

**Parliamentary Inquiry into State-Owned Enterprises**

**Eskom Holdings SOC Limited**

**Date: 12 October 2017**

---

**Submission: Eskom Provident and Pension Fund**

**Retirement Payout: Brian Molefe**

---

## 1 Background

- 1.1 The Fund is a defined benefit<sup>1</sup> pension fund as contemplated in the Pension Funds Act and as such is regulated by the Financial Services Board (FSB). The Fund is supervised by the FSB and must meet all compliance requirements applicable. The FSB and the Fund have regular interactions by means of correspondence, meetings and regulatory visits.
- 1.2 The Fund is bound to act in accordance with the *Pension Funds Act 24 of 1956 (PFA)* and the registered rules of the Fund<sup>2</sup> (the **Rules**). For ease of reference the Rules are attached hereto at **annexure A** in the bundle.
- 1.3 Control and governance of the Fund vests in its board of trustees (the **Board**) in accordance with the PFA and the Rules. The Board is made up of 14 trustees, 7 of whom are employer appointed trustees and the remainder being elected trustees<sup>3</sup>. The term of office of a sitting Board is 4 years and no Board member may serve more than two consecutive terms.
- 1.4 Whilst the Board exercises control and governance over the Fund, it is however not practical for the Board to carry out or attend to the day to day management of the Fund, as such the Fund has a management team. The executive team comprises, amongst others, the Chief Executive (Mr Sbu Luthuli, who also serves as the principal officer), the Chief Financial Officer (Nopasika Lila), the Chief Investment Officer (Ndabe Mkhize) and the Retirement Fund Operations Manager (Joey Sankar). The Fund requires a substantive and comprehensive operating process as it is a self-administered fund, that is, it undertakes its own administration processes which are audited annually. In this submission, for ease of reference we refer to Chief Executive as the Fund CE and the Retirement Funds Operations Manager as the RFO Manager.
- 1.5 The management team together with the employees of the Fund are tasked with the day to day operations of the Fund. In this regard, the Fund operates, amongst other protocols, processes, policies and procedures, within the ambit of the PFA, its Rules, in terms of the governance framework (attached hereto at **annexure B**) of the Fund. The Fund's Governance Framework records various delegations from the Board to Board Committees and to Fund management. Accordingly, in some instances although a function may reside with the Board it may be the subject

<sup>1</sup> Members are provided with a retirement benefit in accordance with a formula as recorded in the Rules, that is, on retirement members are not exposed to investment fluctuations.

<sup>2</sup> See section 13 of the PFA

<sup>3</sup> See Rule 3.3(1)

of a delegation to Fund management. In addition, a delegation of authority was resolved upon in 1994 by the then Board (**Delegation** attached hereto at **annexure C**). In terms of this Delegation, Fund management has been delegated the function of, amongst other things, managing the Fund in accordance with the Rules of the Fund and exercising any discretion reserved in terms of the Rules<sup>4</sup>.

- 1.6 The current Board assumed office on 1 June 2016. The Board and management have continued to operate under the processes determined by former boards of trustees of the Fund. Accordingly the day to day running of the Fund operates, amongst other standard operating processes, as described in paragraph 1.5, particularly in relation to the Delegation. The existence and operation of the Delegation assisted with the smooth running of the Fund. The Board, for all intents and purposes, continues to oversee and govern the Fund in line with best practice and applicable legislation.
- 1.7 The Fund is a restricted Fund, that is, membership of the Fund is restricted to eligible employees and executives of Eskom (including subsidiaries) and the Fund itself (as employer of employees).
- 1.8 As such, employees who meet the eligibility criteria of the Fund are obliged to participate as members. The eligibility criteria as recorded in the relevant provisions in the Rules can be summarised as follows:
- (1) The individual must be below the pensionable age (65 years)<sup>5</sup>.
  - (2) The individual must be an employee of either Eskom (being either Eskom Holdings or Eskom Rotek Industries) or the Fund.
  - (3) The individual must not be on a fixed term contract or fixed purpose contract. The individual must be a permanent employee (given that the definition of eligible employee precludes temporary employees from being eligible and the definition of temporary employee refers to an individual appointed for a specific period, in other words an individual on a fixed term contract).
  - (4) If there was condition requiring that the individual must have been in the employ of Eskom or the Fund for a specified time before being allowed to participate in the Fund, that condition must have been satisfied.

---

<sup>4</sup> Paragraph 1  
<sup>5</sup> Rule 11

- 1.9 The Fund manages in excess of R133 billion worth of assets for its members. As at 30 June 2017, the Fund had 85 000 members, comprised of about 46 900 active members with the balance being made up of pensioners, deferred members and beneficiaries.
- 1.10 The relationship between the employers and the Fund is one of good faith that has been established over a number of years. The Fund depends on the employers in many instances, given that the employers are the interface between the Fund and its members. Further, the information that is required by the Fund for operation is in most instances held by the employers. For instance the Fund is not able to independently ascertain whether an employee is on a permanent or fixed term contract at Eskom. The Fund does not have sight of the contracts of employment. This is normal practice in the retirement funding industry. It is very unusual, and in fact highly unlikely, that any pension fund requires or has sight of the employment contracts of its members.
- 1.11 The Fund does not have application forms given that it is compulsory for all eligible employees of Eskom to become members of the Fund. The process for taking on new employees as members of the Fund is done through a well-established practice of electronic information being transferred from Eskom to the Fund. Eskom provides the Fund with a monthly schedule which records all the members of the Fund including new employees that satisfy the eligibility criteria. This file is known as the Leg File and contains the following relevant information:
- (1) The personal information of the new employee;
  - (2) The employment position of the person, that is, whether they are executive or not; and
  - (3) Salary information.
- 1.12 The information recorded in the Leg File is the only information provided by Eskom in respect of a new employee or new member of the Fund.
- 1.13 Given the vast number of employees of Eskom that participate in the Fund, the relationship of good faith that exists between the Fund and Eskom is imperative for the day to day operations of the Fund.
- 1.14 The Fund is of the view that Eskom is well placed to provide it with the information necessary to create a new member record given that Eskom is well aware of the Rules. The Fund places reliance on Eskom to know the Rules for the following reasons:

- (1) The Fund provides regular updates to Eskom by way of correspondence, where necessary, and through interactions with various stakeholders, including making presentations to Eskom committees and members. The presentations include an overview of the Rules. Attached is a presentation by the Fund to the People and Governance Committee of the Eskom Board (**annexure D**) as well as a member presentation (**annexure E**).
- (2) Members, including the executive of Eskom, are provided with member guides that summarise the applicable Rules. The member guides are also available on the Fund's website. A copy of a member guide is attached (**annexure F**).
- (3) The Fund provides Eskom with all proposed amendments to the Rules so that Eskom is continually aware of its obligations as well as any potential impact that an amendment may have on Eskom.
- (4) Eskom has historically requested information from the Fund relevant to calculations under the various Rules. Further, Eskom has applied the Rules when giving effect to retirements, resignations, deaths and ill-health exit events. Eskom clearly understands the nuances which attach to the various exit Rules.
- (5) The Fund, as its name suggests, was established specifically to provide a retirement funding solution for Eskom. Further, Eskom is not an employer that is newly participating in the Fund; Eskom has participated in the Fund since the Fund's inception.
- (6) The contents of the monthly electronic information provided by Eskom, as recorded in the Leg File (as described in paragraph 1.18), specifically the criteria for eligibility was addressed with Eskom. Prior to 2013 Eskom provided Leg Files that recorded information for employees, including contractors, notwithstanding that contractors are not eligible for membership (given that they are not permanent employees). The member administration system used by the Fund at the time would indicate an error message when the Leg File was loaded as there would be a mismatch in data given that no member files existed or could be created for contractors. This mismatch in data resulted in an undue administration burden for the Fund. During 2013 there were interactions between the Fund and Eskom with a view to addressing the contractor information that was being provided by Eskom. It was agreed

between Eskom and the Fund that Eskom would only provide information for those employees that satisfied the eligibility criteria and not for temporary employees or contractors. The Fund relied on Eskom to ensure that it provided information in line with the Rules and this arrangement. Subsequent to this meeting, Eskom has only, to the Fund's knowledge, provided information in line with the arrangement. Correspondence, in the form of e-mails between Eskom and the Fund, setting out the exclusion of contractors is attached (annexure G).

