;
- 6.1.2. Review current status of all generating plants and provide opinion on the causes and contributory factors for sub optimum output (in excess of 33 require major repair);
- 6.1.3. Review all major incidents at plants and their causes and any avoidable factors not acted upon (including communications between plant and executive);
- 6.1.4. Review maintenance requirements of all generating plants assessing actual vs planned maintenance and review all contracts and service level agreements and compliance to the same as well as costs relative to plan. Have particular regard to all unplanned failures and review in context of maintenance conducted/not conducted;
- 6.1.5. Review all 3<sup>rd</sup> party electricity supply available to the grid (including proposals received but not acted on) and compare to actual supply connected to the grid for the past 36 months. Provide an opinion on the technical reasons and cost implications for not having connected when possible. Review all information including correspondence, negotiations and contracting with regard to that supply and reasons for less than optimum connected supply. In addition, consider the available potential of supply from foreign countries and determine any reasons for supply (from time to time) less than that potential and consider any reasons thereof;
- 6.1.6. Specifically enquire into the principal causes of failure at Majuba and Duvha and make recommendations as necessary. In so doing have regard to management reports and independent insurance/assessor reports and



determine the degree of transparency of reporting to the Board and have regard to the reasons for any late submissions of these reports to the Board.

- 6.1.7. Conduct high level reviews of the new builds at Medupi and Kusile and determine the principal causes and contributory factors to the overruns of cost and time.

- 6.1.7.1. The degree of depth of this report to be agreed between the subcommittee and the inquiry team bearing in mind the time available.

- 6.1.7.2. To determine whether appropriate contingency plans were in place and acted upon at the earliest possible instance;

- 6.1.8. In collaboration with the Financial and Commercial inquiry teams to the review the supply of primary energy (coal, diesel, gas, water) to all plants over the past 36 months and determine whether supplies met specification, quality and delivery requirements (also have regard to any incorrect specifications provided).

- 6.1.9. Review the causes of disruption of power to two Rand Water pumps at Rand Water in September 2014 paying special attention to any lack of proactive or reactive management response i.e. were there warning and how effectively did we react;

- 6.1.10. To consider the impact of weather on the performance of any of the plants and to provide an opinion as to whether these risks could have been mitigated;

- 6.1.11. To review risk management and contingency plans to determine that such are sufficient to negate any generation risk, and at times of plant failure and whether such were implemented effectively.

## 6.2. Commercial

- 6.2.1. Review all procurement and other contracts for capital projects, primary energy supplies and operational services (exceeding R1 million or such figure as varied with agreement with the subcommittee) for the past 48 months and determine adherence to supply chain policy and business case approvals. Have special regard to any contracts and payments made but not matched to specification (cost, time and quality). Have regard to any rolling or renewed contracts that have cumulative value above the threshold;

- 6.2.2. Review all contracts related to Medupi and Kusile from inception. Review these in context to the original business case and adherence to tender and supply chain requirements. The focus to be on commercial matters and not technical. The team to coordinate their inquiry with the Technical and financial teams.

- 6.2.3. Review employee and contractor contracts and payments made to employees and contractors and identify any that bear *prima facie* concern.

- 6.2.4. Undertake electronic assessment of all company email correspondence, identifying certain key words to be proved by the subcommittee, for the last 24 months, and where appropriate undertake interviews with internal and external parties to probe where indicated.

- 6.2.5. Review a random sample of internal correspondence between project leaders and plant/project management on Medupi, Kusile, Majuba and Duvha and identify whether plant management foresaw problems and communicated risk upwards. Review management reactions;

- 6.2.6. Similarly (plants as per above) review all correspondence between suppliers and company in which disputes are debated. Interview suppliers as necessary.
- 6.2.7. Review new posts created over past 36 months and provide a schedule of position and TCC.
- 6.2.8. Review all executive and Board reports pertaining to new builds and summarise material implications and decisions.
- 6.2.9. Review contracts and recruitments of employees with TCC >R1.5m per annum for last 24 months;
- 6.2.10. Review a sample of senior employee suspensions, disciplinary hearings and dismissals (and reinstatements) of employees last 36 months (filter those earning >R1 000 000 p.a.).
- 6.2.11. Review summaries of internal audit reports over the last 36 months and management responses and any action taken on material risks identified;
- 6.2.12. Review internal audit programs – schedule of audits and risk analysis and review Internal audit reports of the same and review actions taken;
- 6.2.13. Review draft external audit reports for the past 3 years (2012-2014) and identify risks noted and not in final reports and determine reasons for such
- 6.2.14. Interview sustainability executive for insight to risks not identified;
- 6.2.15. Review correspondence from insurers of major claims submitted (to be objectively assessed by the team) and premium adjustments for those and reasons for them for past 36 months.
- 6.2.16. To review the organisational model and consider the implication on the performance of the company and make recommendations as required.
- 6.2.17. To consider the implementation of any policy decisions and their impact on the performance of the Company. To coordinate with Financial and Technical inquiry teams to ensure appropriate consideration by each.
- 6.2.18. Review company policies to determine compliance of good governance, transformation and conflict of interest.
- 6.2.19. Review whistle-blower reports for past 36 months and provide an opinion of the satisfactory follow-ups thereof.

### 6.3. Financial

- 6.3.1. Review the approved financial statements of the Company as at 30<sup>th</sup> September 2014 and provide a summarised “red flag” report on material concerns. Review the current management report forecast for the year ending March 2015 and provide similar comments and in particular to any variations not anticipated in September 2014.
- 6.3.2. Review material funding facilities/contracts /bonds of any nature and provide an opinion of the terms relative to the market and the company's risk.
- 6.3.3. Review all steps taken by the Company to recover unpaid “government/municipal” debt (debtors) currently estimated at R4.7 billion. Provide commentary on the impact on the financial standing of the company on such unpaid debt.
- 6.3.4. Review all non- government trade debtors (customers) and provide a similar review and in particular to steps taken to secure payment;
- 6.3.5. Conduct (together with Commercial team) a review of all primary energy supplies over the past 36 months and determine the cost implications of any contracts “not for value”;



- 6.3.6. Determine the lost revenue and/or penalty cost implications of all non-implemented 3<sup>rd</sup> party electricity supply opportunities.
- 6.3.7. Determine the net wasted cost (and reasons therefore) of payments made to primary energy suppliers for materials not received but paid for over the past 36 months.
- 6.3.8. Review all non-government major electricity-user sales contracts (together with their business cases) and determine the value of lost revenue over time and, together with commercial, provide an opinion on the proprietary/commercial wisdom of such contracts at the time.
- 6.3.9. Review all contracts and payment of pre-sold electricity "buy-backs" and access the cost/benefit of such decisions.
- 6.3.10. Together with Technical teams provide an estimated cost to the company of the cost (increased costs) and time (lost revenue) overruns at Medupi and Kusile;
- 6.3.11. To consider asset management policies and practices;
- 6.3.12. To provide a high level financial protection for the next 3 years.

#### 6.4. Coordination

##### 6.4.1. The inquiry coordinator shall:

- 6.4.1.1. Draft terms of reference for the scope of the inquiry.
- 6.4.1.2. Consider suitable persons to fill the positions provided for in this terms of reference and to make recommendations to the subcommittee;
- 6.4.1.3. shall ensure that each of the teams have access to each other so as not to create overlaps and gaps;
- 6.4.1.4. have responsibility for the delivery of the scoped work of each inquiry team and of the final consolidated report;
- 6.4.2. The coordinator shall access to the interim work of each team and to provide comment and guidance to each team as he deems appropriate.

#### 7. REPORTING

- 7.1. Each inquiry team to provide the inquiry coordinator with a weekly and monthly summary of their activities and material (including preliminary) findings for presentation to the subcommittee;
- 7.2. The program coordinator to recommend possible reinstatement of suspended executives as soon as inquiries are complete and risks mitigated.
- 7.3. At the end of the inquiry, present to the Board Committee a report.
- 7.4. The final report to include a summary of material finding and recommendations.

#### 8. APPOINTMENT OF AN INDEPENDENT SERVICE PROVIDER

In the exercise of its authority as delegated by the Board, the Audit Committee has appointed.....to assist with  
..... team of the inquiry.

## 9. FEES

9.1. The respective service providers will negotiate and agree the fees that Eskom will pay to the service provider.

Signed at \_\_\_\_\_ on this the day \_\_\_\_\_ 2015

For and on behalf of Eskom

Signature

\_\_\_\_\_

Name of Signatory

\_\_\_\_\_

Designation of Signatory

For and on behalf of

[Service Provider]

\_\_\_\_\_

Signature

\_\_\_\_\_

Name of Signatory

\_\_\_\_\_

Designation of Signatory

Failure of the mandate

Financial and operational failure

Root out misconduct and inefficiency

What wrong what needs to be done and

083 3885480 Bernard van der Walt

Bjorn

*AB*

*L*

## ESKOM SOC

### PRESS RELEASE

#### THE BOARD ENQUIRY

On Wednesday 11<sup>th</sup> March 2015, the Chairperson of the Board Mr Zola Tsotsi released a media statement and held a media conference announcing the Board's decision to mandate an inquiry in the current state of the Company.

Understandably there has been considerable interest in the inquiry and much expectation created. There have also been numerous media reports variedly reporting the enquiry and this has led to some confusion.

The purpose of this communication is to provide the public with further details on the inquiry and to lessen the space for further confusion.

#### The status quo

Firstly, as a Board we acknowledge that the company has not fulfilled its mandate to the South African public. Maladministration, operational and financial inefficiencies and poor decision-making are evident for all to see. We are determined that these will be rooted out.

What has failed must be fixed. What is wrong must be put right. Where misconduct and inefficiency exists it will be rooted out. Organisational weakness will be corrected. If these are not done with determination and effectiveness the status quo will continue. We will work towards restoring the service and the performance (financial and operational) of Eskom to where it is expected to be.

Some of the major infrastructural and systemic issues may take time but the process of improvement will start immediately and will be sustained. We are committed to this improvement. It is our mandate.

#### The inquiry

To achieve this we need to be clear about where to start. To identify what is wrong and what it will require to fix. We recognise that this must be seen to be believed. The process and our actions must be transparent.

The Board has therefore recognised the need for independent assessment of the state of the company's capability and performance. To ensure that this proceeds quickly and without hindrance or interference we have taken a number of steps.

The Board of Directors has delegated the authority to institute the inquiry to the Board Audit and Risk Committee which shall oversee the process. The Board has appointed an inquiry coordinator who shall be responsible for the implementation of the inquiry as mandated in the terms of





reference. The terms of reference will provide for sound and transparent governance and these will be made public.

**The purpose of the inquiry is:**

*"To provide the Board and Shareholder with an assessment of the current state of Eskom and in particular to determine the existence of misconduct and inefficiency; the reasons for the current lack of, and inconsistency/ unreliability of supply of electricity to customers; to determine the causes of engineering failures, delays and cost overruns; to review the cost and quality of primary energy supply; to review the financial solvency, liquidity and the cost of funding of Eskom and the poor operational performance and to provide recommendations with regard to required actions.*

*The inquiry must be free of all influence or interference and shall be so structured as to ensure that independence is seen to exist.*

**The scope and structure**

The Board delegated the oversight of the inquiry to the Board Audit and Risk Committee. However so as to ensure that even this was not perceived as having influence on the inquiry, the terms of reference provide for a number of important checks and balances.

1. The appointment of a retired judge to ensure that the inquiry is free from influence and bias. The eminent person will not run the inquiry but will have oversight of its governance.
2. The appointment of industry and professional experts in specific fields to undertake the work defined in the scope of the inquiry. These entities/people will be credible and capable.
3. The appointment of a person outside the company who shall coordinate the various aspects and be accountable to the Board subcommittee for the timely delivery of the objectives.

The subcommittee has approved the terms of reference and scope of the inquiry and has put to a number of professional entities that we believe have the capacity and expertise to complete this mandate in the time allowed. These will be selected carefully so as to avoid any risk of conflict of interest.

The Board will provide the public with details of the terms of reference and those persons engaged to undertake the inquiry. We shall do this before the end of Friday 20<sup>th</sup> March. The inquiry will begin on Monday the 23<sup>rd</sup>.

The Board has attracted some criticism regarding this inquiry from various sectors. We believe that is more due to a failure to adequately engage our many and varied stakeholders. For this inquiry to have credibility we need to convey what is it is we are doing to every stakeholder and to continuously seek their views and opinions.

If we do this right only good will flow from it.

Some speculation has arisen as to the overlap of the Board's inquiry and what might appear parallel initiatives. The ministerial "war room" has a very specific mandate to consider the strategic issues and to seek ways of eliminating structural bottlenecks. The "energy committee" is looking at a very specific part of the future energy needs and options. The board's inquiry focuses a fact gathering exercise – the product of which will be shared with both these committees. However the board's



inquiry is focused on internal matters that have affected our performance and identify some key remedial actions that might be identified.

This initiative has the complete support of our shareholder Minister Lynn Brown.

Finally we need to refer to the request to certain senior executives to step aside during this inquiry.

This inquiry is about identifying what is wrong with this organisation. We need to create the space for the inquiry teams to have unfettered access to the company, its people, its systems and its suppliers. In any organisation, its executive has situational influence just through their presence – they would not be leaders otherwise. We have asked them to acknowledge this and we believe that they do. The speculation around their absence from the business is without cause. This inquiry is not about them but about this organisation as a whole. It has a single purpose to restore this company's ability to meet its mandate. What is found to be wrong along the way will be put right.



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A handwritten signature in black ink, located at the bottom right of the page.

DRAFT

## TERMS OF REFERENCE FOR A FORENSIC FACT FINDING ENQUIRY

AT

ESKOM HOLDINGS (SOC) LIMITED

### TERMS OF REFERENCE

#### 1. PREAMBLE

- 1.1. For the past 2 (two) years, the Office of the Chairman and the Eskom Board of Directors (both the new and the old Boards) have been inundated with complaints and concerns raised by various sources internal and external to Eskom with regards to the unreliable power supply, escalating build project costs, escalating maintenance costs, high costs of primary energy and the inordinately high costs of the bond programmes that Eskom has participated in recently. To this end, the Board of Directors have resolved to institute an enquiry into all of these concerns. Having so resolved, the Board of Directors delegated the authority to institute this enquiry to the Audit and Risk Committee under the Chairmanship of Ms Chwayita Mabude. Included in the authority to institute this enquiry, is also the authority to:

- Appoint a service provider
- Manage the costs of executing the enquiry, and
- Ensuring that the service provider delivers on its mandate within the prescribed time lines.

#### 2. APPOINTMENT OF AN INDEPENDENT SERVICE PROVIDER

- 2.1. In the exercise of its authority as delegated by the Board, the Audit Committee has appointed.....to assist with the enquiry.

#### 3. SCOPE OF THE INVESTIGATION

The Service Provider will investigate and report on the following:

- 3.1. the integrity of the procurement processes and their compliance with legislation as well as Eskom's procurement policies;
- 3.2. management of price escalations in contracts as well as the cost of contract modifications with specific references to causes of delays in contract implementation, and the penalty costs arising therefrom;
- 3.3. the capacity within Eskom to manage implementation of the contracts;

- 3.4 security failures and accountability at Eskom as a key national point;
- 3.5 capacity for fleet maintenance and reasons therefor;
- 3.6 the effectiveness of Eskom Board oversight and its ability to exercise oversight over management;
- 3.7 primary energy, with focus on coal and diesel, such as but not limited to costs related thereto
- 3.8 Unreliable power supply, including unnecessary load shedding
- 3.9 Cost escalations of the build program and continuous extension of deadlines
- 3.10 Review of processes of raising bonds and reporting thereof
- 3.11 Recommendations on identified shortcomings and strong points

#### 4. PROCESS

The Service Provider will follow the guidelines below in conducting the investigation:

- 4.1. Conduct interviews with employees in its investigation.
- 4.2. In addition to employees, mentioned in terms of clause 4.1 above, the Service Provider may further conduct interviews with any other party/ies or person/s who may have information regarding this enquiry.
- 4.3. Obtain and analyse, inter alia, minutes, letters, written reports, e-mails, and also determine the bona fides of the allegations and questions and evidence raised by an employee or any other person interviewed in accordance with 4.1 to 4.2 above.
- 4.4. At the end of the enquiry, present to the Audit and Risk Committee a report.

The aforementioned report will contain the following:

- 4.4.1. Documents relied upon during the investigation,
- 4.4.2. Details of evidence submitted by the Parties and/ or employees interviewed,



4.4.3. Analysis of the evidence and documentation referred to in 4.3 above as presented by the Parties and/ or employees, and

4.4.4. Conclusion/s and recommendation/s.

## 6. DURATION OF THE ENQUIRY

6.1. The enquiry will be concluded in a period of three (3) months commencing no later than two (2) days after the signing of these terms of reference by the Party signing last.

6.2. Notwithstanding the provisions of clause 4.4 above, the Service Provider will provide to the Audit and Risk Committee a progress report every two weeks. The first progress report will be due two weeks from the date of the signing of these terms of reference by the Party signing last.

## 7. THE OUTCOME OF THE ENQUIRY

7.1. The conclusion/s and recommendation/s in the report will be final I.

## 8. FEES

8.1. The Parties will negotiate and agree the fees that Eskom will pay to the Service Provider, which fees will take into account the imperatives of the Business Productivity Programme that Eskom is presently embarking on.





456

Signed at \_\_\_\_\_ on this the day \_\_\_\_\_ 2015

For and on behalf of Eskom

Signature

\_\_\_\_\_  
Name of Signatory

\_\_\_\_\_  
Designation of Signatory

For and on behalf of  
[Service Provider]

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name of Signatory

\_\_\_\_\_  
Designation of Signatory

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**Nick Linnell**

---

**From:** Nick Linnell <nickl@theprojectoffice.com>  
**Sent:** Wednesday, 18 March 2015 1:06 PM  
**To:** spowell@ensafrica.com  
**Subject:** Draft Terms of reference - Eskom 18032015.docx  
**Attachments:** Draft Terms of reference - Eskom 18032015.docx

Hi Steven

Here are draft terms and scope. We would like you to consider the commercial stream.

Could you let us know if that is ok and your normal terms and conditions

Thanks

Nick



A handwritten signature in black ink, appearing to be 'S. Spowell'.

A handwritten signature in black ink, appearing to be 'L. Linnell'.

**Nick Linnell**

**From:** Nick Linnell <nickl@theprojectoffice.com>  
**Sent:** Wednesday, 18 March 2015 4:27 PM  
**To:** 'bernard.vanderwalt@za.gt.com'  
**Subject:** Draft Terms of reference - Eskom 18032015.docx  
**Attachments:** Draft Terms of reference - Eskom 18032015.docx

Dear Bernard

Thanks for taking my call.

As discussed would you be kind enough to review the attached and let us know if you are able in principle to undertake this assignment. If you would have regard to any conflicts, capacity and ability to start almost immediately.

Many thanks

Nick

Nick Linnell



email: [nickl@theprojectoffice.com](mailto:nickl@theprojectoffice.com)

cell: 083 488 1000

tel: 021 447 0154

fax: 086 272 1456

[www.theprojectoffice.com](http://www.theprojectoffice.com)

The Project Office

Company Registered Office 22 Melkhout Crescent | Platteklouf 3 | 7500

Directors: N H Linnell | M Green

Postal Add PO Box 15813 | Panorama | 7506

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**Nick Linnell**

**From:** Nick Linnell <nickl@theprojectoffice.com>  
**Sent:** Wednesday, 18 March 2015 12:02 PM  
**To:** 'leo.dlamini@eskom.co.za'; Malesela Phukubje (PhukubM@eskom.co.za);  
'zola.tsotsi@eskom.co.za'  
**Subject:** Media release  
**Attachments:** Media release 18032015. v3docx.docx

Dear Leo/Malesela

The Chair has asked that this media release (to be formatted as you would normally do) be sent to you with the request that it be released immediately. Could you also send it to all Board members and to the Minister.

Kind regards

Nick

Nick Linnell



email: [nickl@theprojectoffice.com](mailto:nickl@theprojectoffice.com)

cell: 083 488 1000

tel: 021 447 0154

fax: 086 272 1456

[www.theprojectoffice.com](http://www.theprojectoffice.com)

The Project Office

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## ESKOM SOC

### PRESS RELEASE

#### THE BOARD ENQUIRY

On Wednesday 11<sup>th</sup> March 2015, the Chairperson of the Board Mr Zola Tsotsi released a media statement and held a media conference announcing the Board's decision to mandate an inquiry into the current state of the Company.

Understandably there has been considerable interest in the inquiry and much expectation created. There have also been numerous media reports variedly reporting the enquiry and this has led to some confusion.

The purpose of this communication is to provide the public with further details on the inquiry and to lessen the space for further confusion.

#### The status quo

Firstly, as a Board we acknowledge that the company has not fulfilled its mandate to the South African public. Maladministration, operational and financial inefficiencies and poor decision-making are evident for all to see.

What has failed must be fixed. What is wrong must be put right. Where misconduct and inefficiency exists it will be rooted out. Organisational weaknesses will be corrected. If these are not done with determination and effectiveness the status quo will continue. We will work towards restoring the service and the performance (financial and operational) of Eskom to where it is expected to be.

Some of the major infrastructural and systemic issues may take time to fix but the process of improvement will start immediately and will be sustained. We are committed to this improvement.

#### The purpose of the inquiry is:

*"To provide the Board and Shareholder with an assessment of the current state of Eskom and in particular to eradicate any misconduct and inefficiency that might exist; to determine the reasons for the current lack of, and inconsistency/ unreliability of supply of electricity to customers; to determine the causes of engineering failures, delays and cost overruns; to review the cost and quality of primary energy supply; to review the financial solvency, liquidity and the cost of funding of Eskom and to provide recommendations with regard to required actions.*

*The inquiry must be free of all influence or interference and shall be so structured as to ensure that independence is seen to exist.*



### The structure and approach

To achieve this purpose we need to identify what is wrong and what it will require to fix it. We recognise that this must be credible if it is to be effective. The process and our actions must be transparent.

The Board has therefore recognised the need for independent assessment of the state of the company's capability and performance. To ensure that this proceeds quickly and without hindrance or interference we have taken a number of steps.

The Board of Directors has delegated the authority to institute the inquiry to the Board Audit and Risk Committee which shall oversee the process.

There will be three distinct areas of enquiry.

A commercial forensic enquiry led by a reputable and leading legal forensic entity. Their scope will inter alia be to review all commercial transactions.

A financial enquiry led by a large accounting firm. They will consider a wide range of financial performance issues more fully detailed in their scope of work.

A technical enquiry led by an engineering team which will also be recognised for its capacity to do the job. This will review the operational performance of the company and also enquire into some of the major failures that we have experienced.

The Board has also decided to appoint a retired judge to ensure that the inquiry is free and importantly seen to be free from influence and bias. This eminent person will not run the inquiry but will have oversight of its governance and will have the authority to investigate any complaints of interference or bias and report these to the board.

The Board has appointed an inquiry coordinator who shall be responsible for the implementation of the inquiry as mandated in the terms of reference. He will effectively project manage the inquiry. We have already appointed a business consultant Mr Nick Linnell to fulfil this role.

### Scope

The terms of reference have been drafted and are currently being negotiated with the entities which will be appointed to lead the three streams of the inquiry. The scope is wide and it shall be as deep as the enquiry teams deem material and necessary to pursue. At risk is the danger of scope creep and an extended inquiry. We will manage this on the basis of risk and importance and should certain issues require further attention the Board will authorise further inquiry. However there will be a report within three months.

The Board will provide the public with details of the terms of reference and those persons engaged to undertake the inquiry. We shall do this before the end of Friday 20<sup>th</sup> March. The inquiry will begin on Monday the 23<sup>rd</sup>.



Some speculation has arisen as to the overlap of the Board's inquiry and what might appear to be parallel initiatives. The Board's inquiry focuses on operational matters that have affected our performance and to identify some key remedial actions.

#### The executive role

Finally we need to refer to the request by the Board to certain senior executives to step aside during this inquiry.

This inquiry is about identifying what is wrong with this organisation. We need to create the space for the inquiry teams to have unfettered access to the company, its people, its systems and its suppliers. In any organisation, its executive has situational influence - just through their presence. They would not be leaders otherwise. We have asked them to acknowledge this and we believe that they do. The speculation around their absence from the business is without cause. This inquiry is not about them but about the organisation as a whole. It has a single purpose to restore this company's ability to meet its mandate. Any culpability regardless of a person's position will be dealt with appropriately.

#### General

The Board has attracted some criticism regarding this inquiry from various sectors. We believe that is more due to a failure to adequately engage our many and varied stakeholders. For this inquiry to have credibility we need to convey to every stakeholder what we are doing. We will ensure regular and meaningful updates of progress.

If we do this right only good will flow from it.

This initiative has the complete support of our shareholder, Minister Lynn Brown.





Nick Linnell

**From:** Nick Linnell <nickl@theprojectoffice.com>  
**Sent:** Thursday, 19 March 2015 10:38 AM  
**To:** spowell@ensafrica.com  
**Subject:** Eskom

Hi Steven

Developments overnight

1. I met with the chairman and the Chair of A&R last night
  - a. A&C refuse to agree to the ToR – do not want independent oversight and do not want 3 companies undertaking the inquiry – they want 1 company reporting directly to the committee. The Chair of A&C was not able to advance a single reason for their position but simply that was their position.
  - b. I made it clear to both that I do not believe that is in the best interests of the company or the public at large. I said I could not agree to the changes;
  - c. It was agreed that I would present my argument to the full A&R committee Thursday evening but I also said that as I had been appointed by the full board I would provide a full report to the board if the A&R committee persisted in limiting the scope and transparency.
2. Overnight the media release was published in IOL news online
  - a. I had earlier forwarded the release to the Eskom Company Sec and communications head copying the chairman who had approved the release. The chairperson had also in my presence called both and instructed them to release the media statement immediately on receipt from me. I asked them to give prior copies to the full board and the Minister
  - b. The minister immediately pushed back saying that only the President could on the recommendation of the minister of Justice approach a retired judge – some nonsense but nonetheless.
  - c. Various members of the A&R then asked the Chairman not to release it
  - d. This was inevitably leaked – now copied to a host of people. However the leak is somewhat garbled as it contains information not in the release and also announces Grant Thornton as leading the commercial stream!! It also appears to target the Chairperson as saying he is running the investigation.
3. Where are we?
  - a. The powers that be must determine what they want today.
  - b. There are clearly vested interests with one side wanting a narrow and secret/closed inquiry and the other wanting a broad and open inquiry.
  - c. My position is that I agreed to do it on the basis that it would be meaningful and properly conducted. I have no doubt you would feel the same.
  - d. I think this will now be a battle of political will and not my space to play. It will be decided one way or the other today as the A&C is now compromised by the expose in the media that a judge will oversee it with independent investigators.

For interest we should not confuse a transparent inquiry (ToR and independent investigators published) with a confidential report to the Board. We have not said that the report would be made public – that would depend of the Board at the time. But the process must be subject to scrutiny.

Could you keep this confidential – you would need to mention it to Michael

I'll be in touch  
 Kind regards  
 Nick

Nick Linnell





email: [nickl@theprojectoffice.com](mailto:nickl@theprojectoffice.com)

cell: 083 488 1000

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Directors: N H Linnell | M Green

Postal Add PO Box 15813 | Panorama | 7506



65

**Nick Linnell**

**From:** Nick Linnell <nickl@theprojectoffice.com>  
**Sent:** Friday, 20 March 2015 11:10 AM  
**To:** 'Bernard van der Walt'  
**Subject:** RE: Draft Terms of reference - Eskom 18032015.docx

**Tracking:**                      **Recipient**                      **Read**  
    'Bernard van der Walt'                      Read: 2015/03/20 11:12 AM

Hi Bernard

We have a problem with mandates and authority - could we hold for a while  
 Thanks

nick

Nick Linnell



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**From:** Bernard van der Walt [mailto:[Bernard.vanderWalt@za.gt.com](mailto:Bernard.vanderWalt@za.gt.com)]  
**Sent:** 20 March 2015 08:10 AM  
**To:** Nick Linnell  
**Subject:** RE: Draft Terms of reference - Eskom 18032015.docx

Hi Nick,

Yes please, phone me on my mobile, 083 388 5480.

