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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 81998/18

In the matter between:

CORRUPTION WATCH (RF) NPC	Applicant
and	
ESKOM HOLDINGS SOC LIMITED	First Respondent
MARK VIVIAN PAMENSKY	Second Respondent
ANOJ SINGH	Third Respondent
BRIAN MOLEFE	Fourth Respondent
VENETE JARLENE KLEIN	Fifth Respondent
ZETHEMBE WILFRED KHOZA	Sixth Respondent
MINISTER OF PUBLIC ENTERPRISES	Seventh Respondent

INDEX

VOLUME 1

Item No.	Description	Page No.
1.	Notice of Motion	1a- 1f
2.	Draft Order	1g- 1j

	Volume 1:	
3.	Founding Affidavit of David Lewis	1-72
	"DL1" : Memorandum of incorporation of Eskom	73-111

DATED at Johannesburg on this 12th day of NOVEMBER 2018

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TO: **THE REGISTRAR**
High Court
PRETORIA

AND TO : **ESKOM HOLDINGS SOC LIMITED**
First Respondent
Eskom Megawatt Park
2 Maxwell Drive
Sunninghill
Sandton

AND TO:

MARK VIVIAN PAMENSKY
Second Respondent
Unit 24
The Regency

Dais Street
Sandton
2196

AND TO: **ANOJ SINGH**
Third Respondent
21 Silversands Avenue
Wendywood
Sandton
2146

AND TO: **BRIAN MOLEFE**
Fourth Respondent
32 Bond Place
Midstream Estate
Gauteng
1692

AND TO: **VENETE JARLENE KLEIN**
Fifth Respondent
11 Numeral Street
Mookloof Estates
Pretoria
0059 /
537 Chpin Street
Constantia Park
Johannesburg
0000

AND TO: **ZETHEMBE WILFRED KHOZA**
Sixth Respondent
95 Pardy Road
Isipingo Hills
Durban
KwaZulu Natal
4133

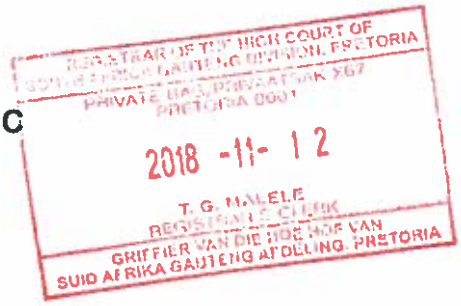
AND TO: **MINISTER OF PUBLIC ENTERPRISES**
Seventh Respondent
Infotech Building
1090 Arcadia Street
Hatfield
Pretoria

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 81998/18

In the matter between:



CORRUPTION WATCH (RF) NPC	Applicant
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MINISTER OF PUBLIC ENTERPRISES	Seventh Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the Applicant intends to make an application to this Court on a date to be arranged with the Registrar in the following terms:

1. That the Applicant is granted the leave of this Court in terms of section 157(1)(d) of the Companies Act, 71 of 2008 ("the Companies Act") to bring this application in the public interest.

2. Declaring that the Second Respondent acted in a manner that amounted to gross negligence with regards to the performance of his functions within, or duties

towards, Eskom in terms of section 50 and 51 of the Public Finance Management Act, 1 of 1999 ("PFMA") and breached his statutory duties under section 50(1)(a), 50(1)(b), 50(1)(d), 50(2), 51(1)(b)(ii), 51(1)(b)(iii), 51(1)(c), and 51(1)(e) of the PFMA.

3. Declaring that the Third Respondent acted in a manner that amounted to gross negligence with regards to the performance of his functions within, or duties towards, Eskom in terms of section 50 and 51 of the PFMA and breached his statutory duties under section 50(1)(a), 50(1)(b), 50(1)(c), 50(2), 50(3), 51(1)(a)(i), 51(1)(a)(ii), 51(1)(a)(iii), 51(1)(b)(ii), 51(1)(b)(iii), 51(1)(c), and 51(1)(e) of the PFMA.

4. Declaring that the Fourth Respondent acted in a manner that amounted to gross negligence with regards to the performance of his functions within, or duties towards, Eskom in terms of section 50 and 51 of the PFMA and breached his statutory duties under section 50(1)(a), 50(1)(b), 50(1)(d), 50(2), 50(3), 51(1)(a)(i), 51(1)(a)(iii), 51(1)(b)(ii), 51(1)(b)(iii), and 51(1)(c) of the PFMA.

5. Declaring that the Fifth Respondent acted in a manner that amounted to gross negligence with regards to the performance of her functions within, or duties towards, Eskom in terms of section 50 and 51 of the PFMA and breached her statutory duties under section 50(1)(b), 50(1)(d), 51(1)(b)(ii), 51(1)(b)(iii) and 51(1)(c) of the PFMA.

6. Declaring that the Sixth Respondent acted in a manner that amounted to gross negligence with regards to the performance of his functions within, or duties towards, Eskom in terms of section 50 and 51 of the PFMA and breached his

statutory duties under section 50(1)(a), 50(1)(b), 51(1)(a)(iii), 51(1)(b)(ii) and 51(1)(c) of the PFMA.

7. Declaring that the Second and Third Respondent failed to deal appropriately with any concerns or complaints, from within or outside Eskom, or acting on their own initiative, relating to:

   7.1. The accounting practices and internal audit of Eskom;

   7.2. The content or auditing of Eskom's financial statements; and

   7.3. The internal financial controls of Eskom (as required by section 94(7)(g) of the Companies Act).

8. Declaring that the Second, Third, Fourth, Fifth and Sixth Respondents failed to exercise the powers and perform the functions of Director:

   8.1. In good faith and for proper purpose (section 76(3)(a) of the Companies Act);

   8.2. In the best interests of the company (section 76(3)(b) of the Companies Act);

   8.3. With the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that Director; and having the general knowledge, skill and experience of that Director (section 76(3)(c) of the Companies Act).

9. Declaring that the Second, Third, Fourth, Fifth and Sixth Respondents are delinquent Directors in terms of section 162(5)(c) of the Companies Act.

10. Declaring that the declaration of delinquency in paragraph 9 subsists for:

10.1. Seven years in respect of public and private companies;

10.2. The lifetime of the person declared delinquent in respect of state-owned entities (section 162(6)(b)(i) and (ii) of the Companies Act).

In the alternative to paragraph 10

11. That the declaration of delinquency in paragraph 9 above is made subject to any conditions the Court considers appropriate (section 162(6)(b)(i) of the Companies Act).

12. Any further and/or alternative relief.

13. Directing the Respondents to pay the costs of this application, including the costs of three counsel where employed.

TAKE NOTICE FURTHER that the affidavit of **DAVID LEWIS** (together with its Annexures) will be used in support of this application.

TAKE NOTICE FURTHER that the applicant has appointed the office of Webber Wentzel, as set out below, as the address at which it will accept notice and service of all documents in these proceedings in terms of rule 6(5)(b).

TAKE NOTICE FURTHER that if you intend opposing this application you are required *(a)* to notify applicant's attorney in writing within five (5) days and within *fifteen* (15) days after you have so given notice of your intention to oppose the application, to file your answering affidavits, if any; and further that you are required to appoint in such notification an address referred to in rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

1e

TAKE NOTICE FURTHER that if no notice of intention to oppose is given, application will be made to this Honourable Court for an order in terms of the Notice of Motion on _____ at 10:00 am or soon thereafter as counsel may be heard.

DATED at Johannesburg on this 12th day of NOVEMBER 2018

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Email: moray.hathorn@webberwentzel.com
Ref: M Hathorn / T Phala
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TO: **THE REGISTRAR**
High Court
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AND TO: **ESKOM HOLDINGS SOC LIMITED**
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Fifth Respondent
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MINISTER OF PUBLIC ENTERPRISES	Seventh Respondent

DFRAT ORDER

IT IS ORDERED THAT:

1. The Applicant is granted the leave of this Court in terms of section 157(1)(d) of the Companies Act, 71 of 2008 ("the Companies Act") to bring this application in the public interest.

2. The Second Respondent acted in a manner that amounted to gross negligence with regards to the performance of his functions within, or duties towards, Eskom

in terms of section 50 and 51 of the Public Finance Management Act, 1 of 1999 ("PFMA") and breached his statutory duties under section 50(1)(a), 50(1)(b), 50(1)(d), 50(2), 51(1)(b)(ii), 51(1)(b)(iii), 51(1)(c), and 51(1)(e) of the PFMA.

3. The Third Respondent acted in a manner that amounted to gross negligence with regards to the performance of his functions within, or duties towards, Eskom in terms of section 50 and 51 of the PFMA and breached his statutory duties under section 50(1)(a), 50(1)(b), 50(1)(c), 50(2), 50(3), 51(1)(a)(i), 51(1)(a)(ii), 51(1)(a)(iii), 51(1)(b)(ii), 51(1)(b)(iii), 51(1)(c), and 51(1)(e) of the PFMA.

4. The Fourth Respondent acted in a manner that amounted to gross negligence with regards to the performance of his functions within, or duties towards, Eskom in terms of section 50 and 51 of the PFMA and breached his statutory duties under section 50(1)(a), 50(1)(b), 50(1)(d), 50(2), 50(3), 51(1)(a)(i), 51(1)(a)(iii), 51(1)(b)(ii), 51(1)(b)(iii), and 51(1)(c) of the PFMA.

5. The Fifth Respondent acted in a manner that amounted to gross negligence with regards to the performance of her functions within, or duties towards, Eskom in terms of section 50 and 51 of the PFMA and breached her statutory duties under section 50(1)(b), 50(1)(d), 51(1)(b)(ii), 51(1)(b)(iii) and 51(1)(c) of the PFMA.

6. The Sixth Respondent acted in a manner that amounted to gross negligence with regards to the performance of his functions within, or duties towards, Eskom in terms of section 50 and 51 of the PFMA and breached his statutory duties under section 50(1)(a), 50(1)(b), 51(1)(a)(iii), 51(1)(b)(ii) and 51(1)(c) of the PFMA.

7. The Second and Third Respondent failed to deal appropriately with any concerns or complaints, from within or outside Eskom, or acting on their own initiative, relating to:

7.1. The accounting practices and internal audit of Eskom;

7.2. The content or auditing of Eskom's financial statements; and

7.3. The internal financial controls of Eskom (as required by section 94(7)(g) of the Companies Act).

8. The Second, Third, Fourth, Fifth and Sixth Respondents failed to exercise the powers and perform the functions of Director:

8.1. In good faith and for proper purpose (section 76(3)(a) of the Companies Act);

8.2. In the best interests of the company (section 76(3)(b) of the Companies Act);

8.3. With the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that Director; and having the general knowledge, skill and experience of that Director (section 76(3)(c) of the Companies Act).

9. The Second, Third, Fourth, Fifth and Sixth Respondents are delinquent Directors in terms of section 162(5)(c) of the Companies Act.

10. The declaration of delinquency in paragraph 9 subsists for:

10.1. Seven years in respect of public and private companies;

10.2. The lifetime of the person declared delinquent in respect of state-owned entities (section 162(6)(b)(i) and (ii) of the Companies Act).

In the alternative to paragraph 10

11. That the declaration of delinquency in paragraph 9 above is made subject to any conditions the Court considers appropriate (section 162(6)(b)(i) of the Companies Act).

12. Any further and/or alternative relief.

13. The Respondents are to pay the costs of this application, including the costs of three counsel where employed.

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MINISTER OF PUBLIC ENTERPRISES	Seventh Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

DAVID LEWIS

state under oath that:

1 I am an adult male. I am the Executive Director of Corruption Watch, the first applicant in this application. Corruption Watch is a non-profit company under the laws of the Republic of South Africa with its principal place of business at 87 De Korte Street, Braamfontein, Johannesburg. A copy of the memorandum of incorporation of the first applicant is attached as **Annexure "DL1".**

2 The facts and allegations contained herein are, save where the contrary is indicated by the context, all within my personal knowledge, or known to me through documents in my possession, or are within the personal knowledge of Suzanne Margaret Daniels ("**Daniels**"). Daniels is the former Company Secretary and former Group Executive: Head of Legal and Compliance at Eskom, whose supporting affidavit is attached and marked as **Annexure "DL2"**. The facts and allegations contained herein are, to the best of my belief, true and correct.

2.1. All documents relied on in this application that are not in the public domain have been provided to the applicant by Daniels.

2.2. Reports and other documents in this application that are not confirmed by the authors or implicated persons herein are relied on, on the basis that:

2.2.1. They are publicly available documents;

2.2.2. It was not possible to obtain confirmatory affidavits from all authors and / or implicated persons;

2.2.3. The respondents are specifically invited to confirm the contents of the reports and documents;

2.2.4. The reports relied on are the product of reputable institutions that any responsible director would take seriously and regarding which they would pursue the issues raised in such reports; and

2.2.5. It is in the interests of justice that the reports and documents should be admitted.

2.3. Further argument in this regard will be made at the hearing of this matter.

3 Where I make legal submissions, I do so based on the advice of my legal representatives.

PURPOSE OF THIS APPLICATION

4 This is an application in terms of section 162(5)(c) of the Companies Act, 71 of 2008 ("Companies Act") to declare certain former members of the Board of Eskom Holdings SOC Limited ("Eskom" or "the Company") delinquent Directors.

5 The Supreme Court of Appeal ("SCA") succinctly discussed the purpose of an order of delinquency. In *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35, the SCA held that:

> *"Its aim is to ensure that those who invest in companies, big or small, are protected against Directors who engage in serious misconduct of the type described in these sections. That is conduct that breaches the bond of trust that shareholders have in the people they appoint to the Board of Directors. Directors who show themselves unworthy of that trust are declared delinquent and excluded from the office of Director. It protects those who deal with companies by seeking to ensure that the management of those companies is in fit hands. And it is required in the public interest that those who enjoy the benefits of incorporation and limited liability should not abuse their position."*

6 This application is brought in the public interest. The South African public represented by the Government of South Africa, through the Minister of Public Enterprises, is the guarantor shareholder and investor in Eskom.

7 The public has an interest in the proper governance and management of Eskom for the following reasons:

7.1. Eskom is a public company and its entire share capital is held by the State, which is represented by a Shareholder Representative. Our courts have held that State Owned Enterprises ("SOEs") are, through the State, owned by the nation.

7.2. Eskom is also a major public entity under Schedule 2 of the Public Finance Management Act, 1 of 1999 ("PFMA").

7.3. Most recently, the ongoing problems with governance at Eskom have impacted on the country's sovereign credit rating and Eskom itself has suffered numerous credit rating downgrades during the past 24 months.

7.4. In April 2017, Standard and Poor Global ("S&P Global"), a global ratings agency, downgraded South Africa's credit rating. They stated candidly *"that contingent liabilities to the state, particularly in the energy sector, are on the rise, and that previous plans to improve the underlying financial position of Eskom may not be implemented in a comprehensive and timely manner."* They remarked that previous identification of necessary governance reforms at Eskom

had not produced these reforms. A copy of S&P Global's statement is attached and marked as **Annexure "DL3"**.

7.5. Similarly, in June 2017, Moody's, another global ratings agency, also downgraded South Africa's credit rating and assigned it a negative outlook. According to the statement, two of the three drivers which led to the downgrade, were linked to the state of governance in SOEs and the need to institute reforms. Moody's specifically lamented the delay in implementing much needed reforms in the governance of SOEs. Poor governance was again highlighted when Moody's indicated, *"pressures to further extend guarantees and utilize procurement practices to advance political objectives are sources of additional potential risk."* A copy of Moody's statement is attached and marked as **Annexure "DL4"**.

7.6. Both ratings agencies downgraded Eskom in November 2017, citing its high level of necessary government support in instances of financial distress, governance difficulties and that these downgrades were consequential on the sovereign ratings downgrade.

7.7. On 26 January 2018, Moody's downgraded Eskom yet again due to the further deterioration in its financial and liquidity position. A copy of Eskom's media statement following the further downgrade is attached and marked as Annexure **"DL5"**. Fitch Ratings, on 31 January 2018, similarly downgraded Eskom, citing weakening liquidity and Eskom's uncertain capacity to fulfil its short-term financial commitments as the basis for its decision. A copy of

Eskom's media statement following the downgrade is attached and marked as Annexure "**DL6**".

7.8. Eskom was further downgraded by S&P in February 2018 and by Moodys in March 2018. Copies of Eskom's media statements following the downgrades are attached and marked as **Annexures "DL7"** and **"DL8"**.

7.9. These downgrades have had a detrimental effect on the growth of our economy and have increased the cost of living, which directly and adversely affects all South Africans and more dramatically, the most vulnerable and poorest of South Africans.

7.10. Eskom as an SOE makes an essential contribution to our country's economy. SOEs are vital to the growth of the economy because they promote the development of the country's strategic sectors, especially energy, transport, telecommunications and manufacturing.

7.11. Eskom's centrality and strategic importance to the South African economy is self-evident. As the country's dominant electricity supplier, the effective operation of Eskom is critical to government's social and economic policies, as well as to the growth, development and transformation of the economy.

7.12. The Minister of Public Enterprises ("the Minister") reiterated Eskom's central role in the progressive reform and strategic transformation of the South African economy during the budget vote speech on 15 May 2018. Discussing the major impact that the reliability of

electricity supply has on the country's economy and its citizen's well-being, the Minister acknowledged that Eskom, as a critical institution, was on the brink of collapse through state capture. A copy of the budget vote speech is attached and marked as **Annexure "DL9".**

8 In light of the above, the importance of well-functioning and transparent SOEs cannot be over-stated. Eskom as a strategic national asset must perform with optimum efficiency and accountability.

9 The public further has an interest in the prudent management of public funds. Accordingly, in circumstances where the directors of a major public entity such as Eskom are alleged to be managing the entity imprudently (if not unlawfully), the public has a right to, and interest in, the prevention of them being placed in positions of directors which require utmost good faith and acting in the best interest of the Company.

10 The facts, which are at the heart of this application, centre on the gross negligence, mismanagement and maladministration of Eskom by the respondent Directors, who were Directors of the Company ("respondent Directors" or "Directors") and were responsible for the management and control of the Company as per the governing prescripts of law and embodied in the Memorandum of Incorporation ("MOI"). The Directors abused their positions in order to benefit other entities and individuals rather than the interests of Eskom and, by necessary extension, the people of South Africa.

11 Announcing Eskom's interim results on 30 January 2018, then Acting Chief Executive Officer ("ACEO"), Phakamani Hadebe ("Hadebe") acknowledged that the significant challenges faced by Eskom are the result of poor

leadership and a lack of corporate governance by these Directors. Hadebe stated that as the shareholder, government waited too long to replace Eskom leaders. A copy of Eskom's statement and a media report on Eskom's interim results are attached as **Annexure "DL10"** and **Annexure "DL11"**, respectively.

12 The actions of the Directors, as detailed in this application, also evidence a breach of the provisions of the Constitution of the Republic of South Africa, 1996 ("Constitution"), the PFMA, and the Companies Act as will be detailed below.

13 Despite the removal of the majority of the Board of Directors of Eskom in January 2018, and the removal of Lynne Brown as the Minister of Public Enterprises ("the former Minister" or "Brown") on 26 February 2018, the erosion of executive oversight and corporate governance at Eskom in the preceding years has placed it in a financially precarious position that has endangered South Africa's economic stability as well. More significantly, Eskom was central to the "state capture" project, which impoverished Eskom and enriched third parties and/or individuals in what appears to be a determined stratagem by the respondent Directors and others to commit fraud, corruption, racketeering and engage in other financial misconduct.

14 In the remainder of this affidavit, I will address the following issues –

14.1. The parties;

14.2. Standing to bring this application;

14.3. The factual background to this application; and

14.4. The grounds for delinquency regarding each of the respondent Directors.

THE PARTIES

The applicants

15 The first applicant is Corruption Watch. Corruption Watch is a non-profit company under the laws of the Republic of South Africa, with its principal place of business at 87 De Korte Street, Johannesburg.

The Respondents

16 The first respondent is Eskom Holdings SOC Limited.

16.1. Eskom is a state-owned company with registration number 2002/015527/06, duly established in terms of the company laws of the Republic of South Africa and section 3 of the Eskom Conversion Act, 13 of 2001 ("Eskom Act"), with its registered office at 1 Maxwell Drive, Sunninghill, Sandton, Johannesburg.

16.2. Eskom is an organ of state as defined in section 239 of the Constitution and a public entity listed in Schedule 2 of the PFMA.

16.3. No relief is sought against Eskom and it is cited due to its interest in this matter. Eskom is specifically invited to assist the Court in its determination of this application and to confirm the avoidable and severe deterioration in its governance and financial position while under the stewardship of the Directors.

17 The second respondent is Mark Vivian Pamensky ("Pamensky").

17.1. Pamensky is an adult male and a former member of the Board of Directors of Eskom. Pamensky was appointed to the Board as a non-executive Director on 11 December 2014.

17.2. On or about 16 November 2016, Pamensky resigned.

18 The third respondent is Anoj Singh ("Singh"), an adult male and former member of the Board of Directors of Eskom.

18.1. Singh was seconded to Eskom in August 2015 as the Acting Chief Financial Officer ("ACFO") and was permanently appointed as the Group Chief Financial Officer ("GCFO") on 25 September 2015. Singh was appointed to the Board on 01 October 2015 as GCFO.

18.2. On or about 29 September 2017, Singh was suspended from Eskom pending investigation.

18.3. On or about 22 January 2018, Singh resigned from Eskom following the removal of the Board and the direction of the new Board *"to immediately remove all Eskom executives who are facing allegations of serious corruption and other acts of impropriety, including Mr Matshela Koko and Mr Anoj Singh"* (statement on measures to strengthen governance at Eskom, attached and marked as **Annexure "DL12"**).

19 The fourth respondent is Brian Molefe ("Molefe").

19.1. Molefe is an adult male and former Group Chief Executive, ("GCE") of Eskom.

19.2. Molefe was appointed as GCE of Eskom on or about 10 October 2015. Prior to his appointment as GCE of Eskom, Molefe was appointed as Acting GCE of Eskom in May 2015.

19.3. On 2 June 2017, the Eskom Board resolved to terminate the Reinstatement Agreement entered into with Molefe, following a directive by the Shareholder Representative, thereby terminating his employment.

20 The fifth respondent is Venete Jarlene Klein ("Klein").

20.1. Klein is an adult female and a former member of the Board of Directors of Eskom. Klein was appointed to the Board as a non-executive Director on 11 December 2014.

20.2. On or about May 2017, Klein resigned.

21 The sixth respondent is Zethembe Wilfred Khoza ("Khoza").

21.1. Khoza is an adult male and a former Chairperson of the Board of Eskom, Chairperson of the Board Tender Committee and a member of the People and Governance Committee.

