**PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES**

**Oversight Enquiry into Governance, Procurement and Financial Sustainability of Eskom.**

*Statement by Devapushpum Naidoo (Viroshini)*

*Eskom Board member from 12 December 2014 to 1 July 2016*

Upon the invite and request of the Portfolio Committee on Public Enterprises I Devapushpum Naidoo, an adult female, residing in Gauteng state herein to the best of my knowledge, an account of certain matters at Eskom during my tenure as a board member, from the 12 December 2014 up until my resignation on the 1 July 2016:

1. My Appointment to the Eskom Board.

I was appointed to the Eskom Board on the 12 December 2014. At the time I was Group Legal Counsel for Mpact limited. I have been in the legal profession for over 20 years in both the Private and Corporate sectors. I have a BPROC, LLB and MBA degrees. I have worked at Telkom, Bytes Technology, American Tower and Mpact Limited and prior to corporate I had my own law firm. In September 2014 I recall an advertisement for board positions at the various State Owned Enterprises and I decided to apply. I was at the time applying for other board positions as well. In December 2014 I received a call from the Department of Public Enterprises, Mrs. Orcilla Ruthnam advising me that I was nominated to be accepted to the Board of Eskom and would I accept the nomination. Upon my acceptance it was announced in the media and I had to advise my current Employer. I honestly believed that accepting the Eskom position was an advancement to my professional career as well as I could be part of making a difference. I was extremely wrong.

1. My Role at Eskom

 Although most corporate board members have 4 meetings a year, at Eskom we were very different. We became board members at a very crucial time in Eskom, there was daily load shedding and this was costing the country millions of rand per day. Further Eskom was in dire financial strain’s and very dependent on financial bailouts from Government. Our first meeting as a Board was in January 2015.

As most of us were new board members we were very dependent on the advice and guidance from the chairperson Mr. Zola Tsotsi who was from the previous board. My decisions were always made in the best interest of Eskom and I tried tiresomely to always probe and ask difficult questions that would force management to act to better Eskom.

As a Board we had to do lots of deep dives to understand the business and was very dependent on information from management and in the beginning from Mr. Tsotsi. For us to try and get a grip of what was really the problems at Eskom the Board tried to understand if management was actually making the changes they said they did.

1. Sub committees

As a Board member I had to sit in subcommittees which formed part of the board.

At first I was on the Sustainability, Audit and Risk Committee (ARC), and New Build and Recovery, subcommittees. In July 2015 when Dr Ben Ngubane was acting Chairman, he and the People and Governance (PG) subcommittee of the Board re allocated the board members to different committees. I was removed from Sustainability and moved to Tender. At my objection. I had a few chats with the chair of PG, Ms. Veneta Klein, and advised her I was not comfortable being on Tender, as I felt it would require more of my time and I was already overwhelmed with the amount of work we had in Audit and Risk. Dr Ben chatted with me and advised me they thought I could add value as he saw how I probed matters and persuaded me to accept the position.

1. Governance and receipt of Information from Management.

*“Governance has been defined to refer to structures and processes that are designed to ensure accountability, transparency, responsiveness, rule of law, stability, equity and inclusiveness, empowerment, and broad-based participation. Governance also represents the norms, values and rules of the game through which public affairs are managed in a manner that is transparent, participatory, inclusive and responsive. Governance therefore can be subtle and may not be easily observable.  In a broad sense, governance is about the culture and institutional environment in which citizens and stakeholders interact among themselves and participate in public affairs. It is more than the organs of the government………. Unesco”*

We were constantly advised that the Old Historical Coal agreements specifically the “Cost Plus Mines” were costing us a lot of money resulting in Eskom having going concern issues. Also the New Build project was costing us a fortune due to the delays. As chair of the New Build and Recovery subcommittee I saw how over the years the price of the new build program escalated. It was really shocking. Eskom was constantly putting out fires and had to even try and facilitate discussions between Contractors and their subcontractors to resolve matters so that in the end Eskom is not affected by Contractors failing to comply with their obligations. It was business at an extra ordinary level to say the least.

It was shocking to discover some of the bad decisions that were made in the past such as the individual agreements in place with contractor’s for the New Build Projects, as opposed to EPC / Turnkey Agreements, also the position we were in, in terms of long term / evergreen agreements, where we were liable for penalties if we load shed clients. For example, in Demand Side Management, during or about in 2007 due to capacity management we entered into agreements with certain companies to load shed them if we did not have sufficient capacity, but subject to us paying them a penalty fee, and although this was regulated it seemed bizarre nevertheless. In 2015 when Eskom was load shedding and had going concern issues, I recall the Build and Recover Committee suggested to management to write to these companies and request that they advise us of their maintenance schedules so we can load shed them when they shut down for maintenance so that we don’t pay have to pay them the penalties. Management advised that they received a reply stating that Eskom must comply with its Agreements. This type of business practices were unconventional, but I soon realized these are historical decisions and Eskom had to manage the situation and move towards a sustainable and enterprising entity that could achieve its core strategy.