- (7) Eskom has a pensions office, staffed by Eskom employees which plays an integral part in the interface with the Fund and has full knowledge of the Rules.
- (8) Eskom, as and when necessary, issues its own human resource policies and procedures, which policies and procedures record Eskom's knowledge of the Rules. In this regard, the following is attached:
  - (a) Policy dated October 1990 pertaining to extra service granted in the event of retirement. The document specifically records instances when additional pensionable service will be granted to employees at Eskom's behest (annexure H).
  - (b) Policy dated 6 April 1999 pertaining to separation benefits for, amongst others, early retirement. The policy expressly at 2.1 appears to record Eskom's understanding of Rule 28 (annexure I).
  - (c) Policy dated 25 July 2000 pertaining to separation benefits for, amongst others, early retirement. The policy expressly at 2.1 appears to record Eskom's understanding of Rule 28 (annexure J).
  - (d) Policy dated 1 April 2001 pertaining to separation benefits for, amongst others, early retirement. The policy expressly at 2.1 appears to record Eskom's understanding of Rule 28 (annexure K).
  - (e) Policy dated October 2008 pertaining to separation packages for, amongst others, early retirement. The policy expressly at 2.1.1 appears to record Eskom's understanding of Rule 28 (annexure L).

- (f) Policy dated 2013 pertaining to separation packages for, amongst others, early retirement. The policy expressly at 1.1.1 appears to record Eskom's understanding of Rule 28 (**annexure M**).

- 1.15 The current administration process is that the Fund receives the electronic member information within the Leg File (as described below in paragraph 1.18(1)) and uploads such information. The Fund conducts certain verifications relevant to the information contained on the Leg File. One such verification is to determine the employment status of a new member. This process is a well-established process as between the Fund and Eskom. The Fund's verification process operates in respect of codes which have been agreed and provided by Eskom. In this regard, an email dated 24 June 2013 relevant to a data confirmation exercise between the Fund and Eskom is attached as **annexure N**. The email, amongst other corroborations received from Eskom, records the codes applicable to the employment status of members (in this regard, **annexure O** records recent codes received from Eskom in line with the historical coding used). These codes inform the verification of the employment status of a new member. The Fund extracts a report of all new members on a monthly basis and the information on such report is verified in various ways. For instance, the Fund would test whether a potential new member is a permanent employee by checking the code on the new member report and determining whether that code aligns with the permanent coding provided by Eskom.
- 1.16 In addition to the new employee information being recorded by Eskom on the Leg File and provided to the Fund, a reconciliation is done every month, by way of a Res file (as described below in paragraph 1.18(3)) also provided to the Fund by Eskom, to determine how many new members have joined and how many members have left the Fund.
- 1.17 After considering the information provided by Eskom, the Fund is in a position to determine whether the eligibility criteria have been met. The employment status of the employees is however tested with reference to the coding provided by Eskom to the Fund. If the eligibility criteria have been met then the Fund is obliged to accept the employee as a member. Where the eligibility criteria have not been met then the Fund is precluded, by operation of the PFA and the Rules, from accepting such an employee as a member.
- 1.18 An employee would, once admitted to the Fund, continue as a member until such time as an exit event occurs (the employee/member resigns, is dismissed or retires for instance). The Fund places

great reliance not just on the application information but also on the monthly electronic member information recorded on the Leg File as well as electronic exit information recorded on the Res File provided by Eskom. In this regard Eskom would provide the Fund with a monthly schedules/files setting out the following:

- (1) Leg File – a file that consists of all member static data i.e. unique number, identity number, initials; surname, date of birth. On the Fund's side, once received, the file is uploaded and the system validates on identity number (the identity numbers recorded on the file are checked against existing member records of the Fund). If an identity number is not found then a new member record is created and treated as a new member. The Leg File outlines the salary and the contributions as well as the benefit the employee will receive at withdrawal. The employee will have their contribution matched to the pensionable salary.
- (2) Pay File – a file that contains member financial data i.e. Member unique number, salary, contributions and additional voluntary contributions. The Pay file essentially shows how much money there is on account, outlines the salary and the contributions, and also depicts the benefit the employee will receive at withdrawal. The employee will have their contribution matched to the pensionable salary.
- (3) Res File – a file that contains all member exits or withdrawals for the month. File contains member static data and exit type, exit date. The system is then updated with the relevant member information.

1.19 Further, the nature of the retirement funding environment is that without a relationship of good faith between a fund and an employer, the fund would find in some instances that it would face practical administration challenges. The environment is one in which a great deal of reliance is placed on the employer to provide information, being the holder of such information, to the Fund.

1.20 Reliance is again placed on Eskom when an employee's employment is terminated, that is, an exit event occurs. The Rules treat exit events differently. For instance an employee whose exit event is attributed to retirement will be entitled to a benefit which is calculated very differently to an employee whose exit event is as a result of a resignation. The Rules regulating exit events are in most instances distinct. In this regard it is immediately evident that reliance would be placed on the employer (with corroboration from the employee) as to the nature of the exit event. The Fund is not

placed to independently ascertain the rationale for an employee's exit and relies on the information provided by Eskom and the employee as recorded in the exit form completed at the time of exit. The relevant exit form must be signed by Eskom and the employee in order to be processed by the Fund and the type of exit will also be recorded in the Res File provided by Eskom to the Fund on a monthly basis.

1.21 All exit forms (the Fund has differing exit forms depending on the type of exit) were available publically on the Fund's website until May 2017. Subsequent to May 2017, the exit forms are available to members who are registered to access the website and are available to Eskom on the Eskom intranet (a template retirement exit form is attached as **annexure P**. The retirement exit form requires the following pertinent information to be completed:

- (1) the form records the available Rules governing retirement and requires that the Rule regulating a retirement be selected. The selection is made by way of ticking the applicable option. The form records options available under Rules 18, 23, 24, 25 and 28;
- (2) the last day in service of the member to be completed;
- (3) the personal details of the member;
- (4) the member is required to initial each page and a signature with a date is required on the third and sixth page of the form;
- (5) the Human resources department at Eskom (HR) is required to populate the following information in relation to the member:
  - (a) date of engagement;
  - (b) deemed start date for pension purposes;
  - (c) final annual basic salary;
  - (d) information around any service outside of the Republic;
- (6) the member makes a declaration that the information provided on the retirement exit form is correct and true; and makes an acknowledgement that the member has read and understood the contents of the retirement exit form. Furthermore, the member agrees that

payment in accordance with the member's instructions will present a full discharge of the Fund's liability to the member; and

(7) a declaration by shared services HR that:

- (a) all required supporting documentation have been attached to the retirement exit form;
- (b) the HR administrator has verified the information supplied on the form and has explained all available options to the member;
- (c) the declaration is signed by the HR administrator and the shared services HR supervisor.

1.22 The reliance placed on Eskom by the Fund is further fortified by the declaration, required from Eskom, that the information supplied on the retirement exit form has been verified.

1.23 As evidenced above Eskom understands and has very good knowledge of the Rules specifically the Rules relevant to new employees and exits from the Fund. Eskom is well aware that the following Rules apply to the differing retirement options. Rules 23, 24, 25 and 28 regulate the retirement of a member in the following instances:

- (1) Rule 23 – regulates retirement at pensionable age, that is, at age 65 years;
- (2) Rule 24 - regulates early retirement, that is, retirement of a member after reaching 55 years of age;
- (3) Rule 25 – regulates retirement due to ill health; and
- (4) Rule 28 – notwithstanding that the heading of the Rule 28 is recorded as "Retrenchment" in substance the Rule regulates instances where a member, who has not reached 65 years of age, is retired from service owing to a reduction in or reorganisation of staff, or to the abolition of his office or post, or in order to facilitate improvements in efficiency or organization or to retrenchment generally.

1.24 It is necessary to devote attention to Rule 28 and 21(4). Rule 28 reads as follows:

- (1) Subject to the provisions of subsections (2), (3) and (4), if a MEMBER who has not attained the PENSIONABLE AGE is retired from the SERVICE owing to a reduction in or reorganisation of staff, or to the abolition of his office or post, or in order to facilitate improvements in efficiency or organization or to retrenchment generally, he shall be paid a benefit equal to three times his contributions plus ten per cent of his FINAL AVERAGE EMOLUMENTS for each year of his PENSIONABLE SERVICE before 1 January 1950; provided that in the case of a MEMBER whose admission to the FUND was deferred under rule 11(1), for the purpose of the calculation of the lump sum payable under this rule, there shall be added to the MEMBER'S contributions the amount which he would have contributed to the FUND if he had been admitted without the waiting period.
- (2) If a MEMBER becomes entitled to a benefit in terms of this rule, he may elect instead:
- (a) that an amount equal to the actuarial value in respect of his SERVICE, as determined by the ACTUARY, be deemed to be a voluntary contribution made by him on the date of leaving the SERVICE; or
  - (b) to receive a benefit equal to his ACCUMULATED CONTRIBUTIONS and to have the balance of the actuarial value in respect of his SERVICE deemed to be a voluntary contribution so made. Provided that in such circumstances the MEMBER shall become a DEFERRED PENSIONER and the benefit in subsection (a) or the balance of the actuarial value in respect of his SERVICE referred to in subsection (b) shall be deemed to be voluntary contributions and dealt with in terms of the provisions of rule 18(7).
- (3) With effect from 4 March 2000 if a MEMBER who has attained the age of 50 years, or who had attained the age of 45 years and who is listed in Appendix 10 to the RULES, and has not less than ten years' PENSIONABLE SERVICE, becomes entitled to a benefit in terms of this rule, he may instead be granted at the discretion of the BOARD after consulting the EMPLOYER, as from the date of his leaving the service of his EMPLOYER, a PENSION in respect of his PENSIONABLE SERVICE calculated in terms of rule 22, without reduction in terms of rule 24.

