

PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES

Oversight Inquiry into Governance, procurement and financial sustainability of Eskom

A. Introduction

1. I, the undersigned, Suzanne Margaret Daniels, hereby set out my factual narrative relating to my experience at Eskom as the Group Company Secretary from 1 October 2015 and subsequently as the Group Executive, Legal and Compliance from 27 July 2017.
2. I am an adult female attorney and conveyancer, born and raised in Cape Town and currently residing in Gauteng.
3. This guideline is prepared with the purpose of informing the Portfolio Committee on Public Enterprises on the specific topics I have been invited to give evidence on and assist it with its enquiry into "state capture".
4. Over the past few months, information relating to the extent of 'state capture' has been reported by the media and other individuals who have stepped forward.
5. The facts set out in this document are within my personal knowledge, unless the context indicates to the contrary. They are to the best of my knowledge and belief both true and correct.
6. To the extent that I rely on information furnished to me by others, I have provided the necessary documentation.

Employment History at Eskom

7. 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.
8. 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.
9. 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.
10. I was appointed Senior Manager, Office of the Group Executive in 2011 and served under Dan Marokane, Kannan Lakmeeharan, and Matshela Koko respectively.
11. Subsequently, I was transferred to the Office of the Chairman on 1 April 2015.
12. 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.
13. 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.
14. 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.

15. 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.
16. 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, Matshela 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.
17. 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.
18. Due to leadership instability at the time, this became a formal reality only in July 2017.

Circumstances Leading to my Suspension

19. When this current board took over which was styled as an Interim board by Minister Lynne Brown, my overall role within the Company became increasingly untenable.
20. The first bullet was launched when, on the instructions on the Interim Board Chairperson, Zethembe Khoza, the Chief Audit Executive, Molefi Nkhabu prepared a board submission wherein he recommended disciplinary action against me.
21. This was unknown to me as I was not provided with the opportunity to make input into the findings of such investigation.
22. I only picked this up as I was preparing for the meeting, and immediately brought it to the attention of my Board Secretary, Mrs Annamarie van der Merwe, and insisted that we prepare a formal written response to the allegations set out in the submission prepared by the Chief Audit Executive. The letter was addressed to Mr Sathie Gounden, the Chairman of the Audit and Risk Committee.

23. Mr Nkhabu, upon receipt of the written correspondence from the board secretary and I, offered a haphazard response in email and indicated that he had made a mistake and apologized.
24. We did not accept the apology as the allegations were quite serious, yet vexatious in nature and ought to have been addressed accordingly via the same committee, which did not happen.
25. To this date, this matter has not been resolved, notwithstanding Mr Nkhabu's pseudo apology. No formal acknowledgment nor action from Mr Gounden has been received to date by either Mrs Van Der Merwe or me.
26. Subsequently I was advised of the investigation on my team building exercise which was also spearheaded by the current interim Board Chairperson, Zethembe Khoza. It is common cause that this allegation found its way into my subsequent notice of suspension on 2 October 2017.
27. On 2 October 2017, I received a Notice of Intention to Suspend on a set of allegations which was hand delivered to my house in the evening by Mr Johnny Dladla, Interim Group Chief Executive at the time. ,
28. I submitted representations on Thursday 5 October 2017 at 9h00 to the then IGCE, Johnny Dladla, as was stipulated in paragraph 6 of the notice.
29. However, on 6 October 2017, I received a Notice of Suspension dated 6 October 2017, wherein the newly appointed Interim Group Chief Executive ("IGCE") Sean Maritz, refers to my written representations of 4 October 2017 and confirms that he has considered same.
30. On the basis of those representations, Sean Maritz decided to confirm my suspension with pay pending the finalization of an investigation and/o disciplinary action into the allegations of misconduct against me, yet the allegations are 100% different to what was put to me on 2 October 2017.
31. The correspondence sets out the basis for the decision and also the terms of my suspension.
32. Therefore the suspension itself is highly irregular.
33. It is for this reason that I have referred the matter of my unfair suspension to the CCMA which I have requested to be expedited based on the public interest at play herein.

34. At the same time I was emailed a Notice to Attend Disciplinary with Annexure "A" setting out the Alleged Misconduct/s. The date, time and place of the hearing was TBC and this Notice was also signed by Sean Maritz, the newly appointed IGCE on 6 October 2017.
35. At the core of these allegations regarding misconduct is the allegation that: *"Whereas you prepared a report for the Minister dated September 2017, which report contains various matters of concern. After perusal of this report and after further relevant information were obtained, issues were identified which could warrant disciplinary proceedings being instituted against yourself. It would thus be in the interest of yourself and Eskom that through an interrogative process of disciplinary proceedings, questions be answered relevant to the report and the information received."*

B. Convening of Board Tender Committee of 11 April 2016 at 21h00

36. My instruction to convene this meeting came from Zethembe Khoza, Chairperson of the Board Tender Committee at the time.
37. This call was around 19h30 on the evening of the 11th April 2016 to my mobile. I had actually missed the call as I was home having dinner with my family when I heard the phone ringing in my study. I stepped away from the dinner table to return Mr Khoza's call. The reason why I can be so specific as to the details is that I have had the opportunity to examine my phone records for the date in question.
38. Mr Khoza informed me that it was necessary to convene a BTC meeting for that evening and that the item to be discussed was the emergency coal supply to Arnot Power Station.
39. I questioned the efficacy of having a meeting at that late hour as the scheduled BTC meeting was due to take place on the 13th April 2016 which was a mere 48 hours away. To the best of my knowledge the emergency had been declared a while back and it would really not make a difference for the station. I also informed him that I had no documentation at hand to distribute to members.
40. Notwithstanding my comments, Mr Khoza instructed me to continue as this was a request driven by the operations. This conversation lasted approximately four and a half minutes according to my telephone records for that day.