Meetings were always urgent. Packs were never given to us timeously and sometimes executives could not attend meetings. It was a very difficult role. By September 2015 from the date we were appointed, we had met 12 times as a Board, which indicated the attention that Eskom required from the Board. These related to the Turnaround Plan for Eskom in the current financial year, strategies going forward, executive performance management, Eskom’s liquidity and the impact of the Nersa decision, and Build Program. (See Board minutes dated 10 September 2015). We had to prepare for meetings by reading sometimes hundreds of pages of material. (See minutes of 10 September 2015 page 8 of 12 submissions 9) It was overwhelming and very time consuming. Matters for approval were always coming to us as urgent, added to packs on the day of the meeting or via round robins.

*The perception in the public domain is that the Board failed in its duties of ensuring that Governance Principles at Eskom were upheld and monitored.*

 In order to address the above, it is important for me to highlight that we were at some stage accused by management of being too operational (See minutes 10 September 2015 submission 9). Specifically, as we were asking very probing questions at subcommittee levels. At the meeting we were told that we needed to reflect on the detail of information we requested from our subcommittees, so as to free management to do their normal work. So it was agreed that we will allow Executive to prove themselves and we backed off a bit.

We also had the Denton Report and we insisted to the CFO (Mr. Anoj Singh) that the recommendations in the Denton report be implemented alternatively he must advise why it should not be implemented (See minutes Audit and Risk dated 4 September 2015, submission 2.2 page 3 of 3). The Denton report provided the Board with a guideline in terms of the key problems. Also Mr. Brian Molefe and Mr. Anoj Singh had joined Eskom from Transnet and it was important for them address the problems as management. In the Audit and Risk meeting of the 23 May 2016 submission No 11.2, page 26 of 27, it was reported by Internal Audit that it had verified that out of the 39 recommendations reported in the Denton’s Report 33 were closed as at February 2016, 5 had been partially implemented and one where management had accepted the risk.

The measures mentioned above and below are just some of the numerous incidences taken by the Board to constantly address governance issues. The Audit and Risk committee dealt with these issues at almost every meeting and the minutes speak for themselves.

MEDIA REPORTS REGARDING COAL CONTRACTS

A Special Board meeting was convened on the 21 September 2015

(See Minutes)

It related to an article in the Sunday times concerning “Eskom Bowing to the Gupta family” in respect of a coal supply agreement. The board instructed the Audit and Risk Committee to do an investigation into the coal procurement contract to confirm if due process was followed.

The Findings of the Investigation (Minutes Audit and Risk Committee Minutes 18 November 2015) are summarized as follows:

Procurement of the laboratories were flawed

No evidence of financial analysis

Supplier development and localization was not adequately consulted with the mines……….

In conclusion the procurement of both mines in the Primary energy division (PED) requirement needed improvement. It was resolved that management would investigate and rectify the situation.

KPMG REPORT ON GOVERNANCE

(See minutes dated 11 February 2016 Audit and Risk) A report was done by KPMG dated the 27 January 2016 on Eskom’s Governance and Control Reporting and monitoring processes.

The report provided guidance and significant findings to assist in the move forward. The company secretary assured the Committee that she would address the shortcomings once the office of the Company secretary was sufficiently strengthened.

Audit and Risk Meeting Minutes 23 MAY 2016, submission 6, “Audit findings”

There were weaknesses found in procurement. The CFO assured the committee that management and the auditors had agreed that the process now in place should mitigate against any repeat audit findings for the next audit cycle. (see minutes) In terms of procurement the CFO (Mr. Anoj Singh) assured the committee that various training programs were implemented and further the Compliance Officer from Transnet would be seconded to Eskom to help with the governance etc. There were constant assurances that compliance issues were being monitored and measures were put in place to ensure compliance (See Audit and Risk minutes dated 8 December 2015, submission 8.1 page 4 and 5 of 11).

I humbly request this committee to peruse the minutes of the Audit and Risk committee and other committees to see how the issue of governance was addressed constantly and how the Board wanted Management to take accountability. Section 76 of the Company’s Act sets out standards of directors’ conduct in line with common law duties, namely to act in good faith and for proper purpose, in the best interest of the company and with the expected degree of care, skill and diligence. I always acted in the best interest of Eskom and applied due care, skill and diligence. I refer to the section on Tenders below, wherein I provide tangible proof of matters where I applied due care to ensure Eskom’s’ interests prevailed.

