

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF
SECTION 182(1)(b) OF THE CONSTITUTION OF THE
REPUBLIC OF SOUTH AFRICA, 1996 AND SECTIONS 8(1)
AND 8(2)(b)(i) OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

Report No: 30 of 2008/9

**REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF
IMPROPER CONDUCT BY THE FORMER CHAIRPERSON OF THE
BOARD OF DIRECTORS OF ESKOM HOLDINGS LIMITED, MR V
MOOSA, RELATING TO THE AWARDING OF A CONTRACT**

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Executive summary

- (i) The Office of the Public Protector conducted an own initiative investigation into an allegation made by a newspaper of improper conduct by the former Chairperson of the Eskom Holdings Limited (Eskom) Board of Directors, relating to the awarding of a contract.
- (ii) It was alleged that a contract for the construction of boiler works for new coal fired power station to be built in the Lephalale area, known as the Medupi Power Station, was awarded by Eskom to a company in which the African National Congress(ANC) has an interest. At the time of the awarding of the contract, Mr Moosa was the Chairperson of the Eskom Board of Directors, but also a member of the National Executive Committee of the ANC, and therefore, so it was alleged, had a conflict of interests.
- (iii) Ms H Zille of the Democratic Alliance also lodged a complaint, based solely on a newspaper report, in connection with the said matter. She furthermore requested an investigation of several other allegations relating to private business dealing and the affairs of the ANC.
- (iv) Eskom is a public entity that falls under the jurisdiction of the Public Protector. However, due to the fact that the Public Protector does not have the powers to investigate the affairs and relationships of private entities, such as political parties, private institutions and businesses, the other allegations referred to by Ms Zille could not be investigated.
- (v) From the investigation it was found that:
 - (a) There was a conflict between the personal interest of Mr Moosa in the ANC and his duty towards Eskom at the time when the

- Board resolved to award the Medupi Boiler Contract to the Hitachi Consortium, in which the ANC has an interest;
- (b) Mr Moosa failed to manage his said conflict of interests in compliance with the Conflict of Interest Policy of Eskom and therefore acted improperly;
 - (c) The contract that was awarded to the Hitachi Consortium was not in any way affected by Mr Moosa's improper conduct;
 - (d) The awarding of the contract by Eskom to an entity in which the ruling party has an interest was not unlawful; and
 - (e) It is desirable that the conducting of business between government institutions or public entities and political parties should be regulated by legislation.
- (vi) The Public Protector recommended that:
- (a) Eskom's Company Secretary takes urgent steps to ensure that all the members of the Board of Directors are provided with a copy of Eskom's Conflict of Interest Policy and the Guidelines for Directors, and briefed on its application and on the law applicable to conflict of interests that are referred to in this report; and
 - (b) The Minister of Public Enterprises considers developing legislation for submission to Parliament to regulate the conducting of business between government entities and political parties.

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1. INTRODUCTION

1.1 This report is submitted to:

The National Assembly;

The Minister of Minerals and Energy;

The Minister of Public Enterprises;

The Board of Directors of Eskom Holdings Limited; and

The National Energy Regulator of South Africa

in terms of the provisions of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and sections 8(1) and 8(2)(b)(i) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 It relates to an investigation into an allegation of improper conduct by the former Chairperson of the Board of Directors of Eskom Holdings Limited (Eskom), Mr V Moosa, in connection with the awarding of a contract pertaining to the construction of a new power station.

2. BACKGROUND

- 2.1 On 8 February 2008, the *Mail and Guardian* newspaper published an article under the heading:

"Moosa in R 38-billion tender conflict".

- 2.2 The article alleged, *inter alia*, that:

"Eskom board chair Valli Moosa presided over the parastatal giving contracts worth billions to African National Congress (ANC) funding company Chancellor House-while also serving on the ANC's fundraising committee.

Eskom would not say this week whether Moosa had declared a conflict of interest or recused himself when his board decided on the contracts. Moosa did not return calls.

The board made crucial decisions about the award of two contracts, together worth R38,5-billion, to a consortium that includes the ANC company."

- 2.3 It was suggested in the article that because of his involvement with the ANC, Mr Moosa had a conflict of interests when he chaired meetings of the Eskom Board of Directors where it was decided to award the said contracts to a company in which the ANC allegedly has an interest.
- 2.4 Referring to the contracts concerned, the article stated that:

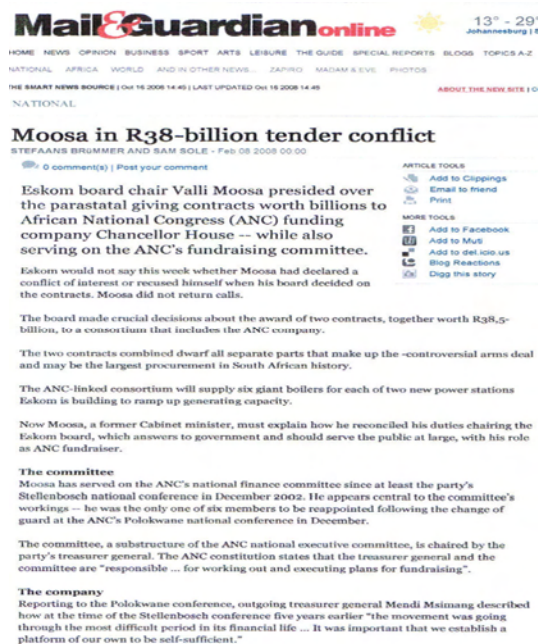
“Eskom’s board gave the go-ahead for the construction of Medupi, the parastatal’s new coal-fired power station in Limpopo, in December 2005-four months after Moosa became the utility’s chairperson.

Engineering company Hitachi Power Africa concluded its ‘empowerment’ transaction with Chancellor House in the same month, company records show.

Chancellor acquired 25%.

The tender process for Medupi’s boilers started in March 2006, and Hitachi Power Africa and Hitachi Power Europe formed a consortium to bid.

Last November Eskom announced the contract, for six boilers, had been awarded to the Hitachi consortium.



The screenshot shows a news article from Mail & Guardian online. The article is titled "Moosa in R38-billion tender conflict" and is dated February 08, 2008. The author is identified as Stefania Brummer and Sami Soale. The article text includes:

Eskom board chair Valli Moosa presided over the parastatal giving contracts worth billions to African National Congress (ANC) funding company Chancellor House -- while also serving on the ANC's fundraising committee.

Eskom would not say this week whether Moosa had declared a conflict of interest or recused himself when his board decided on the contracts. Moosa did not return calls.

The board made crucial decisions about the award of two contracts, together worth R38,5-billion, to a consortium that includes the ANC company.

The two contracts combined dwarf all separate parts that make up the -controversial arms deal and may be the largest procurement in South African history.

The ANC-linked consortium will supply six giant boilers for each of two new power stations Eskom is building to ramp up generating capacity.

Now Moosa, a former Cabinet minister, must explain how he reconciled his duties chairing the Eskom board, which answers to government and should serve the public at large, with his role as ANC fundraiser.

The committee
Moosa has served on the ANC's national finance committee since at least the party's Stellenbosch national conference in December 2002. He appears central to the committee's workings -- he was the only one of six members to be reappointed following the change of guard at the ANC's Polokwane national conference in December.

The committee, a substructure of the ANC national executive committee, is chaired by the party's treasurer general. The ANC constitution states that the treasurer general and the committee are "responsible ... for working out and executing plans for fundraising".

The company
Reporting to the Polokwane conference, outgoing treasurer general Mendi Maimang described how at the time of the Stellenbosch conference five years earlier "the movement was going through the most difficult period in its financial life ... It was important that we establish a platform of our own to be self-sufficient."

...

It said a consortium of engineering firms, Alstom and Steinmüller, had originally outscored Hitachi, and that the board had approved the award to them. Only after Alstom- Steinmüller hiked its price following a difference of opinion over the scope of the work were negotiations reopened with Hitachi- which then emerged as the preferred bidder on an objective basis.”

- 2.5 The allegations made by the *Mail and Guardian* in regard to Mr Moosa were referred to in a number of subsequent articles published by other members of the print media.