Many thanks,  
 Bernard

Bernard van der Walt | Partner  
 Grant Thornton Cape  
 6th Floor, 119 Hertzog Boulevard Foreshore, Cape Town, 8001  
 T (direct) +27 (0)21 417 8790 | T (office) +27 (0)21 417 8800  
 F +27 (0)21 417 8700  
 E [bernard.vanderwalt@za.gt.com](mailto:bernard.vanderwalt@za.gt.com) | [www.gt.co.za](http://www.gt.co.za)

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66

**From:** Nick Linnell [<mailto:nickl@theprojectoffice.com>]  
**Sent:** 19 March 2015 10:40 PM  
**To:** Bernard van der Walt  
**Subject:** RE: Draft Terms of reference - Eskom 18032015.docx

Dear Bernard

There have been some developments that have impacted our earlier intentions - may I revert to you for an explanation

Kind regards

Nick

**From:** Bernard van der Walt [<mailto:Bernard.vanderWalt@za.gt.com>]  
**Sent:** 19 March 2015 03:55 PM  
**To:** Nick Linnell  
**Cc:** Imtiaaz Hashim; Fayaz Mohamed  
**Subject:** RE: Draft Terms of reference - Eskom 18032015.docx

Dear Nick,

Thank you for the update. We have been meeting with our sector experts for most of today. We are busy putting all the CVs and experience together and will have this for you tomorrow.

Can we meet tomorrow at 12 or have a conference call to discuss the plan of action?

Many thanks and kind regards,  
 Bernard

Bernard van der Walt | Partner  
 Grant Thornton Cape  
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 T (direct) +27 (0)21 417 8799 | T (office) +27 (0)21 417 8800  
 F +27 (0)21 417 8700  
 E [bernard.vanderwalt@za.gt.com](mailto:bernard.vanderwalt@za.gt.com) | [www.gt.co.za](http://www.gt.co.za)



Accounting/auditing  
 Firm of the year  
 2015



Accounting

**From:** Nick Linnell [<mailto:nickl@theprojectoffice.com>]  
**Sent:** 19 March 2015 10:34 AM  
**To:** Bernard van der Walt  
**Subject:** RE: Draft Terms of reference - Eskom 18032015.docx

Dear Bernard

Many thanks

When we spoke on the phone I mentioned the request was for you to consider the "financial" stream but I notice that I neglected to mention that in the email to you. I see there is a press article saying that you were appointed to do the commercial forensics. Not sure where that came from but the board would be considering Grant Thornton for the financial stream.

Kind regards

Nick

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**From:** Bernard van der Walt [<mailto:Bernard.vanderWalt@za.gt.com>]  
**Sent:** 18 March 2015 06:56 PM  
**To:** Nick Linnell  
**Subject:** RE: Draft Terms of reference - Eskom 18032015.docx

Dear Nick,

Thank you for the email. Our team has started working on this and we will revert asap.

Many thanks,  
 Bernard

Bernard van der Walt | Partner  
 Grant Thornton Cape  
 6th Floor, 119 Hertzog Boulevard Foreshore, Cape Town, 8001  
 T (direct) +27 (0)21 417 8700 | T (office) +27 (0)21 417 8800  
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 E [bernard.vanderwalt@za.gt.com](mailto:bernard.vanderwalt@za.gt.com) | [www.gt.co.za](http://www.gt.co.za)

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 2014-2015  
 TOP 100  
 FIRM OF THE YEAR

 CMT Awards  
 For Client Satisfaction  
 2014

 Wolfs  
 2014  
 TOP 100  
 FIRM OF THE YEAR

 IMPUMELELO  
 2014-2015  
 TOP 100  
 FIRM OF THE YEAR

 Accounting  
 2014  
 TOP 100  
 FIRM OF THE YEAR

**From:** Nick Linnell [<mailto:nickl@theprojectoffice.com>]  
**Sent:** 18 March 2015 04:27 PM  
**To:** Bernard van der Walt  
**Subject:** Draft Terms of reference - Eskom 18032015.docx

Dear Bernard

Thanks for taking my call.

As discussed would you be kind enough to review the attached and let us know if you are able in principle to undertake this assignment. If you would have regard to any conflicts, capacity and ability to start almost immediately.

Many thanks  
 Nick

Nick Linnell

 **The Project Office**  
 Accountants & Auditors

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**Nick Linnell**

**From:** Nick Linnell <nickl@theprojectoffice.com>  
**Sent:** Saturday, 21 March 2015 9:47 PM  
**To:** ztsotsi@liquifire.biz  
**Subject:** document

Chair a suggested letter

Dear Minister

At the emergency Board meeting held in the evening of Thursday 19<sup>th</sup>, to which I received a late and unexpected notice, the Board asked me to recuse myself during which the remaining members held a private discussion regarding my tenure as a Director and Chairman of the Board.

The Board then informed me that they would be meeting you shortly to ask that I be suspended.

That meeting with you took place on Friday 20<sup>th</sup> and I was subsequently informed that it had been agreed that a further special Board meeting would be called at which my ongoing role would be discussed. I assume that this was with your approval.

Firstly, in so far as these meetings are concerned I regard them as being irregular in terms of the Companies Act and the MOI and otherwise improper.

Secondly, I would respectfully wish to address with you the background to these meetings.

On the 11<sup>th</sup> March the Board resolved to commission an enquiry referred to above. A coordinator was appointed by the Board and he provided a draft terms of reference and a proposed approach and governance as instructed by the A&C on Sunday 15<sup>th</sup>.

I am informed that on the following night, Monday night 16<sup>th</sup> certain board members met with the suspended executive. In the early hours of the following morning (Tuesday) an email was sent to the coordinator stating "Please note that Board Audit, Risk and Compliance Committee will be attending to the matter relating to the Forensic Fact Finding Inquiry, as per advice" This cancelled a scheduled meeting that he had been invited to attend. His further involvement apparently no longer required.

Clearly the meeting between the suspended executives and the Board members was highly irregular. Further a decision of this meeting directly led to the termination of the coordinator's function. It is unfathomable and shocking that the suspended executives were permitted by these Board members to have a role in such a decision.

The A&R thereafter failed to act with regard to the terms and conditions of the enquiry. On Wednesday morning 18<sup>th</sup> the coordinator ignoring the apparent termination of his function emailed a further draft of the Terms of Reference to both me and the Chairperson of A&R. Upon receipt thereof I attempted to arrange a meeting with the A&R chair. By midday and having received information regarding the earlier night time meeting referred to above, I had a media statement drafted and sent to the company Secretary to distribute with copies to the Board and yourself.

That evening I met with the Chair of R&A and the coordinator. The Chair of A&R was not at all happy about the press release or the terms of reference. There followed a lengthy discussion regarding the principles of the enquiry. The chair of A&R opposed both on the basis that "the A&R committee does not want that to happen". Presumably such a decision having been made at the Monday night meeting with the suspended executives.



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The next day the emergency Board meeting was called and the events described above then followed.

It is clear to me that the Board is intent of frustrating the need for an open and independent enquiry and is acting in consort with certain suspended executives.

In the light of the foregoing, the decisions arising from your meeting on Friday with the board are therefore of considerable concern. Clearly there is gross misconduct and the motives behind these are cause for greater concern.

I would urge you to afford me the right to respond to the allegation made and to ask you to ensure the conduct of both members of the Board and the suspended executives are properly investigated. I feel that this in itself is reason enough to require that the enquiry is not under the control of those involved in activities above.

Yours faithfully





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The Honourable Ms Lynne Brown, MP  
Minister of Public Enterprises  
Private Bag X15  
HATFIELD  
0028

Date:  
22 March 2015

Enquiries:  
Tel +27 11 800 8111

Dear Minister Brown

At the emergency Board meeting held in the evening of Thursday 19 March 2015, to which I received a late and unexpected notice, the Board asked me to recuse myself and continued with the Board meeting. The Board then informed me that they would be meeting you shortly. When I enquired about the reason for the meeting with you I was informed that the Board reserved its right not to inform me. I considered that response improper and has the makings of conspiratorial conduct.

That meeting with you took place on Friday 20 March 2015 and I was subsequently informed that it had been agreed that a further special Board meeting would be called at which I would be informed of the outcome of your meeting with the Board. I assume that this was with your approval. As I write this letter I have not received this feedback.

Firstly, in so far as these meetings are concerned I regard them as being irregular in terms of the Companies Act and the Memorandum of Incorporation (MOI). Secondly, I would respectfully wish to address with you the background to these meetings.

On the 11 March 2015 the Board resolved to commission an inquiry referred to above. I informed the Board that there was a coordinator that could assist the Board with the inquiry. The coordinator drafted terms of reference and a proposed approach and governance as instructed by the Audit and Risk (A&R) on Sunday 15 March 2015.

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Megawatt Park Maxwell Drive Sunninghill Sandton  
PO Box 1091 Johannesburg 2000 SA  
Tel +27 11 800 2030 Fax +27 11 800 5803 [www.eskom.co.za](http://www.eskom.co.za)

Eskom Holdings SOC Limited Reg No 2002/015527/08



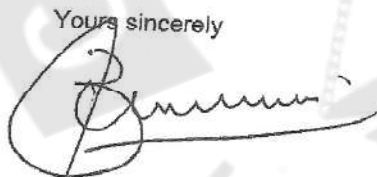
I am informed that on the night of Monday 16 March 2015 certain Board members met with some of the suspended executives. In the early hours of the following morning an email was sent to the coordinator stating *"Please note that Board Audit and Risk will be attending to the matter relating to the Forensic Fact Finding Inquiry, as per advice"* This cancelled a scheduled meeting that the coordinator had been invited to attend – his further involvement was apparently no longer required. Clearly the meeting between the Board members and the suspended executives was highly irregular, which meeting led to the termination of the coordinator's function.

The Audit and Risk (A&R) Committee thereafter failed to act with regard to the terms and conditions of the enquiry. On the morning of Wednesday 18 the coordinator, ignoring the apparent termination of his function, emailed a further draft of the Terms of Reference to both me and the Chairperson of A&R. Upon receipt thereof I attempted to arrange a meeting with the A&R chairperson. By midday and having received information regarding the earlier night time meeting referred to above, I had a media statement drafted and sent to the company Secretary to distribute with copies to the Board and yourself.

That evening I met with the Chairperson of A&R and the coordinator. The Chairperson of A&R was not happy about the press release, specifically the reference to the terms of reference, which she alleged were not in accordance to the A&R committee. The next day a special Board meeting was called and the events described above then followed. It is clear to me that the Board is intent on frustrating the need for an open and independent enquiry and is acting in consort with certain suspended executives.

Clearly there is gross misconduct and the motives behind this behavior is of even greater concern. In the light of the forgoing I have come to the conclusion that the Board is dysfunctional and not serving the best interests of the company. Consequently, I urge you to consider the dissolution of this Board forthwith.

Yours sincerely



Zola Tsotsi  
Chairman

CC: His Excellency President Jacob Zuma





**Nick Linnell**

**From:** Nick Linnell <nickl@theprojectoffice.com>  
**Sent:** Sunday, 22 March 2015 10:14 PM  
**To:** 'letsatsi.duba@gmail.com'  
**Subject:** Eskom  
**Attachments:** chairperson of the Porfolio committee.docx; Draft Terms of reference - Eskom 18032015.docx

Dear Honourable Chairperson

I communicated earlier this week to let you know that the Chairperson would be contacting with regard to an update on the enquiry.

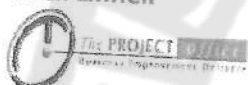
I believe he has now made an appointment to see you urgently.

Please see the attached background to the meeting

Also attached is the draft proposed terms of reference which is not supported by the A&R committee

Kind regards  
Nick

Nick Linnell



email: [nickl@theprojectoffice.com](mailto:nickl@theprojectoffice.com)  
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tel: 021 447 0154  
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# 09



JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,  
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF  
STATE

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AFFIDAVIT

---

I, the undersigned

ANDILE ZOLA TSOTSI

Do hereby state under oath in English:

1.

I am an adult male with ID 4607245514086. I am a pensioner.

My contact details are:

Cell: 083 654 2778 / 065 842 4216

E-mail: [zola.tsotsi@gmail.com](mailto:zola.tsotsi@gmail.com)

The facts herein contained are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

2.

My qualifications include two degrees, one a Bachelor of Science Honours in Mathematics and Chemistry from the University of Botswana, Lesotho and Swaziland (UBLS) in Lesotho in 1970, the other a Bachelor of Science in Chemical Engineering from the University of Surrey, United Kingdom in 1974.

*20/AS*



### 3.

3.1. I began my working career in 1974 with UOP based in Chicago, Illinois, USA. UOP is a Process Engineering company specializing in the engineering and commissioning of petroleum and petrochemical processes. After 9 years, I resigned and started Afritek Consulting in 1983 in Lesotho, an engineering company to consult in the then upcoming Lesotho Highland Water Project Phase 1. Following the democratic elections in Lesotho in 1993, I was appointed the Director General of the Ministry of Natural Resources. I resigned in 1995 to return to South Africa where I was appointed Environmental Affairs Manager in Eskom. I also served as Corporate Strategy Manager until I took early retirement in 2004 to start up a renewable energy company called Maisha Energy.

3.2. I started serving on the Board of my own company as Executive Chairman in 1983. During my stint with the Lesotho government, I was appointed Chairman of Lesotho Electricity Corporation, Water and Sewerage Authority, and Lesotho Highlands Development Authority. In 2004, the Lesotho government set up the Electricity Regulator called Lesotho Electricity Authority and I was invited to become its first Chairman. On completion of this role, I was appointed Chairman of Eskom Holdings in 2011. All the chairmanship appointments in the State Owned Entities were non-executive.

### 4.

4.1. I was appointed to the Board of Directors of Eskom Holdings (Pty) Ltd in July 2011. At the time of the said appointment, Mr. Malusi Gigaba ("Gigaba") was the Minister of Public Enterprises.

4.2. I was approached by Mr. Siyabonga Mahlangu ("Mr Mahalangu") who was then the Advisor to the Minister. He inquired if I would be interested in serving on the Board of Eskom, whereupon I responded in the affirmative after I had considered the matter over some days. I duly submitted my CV on his request and after a few months, I met with the Minister for an interview following which I was offered to chair





the Board. I accepted the responsibility. I was formally appointed for a 3-year term which was renewable once at the Shareholder's Representative's discretion, i.e., the Minister. Eskom was to become the 5th State Owned Entity ("SOE") that I would be Chairman of.

- 4.3. By the time of the end of the first term of the Board, Minister Lynne Brown ("Brown") had succeeded Gigaba as Minister.
- 4.4. The Ministry had put out an advert in the newspaper asking interested individuals to apply for non-executive director positions on the Eskom Board. I duly submitted and was informed in writing that my application was successful and that my second tenure would commence on 11 December 2014. I was re-appointed as Chairman.
- 4.5. I was not informed as to why Ms Chwayita Mabude and I were the only ones from the out-going Board re-appointed. I had no knowledge of who had re-applied.

## 5.

### **Relationship with the Ministers**

- 5.1. I found former Minister Gigaba in office on my arrival. He was Minister for the majority of the duration of my first term on the board. He left in May 2014 and my first term ended in December 2014. I had got to know Minister Gigaba during the time of his service in the Youth League of the ANC.
- 5.2. Minister Brown arrived shortly after the departure of Minister Gigaba. I had not known or met Minister Brown prior to her arrival.
- 5.3. I found Minister Gigaba quite an easy going person and rather knowledgeable about Eskom. I had set up monthly reporting meetings with him and these interactions were productive. I recall some of the occasions when we went into different communities during the 49M campaign just how well he represented our commitment to educating our people about the optimal use of electricity and how

he created space for Eskom at the level of the Chairman to connect with a large spectrum of its customer base.

5.4. Minister Brown and I had an overlap of about 8 months. I tried to create a schedule of regular meetings with her but this did not materialize. I struggled to communicate with her on matters of the company and would only get her attention when there was a problem she wished to address. Her modus operandi were to communicate directly with some of the executives on specific company matters, which approach I felt was divisive.

## 6.

### Relationship with the Guptas

6.1. The ANC had its usual fund raising Gala Dinner on the eve of the January 8 rally in Nelspruit in 2014. Eskom and the SABC were 2 of the main sponsors, and so the chairpersons of these SOEs were afforded not only the opportunity to address the gathering, but also offered seats at the high table which consisted of the ANC "Top Six" and 2 of the older Gupta brothers. The table had name tags so those who did not know one another were able to introduce themselves. This was the first and the only encounter I had with these Gupta brothers. I never got to see or talk to them thereafter.

6.2. I was requested by Mr Tony Gupta to meet with him at their Saxonwold residence on some 3 occasions and once at their Sahara Computers offices in Midrand.

6.3. Tony Gupta generally asked me for assistance on matters they were experiencing some problem with Eskom on, as well in situations where they could advance their business interests.



6.4. My response depended on how much knowledge I had on the matter in question. If I did, I would respond there and then, otherwise I would look into the matter and respond appropriately.

6.5. It was on matters of process that I found him difficult to deal with. He seemed to make little of the fact that management in State Entities is very process lead.

6.6. Tony Gupta explained that they had an interest to supply gas to the Western Cape and saw Eskom's Open Cycle Gas Turbine Plant as an anchor tenant for that business. Consequently, they were looking for exclusivity and wanted to sign an MOU with Eskom. It transpired that this MOU had already been negotiated by another company and at that juncture was with the Department of Energy for signature by the Minister, as was the practice. I explained to him that, not only was the MOU agreed with another party, but it was also beyond the jurisdiction of Eskom. After he discovered who the beneficiary of the MOU was, he promptly accused me of working with "Baba's enemies".

6.7. During the impasse of the TNA contract when the award of the contract by Acting CEO Colin Matjila was under scrutiny for irregularity, I was requested by Tony Gupta to "make this problem go away". I responded that this I could not do as there were processes in place that must take their course. For the first time in my encounter with him, he showed visible signs of anger and frustration as he kept insisting that I was not interested in assisting him.

6.8. There was a position on the organogram of the Procurement Division of Chief Procurement Officer. This position was unoccupied. Tony Gupta approached me to request that I help him fill the position with a person from MTN. I assumed that there was an advert out for this position and that he wanted me to drum up support for his candidate. I discovered that in fact the position was not even advertised and advised him that his candidate would have to compete for the



position with others when it is advertised. He insisted that I am the boss and can make it happen. I informed him that I don't make operational decisions.

6.9. Tony Gupta, made no secret of their intention to influence public servants to assist them with their business interests. He easily spoke disparagingly of those who did not want to assist them, and branded them as "Baba's enemies", a reference to President Jacob Zuma. I found it rather disconcerting that Tony Gupta could wily nily bandy about the name of the President of the Republic at the drop of a hat, let alone invoking expletives in reference to members of the Executive! Observing this behavior, I came to the conclusion that their proximity and ease of access to the President and his Executives is their source of power which emboldened them to direct the affairs of SOEs and Government Departments as has been attested to previously before this Commission.

## 7.

### Events around the SONA of 2015

7.1. A day or two before the State of the Nation Address ("SONA") of February 2015, I was summoned by Minister Brown to her office. The substance of our conversation was as follows: *"Chairman, I have received complaints from management and Board members that you are interfering in management. Please refrain from doing so, because if you don't, I shall have to find someone else to do your job!"* My response was *"Most Board members hardly know what I look like, let alone not having worked with me yet. As for management, if scrutinizing their behavior and decisions and calling them to account constitutes interference with management, then I will happily continue doing so. If you had acceded to my request that we have regular briefing sessions, even this meeting would not have been necessary."*



7.2. The Minister's verbatim response was *"Chairman, you go and do what you have to do, and I will go and do what I need to do. There is no reason for you and I to talk about anything."* That is how the meeting ended.

7.3. On the same day, (the day or two before the SONA in Cape Town), Tony Gupta called and requested that we meet. He suggested that the meeting be at their residence in Constantia, to which I agreed. It turned out that the meeting was intended to tell me that I am not supportive of their business endeavors. He went on to say, *"Chairman, we are the ones who put you in this position, and we are the ones who can take you out!"*, whereupon I responded that *"You do what you have to do, let me carry on with the job that the Cabinet has given me"*.

7.4. What was ironical about this incident is that it occurred a mere few hours after my encounter with the Minister, who, for all intents and purposes, said the same thing to me

7.5. Following the breakfast meeting the President hosted the morning after the SONA, he did a walk about among the guests and when he approached our table, I stood up to greet him, whereupon he inquired how things are going at Eskom. I fleetingly said in response that I have an idea that we institute an external inquiry into the problems the company is experiencing. His response was *"qhubekani nisebenze"*, meaning carry on working.

## 8.

### Responsibilities of the Chairman

8.1. The Chairman is responsible for the organization and management of all Board related matters, namely, meetings of all descriptions, excursions, remuneration, Board Sub-Committees, executing and monitoring of Board decisions and mandates, as well as Board evaluations.

8.2. On the strategic side, communication with the Shareholder's Representative on Company matters is the Chairman's responsibility. The highest accountability, and probably the most difficult, is for the Chairman to ensure that the Board and management, and by extension the whole company, is acting in the best interest of both itself and its stakeholders wherever they may be.

8.3. In general, the Board Chairman is the point of contact between the company and the Minister, whereas the Chief Executive has direct contact with the Director General.

8.4. At the level of the President, it is the Minister that communicates directly. The Minister is at liberty to invite the Chairman to a meeting with the President as deemed appropriate. Though there is no fiduciary relationship between the President and a Director of the Company, the President may summon a Director to a meeting.

## 9.

### **Responsibilities of the Board**

9.1. The primary duty of the Board of Directors is to provide oversight over the business of the company at the behest of and on behalf of the Shareholder. In so doing, it is required to direct the affairs of the company within the framework of a set of laws (Company Law, PFMA, MOI etc.), prescripts (Shareholder Compact, Corporate Plan, Regulatory Mandate, etc.) employing management to operate the business so as to give effect to its outputs.

9.2. The Board discharges its responsibility through a number of Board Sub-Committees, breakaways (management interactions), Parliamentary Portfolio Committee meetings (Legislative Stakeholder interactions) and Annual General Meetings (Shareholder interactions).





## 10.

**Board meetings**

- 10.1. Of the Board meetings that fall within the period January to March 2015, the only meeting that was scheduled was the 26 February meeting. The reason was because there are only 6 scheduled Board meetings per annum, and this was the first for the year.
- 10.2. The induction meeting occurs only when a new Board comes into being. It is not classified as a Board meeting as it has no statutory and fiduciary status. consequently, no decisions binding on the company can be taken in this meeting. These induction meetings are organized by the Shareholder.
- 10.3. The Board meetings convened for the 9 and 11 March 2015 are in fact classified as Special or Emergency Board meetings. The company prescripts stipulate that there must be a minimum of 7 days' notice for Board meetings. These two were convened at shorter notice.

## 11.

**1<sup>st</sup> Board meeting – 26 February 2015**

- 11.1. At about 9pm on 25 February, on the eve of the first scheduled Board meeting, I received a phone call from then President Jacob Zuma. He told me he has been trying to reach Minister Brown, failing which he tried finding Deputy Minister Bulelani Magwanishe. Having failed to find the Deputy Minister too, he found the Acting Director General Matsietse Mokholo, who he informed that the Board meeting is to be postponed. He asked me if I had heard from her whereupon I responded I had not. He told me to expect her call. That was the extent of our conversation.
- 11.2. I was receiving a phone from President Zuma for the first time.



- 11.3. In regard to the postponement of the meeting, I would have expected to have been informed by the Minister in her capacity as the Shareholder Representative with whom the Board has a fiduciary relationship because she has the legal capacity to make this decision.
- 11.4. Board meetings have different categories. There are the Ordinary Board Meetings which are scheduled throughout the year. The draft schedule for these meetings is circulated to Board members towards the end of the preceding year for their comment. Once dates are firmed up, the final schedule is signed off by the Chairman and the published in the formal meeting roster of the company. None of these meetings may be cancelled because each one is designed to deal with specific aspects of the business which have to be addressed at specific times. Examples would be the Shareholder Compact, Corporate Plan, Integrated Report, Auditing of Financial Statements, Annual General Meeting, MYPD (Tariff) Application etc. These meetings can however be postponed on the understanding that they will be rescheduled. Postponement can either be canvassed among Board members for good reason, or may be effected by the Chairman under plausible circumstances, or may be requested by the Minister.
- 11.5. Then there are Extra-ordinary Board meetings, which usually far exceed the Ordinary Board meetings in frequency. When one takes into consideration the size of the business, one has to appreciate that the complexity thereof is proportional to the size. There is pressure for continuous decision making at the highest level. These meetings can be postponed or cancelled in consultation with Board members, or by the Chairman with good reason.
- 11.6. Another categories of meetings are Special and Emergency Board Meetings. The former are usually convened at the request of Shareholder's Representative (Minister) and generally address one issue of particular concern. Emergency





Board Meetings occur when there is a particular emergency. Both these types of meetings are convened by the Chairman.

- 11.7. All these kinds of meetings can be postponed by the Minister. It is unclear as to whether the Minister has the obligation to give reasons for postponement of Board meetings.
- 11.8. Shortly after I had spoken with President Zuma, I received a call from the Acting Director General Matsietsi Mokholo who informed me that the Minister has asked that I postpone the Board meeting. I inquired from her as to the reasons for the postponement. She informed me that she was not given any.
- 11.9. Immediately after this call, I instructed my office to send out the notice of postponement to all Board members.
- 11.10. This instruction to postpone the meeting was the first ever in the course of my tenure as Chairman.
- 11.11. In my telephone conversation with President Zuma, the President did not give me any reason for the postponement of the meeting.
- 11.12. I instructed my office to inform Board members of the postponement.
- 11.13. Whilst it was the President who communicated the need to have the meeting postponed, the actual postponement of the meeting was on the instructions of Acting DG who informed me that the Minister had asked for the postponement. Hence the communiqué to the Board members spoke of the postponement of the meeting by the Minister.



**12.****Meeting at President's residence in Durban**

- 12.1. A day or two before the 7th March 2015, I received a phone call from Ms Dudu Myeni ("Ms Myeni") who informed me that the President would like an audience with me on 7th March 2015 at his Durban residence.
- 12.2. I asked what the purpose of the meeting is, whereupon she declined to discuss the matter over the phone.
- 12.3. My understanding at the conclusion of the telephone conversation was that the meeting is being requested by President Zuma.
- 12.4. Ms Myeni was at that time the Chairperson of SAA. My understanding of Ms Myeni's role is that of a messenger for the President, not the convener of the meeting.
- 12.5. On my arrival at the Presidential Residence in Morningside, Durban, I found Ms Myeni and her son Talent. Soon thereafter a gentleman named Nick Linnell arrived.
- 12.6. We immediately began a discussion of what was going to be presented to the President. This discussion was led by Dudu Myeni. She explained that the situation of Eskom's financial stress and poor technical performance warranted that an inquiry into the company be instituted. She further elaborated that, in the course of the said inquiry, 3 executives, namely, Chief Executive Tshediso Matona, Group Executive for Commercial Matshela Koko, and Group Executive for Group Capital Dan Marokane are to be suspended.
- 12.7. I found this matter altogether shocking and proceeded to question the need for suspending these executives as I saw this as a recipe for inducing instability in the company. She retorted that even the War room was experiencing frustration with the deteriorating performance of the Company, and that the inquiry was essential.





In her view, the suspensions of the executives will not create difficulties because it will be explained that they are not accused of wrongdoing, but are being asked to allow space for the inquiry to proceed unencumbered by their presence. Following this discussion, we went inside the residence and moments later the President joined our company.

