

**INQUIRY INTO ALLEGATIONS BY THE CHIEF PROCUREMENT OFFICER OF
ESKOM HOLDINGS SOC LIMITED**

DATED: 01 JUNE 2021

INTRODUCTION

1. On 4 March 2021, the Board of Eskom Holdings SOC Limited (“Eskom”) took a resolution to establish this inquiry. In the relevant part, the resolution reads: -

“2.2.2. it was resolved that: -

a) an inquiry be conducted to investigate the racism allegations made by the Chief Procurement Officer against the Group Chief Executive”¹

2. The Terms of Reference² (“ToR”) for the inquiry relate to establishing the veracity of allegations of racial discrimination, poor governance, irregular recruitment, and appointments as well as unlawful procurement.

3. After a protracted delay³, Mr. S Tshitangano, the Chief Procurement Officer (“CPO”) agreed to give evidence before this inquiry. This, he did after the Chairperson of the Board of Eskom, Prof. M W Makgoba intimated to him that he is at risk of being charged with misconduct⁴. The relevant part of the letter reads as follows:

“to this end, you are instructed to contact Advocate Semenya by no later than close of business on Friday, 7 May 2021 and make the necessary arrangements for your appearance at the Commission of Inquiry. Failure to do so will leave us with no option but to continue with the investigation process without your

¹ See Extract of the Minutes of the Board (Attachment 1).

² See full text of the Terms of Reference (Attachment 2).

³ See a memorandum from Adv. Semenya SC addressed to the Chairperson of the Board detailing all efforts made inviting Mr. Tshitangano to avail himself for the inquiry (Attachment 3).

⁴ See a letter from Prof. Makgoba to Mr. S Tshitangano dated 6 May 2021 (Attachment 4).

participation and we will also invoke disciplinary processes for breaching your suspension conditions”.

4. In the discharge of the mandate of the Board establishing this inquiry, I was favoured with documents⁵ numbering approximately 1107 pages. I have also heard the evidence of 4 witnesses, namely, Mr. S Tshitangano, Ms. E Pule, Mr. A de Ruyter (“the GCE”) and Prof. M W Makgoba. The transcript of the hearings is in excess of 300 pages.
5. I am mindful of the fact that there are parallel processes dealing with a similar subject matter as in the ToR⁶. For that reason, I remain cautious that I do not unduly straddle the work of the disciplinary committee hearing the allegation of misconduct of the CPO, the Review application under Case Number: 3970/2021 or, for that matter, the work of SCOPA.
6. I have been assisted by Seanego Attorneys Inc. and Advocates Shude and Mudimeli.
7. I deal with the themes which are described in the ToR in their chronology.

⁵ See Bundle A numbering 798 pages; Bundle B numbering 212 pages; Bundle C numbering 31 pages.

⁶ See Eskom’s Replying Affidavit on pages 672 – 798 of Bundle A; See also the reference to Advocate Cassim’s disciplinary inquiry in the attachment to the memorandum in footnote 3 *supra*.

Allegations Regarding Racial Discrimination

8. In his evidence, the CPO disavowed that he accused the GCE of racism in relation to allegations of non-performance made against him by the GCE. He said the following in his evidence before the inquiry:⁷

“Mr. Tshitangano: ‘... where in that letter do I say Andre is a racist ...’

Chairperson: ‘Okay. is the anywhere in paragraph 1 where you think the conduct of the GSE (sic) is racist? ...’

Mr. Tshitangano: ‘No...’

Chairperson: No?

Mr. Tshitangano: No...

Chairperson: Okay...’

“Chairperson: ‘Okay. Okay. Now let me read to you what the terms of reference says under paragraph 1.1. That would be on page 1. It says “the board of inquiry had to determine whether the actions taken by the GCE” oh sorry. Whether the actions taken by the GCE, I’m reading now 1.1, to address allegations of non-performance by the CPOs constitute a racial discrimination and or abuse of power against him. So, as I understand you, you are not making any charge about racial discrimination, but you really want to say that there has been an abuse of power and in that

⁷ Page 77 lines 7, 16 – 18; Page 80 lines 3 – 17 of the transcripts.

regard, you're making reference to failure to comply with the processes?'

