

**BRIAN MOLEFE SUBMISSION TO THE PORTFOLIO COMMITTEE ON  
PUBLIC ENTERPRISES**

**A. THE PURCHASE OF OPTIMUM COAL HOLDING BY TEGETA FROM GLENCORE**

**Background**

1. I arrived at Eskom in April 2015. During this period, Eskom was experiencing Load shedding which was having a debilitating effect on the South African economy as well as on Eskom. Staff morale was very low. The South African public was generally angry with the utility because of the hardship that load shedding was imposing on them. The fastest growing app in social media was called; *“eskom se push”*. This for me summarised the extent of public anger and frustration at load shedding which was generally seen as Eskom’s fault.
  
2. I saw my first task as being to instil a fresh sense of purpose and improve the morale of all staff, including senior management. We embarked on a programme to improve the maintenance of Eskom’s fleet of electricity

generating plants. This led to the development of the strategy of “*Tetris*” by some of Eskom’s young engineers, which we have briefed this committee about during a previous meeting.

3. My view is that this strategy, as well as the implementation thereof by Eskom employees, contributed immensely to the end of load shedding which stopped in August 2015, (see also <https://www.fin24.com/economy/eskom/watch-how-classic-game-tetris-saved-eskom-20151124>). In this respect, Lyle Timm –a young engineer at Eskom-, his team, all the power station managers and the generation team, deserve special mention.

### **The Glencore Contract**

4. Glencore was, during this period, one of the Eskom’s coal suppliers. Their Optimum mine had a 25 year contract to supply coal to Eskom’s Hendrina power station. This contract is due to expire in 2018. (A copy of the contract can be obtained from Eskom).

5. In terms of this contract, Optimum was obliged to supply coal of a certain quality to Eskom at R150 per ton until 2018. The contract also specified that should the coal quality be below certain specified levels, Eskom could impose a fine on Optimum.
  
6. A penalty in terms of this contract had previously been imposed by Eskom in 2012. But there had been on and off negotiations with Glencore on the penalty for about three years. By 2015 when I arrived at Eskom, I was advised that if we do not take steps to recover the debt, the amount owing on the penalty could prescribe.
  
7. In May 2015, I became aware of Glencore's request to increase the contracted price to R530 per ton. This was in essence a request for a variation of the contracted price in favour of Optimum and its shareholder, Glencore. In addition, they wanted the penalties that had already accumulated in terms of this contract (about R2.1bn) to be waived and set aside by Eskom. Their reason for wanting these variations was "hardship".

8. This request was being favourably considered by Eskom before my arrival there. However when I looked at the request, I could not support it. Glencore's "hardship" was nowhere near Eskom and South Africa's as a result of load shedding. I could find no reason to entertain this request as we had legally binding agreements on the price of coal as well as the penalties. For Eskom to have agreed to this request would have been irresponsible in the light of what the company was going through.
9. We met with representatives of Glencore, and made it abundantly clear that their request could not be entertained because Eskom's own position was precarious. I note that during this enquiry, Piers Marsden, who became the business rescue manager of Optimum, characterised our stance in response to Glencore at the time as being commercially sound. I couldn't agree more.
10. Glencore's position was that if they did not get the price increase they would stop the supply of coal to Hendrina and they emphasised that this could result in more load shedding. After the possibility of termination of supply was mentioned by Glencore, we started working on increasing the coal stock piles at Hendrina. I knew that Eskom, and the country,

could not be held to ransom by a supplier of coal who was prepared to let South Africa suffer crippling power shortages to secure an increased price. The additional cost to Eskom of such an increase would have been in the region of R1,98bn per annum.