- 12.8. After some pleasantries, the President inquired what was up for discussion, whereupon Ms Myeni began by saying that the performance of Eskom financially and technically is deteriorating to the extent that there is a serious concern that the company could fail to meet its obligation to supply electricity to the nation.
- 12.9. She pointed to the discussions that are going on in the War Room on the Company's poor performance, saying that even the War Room is very dissatisfied with its performance.
- 12.10. She then arrived at the conclusion that there needs to be an external inquiry into the performance of the company. She further proposed that 3 executives be suspended to make sure they do not impede this inquiry.
- 12.11. I responded by saying the idea of an inquiry was one I had always expressed even before the advent of the new Board. However, I disputed the suggestion of suspensions.
- 12.12. The President then inquired as to whether I knew which executives were to be suspended, whereupon I responded that I knew as Dudu had mentioned them in the discussion prior to this meeting. His response gave me the impression that he had been privy to this discussion.
- 12.13. Dudu Myeni had informed me on my arrival that Nick Linnell is a lawyer who she had commissioned to advise her at SAA and would be available to do the same for



us at Eskom. He made a few comments about how he thought the inquiry would be structured, and that it needed to be completed in 3 months.

- 12.14. I made the observation that it would be preferable if another way of recusal of the executives was applied as suspensions will likely bring instability into the organization and anxiety among investors. I committed to look into the company Human Resources rules for this purpose.
- 12.15. The President then suggested that I take this proposal to be looked at by the Board. He will in the meantime inform the Minister of these developments.
- 12.16. Ms Myeni seemed to have intimate knowledge of what was discussed in the War Room, though I did not know how she came about this knowledge.
- 12.17. The War Room was attended by Ministers and officials of a number of Ministries as well as Eskom executives.
- 12.18. From Eskom the attendees of the War Room were selected by the Executive Committee of management.
- 12.19. Matters discussed at the War Room were kept private and confidential
- 12.20. There was never any discussion as to who should be suspended. This decision was made somewhere by others before I became involved.
- 12.21. The individuals chosen for suspension were the Chief Executive Tshediso Matona, Group Capital Head Dan Marokane, and Technology and Commercial Head Matshela Koko.
- 12.22. My assessment is that each attendee had an interest in the creation of the Eskom inquiry with the exception of Talent who did not speak throughout.





## 13.

Interaction with Mr Linnell

- 13.1. I was introduced to Nick Linnell by Ms Myeni at the residence of the President in Morningside, Durban. He was said to be a lawyer.
- 13.2. Ms Myeni informed me that Mr. Linnell had assisted her before at SAA with issues she needed to be solved, and that he will be in a position to assist us at Eskom. I assumed that this is the reason that Nick Linnell was invited to the meeting.
- 13.3. At the end of the meeting with the President, Nick suggested that he would prepare a memorandum on the process to be followed, and an associated resolution for the Board.
- 13.4. Prior to this meeting, I had never met Nick Linnell.
- 13.5. Mr. Linnell and I worked closely once I had the opportunity to present the idea of the inquiry to the Board. He decided to travel directly to Johannesburg from Durban instead of going home to Cape Town first. On the morning of the Special Board meeting on 9 March, he was available on standby at my request should he be required to brief the meeting. On the Wednesday 11<sup>th</sup> March Board meeting he was present and responded to some questions on the Resolution he had prepared which had been circulated during the Monday 9<sup>th</sup> meeting.
- 13.6. Mr. Linnell continued to provide advice throughout the time of the work towards the suspension of the executives and beyond until I resigned. He stressed the importance of credibility in addressing this matter



- 13.7. Mr. Linnell first produced the memorandum which was setting out the rationale for the inquiry and the attendant resolution for the Board. He also produced and shared the letters of suspension of the executives, the press release and a draft Terms of Reference for the inquiry.
- 13.8. I did not give Mr. Linnell any mandate.
- 13.9. When he appeared before the Board, he was requested by some Board members to assist the People and Governance and Audit and Risk Sub-Committees.

**14.**

**Board meeting of 9<sup>th</sup> March 2015**

- 14.1. The Board meeting of 9 March was convened in response to the visit I had to the President's residence as I have described.
- 14.2. Given that the President had asked that I canvass this proposal for an Inquiry with the Board, I decided to call a Special Board meeting to test the Board's appetite for this proposal.
- 14.3. At the Special Board meeting of 9 March 2015, I informed the Board that I had been summoned to the President's residence for a meeting wherein the proposal for an Inquiry into the state of affairs of the company was made.
- 14.4. At the meeting doubt was cast on the quality of information that was coming from Eskom to the War Room.
- 14.5. The Board is being requested to consider instituting this Inquiry such that it is unfettered by management and other stakeholders.



- 14.6. I also presented the resolution that was prepared by Nick Linnell.
- 14.7. In the course of the discussion by the Board, I proposed that the Board invite the Minister for her to give the Board guidance on this matter.
- 14.8. Mr. Linnell had prepared a Memorandum which I had circulated to Board members in advance of the meeting. This document was presented and discussed at the meeting.
- 14.9. Mr. Linnell had offered to prepare the resolutions and I requested him to go ahead with the work so that I have something to present to the Board.
- 14.10. At the end of the Board meeting, it was concluded that the Minister be invited to engage with the Board on this matter.
- 14.11. To the best of my recollection, I contacted the Minister at the conclusion of the Board meeting.
- 14.12. The request for the Board to meet with the Minister meant that it was at the convenience of the Minister that the meeting will take place. Consequently, the meeting was agreed for the 11<sup>th</sup> March to accommodate the Minister's schedule.

**15.**

**Board meeting of the 11<sup>th</sup> March 2015**

- 15.1. The Board meeting of the 11<sup>th</sup> March had a 2-fold purpose. The first was it was intended to make up for the 26 February meeting that got postponed. Secondly, the Minister had indicated that she was available to attend on this day.





- 15.2. Mr. Linnell spoke on the resolutions which stemmed from the memorandum he had developed. The resolutions were circulated to Board members in the meeting of 9 March 2015.
- 15.3. Mr. Linnell was requested by me to introduce the idea of the inquiry to the Board. Board members asked a number of questions for clarity.
- 15.4. It is also at this meeting that the Board requested Nick to work with the 2 Sub-Committees that were mandated to pursue the Inquiry matter.
- 15.5. The Minister joined the Board meeting of 11 March by invitation from the Board. She was already aware of the idea of an Inquiry and she supported it. She gave the Board the authorization to proceed with it. (The minutes of this meeting are missing)
- 15.6. The Minister mandated the Board to carry out the suspensions of the executive. She even added the name of the Financial Director who was not part of the original 3 executives identified in the meeting at the President's residence. She further mandated the Board to carry out the Inquiry.
- 15.7. The Board deliberated on how the inquiry should proceed. It agreed on the need to have the executives whose area of responsibility would be inquired into be set aside for the duration of the inquiry.
- 15.8. The limitation of the human resources rules meant that the executives would have to be under precautionary suspension as there was no other method of recusal available.





- 15.9. The individuals who were to be suspended were identified as the Chief Executive Mr. Matona, Group Capital Executive Mr. Marokane, Technology and Commercial Executive Mr. Koko, and Financial Director Tsholofelo Molefe.
- 15.10. The Audit and Risk Committee was mandated to be responsible for setting up the terms of reference of the inquiry, and the People and Governance Committee would manage the process of suspensions.
- 15.11. The People and Governance Committee was to look into who would act in the positions of the suspended executives.
- 15.12. In order to mitigate any negative impact the suspensions may have on the Company; the inquiry was set to be completed in 3 months from inception.
- 15.13. It was agreed that the Terms of Reference which would form the basis for the inquiry should be developed by the Audit and Risk Committee.
- 15.14. When the Terms of Reference were being decided upon and subsequently drawn up, I was no longer involved and left whilst this process was in progress.
- 15.15. The basis of the suspensions of all the executives was the same. The idea was that none of them were to be able to gain unfettered access to the company for the duration of the inquiry to ensure that the work of the inquiry is not interfered with.
- 15.16. The executives were individually called to appear before the People and Governance Committee and informed of the suspensions.
- 15.17. The letters of suspension were read out to them. I assured each one that their suspensions were not occasioned by any preconceived wrong doing on their part.



- 15.18. The executives were not given more than the time of their appearance before the committee to deliberate on the suspensions.
- 15.19. I arrived at the People & Governance Sub-Committee shortly after it had started and on my arrival I found Ms Chwayita Mabuda Chairing the meeting. She pronounced the names of the executives who were going to act. There was no discussion as to which executives were suitable to act. At some point Ms Klein took over the proceedings. I was asked to handle the suspension presentations to the executives.
- 15.20. I objected to the inclusion of the name of the FD to the list of executives to be suspended as I felt this would create a problem with our investors and lenders. In so doing, I was exercising my fiduciary obligations in the interest of the Company. However, I was outvoted by my fellow Board members.
- 15.21. It was Dr, Ngubane who responded that the name was provided by the Minister whereupon I decided to call the Minister to register my objection.
- 15.22. The Minister insisted that the name of the FD be included.
- 15.23. I objected to the name of Khoza as acting Chief Executive as he was a Board member given the experience from the previous board of appointing a Board member to the Acting CE's position. He himself stated that he did not feel up to the responsibility.
- 15.24. Notwithstanding anything, it appeared that these names were cast in stone and no amount of objection was going to change the list.





- 15.25. The executives designated to act were Khoza as CEO, Nonkululeko Velezi as FD, Abram Masango as Group Capital Executive and Edwin Mabalane as Technology and Commercial Executive.
- 15.26. It was clear that the People and Governance Committee played no role in the selection of the executives who were to act.
- 15.27. There appear to be some errors and omissions in the minutes of this meeting. I am sited as having chaired the meeting. My recollection is that the meeting was chaired by Chwayita Mabude. Further, the minutes make no mention of the pronouncement of the executives who were going to act, including my objections.

16.

**Acting positions**

- 16.1. I never got to know or told when and how the executives were informed of their acting roles.

17.

**Dentons investigation**

- 17.1. I had already left Eskom at the time the decision to appoint Dentons was under discussion.

18.

**Board meeting of 30 March 2015: Charges laid by the Board against me**

- 18.1. Charge 1: The Director procured the services of an external consultant, Mr. Nick Linnell, to provide consulting services to the company without following the Company's prescribed procurement processes or informing the Board of his actions. In so doing, the Director crossed the line from being a non-executive Director to exercising executive power without the requisite authority.



- 18.2. Response: I traced the history of Nick Linnell's activities from the time of the 9 March Board meeting, the support he gave to both the Board and the ARC and P & G Sub-Committees. P & G declined to deal with the matter of Mr. Linnell's appointment but instead preferred that the Board handle it. Mr. Linnell could only be considered employed by the Board if he had a written letter of appointment or contract signed by the Chairman, or had received some remuneration or compensation for the work he had done for the Board.
- 18.3. Charge 2: The consultant commenced with his work to the knowledge of the Director and without the Board of Directors being informed that the work had commenced within the Company. The Director was aware that no contract of engagement for the Consultant had been concluded, thus exposing the Company to non-compliance with applicable statutes and procedures.
- 18.4. Response: Mr. Linnell was merely assisting the Board pro bono. Commencing work is only possible if it is triggered by some action of engagement by myself or the Board. Incidentally, by the same token, Mr. Kumalo, a Board member, organized a media specialist Mr. Happy Ntshingila to review a media statement that had been produced by the P & G.
- 18.5. Charge 3: The Director authorized the commissioning of a media statement in relation to an inquiry into the affairs of the Company with the assistance of the Consultant without the knowledge and consent of the Board. The media statement consequently fell into the public domain. The media statement contained numerous inaccuracies and misinformation which may lead to the company facing potential legal action from third parties named therein.
- 18.6. Response: I informed Mr. Linnell that the Minister of DPE had called me to request that I correct the misconception in the public domain that I would be leading the Inquiry. This was necessary for the integrity of the Inquiry. I requested Mr. Linnell





to draft a media statement. In it he had made some suggestions such as appointing a retired judge to head the Inquiry, and retaining the services of Grant Thornton to conduct some aspects of the Inquiry. I asked Mr. Linnell to forward the statement to the Company Secretary and my office executive. I asked the latter to send it out to the Board members for their approval as well as the Minister. Both the Minister and Board members who responded objected to the content of the press release. I then instructed the Company Secretary not to release it. I therefore had no knowledge as to how it got into the public domain.

- 18.7. Charge 4: The Company is in the process of establishing the Inquiry and the Director's actions put the integrity of the process and the Inquiry itself at risk. The Director's conduct has undermined the reputation of the Board.
- 18.8. Response: The idea of the Inquiry had been accepted by the Board. At no stage did the Board not know what was happening. A number of the steps the Board took were as a result of the advice of Mr. Linnell. I consulted the Board on this matter as a result of the instruction from the Minister.
- 18.9. Charge 5: The Director's actions did not meet the minimum requirements of the standard of care expected of him as a director of the Company and a member of the Board.
- 18.10. Response: I am of the view that the Inquiry was necessary in the public interest to indicate to the public that the Board was looking into the affairs of the Company. My letter of 26 March provide3d specificity around my action.



## 19.

My resignation at Eskom

- 19.1. Following the Board meeting of 30 March 2015 where charges against me were proffered, there was an In-Committee meeting wherein the Board took a decision to remove me as a Director.
- 19.2. I was approached subsequently by a delegation of the Board consisting of Mr. Khumalo and Dr. Ngubane. They informed me of the Board's decision, and persuaded me to accept it and that we would jointly draft a press statement confirming mutual agreement of an amicable separation, whereupon I decided to consult with my legal team.
- 19.3. Notwithstanding that my legal counsel concluded that the Board had a weak case against me, I decided not pursue the matter any further. I reasoned that because the Company was by then in a precarious position, it would be in the interest of the Company for me not to exacerbate the situation by thrusting it into a legal battle for my own personal gain.
- 19.4. I returned to the Board In-Committee meeting whereupon I tendered my resignation.
- 19.5. I stated that, as a director of the Company, I am entitled to payment of my legal defense as this was a Company matter, to which the Board concurred.
- 19.6. I asked that I be paid the balance of my term as Director, as I had 3 months left of it. The Board responded that remuneration of Directors is the competence of the Minister. They would recommend it but the Minister would have to approve.





- 19.7. I asked that retain the Company cell phone and tablet with the understanding that I would pay for their use. The Board agreed to this proposal.
- 19.8. A few days later after I had left Eskom, I was approached by a media organization for an interview. In the interview, I alluded to the fact that I believed that Minister Lynne Brown had a hand in my departure from Eskom.
- 19.9. Shortly thereafter, Dr. Ngubane called me to inform me that he had passed on my request for payment to the Minister. He further stated that, if I did not retract my statement I made about the Minister, I would not get paid.
- 19.10. Indeed, a week or so later, he called for us to meet, whereupon he showed me a one sentence letter from the Minister addressed to him saying that my request for payment had been declined.
- 19.11. Since the release into the public domain of the Gupta emails, it has come to my attention that reference was made to communication between Dr. Ngubane and a certain Mr. Howa who was then the editor of the New Age newspaper. It stated that Mr. Howa would assist Dr. Ngubane in drafting a media statement detailing my departure from the Eskom Board. This communication took place some 10 days before the matter of my resignation from the Board was discussed.

## 20.

### Salim Essa

- 20.1. My first encounter with Mr. Salim Essa was at one of the TNA Breakfasts sometime around mid-2014. He was introduced to me by Tony Gupta as one of his business associates.
- 20.2. On one occasion thereafter, a company called Regiments had made an unsolicited offer to Eskom to raise much needed funds for Eskom via a methodology called



"Balance Sheet Optimisation". I asked the Acting CE and FD if this is something they think would benefit the Company. The CE was interested in exploring this proposal but the FD questioned Regiment's track record in this regard and opposed to the idea. Regiments had wanted some compensation from Eskom for placing the unsolicited solution. However, Management ultimately declined the offer.

- 20.3. The other occasion was when the new Board came into being where I was required to place Board members in Sub-Committees of the Board. Salim Essa sent me his configuration and asked that I pass it on to the Minister as my submission.
- 20.4. I quietly ignored his submission and sent mine to the Minister, whereupon the Minister responded with the exact submission I had received from Salim Essa.
- 20.5. I kept going back and forth with this process of chopping and changing the allocations with the Minister, until she called me to a meeting. At the meeting was Salim Essa and Tony Gupta. She merely informed me that the Board allocations will be the way she had sent them to me. This she did in the presence of these 2 gentlemen.
- 20.6. I do not know if Mr. Essa had any involvement in my resignation from the Board.
- 20.7. Mr Essa was never present at any of the meetings I had with Tony Gupta.

## 21.

### The appointment of Mr Matjila as Interim CE

- 21.1. Brian Dames was to leave at the end of March 2014. The Board decided that no Board member would act in the position of CE.





- 21.2. The Board further decided to propose Dr. Steve Lennon to act in the position.
- 21.3. The reason for the choice of Dr. Lennon was because he had extensive experience of Eskom's business and that he had stated that he would not be contesting the position.
- 21.4. The Board duly mandated me to seek the concurrence of Minister Gigaba on the acting position by Dr. Lennon. The Minister initially agreed to the proposal.
- 21.5. Shortly before Brian Dames was to leave at end of March 2014, Minister Gigaba berated me over the phone for the choice of Dr. Lennon, saying that appointing a white man would prejudice the ANC's chances of attracting voters for the general election due in a few months.
- 21.6. The Minister informed me that he had decided to propose that Colin Matjila should act in the position of CE.

## 22.

### T-SYSTEMS

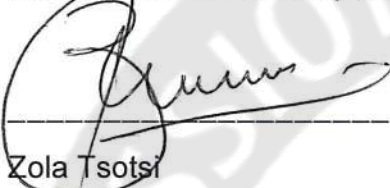
- 22.1. To the best of my recollection, the extension of the T-Systems contract was a matter dealt with by management. The Board or Chairman had no involvement in it save for a report to the Board by way of information. I do not recall the details and background around this matter.



After completion of the statement, the following questions were put to the deponent and his answers were recorded accordingly:


1. Q. Do you know and understand the contents of this statement?  
YES
2. Q. Do you have any objections in taking the prescribed oath?  
NO
3. Q. Do you consider the prescribed oath as binding in your conscience?  
YES

I believe the statement gives a fair account of the event that happened.

  
Zola Tsotsi

13/02/20  
Date

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Mthatha on the 13 day of February 2020, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

  
COMMISSIONER OF OATHS



# 10



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## STATEMENT BY VENETE KLEIN TO THE COMMISSION OF INQUIRY INTO STATE CAPTURE

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### INTRODUCTION

1. I have been approached by the Commission of Inquiry into State Capture ("the Commission") to provide input in respect of matters which form the focus of the Commission's inquiry into state capture ("the Inquiry"). I have volunteered to provide a statement in respect of the relevant matters, in the interests of fully ventilating such matters and assisting the Commission in the execution of its mandate. Although I have endeavoured to address all such matters as comprehensively as possible, this statement should not be construed as being conclusive of my position on the issues in question, nor should my failure to deal with any item in this statement be construed as a waiver of my rights in that regard, which rights remain reserved.
2. I have endeavoured to address all relevant matters (as conveyed to me by the Commission) thematically, and in a generally chronological manner. In order to deal fully with one theme at a time, this has required me occasionally to jump forwards and backwards in time when moving from one theme to another. I believe that this is the most efficient way in which to set out my statement.
3. By designation, at the relevant time, I was a Chartered Director (CD) SA and have graduated from various international executive programmes, including the Senior Executive Programme at Harvard University and the Executive Development Programme at the New School, in New York. In addition, I hold several international qualifications from MIT, INSEAD, IMD and Wits.
4. I have served as an Executive Director and Non-Executive Director on various Boards, including the Barclays Group Ltd, the Reserve Bank and Old Mutual Wealth. Until recently, I served as the Chairperson of The Institute of Directors Southern Africa. I have





garnered various achievements and awards as a result of my recognised performance in my career, including but not limited to the Business Woman of the Year Award, The Barclays International & Commercial Bank Leadership Award, the Nedcor People's Bank Top Managerial Performer Award and the Association of Black Investment & Securities Professionals Award.

5. For a full description with regards to my qualifications and employment background, I refer to my *Curriculum Vitae* ("CV") as well as my abridged CV, copies of which are annexed hereto marked "VK1" and "VK2" respectively.

#### APPOINTMENT TO THE ESKOM BOARD

6. I was nominated by Lionel Ricardo Adendorf to be appointed to the Eskom Board of Directors ("the Board"). I signed and dated the nomination form on 02 October 2014, a copy of which is annexed hereto marked "VK3". The nomination was made in line with the prescripts as set out in the advert that appeared in the Business Times of Sunday, 28 September 2014.
7. On 11 December 2014, I was appointed by the then Minister of Public Enterprises, Lynne Brown ("the Minister") to serve as a non-executive member on the Board. A copy of the appointment letter from the Department of Public Enterprises ("the DPE") is annexed hereto marked "VK4".
8. Eskom was at that point in dire straits, having faced going concern difficulties and with the country having been subjected to stage 3 load shedding. I felt impelled to make myself available to serve on the Board in order to lend my expertise to the cause of addressing the crisis facing Eskom and the country as a whole. I took up this position without any thought of financial gain.
9. I am unaware as to the process that the DPE followed leading up to my final appointment to the Board but would assume that it went through all the normal checks and balances.



**APPOINTMENT AS THE CHAIRPERSON OF THE PEOPLE AND GOVERNANCE COMMITTEE**

10. Given the sheer enormity and complexity of the business, the Board's function is largely discharged through the efforts of various standing Board sub-committees, such as the Audit and Risk Committee ("ARC"), the People and Governance Committee ("P&G Committee") and the Board Tender Committee ("BTC") etc. Each of the board subcommittees has its own chairperson, delegation of authority and terms of reference, which guide the functioning of the sub-committees in conjunction with Eskom's Memorandum of Incorporation ("MOI"), Board Charter, the King III and IV codes on Corporate Governance and applicable legislation, including both the Companies Act 71 of 2008 ("the Companies Act") and the Public Finance Management Act 1 of 1999 ("PFMA").
11. A consequence of the aforesaid is that many matters falling within the delegated authority of the various sub-committees would not necessarily serve before the full Board. Only matters which meet the specified threshold in terms of the relevant materiality framework will serve before the Board. For example, the authority to approve contracts with a value up to R750 million is fully delegated to the executive, while the authority to conclude contracts with a value of over R750 million up to "Investment Decision" or "Budget level" is fully delegated to the BTC. As a result, only contracts with a value of above "Investment Decision" or "Budget level" will come before the full Board for approval. This means that multiple substantial contracts could be approved and concluded on the authority of the executive and the BTC, without the balance of the Board ever coming to know thereof.
12. As a result, members of the Board are required to trust that the checks and balances provided by the corporate governance structures are adhered to and adequately ensure the rigour of all decision-making processes. In addition to the above, the Board members rely heavily on the institutional knowledge and guidance received from the executive in relation to all such decision-making processes, including decisions made by the Board. This reliance is in accordance with the Companies Act. This, however, can result in difficulties from a corporate governance perspective, especially when decisions are



taken based upon information and guidance received from the executive, only to discover subsequently in the media that pertinent information was omitted or inaccurately submitted to the Board.

13. In early 2015, I was first appointed as Chairperson of the Social Ethics and Sustainability Committee, at which time I also served as a member of the Investment & Finance Committee and the P&G Committee. I later became the Chairperson of the P&G Committee and a member of the ARC.
14. During the first few months of the tenure of the new board there were a number of rotations of Board members within the Board sub-committees. This was due to the rotation of Board members as a result of one Board member taking up an executive role.
15. During the course of these rotations and after the suspension of 4 executives (I address the issue in relation to these suspensions below), Mr Zethembe Khoza became Acting Chief Executive Officer and I was moved to chair the P&G Committee.
16. I am not certain of the exact date of my appointment as Chairperson of the P&G Committee, but believe it was on or about 15 March 2015. Later, in about June 2015, I was replaced as Chairperson of the P&G Committee by Ms Chwayita Mabude, only to later be reinstated as Chairperson in or about August 2015.
17. The instability regarding the members of the committees also contributed to the governance issues, as Board members were always working with new people who were not familiar with the challenges that the Board faced.
18. Furthermore, the Board struggled with not having all the required information at hand when submissions were presented. It now appears that many of the submissions that were considered in my time contained misleading information or completely omitted critical information. What compounded matters even further for me, is that there are now differing versions of matters that I previously thought that I fully understood.
19. I believed that I was part of a success story in that we went from stage 3 load shedding at a cost of *circa* R434 million per day to the economy to no load shedding in my tenure



on the Board. I regarded this as one of my finest moments in terms of contributing to the country, which, after all, was my only motivation for agreeing to serve on the Board.

20. I understand my appointment to the position of Chairperson of the P&G Committee to have been motivated by the substantial experience I have acquired in this particular field of corporate governance during the course of my career, as demonstrated above. The primary mandate of the P&G Committee is to assist the Board in dealing with the nomination and remuneration of directors, senior executives, human resources strategies and policies. The P&G Committee is also the custodian of corporate governance to the benefit of Eskom. Following my re-appointment as Chairperson of the P&G Committee in August 2015, I served in that capacity until my resignation from the Board on Friday, 12 May 2017.
21. As chairperson of the P&G Committee, I was frequently called upon to mediate at executive level when matters could not be resolved. I always endeavoured to deal with these matters as discreetly as possible in the interests of the people concerned and the organisation as a whole. Similarly, I was called upon to deal with a number of "people management" issues that were escalated to the chairman of the Board, and which I handled with the same discretion. I attended to all of my functions as Chairperson of the P&G Committee with the rigour and efficiency demanded of anyone occupying a position of that importance.

#### MEETINGS LEADING TO THE DENTONS INQUIRY

22. I now describe the sequence of events in terms of the Board meetings that were scheduled for the period January 2015 – March 2015. At the outset, I note that I was informed of all the meetings, as described below, by the Company Secretary.
23. The Board Induction meeting was held on 16 January 2015 and was arranged by the Company Secretary, Malesela Phukubje. The agenda items included, amongst others, a "war room"<sup>1</sup> update, selective demand curtailment, a financial status update,

<sup>1</sup> The "war room" was a crisis management body (which was being run by the then Deputy President of the Republic of South Africa and supported by a number of high ranking government officials) established to oversee



consideration of Board committee handover reports, a media communication review, risk register consideration, debt management, turnaround strategy, Eskom fleet, panel of experts/International advisory committee and the PFMA section 51 indemnity. I recall having left this meeting feeling rather concerned both by the enormity of the challenges which had correctly been highlighted by the Minister and by the fact that Eskom did not appear to have concrete strategies in place to address these concerns.

24. A meeting was also scheduled by Mr Phukubje, to take place on 26 February 2015, but was later cancelled and did not take place. The reason given was that the DPE had advised that the meeting should not proceed. I raised objections to the cancellation of this meeting in terms of section 52 of the PFMA and Treasury Regulation 29. An email dated 27 February 2015, detailing my objections is annexed hereto marked "VK5".
25. On Sunday, 08 March 2015 the Board received a request to attend a Board meeting on Monday, 09 March 2015 in order to make decisions in accordance with a Board memorandum dated 08 March 2015. The memorandum and resolutions are annexed hereto, marked "VK6". I found it concerning that we had been called to a critical meeting on less than 12 hours' notice. In any event, I had a prior engagement and I duly declined the invitation.
26. I understand that the issues raised at the meeting by Mr Zola Tsotsi, in his capacity as Chairman of the Board, were of such a nature (for example, regarding an independent investigation into Eskom) that those who attended wanted the entire Board as well as the shareholder representative, Minister Lynne Brown to be present. The meeting was therefore rescheduled for 11 March 2015. Since I had not attended the meeting on 09 March 2015, I had to rely on the minutes of this meeting, annexed hereto marked "VK7".

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the implementation of the 5-point plan Government had introduced to address load-shedding, which consisted of:

- i. 30-day emergency measures;
- ii. Co-generation production;
- iii. Gas imports;
- iv. Independent Power Providers (IPPs); and
- v. Demand-side management.)

