

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

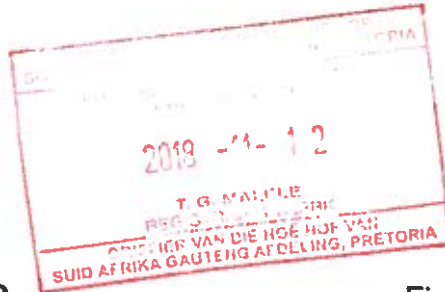
CASE NO:

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

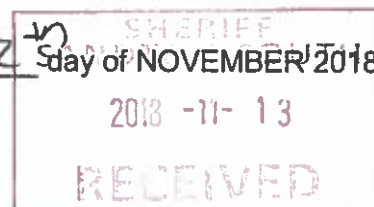
MINISTER OF PUBLIC ENTERPRISES

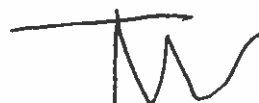
Seventh Respondent

**INDEX
VOLUME 2**

	Volume 2:	
1	"DL2" : Supporting affidavit of Suzanne Margarete Daniels	112 - 268

DATED at Johannesburg on this 12th day of **NOVEMBER 2018**





WEBBER WENTZEL

Applicant's Attorneys

90 Rivonia Road

Sandton

2196

Tel: (011) 530 5867

Fax: (011) 530 6867

Email: moray.hathorn@webberwentzel.com

Ref: M Hathorn / T Phala

3025088

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

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MINISTER OF PUBLIC ENTERPRISES

Seventh Respondent

SUPPORTING AFFIDAVIT OF SUZANNE MARGARET DANIELS

I, the undersigned,

SUZANNE MARGARET DANIELS

state under oath that:

- 1 I am an adult female. I am the former Group Executive: Legal and Compliance and former Group Company Secretary, at points in time

RH 8

[Handwritten signatures]

relevant to this application, at Eskom Holdings SOC Ltd with its registered office at 1 Maxwell Drive, Sunninghill, Sandton, Johannesburg.

- 2 The facts and allegations contained herein are, save where the contrary is indicated by the context, all within my personal knowledge and are, to the best of my belief, true and correct.
- 3 I have read the affidavit of David Lewis ("**Lewis**") of Corruption Watch and, as it pertains to me and my recollection and experience of the events, control, management, operations and administration of Eskom as referred to in that affidavit, I confirm what is set out therein.
- 4 That affidavit further sets out additional facts in support of this application, of which I have personal knowledge and regarding which I have provided documentary evidence to the Applicant, and to be of assistance to the Court. I have also done so as a whistleblower making protected disclosures in the public interest, having testified in Parliament and placed into the public domain details of the failure of corporate governance at Eskom by the respondent Directors.

CAREER AT ESKOM

- 5 I was employed at Eskom for more than twelve years.

5.1. I began my career at Eskom on 1 May 2006 as a Chief Legal Adviser in Generation Primary Energy, Contracts Section.

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- 5.2. I was appointed Group Company Secretary on 1 October 2015 and held this position until 27 July 2017 when I resigned as Group Company Secretary. With effect from 1 September 2016, I was requested to accept the role of Acting Head of Legal and Compliance. I thus fulfilled a dual function of Group Company Secretary and Acting Head of Legal and Compliance for the period 1 September 2016 until 27 July 2017.
- 5.3. I was suspended from Eskom on 6 October 2017. My suspension was the subject matter of arbitration before the Commission for Conciliation Mediation and Arbitration ("CCMA"). On 8 March 2018, the CCMA found that the decision to suspend me was an unfair labour practice and ordered Eskom to uplift the suspension with immediate effect, and to take me back into its employ with effect from 19 March 2018.
- 5.4. On 12 March 2018 I was suspended from Eskom on different charges and pending a disciplinary hearing.
- 5.5. On 20 July 2018 I was found guilty and dismissed from Eskom. I took the ruling on review at the CCMA, which was referred to the Labour Court where it is currently pending.
- 6 I have decided to support this application since I believe that it is in the public interest that those individuals most responsible for the events set out in Lewis' affidavit should be held accountable for their actions, and prevented from repeating their misconduct at other companies, particularly at State Owned Enterprises.

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- 7 I hope that my support of this application will ensure this accountability and serve as a small part in the rebuilding of corporate governance, executive oversight and management at Eskom.
- 8 Attached hereto as Annexures "SD1", "SD2" and "SD3" is a transcript of my evidence before the Portfolio Committee on Public Enterprises during its Inquiry into Eskom, Transet and Denel on 8 November 2017, as well as two affidavits I submitted to the Committee. These provide additional factual evidence underpinning the relief sought in this application.

Deon Daniels

Deponent

I hereby certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at ...LOS ANGELES..... on this the 08th 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.

Pamela Nthabiseng Matlala
 COMMISSIONER OF OATHS
 FULL NAMES: PAMELA NTHABISENG MATLALA
 ADDRESS: LOS ANGELES, CALIFORNIA USA
 EX OFFICIO: VICE-CONSUL
 SOUTH AFRICAN CONSULATE GENERAL
 6300 Wilshire Blvd • Suite 600 • Los Angeles, CA 90048

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[illegible]

COMMISSIONER OF OATHS: EX OFFICIO
KOMMISSARIS VAN EDE: EX OFFICIO
DEPARTMENT OF FOREIGN AFFAIRS
DEPARTEMENT VAN BUITENLANDSE ZAKE



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CERTIFICATE OF AUTHENTICATION

I, the undersigned, PAMELA NTHABISENG MATLALA, of the South African Consulate-General in Los Angeles, do hereby certify that

SUZANNE MARGARET DANIELS
(South African No: [REDACTED])

of whose identity I have satisfied myself has this day, 08 November 2018, signed the attached document in my presence.

The document has been united and sealed with the official seal of this Consulate-General.

Vice-Consul
South African Consulate-General
in Los Angeles



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Eskom Inquiry: Tsholofelo Molefe; Suzanne Daniels

Public Enterprises

08 November 2017

Chairperson: Ms L Mnganga-Gcabashe (ANC)

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Meeting Summary

Documents Handed Out: Submission prepared by: Tsholofelo Molefe [awaited]

The Committee heard from its first witness for the day, Tsholofelo Molefe, who was the former Director of Finance at Eskom. She was suspended by the board of Eskom in 2014 along with three other executives. The evidence leader took the Committee through the testimony of Ms Molefe in relation to her working relations at Eskom during her tenure, challenges at Eskom during her tenure, her role in procurement and refusing to sign contracts and how she new Mr Salim Essa – a known Gupta associate.

The Committee then questioned Ms Molefe on unscrupulous communication between executives and the board and tension amongst the board itself, her suspension and if she was fighting it in any way such as reaching out to the Minister, value for money from certain contracts and whether she had any contact with members of the Gupta or Zuma families.

Members were concerned by the fact that there were clearly greater issues at play than just the suspensions, the culture of not adhering to correct corporate management and the rapid change in the board. They questioned Ms Molefe on The New Age breakfast deal, vetting procedures linked to procurement, learners passing trade tests at Eskom but then not being absorbed despite promises made by the utility to do so and diesel contracts.

There was also discussion on the steam generation project, financial challenges at Eskom during the tenure of the witness, cost escalation at Medupi, robustness of the financial sustainability plan, serious problems of compliance to the Public Finance Management Act and core business being neglected for “managing procurement”.

The Committee then heard from Ms Suzanne Daniels, former Company Secretary and now suspended Eskom Head of Legal. The evidence leader for the Committee asked Ms Daniels to inform the Committee of the purchase and sale of rights to Optimum Coal Holding by Tegeta – Ms Daniels provided evidence on the prepayment, an urgent meeting called by the board tender committee the night of 11 April 2016, the guarantee and the fine levied against Glencore. The Committee also heard about Ms Daniels concerns in this case, what she was aware of, delegation of authority and if the decisions taken had legal basis. Also discussed were monies paid to Trillian, the concept of Others Peoples Money at plan and conflicted board members.

Ms Daniels then took the Committee through the pension payout to Mr Brian Molefe and the circumstances around this in relation to governance failures, board resolutions, proposals to the Minister and amendment of the rules pertaining to the pension payout by the people and governance committee of the board.

The evidence leader then guided Ms Daniels testimony of the relationship between Eskom, Trillian and McKinsey, namely, the payment made to Trillian where no work was rendered, the fact that there was no contract between Trillian and Eskom, the message this sent to the poorest of the poor South Africans and action taken by the board and Minister against the “brazen theft”, to use the words of the witness.

Ms Daniels was took the Committee through her thoughts on the disciplinary process against Mr Koko, circumstances surrounding her suspension and her meetings with members of the Gupta family.

The Committee was blown away and outraged by the testimony of Ms Daniels. It asked if she reported what happened to any state agencies, if the Department of Public Enterprises requested her to implement any unscrupulous activity, if there were any threats against her and why the Guptas were present at a meeting discussing Mr Molefe – Members were incensed and asked why Ms Daniels did not question what Ajay Gupta was doing there and why she did not tell them to get lost.

Members questioned if Ms Daniels advised the board on the irregularity of Mr Molefe's early retirement, if the Minister knew about this pension payout and the Eskom-Trillian relationship, her opinion on the different version relating to the pension of Mr Molefe and the process of prepayment to suppliers. Further discussion was had on the favouring of Tegeta, Ms Daniels role in flouting the law (because Members felt as Company Secretary part of her job was to ensure the board was compliant with legal prescripts), why she should be believed when she was part of the meeting where the Eskom board tried to convince Members the pension payout to Mr Molefe was in order and reasons for her suspension.

Ms Daniels was asked how Mr Koko escaped suspension, the relationship between Mr Koko and the current chair of the board, if the board was influenced by the Guptas, if Mr Khoza was a Gupta conduit and the fact that the name of Mr Gouden weaved through the testimony of Ms Daniels – this called into question integrity of board members and whether they could be declared delinquent

directors. Members also wanted to know which issues were discussed in the report Ms Daniels prepared for the Minister. It was recommended the Committee write to the office of the Gauteng Judge President to inform him of the Committee's discussions today and that he was aware of the abuse relating to state capture.

119

Meeting report

The Chairperson read the oath to Ms Tsholofelo Molefe, who was the former Director of Finance at Eskom.

Ms Molefe took the oath.

Adv Ntuthuzelo Vanara led the evidence collection.

Witness: Ms Tsholofelo Molefe

Adv. Vanara: Can you just give the Committee a brief background of your academic and working experience.

Ms Molefe: I am a chartered accountant by profession. I started my articles with Coopers and Lybrand having completed a BA in Accounting and Finance in the United Kingdom through the British Council's scholarship. I then went through to complete the qualifying examination of the accounting board which qualified me to become a chartered accountant. Following my articles, I then moved to IBM as an internal auditor for three years. I then moved to Liberty Group, as a senior internal auditor, I then joined ABSA, before the Barclays' merger, in 2001 as a senior manager in audit and risk management. I then moved to FNB as a CEO in the personal banking segment for a very short while after which I joined Eskom in 2005 as a financial manager in the transmission division. I then moved to become a general manager of finance and business services in the same division for five years after which I was appointed as the head of customer services for the Eskom Group. I was then appointed as a finance director in Eskom in January 2014. So, I spent three years as head of customer services, two and half to three years in customer services, and then I moved over to being the finance director of the company.

Adv Vanara: We are going to focus this discussion on your role as the finance director. By virtue of your position, you became an executive director serving at board – is that correct?

Ms Molefe: That's correct

Adv Vanara: Can you just explain to the Committee, after you became the finance director, who was the Group Chief Executive that you served under?

Ms Molefe: When I was appointed in January 2014, Mr Brian Dames was still the CEO. He then resigned from the company and left in March 2014 after which an interim CEO was appointed, Mr Collin Matjila, for six months, effective 1st of October 2014. Mr Tshediso Matona was then appointed as the CEO of the company until both of us were suspended from the company in March 2015.

Adv Vanara: Can you share your working relations with the then acting Group Chief Executive, Mr Matjila.

Ms Molefe: I had known Mr Matjila for several years before he was the acting CEO because he had been a member of the board of the company but, in addition to that, he was also chairperson of the board tender committee and, obviously with me being appointed the financial director of the company, I was also chairing the EXCO procurement of the company so therefore I had several engagements with him in preparation for the board tender committees on various occasions so my relationship with him was about discussing what would be presented before the board tender committee, on recommendation from the EXCO procurement committees, and therefore I continued the relationship with him going forward. I think suffice to say that during that time, when I was the procurement chairperson and he was the board tender chairperson, the relationship was fair, really, there were no issues when he became the acting CEO, to my knowledge.

Adv Vanara: When you became a member of the board, the non-executive director, who was the chair of the board?

Ms Molefe: The chairperson of the board was Zola Tsotsi.

Adv Vanara: We heard yesterday, amongst challenges that Eskom faced in and around 2014, related to the financial position of the company and you were appointed in the midst of that challenge – what was your responsibility?

Ms Molefe: My responsibility obviously, having taken over from the predecessors because the issues of the company's financial challenges had been ongoing since we had obviously applied for a tariff application and we received lower than what we had anticipated and the operational challenges were becoming more and more and therefore because of that we had some financial issues we had to deal with, so my first, obviously my first initiative was to make sure that we put in place a long term sustainability plan in place, present it to the board strategy session, which took place around April 2014, and then present it to the shareholder for consideration and it really contained issues around how do we make sure that as a company we got support from government, really indicating that the tariff increases that we had received were not sustainable, but secondly, that we had challenges from an operational perspective side which in themselves were creating some financial issues and I think it has been said publicly around issues of generation maintenance and so forth and we had to put in place, as a company, a programme that we called the business productivity programme for cost saving initiatives so that we were able to survive and make sure the company's sustainable. So we presented the plan to the board strategy session in April, under the chairmanship of Mr Zola Tsotsi, and the committee then obviously looked at the plan and there were concerns it was not adequate enough to get us out of trouble – in their view, from the chairman himself, said we need a more robust plan which we need to give to the Minister of Public Enterprises in three months time, which would have been around June 2014. I then, the chairman of the, well CEO, then requested we be allowed time to work together and

review our plan and we then had a meeting with him to discuss the way forward. He then requested that we should actually bring people in to come and help us with the financial sustainability plan and we then had a meeting over the weekend, because clearly it was urgent, there was no time to waste, so that we could then on Monday provide the chairman with a plan going forward. That in fact struck me was that in the meeting we had over the weekend, he suggested that we, he knows people that can come help us with our financial sustainability plan. In my questions around what sort of help would they give us, he indicated that they had done some work in Transnet, in SAA and, I think the City of Johannesburg or City Power, if I'm not mistaken, regarding balance sheet optimisation. We were sitting there and a gentleman joined us who I didn't know I had actually met him before and was introduced to me again and his name is Salim Essa and the question of how we then take the matter forward, in terms of the financial sustainability plan, was discussed. He, Salim was then asked to tell us which company would help us and he indicated that Regiments Capital would be the company that had done good work in Transnet, in SAA previously in terms of balance sheet optimisation. So I listened to obviously what would be the way forward. We were then asked to have a meeting with Regiments Capital as soon as possible, and having not met Regiments Capital before, we had worked with various financial services advisers even before my time, my predecessors, I had not heard of Regiments before, so we were open to everyone that comes to us and want to help. So, this was on a Sunday we met, a meeting was then convened for the following day to have a discussion with Regiments in terms of how they could help Eskom sort out the financial sustainability plan. In the meeting, Mr Eric Wood, who was the CEO of Regiments Capital, came to the meeting himself, I can't remember if he had anyone else, I think he had one other official with him. Representing Eskom was myself, Dr Steve Lennon, who had been asked by Collin Matjila to join us. We then had a meeting with them and really the purpose of the meeting was first to establish what does the company do, how do they think they can help us and do they understand the challenges that the company is facing and how big the balance sheet of Eskom is. We then asked them if they had done any work for Eskom previously and they did say they had previously worked on a Eurobond in 2005 with Goldman Sachs for Eskom which both myself and Steve Lennon were not aware of. We then asked them, given the size and magnitude of the Eskom balance sheet, do they think they have the capacity to be able to assist us. They then indicated that they do not normally work alone, they would actually partner with McKinsey in most of the contracts that they had done. We then, Mr Matjila then asked them to prepare a proposal for us which we could then consider and come back to us. After the meeting I then went to Steve Lennon to ask him what do you make of this, have you heard of these people, this company and he said no and we talked about the procurement process and I said no, we are going to have to follow procurement process and I will speak to Mr Matjila on that. I then went to Mr Matjila's office immediately and I said to him that we have to follow our procurement process, I do accept that we probably need a robust financial plan, if that's what the board requires, if that's what the Minister requires, however there are other financial services companies that have been lining up for work at Eskom and that we would have to follow a very fair and transparent process. He then in his response said to me that unfortunately we are not going to do that, we are going to go with Regiments Capital because Eskom is known to have appointed a financial services advisory in the past and whatever efforts has been put in place has not yielded results and he said to me that it is an emergency, as we heard from the board the board would like a plan presented to the Minister in a few months time. I said it is an emergency, we need to check the emergency procurement process of Eskom, it's clearly defined what an emergency is, I believe that it is an urgent matter however there are ways of taking it through a modernised procurement process so that it is fair and transparent. He then said I can see you're uncomfortable with this matter, if you're not comfortable I will sign the agreement with Regiments. And that was when my meeting with him stopped.

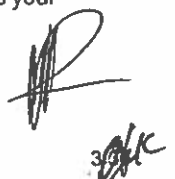
Adv Vanara: Who introduced you to Mr Salim Essa? Is it Mr Tsotsi or Mr Matjila?

Ms Molefe: I actually met, as I indicated, I met Mr Salim Essa, but at that time I didn't know who he was as well, very early after my appointment I was called by the Chief of Staff, I think yes, of the Minister at the time (Mr Malusi Gigaba), Mr Thamsanqa Msomi, where had had asked to speak to me having been appointed as the finance director of the company. He had indicated to me that there had been complaints previously about Eskom not transforming from a procurement perspective and that they hope that, obviously with me being appointed, I understand the transformational objectives of the company and Eskom as a state-owned entity needs to make sure that it accelerates transformation. I indicated to him that it's always been a strategy of the board that we will obviously drive transformation in the company and it has been the case for a while. He indicated to me that there are suppliers currently that are complaining that Eskom, black suppliers that are complaining that Eskom is not providing them with contracts and they would like to meet and just lay their complaints. I indicated to him that I no longer chair the procurement committee – we do have a Chief Procurement Officer and I believe that those issues should be directed there however I do not have issues dealing with people and directing them to the right levels. He then said to me that he would make arrangements for me to meet the suppliers that were complaining – when I met the supplier it was Salim Essa and when I asked him what company he works for he did not divulge the company, he said there are various companies that have been trying to do business with Eskom and they were turned back. He in fact complained about my predecessors that they always went for white companies and he said in their case they had seen results and they always work with McKinsey, that's what he said to me. So when I met him for the second time I was being introduced to him then by Collin Matjila, that's when I realised I have met him before.

Adv Vanara: The meeting in April of the board, which was not happy with your financial sustainability plan, where suggestion for an external service provider to assist you with the plan came about – had it ever served before the then Minister for his or her consideration?

Ms Molefe: It was, remember at that time we were going through a transition, we had, I think at that time Minister Lynne Brown was being appointed as the Minister of Public Enterprises but my predecessors had previously presented strategies to the board which then the board presented to the Minister of Public Enterprises which would have been Malusi Gigaba previously. So I guess the issue was the transition into the new Minister that the board needed to appraise him of what was happening in terms of what was happening from a financial sustainability but also what was happening with operational challenges as well.

Adv Vanara: So in your understanding, the individual, or individuals, were unhappy with your financial sustainability plan, was your board?



Ms Molefe: So the discussion was around is it robust enough, the chairman, Zola Tsotsi himself, said that he believes we need a more robust plan and the Minister is not going to be happy if we cannot provide that plan in three months time so we need to go back and look at what else needs to be done. There were rigorous debates in the board around what the challenges were and really think the board was trying to apply its mind as well because you had various other members of the board other than Mr Tsotsi and Mr Matjila. 121

Adv Vanara: What was urgent about procuring these services?

Ms Molefe: The issue that we were faced with, and it's really about the urgency of procuring the services, but we had been saying for a while that we had financial challenges, it was important for us to settle those issues because those issues had been going on for a while since the MYPD3, the tariff determination application of 2012/2013 so it was important for us that we have an engagement with government on how we move forward in terms of the funding requirements of the company. One of the challenges we had was that we are obviously highly geared as a company for us to be able to go out on to the market to see borrowing, we obviously need to have cost-reflective tariffs which would obviously back up our revenues so what was important was that, because we knew that we did not have very good financial matrix, we needed support from government to understand what are some of the options that we have – are we going to have equity or do we have additional guarantees from government so that we can go out to the market, is there any possibility of any additional tariff adjustment so that we could be able to meet the operational requirements. And of course we have quite a huge build programme which obviously was one of the reasons why we needed to make sure that we have the funding needed.

Adv Vanara: The Monday meeting you left each other where Regiments was supposed to furnish you guys with a proposal – what happens then?

Ms Molefe: They, after we left, they obviously said that we would put together a proposal on what it is they believe they can help us with. In my discussion with Collin I said if it's an emergency you have to tell them to give to us in less than five days and, however, what happened is that they came back to us within 14 days, if I remember very well, because of the things I raised when they sent their proposal, in fact they did not send the proposal, they sent a draft agreement of the, what the nature of the services they would provide is, what the pricing and the terms would be and that was sent within 14 days. I then went and I actually wrote an email to Mr Matjila because they sent me the agreement and I said to him that it is on this basis it does not constitute an emergency, they have taken 14 days. In terms of our procurement process, if I recall we could request suppliers or service providers to give us responses within 14 days on an urgent basis and therefore this did not constitute an emergency. He then, I sent him an email, and copied the head of legal then, and I said I suggest the legal head give us his opinion on how we move on this matter – I then forwarded the agreement to them. He then called me in the evening and reprimanded me for putting such messages on email and asked for a meeting. We then had a meeting the following day and he felt that he was not being supported, he had a mandate from the shareholder and the board, there were certain things that need to happen urgently and we don't have time to waste with our long-winded procurement processes and I said to him as the CEO, or acting CEO, of the company, he was within his every right to go back to the board and ask them to amend the delegation of authority if he felt that it was impeding on us to deliver on time. He then said that he would do no such thing. I then gave him the agreement. After I had given him the agreement, legal looked at it, legal did not make any major changes to it, they then printed it for signature. I then left it in his office for his signature as he indicated that he was going to sign the agreement. After I had done that I remembered I had a meeting with my team, a strategic session at our Eskom Academy of Learning, he called me and said to me I need to sign the agreement. I said to him I am not going to sign the agreement based on our previous discussions. If he feels we need to do this work, having not followed process, he has to sign the agreement. He then threatened to say he is going to bring a driver over to me so that I can sign the agreement – I said I will do no such thing. He asked me to put it in writing and give my reasons why I would not sign the agreement. I did that, I put it in writing, and what I did is that when I sent it back I sent it back to him as well as the chairman of the board as well as three other members of the committee of the board who were chairman's of subcommittee members – I think if I recall it would have been the chairman of the investment committee, it would have been the chairman of the social ethics and sustainability committee and I think the chairman of the audit committee. A couple of days later Mr Tsotsi then called a meeting based on the email I had sent wherein I provided why I was not comfortable signing the Regiments deal because we had not followed process and in the meeting I got support from other board members that because we had not followed process because when you looked at these agreement, the pricing terms was not competitive, it would appear that we should have followed process and although this is urgent for the Minister, it appeared we would not have defined clearly what the financial sustainability programme would constitute and would be part of the definition of an emergency. The chairman of the board, if I remember vividly, was actually not happy with me as well – he said that we are busy wasting time with long-winded procurement processes and heads are going to roll if the Minister does not receive the financial sustainability plan in June.

Adv Vanara: Just give us the name of the chair and the chairpersons of the various committees that served in the task team.

Ms Molefe: The chairman of the board was Mr Zola Tsotsi, the chairman of the investment committee, who served also as a member of the task team, was Mr Mafika Mkhwanazi, the chairman of social ethics and sustainability was Dr Boni Mehlomakulu and the chairman of the audit committee was Ms Bajabulile Luthuli.

Adv Vanara: As a finance director you must be familiar with the regulatory framework around procurement. Let me remind you, it is the Constitution, Section 217, it is the PFMA, Treasury regulations and the policies of an institution – is that correct?

Ms Molefe: That is correct.

Adv Vanara: In your testimony you have referred to both the then chairperson, Mr Tsotsi, and the then acting CEO, Mr Matjila, as people who have absolute disregard for the laws governing procurement processes – is that understanding correct?

Ms Molefe: I would say yes and one of the reasons for that is when I sought legal opinion from the head of legal, Ms Neo Lesela, on the specific matter, she actually quoted section 217 in the memo that we, that I had presented indicating what the requirements of section 217 are and under what circumstances could one be exempted from following section 217. That memo itself said, in my

memo I quoted his legal opinion and I sent it through to Mr Tsotsi, Mr Matjila and the three board members that I mentioned and because, having received that in writing, the chairman, Zola Tsotsi, indicated that we are wasting time with long-winded procurement processes, suggest to me that he had no regard of those procurement regulations. 122

Adv Vanara: The proposal that you got from Regiments, you said there was a fee structure, how much were they going to charge Eskom?

Ms Molefe: So maybe just to step back, in their proposed agreement, what they were proposing to do was a number of initiatives for the company in terms of how we unlock cash on the balance sheet, such as the sale of non-core assets, the sale and lease back as a possibility and how, one of the very big initiatives they had suggested was monetisation of coal contracts and they had made certain assumptions about what the value of the coal contracts that we have as Eskom was, they had made certain assumptions around what the expected tonnes of coal would be required over the next 50 years and therefore came to the conclusion that the present value of those contracts was really essentially undervalued and they believed that we could work with one of the financial services providers, through themselves, to actually seek funding through those contracts and we were opposed to that because, first of all, the contracts do not necessarily belong to Eskom, it's a contract between ourselves and coal miners – that's the first thing. The second thing is that we could not attest to the assumptions that they had made in terms of the price of coal, the current price of coal, and what the future price of coal would be and also what the volumes that Eskom would require in the future. When we looked at it with the primary energy department we felt that it did not make sense. They had suggested that out of that we would probably save the company R10 billion and their fee structure was on an escalating basis such that, even if they were able to, though it was a risk-based fee structure, they were quite confident that they would be able to save us R10 billion and the fees that they would obviously charge would be up to 250 basis points which, when we looked at it, was quite substantial and close to about R500 million if my calculation is correct.

Adv Vanara: I just want us to conclude on this agreement or this proposal, where does it end? What transpires of it? Do you eventually get to approve that they render this service and, if so, who authorises that you could enter into agreement with Regiments?

Ms Molefe: What we did is that in the end we did not, the board did not, authorise the agreement, after I had sent the memo to them. They however said that we need to do a high level desk top exercise to understand whether the initiatives they were presenting to us, that Regiments was presenting to us, were viable or not. So a high level desk top exercise was done on the basis that we had run out of time, the Minister was asking for a plan in a few weeks time and we had not even done that other than the plan that I had prepared with my finance team and therefore the board felt that we could probably do a high level desk top exercise which actually cost us about R800 000. I then insisted that the board should actually approve that based on the fact that we had not gone through a commercial process on the basis that if that's how the board felt, it's urgent, it's understandable, I still need a mandate in writing. So we then prepared the document and the board was happy to approve that on the basis that, let's do a high level desk top exercise and understand what are these initiatives because it could be that they are coming up with initiatives that we have not explored previously and could benefit us.

Adv Vanara: As a finance director, having done the desktop, or allowed them to do this desktop exercise, you sat with a product that had come from Regiments, what value, if any, was that result to Eskom?

Ms Molefe: I would say very little. The reason for that is that they would have to show us how this initiative would work in practical terms. We went through, I think if I recall there must have been 10 or 15 initiatives that they put on the table. Just a number of them we said were not viable and they would not be unlockable, one of them being the coal contract monetisation. Some of them, such as the sale and lease back, we had already explored in the past and therefore felt we could not continue with them. Others we were already doing because, even before my time I indicated my predecessor had started a process of looking at what initiatives could we do to unlock cash on the balance sheet and on recommendations that had been done previously, some of the initiatives that they had suggested were already in progress by the team in finance. So there was very little that we took over from them – it was really an issue of, let's confirm whether we're not missing anything, let's make sure that everything that has been presented here and if I recall back, I probably don't remember everything, but there was probably one or two that we probably overlooked but you had to take it through a process to see if its implementable or not and practical for business to do. So the high level desktop exercise was really just a high level initiative – for each one of those you actually had to unpack them within the business and obviously do a risk assessment of each one of them and see if they could be done or not. At the end, after that had been done, we found very little could be done from what they proposed.

Adv Vanara: My second last question relates to the New Age deal – I think there's evidence before the Committee, and I wouldn't want to burden you further with evidence that is before the Committee, you did not sign the New Age deal, you refused – I want you to just assist the Committee in understanding why you wouldn't sign that deal. Secondly, I'd like you to take the Committee through how the board dealt with Gobodo Report.