21.2. On or about 20 January 2018, Khoza resigned.

22 The seventh respondent is the Minister of Public Enterprises, Mr Pravin Gordhan ("the Minister") cited in his official capacity as the Shareholder

Representative and served care of the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria.

22.1. The Minister is responsible for administering and regulating Eskom under and in terms of the Eskom Act.

22.2. No relief is sought against the Minister, who is cited based on his interest in this application as the Shareholder Representative of Eskom. Like Eskom, the Minister is specifically invited to assist the Court in its determination of this application by providing confirmation of the facts set out below.

STANDING

23 Corruption Watch brings this application in terms of section 157 of the Companies Act, read with section 162. It seeks leave of this Court to bring this application in the public interest.

The Work of Corruption Watch

24 As appears from Annexure **"DL1"** –

24.1. The first applicant was formed to undertake activities aimed at the combating of corruption in all forms in South Africa in order to ensure integrity and accountability in both the public and private sector in the conduct of their functions and operations.

24.2. Two purposes of the first applicant are (i) to engage in litigation, and (ii) to liaise with law enforcement authorities, as well as state investigation

and prosecution authorities, to ensure that appropriate actions are taken in relation to matters referred for investigation and/or prosecution.

25 Corruption Watch is a non-profit organisation that fights corruption and seeks to hold leaders and officials accountable for their actions. Corruption Watch provides a platform for reporting corruption, through its website, an SMS line, social media, email, or post; investigates selected reports of alleged acts of corruption; gathers and analyses information to identify patterns of corruption; and builds campaigns that mobilise people to take a stand against corruption.

26 As an advocacy organisation, much of the work of Corruption Watch is focused on policy and legislative work, public education, outreach programmes, campaigns, and raising the public's awareness of corruption.

27 Corruption Watch will also participate in litigation, such as this application, where it would be in the public interest and would advance the ongoing fight against corruption.

Exposing Corruption Through Reports and Whistleblowers

28 Corruption Watch aims to ensure that the custodians of public resources act responsibly to advance the interests of the public, and to ensure that opportunities for entering into corrupt relationships are reduced.

29 For this reason, the conduct of the respondent Directors while they were directors at Eskom must be held up for scrutiny. Those Directors simply failed in their obligations and refused to fulfil their duties while entrusted with the corporate governance of Eskom. Despite handsome remuneration, the

respondent Directors mismanaged public funds and diverted them from their lawful, proper purposes to unlawful and improper ends. Seemingly willfully blind to obvious conflicts of interest and determined to pursue interests other than Eskom's, to the detriment of Eskom, the respondent Directors must now be held accountable.

30 Corruption such as this weakens institutions and undermines social solidarity. Our primary objective, therefore, is to encourage and enable active public participation in combatting corruption by reporting experiences of corruption in South Africa.

31 We believe that by shining a light on corruption and those who act corruptly, we promote transparency and accountability and protect the beneficiaries of public goods and services.

32 Each act of corruption that is prevented by our citizens underpins and fortifies civil society and thereby enhances democracy, the rule of law and the establishment of a more caring and just society.

33 Whistleblowers, such as Daniels, demonstrate tremendous courage to make the decision to reveal corruption, when often it would be much easier to turn a blind eye and say nothing. Whistleblowers often go through harrowing experiences on their way to vindication and the truth.

34 Through the brave efforts of Daniels, the extent to which the respondent Directors acted delinquently and otherwise in contravention of their obligations and duties, and the extent to which the former Minister also failed to prevent such delinquency, is now known to this Court and to South Africa

through her protected disclosure and testimony at the Portfolio Committee on Public Enterprises Inquiry into Eskom, Transnet and Denel ("Parliamentary Inquiry"). Personal accountability must follow for these individuals.

35 Despite public knowledge of the irregularities at Eskom through various inquiries, investigations and reports, as detailed in this affidavit, there has been no personal accountability for those responsible to date. The cost of corruption is high – the failure of Eskom will cripple the South African economy.

36 The Minister has publicly acknowledged that a compromised Board and unscrupulous executives were installed, who were actively engaged in the looting of Eskom (see **Annexure "DL9"**). These individuals should not escape personal liability and accountability for their role in bringing Eskom to its knees in furtherance of the so-called "state capture" project. The enrichment of, among others, the Gupta family to the detriment of Eskom and its shareholders, the South African public, cannot pass without consequences.

37 The former Minister failed to act in the public interest and hold the respondent Directors accountable, as she should have done. As Shareholder Representative, the former Minister was empowered by the Eskom MOI to take meaningful action against the respondent Directors to hold them accountable for their failures as Directors. Yet she failed to do so, despite the real and persistent threat from Eskom's lenders that no further funds would be lent to Eskom without her acting and dealing with the corporate governance failures at Eskom.

38 In short, the governance and management of Eskom has been nothing short of calamitous. Eskom has been plagued by scandal after scandal pertaining to state capture and the syphoning of public funds from the utility. This has resulted in a warning from the then Minister of Finance that Eskom could collapse the South African economy. A media article to this effect is attached and marked as **Annexure "DL13".**

39 The then Deputy President's critical intervention to ensure that appropriately qualified people were appointed to a new Eskom Board in January 2018 was insufficient to stave off a further credit downgrade. The Moody's statement, attached and marked as **Annexure "DL14"**, provided that:

> *"Eskom has faced mounting liquidity risks in recent weeks, primarily driven by lenders' unwillingness to provide additional funding to the company in the context of serious questions around corporate governance, a lack of leadership and failing trust in the company. The government's announcement, on 20 January 2018, seeking to address these issues through the replacement of the existing Eskom Board members and the plan to tackle long term funding and structural issues is a positive first step towards restoring confidence in the company and, over time, operational performance and its financial position."*

Public Interest and the Applicants' Standing

40 In conclusion, I submit that it is plainly in the public interest that this application be pursued by Corruption Watch with leave of this Court, finding that the first applicant has standing to bring, as it does, this application:

40.1. On behalf of and in the public interest, with the leave of this Court in terms of section 157(1)(d) of the Companies Act, read with section 162(2).

40.2. It is evident from the above that there is significant and well-founded public interest in the good governance and management of Eskom.

41 Further legal submissions regarding the applicant's standing will be made at the hearing of this application.

PURPOSE OF THIS APPLICATION

42 Corruption Watch brings this application to ensure personal accountability for the respondent Directors for their facilitation of and participation in corruption and non-compliance with several statutory obligations while at Eskom.

43 It is insufficient redress that a largely new Board has recently been appointed. It is important that these individuals who so egregiously failed to fulfil their statutory, legal and moral obligations as directors are prevented from occupying these fiduciary positions again.

44 Further legal submissions regarding the appropriateness of the relief sought to achieve these objectives of Corruption Watch will be made at the time of the hearing of this application in due course.

INTRODUCTION TO THE GROUNDS OF DELINQUENCY AND FACTUAL BACKGROUND TO THIS APPLICATION

45 The relevant factual background to the various incidents providing the grounds of delinquency on which the applicants rely are set out below in separate chapters and confirmed in the attached annexures and the supporting affidavit of Daniels.

46 In summary, these are:

46.1. Pamensky's conflicts of interest;

46.2. Eskom's relationship with Tegeta Exploration and Resources (Pty) Ltd ("Tegeta");

46.3. Coal Supply Agreements and related dealings with Optimum Coal Holdings (Pty) Ltd ("OCH") and Optimum Coal Mine (Pty) Ltd ("OCM");

46.4. Financial mismanagement at Eskom – the Qualified Audit; and

46.5. Brian Molefe's "early retirement"/resignation.

47 I address each in turn below.

CHAPTER ONE:

PAMENSKY'S CONFLICTS OF INTEREST

48 The most fundamental duty of a Board member is to act in the best interests of the organisation. The collapse in governance at Eskom allowed for large scale looting of the institution as well as a complete mismanagement of conflicts of interest. Not only did Pamensky use information gained through his position at Eskom to his (and others) personal advantage, he actively acted against Eskom's best interests as detailed below.

49 Pamensky breached section 76 of the Companies Act in that he used his position as a director of Eskom to gain advantage for another person other than for Eskom and, by extension, the public resources with which it is entrusted.

50 Pamensky was appointed as an independent non-executive director of the Eskom Board on 11 December 2014.

51 Pamensky served as Chairman of the following committees of the Board:

51.1. The Investment and Finance Committee for the period December 2014 to July 2016; and

51.2. The Audit and Risk Committee for the period July 2016 to November 2016.

52 During his tenure on the Eskom Board, he also served as a director on the boards of, or had business interests in, other Gupta-related entities including:

52.1. Oakbay Resources and Energy Ltd ("Oakbay") (for the period September 2014 to May 2017);

52.2. Shiva Uranium (Pty) Ltd (27 November 2015 to 7 July 2016);

52.3. Yellow Star Trading 1099 (Pty) Ltd;

52.4. BIT Information Technology (Pty) Ltd; and

52.5. Trillian Capital Properties.

53 At the time, Tegeta also had a 20 percent shareholding interest in Shiva Uranium.

54 Pamensky declared his various interests with regards to the above entities while still a Board member.

55 Despite these declarations, in his role as non-executive board member of

various companies, Pamensky was the conduit for the flow of privileged information between the companies and members of the Gupta family. This sharing of Eskom's internal commercially sensitive information and relevant information is inexplicable by a Director whose fiduciary and legal duties include the preservation of its confidential information. It is further inexplicable to have shared such information with a supplier to Eskom, with which an arms-length relationship was required.

56 On 18 September 2015 Pamensky sent an email to members of the Gupta family and associates attaching documentation on Eskom's new procurement methods for coal. In the email Pamensky provides information on a coal mine (Waterberg Coal Company) he had wanted to buy and states: *"We need to move fast on certain asset acquisitions as Sibanye is picking up all these assets at low valuations which is what we should be doing. We should also look to do a deal with Eskom on the coal plus mines. I have some good thoughts on these assets that can we (sic) a win win for Eskom, the mine owners and ourselves."* (**Annexure "DL15"**)

57 On 22 November 2015, Pamensky sent an email to members of the Gupta family and associates wherein he states: *"We will have the shiva uranium board sorted out by Tuesday. This will allow us to vote on the Tegeta acquisition with no related parties. [...] In terms of the investment committee I am available to start straight away. As I'm at the tail end of the main acquisition of Optimum Coal, please ensure that a condition precedent is that the R2bn claim from Eskom is withdrawn or it becomes the sellers problem."* A copy of the email is attached and marked as **Annexure "DL16".** The two-

billion-rand claim was the same penalty (detailed at paragraph 102 below) in explaining how Glencore was pressured by Eskom to sell Optimum Coal to Tegeta/the Guptas.

58 Again on 25 November 2015 Pamensky sent an email to Atul Gupta stating that he would like to discuss the *"concept on the potential law suit from Eskom to target Co"*, which I understand "target Co" to be a reference to Optimum Coal Mine (see paragraphs 110 below). A copy of the email is attached and marked as **Annexure "DL17".**

59 On 31 January 2016, Pamensky sent an email to members of the Gupta family and associates wherein he states: *"Just for info purposes but Clinton just called me now to make sure that I reply back to you that Ivan is 100% behind the closing of the deal and that Glencor (sic) are not behind these press statements. I don't believe him about the press but do believe him about the fact the closing of the deal is important to Glencor (sic)r. The fact is that Eskom will not deal with Glencor (sic) and the business practitioner mentioned same to me."* A copy of the email is attached and marked as **Annexure "DL18".**

61 Pamensky failed to recuse himself from decisions in which conflicts of interest arose between his various stakes in business. Such failure to recuse himself aids in his willingness to assist in dubious transactions. In an email to members of the Gupta family, Pamensky discusses a possible conflict based on the ORE potential acquisition of Tegeta, which has a contract with Eskom and due to the fact that he sits on the Eskom Board. He states that he does not believe there to be a conflict and requests a meeting to discuss the

matter further. A copy of the email dated 17 November 2015 which evidences same, is attached and marked as **Annexure "DL19".**

62 As a result of Pamensky's unlawful and corrupt conduct, the Organisation Undoing Tax Abuse ("OUTA") has laid criminal charges against Pamensky for corruption and for violating his statutory obligations in terms of the Companies Act and the PFMA. OUTA's affidavit, with accompanying annexures, is marked and attached as **Annexure "DL20"** and its contents will be relied on in this application.

63 Pamensky, while exercising his powers and functions as a Board member failed to:

59.1. Act in good faith and for a proper purpose; and

59.2. Act in the best interests of Eskom as Director (section 62(5)(c)(i) of the Companies Act).

64 In addition, Pamensky knew, alternatively ought to have known, that by using his position at Eskom to acquire and share confidential information with third parties, he failed, inter alia, to:

59.3. Exercise the duty of utmost care to ensure reasonable protection of the assets and records of Eskom as a public entity (section 50(1)(a) of the PFMA);

59.4. Act with fidelity, honesty, integrity and in the best interests of Eskom as a public entity (section 50(1)(b) of the PFMA);

59.5. Seek to prevent any prejudice to the financial interests of the State (section 50(1)(d) of the PFMA); and

59.6. Refrain from using his position or privileges as a member of the Eskom Board in order to improperly benefit another person (section 50(2) of the PFMA).

65 In respect of what is set out above, Pamensky:

59.7. Knew, alternatively ought to have known that he was acting unlawfully;

59.8. Failed to exercise the powers and perform the functions of Director in good faith and for a proper purpose, in the best interests of Eskom;

59.9. Acted in a manner that amounted to gross negligence, willful misconduct or breach of trust in relation to the performance of Eskom, and duties to Eskom in terms of section 162(5)(c)(i), section 162(5)(c)(ii), section 162(5)(c)(iii), and 162(5)(c)(iv)(aa) of the Companies Act.

66 Accordingly, this court must make an order declaring Pamensky a delinquent Director in terms of section 162(5)(c)(i)-(iv) of the Companies Act.

CHAPTER TWO

ESKOM'S RELATIONSHIP WITH TEGETA EXPLORATION AND RESOURCES (PTY) LTD ("TEGETA")

60 Eskom is by far the dominant buyer in the domestic coal market. Coal supply is vital not only to Eskom but to the South African economy. According to the Department of Energy, South Africa produces 224 million tons of marketable coal annually, with fifty-three percent (53%) used for electricity generation.

61 The key role played by our coal reserves in the economy is illustrated by the fact that as at December 2015, Eskom was the seventh largest electricity generator in the world. Eskom had thirteen coal-fired power stations and maintained thirty-three coal contacts serviced by at least twenty-eight suppliers.

62 Coal procurement therefore remains an essential procurement area and it is necessary for Eskom to follow a proper coal procurement strategy and policy in order to minimize risk and exposure. In terms of Eskom's Procurement Policy *"one of the responsibilities of the Eskom Board is to have and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective."*

63 At all relevant times hereto, Tegeta was owned by Oakbay Investments (Pty) Ltd ("Oakbay"), a Gupta family owned business. A copy of the company registration information is attached and marked as **Annexure "DL21".**

64 As set out below and in the attached annexures to this affidavit, Eskom contracted with Tegeta for coal to be supplied to various of its power stations for electricity generation. However, the terms of these supply agreements were uncommercial, caused further financial harm to Eskom, and were the result of action taken by Khoza, Singh and Molefe, in particular, that was contrary to the statutory requirements and legal duties applicable to them.

65 In addition, Khoza, Singh and Molefe failed to respond appropriately to other arms of government, including Treasury, which was attempting to exercise some oversight over these contracts.

66 Accordingly, these arrangements and all of the failures detailed below provide a basis for this Court to conclude that Khoza, Singh and Molefe should be declared to be delinquent Directors.

67 The allegations set out below in respect of the Coal Supply Agreements ("CSAs") entered into by Eskom with Tegeta/OCH/OCM were the subject of several different reports which investigated the matter and corroborated the essential allegations detailed below. The following reports deal with the matter:

67.1. The Price Waterhouse and Cooper ("PWC") Report: Coal Quality Management dated 26 November 2015, attached and marked as **Annexure "DL22";**

67.2. Treasury's Report titled "The verification of compliance with Treasury Norms and Standard's – Appointment of Tegeta Exploration and Resources (Pty) Ltd" and annexures dated 12 April 2016, attached and marked **Annexure "DL23";**

67.3. Extracts of the Public Protector's "State of Capture Report" dated 14 October 2016, attached and marked **Annexure "DL24".**

68 The reports relied on are in the public domain. The content of the reports has not been publicly disputed by Khoza, Singh or Molefe. Corruption Watch invites the respondents to confirm the contents of the reports.

69 In sum, Eskom contracted for unsuitable coal on uncommercial terms with a supplier linked to the Gupta family and Oakbay group of companies, contrary to the duties owed by the Directors to the company and to the public who are directly affected by the failure of corporate governance at Eskom. Eskom's relationship with Tegeta also was contrary to the requirements imposed on Eskom by Treasury. These CSA's also raise grave conflicts of interests for the Directors and were detrimental to Eskom in that its interests were subrogated to the interests of one supplier.

70 For the sake of brevity, I attach the full chronology and detail on the conclusion and terms of the CSA concluded between Eskom and Tegeta on 10 March 2015 (10 March CSA). This is attached and marked as **Annexure "DL25".**

71 As Directors of Eskom, Molefe and Singh were under an obligation to communicate to the Board at the earliest practicable opportunity any information that had come to their attention (section 76(2)(b) of the Companies Act).

72 Molefe, Singh and Khoza were also obliged to exercise their powers and perform their functions in good faith and for proper purpose, in the best interests of Eskom, and with the degree of care, skill and diligence that may be reasonably expected of a person in their position (section 76(3) of the Companies Act).

72.1. Khoza was the Chairman of the Board and Tender Committee at all relevant times when the transactions described served before him.

72.2. Singh was the GCFO at all relevant times.

73 The events detailed below illustrate that Molefe, Singh and Khoza failed to act with fidelity, honesty, integrity and in the best interests of Eskom in managing its financial affairs.

Failure by the Directors to Comply with the Treasury Report

74 The Treasury Report found that there is no evidence which points to Tegeta having complied with the express requirements of Eskom, specifically with clause 29.2 of the 10 March CSA, which required the submission of prescribed information to Eskom within 30 days after the publication of their annual report. The required information consisted of the following:

74.1. Summary of the product qualities supplied;

74.2. Quantities and dates of dispatch of contract coal delivered during the previous year;

74.3. The reserve and resource statements, in accordance with SAMREC Code, relating to the remaining coal to be mined at the Mine;

74.4. Progress on long term issues dealt with in this Agreement;

74.5. Latest tax clearance certificates;

74.6. Tegeta's broad based black empowerment status;

74.7. Employment equity status; and

74.8. The latest audited financial statements.

75 Furthermore, Treasury criticised Eskom for failing to enforce clause 30 of the 10 March CSA, which required the submission of information in respect of compliance with legislation by the supplier. In terms of clause 30, every Eskom supplier must, upon request by Eskom, provide Eskom with copies of all legislated compliance submissions submitted to all competent authorities in terms of legislation aimed at inter alia environmental protection, health and safety, and black empowerment.

76 The Treasury Report contained the following recommendation:

> *"The Accounting Authority must submit evidence of effective and appropriate steps taken to ensure that Tegeta Exploration and Resources (Pty) Ltd:*
>
> *(i) supplied and continue to supply coal that conform to Eskom's standards;*
>
> *(ii) complied and continue to comply with all its obligations under applicable laws (clause 6.1 of the coal supply agreement);*
>
> *(iii) submitted prescribed information to Eskom within 30 days after the publication of the annual report (clause 29.2 of the coal supply agreement);*
>
> *(iv) settled the fine for contravening environmental laws imposed by competent authorities;*
>
> *(v) complied with additional Water Use License requirements; and*
>
> *(vi) selectively mined the seam, use a grader to remove the major inseam partings and avoid over drilling and blasting to improve the quality of coal.*
>
> *The Accounting Authority must submit evidence of effective and appropriate steps taken by Eskom after receiving the SABS coal test results dated 18 September 2015 which confirmed that Tegeta Exploration and Resources (Pty) Ltd.'s coal do not conform to contracted standards.*
>
> *The Accounting Authority must submit evidence of effective and appropriate steps taken by Eskom after Tegeta Exploration and Resources (Pty) Ltd justified its High coal price because of the increased BEE shareholding.*

The Accounting Authority must submit evidence of effective and appropriate steps taken by Eskom to ensure compliance with clause 30 of the Coal Supply agreement with regards to the submission of the legislative submission associated with compliance by the supplier.

The Accounting Authority must submit evidence of effective and appropriate steps taken by Eskom to ensure that Tegeta Exploration and Resources (Pty) Ltd was not paid for the tons of coal that did not comply with its standards."

77 On 12 April 2016, the Treasury Report was sent to Molefe as GCE. The letter informed Molefe that he was to table the report before the Eskom Board and submit the required information/documents on or before 30 April 2016.

78 On 30 August 2016, Molefe purported to answer to the recommendations made by Treasury. The response is attached and marked **Annexure "DL26".** According to the response from Molefe, as at 30 August 2016, the Treasury Report had not been tabled before the Eskom Board. He then seemingly offered to table the Report at the next Board meeting which was set for 27 September 2016, some five months after he had received the Treasury Report.

79 Despite the statutory duty to timeously provide all relevant information to the Board and the request from Treasury that the Report be tabled timeously, Molefe and Singh failed to do so. This is contrary to their duties and obligations as Directors.

80 A reasonable director in the position of GCE and GCFO would have tabled the Report timeously, in compliance with statutory duties and the oversight of

Treasury in ensuring that Eskom was lawfully, diligently and properly managed.

Findings of the PWC Report

81 The Directors' disregard for their duties and failure to cure their non-compliance with the obligations imposed upon them was compounded by their disregard of further warnings regarding the non-compliant nature of the CSAs contained in the PWC Report. Further details of these findings are set out below.

82 On or about 26 November 2015, Eskom received the PWC Report. The PWC Report found that the procurement of coal from *inter alia* Tegeta in terms of the 10 March CSA was improper because there were several failings in respect of the procurement process (the PWC Report discussed the 10 March 2015 CSA concluded between Eskom and Tegeta, however the Report uses a pseudonym to refer to Tegeta). The PWC Report highlighted several failings in the procurement process including that:

82.1. Eskom acted in contravention of Clause 3.7.3.9 of Eskom's Procurement and Supply Management Procedure. Clause 3.7.3.9 requires that unsolicited offers be referred to the Supplier Development & Localisation Department ("SD & L Department") for supplier pre-qualification and registration, in terms of Clause 3.2 of the Procedure. *"Only once evaluated and pre-qualified after application, the supplier may then be given a vendor number confirming registration on the Eskom supplier database and may be considered for any future tenders' enquiries."* This

requirement was not complied with. Eskom's Procurement and Supply Management Procedure is attached as **Annexure "DL27"**;

82.2. Despite being requested, the Commercial and Financial evaluation report was not provided to PWC. PWC was however informed that financial evaluations were performed. But it could not find any evidence that a financial modelling and evaluation process was followed or that there was a clear commercial motivation for entering into the contract on the commercial terms provided; and

82.3. The contract appeared to have been hastily put together through a process of 'cutting and pasting' from various draft contracts or standard contract templates.