Mr. Tshitangano: 'Correct.'

Chairperson: 'That's it.'

Mr. Tshitangano: 'That's it.'"

9. On the aspect of allegations that the GCE preferred a white-owned company above another that is black owned on racial grounds, the CPO had the following to say: ⁸

"Chairperson: '...Whether the actions taken by the GCE to address issues regarding Econ Oil and Energy (Pty) LTD a black owned supplier constitutes racial discrimination against it and or the purging of black suppliers when compared to the treatment of white suppliers such as RULA and ABB. Is that you speaking there? ...'

Mr. Tshitangano: 'No. My concern was which is still there in that document, it's a constitutional requirement and even a supply chain requirement that must treat all suppliers equitably.'"

⁸ Page 80, lines 22 -25; Page 81, lines 1-2 and 8-11 of the transcripts.

10. In his evidence, the CPO disavowed that he has accused the GCE of racism⁹ or preferring a white company above another that is black owned on racial grounds¹⁰ I must state in the most emphatic of terms that this retraction by the CPO is startling. As a Senior Executive member of Eskom, he is alive to the fact that these complaints had enjoyed wide publicity; he wrote to the President of the Republic of South Africa, the Minister of Public Enterprise, the Director General of the Department of Public Enterprise, the Auditor General, the Parliamentary Standing Committee on Public Accounts (“SCOPA”), the Zondo Commission and to the National Treasury.¹¹
11. Any simple google search for “Purging Black Suppliers” reveals names of the GCE referencing him¹² as a racist. It also records complaints by organisations such as the Black Management Forum, calling for the suspension of the GCE.¹³
12. As a Senior Executive at Eskom, the CPO must have known that the nature of these allegations, given the history of South Africa, would impair the dignity of the GCE, malign the entire board of Eskom and imperil the corporate standing of

⁹ Page 77, lines 7, 16-22 of the transcripts where it reads “... where in that letter do I say Andre is a racist ...Chairperson: Okay, is the anywhere in paragraph 1 (in the ToR) were you think the conduct of the GSE (sic) is racist? ... Mr. S Tshitangano: No...Chairperson: No? Mr. S Tshitangano: No... Chairperson: Okay...”

¹⁰ Page 80, lines 3-17 of the transcripts where it reads “Chairperson: Okay, Okay. Now let me read to you what the terms of reference says under paragraph 1.1. that would be on page 1, It says “The Board of Inquiry had to determine whether the actions taken by the GCE” oh sorry, Whether the actions taken by the GCE, I am reading now 1.1, to address allegations of non-performance by the CPO constitutes racial discrimination and or abuse of power against him. So, as I understand you, you are not making any charge about racial discrimination but you really want to say that there has been an abuse of power and in that regard you’re making reference to failure to comply with the processes... ? Mr. S Tshitangano: Correct. Chairperson: That’s it. Mr. S Tshitangano: That’s it.t...”

¹¹ See letters on pages 12 and 28 of Bundle A and the recipients of the letters listed on page 39 of Bundle A.

¹² See a printout of a google search on “Purging Black Suppliers” (Attachment 5).

¹³ *Ibid.*

Eskom, which is the biggest state-owned company. The allegations could potentially harm Eskom's financial status.

13. Despite knowing that these allegations of racism were wrong, egregious, false, baseless, and lacking any substantiation, the CPO did not publicly deny them. It is not surprising that the GCE would take umbrage at these scurrilous allegations; that the Chairperson of the Board would take offence that he is cast as somebody presiding over a corporate entity that is accused of practicing racial discrimination which, according to the CPO is promoting "*a culture where corruption, nepotism and patronage are tolerated*"¹⁴; that bodies like the Black Management Forum would call for the suspension of the GCE¹⁵ given the racial slant that the CPO's concerns have enjoyed in the public domain.¹⁶

14. A proper reading of Eskom's Delegation of Authority Policy¹⁷ regarding the responsibilities of the GCE which reads:

"2.2.3.5. It is hereby recorded that the GCE is, in general terms and subject to what is set out herein, delegated with full authority to manage and run Eskom's business; and:

a) The provisions hereof shall not be construed as in any way limiting the authority of the GCE, subject to the overall limitations set out herein to manage the day-to-day operations of the business in accordance with his/her performance compact.