3. THE POWERS OF THE PUBLIC PROTECTOR TO CONDUCT AN INVESTIGATION ON OWN INITIATIVE

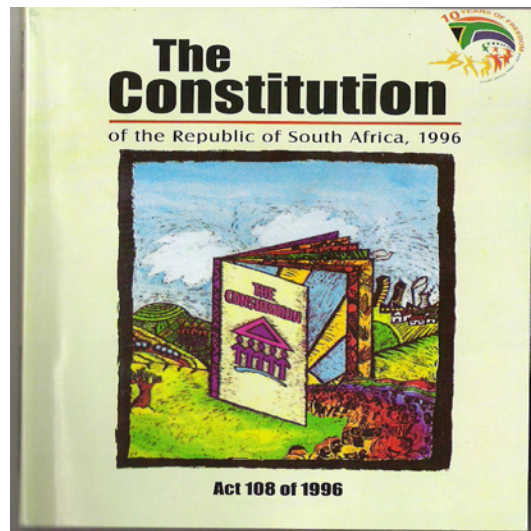
- 3.1 Section 182(1) of the Constitution provides that the Public Protector has the power, as regulated by national legislation to:

- 3.1.1 Investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

- 3.1.2 Report on that conduct; and

- 3.1.3 Take appropriate remedial action.

- 3.2 In terms of section 182(2), the Public Protector has additional powers, as prescribed by national legislation.



- 3.3 Section 6(5) of the Public Protector Act, 1994 provides that the Public Protector shall, "*on his or her own initiative or on receipt of a complaint be competent to investigate any alleged-*

- (a) *maladministration in connection with the affairs of any institution in which the State is the majority or controlling*

shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999;

(b) *abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);*

...."

3.4 "Public entity" is defined by section 1 of the Public Finance Management Act, 1999 (PFMA) as a national or provincial public entity.

3.5 The definition of a "national public entity" includes"

"a board, commission, company, corporation, fund or other entity which is-

(i) *established in terms of national legislation;*

(ii) *fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and*

(iii) *accountable to Parliament.*

3.6 Eskom is listed as a Major Public Entity in Schedule 2 to the PFMA.

3.7 The Public Protector therefore has the power to investigate, on own initiative, the allegation of improper conduct by the former Chairperson of Eskom, referred to in paragraph 2 above.

4. THE COMPLAINT LODGED BY THE DEMOCRATIC ALLIANCE

4.1 The own initiative investigation referred to in paragraph 3.7 above commenced on 25 February 2008.

4.2 On 10 March 2008, Ms H Zille, the Leader of the Democratic Alliance and the Executive Mayor of the City of Cape Town, lodged a complaint based on an article published by the *Sunday Times* on 9 March 2008. Referring to allegations of the improper involvement of the ANC in "a series of corrupt business deals", Ms Zille stated that:

"Amongst the reported allegations are the following:

- *That R 9 million was channeled into the ANC via its front company, Chancellor House, following a R1.5 billion empowerment deal involving Standard Bank, Liberty Life and Stanlib;*
- *The admission by former ANC Treasurer-General Mendi Msimang during the ANC's Polokwane Conference that party members are being 'deployed' to big business in return for a 'compulsory levy' paid to the ANC; and*
- *The involvement of Chancellor House in contracts to build boilers for two new Eskom power stations, in which the ANC stood to gain an estimated R5.8 billion."*

4.3 Ms Zille suggested that the following allegations are investigated by the Office of the Public Protector:

- *"The awarding of state contracts to companies with links to Chancellor House;*
- *Donations made to the ANC in return for influencing the outcome of empowerment deals;*

- *The practice of deploying ANC cadres to big business in return for a 'compulsory levy' paid to the party; and*
- *The role of big business in fostering corrupt relationships with the ruling party."*

5. THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE ALLEGATIONS REFERRED TO BY MS ZILLE

- 5.1 As indicated in paragraph 3 above, the Public Protector has the power to investigate allegations of misconduct relating to public entities and institutions in which the State is the major or controlling shareholder.
- 5.2 In terms of section 182(1) of the Constitution, the Public Protector can also investigate improper conduct in state affairs or in the public administration in all spheres of government.
- 5.3 The Constitution and the Public Protector Act do not afford the Public Protector the powers to investigate the conduct, affairs and relationships of private entities, such as political parties, private institutions and businesses.
- 5.4 The only matter raised by Ms Zille that falls within the powers and jurisdiction of the Public Protector to investigate is the allegation of the improper awarding of a contract by Eskom to a company with a link to an entity called Chancellor House, in which the ANC has an interest.
- 5.5 As Ms Zille's complaint coincided and overlapped with the own initiative investigation that was already being conducted into the alleged improper conduct of Mr Moosa, it was decided to look into the merits of the allegation referred to in paragraph 5.4 above as part of the said investigation.

6. THE INVESTIGATION

The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act, and comprised:

- 6.1 Correspondence with the Company Secretary of Eskom, Mr M Adam;
- 6.2 Correspondence with the former Chairperson of the Eskom Board of Directors, Mr V Moosa;
- 6.3 Consultation with Mr Adam;
- 6.4 Consideration of the voluminous documentation and the information provided by Messrs Adam and Moosa;
- 6.5 Correspondence with the Leader of the Democratic Alliance, Ms Zille;
- 6.6 Consideration and application of the relevant provisions of the Constitution, the Public Protector Act, the Eskom Conversion Act, 2001, the PFMA, and the Companies Act, 1973;
- 6.7 Consideration and application of the generally accepted principles and national and international best practice regarding the identification and proper and effective managing of conflicts of interests;
- 6.8 Consideration and application of Eskom's Conflict of Interest Policy and its Guidelines for Directors of the Board;
- 6.9 Consideration and application of the relevant parts of the judgment in the case of *S v Collier*¹; and
- 6.10 Consideration of the relevant provisions of the Constitution of the ANC.

¹ 1995(2)SACR 648 (C)

7. FURTHER INFORMATION REQUESTED FROM MS ZILLE

7.1 In her letter of complaint, Ms Zille stated that:

"I hope that you will agree that these issues merit a full investigation by your office. Please contact me should you require any assistance or further clarity on the details set out in this letter."

7.2 On 11 March 2008, Ms Zille was advised that the Office of the Public



Protector had already commenced with an investigation into alleged improprieties in connection with a contract that was awarded by Eskom to a company in which Chancellor House has an interest.

7.3 She was requested to provide any information additional to what was stated in her letter of complaint and was also informed that her request would be considered in terms of the constitutional mandate of the Public Protector.

7.4 In her response, dated 11 March 2008, Ms Zille indicated that she had no additional information, other than what was reported by the media.

8. ESKOM HOLDINGS

8.1 Eskom Holdings generates, transports and distributes approximately 95% of South Africa's electricity, which constitutes 60% of the total electricity consumed on the continent of Africa.

8.2 It is the world's 11th largest power utility in terms of generating capacity and ranks 9th in terms of sales.

8.3 Eskom was converted from a statutory body into a public company, by virtue of the Eskom Conversion Act, 2001. The Government of the Republic of South Africa is the sole shareholder of Eskom. It receives funding from the National Revenue Fund.



9. THE MEDUPI CONTRACTS

9.1 The tender process

9.1.1 The contracts awarded by Eskom that are referred to in this report, relate to the construction of a new coal-fired power station in the Lephalale area, known as the Medupi Power Station.

9.1.2 The tender process for the turbine and boiler works of the new power station commenced in March 2006.

9.2 The contract for the boiler works awarded to the Hitachi Consortium

9.2.1 From the investigation it appeared that tenders for the boiler works were received from Alstom S&E and Steinmüller Africa (Pty) Limited in consortium (the Alstom Steinmüller Consortium) and from Hitachi Power Africa (Pty) Limited (Hitachi Africa) and Hitachi Power Europe GmbH, in consortium (the Hitachi Consortium).