83 The PWC Report highlights a number of significant issues that point to the failure of the Board to give proper direction. This is especially so because these failings concern Eskom's procurement of coal.

84 The PFMA requires that Eskom is represented by accountable persons at every level, who must "prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity" and "manage available working capital efficiently and economically".

85 At a minimum, the PWC and Treasury Reports required the Board to investigate allegations that irregular expenditure had been incurred. This was not done.

86 It is clear that the Directors failed to exercise the duty of utmost care and to ensure reasonable protection of Eskom's assets. The failings of Eskom in the procurement process and management of coal procured shows that the Directors failed in this key responsibility.

87 The PWC Report highlights a number of issues which illustrate the extent to which the Board abdicated its responsibility in this essential area. This is evident from the following:

87.1. PWC states that negotiating team leaders were evidently in full control of the process of procurement from start to the end;

87.2. There was no evidence of oversight from the Primary Energy Department ("PED") and consequently by the Board;

87.3. Despite the fact that Eskom's procurement policy prohibited single adjudication, PED continued, seemingly with a mandate from the Board Tender Committee, to enter into contracts in excess of R3 billion, each committing Eskom for ten years or more with a single authority; and

87.4. Despite the fact that there were properly constituted tender committees, there was no evidence that these committees were ever consulted.

88 Of significance is that PWC questioned whether the Board had properly applied its mind to the present-day coal needs of Eskom. In particular, PWC noted that:

> *"It is questionable if similar coal market conditions and Eskom's urgent procurement needs of 2009 still exist today that might justify perpetuating the coal price aspirations and governance system proposed originally. The 2010 MT Mandate had outlived most if not all senior executives and [Board of Directors] members and it is quite conceivable that the current senior executives and [Board of Directors] does not have sight of the original intent, strategy and tactics. Board of Directors Tender Committee should review the coal supply strategy and the associated procurement mandates as soon as possible." (Own emphasis added.)*

89 It is apparent from the PWC Report that the Board delegated vast amounts of its power without any oversight. This allowed individual employees to enter into binding contracts on behalf of Eskom for large amounts of money over extended periods of time. This amounted to an abdication by the Board of its responsibilities as the accounting authority in terms of the PFMA. The Directors must therefore be held accountable for the significant failures in the procurement of coal, detailed further below.

90 The Board, as the accounting authority in terms of the PFMA, had the responsibility not only to put in place proper procurement procedures but also to ensure that such procedures were followed. The Board was, inter alia, required to review the coal supply strategy, contracting strategy and additional procurement mandates. The fact that such responsibilities were seemingly exercised by officials in the Department did not mean that the Board could abdicate its responsibilities as the accounting authority. It is also unclear whether these powers were lawfully and properly delegated by the Board.

91 The 10 March CSA with Tegeta not only flouted internal procurement procedures but resulted in Eskom buying substandard coal from Tegeta.

Between the period April 2015 to August 2015, Eskom made payments to the value of R134 343 403.73 to Tegeta in terms of the CSA.

92 On 10 February 2016, as detailed below, the Committee approved the sale of shares in OCM to Tegeta. They further resolved that the CSA between OCH and Eskom be ceded to Tegeta.

93 These transactions took place under the leadership of Khoza, as Chair of the Board Tender Committee. Khoza was also present at the Special Board Tender Committee Meeting of 11 April 2016 at 21h00 which approved the prepayment to the amount of R659,558,079.38 to Tegeta.

94 A reasonable chairperson of a tender committee would have:

94.1. Ensured compliance with Eskom's Procurement and Supply Management Procedure;

94.2. Exercised the level of oversight required of a Director;

94.3. Provided full information to members of the committee on matters under consideration in a timely manner; and

94.4. Acted in the best interests of Eskom as statutorily required under the Companies Act and the PFMA.

95 In light of Khoza, Singh and Molefe's abdication of responsibility and negligent conduct in their respective key roles, they fall to be declared delinquent Directors in term of section 162(5)(c) of the Companies Act, in that they acted in such a manner that amounted to gross negligence with regards to the performance of their functions within, or duties towards Eskom

in terms of section 50 and section 51 of the PFMA through the following acts and/or omissions:

95.1. Using their position or privileges of, or confidential information for personal gain or to improperly benefit another person;

95.2. Failing to disclose to the accounting authority any direct or indirect personal or private business interest that it might have and withdraw from the proceedings of the accounting authority when the matter is considered;

95.3. Contravening their duty to act fairly and impartially when doing business on behalf of Eskom as a public entity and the duty to uphold the principles of section 50 and section 51 of the PFMA as well as section 217 of the Constitution;

95.4. Failing to exercise the duty of utmost care to ensure reasonable protections of the assets and records of Eskom as a public entity (section 50(1)(a) of the PFMA);

95.5. Failing to act with fidelity, honesty, integrity and in the best interests of Eskom as a public entity in the managing of its financial affairs (section 50(1)(b) of the PFMA);

95.6. Failing to ensure that Eskom maintained an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective (section 51(1)(a)(iii) of the PFMA);

95.7. Contravening section 51(1)(b)(ii) of the PFMA which requires that they must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity;

95.8. Failing to take responsibility for the safeguarding of the assets and management of the revenue, expenditure and liabilities of Eskom (section 51(1)(c) of the PFMA);

95.9. Failing to exercise reasonable care in respect of Eskom's interests; and

95.10. Failing to act within their sphere of influence to prevent prejudice to the financial interests of the state.

96 Accordingly, this Court must make an order declaring Khoza, Singh and Molefe delinquent in terms of section 162(5)(c)(i)-(iv) of the Companies Act.

97 In addition, these failures constitute a serious breach of Singh's fiduciary duties to Eskom and a dereliction of his duties, role and responsibilities as GCFO including his duties to:

97.1. Accept responsibility for the compilation and presentation of all Eskom annual and other financial reports including quarterly shareholder reports and statements for the approval of Board;

97.2. Manage the identification of financial information requirements and ensure that systems are installed and applied to provide financial information;

97.3. Approve the design of financial and administrative support systems and ensure effective implementation; and

97.4. Most importantly, through formal processes and personal leadership to ensure that sound corporate governance principles are adhered to throughout Eskom.

98 Accordingly, this Court must make an order declaring Singh a delinquent Director, on these additional grounds, in terms of section 162(5)(c)(iii) and (iv) of the Companies Act.

99 In addition, the failure by Molefe and Singh to timeously table the Treasury Report with the Board is a breach of the standards of Directors' conduct under the Companies Act and a further ground to declare Singh and Molefe delinquent.

CHAPTER THREE

COAL SUPPLY AGREEMENT AND RELATED DEALINGS WITH OPTIMUM COAL HOLDINGS (PTY) (LTD) ("OCH") AND OPTIMUM COAL MINE (PTY) LTD ("OCM")

Introduction

100 Unfortunately, the coal supply agreements with Tegeta, described above, are not the only instances of the Directors failing in their duties and obligations.

As will be seen below, Eskom's dealings with Optimum Coal Holdings and Optimum Coal Mine, were equally lacking in their lawfulness and propriety.

101 The principal allegations relating to Optimum Coal Holdings ("OCH") and Optimum Coal Mine ("OCM") are contained in the Public Protector's State of Capture Report and based on the record of investigation by the Public Protector. It has not been possible for the first applicant to obtain confirmatory affidavits from the persons interviewed by the authors of the Report, or the authors themselves. However, the Report is in the public domain and the respondents are invited to dispute the correctness of the Report in so far as they allege the facts contained herein are incorrect. Corruption Watch is not aware that the correctness of the Report has been disputed publicly by the implicated Directors.

102 In sum, Eskom and the Directors used their position to engineer the sale of OCH/OCM from Glencore to Tegeta, owned by the Gupta family. Through the use of pressure and threats from Eskom executives and other political figures, OCH/OCM experienced considerable financial distress and was placed in business rescue. The business rescue practitioners eventually had no option but to sell the company. At this stage, Tegeta was positioned to purchase Optimum at a reduced price, in addition to having received financial boosts from Eskom in the form of "coal prepayments", that enabled this process. For the sake of brevity, the full background to this impugned transaction is attached and marked **Annexure "DL28".**

103 This transaction was not lawfully or properly the subject of attention and action by the Directors of a wholly unrelated customer of OCH/OCM, Eskom.

As set out below, the Directors became involved for reasons other than the single-minded pursuit of Eskom's commercial interests.

The Forced Sale of OCH/OCM

104 Molefe as GCE, and, Singh as GCFO, were obliged not to use their position of director, or any information obtained while acting in that capacity, to gain advantage for another person other than Eskom, or to knowingly cause harm to Eskom (section 76(2)(a) of the Companies Act).

105 They were obliged to exercise their powers and perform their functions of director in good faith, in the best interests of Eskom, and with the degree of care, skill and diligence that may reasonably be expected of a person in their position (section 76(3) of the Companies Act).

106 Instead, as detailed below, Molefe and Singh's actions prejudiced one private company in favour of another private company and knowingly caused harm to Eskom.

107 Eskom had a long-standing contract with OCH/OCM for the supply of coal to the Hendrina Power Station. However, it was evident that OCM was supplying coal to Hendrina Power Station at a below cost value and was losing money.

108 An agreement on new terms was drafted with the input of both Eskom and OCH/OCM. However, when approval was required from the full Board, they declined and stated that the matter should obtain the consent of the Acting Group Executive, who at the time was Molefe.

109 Molefe's refusal of the new agreement and attempts to hold OCH/OCM to the current contractual terms appeared to have been calculated to place OCH/OCM under severe financial pressure, eventually forcing its sale. Furthermore, Eskom cancelled the Co-Operation Agreement and levied a fine of R2 176 530 611.99 (two billion one hundred and seventy-six million six hundred and eleven rand and ninety-nine cents) against OCH/OCM.

110 To still further increase the pressure on OCH/OCM, Eskom also issued a letter referring the matter to arbitration as per the CSA and issued a summons for the same penalty amount, on the same day.

111 Further evidence of the apparent Eskom strategy to force the sale of OCH/OCM is sourced from the public statements of former Minister of Mineral Resources Ngoako Ramatlhodi ("Ramatlhodi"), see media articles attached and marked as **Annexures "DL29".** Ramatlhodi revealed that he had attended a meeting with Molefe and Ngubane. Ramatlhodi stated that both Molefe and Ngubane demanded that he suspend all of Glencore's mining licenses in South Africa pending the payment of the R2 billion plus fine imposed on them by Eskom. Ramatlhodi refused to shut down the mines on the basis that the country was experiencing load shedding and that a shutdown would exacerbate it. On 22 September 2015, a few weeks following his refusal to suspend Glencore's mining licenses, Ramatlhodi was transferred to head up Public Service and Administration and was subsequently removed as Minister.

112 These allegations have been denied by Ngubane.

113 The only individuals and or entities who stood to benefit from OCM/OCH not being awarded a revised contract by Eskom were the Gupta/Oakbay/Tegeta suitors which could now purchase a distressed entity in business rescue.

114 Further evidence of the apparent prejudice caused by Eskom is that, once the sale agreement was signed in December 2015, Tegeta appears to have easily managed to secure lucrative contracts to supply coal to Arnot Power Station with coal from OCM. This increased the financial stability of OCM and decreased Tegeta's obligations of post commencement financing to OCH/OCM.

115 Molefe and Singh's actions were in gross violation of sections 50(1), 50(2), 50(3), and 51(1) of the PFMA which provides inter alia that:

115.1. The accounting authority must exercise the duty of utmost care, act with integrity, honesty and in the best interests of the public entity in managing the financial affairs of the public entity;

115.2. The accounting authority must take effective and appropriate steps to prevent irregular expenditure, losses resulting from criminal conduct and expenditure not complying with the operational policies of the public entity;

115.3. A member of an accounting authority may not act in a manner that is inconsistent with the responsibilities assigned to an accounting authority in terms of the PFMA; or

115.4. Use the position or privileges of, or confidential information obtained as accounting authority or member thereof for personal gain or to improperly benefit another person; and

115.5. A member of an accounting authority must disclose to the accounting authority any direct or indirect personal or private business interest that it might have and withdraw from the proceedings of the accounting authority when the matter is considered.

116 Accordingly, this Court must make an order declaring Molefe and Singh delinquent in terms of section 162(5)(c)(i)-(iv) of the Companies Act.

Further Acts of Delinquency in Respect of the Tegeta CSA and OCH/OCM Acquisition

117 In respect of the pre-payment to Tegeta, the respondent Directors failed to act in the best interests of Eskom as the transaction was not commercially favourable to Eskom.

118 On 11 April 2016, at approximately 19h30, Daniels received a telephone request from Khoza to arrange an urgent meeting of the Board Tender Committee for later that same evening to discuss emergency coal supply to Arnot Power Station. The next Board Tender Committee meeting was scheduled for 13 April 2016.

119 Daniels arranged the meeting as requested, which commenced at 21h04. The purpose of the meeting as detailed in the submission document was that supply to Arnot would be inadequate to meet the burn requirements of the

power station over the winter months and that there was an urgent need for additional coal. A copy of the submission document is attached and marked as **Annexure "DL30".**

120 The submission document required that the following resolution be approved and granted:

"Addenda to the Short Term Coal Supply Agreements between various suppliers and Eskom be concluded to extend the supply of coal from various sources to Arnot Power Station for up to a further five (5) months and/or such period as may be requested by the supplier but not later than 30 September 2016. The Chief Financial Officer is hereby authorized to approve the basis for prepayment to secure the fixed coal price for the period of extension. The Group Executive (Generation) is hereby authorized to take all necessary steps to give effect to the above, including the signing of any consents, or any other documentation necessary or related thereto"

121 One of the short term suppliers identified was Tegeta. The submission document identified that Tegeta had indicated a willingness to extend its current contract but that it had requested a prepayment to enable it to meet production requirements from the export component of the mine in lieu of the fact that it subsidises the direct feed to Hendrina Power Station. This would enable it to meet the coal supply demands for the two power stations in the short term.

122 The Board Tender Committee approved the pre-payment without having fully satisfied itself that the transaction was commercially sustainable, contrary to its obligations and duties to do so. At the time, Khoza was Chairperson of the Board Tender Committee.

123 Molefe, Singh and Khoza had a duty to act fairly and impartially when doing business on behalf of Eskom as a public entity. They had a duty to uphold

the principles of section 76 of the Companies Act, section 50 and section 51 of the PFMA, as well as section 217 of the Constitution.

124 As is detailed below, they failed to do so.

125 It was resolved on 11 April 2016 that the financial transaction was subject to:

125.1. The GCFO obtaining a discount in the price;

125.2. The supplier (Tegeta) offers a guarantee to Eskom; and

125.3. The GCFO providing an assurance to the Committee that the transactions are economically viable.

126 Singh failed to follow up and obtain those assurances.

127 Singh did not conduct himself diligently. The prepayment in the amount of R659 558 079.38 appears to never have been used to fund OCM or service the Arnot contract.

128 A few hours before the meeting, a consortium of banks had informed the Guptas that they would not be able to provide them with the R600 million required for the purchase of OCH/OCM, due two days later. The prepayment was utilized by Tegeta solely to fund the purchase of OCH/OCM (see also page 21 of **Annexure "DL24").**

129 Given the timing of the prepayment which was approved on 11 April 2016, it appears highly probable that some, if not all, of the Directors who approved the payment had some knowledge of the true nature of and explanation for the prepayment. The prepayment was approved after the special Board

Tender Committee meeting on 11 April 2016 at 21h00. This was on the same day that Tegeta told the business rescue practitioners that they were R600 million short in respect of the purchase price of R2.15 billion, which needed to be paid on 14 April 2016.

130 The urgency of the special Board Tender Committee meeting on 11 April 2016 at 21h00 was solely for the purpose of benefiting Tegeta in order to fund the purchase of all of the shares in OCH. This is a reasonable inference to be drawn having regard for the context in which this meeting was convened.

131 This is further evidenced by the testimony of Piers Marsden ("Marsden") at the Parliamentary Inquiry who was one of the business rescue practitioners ("BRP") for OCH/OCM. Marsden testified before the Inquiry that on 11 April 2016, he was contacted by the former Oakbay CEO, Nazeem Howa, who indicated that they were R600 million short and were struggling to source funding from banks. However, just two days later – the money was paid. Marsden stated that he blew the whistle on the real purpose of the payment after public statements were made by Acting Eskom GCE Matshela Koko, to the effect that the R600 million was a prepayment for coal. See attached Eskom press release marked as **Annexure "DL31".**

132 Further, subsequent to Tegeta acquiring OCH/OCM, Eskom did not fully enforce its fine of R2 176 530 611.99 against Tegeta as the new owners of OCH/OCM. Eskom reduced the fine, through arbitration and settlement, to less than a quarter of the original amount. Tegeta was only liable for a total

penalty of R557 million, of which Tegeta had paid R248 million by the time of the settlement.

133 Eskom, led by the Board as the accounting authority, was aware that Tegeta was receiving coal from OCM at a rate of R18.68/GJ. Despite this, Eskom entered into the CSA with Tegeta at an initial rate of R22.00/GJ to supply coal to Arnot Power Station.

134 Eskom, acting through Molefe, Singh and Khoza, should have known the exact position of OCH/OCM, both financially and in terms of production output, and should have known that a prepayment was not needed by Tegeta. It was the responsibility of the Chief Procurement Officer to be aware of and take the necessary steps

135 The prepayment amounted to fruitless and wasteful expenditure as it appears that it was not used to meet production requirements at OCM. It moreover exposed Eskom to unnecessary risk especially with regard to its working capital.

136 The Directors accordingly breached section 51(1)(b)(ii) of the PFMA which provides that the accounting authority must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity. The pre-payment was not cost effective and coal could have been sourced directly from OCM at a better rate.

137 The Directors failed to exercise reasonable care in respect of Eskom's interests.

138 Molefe, Singh and Khoza's contravention of section 51 of the PFMA amounts to an offence under section 83(1)(a) of the PFMA and is subject to the penalties under section 86 of the PFMA.

139 The Directors breached section 162(5)(c) of the Companies Act by grossly abusing their positions as Directors, acting in a manner that amounts to gross negligence and breach of trust in relation to the SOE and knowingly causing harm to the company.

140 The Directors failed to:

140.1. Act within their sphere of influence to prevent prejudice to the financial interests of the State;

140.2. Act with fidelity, honesty, integrity and in the best interests of Eskom as a public entity in the managing of its financial affairs (section 50(1)(b) of the PFMA);

140.3. Take responsibility for the safeguarding of the assets and management the revenue, expenditure and liabilities of Eskom (section 51(1)(c) of the PFMA); and

140.4. Ensure that Eskom maintains an effective, efficient and transparent system of financial and risk management and internal control (section 51(1)(a)(i) of the PFMA).

141 For these reasons, Molefe, Singh and Khoza should be held personally accountable by the Court and be declared delinquent.

CHAPTER FOUR

FINANCIAL MISMANAGEMENT AT ESKOM – THE QUALIFIED AUDIT

142 As explained above, the financial management and fiscal health of Eskom is of national importance given its centrality to the South African economy. Regrettably, as will be shown below, several instances of financial mismanagement, failure of Board oversight and a disregard of the risks arising from commercially irrational transactions arose during the tenure of the respondent Directors.

143 The events described below provide the relevant factual background for the applicants' desired relief to have Singh and Pamensky declared delinquent Directors for their central role in, and ultimate responsibility for, what is set out in this Chapter.

144 It is, of course, true that they were not the only Directors of Eskom at this time, nor the only members of the Audit and Risk Committee (as at 31 March 2017, the members of the Committee were Chwayita Mabude (acting Chairperson), Venete Klein, and Pat Naidoo). However, they unquestionably bear responsibility for failing to prevent the qualified audit of Eskom, in breach of their statutory duties as directors in their respective role of GCFO ("Singh") and Chairman of the Audit and Risk Committee ("Pamensky").

145 Pamensky served as Chairman of the Audit and Risk Committee for the period July 2016 to November 2016.

146 The financial statements were prepared under the supervision of the GCFO, Singh. They were approved by the Board of Directors and signed on its behalf by the then interim Chairman, Khoza.

The Role of the Audit Committee

147 The Audit and Risk Committee is required to perform its functions in terms of the requirements of the PFMA, the Companies Act and in accordance with the King Code of Governance Principles for South Africa ("King IV").

148 The Audit and Risk Committee is an independent oversight body and must ensure the integrity of financial controls and identify and manage financial risk. It has several statutory duties including:

148.1. Oversight of financial and non-financial reporting and disclosure;

148.2. Internal control system (oversight/management);

148.3. Risk management; and

148.4. Supervision of internal and external audit functions.

149 The Audit and Risk Committee plays a key role in ensuring accountability and should function as an independent body to ensure the integrity of financial controls, effective financial risk management, combined assurance (the process of parties working together to reach the goal of communicating information to management), and meaningful integrated reporting. It also is required to review the effectiveness of Eskom's internal controls.

150 The effectiveness of an audit committee depends on the effectiveness of the chair of the committee. As Chair of the Audit and Risk Committee, Pamensky was required, at a minimum, to:

150.1. Be independent;

150.2. Provide leadership to and oversight of the work of the Audit and Risk Committee; and

150.3. Deal appropriately with any concerns relating to internal financial controls of Eskom and related matters.

151 The GCFO is responsible to develop, implement and oversee a system of effective financial management. Singh, as GCFO, was required to provide good governance, effective oversight and to address operational matters that constitute sound financial management.

152 A reasonable director in the position of Singh and Pamensky would have performed his/her functions within, and duties towards, Eskom in compliance with the Companies Act and the PFMA.

153 Singh and Pamensky failed to do so.

The Qualified Audit

154 The Board is responsible for the maintenance of adequate accounting records and appropriate systems of internal control as well as the preparation, integrity and fair presentation of the annual consolidated financial statements. The annual financial statements reflect Eskom's financial results, performance against predetermined objectives and the

financial position at the end of the financial year of Eskom, its subsidiaries, joint ventures, associates and structured entities.

155 On 11 July 2017, Eskom published its financial statements for the financial year ending 31 March 2017. In the financial statements, the external independent auditors issued a qualified audit opinion.