- (4) *If a MEMBER'S SERVICE is terminated by due notice from his EMPLOYER, it shall be in the absolute discretion of his EMPLOYER whether he shall be entitled to a benefit in terms of this rule or in terms of rule 30.*
- (5) *Notwithstanding anything to the contrary contained in this rule 28, if the benefit payable in terms of subsections (1), (2) or (3) is less than the MEMBER'S MINIMUM INDIVIDUAL RESERVE, the MEMBER'S MINIMUM INDIVIDUAL RESERVE shall be payable or wholly or in part treated as a deferred benefit instead of the benefit referred to elsewhere in rule 28.*

1.25 For purposes of this submission it is only relevant to consider Rule 28(1) read with Rule 28(3).

1.26 The provisions of Rule 28(1) record the following conditions which are required to be satisfied:

- (a) the member must be below the age of 65 years; and
- (b) be retired from the service owing to a reduction in or reorganisation of staff, or to the abolition of his office or post, or in order to facilitate improvements in efficiency or organization or to retrenchment generally.

1.27 In the event that a member is retired from service owing to a reduction in or reorganisation of staff, or to the abolition of his office or post, or in order to facilitate improvements in efficiency or organization or to retrenchment generally then Eskom would indicate and confirm the application of the Rule on the retirement exit form, that is, select Rule 28 on the form. For the purposes of providing benefits to a member, the Fund would then need to satisfy itself that the member is below pensionable age and that Eskom has provided the relevant approval for a retirement in terms of Rule 28. Eskom is well aware that Rule 28 can only apply when a member is "retired from service owing to a reduction in or reorganisation of staff, or to the abolition of his office or post, or in order to facilitate improvements in efficiency or organisation or to retrenchment generally." The purpose of the confirmation from Eskom as to the type of retirement is so the Fund can be satisfied that Rule 28 can be applied. We refer to these events as the "Specific Events".

(1) In order to apply Rule 28(1), the Specific Events, a member's retirement from service would have had to have resulted from:

- (a) a reduction in or reorganisation of staff;

- (b) the abolition of his office or post;
- (c) in order to facilitate improvements in efficiency or organisation; or
- (d) to retrenchment generally.

1.28 The Fund relies on Eskom to ascertain and confirm, by way of selection of Rule 28 on the retirement exit form, that a Specific Event exists. The Fund tests this by considering the selection of the retirement option as recorded on the retirement exit form. Eskom, as employer, holds the necessary information to test whether the Specific Events in Rule 28 have been met. This has always been the arrangement between Eskom and the Fund over the last 26 years. Eskom is well aware of the criteria because of various interactions with the Fund including presentations, being provided with amendments and most importantly having invoked Rule 28 on numerous occasions in the past. The Rule has been invoked by Eskom on numerous occasions for ordinary employees and executives.

1.29 Once Rule 28 is selected it is then necessary for the Fund to determine the mode of payment. The mode of payment of a benefit under Rule 28 is regulated by Rules 28(2) to 28(5). While Rule 28(1) sets out the requirements which must be met by a member in order to qualify for benefits under Rule 28, Rule 28(2) to Rule 28(5) then record the mechanism or benefit options available to such member. Rule 28(3) specifically regulates the payment options available to members that have attained 50 years of age and have a minimum of 10 years pensionable service. Accordingly, a member that is retired from service under Rule 28 is at least 50 years of age and has a minimum of 10 years pensionable service may receive a benefit under Rule 28(1) read with Rule 28(3).

1.30 In addition, it is not unusual for an employer in a defined benefit fund to be permitted to purchase additional pensionable service. A defined benefit fund, in most instances, uses a member's years of pensionable service to determine the benefit payable to the member on retirement. The greater the number of years of pensionable service then the higher the retirement benefit of the member would be. A fund would not be privy to the rationale which informs an employer seeking to buy additional pensionable service. A fund would only decline an employer purchasing additional pensionable service if the purchase is contrary to the rules or would result in financial exposure to the fund.

1.31 Rule 21 (4) of the Rules reads as follows:

*"An EMPLOYER may make a special payment to the FUND in order to add to the PENSIONABLE SERVICE of a MEMBER in his employ such period of past SERVICE as the BOARD, after consulting the ACTUARY determine."*

- 1.32 It is evident from the provisions of Rule 21(4) that a participating employer in the Fund, including Eskom, can at its behest purchase additional pensionable service. On receiving a request from Eskom the Fund would test that the request is in compliance with the Rules, if yes, then the Fund would calculate the cost of the additional pensionable service. The cost to the employer is dependent on, amongst other factors, the age of the member, marital status and the age of the member's spouse. For instance the cost of additional pensionable service for a member with a much younger spouse would be higher.
- 1.33 Eskom has over the years purchased additional pensionable service for a number of its employees who are members of the Fund. Eskom has also purchased additional pensionable service for a number of its executives. The purchase of additional pensionable service can be done at any point while the employee is a member. The Fund has not in any such instance sought information from Eskom as to why it sought to purchase such additional pensionable service as such information is not relevant to the Fund or its obligations to its membership. Eskom would however engage with the Fund to obtain a list of member variables required to attend to the computation of the cost, Eskom would then revert with the relevant information enabling the Fund to attend to the calculation.
- 1.34 In addition, Eskom has over the years purchased additional pensionable service for executives, in terms of Rule 21(4), and then retired such executives under the provisions of Rule 28(3).
- 1.35 In keeping with its ability to purchase additional pensionable service, Eskom does in certain instances seek additional information from the Fund when it intends terminating or exiting an executive from employment. Such information could include but is not limited to the cost of purchasing additional pensionable service in terms of Rule 21(4) (whereby Eskom makes a special payment to the Fund for the additional years/months purchased). There are instances where Eskom approaches the Fund for a special benefit for specific reasons for the person. This is not unusual but it is not frequent. Eskom, when seeking such information, will advise the Fund of its requirements. The process usually takes the form of a verbal engagement followed by written engagement and then the relevant calculations are performed. Rule 21(4) requests are rare but as these are high

ranking officials at Eskom it is accepted that extra service may be granted by Eskom. This is a usual Eskom practice that does not raise concerns when sought from the Fund.

1.36 Accordingly, the completed retirement exit form will indicate whether additional pensionable service is to be purchased and the relevant Rule regulating the exit. In this regard, one of the options available for selection on the retirement exit form reads "early retirement (no penalties) with potential service (Rule 28)". The retirement exit form does not record the purchase amount or any information relevant to the computation. The computation information and purchase amount is the subject of the background interactions between Eskom and the Fund.

1.37 In addition to interactions with Eskom, the Fund has regular interactions with members. The interactions take the form of presentations to members. The presentations to members may be at the behest of the members or Eskom or an initiative by the Fund. The presentations take place at various locations including the power plants. In addition the Fund has client liaison officers who interact with members. The Fund provides bulk presentations to members in order to cater to the large membership base. In respect of the executives at Eskom the Fund provides a more intimate service. The Fund meets with executives at the time of their appointment to advice on the benefit structure and relevant operations of the Fund. The Fund would also, at the behest of an executive, meet with such executive in the course of their membership and where necessary at termination. The Fund also makes itself available to the executive to uplift relevant documentation where necessary.

1.38 The interaction with members, including the executive of Eskom, is in line with the Fund's duty to communicate with its members and provide the necessary information. The interactions also enable members to become familiar with the Rules. Accordingly, when a member exits the Fund, he or she is very familiar with the operation of the Rules and has many options to seek further information. An executive would have the ability to seek direct advice, in person, from the Fund.

## 2 **Application for membership of Mr Molefe**

2.1 Mr Brian Molefe (**Molefe**) was appointed at Eskom effective from 1 October 2015. Notwithstanding his contract of employment recording an effective date of 1 October 2015 (which contract the Fund did not have sight of until 24 May 2017 through court papers received during the course of litigation), Eskom relayed to the Fund, by way of the Leg File, that Molefe's effective date of employment was

14 September 2015 and this date was used by the Fund for purposes of his membership date. However, the deemed date of engagement recorded on Molefe's exit form was recorded as 25 September 2015, evidencing an immaterial discrepancy (for the Fund's purposes) in this regard. A slight variance in the dates of engagement would not cause any material harm to the Fund. Where the variance is large, the Fund would then either request a break in service to be recorded in terms of the member or request confirmation from the employer as to which date would be the correct engagement date. In this instance the variance was inconsequential to the Fund.