Ms Molefe: In terms of the New Age deal, it was under the ambit of our corporate affairs department led by an employee who reported to Erica Johnson. When the matter came to their attention they obviously had to look at whether we had budget for that or not, whether there was a need in the company to do such a deal. They had a direct discussion with me to say we've been asked to do this, we think we don't have budget for this and one of the problems is that we did not have a policy in the past on this matter – we were in the process of drafting a policy for the board to approve so that we could decide from a sponsorship and others perspective what it is that the company could do and not do. When we looked at the budget, we found that we had very little budget. In fact we had cut budget quite extensively and probably had, if I recall, R12 million left of the budget for the year and thereafter decided that we would not do any more sponsorship given the financial challenges that the company was going through. We then agreed on that basis with Erica Johnson, as my colleague, and that's where I left it. The next time I saw it was where I was sent an email with the contract when it had already been signed and it had been signed by Mr Matjila himself and it had been witnessed by two of our executives and in fact it had already been signed on the other side by the third party, the TNA officials. So when I then received it, I sent an email, a response to them to say we, I'm not sure if you're aware that Mr Matjila cannot sign the contract of R43 million on his own because what happened was that it should have gone through a process of approval as the Chief Executive, obviously he was acting and I copied Mr Matjila on the matter to say that I think you have advised him that in terms of our delegation of authority, he does not have

the delegation to sign this contract. Mr Matjila then called me to say I'm aware of what I have signed, I have a mandate, the same story that he told me with Regiments Capital and I said to him look, you do not have the delegation of authority as the chief executive to sign a contract of this size – my suggestion is that we present this to the board so that the board can decide whether the 123 contract to ratify the contract or not. He said to me that he is not going to do anything like that. I then spoke to our legal counsel at the time, Mr Mohamed Adam, regarding it and he had informed that he was aware of it, he had been pushing back on it simply also because the contract was signed in such a way that it had no exit clause – it was a three year contract for R43 million with no exit clause so he was concerned about the legal implication for Eskom as well and he already had a discussion with the chairperson of the audit committee on the matter. On the same day I happened to have a meeting with the chairperson of the investment committee, Mr Mkhwanazi, he did not sit in the audit committee, if I recall, but he did indicate that he's aware of it and the board will be starting an investigation and has requested that the company secretary consult with Gobodo forensic investigation to start the investigation on the matter. The matter was investigated and during that time we were also preparing for our half year interim results and our auditors were Sizwe Ntsaluba Gobodo so obviously the Gobodo forensic report indicated that there was obviously wrong doing on the part of Mr Matjila, when they look at our procurement processes he should not have signed a contract of this nature on his own without taking it through the proper governance structures. They then started to seek legal action on the matter and by the time that happened I think Mr Matjila obviously stepped down as the acting CEO and Mr Matona came in and he obviously reverted, Mr Matjila reverted to being a board member. So the legal opinion, if I recall, indicated that, gave some options to the board, in terms of what they could do, because Mr Matjila was no longer a member of the executive committee there was very little recourse in terms of disciplinary measures and therefore they needed to explore whether they wanted to take criminal charges against him or whether they wanted to claim the amount that had been procured with TNA or even, and also report the matter to the Minister. I'm aware that the chairman of the audit committee tried on several occasions to engage with the Minister of Public Enterprises but I'm not sure what transpired after that – it was a matter that the board was seized with many times in terms of reporting it to the board. To my knowledge she said that all attempts with the Minister had failed, that's all that she said. Our auditors at the time when they picked up that there was a material irregularity by one of the executives or by an accounting authority, they felt that they need to put a matter of emphasis statement in their audit report that they were preparing for the financial statements. What was important for this financial statement was that we needed them for our prospectors and due diligence that we needed to do for us to be able to go and raise international bond overseas and this was around October. So it was very important that the board sign up on the financial statements, we would obviously then have a public announcement on the results and then we would go out to the international market to raise funding. The board then decided that they would take the advice of the internal auditors that obviously as the board they would like to make sure that the right things is done and they had been seized with the matter of how do they deal with this material irregularity. So they did put measures in place, it was approved by the board and in fact a meeting was called to approve the financial statements with this matter of emphasis statement. However what happened on the day of the committee, which was a few days before the results announcement, Mr Zola Tsotsi called me to say that he is going to cancel the meeting, the meeting can no longer happen and I asked him why because he knows that we need to go out to sign this results so that we can go out to the market, he said it's because of pressure from outside but he did not divulge what pressure that was. I then called all the board members and explained to them how important it was that they signed off on these financials before the results announcement because we cannot have the results announcement if the auditors had not signed off and therefore they must approve the financials. So the board members aligned with my thinking, they supported me and they said they would continue to have a board meeting without Mr Zola Tsotsi. The meeting did take place, without Mr Zola Tsotsi, the board then decided they would select an alternative chairperson at the meeting, which they did, and the financial statements were then approved by the board at the time however what happened is that I think, in terms of how the meeting was convened, after Mr Zola Tsotsi had cancelled the meeting – remember that he had convened the meeting as the chairperson of the board but then he called me to say that he is going to cancel the meeting and he did cancel the meeting but the board then decided that they would continue with the meeting. Unfortunately there was a technicality from a process perspective in terms of how the second meeting was called and it would appear that that meeting was null and void and therefore Mr Zola Tsotsi called me to inform me that the meeting that we had to approve the financials was null and void and that he was having a discussion with the Minister on the results announcement, the results announcement would be cancelled but he was not aware that I was having a meeting with the Minister myself at the time and he wasn't at the meeting. So I then called the board members, I said look this is what has happened, the board then decided no we will meet tonight, which was on a Monday, and they did approve the financials. So essentially that took place.

Adv Vanara: Can you just give us, you mentioned two dates where the first was the technically invalid meeting, where Mr Tsotsi was not there, then there was a second meeting which was the successful meeting where the statements, the annual financial statements, were adopted – can you give us those dates please?

Ms Molefe: So the first meeting, if I recall, was around the end of November, forgive me if I don't remember exactly the date and the results announcement was I think around the 5th of December. So the first meeting with the board members, which was a special board meeting to approve the results with a revised audit opinion, was on a Sunday so that would have been around the 3rd or 2nd of December. The following meeting would have taken place on Monday in the evening which was a day before the results announcement so it was probably around the 4th. I'm not sure of the results announcement was the 4th of 5th of December.

Adv Vanara: There will be minutes of board which would assist us with the dates.

Ms Molefe: There will be.

Adv Vanara: Just one last thing, you paint a picture of Mr Tsotsi as somebody who abuses the law. When it suits what he wants to do, he uses the law. When the law does not suit what he wants to do, including the Constitution which is the highest law in the land, he utterly disregards that – is my observation of that accurate?

Ms Molefe: So I really don't want to speculate but my sense of what really transpired was that he was under pressure particularly when I asked him why he wants to cancel the board meeting to sign off the financials, he indicated that he was under pressure from people outside. So I would say that it was probably because of pressure. I cannot really comment on whether it is in his nature to be able to you know abdicate the law.

Adv Vanara: You were suspended, finally left Eskom – can you take the Committee through that and that is my last question. Thank you.

124

Ms Molefe: I was suspended on the 11th of March alongside three other executives. When we were suspended the board had had two meetings – the first meeting was on the 9th of March. I wish to indicate at this point, it was a new board, the board that had been deliberating on matters that I have just presented now to the Committee, had left in December 2014 with the exception of Mr Zola Tsotsi and the exception of Ms Chwayita Mabude, those were the only members that came back and the rest of the board members were new to the board of Eskom. When we were suspended there was supposed to be a meeting on the 26th of February which would have been the first board sitting, formal board sitting, and essentially the board, that board meeting was very important for us as well because we had just concluded our business plan which in terms of regulation also needed to be approved from a PFMA perspective because we were submitting our funding plan and as well as the borrowing programme so that was important for us. However that meeting, without any reason, was cancelled. We then had the next meeting called, if I recall so by SMS, on the night before on the 8th to say there's an urgent meeting that has been called by the chairman and we had been asked to convene on the 9th of March. That meeting was then a special meeting where Mr Zola Tsotsi informed the committee that he had been requested to do an investigation into the state of affairs of Eskom specifically the financial challenges, the operational challenges, the delay in the build programme and any other matters that the board or the Minister was uncomfortable with. The board then felt that they have just stepped in, they are aware that the executive management is dealing with quite a number of things, they do not support this investigation, it is only going to take time of the executive members when they should be dealing with day to day affairs. They then requested Mr Tsotsi call the Minister and come and explain why it was important to have this inquiry, which was what it was called. The meeting was then adjourned shortly thereafter and we would be informed on when the next meeting would be. The next time we were called by SMS again at night it was on the 10th of March where we were called to a meeting the following day to say that the Minister may be coming to the meeting. We started the meeting with Mr Matona just giving his account of his 150-day plan essentially and shortly thereafter the Minister of Public Enterprises joined the meeting and after she joined the meeting obviously raised issues around the bugs that were in the boardroom, there was a lot of leakages in the media and he's been asking Mr Matuna to deal with those matters and he's not happy that they were not being dealt with decisively. We were then asked to recuse ourselves after that, it must have been after 30 minutes, around 10 o'clock in the morning, and the next time we were called in was later in the afternoon. Mr Matuna was called first and he was then told that he would be suspended and I then was called after him and I was informed that I would be suspended. I was actually issued with a letter of suspension that indicated that Eskom has decided to do, the board of Eskom has on instruction of the Minister, had decided to do an inquiry into the state of affairs and because I'm the executive that is responsible for one of the matters that would be investigated, I'm being asked to step aside so that I do not interfere with the investigation process. What was interesting however was that they did say we had done nothing however should we not provide our laptop devices and so forth, further disciplinary measures would be taken against us. So it was quite confusing at that time to say that we have not done anything wrong, you're asking us to step aside however there would be further disciplinary measures against us for not complying. So we then signed the letters, it was then very clear on the following day when Mr Tsotsi was on the news that there was an inquiry. We were informed the inquiry would take three months but two months into the suspensions we had still not heard from the board on whether the inquiry had started, what were the terms of reference because we were informed that we should be, we would actually be called to testify into the inquiry so I think one can understand we needed to know, we two months into the process, the inquiry hasn't started, you said to us we would be called back in three months time but we haven't started. Shortly thereafter I started engaging my lawyers, I started asking questions around what are the terms of reference of these inquiry, when do we expect to be called and I was getting responses intermittently and I kept on writing to them. Eventually they called me to have a discussion with me around an amicable exit from the organisation. In that view they felt that we probably had reached a point where we could no longer be able to work together considering the fact that the investigation would also take some time so it was probably best for us to part ways and that I continued my career. And that's what essentially happened.

Discussion

Dr Z Luyenge (ANC) appreciated the testimony. He asked Ms Molefe when she realised the directives or communication between the acting Group Chief Executive and the board were in any way unscrupulous. What was the general norm or what was the normal communication channel between the board and management? With the meeting of the 8th convened by Mr Tsotsi through SMS outlining the inquiry to be held, he wanted to know when Ms Molefe became unsettled by such an investigation. Who was meant to be the champion of this investigation – management or the board?

He asked if it was normal to get suspended in a meeting or if it was something open for dialogue. Was the Minister part of the meeting that resolved the suspension? If this was the case, would this be normal or appropriate? He asked Ms Molefe if she made any appeal or communicated with the Department pertaining to the suspension before the lawyers were engaged. If so, was the response satisfactory for Ms Molefe?

Ms Molefe replied that since the board came in, there were always questions and suspiciousness about what the board was coming to do especially given how the previous board was removed. For a while there was an element of mistrust between board and executives – the board probably felt it was informed management should step up or it was uncomfortable with how things were done. On the other hand, management did not understand what the issue was. Less than two years into his role, the new chief executive requested a strategy review of the company to ensure the company was turned around. The strategy review process was a thorough one and management was ready for implementation. This was halted because the new board felt it needed to socialise itself with what management was doing – this caused some discomfort on the side of the executives. For almost five months the strategy could not be implemented because the board was new and needed to familiarise itself with what was being done and go through new approvals. One of the perceptions was that executives were resisting transformation – she always provided assurance that there were plans in place and an enterprise supply development programme in place to ensure transformation was taken seriously. Board and management questioned each other's intentions – it was that kind of relationship for a while. The various resignations took her by surprise such as that of Mr Dames – she questioned what was going on and left her unsettled especially as no one was talking. The executives themselves probably did not know who to trust or speak to – it was becoming toxic at some point because of this. There was little talking of the “soft health” issues in the organisation and this created much tension between the board and the executives and among the executives themselves.

Dr Luyenge, having gone through the academic qualifications of Ms Molefe, especially public administration background, noted that one of the principles of public administration was a politically accredited dichotomy that required the doctrine and phenomenon of working together – he asked if Ms Molefe thought that existed in Eskom.

125

Ms Molefe responded that Eskom had a number of challenges – she was always mindful of this and there were initiatives for everyone to work together for the good of the company. There could be personality issues, trust issues etc but it was important to understand why this was the case. The chairman and the CEO at the time initiated interventions to assist the board and EXCO at the time to go through some of the issues creating tension and how to then move forward – these sessions were professionally facilitated. There were issues but efforts were made which did result in change in management and the board.

Ms N Mazzone (DA) thanked Ms Molefe for being present today. She thought that fundamentally there was a bigger problem at play than just the suspension – it seemed from the testimony of Ms Molefe that there were inherent and pre-existing problems that were simply exasperated by the fact that Ms Molefe had a problem with signing contracts that were not, in her opinion, procedurally and legally sound. It seemed there was a behavioural pattern at Eskom that if someone did not like the way something was done, there was a way to push the matter forward.

She asked Ms Molefe if there was such a culture of not adhering to strict and correct corporate management at the Eskom board. There is agreement that bureaucratic processes can be long-winded but in many instances these processes were long-winded for a reason especially when dealing with public funds, as Eskom was. She was of the opinion that Ms Molefe did the right thing by not signing something she was uncomfortable with – the backlash against Ms Molefe was because people realised that what she was doing was correct and the things others were seeking to do was incorrect. She asked at what point, if any, did Ms Molefe write to a Minister, perhaps someone in an administrative position in government, to warn anyone outside the Eskom ambit that things were happening that she felt were unsound for the company as well as procedurally incorrect.

She was most concerned to hear about Chiefs of Staff of Ministers getting involved in the administration of state-owned entities – a Chief of Staff is a very political appointment and it is made for a reason but they should not be involved in the running of state-owned entities. She asked Ms Molefe to elaborate on her meeting with Mr Essa and describe if she was uncomfortable, thought it was a normal practice, if she was concerned that a Minister's Chief of Staff had asked her to meet someone. She was surprised that Mr Essa would not tell Ms Molefe who he represented – she found this very strange as it was unusual behaviour and sounded like a conspiracy theory one would see on TV. A sound witness had told the Committee that there was enough internal capacity in Eskom not to require the services of either Regiments or Trillian, and certainly not McKinsey, and value for money would not be given to the company by acquiring the services of these agencies – she asked the opinion of Ms Molefe on this as someone, who was experienced in the field of financial management and public administration, if she thought internal capacity in Eskom would have sufficed.

Ms Mazzone was greatly worried by the rapid change in the board of Eskom – she was also not the first witness to point this out to the Committee. When the rapid change happened, the modus operandi of the business went in a certain direction. Ms Molefe was called into a completely new board that had been overhauled, virtually overnight, institutional knowledge lost, a new set of ears, not well versed on what was going on with Eskom at the time, and very shortly thereafter, Ms Molefe was suspended – did she think there was a bad intent requiring the massive and rapid change in the board? She then asked Ms Molefe what date she met with the Minister's Chief of Staff and Mr Essa – this was important for connecting the dots. It was highly irregular for a company of the size and importance of Eskom to send out SMSs during the night calling for meetings because Ministers were due to attend – this was not correct corporate governance. No company the size of Eskom anywhere in the world would be allowed to be run like this. Which Minister called for "heads to roll"? It was disturbing for a Minister or CEO to make such a threat – on what basis would heads roll? The suspension of Ms Molefe was not executed in the correct fashion and did not follow the rules of a company the size of Eskom especially given the position of Ms Molefe – did she feel threatened or concerned which explained why the matter was not pursued further? She sought more information on the suspension and how Ms Molefe felt about it. Since the suspension and knowledge of testifying before the Committee, had Ms Molefe been threatened in any way by any existing member of Eskom in any way or a previous member of Eskom? Had contact been made by Mr Essa? She asked if Ms Molefe, in her employ or now, had been contacted, or had any contact with any of the Gupta family, any of the Zuma family or any other Minister of government.

Ms Molefe addressed the matter of her suspension by saying it was a difficult one because to a large extent she would be speculating – she had been informed by people in various areas that there was news out there that some of the executives were going to be suspended because they were not playing ball or did not understand the mandate. When she thought about what she had done to warrant suspension, she knew exactly what she had said no to. A couple of days before the suspension she was tipped off about the board meeting which would result in suspension. Because it was a rumour she had no factual evidence and ignored it. She remembered vividly that the day before the suspension there was a strategic session of the finance team and one of the team members told her in a panic that she had been called by Matshele Koko to come to Melrose Arch and she asked her why she did not go – the answer was that she did not know what was going on at Melrose Arch but the finance team had work to do and if he wanted someone at Melrose Arch he must phone her and explain this to her. The following day she found out that the four people who would act in place of the suspended executives were called to Melrose Arch.

She was informed that she was being suspended because of financial challenges however external people knew about the suspensions beforehand because they were not playing ball in terms of what some of the board members wanted. She highlighted that in the board Mr Tsotsi chaired and with the TNA matter, the audit committee decided to investigate it and this really created tension in the board among the members particularly between the chairman and members of the investment and audit committees – it was clear the board was divided because some were trying to do the right thing while others were obviously doing something else. There were good board members in the board that left in December 2014 where one would have expected some members to remain for continuity – she did not know why only two members remained. She did not know the mandate of the new board – they had not had a single full board sitting, other than subcommittee meetings regarding investments audit committee approvals. The first meeting the new board had with them was to suspend them because of an inquiry into the state of affairs when in fact in the first meeting the



majority of the board had said no to that without first hearing from the Minister. In the second meeting two days later, the board unanimously, if Ms Molefe recalled very well, maybe with the exception of one or two members, sat in the meeting announcing her suspension. She looked at each member in the eye.

126

Ms Molefe did not know what transpired in the meeting with the Minister because she was asked to recuse herself before being called back in the meeting much later in the day. The investigation was done by the board and not by management – an independent investigator and consultant would be assisting. This ended up being Denton's – those suspended were never called to testify despite being told so. She did consider legal action – in the previous board chaired by Mr Tsotsi, there were good members in the board which management could always speak to hence the TNA matter being investigated and the Regiments deal not being signed. It was interesting that the good board members were removed. She did not know the new board or where the members came from other than Mr Pat Naidoo who was an ex-employee of Eskom. The Minister was there but she did not know if the Minister instructed the suspensions or instructed the conduction of the inquiry. Ms Molefe was of the opinion that she was suspended because she said did not sign many things asked of her.

In terms of value from consultants, Eskom had used consultants for a number of years and it depended on what they were used for – as a utility, some of the best practice for Eskom resided with its global peers. Because the performance of the company had deteriorated, the company needed to look at what it could do differently which other utilities, of its size and magnitude, were doing. This was why advisory services or consulting firms would be requested, to look at best practice. This was however subject to abuse – a department was then created to look at investments. Each and every request for consulting services would go through this department to be rigorously scrutinised to ensure value – if this was not established, it would not be approved. She could not say what happened with this process after she left. She was aware the general manager of the department had since left so it was possible this process was not really followed with discipline. In terms of ensuring the company was financially sustainable, her predecessor took steps to look at what levers could be pulled to ensure the company was financially sustainable – given the size, magnitude and materiality of the financial matters being dealt with, it was important to get credible assistance – Regiments was asked it had done such work before and had the capacity. It said it used McKinsey – she was not aware McKinsey had a financial services department.

The meeting she had with the Minister's Chief of Staff was portrayed as an introductory meeting where challenges with ways of working with predecessors were outlined and to ensure she had the support she required. There were challenges with suppliers complaining Eskom did not give them work. In the 15-minute meeting with Mr Essa, he said he worked with various black-owned companies who complained. He also said he worked with McKinsey and could assist. The Chief of Staff asked for repeated meetings but she refused and requested Mr Tsotsi talk with the Chief of Staff to stop harassing her.

Mr T Rawula (EFF) noted the Committee was conducting the inquiry under *prima facie* public allegations that the Guptas have captured, exerted pressure and were looting Eskom by using politicians and executive managers. Ms Molefe stated that she thought Mr Tsotsi and Mr Matjila were under serious pressure, particularly Mr Tsotsi. Yesterday the Committee received evidence and a report that R1.2 million was given for a breakfast show to be hosted by the New Age – a Gupta-led newspaper. The person that provided that evidence indicated that this decision was taken by Mr Matjila and that executives were under pressure to find rationale to cook the books – he asked Ms Molefe to speak to this because at this time she was the financial director. How did hosting a breakfast enhance the business of Eskom as a power utility?

He wanted to believe that Eskom had a vetting process linked to procurement – he asked Ms Molefe to talk to the portfolio of evidence that was linked to the vetting of Regiments and whether the company had capacity or not. It was funny that Mr Essa complained as a supplier that he was not getting work from Eskom but he refused to divulge the name of the company he represented as a complainant – at some point this should have raised alarms with Ms Molefe as a custodian of the finances of Eskom. More detail was needed on the divergence between Ms Molefe and Mr Tsotsi and Mr Matjila regarding the contract – this answer should be tied to the question on vetting. He was also interested in the legal opinion sought by Ms Molefe when she was put under pressure. When Mr Tsotsi said "heads would roll", was he in fact referring to the suspension of Ms Molefe and Mr Matona? The dates of when this was said and the suspension should be provided so that Members could draw synergy between the statement of "heads rolling" and the irritation of the board. He was interested in the involvement of the Minister – would Ms Molefe say she was suspended by the board or the Minister? Or was the board instructed to carry out the suspension by the Minister? Who produced the financial sustainability plan that was said to not have been robust enough by the board? What were the expected terms of reference for the plan to be determined robust? This morning the Member received a call from learner's from Eskom who were engaged as apprentices who were told that if they passed their trade test, they would be absorbed as artisans – almost all passed the test but Eskom reneged and subjected the learners to an internship of one year. They were told that Eskom did not have money. Because this was at the time Ms Molefe was financial director, he asked her if this was a result of the money looted from Eskom and its dire state.

Ms Molefe answered that with the learnerships or any other employee course, there would need to be budget. Human Resources would look at what was required from each business unit and whether the learners could be permanently absorbed – this was done before looking at budget. She could not comment on what happened in this case. She remembered there being quite a few targets but that financial prioritisation was also done. Budget was allocated to the learnership programme although it was said not every learner who could be accommodated. A finance director would need to balance the fiduciary responsibilities in terms of spending money the company did not have – a process of prioritisation did take place in terms of what money could and could not be spent on and this was not unique to the learnership programme.

After the board said the financial plan was not robust enough, the team continued to work on the plan and did not wait for the proposal for Regiments. There was capacity in Eskom to deal with the matter – there was a very good Group Treasurer with extensive experience in the field, many years experience in the company and highly qualified and regarded in the country as a Treasurer. There was also a very good Group Financial Controller and Economic and Financial Regulator that helped put together the price determination. This team put together the financial plan after Mr Tsotsi put together an emergency task team to look at these matters. The aim was to put the financial plan in place, accelerate what needs to be done with the build programme and then to continue with generation sustainability – this was the terms of reference for the task team. Various solutions were looked at in terms

of what Eskom could do internally to reduce cost over a three to five year period with strict savings by looking at some of the contracts and budget reprioritisation – the consulting budget was cut. Treasury regulations on austerity measures were followed as every cent counted – it was important to not just approach government to increase equity or increase the cost of electricity. The plan was presented to Public Enterprises, the Finance Ministry and other key stakeholders – this culminated in the R23 billion equity injection to Eskom around October 2014 and an adjustment for the tariff increase by an additional 5% above the 8% determined on condition that the company continued with austerity measures. It is important to highlight that Eskom was doing these things on its own even though there was an attempt to get external service providers to assist with balance sheet optimisation – eventually the plan was submitted to government and approved.

There was a delegation of authority approved by the board – it was clear on levels of authority and what the different executives and officers could approve. There was also a detailed procurement policy which aligned with the delegation of authority. There were structures and processes for approval committees so that no one person could sign if there was no delegation to do so. There was always an attempt to do things outside procurement policy – EXCO and the board did not see every transaction as some were at lower level committees. Matters were picked up during audits or when employees blow the whistle on contacts they felt uncomfortable with.

Mr Tsotsi said that “heads would roll” if the Minister said the financial sustainability plan was not ready in time.

Ms Molefe was not aware of a R1.2 million contract – the TNA contract was R43 million over three years. There was budget for sponsorship – this was controlled by the corporate affairs department. Her understanding was that there was budget for the year, for about R14 million but policy approval would need to take place before any further sponsorships could be signed. R12 million was initially requested for the year but this turned into R43 million for a three year period with no exit clause – this was her understanding. Ms Molefe did not sign the contract and she brought to the attention of the chairpersons of the investment and audit committees before being investigated.

The legal opinion highlighted Section 217 of the Constitution which spoke to procurement of goods and services in state-owned enterprises i.e. fair, transparent etc. The opinion said where there were cases of exception and deviation; this needed to be shown as procedurally fair to do so. Her opinion was, given the facts on the table, she did not believe the Regiments matter was being handled fairly in terms of procedure.

Mr S Swart (ACDP) thanked the witness for the helpful information provided today. He asked if Ms Molefe had read the Denton Report at all.

Ms Molefe said that she had started but decided not to conclude it.

Mr Swart appreciated that load shedding was in the tenure of Ms Molefe along with massive increase in the diesel contracts – while austerity and cutting costs were emphasised, there were many questions around the diesel contracts. Information was needed on these contracts where there were questions on procurement involving billions of Rand. This could also be supplemented to the Committee in writing.

Ms Molefe replied that a rigorous procurement process was followed for diesel contracts. Two suppliers were shortlisted and awarded five-year contracts, if she remembered correctly. The challenge was with emergency situations where the volume from the two shortlisted bidders was not sufficient. Smaller suppliers on a short term, emergency basis was arranged in order to avert load shedding. Diesel was costly, there were logistical issues due to the volume required and premiums were paid over and above the contract – each one served before the board tender committee – usage of diesel was the last resort because it was so expensive.

Mr Swart noted the Denton Report raised many issues with the diesel contracts and this was something for the Committee to look at – it would be helpful if additional information could be provided to the Committee. Was Ms Molefe aware of any tension in the board itself when Mr Matjila was appointed acting CEO? It is understood from the academic's report that there was dissatisfaction that a board member was appointed in an acting capacity.

Ms Molefe knew that Mr Matjila was not first preference at the time – according to her knowledge, Dr Steve Lennon was going to be the acting CEO. She could not say why this changed and if some board members were uncomfortable with the appointment of Mr Matjila.

Mr Swart asked Ms Molefe if she was aware that there was evidence before the Committee that the Minister Gigaba was instrumental in the appointment. There was also documentation before the Committee that showed Mr Essa forwarded Mr Matjila's CV to Mr Tony Gupta and Mr Duduzane Zuma. Looking at the appointment of Mr Matjila, one linked the dots i.e. the urgency to finalise Gupta-owned The New Age breakfasts, urgency to finalise the Regiments contract etc – did Ms Molefe think about this?

Ms Molefe found it difficult to comment because she was not privy to the board meetings where Mr Matjila was appointed or the decisions of the Minister on the board members. Through the new CEO, Mr Matona, she knew he was under pressure to appoint Mr Matjila as an executive in the company. She knew the board members that resigned in December 2014 resisted this because they felt due process must be followed and so Mr Matjila should apply like everyone else if he wanted to be appointed.

Mr Swart asked if she thought it was normal for CEOs to be involved in procurement processes. One can now understand, when the dots were connected, why Mr Matjila was appointed – it is fair to assume this was to pursue the business interests of the people that appointed him.

Ms Molefe said that in terms of Eskom processes, CEOs of the company do not sit in neither EXCO procurement committees nor the board tender committee – this was unusual.

Mr Swart said Ms Molefe quite rightly stood up against what was happening as financial director and her fiduciary duties. It paints a picture of certain companies and people benefiting by contracts. Did the change in the board, purge of good board members and suspension of executives standing up against contracts going against process, play into the narrative of certain people playing to the

interests of others?

Ms Molefe agreed especially when the chain of events was looked at and how board members, which stood up for the new matters, were all removed. One questioned this motive. She had no dealings whatsoever with any of the new board members. It was only when one looked back at the chain of events and heard what was in the media, by connecting the dots, it was realised there was something bigger at play than one originally thought.

Mr E Marais (DA) sought elaboration on the procurement of the steam generator at Koeberg.

Ms Molefe said procurement of the steam generator project started before her time under the then CEO Mr Dames. She recalled that at some point the process had to stop because the Minister wanted to ensure the right thing was being done. The project continued when she joined as chairman of EXCO procurement. When she joined in 2012/13, the management team at Koeberg were looking at putting a new tender process in place. The important matter was the outage of 2018 and to accelerate the process. EXCO procurement recommended two lots were awarded to two suppliers – EXCO would then make a recommendation to the board to approve but the board was uncomfortable with the recommendation made. The board decided to appoint an independent international consultant that understood the nuclear environment to ensure there was an unfettered opinion on the project – this was fair if the board felt it needed to do this. A lead negotiator was also appointed to work with the team in Koeberg. At some point she stopped down as chairman of the committee but continued to serve as a member. It was difficult to remember some of the facts because this was a while ago but essentially the international consultant reported directly to the board tender committee. The board was clear that the project should go to one supplier given challenges with multiple suppliers experienced in the past – this was fair. The EXCO procurement committee was not privy to these board meetings with the international advisers when the committee was expected to make recommendations to the board – this was a glaring gap and created tension.

Mr Marais asked Ms Molefe if she, in her position as financial director, at any stage, or prior to the position, had any direct interaction with Minister Gigaba or Minister Brown.

Ms Molefe said there was always interaction with Ministers when presentations were made to them. EXCO members met with the Minister in various forums or if the Minister wanted to address the board in a strategic session – this was the nature of the interaction. When she became financial director, Minister Gigaba was on his way out. She had several engagements with Minister Brown together with the acting CEO and other executives to present the financial plan and other technical strategies to transform the company – that was the nature of the engagements which took place.

Mr Marais asked if Ms Molefe, for the record, concurred The New Age breakfast deal was absurd, there was no value for money, no budget and that this was the main reason why she refused to sign the contract.

Ms Molefe replied that it depended on what the sponsorship was used for – strategic importance to the company was assessed i.e. what was the breakfast about. If the breakfast spoke to the public about matters of energy, this was not necessarily wrong. The issue was with the quantum and the process followed in putting the contract together especially the fact that there was no exit clause for a R43 million contract when the company did not have money.

Mr Marais found it clear that Mr Matjila knew he did not have a mandate to sign a contract for R43 million – was there any charge laid against him for overstepping his boundaries?

Ms Molefe said that the challenge was, by the time the board had stepped out in December 2014, they were dealing with the matter, putting recommendations in place after having received a legal opinion around what action could be taken following the investigation. Unfortunately this did not happen because the board was rotated. The rotated board decided to ratify the contract in March 2015.

Mr Marais asked if Mr Matona, in his period, did anything about this.

Ms Molefe pointed out that by that time the matter was with the board. The board was then rotated and the new board ratified it.

Mr R Tseli (ANC) noted that Ms Molefe indicated the financial challenges started when the 2012/13 proposed tariff increase was not accepted – what was the suggested increase? He asked if Ms Molefe thought the financial sustainability plan was sufficient to take Eskom out of these challenges to the extent that an external service provider was not necessarily needed. Were the services of Regiments/McKinsey costed in such a way that one knew how much was needed per service? Did Ms Molefe have a problem with the desktop high level plan commissioned? He then asked Ms Molefe if she challenged her suspension and, if so, what happened.