41. Subsequent to this conversation I received a submission via email at 19h51 from Edwin Mabelane who was the Chief Procurement Officer at the time, with a request to convene a meeting to discuss the Emergency Supply to Arnot Power Station.

42. For easy reference, I set out the timeline of events in the Table below.

Table 1

DATE	TIME	EVENT
11 April 2016	19h51	Email request from CPO to COSEC for Special BTC with regard to Arnot Emergency Supply
	19h56	COSEC confirmed to Chairman, BTC that meeting will take place at 21h00
	20h00	COSEC prepared document for distribution and set up teleconferencing facilities
	20h15	Meeting invite to BTC members sent by COSEC with submission attached Invitees: Zethembe Khoza, Nazia Carrim, Viroshini Naidoo, Chwayita Mabude, Edwin Mabelane, Ayanda Nteta, Matshela Koko
	20h19	SMS messages sent to all BTC members
	20h30	COSEC confirmed to executives that teleconference is set up for 21h00
	20h53	Ms Viroshini Naidoo sent an email to the COSEC and copied invitees containing 7 questions. Closing sentence: "This matter has been in the public domain so I need to know everything possible has been done to get the best deal for Eskom."
	21h04	The meeting commenced at 21h04 with all members of the BTC connected telephonically. Mr Mabelane and Ms Nteta joined the discussion.

DATE	TIME	EVENT
	21h10	Ms Visroshini Naidoo sent through further questions via email.
	21h32	Meeting closed
	21h36	Email request from Ms Naidoo to COSEC to have the minutes ready for sign off by Wednesday
	21h38	COSEC undertook to have it ready
	21h45	Email from Ms Viroshini Naidoo to Mr Zethembe Khoza re matters coming to the BTC so late
12 April 2016	15h50	Receipt of responses to matters arising from meeting of the 11th by the COSEC
	17h27	Responses from CPO and team emailed to the CFO by the COSEC
13 April 2016	9h00	CFO confirmed the securities from Tegeta Resources. No further questions were raised by Ms Viroshini Naidoo. Minutes of 11 April 2016 were approved at this meeting

C. The convening of the Board or Board Tender Committee in December 2015 to consider the 1.6 billion guarantee which was later referred to the Finance Committee for a decision

43. On December 8 2015, at the instruction of the then chairman of the Board, Dr Ben Ngubane, I collated documentation to be circulated to members of the Board via email requesting their approval or non approval.
44. The submission was titled "Urgent Request to approve the Pre-Purchase of Coal from Optimum Coal (Pty) Ltd".

45. As this matter was of a financial and investment nature, I convened a meeting of the Board investment and Finance Sub-Committee ("IFC") on 9 December 2015.
46. Mr Mark Pamensky, the then Chairman of the IFC recused himself from the meeting due to his conflict of interest as declared.
47. Dr Pat Naidoo was elected by the members to act as chairperson for this particular meeting. Members present at this meeting were Mrs Venete Klein and Mr Zethembe Khoza and the three members constituted a quorum for the IFC.
48. Anoj Singh and I were in attendance as the Group CFO was the coordinating official and I acted as secretariat for the meeting.
49. The discussion of the meeting was as set out in the minutes of the meeting of 9 December.
50. The members resolved that: "It is recommended that the Board approve the transaction as set out in the submission to the Board relating to the pre-purchase of coal from Optimum (Pty) Ltd."
51. This recommendation was conveyed to the Board members as the Round Robin documentation was circulated.
52. By 9 December 2015, my office had received unanimous approval bar, for Mr Pamensky who recused himself and Mr Molefe who was off sick.
53. The full resolution was as follows:
 - 53.1. The request from the Department of Mineral Resources is hereby noted;
 - 53.2. 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 OCM (coal supplier);
 - 53.3. This agreement shall be subject to the necessary regulatory approvals having been obtained by Eskom and the supplier respectively, as and when necessary;
 - 53.4. 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.

54. On 10 December 2015, Ms Caroline Henry, Senior General Manager (Treasury) prepared a Memorandum addressed to the Chief Financial Officer, Anoj Singh, the subject matter whereof was: : "Guarantee in favor of Tegeta Exploration and Resources Proprietary Limited ("TER")"
55. This memorandum set out the rationale for the issuance of a guarantee in favor of TER and sought approval for:
- 55.1.The CFO to approve the issuance of a guarantee in favor of TER;
- 55.2.The CFO to approve ABSA as a counterpart to issue the guarantee;
- 55.3.The CFO to approve the counterpart investment concentration limit excess for ABSA for the duration of the guarantee.
56. This was approved by the CFO on the same day and it was subsequently processed by Ms Henry.