¹⁴ Page 321, lines 2 – 6 of the transcripts.

¹⁵ See footnote 12 *supra*.

¹⁶ *Ibid.*

¹⁷ See page 7 of Bundle B, Delegation of Authority document identifier 240-62072907 later revised on 15 October 2020 Policy signed/authorized on 17 February 2017, revised on 15 October 2020.

b) In particular, the GCE is authorized to prescribe the manner in which authority is exercised by Delegees, and is entitled to act in any matter even where authority is delegated to another Delegee, and to revoke or amend any power/authority granted to any Delegee, provided that any such amendment shall not grant to any Delegee any higher authority than that granted by the Board for that level of Delegee. The authority of the GCE as set out in this clause extends to Exco subcommittees but does not extend to the Board Committees.

2.2.3.6. The GCE shall be entitled to implement or give effect to a Board mandate in the manner s/he deems most effective and efficient for Eskom, and s/he shall not require Board approval for each aspect of a transaction or structuring of transactions, falling within a Board mandate”,

would reveal that the CPO's interpretation thereof is misguided.

15. The CPO, had he familiarized himself with the authority and responsibilities of the GCE, would have known that any inquiry regarding the non-performance or alleged non-performance by the CPO would have been matters that fall squarely within the remit of the GCE.
16. There would therefore have been nothing wrong for the GCE to probe the performance of the CPO, let alone the racial overtones that are given to the subject.

17. The conduct of the GCE regarding Econ Oil and Energy (Pty) Limited (“Econ Oil”) on termination of the contract (also a matter in which Eskom and Econ Oil are in litigation) would be a matter on which the GCE has full responsibility and power.¹⁸
18. On the question of racism and given the South African history, the Chairperson described the issue quite aptly. His evidence was that many of us may struggle to define what a lion is scientifically, but we will all know it, if it entered the room we occupy. He also testified that he is not aware of any single Board member who has seen anything remotely suggesting that the GCE could be racist.

Allegations Regarding Governance

19. The CPO complains that the fact that the GCE questioned him for not making himself available for a Supplier Review Committee (“SRC”) meeting on 19 November 2020¹⁹ constitutes undermining of the CPO and/or the abuse of the GCE’s power and/or, is an interference by the GCE in the SRC process.²⁰ In his response to the GCE dated 19 November 2020, the CPO said the following:

“Afternoon Andre

The meeting was scheduled without considering my Thursday diary:

I had my weekly meeting from 9 to 11 and SES meeting scheduled from 9 to 14 procurement Steerco from 12 to 14...”²¹

¹⁸ *Ibid.*

¹⁹ See email from GCE to CPO dated 19 November 2020 on page 20 of Bundle A

²⁰ See page 1 of Bundle A, paragraph 2.1 of ToR.

²¹ See page 19 of Bundle A *supra*.

20. On this matter, Mr. B Theron who, seemingly frustrated by the inaction of the CPO, decided to call the meeting of the SRC to look into the conduct of Econ Oil.²² The GCE's evidence is that the CPO informed him that he had attended, at the same time, a Board Sub-Committee meeting.²³
21. To this, the evidence of the GCE is that he looked at the calendar for that day and noted that the only meeting that took place was the Board Strategy Committee meeting and that the CPO is not customarily an attendee of such Committee meetings and is also not on the list of invited attendees.²⁴ In his evidence, the GCE says that the CPO gave a different reason why he did not avail himself for the SRC meeting of 19 November 2020 and claimed to have attended an internal staff meeting. Contrary to the GCE's evidence, the CPO's evidence is that he was in another meeting with the GCE. The fact that the CPO was in another meeting is confirmed by the email quoted in paragraph 19 above. The minutes of the Social

²² Email from Mr. B Theron dated 13 November 2020 on page 15 of Bundle A.

²³Page 291, lines 9-25, his evidence read "CHAIRPERSON: *'The second point he makes is that at the same time that meeting was held he was in another meeting with you, amongst others, at the same time?'*

'MR DE RUYTER: 'Chair, I in fact looked at my calendar for that day. In his testimony Mr. Tshitangano says that we were together in a board meeting or a board committee meeting. He uses the phrases interchangeably.'