1. Executive Suspensions (I have addressed this as Ms. Tshelofelo Molefe, mentioned it in her statement and mentioned the Board, even though it was not requested by this committee)

On 9 February 2016 the Chairman Mr. Zola Tsotsi tabled at an in committee meeting that an independent and external board of enquiry should be held at the request of the presidency….(See in-committee minutes’ dates 9/02/2015) Mr. Tsotsi said we must be certain we receive accurate information from management and that it must be certain and credible and suggested that he chairs a committee that will oversee this and he will get the Minister of Public Enterprises and the Minister of finance to approve the expenditure of such an enquiry. The specifics as per Mr. Tsotsi was that the enquiry must be completed within 3 months by 30 June 2015….and presented to the Minister and Presidency by then. He further advised that the presidency had already done all the legal framework and that he was in possession of a document in that regard already. (Kindly refer to the in committee minutes)

The Board pushed back as follows:

1. We were not comfortable with:
* making a decision based on a 2-page document (Which he claimed he had)
* deviating from procurement policies
1. The 3 months could take up managements time, which was needed in focusing on the business.
2. The CFO and CE were new in their positions and their participation so far was positive
3. The Board needed facts and to date nothing was provided, we needed the Minister to make the call
4. The Presidency or Minister must direct the board to do this
5. We need the Minster’s clarity on her expectations.

Mr. Tsotsi agreed to address the above matters with the Minister and revert. It was agreed at the meeting that the Board would engage with the Minister before an enquiry is established and request the terms of reference and scope from her.

11 March 2016 In Committee -Meeting of the board after meeting the Minister

The Board agreed as follows:

An enquiry will be held

The Chairman suggested the suspensions for people whose areas we are investigating, he also mentioned various misdemeanors – (See in- committee minutes for 11 March 2016, page 2 of 4)

The Board was not happy as follows:

The Board wanted a fact finding exercise before suspensions are implemented, so as not to act against innocent people. We felt it would be detrimental to suspend both the CFO and CE at the same time as it would not be good for the financial market.” The chairman (Mr. Tsotsie) advised that the CFO had met with tenderers in a tender and mentioned other indiscretions by certain Executives within Eskom premises.

After much deliberation we agreed to hold the enquiry and suspend the executives whose areas were being investigated. The Chairman was very convincing and we made the decision to proceed with enquiry and to suspend the four executives concerned. The matter was to be attended to by the People and Governance sub- committee.

1. Tender Committee Member

I was appointed to the Tender Committee on the 2nd June 2015, and my first Tender meeting was the 3rd June 2015, as I was only appointed the day before I could not contribute as I did not have sufficient time to peruse the documents. The next Tender meeting was the 21 July 2015 and my last Tender meeting was the 21 June 2016. My last day at Eskom was 1 July 2016. I never chaired the Tender committee but participated as a committee member.

It’s important for me to address the lines of defense (Control Measures) the Tender committee had at Tender:

A. Probity Assurance checks

This was done by either Eskom’s Internal Audit (Assurance and Forensic) or an external Audit Company. The checks were done on all matters that came to Tender. They were two fold. First being an assurance on Process, i.e. whether the right tender processes were followed and in alignment with Eskom policies and regulations. Secondly probity assurance was done on Forensics, whether there were any conflicts in respect to a tender, and the checks were done on ESCOPS (Exco Procurement Subcommittee), managers working on the Tender and the Board. In the circumstances Internal audit including other assurance providers were responsible for independently assessing, reporting and recommending (if need be) on the improvement with regard to the efficacy of controls. See attached Internal Audit Annexure 1 where in October 2015 the Tender committee asked Internal audit to relook at the assurances they provided to the committee, we wanted them to provide additional assurance on the business case as well as the monitoring of benefits for transactions. We at the time agreed it would be done on an as and when basis as the budget was already approved for the 2015 / 2016 financial year and Eskom could not afford to go beyond its budget.

B. ESCOPS (Exco Procurement Subcommittee)

This was a committee that consisted of executives and management and they assessed and approved all matters before it came to the Tender Board committee. They presented each matter to us at a Tender meeting. At the time when I was at Eskom it was chaired by Ms. Ayanda Noah, who was the executive in charge of Distribution. See attached hereto (ESCOPS Annexure 1) the hierarchy of ESCOPS in the Delegation of Authority.