D. Optimum Arbitration

E. Retirement Arrangements - Mr Brian Molefe

57. I have been requested to provide a chronology outlining the sequence of events relating to the reinstatement of Mr Brian Molefe ("Mr Molefe") as the Group Chief Executive Officer ("GCE") of Eskom Holdings SOC Ltd.

Chronology of Events

58. Mr Molefe was appointed as the Eskom acting GCE from 17 April 2015 to 30 September 2015.
59. On 16 October 2015, Dr Ngubane addressed a letter to the Minister of Public Enterprises, Minister Lynne Brown ("the Minister") setting out a proposal in respect of Mr Molefe's remuneration for her consideration and approval. The letter stated that the benchmarks reflected that the current remuneration as paid by Transnet, to Mr Molefe was below the statistical measurements. On that basis, Dr Ngubane proposed a suitable guaranteed remuneration package taking into account the cited benchmarks.
60. On 1 November 2015, the Minister approved the total guaranteed remuneration to be paid to Mr Molefe with effect from the date of his appointment.³ The Minister advised that it was her view and that of Cabinet that the period of employment be stipulated as five years, subject to annual performance reviews.

The Minister further indicated that she awaited receipt of the draft employment contract and performance agreement.

61. On 9 November 2015 Dr Ben Ngubane ("Dr Ngubane") made a formal offer of employment to Mr Molefe, Mr Molefe acknowledged receipt of the letter on 11 November 2015.⁴ Mr Molefe was appointed as the GCE with effect from 1 October 2015.
62. On 18 November 2015, Mr Anton Minnaar of Eskom requested Mr Solly Ntsibande of the EPPF to calculate the potential cost to the business unit should Mr Molefe take early retirement.
63. On 20 November 2015, Mr Ntsibande calculated that the cost of early retirement at the age of 55 years would cost R 15 387 189.75 and the cost of early retirement at age 63 would be R 25 731 519.12.⁶
64. On 25 November 2015, Dr Ngubane directed a letter to the Minister. In this letter, Dr Ngubane outlined Mr Molefe's history of having served in numerous high ranking South African organisations at an executive level to stabilise and ensure the future sustainability and performance of those organisations. Dr Ngubane further indicated that due to the nature of those engagements and the short term contractual obligations, Mr Molefe had not been able to benefit from the growth opportunity of a single pension fund. Dr Ngubane consequently proposed the following material contractual stipulations to bridge this gap and requested the Minister to approve the proposed contractual stipulations:
 - 64.1.Regardless of Mr Molefe's age after the five-year termination date, he be allowed to retire from Eskom's service on the basis that he is aged 63.
 - 64.2.That the penalties prescribed by the EPPF for retirement prior to age 63 be waived.
 - 64.3.That Eskom carries the cost of such penalties (to be paid over to the EPPF).
 - 64.4.In the event that Mr Molefe's contract is not extended beyond the 5-year termination date, he will be allowed to subscribe to any other SOC or government pension fund.
 - 64.5.The Minister did not respond to Dr Ngubane's letter date 25 November 2015. However, this matter was discussed at a meeting of 23 February 2016 set out below.
65. On 9 February 2016, a meeting of the Eskom People and Governance Committee was held to discuss executive early retirement at the age of 50.

66. I attended a meeting of 23 February 2016 with Minister Brown. Dr Ngubane and Mrs Klein in Cape Town whereat Mr Molefe's proposed pension arrangement was discussed between the parties. Minister brown indicated that she would not oppose the pension proposal but the it must be submitted to her in writing so that she can deal with it it expeditiously. We indicated to her that correspondence had been sent to her office in a letter dated 25 November 2015. Confirmation of the cabinet decision in relation to the tenure of Mr Molefe's contract of employment needed to be obtained by Minister Brown.
67. The Minutes of the People and Governance Committee meeting of 9 February 2016, refer to and note the discussion relating to the conclusion of Mr Molefe's employment contract, with particular reference to "... the current rule that staff over 50 years of age with at least 10 years' service were entitled to retire as per the Eskom Pension and Provident Fund Rules." This was followed by a request for "... the Eskom Rules to be amended in respect of executive directors with fixed-term contracts to make up the shortfall in years, waive the penalties and refund the Pension and Provident Fund the actual costs relating to additional service.
68. The People and Governance Committee resolved that:
- 68.1."1. The current Eskom Pension and Provident Fund (EPPF) rule that employees may proceed on retirement from age fifty with ten years' service remains applicable.
- 68.2.2. in cases where Executive Director's (appointed on fixed-term contracts) decide to take retirement and there is a shortfall regarding the EPPF ten years' serve rule, Eskom shall –
- (i) bridge the gap to make up for the ten years;
 - (ii) waive penalties applicable to early retirement;
 - (iii) refund EPPF actual costs for additional services added, plus penalties applicable to early retirement".
69. Subsequent to the resolution, Eskom and Mr Molefe concluded the Executive Employment Contract on 7 March 2016 which recorded, inter alia that:
70. Mr Molefe commenced employment with Eskom as its GCE with effect from 1 October 2015;
- 70.1.it was a fixed-term contract expiring on 30 September 2020;