CHAIRPERSON: *'Correct.'*

MR DE RUYTER: *'And there is no board meeting scheduled for that day. The only board committee meeting that took place was of the board strategy committee that took place from 8 to 9. Mr. Tshitangano was not customarily an attendee of this meeting and he is also not on the list of invited attendees to this meeting. So I find his assertion inexplicable, it does not correlate with the facts as I have them.'* and page 116, lines 17 – 24, where Mr. Tshitangano states: *"on the date, because he just, he doesn't have my calendar, he scheduled that meeting on the 19 November 2020 and on that meeting, there's a board meeting, a Board Sub-committee meeting. When I declined that meeting because he put a time which was between the board meeting and Andre, when he was accusing me, he was aware that we were from that meeting, a Board meeting."*

²⁴ Page 291, lines 18-23.

and Ethics Sustainability Committee meeting which was scheduled for the same date confirms that the CPO attended the meeting at 9:55 and the GCE was not in attendance.²⁵ The CPO does not give adequate reasons why he was not available for the SRC meeting on 19 November 2020.

22. The CPO contends that Mr. Theron had no authority to call the SRC meeting because he, Mr. Theron is not a member of the SRC²⁶ and, for that reason, had no authority to call a special SRC meeting²⁷. To this he added that his diary was not consulted in scheduling the meeting for the 19 November 2020.²⁸ On 16 August 2020 the GCE wrote an email to the CPO indicating that he really wants to receive a report on the Econ Oil proposed cancellation of the contract. This did not enjoy any urgency with the CPO.
23. The CPO also misunderstands the role of the SRC. His evidence that the decision of the SRC cannot be reviewed by Eskom and can only be reviewed by a court, is wrong. The CPO's contention that the decision of the SRC cannot be reviewed by Eskom is based on his misreading of clause 7.4.5²⁹ of the Terms of Reference of the SRC. The proper meaning of this clause is that a service provider cannot have

²⁵ See minutes of the SES meeting (Attachment 6).

²⁶ Page 116, lines 2-6 of the transcript, which read as follows: "MR TSHITANGANO '...Ben Theron who is arranging a meeting, he is not a member of the Supply Review Committee. He does not even have the right or authority to request a meeting. The terms of reference, it is very clear.'"

²⁷ *Ibid.*

²⁸ Page 116, lines 17-20 of the transcript, which reads as follows: "MR TSHITANGANO: 'November, which we still attended. On that date, because he just, he doesn't have my calendar, he scheduled that meeting on the 19th of November and on that meeting, there is a board meeting, a board sub-committee meeting.'"

²⁹ The clause reads "7.4.5. the committee is the final arbiter and next step will be to approach the court if the supplier is not satisfied with the outcome."

the decision of the SRC reviewed but must approach a court of law, if affronted by any decision of the SRC.

24. I am also required to inquire whether the instruction of the GCE dated 31 August 2020 undermines the authority of the Eskom Board and/or the Constitution³⁰. The instruction reads:

“in view of the impending legal separation of our three divisions, as well as the ongoing revision of delegations of authority, you are hereby instructed to refrain from entering into any contracts for the supply of goods and services with the term longer than six months, and a total value greater than R10-million, unless such a contract has been approved by the relevant divisional board, or a delegate of such divisional board, or in the case of group contracts, by Exco. This instruction overrides any current delegation of authority, and you are required to ensure compliance with this instruction in your area of responsibility.”

25. The CPO regards the instruction as undermining the authority of Eskom and/or Parliament and/or the Constitution. Nothing can be more bizarre. The authority of the GCE, as I have pointed out above, includes the power *“to manage and run Eskom’s business.”* The evidence of the GCE is that, in light of the restructuring of the three divisions of Eskom being generation, transmission and distribution; apprehensive that long term contracts may be concluded and hamper the

³⁰ Page 1, paragraph 2.2 of Bundle A.

restructuring, he wanted to ensure that he was made aware of contracts exceeding the period of six months or the threshold amount of R10 million. This was his evidence in this regard:

“MR DE RUYTER: Thank you. So, as you are probably aware, Eskom is going through a restructuring and unbundling process. We are really separating the organisation into three entities: generation, transmission, and distribution. In anticipation of this legal separation we have divisionalized the business, so we’ve set up divisional boards, so for all intents and purposes acting like wholly owned subsidiaries but still within the fold of Eskom Holdings SOC. As part of the divisionalization process we wanted to delegate to the divisional boards the power to conduct their own (inaudible), which is consistent with the eventual goal of legal separation. It came to my attention that in the run-up to amendments to the delegation of authority that would give effect to the subjective, that there was, and in my submission to SCOPA I referred to it as a “sudden alacrity” amongst certain officials in Eskom Procurement to conclude long term

agreements with suppliers. Some of the executives who were going to be appointed or who had in fact been appointed as the managing directors of these divisions approached me and complained and said how can we be expected to take accountability for long term agreements signed immediately before taking over responsibility if we are not involved in how these agreements are negotiated, we will be saddled with these potentially onerous contracts for a long period, three years, five years, and please help us to avoid this, and it is against that backdrop that I issued this instruction and said please check that when you conclude an agreement, greater than R10-million or longer than six months, please ensure that it is approved by the relevant divisional board. So that was the purpose of that instruction, was to ensure that there was sufficient ownership by the management of the divisions of the contracts that were going to be concluded.”³¹

³¹ Page 293, lines 11-25 and page 294, lines 1-19 of the transcript.

26. This, by any language, is perfectly the job of a GCE.
27. On whether the GCE's instruction dated 31 August 2020 constitutes a breach of Eskom's Delegation of Authority of July 2020 or that it is an unlawful usurpation of the Boards power, the answer is no. Again, a close reading of the instruction has a qualifier to it. The caveat is that a contract longer than 6 months or higher than R10 million can also be concluded but with the approval of the relevant divisional board.³² The GCE is the Chairperson of all divisional Boards. He would accordingly know before such an approval can be made.
28. I am called also to inquire whether the GCE's instruction of 31 August 2020 undermines Eskom's internal financial and risk management systems or controls. It would be perplexing that a GCE, whose compact with the Board and responsibility is to manage the day-to-day operations of the business can be unable to give such an instruction. It is surprising that the CPO, as a senior executive at Eskom, would find it necessary to raise this instruction as unlawful and address the President of the country. He should know better.

Allegations Regarding Recruitment

29. I am to inquire on whether the GCE was responsible for any non-compliance with the Eskom internal recruitment process regarding the appointment of the General Manager: Audit and Forensics Ms. Nida Gafoor, Chief Information Officer: Ms. Faith Burn, Company Secretary: Mr. Mlawuli Manjingolo, Senior Manager: Fuel

³² See page 30 of Bundle A *supra*.

it was irregular what do we make of an argument that says in return but you Mr. CPO the line manager you approved it.'

Mr. Tshitangano:

*'I will say I'm coming in after the appointment has been done, there's a big difference when you are recommending the appointment and when the process is done and completed and a contract is supposed to be signed and is given to you because that contract comes only after the negotiations have been done with the successful employee and you are given a product yes, I signed for that product.'*³⁵

32. The CPO went further to concede that the appointment of Mr. Mouton was ratified by the Board that as a result, the issue has since become moot. This was his evidence in that regard:

"Chairperson: 'I'm not suggesting it makes it right, I'm suggesting that it becomes regularized. So, if in my report I say all of these things show that the appointment of Mr. Mouton was irregular I must then include another sentence. Despite these

³⁵ Page 33, lines 5-19 of the transcript.

irregularities the board had ratified the appointment and made it regular.'

Mr. Tshitangano: 'Correct.'³⁶

33. The CPO accepted that for over a period of a year he has been unable to recruit an appropriate expert for fuel oil pricing³⁷. He solicited the help of the GCE who promptly managed to source Mr. Mouton. The CPO also acknowledges that the appointments of all these individuals have since been ratified by the Board.³⁸
34. Ms. E Pule General Manager: Human Resources also gave evidence. Her testimony was that the appointments of all the individuals identified under this heading were regular. In my view, once it is accepted that the board had ratified all these appointments, no useful purpose would be served by interrogating the regularity or otherwise of the appointments. The board is the ultimate authority and accounting officer of the utility under the Public Finance Management Act.³⁹
35. In no veiled language, the CPO writes to the Chairperson of the Board. In part, the letter reads:

"I thought Andre will bring to Eskom a culture where corruption, nepotism and patronage are not tolerated, and where action is taken against those who abuse their power or steal public money as pointed out by the President in his 2020 State of the Nation Address..."