### **Minister Ramatlhodi and Glencore**

11. At about this time, the Department of Minerals announced that Glencore's mining licences have been suspended. The reason for the suspension was that Glencore had not followed due process in the proposed retrenchments of their workers. The effect of the suspension of the mining licenses would be to guarantee the suspension of coal supplies by Optimum to Hendrina.
12. We were relieved, when a few days later, the suspension of the licenses was withdrawn.
13. I was dumbfounded when in May 2017, former Minister Ramatlhodi claimed that the Eskom Chairman, (Dr Ngubane), and I met with him to ask him to suspend Glencore's license, and that he refused because it

would result in more load shedding. He seemed to have forgotten that **he had in fact suspended the license at the time.**

### **Business Rescue**

14. In early August 2015, Glencore decided to put Optimum in business rescue. A business rescue practitioner, Piers Marsden, was appointed. With 48 hours of being appointed, the practitioner wrote to Eskom saying that he requires us to increase the price that we were paying for Optimum coal, otherwise he will have to stop the supply of coal to Hendrina.
15. The supply of coal to Hendrina was indeed suspended by the business rescue practitioner in August. For about a month, we had no coal from Optimum and we supplied Hendrina from the stock piles as well as through scavenging from the small coal miners in the area.
16. The month of August also happened to be the month in which Tetris started showing results. Plant availability improved sufficiently to stop load shedding. However, if Hendrina had been closed because there

was no coal, load shedding would have continued. Load shedding stopped in spite of the fact that Optimum was not supplying us with coal.

17. In his evidence in this enquiry, Piers Marsden confirmed that they used the business rescue rules to avoid entering into arbitration proceedings with Eskom on the R2.1bn penalty. He also said that Eskom did try to take the matter of the R2.1bn penalty on arbitration.
18. In September 2015, Mr Clinton Efron of Glencore, (and **not** the business rescue practitioner), called me to say that they would resume coal supplies to Hendrina at R150 per ton, which we accepted. Subsequently Glencore intimated that they would like to sell Optimum.
19. We told him that that was their decision, but that they must know that our price of R150 per ton stands until 2018 irrespective of who the owner of the mine is. Similarly, the penalty of R2.1bn would remain payable.

## **Sale of Optimum**

20. Glencore, after entertaining several buyers, sold Optimum to Oakbay. The deal was approved by all the creditors of Optimum, (mainly South African banks), as well as the Competition Commission. At the time of the sale, the price of coal for Hendrina remained R150 per ton in line with the agreement, and the R2.1bn penalties remained payable by the new sellers.
21. Pembani had also indicated their interest in buying the mine. When we indicated that the R150 price per ton as well as the penalties will remain payable, their view was that the deal was not attractive. They walked away. Incidentally, Piers Marsden also confirms this in his testimony to this committee.

## **B. PENSION PAYMENT FROM ESKOM PENSION FUND**

22. In April 2015 I was seconded from Transnet to Eskom as Group Chief Executive Officer in an acting capacity.



23. On the 2<sup>nd</sup> of October 2015, I received a letter from the Minister of Public Enterprises appointing me as Chief Executive Officer of Eskom and ex officio member of the Eskom board. The letter did not have a limitation on the period of employment.
  
24. In October 2015 I also received a letter from the Chairman of Eskom, Dr Ben Ngubane confirming my appointment as Group Chief Executive Officer. There was no limitation on the period of employment.
  
25. In early October 2015 I received (and signed) the Executive Employment Contract from Eskom which specified the commencement date as 01 October 2015 (clause 1.2.7). The contract specified that employment was to continue for an indefinite period (clause 3.1).
  
26. In November 2015 my membership of the Eskom Pension Fund was finalised. I also transferred proceeds from my Transnet Pension Fund to the Eskom Pension Fund, (about R4.3m). The Eskom Pension Fund loaded my membership in their system as "PPX" meaning that I was a permanent employee.