70.2. Mr Molefe would be a member of the EPPF, subject to its rules.

71. Mr Molefe's contract of employment was entered into three months before the 2016 Memorandum of Incorporation was adopted. At the time of concluding the employment contract between Mr Molefe and Eskom the 2014 Memorandum of Incorporation was in operation.
72. On 2 November 2016, the Public Protector published her report into the "State of Capture" which made observations against a number of persons, including Mr Molefe.
73. On 3 November 2016, Mr Molefe answered questions from journalists on the Public Protector Report.
74. During 8 to 10 November 2016 (approximately two to three days before Mr Molefe issues a public statement that he is leaving Eskom), Mr Molefe met with the Minister and indicated his intention to step down as Eskom GCE. The Minister described his departure as a resignation during the meeting.
75. On 11 November 2016, Mr Molefe wrote a letter to Dr Ngubane applying for early retirement in terms of the EPPF rules as read with the resolution of the People and Governance subcommittee dated 9 February 2016. Mr Molefe indicated that his last day of service would be 31 December 2016.
76. On 11 November 2016, Mr Molefe issued a statement stating that "I have in the interest of good corporate governance, decided to leave my employ at Eskom from 1 January 2017."
77. On 11 November 2016, Eskom issued a media statement confirming that Mr Molefe has stepped down as Eskom GCE.
78. On 11 November 2016, the Minister issued a statement stating that Mr Molefe had resigned as the Eskom GCE.
79. On 21 November 2016, the People and Governance Committee discussed the terms of Mr Molefe's request for early retirement and approved the request, in principle.
80. On 24 November 2016, Dr Ngubane addressed a letter to Mr Molefe confirming that his application for early retirement was approved in terms of rules 28 and 21.4 of the EPPF Rules and the Board resolution of 9 February 2016. Dr Ngubane further confirmed that penalties would be waived and the potential service to age 63 was granted.

81. On 30 November 2016, the Minister released a media statement that she had approved the appointment of Mr Matshela Koko ("Mr Koko") as Eskom's Acting GCE effective from 1 December 2016.
82. On 31 December 2016, Mr Molefe left Eskom's employment and on 23 February 2017 took up a position as a Member of Parliament for the African National Congress.
83. On 31 December 2016, Eskom issued Molefe with a certificate of service. The certificate notes the reasons for termination as early retirement.
84. On 18 February 2017 the EPPF sends a letter to Mr Molefe welcoming him to the EPPF. The letter stated that the benefits to be paid to Mr Molefe were calculated in terms of the rule of the EPPF.

Reinstatement of Mr Molefe

85. On 16 April 2017, the Sunday Times published an article indicating that Eskom had paid Mr Molefe a pension pay-out of R30 million.
86. On 19 April 2017, Eskom represented by Dr Ngubane, Ms Klein, Mr Minnaar and I attended a meeting with the Minister to discuss concerns relating to the "pension pay-out" referred to in the media article. The Minister instructed Eskom to meet with Mr Molefe and re-evaluate the "pension payment".
87. On 23 April 2017, the Minister issued a media statement indicating that she has declined Mr Molefe's pay-out of R30 million and that she had instructed Eskom to reconsider the issue of the pension and consider a reasonable pension pay out.
88. On 24 April 2017, the Eskom Board met in order to consider and deliberate upon the issues raised by the Minister. On 25 April 2017, a meeting was held with the Minister to discuss suggested options pursuant to the Board meeting of 24 April 2017.
89. On 28 April, Eskom received legal advice relating to the payment of pension benefits to Mr Molefe. Eskom was advised, inter alia, that the early retirement agreement was legally impermissible as it was impermissible for Mr Molefe to take early retirement at the age of 50 in terms of the EPPF rules.
90. On 2 May 2017, the Eskom Board met and considered the legal advice received and concluded that the approval of Mr Molefe's application for early retirement could not be implemented. The Eskom Board therefore decided to rescind the approval and restore status quo prior to the approval of Mr Molefe's application for early retirement.

91. On 3 May 2017, Eskom wrote a letter to Mr Molefe stating that the Eskom Board had engaged the Minister and had resolved to rescind its resolution to approve his early retirement. The letter called upon Mr Molefe to resume his duties as the Eskom GCE.³
92. On 3 May 2017, I sent an email to Mr Ntsibande of the EPPF enquiring about the amounts that had been paid to Mr Molefe as well as the dates when such payments were made. I further enquired about the process required to reverse the transactions between Eskom and the EPPF.
93. On 5 May 2017, Mr Ntsibande responded to my email and stated that a lump sum of R7 792 767.91 had been paid to Mr Molefe and that pension payments of R124 228.95, R59 804.67, R63 703.67 and R73 908.07 had been paid to Mr Molefe respectively during January, February, March and April.
94. On 9 May 2017 the Minister met with the Eskom Board. The Board explained that pursuant to legal advice received the approval of Mr Molefe's application for early retirement was legally impermissible and the Board had resolved to rescind the agreement that culminated from that approval.
95. On 11 May 2017, the Board addressed a letter to Mr Molefe advising him that Eskom had resolved to rescind its decision to grant him early retirement and requested him to report for duty.
96. In consequence of the resolution to rescind the purported approval of the early retirement request, Mr Molefe and Eskom concluded a reinstatement agreement on 11 May 2017. The reinstatement agreement provided for Mr Molefe's employment.
97. contract to continue on its terms and for Mr Molefe to resume his duties in terms of his employment contract. Mr Molefe also agreed to repay amounts received by him pursuant to his purported "early retirement". The parties also agreed, in clause 7 that the period between 1 January 2017 and 15 May 2017 be treated as unpaid leave.
98. On 11 May 2017, the Board wrote a letter to the Minister informing her that it had resolved to rescind the early retirement agreement and to reappoint Mr Molefe as the Eskom GCE. The Board enclosed the reinstatement agreement.
99. On 12 May 2017 the Minister issued a media statement in which she confirmed that Mr Molefe would be reinstated as the Eskom GCE and that she was satisfied with the re-evaluation process and recognised the merits in the proposal, on the proviso that it is legal.