³⁶ Page 172, lines 5-11 of transcript.

³⁷ Page 4 of Bundle A *supra*.

³⁸ See page 29 of Bundle A *supra*.

³⁹ Act 1 of 1999.

The process to identify and engage an expert promoted a culture where corruption, nepotism and patronage are tolerated. Andre disregarded the fairness and transparency principles. As a result, Werner was appointed and given a monthly salary of R200,000.00 as if he is the only expert in this country. Human Resources assisted Andre to appoint his preferred expert undermining the demands of equal treatment and transparency.”⁴⁰

36. An accusation, as wild as this one is, that Eskom tolerates a culture of corruption, nepotism, and patronage, is highly irresponsible, particularly because it lacks any substantiation.

37. In his evidence, the CPO referred to section 195(1)(i) of the Constitution,⁴¹ (“the Constitution”) which provides:

“195 Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

⁴⁰ See pages 4 and 5 of Bundle A *supra*.

⁴¹ Act 108 of 1996.

(h) ...

(i) *Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*”

38. The import of his evidence in relation to section 195(1)(i) of the Constitution is that the employment of Mr. Mouton was not transparent, objective, or fair for the attainment to achieve broad representativity. The Constitutional provision to which he is referring to concerns public administration. It does not refer to a utility such as Eskom.

39. He further attempted to read the Eskom Talent Discovery Procedure⁴² into the above Constitutional provision and section 5 of the Employment equity Act⁴³ (“the Act”). The section of the Act is quoted in paragraph 41 below.

40. The following was his evidence in this regard:

“Mr. Tshitangano: ‘I think there’s one which it (sic) also tied on the policy, the, (sic) there’s one area that I need to highlight on the policy which its (sic) very important also. The, if you look at clause 311, 3.1.1. and point 3 of the Talent Discovery Procedure...’

⁴² See page 158 of Bundle A *supra*.

⁴³ Act 55 of 1998, as amended.

Mr. Tshitangano: *'It will say a vacant position will be open to all eligible applicants in line with the South African Constitution the Employment Equity Act and the Labour Relations Act. From there if you look at the section 195(1)(i) of the Constitution still confirms that for example the public administration must be representative of the South African people with the employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the parts to achieve broad representative.'*⁴⁴

41. ***"5. Elimination of unfair discrimination***

Every employer must take steps to promote equal opportunity in the workplace by eliminating fair discrimination in any employment policy or practice."

42. The CPO's reference to section 5 of the Employment Equity Act and clause 3.1.1.3 of the Talent Discovery Procedure seems to be insinuating that the appointment of Mr. Mouton constituted unfair discrimination against potential candidates because his position was, amongst others, not advertised. In his evidence, he had the following to say:

⁴⁴ Page 30 lines 17 – 21; page 31 lines 8 - 17 of the transcripts.

“Mr. Tshitangano: The line manager must request the appointment of a non-permanent employee by completing the relevant staff requisition form, submitting a motivational, motivation letter and highlighting other alternatives considered which may be approved. Below there it will A, B, C, D, E. In A the line manager must submit the approved staff requisition form to the HRBP, it’s human resource business partner, for the recruitment of a fixed term employee, FTE.”

Chairperson: ‘Okay.’

Mr. Tshitangano: ‘It’s fixed term employee. B, fixed term employees are identified and sourced by shared services HR, SS is shared services HR, through advertisement, sourcing CVs and the recruitment process in the document earlier at the beginning it will, the procedure shows you what happens when you, under recruitment, what happens under sourcing.’”⁴⁵

“Mr. Tshitangano: Yes, without giving the other potential candidates the opportunity to participate in whatever, there’s nothing wrong if you know a person who have got these skills and they are supposed to advertise it when you can be able to say hey we are advertising

⁴⁵ Page 5, lines 7 – 23 of the transcripts.

a post, apply. But if you only identify one person and interview one person and appoint one person that's where the concern is."⁴⁶

43. Confronted with Mr. Tshitangano' s evidence, the Group Executive Human Resources, Ms. Pule gave the following evidence on this aspect:

"Chairperson: 'And then he copies you, I think, to say, please facilitate the appointment of Mr. Mouton?'