27. On 1 November 2015, the Minister wrote a letter to Dr Ngubane informing him of a cabinet decision to employ all Parastatal Executives on five year contracts. This meant that my contract of employment would be changed to a five year contract.
28. On 9 November 2015 I received a letter from Dr Ngubane advising me that I will be required to enter into a fixed term contract of employment.
29. On 25 November 2015 Dr Ngubane wrote a letter to Minister Brown requesting her approval that;
- 29.1 At the end of the five year contract, I be allowed to retire from service as if I am 63 years old;
- 29.2 Penalties prescribed by the EPPF be waived and Eskom would carry the cost of the penalties.
30. The letter of 25 November 2015 from Dr Ngubane to the Minister was sent by the Eskom Company secretary, Ms S Daniels, to Ms K Davids (Minister's PA), O Ruthman and Z Mbilase at the Department of Public

Enterprises. The letter was e mailed at 20h33 on the 25 November 2015 by Ms Daniels.

31. At 21h05 on 25 November 2015, Ms K Davids acknowledged receipt of the letter and undertook to bring the letter to the Minister's attention.
32. On 26 November 2015, K Mhlongo sent an e mail to Ms S Daniels confirming that the letter will be brought to the Minister's attention.
33. On 9 February 2016, the People and Governance sub-Committee of the Eskom board (P&G) received a presentation from Mr A Minnaar where he;
  - 33.1 reported that a five year contract for the Group Chief Executive of Eskom is a first for Eskom;
  - 33.2 referred to previous precedents at Eskom where additional pensionable service was granted to executives and penalties were waived;
  - 33.3 explained the EPPF rules that permit staff members of over 50 years age to retire early and where Eskom made up the shortfall.

34. At this meeting, the P&G sub-committee made a resolution that;
- 34.1 The EPPF rule that employees may proceed on retirement from age 50 with ten years' service remains applicable;
- 34.2 Where executive directors (not specifically the GCE) on fixed term contracts take early retirement and there is a shortfall regarding the ten years, Eskom will bridge the gap, waive penalties and refund EPPF cost.
35. I note that Mr Brian Dames testified recently before this committee that there was a practise at Eskom to permit executives to take early retirement from Eskom. Mr Sibusiso Luthuli, Principal Officer of the EPPF said that Pension Fund Rule 28 permitted normal retirement from the Fund at age 50, with the permission of the employer. I further refer to the Guide to Benefits of the EPPF which refers to early retirement from the Fund being possible from the age of 50. The Guide informed my understanding of the EPPF Rules and was referred to by Mr Minnaar in the P & G sub-committee, referred to above.

36. On 11 November 2015, I wrote a letter to Dr Ngubane requesting early retirement in terms of the rules of the EPPF and the resolution of the P&G meeting of 9 February 16.
37. On 24 November 2016, I received a letter from Dr Ngubane communicating the Eskom Board's acceptance of my early retirement.
38. On 18 February 2017, I received a letter from the EPPF welcoming me as a pensioner and providing details of my pension.
39. I did not receive R30.1m as has been widely reported. I received a lump sum of some R7.7m from the EPPF on being admitted to the Fund. Of this, some R4.3m had been transferred by me from the Transnet Pension Fund to the EPPF.
40. In April 2015, after I had accepted appointment as a Member of the National Assembly by the North West Province of the ANC, Members of the Eskom board and Company Secretary met with me and intimated that the acceptance of my early retirement application was a mistake. I

asked them to make a proposal on a way forward that would get the Minister of Public Enterprises' approval.

41. On 11 May 2017 I received a letter from Dr Ngubane requesting me to resume duties as Eskom Group Chief Executive. Because of the common error of implementing the early retirement, the legal position was that the situation had to be restored to *status quo ante*. I obtained legal advice from senior counsel who confirmed that that was indeed the legal position. I signed a Reinstatement Agreement which regulated my return to duties, as did Eskom. Eskom also assured me that the Minister was comfortable and had approved this arrangement. Ms Daniels, in her testimony to this committee, indicated that such approval from the Minister had been obtained.
42. On 15 May 2017 I resumed duties as Eskom Group Chief Executive.
43. On 17 May 2017 the Eskom Group Company Secretary wrote a letter to the Principal Officer of the EPPF advising him of my resumption of duties at Eskom with effect from 15 May 2017 and further advising that my membership of the Pension Fund must be reinstated.