100. On 15 May 2017, Mr Molefe reported for duty in terms of the reinstatement agreement. Litigious Proceedings in respect of Mr Molefe's reinstatement
101. On 15 May 2017, the Democratic Alliance ("DA") brought an urgent court application in the Pretoria High Court against the Minister, Eskom and Mr Molefe challenging the legality of Mr Molefe's reinstatement.
102. On 17 May 2017, I directed a letter to Mr S Luthuli of the EPPF, in which I requested the EPPF to stop making any further pension payments to Mr Molefe. The letter recorded that Eskom and Mr Molefe had agreed to a reversal of his early retirement. I asked Mr Luthuli to confirm the following:
- 102.1. that in accordance with the reinstatement agreement, the period from 1 January 2017 to 14 May 2017 will be regarded as unpaid leave;
- 102.2. that the EPPF will not disburse pension payment funds to Molefe consequent on his approved application for early retirement;
- 102.3. that the EPPF will reinstate Mr Molefe's membership of the Fund as from 15 May 2017;
- 102.4. the EPPF inform Mr Molefe of the amount of money that he is required to repay to the EPPF; and
- 102.5. the EPPF would advise Eskom as to the date it will refund to Eskom the amount disbursed by it in respect of Mr Molefe's early retirement.
103. On 17 May 2017, Eskom filed a notice of intention to oppose the application by the DA.
104. On 19 May 2017, the Economic Freedom Fighters ("EFF") brought an application against Eskom, the Minister and Mr Molefe challenging the legality of Mr Molefe's reinstatement. The EFF sought further relief declaring the Eskom Board to have breached their fiduciary duties owed to Eskom. The EFF sought an order requiring the Minister to remove the Board. The EFF has recently stated that it will not pursue the relief sought relating to the Board, in the light of the Eskom Board having been reconstituted.
105. On 22 May 2017, Solidarity brought an application against Eskom, the Minister, Mr Molefe and other Eskom board Members in which it, inter alia, challenges the legality of Mr Molefe's reinstatement. Solidarity seeks an order requiring the National Director of Public Prosecutions to investigate the conduct of the Eskom Board and Mr Molefe.

106. On 22 May 2017, Eskom filed an answering affidavit to the applications brought by the DA and EFF. On 2 June 2017, Eskom filed a supplementary affidavit which served as a supplementary answering affidavit to the EFF and DA application and an answering affidavit to the Solidarity application.

Minister Brown's Directive to the Board of Directors

107. On 31 May 2017, the Minister issued a directive to the Eskom Board instructing it to rescind its decision to reinstate Mr Molefe as GCE.

108. On 2 June 2017, the Eskom Board met and passed a resolution giving effect to the Minister's directive.

109. On 2 June 2017, I addressed a letter to the EPPF advising it that pursuant to a resolution of the Board as per the Minister's directive, Mr Molefe was no longer in Eskom's employ. The letter further stated that Mr Molefe was not entitled to any pension fund payments since he was not entitled to any early retirement benefits pursuant to the rules of EPPF. The EPPF was requested to confirm that it will not make any payments to Mr Molefe in relation to his purported early retirement and that it would refund to Eskom the amount which Eskom paid to it in relation to Mr Molefe's purported early retirement. The EPPF was also requested to reimburse Eskom the amount already paid to Mr Molefe upon receipt of the money from Mr Molefe.

110. On 2 June 2017, Eskom directed a letter to Mr Molefe in which it notified Mr Molefe of the Minister's directive of 31 May 2017 and Eskom's decision to give effect to that directive.

Brian Molefe/Eskom Holdings SOC Ltd/Lyona Brown, Minister of Public Enterprises

111. On 5 June 2017, Mr Molefe brought an urgent application out of the Labour Court against Eskom and the Minister requesting the court to declare that the decision by Eskom is unlawful and void ab initio and seeking a reinstatement of his position as Eskom GCE.

112. On 6 June 2017, Eskom, the Minister and Mr Molefe agreed that Mr Molefe would not be required to render his services at Eskom pending the determination of the Labour court application.