- 9.2.2 The records of the evaluation indicate that the criteria did not include consideration of the shareholders interests of tenderers, except insofar as it was required to evaluate a tenderer's financial standing. Tenderers could therefore not have been afforded any preference by reason of any shareholder interest and no tenderer could likewise have been prejudiced.
- 9.2.3 In terms of the evaluation conducted by the different entities of Eskom that were involved, the Alstom Steinmüller Consortium's tenders ranked first over all.
- 9.2.4 On 14 June 2007, the Board of Directors resolved, *inter alia*, that the Tender Committee was authorized to approve the resolution that contracts be entered into with the Alstom Steinmüller Consortium for the Medupi Boiler Works. The resolution was however made subject to: "*...once the audit report requested by the Board has been finalized, unless there is a material adverse finding in the audit report, in which event this matter must be submitted to the Board for consideration.*"
- 9.2.5 The audit report referred to above was submitted on 22 August 2007².
- 9.2.6 On 31 August 2007, Eskom informed the Alstom Steinmüller Consortium that their tender for the Medupi Boiler Works was accepted subject to certain conditions.
- 9.2.7 There were however, a number of technical and commercial issues that had to be resolved with the Alstom Steinmüller Consortium, which included, amongst others, the scope of the works. This issue had a significant impact on the price that was tendered.

² See paragraph 10 below

9.2.8 In an attempt to resolve this matter, Eskom suggested that the contract for the boiler works is concluded and that the outstanding issue be dealt with in terms of the mechanisms provided. This proposal was however rejected by the Alstom Steinmüller Consortium.

9.2.9 As the matter could not be resolved, Eskom's evaluation team held the view that it had to consider other options. One option was to re-issue the tender and the other was to approach the only other tenderer, the Hitachi Consortium. After having obtained external legal opinion on the legalities involved, and having considered the delays that would result from a new tender process, mindful of the electricity crises experienced by South Africa, it was decided that it was in the best interest of Eskom to approach the Hitachi Consortium.

9.2.10 Following negotiations with the Hitachi Consortium, it was decided to re-submit its tender to a comparative evaluation against that of the Alstom Steinmüller Consortium, taking into account the issues referred to in paragraph 9.2.7 above. In this comparative process, the Hitachi tender emerged as the preferred tender.

9.2.11 On conclusion of the extensive evaluation process, the Hitachi tender was submitted to the same process of approval as was the case of the Alstom Steinmüller tender.

9.2.12 On 24 October 2007, the Board Tender Committee resolved to recommend to the Board of Directors that the contract for the Medupi Boiler Works is



awarded to the Hitachi Consortium.

9.2.13 The Board of Directors resolved at a meeting held on 25 and 26 October 2007 that an agreement could be negotiated and concluded with the Hitachi Consortium for the Medupi Boiler Works. The resultant contract was concluded on 30 October 2007.

10. THE REVIEW OF THE TENDER EVALUATION PROCESS

10.1 The procurement process for the Medupi Build Programme was reviewed by an independent firm of auditors, *Deloitte & Touche*.

10.2 Two reports were submitted to the then Chairperson of the Board, Mr Moosa, on 22 August 2007 and 5 December 2007, respectively.

10.3 The first review report considered the initial procurement process in terms of which the Medupi Boiler Contract was awarded to the Alstom Steinmüller Consortium.

10.4 Included in the second review report were the findings by the auditors relating to the subsequent awarding of the Medupi Boiler Contract to the Hitachi Consortium.

10.5 From the first review report it appeared that enquires were made to identify any potential conflict of interests of, *inter alia*, Board members and the entities that tendered for the Medupi Boiler Contract. These enquiries consisted only of "*public record corporate entity searches*" relating to South African registered entities involved in the submitting of tenders for the project concerned. The result of these enquiries was recorded as:

“None of the Eskom Board and Tender Committee members in relation to whom we performed the enquiries was found to hold directorships in the relevant entities.”

- 10.6 As far as the involvement of *“a political entity”* was concerned, the first review report stated:

“In the course of the assignment, we learnt that Chancellor House, a company allegedly owned by the African National Congress (ANC), is a shareholder of Hitachi Power Africa.

Although it may be inferred that the ruling party may be both player and referee in such a situation, no information was brought to our attention that any political influence was exerted in relation to the Project Alpha (the Medupi) tender process.”

- 10.7 As far as the procurement process prior to the final decision of the Board is concerned, the report did not identify any material irregularities or deviation from the applicable policies or legislation.

- 10.8 The second review report on the awarding of the boiler contract to the Hitachi Consortium found that:

“In our view, and considering the circumstances and the urgency of the situation, Eskom exercised the correct option and its decision to approach Hitachi to reinstate their boiler offer was justifiable.

As indicated above, Eskom had limited choices in the circumstances. We do not believe that Eskom could have approached any of the suppliers that initially expressed interest in the enquiry, but did not

actually submit tenders. Other than re-issuing a new tender enquiry, Eskom could only have approached the other tenderer, Hitachi.

As indicated, we believe that the potential prejudice to Eskom had the tender been re-issued greatly exceeds any potential risks or re-negotiating with Hitachi.”

- 10.9 According to the second review report, which was submitted to the Board after its decision to award the boiler contract to the Hitachi Consortium, public record entity searches were performed in respect of Board Members that were involved in considering and approving the resolution to award the boiler contract to the Hitachi Consortium, in order to identify potential conflicts of interests. The recorded finding stated that none of the Board members was found to hold directorships in the relevant entities.

11. MR MOOSA’S INVOLVEMENT IN THE AWARDING OF THE MEDUPI BOILER CONTRACT TO THE HITACHI CONSORTIUM

- 11.1 According to Eskom’s records and the information obtained from the Company Secretary, Mr Moosa’s only involvement in the awarding of the Medupi Boiler Contract to the Hitachi Consortium was in his capacity as the Chairperson of the Board of Directors.
- 11.2 The Company Secretary also indicated that it was Mr Moosa that insisted that an independent review of the procurement process be conducted by independent auditors, to ensure compliance with Eskom’s procurement policies and standards and with the relevant legislation.
- 11.3 According to the Minutes of the Board Meeting, held on 24 and 25 October 2007, Mr Moosa chaired the meeting where the Board

resolved that the Medupi Boiler Contract should be awarded to the Hitachi Consortium.

12. CONFLICT OF INTERESTS: GENERAL PRINCIPLES

12.1 The identification and management of a conflict between the personal interests of a decision maker in the private and public sector and that of the entity that he/she serves, has been the subject of much discussion and debate in academic, business and public administration circles for centuries.

12.2 Some writers on the issue claim that the identification and management of conflicts of interests is merely a part of sound and proper business ethics, which originated in the application of everyday moral or ethical norms to business and public service dealings, since times immemorial.

12.3 Currently, the global discussion on the prevalence and impact of conflicts of interests in the public service is more alive than ever. Wilson R Abney, in his paper entitled: "*A brief history of public service ethics in the United States: 1787-1997*"³, for example, stated the following in this regard:

"Every recent study of the American electorate has found that most citizens do not believe that government officials make decisions in the public interest. Instead, Americans are convinced that the campaign donations which politicians and political parties have solicited from, and which have been provided by special interest groups, are more important to the politicians and parties in deciding positions on issues of public policy than the achievement of the common good. Because

³ 2007 Ethics Counts, LLC

people no longer trust the politicians, the politicians call the people 'cynical', but history and current events demonstrate that politicians have provided ample reason for the public's lack of trust."

12.4 The sentiments referred to by Abney equally apply in many other parts of the world and some of it also finds expression in the views and perceptions of many South Africans.

12.5 M H Kanyane of the University of Limpopo⁴ supports the notion that conflict of interest is becoming more and more prevalent in our present day society:

"Its affects are disastrous to an institution or a department in as far as both finances and reputation risks are concerned. This obviously affects the country as a whole.

.....

One of the achievements of the first term of the post-1994 era is the enactment, in the wake of ethical concerns, of legislation, codes of conduct, and the establishments of institutional mechanisms, as a basis for resolving ethical questions of governance. However, conflict of interests proved to be a resilient test to the government and contributed to corroding the moral and economic fabric of the country. In spite of these shortcomings, the institutional and legislative mechanisms put in place should be turned into potent weapons for combating conflict of interests.

The public is entitled to feel confident that their power or sovereignty is being exercised for their benefit. For as the famous counsel, Archibald Cox, has noted, the stability of government rests on the

⁴ *Conflict of interest in South Africa: Unraveling the revolving door*, Journal of Public Administration, October 2005

maintenance of public confidence. Both a free society and democratic government require a high degree of public confidence in the integrity of those chosen to govern. However, the confidence is sometimes eroded by the appearance of a conflict of interest. For this reason, the ethical requirements for legislators, ministers and officials are apparent and imperative to build public confidence. In this way a politician or official who creates the appearance of a conflict of interest is simply inviting the closer inspection of his or her motive." (emphasis added)

12.6 There are many different views on the definition of 'a conflict of interest'. However the common theme present in all definitions relates to a clash between the official or business duties of the decision maker concerned and his/her personal interests.