156 The qualified audit opinion arose as a consequence of Eskom's external auditors being unable to conclude that the irregular expenditure disclosed in the financial statements, included all of the irregular expenditure that was incurred by the company in the financial year ending 31 March 2017.

157 The irregular expenditure disclosed in the financial statements amounted to R2.9 billion and comprised of expenditures that were incurred:

157.1. Without PFMA approval;

157.2. Following incorrect tender processes;

157.3. Without investment approval;

157.4. In breach of the Preferential Procurement Policy Framework Act, 5 of 2000 ("PPPFA"), monetary thresholds and lack of associated tax clearance certificates;

157.5. In breach of environmental regulations;

157.6. In relation to the use of labour brokers;

157.7. In relation to the use of sole sources of supply; and

157.8. That revealed the incorrect classification of contracts as emergency procurement.

158 Some of these irregularities were cured in various ways, mostly through condonation.

159 The irregular expenditure that was incurred by Eskom is set out in note 52 of the financial statements, attached and marked as **Annexure "DL32".**

160 It appears from the financial statements that the irregular expenditure incurred in 2016 was R348 million and that this amount ballooned to R2.9 billion in 2017 resulting in the qualified audit. This was the first time that an audit opinion had been qualified for Eskom.

The Effect of The Qualified Audit

161 The qualified opinion triggered an event of default on two loan facilities that total R17.2 billion from the French Development Agency and the Development Bank of South Africa ("DBSA") respectively. The occurrence of the event of default also had the possibility of triggering cross defaults on other loan agreements and this would have resulted in the acceleration of Eskom's entire debt book, at the time, of approximately R340 billion. Once Eskom became aware of the event of default, it had an obligation to inform its lenders about the event.

The Interactions with the DBSA

162 Singh, as GCFO of Eskom, wrote to the DBSA on 7 July 2017 advising it of the triggering of the event of default and requesting permission for an amendment

to the provisions of the term loan facility agreement entered into by the DBSA and Eskom on 4 November 2010. The letter is attached, marked as **Annexure "DL33".**

163 The DBSA responded and advised that it would only consider waiving its rights in terms of the term loan facility agreement if and when certain conditions were met, as outlined in its letters dated 14 July 2017 and 19 July 2017, marked and attached as **Annexures "DL34"** and **"DL35"** respectively.

164 In particular, in the DBSA's letter dated 19 July 2017, the DBSA agreed not to enforce its rights until close of business on 25 July 2017. The DBSA required Eskom to provide the following by 17h00 on 25 July 2017:

164.1. Full disclosure of the events that led to the event of default based on Eskom's understanding of those events as at 25 July 2017;

164.2. A detailed plan of mitigating measures Eskom proposed to put in place and remedial action Eskom proposed to take to ensure that Eskom's audited financial statements would not again be qualified;

164.3. The Audit Committee's written approval of the detailed plan of mitigating measures Eskom proposed to put in place and any remedial action Eskom proposed to take to address the events that led to the event of default;

164.4. Written confirmation, to the satisfaction of DBSA, that Eskom had properly identified and suspended or placed on special leave those employees or Directors or officers who played a role in the events

leading up to the qualification of Eskom's audited financial statements and control failures around Eskom's contract management; and

164.5. Evidence of immediate action taken at senior management level where allegations have been made of fiduciary responsibilities which have been compromised.

165 The DBSA sought to ensure that there was accountability and that corrective measures were taken for the qualified audit that had been issued to Eskom.

166 Eskom responded to this letter on 25 July 2017. However, its response failed to adequately address the conditions highlighted in the DBSA's letter of 19 July 2017. In particular, Eskom sought to avoid the conditions placed by the DBSA that required it to take action against senior managers, employees and Directors who played a role in the events leading up to the qualification of Eskom's audited financial statements and control failures around Eskom's contract management. Eskom's response is attached, marked as **Annexure "DL36".**

167 In a sternly worded response to Eskom, dated 26 July 2017, attached and marked as **Annexure "DL37"**, the DBSA noted Eskom's unsatisfactory response to the conditions that it had required it to meet before the 25 July 2017 deadline. The DBSA noted that Eskom had failed to address these conditions. The DBSA therefore decided that it had no choice but to issue an ultimatum to Eskom that it comply with the requirements of the 19 July 2017 letter by 17h00 on 28 July 2017. In particular and with reference to paragraph 3.4 of that letter, the DBSA specifically requested the Board of Eskom, by the extended date and time, to:

167.1. Reflect on the Eskom GCFO's ("Singh") role in the events leading up to the qualification of Eskom's audited financial statements and the control failures around Eskom's contract management; and

167.2. Suspend then GCFO ("Singh") or place him on special leave to enable an independent and transparent investigation to be conducted into his role at Eskom.

168 On 28 July 2017, Eskom responded and advised the DBSA that the Eskom Board had now placed Singh on special leave pending an investigation into the events leading up to the qualification of the Eskom financials and the control failures in relation to the contract management function within Eskom, as well as generally his role in certain events which took place at Eskom. The letter is attached and marked as **Annexure "DL38"**.

169 It was only following this action taken by the Eskom Board, at DBSA's insistence, that the DBSA agreed to waive its rights in terms of the term loan facility agreement.

170 The qualified audit and the subsequent triggering of the events of default in the term loan facility agreement placed Eskom under enormous risk, including that:

170.1. The likelihood of the South African government having to step in and assume the guarantee debts of Eskom as primary obligor resulting in further sovereign ratings downgrades;

170.2. Eskom may have had to follow debt restructuring that would have had a detrimental impact on the South African economy;

170.3. Eskom and the government would have likely been downgraded by the ratings agencies while the situation remained, and this would have had negative implications for the South African currency on foreign exchange markets;

170.4. There would have been a possible run on the equity markets;

170.5. There would have been a deepening of the weak GDP growth of the country with negative consequences on issues such as unemployment; and

170.6. Eskom's financial sustainability would have been further compromised.

171 Eskom's hand was eventually forced by the lenders to ensure that corrective action and accountability was taken for the qualified audit.

172 Had Singh and Pamensky diligently, rather than delinquently, performed their statutory and legal duties, Eskom's audit would not have been qualified and it would not have risked the occurrence of an event of default.

173 In addition, during the tenure of this Audit and Risk Committee, chaired by Pamensky, irregular expenditure at Eskom increased fourfold from R348 million in 2016 to R2.9 billion in 2017. The Audit and Risk Committee was therefore negligent, and its members failed in their statutory duties, including the following specifically related to audit and risk:

173.1. Ensuring oversight of financial and non-financial reporting and disclosure;

173.2. Ensuring that there were internal control systems;

173.3. Ensuring risk management; and

173.4. Ensuring proper internal and external audit functions.

174 The qualified audit and ballooning of irregular expenditure caused and continues to cause significant damage to Eskom's reputation. Some of Eskom's creditors threatened to recall significant loan amounts which Eskom relied on for financial solvency and liquidity, and which loan agreements contain conditions including that Eskom maintain an unqualified audit. The qualified audit also threatened the credit rating of Eskom.

175 In addition, the financial statements failed to accurately identify all instances of irregular expenditure, which is a further breach of section 55(2) of the PFMA.

176 In sum, the dire financial state of Eskom is evidence of gross mismanagement and irresponsible financial management. Singh as GCFO was ultimately responsible for ensuring that sound corporate governance principles are adhered to throughout Eskom's financial affairs.

177 In light of this negligent misconduct, I submit that Pamensky and Singh, in particular, fall to be declared delinquent Directors in term of section 162(5)(c)(iii) and (iv)(aa) of the Companies Act, in that they acted in such a manner that amounted to gross negligence with regard to the performance of their functions within, or duties towards, Eskom in terms of section 50 and section 51 of the PFMA by failing to:

177.1. Exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity (section 50(1)(a) of the PFMA);

177.2. Act with fidelity, honesty, integrity and in the best interests of Eskom as a public entity in the managing of its financial affairs (section 50(1)(b) of the PFMA);

177.3. Ensure that Eskom maintains an effective, efficient and transparent system of financial and risk management and internal control (section 51(1)(a)(i) of the PFMA);

177.4. Ensure that Eskom maintains a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of section 76 of the PFMA (section 51(1)(a)(ii) of the PFMA);

177.5. Ensure that Eskom maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective (section 51(1)(a)(iii) of the PFMA);

177.6. Ensure that Eskom takes effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure and expenditure not complying with the operational policies of Eskom (as contemplated in section 51(1)(b)(ii) of the PFMA);

177.7. Exercise the duty of utmost care to ensure reasonable protections of the assets and management the revenue, expenditure and liabilities of Eskom (section 51(1)(c) of the PFMA); and

177.8. Take effective and appropriate disciplinary steps against any employee of the public entity who contravenes or fails to comply with a provision of the PFMA, commits an act that undermines the financial

management and internal control system of Eskom, or makes or permits an irregular expenditure or a fruitless and wasteful expenditure (section 51(1)(e) of the PFMA).

178 Pamensky and Singh further failed to:

178.1. Receive and deal with appropriately any concerns or complaints, whether from within or outside the company, or on its own initiative, relating to –

(i) The accounting practices and internal audit of the company;

(ii) The contents of auditing of the company's financial statements;

(iii) The internal financial controls of the company; or

(iv) Any related matter (section 94(7)(g) of the Companies Act); and

(v) Make submissions to the Board on any matter concerning the company's accounting policies, financial control, records and reporting (section 94(7)(h) of the Companies Act).

179 A reasonable director and chairperson of an audit committee and a reasonable CFO would have taken the steps necessary to ensure a system of effective financial management, and compliance with their statutory duties.

180 Pamensky and Singh failed to do so.

181 Accordingly, this Court must make an order declaring Pamensky and Singh delinquent Directors in terms of section 162(5)(c)(iii) and (iv) of the Companies Act.

CHAPTER FIVE

BRIAN MOLEFE'S "EARLY RETIREMENT"/RESIGNATION

Introduction

182 The next incident providing grounds for delinquency on which the applicant relies pertains to the scheme that was set up by Eskom and its Directors to pay Molefe R30.1 million in "early retirement benefits".

183 The scheme essentially amended the applicable pension fund rules in respect of executive directors with fixed term contracts to make up the shortfall in years, waive penalties and refund to the Eskom Pension and Provident Fund ("EPPF") the actual cost relating to the additional service.

184 Molefe was appointed as Acting GCE of Eskom on 17 April 2015 and his appointment as GCE was made permanent on 1 October 2015.

185 On 16 October 2015, a letter was addressed to the former Minister, setting out a proposal in respect of Molefe's remuneration for her consideration and approval. The letter stated that the benchmarks reflected that the current remuneration as paid by his former employer, Transnet, to Molefe was below the statistical measurements. On that basis, a suitable guaranteed remuneration package was proposed, taking into account the cited benchmarks. The letter is attached, marked **Annexure "DL39".**

186 On 1 November 2015, the former Minister approved the total guaranteed remuneration to be paid to Molefe with effect from the date of his appointment. She advised that it was her view and that of Cabinet that the

period of employment be stipulated as five years, subject to annual performance reviews. The letter is attached, marked **Annexure "DL40".**

187 On 9 November 2015, Eskom made a formal offer of employment to Molefe, Molefe acknowledged receipt of the letter on 11 November 2015. Molefe was appointed as the GCE, with effect from 1 October 2015.

188 On 25 November 2015, correspondence from Eskom was directed to the former Minister, a copy of which is attached marked as **Annexure "DL41".** In this letter, Molefe's history of having served in numerous high ranking South African organisations at an executive level to stabilise and ensure the future sustainability and performance of those organisations was outlined. It was further indicated that due to the nature of those engagements and the short term contractual obligations, Molefe had not been able to benefit from the growth opportunity of a single pension fund. Consequently, the following material contractual stipulations to bridge this gap were proposed and the former Minister was requested to approve the proposed contractual stipulations:

188.1. Regardless of Molefe's age after the five-year termination date, he be allowed to retire from Eskom's service on the basis that he is aged sixty-three;

188.2. That the penalties prescribed by the EPPF for retirement prior to age sixty-three be waived;

188.3. That Eskom carries the cost of such penalties (to be paid over to the EPPF); and

188.4. In the event that Molefe's contract is not extended beyond the five-year termination date, he will be allowed to subscribe to any other SOC or government pension fund.

189 The former Minister did not respond to the letter dated 25 November 2015. However, this matter was discussed at a meeting on 23 February 2016, which Daniels attended.

190 Daniels also attended a meeting of 23 February 2016 with Brown, Ngubane and Klein, in Cape Town, where Molefe's proposed pension arrangement was discussed. The former Minister indicated that she would not oppose the pension proposal but that it must be submitted to her in writing so that she can deal with it expeditiously. It was indicated to her that correspondence had been sent to her office in a letter dated 25 November 2015. Confirmation of the Cabinet decision in relation to the tenure of Molefe's contract of employment needed to be obtained by the former Minister.

191 A meeting of the People and Governance Committee was held 9 February 2016, chaired by Klein. As already indicated, this proved to be a crucial meeting.

192 The Committee passed a resolution that, in cases where Executive Directors decided to take early retirement and there was a shortfall regarding the EPPF ten years of service rule, Eskom would bridge the gap to make up for the ten years, waive the penalties applicable to early retirement, and Eskom would refund the pension fund the actual costs for additional service added, plus penalties applicable to early retirement.

193 In terms of the resolution, Molefe and Singh, who were to be appointed on five-year fixed-term contracts, would be able to qualify for the early retirement benefits contrary to the rules of the EPPF. The resolution was consistent with the proposal in the letter to the former Minister dated 25 November 2015, discussed above.

194 On 2 November 2016, the Public Protector released her State of Capture Report. Following the emergence of a plethora of allegations implicating Molefe in the Report, Molefe announced, on 11 November 2016, that he would be terminating his employment with Eskom. On the same date, Molefe also submitted a request for early retirement.

195 On 11 November 2016, the former Minister issued a statement stating that Molefe had resigned as the Eskom GCE.

196 On 21 November 2016, the People and Governance Committee discussed the terms of Molefe's request for early retirement and approved the request, in principle. This meeting was not quorate and was thus unable to pass any resolutions.

197 On 24 November 2016, correspondence was addressed to Molefe, confirming that his application for early retirement was approved in terms of rules 28 and 21.4 of the EPPF Rules and the committee resolution of 9 February 2016.

198 The correspondence was based on an extract from the 9 February 2016 meeting minutes and resolution. Reliance was placed on the meeting of 9 February 2016 as basis for accepting Molefe's application despite knowledge

that no resolution was passed to that effect. It was further confirmed that penalties would be waived and the potential service to age sixty-three was granted.

199 Molefe left Eskom's employment and, on 23 February 2017, took up a position as a Member of Parliament for the African National Congress.

200 The issue of Molefe's departure from Eskom resurfaced again on 16 April 2017, when the Sunday Times newspaper published an article detailing that Molefe had received a R30 million pension pay out.

201 The former Minister later instructed the Board to engage Molefe and report back with an appropriate pension proposal and further to investigate how its proposal got into the public domain prior to her having had an opportunity to consider it.

202 Notwithstanding this instruction, on 23 April 2017, the former Minister issued a media statement that she had declined Eskom's proposal to pay Molefe a R30 million pension payout on the basis that it lacked legal rationale and was not justifiable in light of the current financial challenges faced. A copy of the statement is attached and marked as **Annexure "DL42".**

203 However, Molefe's pension proposal was discussed with the former Minister at the 23 February 2016 meeting attended by Daniels, together with Ngubane and Klein, where the Minister indicated that she would not oppose the pension proposal.

204 Further, it was under the direction of the former Minister that Eskom was instructed to look at alternative pension proposals for Molefe. See Eskom

correspondence dated 11 May 2017, attached and marked as **Annexure "DL43"**.

205 On 11 May 2017, the Chairman of the Eskom Board, directed a letter to Molefe in which he was offered his former position of Eskom GCE. Molefe returned to Eskom in what was claimed to be a "reinstatement".

206 On 25 January 2018, the High Court set aside the scheme as unlawful. In its judgment, attached and marked as **Annexure "DL44"**, the High Court noted:

> *"There is a strong inference to be drawn from the above factors that the early retirement agreement was a deliberate scheme devised by Eskom with the involvement of Molefe to afford him pension benefits he was not entitled to. The scheme permitted Molefe to proceed to early retirement at age 50 by buying him extra pensionable service. The scheme was started soon after Molefe's permanent employment and was deployed after he had publicly stated that he was voluntarily leaving Eskom's employ."*

207 On 10 October 2018, the SCA dismissed Molefe's application for leave to appeal the judgment.

208 The key driver of the scheme appears to have been Klein as Chairperson of the People and Governance Committee. Klein devised the proposal in conjunction with other directors and presented it to the People and Governance Committee for approval.

209 As part of its mandate, the People and Governance Committee assisted the Board in dealing with the nomination and remuneration of directors and developing human resources strategies and policies. As Chairperson, Klein, was responsible to perform her functions in good faith and for a proper purpose, in the best interests of Eskom, and with the degree of care, skill

and diligence that may reasonably be expected of a person carrying out those functions.

210 As detailed below, Klein did not act in good faith and with the degree of care, skill and diligence reasonably expected of a director in her position.

211 The then Chairman of Eskom, Dr Ben Ngubane, was present at that meeting and signed the related correspondence in his capacity as Chairman of the Eskom Board.

212 In addition, Khoza was also a member of the People and Governance Committee. On 21 November 2016, the People and Governance Committee confirmed acceptance of Molefe's request for early retirement.

213 The High Court found in, paragraph [27] of its judgment, that Molefe was present at the meeting of 9 February 2016. It states that he was present despite not being a member of the Committee and that he failed to disclose his interest in the matter. The retirement scheme was discussed at an in-committee meeting on 9 February 2016. Molefe was excused from the meeting at this time and was not present for the discussion, nor was Singh present. See attached the minute of the meeting, marked as **Annexure "DL45".** We are not aware of whether the High Court had sight of this minute.

214 As can be seen in the attached judgment at paragraph [73], the Court found that:

"... there was no legal rationale for the pension arrangement and that it was unjustifiable, it was [therefore] irrational for the Minister to approve the reinstatement of Molefe as a better value proposition to an unlawful pension proposal ..."

215 At the Parliamentary Inquiry on 20 October 2017, Sibusiso Luthuli, CEO of the Eskom Pension Fund, stated that around the time of Molefe's resignation, the Eskom Pension Fund had received a letter from Eskom – signed by then Board chairman Ngubane – that "specifically requested the application" of certain pension fund rules. This request essentially "bought 13 years of additional service" for Molefe, shifting up his pensionable age – on which total amounts were calculated -- from an actual 50, to 63.

216 It was further disclosed by Mr Luthuli that Molefe should never have been a member of the Eskom Pension Fund as he was employed on a five-year fixed term contract. However, Eskom provided the Eskom Pension Fund with information that created the impression that Molefe was a permanent employee. It subsequently transpired that Minnaar had entered Molefe onto the system as a permanent employee and had not amended this status when the contract was converted to a fixed-term contract.

217 The Eskom Pension Fund relied on that information. Molefe left Eskom at the end of 2016 with an after-tax pension cash pay-out of R7.9 million and regular monthly pension.

Grounds for Delinquency Arising from the "Early Retirement" Incident

218 The High Court, in setting aside the "Early Retirement" Agreement, stated that the decision by Eskom to give Molefe R30.1 million in retirement

benefits after only fifteen months of service constituted an abuse of public funds. The court found at paragraph [39] that:

> *"The decision by Eskom to waive penalties and buy Molefe an extra 13 years of service totaling R30.1-million after only 15 months service at the age of 50 stretches incredulity and is unlawful for want of compliance with the rule of the EPPF. What is most disturbing is the total lack of dignity and shame by people in leadership positions who abuse public funds with naked greed for their own benefit without a moments consideration of the circumstances of fellow citizens who live in absolute squalor throughout the country with no basic services."*

219 The Court also found, at paragraph [55] to [56], that:

> *"It has subsequently become common cause between the parties that the early retirement agreement which purported to permit Molefe to retire from Eskom on full pension benefits after only 15 months of service at the age of 50 was unlawful in that it breached the Rules of the Eskom Pension Fund.*
>
> *There is a strong inference to be drawn from the above factors that the early retirement agreement was deliberate scheme devised by Eskom with the involvement of Molefe to afford him pension benefits he was not entitled to. The scheme permitted Molefe to proceed to early retirement at age 50 by buying him extra pensionable service. The scheme was started soon after Molefe's permanent employment and was deployed after he had publicly stated that he was voluntarily leaving Eskom's employ."*

220 In conclusion, this mismanagement was perpetrated in the following ways:

220.1. Molefe was a temporary employee on a five-year fixed term executive employment contract and thus not eligible to be a member of the Eskom Pension Fund. Despite the fact that Molefe was not being retrenched, Eskom, by letter signed by Ngubane on 24 November 2016, provided the Eskom Pension Fund with information that Molefe was appointed as permanent employee and requested

the Eskom Pension Fund to grant Molefe extra service in accordance with the provisions of the rules. The associated costs amounted to R30.1 million. Eskom paid this amount to the Eskom Pension Fund.

220.2. Klein drove the issue of affording Molefe these retirement fund benefits by firstly seeking approval from the former Minister in the letter dated 25 November 2015 and then by obtaining a formal resolution of the People and Governance Committee.

220.3. Molefe concealed the issue of the purported early retirement and misled the public to believe that he had in fact resigned from Eskom. In a public statement issued on 11 November 2016, Molefe indicated that he had in the interests of good corporate governance decided to leave his employ at Eskom and did so voluntarily. See media statement dated 11 November 2016, attached and marked as **Annexure "DL46".**

221 In the High Court proceedings, despite the letter being received in the Registry of the Department, the former Minister maintained that she was unaware of the request by Molefe for early retirement.

222 The "early retirement" agreement was in fact a misuse of public funds.

223 A Director in Klein's position would have known that providing an employee on a five-year fixed term employment contract with R30.1 million in retirement benefits after only fifteen months of service constituted an abuse

of public funds and would have taken the steps necessary to prevent such a resolution from being passed.

224 Molefe, as a Director and Chief Executive, must have known that the pension agreement, which he initiated and willingly accepted was an unlawful use of public funds. A reasonable director in his position would have taken steps to prevent the unlawful use of public funds and would not have accepted the R30.1 million in retirement benefits.