27. In terms of the memorandum, the Board was requested by Mr Tsotsi to take a resolution to commission an inquiry into the technical, commercial and structural status, as well as any acts and/or omissions which had contributed to the deficiency of generating and distribution capacity, of Eskom. Mr Tsotsi also proposed that this inquiry should be completed within a period of 3 months and that the Board subcommittee delegated to spearhead this inquiry should appoint an independent investigator, free of any influence or suspicion.
28. I found it concerning when reading the minutes of 09 March 2015 that the Chair referred to the Presidency having expressed concern, presumably to the Chair, regarding the performance of Eskom. The meeting agreed to invite the Minister to address the issues as articulated by the Chairman. I have seen two sets of the minutes of this meeting, the original unsigned minute (annexed as "VK7") mentions the Presidency, whereas the signed set of these minutes had mentions of the Presidency removed.
29. At the meeting of 11 March 2015, the erstwhile Group Chief Executive Officer, Mr Tshediso Matona, again outlined the problems facing Eskom, which included:
- a. Departures of senior executives through resignations and retirements, which required him to reshuffle the team;
  - b. Engagement with labour as staff morale was a big challenge;
  - c. Gaps in information provided to the "war room";
  - d. Unlikelihood of savings targets being met for the financial year due to serious leakage in primary energy costs;
  - e. The liquidity buffer of R20 billion had decreased to R4.9 billion as 2 expected loan amounts had not been received; and
  - f. The non-payment of substantial amounts owing by Municipalities.



30. The Minister also addressed the Board that day, once again expressing her concern around the Board getting a handle on the business. The Minister conceded that she had no right to instruct the Board on any matter regarding the conduct of Eskom's business.
31. The Minister did note a number of issues:
- a. She was aware that the Board may have been feeling that it had fallen by the wayside given the activities of the "war room";
  - b. Concern regarding the interest rates which Eskom had negotiated and agreed to in the market;
  - c. The inequality of coal price purchases, with some companies being paid more than others;
  - d. Mismanagement of the load shedding process;
  - e. The purchasing of diesel "on the hoof";
  - f. The appointment of the Board did not bring about any problems and the process ran smoothly; and
  - g. The ARC may procure the services of an independent, credible forensic investigator to undertake the inquiry proposed by Mr Tsotsi and not someone who had previous dealings with Eskom or whose independence may be in doubt.
32. The activities of the "war room" were particularly concerning as I was of the view that they were potentially instructing the Board. For example, the "war room" took the decision that the Board should not proceed with the mooted voluntary severance package process as started by the previous Board. The minutes of the meeting highlighting this are annexed hereto and marked as "VK8".



33. After the Minister left, the Board convened a Board in-committee meeting where Mr Tsotsi again presented his memorandum proposing an inquiry into corporate governance issues at Eskom and sought the Board's support in that regard. It was agreed that:
- a. A forensic inquiry would be established, and would be driven by the P&G Committee and the ARC; and
  - b. The ARC would be the custodian of the inquiry and would engage with other committees as and when necessary.
34. Mr Tsotsi proposed that those Executive Committee members who were heading up the divisions where the inquiry would take place step down during such inquiry. Mr Tsotsi (at the 11 March 2015 Board in-committee meeting) assured the Board that he had compiled a report that supported the establishment of an inquiry (I deal later with Mr Tsotsi's subsequent admission at the 19 March 2015 meeting, that such report never existed). However, the Board was concerned about the continuity challenges this would occasion, especially given the fragility of the company at the time. The members agreed that there was a trust deficit between the Board and the Executive Committee members involved in the matters forming the focus of the inquiry and that it would therefore be in the best interest of the inquiry if they were asked to step aside for the period of the inquiry in order for it to be concluded within the proposed 3 month period.
35. The Board members expressed the view that they would prefer to do a fact-finding exercise before asking the relevant executives to step aside. There was concern that acting with haste may result in Eskom finding itself in a position where it has to fight cases in the Labour Court. Mr Tsotsi explained that this would slow down the inquiry and that a lot of work had already been undertaken and that he could provide the Board with a report as per the work that had been done previously.
36. Based on that, Mr Tsotsi then advised that the Group Executive: Commercial & Technology, Group Executive: Group Capital, Financial Director & Group Chief Executive should be suspended. The reasons provided by Mr Tsotsi were, *inter alia*, that the



Financial Director had met with tenderers during a tender process, while in respect of the Group Executive: Commercial & Technology there was an allegation of misconduct which included another staff member. The minutes of the 11 March 2015 meeting are annexed hereto marked as "VK9".

37. Mr Tsotsi had recommended that Mr Malesela Sekhasumbi act as Group Executive Commercial & Technology. I found this recommendation to be concerning as Mr Sekhasumbi was on suspension and Mr Tsotsi did not share this with the Board when he made his recommendation. Later, this was one of the items that the Board charged Mr Tsotsi with prior to his removal from the Board. A letter from the attorney representing Eskom to Mr Tsotsi's attorneys regarding this issue is annexed hereto and marked as "VK10".
38. The Board, at the 11 March 2015 meeting, resolved as follows regarding the inquiry and suspensions:
- a. An inquiry shall be instituted into the affairs of Eskom and that the duration of the inquiry shall be three months. The Board envisaged that, upon completion, this inquiry would provide it with an independent view of reasons for the following:
    - i. The poor performance of Eskom's generation plant;
    - ii. Delays in bringing the new generation plant on-stream;
    - iii. High costs of primary energy;
    - iv. Eskom's financial challenges;
    - v. Integrity of the procurement processes and compliance with legislation as well as Eskom's procurement policies;



- vi. Contract management, in particular cost escalations, frequent modifications, penalty costs and Eskom's capacity to manage contracts in general; and
  - vii. Security failures and accountability at Eskom as a Key National Point.
- b. The ARC shall take custodianship of the inquiry and that the P&G Committee and other committees assist where necessary and report to the Board. The ARC is mandated to draft the Terms of Reference ("ToR"). The P&G Committee was mandated to provide support; and
  - c. The key executives be put on suspension for the duration of the inquiry.
39. A meeting of the P&G Committee was convened immediately after the Board meeting to deal with the decision to suspend the executives whose areas of responsibility would be investigated for the duration of the inquiry.
40. The P&G Committee accepted the identified four executives to be suspended as:
- a. Tshediso Matona, Chief Executive Officer;
  - b. Tsholofelo Modise, Financial Director;
  - c. Dan Morokane, Group Executive: Group Capital; and
  - d. Matshela Koko, Group Executive: Technology and Commercial.
41. While on the topic of the mooted suspensions, I interpose to note the potential roles of Ms Suzanne Daniels and Mr Salim Essa in the suspensions. Ms Daniels, in her testimony before the Parliamentary Inquiry noted that she met Mr Essa on 09 March 2015 when attending a meeting with Mr Koko. Ms Daniels testified that, at this meeting, Mr Essa questioned what it would take to have employees suspended. Ms Daniels claims to have advised Mr Essa that she was a contract expert and not an employment expert.
42. At this point in time, and in line with her testimony, Ms Daniels was a senior manager, not the head of legal and the company secretary. She was only appointed as Group

Company Secretary on 01 October 2015, well after the suspensions had taken place. Yet the metadata of the pre-suspension letters for the four Executives, illustrates that Ms Daniels authored the letters and that they were last modified by Mr Essa on 10 March 2015, who she allegedly had her first encounter with the day prior. I discovered this when considering the letters for purposes of preparing this statement. The pre-suspension letters and printouts of the corresponding metadata of each letter are annexed hereto marked "VK11", "VK12", "VK13", and "VK14".

43. This is of particular concern to me as Ms Daniels, by her own admission, was at a relatively low level and should not have been drafting suspension letters. In my view this should have been done by Neo Tsholanku, the Head of Legal at the time. Of even greater concern, and frankly horrifying, is the fact that the letters were provided to and modified by Mr Essa the very day after he had enquired from Ms Daniels what it would take to have employees suspended. Mr Essa had no legitimate reason to be involved in Eskom internal processes let alone the drafting of suspension letters in respect of senior executives.
44. Returning to the process of the suspensions, the relevant executives were called into the P&G meeting (which was convened immediately after the 11 March 2015 Board meeting), chaired by Zola Tsotsi, individually and were informed of the Board's decision to launch an inquiry. They were further advised of the Board's view that their presence could hamper the said inquiry.
45. The P&G Committee, under the chairmanship of Mr Tsotsi, then gave each executive an opportunity to give the meeting any reasons as to why their presence would not hamper the inquiry. After this process was followed, the said executive were each asked to recuse him/herself in order to allow the P&G Committee to deliberate on the information and reasons provided by said executive and then make a final decision on his/her possible suspension.
46. In the cases of all four executives, the P&G Committee found that the reasons presented were not strong enough and proceeded with the suspensions. The suspensions were




deemed necessary in order to give effect to the Board's decision to proceed with the inquiry in an unfettered manner and to ensure same was concluded within the agreed three-month timeframe.

47. To my understanding, none of the suspended executives were given reasons for their suspensions. Instead, they were simply told that they were required to step aside in order for the inquiry to be speedily concluded and that they were not being formally charged.
48. It is worth remembering that none of the suspended executives were ever charged with specific wrongdoing – the reason for their suspension was purely as guided by Mr Tsotsi, namely that they might have interfered with the inquiry.
49. Besides Mr Matona and Mr Koko, I was advised that the remaining executives (namely, Mr Morokane and Ms Molefe) approached Eskom with the intention of settling, in terms of which they would resign from their respective positions and accept an exit package.
50. The Board considered these settlement requests and delegated the Acting Chairman, Dr Ngubane, myself and Mr Kumalo to enter into negotiations with the four suspended executives around their exit from Eskom and in relation to their respective exit packages.
51. The authorization provided for:
  - a. The Acting Chairman, Dr Ngubane, myself and Mr Kumalo to enter into exit negotiations with each of Mr Matona, Ms Molefe, Mr Koko and Mr Morokane;
  - b. That any settlement should be within the following parameters:
    - i. The financial package to be negotiated shall not exceed a maximum amount of up to 12 months' total package;
    - ii. Any benefits due to the affected executives as per the standard conditions of employment shall be implemented according to the relevant Eskom policies and procedures; and





- iii. Settlement agreements shall set out the terms and conditions of the exit and include the relevant provisions relating to confidentiality.
- c. That the Chairperson of the P&G Committee be authorised, with the power to delegate further, to take all the necessary and all immediate steps to give effect to the above including the signing of any agreements or other documentation necessary or related thereto.
52. To the best of my recollection, I recall that all settlement figures were provided for by Anton Minnaar, the Executive Support Manager at the time.
53. Mr Morakane requested an exit discussion, which was handled by Messrs Khumalo and Khoza.
54. Various meetings were held with Ms Molefe, some of which I was a part of, however her final exit agreement was handled by Mr Khoza.
55. Mr Matona referred his matter to the Labour Court, Johannesburg for an order to set aside his suspension and allow him to return to work. This application was brought on an urgent basis and was opposed by Eskom. At the same time, Mr Matona had lodged an unfair labour practice dispute with the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The Labour Court found that there was no basis for urgency and dismissed the application in this regard. It nonetheless found in favour of Mr Matona in respect of procedural fairness of the suspension and referred the matter to the CCMA for proper handling of the issues prior to it being heard at the Labour Court.
56. My reason for supporting Mr Matona's departure was that he did not appear to have a handle on the turnaround of the organisation, which was particularly critical at that point in time. Dr Ngubane met with him and discussed his possible departure from Eskom. An agreement was subsequently reached with Mr Matona and he exited the services of Eskom.
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57. With regards to Mr Koko, I was present at a meeting with him. He was the one executive who was not interested in leaving the employ of Eskom. He indicated that he wanted his job back. Upon objecting to this, I was mandated by the Board to engage with a senior partner of Dentons in order to establish whether or not Mr Koko had been, by way of the inquiry, found guilty of any wrongdoing.
58. In this regard, I contacted Mr Noor Kapdi of Dentons, who indicated that they had not found any evidence of wrongdoing by any of the suspended executives. In order to address my discomfort, I decided to engage with Mr Jerry Kaapu of Bowman Gilfillan, who advised that Eskom could not keep someone on suspension if the inquiry did not find any evidence of wrongdoing. Dentons also provided a letter confirming the above.
59. As far as I am aware, Mr Koko was reinstated in early July 2015. I refer to the 1 July 2015 meeting and minutes thereof where it is written that the fourth executive (Mr Koko) should be reinstated. This meeting was chaired by Ms Mabude. The minutes of this meeting are annexed hereto marked "VK15".
60. During this time, one of the Board members acted as Interim Chief Executive with effect from 12 March 2015 and Mr Brian Molefe was subsequently seconded to Eskom from Transnet as Acting Chief Executive. As per the Secondment Agreement between Transnet and Eskom, the duration of secondment was three months, until July 2015.
61. Acting arrangements were approved by the P&G Committee and the following executives were appointed:
- a. Edwin Mabelane (Acting Group Executive: Technology and Commercial);
  - b. Nonkululeko Veleli (Acting Finance Director);
  - c. Abram Masango (Acting Group Executive: Group Capital); and
  - d. Zethembe Khoza (Interim Chief Executive).



62. The said executives were called in by the Board during a P&G Committee meeting on 12 March 2015 (chaired by Mr Khoza) and were informed of their acting positions.
63. The next relevant meeting was the Board in-committee meeting of 19 March 2015, which Mr Nick Linnell attended, as the independent consultant. I now note that the Board was introduced to Mr Linnell at the 11 March 2015 meeting (and not this meeting of 19 March 2015, which was previously my recollection). Mr Tsotsi, the Chairman, informed the Board that the consultant he had appointed (Mr Linnell) had been referred to him from higher up, in the Presidency. It was of concern to the Board that no proper process was followed to engage Mr Linnell's services. The Board accordingly expressed discomfort with the engagement of Mr Linnell. Moreover, the Board felt that the Mr Tsotsi's actions had compromised the Board as well as the integrity of the inquiry. The minutes of the 19 March 2015 meeting are annexed hereto marked "VK16".
64. Further, during this meeting, Mr Tsotsi admitted that the report he had referred to earlier (at the 11 March 2015 meeting) in support of the inquiry did not exist.
65. With regards to issues relating to the media statement that he had released earlier in March 2015, Mr Tsotsi explained that during the preparation of the media statement, he intended for it to be distributed for input by the Board and the DPE. Thereafter, it would be issued. However, and according to Mr Tsotsi, the draft media statement had unfortunately leaked to two media houses and was distributed in the public domain without receiving approval from the Board. Further, the contents of the ToR which had been prepared by the Chairman of ARC were contradicted by the contents of the media statement in that the Board had never resolved to appoint Mr Linnell or a retired judge to oversee the inquiry. The draft Terms of Reference and the media statement are annexed hereto marked "VK17" and "VK18", respectively.
66. The original ToR were sent to the Board by the Company Secretary and were then further unpacked by the ARC.



67. The Board unanimously agreed at the Board in-committee meeting on 19 March 2015 that it had lost confidence in the chairman (i.e. Mr Tsotsi) and would recommend his removal as a director due to:
- a. His failure to seek or obtain Board approval for the appointment of a consultant (i.e. Mr Linnell);
  - b. His actions in terms of the suspensions; and
  - c. Preparing and distributing a media release without Board approval.
68. This information was shared with Mr Tsotsi on his return to the meeting of 19 March 2015. Furthermore, the Board had resolved to inform the Minister regarding this breakdown between the Board and the Chairman.
69. At the meeting of 19 March 2015, the Board elected Dr Baldwin Ngubane, who at a later stage became the Chairman of the Board, to act as chairperson until we had communicated our resolution with the Minister.
70. The Board communicated its resolution to the Minister at a meeting on 20 March 2015. It was also indicated that the Board had requested the meeting in order to consult with the Minister regarding removal of a director in terms of the MOI.
71. The Board indicated that the Chairman of the Board had performed certain actions which rendered his continued directorship untenable. In the main, the actions were the following:
- a. Engagement of an external consultant (Mr Linnell, who appears from the metadata thereof, to have been responsible for drafting the resolutions that were sent to the Board for consideration on 08 March 2015) to provide services to Eskom without following Eskom's procurement processes or informing the Board of his actions;



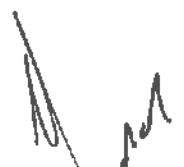


- b. Misrepresenting to the Board that there was a Report which had been prepared by the consultant and which contains findings about misconduct by certain executives;
- c. Preparing a media statement to be issued in the name of the Board, which contained inaccurate information as well as information which named third parties and had the potential to prejudice Eskom's interests; and
- d. The additional charge of Mr Tsotsi misleading the board when he tried to bring Mr Sekhasumbi back from suspension to take up an executive role.

72. It was clarified at the 19 March 2015 meeting that the Board was required to act in accordance with its fiduciary duties and that if the statement had mentioned that the Board had presided over an organization fraught with corruption, fraud and other maladies, it would bring Eskom into disrepute. The Board confirmed that it was unanimous in its view regarding the steps which were to be taken against the Chairman, and the consultation with the Minister.
73. The Board felt that the suspension was further necessitated by its discomfort of where Mr Tsotsi's instructions were coming from; there were underlying tones of influence on the Board from the Presidency and the 'war-room' as described above.
74. The Minister supported the views of the Board in accordance with the MOI. The Board elected to proceed with the suspension, in accordance with the MOI, and after its consultation with the Minister.
75. The Minister was kept apprised of the developments in removing Mr Tsotsi as Chairman, at a meeting held with Eskom Board Members and the Minister on 01 April 2015, at which I was present. The minutes of the 01 April 2015 meeting are annexed hereto marked "VK19". We informed the Minister that the following steps were taken in this regard:



- a. A Notice of Meeting was sent to Mr Tsotsi on 22 March 2015, calling him to a meeting with the Board on Wednesday, 25 March 2015. The Notice outlined that the Board had lost confidence in him and that he was required to present representations to persuade the Board to reconsider its position.
- b. The meeting commenced at 18:00 on 25 March 2015 and was attended by the full Board. Mr Tsotsi was also present and was represented by Ngcebetsha Madlanga Inc Attorneys, who had briefed Mr Nazeer Cassim SC as counsel in the matter. Through his counsel, Mr Tsotsi requested a postponement of the meeting on the grounds that the notice given to him was short. They stated that, in effect, they had been given one day's notice which, for a matter as serious as that under consideration, was not fair.
- c. The Board acceded to their request and it was agreed that the meeting would reconvene on Monday, 30 March 2015 at 20:00.
- d. On 30 March 2015 at 17:00 the Board was advised through Eskom's attorneys that Mr Tsotsi had once again not had adequate time to prepare as he had spent the weekend of 27-29 March 2015 in Cape Town on Eskom business. Consequently, Mr Tsotsi's attorneys requested another postponement.
- e. The Board took the position to proceed with the meeting in Mr Tsotsi's absence as it was of the view that he was delaying the process. This was communicated to his counsel.
- f. At 20:00 the meeting commenced, and Mr Tsotsi was in attendance with his legal team. Together with his counsel, Mr Tsotsi presented his version in response to the allegations which had been made against him.
- g. After conclusion of the presentation, Mr Tsotsi asked the Board to consider the impact his removal from the Board would have on his life and on his family, as well as on his ability to earn a living. He was then asked to recuse himself so that the Board could consider everything that had been presented.



- h. After significant deliberation – after which it became clear that the Board was still of the same view of no longer having confidence in Mr Tsotsi – the Board decided that it would engage Mr Tsotsi directly in terms of how it ought to disengage, being cognisant of his request to consider his interests.
- i. Two Board members were nominated to have an offline discussion with Mr Tsotsi – expressing the Board’s view and encouraging him to disengage/resign rather than put this matter to a vote. After a lengthy dialogue, Mr Tsotsi addressed the full Board together with his legal representatives and advised the Board that:
  - i. He had decided to resign with immediate effect as both Chairman of the Board and as a non-executive director;
  - ii. He wished to be afforded a few days to empty out his office of personal belongings;
  - iii. He wished to be supported with payment for his legal representatives – which was standard practice at Eskom at the time; and
  - iv. He wished to be paid an amount equivalent to 3 months’ board fees, taking into account that his tenure would have ended at the AGM.
- j. The Board accepted points i – iii but pointed out that point iv would require consultation with the Minister and her approval. I note that the Minister later declined to pay the amount Mr Tsotsi requested.

#### THE DENTONS INQUIRY

76. As I alluded to earlier, the process of appointing Dentons and finalising the ToR was handled under the custodianship of the ARC, which was chaired by Ms Mabude. I only became a member of ARC on or about June 2015.

77. The original Draft ToR was sent to the Board by the Company secretary, Mr Phukubje on 14 March 2015, which I also received. I was comfortable that the original intent was covered and therefore did not add anything.
78. The 14 April 2015 meeting of the ARC articulated the process followed in appointing Dentons. As my first ARC meeting was only in June 2015, my only exposure to this meeting was in terms of the minute, a copy of which is annexed hereto marked "VK20".
80. Dentons gave a presentation of its report to the Board on 25 June 2015, wherein issues related to timing, costs and extending the inquiry beyond three months were discussed.
81. Dentons made numerous recommendations in their report relating to various aspects of Eskom, including commercial, generation, group capital, finance, and group security. The Dentons recommendations as well as the ARC table tracking Eskom's progress in addressing each of the recommendations is annexed hereto marked "VK21".
82. To make the process more manageable and to keep an accurate record of events, the recommendations were broken down into their respective group divisions. The Board was then provided with feedback through every ARC meeting.
83. The Board eventually declined to extend the Dentons investigation due to the agreed timeframe of three months expiring. This is consistent with the original decision as distributed on 08 March 2015. Further, the budgetary constraints played a big role in the allotted time being strictly adhered to.
84. I am aware that three reports were issued by Dentons:
- a. The first report was that presented at the June 2015 meeting, and was collected and shredded. This report included allegations against individuals and companies that had not yet been investigated. Eskom was uncomfortable





releasing the names of those individuals and companies mentioned in the report that had *not* been investigated by Dentons;

- b. The second report was that of 02 July 2016, that had the names of the above individuals and companies removed. This was a version of the report that the Board felt comfortable releasing to the public; and
- c. The third version of the report was the 02 July 2016 report which was redacted heavily by Suzanne Daniels. At this point in time (early 2017), there was a lot of pressure to release the report. A meeting was therefore held with Ms Daniels to discuss the most effective way to release the approved 02 July 2016 version of the report. This was an informal meeting; hence I do not have any minutes for it, and I recall certain (but not all) Board members attending it. Those I can recall in attendance were Dr Ngubane, Mr Singh, Dr Naidoo, Mr Khoza and myself. It was agreed that the 02 July 2016 version of the report (not the redacted version prepared by Ms Daniels) would be released at a media briefing the day after this meeting. At the end of the meeting Ms Daniels asked to consult with counsel to get an opinion on releasing this version of the report. I did not hear back from Ms Daniels regarding the advice she received from counsel. The next morning at the media briefing, Ms Daniels proceeded to explain to the media that she could only release the redacted version of the report (i.e. the version prepared by her) as per the advice she had received from counsel. This was the first time that I or the other Board members present had become aware that Ms Daniels was releasing her redacted version of the report rather than the 02 July 2016 version of the report. This came as a shock to me and the other Board members.

#### MATTERS RELATING TO BRIAN MOLEFE

85. Brian Molefe and Anoj Singh were seconded to Eskom by Minister Brown. I welcomed the secondments. I have noted, in great detail, the appointment of Mr Molefe, his resignation, and his pension pay-out in my affidavit to the Hawks. The affidavit I submitted to the Hawks covering these subjects is, annexed hereto marked as "VK22".





VENETE JARLENE KLEIN

DEPONENT

I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and deposed before me at PRETORIA on this the 2 day of MARCH 2020 and that the provisions of the regulations contained in the Government Notice R1258 of the 21<sup>st</sup> of July 1972, as amended, and Government Gazette Notice R1648 of the 19<sup>th</sup> of August 1977, as amended, have been complied with.



ADV. Daniel Gouws Marais  
COMMISSIONER OF OATHS EX OFFICIO  
AURECON SOUTH AFRICA (PTY) LTD  
AURECON CENTRE  
LYNNWOOD BRIDGE OFFICE PARK  
4 DAVENTRY STREET, LYNNWOOD MANOR 0081  
ADVOCATE, SOUTH AFRICA



"VK22"

1

## AFFIDAVIT

I, the undersigned

VENETE JARLENE KLEIN

state that,

1.

I am an adult female with identity number 580914 0109 082, residing at 11 Numeral Street, Mooikloof, Pretoria. I am self-employed as the Chief Executive Officer of Klein Inc. Management Consultants and my offices are situated at 517 Mendelssohn Street, Constantia Park, Garsfontein, Pretoria. My telephone number is (012) 993 5856 and cell phone number is 082 412 5759.

2.

On 11 December 2014, I was appointed by the erstwhile Minister of Public Enterprises, Lynne Brown ("the Minister") to serve as a non-executive member on the Eskom Board of directors ("the Board").

3.

In early 2015, I was appointed as Chairperson of the Social Ethics and Sustainability Committee, at which time I also served as a member of the Investment and Finance Committee and the People and Governance ("P&G") Committee. I later became the Chairperson of the P&G Committee and a member of the Audit and Risk Committee. I am not

certain of the exact date of my appointment as Chairperson of the P&G Committee, as during the first few months of the tenure of the new board there were a number of rotations of the Board members within the Board sub-committees.

4.

In or about June 2015, I was replaced as Chairperson of the P&G Committee by Ms Mabude, only to later be reinstated as Chairperson in or about August 2015.

5.

My duties in this position were, broadly speaking, to assist the Board in dealing with the nomination and remuneration of directors and senior executives, human resources strategies and policies and to support the Board in its role as custodian of corporate governance. A more detailed summary of the responsibilities of the members of the P&G Committee is detailed in the terms of reference of the committee dated May 2015, a copy of which is attached hereto as annexure "VK1".

6.

#### THE APPOINTMENT OF MR MOLEFE AS GROUP CHIEF EXECUTIVE OFFICER

- 6.1 Following Mr Matona's departure, Mr Brian Molefe was seconded to Eskom as Acting Chief Executive Officer on 17 April 2015, for a period of 3 months. Mr Molefe had, prior to this position, been employed as Group Chief Executive Officer at Transnet.



6.2 At the time of Mr Molefe's secondment, Eskom was understandably in an extremely unstable position. In addition to the crisis at executive and Board level, Eskom remained with going concern problems and stage 3 load shedding. During his tenure Mr Molefe successfully addressed the various key challenges faced by the Board viz:

6.2.1 Re-organised the Eskom team in order to address load shedding, which had already reached stage 3;

6.2.2 Addressed the financial challenges facing Eskom, which had been faced with going concern problems;

6.2.3 Dealt with the integrity of data, as most data produced by executives before then had been questionable;

6.2.4 Reduced the time spent and role played by the "war room" in "solutioning" Eskom's problems.

6.3 Bearing in mind that 4 senior executives had been suspended in March 2015, I was particularly relieved and pleased with the manner in which Mr Molefe had brought immediate stability to the organisation and taken control of the business with all the correct results.

6.4 Prior to Mr Molefe's secondment from Transnet, the Board had basically become operational and spent many late nights trying to stabilise the business. As mentioned above, there was a trust deficit between the Board and the executive team, which was largely due to the inability of the executives to get a handle on the issues which plagued

Eskom at the time as well as various allegations of impropriety in conducting their duties. The Board viewed the situation as an exceptional circumstance which necessitated its "hands on" approach to the day to day running of the organisation. Mr Molefe's appointment to the position of acting Group Chief Executive Officer allowed the Board an opportunity to step back into its rightful role of fiduciary oversight.

6.5 Needless to say, the entire Board, including me, was in awe of what Mr Molefe had been able to deliver, especially as he had done so with substantially the same executive team who had previously not known how to turn the load shedding situation around.

6.6 Bearing in mind that the Board had been under severe public and media scrutiny and attack since its appointment in December 2014, the turnaround experienced under Mr Molefe's tenure had been particularly pleasing. In fact, such was his performance that Mr Molefe was nominated for the award of South African of the Year in 2015.

6.7 In his tenure as Acting Group Chief Executive, Mr Molefe assisted the Board with the turnaround of Eskom. Along with the rest of the Board, I was impressed by Mr Molefe's performance and the immediate and significant strides that Eskom made under his leadership. Mr Molefe demonstrated the expertise, urgent resolve and certainty of direction required to set Eskom on the right course.