The above lines of defense gave me assurance of matters complying with the governance principles in respect to Procurement. It also assured me that management was approving matters before it came to Tender.

1. Matters before me at Tender

I must first advise the committee, that I only received the Eskom Minutes of meetings I attended as a Board member during or about July 2017. Despite my numerous requests after the State Capture report came out in November 2016 Eskom simply ignored my pleas and only after it was aired that Parliament will be holding an enquiry into Eskom did I receive the minutes. After I resigned, Eskom requested I send my packs to them for destroying. Further only in October 2017 I was given access to the submission documents and in committee meeting minutes. Eskom has also failed to pay my legal fees relating to the state capture report, so I am forced to represent myself herein. They have made numerous promises to pay my fees but to date, no avail. I currently have an invoice owing to attorneys in the sum of approximately R28000.00 and they have not paid it for more than 8 months. I have not abused my rights by incurring unnecessary fees, but Eskom’s treatment of me as an ex board member is unkind and malicious. Due to the short notice by the Portfolio committee, I may have erred in leaving out or mentioning a matter in this statement or in my evidence due to the amount of reading I had to do in such a short time. In the circumstances I reserve my rights to supplement my statement at a later stage, or to address any inaccuracies.

SAP Modification.

I would like to draw the attention of the committee on a matter where it came to us via round robin and I eventually said to the Chair of Tender I was not happy with round robin resolutions. See attached SAP Annexure A and B, where a modification for a SAP agreement came to Tender for 70 million rand yet it was below our threshold and I advised the chair of the Tender committee that he should please hold a special meeting to deal with these matters. I further asked him whether something was extra ordinary in the SAP matter as it was way below our threshold. And as we had a meeting recently I could not understand why this was coming to us as a round robin when it could have been dealt with then.As a result of my request, he called a meeting instead of dealing with the matter via round robin.

The following are matters that came before me at Board Tender as requested by the Portfoloio Committee:

1. **Prepayment of coal to Tegeta: 11 April 2016**

 On the 11 April 2016 at approximately 20:17 I received a request to attend a special Board Tender Committee (BTC) meeting. It was for the extension of 2 current short term contracts that was expiring in 3 days. Attached hereto is the email invite and submission documents: Arnot Annexure A.

April 11. 2016 at 20:53

After perusal of the minutes at the above mentioned time I sent the Company Secretary, Ms. Suzanne Daniel, an email (Arnot Annexure B) with a list of questions as I was really concerned about this transaction. We did not have money yet we were prepaying a Company for coal.

***“My Questions were as follows:***

***1.When is the RFP going to be ready***

***2. Is the delay not costing us money.***

***3. Has Usimbithi already been supplying us, and if so why are we not negotiating a cheaper rate, they know we going out to tender they may agree to cheaper rates.***

***4. Is Tegeta the new company that bought Optimum, was optimum supplying us before and at a better rate.***

***5. Are they not in business rescue, by prepaying them who gets the money is it the Business Rescue Practitioner. Can we lose money by it going to the administrator?***

***6. If we put the money in the bank instead of prepayment and earn interest will I be getting a better deal based on the price I'm paying for the coal.***

***7. Can we justify the price we paying for this coal to the public and DPE***

***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.”***

11 April 2016: 21H01

I received an email from Ms. Daniel that the Chief Procurement Officer will address my questions on the teleconference. (Arnot: Annexure C). In Ms. Daniels statement to the Portfolio Committee I noticed she says that (no 39) “To the best of her knowledge the emergency had been declared a while back and would not really make a difference for the station “. She never mentioned this to the committee and had she done this the meeting would have gone in a very different direction.

11 April 2016: 21:09

During the teleconference I sent another email (Arnot: Annexure D) to the company secretary, asking

“Why ***is the shortage discovered so late, why were these companies chosen over the others.”***

Firstly, I must advise that the Board’s threshold is R750 million rand and above. This matter should not have come to us, and when a member asked the question, we were advised because the Tender committee approved the original mandate any modification would need to come back to the approval authority (see minutes for Tender Meeting page 2 of 4)

On the teleconference I was advised that the prepayment was necessary as we needed to commit to an agreement for the supply of coal to Arnot. Failing which we will not have coal and may have to load shed. I was very upset about this as at the time if I recall correctly we were at Nersa requesting an increase in tariffs, probably the week before. This was as I discussed earlier, business transactions that were not the norm elsewhere. Instead of Eskom dictating the price and circumstances of acquiring coal it was the supplier that was dictating the terms. Eskom according to my knowledge is the biggest purchaser of coal in SA and should be dictating how much and how it pays for coal.