225 Klein and Molefe fall to be declared delinquent Directors in term of section 162(5)(c)(iii) and (iv)(aa) of the Companies Act, in that they acted in such a manner that amounted to gross negligence with regards to the performance of their functions within, or duties towards, Eskom in terms of section 50 and section 51 of the PFMA by failing to:

225.1. Act in the best interests of Eskom as a public entity in the managing of its financial affairs (section 50(1)(b) of the PFMA);

225.2. Prevent any prejudice to the financial interests of the State by the Board (section 50(1)(d) of the PFMA);

225.3. Prevent fruitless and wasteful expenditure (section 51(1)(b)(ii) of the PFMA);

225.4. Manage the available working capital efficiently and economically expenditure (section 51(1)(b)(iii) of the PFMA); and

225.5. Safeguard the assets and manage the revenue, expenditure and liabilities of Eskom responsibly (section 51(1)(c) of the PFMA).

226 Accordingly, this Court must make an order declaring Klein and Molefe delinquent in terms of section 162(5)(c)(iii) and (iv) of the Companies Act.

CONCLUSION

227 The Eskom Board constitutes the governing body of Eskom yet the Directors on the Board, acting through the various sub-committees, failed to take necessary steps to protect the assets of Eskom. The Directors failed to act in the best interests of Eskom by safe-guarding against the contravention of legislation and policy and by failing to act against gross mismanagement when encountered.

228 The failure of proper oversight by key sub-committees such as the People and Governance Committee, the Board Tender Committee and the Audit and Risk Committee enabled the mismanagement of funds from Eskom.

229 In failing to exercise the duty of utmost care and not acting in the best interests of Eskom, the Directors breached their fiduciary duties to manage the interests of the Board and those of Eskom in terms of section 50 of the PFMA.

230 It is evident from what is stated above that the respondent Directors failed in their duties to act with diligence, care and skill in carrying out their obligations to Eskom. In some instances, the respondent Directors acted negligently and unlawfully in pursuing opportunities for related parties and close associates. In so doing, the Directors betrayed public trust and misused the public power that was entrusted in them for the oversight of Eskom.

231 The Directors must be held personally responsible and accountable for their action and inactions.

232 As such, the applicant prays for an order in terms of the Notice of Motion.

Deponent

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Sandton on this the 9th day of November 2018 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No ~~R1648 of 19~~ August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS
FULL NAMES: PALESA NHLAPO
ADDRESS: Commissioner of Oaths
EX OFFICIO: Ex-Officio
Practising Attorney RSA
Hogan Lovells (South Africa) Inc.
140 West Street
Sandton, Johannesburg

Eskom

This Memorandum of incorporation was submitted and adopted by Special Resolution passed by the Shareholder of the Company on 1 July 2016 and initialled by the Chairperson for the purpose of identification.

MEMORANDUM OF INCORPORATION OF

ESKOM HOLDINGS SOC LTD

Registration number: 2002/015527/30

which is a state-owned company, may have up to 15 director(s) who shall not be entitled to appoint alternate directors, is authorised to issue securities as described in clause 6, and is referred to in the rest of this MOI as "the Company".

This MOI is in a form unique to the Company, as contemplated in section 13 (1) (a) (ii) of the Companies Act 71 of 2008, as amended.

Adoption of MOI

This MOI was proposed by the Board of the Company in accordance with section 16 (1) (c) (i) (aa) and was adopted by Special Resolution passed by the Shareholder of the Company on 1 July 2016 in accordance with section 16 (1) (c) (ii) in substitution for the existing MOI of the Company in accordance with section 16 (5) (a) and initialled by the Chairperson for the purpose of identification.

Preamble

The Company is a pre-existing company as contemplated in item 2 of Schedule 5 of the Companies Act and was incorporated in accordance with the Enabling Legislation to carry on the business of providing energy/electricity and related services, including the generation, transmission, distribution and retail thereof, it being recorded that the Company is also subject to the provisions of the PFMA.

The Government is the sole Shareholder of the Shares in the Company and the rights attached to those Shares are exercised by the Minister. This Memorandum of Incorporation regulates the Company and its relationship with its Shareholder, subject to the provisions of the Legislative and Policy Framework.

MEMORANDUM OF INCORPORATION	Document Identifier	240-65347859	Rev	0

TABLE OF CONTENTS

Clause number and description
Page

MEMORANDUM OF INCORPORATION	Document Identifier	240-65347859	Rev	0

1 INTERPRETATION

In this Memorandum of Incorporation-

1.1 Capitalised words that are not defined in this MOI will bear the same meaning in the Companies Act or the PFMA, unless the context provides otherwise.

1.2 Unless the context provides or requires otherwise, the following words and expressions bear the meanings assigned to them and cognate expressions bear corresponding meanings: –

1.2.1 **"Ad Hoc Committee"** means an ad hoc committee established by the Board from time to time for a specific task or objective and dissolved after the completion of the task or the achievement of the objective;

1.2.2 **"Administrator"** means the person appointed by the Shareholder in terms of clause 3 of this MOI;

1.2.3 **"Approval of the Shareholder"** means a written notice from the Shareholder to the Company recording the Shareholder's approval of a matter or a copy of a Shareholder's resolution granting approval of a matter.

1.2.4 **"Auditing Profession Act"** means the Auditing Profession Act, No. 26 of 2005;

1.2.5 **"Board"** means the "board" of the Company from time to time, as defined in the Companies Act, which is also the Accounting Authority for purposes of the PFMA;

1.2.6 **"Business Day"** means any day other than a Saturday, Sunday or official public holiday in the Republic;

1.2.7 **"Group Chief Executive"** means the group chief executive of the Company;

1.2.8 **"Group Chief Financial Officer"** means the group chief financial officer of the Company;

1.2.9 **"Companies Act"** means the Companies Act, No. 71 of 2008 as amended, consolidated or re-enacted from time to time and includes all schedules thereto and the Regulations;

1.2.10 **"Company"** means Eskom Holdings SOC Ltd, Registration no. 2002/015527/30 or whatever other name it may be known by from time to time;

1.2.11 **"Company in general meeting"** means a formal meeting of, or a resolution passed by, the Shareholder;

1.2.12 **"Consultation/Consult"** means a formal engagement requested by one party, at such time, in such manner and at such place agreed to between the parties, having first provided the other party, in writing, with such relevant information as the party might reasonably require, including information that the party may specifically request, to allow the party to consider the matter upon which the party is being Consulted.

1.2.13 **"Corporate Plan"** means the three-year plan of the Company as contemplated in the PFMA read with the Treasury Regulations, regulatory framework as set out in the Electricity Regulation Act, Companies Act and other legislation governing and prescribing the role and functions of the Company, which plan must include (but is not limited to): –

1.2.13.1 strategic objectives and outcomes identified and agreed on by the Shareholder in the Shareholder's Compact;

1.2.13.2 strategic and business initiatives as embodied in business function strategies;

1.2.13.3 key performance measures and indicators for assessing the Company's performance in delivering the desired outcomes and objectives;

1.2.13.4 a risk management plan;

1.2.13.5 a fraud prevention plan;

1.2.13.6 the SMF;

1.2.13.7 a financial plan addressing –

1.2.13.7.1 quarterly projections (for the first year) of revenue, expenditure and borrowings against annual targets;

1.2.13.7.2 asset and liability management;

1.2.13.7.3 cash flow projections;

1.2.13.7.4 capital expenditure programmes; and

1.2.13.7.5 dividend policies;

1.2.13.8 such other issues as may be required in terms of the PFMA from time to time;

1.2.14 **"Deliver"** means in the manner in which the Company is entitled to give notice or deliver documents in accordance with clause 26 of this MOI and the Companies Act, including Table CR3 of the Regulations, and **"Delivered"** and **"Delivering"** shall have the corresponding meaning as the context may indicate;

1.2.15 **"Directors"** means the "directors" of the Company from time to time, as defined in the Companies Act;

1.2.16 **"Directive"** means the directive given by the Shareholder in terms of clause 3 of this MOI in which the Shareholder states the steps to be undertaken to remedy a situation contemplated in clause ** and which will include the reasons for issuing the directive and time within which the steps must be taken;

1.2.17 **"Distribution"** means a "distribution" as defined in the Companies Act and **"Distribute"** and **"Distributed"** shall have the corresponding meaning as the context may indicate;

1.2.18 **"DoA"** means the Delegation of Authority Framework approved by the Board from time to time governing the principles and conditions upon which the Board shall delegate authority;

1.2.19 **"Effective Date"** with reference to any particular provision of the Companies Act, means the date on which that provision came into operation in terms of section 225 of the Companies Act otherwise the date set out as the Effective Date in the Shareholders' resolution adopting this MOI;

1.2.20 **"Electronic Address"** means in regard to Electronic Communication, any email address furnished to the Company by the Shareholder;

1.2.21 **"Electronic Communication"** has the meaning set out in section 1 of the Electronic Communications and Transactions Act, No. 25 of 2002;

1.2.22 **"Enabling Legislation"** means the Eskom Conversion Act, No. 13 of 2001 as amended or any legislation that replaces it;

1.2.23 **"Exco"** means the members of the Executive Management Committee of the Company from time to time;

1.2.24 **"Ex Officio Director"** means an "ex officio director" of the Company from time to time, as defined in the Companies Act;

1.2.25 **"Financial Assistance"** has the meaning set out in section 45(1) of the Companies Act;

1.2.26 **"Financial Year"** has the meaning set out in clause 27 of this MOI;

1.2.27 **"Gazette"** means the Government Gazette of the Republic;

1.2.28 **"Government"** means the Government of the Republic;

1.2.29 **"Guidelines"** means the 'guidelines for the appointment of a Chief Executive for a State Owned Enterprise' as issued by the Minister from time to time;

1.2.30 **"Ineligible or Disqualified"** means ineligible or disqualified as contemplated in the section 69 of the Companies Act or as contemplated in clause 14.13 of this MOI which shall apply not only to Directors but also to members of Board committees and Prescribed Officers;

1.2.31 **"Law"** means any law of general application, as amended and re-enacted from time to time, and includes the common law, constitution, decree, treaty, ordinance, by-law, order, regulation or any other enactment of legislative measure of government (including local and provincial government) statutory or regulatory body which has the force of law;

1.2.32 **"Legislative Framework"** means the legislative and regulatory framework from time to time in force which relates to or affects the Company including, the Companies Act, the PFMA, the National Treasury Regulations, the Enabling Legislation, National Energy Regulator Act, Electricity Regulation Act, the National Nuclear Regulator Legislation and Regulations and any and every other Law, which relates to or affects the Company;

1.2.33 **"Material"** means "material" as defined in the Companies Act;

1.2.34 **"Memorandum of Incorporation"** or **"MOI"** means this Memorandum of Incorporation of the Company, as amended from time to time;

1.2.35 **"Minister"** means the Minister of Public Enterprises in her/his capacity as the representative of the Government and the Executive Authority (as defined in the PFMA) of the Company, or if any other Minister is designated as being the representative of the Government or the executive authority, then that Minister acting in such capacity;

1.2.36 **"Month"** means a calendar month;

1.2.37 **"Notice"** means notice in writing and delivered according to the provisions of the MOI and more particularly the provisions of clause 26 of the MOI;

1.2.38 **"Office"** means the registered office of the Company;

1.2.39 **"Ordinary Resolution"** means a resolution adopted with the support of more than 50% (fifty per cent) of the Voting Rights Exercised on the resolution at a Shareholder's Meeting, or by the Shareholder acting other than at a meeting, as contemplated in section 60 of the Companies Act;

1.2.40 **"Ownership Control"**, in relation to the Company, means the ability of the Shareholder, in accordance with the provisions of section 1 of the PFMA, to exercise any of the following powers to govern the financial and operating policies of the Company in order to obtain benefits from its activities:

1.2.40.1 to appoint or remove all or the majority of the Directors,

1.2.40.2 to appoint or remove the Company's CE;

1.2.40.3 to cast all, or the majority of, the votes at meetings of the Board;

1.2.40.4 to control all, or a majority of, the voting rights at a general meeting of the Company.

1.2.41 **"Person"** includes a Juristic Person;

1.2.42 **"PFMA"** means the Public Finance Management Act, No. 1 of 1999, as amended;

1.2.43 **"Policy Framework"** means any and every , directive, guideline, framework, or policy , from time to time in force concerning and affecting the Company or its Subsidiaries and the relationship between the Shareholder, the Company and the Board from time to time and which comprise, without limitation, the Strategic Intent Statement, the Shareholder's Compact, the SMF, the Corporate Plan, Governance Codes of Good Practice and Protocol's from time to time, the Delegation of Authority Framework and the SMF.

1.2.44 **"Prescribed Officers"** means a person who, within a company, performs any function that has been designated by the Minister of Trade and Industry in terms of section 66(10) of the Companies Act which, for the avoidance of doubt, includes any member of Exco;

1.2.45 **"Present"** shall have the meaning ascribed to the term "present at a meeting" in the Companies Act;

1.2.46 **"Public Audit Act"** means the Public Audit Act, No. 25 of 2004;

1.2.47 **"Regulations"** means the regulations published pursuant to the Companies Act from time to time;

1.2.48 **"Remuneration Policy"** means the Remuneration Policy of the Company which will incorporate any "Remuneration Guidelines" and/or "Standards" published by the Minister from time to time which will be confirmed by the Company on an annual or biennial basis as contemplated in clause 13.1.1.3 of this MOI;

1.2.49 **"Republic"** means the Republic of South Africa;

1.2.50 **"Revenue Fund"** has the meaning set out in section 1 of the PFMA;

1.2.51 **"Round Robin Resolution"** means a resolution passed other than at a –

1.2.51.1 Shareholder's Meeting, which –

1.2.51.1.1 was submitted for consideration to the Shareholder; and

1.2.51 1.2 was voted on in Writing by the Shareholder or by a duly authorised representat ve on behalf of the Shareholder, within 20 (twenty) Business Days after the resolution was submitted to the Shareholder as contemplated in section 60 (1);

1.2.51.2 meeting of Directors, in respect of which 75% (seventy five per cent) of the Directors voted on in Writing by signing a resolution, within 10 (ten) Business Days after the resolution was submitted to them as contemplated in section 74;

1.2.52 **"Securities"** means "securities" as defined in the Companies Act;

1.2.53 **"Securities Register"** means the register of issued Securities of the Company required to be established in terms of section 50(1) of the Act and referred to in clause 8 hereof;

1.2.54 **"Shareholder"** means the Government represented by the Minister;

1.2.55 **"Shareholder's Compact"** means the agreement, entered into pursuant to the Treasury Regulations, between the Shareholder and the Board annually;

1.2.56 **"Shareholder's Meeting"** means with respect to any particular matter concerning the Company, a meeting of the Shareholder who is entitled to Exercise Voting Rights in relation to that matter;

1.2.57 **"Shares"** means one of the units into which the proprietary interest of the company is divided and issued, or to be issued, by the Company;

1.2.58 **"Sign"** and **"Signature"** include, respectively, lithography, printing, electronic signature or signing by a mechanical or electronic process or means;

1.2.59 **"Significance and Materiality Framework" or "SMF"** means the agreement between the Minister and the Company for the purposes of the PFMA, in particular sections 51, 54 and 55 thereof and pursuant to Treasury Regulations, in particular regulation 28.3.1 thereof, which sets out a framework of levels of significance and materiality applicable to certain matters and transactions and the process that must be followed for authorisation by the Executive Authority;

1.2.60 **"Special Resolution"** means a resolution adopted with the support of at least 75% (seventy five per cent) of the Voting Rights Exercised on the resolution at a Shareholder's Meeting or by the Shareholder acting other than at a meeting, as contemplated in section 60 of the Companies Act;

1.2.61 **"Standing Committee"** means a permanent committee of the Board with a continued existence established by the Board or in accordance with the Legislative or Policy Frameworks to deal with a specified set of duties. This excludes Ad Hoc Committees;

1.2.62 **"Strategic Intent Statement"** means the primary tool used by the Shareholder to communicate its expectations of the Company strategy and which contains the Company's strategic purpose, scope of business, core business, consultation thresholds or investment strategy developed by the Shareholder in consultation with sector departments, National Treasury and the Presidency of the Republic and taking into account an assessment of the interaction between the policy and regulatory environment with the financial and operational goals of the Company to ensure shareholder value optimisation and achievement of wider socio-economic objectives;

1.2.63 **"Subsidiary"** means a "subsidiary" of the Company, as such term is defined in the Companies Act;

1.2.64 **"Treasury Regulations"** means the regulations made by the National Treasury of the Republic in terms of section 76 of the PFMA and any amendment thereof or substitution therefor from time to time;

1.2.65 **"Voting Rights"**, with respect to any matter to be decided by the Company, means the rights of the Shareholder to vote in connection with that matter; and

1.2.66 **"Writing"** includes Electronic Communication.

1.3 In this MOI, unless the context clearly indicates otherwise:

1.3.1 Words importing the singular number shall include the plural number and vice versa.

1.3.2 Words importing any one gender shall include the other two genders.

1.3.3 Words importing natural persons shall include Juristic Persons (whether corporate or not and including partnerships and trusts) and vice versa.

1.3.4 References to the Shareholder entitled to vote Present at a meeting or acting in person shall include the Shareholder represented by duly authorised representative/s (which duly authorised representatives may be natural or Juristic Persons) as contemplated in this MOI or acting in the manner prescribed in the Companies Act.

1.3.5 Reference to a section by number in this MOI shall be a reference to the corresponding section in the Companies Act and or the PFMA, as applicable, unless otherwise stated.

1.3.6 A reference to a clause by number refers to a corresponding provision of this MOI.

1.3.7 Clause headings are for convenience only and are not to be used in its interpretation.

1.3.8 Reference to any provision of any Law shall include such provision as amended or re-enacted from time to time and includes any subordinate legislation made from time to time under such Law. Any reference to a particular section in a Law is to that section as at the date of adoption of this MOI, and as amended or re-enacted from time to time and/or an equivalent measure in a Law, provided that if as a result of such amendment or re-enactment, the specific requirements of a section referred to in this MOI are changed, the relevant provision of this MOI shall be read also as if it had been amended as necessary, without the necessity for an actual amendment.

1.3.9 Subject to the preceding clause, any words or expressions defined in any Law shall, unless the context otherwise requires, bear the same meaning in this MOI as in the Law in which they are defined. If any term is defined within the context of any particular clause in the MOI, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this MOI, notwithstanding that that term has not been defined in this interpretation provision.

1.3.10 Reference to a Shareholder represented by a proxy shall include a Shareholder represented by (i) an agent appointed under a general or special power of attorney; or (ii) the Minister.

1.3.11 Any reference to a notice shall be construed as a reference to a Written notice, and shall include a notice which is transmitted electronically in a manner and form permitted in terms of the Companies Act and/or the Regulations.

1.3.12 If the Companies Act is amended at any time to confer any right or benefit on the Company, then this MOI shall be deemed to have been amended so as to result in the Company enjoying the full benefit of any such amendment to the Companies Act.

1.4 The rule of construction that a contract shall be interpreted against the party responsible for the drafting or preparation of the contract, shall not apply to this MOI.

1.5 The words "include", "including" and "in particular" shall be construed as being by way of example or emphasis only and shall not be construed, nor shall they take effect, as limiting the generality of any preceding word/s.

1.6 The words "other" and "otherwise" shall not be construed eiusdem generis with any preceding words where a wider construction is possible.

1.7 Any reference in this MOI to any other agreement or document shall be construed as a reference to such other agreement or document as same may have been, or may from time to time be, amended, varied, novated or supplemented.

1.8 Unless specifically otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a Business Day, the next succeeding Business Day.

1.9 Where figures are referred to in numerals and in words, and there is any conflict between the two, the words shall prevail, unless the context indicates a contrary intention.

1.10 This MOI shall be deemed to authorise the Company to do anything which the Act empowers a Company to do if so authorised by its MOI unless that authority is expressly excluded.

2 INCORPORATION AND NATURE OF THE COMPANY AND GOVERNING PROVISIONS

2.1 Juristic Personality

2.1.1 The Company is a pre-existing company as defined in the Companies Act and, as such, continues to exist as a public company as if it has been incorporated and registered in terms of the Companies Act, as contemplated in item 2 of Schedule 5 of the Act, and this MOI replaces and supersedes the MOI of the Company applicable immediately prior to the filing hereof.

2.1.2 The Company was registered and incorporated on 1 July 2002 in terms of the Enabling Legislation and operates as a State Owned Company as defined in Section 1 of the Companies Act being listed as a major public entity in Schedule 2 of the PFMA.

2.2 Governing Provisions

The Company shall be governed by:

2.2.1 the unalterable provisions of the Companies Act subject to:

2.2.1.1 any higher standards, greater restrictions, longer periods of time or more onerous requirements set out in this MOI in accordance with section 15(2)(a)(iii)); and

2.2.1.2 any exemption granted in accordance with the provisions of section 9;

2.2.2 the alterable provisions of the Companies Act (subject to any negation, restriction, limitation, qualification, extension or other alteration set out in this MOI in accordance with section 15(2)(a)(ii)); and

2.2.3 the provisions of this MOI (subject to and in accordance with section 15(2)); and

2.2.4 the provisions of the Legislative Framework; and

2.2.5 the provisions of the Policy Framework.

2.3 Conflicting Provisions with the Companies Act

In any instance where there is an inconsistency between a provision, be it express or tacit, of the Companies Act and:

2.3.1 A provision of the PFMA then:

2.3.1.1 the provision of both the Companies Act and the PFMA apply concurrently, to the extent that is possible to apply and comply with the one inconsistent provision without contravening the second (section 5 (4) (a)); and

2.3.1.2 to the extent that it is impossible to apply or comply with the inconsistent provision without contravening the second the applicable provision of the PFMA shall prevail except to the extent provided otherwise in sections 30 (8) or 49 (4) as provided for in section 5 (4) (a) of the PFMA.

2.3.2 a provision of the Policy Framework the provision of the Companies Act shall apply to the extent it has not been altered by the MOI in which case the provisions of clause 2.4.4 of the MOI shall apply.

2.4 **Conflicting Provisions with the MOI**

In any instance where there is a conflict between a provision, be it express or tacit, of this MOI and:

2.4.1 an unalterable provision of the Companies Act; the unalterable provision of the Companies Act shall prevail:

2.4.2 an alterable provision of the Companies Act: the provisions of this MOI shall prevail; and

2.4.3 a provision of the PFMA: the provisions of the PFMA shall prevail; and

2.4.4 a provision of the Policy Framework: the provisions of this MOI shall prevail, provided that if:

2.4.4.1 the provision of the Policy Framework simply adds to but is not inconsistent with this MOI; or

2.4.4.2 the provisions of this MOI provide for the Policy Framework to prevail; or

2.4.4.3 the Companies Act does not require the MOI to take precedence over that provision of the Policy Framework;

the provisions of the Policy Framework shall prevail.