- 2.2 As previously advised, the Fund is not privy to the contracts of employment that are entered into between Eskom and its employees. This is the position even in circumstances where Eskom applies for its employees to become members of the Fund. Eskom is aware of the requirements for membership in the Fund and it identifies qualifying employees whose details it provides to the Fund. The Fund relies entirely on the information that it receives from Eskom in respect of employees that qualify for membership in the Fund.
- 2.3 In respect of Molefe, Eskom provided the Fund with files, including the Leg File, containing his details and therein was, among other things, a recordal with a code "PPX" that indicates (as per the coding provided to the Fund by Eskom) that the employee is a permanent executive in the "F-band". This is the Fund's understanding and how they have always understood the files to work. The Fund had no need to test Molefe's purported status as a permanent employee given Eskom's knowledge of the Rules, the coding provided by Eskom and established practice between the Fund and Eskom. A copy of the document recording the Leg File information provided relevant to Molefe is annexed hereto marked **annexure Q**.
- 2.4 Prior to becoming employed at Eskom, Mr Molefe was employed by Transnet and as such was a participating member of the Transnet Pension Fund (TPF). On withdrawal from the Transnet Pension Fund, Mr Molefe opted to transfer his benefits from the TPF to the Fund. The transfer process is regulated by the provisions of the PFA.
- 2.5 In keeping with the on-boarding process for executives in terms of which executives are to be assigned a consultant to personally take them through the intricacies of membership in the Fund, a client manager Mr Solly Ntsibande (**Ntsibande**) was assigned to Molefe's membership.

2.6 On 29 September 2015, a meeting was held at Eskom's office at Megawatt Park. The attendees at the meeting were Ntsibande, Molefe and Mr Anton Minnaar (the executive remuneration manager at Eskom). Mr Minnaar looks after the interests of the executives at Eskom including their pension related considerations. The agenda of the meeting was to discuss the transfer of Molefe from TPF to the Fund. Mr Molefe sought to understand whether his benefits (about R4.2 million) could be transferred. In addition he sought to understand the benefits that would be available to him at the Fund.

2.7 Subsequent to the meeting, on 1 October 2015, the Fund recorded in an e-mail to Eskom (attached as **annexure R**) that the Fund had completed the relevant aspects of the Recognition of Transfer forms (the forms prescribed by the FSB to regulate individual transfers between funds) and submitted same to the TPF. The Fund was awaiting action from the TPF and the eventual transfer of the funds. The Fund advised Mr Minnaar that all administration actions necessary for the transfer of Molefe's funds from the TPF to the Fund had been completed, save for:

- (1) the actual transfer of monies from Transnet to the Fund; and
- (2) the procedural aspect of placing Molefe on Eskom's payroll, which was expected to be completed.

2.8 On 10 November 2015, Anton Minnaar (Executive Support Manager), requested calculations in respect of Molefe's overall pension payments and early retirement costs in the event that Molefe were to retire at age 54 and Eskom waived the penalties in respect of such early retirement. In response, Mr Ntsibande informed Eskom that in 5 years' time when Molefe would be 54, Molefe would only have 5 years' service and Eskom would then be required to purchase additional pensionable service of 5 years to make up the minimum of 10 years' service (**annexure S**). The Fund provided this information on the basis that Rule 28(3) would apply subject to Molefe having a minimum of 10 years pensionable service. Accordingly, his actual pensionable service at age 54 would be five years, thus requiring an additional pensionable service of five years to be purchased by Eskom in order that he has the 10 years pensionable service required by Rule 28(3).. As stated above it is not unusual for Eskom to seek benefit information relevant to its employees.

2.9 As previously advised Rule 28(3) permits a member to retire from service if the following is satisfied:

- (1) The member is retired from service owing to a reduction in or reorganisation of staff, or to the abolition of his office or post, or in order to facilitate improvements in efficiency or organization or to retrenchment generally;
- (2) The member has attained at least the age of 50 years; and
- (3) The member has a minimum of 10 years pensionable service.

2.10 The Fund provided the calculation in line with Rule 28(3) as that is the only Rule which permits a member to retire from service prior to reaching age 55 years.

2.11 In an email from Ntsibande to Minnaar on 17 November 2015 (**annexure T**) Ntsibande provided Eskom with early retirement calculations if Molefe were to retire at ages 55 or 63. These calculations were based on the assumption that Molefe's wife would be 5 years younger than Molefe<sup>6</sup>; the actual age of the spouse would impact this calculation (a much younger spouse resulting in an increased cost). Further the Fund advised that the figures were based on the salary as at the date of calculation and would change over time in the years to come. The Fund did not test why the figures were requested as it was not unusual for Eskom to request figures relevant to executives or other members.

2.12 On 18 November 2015, as per **annexure U**, Eskom requested further figures in respect of an early retirement by Molefe factoring in a 6.5% year on year salary increase based on a retirement age of 63 years. The Fund provided the relevant figures on 20 November 2015 (**annexure V**) in respect of Molefe's retirement at ages 55 and 63. The early retirement cost calculations suggested a cost of R15 387 189 relevant to age 55 and R25 731 519 for retirement at age 63. The figures were based on the assumption that Molefe's spouse would be no more than 5 years younger than him. Requests of this nature are not unusual.

2.13 The Fund did not interrogate the need for the calculations as such information has no impact on the operations of the Fund as Eskom makes payment of any amounts required for the purchase of additional pensionable service.

2.14 In the period 8 December 2015 to 21 December 2015, Anton Minnaar requested various updates and clarifications in relation to the early retirement cost calculations by the Fund, which were duly

---

<sup>6</sup> In the absence of a spouse's actual age the agreed practice at the Fund is to factor the spouse to be 5 years younger

provided as shown in **annexure W**. More specifically he requested the figures on 10 December 2015 as the information was required to finalise the 'issue with the Minister'.

- 2.15 No further communication was received from Eskom relevant to calculation of benefits for Mr Molefe until closer to the date of his termination of employment.

### 3 **Membership of Molefe**

While Molefe remained a member of the Fund, Eskom and Molefe continued to contribute to the Fund. Initially, arrear contributions were paid by Eskom because of Molefe's delayed entry into the Fund as a result of Eskom having delayed in entering Molefe onto the Leg File. No information relevant to Molefe was sought by Eskom during this period.

### 4 **Termination of Molefe's membership**

- 4.1 On 18 August 2016, Eskom requested calculations via email in respect of the early retirement costs if Molefe were to retire at age 50, with penalties waived and additional years of service bought up to age 63 (**annexure X**). Further, the email quoted Molefe's member number and made enquiries into the costs of penalties, additional service costs and monthly pension.
- 4.2 The e-mail referred to in paragraph 4.1 above indicated to the Fund that Eskom intended retiring Molefe under Rule 28 (given his age) and to purchase additional service for Molefe under Rule 21(4).
- 4.3 The Fund responded with calculations as per the email dated 22 August 2016. The Fund advised that the total cost to the Eskom business unit would be an estimated amount of R25 980 204. This calculation was again based on the assumption that Mr Molefe's spouse was 5 years younger than him. The calculation was done using the following member variables:
- (1) An exit date of 31 December 2016;
  - (2) Molefe's final average emoluments;
  - (3) Molefe's actual service as at the exit date would be a period of 15 months; and
  - (4) Potential service till age 63 years being 156 months (at the time of the exit Molefe was 50 years of age, meaning that he would need additional service for 13 years).

- 4.4 General commutations were used in determining this amount; the exact facts were not used. See annexure Y. The Fund provided the information as such a retirement, on satisfaction of certain criteria, is permitted under Rule 28(1) read with Rule 28(3).
- 4.5 On 16 November 2016 a meeting was requested telephonically by Anton Minnaar to discuss the possible exit of Molefe from Eskom, the effect of Molefe's divorce along with the documentation (including a letter of approval recording the exit and stating exactly what early retirement option was going to be used) and the administration process that would need to be followed if an exit were to occur. The meeting was attended by Mr Ntsibande and Mr Minnaar only.
- 4.6 Subsequent to the meeting a letter dated 16 November 2016 was purported to be sent by the Fund to Eskom. The letter appears to be a cut and paste of the contents of the e-mail sent by the Fund to Eskom on 22 August 2016. See annexure Z.
- 4.7 Sometime after the figure was calculated to be in the region of R26 million (possibly in November 2016), Sankar advised the Fund CE that Eskom had made enquiries relevant to the cost of retiring Molefe under Rule 28 with purchase of additional pensionable salary under Rule 21(4). The Fund CE was advised at that stage that the figure was in the region of R26 million. The Fund CE other than being advised of the enquiry had no further involvement in the matter<sup>7</sup> until after Molefe was retired and received his benefit from the Fund. This will be set out more fully below.
- 4.8 On 19 December 2016, a meeting was held with Ms Merinda Botha (Human Resources Officer at Eskom) for the collection of the documents needed for Mr Molefe's early retirement (retirement exit forms). This meeting was attended by Mr Ntsibande and was solely for the purpose of collecting the completed documentation and did not entail any further discussions of the matter. The collection of the completed documents necessary for Molefe's exit by the Fund is not an unusual practice in relation to executives because, as described above, executives are given individual treatment by the Fund. The individual treatment offered to executives is not extended to processing and consideration of information, that is, no special treatment is afforded to executives when the Fund considers an executive's exit form.
- 4.9 Once the Fund received Molefe's retirement exit form, the standard operating process applicable to a retirement of a member was implemented.