12.7 According to Dr M J Mafunisa⁵, interest includes:

"...all those influences, emotions and loyalties that could influence a public functionary and compromise the exercise of his or her competent judgment. Conflict of interest involves a clash between influences of this nature and the interests of the public that the functionaries serve."

12.8 Judy Nadler and Miriam Schulman of the Markkula Center for Applied Ethics at the Santa Clara University in California, give a very simple definition to the concept⁶:

"Conflict of interest occurs when an officeholder puts his or her personal or financial interest ahead of the public interest."

⁵ Senior Lecturer at the School for Public Management and Administration at the University of Pretoria: *Conflict of interest: Ethical Dilemma in politics and administration*, South African Journal of Labour Relations: Winter 2003

⁶ See:

http://www.scu.edu/ethics/practicing/focusareas/government_ethics/introduction/conflicts

12.9 They also hold the view that the law regulating conflict of interests is aimed at the perception as well as the reality, that a public official's personal interest may influence a decision. *"Even the appearance of impropriety undermines the public's faith that the process is fair."* (emphasis added)

12.10 Dr Mafunisa (supra) supports this view, as follows:

"The concept (of conflict of interests) is applicable not only to situations where a conflict of interest actually exists, but also to situations where it appears to exist. A charge of conflict of interest may arise not only when public duty clashes with private interest, but also when they appear to converge."

12.11 Nadler and Schulman (supra) further stated in this regard that:

"Another common misconception about conflicts of interest is that office holders are absolved of their responsibility merely by being transparent about their stake in the issue. It is not sufficient for government officials to make conflicts public. They must take themselves out of the decision-making process altogether." (emphasis added)

12.12 The South African Public Service Commission (PSC) conducted a comprehensive study into to occurrence and management of conflicts of interest in the Public Service. In its report issued in July 2006⁷, the PSC referred to the generally accepted definition of a conflict of interest in the public service i.e. *"a conflict between the public duties and private interests of a public official, in which the public official has*

⁷ REPORT ON MANAGING CONFLICTS OF INTEREST IN THE PUBLIC SERVICE, Public Service Commission, July 2006, from page 15

private capacity interests which could improperly influence the performance of his/her official duties and responsibilities”, and stated that:

"The above mentioned is a rather narrow approach when looking at conflicts of interest. One needs to look at conflicts of interest more comprehensively. In this respect it needs to be mentioned that the interaction between the private and public sectors has made the issue of conflicts of interest much more complex. In recent years, especially in South Africa, a great velocity between the public and private sectors was evident. In South Africa, for example, the government promotes mechanisms such as Black Economic Empowerment. This interaction has given rise to the fact that whilst conflicts of interest in the past focused on traditional sources of influence such as nepotism, gifts and hospitality, conflicts of interest in recent years are more directed on:

- a public official having private business interests in the form of partnerships, shareholdings, board membership, investments and government contracts;*
- a public official leaving to work in a private company or a Chief Executive Officer taking up a key position in a government department with a commercial relationship with his/her former company; and*
- a public official having affiliations with other organizations.”*

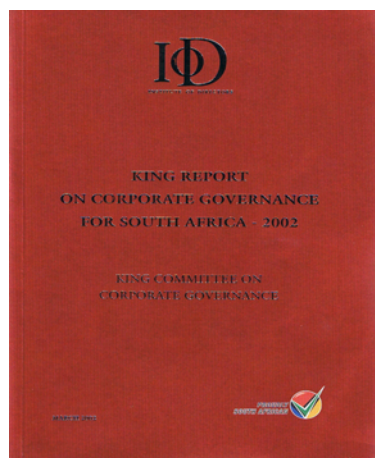
12.13 In dealing with the question as to whether it is wrong to have a conflict of interests, the Report of the PSC makes the following important observation⁸:

⁸ On page 18

"There are many misconceptions about conflicts of interest. Some of them are that it is something to be ashamed of and should be hidden or ignored. In terms of media commentary on the matter it would appear that in the South African context we have fallen into these misconceptions. Conflicts of interest are not wrong in themselves. It is how they are managed that is important. In this regard it should be noted that public officials are also private individuals, and there will be occasions when an official's own private interests may come into conflict with his/her public duty which is to put public interest first at all times. Where reasonably possible, a public official should avoid conflicts between his/her personal interest and the public interest. However, where conflicts of interest cannot reasonably be avoided, an official has a responsibility to identify and effectively manage any conflicts of interest he/she may have, in consultation with his/her supervisor."(emphasis added)

12.14 The *King Report on Corporate Governance for South Africa-2002*⁹ stated the following in regard to conflict of interests of directors of companies:

"The personal interests of a director, or persons closely associated with the director, must not take precedence over those of the company and its shareowners. A director should avoid conflicts of interest, even when these could only be perceived as such. Full and timely disclosure of any conflict, or potential conflict, must be made known to the board. Where an actual or



⁹ From page 47

potential conflict does arise, on declaring their interest, a director can participate in the debate and/or vote on the matter, but must give careful consideration to their own integrity in such circumstances and the potential consequences it may have for the board, company and themselves personally.”(emphasis added)

12.15 In his book *"The Corporate Citizen"*¹⁰, Mervyn King SC dealt extensively with the duties of good faith, care, skill and diligence of directors of companies¹¹ and the fact that courts in the twenty-first century are applying more objective tests to compliance with these duties. The modern test therefore, according to King, is what a reasonable director who acted honestly, diligently and with skill would have done in the circumstances of each case.

12.16 King emphasized that the average director cannot be expected to apply these legal tests in the heat of the boardroom. This is particularly true when one considers the different aspects of these duties gleaned from American, English and Commonwealth jurisprudence.

12.17 In order to address this dilemma, King developed 10 pertinent questions that every director should ask himself/herself in regard to the issues before the board. The very first question is:

"Do I as a director of this board have any conflict in regard to the issue before the board?"

12.18 As remote as the conflict might be, King recommends that it (the conflict) is disclosed. *"This disclosure is not the end to the enquiry. The following question should then be asked: 'Should I excuse myself from*

¹⁰ Penguin Books South Africa, 2006

¹¹ From page 51

the remainder of the board meeting or should I make my contribution, having regard to the fact that I was asked to be a member of the board either for my practiced ability or because of my representativity?"

12.19 The tenth question that King suggests a director should ask is:

"Will the board be embarrassed if its decision and the process employed in arriving at its decision were to appear on the front page of a national newspaper?"

13. THE LEGISLATION AND POLICY PRESCRIPTS REGULATING THE MANAGING OF CONFLICTS OF INTEREST PERTAINING TO THE PROCUREMENT PROCESSES OF ESKOM

13.1 The Constitution

Section 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation (such as Eskom), contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

13.2 The Public Finance Management Act, 1999

13.2.1 As indicated above¹², Eskom is listed as a Major Public Entity in Schedule 2 to the PFMA.

13.2.2 In terms of section 49(1), every public entity must have an authority which must be accountable for the purposes of the Act.

¹² See paragraph 3.6 above

13.2.3 Section 49(2) provides that if the public entity has a board, the board is the accounting authority.

13.2.4 A member of an accounting authority may not, in terms of section 50(2), act in a way that is inconsistent with the responsibilities assigned to the accounting authority or use the position of or confidential information obtained as accounting authority for personal gain or to improperly benefit another person.

13.2.5 Section 50(3) is of particular significance to the issue of conflict of interests. It provides that:

"A member of an accounting authority must-

(a) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and

(b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant."

13.3 THE COMPANIES ACT, 1973

13.3.1 Section 234 deals with the duty of a director of a company to disclose any direct or indirect material interest in a contract which has been or is to be entered into in pursuance of a resolution taken or to be taken at a meeting of directors of the company.