Ms Molefe responded that Eskom applied for a 16% tariff increase over a five year period and was awarded 8%. It then looked at the revenue shortfall and what it meant in terms of meeting the business requirements of the company over the five year period. A financial plan was then crafted to close this gap created by the tariff determination being lower than expected. There were many moving parts from a technical perspective – generation maintenance was not sorted out but a technical team could provide more insight on the utility's technical challenges. The financial plan was sufficient at the time to assist Eskom but there were other challenges when looking at the business plan for the next cycle. The team looked at if demand would be met and, if not, what levers could be pulled in terms of diesel, other supply-side options such as short term power purchase arrangements and other demand-side options working with Eskom's customers. There was also a problem with insurers from a generation perspective where the insurance premium was increased. The biggest driver behind the challenges was not only the tariff but the delays in the build programme and technical challenges.

The Regiments R500 million was risk-based pricing e.g. if the company saved Eskom R10 billion, Regiments would be paid 2.5% of the saving. This was more than other companies had charged in the past and this was one of the sticking points. Another challenge was that process was not followed – others could have been invited. Ms Molefe did not have a problem with the high level desktop exercise – the issue was around not following process.

With her suspension, it was only when reading newspaper articles thereafter, did she realise there were bigger issues at play. She communicated with the board two months after she was suspended to ask about the way forward. She considered legal action and going to court but it would have been a long-winded process – it was important to consider the outcome such as working with the board despite strained relationships. For her it was the best decision to simply part ways with the board.

Mr Tseli wanted to know exactly what was irregular with the financial sustainability plan – the process or that it came in the form of an agreement instead of just the costs?

Ms Molefe replied that a balance sheet optimisation programme was suggested as part of the financial sustainability plan for Eskom. The challenge was that procurement process was not followed- there could have been other players that provided similar services so the market needed to be tested, look at competitive pricing etc.

Mr P Gordhan (ANC) thanked Ms Molefe for assisting the Committee with various matters. Looking at the financial position of Eskom, when her predecessor left, Eskom was in investment-grade but in 2015/16 it was junk-grade status - what changed during that period?

Ms Molefe pointed to the tariff adjustments and although measures were put in place, technical challenges continued such as cost escalation in the build process and various delays. This meant going back to the market to see if the company could get funding but because it was so highly leveraged this was a fundamental issue. It was decided that maintenance could no longer be postponed so there was a need to balance maintenance and avoiding load shedding – this meant more money for supply side options, diesel and reduction.

Mr Gordhan said that at some stage the evidence leader might want to bring the Committee information on decisions to delay maintenance – this eventually led to operational and financial deterioration and had serious consequences. He asked Ms Molefe what she thought was the root cause of the cost escalation for Medupi.

Ms Molefe responded that there were a number of issues such as protracted labour disputes at Medupi, which lasted over 12 months if she remembered correctly, escalation of incurring costs due to some of the contracts signed, technical issues with suppliers such as Hitachi and delays in the build escalated cost. It was over a number of years. More detailed planning could have been done upfront – there was less planning because of time pressures to bring the plant into commercial operation to meet demand.

Mr Gordhan found it clear that there were serious problems with compliance with the PFMA given the Ms Molefe's experience in terms of the financial sustainability plan, New Age contract and other procurement in Eskom over that period –was this a fair statement?

Ms Molefe said this was correct.

Mr Gordhan noted that in December 2014, three experienced Eskom executives stepped down – what happened?

Ms Molefe did not know if it all happened in December 2014 but she knew an executive, who reported to the head of procurement and technology, was suspended in July. The board had provided a mandate for Ms Maharaj to do certain things in terms of the contract she had placed before them and she did not carry out that mandate. Ms Maharaj would have to speak for herself on the details because it went through a disciplinary process. There was also the CIO – there were procurement governance issues against him which were brought to the attention of his executive manager, Erica Johnson. Ms Johnson was asked to look at that and take it to disciplinary and the CIO was cleared. There was then a change in executives and the CIO then reported to Mr Koko. There was also a general manager in procurement that was suspended.

Mr Gordhan noted that the Committee heard lots of evidence that the core business was increasingly neglected for managing procurement in a way where certain people would benefit particularly around 2014-2016 – he asked if Ms Molefe agreed this was a trend developing at the top level.

Ms Molefe agreed noting that there was a lot of tension and discussion. Executives found themselves in procurement meetings when they needed to be dealing with day-to-day issues. To a large extent there was support from some of the board members but, to her knowledge, there seemed to be tension among the board regarding this matter.

Mr Gordhan asked why Ms Molefe stopped reading the Denton Report.

Ms Molefe wanted to move on – the board did not want her, she could have taken them to court but she considered her options and wanted to move on. Unless the people were brought to book, what was the point? The Denton report just suggested financial and technical challenges were investigated but, given what she and her colleagues went through, it was much more than that.

Mr Gordhan asked if this meant there was a board, and possibly a ministry, that had all the information on misgivings but showed little determination to resolve it.

Ms Molefe agreed – when she was suspended she specifically referred to Mr Tsotsi – she failed to understand that he had been in the board for the past three years but still today did not understand what the issues were when they were repeated so many times. These issues were presented to the board by Ms Molefe's predecessor when Mr Tsotsi was on the board as well so the issues were not new.

Mr Gordhan asked if it might be a case that it was not that Mr Tsotsi did not understand but did not want to or have the will to resolve those issues.

Ms Molefe said this was possible because the issues were described many times over.

Ms G Nobanda (ANC) asked if there were any other contracts, despite the two she did not sign, that Ms Molefe did not feel comfortable with.

Ms Molefe responded that there was the SGR contract where the issue was in the manner it was done, as opposed to the supplier. She was uncomfortable with how the Chief Executive at the time wanted to deal with it and when the chairperson of the tender board intervened. There was also the T Systems contract when the board seemed to go back on its decision when suppliers for the contract were already shortlisted.

Ms Nobanda asked if Mr Essa was the only Gupta-associate that Ms Molefe had met or if any other Gupta was met after that or before.

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Ms Molefe replied that she had only met Mr Essa and not any of the Gupta family, brothers or any other associates. She also met Mr Wood who was the CEO of Regiments Capital.

Ms Nobanda asked if there was any golden handshake, determination, agreement or money payable of some sort.

Ms Molefe explained it was on a negotiation basis – she is still out of a job and did not know how long it would take to find another job. She made it clear there was no golden handshake but she was negotiating based on the fact that she was out of a job and did not know when she would find another job. One needed to comprise and decide if it was really worth taking the matter to court.

Ms Nobanda asked if it was strange that a three month old board would suspend four executives. Could it be said Eskom operated by using bullying and fear tactics to get rid of people it thought were not toeing the line or doing what they were supposed to.

Ms Molefe said it would appear so if she looked at all the suspensions that took place which did not warrant dismissal. It was strange for a board, which had only been around for two and a half months, to execute a mandate of suspensions especially when the board was initially clear it wanted the Minister to explain.

Mr M Gungubele (ANC) noted that there seemed to be a trend among bureaucrats to not confront injustice when it faced them in the workplace particularly when it affected a state institution. Why did bureaucrats chose to instead pack their bags and go? This was an important question when the country was affected.

Ms Molefe's personal view was that it was an issue of trust and not knowing whether anything will come out of what one was doing or stood for. One considered that, at the end of the day, one had family, parents to look after and, at the end of the day, one was more in jeopardy in that sense.

Mr Gungubele asked if this meant the general commitment to principals was that it was difficult to make a sacrifice in that environment.

Ms Molefe said this was absolutely correct – if one could not trust the board, one would then go to the Minister. Would one go to the President next? She did not believe she had the authority to do so other than by writing to the President.

Mr Gungubele found Ms Molefe to be someone who did not just work in finance for pure employment – he asked which year she got to Eskom to do that work?

Ms Molefe took over as finance director in January 2014 after spending three years in customer service looking after Eskom's consumers, integrated demand management etc. Before that she was in the finance division in transmission – she was not sure if she answered the question.

Mr Gungubele wanted to know what the key aspects were of the total cost structure that was mainly responsible for the financial sustainability problem.

Ms Molefe said as finance director, one would look at everything and understand the operational challenges of the country to support the business. Financials itself was not only important – it was important to balance financial sustainability with operations in the company.

Mr Gungubele thought of the key responsibilities in leading an institution financially was to analyse financial trends, risk etc – before the February 2015 bailout, did Ms Molefe observe the factors threatening this direction other than the tariffs?

Ms Molefe reiterated it was not just about tariffs but other operational challenges requiring funding – generation maintenance was postponed for a very long time for various reasons, there was then the main load shedding event in 2008, strategy for the 2010 World Cup. This meant that while demand was growing, maintenance was deferred. This continued into 2014 where it was recognised this was a risk to generation sustainability.

Mr Gungubele asked if she remembered the diesel intervention era.

Ms Molefe confirmed the diesel intervention era worked in totality with the strategy she referred to because in order to do maintenance, while demand was growing, one had to resort to diesel.

Mr Gungubele asked if she knew how the diesel was sourced and supplied during this period.

Ms Molefe answered that there were two suppliers. In emergency situations, the company would procure from smaller suppliers that it had not contracted with – she could not remember the names.

Mr Gungubele said there was an interim CEO that was not interested in procedure and wanted things done as soon as possible while there was a chair of a board. He understood the concern with Regiments to be that instead of putting a case for itself, it came with an agreement i.e. it did not submit what it was asked to and the interim CEO did not have a problem with this. The board seemed to understand the concern but the chairperson of the board wanted the contract expedited – were the interim CEO and board chair interested in getting things done or were they interested in who was appointed?

Ms Molefe, looking at the contract, was sure the individuals were working together.

Mr Gungubele asked if it was correct to say there were some collaborating efforts with the common denominator being Mr Essa.

Ms Molefe agreed.

Mr Gungubele was curious to find out from the Chief of Staff, of the Minister at the time, how he ended up being in a meeting with Mr Essa – this would be important to look at if the Chief of Staff was an activist in the office of the Minister in the context of state capture. The Member was interested in finding out what business The New Age deal had in taking Eskom forward.

Ms Molefe said this was why it was important to have an approved sponsorship policy so that it was very clear whether the policy was aligned to the strategy of the company. There were issues with demand and any platform could be used to forward those strategies. The sponsorship was not approved because one felt it could not be prioritised at the time. If the board felt the breakfast was aligned with the policy then it must be approved in the ambit of governance structures. This would also need to be balanced against the financials – it would have been up to the board. 131

The Chairperson thanked the witness for her time afforded to the Committee. Her information was valuable and would assist the Committee with having a deeper understanding of the going-ons at the company during her tenure.

The Chairperson read the oath to Ms Suzanne Daniels, who was the former Head of Legal at Eskom.

Ms Daniels took the oath.

Adv Ntuthuzelo Vanara led the evidence collection.

Witness: Ms Suzanne Daniels

Adv Vanara: Ms Daniels, we have time pressures. I'd like us to start with the purchase and sale of the rights in Optimum Coal Holding by Tegeta. I'd like us to deal with firstly the pre-payment, we'd then deal with the guarantee that Eskom instructed ABSA Bank to give to the Bank of Tegeta in relation to the transaction. The third aspect I'd like to deal with in relation to the transaction is the R2.1 billion fine that was levied against Glencore. In respect to the prepayment, there was a meeting at night on the 11th of April 2016 – can you share with the Committee, one, who convened this meeting, at what age of the day was this meeting convened and what was the agenda of this meeting and what was the resolution.

Ms Daniels: Adv Vanara, just as clarification, and Members of the Committee, I was Group Company Secretary at Eskom from the 1st of October 2015 to 27 July 2017 and I was acting Head of Legal and Compliance from the 1st of September 2016 to the 27th of July 2017 when my appointment of Group Executive for Legal and Compliance became permanent. So at the time of convening the meeting I held the position of Group Company Secretary and the responsibility to convene the meeting was mine. So to give you the background, in terms of the administrative requirements, I would have convened the meeting. At what stage did I receive that instruction – it was approximately at half past seven that evening that I received a call from Mr Zethembe Khoza, who was the board tender committee chairperson at the time. I remember the time because I actually had the time to check my telephone records. At that time my phone was in my study and I was having dinner so I was at home. He said to me that...I actually missed the call so I had to call him back, he said to me that I need to arrange a meeting for that evening and the item that was going to be discussed was the emergency coal supply. I actually questioned having a meeting at that late an hour. At the time that he called me, I had actually received no documentation for that meeting if it were to happen that evening and also that barely 48 hours later we were going to have a scheduled board tender committee meeting on the 13th of April. I raised these issues with him, his response was the operations required the meeting because there was an emergency and I actually said to him that to the best of my recollection, as I attend all board committees meetings, to the best of my recollection at the time, the emergency was actually declared about three months ago so there's was really no...you know...it didn't really meet the requirements of the emergency. He still persisted and then I arranged the meeting. I received the documentation for the meeting at 1951 that evening from Edwin Mabelane, who was the Chief Procurement Officer, and he requested that I convene the meeting and that I circulate the documentation. What I then did was...now it was around nine o'clock so I confirmed to the chairperson that I received documents and given that members still had to read through the documentation, my suggestion was we do this at nine o'clock. I was actually hoping that the directors would not be available but I called each one of them and I sent an SMS as well which was my practice to...it was the evening. I prepared the document for distribution. There was a submission in the standard prescribed format that we have and there was, what is called, the modification report which is the reason, you know, why the procurement team motivated for modifying those particular contracts. There were two suppliers, one being Tegeta. I sent that out in PDF format, the meeting invite went out at quarter past eight that evening and the invitees were Zethembe Khoza, Nazia Carrim, Viroshini Naidoo, Chwayita Mabude, Edwin Mabelane, Ayanda Nteta, who was the primary energy executive at the time, and Matshela Koko. I followed that up with the SMS messages. Ms Chwayita Mabude was the only one who let me know she would be joining the meeting later. This was a telephonic conference so I set up, you know, the Telkom setup, and then at half past eight that evening I confirmed with the executives namely Mr Mabelane, Ms Nteta and Mr Koko that the meeting would take place at nine o'clock. During that time Ms Viroshini Naidoo sent an email to me which set out a number of questions – I will provide you with that evidence. It was questions regarding the contract, or submission in front, and her closing sentence was "this matter has been in the public domain so I need to know everything possible has been done to get the best deal for Eskom". I forwarded those questions to the CPO, which is Chief Procurement Officer, please excuse, Eskom has lots of acronyms, to the CPO and Ayanda so that they can answer and the meeting commenced at about four minutes past nine that evening. The resolution from that meeting, if you indulge me two minutes I'll get my file out...the resolution to that meeting was as follows: "the addenda to the short term coal supply agreements between various suppliers and Eskom to be concluded to extend the supply of coal various sources to Arnot Power Station for up to a further five months and/or such period as may be requested by the supplier but no later than 30 September 2016. The Chief Financial Officer is hereby authorised to approve the basis for prepayment to secure the fixed coal price for the period of extension provided that there is a discount in the price, the supplier offers a guarantee in favour of Eskom and that the CEO can provide assurance to the committee that the transactions are economically viable for Eskom. The Group Executive Generation is hereby authorised to take all the necessary steps to give effect to the above including the signing of any consent or any other documentation necessary or related thereto".

Adv Vanara: The prepayment in respect of Tegeta – how much did it amount to? Sorry it's not the prepayment, it's the, what do you call it?

Ms Daniels: It was R659 558 079.38.

Adv Vanara: To the best of your knowledge, was this amount of money paid by Eskom to Tegeta?

Ms Daniels: Yes it was. I prepared the security arrangements and the share certificates that were provided for the transaction came from Tegeta.

Adv Vanara: Are you aware that part of that amount of money was paid as part of the purchase price of the Optimum Coal Holding?

132

Ms Daniels: Yes I became aware of that in the Public Protector's Report, the previous Public Protector, Advocate Madonsela and what struck me as quite coincidental was that that was the exact amount to the cent that was paid.

Adv Vanara: We received evidence from Mr Piers Marsden, who was one of the business rescue practitioners of Optimum Coal Mine. He...it is on record that the amount that Eskom paid did not go to the business rescue practitioners – are you aware of that?

Ms Daniels: Well based on the agreements that I drew up, yes it did not go to Optimum, it went to Tegeta directly.

Adv Vanara: Is it also correct that on the 11th, or just before the full purchase price got to be paid on the 14th of April 2016, Tegeta were not the owners of Optimum Coal Mine but they had the right to own the mine subject to the payment of the full purchase price but at the time, they were not the owners of the mine?

Ms Daniels: That is correct. The business rescue proceedings were finally wound up around August of that same year so I think the court order was handed down on the 31st of August 2016.

Adv Vanara: In your view as Company Secretary, the payment of Eskom indirectly which went to the purchase price of the mine, did it have any legal basis?

Ms Daniels: I think from our side the legalities were sort of murky. In the primary energy environment there is usually this practice among suppliers who had more than one source that they can, you know, transport coal between each other, and it's not the first time, but in this instance what is striking and what actually makes this of dubious...you know what makes this very doubtful, is that this is the exact amount which was claimed to be the shortfall.

Adv Vanara: There is evidence before the Committee from Mr Piers Marsden that Mr Salim Essa, on the 11th, in the morning 'round about 10, had a meeting with him and requested him, as the business rescue practitioner, to approach a consortium of banks, who were the major creditors of Optimum Coal Holding, for a R1.6 billion loan. He subsequently went to meet with the banks and the response the banks gave to him, which he subsequently conveyed to Mr Salim Essa, was that the bank declined to provide the loan. You clearly had not been satisfied that the meeting, in the evening of the 11th, was convened – do I understand your testimony to be correct?

Ms Daniels: Yes that is correct.

Adv Vanara: Did you find it...did you not find it strange that on the same day, in the evening, the message communicated to you by Mr Zethembe Khoza calling for a special BTC meeting?

Ms Daniels: I will have to ask the honourable guest presenter to please repeat it.

Adv Vanara: We still on the prepayment. There's testimony before the Committee by one of the business rescue practitioners that on the 11th at 10, there was a meeting between himself and Mr Salim Essa and at that meeting Mr Essa informed him there was a shortfall of R600 million on the purchase price – he asked him to approach the consortium of banks, who were the major creditors of Optimum Coal Holding, for a 600 million loan. At three o'clock he, the business rescue practitioner, communicated back to Mr Salim Essa informing him that the banks had turned down the loan application. So we now know that on the 11th, the purchasers of the Optimum Coal Holding required 600 million – my question to is, you had reservations about this special BTC meeting. It's called the same day that there is this response to Mr Essa, Salim, so the question to you is... I understand you had these reservations which you confirmed. Now that I'm giving you this information that you didn't know, that I assume you didn't know, does it reinforce your concerns for this special board meeting, board tender committee meeting?

Ms Daniels: I can confirm to you I did not know of the meeting between the business rescue practitioner and Mr Essa on that day and yes it does then reinforce my concerns and actually validates them.

Adv Vanara: So, common sense therefore must dictate to us the 600 million loan Mr Salim Essa, or somebody powerful enough to influence BTC to sit and to source the shortfall - is that a far-fetched hypothesis?

Ms Daniels: In my view and based on the facts that I have in front of me and learnt at the time, and post that, I think it's a fair and reasonable inference to make.

Adv Vanara: We know now, in terms of the Public Protector's Report, which has not been challenged at least in respect of this specific allegation, that the then Group Chief Executive, Mr Molefe, had been in telephonic conversations with certain individuals said to be the owners of Tegeta. Have you read the Public Protector Report and are you familiar with this portion of evidence in her Report?

Ms Daniels: Yes I am very familiar with the Public Protector's Report as my team and I provided the responses to the Public Protector in the first instance and we took counsel on Eskom's approach to the recommendations in the Report. So yes I am. In regard to Mr Molefe's telephone calls, that came as a total surprise to us, it wasn't one of the questions, we didn't have answers. I can tell you that Mr Molefe was quite surprised by that and I asked him for his telephone records so that we can verify that – as I sit here I have not received them.

Adv Vanara: I have no reason, at least until now, not to believe what the Public Protector says in her Report and therefore I must accept that Mr Molefe, based on the Public Protector's Report, could possibly have arranged or been influential in the arrangement of the meeting of the 11th of April 2016, through of course the chairperson of the board tender committee.





Ms Daniels: Based on what I know, you know what happened at the time, and based on what has subsequently come out in the media etcetera, I am convinced that there must have been some sort of undue influence as it would be very unusual for me to get a phone call from the chairman of the BTC to arrange a meeting for that day at such a late hour.

133

Adv Vanara: And had this meeting, set on the 13th of April, the board tender committee meeting, if it had sat on the 13th of April 2016, given that we now know through the business rescue practitioner, the due date for the full purchase price was the 14th of April, would Eskom had been able to transfer the 600 million to Tegeta so that Tegeta could pay by due date which is the 14th of April – would that have been possible?

Ms Daniels: No it would not have been possible because as you can see from the evidence that you have, that there were conditions to the decision – I also had to put in place the security arrangement and that took some time. It now makes sense why I was allowed to be excused from the meeting of the 13th to go and finish the agreement because the actual payment took place on the 13th of April.

Adv Vanara: So given that you had to do from the 11th to effecting the payment on the 13th, if the meeting had taken place on the 13th of April as scheduled, it would have meant you were only able to effect payment after the 14th – is that correct?

Ms Daniels: That is correct.

Adv Vanara: Can we then move to the second aspect which is the guarantee and I must remind the meeting that you, graciously so, furnished us with a document that guides us through your testimony and I think we on page seven of the document which is the convening of the board tender committee meeting in December 2015 to consider the 1.6 billion guarantee which was later referred to the finance committee for decision – can you take the Committee through the proceedings of that meeting.

Ms Daniels: Yes, I'll do that. At the outset I just want to clarify it was not a board tender committee meeting, it was a round robin resolution of the full board that I had to prepare and that's why you'll see there I received that instruction from the chairman of the board at the time, Dr Ngubane, and I collated the documentation to be circulated to members. Once again the title of this submission was: "The urgent request to approve the pre-purchase of coal from Optimum Coal PTY Limited". As this matter was one of an actual financial and investment nature, I had recommended that there was an IFC meeting prior to the resolution being concluded and therefore...I'm sorry an IFC meeting is an Investment and Finance Committee meeting, which is a subcommittee of the board, and that meeting took place at 8:30 on the morning of the 9th of December. It was once again a telephonic meeting due to the time of the year and the timing and the submission to the board consisted of the submission document, the letters from the Department of Mineral Resources, the response to the Director General of the Minister of Mineral Resources and then my covering note which set out what the resolution was required and then all the signatures that I collated so for Members who are not familiar, when you do round robin resolutions you need at least 75% of the members to approve and it would only be ratified at the next board meeting but at the time the decision was taken you can give effect to that decision. So at the IFC meeting that was called, Mr Mark Pamensky who was then chairperson of the investment and finance committee recused himself due to his conflict of interest, as declared he was a director of Oakbay Investment at the time. Dr Pat Naidoo was elected to chair the meeting and members who were present at this meeting were Mrs Venete Klein and Mr Zethembe Khoza and these three members constituted quorum for the meeting. Anoj Singh and I were in attendance as the Group Chief Financial Officer, who was the coordinating official and I acted as the secretariat for the meeting. The discussion of the meeting was set out in the minutes and I shall provide you with a copy of that Mr Vanara. The members resolved that is recommended that the board, that the board approve the transaction as set out in the submission to the board relating to the pre-purchase of coal from Optimum PTY Limited. This recommendation was conveyed to the board members as the round robin documentation was circulated. I then sent an email saying this is the recommendation from the IFC. By the end of that day my office had received unanimous approval bar for Mr Pamensky who had recused himself and Mr Molefe who was off sick. With your indulgence I will read you the entire resolution, the full resolution was as follows: "the request from the Department of Mineral Resources is hereby noted. The Group Chief Executive, together with the Group Executive for Generation and Chief Financial Officer, are hereby authorised to negotiate and conclude a pre-purchase of coal agreement with the proposed owners of Optimum Coal Mine. This agreement shall be subject to the necessary regulatory approvals having been obtained from Eskom and the supplier respectively as and when necessary. The Chief Financial Officer is hereby authorised to take all the necessary steps to give effect to the above including the signing of any consent or any other documentation necessary or related thereto".

Adv Vanara: Sorry, just on the resolution, why would the negotiations for this pre-purchase of coal agreement be with the proposed owners and not the business rescue practitioners?

Ms Daniels: I'm not sure if, I'm really not sure of what happened. I will have to look at the motivation. I can give you if there was any rationale but from what I have in front of me that wasn't the rationale.

Adv Vanara: Okay you may proceed.

Ms Daniels: I think, just to give Members context, this is a letter written to the Director General at the time, I'm not sure if he is still the Director General, Dr Thibedi Ramontja, at the Department of Mineral Resources and it comes from Matshela Koko, the Group Executive Generation, and it is dated the 6th of December 2015. The headline is: "Optimum Coal Mine Propriety Limited, Coal Supply to Hendrina Power Station.

As you may be aware, Eskom is involved in a legal wrangle with the above supplier from about August this year. In rather dramatic fashion, the company was placed under business rescue and Eskom was faced with intermittent veiled threats of liquidation while at the same time the business rescue practitioners purportedly sought constructive engagement between the parties. From Eskom's perspective it was expected that as Glencore operation, Optimum Coal Mine would enjoy far more support than the conditional funding for a limited time period that was on offer. Optimum supplies one of Eskom's key contributors to the national power system as Hendrina Power Station is a stalwart in the Eskom fleet supplying approximately 2000 megawatts to the national grid. Glencore was fully aware of the dynamics and history relating to the coal supply agreement and its structure when it concluded the sale with its previous owners. At the latest meeting of the parties, the business rescue practitioners together with the Glencore representative indicated that Optimum is being rescued and that it would honour the contract



in its current form with no amendments. They further advised that they will follow the contract route to process the Eskom claim of 2.2 billion. They made it very clear that they are not insisting on the extension of the Koornfontein coal supply contract with Eskom. They insisted that the extension of Koornfontein coal supply contract is at the discretion of Eskom. Eskom is perplexed by this about-turn given the evidence¹³⁴ of the past few months and at the blatant disregard Optimum displays for the threats of liquidation has on the precarious balance of electricity supply and commercial viability. As a Glencore operation, Optimum surely cannot be perceived to be acting in the national interest". It's a rather long letter – that sort of gives you the motivation and then in parallel, "you're aware we have similar challenges at Arnot Power Station. While Eskom surely appreciates the turnaround of the business, it remains concerned at such erratic display of business stability may compromise the security of supply to Hendrina Power Station in the short to medium term. Therefore Eskom would require a firm resolution on Optimum by mid-December 2015. The risk of security of supply for Hendrina, Komati and Arnot Power Station is of such key national interest, that we thought it important to bring it to your attention. The upcoming adversity facing Eskom would require some form of intervention on the part of the Department of Mineral Resources to assist Eskom in leveraging the necessary key authorities to assist in ensuring resolution to the coal supply situation and certainly going forward. I would request your assistance in this regard. Should you require any further information please do not hesitate to contact me.

Yours sincerely

Matshela Koko

Group Executive Generation

This was part of the submission and then the Director General responded in the following way:

Having regard to the above, which is the letter and the intervention required from the Department, we would like to advise as follows, in respect of Hendrina Power Station, the Department will prioritise and fast track approvals for the transfer of the mining rights on an urgent basis should this be lodged. We have already requested an urgent meeting with Competition Commission to go and plead the case and explain the urgency with which it must be treated as it is indeed a specific case given the consequences for our country. Financial provision due to historical liabilities as OCH level is estimated at 1.7 billion. The amount still has to be confirmed through a process which will involve the parties concerned. We would also request for Eskom to play an active role in providing support for the project to proceed. In return for the new owners honouring the current contract to 2018 and for driving transformation, we would like to propose that consideration be made for some pre-payment to be made for up to one year of coal supply understanding the upfront capital injections to be made to ramp up production to meet coal supply requirements for these mines. We firmly believe that every possible angle must be considered and offered to ensure that supply is guaranteed at the contract price for all of these critical times thereby averting any national crisis that we as South African can ill-afford.

Adv Vanara: Due to time pressures, particularly the documentation that we have, we, the Committee will, at its own pleasure, interrogate the documents. But I want us to quickly go to paragraph 54 of your statement, on page nine.

The Chairperson: Advocate, we still have more time. We'll join a little bit later, you can continue. Relax.

Adv Vanara: Thank you Chair. Can we just go to what happens after the board's resolution which you deal with on page nine, paragraph 54?

Ms Daniels: Alright, so on the 10th of December, Ms Caroline Henry, the Senior General Manager for Treasury, we have a Treasury Department in Eskom and she was then Treasurer at the time, she prepared a documentation – I'm not privy to the discussions that happened between Caroline and Anoj on that but because I would work closely with her on issuing of guarantees and share related transactions, she then provided me with a copy of the memo that she prepared. What she asked is that, what the approval did was say that we were going to lay out R1.6 billion in cash to Optimum which she did not feel was the appropriate manner in which to do it. So she prepared a note which said that she would ask the Chief Financial Officer to approve the issuance of a guarantee in favour of Tegeta Exploration and Resources and to approve a counter-party investment concentration limit excess for ABSA for the duration of the guarantee, because from what I understand, it then exceeded our borrowing limits and whatever limits we have. Her reasoning for this at the time was that in order to provide Tegeta payment certainty and shield Eskom from recovery of the funds in the case of the conditions precedents are not met and Eskom contracted to issue a performance guarantee. So what she was asking was that instead of laying out the cash, can we please issue a guarantee in this regard. but this would have required...the guarantee was for three months, it was for R1.6 billion and her recommendation was that the CFO approve the issuance of the guarantee in favour of Tegeta. The CFO approved ABSA as a counter-party to issue the guarantee and the CFO approved the counter-investment concentration limit excess for ABSA for the duration of the guarantee. And this was approved by Anoj Singh, as Chief Financial Officer, on the 10th of December 2015.

Adv Vanara: What was Mr Anoj Singh's delegation of authority's limit?

Ms Daniels: In terms of the resolution of the board, he was authorised to take all the necessary steps to give effect to the above including the signing of any documentation. In this particular instance, with the issuing of a 1.6 billion guarantee, we would have required PFMA approval.

Adv Vanara: Okay but I'm still asking the question – surely the board can't take a resolution authorising an official to act *ultra vires*. Would you agree with me?

Ms Daniels: I agree with you. In the issuing of the financial instrument, they ought to have been made aware that...our materiality framework is 1.5 billion and anything over that 1.5 billion needs approval so in this instance, while the guarantee was probably a better commercial transaction, it was still irregular.

Adv Vanara: That's my question - what was Mr Anoj Singh's delegation of authority?

Ms Daniels: As Ms Tsholofelo told you earlier that it's quite a detailed document so I will let you have it but even if he had the authority given the materiality framework, we would have had to apply for permission from the Minister.