44. On 15 May 2017 the DA launched an urgent High Court application to challenge my resumption of duties. This was followed by an application by the EFF. The matter was originally set down to be heard on 2 June 2017.
45. On 31 May 2017 Minister Brown sent a letter to Dr Ngubane instructing the board to rescind the decision to reinstate me as Group Chief Executive.
46. On 24 May 2017 Solidarity launched an urgent High Court application seeking to review various decisions concerning my resumption of duties and related relief.
47. On 2 June 2017 after a brief Eskom board meeting I received a letter from Dr Ngubane advising me of the Minister's instruction to rescind my reinstatement. .
48. On 5 June 2017 I launched a Labour Court Application to set the summary dismissal aside.

49. On 6 June 2017 the High Court application was postponed pending the outcome of my Labour Court application
50. On 4 July 2017 the Labour court issued an order postponing hearing my application until after judgement in the High Court applications brought by the DA and the EFF.
51. The High Court will hear the applications from 29 November 2017 to 1 December 2017.

#### C. PUBLIC PROTECTOR'S REPORT

52. The Public Protector released a report titled "State of Capture Report" dated 14 October 2016. The report contained a series of "observations" and did not make any findings.
53. Paragraphs 5.96 to paragraph 5.101 deal with my phone records and makes some "notes".



54. Although the Public Protector makes the “notes”, she did not ask me for my side of the story as regards the phone calls, nor did she bring the phone records in her possession to my attention before she finalised the report.
55. Significantly, the Public Protector’s report did not make any findings as regards her “notes” relating to my phone records.
56. Nevertheless, paragraph 5.97 refers to contact between myself and Mr Ajay Gupta on a number of occasions. The Public protector fails to provide any other details about the phone calls. She does not provide the phone numbers nor the dates and times when the phone calls were made. It is therefore difficult for me to determine the veracity of her claim in paragraph 5.97 of the report.
57. Similarly in paragraph 5.98, there are no details of the phone numbers or the dates and times of the phone calls. I can therefore not confirm or deny the veracity of the claims.

58. In paragraph 5.100 the Public Protector says that I can be placed in the Saxonwold area 19 times. That is all that is said. She does not provide context or even suggest what I may have been doing there. What I understand from enquiries made to a communication expert is that any user of a cell phone within the area of coverage of a cell phone tower (e.g. Lynnwood) will be recorded as being in the “area” of, say, Lynnwood. This includes a user who is in transit through the coverage area of that tower.
59. But more importantly, paragraph 5.99 which suggests the number of instances that I was purportedly in the Saxonwold area only shows that I was there five times and not 19 times.
- 59.1 **05 August** when, according to the cell phone service provider’s records, I was in the area between 09h17 and 09h41 and made one phone call and received nine others.
- 59.2 **17 August** when, according to the cell phone service provider’s records, I made two phone calls while I was in transit in the area

- 59.3 **18 August** when, according to the cell phone service provider's records, I made one phone call while I was in transit in the area
- 59.4 **23 August** when, according to the cell phone service provider's records, I listened to my voice messages while in transit in the area.
- 59.5 **28 August** when, according to the cell phone service provider's records, I received two calls, listened to my voice messages and received one call while in transit in the area.
60. Paragraph 5.101 says that I had contact with Mr Atul Gupta. This is not true because the phone call from Mr Atul Gupta to myself was forwarded to my message box. There is no other record in my phone records that shows that I returned Mr Atul Gupta's call or that he ever tried to contact me again.
61. This is according to my cellular phone records which I have thoroughly examined since the release of her report.

62. I would have raised these and other discrepancies had Ms Madonsela afforded me an opportunity to present my side of the story.

**BRIAN MOLEFE**

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