Correspondence From Various Bodies and Other Matters

113. On 6 June 2017, the Minister received a letter from Advocate Rory Voller a commissioner at the Companies and Intellectual Properties Commission (CIPC). The email records that the CIPC was in possession of an Eskom Board meeting minute of 29 November 2017, which reflected that Mr Molefe had resigned as Eskom GCE. The CIPC had various queries for the Eskom Board relating to the position Mr Molefe held, in the light of his return to Eskom on 15 May 2017.
114. On 7 June 2017, Mr Luthuli addressed a letter to me confirming receipt of the letters dated 17 May 2017 and 2 June 2017 respectively and that Mr Molefe's pension has been suspended pending legal advice and consideration of the matter.
115. On 8 June 2017, Ms Daniels responded to the CIPC letter and stated that the minute of 29 November referred to by the CIPC was a draft minute which had not been approved by the Board.
116. On 5 June 2017 the EFF applied to the Labour Court to intervene as interested parties in the application brought by Mr Molefe, the DA similarly applied for leave to intervene on 7 June 2017.
117. On 15 June 2017 Eskom filed an explanatory affidavit in which Eskom set out details surrounding the implementation of the Minister's directive and stating that Eskom abides by the decision of the Labour Court.
118. On 15 June 2017, the Minister has filed an opposing affidavit.
119. On 15 June 2017, Mr Luthuli of the EPPF addressed a letter to Ms Daniels. Mr Luthuli stated that the EPPF proposed that Eskom be reimbursed as follows:
120. A refund to Eskom on receipt of a competent court order;
121. Mr Molefe repay Eskom the amount which is owed by him; and
122. Mr Molefe and the EPPF attend to obtaining a refund from SARS which refund, if granted, be paid to Mr Molefe or Eskom as case may be.
123. On 4 July 2017, the Labour Court determined that Molefe's application should be stayed pending the determination of the EFF and DA applications in the High Court.
124. The DA, EFF and Solidarity applications will be heard in the High Court during 29 November to 1 December 2017.

R. Corporate Governance Matters

125. The State of Capture Report released by the then Public Protector, Advocate Thuli Madonsela, put the role and the responsibility of the board of directors as the accounting authority in terms of the PFMA and other legislative prescripts under scrutiny.

G. McKinsey/Trillian

126. My approach to this matter has been to set out the facts as I know them and thereafter take specific questions as necessary.

127. 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.

First Contract

128. The First Contract was for the provision by McKinsey of consulting services to Eskom for a period of six months.

129. The Eskom Acceptance Letter is dated 29 September 2015 and it is addressed to Alexander Weiss and Vikas Sagar of McKinsey re "notification of acceptance for the provision of consulting services".

130. It is signed by Matshela Koko, Group Executive: Technology and Commercial and signed by Alexander Weiss of McKinsey on 29 September 2015.

131. From 30 October 2015 to January 2016 McKinsey issued eight invoices to Eskom of approximately R80 million, incl. VAT to Eskom under the First Contract.

132. Trillian Management Consulting (Pty) Ltd issued an invoice (referenced as MC01) to Mr Anoj Singh which appears to be related to the First Contract on 31 January 2016 for R26 900 000 excl. VAT. It appears that this invoice was sent to Eskom on 12 February 2016.

133. The invoice itself doesn't reference the First Contract directly.

134. The supporting document provided by Trillian to Mr Anoj Singh dated 12 February 2016 under cover of which the invoice was apparently sent states that it is for "the support of the CFO office on the Eskom Procurement Turnaround and Defined Benefit Obligations." It gives certain bullet points regarding the services performed under each and states that a detailed report will be available on 15 February 2016 regarding this.
135. McKinsey issued a letter to Eskom dated 9 February 2016 authorising Trillian to invoice Eskom directly for work performed pursuant to the First Contract. This was however subject to McKinsey confirmation of the amounts claimed and work done. There is no indication in the documentation that McKinsey provided this confirmation regarding MC01.
136. This invoice was signed for payment by Prish Govender and Edwin Mabelane on 8 April 2016.
137. The invoice dated 31 January 2016 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.

The Second Contract

138. The Second Contract was entered into on 7 January 2016 between Eskom and McKinsey, signed by Dr. Alex Weiss (McKinsey) and Edwin Mabelane (Eskom).
139. It is called a "Service Level Agreement". It however also appears to be called the "Master Services Agreement" in certain documents. It authorized approximately R540 million in down-payments.
140. The process to conclusion of this contract began in 2015.
- 140.1. On 6 July 2015, the Board Tender Committee provided a mandate to negotiate with McKinsey to develop the current Top Engineers Programme into an Internal Consulting Unit.
- 140.2. It is important to note that the BTC decision was obtained via round robin and the round robin resolutions were signed by:
- 140.2.1. Ms Viroshini Naidoo on 6 July 2015
- 140.2.2. Ms Nazia Carrim on 3 July 2015
- 140.2.3. Ms Chwayita Mabude on 6 July 2015

140.2.4.Mr Zethembe Khoza

141.During August and September 2015 there was a series of discussions between the Procurement Manager responsible for the transaction and the PFMA office (part of Group Compliance) on the applicability of the deviation request to National Treasury was required when dealing with a risk based consulting contract such as the McKinsey one was. **Group Compliance specifically advised that a deviation application was required and that if an award was made before a deviation was granted by National Treasury, then the expenditure would be irregular.**

142.It was then that the First Contract appears to have been entered into for the provision of professional strategic consulting services for ad hoc support on urgent finance and strategy work, at a contact value not exceeding R98 770 024.08 excl. VAT and travel and subsistence.

143.The Board Tender Committee (BTC) authorized the entry into the "Top Consultants" Contract on 21 October 2015. There is no contract value directly associated with the BTC approval for this contract. This is what is then termed the Second Contract.