13.3.2 It provides that such a director has to disclose his/her material interest in writing before the meeting of the directors where the question of confirming or entering into the contract is taken into consideration for the first time. The disclosure has to be read out to the meeting or each director present has to state in writing that he/she has read the declaration.

13.4 THE ESKOM CONFLICT OF INTEREST POLICY AND GUIDELINES FOR DIRECTORS

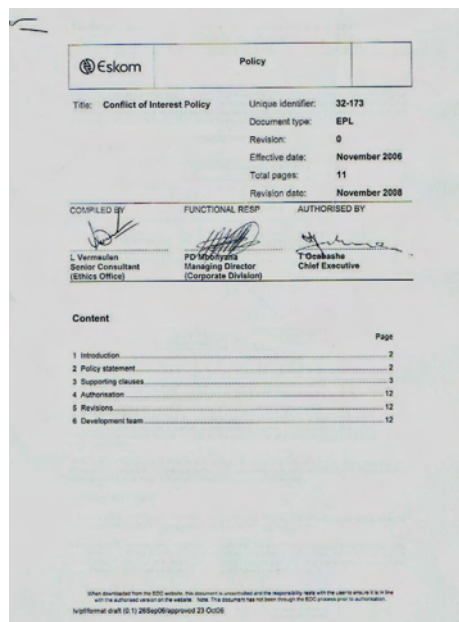
13.4.1 Eskom's Conflict of Interests Policy (the Policy) became effective on 1 November 2006¹³.

13.4.2 The introductory paragraph of the Policy reads as follows:

"This policy document sets out the obligations of employees and directors with regard to conflicts of interest and the declaration and management of these interests.

...

Eskom subscribes to ethical values and legal principles. This requires that Eskom, its directors, its employees, its customers, and its suppliers act with integrity and create public confidence by conducting business in a fair, impartial and transparent manner.



¹³ See paragraph 3.6 of the Policy

For this reason, Eskom makes every effort to ensure that conflicts of interest do not compromise or are not perceived to compromise its business decisions.”

13.4.3 Paragraph 3.3.1 of the Policy defines a conflict of interest as follows:

“A conflict of interest arises when one’s personal interests or other interests affect, or could be perceived to affect, or has the potential to affect, ones objectivity and discretion and/or the objectivity and discretion of another employee in performing Eskom duties or making decisions on behalf of Eskom.” (emphasis added)

13.4.4 A “*personal interest*” may, according to the Policy, be an actual or potential, direct or indirect interest of an employee or a director in any business, entity, undertaking, or investment, as a shareholder, director, associate, member, adviser/consultant, or in any other capacity.

13.4.5 The Policy also states that:

“It is important to note that conflicts of interest can arise in various situations and are not confined to interests in contracts or direct financial interests.”

13.4.6 Situations mentioned in the Policy where conflicts of interest could arise include private or political interests that may conflict with Eskom’s interest.

13.4.7 Paragraph 3.5.2.1 deals with the managing of conflicts of interest. It provides, *inter alia*, that any conflict of interest must be declared as soon as it arises.

13.4.8 Subparagraph 3.5.2.1.7 (a) is of particular significance in this regard. It provides that:

"The fact that a conflict of interest has been declared does not mean that it has been addressed. Such a conflict of interest must still be managed and could mean that the following additional steps are required:

- a) *Where there is a conflict of interest, the employee or director must excuse himself/herself from any deliberations or committee meetings or access to information dealing with that particular item and may not participate in any decisions relating to the matter, unless otherwise agreed to by the committee."*

13.4.9 In paragraph 3.5.5 additional responsibilities are put on directors and senior managers of Eskom. It states that they need to be aware that their seniority results in perceptions of conflict more readily, and that their conduct is, therefore, subject to greater scrutiny. Directors are also obliged to disclose their direct or indirect personal or business interests or any interest that any spouse, partner or close family member may have in any matter, to the Eskom Board.

13.4.10 Non compliance with the obligations set out in the Policy could, in terms of paragraph 3.5.8, amount to misconduct.

13.4.11 In March 2004, Eskom issued *Guidelines for directors of Eskom Holdings Limited and its subsidiaries* (the Guidelines).

13.4.12 The issue of guarding against a conflict of interests having an impact on the decisions taken by directors and the Board is covered quite extensively in the Guidelines.

13.4.13 On pages 43 and 44 of the Guidelines, it is stated, for example that:

“As previously observed, one of the crucial fiduciary duties of any director is to act always in the best interests of the company and to avoid any action or conduct on his part that could be construed to be in conflict with the interests of the company.

Conflicts of interest can arise in any number of ways and would generally be construed to achieve some form of personal advantage or benefit, often financial, for the director, but could be anything over which he may indirectly gain some benefit and should be treated with considerable circumspection to ensure that his personal integrity is not compromised, even by association.

Regardless of having made a general disclosure of the nature prescribed, it is necessary for directors to remind the board of any interest they may have at the beginning of each meeting where a matter is on the board agenda for discussion which could relate to that interest, either directly or indirectly.

The best policy for a director to adopt, is whenever there is uncertainty as to whether there may be a conflict of interest, is to be transparent and make the disclosure anyway. The remaining members of the board can decide for themselves if there is in fact any conflict or not, whether actual or perceived.”(emphasis added)

14. MR VALLI MOOSA

14.1 Mr Moosa served the South African Government as Minister of Constitutional Development from 1994 to 1999 and as Minister of Environmental Affairs and Tourism from 1999 to 2004.

14.2 He is a member of the National Executive Committee of the ANC and has served on a number of boards of public and private companies.

15. THE EVIDENCE OF MR MOOSA

15.1 The initial approach for a response on the allegations made

15.1.1 On 12 May 2008, Mr Moosa was approached in writing and referred to the allegations made in the article published by the *Mail and Guardian* referred to above¹⁴ and requested to provide a detailed response thereto.

15.1.2 Mr Moosa responded in writing on 10 June 2008. He confirmed that Eskom awarded the Medupi Boiler Contract to the Hitachi Consortium and that a company called Chancellor House owns shares in Hitachi Africa. As far as the allegations published by the said newspaper were concerned, Mr Moosa stated, *inter alia*, that:

"The Mail and Guardian article suggests that because Chancellor House is linked to the ANC and because I serve on the National Executive Committee (NEC) of the ANC, the awarding of the contract to Hitachi by Eskom was improper.

The issue therefore is whether there was any undue influence that affected or attempted to influence the process or the outcome thereof. As is borne out by the report provided to you, which is supported by the findings of the independent review by Deloitte, the process was fair and equitable and the winning tender emerged from an objective

¹⁴ See paragraph 2 above

process. The Deloitte report concludes that the process was thorough and equitable and not biased towards any predetermined outcome.

...

Based on the process followed, which was reviewed by Deloitte, it is clear that neither I nor any other individual or committee was in a position to arbitrarily influence the outcome of the objective evaluation.

...

My membership of the NEC of the ANC is widely known and was formally disclosed to the Eskom board of directors. Further, notwithstanding my membership of the ANC NEC, I did not have any interest that gave rise to a conflict of interests relating to the matter that was to be decided by the board. I therefore reject any assertion that I acted improperly."

15.1.3 Reference was also made to a letter sent by Mr Moosa to the *Mail and Guardian* in which he denied the allegations made against him and to a communiqué sent to the Eskom staff by the Chief Executive Officer in which he stated that the suggestion by the newspaper that the procurement process was in some way flawed or subjected to political influence, was unfounded.

15.2 Further information requested from Mr Moosa and the application of due process

15.2.1 On 10 July 2008, further information was requested from Mr Moosa, as follows:

"From the contents of your letter and the documents submitted to us, it appears that at the time when the Board of Directors resolved to award the relevant contracts to Hitachi, you were aware of the fact that Chancellor House owned shares in Hitachi Africa.

The question that arises is therefore whether or not it would have been appropriate for you to have recused yourself from the relevant meeting(s) where the awarding of the contracts to Hitachi were discussed and approved, to prevent a perception of a conflict of interest in the light of the ANC's interest in Chancellor House, as was suggested on the last page of the media article that you were referred to in my letter of 12 May 2008."

15.2.2 Mr Moosa was referred to the provisions of section 7(9) of the Public Protector Act, 1994, which provides that:

"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."