6.8 On 19 June 2015, Ms Suzanne Daniels sent a letter, a copy of which is attached hereto as annexure "VK2", to the Minister on behalf of Dr Ngubane, in his capacity as then interim Chairperson of the Board, in which he motivated for the appointment of Mr



Molefe as Chief Executive Officer of Eskom. It appears however from correspondence between Dr Ngubane and Ms Daniels, during this time, that Dr Ngubane advised Ms Daniels that the motivation for the appointment of Mr Molefe was premature as he had not yet served 6 months as Acting Chief Executive Officer. He further advised that the correct approach would be to motivate for an extension of Mr Molefe's secondment to Eskom. A copy of the email from Dr Ngubane to Ms Daniels is annexed hereto as annexure "VK3".

6.9 On 23 June 2015, Dr Ngubane, wrote to the Minister and requested her support and endorsement for the extension of the secondment of Mr Molefe as Chief Executive Officer of Eskom for a further period of 3 months, to be negotiated between Eskom and Transnet. A copy of the letter is annexed hereto as annexure "VK4". In his letter, Dr Ngubane also advised the Minister that the P&G Committee had resolved to seek the appointment of Mr Molefe to the position of Group Chief Executive Officer, as soon as possible. He mentioned further that I was tasked with obtaining a legal opinion on the most optimal route to be followed to give effect to the appointment of Mr Molefe.

6.10 This opinion was obtained, from Bowman Gilfillan Attorneys, on 18 June 2015 and accordingly informed the contents of Dr Ngubane's aforementioned letter.

6.11 The P&G Committee decided to obtain this legal opinion as it was cognisant of the fact that its intention to recommend (to the Board, and ultimately, the Minister) the appointment of Mr Molefe without following the ordinary external search process may amount to a deviation from the terms of the MOI. It was therefore agreed that the prudent approach would be to obtain a legal opinion regarding the permissibility of



appointing a Chief Executive Officer without following the usual process of the Board providing the Minister with a shortlist of candidates from which the Minister would appoint the Chief Executive Officer.

6.12 As the Board, we strongly believed that Mr Molefe had done an outstanding job in turning Eskom around and was the ideal candidate to remain at the helm. It made no sense to risk destabilising the business by bringing in a different Chief Executive Officer, especially in circumstances where we had only just begun to stabilise the business. In fact, we considered Mr Molefe's retention as crucial to maintaining Eskom's new formed stability. The legal opinion concluded that Eskom could appoint a Chief Executive Officer without conducting an external search process and that the Board could provide the Minister with a shortlist of one candidate only, who the Minister could then decide to appoint or not.

6.13 In a letter dated 27 June 2015, a copy of which is annexed hereto as annexure "VK5", the Minister responded to Dr Ngubane's letter. In her letter, the Minister agreed, in essence, with the request to extend the period of Mr Molefe's secondment. The Minister also requested that the Board deal expeditiously with the process of appointing a new Chief Executive Officer, in accordance with the MOI, the Labour Relations Act and Eskom's employment policies and procedures. The Minister ended her letter by requesting sight of the full legal opinion and recommendation on the optimal route to follow in the appointment of the Chief Executive Officer.

6.14 The legal opinion was sent by Ms Daniels to Ms Orcillia Ruthnam, the Chief Director: Governance of the Legal and Governance Department at DPE on 13 September 2015





(annexure "VK6"). Ms Ruthnam responded to Ms Daniels on 14 September 2015 (annexure "VK7") and requested clarification regarding whether Eskom's attorneys had considered the "*Guidelines for the appointment of a Chief Executive for a State Owned Enterprise*" ("*Guidelines*") which Guidelines were also attached to the email from Ms Ruthnam. We then forwarded the Guidelines to Eskom's attorneys for a supplementary opinion on whether the proposed process for appointing Mr Molefe as Chief Executive Officer remains competent in view of the guidelines.

6.15 The supplementary opinion was received on 15 September 2015 and forwarded to Ms Ruthnam at DPE on 16 September 2015. A copy of the email to Ms Ruthnam is annexed hereto as annexure "VK8". In brief, the supplementary opinion acknowledged that the Board is actually required to make recommendations to the Minister on the top 3 candidates in order of priority, and that any proposed deviation from that requirement required the Board to notify the Minister in writing and to provide reasons for the deviation.

6.16 In accordance with the legal advice received, I subsequently submitted a notification of Eskom's departure from the application of the Guidelines in the appointment of its Chief Executive Officer, by way of a letter to the Minister, which I understand was sent to her office by Ms Daniels on 16 September 2015 (the signed version following on 23 September 2015). A copy of the email is annexed hereto as annexure "VK9". The Minister did not object to the aforementioned departure.

6.17 On 9 September 2015, the P&G Committee met to discuss the issue of vacancies in the executive team. The meeting resolved that it was important to first address the



vacancies in the office of the Chief Executive Officer and Chief Financial Officer and that approval in this regard must be sought from the Board. A copy of the P&G Committee resolution dated 9 September 2015 is annexed hereto as "VK10".

6.18 On 10 September 2015, the Board resolved that the P&G committee should submit a recommendation to the Minister around the appointment of a Group Chief Executive Officer. A copy of the Board resolution dated 10 September 2015 is annexed hereto as annexure "VK11".

6.19 Pursuant to the aforementioned Board resolution, on 11 September 2015 Dr Ngubane, addressed a letter to the Minister in which he advised the Minister of the Board's resolution to propose permanently appointing Mr Molefe as Group Chief Executive Officer. Attached to the letter was a draft employment contract, for the Minister's consideration and approval. A copy of the letter is annexed hereto as annexure "VK12".

6.20 We were confident that Mr Molefe was the right man to drive Eskom towards a successful future, given the turnaround already experience in a short space of time. Permanently appointing Mr Molefe was also identified as offering Eskom the leadership stability that had been so sorely lacking before then (it should be remembered that Eskom had appointed 7 different Group Chief Executive Officers in the prior 6 year period).

6.21 On 2 October 2015, the Minister approved the appointment of Mr Molefe as Group Chief Executive Officer. In this regard the Minister addressed a letter to Dr Ngubane, on which I was copied, enclosing copies of the letters she had addressed to Mr Molefe and Mr Singh. A copy of these letters is attached hereto as annexure "VK13". These letters

confirmed Mr Molefe's and Mr Singh's appointments as Group Chief Executive Officer and Chief Financial Officer, respectively. Furthermore, the letters indicated that their appointments would be effective as at 1 October 2015. No indication of the terms of the respective appointments was made in the letters.

6.22 On 9 October 2015, I received an email from Ms Daniels drawing my attention to email correspondence between herself and Ms Ruthnam (annexure "VK14"), in which:

6.22.1 Ms Ruthnam suggested that the Minister had approved a 5 year contract for Mr Molefe;

6.22.2 Ms Daniels had asked Ms Ruthnam to check this since the Minister's letter approving Mr Molefe's appointment had not specified a 5 year contract and all of Eskom's previous Eskom's previous Group Chief Executive Officers were permanent appointments;

6.22.3 Ms Ruthnam advised that the 5 year term was a cabinet requirement but that she would revert as to whether the Minister must write back to the Board on the matter.

6.22.4 I received no further correspondence in this regard and believed the issue had been resolved.

6.23 On 16 October 2015, Dr Ngubane addressed a letter to the Minister regarding the proposed terms of Mr Molefe's appointment and remuneration. A copy of the letter is annexed hereto as annexure "VK15". The contents of this letter were informed by

various inputs received by the P&G Committee from Mercer, PE Corporate & Deloitte on chief executive remuneration packages.

6.24 The Board was officially advised in November 2015 that Cabinet had approved the terms of Mr Molefe's appointment for a period of 5 years, but by that time Mr Molefe had already signed a contract permanently appointing him to the position of Group Chief Executive Officer. I understand that Dr Ngubane had presented a permanent contract of employment (and not one for a 5 year term) to Mr Molefe on 9 November 2015, and that Mr Molefe had signed it on 11 November 2015. A copy of the contract signed by Mr Molefe is annexed hereto as annexure "VK16".

6.25 On 9 November 2015 (after Mr Molefe had signed his permanent contract of employment), I received an email from Ms Daniels enclosing a draft offer of employment letter, dated 13 October 2015. The letter specified that Mr Molefe would enter into a fixed term employment contract with Eskom, however, the term of the contract was not specified. A copy of the email and draft contract is annexed hereto as annexure "VK17".

6.26 I now understand that the Minister addressed a response to Dr Ngubane's letter dated 1 November 2015 (I am not sure on what date the letter was received by Dr Ngubane), in which she approved the proposed remuneration but confirmed that she required the term of employment to be specified as 5 years. I did not have sight of the Minister's response at the time that it was received and was only informed after Mr Molefe had already signed the permanent contract that the Minister still insisted on a 5 year contract.





6.27 The Board was faced with the challenge of having to change the signed permanent contract to a 5 year fixed term contract in accordance with the Minister's instruction.

6.28 Until that point (i.e. of learning that the Minister and Cabinet remained insistent that Mr Molefe be appointed for a fixed term of 5 years) my understanding was that the contract had been approved as permanent, as per the Board's request and as informed by all previous Chief Executive Officer appointments. As a Board we relied heavily on guidance received from Mr Anton Minnaar, the Executive Remuneration Officer, regarding the standard terms of employment of Eskom Group Chief Executive Officers (Mr Minnaar had presented to the Board prior to Mr Molefe's permanent appointment the explanation that all previous Group Chief Executive Officers had permanent contracts of employment). We placed confidence in Mr Minnaar's guidance as he had been involved in the appointment of 7 previous Chief Executive Officer's in the preceding 6 year period.

6.29 Mr Molefe was thereafter advised of the Minister's direction. I understand that Dr Ngubane had engaged with Mr Molefe in this regard, and that Mr Molefe had been quite concerned at the change that was required to be made to the terms of his appointment. The Board was advised by Dr Ngubane that Mr Molefe was willing to accept a 5 year contract, however, he had some concerns regarding the perceived pension benefit which he had understood would emanate from his permanent employment at Eskom.

6.30 Dr Ngubane and I, having considered the impact of losing Mr Molefe, if a resolution on the terms of his appointment could not be reached, engaged Mr Minnaar for advice as to how the contracts of previous Chief Executive Officers were dealt with in the past and what benefits would Mr Molefe be losing in the case of a 5 year contract, as opposed to permanent contracts of employment. Mr Minnaar explained that all previous Chief Executive Officers at Eskom had been on a permanent contract and that Mr Molefe would not be able to accumulate an equivalent pension benefit during his service at Eskom. In light of this, we agreed that an arrangement could be put in place to ensure that he is not adversely affected in respect of his pension benefits.

6.31 Mr Minnaar assisted the Chairman in drafting and dispatching a letter to the Minister on 25 November 2015 to recommend that a retirement arrangement be reached with Mr Molefe in order to allay his concerns regarding his pension and to lock him in for the benefit of Eskom. The arrangement proposed by Dr Ngubane in this regard was as follows:

- 6.31.1 Regardless of Mr Molefe's age after the 5 year termination date, he would be allowed to retire from Eskom's service on the basis that he is aged 63.
- 6.31.2 The penalties prescribed by the Eskom Pension and Provident Fund ("EPPF") for retirement prior to age 63 will be waived (i.e. not paid by Mr Molefe).
- 6.31.3 That Eskom carries the cost of such penalties (to be paid over to the EPPF).

6.31.4 In the event that Mr Molefe's contract is not extended beyond the 5 year termination date, he will not be allowed to subscribe to any other State Owned Companies or government pension fund.

6.31.5 Should the contract be extended, however, it is important to note that the cost of any subsequent penalties (actuarial value) will decrease proportionately.

A copy of the aforementioned letter is annexed hereto as annexure "VK18".

6.32 The effect of the retirement arrangement would be to place Mr Molefe in the same position that he would have been in had he retired from Eskom at the age of 63. The Board supported the arrangement as it was critical to securing Mr Molefe's long-term retention at Eskom. It was, at all times my understanding and what I understood as the intention of the Board, that Mr Molefe would only qualify for this benefit after serving an initial 5 year period.

6.33 The terms of the arrangement were communicated to the Minister for her noting in a letter from Dr Ngubane on 25 November, in accordance with advice received from both Legal and Executive support. I was not aware, at the time, that the Board's proposal to the Minister, with regard to Mr Molefe's retirement arrangement had not received feedback from the Minister. I accepted that the P&G Committee had the right to recommend the resolution to the Board.

6.34 The P & G Committee met on 9 February 2016 to deliberate on the conclusion of the contract with Mr Molefe, including the aforementioned issue relating to his pension

benefits. In order to better understand the distinction between appointing Mr Molefe on a fixed term versus permanent basis, and the options available to the Board for addressing Mr Molefe's concerns over the impact of a fixed term contract on his ability to grow an adequate pension benefit, the Board sought input and guidance from Mr Minnaar (in his capacity as Executive Remuneration Officer). Mr Minnaar explained to the P&G Committee at the meeting that as a result of Mr Molefe's short term contracts in the numerous public entities in which he had served at executive level, Mr Molefe had been deprived of the opportunity to grow a pension benefit in a single fund.

6.35 At the meeting of 9 February 2016, it was resolved that:

*"7.5.1 the current Eskom Pension and Provident Fund (EPPF) rule that Employees may proceed on retirement from age 50 with 10 years' service, remains applicable;*

*7.5.2 in cases where an Executive Director (appointed on a fixed term contract) decide to take early retirement and there is a shortfall regarding the EPPF 10 years' service rule, Eskom shall:*

- i. bridge the gap to make up for the 10 years;*
- ii. waive penalties applicable to early retirement; and*
- iii. refund EPPF actual cost for additional service added, plus penalties applicable to early retirement."*

*7.5.3 a proposal in respect of the Chief Financial Officer to be considered and submitted to the Committee in due course."*

*101*



A copy of the minutes of minutes of the P & G meeting held on 9 February 2016 are annexed hereto as annexure "VK19".

6.36 What the minute of the P&G Committee meeting of 9 February 2016 neglected to record, was the intention of the P&G Committee that the arrangement must be structured in such a way that the benefit would only accrue to Mr Molefe upon completion of his 5 year term, and that Mr Molefe would not be able to participate in any other government pension fund after qualifying as per the resolution. These intentions were clearly recorded in the letter to the Minister dated 25 November 2015 and are clear from the audio recording of the meeting.

6.37 The resolution of the P&G Committee meeting of 9 February 2016 was approved by the Board on 19 April 2016. A copy of the Board resolution is annexed hereto as annexure "VK20".

6.38 On 7 March 2016, Mr Molefe signed a second contract of employment for a fixed five year term, with effect from 1 October 2015 and terminating on 30 September 2020. A copy of the contract is annexed hereto as annexure "VK21".

7

#### MR MOLEFE'S EARLY RETIREMENT

7.1 Shortly after the release by the Public Protector of her report Mr Molefe enquired from me whether he qualified for the pension pay out benefit. I was not sure as I was




of the view that the resolution only kicked in after he had served a period of 5 years or beyond. I therefore asked Mr Minnaar, who confirmed that Mr Molefe did indeed qualify. I was surprised by this, as I was of the understanding that Mr Molefe needed to serve out at least the 5 year term of his initial appointment in order to qualify for this benefit. I accepted that this would be debated by the Board, which I believed would still have the final say on the matter

7.2 At a special board meeting on 7 November 2016, the Board asked Mr Molefe about the allegations in the State of Capture report. Minutes of the Board meeting are annexed hereto as annexure "VK22". Mr Molefe shared with the board his side of the story and the impact it had on his family. After that meeting, Mr Molefe mentioned to me that he would be sending his letter that night. That did not happen.

7.3 During a press conference on 11 November 2016, Mr Molefe indicated that he had decided to leave his employ at Eskom. Mr Molefe indicated, in a press statement, that his decision to step down was motivated by the reputational risk to Eskom as a result of the findings made by the Public Protector in her report of 2 November 2016. A copy of Mr Molefe's statement is annexed hereto as annexure "VK23".

7.4 On 11 November 2016, Mr Molefe submitted a letter seeking approval for early retirement in terms of the Eskom Pension Fund rules read in conjunction with the resolution of the P&G Committee, dated 9 February 2016. This letter was not presented to me as chairperson of the P&G Committee, and was apparently only sent to Dr Ngubane (as chairman of the Board) and the Minister. A copy of the letter is annexed hereto as annexure "VK24".



7.5 On 11 November 2016 Eskom issued its own press release in which it confirmed Mr Molefe's decision to step down. A copy of the Eskom press release is annexed hereto as annexure "VK25".

7.6 On 21 November 2016 the P&G Committee met to deliberate on various issues, including the State Capture Report and Mr Molefe's decision to step down. I made it clear at the commencement of the meeting that the meeting was not quorate and, therefore, that no decisions could be taken at the meeting. This is reflected in the recording minutes of the meeting. A copy of the minutes of the P & G meeting are annexed hereto as annexure "VK26".

7.7 This is when I first became aware of the contents of Mr Molefe's letter of 11 November 2016 (i.e. in terms of which he sought approval for early retirement). The Committee was advised by Mr Minnaar that Mr Molefe was entitled to receive his pension benefit pursuant to his early retirement. Mr Minnaar read to the meeting an extract from a letter he had prepared for Dr Ngubane to send to Mr Molefe, confirming the acceptance of his request for early retirement.

7.8 As the meeting was not quorate, the approval of Mr Molefe's pension benefit was only supported in principle by the P&G Committee. It was understood by me, and I believe the other members of the P&G Committee that were present, that:

7.8.1 the matter would be deliberated upon and a decision would be taken at a P&G Committee meeting with a quorum;



7.8.2 the decision would then be placed before the Board as a recommendation for approval. All decisions relating to the Group Chief Executive taken by the P&G Committee were subject to Board approval in terms of Eskom's Delegation of Authority;

7.8.3 the issue relating to the non-fulfilment of the 5 year tenure would also be deliberated upon and decided at the Board meeting;

7.8.4 only once approved by the Board would a letter be sent to Mr Molefe confirming the acceptance, or otherwise, of his request for early retirement.

7.9 Further to the above, I have now been advised that as the decision related to the removal of the Group Chief Executive Officer, the matter required the Minister's approval as per Eskom's Memorandum of Incorporation, adopted on 1 July 2016. A copy of the Memorandum of Incorporation is annexed hereto as annexure "VK27".

7.10 On 24 November 2016, and without having sought approval from either the P&G Committee, the Board or the Minister, Dr Ngubane addressed a letter to Mr Molefe communicating Eskom's acceptance of Mr Molefe's request for early retirement. A copy of the letter is annexed hereto as annexure "VK28". Upon being made aware of this letter, I asked the Company Secretary, Ms Daniels, who had approved the acceptance communicated by Dr Ngubane. In response she advised that the decision to accept Mr Molefe's early retirement did not require Board approval (and had ostensibly been approved by Dr Ngubane on his own). This is contrary to what we were



advised at the P&G committee meeting on 21 November 2016. Dr Ngubane claims to have been told by Mr Minnaar that the P&G Committee had approved the letter, which it clearly had not.

7.11 I understand that Mr Minnaar called for actuarial values of the amount to be paid out to Mr Molefe if he qualified for early retirement. I also recall Mr Minnaar mentioning the financial implications of Mr Molefe's early retirement to me at some point, however, this was done in passing and did not amount to a fully-fledged discussion with respect to the amounts involved nor was this communicated to me in formal correspondence.

7.12 My understanding is that Mr Molefe chose to receive 30% of the pension benefit as a lump sum payment and that the remainder is to be paid out to him as a monthly pension of R100 000 per month.

#### REINSTATEMENT OF MR MOLEFE

8.1 The following Wednesday, 19 April 2017, we were summoned to the Minister's office to discuss Mr Molefe's pension payout. At the meeting, the Minister enquired as to why Mr Molefe had qualified for the pension payout, considering that he was on a 5 year contract. In response to the Minister's query, we explained that this was the first time that any Eskom Group Chief Executive Officer was on a fixed term contract and that the Board was in quandary when advised (after signing the permanent contract on 11 November 2015) that there ought to have been a term attached to Mr Molefe's

contract. We further explained that Mr Molefe had some concerns regarding the perceived loss of the pension benefit which he understood would have emanated from his permanent employment at Eskom, which is what led to us recommending a solution to the Minister in Mr Ngubane's letter dated 25 November 2015. It was only at this point (at the meeting with the Minister on 19 April 2017) that I became aware that our recommendation was never accepted by the Minister. A copy of an unsigned and undated letter from Dr Ngubane to the Minister with the subject "*Rationale behind the retirement of Mr Brian Molefe*" is annexed hereto as annexure "VK29".

8.2 The Minister expressed her dissatisfaction with the early retirement arrangement reached with Mr Molefe and instructed the Board to engage with Mr Molefe with the view to renegotiate the terms of his early retirement. At that meeting the Minister advised that her team had given input in response to the Board's recommendation of 25 November 2015 and that the Director General had given the DPE's feedback to Eskom's Chief Financial Officer, Mr Singh. Whatever the discussions were, the outcome was never communicated back to the Board.

8.3 The Board had also been advised by Ms Daniels that we did not require the Minister's approval in respect of the acceptance of Mr Molefe's retirement.

8.4 Neither I nor the Board had received any feedback from Mr Singh as articulated by the Director General of the DPE to suggest that our recommendation was not supported.



8.5 At that meeting it became clear that there were quite a few issues where I had been led to be of one view – on account of feedback from either Mr Minnaar, Ms Daniels or the Chairman - and the DPE was of another, viz:

8.5.1 the Fixed term contract of the Chief Executive Officer versus the full-term contract, given that this was the first time that Eskom had adopted a fixed term contract in respect of the Chief Executive Officer.

8.5.2 the request of the change of Eskom policy in order to secure Mr Molefe's appointment on a 5 year contract and the DPE's handling of this matter.

8.5.3 the question of whether Mr Molefe qualified to be a member of the EPPF notwithstanding the fact that he was only on a 5 year fixed term contract (I believed that he did, whereas the DPE contends that he never).

8.6 I was surprised by the events of the day as my colleagues and I had been led to believe that we had acted within the rules of the EPPF and that the transaction had met all the governance protocols as confirmed by Ms Daniels, who was both the Company Secretary, and the Head of Legal at the time.

8.7 The main point of contention was that we were operating under the previous Memorandum of Incorporation ("MOI"), in terms of which the Minister was not required to sign off on the exit of the Chief Executive Officer. Also, according to Ms Daniels, the resolution of the P&G Committee adopted on 9 February 2016 stood. According to her, this had the effect that Dr Ngubane did not require approval from the Board to affect the signing of the application for early retirement by Mr Molefe.



This, coupled with the feedback from the EPPF to the effect that Mr Molefe qualified for early retirement in terms of the EPPF rules, gave me comfort that we had acted completely within the rules and the mandate of the Board. It therefore came as a surprise to me to learn that the pension arrangement didn't carry the Minister's blessing.

8.8 The Minister gave the Board 7 days to renegotiate with Mr Molefe, as she advised that she simply could not support a payout of R30 million. To my mind, the money had not yet been paid over, so looking for an alternative solution was workable.

8.9 As we were under pressure for time, Ms Daniels and I were mandated to go and meet with Mr Molefe to explain the Minister's position on the matter. At that meeting on the evening of 19 April 2017 we explored all the possible ways in order to resolve the impasse, and the following alternatives emerged:

8.9.1 Mr Molefe abandoning the pension benefit;

8.9.2 Agreeing on a more acceptable benefit;

8.9.3 Mr Molefe returning to Eskom.

8.10 It has to be noted that Ms Daniels and I did not have the requisite mandate to agree on anything with Mr Molefe; we were merely engaging with him in order to explore possible resolutions – which still required Board approval.





8.11 At this meeting with Mr Molefe we learnt that 30% of the pension benefit had already been paid over in January 2017, and that Mr Molefe has been receiving monthly pension payments of *circa* R100 000 since then.

8.12 Early the next morning (i.e. on 20 April 2017)) Mr Molefe called me and explained that he had been thinking about how best to resolve the matter, and that if he agrees to forego all retirement benefits he would effectively still be in the employ of Eskom. I shared the information conveyed in the call with both the Company Secretary and the Chairman, Dr Ngubane.

8.13 Dr Ngubane and I met with Mr Molefe that Friday morning (i.e. on 21 April 2017) in order to look at workable solutions to what had by now become a matter of immense public interest. Nothing came of the meeting, as it remained unclear how best to address the impasse.

8.14 That next Sunday (i.e. 23 April 2017)), before any of our discussions had been properly explored, the Minister publicly expressed her view that the Board had acted improperly in the award of the R30 million pension benefit and that she had instructed the Board as articulated above. This created additional pressure as I, for one, was hopeful that we could resolve the matter amicably – albeit that this would be very difficult to achieve at that time.

8.15 On 24 April 2017, the Board met to discuss the events as published in the media as well as the Minister's concerns in the meeting of 19 April 2017. The Board was also

updated on the discussions with Mr Molefe on 19 April and 21 April 2017. The meeting was attended by Mr Adiel Patel of Cliffe Dekker Hofmeyer attorneys. Mr Patel explained to the Board that the EPPF Board had the option to decline the request by Mr Molefe in respect of his early retirement. The minute of this Board meeting is annexed hereto as annexure "VK30".

8.16 At the meeting of 24 April 2017 Ms Daniels further advised that the Minister's approval for the pay out of retirement benefits was not required. I also confirmed with Mr Patel whether the proper decision making process had been followed. He confirmed that it was his view that the required decision making process had been followed.

8.17 At this meeting I raised the following points:

8.17.1 The pension arrangement only arose as a result of the introduction of a fixed term contract of 5 years. It was initially the intention of the Board to provide Mr Molefe with a permanent contract as was the case with the previous Chief Executive Officers;

8.17.2 Mr Molefe had advised previously that he wanted to retire from Eskom as he had been on various 5 year assignments and that was the biggest attraction to him and the reason that he agreed to be seconded from Transnet to Eskom.


8.18 The Board met on Tuesday, 2 May 2017 in order to look at the various options at its disposal, at which point we also considered the upshot of the legal opinion received from senior counsel on 28 April 2017. Ms Daniels prepared a summary of the legal

opinion, which she submitted to the Board for consideration at its meeting of 2 May 2017. We were informed that senior counsel's advice was that Mr Molefe's return was the most plausible resolution to the dilemma faced by the Board.

8.19 On 2 May 2017, the Board took the view that, subject to confirmation by another Senior Counsel, should Mr Molefe be amenable to returning to Eskom and if it was plausible (given that he was by now a Member of Parliament), his return to Eskom could solve more than just the issue of the R30 million. A copy of the minutes of the Board meeting held on 2 May 2017 is annexed hereto as annexure "VK31".

8.20 Eskom had by that time engaged a Search Firm, Woodburn Mann, and had agreed on a shortlist for the appointment of the next Group Chief Executive Officer. We were also faced with extreme media challenges regarding the acting Group Chief Executive Officer (i.e. Mr Koko) regarding contracts awarded to a company in which his step-daughter had a substantial interest (Impulse International (Pty) Ltd) being investigated at the time.

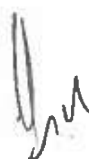
8.21 On 2 May 2017, the Board resolved that the best of the options presented by senior counsel was to rescind the decision to accept Mr Molefe's early retirement and to reinstate Mr Molefe. A decision was accordingly taken to rescind the acceptance of Mr Molefe's early retirement. The Board understood this to be entirely lawful and acceptable based on the opinion received from senior counsel.



8.22 At the meeting the Board again considered that it had acted within the rules of the EPPF and Eskom's MOI, and agreed that its decisions and actions had been reasonable and rational considering all the factors and dynamics at the time of the request for early retirement as well as when it was trying to conclude the contract of employment with Mr Molefe in February 2016.