<sup>7</sup> The standard operating process of the Fund in respect of the processing of retirement requests does not require the involvement of the Fund CE.

- 4.10 In keeping with the Fund's advice that confirmation was required from Eskom as to the purchase of additional pensionable service relevant to the retirement of Molefe, on 20 December 2016, the Fund received a letter attached hereto at **annexure AA**, dated 24 November 2016 and addressed to Molefe. The letter accompanied the completed retirement exit form. The chairman of Eskom board of directors recorded that Molefe's early retirement had been approved "in terms of rule 28<sup>8</sup> and 21.4<sup>9</sup>" of the Fund Rules. The letter further stated that "penalties will be waived and that potential service to age 63 is granted" to Molefe. The letter served as further evidence of the type of retirement and confirmation of purchase of additional service. The letter is further evidence of Eskom's knowledge of the application of the relevant Rules.
- 4.11 The exit information provided to the Fund for the purposes of considering the exit of Molefe included the following:
- (1) The original exit Form 1 received from Eskom (retirement exit form);
  - (2) Signed approval of the early retirement by Eskom;
  - (3) Supporting member documentation such as marriage certificate and
  - (4) Confirmation from Eskom in the form of the letter from the Chairman of the Eskom Board .
- 4.12 Molefe's retirement exit form is attached as **annexure AB**. The form expressly records that Rule 28 "early retirement (no penalties) with potential service (Rule 28)" was selected.
- 4.13 The process followed by the Fund subsequent to the receipt of the withdrawal form and exit information was as follows:
- (1) In respect of Molefe, the exit process ran from 20 December 2016 to end of January 2017.

<sup>8</sup> The heading of Rule 28 suggests that it regulates the payment of benefits in the event of a retrenchment. However, its application in any instance may be ascertained by its wording. Rule 28(1) reads as follows:

*Subject to the provisions of subsections (2), (3) and (4), if a MEMBER who has not attained the PENSIONABLE AGE is retired from the SERVICE owing to a reduction in or reorganisation of staff, or to the abolition of his office or post, or in order to facilitate improvements in efficiency or organization or to retrenchment generally, he shall be paid a benefit equal to three times his contributions plus ten per cent of his FINAL AVERAGE EMOLUMENTS for each year of his PENSIONABLE SERVICE before 1 January 1950; provided that in the case of a MEMBER whose admission to the FUND was deferred under rule 11(1), for the purpose of the calculation of the lump sum payable under this rule, there shall be added to the MEMBER'S contributions the amount which he would have contributed to the FUND if he had been admitted without the waiting period.*

The provisions of Rule 28(1) record the following conditions which are required to be satisfied:

- (a) the member must be below the age of 65 years; and
- (b) be retired from the service of the employer as a result of specific events recorded in Rule 28(1).

<sup>9</sup> An employer may make special payment to the Fund in order to add to the Pensionable Service of a Member in his employ such period of past Service as the Board, after consulting the Actuary, determine.

- (2) As stated above Ntsibande had collected, on request from Merinda Botha, Molefe's completed retirement exit form;
- (3) The form was then scanned to the administration system of the Fund by Data Maintenance and checks were done as to whether the form was an original document, whether each page was initialled and signed correctly and whether each supporting document was an original certified document;
- (4) The form was allocated to Fund Benefits Administrator (Gloria Tshose) for capturing of member information and calculation of the early retirement claim within the work flow administration system. During exit capturing, Gloria checked that Molefe's forms were completed in original ink and the accompanying documents were certified in original ink and that all required support documents were annexed to the form. The Fund tested that the following exit criteria had been met in order for the claim to be processed:
  - (a) member exit date and age;
  - (b) signed application form along with approval from the employer; and
  - (c) all static info is as captured at the capturing stage;
- (5) Molefe's captured details and the relevant calculations were verified by the Fund Benefits Supervisor (Sipho Mtshali) and then sent back to Fund Administrator to apply for a tax directive. Verification at this level was done on the exit criteria listed above along with the documentary requirements. The member values inclusive of monthly pension and lump sums were verified in accordance with the approval granted by Eskom at exit;
- (6) If the member had additional voluntary contributions, a manual tax directive is submitted. If not then an electronic submission is done to SARS. A manual tax directive was submitted in relation to Molefe;
- (7) On receipt of the tax directive, the Fund activated the claim with the necessary tax deduction. The claim with the tax deduction was then uploaded and sent back to the Fund Benefits Administrator;

- (8) The exit information was sent to the Fund Benefits Supervisor for final verification of the gross lump sum, monthly pension rewarded and tax uploaded onto the member claim;
- (9) Molefe's claim was then approved by Fund Benefits Manager (Diego Vitale) after he had verified that original member documentation was submitted, Eskom's approval for early retirement had been attached to the claim, there were member certificates (i.e. certified documents) to support the static information provided, the exit type as well as exit date were verified and applied correctly and the pension values (lump sum and monthly) were calculated correctly. Where a claim is above R1 million it must be routed to Sankar (**RFO Manager**);
- (10) Molefe's claim was then authorised by the RFO Manager and activated to Fund payroll department subsequent to the following verifications having been undertaken by the RFO Manager on the claim: original member documentation was submitted, Eskom's approval for early retirement had been attached to the claim, there are member certificates (i.e. certified documents) to support the static information provided, the exit type as well as exit date were verified and applied correctly and the pension values (lump sum and monthly) were calculated correctly;
- (11) Subsequent to being satisfied that the benefit could be paid a number of further administration steps occurred, including but not limited to, uploading Molefe's banking details and effecting deductions to the payments;
- (12) Payment was then effected to Molefe's bank account via activation of benefit by Fund payroll manager electronically and payment to be effected (lump sum and monthly); and
- (13) Early retirement costs, the R30.1 million, was recovered from Eskom.

4.14 In the course of the above verification and administration process, the Fund identified that the start date recorded on the withdrawal form (25 September 2015) differed to the date on the Fund's data system (14 September 2015). The Fund determined this discrepancy to be immaterial as the Fund had received a full contribution for September 2015. Nothing turned on the discrepancy.

4.15 In the course of the administration process followed after receiving Molefe's retirement exit form the Fund had to satisfy itself that Rule 28 could be applied. In this regard the Fund, as was the usual

practice, was satisfied that a Specific Event had occurred on the basis that Eskom had confirmed that Rule 28 applied by way of the retirement exit form and the letter from the chairman of the Eskom board. As stated above the Fund relies on Eskom, as the employer, to indicate the reason for a retirement. The Fund has never tested Eskom's selection of Rule 28. In the instance of Molefe the Fund was satisfied that Molefe had attained age 50 years, Eskom had indicated that a Specific Event was satisfied and on purchasing additional service (in terms of Rule 21(4)) Molefe would have more than 10 years pensionable service. In short, the Fund was satisfied that Rule 28(1) and (3) were applicable.

4.16 In calculating the cost of the early retirement, actuarial factors which took into account, *inter alia*, the CEO's pensionable emoluments, length of service, early retirement penalties, age, gender and marital status were considered. The associated costs amounted to R30.1 million, which costs were invoiced to Eskom and which costs Eskom paid to the Fund on 23 March 2017. In essence the calculation contemplated the following:

- (1) Had Molefe actually retired at age 63 years (with a start date of September 2015) he would have been entitled to pension calculated with reference to 172 months actual pensionable service;
- (2) At the time of his retirement Molefe had approximately 16 months actual pensionable service;
- (3) In order for the Fund to provide a benefit as if Molefe had retired at age 63 years, Eskom had to purchase 156 months additional pensionable service; and
- (4) In order to fund Molefe's pension as if he had retired at age 63 years and had pensionable service of 172 months, it was necessary for Eskom to make payment to the Fund of an amount of R30,1 million.

4.17 In effect Molefe's benefit from the Fund constituted the following:

- (1) The sum of his benefit transferred from the TPF, the actual contributions received up to 31 December 2016 and the amount paid by Eskom for the additional pensionable service; and

- (2) After the relevant deductions were applied to the total amount, Molefe was paid one third as a cash lump sum and the balance (two thirds) remained in the Fund in order to provide for Molefe's monthly pension payments;

4.18 Subsequent to the process set out above, and after the Fund had satisfied itself of its processes, Molefe became a pensioner of the Fund with effect from 1 January 2017. He opted to commute one-third of his retirement capital for a single cash payment, the gross amount of R9 767 743.68 was paid to him on 1 February 2017. With effect from 1 January 2017 until 1 May 2017, he received a gross monthly pension of R111 866.17 in terms of Rules.