135

Adv Vanara: And are you aware that the Minister's permission was sought and obtained in this regard?

Ms Daniels: No it wasn't.

Adv Vanara: You mentioned that the cash...or the General Manager, Ms Caroline Henry, was not comfortable with the cash payment but was more comfortable with the, or at least recommended, the performance guarantee.

Ms Daniels: Yes she states that in the memo that she provided because from what I can deduce, her instruction was obviously to make sure that the money is available.

Adv Vanara: Now we have...and of course this guarantee facilitates Tegeta...the bank, ABSA, issues the guarantee on instructions of Eskom to the Bank of Baroda in favour of Tegeta – am I correct?

Ms Daniels: I don't know if it went to the Bank of Baroda because in terms of the documentation it was in favour of Tegeta. What I do recall is that we had to work to get it done that day and Matshela Koko personally took the original guarantee – I don't know where he took it to.

Adv Vanara: And we...there is evidence before the Committee that this guarantee then facilitated the 1.6 payment towards the purchase price – so we've got the 1.6 now. We've got the 600 plus million. There's also evidence before the Committee that Eskom paid Trillian monies and Trillian contributed to the purchase price – do you have any knowledge about that?

Ms Daniels: The monies that were paid to Trillian yes I do have knowledge of that as I'm the author of the infamous 48-hour report sent to Minister Lynne Brown and there was a series of payments between 2016 and 2017 which amounted to about 564 million.

Adv Vanara: Okay we will deal with those a bit later when we deal with relations with Trillian and McKinsey and Eskom.

Ms Daniels: I wasn't aware about the contribution to this transaction until the Public Protector's Report.

Adv Vanara: Are you aware of a concept called OPM? In other words, a company uses Other, for O, People's, for P, and M, Money, to conduct a business?

Ms Daneisl: Yes I am. Prior to joining Eskom I was an attorney in commercial practice and I've used some of these guarantees to do that, yes so I am aware.

Adv Vanara: This particular transaction we just discussed now, if the 1.6 billion was facilitated by Eskom, the 600 million came from Eskom and a portion of the purchase price came from Trillian who happened to have been paid under very dubious circumstances, also by Eskom – do we see this OPM concept at play here?

Ms Daniels: From all the evidence that I had at the time, what I know now, what I know from the media and from other reports, this is definitely a case of OPM. While the guarantee was in place until the 31st of March, at all the relevant times it would have appeared to any investor that Optimum actually had the financial resources to buy the mine.

Adv Vanara: The hashtag Gupta Leaks – there is an email from Mr Mark Pamensky, who was a board member at Eskom, and I do appreciate that he recused himself at the meeting because of the potential conflict of interest, but what disturbs me in particular is the email that I've seen, and of course Mr Pamensky would get a chance to come and respond, but the email suggest that from inside the board, he was communicating with people at Oakbay regarding the sale of the mine – are you aware of such email?

Ms Daniels: Yes I am aware of that email and it really shocked me when I read about it as I did not relate it to the R1.6 billion pre-purchase. I actually related it to...because if you look at the timing of that email, it actually relates to the resolution of the penalty so that was the defining moment for me as to why, and we'll get to that, as to why that deal went the way that it did and it was really a devastating moment for me.

Adv Vanara: I introduce that because we are to get to exactly the fine and I would like you to take the Committee through this fine. My understanding is that, and there is evidence before the Committee, that amongst other challenges Glencore experienced financially, the financial situation of Optimum Coal Holding and its subsidiaries was exasperated by challenges it had in relation to Optimum Coal Mine. And over and above that, Eskom had levied a 2.1 billion fine which related to some of the regulatory contraventions and quality of coal. Can you take the Committee through what Glencore's position was and what Eskom's position was on the fine, *vis-a-vis* the fine, and how the position changed drastically when Tegeta became the owners of the same mine.

Ms Daniels: Mr Vanara I am at a slight disadvantage because I left primary energy in 2011 so I'm not close to what happened then. I became involved in September 2016 as the acting head of legal and also when the Optimum came out with business rescue I would then have to deal with arbitration and the subsequent legal proceedings so I can give you an account of what I did from that, if that's in order.

Adv Vanara: That's in order ma'am.

Ms Daniels: So the first thing that I did, you know, is ask what had happened. I think for context the 2.2 billion was fined from 2012 to date so we actually were dealing with a historical issue. During the time that Glencore was engaged in a cooperation agreement with Eskom, from my reading of the documents that were made available to me, there was a period where Glencore and Eskom were negotiating future contracts, existing contracts as a portfolio. They entered into a cooperation agreement and in terms of this agreement the implementation, or the exercise of penalties, was stayed so that people could find a solution. And I think of one of the solutions that parties were hopeful of fining was how to deal with the penalty. The reasons summons was issued was to stage prescription on the matter because you can see the claim arose in 2012 and we were now in 2016 so part of it had already dissipated.

Summons was issued at the time, prior to business rescue. In terms of the contract between Eskom and Optimum, arbitration is the way to sort matters of this nature out in the first instance. I was actually involved in an arbitration with Optimum when I was at primary energy so you know, it has a...it is a quick way to deal with matters. And in this instance what I asked for was all the reports, what had been done to date, the rationale for the 2.2 billion and I was presented with this spreadsheet. Now this spreadsheet spanned the time and what I noticed was that there were various amounts, you know, it wasn't consistent. My first question to the primary energy team and the lawyers was, how did you arrive at this 2.2 billion and I called a meeting 'cause I was quite familiar with the Optimum agreement based on my experience, it was actually the first matter I dealt with at Eskom when I started there because BHP Billiton had ceded the contract to another party so I knew the contract quite well. I also, the previous time when we had to negotiate the quantities, the very penalty regime that was in place, I was part of the negotiating team that did so, so the numbers that I was seeing and the manner in which it was calculated was not in line with that methodology. So I wanted to know how did they get to it, what considerations etcetera. When I had the meeting with the team it consisted of the finance group, the contract manager, the coal supply manager and the legal team and my question was simply how did you get to 2.2 billion. I was quite shocked at the answer – the answer that came back was no, this is not actually 2.2 billion and anybody who knows me and who's worked with me knows that I don't keep my mouth shut and I actually asked why, what happened? As ludicrous as it sounds, the answer was there was an error in the spreadsheet and we used the incorrect formula. So a billion Rand disappeared off that claim and at that point I was beyond furious. I said but we have gone out in the media, there's been a big story about this, how the heck do you think I'm going to go into court, I have a philosophy that I only go into court if I know that we have a more than 50% chance of winning because I don't want to waste resources – Eskom has a huge legal budget, I mean for litigation but you know we need to spend it prudently. The other element was that the person who had actually managed and drawn out the spreadsheet had now moved to Glencore so if I were ever to go into arbitration and have to call witnesses I would be dealing with a hostile witness or if I would have a witness at all. The contract manager had also left the employ so all I had was documentation. I then asked the primary energy people to kindly draw up for me the rationale as to how they got that. To cut a long story short, in the final analysis, I think we could of, I think the claim would have been round about, my estimation was R722 million and I was quite pleased to hear Mr Marsden, he estimated it at around R700 million so we weren't far off the mark. At that stage I was now quite perturbed because this was a huge reputational issue for Eskom, a huge risk. We'd gone out, we had our Group Chief Executive. I spoke to Matshela Koko and Anoj Singh, at the time Anoj Singh was my direct manager, and Matshela Koko was the Group Chief Executive, and I said that while I do have the delegation of authority to decide on whether Eskom proceeds with litigation or not, I was not prepared to make this decision on my own without bringing it to the attention of the board. Obviously there was wrangling, let's see if we can get out of it, and I said no, I'm going to the board. Unfortunately I had to go to the board tender committee because this was essentially a procurement issue. In the background we continued with the arbitration so we filed papers, we did, you know, the normal so that we did not waste time. At the first occasion that I went to the board tender committee, I just wanted to appraise them of the risk that we faced in terms of, we had a 2.2 billion claim and now it looks like we're going to end up with nothing. We went away and did some more work and then I formally approached the board tender committee, took them through what was required, I actually brought in the external legal team that helped us, had done a formal case assessment from counsel as well so that I knew my legal assessment was correct and we did, there was one done before business rescue but I now did one after business rescue because it had different implications. So from that we could see that at most we would be able to prove around 700 million. The other complicating factor was that about 248 million of that penalty had already been paid so whatever amount you settled at you would need to deduce the 248 million and based on the calculations that had been done independently, when I looked at the records, that is exactly the same amount that Glencore had said at the time that they owed so there was no reason to quibble about the 248 million, I think we were out by a few cents quite frankly. On that basis we continued. It left us in a bit of a quagmire as far as the arbitration was concerned so once we got the pleadings from the supplier, it was interesting at the first arbitration, or pre-arbitration meeting, you know attorneys always talk settlement and we were saying sort of okay lets entertain it, give us your proposal but given that I knew in the background and what I know now about the, from the emails as you say, from all the other reports, I think I was on a hiding to nothing quite frankly because the attorney who walked in there, he had a file, now bearing in mind that this matter had been going on for so long, he walked in there with a file with like a couple of pages in, like this, and I, my team had like a whole row of things because it was quite a historic matter so it was clear that he wasn't briefed properly or that he was so confident that they would get what they wanted. I pushed back, I said that I wanted a formal settlement proposal. It took us a couple of meetings. In the interim, in parallel, I went to the BTC, and they gave me, because the supplier indicated a settlement or a pre-direction to settle, I'd ask for a mandate to settle but not conclude – you see in Eskom we had, because I wanted to supply the board with the settlement parameters because at that stage I did not know what the supplier would come back with. The supplier actually was quite disingenuous – it came back and said we owe you 239 million of which we paid it so we don't owe you anything. So I said well then we're going to go and fight. We wrangled, we met, obviously they had the information from Glencore so the figure was around the 248 million but that was only a portion of the claim and I was interested in the balance of the claim. So we wrangled and wrangled, I think the figure started...to get them up to 500 million was quite an effort. I then went back to the board tender committee, told them, this was between January and the first quarter of the year, and I said to them that, look, this is the situation. My view is that we should still go ahead and claim the 700 million but I'm open to this. At the meeting it was quite strange because they wanted to know, members wanted to know, why are you here?, you know you can sort this out yourself and I said no, given the risk to Eskom, I am not going to make this decision by myself, I would need the board to support the issues. My view was stated very clearly that we could claim up to 722 million or that's what I thought we could reasonably defend. I took them through what we needed to do, and then to my surprise, or not so much now knowing what I know, the board tender committee gave me a mandate to settle the claim without coming back to them and the words were "no less than 500 million" and this was offered, stated by Mr Naidoo who, this was proposed by Dr Naidoo, Pat Naidoo, who was a member of the BTC at the time, and supported by the other members. So there I went with a mandate to settle while I had said 700, I came out with a mandate saying not less than 500 million. I instructed the attorneys push as hard as you can, I'm not going to the board, or I am not going to be able to explain to South Africa 500 million or less, so I'm not going to take that chance. We ended up settling at 577 million and of which 248 million had already been paid. So Optimum then owed us the balance and that was to be paid over the duration of the contract which ends next year.

Adv Vanara: Let's then move to the payment of the pension fund, or the pension payment, to Mr Molefe. Can you share with the Committee the circumstances around the payment of the 30 million plus paid to him as the pension.



Ms Daniels: I actually need to clarify – the 30 million was not paid to Mr Molefe but was paid to the Eskom pension fund and Mr Molefe then drew a pension of, I think it was R100 000 a month and then taxed – the figures are in the court papers so I am happy to take you through how we got to that. I think in the evidence guideline that I've prepared, I set out quite in detail what happened before that but I think for us we woke up one Sunday morning to read in the Sunday Times that Mr Molefe had received a R30 million pension payout. It was only at that point that we then started looking at the...because I must admit up until that stage the figure that was actually provided to Mr Molefe was not communicated back to board so at least we read about it in the Sunday Times. We then, obviously as a result of that newspaper report, got called to a meeting with Minister Lynne Brown. Eskom was represented by Dr Ben Ngubane, as the chairperson, Mrs Venete Klein as the chairperson of people and governance, Mr Anton Minnaar, who is the Executive responsible for executive remuneration and who administered the pension arrangements in this instance and myself in my capacity as company secretary. And she wanted to discuss the concerns related to the pension payout referred to in the article of the Sunday. We went through the rationale and the background and I've set it out in quite detail in the preceding paragraphs and Members are welcomed to ask me about it. And then she indicated that she was quite horrified at this amount and that we would need to...her words were reevaluate the pension payment or, if I can quote her, she actually said "an alternative pension arrangement" so the instruction to Eskom at that point in time was, not happy with 30 million, go and negotiate an alternative pension payout. We then met, myself and Mrs Klein then met with Mr Molefe basically it was without prejudice, it was also to see where he was at in terms of his amenability to actually reduce the amount or any other alternative arrangement. And he was really not...he asked for time to think about it which was fair because we actually did it on the, we actually met with him on the afternoon after the meeting with the Minister. I had also instructed attorneys; based on the Sunday Times article and we were also getting our information together as to how we got to the 30 million. So the agreement was Eskom would negotiate with Mr Molefe and return with a proposal to Minister Brown. However Minister Brown issued a statement on that Sunday which said that she has now declined the Molefe payout and that she had instructed Eskom to reconsider the issue. The statement was a bit contrary to the agreement so we then had to look at it. During this time I briefed the board on what was discussed with Minister Brown and then we had a meeting on the 25th of April. My legal team and I worked over the weekend to get all the papers together and we suggested options pursuant to the meeting. On the 28th of April we received our legal counsel's opinion in respect of the payment of the pension benefits and Eskom was then advised that the early retirement agreement was actually legally impermissible as it was not allowed for Mr Molefe and you will see in the subsequent litigation there's different interpretations. It was not allowed for Mr Molefe to take early retirement at the age of 50 in terms of the rules because the decision was made in terms of specific rules and those rules really did not apply to Mr Molefe. So on the 2nd of May we met and we considered the legal advice received and I advised the board that the approval of Mr Molefe's application for early retirement actually could not be implemented. That left Eskom in a bit of a quandary as he had departed – he was now an MP because technically if that agreement was illegal or impermissible, he was still an employee of Eskom and therefore the election had to be put to him that you either come back or you resign. The other options were that we provide him with a settlement arrangement and the other for us to sue the pension fund and you know there was a lot of cross litigation, very technical, it's in the documentation that I have provided to you.

Adv Vanara: Okay, I want us to just go back a little bit because I'm interested in what I perceive to be governance failures. There's a letter dated 16 October 2015 addressed by Dr Ngubane to the current Minister of Public Enterprises – is it correct that Dr Ngubane was not an executive chairperson of the board?

Ms Daniels: No he was not.

Adv Vanara: Was there ever a board resolution prior to his letter to the Minister?

Ms Daniels: Which letter?

Adv Vanara: The one dated 16 October 2015.

Ms Daniels: That one was in connection with his remuneration so executive remuneration was discussed at the people and governance committee which was chaired by Mrs Venete Klein. This did not deal with the pension arrangements.

Adv Vanara: Yes I know but it seems to form the basis later on around the discussions on the pension regime, isn't that correct?

Ms Daniels: No, that isn't correct. That's the letter of 25 November 2015, its in paragraph 64.

Adv Vanara: I'm sorry for that but prior to this meeting of the 25th November 2015, was there any board resolution that Dr Ngubane was communicating to the Minister?

Ms Daniels: Yes there was. This was discussed at the people and governance committee and also during this time Eskom was negotiating Mr Molefe's permanent employment with him as the Group Chief Executive and I'm using the term permanent employment very loosely not in the contractual terms because you would recall he came across to Eskom on secondment from Transnet and his secondment had been extended, I think, twice.

Adv Vanara: Can you for the record read what then were the proposals to the Minister. In other words you confirm that paragraphs 64.1 to 64.4 were issues consistent with the resolution of the people and governance committee.

Ms Daniels: Yes that I...at this stage it was a proposal to the Minister. It would only be confirmed at a meeting of 7 February 2016 but what the proposal was, as extracted from the letter, and this was the provisions, one was: regardless of Mr Molefe's age after the five year termination date, he be allowed the retire from the service on the basis that he is aged 63, that the penalties described in the Eskom pension and provident fund prior to age 63 be waived, that Eskom carries the cost of such penalties to be paid over to the EPPF, in the event that Mr 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.

Adv Vanara: Now what happens to the letter that is sent to the Minister with these proposals?



Ms Daniels: I forwarded that letter as signed by Dr Ngubane to the Minister's office. I usually as protocol is... the Company Secretary is the one that communicates formally correspondence with the Minister's office and so I sent it to her PA, Ms Kim Davids. Receipt was acknowledged. In that time we were discussing remuneration issues for executives and non-executive directors because they were all new and also in preparation for the AGM. And so I think the first meeting that year was the 9th of February 2016 and this was to discuss the retirement of Mr Molefe and other remuneration matters. Well this is not his formal retirement proposal. So that was on the 9th of February. From my notes there was a subsequent meeting which I attended on the 23rd of February with Minister Brown, Dr Ngubane and Mrs Klein in Cape Town where Mr Molefe's pension arrangement, as set out in that letter, was discussed. Minister Brown indicated that she would not oppose the pension proposal but that it must be submitted to her in writing so that she could deal with it expeditiously. I highlighted to her that the correspondence had been sent to her office in the letter dated 25 November 2015. We also required clarification because when Mr Molefe joined Eskom it was on the basis that he would be a permanent employee as defined permanently employee i.e. no fixed term contract however the...and that is also how the letters came from Minister's office when she appointed him or support the recommendation that he be appointed as Chief Executive that he would be permanently employed. I then asked the governance unit in the DPE that they had mentioned that it was going to be a five year contract as per Cabinet but it was not stipulated. They subsequently corrected that but Minister seemed to be surprised, she asked that could confirm for us whether that it indeed was the Cabinet position and it subsequently appeared that it was so, that it was confirmed. So at the meeting of the 9th of February, the people and governance committee, I set out what was resolved at the meeting in paragraph 68.

Adv Vanara: Just before you get to paragraph 68, there is in paragraph 67, the meeting seems to have noted the discussions relating to the conclusion of Mr Molefe's employment contract, it says with particular reference to and I quote, the current rule that staff over 50 years of age with at least 10 years service were entitled to retire at or as per the Eskom pension and provident fund rule. This was followed by a request and I quote: *"the Eskom rules to be amended in respect of executive directors with fixed term contracts to make up for shortfall in years waive the penalties and refund the pension and provident fund the actual cost relating to additional services"*. Unquote. So what I gather here is that at least the peoples and governance committee seemed to be familiar with the rules of the Eskom pension and provident fund to the extent that they were to request amendment to the rules – is that correct?

Ms Daniels: Let me just give you a bit of context before I answer, the Mr Anton Minnaar was the person who dealt with the Eskom pension fund and he and Ms Klein, Mrs Klein, as the chairperson of people and governance, ran with this transaction. It was not really fully discussed at the board. And you know when you talk about the governance, we have non-executive directors, there are only two executive directors, namely, the chief executive and the chief financial officer so this was a bit unusual. The first time that myself and the board secretary actually knew about these things was at the meeting because we were told it's so highly confidential and also as I was a junior to the chief executive I couldn't have access to that so what was anticipated that we could amend, that Eskom could amend the Eskom pension fund rules but that was not so. And this was on the advice of Mr Anton Minnaar but that did not materialise in that manner.

Adv Vanara: I hear your explanation. The point I'm making is that it would appear that members of the people and governance committee knew about a rule that pertains to the pension payout and they are aware that this rule, insofar as the executives that are appointed on contract had to be amended and that's why there's now a request to amend the rule.

Ms Daniels: Yes that's correct because this was the first time that Eskom would have executives on fixed-term contracts but they were quite familiar with the rules.

Adv Vanara: The Eskom pension fund, pension and provident fund, says it was misled by Eskom in that Eskom presented Mr Molefe as a permanent employee as opposed to a fixed term contract employee which would not have entitled him membership of the fund – what is your response to that?

Ms Daniels: I agree with the Eskom fund – in our preparations for the court case coming up, we discovered that indeed he was loaded onto the system as a permanent employee notwithstanding the employment contract was very clear that his employment terminates in 2020.

Adv Vanara: Let's then move quickly to the Trillian McKinsey and Eskom relationship – the first contract you're referring to, there was a payment to Trillian Management Consulting. Ms Bianca Goodson testified that at the time of receipt of this invoice, which amounted to in excess of 30 million – not R30, not R30 000, R30 million. It was herself and her COO and no work had been rendered to Eskom. Are you aware why and the circumstances Eskom paid this amount?

Ms Daniels: I wasn't involved in the actual transaction – I was neither company secretary nor head of legal at the time however I am the person putting together the report for Minister Brown and so based on, what I'm going to tell you is based on that and it does corroborate what you mentioned Ms Bianca Goodson, it really does corroborate her version, her testimony here. It is also corroborated in the Oliver Wyman Report which points out that the value for money for Eskom is actually questionable.

Adv Vanara: And that's besides the point that there was no contract between Eskom and Trillian.

Ms Daniels: No, at no stage during payment cycles or any of the payments was there a formal contract between Trillian and Eskom – Trillian was styled as a subcontractor to McKinsey. In this particular instance you will find, going through the records, that payment was made and Trillian was registered as a subcontractor to McKinsey on the Eskom system.

Adv Vanara: So there's no relationship between Trillian and Eskom – there's a relationship between Trillian and McKinsey is that correct?

Ms Daniels: That's correct although McKinsey formally terminated or formally advised Eskom that it terminated its relationship with Trillian.

Adv Vanara: We'll get there very shortly. The point I'm making – if there were payments to be made to Trillian, those payments should have been paid, based on a relationship, paid by McKinsey to Trillian based on the relationship that they had – is that correct?

Ms Daniels: That is correct.

Adv Vanara: The second contract there's again amounts paid to Trillian – how much was that? Look at paragraph 144, page 20 of your document. 139

Ms Daniels: Payments to Trillian under this contract, the second contract, was R564 562 913.29.

Adv Vanara: Ms Bianca Goodson told us the business operating model of Trillian Management Consultant that they do not do the work. They use their influence to get the business in the public sector. They get an international company that's competent to do the work, they subcontract as SDL and that's how they make their fee. If you look at this McKinsey TMC arrangement, is it consistent with that operating model?

Ms Daniels: On the face of it no. there's a slight...and I do acknowledge that her, you know she was there for a short time. I have looked at minutes of the steering committee and there are Trillian representatives at the meetings at Eskom even though there was no contractual relationship between the parties. They were there as part of the McKinsey team. So whether that was their business model throughout, I can't say.

Adv Vanara: You're South African. You know the material conditions under which majority of this country live in. There are people that struggle to make ends meet. When Eskom pays these amount of money to companies that do not have contracts with them, where there was no procurement process, where we cannot verify the value add – what message are we sending to the poor of the poorest in this country?

Ms Daniels: In this instance Mr Vanara I'm not so sure what the message would be but in my view, based on what I know and what I have discovered, there's only one way to describe this between the people of South Africa – this was brazen theft.

Adv Vanara: According to your knowledge you have prepared a report for the Minister and are you prepared to make that report available to the Committee or are there any reasons why you can't make that report available to the Committee?

Ms Daniels: I am fully prepared to make it available to the Committee and answer any questions. This is the report that I prepared for the Minister which she said was glaring gaps and this is the entire history and hence I can confidently say it was brazen theft.

Adv Vanara: So this report was given to the Minister?

Ms Daniels: Yes it was. It was personally delivered by me to the Director General on the 1st of September 2017.

Adv Vanara: You refer to some of the activity as brazen theft – are you aware that the Minister has actioned this report in terms of reporting the thieves to the law enforcement agencies?

Ms Daniels: No, she...the action that she took was to discredit or try and discredit the report by advising the acting Chief Executive on the morning that it was going to deliver it that it had been leaked to the media when that would have not been possible as I was still busy collating the pages. The, there was a meeting between her and the chairperson and the, sorry, the interim chairperson, Mr Zethembe Khoza, and the interim chief executive, Mr Johnny Dladla, on the 15th of September at the airport where they discussed the report because she issued a media statement on that evening.

Adv Vanara: So the board is aware of your report to the Minister which points, among others, some brazen thieves – has the board acted against the thieves?

Ms Daniels: I briefed...the answer is no. I briefed the board on the 29th of August regarding the outcomes and the findings of the Bowman's Report and regarding the findings that were made and I set out the recommendations –you'll see I refer to a memorandum of the 29th of August, I set out the various legal remedies that we needed to take including referring the matter to the Hawks. I think the board was not really interested in hearing me. They gave me some pointers in how I needed to fix up the memorandum and the thing that stuck in my mind was that Dr Naidoo told me to go and make sure that the numbering was correct – for me there were far more important issues in the memorandum than the numbering but be that as it may, I then, I was asked to take back those memos so that nobody had a copy and I was instructed to shred it but I did not shred it so I have the full bundle of what I handed out there and you'll see my notes on there as to what was discussed at that meeting.

Adv Vanara: Would you be so kind to hand the bundle with your notes to the Committee including the report that you submitted to the Minister and to your board. But let me go back to the meeting of the 21st of November 2016. There's a CIPC letter addressed to Eskom and also sent to the Minister raising a concern around Mr Molefe's return. According to CIPC, they were informed that Mr Molefe had resigned and draft minutes of a meeting were sent to CIPC – can you shed light around that.

Ms Daniels: Mr Molefe held two positions as a non-executive director and as an employee of Eskom. Insofar as the directorship was concerned, CIPC requires that you have a formal noting that he resigned as a director – early retirement does not feature on their options and that was I explained to them in the letter that I then wrote. The minutes was still draft because we were trying to find a way in which to say that he had left the company and that we could, you know, deregister him as a director on the system. You will see that, so what we did in the updated, the final minutes, was to say he resigned as a director and he applied for early retirement as an employee, to make it very clear.

Adv Vanara: Where are the minutes of this meeting 29 November 2016? The 29 November 2016 there was a draft minutes sent to CIPC to communicate his resignation. In the response you say those were draft minutes – I want to find out, a draft must become a final document at some point.

Ms Daniels: Yes so I have that for you as well. I've kept the full set of how it developed.

Adv Vanara: So they are no longer draft?



Ms Daniels: No they are no longer draft. At the time when they were submitted...I think what occurred is administratively someone in the office of the Company Secretary deals with statutory requirements and they used the draft minutes to do that which is not good practice but I have that on record as well as the responses that we gave.

140

Adv Vanara: In your report to the Minister, and you shared with the board, you making reference to brazen theft and therefore there must be thieves – do you identify the thieves?

Ms Daniels: Yes I did.

Adv Vanara: Can you share with the Committee who the thieves are.

Ms Daniels: Mr, the people implicated and who I identify as thieves, that's my view, is Matshela Koko, Anoj Singh, Edwin Mabelane, Prish Govender and Charles Kalima.

Adv Vanara: We know that Mr Koko is going through some disciplinary proceedings. In those charge, so are you aware the charges that he is facing, are any of the issues that you identify in your report as forming the basis to call him a thief part and parcel of those charges?

Ms Daniels: No they are not. That relates to the matter of Impulse International where he failed to declare his step-daughters interest in the company.

Adv Vanara: But you must surely agree with me that package should form part of those proceedings, isn't it?

Ms Daniels: Yes in the ordinary course of business I would agree with you. The reason I sought to keep it out of that particular disciplinary inquiry was for me that the current disciplinary inquiry is a sham.

Adv Vanara: We know that the, or at least I know that the Cliff Dekker Hofmeyr Report, on the Impulse issue, had exonerated Mr Koko, Matshela. How, I'm not aware but my understanding is that that seemed to be the basis of the charges he's facing – is that correct?

Ms Daniels: That is correct. The Report of 13 June did make that conclusion that factually Mr Koko's version held up however I recommended to the board that we cannot accept that Report at face value – there was no cross examination of any of the people interviewed, there was no legal testing. I spoke to the people who opined on that Report and I was not comfortable with the responses – I thought they were superficial. I recommended that we obtain a legal opinion from senior counsel on that matter and that senior counsel provide us with a view and you would see that Advocate Azhar Bham briefed and that he came back with quite a few anomalies in the, in the opinion that he provided and he did recommend disciplinary action against Mr Koko to interrogate those issues. He also assisted Eskom in preparing the original charge sheets.

Adv Vanara: The original evidence leader, who I believe was subsequently removed, is he on the panel of lawyers providing service to Eskom, if not how did he get to be appointed?

Ms Daniels: I was away on leave that the time but no he is not part of the panel. The audit and risk committee instructed the Chief Procurement Officer, Mr Jay Pillay, to source these individuals so he sourced senior counsel, three senior counsels and Mr Sebetja Matsaung. So the CVs were presented to me. Originally my proposal to the audit and risk committee was Advocate Sibande be case presenter for Eskom as he was intimately *au fait* with the case and that one of the senior counsel, I think Allister, I just can't remember his surname, as the chairperson as he had the most experience in terms of labour matters etcetera. I set that out in a very detailed memo to audit and risk committee. They came back and supported it on the one day but the next day Mr Gounden who is the chairperson of the audit and risk committee, sent me a message and said I must please speak to the chairman he has some ideas on the case presenter. I asked him to clarify, you know, because I needed it to go ahead and before he could respond I got a message from the chairman saying that him and Mr Gounden thought that Mr Matsaung should be the case presenter. My views on Mr Matsaung's experience to deal with a matter of this nature were quite broadly reported. I thought he had very little experience and this matter was not suited for a person of his level of experience.

Adv Vanara: My second last question, you refer to that disciplinary process as a sham – what do you mean by that?

Ms Daniels: There's been considerable board interference in that investigation and with Mr Khoza leading the charge. He, in my discussions with him, he would mention that "I was talking to Matshela this morning and he thinks we should do it this way". I don't think he realised that he had told me that 'cause I actually said "I beg your pardon" and then he changed tact, you know. That made me suspicious. The fact that after formal board approval of the charge sheet prepared by myself and Advocate Bham they had been changed twice. I was very surprised to see what was published as the charge sheet- it is fatally flawed in law so the risk to Eskom of Mr Matshela Koko being exonerated on those set of charges is actually quite high. And then also the manner in which the case was dealt with from the start – the fact that the evidence leader actually didn't really prepare witnesses. I had asked him for a list of his suggested witnesses on the 23rd of August this year and I'm still waiting for it so you know I really don't have any faith in the process that is on the go at the moment.

Adv Vanara: My last questions are twofold – one, have you ever been to the Gupta family, if so, why and secondly, why are you on suspension?