8.23 I appreciate now that the mere rescission (if that is legally possible) of the acceptance of Mr Molefe's application for early retirement does not necessarily automatically mean that he ought to have been reinstated to the position of Group Chief Executive Officer. I say so as Mr Molefe's public statements were to the effect that he would be stepping down, and not that he would only do so if his application for early retirement was approved. Therefore, even if the acceptance of Mr Molefe's application for early retirement was rescinded, I now understand that it shouldn't necessarily follow that he should be reinstated to the position of Group Chief Executive Officer, as the position remained that he had *de facto* stepped down from that position. The Board, however, was never advised of this. On the contrary, the Board was advised that this was entirely lawful and acceptable. The Board was also not advised whether Mr Molefe's reinstatement required the approval of the Minister, which I now understand that it did.

8.24 I was not privy to the negotiations around Mr Molefe's reinstatement. In this regard, the Chairman and Company Secretary attended a range of meetings with different stakeholders.

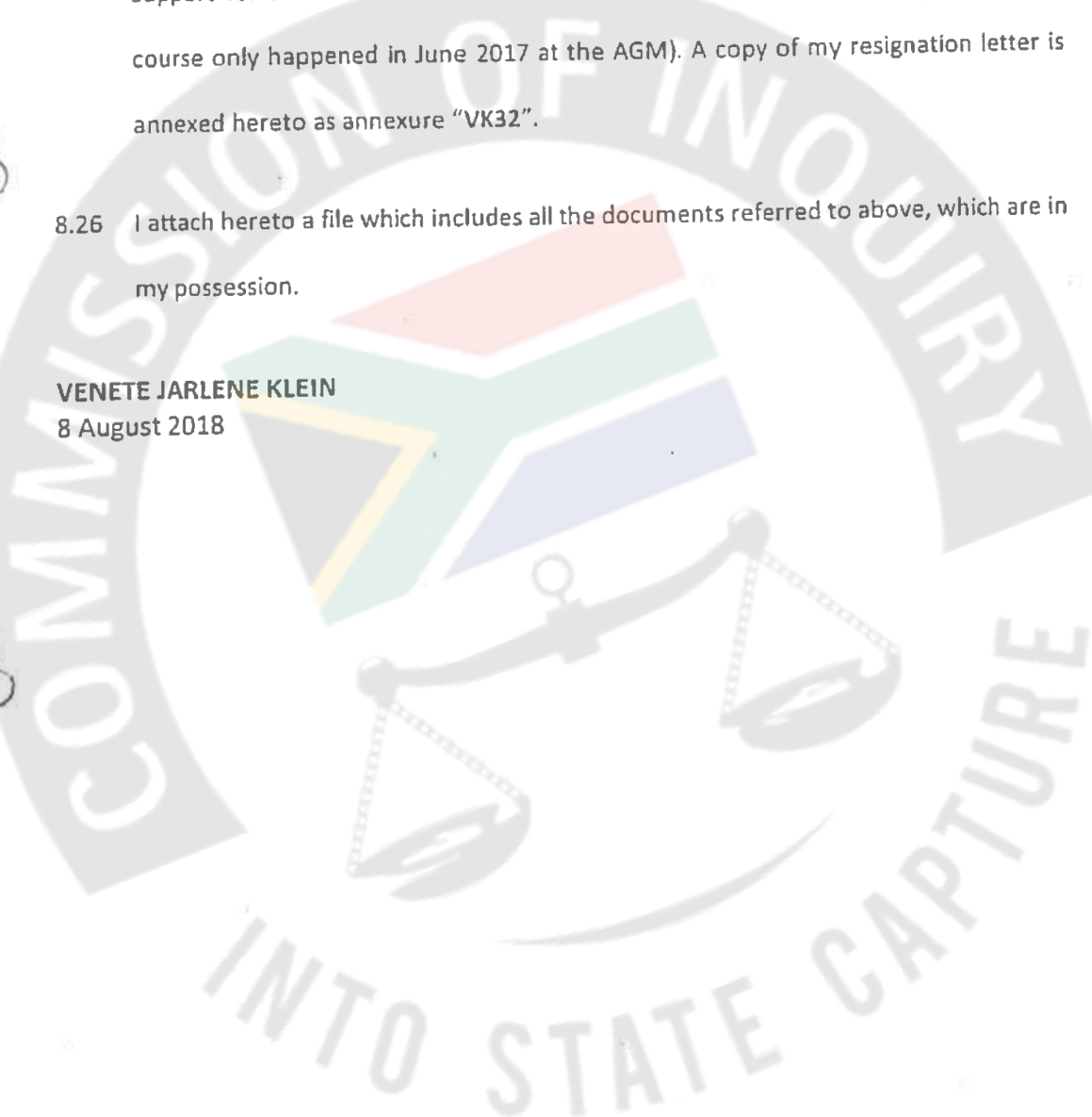




8.25 To my mind, we were solving quite a few problems with Mr Molefe's return. I could not have imagined the outrage of "SA Inc" on this decision. Having viewed the impact of this when Mr Molefe's return was announced on 12 May 2017, I decided immediately to affect my resignation (which I had first tendered on 7 June 2016 and later postponed until October 2016 at the request of the Minister, as she needed support for the Eskom board until she appointed additional members – which of course only happened in June 2017 at the AGM). A copy of my resignation letter is annexed hereto as annexure "VK32".

8.26 I attach hereto a file which includes all the documents referred to above, which are in my possession.

VENETE JARLENE KLEIN  
8 August 2018



*[Handwritten signature]*

# 11



**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE  
CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR  
INCLUDING ORGANS OF STATE**

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**AFFIDAVIT**

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I, the undersigned

**SUZANNE MARGARET DANIELS**

Do hereby state under oath in English that:

1. I am an adult female with ID 6908230280081.

My contact details are:

Cell: 082 580 7832

E-mail: [suzanne.daniels@icloud.com](mailto:suzanne.daniels@icloud.com)

2. The facts herein contained are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.
3. My qualifications include, Bachelor of Arts (B.A), Bachelor of Laws (LL.B) and Postgraduate Diploma in Law.



**MY EMPLOYMENT HISTORY AT ESKOM**

4. I began my career at Eskom on 1 May 2006 as a Chief Legal Adviser in Generation Primary Energy, Contracts Section. This business unit was part of the Generation Division at the time headed by Ehud Matya.
5. I became Acting Contracts Manager, Primary Energy in April 2007 and during this period I was accountable for the articulation, promotion and execution of a contract advisory and risk management approach in the fuel procurement executed by the Primary Energy Division.
6. I was permanently appointed to the role of Senior Manager: Contracts (Coal, Water and Gas) in April 2008 until January 2010 when I moved to the office the Managing Director, Primary Energy Division.
7. I was appointed Senior Manager, Office of the Group Executive in 2011 and served under Dan Marokane, Kannan Lakmeharan, and Matshela Koko respectively.
8. Subsequently, I was transferred to the Office of the Chairman on 11 April 2015.
9. I was appointed Group Company Secretary on 1 October 2015 and held this position until 27 July 2017 when the current interim board of Eskom accepted my resignation as Company Secretary. The duties of the Company Secretary are set out in section 88 of the Companies Act, 2008 as amended.
10. It is important to note, I attended board meetings and board subcommittee meetings as company secretary and not as a director, hence I would have no





voting rights. My role was to record the proceedings of the meeting and produce a record thereof in the form of minutes. While part of the role required that I advise the board on compliance with regulatory and statutory requirements, this role was located within the legal and compliance department and thus my role was limited to adherence to the Companies Act and the Memorandum of Incorporation.

11. Upon the departure of the General Manager: Legal and Compliance, I was requested by the Group Chief Financial Officer and Group Chief Executive to caretake the role of Acting head of legal with effect from 1 September 2016 and thus I fulfilled a dual function of Company Secretary and Acting Head of Legal and Compliance for the period until 27 July 2017.
12. In hindsight, at the time it made sense to assume both roles as the guiding principle was that as an officer of the company, I had to act in the best interests of Company. For a period of time I exercised duty of care in these roles and executed both to the best of ability. This is evidenced by the successes Eskom enjoyed in Court and other regulatory forums. On the Company Secretary, various initiatives such as improving the quality of minute taking and record keeping and/or the entire capacity decision making and verification.
13. While this principle is theoretically sound as stated in the textbooks, it became problematic for me as this led to clashes with the then Interim Chief Executive, Matshele Koko and also caused disquiet at Board and Exco level. This dual role demands a higher order leadership for it to function optimally to achieve its natural objectives.
14. As it became untenable for me, which ultimately impacted the span of my operations, I formally advised the Board that I wished to take up the role of Head



of Legal and Compliance in March 2017 and would resign as Company Secretary.

15. Due to leadership instability at the time, this became a formal reality only in July 2017.

### **THE SUSPENSION OF THE FOUR EXECUTIVES**

16. At the time of the suspension of the four executives, I held the position of Senior Manager; Office of the Group Executive (Group Technology & Commercial). I reported to Matshela Koko, in his capacity as Acting Group Executive. (Dan Marokane, had been moved to Group Capital).
17. My first knowledge of the impending suspension of the four executives was on **10 March 2015**. In my parliamentary testimony I surmised that this was the 9<sup>th</sup> March but evidence shown to me by the Zondo investigation team shows that this meeting took place on the 10<sup>th</sup> March.
18. As I have testified in Parliament, I received a call from Matshela Koko in the afternoon wherein he instructed me to meet him at Melrose Arch. I was at Megawatt Park at the time and packed up for the day and went to meet him there. He did not give any indication of the reason for the meeting at Melrose Arch and I did not ask any detail.
19. I was questioned at Parliament as to why I would have heeded such a call from Matshela Koko. To put it into context, he was my direct superior at that time and I had no reason to suspect anything out of the ordinary. We had spent quite a bit of time working together on the Westinghouse legal challenge to Eskom awarding the Koeberg Steam Generator contract to AREVA that my perception of him at



the time was one of a fastidious, loyal and principled Eskom executive.

20. I waited at JB Rivers for just over an hour when Matshela Koko called to ascertain my whereabouts. I confirmed that I was at JB Rivers and he came to meet me there. He paid the bill and he instructed me to follow him. We walked across the road to a nearby office complex. We took the elevator to the first floor and then he led me to an office at the corner of the building.
21. We entered the offices (I could not see any plaque on the outside of the office). We were greeted by a receptionist and Koko instructed me to hand my mobile to the receptionist. We proceeded to enter a mini boardroom and waited for someone to join us. I asked Koko what was the purpose for meeting at this place. He gestured that I should be patient.
22. As we were chatting, a gentleman walked into the boardroom and introduced himself as Salim Essa (Essa), adviser to Minister Brown. I was quite puzzled. A few pleasantries were exchanged and it was then that Essa asked me *"What is the procedure to be followed if one wanted to suspend someone at Eskom?"* I was quite taken aback and looked at Koko enquiringly. He nodded and I took that as an indication that I could answer Essa.
23. My response was that one could not suspend someone at a whim and needed a very good reason to do that. I explained the process as I understood it and pointed out to Essa that I did not work in the Industrial Relations ("IR") section. Therefore, my knowledge of labour law was high level.
24. He seemed to accept this and then proceeded to tell me that in the upcoming days, four (4) executives at Eskom would be suspended, namely, Tshediso Matona, Tsholofelo Molefe, Dan Marokane and Matshela Koko. I looked at Koko



in shock and he appeared to have knowledge of this as his demeanour remained composed.

25. Essa proceeded to tell me that there would be an investigation by an independent firm into the affairs of Eskom. I was flabbergasted at this point, I was not sure if I was to believe this man as he had sketched the scenario to me in front of one of the impacted parties.
26. I cannot recall how the meeting ended but I was excused and Koko accompanied me out of the building. I was quite perturbed at what I had heard and I do not recall speaking to him at the time.
27. On my way home I called a friend of mine to ask him about Essa. My words were *"I met this man called Salim Essa, can he do what he says he can?"*. My friend responded, *"in all probability, yes"*.
28. Thereafter, I received a call from Dr Guenon, the Head of the Southern region for AREVA at the time.
29. My next message I sent was to Dan Marokane ( "Mr Marokane"). I sent him a text as it was his day off. He responded by saying that he will pop by my house as he was in the area. He arrived later that afternoon and I told him what had transpired in the afternoon. Mr Marokane indicated that he was aware of the rumours that were circulating about their impending suspensions and that he would relay what I had told him to the other two parties, namely Mr Tshediso Matona and Ms Tsholofelo Molefe.





30. Just to give context, as an employee at the SOC Eskom, I was quite used to the amount of political interference and lobbying behind the scenes which took place. However, I had not been exposed to this level of "behind the scenes" influence by a third party as I was on this day. This level of interference would continue to be the hallmark of the period from 2015 up until I eventually departed from Eskom in 2018.
31. The day after this meeting, I had arrived at work just after 9h00 and Matshela Koko was frantically calling me. He asked me about my whereabouts and also why I was talking to Rustum Mohamed and the French. Rustum Mohamed was the friend I had spoken to, and we have been friends for more than 20 years, so I was quite shocked that Koko knew about this call and also the call from Dr Guenon. I had asked Dr Guenon to call me when I was back in the office. This was the first suspicion that I had that my mobile phone was bugged, as Koko could relate to me verbatim who I had spoken to. I was alone in my car at the time of making the call and receiving the call from Dr Guenon.
32. Koko called me in quick succession that morning as he wanted to see me rather urgently. He was agitated and his stated reason for this was that he suspected that he was going to be suspended.
33. I was rather tense by that time and told him that I did not see the logic for him being agitated, as he was clearly privy to what was happening in the Boardroom at the time.
34. There was a Board meeting scheduled for that day and it was generally a tense atmosphere on the executive floor. I was not present at these meetings as I was not the Company Secretary at the time but I have read the minutes of the meetings:



35. The minutes clearly indicate that at a meeting with the Board of Directors of Eskom Holdings SOC Limited ("the Board") on **11 March 2015**, the Honourable Minister of Public Enterprises, Ms Lynne Brown, raised a number of concerns with the Board in respect of the following:
- 35.1. Information that Eskom was sharing with the War Room was deemed to be unreliable and misleading in some respects;
  - 35.2. Load shedding continued to occur with alarming regularity;
  - 35.3. Issues relating to reports of retrenchment and voluntary separations could not continue;
  - 35.4. A forensic enquiry into matters affecting the business operations of the company may be needed;
  - 35.5. The interest rates and borrowing terms negotiated by Eskom in the market appear to be unfavourable to it;
  - 35.6. Appears to be inequities in the coal price purchases negotiated;
  - 35.7. Perception of manipulation of the load shedding process;
  - 35.8. Lack of planning in diesel purchases;
  - 35.9. Breaches of security in the bugging of board rooms and leaking of information;
  - 35.10. Lack of transparent reporting to the Shareholder. Copy of the minutes of the meeting is attached hereto marked "**Annexure SMD1**".

36. Following on the meeting with the Honourable Minister of Public Enterprises, the Board proceeded to deliberate on the issues raised by the Minister and the most optimal manner in which to begin to address the issues which confronted the Company.
37. A number of issues were deliberated and debated upon flowing from the concerns raised by the Honourable Minister and the Board finally resolved that:
- 37.1 An inquiry be instituted into the affairs of Eskom and that the duration of the inquiry should be three months;
  - 37.2 The Audit and Risk Committee ("ARC") shall take custodianship of the inquiry and that the People & Governance Committee ("P&G") and other committees assist where necessary and report to the Board. The ARC was mandated to draft the Terms of Reference;
  - 37.3 The key executives be put on suspension for the duration of the inquiry;
  - 37.4 The Corporate Plan and the Borrowing Programme be deferred until further notice; and
  - 37.5 Management must institute an investigation into the bugging of the Boardroom and report to the Board on their findings and recommendations. Copy of the minutes is attached hereto as "**Annexure SMD2**"
38. A meeting of the People and Governance Committee ("P&G") was convened immediately after the Board meeting to deal with the decision to suspend key executives for the duration of the enquiry.



39. P&G identified the key executives to be put on suspension for the duration of the enquiry as:

39.1 Tshediso Matona, Chief Executive Officer;

39.2 Tsholofelo Molefe, Financial Director;

39.3 Dan Marokane, Group Executive: Group Capital;

39.4 Matshela Koko, Group Executive: Technology and Commercial.

40. I do not have a copy of these P&G minutes, however, I mention them in the subsequent report that I prepared for the then Minister of Public Enterprises, Ms Lynne Brown on the matter.

41. These executives were then called into the meeting individually and were informed of the Board's decision to launch an enquiry. They were further advised of the Board's view that their presence could hamper the said enquiry. The 4 executives were suspended on **11 March 2015**.

42. On **13 March 2015**, I was called to a meeting with Dr Pat Naidoo (Dr Naidoo), a Board member and Chairperson of the Board Recovery & Build Program Committee. At that stage one of my duties was the coordinating of and liaison with the Board on procurement matters.

43. At this meeting Dr Naidoo enquired what the process would be to appoint an independent consultant as the Board had acquired the services of one Mr Nick Linnell ("Mr Linnell") as an adviser to the Board. This was not a formal meeting as it was only him and the meeting coordinator for the Build Recovery & Build Program Committee present in the room.



44. I explained the process to Dr Naidoo and the options as to how the Board could go about it. It did involve putting out an RFQ/RFP for the services. It did however appear that the Board had already engaged the services of Mr Linnell as an adviser to the Board.
45. He spoke of the Board wanting to initiate an independent fact-finding exercise which he described as an "Eskom Deep Dive".
46. My impression proved to be correct, as I would later be called upon to cancel the contract between Eskom and Mr Linnell. I attach a letter from Mr Linnell addressed to the Chairperson of Eskom which set out the interactions with the Board on the matter marked "**Annexure SMD3**". I also attach an email which I received from Mrs Venete Klein which confirms that the Board had in fact engaged the services of Mr Linnell. A copy is attached marked "**Annexure SMD4**".
47. On **9 April 2015**, the Acting Chairman of the Board, Dr Ben Ngubane, called Mr Leo Dlamini ("**Mr Dlamini**") and I to his office and informed us that I would be transferred to the Chairman's office and that Leo would have to be transferred elsewhere in the organisation.
48. Dentons was appointed to conduct the enquiry late April, as the appointment was confirmed by the Board Audit and Risk Committee on **20 April 2015**.
49. The Eskom Board meeting of **23 April 2015** discussed the interface between the WAR ROOM, that was being led by the Deputy President at the time, Cyril Ramaphosa, and the Dentons Review. Copy of the minutes of the meeting is attached marked "**Annexure SMD5**".



50. The Chief Executive was instructed to develop the framework of interaction with the WAR ROOM. It was at this meeting that he outlined the maintenance strategy to stop load-shedding. He also emphasised that should Eskom be able to achieve this, the purpose for the WAR ROOM would be obsolete.<sup>1</sup> The Acting Chief Executive at that time was Brian Molefe.
51. The meeting proceeded to discuss the removal of one of the directors, Mr Norman Baloyi, and confirmed that the removal had been approved by the Minister of Public Enterprises.
52. It was at this meeting that Thomson Wilks, a firm of attorneys not on the Eskom panel, was approved to review Eskom's Memorandum of Incorporation and that it was made clear that they were advising the Board in respect of the suspension of the four executives and the attendant matters thereto.
53. Mr Matona's challenge to his suspension at the CCMA was discussed, as well as options for the treatment of his suspension. Already at this point, his reassignment to another post in government was being considered by the Minister of Public Enterprises and the changing of the status of suspension to special leave.
54. The Board emphasised that this would not alter the fact that he would remain on suspension. Dr Ben Ngubane and Mr Romeo Khumalo ("Mr Khumalo") were mandated to meet with Mr Matona on **29 April 2015** to discuss the matter of his suspension. At this point, it was clear that the Board was not really considering the option of the return of the executives, contrary to their public utterances.

<sup>1</sup> An indication of the "us and them" stance that the Board took against the institutions of government.

## SETTLEMENT MEETINGS WITH SUSPENDED EXECUTIVES

55. It was further clear that the exit of the executives was the ultimate aim, as the Board reiterated that the Dentons Review would continue. It was a separate enquiry and its outcomes were deemed independent of the four executives. The Board at this stage already anticipated that the executives would resign to avoid charges.
56. I was tasked with coordinating the meetings of the executives and the Board during this time. I attended some of the meetings to take notes and keep Dr Ngubane apprised of proceedings.
57. The first meeting that I attended regarding one of the suspended executives was on **4 May 2015** where Mrs Venete Klein, Mr Romeo Khumalo and Dr Ben Ngubane met with Ms Tsholofelo Molefe. This meeting took place at the Protea Hotel, Midrand. The introduction of the meeting by Mrs Klein set the tone: she advised Ms Molefe that the Board had mandated the delegation, that is her, Mr Khumalo and Dr Ngubane, to interact with the executives and the question was *"How do we amicably find a solution?"*.
58. Ms Molefe highlighted to the Board members present that there was a clear contradiction to what had been communicated to them and what was reported in the media. She emphasised that in the eight weeks since her suspension she had not had any communication from the Board or a response to her correspondence. She had enquired as to what was the position of the Board at that point in time.
59. At this point Mr Khumalo very directly conveyed to Ms Molefe: *"Without prejudice and reserving the rights of Eskom, the terms of reference for the review were developed by the Audit and Risk Committee and that this was a separate discussion."* He further went on to say, *"Can we find a way of amicably parting ways? The parties would like to avoid the legal wrangle on each side. Would you*



*consider a managed parting of the ways? Would you be open to this discussion and also the public management thereof?"*

60. Ms Molefe responded that *"Eskom had already appointed lawyers in the matter and that it put them at an unfair advantage. ...The trust issues are so deep so it would be something I would consider."* She further requested time to appoint legal representatives and time to consider the proposal. She also stressed that her professional integrity had been impugned by her suspension and that her integrity as a chartered accountant was critically important to her.
61. Mr Khumalo confirmed that the delegation would put a "without prejudice" offer on the table. He emphasised that the Board would work with her to manage her exit. It was agreed that a formal offer would be put to Ms Molefe by the end of that week.
62. In-between these meetings, a meeting with Brian Molefe, also took place at the Protea Hotel where the Board members present briefed him on their top priorities as set out in Minister Brown's correspondence of 22 April 2015 and which he needed to attend to as a matter of urgency. These were the top priorities:
  - 62.1. Board position on tariff re-opener;
  - 62.2. weekly reports on the Dentons Enquiry;
  - 62.3. short term deliverables of the appointed interim executives;
  - 62.4. report on servicing and treatment of the World Bank loan;
  - 62.5. issue of bugs in the main boardroom.
63. I do not have a copy of the correspondence dated 22 April 2015.



64. The delegation subsequently met with Mr Tshediso Matona on the same day. Mr Khumalo opened the discussion and emphasised that at that stage there was no commitment to a specific alternative role in government, but that it would be considered. He emphasised that Mr Matona's *"court action did not sit well with the powers that be"*. There appeared to have been prior discussions that I was not privy to.
65. Mr Khumalo then proceeded to outline the framework of a proposal to Mr Matona. He stressed that Eskom was committed to managing the messaging together with Mr Matona so that his dignity and credibility, as well as the credibility of the Board, remained intact. The financial proposal included a payment by Eskom to the Government Employees Pension Fund to secure Mr Matona's full benefit as a government employee, since he had been at Eskom for a relatively short time. It was confirmed that Eskom and the Department of Public Enterprises were working together to secure the full benefit, to have it approved and reinstated. The prospect of another role in government was also mooted. Mr Matona requested that a formal proposal be tabled and that a further meeting be set up.
66. The second meeting with Ms Molefe took place on **7 May 2015** where an offer was tabled to her. She undertook to consider it.
67. It must be noted that I do not include these details in my testimony to cause harm to the individuals involved, but to give this Commission a sense of the careful orchestration of events on the part of the Eskom Board to ensure that the identified persons would not return to Eskom.
68. The Board met with Matshela Koko on **11 May 2015** and the tenor of this meeting was dramatically different from the previous two I had sat in. The Board was represented by Mrs Venete Klein and Mr Zethembe Khoza.



69. Unlike the previous two meetings, Mr Koko was given time to express his sentiments on the issue of his suspension quite in length. He waxed lyrical – “*I don’t understand*” and “*shocked and surprised*” permeated his speech and the now legendary “*Eskom is in my veins*” was part of his rendition of his position at that moment.
70. He also portrayed his relationship with the previous chairperson, Mr Zola Tsotsi, as acrimonious and he attributed this acrimonious relationship as the reason for him finding himself on suspension. He went at great lengths to impart to the Board members that they had been misled and that he “would not make it difficult for the Board” if the board says “you don’t fit”, he would accede and leave Eskom.
71. Mr Khoza thanked him for his submission and Mrs Klein started her conversation with an opening question of “*Could you fully trust this Board again?*” Once again Koko emphasised that he believed that the reason for his present situation was the acrimonious relationship he had with Mr Tsotsi which led to acrimony between him and the previous Board. At this point Mrs Klein then asked “*Could you come back and work with this Board?*” Mr Koko retorted that he had “*horror stories relating to Zola Tsotsi*” and not the current Board. Mrs Klein thanked him for his honesty and took note that he had said “*I will come back to Eskom*”. She emphasised that this confirmed that the trust element was intact and that Koko was prepared to sit it out and wait. She confirmed that she respected what he had told them and thanked him for being open and frank.
72. I was not privy to the discussions with Mr Dan Marokane, but he had informed me that he was liaising with the Board at the time through his attorneys and that there was correspondence on more than one occasion that had not been replied to by the chairperson of the Board.

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73. The Board delegation met on **19 May 2015** and I was in attendance. Mrs Klein opened the discussion by emphasising the need to find settlement with the parties and *"clear the decks"*. She also confirmed that the *"Shareholder has approved to get rid of the people and make the necessary concessions if it sorts out the problem"*. She stressed that *"the priority is to get the people off and away"*. The meeting further discussed the various settlement arrangements as the "Minister had a ceiling of R12 million to negotiate" and the guiding principles were i) full cost to company, up to twelve months, ii) payment of tranche 8, iii) payment of tranche 9; iv) contribution to legal costs and v) communication plan around the suspended executives. The settlements with Mr Marokane and Ms Molefe were mentioned as those that needed to be finalised.
74. I was then asked to prepare a Brief to the Minister from the Chairman on the status of the suspended executives. A copy of the briefing document is annexed hereto marked **"Annexure SMD6"**.

#### **DENTONS REVIEW**

75. As already indicated, I was not a witness to the Board meetings of March 2015 referred to above. My knowledge stems from reading the minutes of the meetings.
76. Eskom records reflect that at a meeting with the Board on **11 March 2015**, the Honourable Minister of Public Enterprises, Lynne Brown, raised a number of concerns with the Board in respect of the issues already listed above.
77. A copy of the minutes is already attached marked **"Annexure SMD1"**.
78. Following on the meeting with the Honourable Minister of Public Enterprises, the Board proceeded to deliberate on the issues raised by the Minister and the most

optimal manner in which to begin to address the issues which confronted the Company.

79. A number of issues were deliberated and debated upon flowing from the concerns raised by the Honourable Minister and the Board finally made certain resolutions already specified above.
80. A copy of the minutes is already attached marked "**Annexure SMD2**".
81. As already stated, a meeting of the People and Governance Committee ("P&G") was convened immediately after the Board meeting to deal with the decision to suspend key executives for the duration of the enquiry, and the executives were identified as already explained.
82. I was not part of the procurement process which resulted in the appointment of Dentons. This was handled by senior managers in procurement and the General Manager Legal at the time, Neo Tsolanku.
83. The first presentation to the Board by the Dentons Team was on **27 May 2015**. It stressed the preliminary nature of the feedback, as they were only six weeks into the investigation.
84. The feedback detailed the mixed messaging that Dentons was receiving from the Board and the Shareholder in the understanding of the brief:
- 84.1 The Minister of Public Enterprises described it as a "deep dive".
- 84.2 The Eskom Board instruction is "Tell us what is wrong and we will fix it".
- 84.3 Audit and Risk Committee shifts between "investigate all executives" and "investigate suspended executives".



85. The feedback at this stage highlighted the following:

85.1 Information provided by the EXCO was not complete;

85.2 Poor performance of Eskom generation plant;

85.3 Delays in new build decisions leading to unrealistic timeframes;

85.4 High cost of primary energy (cost of coal);

85.5 Diesel purchasing handled incorrectly;

85.6 Financial challenges;

85.7 Anecdotal references to influence over procurement exerted by the executives.

86. These anecdotal references mentioned Matshela Koko in the main and the various allegations were described as obtained from witness interviews across the organisation. This detail did not make its way into the final reports.