15.2.3 It was indicated to him that as he was implicated in the matter being investigated as having had a conflict of interests and as such implication may be to his detriment or may result in an adverse finding against him, he was afforded a further opportunity to respond thereto.

15.3 Further evidence submitted by Mr Moosa

15.3.1 Mr Moosa responded to the further opportunity to address the allegations made against him in much detail, on 28 July 2008.

15.3.2 He re-emphasized the facts of the tender process that gave rise to the awarding of the Medupi Boiler Contract to the Hitachi Consortium.

15.3.3 According to Mr Moosa, he had no private or business interest in any of the tenderers or in the Chancellor House entities.

15.3.4 He also submitted an argument on the principles of conflict of interests based on the Companies Act and the Public Finance Management Act, the relevant provisions of which were referred to above¹⁵ and the writings of *Henochsberg* on the Companies Act. In this regard, Mr Moosa stated:

"A director could have an indirect interest in a contract with a company of which he is an employee, but the interest would only be material if he stands to benefit significantly from the conclusion of the contract—for example where it results in an increase in salary. Otherwise, the fact that he is an employee does not amount to a material interest by virtue of that fact alone.

A conflict of interest can arise where there is no beneficial interest in a transaction, provided there was a duty owed to another which conflicted with the duty owed to the company. However, it does not mean that by virtue only of the membership of a company or organization that a conflict of interest necessarily arises. This issue was also considered in the context of administrative action and the court referred to the following which is also applicable in this instance:

"...Professor Baxter gives a commonly cited example, namely the mere fact that a decision-maker is a member of the SPCA does not necessarily disqualify him from adjudicating upon a matter involving alleged cruelty to animals."

¹⁵ See paragraph 13 above

15.3.5 In this regard, Mr Moosa relied on an extract from the judgment in the case of *S v Collier*¹⁶.

15.3.6 Mr Moosa further argued that his membership of the National Executive Committee of the ANC did not give rise to a duty towards the ANC that conflicted with the duty that he owed Eskom.

15.3.7 According to Mr Moosa, the principles applicable to circumstances where a conflict of interests relating to the director of a company exists, do not require “*a mechanistic recusal*” by him/her. His/her action would be determined by the circumstances of every such matter.

15.3.8 Mr Moosa referred to the fact that the law allows an accounting authority to waive the need for recusal in appropriate cases. He also claimed that he had taken the appropriate action, even if a conflict of interests did exist and that the Board did not object to his participation in the discussions relating to the contract in question.

15.3.9 It was further argued by Mr Moosa that there is ample authority for the view that public perception of bias relating to a decision of a Board of Directors can only be justified if it is based on reasonable apprehension. In this regard he stated that:

"At the outset I would like to point out that what is referred to as 'public perception' is by and large based on the perceptions of a relatively small number of journalists. The Mail & Guardian suggests that Chancellor House is linked to the ANC, and because I serve on the National Executive Committee the awarding of the contract by Eskom

¹⁶ 1995(2)SACR 648 (C)

to the Hitachi Consortium was improper. This view is also supported by reference to unrelated facts, for example, the fact that I was re-elected to the NEC at the recent ANC national conference in Polokwane.

This does not provide a sufficient basis to support the assertion of a 'reasonable perception' of a conflict.

...

I was obviously aware of the involvement of Chancellor House in the process as this was set out in the Deloitte report. However, based on the circumstances outlined in this response and the additional steps taken by the Board, I did not believe that there could be any reasonable perception of bias regarding the matter."

15.3.10 It was noted that Mr Moosa failed in both his responses referred to above to refer in any manner to the provisions of Eskom's Conflict of Interest Policy and the Guidelines.

15.4 Referring Mr Moosa to the Policy and the Guidelines

15.4.1 In a subsequent and final request for assistance in the investigation, addressed to Mr Moosa on 11 August 2008, it was stated that:

Subsequent to receiving your letter and having met with the Company Secretary, we discovered from our studying of the documents provided by Mr Adam that Eskom has a comprehensive Conflict of Interest Policy that regulates the obligations of employees and directors with regard to conflict of interests and the declaration and management of such interests.

...

Under the circumstances, we deem it appropriate to afford you a further opportunity to provide us with any additional comments that

you may have in regard to how the provisions of the Policy and the Guidelines were applied, if at all, in respect of your interest in the ANC when the awarding of the contract to the Hitachi Consortium was considered by the Board.”

15.4.2 Mr Moosa was also referred to the fact that his membership of the ANC was declared to the Board by means of a form entitled: “*Declaration of Directorships held by Eskom Non-Executive Board Members*”, dated 19 July 2007. In this regard, he was requested to indicate whether, except for this declaration, the Board was reminded of his interest in the ANC (and therefore in Chancellor House) before the meetings where the awarding of the contract to the Hitachi Consortium was discussed.

15.4.3 It was also requested that Mr Moosa should clarify whether he was in fact a member of a fundraising committee of the ANC at the time when the contract in question was awarded, as was alleged, and if not, whether he was in any other manner involved in the raising of funds for the ANC at the time.

15.5 Mr Moosa’s claims to have complied

15.5.1 In his response, Mr Moosa argued that his actions referred to in the investigation complied with the provisions of the Policy and the Guidelines. In this regard he again relied on the independent audit review of the tender process that was commissioned by the Board, on his recommendation.

15.5.2 He expressed the view that the definition of conflict of interests in the Policy takes into account the notion of perceived interests, which, as he argued in his earlier response, had to be based on reasonable apprehension.

15.5.3 As far as the disclosure of a conflict of interests to the Board is concerned, Mr Moosa stated:

"I would like to point out that the practice at the Eskom Board meeting is that the written declaration of interests of each director is circulated to all members at the beginning of each meeting. The copy of my declaration of interest was therefore circulated at the Board meeting."

15.5.4 In response to the question as to whether, except for the said declaration of interests, the Board was reminded of his interest in the ANC when the contract in which the ANC had a substantial interest because of its involvement in Chancellor House, was discussed, Mr Moosa merely stated that the Board did not object to his participation and that his membership of the ANC was a widely known fact by the directors.

15.5.5 Mr Moosa further explained that he is a member of the Finance Committee of the ANC that reports to the National Executive Committee and that he has been involved in general fundraising activities for the ANC, from time to time. He however, maintained that his membership of the Finance Committee did not give rise to a duty towards the ANC or that conflicted with the duty that he owed to Eskom.

15.5.6 In regards to Chancellor House, Mr Moosa stated that:

"I must emphasize that the first time that I became aware of the involvement of Chancellor House Holdings in the Hitachi Consortium was when it was reported by Deloitte. At no stage was this matter discussed with me and I never discussed this matter with ANC"

structures or with any other member of the ANC, whether directly or indirectly.”

15.5.7 Mr Moosa also referred to a meeting of the Board, held on 28 February 2008. From the Minutes of the meeting provided by Mr Moosa, it appeared that the Board discussed media reports regarding the Medupi Tender. At the time of the discussion, Mr Moosa recused himself and Mr A Morgan chaired the discussion.

15.5.8 The said Minutes recorded that the background to the matter was explained by the “CE”. It, unfortunately does not state who this person was and what the contents of the background was that was explained to the meeting.

15.5.9 It was further recorded that:

“In the light of the recent press articles regarding the award of the Medupi Tender, the Board felt that it was appropriate to discuss this matter.

Members indicated that they were satisfied that there was no undue influence regarding the process and were confident that the integrity of the process had not been compromised. These issues had been considered at the time that the tender was awarded and the relevant issues highlighted in the independent review by Deloitte (sic). The matter was being considered from a reputational perspective to consider whether it should be dealt with differently.

The Board was satisfied that the Chairman had conducted himself with integrity.

Members recognized the need to err of (sic) the side of conservatism when dealing with declaration of interests. From the communication perspective, there was no need to deal with the matter differently.”