Ms Daniels: I'll answer the first one...I'll answer the last one first – my reason for suspension is as follows. I quote from it because Eskom has been denying that I am on suspension because of my report to the Minister but my charges clearly read as follows: "at the core of these allegations regarding misconduct is the allegation that, whereas you prepared a report for the Minister dated September 2017, which report contains various matters of concern. After perusal of this report and after further relevant information were obtained, issues were identified which could warrant disciplinary proceedings being instituted against yourself. It would thus be in the interests of yourself and Eskom that through a interrogative process of disciplinary proceedings questions be answered relevant to the report and the information received". And I close the quote. So that's the reason for my suspension. In respect of your answer on the Gupta family, I have had the occasion to meet Mr Ajay Gupta on the 29th of July 2017.

Adv Vanara: What were the circumstances and did you have any discussion with him? Who had accompanied you to this meeting?

Ms Daniels: Okay, I was contacted by Mr Salim Essa and he asked to meet for coffee. I was intrigued as I had met him on previous occasions as well which I will share with you. And the reason I remember the date so vividly is that it was the only free Saturday that I had upon coming back from holiday. Subsequent to that I take my daughter to maths every Saturday morning so there was no opportunity to have coffee with anybody. I met him at Melrose Arch outside, I think it's the...he had said meet me outside the African Pride Hotel and I thought...I was in the reception area and he came to meet me and then we walked to a...I didn't know that there were actually townhouses at Melrose Arch, a set of apartment blocks and we went into one of those apartments and as we walked into the lounge area, there were four people which I was introduced to - Mr Ajay Gupta, Mr Duduzane Zuma, Deputy Minister Ben Martins and a Chinese lady who's name I just cannot remember because at that point I was actually speechless. The purpose of the discussion was around the process of the Molefe court proceedings. Mr Gupta wanted to know how far they were and I said there was a scheduled meeting with the Deputy Judge President to discuss when we would set down the matter because as you would know, as the Honourable Members would know, the DA, EFF and Solidarity have joined the application and we wanted all the matters heard on the same day. He then...it was very difficult to understand him because he speaks in a very heavy Indian accent but the gist of what I could gather was that he was saying that, okay, he will have to talk to someone in the DJP's office and to make sure that the meeting, that the hearing take place after December 2017 so that it could be dealt with then. He mentioned something about Nkosazana Dlamini-Zuma but I really couldn't follow what he was saying partly also because I couldn't believe where I was and what I was hearing. And then there was some mumbling and then I left. That was the second occasion that I drove from Melrose Arch to my house, locked the door, poured myself a stiff shot of whiskey and went to sleep. The first occasion was on the 9th of March 2015, I think it was, I just want to check the...it was the date Ms Molefe mentioned, the 9th of March when Matshela Koko phoned me to meet him at Melrose Arch and went through. He came and collected me at JB Rivers once again and we went to the office of, who I now know as Salim Essa. Mr Essa started explaining to me, he asked me what was Eskom's disciplinary procedure. I said I was not really familiar with it because I'm actually not a...I have an aversion to employment law, because I'm a contracts person, but I said generally you know if you want to discipline someone you have to give them a right of hearing and all of that. He got a little bit more specific and asked me what needs to be done if you want to suspend people and I said well, you'd have to have a reason to suspend them and a rather valid reason, and give them a chance to respond and then you can make your decision and that was as far as I go. He then proceeded, in the presence of Matshela Koko, to sketch out to me what was going to be happening in the next couple of days. He told me that Mr Matona, Ms Molefe, Mr Marokane and Mr Koko would be suspended and that there would be an investigation into Eskom and that you know, the board would communicate this in due course. Little did I know that it was going to happen the next day or it actually happened the day after. And I actually didn't respond - that was the first occasion I went home from Melrose Arch. I think those are...and then the second time I saw Mr Essa was at Eskom. It was round about October 2015 as he congratulated me on my appointment as Company Secretary so those are the last significant dates for me.

Adv Vanara: As I hand over to the Chair, Mr Koko was the one who convened the meeting with you and Mr Essa and he was going to be part of those suspended? And we know that he's the only one who survived the suspension - is that correct?

Ms Daniels: That is correct.

Adv Vanara: No further questions Chair.

Discussion

Dr Luyenge thanked the presenter for her thorough assessment of events. He asked if she would have access to the attendance registers in terms of evidence as to who was present at the meetings - such information would make it easier for the Committee and Parliament to take the matter forward. It seemed the witness collected a lot of information - approximately how much money was lost? He asked this because the Committee wanted to ascertain how much damage there was already insofar as Eskom was concerned. The conduct of the board and management at Eskom was something he did not believe in the past when people spoke about activities convened to loot state resources - the witness made it clear there were these types of meetings. At times when people stole, a human element came to the fore that one would not want it to be seen but by the looks of it, what was happening now was an arrogant kind of behaviour that failed to put the plight of the poor masses of the country. He asked Ms Daniels to share if she reported these activities to any state entities and, if so, what the response was. He asked if she had been receiving any threatening calls or was discouraged from testifying before the Committee. He questioned if Ms Daniels was ever part of a meeting or received any instruction to implement these unscrupulous activities.

Ms Daniels responded that she had prepared a full dossier for Adv Vanara but was still in the process of putting it together given the amount of information. It would be given to the Committee for purposes of its inquiry - it would include minutes, documents etc. She could not say how much was lost to SA. The rough estimate she spoke about today was about R5 billion. Looking at all the transactions, enough information had not been uncovered and Eskom employees were increasingly coming forward with more information. She had not approached any state agency - given all that had happened she was very sceptical as to the *bona fides* of the state entities. She had been receiving threatening calls, had attempted break-ins at home, been bullied on the road, followed a number of times and had her phone tapped. When she met with Mr Essa she phoned her friend, Rustum Mohamed, to ask if he knew Mr Essa and if he could be trusted - the next day at work, Mr Koko asked her why she was speaking to Mr Mohamed. She had increased security at her home and made sure she did not taking the same route home. Threatening messages disappeared off her phone so she did not have evidence to lay a charge. These were death threats saying "if you know what's good for you, you'll shut up".

She did not have direct instruction from the Department but recalled a time when she was approached by Ms Davids, the PA to Minister Brown, at a chairperson's forum, where Ms Davids informed her that Minister Brown had been receiving complaints from suppliers and the Minister would be issuing a letter to say the suppliers must be given work. When Ms Daniels questioned who the suppliers were Ms Davids mentioned Trillian. Ms Daniels was incredulous at that time because Trillian was in the news. She was also

surprised that a PA was telling her what to do. Ms Davids also phoned her to inform her that Minister Brown requested she used Nkonki for the investigation of Mr Koko – this added to why she thought the process was a sham. She was perturbed by the fact that a PA would be allowed to do so. There may have been more such instances that she was oblivious to.

142

Dr Luyenge asked if Ms Daniels came across any of the Guptas.

Ms Daniels reiterated that she had met Mr Ajay Gupta on 29 July 2017 in relation to the matter of Mr Molefe.

Ms Mazzone was blown away by the testimony of Ms Daniels which confirmed what many unfortunately already knew. It was very important for the Committee to note that Ms Daniels had been threatened and that her safety had come into question – the Committee did all it could to keep Ms Daniels safe although nothing could be guaranteed. At least the matter was now on public record – the Member was once told the best way to deal with bullies is to blow the smokescreen away so that it was out in the open and Ms Daniels had now done so. She hoped no one was as silly as to harm Ms Daniels now as it would be too obvious who it is. It defied logic as to what a member of the Gupta family would be doing at a meeting concerning an internal Eskom inquiry.

Ms Mazzone asked if a reason was given or why it was justified that Mr Gupta would be at a meeting discussing Mr Molefe's court case – this made no sense to her. Did anyone query why Mr Gupta was there? Was there intimation of who the Deputy Judge President was? Was someone named? Did it mean they were trying to get someone to be the Deputy Judge President? Was there a discussion with Dr Ngubane, as board chairperson at the time, instructing that Mr Molefe would go on early retirement was completely irregular and could not be done? If so, what was Dr Ngubane's reaction to that? Coincidentally it is one year ago to the day since Mr Molefe resigned. She asked Ms Daniels if she is clearly of the opinion that there is no way and no how that Mr Molefe could have belonged to the pension fund and could have received the pension fund payout that he did because of the contract he was on. Minister Brown was vocal that she did not know these things were happening and was going to institute inquiries – she asked Ms Daniels if the Minister in fact knew about the Eskom Trillian relationship. In a parliamentary question, Minister Brown claimed to not know of the relationship. Did Minister Brown know from the onset about Mr Molefe's pension payout? Did Minister Brown know Ms Daniels was asked into these meetings where people like Mr Gupta were present? The Department of Public Enterprises is the stakeholder so surely the DG must know of what was happening as he oversees the Department under which Eskom falls – were these matters ever reported to the DG? Was Ms Daniels ever instructed to do anything by the DG of DPE? She asked Ms Daniels if she knew of matters being reported to the DG of DPE but not then acted on. It would seem Eskom has become a three way run entity by the board of Eskom, government and a Gupta-affiliated consortium – she asked Ms Daniels if she agreed with that assumption.

Ms Daniels noted the meeting of 29 July was not a scheduled one. Mr Essa had asked her to meet him – she could not say why Mr Gupta was there etc because it was not actually a formal meeting. Mr Gupta was in a grey tracksuit pants, no shoes and a t-shirt so it was not a meeting – in her view he looked worse than someone at a shebeen. She felt like she was in a movie with Mr Gupta, Mr Duduzane Zuma, Mr Ben Martins, who is the Deputy Minister of Public Enterprises, and a lady she did not know but would be able to recognise from a picture. Ms Daniels prayed to God that she was not killed at the meeting because she felt she walked into a trap – these were kinds of thoughts going through her head. The Deputy Judge President allocated judges. The scheduled meeting from Eskom's side was to arrange a date for a hearing of all the applications. The machinations were to make sure the hearing took place post-December 2017 so that it was more favourable – this was her guess. The talk at the meeting was about trying to figure out how the process could be influenced. Attorneys know that if they were nice to registrars etc they would get suitable dates. She found it shocking that Mr Gupta knew about this. After this meeting she was convinced state capture was real.

She had no doubt Dr Ngubane must have been aware of what was happening in the board because under his watch there was the Mr Molefe payment, driven by Ms Klein, BTC issues and Mr Pemansky being chairman of the IFC while sitting on Oakbay and was found to be the CEO of Trillian Property and Asset Management while presiding over disposal of Eskom's non-core assets. Facts are facts – one could not be the head of an organisation and not know what was going on. In terms of the pension payment, protocol was that only the chairman corresponded with the Minister so in this instance the letter was prepared by Mr Minnaar and signed off by Ms Klein and Mr Khoza. Now that she had all the facts, Ms Daniels knew Mr Molefe was not entitled to the pension payout.

Based on her PA's intimations to Ms Daniels, Minister Brown knew about Trillian before. Her reaction to Ms Daniels' report meant that the Minister sanctioned the action – there was no other inference to draw. Ms Daniels was also convinced Minister Brown knew of the pension payout to Mr Molefe but tried to fob it off on her officials. Three people in the office of Minister Brown acknowledged receipt of the letter and there was a meeting with the Minister on 23 February at her instance – the Minister therefore could not have not known. On a balance of probabilities, Minister Brown must have known about the Gupta meeting. Ms Daniels, given her experience and what she now knew, was of the opinion that everyone in the office of Minister Brown was captured. As a right thinking South African, Ms Daniels would not be fooled. The DG of DPE had never instructed Ms Daniels to do anything but the officials in the Department had an attitude that Eskom worked for them and so did not really understand the role of a shareholder. At times unnecessary reports and information were required – Eskom officials were called to meetings with the Department at a moment's

notice where they would have to explain for hours when they actually had work to do – this was an abuse of power and not a healthy relationship. It pointed to the paucity of leadership – when the Minister and DG were so lax not much could be expected. Ms Daniels definitely agreed Eskom was being run three ways.

143

Mr Swart was outraged by what was shared with Committee today and the level of capture suspected on the *prima facie* evidence. The factual findings of the Public Protector's Report have not been taken on review whilst a small part of it has been taken on review by the President relating to a legal issue – we know the Public Protector found serious breaches of the PFMA particularly with the Tegeta contract. He did not understand why Ms Daniels complied with the Gupta meeting of 9 March 2015 – he asked why she did not tell them to get lost or ask them what right they had to ask her those questions, similarly to what the previous Deputy Minister of Finance told the Guptas in more lucid terms. The meeting of 9 March 2015 fits into the pattern of the executives being suspended as the Committee heard from Ms Molefe this morning, after Ms Molefe pushed back on signing Gupta-influenced contracts. It was heard from Ms Daniels that the entire sequence of events was all planned out. This all plays into the narrative of Eskom having been captured by Gupta-aligned people. He asked Ms Daniels to comment on this.

Ms Daniels replied that the meeting of 9 March 2015 was not a formal one – at the time she was a senior manager i.e. four levels junior than what she is now. She has been with Eskom for 11 years beginning as a junior legal advisor after working her way up. After the meeting with Mr Essa, she also phoned Mr Dan Morakane, who was at that stage the acting Group Executive: Group Capital and her boss prior to Mr Koko – she told Mr Morakane exactly what happened and he said he had heard the rumours. After the meeting with the Guptas, she instructed the team to get a date before December 2017. The case is now going to court on 29 November 2017 – in this way Ms Daniels did what she could to put her foot down.

Mr Swart said the CEO of Trillian Advisory told the Committee about the payments – the CEO was of the view the payments were made in contravention of the PFMA and the Companies Act and were therefore unlawful. The Report of the Public Protector also referred to this but yet at this stage very little action has been taken. The Budlender Report also expressed concern that the matter of capturing was ongoing and malfeasance was ongoing. What was happening now to recover the funds from Trillian and McKinsey? Is there litigation? Is it going to the Special Investigating Unit (SIU) which would be a further delay tactic because the President appoints the SIU?

Ms Daniels said the Bowman's Report recommended certain steps – she briefed the board on this on 29 August. Notwithstanding the referral to the SIU, there is an obligation on the board of directors, as the accounting authority, to recover the money. She made this clear in her presentation that despite referring it to the SIU (on which there was a formal board resolution) there was an obligation in terms of the PFMA and Companies Act. She could hand her files to the Hawks but she did not have confidence that they would do anything about it. She personally issued the letter of demand to McKinsey and Trillian – she did not tell anybody that she was doing this except the CEO. The very next day she was suspended.

Mr Swart asked where the process was now.

Ms Daniels heard through anecdotes that the board was trying to discredit her report and discredit veracity of the Bowman's Report so that it cannot be used. Apart from suspensions, no action had been taken.

Mr Swart asked if this meant no further action was taken since the letter of demand was issued.

Ms Daniels said the letter was issued on 4 or 5 October 2017. She recommended Eskom go to court, get the decision to pay set aside, as it was an action in terms of the Administrative Justice Act, and this needed to be done within six months of the decision being taken. By now, because of all the stalling, she thought a Judge or any court would be hesitant to grant condonation. She found McKinsey's commitment to pay the R1.6 billion quite disingenuous because she was sure its lawyers would have informed them the time period for Eskom to do something was now expired. She had been on suspension since 6 October 2017 and her access to Eskom information was severed.

Mr Rawula sought the legal opinion of Ms Daniels on the different versions relating to the pension/leaving of Mr Molefe where Eskom basically bent the rules to specifically fit the case of Mr Molefe. What was the actual version of events? The proposed amendments to fit Mr Molefe were actually effected by Eskom because the R7.9 million, as a result of the adjustment, would not have been paid if that was not the case. The point is the process was already ongoing – he asked Ms Daniels to respond to this.

Ms Daniels, speaking in her personal capacity and not for Eskom, said it was indeed a fit for purpose arrangement done specifically for Mr Molefe. There were attempts to do the same for Mr Anoj Singh but because Mr Singh was too young it would not have worked. In her view the talk of early retirement, leaving and all the different versions was all a smokescreen to create confusion – Mr Molefe did not officially offer a resignation letter. The statement Mr Molefe made that he was stepping down in the interests of good governance was sent to all board members as well. Mr Molefe applied for early retirement but he did not meet the requirements but the board was willing to subsidise that. If Mr Molefe did qualify for early retirement, as a pensioner he would be able to take a third of what was due to him as a cash payment – this money would then have to be paid back because Mr Molefe was not entitled to it. Ms Daniels made it clear she was not called to advise on these matters. Only after reading the Sunday Times that morning did she start putting together a file – only after going through the information did she realise Mr Molefe did not qualify and she distinctly remembered asking if it meant he was still an employee of Eskom while being an MP.

Mr Rawula asked if it was standard practice for Eskom to make prepayments in reference to its contract with Tegeta. The Committee heard from the business rescue practitioner that there was a contract which Eskom had with Pembani but for some reason Eskom was not happy with the contract other than that it did not have the capacity envisaged – at the same time Eskom preferred the contract with Tegeta. Was Tegeta favoured because it was a Gupta-linked company? The Committee also heard Mr Koko pressured officials to flout procurement processes and policies and for this the officials were suspended. Part of the job of Ms Daniels was to ensure the board was compliant with legal prescripts – he asked Ms Daniels what her role was in terms of flouting the law. In hindsight based on her own personal ethics, he asked Ms Daniels if she should have resigned earlier or blown the whistle against wrong doing taking place.

Ms Daniels clarified that she was a legal adviser at Eskom in the primary energy division in 2006. She then became primary contracts manager in the primary energy division from 2009 until 2011 before working as a senior manager in the office of the Group Executive. Her role changed along the way. She only became Group Company Secretary on 1 October 2015 before taking over, by request, as the acting Head of Legal when the incumbent left. She reported issues in 2015 to Mr Morakane. Mr Matjila did not pressure Ms Daniels into signing any contracts – as chairperson of the suppliers' suspension committee, where errant suppliers were dealt with, she dealt with a supplier who had committed fraud and the committee in effect blacklisted them so the company could not do business with Eskom for five years. Mr Matjila wanted Ms Daniels to uplift this suspension but she refused and he then threatened to fire her that day and she said "go ahead". This was the only instance where Mr Matjila forced her to do something that she did not want to do but he did not succeed.

Ms Daniels was not aware that Eskom entered into a contract with Pembani – she knew Pembani approached Mr Molefe to sign a contract as it was interested in buying Optimum on terms. This was not presented to Eskom – she only found out about this in the Public Protector's Report.

Suppliers across the board were often given prepayment – there were strict rules about it and in the case of Tegeta those rules were applied. Ms Daniels had the share certificate, it was pledged and the guarantee was only uplifted once the money was set off against the coal delivered. The case was unusual in that Eskom clearly favoured Tegeta because it helped them buy Optimum.

Ms Nobanda was interested in the meeting with the Guptas – she asked Ms Daniels to repeat who was present at the meeting with Mr Ajay Gupta.

Ms Daniels repeated that it was Mr Ajay Gupta, Mr Duduzane Zuma, Mr Salim Essa, Deputy Minister Ben Martins and a lady whose name she just could not remember.

Ms Nobanda reminded Ms Daniels of the meeting of the Committee of 23 May 2017 at the Townhouse Hotel which she was part of with Dr Ngubane and some of the Eskom board members. In this meeting, Dr Ngubane mentioned that Mr Molefe qualified for the pension fund payment. Ms Daniels was present at the meeting and assisted in explaining the calculations and how the R30 million was reached. The Member asked why she should now believe what Ms Daniels was saying and presenting to the Committee was true. At the time Ms Daniels did not say what was happening was wrong.

Ms Daniels responded that at the time she did not have all the information that she had at her disposal right now. She went through an extensive process of looking for documents and putting it together. Information in the file on the Mr Molefe matter came from different departments. Whatever she told the Committee Ms Daniels could verify with fact. Had she known something was wrong at the time Ms Daniels would have said so.

Ms Nobanda asked if Ms Daniels did not have the information she did now, and everything went smoothly for the pension payout of Mr Molefe, it would have meant Ms Daniels was complicit in the deed whether it was wrong then or wrong now.

145

Ms Daniels did not agree as her role as Company Secretary was administrative. In terms of this transaction she was not asked for advice at any time. At the meeting she recorded the advice. She supported the theory of the Member that had the Sunday Times not published this story, no one would have been any the wiser – this came with the benefit of hindsight and what Ms Daniels knew now.

Ms Nobanda referred to the section of Ms Daniels' statement which spoke to circumstances leading to her suspension – she asked what led the board to suspend her if the board was new. Were the recommendations for disciplinary action against Ms Daniels what led to her suspension or was this a different matter?

Ms Daniels was saying in the statement that her role became increasingly difficult with the new board – at its first meeting of 23 June, the new board tasked Ms Daniels with firing the manager in the office of the chairperson who had written an opinion on Eskom's reputational crisis and the board's breach of its fiduciary duty. Ms Daniels refused to do so because the manager was hired to deal with Eskom's communication, more particularly the board's reputational issues. In her case, Ms Daniels took annual leave from 1 July and while away, at a board breakaway, Mr Khoza announced that the board decided that the Group Company Secretary and Head of Legal cannot be one person and Ms Daniels needed to choose knowing full well that she had already chosen in March of that year to be Head of Legal. During this period, because of the Molefe matter and the governance issues raised and that decisions taken were actually irregular, the chairman of the board asked the Chief Audit Executive to do an investigation on the governance issues. That Chief Audit Executive recommended to the board, without her knowledge, that she be suspended – this was on a different charge. She picked this up while preparing for the audit and risk committee and it was said she backdated minutes and had not done certain things. A detailed response was then provided to Mr Gounden and his colleagues and to this day no response was received. The Audit Executive then said he made a mistake via email – Ms Daniels did not accept it and told him to go back to the board to inform it this was wrong. He was then requested to amend his submission but it did not deter from the fact that there was a concerted effort to get Ms Daniels out of the way.

Ms Nobanda asked Ms Daniels why she thought Mr Koko was so comfortable taking her along to meetings with Guptas.

Ms Daniels explained she was the, for want of a better word, chief of staff in the office of Mr Koko – these meetings were ad hoc and were not actually meetings. Mr Koko said they would go and discuss IPPs but then they would end up at the offices of Trillian where she would wait outside as Mr Koko met with Mr Essa and Mr Wood. The meetings were not formal. There was no discussion of "how" and "why" and there were no actions for Ms Daniels to take. Mr Koko also wanted to "show off" who he knew.

Mr Gungubele questioned how Mr Koko escaped from being suspended.

Ms Daniels said the strategy of Mr Koko was to "wait it out" while the other executives left. There was a meeting where Mr Koko had to motivate why he should stay – he prepared a written submission and thereafter the board was ostensibly convinced that Mr Koko was sincere and wanted to come back.

Mr Gungubele asked if the relationship between the current chair of the board and Mr Koko was purely professional.

Ms Daniels, in her view, did not think it was. During the disciplinary process Mr Khoza was quite hostile towards Ms Daniels in terms of what she wanted to do. He interfered in the charges and was too operational to be the chairperson.

Mr Gungubele noted there was a general allegation against the current board that it was a Gupta board – he asked Ms Daniels to comment on this allegation.

Ms Daniels, in her view, agreed certainly in the case of the current and previous board, in her experience because she worked with both boards. During the time when banks were beginning to question peoples accounts, one of the directors phoned her for advice and the director was livid because she had been declared a politically exposed person – she then said to her "we all know this is a Gupta run board and we all know we take instructions from the Guptas so if these guys think I am going to go down I will tell on them".

Mr Gungubele asked how critical Mr Khoza was on the board for being a Gupta conduit.

Ms Daniels said that in Mr Khoza's previous role as chairperson of the board tender committee, many of the transactions went through unopposed, there were round robin resolutions and ad hoc board committee meetings called at a moment's notice – the ground was there. For a non-executive chairperson Mr Khoza had been at the office every day – that is unprecedented.

Mr Gungubele requested the Committee get all the CVs from the current board to ascertain if they were professionally appointed. He asked Ms Daniels to explain the prepayment.

Ms Daniels replied that in simple terms, it meant Eskom gave the supplier the cash ahead of supply. This was because if Eskom was going to ask the supplier for more coal, it would need to fund the operations of the supplier.

Mr Gungubele questioned if it was correct that this prepayment was deposited to Tegeta.

Ms Daniels confirmed this. She drafted the pledge and share agreement. When there was cross-supply, as there was in this case from Hendrina to Arnot, it was plausible.

Mr Gungubele asked if this was legal oversight on the part of Ms Daniels.

Ms Daniels said she was not a lawyer then.

Mr Gungubele noted Ms Daniels was the Company Secretary and her primary responsibility was to advise on corporate governance. She was also legally trained – to an extent she must accept there was oversight on her part.

Ms Daniels accepted this – her focus was to ensure Eskom had security.

Mr Gungubele wanted to know more about the guarantee of R2.1 billion, which involved ABSA, and the story behind it. 146

Ms Daniels said Mr Koko wrote to the DG of the Department of Mineral Resources. Usually the Eskom coal contract was used as surety – it was a little bit unusual for Eskom to have given the guarantee to a supplier.

Mr Gungubele asked if it was unusual or wrong.

Ms Daniels stated it was wrong.

Mr Gungubele asked who prepared the documentation in this case.

Ms Daniels responded that it was Treasury – she was not involved in it.

Mr Gungubele questioned the role of Cliff Dekker Hofmeyr and if procuring the company, in terms of corporate governance, was a prudent decision.

Ms Daniels said they were on the Eskom panel and investigated the conflict of interest and whistle blower reports. With the benefit of hindsight, she would have used another company.

Mr Gordhan wanted to play devil's advocate for a short while and put to Ms Daniels that she was spilling the beans due to the suspension as opposed to something being genuinely wrong.

Ms Daniels responded that she was fighting the suspension – she believed in Eskom and would like to go back to work to be part of the Eskom clean up. Other than when asked about her personal opinion, Ms Daniels ensured she could back up what she was saying with documentary evidence. This was not an act of vindication on her part.

Mr Gordhan asked how Ms Daniels would rebut Mr Koko or Mr Essa if they denied her claims around having coffee at Melrose Arch and seeing certain people in tracksuit pants.

Ms Daniels would not be able to do – it would be her word against theirs. People said the Gupta leaks were not true but now we know that they are – it was a question of one making up one's mind as to whether one believed Ms Daniels or not.

Mr Gordhan noted that the name of Mr Gounden flowed constantly through the testimony of Ms Daniels – he asked if Mr Gounden operated with the right level of integrity on the board and as chair of the audit committee.

Ms Daniels was of the view that no – Mr Gounden was very much tied to the influence of Mr Khoza. When Ms Daniels presented the Trillian Report to the audit and risk committee, Mr Gounden was prepared to allow Mr Anoj Singh to sit in while she presented – at this point she lost respect.

Mr Gordhan wanted to know what "issues" were discussed in the report Ms Daniels prepared for the Minister.

Ms Daniels responded that there were four issues – Minister Brown said it was clear from the report there was a complete failure in audit control and Ms Daniels agreed with her on this because the report by the Chief Audit Executive said the McKinsey Trillian deal was above board, compliant and the only thing required was a termination agreement. The second question the Minister asked was why there was no contract in place for Trillian – she responded that there was no legal or contractual obligation to do so. Thirdly, the Minister said it appeared the legal department had no role in the contracting process – this was not true because it was dealt with by her predecessor and there was in fact an opinion from Adv Kennedy that the contract between McKinsey and Eskom required Treasury approval for the deviation. The fourth issue was that the Minister wanted an explanation to the executive ethics committee as to why she had lied to Parliament.

Mr Gordhan asked why Ms Daniels was being suspended – was it incompetence?

Ms Daniels said they said she ought to have known about the contract and advised the board – the first time she became aware of the matter was on 5 December 2016.

Mr Gordhan wanted to know why Mr Dladla delivered the suspension personally to Ms Daniels at her residence.

Ms Daniels thought he was under enormous pressure to suspend her – she expected it from the day she handed in the Trillian-McKinsey report. Mr Dladla needed to go back and say he delivered the suspension.

Mr Gordhan asked Ms Daniels, based on her knowledge of the Companies Act and PFMA, if the current and previous directors of the Eskom board were capable of being reported for their lack of diligence, amongst other things, to the CIPC and declared delinquent directors?

Ms Daniels thought a delinquency application would have very much merit in this instance.

Mr Gordhan recommended the Committee write to the office of the Gauteng Judge President and inform him that the DJP's office came up in its discussions today so that he was aware of the abuse of these sorts of matters in the context of state capture.

Mr Marais asked if it was also the task of the Deputy Judge President to allocate cases to Judges – this was the crucial point because the Deputy Judge President could decide which Judge to give this case to.

Ms Daniels said this should be emphasised and it explained why Mr Gupta, at that meeting, wanted to know the process.

Mr Tseli did not want to assume that Ms Daniels, as a legal person and in the course of performing her duties in advising the board, did it in writing.

Ms Daniels responded that she did some memos especially around the McKinsey Trillian matter.

Mr Tseli asked if Ms Daniels advised in writing on what was best to do in the Mr Molefe pension matter.

147

Ms Daniels said this was all in writing.

Mr Tseli asked if Ms Daniels, as Company Secretary, was not supposed to be part of the processes involving the business rescue practitioner negotiations around the R600 million shortfall.

Ms Daniels would not have been as her role was administrative to the company. She recalled being called to one meeting with the business practitioners but Mr Koko wanted notes taken of the meeting – Mr Nazeem Howa was there and the people from primary energy.

Mr Tseli sought her comment on the relaxing of the rules of the Mr Molefe pension matter. Was there anything wrong in that particular instance?

Ms Daniels explained the relaxation of the pension fund rules did not materialise because the board was not authorised to do so – the pension fund was administered by a separate board of trustees and any amendment to the rule would get done there. The best that could have been done was to ask the pension fund certain questions.

Mr Tseli asked if this was the first instance of a rule needing to be amended that Ms Daniels had come across since working for the company to address a particular aspect.

Ms Daniels said it was not – it had been done before when executives took early retirement but the instance of Mr Molefe was different because he was a contract employee. She was quite relieved that it could not be done.

The Chairperson thanked Ms Daniels for her time before the inquiry and her cooperation. It was valued and would assist a great deal in providing Members with an understanding of Eskom during her tenure.

The meeting was adjourned.

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Submission prepared by: Suzanne Margaret Daniels
Group Executive: Legal and Compliance
Eskom Holdings SOC Ltd
08 November 2017

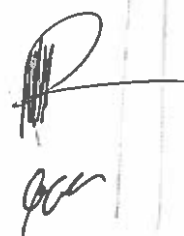
PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES

Oversight Inquiry into Governance, procurement and financial sustainability of Eskom

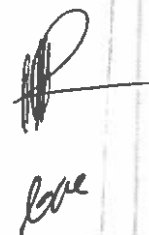
1. I, the undersigned, Suzanne Margaret Daniels, hereby set out my factual narrative relating to my experience at Eskom as the Group Company Secretary from 1 October 2015 and subsequently as the Group Executive, Legal and Compliance from 27 July 2017.
2. I am an adult female attorney and conveyancer, born and raised in Cape Town and currently residing in Gauteng.
3. This guideline is prepared with the purpose of informing the Portfolio Committee on Public Enterprises on the specific topics I have been invited to give evidence on and assist it with its enquiry into "state capture".
4. Over the past few months, information relating to the extent of 'state capture' has been reported by the media and other individuals who have stepped forward.
5. The facts set out in this document are within my personal knowledge, unless the context indicates to the contrary. They are to the best of my knowledge and belief both true and correct.
6. To the extent that I rely on information furnished to me by others, I have provided the necessary documentation.