**5 Issues arising subsequent to Molefe becoming a pensioner**

5.1 Molefe received a monthly pension for a period of five months, during this time other than making payment of the monthly pension and receipting the R30.1 million payment from Eskom, the Fund had no other interactions of relevance.

5.2 The Fund CE became aware of potential issues with Molefe's pension payments on 16 April 2017 when a Sunday Times article was published. The Fund CE was under the impression that the cost of the additional pensionable service was in the region of R26 million. He was aware that the potential cost of additional pensionable service was estimated to be R26 million and assumed that this was what the article was referring to when reference was made to a R30 million handshake having been paid to Molefe. He thought it would be prudent to test the veracity of the article relevant to the amount. He was also concerned that the article appeared to incorrectly record that the amount of R30 million had been paid in full to Molefe. The article is attached as **annexure AC**.

5.3 The Fund CE proceeded, on 16 April 2016, to make internal inquiries with Mr Sankar. Mr Sankar as the Fund's Operations Manager would have had the final sign off on Molefe's retirement and as such would have the relevant knowledge. Mr Sankar confirmed that the R30 million was a correct reference and that the process was handled in terms of the Rules. Mr Sankar advised that the difference in figure had resulted because Molefe's wife was much younger than the initial assumption of her being only 5 years younger than Molefe. Mr Sankar further confirmed that Molefe was only paid a third of his benefit in accordance with the Rules and legislation.

5.4 Following from the discussion with Mr Sankar, the Fund CE phoned the Chairperson of the Board and alerted her to the contents of the article. The Fund CE was of the view that it was his duty to

address the matter with the Board, through the Chairperson, given that the matter was in the public domain and not a correct recordal of what had transpired. The Fund CE mentioned the R30 million pension payment and confirmed that the money was paid in terms of the Rules. The Chairperson then informed each member of the Board telephonically of the recent developments so that the members of the Board would be aware of the situation.

5.5 Later that day the Fund CE spoke to the Board's audit and risk committee chairperson and raised the issues in the article and explained the correct position. The Fund CE stated that Molefe's retirement including the purchase of the additional pensionable service was a permitted transaction under the Rules.

5.6 In the period that followed the initial Sunday Times reports, the Board followed media reports<sup>10</sup> which indicated in essence that:

- (1) Molefe's retirement had not been approved by the Minister of Public Enterprises;
- (2) Molefe resumed his position as chief executive officer of Eskom with effect from 15 May 2017 and was subsequently terminated.

5.7 The position of the Fund subsequent to the media raising concerns with the payment of R30.1 million by Eskom relevant to the retirement of Eskom is best addressed under the following categories:

- (1) Initial meetings and communications between Eskom and the Fund;
- (2) Board action in relation to the Molefe matter;
- (3) Fund relationship with Eskom;
- (4) Litigation by Solidarity;
- (5) Other.

5.8 For ease of convenience the above sub-headings are used.

---

<sup>10</sup> The media reports included statements issued by Eskom relevant to the Fund.

Initial meetings and communications between Eskom and the Fund after the Molefe issue had arisen

- 5.9 On 20 April 2017, a meeting was requested telephonically by Mr Minnaar with the Fund. Mr Minnaar indicated that the purpose of the meeting was for the Fund to provide a high level explanation of the calculation of the early retirement costs to Eskom. Mr Ntsibande attended the meeting. Eskom, when requesting the meeting, had not advised the Fund that its legal representatives would be attending. Ntsibande, on attending the meeting, found that the meeting was being attended by Anton Minnaar as well as the Eskom legal representative, Mr Adil Patel of Cliffe Dekker Hofmeyr and Ms Veneta Klein of Eskom (Chairperson of People and Governance at Eskom). Ntsibande advised that the early retirement with penalty and the early retirement without penalty and potential service were factors determining penalties. While in the meeting, Ntsibande sent correspondence to the Fund CE as Ntsibande was not comfortable with being in a meeting with Eskom's legal representatives without a member of the Fund executive being present. This correspondence is attached hereto at **annexure AD**.
- 5.10 Subsequent to that meeting the Fund took the decision that all future correspondence relevant to the Molefe matter would be handled through the office of the Fund CE.
- 5.11 On 2 May 2017, a meeting was requested by Theresa Michaels (office of the Chief Financial Officer of Eskom) between the Fund and the SizweNtsalubaGobodo auditors (**SNG**) to provide an overview of the early retirement cost calculation, which meeting was attended by Joey Sankar, Diego Vitale, Solly Ntsibande and Nkanyiso Ngobese of SNG. No further correspondence or queries were received from SNG, the Fund took this to mean that SNG was satisfied with the explanation of the cost calculation.
- 5.12 On 3 May 2017, Suzanne Daniels (Eskom's Group Company Secretary) requested details on the amounts that had been paid to Molefe and process to be followed in the event the transactions were reversed. The Fund responded on 5 May 2017, prior to taking legal advice, with an email recording payments disbursed to Molefe and advising that:
- (1) The Fund under normal practices does not reverse claims as "the member would have elected his exit type and this would also be ratified by the employer"; and

- (2) a high level process could be considered by the Fund in the event of a refund being considered

(annexures AE and AF).

- 5.13 On 8 May 2017, Suzanne Daniels sent a further letter to the Fund CE noting a Request for Information from the Fund to SNG to complete the year-end audit – the information requested included details on Molefe (annexure AG).
- 5.14 On 10 May, Theresa Michaels sent a further letter to the Fund CE requesting access to information for review by Ernst&Young (EY). The letter was signed by the Chief Financial Officer of Eskom, Mr Anoj Singh (annexure AH).
- 5.15 The Fund received an email on 10 May 2017 from Suzanne Daniels instructing the Fund to “desist” from paying the CEO’s monthly pension until further notice from Eskom (annexure AI).
- 5.16 In response to Suzanne Daniel’s email, on 12 May 2017, the Fund CE sent a letter to Suzanne Daniels addressing Eskom’s request to stop Molefe’s pension payments. The response recorded that Molefe was a pensioner and requested reasons as to why Molefe’s pension should be stopped. Further, the letter advised that the Fund had acted in accordance with the confirmation provided by the Eskom Chairman of the Board, which confirmation specifically referenced the applicable Rules. In addition the letter advised that the Fund did not and is not a participant in Eskom’s decision making processes and negotiations with employees (annexure AJ).
- 5.17 On 15 May 2017, a meeting was requested by Theresa Michaels between the Fund and the EY Auditors. The meeting was intended to provide an overview of the claims process to the auditors. The meeting was attended by Joey Sankar, Diego Vitale, Solly Ntsibande, the Fund CE, Ayanda Gaqa, Theresa Michaels and EY auditors. The purpose of the meeting appeared to be to determine who had leaked payment information to the media. EY sought to test the chain of custody and the internal processes within the Fund. The Fund advised that it was not aware of anyone who would have leaked this information. The key point, made by the Fund, was that the Fund was in possession of the relevant information long before the payment was made by Eskom in March 2017. Therefore it is likely that since the Sunday Times appeared to coincide with the payment of the R30.1 million by Eskom it was more likely that the information leak came from Eskom. Another indicator to the leak

having come from Eskom's ranks was that the information provided included a screen grab of an SAP form, which is not used by the Fund; it is used only by Eskom in its data capturing.

5.18 Eskom and the Fund had no further administration interaction relevant to the Molefe matter.

Board action in relation to the Molefe issue

5.19 The purchase of additional pensionable service and subsequent retirement of Molefe had not served before the Board as such the Board was not aware of the facts. Management dealt with the matter in line with the Governance Framework and the Delegation. As was the normal practice within the Fund as stated above, in terms of the Governance Framework and the Delegation, the function of dealing with the on-boarding and exit of members to the Fund had been delegated by the Board to management.

5.20 On 19 April 2017, a meeting of the Benefits Committee of the Fund (a committee of the Board) was held wherein the Benefits Committee was notified of and provided with clarity on the media reports regarding Molefe's early retirement and pension pay out. It was confirmed that the R30.1 million was not transferred to Molefe but was paid by Eskom to the Fund.

5.21 The audit and risk committee initially discussed the payment of pension benefits to Molefe at a meeting held on 8 May 2017 and recommended that:

- (1) independent advice be sought regarding the application and interpretation of the Rules;
- (2) the matter be escalated to the Board for further consideration; and
- (3) a governance process to guide Fund Management on issues that required the Board's attention to be put in place.