3 PURPOSE, POWERS AND CAPACITY OF THE COMPANY

3.1 The objective of the Company is to provide energy/electricity and related services, including the generation, transmission, distribution and retail thereof. In doing so it has all the powers to implement this mandate subject to any limitations set out herein, the Shareholder's Compact, the Strategic Intent Statement and any other limitations imposed by the Shareholder. In fulfilling its obligations, it is specifically acknowledged that the Company has a developmental role and will through its activities promote transformation, economic development, broad based black economic empowerment and may support relevant national initiatives.

3.2 In addition to the Strategic Intent Statement which shall be issued by the Shareholder by 30 April each year, the Shareholder may, after Consultation with the Board, require changes to the mandate and objectives of the Company if-

3.2.1 it is reasonably necessary to do so; or

3.2.2 it is in the best interest of the Company.

3.3 The Company is not subject to any restrictive conditions or prohibitions contemplated in section 15(2) (b) or (c);

3.4 The Company has, subject to section 19(1)(b)(i), all of the legal powers and capacity of an individual which are not subject to any restrictions, limitations or qualifications, as contemplated in section 19(1)(b)(ii);

3.5 Notwithstanding anything to the contrary contained herein or any omissions from this MOI of any provisions to that effect, the Company may do anything that the provisions of the Legislative Framework or the Policy Framework empower it to do if not expressly prohibited in terms thereof.

3.6 The Company shall not:

3.6.1 appoint to or remove a Director from the Board; or

3.6.2 appoint or remove the Chairperson of the Board, Group Chief Executive or Group Chief Financial Officer other than as provided for in terms of this MOI.

3.7 It is specifically recorded that only the Shareholder, in exercising its Ownership Control in terms of section 63 (2) of the PFMA, may appoint or remove Directors in accordance with the provisions of section 66 (4) (a) (i) of the Companies Act.;

3.8 The Shareholder may direct the Company to take any action specified by the Shareholder if the Company:

3.8.1 is in financial difficulty or is being mismanaged;

3.8.2 fails to perform its functions effectively or efficiently;

3.8.3 has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under the Legislative or Policy Framework;

3.8.4 has failed to comply with any law or any policy envisaged in the Legislative or Policy Framework;

3.9 A Directive contemplated in clause 3.8 must state in writing:

3.9.1 the reasons for issuing the directive;

3.9.2 the steps which must be taken to remedy the situation; and

3.9.3 a reasonable period within which the steps contemplated in clause 3.9.2 must be taken.

3.10 If the Company fails to comply with the Directive as contemplated in clause 3.8 within the stated period, the Shareholder may:

3.10.1 after having given the Company a reasonable opportunity to be heard; and

3.10.2 after having afforded the Company a hearing on any submissions received,

3.10.2.1 initiate an investigation into the matter in accordance with terms of reference determined by the Shareholder; and /or

3.10.2.2 where circumstances so require, appoint a person as Administrator to assume responsibility for and to ensure fulfilment of the Directive to the extent as may be further determined in writing by the Shareholder from time to time..

3.11 If the Shareholder appoints an Administrator in terms of clause 3.10.2.2:

3.11.1 the Administrator may do anything which the Company might otherwise be empowered or required to do by or under the Legislative or Policy Framework and this MOI to the exclusion of the Company and any of its directors, officers or employees;

3.11.2 the Board may not, while the Administrator is responsible for fulfilling the Directive, exercise any of its powers or perform any of its duties relating to the Directive or matters incidental thereto;

3.11.3 a director, officer, employee or a contractor of the Company must comply with a directive given by the Caretaker.

3.12 The Shareholder shall:

3.12.1 review the performance of the Company regularly whilst it is under administration of the Administrator; and

3.12.2 while the intervention continues, review the intervention and the performance of the Administrator regularly; and

3.12.3 within six months or any shorter period of time as may be determined by the Shareholder in writing, of appointing the Administrator and thereafter at intervals of every three months, , table a report on the Administrator's findings in the National Assembly.

3.13 Once the situation has been remedied to the satisfaction of the Shareholder and the Company is able to perform its functions effectively, the Shareholder shall terminate the appointment of the Administrator.

3.14 Notwithstanding clause 3.10, the Shareholder may dissolve the Board if the Shareholder, on good cause shown, loses confidence in the ability of the Board to perform its functions effectively and efficiently. The Shareholder may dissolve the Board only:

3.14.1 after having given the Board a reasonable opportunity to be heard; and

3.14.2 after having afforded the Board a hearing on any submissions received.

3.15 If the Shareholder dissolves the Board, the Shareholder

3.15.1 may appoint an Administrator to take over the functions of the Board and to do anything which the Board might otherwise be empowered or required to do by or under this Act, subject to such conditions as the Minister may determine; and

3.15.2 shall, as soon as it is feasible but not later than three months after the dissolution of the Board, replace the members of the Board in the manner as contemplated in this MOI.

3.16 The costs associated with the appointment of an Administrator shall be for the account of the Company.

3.17 The appointment of the Administrator terminates in accordance with the provisions of clause 3.13 or when a new Board is in place in terms of clause 3.15.2.

3.18 If the Board, any of its members or any officer or employee of the Company is alleged to have committed financial misconduct as contemplated in Chapter 10 of the PFMA then the Shareholder must initiate an investigation into the matter and if the allegations are confirmed, the Shareholder must ensure that appropriate disciplinary proceedings are initiated immediately.

3.19 Notwithstanding this section, the Shareholder retains the right at any time to approach a competent court for relief in any matter the Shareholder considers appropriate.

3.20 The Company shall not, without the prior Written approval of the Shareholder: --

3.20.1 enter into any transaction which exceeds or falls outside of the limits prescribed by the Shareholder's Compact or the SMF;

3.20.2 establish or participate in –

3.20.2.1 the establishment of a company; or

3.20.2.2 a significant partnership, trust, unincorporated joint venture or similar arrangement;

3.20.3 acquire or dispose of a significant shareholding in a company or a significant asset;

3.20.4 commence or cease a significant business activity;

3.20.5 commit the Company or its Subsidiaries to borrowings which confer rights to a lender to convert debt into Shares of any kind;

3.20.6 undertake or agree to a significant change in the nature or extent of the Company's interest in a significant partnership, trust, unincorporated joint venture or similar arrangement;

3.20.7 approve the candidate nominated by Board for the position of the FD;

3.20.8 issue, or approve the transfer of, any Shares in the Company; and

3.20.9 subject to clauses 4.1 and 4.2 below, amend the provisions of this MOI.

provided that the provisions of the PFMA are not contravened.

3.21 In addition to the limitations and restrictions set out in clause 3.6 and 3.20 above, the Board shall ensure that –

3.21.1 the proposed Board-approved Shareholder's Compact for the following Financial Year to be submitted to the Shareholder by 30 September of each year;

3.21.2 the annual budget, the Corporate Plan and the Shareholder's Compact of the Company shall be presented and/or submitted to the Shareholder prior to 28 February of each year; and

3.21.3 the Company discloses to the Shareholder all changes to terms and conditions of trade which may have a Material impact on the Company.

3.22 Subject at all times to the PFMA, the Shareholder may, in exceptional circumstances specify any limitations regarding the general authority of the Company to raise or borrow funds from time to time for the purposes of the Company, or secure the payment of such sums provided that the borrowing programme in terms of the Shareholder's Compact is not affected.

4 AMENDMENTS TO MOI

4.1 Save for correcting patent errors in spelling, punctuation, reference, grammar or similar defects on the face of the MOI, which the Board is empowered to do, all other amendments of the MOI shall be effected in accordance with section 16(1) of the Companies Act and the provisions of this MOI.

4.2 The Board shall publish a notice of any alteration of the MOI correcting a patent error in spelling, punctuation, reference, grammar or similar defect on the face of the MOI on the Company's website, furnish a copy of the alteration to the Shareholder, and file the notice of such alteration as contemplated in section 17(1) of the Companies Act.

5 THE MAKING OF RULES

The Board is prohibited from making, amending or appealing any rules contemplated in section 15(3) of the Act and the Board's capacity to make such rules is hereby excluded.

6 AUTHORISED SHARES IN THE COMPANY, ALLOTMENT AND ISSUE

6.1 Authorised Shares in the capital of the Company

6.1.1 Subject to the Enabling Legislation, the Company is authorised to issue no more than 100 000 000 000 (one hundred billion) ordinary Shares of no par value and the same class, which shall rank *pari passu* in all respects and each such ordinary Share entitles the Shareholder to:-

6.1.1.1 attend, participate in, speak at and vote on any matter to be considered at any meeting of the Shareholder;

6.1.1.2 vote on any proposal to amend the preferences, rights, limitations and other terms associated with that Share;

6.1.1.3 participate proportionally in any Distribution made by the Company to the Shareholder;

6.1.1.4 participate in Distributions to the Shareholder;

6.1.1.5 receive proportionally the net assets of the Company upon its liquidation/dissolution; and

6.1.1.6 Exercise any other rights attaching to the ordinary Shares in terms of the Companies Act or any other law.

6.2 At the date of this MOI, there are 83 000 000 001 (eighty three billion and one) ordinary Shares in issue. The issued ordinary Shares are held by the Shareholder.

6.3 The Board shall not have the power to amend the authorisation (including increasing or decreasing the number) and classification of Shares (including determining rights and preferences) as contemplated in section 36(2)(b) read with section 36(3) of the Companies Act.

6.4 Subject to provisions of the Companies Act and the Enabling Legislation, the Company may from time to time by Special Resolution passed by the Shareholder: -

6.4.1 increase or decrease the number of its authorised Shares;

6.4.2 reclassify any Shares that have been authorised but not issued;

6.4.3 classify any unclassified Shares;

6.4.4 create any class of Shares and establish any preferences, rights, limitation or other terms in respect of any class of Shares so created, in terms of section 37 of the Companies Act;

6.4.5 alter the provisions of this MOI with respect to the objects and powers of the Company;

6.4.6 convert any Shares in the Company to Shares of a different class, whether issued or not, and in particular (but without derogating from the generality of the aforegoing) convert ordinary Shares or preference Shares to redeemable preference Shares, provided that moneys other than dividends due to the Shareholder or the amount payable on the redemption of any preference Shares shall be held in trust by the Company indefinitely until lawfully claimed by the Shareholder; and

6.4.7 to the extent that the Company immediately before the Effective Date has authorised but unissued par value Shares in its capital of a class of which there are issued Shares, issue the unissued Shares of that class at par or at a premium or at a discount.

6.5 The Board shall not have the power to issue: -

6.5.1 authorised Shares as contemplated in section 38 of the Companies Act; or

6.5.2 options relating to the allotment or subscription of authorised Shares or other Securities and secured and unsecured debt instruments as contemplated in sections 42 and 43 of the Companies Act; or

6.5.3 capitalisation Shares or offer a cash payment in lieu of awarding a capitalisation Share in accordance with section 47 of the Companies Act,

without an Ordinary Resolution of the Shareholder.

6.6 Certificates of Securities

The Securities issued by the Company shall be evidenced by certificates, which shall contain the information specified in section 51(1) of the Companies Act, and which shall be issued in the manner prescribed in section 51 of the Companies Act.

6.7 Register of Securities

The Company shall establish and keep a register of its issued Securities at its Office in the manner specified in section 50 of the Companies Act.

7 PRE-EMPTION ON ISSUE OF ORDINARY SHARES

7.1 Save if –

7.1.1 ordinary Shares are to be issued for the acquisition of any asset or for an Amalgamation or Merger;

7.1.2 the Shareholder by Ordinary Resolution approves the issue of ordinary Shares for any other purpose without this clause applying;

7.1.3 a capitalisation issue of ordinary Shares is to be undertaken;

7.1.4 ordinary Shares are to be issued in terms of option or conversion rights;

7.1.5 ordinary Shares are to be issued for a subscription price which is not a cash amount payable in full on subscription,

the Shareholder has a right, before any other Person to be offered and within a reasonable time, to subscribe for all the ordinary Shares to be issued. The offer to the Shareholder shall be Delivered in Writing specifying the number of ordinary Shares offered, and specifying a time (which shall not be less than 14 (fourteen) Business Days after the date of the offer) by which the offer must be accepted and the requisite portion of the subscription price paid, failing which it shall be deemed to be rejected. After the expiration of the time within which an offer may be accepted, or on the receipt of a response from the Shareholder that it declines to accept the ordinary Shares offered, the Board may, subject to the aforegoing provisions and clause 3.20.8 of this MOI, issue such ordinary Shares.

8 PROHIBITION REGARDING BENEFICIAL INTERESTS

The Company shall not permit its Shares to be held by, and registered in the name of, one Person for the Beneficial Interest of another Person, as set out in section 56(1) of the Companies Act.

9 RESTRICTION ON THE TRANSFER OF SHARES

In addition to any other prescribed obligations which the Shareholder may agree to, no Shares shall be transferred without the prior Written consent of the Shareholder.

10 TRANSFER OF SECURITIES

10.1 The Shareholder is the holder of all the issued Shares which relate to the Company as set out in clause 6.2 above.

10.2 Where the Shareholder may elect to sell, cede or transfer any of the Securities in the Company the instrument of transfer of any such Securities shall be signed by both the transferor and the transferee and the transferor shall be deemed to remain the holder of such Securities until the name of the transferee is entered in the Securities Register.

10.3 Subject to such restrictions as may be applicable, (whether by virtue of the preferences, rights, limitations or other terms associated with the Securities in question), any Shareholder or holder of Securities may transfer all or any of its Securities by instrument in Writing in any usual or common form or any other form which the Board may approve.

10.4 Every instrument of transfer shall be Delivered to the Office of the Company, accompanied by:

10.4.1 the certificate issued in respect of the Securities to be transferred; and/or

10.4.2 such other evidence as the Company may require to prove the title of the transferor, or her/his right to transfer the Securities.

10.5 All authorities to sign transfer deeds or other instruments of transfer granted by holders of Shares for the purpose of transferring Securities which may be lodged, produced or exhibited with or to the Company at its Office shall, as between the Company and the grantor of such authorities, be taken and deemed to continue and remain in full force and effect, and the Company may allow the same to be acted upon until such time as express notice in writing of the revocation of the same shall have been given and lodged at such of the Company's Office at which the authority was first lodged, produced or exhibited. Even after the giving and lodging of such notice, the Company shall be entitled to give effect to any instruments signed under the authority to sign and certified by any officer of the Company as being in order before the giving and lodging of such notice.

10.6 All instruments of transfer, when registered, shall either be retained by the Company or disposed of in such manner as the Board shall from time to time decide. Any instrument of transfer which the Board may decline to register shall (unless the Board shall resolve otherwise) be returned on demand to the person who lodged it.

10.7 Securities transfer tax and other legal costs payable in respect of any transfer of Securities pursuant to this MOI will be paid by the Company to the extent that the Company is liable therefore in Law, but shall, to that extent, be recoverable from the person acquiring such Securities.

11 SHAREHOLDER'S AND DIRECTORS' RIGHT TO INFORMATION

11.1 The Shareholder shall have the rights to all such information relating to the Company as contemplated in this MOI, or in accordance with the Legislative or Policy Framework.

11.2 The Board shall procure that detailed management accounts of the Company and its Subsidiaries shall be prepared on a quarterly basis and submitted to the Shareholder within the Month after the end of the quarter or such other period as may be agreed by the Shareholder and the Company in Writing in respect of which such accounts are being prepared. Any Director or the Shareholder shall be entitled to request from time to time such accounting and other information as may be reasonably required by such Director or the Shareholder.

12 RECORD DATE

If, at any time, the Board fails to determine a Record Date as contemplated in section 59(1) of the Companies Act, the Record Date for the relevant action or event is as determined in accordance with section 59(3) of the Companies Act.

13 SHAREHOLDER'S MEETINGS AND ROUND-ROBIN RESOLUTIONS

13.1 Convening of Shareholder's Meetings and Annual General Meetings

13.1.1 Subject to any exemption which may be granted to the Company in terms of the Companies Act, the Board shall convene an Annual General Meeting at least once a year but no later than 15 (fifteen) Months after the date of the previous Annual General Meeting or within an extended time allowed by the Companies Tribunal, on good cause shown, which must, at a minimum, provide for the following business to be transacted –

13.1.1.1 presentation of the Integrated report, comprising –

13.1.1.1 1 the Directors' report;

13.1.1.1.2 report of the external auditors;

13.1.1.1 3 audited Financial Statements for the immediately preceding Financial Year, subject to the provisions of section 84(3) of the Companies Act;

13.1.1.1.4 an audit committee report; and

13.1.1.1.5 the social and ethics committee report;

13.1.1.2 appointment of Directors by the Shareholder, to the extent required by the Companies Act, this MOI or the PFMA;

13.1.1.3 consideration of the Remuneration Policy of the Company and confirmation that such Remuneration Policy is in accordance with any "Remuneration Guidelines" and/or" Standards" published by the Minister from time to time;

13.1.1.4 approval of the remuneration payable to non-executive Directors by Special Resolution (except where such remuneration has been approved by the Shareholder by Special Resolution within the previous two years, although this may be considered on an annual basis if so required by the Shareholder);

13.1.1.5 approval of the remuneration payable to executive Directors and members of Exco by Ordinary Resolution;

13.1.1.6 appointment of an Auditor for the current Financial Year, subject to the provisions of section 84(3) of the Companies Act;

13.1.1.7 noting of the audit fees for the previous Financial Year under review;

13.1.1.8 authorising the Board to fix the audit fees for the current Financial Year;

13.1.1.9 appointment of an audit committee, subject to clause 19 below;

13.1.1.10 approval of the Distribution to the Shareholder, if any, which shall have been recommended by the Board in accordance with any Distribution policies applicable to the Company, from time to time and the provisions of clause 24 of this MOI and any applicable provisions of the PFMA, on condition that the Shareholder may not approve a Distribution higher than that recommended by the Board. In the event Board resolving not to declare a Distribution such resolution to be noted by the Shareholder.;

13.1.1.11 noting of the Shareholder's Compact for the current Financial Year;

13.1.1.12 consideration and/or approval of the SMF;

13.1.1.13 consideration of the performance of the Board, through the Board performance appraisal report for the previous Financial Year; and

13.1.1.14 any matters raised by the Shareholder, with or without advance notice to the Company.

13.1.2 The Shareholder or Board may, subject to the provisions of section 61 of the Companies Act, convene a Shareholder's Meeting at any time.

13.1.3 The Company authorises the Minister to call a Shareholder's Meeting for the purposes of section 61(11) of the Companies Act.

13.1.4 The Shareholder's Meetings referred to in clauses 13.1, 13.1.2 and 13.1.3 above shall be held in Johannesburg, Pretoria or Cape Town, provided however, that in exceptional circumstances, such meetings shall be held at any other place as the Shareholder deems fit.

13.1.5 The Company shall, as determined by the Board, either –

13.1.5.1 hold a Shareholder's Meeting in order to consider one or more resolutions; or

13.1.5.2 as regards such resolution/s that could be voted on at a Shareholder's Meeting, other than an Annual General Meeting, instead require such resolutions to be dealt with by Round Robin Resolution of the Shareholder.

13.1.6 Within 10 (ten) Business Days after the Shareholder adopts a Round Robin Resolution, the Company must Deliver a statement describing the results of the vote, consent process, or appointment to the Shareholder.

13.1.7 The Company must hold a Shareholder's Meeting or put the proposed resolution to the Shareholder by way of a Round Robin Resolution: –

13.1.7.1 at any time that the Board is required by the Companies Act or the MOI to refer a matter to the Shareholder for decision; or

13.1.7.2 whenever required to fill a vacancy on the Board; and

13.1.7.3 when otherwise required in terms of section 61(3) of the Companies Act or by this MOI.

13.2 Notice of meetings of the Shareholder

13.2.1 Subject to compliance with section 62 of the Companies Act, an Annual General Meeting and a general meeting of the Shareholder shall be convened by giving notice of at least 15 (fifteen) Business Days to the Shareholder.

13.2.2 A notice of a Shareholder's Meeting must be in Writing, in plain language and must include: -

13.2.2.1 the date, time and place for the meeting, and the Record Date for the meeting;

13.2.2.2 the general purpose of the meeting, and any specific purpose contemplated in section 61(3) (a) of the Companies Act if applicable;

13.2.2.3 in the case of the Annual General Meeting, the complete Financial Statements to be presented and directions for obtaining a copy of the complete annual Financial Statements for the preceding Financial Year;

13.2.2.4 a copy of any proposed resolution of which the Company has received notice, and which is to be considered at the Shareholder's Meeting, and a notice of the percentage of Voting Rights that will be required for that resolution to be adopted;

13.2.2.5 a reasonably prominent statement that: --

13.2.2.5.1 the Shareholder shall be entitled to appoint a proxy to attend, participate in, speak and vote at the Shareholder's Meeting in the place of the Shareholder or give or withhold Written consent on behalf of the Shareholder to a decision by Round Robin Resolution of the relevant Shareholder;

13.2.2.5.2 a proxy need not be a Shareholder;

13.2.2.5.3 a Shareholder may appoint more than 1 (one) proxy to Exercise Voting Rights attached to different Securities held by that Shareholder in respect of any Shareholder's Meeting;

13.2.2.5.4 the proxy may delegate the authority granted to her/him as proxy, subject to any restriction in the instrument appointing the proxy her/himself;

13.2.2.5.5 participants in a Shareholder's Meeting are required to furnish satisfactory identification in terms of section 63(1) of the Companies Act in order to reasonably satisfy the person presiding at the Shareholder's Meeting that the right of that person to participate and vote, either as the Shareholder, or as a proxy for the Shareholder, has been reasonably verified; and

13.2.2.5.6 participation in the Shareholder's Meeting by Electronic Communication is available, and provide any necessary information to enable the Shareholder or its proxy to access the available medium or means of Electronic Communication and advise that access to the medium or means of Electronic Communication is at the expense of the Shareholder or proxy, except to the extent that the Company determines otherwise.

13.2.3 A Shareholder's Meeting may proceed notwithstanding a Material defect in the giving of the notice, subject to clause 13.2.4 below, only if every Person who is entitled to Exercise Voting Rights in respect of each item on the agenda of the Shareholder's Meeting is Present at the Shareholder's Meeting and votes to approve the ratification of the defective notice.

13.2.4 If a Material defect in the form or manner of giving notice of a Shareholder's Meeting relates only to one or more particular matters on the agenda for the Shareholder's Meeting: -

13.2.4.1 any such matter may be severed from the agenda, and the notice remains valid with respect to any remaining matters on the agenda; and

13.2.4.2 the Shareholder's Meeting may proceed to consider a severed matter, if the defective notice in respect of that matter has been ratified in terms of clause 13.2.3 above.