Nevertheless, after much deliberation on the telecon we agreed to extend the contract with the two proposed suppliers subject to the following:

“The ***Chief Financial Officer is hereby authorized to approve the basis for the prepayment to secure the fixed coal price for the period of extension provided that there is a discount in the price, the supplier offers a guarantee in favor of Eskom and that the CFO can provide assurance to the committee that the transactions are economically viable for Eskom……….”*** (See Tender Minutes 11 April 2016)

And under “General” a comment was raised that a report be put to board “not” to endorse late submissions.

11 April 2016: 21: 44

See my email (Arnot Annexure: E) to the chairman Mr. Khoza after the meeting asking him ***to manage matters coming before the board so late, as we needed sufficient time to deliberate on matters***.

13 April 2016

Two days later we had a scheduled Tender meeting which the CFO attended and advised us that the Company Tegeta/ Optimum will give us a guarantee in the form of shares to ensure that the amount of the prepayment will be secured. The CFO apologised to the committee for overlooking the current situation of the company. He admitted that it was an oversight on management and at the time of the request they had an old guarantee on the assets of the company and lien over the coal assets, but now due to the boards queries on the teleconference, specifically whether this company will be able to trade if their Bank accounts were closed etc., he now has requested and received a guarantee of unencumbered shares from the company, subject to a guarantee being provided which would be more suitable.( See minutes of Tender Committee Meeting : 13 April 2016, Number 4.1 , page 2 of 24. Attached hereto as Arnot: Annexure F

The first time I became aware that this money was used to pay for the acquisition of Tegeta from Optimum was after the Public Protector report came out.

1. **T Systems**

Minutes of Board Tender Committee dated the 18 August 2015

Submission10.15

A feedback on the above matter came back to the Tender committee for noting.

“The results of the negotiations with T-Systems SA (Pty) Ltd for continuation of services during disengagement at a value of approximately R1.1 billion rand.

I joined Tender Committee in June 2015 and this was the first and only time this matter came before me. So I cannot address what transpired before the contract was awarded.

c) **DUVHA**

This matter first came before me in the Build and Recovery Subcommittee to discuss the details concerning the technical aspects. And as this committee was responsible for ensuring the recovery of Duvha and Majuba timeously, the matter was addressed on the following basis:

What were the causes for the Duvha incident, specifically dealing with the technical aspects as well as the insurance issues relating to the repairs.

The commercial part of the matter was referred to the Tender committee for adjudication.

The times the matter came before me is as follows:

1. Board Tender Meeting Minutes of the 3 June 2015, submission 9.7. page 12 of 15

(This was my first meeting as I was appointed to the committee on the 2nd of June 2015) I attended but did not participate as it was short notice for me to peruse the documents.

The submission was for the reviewing of the strategy for Duvha Unit 3

It was resolved for Eskom to negotiate but not conclude with an Engineering Procurement and Construction Management Contract (EPCM) with Fluor Sa and not Fluor Power Division -Greenville for 48 months. This is the company the insurer had approved.

To negotiate but not conclude an EPC/ Turnkey Contract with Fluor SA as opposed to doing multiple contracts. The Committee resolved for Eskom to negotiate with Doosan for engineering, design and procuring of long lead items. I recall in this matter that because of the high of the claim, a loss adjuster was appointed by the insurer to ascertain the loss suffered and to ensure the insured was put in a position it was in before the loss occurred.

1. Board Meeting (whole board) 10 September 2015

The Duvha matter was also addressed at the Board meeting dated the 10 September 2015.

Submission According to Management the Insurers wanted to repair Duvha with Technology that was ‘NEW” different to the other 5 units and not “like for like”. I recall that we were advised that the Insurer wanted to appoint a company to attend to the repairs and management advised that this would cause problems later in terms of guarantees and spares etc.

The board resolved that the matter be referred to the Tender committee (See Board minutes dated 10/09/2015, submission 15.16) and Eskom should negotiate and conclude a cash settlement. It was resolved to except the cash settlement from the insurer and seek the appropriate contractor to repair the unit.

1. Board Tender Meeting 10 December 2015

The next time this matter came before me was at a Tender meeting dated 10 December 2015

The submission made by management were as follows:

The insurer settled at 4.9 billion, however the insurer imposed a penalty that if Eskom failed to implement a contract by 31 March 2016 then Eskom would lose approximately about 100 million rand that formed part of the settlement.

Management recommended three suppliers: Alstom, Mitsubishi Hitachi and Doosan. There were numerous concerns expressed on why we were considering Hitachi as Eskom was already incurring numerous problems with Hitachi in Medupi and Kusile. Management assured the committee that lessons learnt will be considered herein. (See minutes dated 10 December 2015 parag 11.0, page 5 of 23.)