7. I began my career at Eskom on 1 May 2006 as a Chief Legal Adviser in Generation Primary Energy, Contracts Section. This business unit was part of the Generation Division at the time headed by Ehud Matya.
8. I became Acting Contracts Manager, Primary Energy in April 2007 and during this period I was accountable for the articulation, promotion and execution of a contract advisory and risk management approach in the fuel procurement executed by the Primary Energy Division.
9. I was permanently appointed to the role of Senior Manager: Contracts (Coal, Water and Gas) in April 2008 until January 2010 when I moved to the office the Managing Director, Primary Energy Division.
10. I was appointed Senior Manager, Office of the Group Executive in 2011 and served under Dan Marokane, Kannan Lakmeeharan, and Matshela Koko respectively.
11. Subsequently, I was transferred to the Office of the Chairman on 1 April 2015.
12. I was appointed Group Company Secretary on 1 October 2015 and held this position until 27 July 2017 when the current interim board of Eskom accepted my resignation as Company Secretary. The duties of the Company Secretary are set out in section 88 of the Companies Act, 2008 as amended.
13. It is important to note, I attended board meetings and board subcommittee meetings as company secretary and not as a director, hence I would have no voting rights. My role was to record the proceedings of the meeting and produce a record thereof in the form of minutes. While part of the role required that I advise the board on compliance with regulatory and statutory requirements, this role was located within the legal and compliance department and thus my role was limited to adherence to the Companies Act and the Memorandum of Incorporation.
14. Upon the departure of the General Manager: Legal and Compliance, I was requested by the Group Chief Financial Officer and Group Chief Executive to caretake the role of Acting head of legal with effect from 1 September 2016 and thus I fulfilled a dual function of Company Secretary and Acting Head of Legal and Compliance for the period until 27 July 2017.



15. In hindsight, at the time it made sense to assume both roles as the guiding principle was that as an officer of the cOmpany, I had to act in the best interests of Company . For a period of time I exercised duty of care in these roles and executed both to the best of ability. This is evidenced by the successes Eskom enjoyed in Court and other regulatory forums. On the Company Secretary, various initiatives such as improving the quality of minute taking and record keeping and/or the entire capacity decision making and verification.
16. While this principle is theoretically sound as stated in the textbooks, it became problematic for me as this led to clashes with the then Interim Chief Executive, Matshela Koko and also caused disquiet at Board and Exco level. This dual role demands a higher order leadership for it to function optimally to achieve its natural objectives.
17. As it became untenable for me, which ultimately impacted the span of my operations, I formally advised the Board that I wished to take up the role of Head of Legal and Compliance in March 2017 and would resign as Company Secretary.
18. Due to leadership instability at the time, this became a formal reality only in July 2017.
19. When this current board took over which was styled as an Interim board by Minister Lynne Brown, my overall role within the Company became increasingly untenable.
20. The first bullet was launched when, on the instructions on the Interim Board Chairperson, Zethembe Khoza, the Chief Audit Executive, Molefi Nkhabu prepared a board submission wherein he recommended disciplinary action against me.
21. This was unknown to me as I was not provided with the opportunity to make input into the findings of such investigation.
22. I only picked this up as I was preparing for the meeting, and immediately brought it to the attention of my Board Secretary, Mrs Annamarie van der Merwe, and insisted that we prepare a formal written response to the allegations set out in the submission prepared by the Chief Audit Executive. The letter was addressed to Mr Sathie Gounden, the Chairman of the Audit and Risk Committee.



23. Mr Nkhabu, upon receipt of the written correspondence from the board secretary and I, offered a haphazard response in email and indicated that he had made a mistake and apologized.
24. We did not accept the apology as the allegations were quite serious, yet vexatious in nature and ought to have been addressed accordingly via the same committee, which did not happen.
25. To this date, this matter has not been resolved, notwithstanding Mr Nkhabu's pseudo apology. No formal acknowledgment nor action from Mr Gounden has been received to date by either Mrs Van Der Merwe or me.
26. Subsequently I was advised of the investigation on my team building exercise which was also spearheaded by the current Interim Board Chairperson, Zethembe Khoza. It is common cause that this allegation found its way into my subsequent notice of suspension on 2 October 2017.
27. On 2 October 2017, I received a Notice of Intention to Suspend on a set of allegations which was hand delivered to my house in the evening by Mr Johnny Dladla, Interim Group Chief Executive at the time.
28. I submitted representations on Thursday 5 October 2017 at 9h00 to the then IGCE, Johnny Dladla, as was stipulated in paragraph 6 of the notice.
29. However, on 6 October 2017, I received a Notice of Suspension dated 6 October 2017, wherein the newly appointed Interim Group Chief Executive ("IGCE") Sean Maritz, refers to my written representations of 4 October 2017 and confirms that he has considered same.
30. On the basis of those representations, Sean Maritz decided to confirm my suspension with pay pending the finalization of an investigation and/o disciplinary action into the allegations of misconduct against me, yet the allegations are 100% different to what was put to me on 2 October 2017.
31. The correspondence sets out the basis for the decision and also the terms of my suspension.
32. Therefore the suspension itself is highly irregular.
33. It is for this reason that I have referred the matter of my unfair suspension to the CCMA which I have requested to be expedited based on the public interest at play herein.



34. At the same time I was emailed a Notice to Attend Disciplinary with Annexure "A" setting out the Alleged Misconduct/s. The date, time and place of the hearing was TBC and this Notice was also signed by Sean Maritz, the newly appointed IGCE on 6 October 2017.
35. At the core of these allegations regarding misconduct is the allegation that: "Whereas you prepared a report for the Minister dated September 2017, which report contains various matters of concern. After perusal of this report and after further relevant information were obtained, issues were identified which could warrant disciplinary proceedings being instituted against yourself. It would thus be in the interest of yourself and Eskom that through an interrogative process of disciplinary proceedings, questions be answered relevant to the report and the information received."
36. My instruction to convene this meeting came from Zethembe Khoza, Chairperson of the Board Tender Committee at the time.
37. This call was around 19h30 on the evening of the 11th April 2016 to my mobile. I had actually missed the call as I was home having dinner with my family when I heard the phone ringing in my study. I stepped away from the dinner table to return Mr Khoza's call. The reason why I can be so specific as to the details is that I have had the opportunity to examine my phone records for the date in question.
38. Mr Khoza informed me that it was necessary to convene a BTC meeting for that evening and that the item to be discussed was the emergency coal supply to Arnot Power Station.
39. I questioned the efficacy of having a meeting at that late hour as the scheduled BTC meeting was due to take place on the 13th April 2016 which was a mere 48 hours away. To the best of my knowledge the emergency had been declared a while back and it would really not make a difference for the station. I also informed him that I had no documentation at hand to distribute to members.
40. Notwithstanding my comments, Mr Khoza instructed me to continue as this was a request driven by the operations. This conversation lasted approximately four and a half minutes according to my telephone records for that day.




41. Subsequent to this conversation I received a submission via email at 19h51 from Edwin Mabelane who was the Chief Procurement Officer at the time, with a request to convene a meeting to discuss the Emergency Supply to Arnot Power Station.
42. For easy reference, I set out the timeline of events in the Table below.


Table 1

DATE	TIME	EVENT
11 April 2016	19h51	Email request from CPO to COSEC for Special BTC with regard to Arnot Emergency Supply
	19h56	COSEC confirmed to Chairman, BTC that meeting will take place at 21h00
	20h00	COSEC prepared document for distribution and set up teleconferencing facilities
	20h15	Meeting invite to BTC members sent by COSEC with submission attached Invitees: Zethembe Khoza, Nazia Carrim, Viroshini Naidoo, Chwayita Mabude, Edwin Mabelane, Ayanda Nteta, Matshela Koko
	20h19	SMS messages sent to all BTC members
	20h30	COSEC confirmed to executives that teleconference is set up for 21h00
	20h53	Ms Viroshini Naidoo sent an email to the COSEC and copied invitees containing 7 questions. Closing sentence: "This matter has been in the public domain so I need to know everything possible has been done to get the best deal for Eskom."
	21h04	The meeting commenced at 21h04 with all members of the BTC connected telephonically. Mr Mabelane and Ms Nteta joined the discussion.




DATE	TIME	EVENT
12 April 2016	21h10	Ms Viroshini Naidoo sent through further questions via email.
	21h32	Meeting closed
	21h36	Email request from Ms Naidoo to COSEC to have the minutes ready for sign off by Wednesday
	21h38	COSEC undertook to have it ready
	21h45	Email from Ms Viroshini Naidoo to Mr Zethembe Khoza re matters coming to the BTC so late
12 April 2016	15h50	Receipt of responses to matters arising from meeting of the 11th by the COSEC
	17h27	Responses from CPO and team emailed to the CFO by the COSEC
13 April 2016	9h00	CFO confirmed the securities from Tegeta Resources. No further questions were raised by Ms Viroshini Naidoo. Minutes of 11 April 2016 were approved at this meeting

43. On December 8 2015, at the instruction of the then chairman of the Board, Dr Ben Ngubane, I collated documentation to be circulated to members of the Board via email requesting their approval or non approval.
44. The submission was titled "Urgent Request to approve the Pre-Purchase of Coal from Optimum Coal (Pty) Ltd".

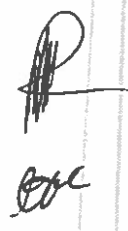


Life.

45. As this matter was of a financial and investment nature I convened a meeting of the Board Investment and Finance Sub-Committee ("IFC") on 9 December 2015.
46. Mr Mark Pamensky, the then Chairman of the IFC recused himself from the meeting due to his conflict of interest as declared.
47. Dr Pat Naidoo was elected by the members to act as chairperson for this particular meeting. Members present at this meeting were Mrs Venete Klein and Mr Zethembe Khoza and the three members constituted a quorum for the IFC.
48. Anoj Singh and I were in attendance as the Group CFO was the coordinating official and I acted as secretariat for the meeting.
49. The discussion of the meeting was as set out in the minutes of the meeting of 9 December.
50. The members resolved that: "It is recommended that the Board approve the transaction as set out in the submission to the Board relating to the pre-purchase of coal from Optimum (Pty) Ltd."
51. This recommendation was conveyed to the Board members as the Round Robin documentation was circulated.
52. By 9 December 2015, my office had received unanimous approval bar, for Mr Pamensky who recused himself and Mr Molefe who was off sick.
53. The full resolution was as follows:
 - 53.1. The request from the Department of Mineral Resources is hereby noted;
 - 53.2. The Group Chief Executive, together with the Group Executive for Generation and Chief Financial Officer, are hereby authorised to negotiate and conclude a pre-purchase of coal agreement with the proposed owners of OCM (coal supplier);
 - 53.3. This agreement shall be subject to the necessary regulatory approvals having been obtained by Eskom and the supplier respectively, as and when necessary;
 - 53.4. The Chief Financial Officer is hereby authorised to take all the necessary steps to give effect to the above, including the signing of any consents, or any other documentation necessary or related thereto.




54. On 10 December 2015, Ms Caroline Henry, Senior General Manager (Treasury) prepared a Memorandum addressed to the Chief Financial Officer, Anoj Singh, the subject matter whereof was: "Guarantee in favor of Tegeta Exploration and Resources Proprietary Limited ("TER")"
55. This memorandum set out the rationale for the issuance of a guarantee in favor of TER and sought approval for:
- 55.1. The CFO to approve the issuance of a guarantee in favor of TER;
 - 55.2. The CFO to approve ABSA as a counterpart to issue the guarantee;
 - 55.3. The CFO to approve the counterpart investment concentration limit excess for ABSA for the duration of the guarantee.
56. This was approved by the CFO on the same day and it was subsequently processed by Ms Henry.
57. I have been requested to provide a chronology outlining the sequence of events relating to the reinstatement of Mr Brian Molefe ("Mr Molefe") as the Group Chief Executive Officer ("GCE") of Eskom Holdings SOC Ltd.
58. Mr Molefe was appointed as the Eskom acting GCE from 17 April 2015 to 30 September 2015.
59. On 16 October 2015, Dr Ngubane addressed a letter to the Minister of Public Enterprises, Minister Lynne Brown ("the Minister") setting out a proposal in respect of Mr Molefe's remuneration for her consideration and approval. The letter stated that the benchmarks reflected that the current remuneration as paid by Transnet, to Mr Molefe was below the statistical measurements. On that basis, Dr Ngubane proposed a suitable guaranteed remuneration package taking into account the cited benchmarks.
60. On 1 November 2015, the Minister approved the total guaranteed remuneration to be paid to Mr Molefe with effect from the date of his appointment.³ The Minister 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 Minister further indicated that she awaited receipt of the draft employment contract and performance agreement.

61. On 9 November 2015 Dr Ben Ngubane ("Dr Ngubane") made a formal offer of employment to Mr Molefe. Mr Molefe acknowledged receipt of the letter on 11 November 2015.⁴ Mr Molefe was appointed as the GCE with effect from 1 October 2015.
62. On 18 November 2015, Mr Anton Minnaar of Eskom requested Mr Solly Ntsibande of the EPPF to calculate the potential cost to the business unit should Mr Molefe take early retirement.
63. On 20 November 2015, Mr Ntsibande calculated that the cost of early retirement at the age of 55 years would cost R 15 387 189.75 and the cost of early retirement at age 63 would be R 25 731 519.12.⁶
64. On 25 November 2015, Dr Ngubane directed a letter to the Minister. In this letter, Dr Ngubane outlined Mr 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. Dr Ngubane further indicated that due to the nature of those engagements and the short term contractual obligations, Mr Molefe had not been able to benefit from the growth opportunity of a single pension fund. Dr Ngubane consequently proposed the following material contractual stipulations to bridge this gap and requested the Minister to approve the proposed contractual stipulations:
 - 64.1. Regardless of Mr 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 63.
 - 64.2. That the penalties prescribed by the EPPF for retirement prior to age 63 be waived.
 - 64.3. That Eskom carries the cost of such penalties (to be paid over to the EPPF).
 - 64.4. In the event that Mr Molefe's contract is not extended beyond the 5-year termination date, he will be allowed to subscribe to any other SOC or government pension fund.
 - 64.5. The Minister did not respond to Dr Ngubane's letter date 25 November 2015. However, this matter was discussed at a meeting of 23 February 2016 set out below.
65. On 9 February 2016, a meeting of the Eskom People and Governance Committee was held to discuss executive early retirement at the age of 50.

66. I attended a meeting of 23 February 2016 with Minister Brown, Dr Ngubane and Mrs Klein in Cape Town whereat Mr Molefe's proposed pension arrangement was discussed between the parties. Minister Brown 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. We 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 Mr Molefe's contract of employment needed to be obtained by Minister Brown.
67. The Minutes of the People and Governance Committee meeting of 9 February 2016, refer to and note the discussion relating to the conclusion of Mr Molefe's employment contract, with particular reference to "... the current rule that staff over 50 years of age with at least 10 years' service were entitled to retire as per the Eskom Pension and Provident Fund Rules." This was followed by a request for "... the Eskom Rules to be amended in respect of executive directors with fixed-term contracts to make up the shortfall in years, waive the penalties and refund the Pension and Provident Fund the actual costs relating to additional service.
68. The People and Governance Committee resolved that:
- 68.1."1. The current Eskom Pension and Provident Fund (EPPF) rule that employees may proceed on retirement from age fifty with ten years' service remains applicable.
- 68.2.2. in cases where Executive Director's (appointed on fixed-term contracts) decide to take retirement and there is a shortfall regarding the EPPF ten years' service rule, Eskom shall –
- (i) bridge the gap to make up for the ten years;
 - (ii) waive penalties applicable to early retirement;
 - (iii) refund EPPF actual costs for additional services added, plus penalties applicable to early retirement".
69. Subsequent to the resolution, Eskom and Mr Molefe concluded the Executive Employment Contract on 7 March 2016 which recorded, inter alia that:
70. Mr Molefe commenced employment with Eskom as its GCE with effect from 1 October 2015;
- 70.1 it was a fixed-term contract expiring on 30 September 2020;

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- 70.2. Mr Molefe would be a member of the EPPF, subject to its rules.
71. Mr Molefe's contract of employment was entered into three months before the 2016 Memorandum of Incorporation was adopted. At the time of concluding the employment contract between Mr Molefe and Eskom the 2014 Memorandum of Incorporation was in operation.
72. On 2 November 2016, the Public Protector published her report into the "State of Capture" which made observations against a number of persons, including Mr Molefe.
73. On 3 November 2016, Mr Molefe answered questions from journalists on the Public Protector Report.
74. During 8 to 10 November 2016 (approximately two to three days before Mr Molefe issues a public statement that he is leaving Eskom), Mr Molefe met with the Minister and indicated his intention to step down as Eskom GCE. The Minister described his departure as a resignation during the meeting.
75. On 11 November 2016, Mr Molefe wrote a letter to Dr Ngubane applying for early retirement in terms of the EPPF rules as read with the resolution of the People and Governance subcommittee dated 9 February 2016. Mr Molefe indicated that his last day of service would be 31 December 2016.
76. On 11 November 2016, Mr Molefe issued a statement stating that "I have in the interest of good corporate governance, decided to leave my employ at Eskom from 1 January 2017."
77. On 11 November 2016, Eskom issued a media statement confirming that Mr Molefe has stepped down as Eskom GCE.
78. On 11 November 2016, the Minister issued a statement stating that Mr Molefe had resigned as the Eskom GCE.
79. On 21 November 2016, the People and Governance Committee discussed the terms of Mr Molefe's request for early retirement and approved the request, in principle.
80. On 24 November 2016, Dr Ngubane addressed a letter to Mr Molefe confirming that his application for early retirement was approved in terms of rules 28 and 21.4 of the EPPF Rules and the Board resolution of 9 February 2016. Dr Ngubane further confirmed that penalties would be waived and the potential service to age 63 was granted.



81. On 30 November 2016, the Minister released a media statement that she had approved the appointment of Mr Matshela Koko ("Mr Koko") as Eskom's Acting GCE effective from 1 December 2016.
82. On 31 December 2016, Mr Molefe left Eskom's employment and on 23 February 2017 took up a position as a Member of Parliament for the African National Congress.
83. On 31 December 2016, Eskom issued Molefe with a certificate of service. The certificate notes the reasons for termination as early retirement.
84. On 18 February 2017 the EPPF sends a letter to Mr Molefe welcoming him to the EPPF. The letter stated that the benefits to be paid to Mr Molefe were calculated in terms of the rule of the EPPF.
85. On 16 April 2017, the Sunday Times published an article indicating that Eskom had paid Mr Molefe a pension pay-out of R30 million.
86. On 19 April 2017, Eskom represented by Dr Ngubane, Ms Klein, Mr Minnaar and I attended a meeting with the Minister to discuss concerns relating to the "pension pay-out" referred to in the media article. The Minister instructed Eskom to meet with Mr Molefe and re-evaluate the "pension payment".
87. On 23 April 2017, the Minister issued a media statement indicating that she has declined Mr Molefe's pay-out of R30 million and that she had instructed Eskom to reconsider the issue of the pension and consider a reasonable pension pay out.
88. On 24 April 2017, the Eskom Board met in order to consider and deliberate upon the issues raised by the Minister. On 25 April 2017, a meeting was held with the Minister to discuss suggested options pursuant to the Board meeting of 24 April 2017.
89. On 28 April, Eskom received legal advice relating to the payment of pension benefits to Mr Molefe. Eskom was advised, inter alia, that the early retirement agreement was legally impermissible as it was impermissible for Mr Molefe to take early retirement at the age of 50 in terms of the EPPF rules.
90. On 2 May 2017, the Eskom Board met and considered the legal advice received and concluded that the approval of Mr Molefe's application for early retirement could not be implemented. The Eskom Board therefore decided to rescind the approval and restore status quo prior to the approval of Mr Molefe's application for early retirement.



91. On 3 May 2017, Eskom wrote a letter to Mr Molefe stating that the Eskom Board had engaged the Minister and had resolved to rescind its resolution to approve his early retirement. The letter called upon Mr Molefe to resume his duties as the Eskom GCE.³
92. On 3 May 2017, I sent an email to Mr Ntsibande of the EPPF enquiring about the amounts that had been paid to Mr Molefe as well as the dates when such payments were made. I further enquired about the process required to reverse the transactions between Eskom and the EPPF.
93. On 5 May 2017, Mr Ntsibande responded to my email and stated that a lump sum of R7 792 767.91 had been paid to Mr Molefe and that pension payments of R124 228.95, R59 804.67, R63 703.67 and R73 908.07 had been paid to Mr Molefe respectively during January, February, March and April.
94. On 9 May 2017 the Minister met with the Eskom Board. The Board explained that pursuant to legal advice received the approval of Mr Molefe's application for early retirement was legally impermissible and the Board had resolved to rescind the agreement that culminated from that approval.
95. On 11 May 2017, the Board addressed a letter to Mr Molefe advising him that Eskom had resolved to rescind its decision to grant him early retirement and requested him to report for duty.
96. In consequence of the resolution to rescind the purported approval of the early retirement request, Mr Molefe and Eskom concluded a reinstatement agreement on 11 May 2017. The reinstatement agreement provided for Mr Molefe's employment,
97. contract to continue on its terms and for Mr Molefe to resume his duties in terms of his employment contract. Mr Molefe also agreed to repay amounts received by him pursuant to his purported "early retirement". The parties also agreed, in clause 7 that the period between 1 January 2017 and 15 May 2017 be treated as unpaid leave.
98. On 11 May 2017, the Board wrote a letter to the Minister informing her that it had resolved to rescind the early retirement agreement and to reappoint Mr Molefe as the Eskom GCE. The Board enclosed the reinstatement agreement.
99. On 12 May 2017 the Minister issued a media statement in which she confirmed that Mr Molefe would be reinstated as the Eskom GCE and that she was satisfied with the re-evaluation process and recognised the merits in the proposal, on the proviso that it is legal.



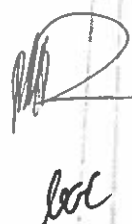

100. On 15 May 2017, Mr Molefe reported for duty in terms of the reinstatement agreement. Litigious Proceedings in respect of Mr Molefe's reinstatement
101. On 15 May 2017, the Democratic Alliance ("DA") brought an urgent court application in the Pretoria High Court against the Minister, Eskom and Mr Molefe challenging the legality of Mr Molefe's reinstatement.
102. On 17 May 2017, I directed a letter to Mr S Luthuli of the EPPF, in which I requested the EPPF to stop making any further pension payments to Mr Molefe. The letter recorded that Eskom and Mr Molefe had agreed to a reversal of his early retirement. I asked Mr Luthuli to confirm the following:
- 102.1. that in accordance with the reinstatement agreement, the period from 1 January 2017 to 14 May 2017 will be regarded as unpaid leave;
- 102.2. that the EPPF will not disburse pension payment funds to Molefe consequent on his approved application for early retirement;
- 102.3. that the EPPF will reinstate Mr Molefe's membership of the Fund as from 15 May 2017;
- 102.4. the EPPF inform Mr Molefe of the amount of money that he is required to repay to the EPPF; and
- 102.5. the EPPF would advise Eskom as to the date it will refund to Eskom the amount disbursed by it in respect of Mr Molefe's early retirement.
103. On 17 May 2017, Eskom filed a notice of intention to oppose the application by the DA.
104. On 19 May 2017, the Economic Freedom Fighters ("EFF") brought an application against Eskom, the Minister and Mr Molefe challenging the legality of Mr Molefe's reinstatement. The EFF sought further relief declaring the Eskom Board to have breached their fiduciary duties owed to Eskom. The EFF sought an order requiring the Minister to remove the Board. The EFF has recently stated that it will not pursue the relief sought relating to the Board, in the light of the Eskom Board having been reconstituted.
105. On 22 May 2017, Solidarity brought an application against Eskom, the Minister, Mr Molefe and other Eskom board Members in which it, inter alia, challenges the legality of Mr Molefe's reinstatement. Solidarity seeks an order requiring the National Director of Public Prosecutions to investigate the conduct of the Eskom Board and Mr Molefe.



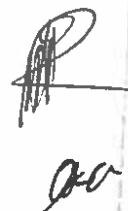

106. On 22 May 2017, Eskom filed an answering affidavit to the applications brought by the DA and EFF. On 2 June 2017, Eskom filed a supplementary affidavit which served as a supplementary answering affidavit to the EFF and DA application and an answering affidavit to the Solidarity application.
107. On 31 May 2017, the Minister issued a directive to the Eskom Board instructing it to rescind its decision to reinstate Mr Molefe as GCE.
108. On 2 June 2017, the Eskom Board met and passed a resolution giving effect to the Minister's directive.
109. On 2 June 2017, I addressed a letter to the EPPF advising it that pursuant to a resolution of the Board as per the Minister's directive, Mr Molefe was no longer in Eskom's employ. The letter further stated that Mr Molefe was not entitled to any pension fund payments since he was not entitled to any early retirement benefits pursuant to the rules of EPPF. The EPPF was requested to confirm that it will not make any payments to Mr Molefe in relation to his purported early retirement and that it would refund to Eskom the amount which Eskom paid to it in relation to Mr Molefe's purported early retirement. The EPPF was also requested to reimburse Eskom the amount already paid to Mr Molefe upon receipt of the money from Mr Molefe.
110. On 2 June 2017, Eskom directed a letter to Mr Molefe in which it notified Mr Molefe of the Minister's directive of 31 May 2017 and Eskom's decision to give effect to that directive.
111. On 5 June 2017, Mr Molefe brought an urgent application out of the Labour Court against Eskom and the Minister requesting the court to declare that the decision by Eskom is unlawful and void ab initio and seeking a reinstatement of his position as Eskom GCE.
112. On 6 June 2017, Eskom, the Minister and Mr Molefe agreed that Mr Molefe would not be required to render his services at Eskom pending the determination of the Labour court application.



113. On 6 June 2017, the Minister received a letter from Advocate Rory Voller a commissioner at the Companies and Intellectual Properties Commission (CIPC). The email records that the CIPC was in possession of an Eskom Board meeting minute of 29 November 2017, which reflected that Mr Molefe had resigned as Eskom GCE. The CIPC had various queries for the Eskom Board relating to the position Mr Molefe held, in the light of his return to Eskom on 15 May 2017.
114. On 7 June 2017, Mr Luthuli addressed a letter to me confirming receipt of the letters dated 17 May 2017 and 2 June 2017 respectively and that Mr Molefe's pension has been suspended pending legal advice and consideration of the matter.
115. On 8 June 2017, Ms Daniels responded to the CIPC letter and stated that the minute of 29 November referred to by the CIPC was a draft minute which had not been approved by the Board.
116. On 5 June 2017 the EFF applied to the Labour Court to intervene as interested parties in the application brought by Mr Molefe. The DA similarly applied for leave to intervene on 7 June 2017.
117. On 15 June 2017 Eskom filed an explanatory affidavit in which Eskom set out details surrounding the implementation of the Minister's directive and stating that Eskom abides by the decision of the Labour Court.
118. On 15 June 2017, the Minister has filed an opposing affidavit.
119. On 15 June 2017, Mr Luthuli of the EPPF addressed a letter to Ms Daniels. Mr Luthuli stated that the EPPF proposed that Eskom be reimbursed as follows:
120. A refund to Eskom on receipt of a competent court order;
121. Mr Molefe repay Eskom the amount which is owed by him; and
122. Mr Molefe and the EPPF attend to obtaining a refund from SARS which refund, if granted, be paid to Mr Molefe or Eskom as case may be.
123. On 4 July 2017, the Labour Court determined that Molefe's application should be stayed pending the determination of the EFF and DA applications in the High Court.
124. The DA, EFF and Solidarity applications will be heard in the High Court during 29 November to 1 December 2017.

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125. The State of Capture Report released by the then Public Protector, Advocate Thuli Madonsela, put the role and the responsibility of the board of directors as the accounting authority in terms of the PFMA and other legislative prescripts under scrutiny.
126. My approach to this matter has been to set out the facts as I know them and thereafter take specific questions as necessary.
127. It is common cause that payments to McKinsey and Trillion were made in 2016 and 2017 under two contracts which had been entered into in 2015 (the First Contract, dated September 2015) and 2016 (the Second Contract, dated January 2016) between Eskom and McKinsey. There are no separate contracts with Trillion for this period.
128. The First Contract was for the provision by McKinsey of consulting services to Eskom for a period of six months.
129. The Eskom Acceptance Letter is dated 29 September 2015 and it is addressed to Alexander Weiss and Vikas Sagar of McKinsey re "notification of acceptance for the provision of consulting services".
130. It is signed by Matsheia Koko, Group Executive: Technology and Commercial and signed by Alexander Weiss of McKinsey on 29 September 2015.
131. From 30 October 2015 to January 2016 McKinsey issued eight invoices to Eskom of approximately R80 million, incl. VAT to Eskom under the First Contract.
132. Trillion Management Consulting (Pty) Ltd issued an invoice (referenced as MC01) to Mr Anoj Singh which appears to be related to the First Contract on 31 January 2016 for R26 900 000 excl. VAT. It appears that this invoice was sent to Eskom on 12 February 2016.
133. The invoice itself doesn't reference the First Contract directly.