87. I am able to say this as I received a copy of the initial drafts where Matshela Koko was heavily implicated in tender manipulation and was described as running the organisation by means of strategically placed proxies. Descriptions of specifications being tailored for specific companies, decisions of lower committees overturned, etc were provided by the various witnesses.

88. These details did not make it into the official records of Eskom as it was decided by the Board that it would be destroyed. This is recorded in the Board minute of 14 August 2015 where it states *"... concern was expressed with regard to the collection and destruction of initial reports. The Company Secretary was expected to take the necessary steps to ensure that all original reports were collected in exchange for the final reports. In view of this concern, the Chairman of P&G, Ms V Klein undertook to ensure that all reports were returned to her within 7 days for them to be destroyed"*.
89. A copy of the minutes is attached hereto marked **"Annexure SMD7"**.
90. Mrs Klein emphasised that the Board needed "to find a way for the Minister to dissociate herself in the public space" and that the inquiry should be perceived as a "Board Initiative". The Minister failed to take a definitive stance on the matter throughout and this led to often conflicting positions and created a fracas at operational level.
91. Copies of the Dentons Reports as formally provided to me are attached hereto marked **"Annexure SMD8"** and **"Annexure SMD9"**.

#### **T-SYSTEMS**

92. I was not directly involved in this matter but I have discovered the following in my notes from the meeting of the day.
93. The matter of the IT infrastructure and outsourcing to T-systems was discussed at a Board Tender Committee (BTC) meeting on 28 February 2015.

94. It was at this BTC meeting that the change of business strategy in relation to the IT Infrastructure was presented by Sean Maritz, acting CIO at the time.

After completion of the statement, the following questions were put to the deponent and her answers were recorded accordingly:

1. Q. Do you know and understand the contents of this statement?  
Yes
2. Q. Do you have any objections in taking the prescribed oath?  
No
3. Q. Do you consider the prescribed oath as binding in your conscience?  
Yes

I believe the statement gives a fair account of the event that happened.

*Pauls*

Signature of Deponent

17 / 8 / 2020

Date

I HEREBY CERTIFY that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn before me at PRETORIA on the 17 day of August 2020, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

*KB DINTWE* *Captain*

COMMISSIONER OF OATHS



# 12





**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,  
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF  
STATE**

**AFFIDAVIT**

I, the undersigned,

**BALDWIN SIPHO NGUBANE**

do hereby state under oath that:

**1. Introduction**

- 1.1. I am an adult male South African citizen currently retired and self - employed.
- 1.2. The facts herein contained are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

**2. Qualifications**

- 2.1. My qualifications include a Bachelor of Medicine and Bachelor of

*Bug A -  
Baldwin Ngubane*

Surgery (MBChB) (Natal); MPRAX Med (Master of Family Medicine) (Natal); DTM&H & DPH (Diploma in Tropical Medicine & Hygiene and Diploma in Public Health) (Wits) Dip. Economic Principles (London).

2.2. I have been approached by investigators associated with the Commission of Inquiry into Allegations of State Capture, Fraud and Corruption in the Public Sector and certain Organs of State (**"the Commission"**) and have been requested to provide a statement which details matters relating to my tenure as member and chairman of the board of directors (**"the Board"**) of Eskom Holdings SOC Limited (**"Eskom"**).

2.3. I have agreed to provide this statement as well as evidence to the Commission freely and voluntarily.

### 3. **Appointment to the Eskom Board**

3.1. I was appointed to the Board of Eskom during December 2014 following a nomination process initiated by the Minister of Public Enterprises (**"the Minister"**). Ms Lynne Brown (**"Ms Brown"**) was the Minister at that time.

3.2. I had not known Minister Brown prior to my appointment to the Board

of Eskom. I was notified of my appointment by letter from Minister Brown.

3.3. I was initially an ordinary member of the Board but following the resignation of Mr Zola Tsotsi ("Mr Tsotsi") as Chairman, I was appointed acting Chairman from 30 March 2015 until October 2015 when I was appointed Chairman. I have previously stated in my statement to Parliament that I was appointed acting Chairman with effect from 15 March 2015. That was incorrect.

3.4. I acted as Chairman of the Board Tender Committee ("BTC") meeting held on 28 February 2015. This was an *ad hoc* appointment. I was asked by Mr Tsotsi to chair that meeting.

3.5. I served as Chairman of the Board until June 2017, when I resigned of my own volition.

3.6. I do not have copies of the letters appointing me as acting Chairman and later as Chairman nor my resignation letter from the Board.

#### 4. The suspension of the four Eskom executives

4.1. I was not Chairman of the Board at the time of suspension of the four



executives, namely, the Group Chief Executive Officer, Mr Tsediso Matona ("**Mr Matona**"), Group Executive, Commercial and Technology, Mr Matshela Koko ("**Mr Koko**"), Group Executive Group Capital, Mr Dan Marokane ("**Mr Marokane**") and the Finance Director, Ms Tsholofelo Molefe ("**Ms Molefe**").

4.2. I shall henceforth refer to Mr Matona, Mr Koko, Mr Marokane and Ms Molefe collectively as "**the four executives**".

4.3. The suspension of the four executives came up for discussion at a board meeting which took place on or about 9 March 2015. This meeting was preceded by another, where the Board discussed, amongst others, the Minister's strategic statement of intent and other matters. I believe this may have been the board induction meeting. I do not recall the date of this meeting nor the Minister's role in it, but I recall it was the very first board meeting since our appointment.

4.4. Mr Tsotsi, convened a special board meeting on or about 9 March 2015. Minutes of this meeting are annexed hereto marked "**BSN1**". Mr Tsotsi apologised for failing to give the Board the usual notice of meeting of at least seven days before the meeting. The reason, as his resolution states, was that "*there are exceptional circumstances demanding the necessity for an urgent meeting of the Board of Directors*". This

Buy X -



meeting focused entirely on the proposed suspension of the four executives and the establishment of an inquiry into Eskom's affairs. Mr Tsotsi was asking the Board to resolve that an external independent inquiry be set up to investigate and determine the facts relating to the then current technical, commercial and structural status and any acts and/or omissions that have contributed to the deficiency of generating and distribution capacity of Eskom.

4.5. During this meeting, Mr Tsotsi reported that he had met with President Jacob Zuma at his house in Durban, who had instructed him to procure from the Board a resolution approving the establishment of an internal independent inquiry into Eskom's affairs and the suspension of the four executives. I was not part of the meeting with President Zuma and do not know who else attended the meeting.

4.6. In terms of Mr Tsotsi's proposal, the Board was to set up a subcommittee comprising Mr Tsotsi, Ms Chwayita Mabude, Chairperson of the Eskom Audit and Risk Committee (the "ARC") and Mr Zethembe Khoza ("Mr Khoza"), Chairman of the Eskom People and Governance Committee ("P&G Committee"), mandated with delegated authority of the Board to determine the terms of reference of the inquiry. The subcommittee would have the Board's delegated authority to take all such steps and measures to ensure the unfettered

fulfilment of this mandate. Also, that the Board authorised the Chairman, in consultation with the Minister and the Minister of Finance to approve expenditure sufficient to fund the inquiry. And that this inquiry shall be required to present its final report to the Board, the Minister and the Presidency by no later than the 30<sup>th</sup> June 2015. That the subcommittee would have the authority to deviate from the requirements of Eskom's Procurement Policies and Procedures as is necessary, given the urgency to complete the investigation within three months and to appoint such persons or entities to conduct the inquiry that are independent of Eskom and free of any influence or suspicion of influence of any party that might have an effect on the inquiry, save that the subcommittee shall if required provide reasons to the Ministry of Finance for any such deviations.

4.7. A Board member stated that he was not comfortable with making major decisions based only on a two-page document and there had been no opportunity to discuss the issue in an in-committee session. He was also against approving a resolution allowing for deviation from Eskom's Procurement Policies and Procedures.

4.8. The Chairman reported that an independent resource had been identified already by the Presidency. He reported further that the Presidency had done all the legal and governance work to facilitate the



resolution on deviation from procurement policies and procedures.

4.9. I recall a Board member expressed the view that the Board was being asked to approve the implementation of a subcommittee with wide-ranging powers and he felt that he could not agree with the request.

4.10. When Mr Tsotsi said the four executives had to be suspended, the Board differed with him because he did not give the Board cogent reasons as to why they ought to be suspended. The Board intimated to him that the reasons he was giving for their suspension were defamatory, and unsubstantiated. The Board did not support the proposed suspensions.

4.11. Mr Tsotsi reported that the Presidency had expressed a concern that the impact of Eskom on power shortages in the country had been understated and therefore required the Board to ensure that it received accurate information from management about those matters. He reported that the Presidency required that the inquiry be unfettered by management, the Board and other policy stakeholders and that it must be seen to be credible and objective and have a mandate that would be penetrating and unhindered.

4.12. The Board suggested that the four executives take special leave while

the concerns Mr Tsotsi had raised were being investigated. Nonetheless, Mr Neo Tsolanku ("Mr Tsolanku") from Legal Department at Eskom, whom Mr Tsotsi had brought with to the meeting, advised that special leave only applied in special cases, not for investigation purposes.

4.13. At this time, all of us, except for Mr Tsotsi and Ms Mabude, were newly appointed to the Board. We were therefore taken by surprise that we had to deal with an issue of such magnitude so early in our tenure.

4.14. The meeting was uneasy and tense. Members suggested that the Minister be invited to meet with the Board to explain the decisions that were required by government and the basis thereof, before the Board could consider the proposed resolutions further.

4.15. The Board specifically needed to obtain clarity from the Minister regarding the following –

4.15.1. the reasons for the establishment of the inquiry, its terms of reference and the basis of the suspension of the four executives whilst the enquiry was underway;

4.15.2. the proposal of the appointment of Mr Nick Linnell ("Mr



Linnell") to conduct the inquiry. Mr Tsotsi indicated that President Zuma required Mr Linnell to undertake the inquiry;

4.15.3. the role of the Board whilst the inquiry was underway, specifically whether the Board would be expected to continue with its normal duties during this time; and

4.15.4. the role that the Board would play in relation to the activities of the war room that had been set up to manage the power supply challenges that were facing Eskom. The Board was appraised of the War Room and its activities by the Minister when she came to speak to the Board on 11 March 2015. During this time, the Board was not involved in the activities of the War Room. The Eskom executives were responsible for the management of the affairs of the War Room. This was a matter of concern to the Board.

4.16. The meeting adjourned to allow the Minister to address the Board on these matters. The Minister came to address the Board on 11 March 2015. Minutes of this meeting are annexed hereto marked "BSN2".

4.17. Although the Minister did not direct the Board to suspend the four executives, she raised concerns of her own against them. The concerns related to the War Room, which she suggested complained it was not receiving consistent information from management and therefore it could not develop strategies to turn around Eskom and stop load shedding. The Minister felt that the presence of the four executives might hinder the investigation.

4.18. After meeting with the Minister, it was clear to the Board that government, as shareholder of Eskom, required the inquiry to proceed and that the four executives had to "*step aside*" whilst the enquiry was underway.

4.19. The board meeting proceeded after the Minister's address. During the meeting, the Chairman provided names of persons whom he suggested the Minister had approved would act in the positions of the four executives once they are suspended. These were Mr Khoza, a member of the Board, who was suggested as acting Group Chief Executive Officer ("GCEO") and three others whom I cannot recall. The acrimony and mistrust that prevailed at the meeting between Mr Tsotsi and the Board was so much that because I was the eldest on the Board, I was mandated to call the Minister to inquire on the veracity of the Chairman's representations regarding the Minister's approval for the

appointment of those persons to act in the positions that would be vacated by the four executives whilst the investigation proceeds. Minister Brown stated that she had not given any instructions as to who should fill the positions vacated by the four executives. She indicated that she would only need to be consulted by the Board in relation to the filling of the acting GCEO position, and only be informed of the Board's decision regarding the other positions.

4.20. Overall, most members of the Board were of the view that everything was happening too sudden upon the commencement of our tenure and were uncomfortable with the suspension of the four executives because there was no apparent case of wrongdoing against them. Nonetheless, appreciating that that was what the government required, the Board ultimately approved the establishment of the inquiry and the suspension of the four executives in order to address government's concerns regarding the presence of the four executives at Eskom whilst the inquiry was underway.

4.21. The Board decided that the suspension of the four executives would endure only for three months, by which time it was envisaged the inquiry would have been completed.

4.22. The Chairman proposed that Mr Linnell be appointed to conduct the

inquiry. The Board was uncomfortable with the manner in which the recommendation of Mr Linnell's appointment came about. He was proposed by the Chairman without any process nor involvement of the Board. The Board decided that instead of Mr Linnell, the inquiry would be conducted by someone appointed independently by the Board. The ARC was entrusted with the process to appoint an independent service provider to undertake the investigation. As result, following a procurement process conducted by the supply chain division, during April 2015 Eskom appointed Dentons, an international law firm based in Sandton, to conduct the inquiry. I do not have copies of the procurement documents nor the appointment letter issued to Dentons.

4.23. Apart from the name of President Jacob Zuma, which was mentioned by the Chairman when he introduced the need for the establishment of the inquiry, I do not recall any mention of, or interaction of the Board with, Ms Dudu Myeni.

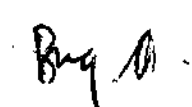
4.24. The ARC formulated the terms of reference of the inquiry conducted by Dentons and the Board approved them. A copy of the terms of reference is annexed hereto marked "BSN3".

4.25. The inquiry looked at, amongst others, the following key issues –



- 4.25.1. the poor performance of our coal fleet which was causing the load shedding;
- 4.25.2. the delay in the New Build programme which was characterised by billions of penalties and claims, and questioning the ability to handle contracts at Eskom;
- 4.25.3. the financial challenges of Eskom, the fact that NERSA had cut down on the tariff, and how the financial gap would be covered in terms of revenues that would be low;
- 4.25.4. the security at Eskom as a key national point; and
- 4.25.5. the integrity of the Eskom procurement process and how it complied with the rules.
- 4.26. Dentons presented the Board with a big report, which we passed on to the ARC to process and implement. The ARC was led by Ms Mabude. The ARC gave each division of Eskom issues that had to be corrected in their sphere of responsibility. By the time I left, I think about 18 of the issues had been corrected and implemented. I do not have a copy of the Dentons report.

- 4.27. The scope of the inquiry did not include an investigation into any misconduct on the part of the four executives. Upon the conclusion of the inquiry, Dentons did not find nor attribute any wrongdoing to the four executives. Nonetheless, except for Mr Koko who was keen to return to Eskom, the others were not.
- 4.28. Whilst the inquiry was pending, Mr Matona had filed a labour dispute with the CCMA against Eskom. Following the conclusion of the inquiry, Mr Matona negotiated and settled the dispute out of court and left Eskom. This process was handled by the P&G Committee. I was not involved with it.
- 4.29. Prior to that, I had been tasked by the Board to attend the CCMA proceedings which Mr Matona had instituted against Eskom. During one of my interactions with Mr Matona at the CCMA I suggested to him, at my own initiative, that he should consider returning to his position. However, Mr Matona was too upset with the whole saga and made it clear to me that he would not return to Eskom.
- 4.30. Mr Marokane and Ms Molefe also left the employ of Eskom following settlements that were reached with each of them by Eskom. This too was handled by the P&G Committee. I am not privy to the details of the settlements. I do not recall whether they too were offered the



opportunity to return to Eskom. I was not involved in any such discussions with them.

**5. The removal and/or resignation of Mr Zola Tsotsi**

5.1. As I have indicated previously, the relationship between Mr Tsotsi and the rest of the Board did not start off well. It was characterized by acrimony and mistrust from the onset.

5.2. This emanated from his handling of –

5.2.1. the proposal for the appointment of Mr Linnell to conduct the inquiry which had been proposed by government into Eskom's affairs without following any procurement process nor prior consultation with the Board. The board felt that he was involving himself in matters which encroached into the terrain of executive management, which he could not do as a non-executive chairman. Moreover, such appointment had financial implications, which unless implemented in compliance with the Eskom procurement policy would result in irregular expenditure;

5.2.2. the proposed suspension of the four executives without

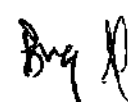
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any apparent allegations of wrongdoing having been levelled against them. Inasmuch as the suggestion was that the four executives were required to "*step aside*" to allow the inquiry to continue unhindered by their presence at Eskom, the Board considered that it was a high handed approach, which was not in the interests of Eskom and the four executives; and

5.2.3. the unilateral manner which the Chairman went about nominating the people who would act in the positions that were to be vacated by the four executives whilst the inquiry was underway. The Chairman went ahead to recommend such persons to the Minister without regard to the Board.

5.3. It was because of these decisions, which he sought the Board to "*rubberstamp*" that the Board lost faith in his leadership. This conduct culminated in the decision by the Board to initiate a motion of no confidence against Mr Tsotsi, with the view to remove him as Chairman.

5.4. To my knowledge the motion of no confidence against Mr Tsotsi was a Board driven process, without any external influence from anyone. The





charges were formulated by the Audit and Risk Committee (**"the ARC"**) and subsequently approved by the Board at its meeting of 14 March 2015. I agreed with the position of the Board that Mr Tsotsi had conducted himself improperly. Mr Tsotsi was asked to recuse himself when the item on his alleged misconduct came up for discussion by the Board and I was requested by the Board to chair the meeting. A copy of the minutes of meeting of 14 March 2015 is annexed hereto marked **"BSN4"**.

5.5. Shortly after the decision of the Board to pass a motion of no confidence against Mr Tsotsi, I was mandated by the Board to meet with him to explore whether he would be amenable to stepping down without having to endure the specter of a drawn-out disciplinary hearing. I met with him, but he was not persuaded to follow that route. He felt the charges were without merit and that he wanted to clear his name in a formal meeting.

5.6. On 30 March 2015, the Board convened a meeting to consider, amongst others, the motion of no confidence and the removal of Mr Tsotsi as a director and Chairman of Eskom. Mr Tsotsi attended the meeting with his legal representative. Mr Mark Pamensky (**"Mr Pamensky"**) was appointed to chair the meeting. At this time I was yet to be appointed the acting Chairman of the Board. The allegations of

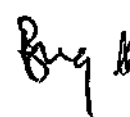
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misconduct were put to Mr Tsotsi and he placed all the allegations in dispute. Subsequently, the meeting adjourned and a discussion ensued between me, Mr Pamensky and Mr Tsotsi, during which we sought to persuade Mr Tsotsi to step down voluntarily without the Board having to vote on the matter. These discussions culminated in Mr Tsotsi's resignation as director and Chairman, on the basis that the Board would abandon its motion of no confidence against him. A copy of the minutes of meeting of 30 March 2015 is annexed hereto marked "BSN5".

5.7. The Minister accepted Mr Tsotsi's resignation and during the Annual General Meeting ("AGM") held on 31 March 2015, the Minister announced Mr Tsotsi's resignation and my appointment as acting Chairman. I do not have copies of the correspondence exchanged between Mr Tsotsi and the Minister regarding his resignation. A copy of the minutes of the AGM is annexed hereto marked "BSN6".

5.8. I do not recall at what stage the Minister was notified of the Board's decision to bring a motion of no confidence against Mr Tsotsi. I am however aware that the Minister was not opposed to the decision. I remember that during one of our meetings with the Minister, she too had been critical of Mr Tsotsi for various conduct, including his alleged interference with executive management in the performance of their



duties, for instance the award of contracts for the supply of oil and diesel, where she accused him of attempting to influence who should be awarded the contracts.

5.9. On 31 March 2015, I issued a press statement on my appointment as acting Chairman. In it, I also thanked Mr Tsotsi for his service to Eskom. I did not personally prepare the statement. It was provided to me by the Company Secretariat. Mr Phukubje Malesela was the Company Secretary of Eskom at the time.

5.10. I hasten to add that as a matter of practice, I did not prepare my own speeches or press statements at Eskom. They would be provided to me by the Company Secretariat or Corporate Affairs division.

5.11. I did not have a meeting or conversation with Mr Salim Essa ("Mr Essa") regarding Mr Tsotsi's resignation from Eskom. Nor did I have any correspondence with Mr Essa regarding any appointments and resignations and movement of any employees within Eskom.

## 6. **The appointment and early retirement of Mr Brian Molefe**

6.1. After the suspension of the four executives, including Mr Matona, who was the GCEO, there was serious vacuum in the leadership of Eskom.



- 6.2. The Board petitioned the Minister to approve the appointment of Mr Khoza as interim GCEO, whilst the P&G Committee worked with the Minister to find someone capable of turning around institutions and whose leadership had been tested to assume the position.
- 6.3. Whilst the search for a new GCEO was underway, the Minister suggested that we consider Mr Brian Molefe ("**Mr Molefe**"). The Board was amenable to the Minister's suggestion because we knew of Mr Molefe's track record, based on his work at the Public Investment Commissioners ("**PIC**") and Transnet SOC Limited ("**Transnet**"). The Board felt that Eskom was in dire straits and needed someone with Mr Molefe's skills and experience.
- 6.4. The Minister suggested that the Board approaches Transnet to request for Mr Molefe's release to Eskom. I wrote to the chairperson of Transnet, Ms Linda Mabaso ("**Ms Mabaso**") to convey our request and the board of Transnet agreed to release Mr Molefe on a secondment to Eskom. I do not have copies of the letters exchanged between the boards of Eskom and Transnet regarding Mr Molefe's appointment nor the secondment agreement.
- 6.5. Mr Molefe was therefore seconded to Eskom as the acting GCEO on 17 April 2015, for a period of 3 months. I do not recall how the 3 months





period came about.

6.6. On 23 June 2015, I addressed a letter to the Minister requesting her support for the extension of Mr Molefe's secondment as acting GCEO for a further period of 3 months. A copy of this letter is annexed hereto marked "**BSN7**". In the same letter, I informed the Minister that the P&G Committee had resolved to seek the full-time appointment of Mr Molefe to the position of GCEO and Ms Venete Klein ("**Ms. Klein**"), who chaired the P&G Committee had been tasked to procure a legal opinion on the most optimal approach to follow to give effect to the appointment of Mr Molefe. The Board did not wish to go through a public recruitment process because it had found its candidate in Mr Molefe.

6.7. The legal opinion was obtained from Bowman Gilfillan ("**Bowmans**") on 18 June 2015. A copy of the legal opinion is annexed hereto marked "**BSN8**". Bowmans advised that Eskom could appoint a GCEO without having to conduct a public recruitment process and that the Board could provide the Minister with a shortlist of one candidate only, whom the Minister could elect whether to appoint or not.

6.8. On 27 June 2015, the Minister responded to my letter agreeing to the request for the extension of Mr Molefe's secondment and also requested the Board to deal expeditiously with the appointment of a

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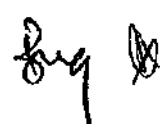
new GCEO in accordance with Eskom's Memorandum of Incorporation, Labour Relations Act and Eskom's employment policies and procedures. The Minister also requested to be provided with a copy of the complete legal opinion obtained from Bowmans on the matter. A copy of the Minister's letter dated 27 June 2015 is annexed hereto marked "BSN9".

6.9. On 13 September 2015, Ms Suzanne Daniels ("**Ms Daniels**") transmitted the legal opinion to Orcillia Ruthnam ("**Ms Ruthnam**"), who was at the time the Chief Director: Governance of the Legal and Governance Department at the DPE.

6.10. On 14 September 2015, Ms Ruthnam responded to Ms Daniels and enquired whether Bowmans had considered the "*Guidelines for the appointment of a Chief Executive Officer for a State - Owned Enterprise*" ("**the Guidelines**"). Ms Ruthnam also enclosed a copy of the Guidelines in her communication to Ms Daniels.

6.11. Copies of the emails exchanged between Ms Daniels and Ms Ruthnam on 13 and 14 September 2015 are annexed hereto marked "**BSN10**" and "**BSN11**", respectively.

6.12. On the same day, the Guidelines were sent to Bowmans, requesting



them to prepare a supplementary opinion having regard to the Guidelines, specifically on whether the proposed appointment of Mr Molefe on a permanent basis as GCEO was competent. A copy of the Guidelines is annexed hereto marked **"BSN12"**

6.13. On 15 September 2015, Bowmans delivered the supplementary opinion, advising Eskom that the Board was actually required to make recommendations to the Minister on the top 3 candidates in the order of priority and that any proposed deviation from that requirement required the Board to notify the Minister of such deviation in writing, together with reasons therefor. A copy of the supplementary opinion is annexed hereto marked **"BSN13"**.

6.14. On 16 September 2015, the supplementary opinion was emailed to Ms. Ruthnam at the DPE. A copy of the email is annexed hereto marked **"BSN14"**.

6.15. Ms Klein subsequently submitted a notification of Eskom's departure from the application of the Guidelines by way of a letter to the Minister. I understand the letter was sent to the Minister's office by Ms Daniels on 16 September 2015 with a signed version following thereafter, on 23 September 2015. The Minister did not object to the deviation.



- 6.16. Copies of the correspondence transmitted by Ms Daniels to the Minister on 16 and 23 September 2015 are annexed hereto marked "**BSN15**" and "**BSN16**", respectively.
- 6.17. In the meanwhile, on 10 September 2015, the Board resolved that the P&G Committee should submit a recommendation to the Minister for the appointment of Mr Molefe as GCEO. A copy of the minutes of this meeting are annexed hereto marked "**BSN17**". On 11 September 2015, and pursuant to the aforesaid resolution, I addressed a letter to the Minister advising her of the Board's decision to propose the permanent employment of Mr Molefe as GCEO. A draft employment contract was annexed to the letter for the Minister's consideration and approval. I attach hereto a copy of the said letter dated 11 September 2015 and the draft employment contract marked "**BSN18**" and "**BSN19**", respectively.
- 6.18. On 2 October 2015, the Minister approved the appointment of Mr Molefe as GCEO. In this regard, the Minister addressed a letter to me, copying Ms Klein and enclosing letters addressed to Mr Molefe and Mr Anoj Singh ("**Mr Singh**"), confirming their appointments as GCEO and Chief Financial Officer ("**CFO**"), respectively, with effect from 1 October 2015. The letters to each of Mr Molefe and Mr Singh did not specify the duration of their respective appointments. Copies of the said






letters are attached marked "**BSN20**" and "**BSN21**", respectively.

6.19. I do not recall how the process of appointment of Mr Singh came about. The P&G Committee managed that process. Nor do I recall whether the impact of Transnet losing both its GCEO and CFO at roughly the same time was considered or discussed with the Minister. Nonetheless, I am aware that the Board of Eskom was not opposed to Singh's appointment at Eskom. I did not know Mr Singh prior to his appointment at Eskom.

6.20. On 7 October 2015, a permanent contract of employment was prepared for Mr Molefe. A copy of the contract is annexed hereto marked "**BSN22**". The Minister's letter dated 2 October 2015 and addressed to Mr Molefe made no mention of a fixed term employment contract. The Board was advised by Mr Anton Minnaar ("**Mr Minnaar**"), Executive Remuneration Officer at Eskom, that none of the previous GCEOs of Eskom was appointed on a fixed term contract, hence the proposal to appoint Mr Molefe on a permanent contract.


6.21. On 8 October 2015, Ms Klein received an email from Ms Daniels, drawing her attention to the exchange of email communication between Ms Daniels and Ms Ruthnam regarding the term of appointment of Mr Molefe. A copy of this email is annexed hereto marked "**BSN23**". Ms



Ruthnam advised that the Minister had approved a five-year term for Mr Molefe. Ms Daniels had requested that Ms Ruthnam verify this as Mr Molefe's appointment letter had not stipulated a five-year term and that all previous GCEOs at Eskom were appointed on a permanent basis. Ms Ruthnam advised that the five-year term was a cabinet requirement. Nonetheless, Ms Ruthnam undertook to revert on whether the Minister would need to address the Board on the issue. According to Ms. Klein, she received no further correspondence on the issue and, under the circumstances, assumed the issue was resolved.