We were advised that Doosan’s technology was a prototype and new in SA and had never been used here so it was not suitable for SA. Management also advised there was an unsolicited offer from Hypec for the sum of R5bn, but it was for a scope beyond what Hitachi and Billfinger provided.

The committee then approved that Eskom negotiate and conclude with one of following three parties:

Billfinger

Hitachi Power Systems Europe Gmbh (MHPSA)

Hubei Honguan Power Engineering Company limited (Hypec)

Subject to price, technical suitability SDL.

1. Tender Meeting 21 June 2016

A submission was made for the committee to approve a contractor for pre- demolishing, structural assessment and repairs and scope of work.

This was the last time this matter came before me. I am not sure when the committee approved a contractor for the construction of Unit 3 for Duvha, as this was the last tender meeting I attended.

**I was not asked by the committee to address the following matters but because it was addressed by Ms. Suzanne Daniel who implicated the board, I feel obliged to advise the committee of what transpired in terms of my role as a Board member.**

1. **R1.6 Billion Guarantee**

The first time I heard of such an issue was on television watching an Eskom news briefing. I could not recall authorizing a guarantee and was surprised as such a value was within the Board threshold and I could not recall approving such a transaction.

After perusal of my emails I found a round robin request in terms of a “Pre-Purchase of Coal for Optimum”. I attach hereto (Optimum Annexure A) an email with the submission documents sent to the Board on the 8 December 2015 AT 17:51 PM. On the basis of the submission my understanding of the matter was that Optimum was in financial trouble and this commitment from Eskom of a pre-purchase of coal which was supported by the Department of Mineral Resources, would allow the company to continue to operate and ensure that it would look lucrative etc. in respect to any prospective purchasers. If this company continued to operate then Eskom would be assured of a capacity of supply of coal.

8 December 2015 :18: 32PM

I first sent questions to the company Secretary Ms. Suzanne Daniels around the resolutions. I attach hereto an email confirming same (See Optimum Annexure B)

8 December 2015: 19H00

Its seems either Mr. Anoj Singh or Mr. M Koko responded to my questions (See Optimum Annexure C).

The responses to my questions were ***that we are buying coal in terms of an existing contract and at the agreed price as per the agreement. Further I was advised there is no other means of getting Coal for Hendrina at a price of R150/ tonne.***

This matter was also regarded by management as urgent and we had to approve by the next day which would be the 9 December 2015 at 12pm.

8 December 2015: 19H30

I approved it subject to the following:

-***The Investment and Finance Committee (IFC subcommittee of the Board) signs off,***

 ***-It complies with PFMA and other statutory regulations. As the amount was above the board’s threshold, of R1.5 billion I asked the Company secretary the erstwhile Ms. Daniel if it did not require DPE approval as I recalled the matter was over 1.5 billion had to go to DPE for approval.***

***A copy of my email is attached***. (Optimum Annexure C)

Ms. Daniel says in her statement number 45, stated that she convened a meeting with IFC and in her evidence confirmed that it was due to her understanding of the threshold that is why she did it. I draw the committee to the above email I sent wherein I brought it to her attention. She should have called the IFC meeting before the round robin was circulated to the board. I am also aware another Board member refused to sign until IFC approved it. With respect Ms. Daniel was incorrect in her submission to the committee when she read out the resolution, which forced Advocate Vanara to ask her the question whether the board was negligible in instructing Mr. Singh to sign a guarantee out of his delegation and not in compliance with PFMA. As the Board never approved a guarantee. Nevertheless an IFC meeting was convened the next day the 9th.

9 December 2015: 8h30 AM

The Investment and Finance committee (IFC) held a meeting as per the request above and approved the pre-purchase of coal from Optimum. See minutes of the IFC meeting (Attached is Optimum Annexure D**). IFC approved the transaction for a “pre-purchase of coal”, subject to all the necessary regulatory approvals having been obtained by Eskom and the supplier.**

Ms. Daniel upon receipt of my email and IFC’s recommendations should have ensured that the matter was approved by DPE and all other regulatory compliance was adhered to.

19 April 2016 Eskom Board Meeting

(See attached copy of minutes’ page 9 of 11) wherein the above matter was ratified by the board as a pre-purchase of coal from Optimum. A copy of the minutes is attached hereto (Optimum Annexure E). This was done three months later. There was never an approval by the Board for a guarantee for R1.6 billion nor the approval for the pre-purchase of coal from Tegeta for the value of R1.6 billion. Ms. Daniel was the company secretary in April 2016 and brought this matter before us to be ratified. She first should have advised the Board that a guarantee was issued and NOT the pre-purchase as agreed by the board. She owed the Board a duty to report where the Company had acted against the Board’s authority.