MS Pule: 'Yes.'

Chairperson: 'Is that how it should happen?'

Ms. Pule 'Yes, it is not unusual, so we've always had recommendations but then they would go into the HR process to then process further.'

Chairperson: 'And it doesn't appear on the record that Mr. Mouton was part of what shall I say, competition for that post?'

Ms. Pule 'We have not advertised it.'

Chairperson: 'That's the point I'm making.'

Ms. Pule: 'Okay., we have not advertised the fixed term.'

Chairperson: 'Is that according to your policy and procedures?'

Ms. Pule: 'We do have a practice. We have not always advertised. I can't even think of a fixed term that we've advertised. It has

⁴⁶ Page 32, lines 9-16 of the transcript.

always been needs based and then we would have recommendations, or we would ask agencies for CVs.'

Chairperson: 'I'm asking whether that is in accordance with your policies, that fixed term contracts are not advertised?'

*Ms. Pule: 'No, ideally we prefer that to be advertised, but at this level, I don't recall in probably the last ten years, that we've advertised those short-term contracts.'*⁴⁷

44. The GCE, was also confronted with Mr. Tshitangano' s allegation on whether Eskom Recruitment HR policy was complied with in the appointment of Mr. Mouton and whether the GCE was responsible for the non-compliance⁴⁸, the GCE had the following to say:

"MR DE RUYTER: 'Yes, but that was the instruction that was given. Now Mr. Tshitangano then signed the HR requisition to appoint him as a fixed term contractor, informed by Ms. Pule, and he importantly also signed the contract of employment with Mr. Mouton. Now, Chair, if Mr. Tshitangano had serious reservations about the correctness of my appointing or wanting to appoint, or suggesting to appoint Mr. Mouton, then he certainly did not ~~at~~ that at the time, he did not raise a hand and say, look, I seriously

⁴⁷ Page 219, lines 21-25; page 220, lines 1-25; page 221, line 1 of the transcript.

⁴⁸ Page 2 of Bundle A, paragraph 3.1 thereof.

disagree with what you are doing here. Bearing in mind that by that time, even though I had done my homework, I was no (sic) an expert on Eskom HR policies, and I had to rely on what Ms. Pule was able to assist me with, and I continue to rely on my executives to tell me if they are of the view that what I am requesting them to do is not allowed in terms of whatever policy is in place. Very similar to my requesting the CFO to change numbers in financial statements, I would expect him to say, no, I can't do that, it is unlawful and u (sic) acceptable, and I refuse to do so, so neither Ms. Pule nor Mr. Tshitangano raised any concern about Mr. Mouton's appointment.”⁴⁹

45. Documents⁵⁰ show that the CPO, as line manager, acquiesced to the appointment by signing the contract and the motivation for Mr. Mouton's appointment.
46. In his own email to the GCE⁵¹, the CPO owned up to the fact that, for over a year, he had been unable to procure an expert relevant to the pricing of the fuel oil and procurement costs. He in fact requested the GCE to help him hunt for the expertise⁵².

⁴⁹ Page 300, lines 16-25 and 301, lines 1-11 of the transcript.

⁵⁰ See pages 620 – 633 of Bundle A *supra*; pages 56 – 58 of Bundle A *supra*.

⁵¹ Page 4 of Bundle A *supra*.

⁵² *Ibid*.

47. On the same day, the GCE helped to procure the services of Mr. Mouton⁵³, who, according to the GCE, has to date saved Eskom more than R600,000,000.00 (six hundred million rand)⁵⁴.
48. It is disquieting that the CPO's complaints include the engagement of Mr. Mouton by Eskom. It is also revealing that the initial contract concluded with Mr. Mouton was signed by the CPO himself without demure⁵⁵.