6.22. On 16 October 2015, I addressed a letter to the Minister on the proposed terms of Mr. Molefe's appointment and remuneration. A copy of this letter is annexed hereto marked "BSN24". The contents of the letter were informed by various inputs which the P&G Committee had obtained from Mercer, PE Corporate and Deloitte on chief executive remuneration packages. I do not have copies of these reports. None of these inputs considered any compensation for the loss of pensionable earnings that would result from Mr Molefe's appointment on a fixed term contract. The Board's understanding was that Mr Molefe's employment would be on a permanent basis.

6.23. On 1 November 2015, the Minister responded to my letter of 16 October 2015, in which she approved the proposed remuneration package to



Mr Molefe, a copy of the Minister's approval is attached hereto as **"BSN25"**. The Minister further recorded that the term of Mr Molefe's appointment was for a period of 5 years, subject to annual performance reviews. I do not recall corresponding with the Minister regarding Mr Singh's appointment.

6.24. The Minister's letter of 1 November 2015 was addressed to me as the Chairperson of the Board and was received by Ms Daniels on 4 November 2015.

6.25. On 9 November 2015, I presented Mr Molefe with a permanent contract of employment. At this time, the Minister's letter to me dated 1 November 2015 had not come to my attention or that of the Board. I do not know how the letter was transmitted to Ms Daniels.

6.26. On 12 November 2015, Ms Klein received an email from Ms Daniels enclosing a draft offer of employment letter dated 13 October 2015 which specified that Mr. Molefe would enter into a fixed term employment contract with Eskom but the term was not specified. A copy of this email is annexed hereto marked **"BSN26"**. At this time I was still not aware of the Minister's letter dated 1 November 2015.

6.27. The Minister approved Mr Molefe's proposed remuneration but



indicated that the term of employment would be for a fixed term of 5 years. The Minister directed the Board to change Mr Molefe's signed contract from a permanent one to a five-year fixed term.

6.28. On or about 16 November 2015, I advised Mr Molefe of the Minister's decision. Mr Molefe was amenable to the variation of his contract of employment to a fixed term contract of 5 years. Mr Molefe however had concerns regarding the adverse impact that the variation would have on his retirement and pension benefits.

6.29. Around that time, I was advised by the head of the P&G Committee that Mr Molefe had threatened to leave Eskom if the matter was not resolved to his satisfaction.

6.30. I advised the Board of the outcome of my discussions with Mr Molefe and his discontentment with the effect of the variation of the term of the contract of his employment on his retirement and pension benefits. The Board did not wish to lose Mr Molefe. As result, myself and Ms Klein were tasked to engage with Mr Minnaar to come up with a solution. I do not recall when this discussion with the Board took place or if there are minutes of such discussion. It is unlikely that it was discussed in a formal board meeting.

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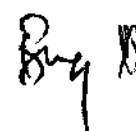


6.31. Mr. Minnaar was involved in the appointment of 7 previous GCEOs at Eskom in the six-year period prior to Mr Molefe's appointment. Mr. Minnaar advised that all Eskom's previous GCEOs were employed on a permanent contract basis and that based on the fixed five-year term contract, Mr. Molefe would not be able to accumulate an equivalent pension benefit during his service at Eskom. At this time, neither the Board nor Mr Molefe was aware that Mr Molefe could not be a member of the Eskom Pension and Provident Fund ("EPPF") unless he was a permanent employee of Eskom.

6.32. The Board then agreed that an arrangement should be put in place to ensure that Mr Molefe was not adversely affected in respect of his pension benefits. On 25 November 2015, Mr Minnaar assisted me in drafting a letter to the Minister, recommending that a retirement arrangement be reached with Mr Molefe in order to allay his pension concerns. A copy of the said letter is attached as "**BSN27**".

6.33. The arrangement proposed by the P&G Committee with the guidance of Mr Minnaar was that:

6.33.1. regardless of Mr. Molefe's age after the expiry of his five-year contract, he would be allowed to retire from Eskom's on the basis that he was aged 63;



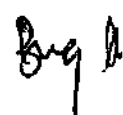
6.33.2. the penalties prescribed by the EPPF for retirement prior to the age of 63 would be waived and not payable by Mr Molefe. Eskom would then carry the costs of such penalties, which would be paid over to EPPF;

6.33.3. If Mr Molefe's employment contract was not extended beyond the five-year period, he would not be allowed to subscribe to any other state-owned companies or government pension fund; and

6.33.4. should the employment contract be extended, the costs of any subsequent penalties would decrease proportionately.

6.34. The effect of the abovementioned arrangement was such that Mr Molefe would be placed in the same position that he would have been had he retired from Eskom at the age of 63. The Board was in support of the arrangement.

6.35. On 25 November 2015, the terms of the arrangement were communicated in writing by Ms Daniels to the Minister's office. The Minister's office acknowledged receipt of the letter and undertook to bring its contents to the Minister's attention. Copies of this



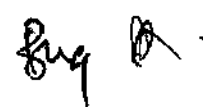
correspondence are annexed hereto marked "**BSN28**" and "**BSN29**", respectively.

6.36. As at 9 February 2016, however, a formal response to the letter addressed to the Minister had still not been received and at that time, there was no formal contract of employment with Mr. Molefe.

6.37. On 9 February 2016, the P&G Committee met to deliberate on the conclusion of a contract of employment with Mr. Molefe, including the issue relating to his pension benefits. In order to better understand the distinction between appointing Mr Molefe on a fixed term, as opposed to a permanent contract, basis and the options available to the Board for addressing Mr Molefe's concerns, the Board sought guidance from Mr. Minnaar.

6.38. Mr. Minnaar explained to the Board that due to Mr. Molefe's short term contracts with numerous public entities in which he served at executive level, he was deprived of the opportunity to grow a pension fund in a single fund.

6.39. The P&G Committee then resolved at its meeting of 9 February 2016 that:



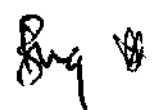
"7.5.1 the current EPPF rule that Employees may proceed on retirement from the age of 50 with 10 years' service remains applicable;

7.5.2 in cases where an Executive Director (appointed on a fixed term contract) decides to take an early retirement and there is a shortfall regarding the EPPF 10 years' service rule, Eskom shall:

- i. bridge the gap to make up for the 10 years;
- ii. waive the penalties applicable to early retirement;  
and
- iii. refund EPPF actual costs for additional service added, plus penalties applicable to early retirement."

7.5.3 a proposal in respect of the Chief Financial Officer to be considered and submitted to the Committee in due course."

6.40. A copy of this resolution is attached hereto marked "BSN30".



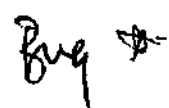


6.41. It was the intention of the P&G Committee that the arrangement had to be structured in such a way that the benefit would only accrue to Mr Molefe upon completion of his five-year term and that Mr Molefe would not be able to participate in any other government pension fund after qualifying for retirement at Eskom as per the resolution. Such intention was communicated to the Minister in my letter to her dated 25 November 2015. The practice was that the Board would take a decision on such matters and thereafter refer the same to the Minister for concurrence.

6.42. On 7 March 2016, Mr Molefe signed a second contract of employment for a fixed term of 5 years with effect from 1 October 2015 and terminating on 30 September 2020. A copy of the contract is attached hereto marked **"BSN31"**.

6.43. On 19 April 2016, the Board approved the resolution of the P&G Committee meeting of 9 February 2016. A copy of the board resolution is attached hereto marked **"BSN32"**.

6.44. On 6 September 2016, it was decided to increase the long-term incentive award for Mr. Molefe to two times the annual pensionable earnings on the basis that the amount was relatively low based on the benchmark against similar long - term incentive awards to the chief

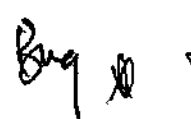


executives at his level. A copy of the resolution is attached hereto marked **"BSN33"**.

- 6.45. On 24 October 2016, the P&G Committee approved the additional award in the form of an increase to Mr Molefe's long-term incentive to two times the annual pensionable earnings. A copy of the resolution is attached hereto marked **"BSN34"**.

**7. The eventual payment of pension benefits to Mr Brian Molefe**

- 7.1. On 11 November 2016, Mr Molefe formally submitted his request for early retirement in terms of the EPPF rules read together with the board resolution of 9 February 2016. In the same letter, he also indicated that his last day of service would be on 31 December 2016. A copy of the said letter is attached marked **"BSN35"**.
- 7.2. On 15 November 2016, EPPF provided Eskom with the calculation of Mr Molefe's early retirement benefits on the basis that he would exit the service on 31 December 2016. It came to an amount of R25, 80 204,19.
- 7.3. On 21 November 2016, Mr Molefe's request for early retirement was discussed at a special meeting of the P&G Committee and the meeting agreed to support Mr Molefe's request and payment to him of the

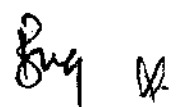


retirement benefits as calculated by EPPF. I was not at this meeting. I subsequently learned from Mr Minnaar that the meeting was not quorate.

7.4. On 24 November 2016, I wrote to Mr Molefe informing him of the approval of his request for early retirement in terms of Rule 28 and Rule 21.4 of the EPPF rules. I also confirmed that all penalties would be waived and further that his early retirement will be on the basis that Mr Molefe be deemed to have achieved the age of 63. The advice to the Board was that other senior executives had Eskom pay the penalty when they took early retirement. That was the point of departure. A copy of my approval letter is attached hereto marked "BSN36".

7.5. At this time I was not aware that the Minister had not responded to my letter dated 25 November 2015 regarding Mr Molefe's retirement. Mr Molefe's retirement was managed by the P&G Committee, with the assistance of Mr Minnaar. Board committees were entitled to take decisions on matters they were seized with and report to the Board on a quarterly basis in respect of resolutions they have taken. Thus, I had assumed that all was above board.

7.6. As at 23 March 2017, and pursuant to his early retirement, Mr. Molefe was paid the following amounts –



- 7.6.1. R575, 679.91 in respect of his salary up to December 2016;
- 7.6.2. R226, 278.84 in respect of leave due to him; and
- 7.6.3. R2, 110, 185.00 in respect of a short-term incentive bonus to the end of December 2016.
- 7.7. The total amount paid to Mr Molefe was the sum of R2, 912, 143.75.
- 7.8. I do not recall that the Board was consulted for approval of the above-mentioned amounts.
- 7.9. On 19 April 2017, the Minister called a meeting with me to discuss Mr Molefe's pension pay-out. It became evident at this meeting, that the Minister did not approve of Mr Molefe's early retirement arrangements as set out in my letter dated 25 November 2015. I do not have a copy of the minutes of this meeting.
- 7.10. The Minister maintained that the amount of R30, 103, 915.62 which was paid by Eskom to EPPF in respect of Mr Molefe's early was not permissible and should be repaid. I wish to point out that the Board had not been consulted for approval of these amounts. The P&G





Committee had taken this decision.

7.11. Following the meeting with the Minister, Ms Klein and Ms Daniels had a meeting later that evening with Mr Molefe to inform him of the Minister's position regarding his retirement arrangements.

7.12. According to Mr Molefe, he had received R7, 700, 000.00 from the EPPF on being admitted to the EPPF and of this sum, R4, 300, 000.00 had been transferred from the Transnet Pension Fund to the EPPF. I have not been able to verify these payments.

7.13. On 17 May 2017, the Board rescinded its acceptance of Mr Molefe's early retirement upon becoming aware that the Minister did not support it. A copy of the minutes of the Board meeting held on 17 May 2017 is annexed hereto marked "BSN37".

**8. Relationship with Mr Salim Essa and/or the Gupta's**

8.1. I knew Mr Salim Essa and Mr Nazeem Howa from past interactions with each of them before I was appointed to the Eskom Board.

8.2. I came to know Mr Howa when attending The New Age breakfast meetings during my time as Chairman of the South African

By M.

Broadcasting Corporation ("**SABC**").

8.3. I also knew Mr Essa prior to my appointment at Eskom. I had met him for the first time during 2011 or so when I was at the SABC. Mr Essa was on the Board of Broadband Infraco SOC Limited ("**BBI**"). I used to attend meetings with various state-owned entities, including BBI, as part of the SABC delegation, where we were discussing digital migration for the country. These were some of the occasions during which I interacted with Mr Essa.

8.4. Sometime during 2013, when I was sitting at JB's, Melrose with some people involved in the oil business in West Africa, especially Mali. Mr Essa came over to greet me. I introduced him to the people I was with. Once he knew we were talking about the oil business, he expressed an interest to participate as he too was in the oil business. He indicated that he had interests in oil blocks in other African countries. Following several interactions with me he suggested we form a new entity for oil exploration in African countries with potential oil blocks. This is how Gade Oil and Gas (Pty) Ltd ("**Gade**") came about.

8.5. Gade was a newly established entity and we each owned a 50% (fifty percent) interest. Both Mr Essa and I were directors of Gade. Mr Essa was to provide the financial capital required and arrange for our

By 10

prospective exploration in Central African Republic ("CAR"). I was to leverage my networks from my days in the Diplomatic Corps as Ambassador to procure contracts, particularly for supply of oil to African countries in which there was need.

8.6. The venture collapsed around the time of the civil unrest in CAR during 2013 and Mr Essa resigned as director of Gade. In the end, Gade never traded.

8.7. I knew members of the Gupta family. When I was Chairman of the SABC I often met members of the Gupta family together with officials of The New Age newspaper at the business breakfasts which were arranged by The New Age and broadcast on the Morning Live programme of the SABC. My relationship with them was social, but not business related. I used to receive invitations for social events at their home in Saxonwold and attended some.

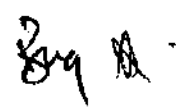
8.8. I was invited to and attended the much talked about wedding at Sun City. At that time, I was a member and Chairman of the SABC board.

8.9. I have travelled through Dubai three or four times, but never at the expense of the Guptas or at their instance. These were personal journeys to overseas countries. I did not keep a record of these travels.

Byg

## 9. Business Man email account

- 9.1. I was copied on the email addressed to Ms Daniels regarding the draft statement by chairman on 11 June 2016 from "*businessman*" on the email address: [Inforportal1@zoho.com](mailto:Inforportal1@zoho.com). There were comments made to the media statement I was going to issue. A copy of the email is annexed hereto marked "**BSN38**".
- 9.2. I understood from Ms Daniels that the "*businessman*" email address belonged to Mr Richard Seleke ("**Mr Seleke**"), who at the time was the Director General ("**DG**") at DPE.
- 9.3. The Director General of any Government Department has a lot of influence as he/she speaks and advises the Minister directly. The DG in this instance took a keen interest in the business of Eskom, especially on how Eskom was reflected in the media. He was also very concerned that he and the Minister often saw statements issued by Eskom for the first time, in the media. I had a meeting with him at his DPE office at some point, where he expressed this concern. I cannot recall when this meeting was.
- 9.4. I did not share Eskom confidential or proprietary information with Mr Essa or anyone outside Eskom and the DPE.





## 10. T-Systems

- 10.1. I was appointed to the Eskom Board during December 2014. Soon after my appointment Mr Tsotsi asked me to chair the BTC, to which I agreed.
- 10.2. To the best of my knowledge, Eskom had commenced the procurement process which was aimed at replacing T-Systems before I was appointed to the Eskom Board.
- 10.3. During February 2015, the Executive Committee Procurement Sub-Committee ("EXCOPS") decided to cancel the procurement process aimed at replacing T-Systems in relation to the provision of IT services to Eskom.
- 10.4. EXCOPS' made a presentation to the BTC motivating for the cancellation of the procurement process to the BTC meeting held on 28 February 2015 I chaired the BTC meeting.
- 10.5. In my statement to Parliament I suggested the BTC meeting took place on 24 February 2015. I have now established that date was incorrect. 24 February 2015, was the meeting of the Executive Committee Procurement sub-Committee which decided on the recommendations

that were to be presented to BTC at the 28 February meeting.

10.6. EXCOPS' motivation for the cancellation of the procurement process was presented to the BTC as follows:

10.6.1. Around December 2014, more than 50% of senior Eskom employees who were critical to the management of the Eskom IT Division accepted voluntary severance packages which had been offered by Eskom to employees in general, and left Eskom;

10.6.2. The departure of the said employees resulted in depletion of skilled resources and thus a lack of requisite capacity within the IT Division, as the affected positions were quite senior. This negatively affected Eskom's Generation Division;

10.6.3. By virtue of the crisis in Eskom's Generation Division, as manifested in persistent load shedding at the time, the view was then formed that bringing in a new IT service provider, which would be unfamiliar with the Eskom Generation business, would likely exacerbate the electricity supply problem which was already prevalent

during that entire period;

10.6.4. T-Systems' continued involvement, as the incumbent IT service provider, which was already familiar with the power station system in Eskom would be in the best interests of both Eskom and the country; and

10.6.5. That under the circumstances, it made commercial sense for Eskom to extend T-Systems' contract, and to cancel the procurement process which was then aimed at replacing them.

10.7. On the strength of the abovementioned motivation by EXCOPS, the BTC approved the recommendation for cancellation of the procurement process to replace T-Systems. The procurement process was then cancelled by Eskom.

10.8. I do not have the documents pertaining to the EXCOPS decision and the procurement process under consideration.

10.9. My understanding was and still is that in terms of the Eskom SCM Procedure, Eskom was entitled to cancel any procurement processes. Paragraph 3.4.5.7 of the SCM Procedure states, *inter alia*, that

Baq

cancellation/re-issuing of tenders may occur any time after the tender has been issued to the market and before contract award.

10.10. I recall an oral opinion was expressed by Mr Neo Tsolanku, a legal adviser at Eskom, that Eskom could not cancel the procurement process because it did not meet the criteria for cancellation of tenders as stipulated in the procurement regulations. However, following extensive deliberations on the matter, the BTC decided to cancel.

10.11. I note that the minutes of the meeting of 28 February 2015 refer to change of business strategy as but one of the motivations that were presented to the BTC in support of cancellation of the procurement process. I do not recall the discussion of the BTC on that aspect nor that it was considered at all.

10.12. I did not discuss the cancellation of the procurement process or extension of the T-Systems contract with Mr Essa.

#### 11. **Meeting with Minister Ngoako Ramatlhodi**

11.1. I set out below the context of my and Mr Molefe's meeting with Advocate Ngwako Ramatlhodi ("Minister Ramatlhodi").

Buy 18



- 11.2. As Chairman of Eskom I had consistently sought to protect Eskom's generating capacity as this was critical to ensuring load shedding ends. Central to this effort was ensuring adequate supplies of the volumes of coal required, but at affordable prices.
- 11.3. I recall from the documents I have gleaned at the time that Glencore were insisting on substantial increases in the price of coal while the quality of the coal they supplied was declining. Glencore had been washing their coal to RB1 export grade and giving Eskom the middlings coming out of the wash. I learned that this had been happening from 2012 onward.
- 11.4. At some point the Energy Availability Factor ("EAF") across various Eskom power stations deteriorated by 10% from 85% to 75% due to breakdowns associated mostly with the burning of low quality coal.
- 11.5. The boiler explosion at Duvha was due to inadequately combusted coal as far as reports to me indicated. 10% of coal plants were not available at any one time.
- 11.6. At the meeting held between the Minister and the Board on 20 March 2015, the Minister insisted that she be informed of coal supplies that were in place throughout the country because the supply of coal to



Eskom could not be compromised. The meeting was to discuss *"the state of the system"* as I recall. These meetings were also attended by members of executive management. I do not have minutes of this meeting.

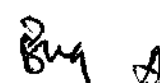
11.7. The Minister also wanted to be provided with the timeline generating units that were coming out of maintenance. She went on to say government's efforts at transforming the lives of especially poor South Africans could not be frustrated. 6,000,000 households were already connected to the electricity grid and load shedding was denying them a better quality of life. I do not recall if there were minutes of this meeting. These would be briefings before the open meetings with the press.

11.8. To meet its goals Eskom was to implement cost containment measures and find a solution on pricing of coal supplies. The high cost of coal would drive up the cost of electricity.

11.9. There were six coal mines where Eskom had to provide capital expenditure (the cost plus mines), and this resulted in cost increases in relation to the coal price itself, as Eskom was required to make continuous investments to bring out the coal.

By A.

- 11.10. Despite the capital investments coal from cost plus mines was marginally cheaper than of fixed price collieries, e.g. Kusile coal (a cost plus mine) was R300/ton compared to R400 from an untied colliery.
- 11.11. On 21 August 2015 the GCEO, Mr Molefe, reported to the Board that there was a danger that the Eskom grid could lose 2000MW from the Hendrina power station which was supplied by Glencore's Optimum Colliery. Mr Molefe reported that he had had an acrimonious meeting with Glencore who wanted the price per ton increased from the contractual value of R150 per ton to R500 per ton, which he had refused. I cannot recall whether Mr Molefe's report was in writing. I am not aware there are minutes of this meeting.
- 11.12. Mr Molefe advised me that Glencore had indicated they would stop supplies to Hendrina. If executed this would result in the loss of 2000MW, which was going to reverse all the gains management had achieved in the race to stop load shedding and stop the use of very expensive diesel for the Open Cycle Gas Turbine generators, which was the last desperate effort to keep the lights on.
- 11.13. Mr Molefe further advised me that every R10 increase in the price of coal would increase the tariff by 4%. To make matters worse, Hendrina required coal which has a CV of 23 GJ while other collieries produce of

By 

a CV of 21 GJ, therefore this higher quality CV was difficult to obtain. Hendrina was one of three best performing power stations in terms of EAF.

11.14. The fact that Optimum Colliery was being placed under business rescue also presented a risk that there would be no further coal supplies from Optimum Colliery.

11.15. In the face of all these concerns about the sustainability of coal supplies for Hendrina power station, Minister Ramatlodi had suspended the mining licence for Optimum Coal Holdings on 03 August 2015. He suspended the licences because Glencore had apparently undertaken retrenchments in a non-compliant manner.

11.16. Optimum Coal Holdings had open cast mines and a complex of Underground Mines. Among These are:

11.16.1. Kwagga Colliery;

11.16.2. Pullenshope Colliery;

11.16.3. Ekeboom Colliery;



11.16.4. Boschmanspoort Colliery; and

11.16.5. Koorfontein Colliery.

11.17. Loss of coal from all these collieries would seriously jeopardise Eskom electricity generation.

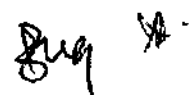
11.18. These were the concerns that drove Mr Molefe and I to request a meeting with Minister Ramatlhodi, who then was the Minister of Mineral Resources, to appraise him of the consequences of suspension of the coal mining licence. The meeting took place at Minister Ramatlhodi's offices in Pretoria. The meeting was arranged by Mr Molefe. I cannot remember the date of the meeting. Luckily Minister Ramatlhodi reinstated the mining licence on 11 November 2015

11.19. I deny Minister Ramatlhodi's account of the version of events regarding the purpose and content of my discussion with him during the meeting which was held between him, Mr Molefe and I. That was the only meeting which Mr Molefe and I attended with Minister Ramatlhodi. I do not recall there was anyone else accompanying Minister Ramatlhodi to the meeting.

12. **The R1.68 billion guarantee**

by A .

- 12.1. The guarantee fell within the primary coal energy issues, which I was not involved with.
- 12.2. The R1.68 billion guarantee was approved by the Board during December 2015. I do not have copies of the report that served before the Board nor the minutes of this meeting.
- 12.3. The Company Secretary, Ms Daniels, requested an urgent meeting on the basis of the letter Mr Matshela Koko ("**Mr Koko**") had written to the DG of the Department of Mineral Resources ("**DMR**") on 6 December 2015, and the undated response of the DG of DMR. Copies of this correspondence are attached hereto marked "**BSN39**" and "**BSN40**", respectively. The Company Secretary presented a memorandum dated 8 December 2015 dealing with the urgency of the matter, a copy of which is attached hereto marked "**BSN41**". But because people were in different places we agreed on a round robin resolution. It had first to go through the Investment and Finance Committee ("**IFC**"). The IFC had its own round robin. They approved the emergency payment in order to secure coal supply. Since the IFC had recommended it, the Board approved the proposed round robin resolution and approved the issuing of the guarantee. A copy of the approved resolution is annexed hereto marked "**BSN42**".



### 13. Conclusion

13.1. I believe the statement gives a fair account, to the best of my knowledge or recollection, of the events that happened during my tenure at Eskom.

Bogubane

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at 04 August on the Umheli day of Post office 2020, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

Shur

COMMISSIONER OF OATHS

Semata Beluen

Beluen



# 13





**WRITTEN SUBMISSION OF MR MATSHELA MOSES KOKO**

I, the undersigned,

**MATSHELA MOSES KOKO**

hereby state that:

**INTRODUCTION**

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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<sup>8</sup> MMK 2, bundle pp 2 – 3.

**“THE PURCHASE OF OPTIMUM COAL HOLDING BY TEGETA FROM GLENCORE”**

**Introduction**

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

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

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

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

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

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

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

<sup>15</sup> MMK 3, bundle pp 4 – 5.



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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

89. My belief at the time was that if that was what was going to be required to save the situation, that was what had to be done, taking into account that prepayments for

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<sup>46</sup> MMK 21, pp 64 – 65.



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

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

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

<sup>48</sup> MMK 3, bundle pp 4 – 5.

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

**Eskom’s presentation to SCOPA**

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

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

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

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

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

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

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

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



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104. Tegeta was at the time already a coal supplier to Eskom elsewhere. Tegeta owned a coal mine, Brakfontein Mine, that supplied coal to the Majuba Power Station on a long term contract. As buyer in terms of the 10 December 2015 deal with OCH it was also at that stage likely to become party, via Optimum, to the Hendrina Coal Supply Agreement enduring until the end of 2018.
105. Tegeta supplied coal to Arnot from coal sourced from Optimum's export coal stockpile. It had purchased the coal in terms of two agreements, each for fixed tonnages of coal, which, however, had fixed termination dates. These contracts had been concluded with the business rescue practitioners of Optimum.<sup>53</sup> The last of the two agreements expired on 15 April 2016.
106. Mr Piers Marden confirmed before this committee that:
- “Optimum Coal Mine never supplied coal to Eskom. We supplied coal to Tegeta on a 30-day payment terms. So the prepayment was a transaction between Tegeta and Eskom...”.*
107. Umsimbithi operates the Wonderfontein Colliery that supplies coal to Arnot. It also had a short term contract with Eskom that would expire during June 2016.
108. The offers for the increased coal supply encompassed that the short term contracts with Tegeta and Umsimbithi had to be extended. In Tegeta's case that required that a contract for an extension be negotiated and agreed between Eskom and Tegeta and that Tegeta secure the coal with Optimum.
109. I learnt from Ms Nteta that Tegeta had requested a prepayment in respect of the to be extended short term coal supply agreement. It made a case in this regard on the

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

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

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

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

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

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

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

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

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

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

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

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



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

#### **Carte Blanche**

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

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

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

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

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

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

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



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

**"CORPORATE GOVERNANCE AT ESKOM"**

138. Insofar as I have been requested to make a written submission to Eskom regarding "corporate governance at Eskom", I am somewhat at a loss to understand what I am required to provide to the Portfolio Committee. Eskom, as a corporate entity, is governed in terms of detailed written policies and procedures that are, in the usual course, regularly reviewed in three year cycles and subjected to renewed approval at various levels within the organisation. The most important of these is probably Eskom's "Delegation of Authority Policy".

139. Eskom's policies and procedures are carefully crafted documents that have been compiled on the basis of Eskom's institutional knowledge accumulated over many decades, sound business practices and a legal environment constituted of a wide array of regulatory provisions arising in terms of primary and subordinate legislation.

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

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

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

**Mrs Venete Klein**

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

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

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



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

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

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

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

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

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

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

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

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



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

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

**MS SUZANNE DANIELS**

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

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

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

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

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

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



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

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

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

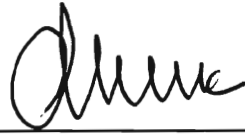
*“3.18.7. When we spoke about TMC’s direct invoicing to Eskom [as I had been instructed to do], Matshela responded that he understood TMC’s request to invoice directly, but could not support it – simply put, there were no contracts in place between Eskom and TMC.”*

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

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

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**MATSHELA MOSES KOKO**

21 January 2018  
Johannesburg