After the IFC meeting I never received a feedback from Ms. Daniel as to what transpired. However, she advises that she conveyed this to the board members (no 51 of her statement) as the Round Robin documentation was circulated. The Round Robin came to me on the 8th of December the day before and I had confirmed it subject to the above. Ms. Daniel never sent it to me on the 9th of December 2015, nor did she advise me what transpired at IFC.

At the time when the matter came to us in December 2015 no mention of who the prospective purchasers of Optimum was. This matter was referred to IFC for their approval, as a subcommittee to assess whether Eskom is financially capable of entering into such a deal, as it was an investment request and within their ambit to deliberate and recommend to the board. I recall my thinking was around trying to ensure the company continues to trade so as to ensure supply to Eskom, and I did not see any risk as we were already depending on this company for supply and we had an agreement in place with a good price per tonne. The Boards authority was totally disregarded herein.

The board firstly could not have signed off on a guarantee as the boards threshold was 250 million rand for a guarantee. See attached a submission by Mr. Neo Tsholofanku (Head of Legal at the time ) on the Delegation of Authority and the Board Tender committee’s threshold for a guarantee, which was subject to various restrictions. (Optimum Annexure F). Ms. Daniel ought to have known this as she was the Company secretary.

1. **Mckinsey**

This matter first came to me as a Board Tender committee member on the 2 June 2015 from the secretary of tender as a Round Robin. I joined the tender committee on the 2 June 2015.

I’m not sure if the matter was discussed at a Tender meeting prior to this. It was for the approval of a “commodity strategy to appoint Mckinsey & Company on a Sole Source basis to develop the current Top Engineers Programme into a unit that can provide world class management consulting service…. (I attach hereto the email as well attachments. Mckinsey Annexure A). I had many queries with the matter as I was not comfortable with the submission and sent an email to Mr. Edwin Mabelane that I would like to discuss the matter with him. Attached hereto are my emails and his reply (Mckinsey Annexure B and Annexure C. **However, I refer the committee to the submission documents attached hereto which clearly shows that the Initial submission was for Eskom to enter into a three (3) year agreement with Mckinsey. One of my changes was that Eskom needed to relook at the business case in in twelve months, therefore I requested an exit clause in twelve months to be inserted.**

I Attach hereto (Mckinsey Annexure D and E) an email from the Tender committee secretary (Ms Matabane ) reflecting the changes by inserting the “12 months with an exit clause”. The changes are highlighted in red. Mr. Edwin Mabelane will confirm that I had requested the exit clause at 12 months.

We were advised that there would be no loss to Eskom as Mckinsey will receive a fee only if they achieve benefits for Eskom. At the time we had serious going concern issues, I refer the committee to Board minutes for the 31 March 2015 page 6, parag 7.2 and minutes dated the 28 May 2015, page 2, parag 7. Our strategy was to try and reduce costs within the business and create a good financial standing with the ultimate aim of being profitable.

I signed this resolution on the 6th of July 2015 after the 12 months term and exit clause was inserted. I have read in an article that Mr. Khoza has stated that Mr. Anoj Singh had negotiated with Mckinsey a cancelation of this agreement during July 2016. If Management had complied with the resolution that the Tender committee signed, and this clause was inserted, then cancellation in July 2016 would have been according to the Agreement and the exit clause the board insisted on.

A second Mckinsey contract came to Board (whole board) as a request via round robin for the board to appoint Mckinsey as a key partner in providing financial and strategic topics at a fixed cost price of R101,733,124.80 for a duration of 8 months. This was also a “Sole Agreement “. As it was a consulting agreement and being a sole agreement my understanding was if we contracted with Mckinsey herein, Mckinsey will not be able to sub-contract. And further consultancy agreements are based on skills within a firm and therefore it’s important to ensure that the contractor delivers and not another entity. So under this Agreement Mckinsey would not have been able to subcontract to any other supplier.

*I’m not sure why this matter came before us as it was well below the threshold of the Board or even the Board tender committee*.