13.2.5 A non-Material defect in the form or manner of Delivering notice of a Shareholder's Meeting, or an accidental or inadvertent failure in the Delivery of the notice to the Shareholder to whom it was addressed if the Company elects to do so, does not invalidate any action taken at the Shareholder's Meeting.

13.2.6 The Shareholder or its proxy, who is Present at a Shareholder's Meeting: –

13.2.6.1 is regarded as having received or waived notice of the Shareholder's Meeting if at least the required minimum notice was given;

13.2.6.2 has a right to: —

13.2.6.2.1 allege a Material defect in the form of notice for a particular item on the agenda for the Shareholder's Meeting; and

13.2.6.2.2 participate in the determination whether to waive the requirements for notice, if less than the required minimum notice was given, or to ratify a defective notice; and

13.2.6.3 except to the extent set out in clause 13.2.6.2 above, is regarded to have waived any right based on an actual or alleged Material defect in the notice of the Shareholder's Meeting.

13.3 <u>Proceedings at meetings of the Shareholder</u>

13.3.1 The Annual General Meeting shall deal with and dispose of all matters prescribed by the Companies Act and the provisions of this MOI and may deal with any other business raised by the Shareholder or any other business laid before it.

13.3.2 The quorum necessary for the commencement of a Shareholder's Meeting or for a matter to be considered at a Shareholder's Meeting shall be the Shareholder Present in person or represented by proxy. Business at any Shareholder's Meeting may only be conducted while a quorum is Present.

13.3.3 The appointment of a proxy to represent the Shareholder in any Shareholder's Meeting or Annual General Meeting of the Company shall be in accordance with the provisions of the Companies Act and this MOI.

13.3.4 A Shareholder's Meeting may be conducted by way of Electronic Communication or by any one or more persons participating in the Shareholder's Meeting by Electronic Communication.

13.3.5 Any Shareholder's Meeting may be postponed or adjourned as provided for in the Companies Act.

13.3.6 If within 1 (one) hour from the time appointed for the Shareholder's Meeting, a quorum is not Present,

13.3.6.1 for the meeting to begin, the Shareholder's Meeting shall be postponed, without motion or vote or further notice to the date, time and place, as agreed to by the Shareholder

as soon as reasonably practicable after the date of such postponed or adjourned meeting;

13.3.6.2 for consideration of a particular matter to begin, if there is no other business on the agenda of the meeting, consideration of the matter may be postponed without motion or vote or further notice to the date, time and place, as agreed to by the Shareholder as soon as reasonably practicable after the date of such postponed or adjourned meeting.

13.3.7 No further notice is required to be Delivered by the Company of a Shareholder's Meeting that is postponed or adjourned as contemplated in clause 13.3.6 above, unless the location or time for the Shareholder's Meeting is different from a location or time announced at the time of postponement or adjournment, in the case of a postponed or adjourned Shareholder's Meeting.

13.3.8 The chairperson of the Board shall preside as chairperson at every Shareholder's Meeting of the Company. If the chairperson is not Present at the Shareholder's Meeting, or if s/he is not Present within 30 (thirty) minutes after the time appointed for holding the Shareholder's Meeting, the Shareholder shall choose any non-executive Director Present to be chairperson of the Shareholder's Meeting. If no such Director is Present or if none of the non-executive Directors Present are willing to chair the meeting, then the Shareholder (or a duly authorised representative thereof) shall be entitled to chair the Shareholder's meeting.

13.3.9 The chairperson may, in accordance with section 64(10) of the Companies Act, with the consent of any Shareholder's Meeting at which a quorum is Present (and shall if so directed by the Shareholder's Meeting), adjourn the Shareholder's Meeting from time to time and from place to place, but no business shall be transacted at any adjourned Shareholder's Meeting other than the business left unfinished at the Shareholder's Meeting from which the adjournment took place.

13.3.10 When a Shareholder's Meeting is adjourned as a result of a direction given in terms of any applicable provision in the Companies Act, notice of the adjourned Shareholder's Meeting shall be given in the manner prescribed by such provision but, save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned Shareholder's Meeting. No Shareholder's Meeting may be adjourned beyond a period of 60 (sixty) Business Days from the date on which the adjournment occurred.

13.3.11 Every resolution of the Shareholder is either an Ordinary Resolution or a Special Resolution.

13.3.12 A Round Robin Resolution signed by the Shareholder or by a duly authorised representative on behalf of the Shareholder, within 20 (twenty) Business Days after it has been submitted to the Shareholder in terms of section 60 of the Companies Act, shall be as valid and effective as if it had been passed at a Shareholder's Meeting of the Company duly convened and held.

14 DIRECTORS

14.1 General

14.1.1 The Shareholder shall have the exclusive power to appoint Directors pursuant to the provisions of section 66 (4) (a) (i) of the Companies Act and section 63(2) of the PFMA.

14.1.2 The Board shall consist of a minimum of 3 (three) Directors and a maximum of 15 (fifteen) Directors, the majority of which shall be Directors that are not employed by the Company ("non-executive Directors") and at least 2 (two) of which shall be Directors who are employees of the Company, being the Group Chief Executive and the Group Chief Financial Officer ("executive Directors").

14.1.3 It is specifically recorded that the executive Directors are not ex officio directors as contemplated in section 66 (4) (a) (ii) of the Companies Act.

14.1.4 No Director shall be entitled to appoint an Alternate Director.

14.1.5 The Shareholder shall endeavour to ensure that the Board shall: -

14.1.5.1 be appropriately balanced in terms of executive and non-executive Directors;

14.1.5.2 be representative of the gender and race demographics of the Republic;

14.1.5.3 be appointed on the grounds of their knowledge and experience which, when considered collectively, should enable the Board to attain the objects of the Company;

14.1.5.4 when viewed collectively, possess appropriate skills and experience relevant to the business of the Company; and

14.1.5.5 not include persons who are ineligible or Disqualified, as set out in section 69 of the Companies Act.

14.1.6 The Shareholder shall have the right to appoint a Director to the Board, who may be a Government official, whenever the Shareholder deems it necessary, subject always to the provisions of the Companies Act, this MOI and the Policy Framework.

14.2 Appointment of non-executive Directors

The non-executive Directors shall be appointed by the Shareholder for a period of 3 (three) years at a time ("a term"), which appointment is reviewable annually, provided that no non-executive Director is appointed for longer than 3 (three) consecutive terms.

14.3 Process of appointment and removal of the Group Chief Executive

14.3.1 The Shareholder shall, on behalf of the Company, have the exclusive power, in exercising its Ownership Control pursuant to the provisions of sec 63 (2) of the PFMA, to appoint and remove the CE as an employee of the Company in accordance with the Guidelines

14.3.2 The Shareholder may request the Board to identify, nominate and evaluate potential candidates for appointment as the Group Chief Executive in accordance with the Guidelines and to submit a shortlist of candidates to the Shareholder to assist the Shareholder with the appointment.

14.3.3 The Shareholder's act of appointment of the Group Chief Executive binds the Company to the exclusion of the Board

14.3.4 The Minister shall be noted as a party to any contract of employment between the Company and the Group Chief Executive.

14.3.5 The Group Chief Executive shall report to the Board and shall only become an executive Director of the Company if appointed to the Board by the Shareholder in terms of clause 14.1.1 of this MOI.

14.3.6 The Shareholder shall, on behalf of the Company, have the exclusive power to remove the Group Chief Executive as an employee of the Company which removal would constitute a dismissal as envisaged in terms of Section 186(1)(a) of the Labour Relations Act 66 of 1995 ("the LRA"). Consequently, the provisions of the LRA apply to any such removal.

14.4 Process of appointment of the Group Chief Financial Officer

14.4.1 The Board shall identify, nominate, evaluate and appoint a candidate for the position of Group Chief Financial Officer, provided that the Shareholder shall, in Writing, approve such candidate prior to the appointment by the Board.

14.4.2 If the Shareholder does not approve the candidate nominated by the Board for the position of the Group Chief Financial Officer, the Shareholder shall be required to provide a Written substantive motivation to the Board as to why the Shareholder does not approve the candidate nominated by the Board.

14.4.3 Provided the Shareholder provides such Written substantive motivation to the Board, such candidate shall not be appointed as the Group Chief Financial Officer and the Board shall identify and nominate an alternative candidate for appointment as the Group Chief Financial Officer and the process contemplated in this clause 14.4 shall be repeated until such time as an appointment has been made.

14.4.4 The Group Chief Financial Officer shall only become an executive Director of the Company if appointed to the Board by the Shareholder in terms of clause 14.1.1 of this MOI.

14.5 Chairperson of the Board

14.5.1 The chairperson of the Board shall be appointed by the Shareholder.

14.5.2 The Company in general meeting shall be entitled to designate an acting chairperson (from any of the non-executive Directors) and determine the period for which such acting chairperson is to hold office and any other terms and conditions applicable to such appointment until the Shareholder appoints the chairperson.

14.5.3 The chairperson of the Board shall chair all the meetings of the Board. If the chairperson is not Present at any such meeting or if s/he is not Present within 30 (thirty) minutes after the time appointed for holding the meeting, the Directors Present shall choose any non-executive Director to be chairperson of the meeting.

14.5.4 The Director appointed as chairperson of the meeting in terms of clause 14.5.3 above shall act as chairperson: -

14.5.4.1 for the duration of the meeting until the meeting is adjourned; or

14.5.4.2 for such a period of time after the adjournment of the meeting at which such Director was appointed as chairperson until the chairperson of the Board becomes available.

14.5.5 The chairperson of the Board shall not be appointed or serve as the chairperson of a Standing Committee (save for the People and Governance Committee) or as the chairperson of a Subsidiary board.

14.6 Appointment of Directors to the boards of the wholly-owned Subsidiaries of the Company

14.6.1 For so long as the Government is the sole Shareholder, it is recorded that the board of a wholly-owned Subsidiary of the Company should, subject to clause 14.6.2 below and any other law applicable to the Subsidiary, comprise employees of such Subsidiary or the Company.

14.6.2 It is recorded that, should any wholly-owned Subsidiary of the Company wish to appoint directors who are not employees of the Subsidiary or the Company, such appointments shall be approved by the Shareholder in Writing.

14.7 Remuneration of Directors

14.7.1 The Board or the committee of the Board responsible for remuneration matters of the Company shall determine the remuneration of the individual Directors and Exco within the framework of the Remuneration Policy and which remuneration shall be approved by Special Resolution or Ordinary Resolution as contemplated in clauses 13.1.1.4 and 13.1.1.5 respectively of this MOI.

14.7.2 Non-executive Directors may be paid all travelling, hotel and other expenses properly incurred by them in or about the performance of their duties as Directors, including, those expenses incurred in attending and travelling to and from meetings of the Directors or any committee of the Directors or at any Shareholder's Meeting.

14.8 Powers of Directors

14.8.1 Subject to clause **Error! Reference source not found.**, the management and control of the Company shall be vested in the Board which, in addition to the powers and authorities expressly conferred upon it by section 66 (1) of the Companies Act, sections 49 to 55 of the PFMA, this MOI, , may Exercise all such powers, and do all such acts and things, as may be Exercised or done by the Company and are not, in terms of this MOI or the Legislative and Policy Framework, expressly directed or required to be Exercised or done by the Company in general meeting or with the prior Written consent of the Shareholder.

14.8.2 The Board may, subject to the provisions of section 56 of the PFMA, delegate, any of its powers or functions to any Directors, employee(s) and/or to committees. The delegation shall be Exercised lawfully, within prescribed powers and authorisation levels and in terms of the Company's policies, directives and procedures.

14.8.3 The delegation: -

14.8.3.1 may be made on and subject to any conditions determined by the Board;

14.8.3.2 may be given together with the power to sub-delegate subject to the provisions of the PFMA and the Companies Act and further subject to any conditions so determined (if any);

14.8.3.3 shall be communicated to the delegate in Writing and such Written communication must contain full particulars of the matters being delegated and of the conditions determined under clauses 14.8.3.1 and 14.8.3.2 above, if any, and where the power of sub-delegation is also conferred, must state that fact, as well as any conditions determined under this clause 14.8.3.3 if any; and

14.8.3.4 shall be reviewed on a regular basis.

14.8.4 The Board may, without requiring the consent of the Shareholder, and in accordance with clause 14.8.3 above from time to time revoke, withdraw or vary such powers contemplated in this clause 14.8.

14.9 Recognition of the DoA

It is recorded that the DoA records (but does not create) certain limitations on the powers of the Directors, which limitations arise as a result of this MOI, the Companies Act and the PFMA. It is further recorded that it is the intention of the Board that it shall delegate certain of its powers and functions to Directors, employees and/or committees as contemplated in the DoA by passing a resolution of the Board adopting the DoA in accordance with the principles set out in clause 14.8 above.

14.10 Proceedings at Meetings of Directors

14.10.1 The Directors may meet for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit.

14.10.2 The company secretary or a Director may at any time: -

14.10.2.1 when authorised by the Board; or

14.10.2.2 if requested by at least 1 (one) Director which request shall also be approved by the chairperson of the Board; or

14.10.2.3 if requested by at least 2 (two) Directors of the Company

convene a meeting of the Board.

14.10.3 The Board shall determine the period of notice which shall be given for meetings of Directors and/or for Round Robin Resolutions and may determine the form or medium of giving such notice, which may include Electronic Communication. It shall be necessary to give notice of a meeting of Directors and/or for Round Robin Resolutions to all Directors even those for the time being absent from the Republic.

14.10.4 A meeting of Directors shall proceed even if the Company has not given the required notice of such meeting in accordance with clause 14.10.3 above or if there was a defect in the giving of the notice, provided that all Directors: -

14.10.4.1 acknowledge actual receipt of the notice of the meeting concerned; and

14.10.4.2 are Present at the meeting; or

14.10.4.3 waive notice of the meeting.

14.10.5 A meeting of Directors may be conducted by one or more Directors participating in the meeting by Electronic Communication.

14.10.6 The quorum for a meeting of Directors shall be not less than a majority of Directors.

14.10.7 Subject to exclusions in the Companies Act, each Director shall have 1 (one) vote on a matter before a meeting of Directors.

14.10.8 Resolutions of the Directors in a meeting shall be decided by a majority of votes. In case of an equality of votes, the chairperson shall not have a casting vote (in addition to her/his vote as a member of the Board or a Board committee) and the matter being voted on fails.

14.10.9 Subject to the Companies Act and this MOI, a Round Robin Resolution, signed and approved by not less than 75% (seventy five per cent) of the Directors shall be as valid

and effective as if it had been passed at a Board or Board committee meeting, duly called and constituted.

14.10.10 Resolutions adopted by the Directors –

14.10.10.1 must be dated and sequentially numbered; and

14.10.10.2 are effective as of the date of the resolution, unless the resolution states otherwise.

14.10.11 The company secretary shall attend meetings and record the minutes of the meetings. Where it is not at all possible for the company secretary to attend any such meeting, the Board or Board committee, as the case may be, shall ensure that minutes are recorded, kept and prepared for that meeting. The Director or any other person elected by the Board or Board committee to record and keep minutes of a meeting held by making use of Electronic Communication shall, as soon as is reasonably possible after such meeting has been held, provide the company secretary with a copy of the minutes of the meeting.

14.11 Removal of Directors

14.11.1 Despite anything to the contrary in the Companies Act, this MOI, or any agreement between the Company and a Director, or between any Shareholder and a Director, the Shareholder shall be solely responsible for the removal of a Director in accordance with the provisions of Section 63(2) of the PFMA, provided that the Director concerned shall:

14.11.1.1 be removed by an Ordinary Resolution adopted at a Shareholders Meeting as provided for in section 71 (1) of the Companies Act; and

14.11 1.2 have been given 15 (fifteen) Business Days Written notice of the meeting and the resolution; and

14.11 1.3 be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to the vote.

14.11.2 Where an allegation contemplated in section 71(3) of the Companies Act has been made the Board must determine, by resolution, whether that the Director has either:

14.11.2.1 become Ineligible or Disqualified to be a Director of the Company in terms of the Companies Act; or

14.11.2.2 become incapacitated to the extent that such Director is unable to perform the functions of a Director and is unlikely to regain that capacity within a reasonable time; or

14.11.2.3 neglected or been derelict in the performance of the functions of a Director.

14.11.3 Before the Board may consider a resolution contemplated in clause 14.11.2 above the Director concerned must be given:

14.11.3.1 notice of the meeting and the resolution proposed to be passed at such meeting and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the Director to prepare and present a response; and:

14.11.3.2 a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to the vote.

14.11.4 Where the Board has made a determination as contemplated in 14.11.2 then the Board, having regard to the provisions of section 5(4) of the Companies Act, shall not remove the Director but must, within 24 hours of having made its determination, refer its determination to the Shareholder in which case the provisions of clause 14.11.1 shall apply *mutatis mutandis*.

14.12 Rotation of Directors and filling of vacancies

14.12.1 If a Director ceases to hold office or a term of office of any Director is due to expire, the Shareholder shall, in compliance with the provisions of section 70 of the Companies Act, ensure that necessary steps are taken to appoint the requisite number of eligible persons as Directors in the place of the retiring Director/s as soon as possible. In this regard the Board shall, where possible, advise the Shareholder within a reasonable time of such impending vacancy.

14.12.2 The Shareholder shall fill in any vacancy that arose on the Board by a new appointment as contemplated in terms of section 70(3) (a) of the Companies Act.

14.12.3 A person shall cease to be a Director and a vacancy on the Board shall arise: -

14.12.3.1 when the Director's term of office expires as contemplated in clause 14.12.3.3 below;

14.12.3.2 if, subject to the provisions of 14.11.2, any of the circumstances referred to in section 70(1)(b) of the Companies Act occur, which include the following, if the Director: -

14.12.3.2.1 resigns (provided that such resignation is given by Written notice to the Shareholder and the Company);

14.12.3.2.2 dies;

14.12.3.2.3 in the case of an *Ex Officio* director, ceases to hold the office, title, designation or similar status that entitled the person to be an *Ex Officio* Director of the Company;

14.12.3.2.4 becomes incapacitated to the extent that the person is unable to perform the functions of a Director and is unlikely to regain that capacity within a reasonable period, subject to section 71(3) of the Companies Act;

14.12.3.2.5 is declared delinquent by the court or placed on probation under conditions that are inconsistent with continuing to be a Director of the Company, in terms of section 162 of the Companies Act;

14.12.3.2.6 becomes Ineligible or Disqualified in terms of section 69, subject to section 71(3) of the Companies Act; or

14.12.3.2.7 is removed as a Director by: -

14.12.3.2.7.1 a resolution of the Shareholder in terms of section 63 (2) of the PFMA and in accordance with the provisions of 14.11.1; or

14.12.3.2.7.2 a resolution of the Shareholder in terms of section 63 (2) of the PFMA and in accordance with the provisions of 14.11.2; or

14.12.3.2.7.3 an order of the court in terms of section 71(5) or (6) of the Companies Act; or

14.12.3.2.7.4 if s/he is absent from Board meetings for 3 (three) consecutive meetings without leave of the Board and the Shareholder resolves that the office be vacated;

14.12.3.3 in the case of non-executive Directors: -

14.12.3.3.1 a Director's appointment is reviewed and her/his term is terminated prematurely to the 3 (three) year term;

14.12.3.3.2 a Director has served for a 3 (three) year term, and fails to be re-appointed as Director for a 2nd (second) term; or

14.12.3.3.3 a Director has served for 2 (two) consecutive 3 (three) year terms, and fails to be re-appointed as a Director for a 3rd (third) term;

14.12.3.3.4 a Director has served for 3 (three) consecutive 3 (three) year terms, which 3rd (third) term has now expired.

14.12.4 Unless the Shareholder resolves otherwise, a Director shall also cease to hold office and a vacancy shall arise if: -

14.12.4.1 s/he is Knowingly interested in any contract or proposed contract with the Company and fails to declare her/his interest and its nature in the manner required by the Companies Act and the PFMA; or

14.12 4.2 s/he assigns her/his estate for the benefit of her/his creditors, or suspends payment or files a petition for the liquidation of her/his affairs, or compounds generally with her/his creditors; or

14.12 4.3 s/he ceases to be an employee of the Company or is suspended as an employee of the Company and the Shareholder has resolved to remove such director in accordance with the provisions of clause 14.11.1.

14.12.5 In addition, if the CE or FD ceases to hold office as a Director for any reason whatsoever, her/his appointment as CE or FD (as the case may be) shall *ipso facto* terminate without prejudice to any claims for damages which may accrue to her/him as a result of such termination in accordance with applicable employment laws; provided however, that s/he shall not be precluded from being employed in any other position of the Company by virtue of the fact that s/he is no longer a Director.

14.13 Ineligibility or Disqualification of Directors

14.13.1 A person is Ineligible to be a Director of the Company if the person-

14.13.1.1 is a Juristic Person;

14.13.1.2 is an unemancipated minor, or is under a similar legal disability; or

14.13.1.3 does not satisfy any qualification set out in the MOI.

14.13.2 A person is Disqualified to be a Director of the Company if-

14.13.2.1 a court has prohibited that person to be a Director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 69 of 1984; or

14.13.2.2 save under authority of the court, the person -

14.13.2.2.1 is an unrehabilitated insolvent;

14.13.2.2.2 is prohibited in terms of any public regulation to be a Director of the Company;

14.13.2.2.3 has been removed from an office of trust, on the grounds of misconduct involving dishonesty;

14.13.2.2.4 has been convicted, in the Republic or elsewhere and imprisoned without the option of a fine, or fined more than the prescribed amount for theft, fraud, forgery, perjury or an offence: -

14.13.2.2.4.1 involving fraud, misrepresentation or dishonesty,

14.13.2.2.4.2 in connection with the promotion, formation or management of a company, or in connection with any act contemplated in section 69(2) or 69(5) of the Companies Act; or

14.13.2.2.4.3 under the Companies Act, Insolvency Act, 1936; Close Corporation Act, 1984; Competition Act, 1998; Financial Intelligence Centre Act, 2001; Securities Services Act, 2004; or Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004.