5.22 On 15 May 2017, the Strategic Investment Committee (a committee of the Board) held a meeting at which the Fund CE provided the committee with background to the media reports regarding Molefe's early retirement and the payment of pension benefits to Molefe. The Fund CE indicated that from the Fund Management's perspective, such payments were made in terms of the Rules which were applied based on the retirement withdrawal application received. The committee noted that an independent legal opinion should be obtained on the matter to ensure that the Fund had complied with all Rules and requirements.

- 5.23 On 16 May 2017, the Legal and Governance Committee (a committee of the Board) held a meeting in relation to the payment of benefits to Molefe. The committee was provided with an overview of the process followed in respect of Molefe. Queries were raised in respect of the Fund's interpretation of the Rules (given the various opinions reported by the media) and it was recommended that the Fund should seek a legal opinion in respect of, amongst other things, the Fund's interpretation and application of the Rules. The Fund CE indicated that from the Fund Management's perspective, such payments were made in terms of the Rules.
- 5.24 The media reports which informed the Board's decision to obtain legal advice suggested that Molefe could not have been paid a retirement benefit as he was only 50 years of age. The suggestion made by the media was that the Rules only permitted retirement from the age of 55 years.
- 5.25 On or about 16 May 2017 Norton Rose Fulbright was briefed to provide an opinion which considered the application of the Rules to the retirement of Molefe. Norton Rose Fulbright was requested, amongst others, to provide advice:
- (1) whether or not Molefe was entitled to retire as contemplated by the Rules;
  - (2) whether or not the provisions of Rule 21(4) read together with Rule 28 permitted:
    - (a) Eskom to purchase future service on behalf of Molefe; and
    - (b) the Fund to grant Molefe retirement benefits without the application of penalties;
  - (3) whether or not the Fund followed the correct governance protocol in approving the application for early retirement;
  - (4) whether or not the Fund is permitted to cease the monthly payment of Molefe's pension in line with the request received from Eskom;
  - (5) whether or not the Fund is legally permitted to reverse the retirement status of Molefe;
  - (6) whether or not Molefe may be legally required to refund the lump sum amount and monthly pensions that have been paid to him to date; and

- (7) whether there are any legal and governance risks to the Board and to the Fund arising from this transaction as well as recommendations on how to remedy the gap, if any, going forward.

5.26 The article in the Sunday Times resulted in media interest relevant to the payment to Molefe. The Fund was contacted by numerous media publications. Ultimately the Fund released a press statement on 16 May 2017 which, in essence, recorded the responsibility of the Fund to all members and set out the operation of the Rules specifically Rule 28 and 21(4). Attached hereto as **annexure AK**.

5.27 On 19 May 2017 the requested opinion was provided by the legal representatives. The opinion in essence identified that:

- (1) Rule 28(1) read with Rule 28(3) permitted a member to retire from service owing to a reduction in or reorganisation of staff, or to the abolition of his office or post, or in order to facilitate improvements in efficiency or organisation or to retrenchment generally;
- (2) The Fund, given the nature of its relationship with Eskom and the contents of the retirement exit form, was entitled to rely on the information provided by Eskom advising that Rule 28 had been triggered;
- (3) Rule 28(1) read with Rule 28(3) permitted the retirement of a member who had attained at least 50 years of age and had a minimum of 10 years pensionable service;
- (4) Rule 21(4) permitted Eskom to purchase additional pensionable service relevant to Molefe; and
- (5) Rule 28(3) required the Board of the Fund to apply its discretion to the application of Rule 28(3).

5.28 The legal representatives of the Fund held that notwithstanding that Rule 28 contemplated retirement and could in theory be applied to Molefe, it had not been applied correctly because the Board had not applied its discretion to the matter as required by Rule 28(3). Accordingly, the only failure in the process was not that Molefe could not be retired at age 50 years or that Eskom could not purchase additional service for Molefe but rather that the Board had to consider the matter.

- 5.29 The initial brief to the Fund's attorneys did not include the Delegation and as such no reference was made to this document in the initial opinion. The opinion was amended to reference the Delegation on 8 August 2017 however the initial conclusions remained. Suffice to say that management and the Fund in determining the payment of benefits to Molefe believed that the Delegation authorised management to deal with the matter and the matter proceeded under such mistaken belief. Until the Fund received this opinion it had no belief that it was incorrectly operating under the relevant delegation.
- 5.30 Counsel for the Fund considered the advice provided by its attorneys and agreed with the salient provisions. The Board took the view that it would be in the best interests of the Fund to obtain a refund from Molefe and correct the situation through the litigation which had already been instituted in the matter. The litigation is discussed in more detail below.
- 5.31 The Fund together with its legal team continued to meet on a regular basis with a view to ensuring that the Fund and its members were not prejudiced.
- 5.32 On 22 May 2017, a special meeting of the Board was held to discuss the payment of pension benefits to Molefe.
- (1) Solly Ntsibande provided the Board with a presentation on the history of the pension benefits for Molefe.
  - (2) The Board was provided with a high level summary of the legal opinion, by its legal representatives, on the application of the Rules to the early retirement of Molefe. The Board was advised that Rule 28 contemplated retirement age 50 years and that Rule 21(4) permitted the purchase of additional pensionable service by a participating employer. The Board was however advised that the delegation of discretion was not permissible in law and as such Management was not empowered to take the relevant decision.
  - (3) The Board resolved that, amongst other things:
    - (a) in future, all Rule 28(3) applications should be submitted to the Board for consideration and determination; and
    - (b) a meeting with the FSB should be scheduled to brief the FSB on the Fund's position on the matter.

- 5.33 A second media statement was released on 22 May 2017 which recorded that the Fund does not participate in employer negotiations. The release also sought to clarify the operation of the Fund and its Rules. The second media statement is attached as **annexure AL**.
- 5.34 On 26 May 2017, at the scheduled meeting of the Board, the legal opinion in relation to the application of the Rules was discussed. The attorneys for the Fund were present and attended to various queries raised by the Board. The Board resolved to have proactive interactions with the FSB and to ensure compliance with the Rules. It was also resolved that communication would be sent to members to allay any concerns arising from the media reports.
- 5.35 A communication to members was sent on 26 May 2017. The communication sought to inform members of the position relevant to the payment of Mr Molefe and to reiterate that the Fund would not prejudice its members. The communication further sought to inform members that the Fund had operated within the Rules and the PFA when making pension payments to Molefe. The communication is attached as **annexure AM**.
- 5.36 The Fund, on 2 June 2017, met with the FSB, to take the FSB through the Molefe exit by retirement, explain the Fund's involvement in same and address any queries from the FSB. The Fund advised the FSB that it had sought legal advice on the matter which advice had indicated that retirement was permitted under Rule 28 however the Board was required to apply discretion. The FSB was advised that the Fund had acted in accordance with an existing delegation to management but going forward the Board had resolved to attend to Rule 28(3) applications. The Fund undertook to keep the FSB updated and to provide relevant documentation to the FSB.
- 5.37 Following the meeting, the FSB requested further information in an email dated 5 June 2017. The additional information requested by the FSB was provided to the FSB on 15 June 2017.
- 5.38 On 17 July 2017 the Daily Maverick reported that Molefe was not in fact eligible for membership of the Fund.
- 5.39 On 26 July 2017 the Daily Maverick published an article which suggested that the tax directive that had been obtained was incorrect in that it was based on incorrect source information submitted by the Fund. The article suggested that Molefe had benefitted from the incorrect information that had been supplied to SARS by the Fund.

5.40 The Fund raised both the matter of the eligibility as well as the tax directive with its legal team. The recommendations were as follows:

- (1) The legal team would provide an opinion relevant to whether Molefe was in fact eligible for membership of the Fund;
- (2) The legal team would obtain an opinion from tax experts relevant to treatment of the amount which had transferred into the Fund from the TPF;
- (3) The Fund would write to Eskom with a view to identifying whether any other employees of Eskom employed on fixed term contracts were purported to be members of the Fund; and
- (4) The Fund would meet with Eskom with a view to discussing the various issues which had arisen to ensure that checks and balances were implemented to avoid future issues.

5.41 The Fund, after becoming aware of the issues raised by the Daily Maverick relevant to the eligibility and tax considerations, provided the FSB with an update by email.

5.42 On 31 August 2017, the Fund received external advice relevant to the taxation of amounts transferred to the Fund (on behalf of a Molefe) from TPF. In essence, the advice identified that the amount so transferred to the Fund did not constitute a voluntary contribution as contemplated by section 11(k) of the Income Tax Act, 1962. However, it was accepted that the manually submitted request for a tax directive did not make provision for the recording or treatment of these amounts so transferred from a previous retirement fund. In consequence of this determination, the Fund's attorneys have made contact with SARS with a view to determining a suitable way forward in respect of the recording and treatment of these amounts when completing the request for a tax directive. The Fund continues to actively seek a solution which addresses the concern it has identified.