Allegations Regarding Procurement

49. Under this heading, the question is whether the GCE's instruction to the CPO to pursue cost savings and/or the suggestion of options to be explored for achieving cost savings, constitute unlawfulness and/or an abuse of power.⁵⁶
50. The evidence of the CPO is that he was expected to realize a saving of 8% of the budget.⁵⁷ His attitude was that the means through which he was expected to achieve that end were improper⁵⁸. According to him the legal opinion that he

⁵³ *Ibid.*

⁵⁴ Page 301, lines 17 – 23 of the transcripts, which read: "**Mr. de Ruyter:** ...bearing in mind that Mr. Mouton in his first year at Eskom contributed some R600-millions of savings in fuel oil procurement cost, and this is after normalizing for exchange rate and oil price movements, so the value that Mr. Mouton added during his tenure is incontrovertible, he saved Eskom a lot of money, so, Chair, that's where we are on that one."

⁵⁵ See footnote 33 *supra*.

⁵⁶ See page 2 of Bundle A, paragraph 4.1.

⁵⁷ Page 125, lines 13-14, page 128, lines 14-18 of the transcript, which reads "MR TSHITANGANO: 'In a year they will say you must save 8% of the contracts that have been finalized' and MR TSHITANGANO: 'And this contracts now had concluded, but on the other hand he will come to you and says yes, I'm charging you which is not your area, but they went to the media and says yes, Solly did not even achieve this 8%.'"

⁵⁸ Page 187, lines 17-24 of the transcript, which reads: "MR TSHITANGANO: 'There was no question of the abuse of power. The issue which is very clear from the statement that - remember they were only choosing whatever they want to choose but from the document and the arguments that is there (inaudible) what we

received was that contractual arrangements made with suppliers could not be unilaterally varied.⁵⁹ His contention was that such a variation would attract liability for Eskom. It was also his attitude that once an instruction was given by the GCE that no contract in excess of R10 million should be concluded, there was no possibility of achieving an 8% saving. It would appear the CPO misunderstood the instruction. If any contract exceeding six months of the R10 million threshold was commercially indicated, what was then a necessary instruction was to obtain the approval of the relevant divisional head. For those reasons the CPO made no attempts to renegotiate the agreements with any of the suppliers.

51. On the other hand, the evidence of the GCE on this topic was that, on the information of the General Manager: Transformation Mr. Ngoako Huma (“Mr. Huma”), by extending payment terms, Exco thought that up to R3.9 billion could be liberated from working capital by changing the payment terms. He thought that it was a good opportunity to improve Eskom’s position, which was heavily constrained. For that reason, Mr. Huma asked the CPO to go forth and see what could be done.⁶⁰ For reasons already alluded to, the CPO elected not to do anything about it.

are saying the argument that was there was that can we – the instruction to say save, there’s nothing unlawful; there is nothing. But the means to achieve that savings is the one that is a problem.”

⁵⁹ Page 188, lines 10-15, which reads “CHAIRPERSON: ‘Okay. So, and the subject is to incentivize the approach to payment terms, correct and he’s making suggestions about payment terms. [10:53] Legally saying that you cannot unilaterally change – ‘MR TSHITANGANO: ‘Correct.’”

⁶⁰ See page 30 -31 of Bundle A *supra*.

52. In any event, there can be nothing unlawful about renegotiating an agreement. Such a renegotiation, obviously with the other contracting parties' consent, may either yield positive outcome or not. A cost saving strategy and an instruction by the GCE to pursue such a strategy is perfectly within the competence of the GCE, given his compact with the Board.

Conclusion

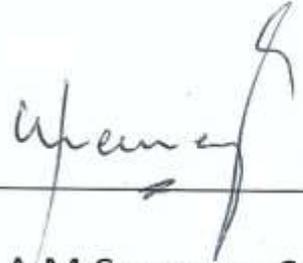
53. Having heard all the evidence, and considered all the documents, I could find no substantiation for the allegation that the GCE has conducted himself in any manner that would amount to racist practice.

54. I could also find no substantiation of poor governance on the part of the GCE or Eskom.

55. There was no substantiation for the allegation that the recruitment processes were irregular.

56. The claim that the procurement processes were unlawful is also without merit.

57. I, accordingly, cannot find in Eskom, anyone guilty of any wrongdoing and would be making no recommendation to that effect.

A handwritten signature in black ink, appearing to read 'I A M Semanya', written over a horizontal line.

Advocate I A M Semanya SC