15 FINANCIAL ASSISTANCE AND BORROWING POWERS OF THE COMPANY AND COMPANY'S SUBSIDIARIES

15.1 Financial Assistance

15.1.1 The Company is prohibited from and shall not have the power to –

15.1.1.1 authorise the provision by the Company of Financial Assistance to any person for the purpose of, or in connection with, the subscription of any option, or any Shares, issued or to be issued by the Company or a Related Person or Inter-Related company, or for the purchase of any Shares of the Company or a Related or Inter-Related company;

15.1.1.2 provide any direct or indirect Financial Assistance to a Related or Inter-Related company or corporation, or to a member of a Related or Inter-Related corporation or to a person Related to any such company, corporation, or member,

15.1.1.2.1 except, in each case, where –

15.1.1.2.2 the Shareholder has approved such Financial Assistance, either for the specific recipient or generally for a category of potential recipients (and the specific recipient falls within that category), by Special Resolution adopted within the previous two years; provided that where the Shareholder is requested to approve the provision of specific Financial Assistance, the Board shall, at the request of the Shareholder, provide such information to the Shareholder as the Shareholder may require, to satisfy the Shareholder that the conditions set out in clauses 15.1.1.2.3, 15.1.1.2.4 and 15.1.1.2.5 below have been met, or will be met; and

15.1.1.2.3 the provisions of the PFMA have been met; and

15.1.1.2.4 the provisions of section 44 and/or 45 (as the case may be) of the Companies Act have been met; and

15.1.1.2.5 the Board is satisfied that –

15.1.1.2.5.1 immediately after providing the Financial Assistance, the Company would satisfy the solvency and liquidity test prescribed in section 4 of the Companies Act; and

15.1.1.2.5.2 the terms under which the Financial Assistance is proposed to be given are fair and reasonable to the Company.

15.1.2 The Company shall be prohibited from providing any direct or indirect Financial Assistance to any Director or Prescribed Officer of the Company or to a person Related or Inter-Related to any such Director or Prescribed Officer save in respect of any Financial Assistance which has been approved in terms of section 45 of the Companies Act and in terms of clause 15.1.1.2 above and contemplated in accordance with the terms of employment applicable to Prescribed Officers, subject always to the provisions of section 45 of the Companies Act.

15.2 Board's power to effect borrowing

Subject to the provisions of the PFMA (and, in particular, section 66 of the PFMA), the Board may raise or borrow funds from time to time for the purposes of the Company, or secure the payment, of such sums as is in accordance with its Corporate Plan and the borrowing programme submitted to the Shareholder, unless otherwise determined by the Shareholder subject to clause 3.22 of this MOI.

15.3 Company's power to issue guarantees, indemnities, security or to enter into other transactions that bind the Company to any future financial commitment

The Company may not –

15.3.1 issue a guarantee, indemnity or security; or

15.3.2 enter into any other transactions that bind, or may bind, the Company or the Revenue Fund to any future financial commitment,

unless the provisions of the PFMA, in particular, section 66 thereof, are complied with.

15.4 Financing and funding structures

The Board shall, in accordance with the PFMA and the Enabling Legislation, consider and determine the funding structures of the Company having regard to the funding requirements of the Company from time to time.

16 PERSONAL FINANCIAL INTEREST AND DECLARATION BY DIRECTORS

16.1 For purposes of this clause 16, "Director" includes a Prescribed Officer and a person who is a member of a committee of the Board, irrespective of whether or not the person is also a member of the Board.

16.2 The Company shall establish a policy that will deal with Personal Financial Interests and conflicts of interest of Directors and employees of the Company, which shall be consistent with the provisions of the Companies Act and the PFMA.

16.3 If a Director has a Personal Financial Interest or Knows that a Person Related to the Director, as described in section 2 of the Companies Act, has a Personal Financial Interest in respect of any matter to be considered by the Board, the Director: -

16.3.1 must disclose the interest and its general nature in Writing before the matter is considered at the meeting;

16.3.2 must disclose to the meeting any Material information relating to the matter, and that is known to the Director;

16.3.3 may disclose any observations or pertinent insights relating to the matter if requested to do so by the other Directors;

16.3.4 if Present at the meeting of the Board, must leave the meeting immediately after making any disclosure contemplated in clause 16.3.2 or 16.3.3 above;

16.3.5 must not take part in the consideration of the matter, except to the extent of the disclosures contemplated in clauses 16.3.2 or 16.3.3 above;

16.3.6 while absent from the meeting as provided in clause 16.3.4 above: -

16.3.6.1 shall be regarded as being Present at the meeting for the purpose of determining whether sufficient Directors are Present to constitute a quorum of the meeting;

16.3.6.2 shall not be regarded as being Present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted; and

16.3.7 must not execute any document on behalf of the Company in relation to the matter unless specifically requested or directed to do so by the Board.

16.4 If a Director of the Company acquires, or Knows that a Related Person has acquired, a Personal Financial Interest in an agreement or other matter in which the Company has a Material interest, after the agreement or other matter has been approved by the Company, the Director shall promptly disclose to the Board, the nature and extent of that interest, and the Material circumstances relating to the Director or Related Person's acquisition of that interest, as the case may be.

16.5 If, in the reasonable view of the other non-conflicted Directors, a Director or the Related Person in respect of such Director, has a Material interest in the matter to be considered at the meeting of the Board, the Director shall only be entitled to such information concerning the matter to be considered at the meeting of the Board as shall be necessary to enable the Director to identify that such Personal Financial Interest exists or continues to exist.

16.6 A decision by the Board, or a transaction or agreement approved by the Board, is valid despite any Personal Financial Interest of a Director or Person related to the Director, only if: -

16.6.1 it was approved following disclosure of that interest in the manner contemplated in section 75 of the Companies Act; or

16.6.2 despite having been approved without disclosure of that Personal Financial Interest, it

16.6.2.1 has subsequently been ratified by an Ordinary Resolution of the Shareholder following disclosure of that Personal Financial Interest; or

16.6.2.2 has been declared to be valid by the court in terms of section 75(8) of the Companies Act.

16.7 A Director may at any time disclose any general Personal Financial Interest in advance by delivering a Written notice to the Board setting out the nature and extent of that interest for the purposes of this clause 16 until changed or withdrawn by such Director in Writing.

16.8 A court, on application by any interested Person, may declare valid a transaction or agreement that had been approved by the Board, or Shareholder as the case may be, despite the failure of the Director to satisfy the requirements of this clause 16 and section 75 of the Companies Act.

16.9 The provisions of this clause 16 do not derogate from those Directors' duties prescribed by the PFMA and the Directors shall be required to comply both with the provisions of this clause 16 and the provisions of the PFMA.

17 INDEMNIFICATION AND DIRECTORS' INSURANCE

17.1 For the purposes of this clause 17, "Director" includes a former Director, a Prescribed Officer, a person who is a member of a committee of the Board or of the audit committee of the Company, irrespective of whether or not the person is also a member of the Board.

17.2 Subject to the provisions of the PFMA, the Company may –

17.2.1 not directly or indirectly pay any fine that may be imposed on a Director, or on a Director of a Related company, as a consequence of that Director having been convicted of an offence in terms of any national legislation unless the conviction is based on strict liability;

17.2.2 advance expenses to a Director to defend litigation in any proceedings arising out of the Director's service to the Company. For purposes of this clause 17, "service to the Company" includes services which are directly linked to the activities of the Company, and services which the Company consents to or acknowledges; and

17.2.3 directly or indirectly indemnify a Director for –

17.2.3.1 any liability, other than in respect of –

17.2.3.1.1 any liability arising in terms of section 77(3)(a), (b) or (c) of the Companies Act or sections 86(2) or (3) of the PFMA, or from wilful misconduct or wilful breach of trust on the part of the Director; or

17.2.3.1.2 any fine contemplated in clause 17.2.1 above;

17.2.3.2 any expenses contemplated in clause 17.2.2 above, irrespective of whether it has advanced those expenses, if the proceedings –

17.2.3.2.1 are abandoned or exculpate the Director; or

17.2.3.2.2 arise in respect of any other liability for which the Company may indemnify the Director in terms of clause 17.2.3.1 above.

17.3 Subject to the provisions of the PFMA, the Company may purchase insurance to protect –

17.3.1 a Director against any liability or expenses contemplated in clause 17.2.2 or 17.2.3 above; or

17.3.2 the Company against any contingency including but not limited to –

17.3.2.1 any expenses –

17.3.2.1.1 that the Company is permitted to advance in accordance with clause 17.2.2 above; or

17.3.2.1.2 for which the Company is permitted to indemnify a Director in accordance with clause 17.2.3.2 above; or

17.3.2.2 any liability for which the Company is permitted to indemnify a Director in accordance with clause 17.2.3.1 above.

17.4 The Company is entitled to claim restitution from a Director or of a Related company for any money paid directly or indirectly by the Company to or on behalf of that Director in any manner inconsistent with section 78 of the Companies Act.

18 AUDITORS

18.1 Subject to clause 18.2 of this MOI, Auditors shall be appointed, and their duties regulated in accordance with the provisions of sections 90, 91, 92 and 93 of the Companies Act, the Auditing Profession Act and applicable provisions of the Public Audit Act.

18.2 The Company shall not be required to appoint an Auditor for any Financial Year in respect of which the Auditor-General has elected, in terms of the Public Audit Act, to conduct an Audit of the Company.

18.3 Subject to the provisions of the Companies Act, the Auditing Profession Act and the Public Audit Act, all acts done by any Person acting as Auditor, shall, as regard to all Persons dealing in good faith with the Company, be valid notwithstanding that there was some defect in that appointment.

18.4 Nothing precludes the election by the Company at its Annual General Meeting of an Auditor other than one nominated by the audit committee referred to in clause 19 below, but if such an Auditor is elected, the appointment is valid only if the audit committee is satisfied that the proposed Auditor is independent of the Company.

18.5 In considering whether, for the purposes of the Companies Act, a Registered Auditor is independent of the Company, the audit committee must –

18.5.1 ascertain that the Auditor does not receive any direct or indirect remuneration or other benefit from the Company, except –

18.5.1.1 as Auditor; or

18.5.1.2 for rendering other services to the Company, to the extent permitted in terms of the Companies Act;

18.5.2 consider whether the Auditor's independence may have been prejudiced –

18.5.2.1 as a result of any previous appointment as Auditor; or

18.5.2.2 having regard to the extent of any consultancy, advisory or other work undertaken by the Auditor for the Company; and

18.5.3 consider compliance with other criteria relating to independence or conflict of interest as prescribed by the Independent Regulatory Board for Auditors established by the Auditing Profession Act,

18.6 in relation to the Company, and if the Company is a member of a Group of Companies, any other company within that Group of Companies.

19 AUDIT COMMITTEE

19.1 In terms of section 94 of the Companies Act, the Board shall propose, and the Shareholder shall appoint, an audit committee. In the event that the Shareholder elects not to appoint any person proposed by the Board to the audit committee, the Board shall propose an alternate person for appointment by the Shareholder.

19.2 The audit committee shall comprise at least 3 (three) members, all of whom shall, subject to clauses 19.5 and 19.6 below, be non-executive Directors of the Company and whose appointment shall comply with (i) section 77 of the PFMA read with the Treasury Regulations; and (ii) to the extent that the provisions of section 94(5) of the Companies Act and Regulation 42 do not conflict with section 77 of the PFMA read with the Treasury Regulations, section 94(5) of the Companies Act and Regulation 42.

19.3 The audit committee shall meet at least 4 (four) times in a year to execute its duties.

19.4 The Board shall, subject to clause 19.5 below, propose a chairperson for the audit committee, for approval by the Shareholder at the Annual General Meeting.

19.5 In accordance with the Treasury Regulations the chairperson of the audit committee shall be independent, be knowledgeable of the status of the position, have the requisite business, financial and leadership skills and may not be the chairperson of the Board or a person who fulfils an executive function in the Company.

19.6 Each member of the audit committee must –

19.7 satisfy any applicable requirements prescribed by the Minister of Trade and Industry from time to time in terms of section 94(5) of the Companies Act.

19.7.1 not be –

19.7.1.1 involved in the day-to-day management of the Company's business or have been so involved at any time during the previous Financial Year;

19.7.1.2 a Prescribed Officer, or full-time employee, of the Company or another Related or Inter-Related Person, or have been such an Officer or employee at any time during the previous 3 (three) Financial Years; or

19.7.1.3 a Material supplier or customer of the Company, such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that Director is compromised by that relationship; and

19.7.2 not be a Related Person to any person who falls within the criteria in clauses 19.7.1.1 to 19.7.1.3 above.

19.8 The Board must appoint a person to fill any vacancy on the audit committee within 40 (forty) Business Days after the vacancy arises.

19.9 The audit committee shall execute all the functions as may be prescribed from time to time by the Companies Act (as read with the Regulations) and the PFMA (as read with the Treasury Regulations).

19.10 The Company may determine that its audit committee will perform the functions required by section 94 of the Companies Act on behalf its Subsidiaries.

19.11 The Company must pay all expenses reasonably incurred by its audit committee, including, if the audit committee considers it appropriate, the fees of any consultant or specialist engaged by the audit committee to assist it in the performance of its functions.

19.12 No person shall be elected as a member of the audit committee, if s/he is Ineligible or Disqualified and any such election shall be a nullity. A person who is Ineligible or Disqualified must not consent to be elected as a member of the audit committee nor act as a member of the audit committee. A person placed under probation by a court must not serve as a member of the audit committee unless the order of court so permits.

20 SOCIAL AND ETHICS COMMITTEE

20.1 In terms of section 72 (4) of the Companies Act, the Board must appoint a social and ethics committee unless it has been exempted in terms of the Companies Act from having to have a social and ethics committee.

20.2 The Company may determine that its social and ethics committee will perform the functions required by Regulation 43 on behalf of its Subsidiaries.

20.3 The social and ethics committee shall comprise at least 3 (three) members, all of whom shall be Directors of the Company, at least 1 (one) of whom must be a Director who is not involved in the day-to-day management of the Company's business, and must not have been so involved within the previous 3 (three) Financial Years and whose appointment shall be in compliance with the Companies Act and any regulations published thereunder.

20.4 The social and ethics committee shall meet at least once a year to deal with and attend to all functions and matters that are required to be dealt with by the committee in terms of the Companies Act and any regulations published thereunder.

20.5 The social and ethics committee shall execute all the functions as may be prescribed from time to time by the Companies Act (as read with the Regulations) and the PFMA (as read with the Treasury Regulations).

20.6 The social and ethics committee of the Company is entitled to –

20.6.1 require from any Director or Prescribed Officer any information or explanation necessary for the performance of the committee's functions;

20.6.2 request from any employee of the Company any information or explanation necessary for the performance of the committee's functions;

20.6.3 attend any Shareholder's Meeting;

20.6.4 receive all notices of and other communications relating to any Shareholder's Meeting; and

20.6.5 be heard at any Shareholder's Meeting on any part of the business of the meeting that concerns the committee's functions.

20.7 The Company must pay all the expenses reasonably incurred by its social and ethics committee, including, if the social and ethics committee considers it appropriate, the costs or the fees of any consultant or specialist engaged by the social and ethics committee in the performance of its functions.

21 BOARD COMMITTEES

21.1 Other than the statutory committees of the Audit Committee and the Social and Ethics Committee the Board may, in terms of section 72 of the Companies Act, establish Standing Committees and Ad Hoc Committees.

21.2 The Minister takes cognisance of the Standing Committees established by the Board as set out in clause 21.4 below, however should the Board wish to establish new Standing Committees, such committees may only be established with the prior Written consent of the Minister.

21.3 Furthermore, in the application by the Board to the Minister of a new Standing Committee, the Board must submit Written terms of reference including *inter alia* the need for such a committee, the functions of the committee and any other information required by the Minister. The number of Directors appointed to serve on the committee will be at the discretion of the Minister.

21.4 Standing Committees at date of this MOI (in addition to those required by the Companies Act) include: -

21.4.1 People & Governance committee;

21.4.2 Tender committee;

21.4.3 Investment and Finance committee; and

21.4.4 Risk Committee

21.5 No person shall be appointed as a member of a Board committee, if s/he is Ineligible or Disqualified and any such appointment shall be a nullity. A person who is Ineligible or Disqualified must not consent to be appointed as a member of a Board committee nor act as such a member. A person placed under probation by a court must not serve as a member of a Board committee unless the order of court so permits.

21.6 Meetings of a committee of the Board shall be governed by the provisions of this MOI regulating the meetings and proceedings of Directors.

22 PRESCRIBED OFFICERS

22.1 No person shall hold office as a Prescribed Officer, if s/he is Ineligible or Disqualified. A person who is Ineligible or Disqualified must not consent to be appointed to an office or undertake any functions which would result in her/him being a Prescribed Officer nor act in such office nor undertake any such functions. A person placed under probation by a court must not consent to be appointed to an office or undertake any functions which would result in her/him being a Prescribed Officer nor act in such office nor undertake any such functions unless the order of court so permits.

22.2 A Prescribed Officer shall cease to hold office as such immediately s/he becomes Ineligible or Disqualified in terms of the Companies Act.

23 COMPANY SECRETARY

23.1 The Board must appoint the company secretary from time to time, who –

23.1.1 shall be a permanent resident of the Republic and remain so while serving as company secretary; and

23.1.2 shall have the requisite knowledge of, or experience in, relevant laws; and

23.1.3 may be a Juristic Person subject to the following: -

23.1.3.1 every employee of that Juristic Person who provides company secretary services, or partner and employee of that partnership, as the case may be, is not Ineligible or Disqualified;

23.1.3.2 at least 1 (one) employee of that Juristic Person, or one partner or employee of that partnership, as the case may be, satisfies the requirements in clauses 23.1.1 and 23.1.2 above.

23.2 The company secretary shall not be a Director.

23.3 Within 60 (sixty) Business Days after a vacancy arises in the office of company secretary, the Board must fill the vacancy by appointing a Person whom the Board considers to have the requisite knowledge and experience. A change in the membership of a Juristic Person or partnership that holds office as company secretary does not constitute a vacancy in the office of company secretary, if the Juristic Person or partnership continues to satisfy the requirements of clause 23.1.3 above.

23.4 If at any time a Juristic Person or partnership holds office as company secretary of the Company –

23.4.1 the Juristic Person or partnership must immediately notify the Board if the Juristic Person or partnership no longer satisfies the requirements of clause 23.1.3 above, and is regarded to have resigned as company secretary upon giving that notice to the Company;

23.4.2 the Company is entitled to assume that the Juristic Person or partnership satisfies the requirements of clause 23.1.3 above, until the Company has received a notice contemplated in clause 23.4.1 above; and

23.4.3 any action taken by the Juristic Person or partnership in performance of its functions as company secretary is not invalidated merely because the Juristic Person or partnership had ceased to satisfy the requirements of clause 23.1.3 above at the time of that action.

23.5 The company secretary may resign from office by giving the Company 1 (one) month's Written notice or less than that with the prior Written approval of the Board.

23.6 If the company secretary is removed from office by the Board, the company secretary may, by giving Written notice to that effect to the Company by not later than the end of the Financial Year in which the removal took place, require the Company to include a statement in its annual Financial Statements relating to that Financial Year, not exceeding a reasonable length, setting out the company secretary's contention as to the circumstances that resulted in the removal. The Company must include this statement in the Directors' report in its annual Financial Statements.

24 DISTRIBUTIONS TO THE SHAREHOLDER

24.1 The Board may make Distributions to the Shareholder from time to time in accordance with the Enabling Legislation and the Distributions or similar policy of the Company from time to time, subject to the provisions of clauses 13.1.1.10 and 24 of this MOI, the provisions of section 46 of the Companies Act and any applicable provisions of the PFMA

24.2 The Board, after Consultation with the Shareholder, shall develop an appropriate Distribution or similar policy and framework for the Company taking into account, *inter alia*, the Corporate Plan and strategic objectives which shall be reviewed on a regular basis. In addition, the Company shall be entitled to invest sufficient funds of the Company for the adequate capitalisation and on-going investment in Subsidiaries deemed appropriate. Such capitalisation or investment, and expenditure incurred in respect of industry restructuring, delivery of universal services or any other socio-economic activities carried out by the Company upon the request of the Shareholder shall be taken into account in calculating any Distribution and other payments payable to the Shareholder.

24.3 Without derogating from the provisions of clause 24.1 above and subject to the requirements of the Companies Act and clause 13.1.1.10 of this MOI, the Board may resolve to Distribute or deal with, in any way authorised by the Companies Act, all or any part of the amount for the time being standing to the credit of any of the Company's reserves or any share capital of the Company.

25 ACCOUNTS

25.1 The Board shall cause to be kept such Accounting Records and books of account as are prescribed by the Companies Act and the PFMA.

25.2 The Financial Statements, books of account and other books and documents of the Company shall be kept at, or be accessible from, the Office of the Company or (subject to the provisions of section 25 of the Companies Act, and the PFMA) at such other place as the Board thinks fit, and shall be open to inspection by the Shareholder and the Board during normal business hours.

25.3 The Board shall, in accordance with sections 30 and 31 of the Companies Act and section 55 of the PFMA, cause to be prepared and presented at the Company's Annual General Meeting such reports as are referred to in those sections and required in terms of this MOI.

25.4 Subject to the provisions of the Companies Act, a copy of the documents referred to in clause 25.3 above shall be Delivered or sent by post to the registered address of the Shareholder at least 15 (fifteen) Business Days before the Annual General Meeting, so that such period shall not include the day on which such documents are Delivered or sent, or deemed to be Delivered or sent, or the day on which the meeting is to be held. Alternatively, the Shareholder may give the Company an Electronic Address in which case a copy of the said documents may be Delivered to the Shareholder at that address.

26 NOTICES

26.1 Notices and documents required to be published as contemplated in sections 15(3)(a) or 17(1)(a) of the Companies Act shall be Delivered by the Company to the Shareholder by hand delivery to the registered address of the Shareholder or by transmission through the post in a prepaid letter, by telefax or any Electronic Communication addressed to the Shareholder at its registered address or Electronic Address (as the case may be).

26.2 The Shareholder chooses the address of the permanent office of the Shareholder in Pretoria as its registered address or such other address (including an Electronic Address) as the Shareholder shall upon Written notice be entitled to change.

26.3 The Shareholder after having furnished an Electronic Address to the Company, by doing so-

26.3.1 authorises the Company to use Electronic Communication to give notices, documents, Records or statements or notices of availability of the aforegoing to it; and

26.3.2 confirms that same can conveniently be printed by the Shareholder within a reasonable time and at a reasonable cost.

26.4 Every notice calling any general meeting shall comply with the provisions of the Companies Act unless otherwise determined by the Board.

27 FINANCIAL YEAR

The Financial Year of the Company is the 12 (twelve) Month period ending on 31 March of each year. The Financial Year may not be changed by the Board without the prior Written consent or approval of the Shareholder and subject to the PFMA and the requirements of section 27(4) of the Companies Act.

28 WINDING UP

Subject to the provisions of the Companies Act, the Company shall not be wound up or be placed into "business rescue" as contemplated in the Companies Act without the prior Written consent of the Shareholder.

29 SUBSIDIARIES

The Company may, from time to time, form or acquire further Subsidiaries, subject to the provisions of this MOI, the PFMA and the Enabling Legislation.

30 PROTECTION OF WHISTLE-BLOWERS

The Company shall establish and maintain a system to receive disclosures contemplated in section 159 of the Companies Act.