5.43 On or about 4 September 2017 the Fund received legal advice relevant to the eligibility of Molefe to participate in the Fund. The salient conclusion of the opinion, supported by counsel, was that Molefe did not satisfy the eligibility criteria of the Fund and as such was precluded from being a member of the Fund. The Fund however was entitled to rely on Eskom to provide it with Molefe's employment status. It is evident that Eskom was well aware of the Rules relevant to eligibility.

*Fund relationship with Eskom*

- 5.44 On 17 May 2017, Suzanne Daniels sent correspondence to the Fund CE requesting that pension payments for Molefe be stopped referencing emails from Solly Ntsibande dated 5 May 2017. The correspondence advised that the period during which Molefe was not at Eskom would be treated as unpaid leave and sought confirmation from the Fund that there would be no break in service. The letter also sought information as to the amount that should be repaid by Molefe in line with a reinstatement agreement (the agreement was attached but the Fund was not a party) and seeking a date on which the Fund would repay Eskom (**annexure AN**).
- 5.45 On 2 June 2017, Suzanne Daniel's re-sent the letter of 17 May 2017 noting Eskom's board decision to rescind Molefe's re-instatement and the stoppage of his pension. The letter also addressed the repayment to Eskom (**annexure AO**).
- 5.46 On 7 June 2017, the Fund wrote to Suzanne Daniels advising that Molefe's pension had been suspended and that the Fund was ensuring compliance to the Rules (**annexure AP**). On the same day, the Fund received an urgent request from Anton Minnaar in respect of a request to repay the R30.1 million. This was responded to by Solly Ntsibande, acknowledging Eskom's request and noting that the Fund would be seeking legal advice.
- 5.47 Subsequent to receiving legal advice, on 15 June 2017 (**annexure AQ**) the Fund addressed a letter to Suzanne Daniels, and advised Eskom that it was not in position to refund Eskom given that Molefe had been paid out his lump sum benefit (leaving the Fund out of pocket if it repaid Eskom prior to being repaid by Molefe) and that the Fund could not reverse the purchase of additional pensionable service as the Rules did not provide for a reversal. Furthermore, in respect of the letters received from Eskom dated 17 May 2017 and 2 June 2017 in relation to Eskom's request to stop Molefe's pension payments, the Fund recorded, amongst others, that:
- (1) The purchase of additional pensionable service is independent of Molefe's retirement event;
  - (2) The Fund, in the absence of empowering Rules, was not in a position to give effect to the refund requested by Eskom;
  - (3) The Fund was taking legal advice on a possible counter application (in the Solidarity litigation) with a view to obtaining an order ordering repayment by Molefe and permitting the Fund to refund Eskom; and

(4) Proposing the mechanism for repayment in the event that the counterclaim was successful.

5.48 Eskom through its interim chairman of the board, in a letter dated 25 July 2017, made an offer to the Fund for payment of the Fund's reasonable legal fees relevant to the parliamentary inquiry and subject to Eskom obtaining written consent from its insurer. The Fund, in a letter dated 12 September 2017, responded to the offer by rejecting same on the basis of avoiding a conflict of interest position but advising that the offer was appreciated given that the Fund was incurring costs not of its own making. The correspondence is attached as **annexures AR and AS**, respectively.

5.49 The Fund, through the office of the Fund CE, wrote to Eskom on 27 July 2017 recording that it relies on Eskom to provide it with correct employee information. The Fund further advised that it has come to its attention that there is a possibility that Mr Molefe may not have been eligible to participate in the Fund (the letter was sent prior to the Fund receiving confirmation of the position from its legal team) despite his details being recorded on the Leg File. The Fund sought confirmation that the information in respect of all other employees was correctly provided by Eskom. The letter is attached hereto as **annexure AT**.

5.50 On 16 August 2017 a meeting was set up with Eskom to discuss the state of play and the issues of eligibility. This was based on legal advice received by the Fund. Eskom cancelled the meeting a short while before it was set to start. The Fund was to present to Eskom and this included discussion of the legal fees to be paid by Eskom. The topics for discussion were:

- (1) Brian Molefe;
- (2) Fixed term employees; and
- (3) Return of the funds paid out.

5.51 This presentation was sent to Eskom. It was sent to the pensions office and was to serve as the agenda for the meeting.

5.52 On 3 October 2017 the Fund CE sent a follow up e-mail to Eskom relevant to the query on the correct information having been provided to the Fund. The e-mail also requested confirmation from Eskom as to whether the currently suspended Chief Financial Officer of Eskom was on a fixed or permanent contract. A response was received on the same day advising that Eskom was currently attending to the query on other instances of incorrect participation in the Fund and would revert. With

regard to the CFO, Eskom advised that he is a "permanent employee with a fixed termination date and falls under the group "Permanent". Correspondence attached as **annexures AU and AV**, respectively.

5.53 On 4 October 2017 counsel for the Fund advised that a request be made to Eskom for a copy of the contract of employment of the CFO to enable the Fund to independently ascertain his eligibility. The Fund requested same from Eskom and is awaiting a response.

5.54 The Fund has also received a request dated 21 September 2017 from Eskom to attend at the Department of Public Enterprises to present, on Eskom's behalf, the Rules. The Fund has declined this request. The correspondence is annexed hereto at **annexures AW and AX**, respectively

#### Solidarity litigation

5.55 In the course of the events set out above a number of parties have initiated litigation against Molefe and Eskom. The various matters have ultimately been consolidated. The Fund has been cited as one of 22 respondents in the application brought by Solidarity to, amongst other things, reverse the payment of the benefit paid to the Molefe as well as the decision taken by Eskom to retire Molefe. Copies of court papers in case number 34042/17 are attached at **annexure AY**.

5.56 The Fund has not taken issue with the relief sought by Solidarity but has on counsel's advice launched a counter application. The sole purpose of the counter application is to obtain an order for repayment of the one third lump sum amount which was paid by the Fund to Molefe. The Fund has launched the counter application so as to ensure that its members are not prejudiced. The Fund was provided with a reinstatement agreement signed between Eskom and Molefe which recorded that Molefe would repay the relevant amount to the Fund in November 2017. The Fund was not party to such an agreement. Further the status of the reinstatement agreement itself is uncertain in light of the various litigation proceedings. As such the Fund was advised not to place reliance on the agreement but to rather solidify its own position by way of the counter application. The counter application was launched prior to the Fund receiving legal advice on the eligibility of Molefe.

5.57 Subsequent to the Fund launching the counter application, Solidarity filed a supplementary founding affidavit. In response to that affidavit the Fund filed an answer. The answer expressly sets out that the Fund's position is that Molefe is not eligible to participate in the Fund and as such was not entitled to payment from the Fund. The Fund records that it would not have been in such a position

(expending unnecessary legal fees, reputational damage and have made payment to Molefe) but for the incorrect information supplied by Eskom relevant to Molefe's status as an employee.

5.58 It has become evident to the Fund from perusing and considering the court papers filed by both Solidarity and Eskom that the Fund reliance on Eskom and belief that Eskom was well aware of the Rules is correct. For instance, in a meeting of the Eskom Board People and Governance Committee: In-Committee, attended by, amongst others, Molefe, held on 9 February 2016 (a copy of the minutes is attached hereto at **annexure AZ**) the conclusion of Mr Molefe's employment contract was discussed. Mr Minnaar presented that, in terms of the Rules, only staff over 50 years of age with at least 10 years' service were entitled to retire as per the Fund Rules. He also noted that a fixed term contract of 5 years at an executive level was a first for Eskom, was not aligned with best practice and would have a negative impact on the individual executive's retirement benefits. Therefore, to remedy the negative impact, it was resolved at this meeting that Eskom shall, in instances where an Executive Director appointed on a fixed term contract decides to take early retirement and there is a shortfall in service years, Eskom shall:

- (a) bridge the gap to make up for the 10 years of service;
  - (b) waive penalties applicable to early retirement; and
  - (c) refund the Fund's actual costs for additional service added plus penalties applicable.
- (2) The Chairman of the Eskom Board, Ben Ngubane, in his affidavit dated 22 May 2017 stated that the reference by the Eskom Board to the Fund Rules was mistaken and should have been a reference to the Fund's "Member's Guide to Benefits".

5.59 Given the complexities which this matter presents, the Fund has determined that it will await a court decision before seeking a refund from Molefe or making payment of a refund to Eskom. The judgment in this matter will, in the Fund's view, have a direct impact on the strategy which the Fund adopts to resolve this matter.

#### Other

5.60 In addition to the court matter and the parliamentary inquiry the Fund has been advised that the payment to Molefe is being investigated by the Hawks. The Fund has been contacted by the Hawks

but the investigation has not proceeded any further. The Fund has made itself available to the Hawks for discussions on the matter.

- 5.61 The Fund has been made aware of media reports which suggest that the matter will be investigated by the Public Protector. The Fund has not received any communication from the Public Protector on the matter.