144.Payments by Eskom to Trillian and McKinsey under the Second Contract total R 1,593,155,413.01 (R 1,028,592,499.72 to McKinsey and R 564,562,913.29 to Trillian) they were made between August 2016 and February 2017.

145.The next time this matter comes before the BTC is on 21 June 2016 whereat it approves the cancellation of the McKinsey 'risk based process' and for the costs to be negotiated and finalised. Eskom then cancel's the contract and notifies McKinsey.

146.In this presentation I list the meetings that I consider critical for the execution of the McKinsey Trillian matter. They include, amongst others,

146.1.Board meeting of 29 November 2016

146.2.BTC of 13 December 2016

Board Meeting of 29 November 2016

147.Zethembe Khoza, Chairperson of the BTC at the time, raised the issue of Trillian at this meeting of the board of directors on 29 November 2016 in regard to the press reports that were out at the time.

148. At this meeting, the then Group Chief Financial Officer, Anoj Singh, provided his understanding of the background to the matter and mentioned the BTC approval provided for engagement with McKinsey which had the authority to subcontract and in exercising that authority, had subcontracted to Trillian.
149. He clearly stated that payments were made to both McKinsey and Trillian although management had revisited the MSA (Master Services Agreement) with McKinsey and raised its concerns over procurement on a single source basis.
150. The MSA with McKinsey had subsequently been terminated.
151. Whilst it was correct that Eskom did not have a direct contractual relationship with Trillian, the company had been subcontracted to McKinsey and work done by Trillian had to be paid for.
152. The GCFO further stated that Trillian had also undertaken work for Eskom in respect of assessing risks and it was providing assistance with the EFC matter.
153. In conclusion, it was noted that the relationship with McKinsey had been terminated, the MSA had been cancelled and provisions had been made for any final outstanding payments owing.
154. Mr Khoza was comfortable with the explanation provided by the GCFO as he raised no further issues.
155. The Board also appeared comfortable with the explanation provided by the GCFO. The non-executive directors in attendance at this meeting were Dr Ben Ngubane, Mrs Venete Klein, Ms Chwayita Mabude, Dr Pat Naidoo and Mr Zethembe Khoza.

Report to Minister Brown in re the Procurement of Services and Payments to McKinsey and Trillian ("48 hour Report")

156. I wish to emphasise that my actions in the matter of preparing and submitting the Report on Procurement of Services and Payments to McKinsey and Company Africa (Pty) Ltd and Trillian Capital Partners (Pty) Ltd ("Report") were undertaken in good faith at all times and in accordance with the instruction from the Audit and Risk Committee.
157. At the meeting of the Board on 29 August 2017, whereat I had presented, at the request of the Interim Group Chief Executive at the time, Johnny Dladla, I set out a summary of the key findings of the exercise undertaken by Bowmans and set out the recommendations for the way forward. This was captured in a

memorandum dated 29 August 2017 which I had prepared and the remedies set out therein were supported by David Unterhalter SC in a formal written opinion.

158. At this meeting, the compilation and verification of the content of the Report was delegated to the Audit and Risk Committee due to the Acting Chairman's and Acting Group Chief Executive's imminent departure to China on Eskom business.

159. I was then tasked to update the memorandum that I had prepared and also structure same as per the discussion between the Acting Chairperson and Minister Brown in preparation for the submission to the Minister on 1 September 2017 on the issues, more specifically a letter that arrived on 31 August 2017 requesting Eskom to clarify payments to Trillian and provide the report by no later than 1 September 2017.

Structure of the Report

160. The structure of the said Report was informed by the email instruction from the Acting Chairman to Mr Dladla and Mr Gounden, the text whereof is set out below for easy reference, together with the discussion at the Board meeting.

161. The discussion at the Board meeting was based on my Memorandum dated 29 August 2017, titled "Alleged Irregularities in connection with the Procurement of Services from McKinsey and Company Africa (Pty) Ltd".

162. It was on the strength of this Memorandum of 29 August 2017 and the discussion at the meeting, that the email of the Interim Chairman of the Board was premised,

163. Having regard to all of the above, the Report which I compiled in a very short time, was constructed as follows:

163.1. Background (which recorded all the governance related deliberations from the outset of the engagement with McKinsey)

163.2. Internal Audit on MSA Procurement Process (which set out the exercise undertaken by Eskom's internal audit function in respect of the procurement process)

163.3. Assessment by Oliver Wyman (which described the work undertaken by the Oliver Wyman)

- 163.4. Legal Review (which set out the contents of the review undertaken by Cliffe Dekker Hofmeyer, amplified as a consequence of the recommendations contained in the Oliver Wyman Report) ;
- 163.5. Payments made by Eskom to McKinsey and Trillian (which set out the chronology of payments and how they were given effect to by Eskom)
- 163.6. Oliver Wyman/Eskom Holdings SOC Ltd (which set out the legal matter which arose between the parties and required of Eskom to issue a correction to the media)
- 163.7. Response and Actions (which set out the actions which have been undertaken by the company in response to the findings of the exercise by Bowmans and the forensic investigation by G9.)
- 163.8. Annexures attached to this Report were:

- A Letter from Eskom to McKinsey dated 19 February 2016
- B Letter from McKinsey to Eskom dated 25 February 2016
- C Draft Memorandum Top Engineers Programme Review, Memorandum from Molefi Nkhabu – Senior General Manager (Assurance and Forensic) to Anoj Singh (Group Chief Financial Officer)
- D Oliver Wyman Draft Preliminary Report dated 9 December 2016
- E Oliver Wyman Report dated 15 December 2016
- F Draft Settlement Letter as prepared by CDH for Eskom with detailed drafting notes and comments for Eskom's consideration dated 15 February 2017
- G Memo from CDH to Eskom dated 17 February 2017 setting out chronology of events with specific comments relating to the risk based service level agreement concluded between Eskom and McKinsey
- H Memo from Eskom to CDH dated 20 February 2017 setting out a response to the CDH Memorandum of 17th February 2017
- I Memo from CDH dated 28 February 2017 setting out updated chronology of events with specific comments relating to the risk based service level agreement concluded between Eskom and McKinsey
- J Letter from McKinsey to Eskom dated 30 March 2016 advising Eskom that "McKinsey's interactions with Trillian have now been terminated with confirmation having been sent to Trillian".
- K First Contract between Eskom and McKinsey
- L Letter from McKinsey to Eskom dated 9 February 2016 providing "Authorisation to pay Subcontractor Directly"
- M Second Contract between Eskom and McKinsey
- N Letter from Trillian Capital Partners to Eskom requesting that "Eskom reviews the terms of the risk based contract and reimburse it as per the contractual arrangements, in order for it to close out the contract.
- O Letter dated 23 August 2017 from Adams and Adams to Eskom
- P Media reply as provided from the Office of the CFO dated 7 July 2017
- Q Correction letters from Eskom to the journalists dated 25 and 28 August 2017 respectively

- R 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 Trillion Capital Partners (Pty) Ltd dated 2 August 2017
- S Eskom Assurance and Forensic Department "The Trillion Investigation" dated 21 August 2017
- T Submissions to the Board Tender Committee and Exco Procurement Subcommittee
- 22 June 2015
 - 6 July 2015
 - 8 October 2015
 - 9 June 2016
 - 8 August 2016
 - 12 December 2016

164. The Report was sent out on the 31 August 2017 to the Audit and Risk Committee Members for perusal and review and to be discussed at the special meeting convened that day.

Audit and Risk Committee 31 August 2017

165. While the meeting was scheduled for an hour, I took members through a page turn of the Report as prepared. Edits were suggested and these were incorporated by me.

166. The updated Report as per the instruction of the Audit and Risk Committee was circulated by me via email and the Company Secretary had been provided with a complete Report consisting of the Report and its annexes for copying and distribution to the members.

167. Members had requested hard copies and as the Report consisted of 29 pages and 25 annexes. I assume that the time lapse between the meeting and the receipt of the full pack may have been 5 days. The Company Secretary would need to verify same. I confirm that I had emailed the Report to the members, minus the annexes, some of which they had obtained as part of the earlier deliberations but a more complete set was provided in the hard copy edition.

168. It is also important to note that the Report, as prepared by me, was checked by Bowmans, Cliffe Dekker Hofmeyer and Oliver Wyman to ensure that I had depicted the facts insofar as it pertained to the respective entities correctly. Their comments were incorporated and signed off by the respective representatives.

169. Mr Gounden, as Acting Chairman and Chairman of the Audit and Risk Committee, signed off the cover letter and the pack for delivery to the Director General, Department of Public Enterprises as per the instruction received from Minister's office. It does beg the question of whether Mr Gounden was fully apprised of the import of Minister Brown's statement as it would mean that he acted without authority too as Minister Brown stated in her media statement that the Report was not signed by the Chairman.

Meeting With Minister Brown, 15 September 2017

170. Minister Brown met with the IGCE and IC on 15 September at OR Tambo International.

171. Upon his return to the office, Mr Dladla was clearly upset and interrogated me as to exactly when I undertook the legal review, the response to the 4 issues raised by the Minister.

172. I responded that the legal review was commenced on 5 December 2017 when Prish Govender sent me a request to review documents and that I had prepared a pro forma response for consideration upon request of the Acting Group Chief Executive, Thava Govender on 13 September 2017.

173. It was further concerning to read in the statement issued by the Department of Public Enterprises that Minister Brown indicated that the Report contained "glaring gaps" while Her subsequent supplementary questions were limited to four issues, of which I had prepared a draft response for consideration and suggested the attachments thereto.

174. I prepared a detailed Memorandum subject "Minister Brown's Media Release of 15 September 2017" to the Acting Group Chief Executive at the time, Johnny Dladla, dated 17 September 2017 setting out the information necessary to address issues raised insofar as it pertains to the activities for which I am accountable and responsible. This Memorandum also set out a detailed response to the bullet no 4 as contained in the first statement issued at 19h18.

175. To date, I have not had any formal feedback whatsoever on the documents submitted which were prepared to assist the Board to respond to the supplementary questions by the Minister, although I understand that a different report was sent to the Minister **in addition to** the one which I prepared.

H. Conclusion

In the final analysis, my conclusion is:

176. The wrongful actions uncovered were as clever as it was brazen.

177. My professional expertise was unwittingly exploited to accomplish personal vested interests against Eskom.