16. THE APPOINTMENT OF MR MOOSA AS THE CHAIRPERSON OF THE ESKOM BOARD OF DIRECTORS

- 16.1 Eskom was converted from a statutory body into a public company in which the State is the sole shareholder, by virtue of the provisions of the Eskom Conversion Act, 2001, with effect from 1 July 2002. The representative of the shareholder is the Minister of Public Enterprises.
- 16.2 As indicated above, Eskom is listed in Schedule 2 to the Public Finance Management Act, 1999 as a Major Public Entity. The Eskom Board of Directors is, in terms of section 49(2) of this Act, its accounting authority.
- 16.3 In terms of Eskom’s Articles of Association, the shareholder (the State) appoints the non-executive directors, the chief executive and, after consulting the Board, the chairperson. The remaining executive directors are appointed by the Board after obtaining the approval of the shareholder.
- 16.4 Mr Moosa’s appointment as Non-Executive Chairperson of the Board was approved by the Cabinet on 19 July 2005.

17. THE NATIONAL EXECUTIVE AND FINANCE COMMITTEES OF THE ANC

17.1 The Constitution of the ANC provides that its National Conference is the supreme ruling body of the organization. The National Executive Committee (NEC) is elected by the National Conference.



17.2 Rule 12 of the ANC Constitution provides that the NEC *"is the highest organ of the ANC between National Conferences and has the authority to lead the organization, subject to the provisions of this Constitution."*

17.3 The NEC has the power to, *inter alia*,:

17.3.1 Carry out decisions and instructions of the National Conference and the National General Council;

17.3.2 Manage and control all the national and international property assets of the ANC; and

17.3.3 Appoint the National Finance Committee.

17.4 The National Finance Committee has to report to the NEC at least twice a year on the finances and budget of the ANC.

18. THE DUTIES OF THE SECRETARY OF A PUBLIC COMPANY

Section 268G of the Companies Act provides that the duties of the secretary of a public company include to:

- 18.1 Provide the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers; and
- 18.2 Making the directors aware of all law and legislation relevant to or affecting the company.

19. ANALYSIS OF AND OBSERVATIONS MADE FROM THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

19.1 Did Eskom act unlawfully or improperly by awarding a contract to a consortium in which the ANC has an interest?

19.1.1 The complaint of the Democratic Alliance in this regard was based solely on reports by the media that the ANC was to benefit financially from the Medupi Boiler Contract that Eskom awarded to the Hitachi Consortium, due to its interest in one of the shareholders, Chancellor House.

19.1.2 The basis for the objection to the said awarding of the contract appeared to be that it was improper for Eskom to contract with an entity in which the political party that has the majority representation in government has an interest. The notion in this regard was that the ANC was using its political influence to its own improper financial advantage and to the detriment of others.

19.1.3 No legal or policy prescript could be found that prohibited the awarding of the contract to an entity in which a political party represented in government has an interest.

19.1.4 It is the State and not the ANC that is the sole shareholder of Eskom. The suggestion that by awarding the contract to the Hitachi Consortium, the State was actually a player and a beneficiary cannot be supported, as it loses sight of the differences between the concepts of "the State", "the Government" and political parties represented in government. The latter are private entities whose fundamental rights, including the right to trade freely, are recognized and protected by law.

19.1.5 However, it would be naive to disregard the perception that the ruling party could use its political influence to improperly benefit from contracts with public entities.

19.1.6 The issue of whether or not political parties should be allowed to be involved in business dealings with government or public entities, is a matter that has to be considered by Parliament, and if so resolved, regulated by legislation.

19.1.7 From the independent audit of the procurement process relating to the Medupi Boiler Contract, no indication could be found that the ANC in fact exerted political pressure on Eskom to award the contract to the Hitachi Consortium.

19.1.8 The fact that the boiler contract was initially awarded to another tenderer and that the subsequent decision to award it to the Hitachi Consortium was based on merit and after obtaining independent legal advice, supports the contention that the boiler contract was not awarded to the Hitachi Consortium because of its relationship with the

ANC. It is also supported by the findings of the independent audit review on Eskom's decision in this regard.

19.1.9 It was noted that the leadership of the ANC changed in December 2007, shortly after the awarding of the contract to the Hitachi Consortium. The newly elected leadership was apparently quite concerned about the public comments made on the involvement of the ANC in the contract with Eskom, as appears from newspaper reports published late in February 2008. The Treasurer General reportedly stated that because of "*governance issues*" Chancellor House would be exiting from the deal with Eskom¹⁷.

19.2 Did Mr Moosa have a conflict of interests as the Chairperson of the Board of Directors of Eskom because of his private interest in the ANC?

19.2.1 From the evidence submitted by Mr Moosa, it appeared that the general principles of and the legislation and policies regulating conflicts of interests of Eskom employees and directors of the Board, as discussed in paragraphs 12 and 13 above, were not in dispute.

19.2.2 It was also not disputed that Mr Moosa was aware of the ANC's interest in the awarding of the contract at the time when he chaired the meeting where the Board resolved to award the contract to the Hitachi Consortium¹⁸.

¹⁷ See for example *Business Report of 21 February 2008*

¹⁸ See paragraphs 10.2 and 15.5.6 above. As also indicated in paragraph 18.4 below, the *Deloitte* report was submitted to the Board before the meeting where the awarding of the contract to the Hitachi Consortium was discussed.

19.2.3 Mr Moosa maintained that his membership of the NEC of the ANC did not give rise to a conflict with his duty as the Chairperson of the Eskom Board of Directors under the particular circumstances.

19.2.4 In this regard, he emphasized that he had disclosed his membership of the NEC and that he was not a director, member, trustee or beneficiary of Chancellor House.

19.2.5 As indicated above, the fact that an interest was disclosed does not mean that there was no conflict that had to be managed in relation to the matter on which the Board had to decide. It was not alleged that Mr Moosa had any direct relationship with Chancellor House, other than involvement with the ANC, that owns it.

19.2.6 Mr Moosa also held the view that the mere fact that he is a member of the NEC of the ANC did not by itself result in a conflict of interests. In this regard, he contended that as he did not benefit from the contract awarded to the Hitachi Consortium and therefore had no material interest in the contract, there could not have been a conflict of interests.

19.2.7 The PFMA, the Policy and the Guidelines however, do not exclude non-material interests where conflict of interests is regulated. It is also not in line with current national and international best practice to focus only on material interests when defining and managing conflicts of interests¹⁹.

¹⁹ See the discussion in paragraph 11 above

19.2.8 Mr Moosa referred to the judgment of Hlophe J, in the case of *S V Collier*²⁰. In this matter, the accused in a criminal case insisted that he be tried by a black magistrate. The white magistrate, before whom the matter was called, refused to recuse himself. In dismissing the application, the learned Judge stated²¹:

"Equally, the apparent prejudice argument must not be taken too far; it must relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision. Professor Baxter gives a commonly cited example, namely the mere fact that a decision-maker is a member of the SPCA does not necessarily disqualify him from adjudicating upon a matter involving alleged cruelty to animals. By the same token, the mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true. Otherwise no black magistrate or Judge could ever administer justice fairly and evenhandedly in a matter involving white accused."

"For the reasons set out above, the argument that the white magistrate erred in refusing to recuse himself upon being asked to do so at the appellant's trial is both unfortunate and untenable. The fact that he is a white person, does not disqualify him from presiding in a case involving an accused belonging to a different race."

19.2.9 The cited judgment is clearly distinguishable from the argument raised by Mr Moosa. The applicant in that matter based his reasoning only on the possible prejudice that he could suffer if not tried by a person from the same race group. He did not claim that the magistrate should

²⁰ 1995(2) SACR 648(C)

²¹ At 650 E

recuse himself because he had a conflict of interests in the merits matter to be heard. Belonging to a particular race group is not a matter of choice and quite different from belonging to a particular organization. If the court agreed with the applicant in this matter, it would have resulted in an absurdity, which is also not what the principles relating to the identification and managing of conflicts of interests have in mind.

19.2.10 According to Mr Moosa, his membership of the NEC of the ANC did not give rise to a duty towards the ANC that conflicted with the duty owed to Eskom. The issue that had to be considered in this regard was whether Mr Moosa's interests in the governing structure of the ANC that controls its finances and assets could have, or could have been perceived to have influenced his objectivity in participating in a decision by the Board to award a contract from which the ANC would benefit financially.

19.2.11 There can be no doubt that Mr Moosa, as a member of the NEC and its Finance Committee owed a duty to the ANC to act in its best financial interests. Likewise, as the Chairperson of the Eskom Board of Directors it was expected of him to act in the best financial interests of Eskom. These two interests were therefore in direct conflict at the time when the awarding of the contract to the Hitachi Consortium was considered by the Board.