October 2015 Tender Meeting 21/10/2015

A submission was put to the Tender committee to approve a “Risk Based Agreement” as the Top Engineers Agreement was not risk based. This matter was related to the Top Engineers strategy that came to the Tender committee in July 2015, when I first joined Tender. The request was for Mckinsey to “Develop “the Current Top Engineers programme into and Internal Consulting unit, that can provide a world class management consulting services capable of resolving emerging company wide risks by unlocking cash, without tendering. As Mckinsey was already providing a service and our Top engineers were already within the group this seemed to be added value to Eskom, and it fell into our strategy of turning Eskom into a business that could provide services to the company as well to outside companies at a price beneficial to Eskom. Mckinsey will also improve efficiency in other areas and try and save money by negotiating contracts that will add value but at the same time save Eskom millions. Further we were advised that the cost was based on a % of the savings that McKinsey saved Eskom. This supported our aim of reducing costs at Eskom. As this was a follow up to the MSA that Tender approved in July the exit clause at 12 months which I insisted on, was inserted.

At the meeting we had a lengthy discussion on the PFMA issue and also whether this was not like the B2B Programme which was implemented by the previous board and failed to achieve the results it was intended for. On the PFMA issue Mr. Neo Tsholofanko the Head of legal advised the Tender committee that the Agreement will be a “condition precedent” to the compliance of PFMA and National Treasury regulations. I refer the committee to listen to the recording of the minutes of the 21 October 2015, where Mr. Tsholofanko confirms this.

The submission in October was presented by ESCOPS (Mckinsey Annexure D). This was the last time the Mckinsey matter came to the Board. And on the basis of the minutes Management had to ensure that the Agreement complied with all regulations, including National Treasury and PFMA.

There was never an agreement that came to me as a board member for Trillian, Regiments or for Mckinsey sub-contracting to any other company, as of 1 July 2016 when I left Eskom. The first time I heard of Trillian doing work for Eskom was in the newspapers and the parliamentary enquiry.

Public Protector Report

FINDINGS BY PP

There were no findings, I refer to paragraph 7 of the report which talks of “OBSERVATIONS” There were no findings as a result of which I received legal opinion from my attorney who advised me, that as the Public Protector did not make any findings, I could not take the report on review, as one cannot set aside observations. The best solution would be for me to go to the judicial enquiry, which I am currently waiting for.

ISSUES IN THE REPORT CONCERNING ME.

I attach hereto the notice sent to the Board on the 1 October 2016 I only found out about this the day before Thuli Madonsela left office and the day before her report was made final. To be exact I found out at 8h30 pm at night on the 13 October 2016 when I received a WhatsApp message from the company secretary Ms. Suzanne Daniels requesting if she can call me. She called me around 9pm and advised me to look at my emails. The email sent to me at 9h20 pm attached the Notice from the Public Protector as well as the response that Eskom sent to the PP on my behalf the same day.

I categorically state that I never knew of the PP’s investigations involving me, nor did Eskom consult with me before responding. Nevertheless, it was too late for me to respond immediately. I responded however two days later, and attach hereto my letter sent to the Public Protector, from my attorneys Thomson Wilks, which is self-explanatory. (SEE PP Annexure A). Attached is her reply which advises she cannot address the matter as her predecessor had finalised the report.

The Public Protector’s Notice did not talk about my husband’s Company Albatime (Pty) Ltd contributing to the purchase of Tegeta/ Optimum, therefore I did respond to it. The first time I heard of this was the day the State Capture Report was made public. I addressed the matter with my husband and he advised me that he did not contribute to the purchase of Tegeta/ Optimum.

I refer to the following meetings that the PP referred to where she states I did not declare my interest. Although I have no interest in Tegeta/ Optimum, during or about January 2016 I read in the newspaper articles about Mr. Zwane visiting Switzerland and was involved in discussions with the Glencore concerning the Optimum coal mine. I thereafter wrote to the company secretary Ms. Daniel and advised her that maybe because my husband is an advisor to Minister Zwane, I should abstain from voting in matters relating to mining.

The first Tender committee meeting for 2016 was on the 10 February 2016.

I attached hereto (See PP Annexure B and C) page one and page three of the minutes of that meeting as well as page 25. As you can see in the first two pages I was present at the meeting and further under “Declaration of interest “I did not declare any interests as I had no interest in any of the companies under discussions. ***However, on page 25 of the minutes when the matter of “Optimum” was being discussed I reminded the committee that my husband was an advisor in the Department of Mineral Resources and left the room.***

**The next Tender meeting was on the 7 March 2016. I refer to the second page of the meeting (see PP Annexure D) where I reminded the committee my husband was an advisor and the committee felt that because we were not dealing with the awarding of any mining tenders but only Eskom strategies I should remain in the meeting. See attached the second page of the minutes reflecting the above**.

My husband resigned as an Advisor to Minister of Mineral Resources on the 31 March 2016.

The next tender meeting was a special meeting called on the 11 April 2016. As my husband was no longer an advisor I was advised by the chair of Tender that I should attend as the conflict had fallen away.