134. The supporting document provided by Trillian to Mr Anoj Singh dated 12 February 2016 under cover of which the invoice was apparently sent states that it is for "the support of the CFO office on the Eskom Procurement Turnaround and Defined Benefit Obligations." It gives certain bullet points regarding the services performed under each and states that a detailed report will be available on 15 February 2016 regarding this.
135. McKinsey issued a letter to Eskom dated 9 February 2016 authorising Trillian to invoice Eskom directly for work performed pursuant to the First Contract. This was however subject to McKinsey confirmation of the amounts claimed and work done. There is no indication in the documentation that McKinsey provided this confirmation regarding MC01.
136. This invoice was signed for payment by Prish Govender and Edwin Mabelane on 8 April 2016.
137. The invoice dated 31 January 2016 was paid on 12 April 2016. Upon payment, it was recorded on the Eskom SAP system as being paid under the First Contract and Trillian was indicated as a sub-contractor to McKinsey under the First Contract.
138. The Second Contract was entered into on 7 January 2016 between Eskom and McKinsey, signed by Dr. Alex Weiss (McKinsey) and Edwin Mabelane (Eskom).
139. It is called a "Service Level Agreement". It however also appears to be called the "Master Services Agreement" in certain documents. It authorized approximately R540 million in down-payments.
140. The process to conclusion of this contract began in 2015.
- 140.1. On 6 July 2015, the Board Tender Committee provided a mandate to negotiate with McKinsey to develop the current Top Engineers Programme into an Internal Consulting Unit.
- 140.2. It is important to note that the BTC decision was obtained via round robin and the round robin resolutions were signed by:
- 140.2.1. Ms Viroshini Naidoo on 6 July 2015
- 140.2.2. Ms Nazia Carrim on 3 July 2015
- 140.2.3. Ms Chwayita Mabude on 6 July 2015

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140.2.4. Mr Zethembe Khoza

141. During August and September 2015 there was a series of discussions between the Procurement Manager responsible for the transaction and the PFMA office (part of Group Compliance) on the applicability of the deviation request to National Treasury was required when dealing with a risk based consulting contract such as the McKinsey one was. **Group Compliance specifically advised that a deviation application was required and that if an award was made before a deviation was granted by National Treasury, then the expenditure would be irregular.**
142. It was then that the First Contract appears to have been entered into for the provision of professional strategic consulting services for ad hoc support on urgent finance and strategy work, at a contract value not exceeding R98 770 024.08 excl. VAT and travel and subsistence.
143. The Board Tender Committee (BTC) authorized the entry into the "Top Consultants" Contract on 21 October 2015. There is no contract value directly associated with the BTC approval for this contract. This is what is then termed the Second Contract.
144. Payments by Eskom to Trillian and McKinsey under the Second Contract total R 1,593,155,413.01 (R 1,028,592,499.72 to McKinsey and R 564,562,913.29 to Trillian) they were made between August 2016 and February 2017.
145. The next time this matter comes before the BTC is on 21 June 2016 whereat it approves the cancellation of the McKinsey 'risk based process' and for the costs to be negotiated and finalised. Eskom then cancel's the contract and notifies McKinsey.
146. In this presentation I list the meetings that I consider critical for the execution of the McKinsey Trillian matter. They include, amongst others,
- 146.1. Board meeting of 29 November 2016
- 146.2. BTC of 13 December 2016
147. Zethembe Khoza, Chairperson of the BTC at the time, raised the issue of Trillian at this meeting of the board of directors on 29 November 2016 in regard to the press reports that were out at the time.





148. At this meeting, the then Group Chief Financial Officer, Anoj Singh, provided his understanding of the background to the matter and mentioned the BTC approval provided for engagement with McKinsey which had the authority to subcontract and in exercising that authority, had subcontracted to Trillian.
149. He clearly stated that payments were made to both McKinsey and Trillian although management had revisited the MSA (Master Services Agreement) with McKinsey and raised its concerns over procurement on a single source basis.
150. The MSA with McKinsey had subsequently been terminated.
151. Whilst it was correct that Eskom did not have a direct contractual relationship with Trillian, the company had been subcontracted to McKinsey and work done by Trillian had to be paid for.
152. The GCFO further stated that Trillian had also undertaken work for Eskom in respect of assessing risks and it was providing assistance with the EFC matter.
153. In conclusion, it was noted that the relationship with McKinsey had been terminated, the MSA had been cancelled and provisions had been made for any final outstanding payments owing.
154. Mr Khoza was comfortable with the explanation provided by the GCFO as he raised no further issues.
155. The Board also appeared comfortable with the explanation provided by the GCFO. The non-executive directors in attendance at this meeting were Dr Ben Ngubane, Mrs Venete Klein, Ms Chwayila Mabude, Dr Pat Naidoo and Mr Zeihembe Khoza.
156. I wish to emphasise that my actions in the matter of preparing and submitting the Report on Procurement of Services and Payments to McKinsey and Company Africa (Pty) Ltd and Trillian Capital Partners (Pty) Ltd ("Report") were undertaken in good faith at all times and in accordance with the instruction from the Audit and Risk Committee.
157. At the meeting of the Board on 29 August 2017, whereat I had presented, at the request of the Interim Group Chief Executive at the time, Johnny Dladla, I set out a summary of the key findings of the exercise undertaken by Bowmans and set out the recommendations for the way forward. This was captured in a




memorandum dated 29 August 2017 which I had prepared and the remedies set out therein were supported by David Unterhalter SC in a formal written opinion.

158. At this meeting, the compilation and verification of the content of the Report was delegated to the Audit and Risk Committee due to the Acting Chairman's and Acting Group Chief Executive's imminent departure to China on Eskom business.

159. I was then tasked to update the memorandum that I had prepared and also structure same as per the discussion between the Acting Chairperson and Minister Brown in preparation for the submission to the Minister on 1 September 2017 on the issues, more specifically a letter that arrived on 31 August 2017 requesting Eskom to clarify payments to Trillian and provide the report by no later than 1 September 2017.

160. The structure of the said Report was informed by the email instruction from the Acting Chairman to Mr Dladla and Mr Gounden, the text whereof is set out below for easy reference, together with the discussion at the Board meeting.

161. The discussion at the Board meeting was based on my Memorandum dated 29 August 2017, titled "Alleged Irregularities in connection with the Procurement of Services from McKinsey and Company Africa (Pty) Ltd".

162. It was on the strength of this Memorandum of 29 August 2017 and the discussion at the meeting, that the email of the Interim Chairman of the Board was premised.

163. Having regard to all of the above, the Report which I compiled in a very short time, was constructed as follows:

163.1. Background (which recorded all the governance related deliberations from the outset of the engagement with McKinsey)

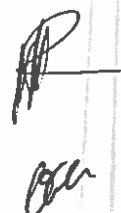
163.2. Internal Audit on MSA Procurement Process (which set out the exercise undertaken by Eskom's internal audit function in respect of the procurement process)

163.3. Assessment by Oliver Wyman (which described the work undertaken by the Oliver Wyman)

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Boe

- 163.4. Legal Review (which set out the contents of the review undertaken by Cliffe Dekker Hofmeyer, amplified as a consequence of the recommendations contained in the Oliver Wyman Report) ;
- 163.5. Payments made by Eskom to McKinsey and Trillian (which set out the chronology of payments and how they were given effect to by Eskom)
- 163.6. Oliver Wyman/Eskom Holdings SOC L'd (which set out the legal matter which arose between the parties and required of Eskom to issue a correction to the media)
- 163.7. Response and Actions (which set out the actions which have been undertaken by the company in response to the findings of the exercise by Bowmans and the forensic investigation by G9.)
- 163.8. Annexures attached to this Report were:

- A Letter from Eskom to McKinsey dated 19 February 2016
- B Letter from McKinsey to Eskom dated 25 February 2016
- C Draft Memorandum Top Engineers Programme Review, Memorandum from Molefi Nkhotu – Senior General Manager (Assurance and Forensic) to Anoj Singh (Group Chief Financial Officer)
- D Oliver Wyman Draft Preliminary Report dated 9 December 2016
- E Oliver Wyman Report dated 15 December 2016
- F Draft Settlement Letter as prepared by CDH for Eskom with detailed drafting notes and comments for Eskom's consideration dated 15 February 2017
- G Memo from CDH to Eskom dated 17 February 2017 setting out chronology of events with specific comments relating to the risk based service level agreement concluded between Eskom and McKinsey
- H Memo from Eskom to CDH dated 20 February 2017 setting out a response to the CDH memorandum of 17th February 2017
- I Memo from CDH dated 28 February 2017 setting out updated chronology of events with specific comments relating to the risk based service level agreement concluded between Eskom and McKinsey
- J Letter from McKinsey to Eskom dated 30 March 2016 advising Eskom that "McKinsey's interactions with Trillian have now been terminated with confirmation having been sent to Trillian".
- K First Contract between Eskom and McKinsey
- L Letter from McKinsey to Eskom dated 9 February 2016 providing "Authorisation to pay Subcontractor Directly."
- M Second Contract between Eskom and McKinsey
- N Letter from Trillian Capital Partners to Eskom requesting that "Eskom reviews the terms of the risk based contract and reimburse it as per the contractual arrangements, in order for it to close out the contract"
- O Letter dated 23 August 2017 from Adams and Adams to Eskom
- P Media reply as provided from the Office of the CFO dated 7 July 2017
- Q Correction letters from Eskom to the journalists dated 25 and 26 August 2017 respectively



- Interim report back to Eskom Holdings SOC Limited on an investigation of alleged irregularities in connection with the procurement of services from and payments to McKinsey and Company Africa (Pty) Ltd and Tilon Capital Partners (Pty) Ltd dated 2 August 2017
- Eskom Assurance and Forensic Department "The Tilon Investigation" dated 21 August 2017
- Submissions to the Board Tender Committee and Expo Procurement Subcommittee
 - 22 June 2015
 - 6 July 2015
 - 8 October 2015
 - 9 June 2016
 - 8 August 2016
 - 12 December 2016

164. The Report was sent out on the 31 August 2017 to the Audit and Risk Committee Members for perusal and review and to be discussed at the special meeting convened that day.


165. While the meeting was scheduled for an hour, I took members through a page turn of the Report as prepared. Edits were suggested and these were incorporated by me.

166. The updated Report as per the instruction of the Audit and Risk Committee was circulated by me via email and the Company Secretary had been provided with a complete Report consisting of the Report and its annexes for copying and distribution to the members.

167. Members had requested hard copies and as the Report consisted of 29 pages and 25 annexes, I assume that the time lapse between the meeting and the receipt of the full pack may have been 5 days. The Company Secretary would need to verify same. I confirm that I had emailed the Report to the members, minus the annexes, some of which they had obtained as part of the earlier deliberations but a more complete set was provided in the hard copy edition.

168. It is also important to note that the Report, as prepared by me, was checked by Bowmans, Cliffe Dekker Hofmeyr and Oliver Wyman to ensure that I had depicted the facts insofar as it pertained to the respective entities correctly. Their comments were incorporated and signed off by the respective representatives.

169. Mr Gounden, as Acting Chairman and Chairman of the Audit and Risk Committee, signed off the cover letter and the pack for delivery to the Director General, Department of Public Enterprises as per the instruction received from Minister's office. It does beg the question of whether Mr Gounden was fully apprised of the import of Minister Brown's statement as it would mean that he acted without authority too as Minister Brown stated in her media statement that the Report was not signed by the Chairman.
170. Minister Brown met with the IGCE and IC on 15 September at OR Tambo International.
171. Upon his return to the office, Mr Dladla was clearly upset and interrogated me as to exactly when I undertook the legal review, the response to the 4 issues raised by the Minister.
172. I responded that the legal review was commenced on 5 December 2017 when Prish Govender sent me a request to review documents and that I had prepared a pro forma response for consideration upon request of the Acting Group Chief Executive, Thava Govender on 13 September 2017.
173. It was further concerning to read in the statement issued by the Department of Public Enterprises that Minister Brown indicated that the Report contained "glaring gaps" while Her subsequent supplementary questions were limited to four issues, of which I had prepared a draft response for consideration and suggested the attachments thereto.
174. I prepared a detailed Memorandum subject "Minister Brown's Media Release of 15 September 2017" to the Acting Group Chief Executive at the time, Johnny Dladla, dated 17 September 2017 setting out the information necessary to address issues raised insofar as it pertains to the activities for which I am accountable and responsible. This Memorandum also set out a detailed response to the bullet no 4 as contained in the first statement issued at 19n18.
175. To date, I have not had any formal feedback whatsoever on the documents submitted which were prepared to assist the Board to respond to the supplementary questions by the Minister, although I understand that a different report was sent to the Minister **in addition to** the one which I prepared.





In the final analysis, my conclusion is:

176. The wrongful actions uncovered were as clever as it was brazen.

177. My professional expertise was unwittingly exploited to accomplish personal vested interests against Eskom.


Bae



HEFFERMAN

ATTORNEYS | NOTARIES

SD3

Address: 1007 Saxby Avenue, Eldoraigae, Centurion 0157

Tel: 012 653 1048

Postal Address: 153 Leyden Avenue, Clubview, 0157

Emergency Contact: 0733 490 969 / 074 800 4278 / 082 673 2300

sean@sdhattorneys.co.za

Website: www.sdhattorneys.co.za

TRUST ACCOUNT DETAILS

NAME: HEFFERMAN ATTORNEYS TRUST

FIRST NATIONAL BANK

BRANCH: 250 655 ACC NUMBER: 62744436206

Date: 12 April 2018

Your Ref:

Our Ref: COETZEE//HS0077

Mr D Mocumi
Office to the Chairperson
Portfolio Committee on Public Enterprises
Parliament Street
Cape Town
8001

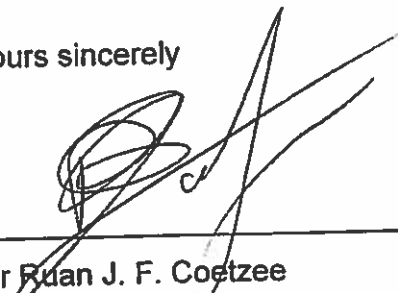
VIA EMAIL: dmocumi@parliament.gov.za
Tel: 0837098512

Dear Sir

IN RE: OVERSIGHT INQUIRY INTO GOVERNANCE, PROCUREMENT AND
FINANCIAL SUSTAINABILITY OF ESKOM

1. We refer to the above matter.
2. In accompanying of this letter is Ms S M Daniels further submission in the response to the evidence presented to the committee.
3. We trust that the above is order.

Yours sincerely



Mr Ruan J. F. Coetzee
Email: ruan@sdhattorneys.co.za

Sean Desmond Hefferman BLC | LLB

Assisted By

Ruan Coetzee B.Com Law LLB

Aneta Ruszkowska LLB

Dr. Gawie Van Der Merwe LLB | Notary | B.ING | M.ING | D.ING (ELEC)



**THE PARLIAMENT OF SOUTH AFRICA
PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES**

175

TO: THE OFFICE OF THE CHAIRPERSON
OF THE PORTFOLIO COMMITTEE ON
PUBLIC ENTERPRISES

DATE: 18 April 2018

IN RE: OVERSIGHT INQUIRY INTO GOVERNANCE, PROCUREMENT AND
FINANCIAL SUSTAINABILITY OF ESKOM

**FURTHER SUBMISSIONS BY MS SUZANNE MARGARET DANIELS IN
RESPONSE TO THE EVIDENCE PRESENTED TO THE COMMITTEE**

I, the undersigned,

SUZANNE MARGARET DANIELS

make the following further submissions to Parliament and state that:

1. I respond accordingly to the submissions of the following persons that sought to implicate me and/or made specific negative reference to me in their testimony and/or submissions:

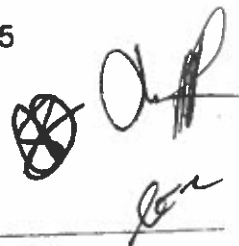
Paragraphs

1.1. Matshela Koko

3-11

1.2. Venete Klein

12 -35



1.3. Minister Lynne Brown

36- 46 176

1.4. Viroshini Naidoo

47-49

2. The contents hereof are within my personal knowledge, save where otherwise stated and are to the best of my belief both true and correct.

**IN RESPONSE TO MR KOKO SUBMISSIONS AND ORAL TESTIMONY OF 24
JANUARY 2018**

3. AD PARAGRAPH 62

I testified as to the sequence of events in respect of the Optimum arbitration settlement and I stand by my testimony. Mr Koko's attempts to insinuate that there could have been some sort of impropriety pertaining to the pending legal action that was part of my job description to defend, are spurious and I accordingly deny the allegation in this regard. I further submit that I also included the approval of the board in my decisions and any advice that I gave to the board was in accordance with the legal advice obtained from Eskom's attorneys and/or counsel. I attach the memorandum which I prepared for signature by the GCE and the GCFO to approve the settlement; it sets out the rationale and process undertaken to reach settlement. The Memorandum is annexed hereto marked **SMD 1**.



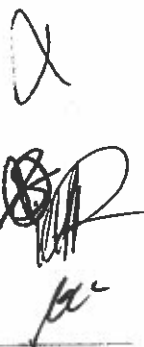
At all material times, I acted in accordance with the sound legal advice from Eskom's attorneys and subsequent board decisions. My expertise greatly aided Eskom and was to the detriment of Mr Koko's aims as I adhered to the rules and procedures of Eskom. My involvement in drafting the letter does not imply any wrongdoing on my part. It was drafted as per my instructions and within the framework of the prevailing legal prescripts. I further submit that at the time of the drafting of the letter and the information provided to me, to my knowledge the transaction appeared bona fide.

5. AD PARAGRAPH 89

The instructions to prepare a submission for the Board's consideration did emanate from Mr Koko and these were encapsulated in the submission that I drafted for his approval. The finer details as to financing models and structure were provided by Mr Singh. I have attached hereto email correspondence setting out the questions which Mr Singh and Mr Koko fielded and the committee will note that the questions were answered directly by the two. The correspondence is annexed hereto as **SMD 2**.

6. AD PARAGRAPH 92 – 94

My participation in the drafting of the presentation was limited to the legal aspects of the presentation. My input, as provided to the office of the CFO which was coordinating the various inputs, is annexed hereto as **SMD 3**. It must be noted

Handwritten signature and initials in the bottom right corner of the page.

that my edits are in redline for easy reference. I submit that I assisted the ~~the~~¹⁷⁸ Chairperson of the Board in accordance with my statutory duties and in accordance with the duties and responsibilities as Acting Head of Legal & Compliance.

7. AD PARAGRAPH 113 & 129

I drafted the security and pledge agreement as share transactions and matters relating to security were dealt with by the Company Secretary. I prepared the two pager which contained the *essentialia* of the requirements for pledge and security and a fully termed contract was drafted and signed by the parties subsequently. My instructions were that the agreement was to be signed on the 13th April 2016 and thus the approach adopted. I submit that I, from a legal and compliance perspective, had no reason to object to the agreement. As per my earlier testimony, the information that indicated any wrongdoing was only revealed to me at a much later stage. Any act on my part in expressing my view to Mr Koko in it being in order to sign the document, was bona fide and without any malice on my part.

8. AD PARAGRAPH 145

In May 2015 I was acting Senior Manager in the office of the Chairman and I can confirm that I was tasked with liaising with the suspended executives to convene and arrange meetings with the executives and directors. I was not appointed as acting Company Secretary in May 2015, as Malesela Phukubje was the company Secretary at the time, and my appointment as Company Secretary only transpired after 1 October 2015

9.1. I take note of the content of the paragraphs and submit that I was not actively involved in seeking to unseat Mr Koko and that any role I might have played, which is denied, in the suspension of Mr Koko was in accordance with the law, rules and regulations and as a result of the alleged improprieties of Mr Koko. I further submit that on his own version he has been on suspension on numerous occasions.

9.2. The Cliffe Dekker Hofmeyr Report of 13 June 2017 was presented to the Audit and Risk Committee ("ARC") on 14 June 2017. It was at this meeting that the ARC resolved that it would recommend to the Board that:

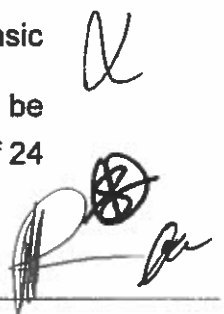
9.2.1. a legal opinion be obtained, based on the outcome of the investigation and the findings contained in the report as presented by Cliffe Dekker Hofmeyr and Nkonki, as to the appropriateness of action and/or sanction against Mr Koko;

9.2.2. additional internal control measures be considered to limit the risk of similar incidents going forward; and that

9.2.3. Appropriate action against the supplier (Impulse) for non-compliance to Eskom policies and procedures be investigated and considered.

9.3. At its meeting of 15 June 2017, the Board:

- a) noted the recommendation of the Audit & Risk Committee that possible action against Mr Koko based on the findings of the Impulse Forensic Investigation as presented by Cliffe Dekker Hofmeyr and Nkonki be



considered and that a legal opinion in this regard be obtained from 180
labour law expert to assist the Board in identifying the appropriate action
and/or sanction; and that

- b) the matter be referred back to the Audit & Risk Committee for further consideration and for a formal recommendation to be made by the Audit & Risk Committee to the Board regarding the nature of the proposed action/sanction, if any, based on the legal advice to be obtained.

9.4. Mr Qoma's paper played no role in the deliberations regarding the action and/or sanction against Koko. Senior Counsel opined that there was certain evidence that needed to be tested by way of an interrogative process as per the disciplinary process.

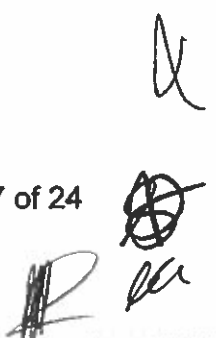
10. AD PARAGRAPH 156

10.1. I deny that I in any way was involved in securing the payment as alleged by Mr Koko. Mr Koko's testimony alludes to "approval" by me which is illogical given my role either as Company Secretary and/or Head of Legal & Compliance. In my capacity as Head of Legal & Compliance, my delegated authority is not executive in nature when it comes to the settlement of claims. Decisions to settle matters are made by the accountable executives in consultation with the Head of Legal and Compliance.

10.2. In this instance, I raised my concerns with the Group Chief Financial Officer in early February 2017 as the first memorandum from Cliffe Dekker Hofmeyer to Prish Govender was submitted on 17 February 2017. Therein the concern regarding the validity of the contract was highlighted in relation

to the fulfilment of the suspensive conditions and the various other concerns the legal team had. Notwithstanding the signing of the settlement letter on the 17th February 2017, the legal team persisted with providing the advice in writing as per the memorandum to Prish Govender.

- 10.3. Govender had dealt directly with CDH on the matter, and on 15 February 2017 had instructed CDH to prepare a draft settlement letter, notwithstanding the legal advice to the contrary. I was therefore effectively bypassed.
- 10.4. This was followed up by the memorandum of 28 February 2017 to close off the matter even though it was superfluous. I received a draft memorandum from Prish Govender on 21 February 2017 dated 17 February 2017. It is important for me to point out that the support sought from me in my capacity as Company Secretary and as Head of Legal & Compliance did not trigger payments to Trillian and McKinsey as they were already in process.
- 10.5. Put differently, the instructions to the legal team by the correct executive authority, Prish Govender, were to give effect to the approval as per the Board Tender Committee decisions, notwithstanding the legal and governance issues raised in the meeting with Prish Govender on 7 February 2017.
- 10.6. Trillian submitted an invoice dated 15 February 2017 which payments were cleared/paid on 22 February 2017. McKinsey was paid on 21/28 February and these invoices were signed and approved by Edwin Mabelane and Prish Govender respectively.

Handwritten signatures and initials are present at the bottom right of the page. There is a large, stylized signature that appears to be 'K' or 'L'. Below it, there are several smaller initials and signatures, including one that looks like 'R' and another that looks like 'P'.

10.7. I acknowledge that my signature of this document was a severe lapse of judgment on my part. While this Memo was dated 17 February 2017, it was not signed on the day. It was emailed to me by Govender on 21 February 2017 in the late afternoon, while I was attending to another matter. He only sent the two pages and no supporting documentation. Govender pressured me to sign the document, which I did without undertaking a proper review of the memorandum and its annexes.

10.8. Despite this, by the time I signed the memorandum Mabelane had already addressed a full and final settlement offer to McKinsey on 16 February 2017, as consistent with the instruction to settle reiterated by Govender to Moodley on 15 February 2017.

10.9. I note that this is detailed in my report to the Minister, at pages 11 to 14. Mr Koko attempts to portray me as the architect of the payments to Trinllian Management Consulting. However, during my tenure as Senior Manager in his Office he shared details of a number of transactions where he indicated that his "principals" told him to focus on. I surreptitiously attached hereto a copy as annexure marked Annexure SMD 4.

10.10. The piece of paper was undated, informal with hand written notes and I accordingly filed the paper amongst my files.

10.11. The importance of the piece of information only became apparent to me after reading the revelations made in the Public Protector's Report,¹ with specific reference to certain transactions, and the subsequent Parliament Enquiry. It is important to note that the McKinsey transaction is Item 2 on that

¹ The Public Protector's Report: "State of Capture" Report No 6 of 2016/17

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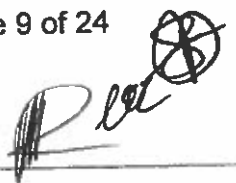
list and is assigned a value of R 10 000 000 000-00, which is consistent with the testimony of other witnesses at the enquiry.

11. I respectfully submit that this clearly places Mr Koko's submission that he was unaware of certain transactions into question. I further submit that Mr Koko acted willfully and in a premeditated fashion in furtherance of state capture since 2015, if not earlier.

IN RESPONSE TO MRS KLEIN SUBMISSIONS:

12. AD PARAGRAPH 49

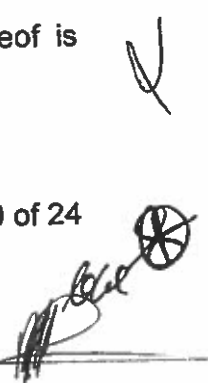
I was appointed as Company Secretary with effect from 1 October 2015. I addressed the duality of my roles as Group Company Secretary and Head of Legal in my first submission to the Parliamentary Committee on 8 November 2017. It must be noted that I had undertaken a recruitment process to hire a deputy company secretary and Mrs Klein formed part of the interview panel but we were not successful in finding a suitable candidate. Further, I made a submission to the P&G in the first quarter of 2017 to handle my transition from Secretariat to Legal in a seamless manner, which was not approved as members felt a deputy Company Secretary. During my tenure as Company Secretary, Ms Klein and I were in contact on a regular basis as she was a member of various key board subcommittees and also later the Chairperson of the People and Governance subcommittee (P&G). My working day would normally start with a telephone call from her relating to the various issues that her committee and/or the Board was dealing with at that stage.



The content is noted in the paragraph and emphasis is placed on the fact that the secretariat's function improved under the guidance and structure of myself. Upon the departure of the General Manager: Legal and Compliance, Advocate Neo Tsholanku. I was requested by the Group Chief Financial Officer (Singh) and Group Chief Executive (Molefe) to caretake the role of acting head of legal and thus I fulfilled a dual function of Company Secretary and Acting Head of Legal and Compliance. At that stage, there was no objection and/or complaints by the board about me serving in both capacities.

14. AD PARAGRAPH 58

- 14.1. At the time, Mrs Venete Klein ("Klein") was the Acting Chairperson of the People & Governance Committee ("P&G"), the subcommittee of the Board which dealt with issues relating to executives as one of its key areas of reference.
- 14.2. Mrs Klein is implying that I drafted and sent the letter of 19 June 2015 out of my own volition and acted independently in this instance, in an effort to downplay her role in this matter.
- 14.3. I wish to place it on record that the letter of 19 June 2015 was prepared by me on the instruction of Klein who indicated that she was in direct communication with the Minister's office. The letter of 19 June 2015 concerned the Appointment of the Chief Executive, a copy whereof is annexed hereto marked **SMD 5**.



14.4. It was Klein who urged me to send the letter and assured me that 185
Ngubane was comfortable with the content and that she would take
responsibility should there be any issues.

14.5. Thus the letter was sent with the signature "not signed as electronically
submitted". Ngubane was out of town at the time and was not easily
reachable.

14.6. The letter was sent to the department of Public Enterprises via email and
addressed to the Deputy Director General Legal Governance and Risk, Mrs
Matsietsi Mokholo ("Mokholo") who was the Acting Director General at the
time, and Ms Kim Davids ("Davids"), Executive Personal Assistant to the
Minister . I copied Ngubane, Klein and Khoza (Zethembe Khoza) on the
correspondence when I dispatched the email. All three directors were
members of the P&G subcommittee of the Board.

14.7. I further submit that Dr Ngubane's objection at the time was not in relation
to the contents submitted to the Minister, but due to the fact that the
aforesaid letter was not signed and I accordingly revised my future
approach in this regard. Further I duly retracted the document that was sent
on or about 23 June 2015 in accordance with Dr Ngubane's instructions.

15. AD PARAGRAPH 60

I submit that from a compliance perspective there was no objection. The legal
opinion was later supplemented when the Department of Public Enterprises
requested the legal team to consider the rules of the Public Service in addition.

This supplementary opinion was received in September 2015.

X





Although I was not privy to the discussions of the board members in relation to this matter at that stage I can submit that there was no prima facie evidence to doubt or question Mr Molefe's appointment.

17. AD PARAGRAPH 64 – 63

The reason for the delay from July to September was that the legal and governance unit in the DPE had suggested that Eskom wait for a period of six months to pass for Molefe to be in the acting position so that the prospect of a permanent appointment can be mooted.

18. AD PARAGRAPH 69

I submit that I commented on the draft employment contract in that I indicated that Mr Molefe's appointment needed to be a fixed term contract of 5 years in accordance with the decision of Parliament in relation to the appointment of CEO of public institutions.² I submit that this was rectified and refer you to paragraph 14.7 hereof.

² This was confirmed in the communication between Ms Ruthnam and I and also in a subsequent letter from Minister Brown to Eskom.

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- 19.1. The issue regarding the term of Mr Molefe's contract was resolved as I worked with Ruthnam and Minnaar respectively on the matter.
- 19.2. Once the clarification was obtained from the DPE, we amended the "Offer of Employment" signed by the parties in November 2015 and also then the Executive Employment contract which was signed by the parties in March 2016. Both documents refer to a "fixed term contract" and the March 2016 document clearly states that the contract terminates in 2020.
- 19.3. Molefe signed the offer of employment on 11 November 2015. This document clearly states in paragraph 1 that: "You will be required to enter into a **fixed term** Employment Contract." [my emphasis] The reason the term was not specified at this point was that Ruthnam was still seeking confirmation of the term of the contract.
- 19.4. The executive employment contract, signed by Molefe on 7 March 2016 clearly sets out the period of employment in clause three thereof. Clause 3.1 clearly states: "The Executive's employment with the Company is based on a fixed term contract that expires on 30 September 2020 ("the Termination Date)".
- 19.5. It is my respectful view that there ought not to have been the confusion as both documents clearly set out the nature of the contract and period of employment respectively.



I submit that the contract of employment clearly stated at the very least the termination date of the fixed employment.

21. AD PARAGRAPH 77

I submit that this issue of tenure ought not to have been any challenge for the board as the matter was properly advised by me, as Company Secretary prior to signature, Ms Ruthman from the Minister's office and that this was a fiction constructed to obscure the issues. I further submit that it was later revealed that Mr Molefe orchestrated his own retirement with the support of the board, in spite of being properly advised of their illegality.³

22. AD PARAGRAPH 81

22.1. The content hereof is factually incorrect: the email exchange between Minnaar and Klein of 20 November 2015 clearly point to Klein's participation in the conceptualizing and drafting of the letter to the Minister, which Ngubane ultimately signed on 25 November 2015. A copy of the email is attached hereto marked **SMD 6**.