19.2.12 The provisions of the Policy are clearly based on current international standards and views in regard to the identification and management of conflicts of interest. Its definition of the concept is unambiguous and wide in its covering of all types of interests that could affect or be perceived to affect the objectivity of a decision maker.

- 19.2.13 Personal interests are defined separately as potential, direct or indirect interests in any entity in any capacity and include political interests. Clearly, membership of the governing institution of a political organization is a personal interest in terms of the Policy.
- 19.2.14 What is furthermore clear from the definition of a conflict of interests in the Policy, is that it arises for even where the conflict did not have an actual impact on the decision maker's objectivity, but could only have been perceived as having such an effect. In this regard, the Policy extends a specific warning to directors that their position might result in perceptions of conflicts more readily.
- 19.2.15 Mr Moosa submitted that in order for such a perception to arise, it has to be based on reasonable apprehension. He argued that there was no public perception of a conflict of interests on his part as the issue was raised by a small number of journalists who based their perceptions only on the fact that he is a member of the NEC. According to Mr Moosa, their views could not form the basis of a reasonable perception of a conflict of interests.
- 19.2.16 The view is however held that what the Policy aims to regulate is the managing of conflicts and perception of conflicts of interests. It does not provide that a certain number of people must express their views for a perception of a conflict of interests to arise.
- 19.2.17 The Policy is directed at employees and directors of Eskom who have to avoid conflict of interests and not at the public. What was therefore expected of Mr Moosa was to have asked himself before he participated in the meeting(s) concerned, what the perception of a reasonably well informed member of the public would be if he, as a member of the NEC of the ANC, presides as Chairperson of the

Board where a decision by Eskom to award a contract to an entity in which the ANC has a substantial interest, is discussed.

19.2.18 From applying this objective and reasonable test, the only sensible conclusion is that Mr Moosa's interest in the ANC could, at least, have been perceived as having affected his objectivity and discretion in making the best decision in the interests of Eskom.

19.3 How was Mr Moosa's conflict of interests to be managed?

19.3.1 As indicated above²², there is nothing peculiar or inappropriate in having a conflict of interests. It is how the conflict is managed that determines whether or not the conduct of the decision maker concerned was proper.

19.3.2 From the earlier discussion of the general principles and the relevant legislative and policy prescripts in this regard, it is clear that the first step is that the conflict should be declared²³.

19.3.3 The provisions of paragraph 3.5.2.1 of the Policy make a clear distinction between an annual declaration of interests and the declaration of a conflict of interest that arose in a particular instance.

19.3.4 During the investigation Mr Moosa submitted a form entitled: "*DECLARATION OF DIRECTORSHIPS HELD BY ESKOM HOLDINGS NON EXECUTIVE BOARD MEMBERS*". It appears from this form that it formed part of a declaration of interest form for non-executive board members.

²² See paragraph 12 above

²³ See paragraphs 12 and 13 above

19.3.5 Mr Moosa's membership of the "Non-Executive Committee" (sic) of the ANC is recorded on the form, dated 19 July 2007. From the contents and structure of the form and Mr Moosa's explanation in this regard, it became obvious that what he submitted was part of the declaration of interests forms that directors have to complete regularly. It did not record that Mr Moosa had a conflict of interest in the matter relating to the consideration by the Board of the awarding of a contract to the Hitachi Consortium.

19.3.6 Secondly, the Policy, (in keeping with the said general principles and relevant legislation) provides that whenever a conflict of interests (as defined by the Policy) arises, the conflict must be declared and the director must excuse himself/herself from any deliberations dealing with the item concerned, unless otherwise agreed to by the Board.

19.3.7 When questioned about his compliance with this part of the Policy and the Guidelines referred to in paragraph 13 above, Mr Moosa explained that it is the practice at Board meetings that the said written declaration of interests of each director is circulated to all members at the beginning of each meeting. He further stated that the Board was well aware of his membership of the NEC of the ANC and that the members did not object to him participating in the meeting where the contract in question was discussed.

19.3.8 No indication could be found that Mr Moosa informed the Board of the of his interest as a member of the NEC of the ANC in the discussion that was to take place in connection of the awarding of the Medupi Boiler Contract to a consortium in which the ANC has a substantial financial interest, as he was required to have done. There is also no indication that the Board considered such a disclosure and decided

that despite his conflict of interests in the matter, Mr Moosa could still participate in the deliberations and decisions of the Board.

19.3.9 The subsequent decision by the Board that Mr Moosa acted with integrity in the matter concerned, cannot remedy the procedural shortcomings referred to above that could have resulted in a reasonable perception that Mr Moosa was biased in respect of the awarding of the contract in question to the Hitachi Consortium.

19.3.10 As the Chairperson of the Board, it was reasonably expected of a person of the caliber of Mr Moosa, to have led by example in the application of and compliance with the Policy and the Guidelines and to be seen to be acting in the best interests of Eskom.

19.4 The relevance of the review of the independent auditors

19.4.1 Mr Moosa claimed in his response during the investigation that he did more than what was expected of him as a director by the Policy and the Guidelines, by recommending to the Board that a review of the procurement process is performed by independent auditors. The auditors were requested to also include in the review "a *conflict of interest assessment of all Board members, executives and other persons involved in the tender process.*"

19.4.2 The reports of the auditors state that the conflict of interest assessment consisted of "*public record corporate entity searches on the Eskom Board members*" from which it was found that none of the Board members held directorships in the relevant entities (tenderers).

19.4.3 No indication could be found that the auditors were aware of the Policy and the Guidelines and that compliance with its provisions in terms of avoiding conflicts with the declared interests, other than public record corporate entity interests, was investigated or considered.

19.4.4 The first audit report was submitted to the Board before the meeting where the awarding of the boiler contract to the Hitachi Consortium, when Mr Moosa's conflict of interest arose, was discussed. The second audit report was submitted after the contract was already awarded.

19.4.5 It therefore follows that although the findings of the audit review were significant in respect of the procurement process, it did not absolve Mr Moosa from declaring his said conflict of interests to the Board before the relevant meetings and allowing the Board to take a decision thereon, as prescribed by the Policy and the law.

19.5 Did Mr Moosa's conflict of interest and the failure to manage it have an impact of the decision to award the Medupi boiler contract to the Hitachi Consortium?

19.5.1 The documentation relating to the Medupi contracts that was submitted and studied during the investigation and the review reports of the independent auditors, clearly indicate that the prescribed procurement process was properly followed and that it was impossible for one individual to have influenced a decision in a particular direction.

19.5.2 No indication could be found that the decision to award the contract to the Hitachi Consortium was in any way influenced by Mr Moosa. Put differently, the evidence and information obtained during the investigation indicate that the contract would probably have been

awarded to the Hitachi Consortium even if Mr Moosa was not a member of the Board of Directors at the time.

20. KEY FINDINGS

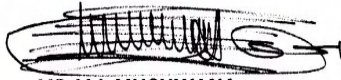
The following key findings have been made from the investigation:

- 20.1 There was a conflict between the personal interest of the former Chairperson of the Eskom Board of Directors, Mr V Moosa, in the African National Congress and his duty towards Eskom at the time when the Board resolved to award the Medupi Boiler Contract to the Hitachi Consortium, in which the ANC has an interest;
- 20.2 Mr Moosa failed to manage his said conflict of interests in compliance with the Conflict of Interest Policy of Eskom and therefore acted improperly;
- 20.3 The contract that was awarded to the Hitachi Consortium was not in any way affected by Mr Moosa's improper conduct;
- 20.4 The awarding of the contract by Eskom to an entity in which the ruling political party has an interest was not unlawful; and
- 20.5 It is desirable that the conducting of business between government institutions and public entities and political parties should be regulated by legislation.

21. RECOMMENDATIONS

In terms of the provisions of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, it is recommended that:

- 21.1 Eskom's Company Secretary takes urgent steps to ensure that all the members of the Board of Directors are provided with a copy of the Policy and the Guidelines and briefed on its application and on the law applicable to conflict of interests, referred to in this report; and
- 21.2 The Minister of Public Enterprises considers developing legislation for submission to Parliament to regulate the conducting of business between government entities and political parties.



ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Date: 18 February 2009