22.2. There was no legal support sought from me on the contents of this letter and I was not requested to opine on the matter from a compliance perspective. In this instance and at that time, my duty was purely

³ Paragraph 56 in the judgment of the Democratic Alliance // The Minister of Public Enterprise & 2 other under case number 3305/2017



administrative in having been requested to dispatch the signed correspondence to the Minister's office.

23. AD PARAGRAPH 84

I submit that Ms Klein was kept abreast at all times as Mr Anton Minaar clearly stated at the P & G board Meeting of 9 February 2016 that no feedback was obtained from the Minister. Mrs Klein was the chairperson of the meeting.

24. AD PARAGRAPH 86

I submit that Mrs Klein signed off the minutes of the meeting as an accurate record of the meeting. Any mistake or omission by me would be bona fide and without any malice.

25. AD PARAGRAPH 90

The allegation that the board was delegated and never discussed the Duvha matter is untrue as this matter was discussed on at least two (2) occasions where Mrs Klein participated/and or attended the meeting.

26. AD PARAGRAPH 91

The issue of departing board members were discussed with the Minister, however I submit that this does not absolve a board member from accountability. I further

Q
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submit that the committees were rearranged after obtaining the input from M190 Klein in her capacity and Chairperson of the P&G Committee.

27. AD PARAGRAPH 99

The office of the Company Secretary did not receive the letter that is referred to as there were direct attempts to by-pass my office by certain of the board members and executives when it came to correspondence for the Chairperson's signature. I am aware that Mrs Klein, as Chairperson of the P&G Committee, signed a resolution in support of the early retirement of Mr Molefe as this resolution accompanied the aforesaid letter forwarded to Dr Ngubane.

28. AD PARAGRAPH 102

I submit that Mrs Klein was aware, alternatively ought to have been aware of the content of Mr Molefe's retirement letter as she supported the same in the resolution as Minaar read out the contents of the application for early retirement at the meeting of 21 November 2015, where she was the Chairperson.

29. AD PARAGRAPH 103

The procedure is noted, however this is not what transpired. After asking Dr Ngubane, he informed me that the pack of documents provide to him in order to approve the early retirement of Mr Molefe included a resolution from the P & G Committee approving the early retirement request with the requirement that that

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Dr Ngubane signed the letter approving the benefits, and seeing the accompanying resolution of the P & G Committee approving the early retirement request, Dr Ngubane proceeded to sign off on Mr Molefe's early retirement. I need to place on record that the office of the Company Secretary was wilfully circumvented in this instance.

30. AD PARAGRAPH 105

I deny that the allegation and/or insinuation that the me being the Company Secretary at the time was partial, conflicted and presented the wrong advice to the Board. I submit that the Board members actively tried to exclude and avoid the Company Secretary's office in that there was no request to the Company Secretary, nor the Head of Legal, to properly advise the board. Further when I took the post of Company Secretary and the interim Head of Legal, the combination of the post was meant to be temporary as per Mr Singh's offer at the time. The board, with specific reference to Mrs Klein, approved the combination of the posts and my appointment without any objection at the time.

31. AD PARAGRAPH 106

I deny the allegation that I created a risk to Eskom or the Board or that the Board or its members was concerned at all. I submit that my work only became unsatisfactory according to specific board members due to my unwillingness and robust approach to compliance with rules, regulations and instructions. As Company Secretary my accountability was to the Office of the Chairman of the

Board. I only acted as Head of Legal until a permanent position could be made and
I elected to hold that position in July 2017.

32. AD PARAGRAPH 108

I deny the facts as they are stated and submit that the P & G Committee adopted a resolution that was forwarded to the Office of the Chairperson in support for the early retirement request of Mr Molefe and it is on this basis, that the Chairperson of the Board, Dr Ngubane, approved the early retirement request. I submit that I in my capacity of Company Secretary was side-lined at all times in this regard. My role only became more prominent in and during April 2017 when the early retirement issues reached the media.

33. AD PARAGRAPH 109

I submit that it's untrue that Mrs Klein was not aware or ill-informed in this matter as Mr Minaar sent emails to Mrs Klein in this regard and the two were in direct contact with one another in this regard.

34. AD PARAGRAPH 114

Mrs Klein was present at the board meeting of 29 November 2016, where a full explanation of McKinsey and Trillian issue was provided to the Board by the CFO.

I submit that the source that was referred to by Dr Ngubane was Minister Brown herself. She provided Dr Ngubane with a pre-drafted list of items that she wished to be investigated. A copy of the list is attached hereto marked **SMD 7**. The list is significant as it indicated that Minister Brown was aware or ought to have been aware of the relevant issues way prior to 2 March 2017. It further speaks directly to the truthfulness and how forthcoming the Minister was in her own testimony.

**IN RESPONSE TO MINISTERS BROWNS SUBMISSION TO THE ENQUIRY ON 22
NOVEMBER 2017**

36. Minister Brown made reference in her oral testimony that I contradicted myself in that I only learned about the details of Mr Molefe's retirement from the newspapers, however still proceeded to defend the decision of the board.

37. In order to clarify this I refer the committee to my first submissions at paragraph 58 to 124 stating the chronology of events.

38. I submit that my conclusion was/is that the whole ordeal pertaining to Mr Molefe's retirement was orchestrated.⁴

⁴ This was also the conclusion of a full bench in the High Court of Pretoria, Gauteng Division in the matter of the *Democratic Alliance and The Minister of Public Enterprise & 2 others* under case number 3305/2017.

39. The initial legal opinion in the Molefe matter was obtained on 28 April 2017 from Advocate Babamia and Advocate Sikhakhane SC. It was not a phantom as Ms Brown states. She questioned the existence thereof as she was unable to obtain a copy thereof. It is here that Brown fails to mention that I provided a legal basis to her DDG Legal and Governance for the approach taken.

40. On 23 April 2017, Brown issued a media statement headed "Minister Brown declines Brian Molefe's pension payout" which by its very nature, questioned the action and legal rationale of the Board and stopped short of calling the Board reckless. The action of this public statement immediately put the Shareholder Representative (Brown) and the Board of Eskom in an adversarial mode on the Molefe issues as it was contrary to Brown's previous instruction to the Board on 19 April 2017 whereat Brown instructed Eskom to meet with Molefe and re-evaluate the "pension payment".

41. Re-evaluation and declining a pension payout are two diametrically opposed actions and hence pitted the Board and the Shareholder in opposite sides of the spectrum.

42. Brown ought to have known that in either capacity my primary duty was to act in the best interest of the Company and not in that of any individual and/or group of individuals. The media statement of 23 April 2017 lay the basis for an action to declare the directors as delinquent in terms of the Companies Act and I cautioned the Board in terms of those provisions as to how to deal with the Ministry. The



ultimate decision on the part of the Board was to separate the issues and deal with the transactional matter of Molefe's pension as a priority and address the import of Brown's media statement via separate correspondence.

43. I also met with the DDG (Legal, Governance & Risk), subsequent to our meeting with Brown on 19 April 2017, whereat I told her my concerns regarding the privilege attached to providing her with a copy of the opinion but that I had no issue with our respective counsel discussing the issues. In that manner, we protect the client/attorney relationship and avoid the conflict of interest dilemma. Once we were done with the meeting, I instructed counsel to have the discussion with his counterpart but was later advised that the DPE had instructed its counsel to stem all communications with Eskom on the matter. I found this peculiar in light of the earlier discussions with my counterpart.

44. What I had stated in my testimony before the committee on 8 November 2017, was that *"we woke up one Sunday morning to read in the Sunday Times that Molefe had received a R 30 million pension pay-out. It was only at that point that we then started looking at this again, because I must admit up until that stage the figure that was actually provided to Mr Molefe was not communicated back to board, so at least we read about it in the Sunday Times."*

45. Accordingly at no time had I stated that the pension arrangements were a surprise merely the **amount** that was eventually accrued to Mr Molefe.

46. Brown's insistence on the opinion is an attempt to deflect from the issues that she acted erratically as the shareholder representative issuing counterintuitive instructions which created the confusion that ensued.

IN RESPONSE TO MR S VIRSOHNI NAIDOO'S SUBMISSIONS

47. AD PARAGRAPH 7 (A), PAGE 9

As stated in my submission of 8 November 2017, I questioned the efficacy of having a meeting at that late hour as the scheduled meeting was due to take place on 13 April 2016 which was a mere 48 hours away. My comment was in relation to the scheduling and not the substantive merits of the submission as I had no documentation at the time of the call. Thus the comment which Mrs. Naidoo is referring to, is taken out of context as I was only advising Mr. Khoza as a board tender committee chairman in exercising his right of calling an urgent committee meeting as there was already one scheduled for 9h00 on 13 April 2016. The question of urgency was asked by Ms Naidoo during the meeting and the reply was minuted. At the time she appeared satisfied with the response from the Chief Procurement Officer and the Acting General Manager (Fuel Sourcing).

48. AD PAGE 14

My email records do not reflect that Ms Naidoo provided her approval conditionally - her email stated " *I confirm I support the round robin.please ensure...*"

Her requests were attended to: The IFC meeting was convened for 8h30 on 19 December 2015. The PFMA opinion was obtained from the Group Compliance Officer. The contract was put in place with the necessary conditions precedent. A copy of the email is attached hereto SMD 8.

49. AD PAGE 15

In regards to Mrs. Naidoo's comment in reference to the pre-purchase of coal for Optimum, that I never notified the board that a guarantee was issued and not a pre-purchase as was agreed by the board. The pre-purchase was approved by the IFC on 9 December 2015. Minutes of the meeting were sent out on 9 December 2015, together with a round robin request on 8 December 2015. A guarantee was thereafter issued. The details were stated in my original submission paragraphs 45 to 56. The resolution read all documents to give effect to the pre-purchase so the guarantee would be covered thereby. The round robin was ratified at the Board meeting of April 2016.



SUZANNE MARGARET DANIELS

I certify that the DEPONENT has acknowledged that she knows and understands the contents of this affidavit, that she does not have any objection to taking the oath, and that she considers it to be binding on her conscience, and which was sworn to and signed before me at PRETORIA on this the 18 day

of APRIL 2018, and that the administering oath complied with ~~198~~ regulations contained in Government Gazette No. R 1258 of 21 July 1972, as amended.



COMMISSIONER OF OATHS:

Name & Surname: _____

Occupation: _____

Address: _____

RUAN COETZEE

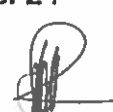

Practising Attorney

Commissioner of Oaths

HEFFERMAN ATTORNEYS

1007 Saxby Avenue, Eldoraigae, Centurion

Tel: 012 653 1048 Fax: 086 551 9832

MEMORANDUM

To: Mr Matshela Koko, Interim Group Chief Executive Reference
Mr Anoj Singh, Group Chief Financial Officer

From: Ms Suzanne Daniels Version: 01

Date: 13 March 2017

SUBJECT: ESKOM HOLDINGS SOC LTD/OPTIMUM COAL MINE PTY LTD/OPTIMUM
COAL HOLDINGS (PTY) LTD

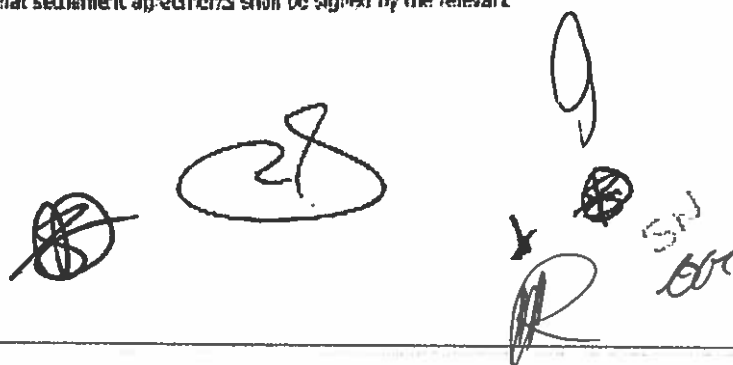
PURPOSE

1. The purpose of this Memorandum is to request the approval of the Interim Group Chief Executive and the Group Chief Financial Officer to settle the legal claim in the above matter in the manner set out herein and recorded in the attached Draft Settlement Agreement, to be signed by the Group Chief Financial Officer as the approval authority.¹

BACKGROUND

2. On 5 August 2015 Eskom Holdings SOC Limited ("Eskom") issued a summons (including the referral to arbitration) against Optimum Coal Holdings (Proprietary) Limited ("OCH") and Optimum Coal Mine (Proprietary) Limited ("OCM") for the payment in the amount of R 2, 176 530 611.99 (Two billion one hundred and seventy six million five hundred and thirty thousand six hundred and eleven rand and ninety nine cents) for its failure to supply and deliver coal which complies with the coal quality specification contemplated by the coal supply agreement ("CSA"), to Eskom's Hendrina Power Station ("Hendrina"). The pertinent provisions of the claim read as follows –

¹ Clause 8.2 of the Delegation of Authority Framework sets out that settlement agreements shall be signed by the relevant approval authority. In this instance, this would be the GCFO.



"The Defendants have for a consecutive period from 1 March 2012 to 31 May 2015 (the "Supply Period"), failed to supply the Plaintiff with coal which meets the quality parameter contemplated in clause 3.4 of the First Addendum, in that 20% to 45% of the coal supplied and delivered by the Defendants to the Plaintiff on a monthly basis, during the Supply Period, was smaller than 0.81mm. Despite this failure by the Defendants, the Plaintiff has, without prejudice to its right in terms of clause 3.6 of the First Addendum, paid the Defendants for such coal, without applying any adjustment or reduction to the payment, for the Defendants' failure to comply with the quality parameters, even though the Plaintiff was entitled to adjust or reduce the payment accordingly.

The reduction the Plaintiff was entitled to impose on the purchase price paid to the Defendants for the Supply Period amounts to R 2, 176 530 611.99 (Two billion one hundred and seventy-six million five hundred and thirty thousand six hundred and eleven rand and ninety-nine cents)."

("Eskom Claim")

3. The Eskom Claim was preceded by a letter of demand dated 16 July 2015 in which Eskom demanded payment of the amount of R 2, 176 530 611.99 (Two billion one hundred and seventy-six million *five hundred and thirty thousand* six hundred and eleven rand and ninety-nine cents). Instead of OCM formally replying to the letter of demand received from Eskom, Glencore made various public statements relating to Eskom's demand and thereafter on 5 August 2015 OCM and OCH was placed into business rescue.
4. On 20 August 2015 the attorneys of OCH and OCM delivered its notice of intention to defendant the Eskom Claim, including their attorneys addressing a letter to CDH reserving their client's rights. On 31 August 2016 the business rescue practitioners of OCM filed a Notice of Termination of the Business Rescue Proceedings with the Companies and Intellectual Property Commission.
5. In light of the aforementioned, Eskom re-commenced with the referral of the arbitration in respect of the Eskom Claim for final determination. Eskom has an election to either

continue with the arbitration against OCM or consider an amicable settlement with OCM in relation to the Eskom Claim. One of the main reasons it was important for Eskom to initiate the Eskom Claim against OCM and OCH was to stay the running of prescription in respect of the portion of the Eskom Claim which arose during 2012. The Eskom Claim is primarily based on the failure by OCM to meet the coal quality specification.

DISCUSSION

1. The fact that Eskom initiated the Eskom Claim, does not automatically mean that the amount claimed is due and payable. Eskom still has the onus as the plaintiff/claimant to demonstrate to a court/arbitrator on a balance of probabilities that the amount is due and payable.
2. In terms of the CSA, Eskom was contractually entitled to impose the penalties for any failure to comply with the quality specification – however due to a number of impasse's which arose between the parties relating to the imposition of the penalties (i.e. sampling process, the calculation of the penalty, interpretation of the penalty clause), Eskom reserved its right to impose the penalties at a later stage.
3. Subsequent to the issue of summons, Eskom recalculated an amount owing of R1.17 billion for the period under dispute. While the calculations could be verified, the basis of the interpretation is still under question.
4. The issues of concern relating to the Eskom Claim has always been, amongst others, the following (evidential items) –
 - 4.1 Eskom's compliance with all the contractual requirements in terms of the CSA and addenda (clause 9.6² of the CSA and 3.4.3³ of the First Addendum) to inform OCM on a monthly basis of its failure to comply with the quality specification, including such calculation of the

² Eskom must notify Optimum in writing within 15 days after each days deliver whether all coal supplied and delivered by Optimum to Eskom complies with the quality specifications.

³ Eskom will in writing advise Optimum monthly in terms of the manner in which such penalties will have been calculated and Eskom will deliver to Optimum, together with the details of such calculations, laboratory relevant results in respect of the coal in question in support of such calculation.

penalty to be deducted from the monthly invoice.

4.2 Rectification of clause 3.6 of the First Addendum as Eskom and OCM has opposing interpretations relating to the manner in which payment reduction should be calculated. Eskom has on a number of occasions placed on record that it only intends to deduct such amounts for OCM's failure to supply the correct quality specification as it is entitled to in terms of the CSA and addenda thereto. As Eskom will need to rely on the evidence of Eskom's ex-employees for that part of its claim, it was decided that in order to avoid the prescription of portions of the Eskom Claim (to the extent that some portion have not already prescribed) to proceed with action/referral to arbitration and amend the statement of claim/particulars of claim relating to, amongst others, the rectification of clause 3.6 of the First Addendum at a later. On Eskom's version the current Eskom Claim, subject to there being compliance with the other provisions of the CSA and the integrity of the sampling process, could be substantially more.

4.3 The integrity of the sampling method utilised to assess compliance by OCM with the coal quality specification of coal supplied and delivered to Hendrina,

5. The aforesaid hurdles do not imply that the Eskom's Claim is not sound. It merely implies that Eskom will need to ensure that it is in a position to lead evidence (factual and expert) to demonstrate to an arbitrator or a court that the amount claimed (or a portion thereof) is due and payable by, *inter alia*, refuting any contention by OCM that (1) It failed to comply with the terms of the CSA, (2) It waived its right to impose penalties in terms of the CSA (3) It failed to calculate the claim properly.

6. During September 2016 the arbitration proceedings instituted by Eskom against Optimum were reinstated, pursuant to Optimum being discharged from business rescue on 31 August 2016. As part of the recommenced arbitration proceedings, Optimum filed its statement of defence on 5 December 2016 and Eskom filed its replication thereto on 26 January 2017. The parties held a further pre-arbitration meeting with the arbitrator on 28 January 2017 on the further process required to conclude the arbitration proceedings.

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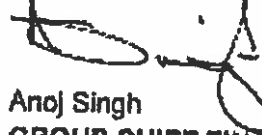
**ESKOM HOLDINGS SOC LTD/OPTIMUM COAL MINE PTY LTD/OPTIMUM COAL 203
HOLDINGS (PTY) LTD**

Recommended by:



Suzanne Daniels
ACTING HEAD: LEGAL AND COMPLIANCE
Date: 14/3/2017

Recommended by:



Anoj Singh
GROUP CHIEF FINANCIAL OFFICER
Date: 14/03/17

Approved/~~Not approved~~



Matshela Koko
INTERIM GROUP CHIEF EXECUTIVE
Date: 14/3/17



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**IN THE ARBITRATION BEFORE ADV. RA SOLOMON S.C
JOHANNESBURG**

In the matter between:

ESKOM HOLDINGS SOC LIMITED

Claimant

and

**OPTIMUM COAL MINE (PROPRIETARY) LIMITED
TEGETA EXPLORATION AND RESOURCES
(PROPRIETARY) LIMITED**

First Defendant
Second Defendant

SETTLEMENT AGREEMENT

PREAMBLE

The Claimant initiated arbitration proceedings against the Defendants for payment in the amount of R2 178 630 611.99 for accrued penalties not imposed against the Defendants by the Claimant for the period of March 2012 to May 2016 ("the Claim"). The aforesaid Claim was defended by the Defendants.

WHEREAS the Parties entered into a process of negotiation in order to resolve the Claim. Pursuant to the settlement negotiations, the Parties have agreed to settle this dispute in respect of the accrued penalties for the period March 2012 to May 2016 in an amount of R 577 839 105.42.

WHEREAS the Parties acknowledge that the accrued penalty amount of R 577 839 105.42 is in full and final settlement of the Claim.

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NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

It is hereby recorded and agreed that the accrued penalty due and payable for the period March 2012 to May 2015 is the amount of R 577 839 105.42 ("the Settlement Amount").

1 CALCULATION AND SETTLEMENT OF HISTORIC PENALTIES

The Settlement Amount is calculated based on the following periods i.e.:

1.1 The period March 2012 to May 2014:

The parties agree that an amount of R158 386 758.77 (one hundred and fifty-eight million three hundred and eighty-six thousand seven hundred and fifty-eight rand and seventy-seven cents) was deducted from payments due to the Defendants as penalties. The parties accept the aforesaid figure to be a settlement of any and all penalties due for the period March 2012 to May 2014;

1.2 The period June 2014 to May 2015:

1.2.1 For this period the Claimant calculated penalties in the amount of R419 452 346.66 (four hundred and nineteen million four hundred and fifty-two thousand three hundred and forty-six rand sixty-five cents) which is due and payable by the Defendants. In order to settle and resolve the matter, the Defendants accepts liability in an amount of R255 400 819.18 (two hundred and fifty-five million four hundred thousand eight hundred and nineteen rand and eighteen cents) calculated in accordance with paragraph 1.2.2 *infra*, on which the parties so settle.

1.2.2 The amount of R255 400 819.18 (two hundred and fifty-five million four hundred thousand eight hundred and nineteen rand and eighteen cents) is calculated as:

Total Penalty from March 2012 – May 2015	R 577 839 105.42
Less: Penalties already deducted	R 158 386 758.77
Total Penalty	R 419 452 346.66

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Less: CV Penalty (Binary Score M Total Penalties)	- R 126 679 838.80
Less: GC Penalty reduction Sept 2013- May 2014	- R 37 371 888.07
Total payable	R 255 400 819.18

2 PAYMENT OF SETTLEMENT AMOUNT

2.1 The parties agree and confirm that the balance of the Settlement Amount of R 255 400 819.18 will be paid by the Defendants to the Claimant in equal monthly instalments, the first payment to be made on 1 April 2017 and the last payment to be made on or before 31 December 2018 when the current Coal Supply Agreement terminates. For clarity, the Claimant shall not be entitled to set off or deduct the monthly instalments from the monthly payments due by the Claimant to the Defendants for the remaining period of the Coal Supply Agreement.

2.2 In the event that any one payment is not paid in full on the due date:

2.1.1 the full amount then outstanding (whether or not the date for payment has fallen due) shall become due and payable immediately; and

2.1.2 the Defendants hereby consents to the Claimant making application for this settlement agreement/arbitration award to be made an order of court in terms of section 31 of the Arbitration Act 42 of 1965 and judgment to be granted for the outstanding amount, together with *mora* interest and costs occasioned by such application.

3 GENERAL

3.1 This settlement agreement constitutes the sole record of the agreement between the parties in relation to the dispute raised herein.

3.2 The parties shall be bound by any express, tacit or implied term, representation, warranty, promise or the like not recorded herein. No addition to, variation, novation or agreed cancellation of any provision in this settlement agreement shall

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be binding upon the parties unless reduced to writing and signed by and on behalf of the parties.

- 3.3 No indulgence or extension of time which any party may grant to any other shall constitute a waiver of or whether by estoppel or otherwise limit any of the existing or future rights of the parties in terms hereof save in the event and to the extent that the parties have signed a written document expressly waiving or limiting such a right.

4 COSTS

Each party will be liable for its own costs towards the arbitration whilst both parties will share the costs of the arbitrator equally.

5 CONFIDENTIALITY

The existence, contents and terms of this settlement agreement are confidential and, save as may be required by law, no party shall disclose same to any third party other than its affiliates and their respective directors, employees, officers and advisors.

6 ARBITRATION AWARD

The parties agree that this settlement agreement be made an award by the arbitrator and both parties request the arbitrator to do so.

SIGNED AT 312 ON THIS 14 DAY OF march 2017.



DULY AUTHORISED THERETO
AND ON BEHALF OF
ESKOM HOLDING SOC
LIMITED





SIGNED AT _____ ON THIS _____ DAY OF _____ 2017.

DULY AUTHORISED THERETO
AND ON BEHALF OF
OPTIMUM COAL MINE (PTY) LTD

SIGNED AT _____ ON THIS _____ DAY OF _____ 2017.

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DULY AUTHORISED THERETO AND ON BEHALF OF
OPTIMUM COAL HOLDINGS LTD

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Memorandum

TO : SUZANNE DANIELS

SUBJECT : CONSIDERATIONS FOR PURPOSE OF SETTLEMENT DISCUSSIONS WITH OPTIMUM COAL MINE (PTY) LTD

DATE : 10 MARCH 2017

- 1.1 Eskom still has the onus as the plaintiff/claimant to demonstrate to a court/arbitrator on a balance of probabilities that the amount is due and payable. These additional considerations for the potential settlement of the Optimum claim must be read in conjunction with our advice dated 2 December 2016.
- 1.2 In terms of the CSA, Eskom was contractually entitled to impose the penalties for any failure to comply with the quality specification – however due to a number of impasse which arose between the parties relating to the imposition of the penalties (i.e. sampling process, the calculation of the penalty, interpretation of the penalty clause), Eskom reserved its right to impose the penalties at a later stage.
- 1.3 The issues of concern relating to the claim has always been, amongst others, the following (evidential items) –
 - 1.3.1 Eskom's compliance with all the contractual requirements in terms of the CSA and addenda (clause 9.6¹ of the CSA and 3.4.3² of the First Addendum) to inform OCM on a monthly basis of its failure to comply with the quality specification, including such calculation of the penalty to be deducted from the monthly invoice.
 - 1.3.2 Rectification of clause 3.8 of the First Addendum as Eskom and OCM has opposing interpretations relating to the manner in which payment reduction should be calculated. Eskom has on a number of occasions placed on record that it only intends to deduct such amounts for OCM's failure to supply the correct quality specification

¹ Eskom must notify Optimum in writing within 15 days after each day's delivery whether all coal accepted and delivered by Optimum to Eskom complies with the quality specifications

² Eskom will in writing advise Optimum monthly in terms of the manner in which such penalties will have been calculated and Eskom will deliver to Optimum, together with the details of such calculations, laboratory relevant results in respect of the coal in question in support of each calculation.

as it is entitled to in terms of the CSA and addenda thereto. As Eskom will need to rely on the evidence of Eskom's ex-employees for that portion of its claim, it was decided that in order to avoid the prescription of the portions of Eskom Claim (to the extent that some portion have not already prescribed) to proceed with action/referral to arbitration and amend the statement of claim/particulars of claim relating to, amongst others, the rectification of clause 3.6 of the First Addendum at a later stage. On Eskom's version the current Eskom Claim, subject to there being compliance with the other provision of the CSA and the integrity of the sampling process, could be substantially more

- 1.3.3 The integrity of the sampling method utilised to assess compliance by OCM with the coal quality specification of coal supplied and delivered to Hendrina;
- 1.4 The aforesaid hurdles do not imply that the Eskom Claim is not sound. It merely implies that Eskom will need to ensure that it is in a position to lead evidence (factual and expert) to demonstrate to an arbitrator or a court that the amount claimed (or a portion thereof) is due and payable by, amongst others, refuting any contention by OCM that (1) it failed to comply with the terms of the CSA, (2) it waived its right to impose penalties in terms of the CSA (3) it failed to calculate the claim properly.
- 1.5 Having regard to the aforesaid, there are inherent difficulties with Eskom's claim for the period March 2012 to May 2014 during which Eskom already deducted a penalty amount of R158 386, 758.77 ("the Penalised Period"). This does not mean that Eskom does not have a valid claim for the further penalties during the Penalised Period. However, it will be a taxing process for Eskom to demonstrate that for the Penalised Period an additional penalty or payment reduction of R1, 432 065, 841. 95 (with sizing) or R634, 361, 541. 53 (without sizing) is payable.

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- 1.6 In respect of the R634, 361, 641. 53 claim (without reference to the without sizing claim), Eskom has no documents in which it reserves its rights to claim such penalties or implement a further payment reduction. Thus that portion of the claim will most probably be difficult to prove specifically with reference to clause 9.6 of the CSA which contains a deeming provision which provides that, should Eskom not have notified Optimum of its failure to comply with the quality specification and the calculation of the penalty/payment reduction, it is deemed that the coal conformed with the quality parameters. The hurdles for the sizing claim of R1, 432 065, 841. 95 during the Penalised Period is similar, but additional complexities are added as Eskom will need to demand a rectification of the First Addendum on various aspects of how clause 3.6 of the First Addendum must be interpreted. However, in principle the payment reduction for sizing is a parameter where Eskom is entitled to impose a payment reduction. On even the most conservative approach, the sizing quality parameter is an important factor to have regard to in the calculation of the penalty amount. Enclosed is a calculation for the Penalised Period which a) excludes the additional penalties and b) includes the additional penalties.

- 1.7 For the period June 2014 to May 2015 ("Period Not Penalised") Eskom's claim with the sizing penalty is R744,464,770.02 or R 418,452,346.65 without sizing penalty.

	Eskom's 2017 sizing penalty R418		Total of 14 of 14 years penalised (2014-2015)		
			Total penalty	Penalty (2015) Multiplier	Appl. to 2015
Jun 14	58,008,186.18		17,844,337.54	0.30	5,353,301.26
Jul 14	61,051,306.70		18,315,391.51	0.30	5,494,617.45
Aug 14	70,421,081.10		21,126,324.33	0.30	6,337,897.29
Sep 14	66,480,830.15		19,944,249.05	0.30	5,983,274.71
Oct 14	77,897,286.70		23,369,186.01	0.30	7,010,755.80
Nov 14	81,718,476.17		24,515,541.85	0.30	7,354,662.55
Dec 14	81,794,706.44		24,538,411.93	0.30	7,361,523.58
Jan 15	81,794,706.44		24,538,411.93	0.30	7,361,523.58
Feb 15	81,794,706.44		24,538,411.93	0.30	7,361,523.58
Mar 15	81,794,706.44		24,538,411.93	0.30	7,361,523.58
Apr 15	81,794,706.44		24,538,411.93	0.30	7,361,523.58
May 15	81,794,706.44		24,538,411.93	0.30	7,361,523.58
	101,121,479.02		418,452,346.65	0.30	125,535,703.99

- 1.8 The penalty or payment reduction for the Period Not Penalised is faced with similar hurdles as the claim for the Penalised Period. The difference is that no penalty has been deducted. Eskom as a potential settlement will need to discount its risk with proceeding with the claim against Optimum taking into account that for the Penalised Period it already deducted R168, 386, 758.77 and as a compromise abandon such additional penalties/payment reduction it still needs to prove, but use the claim for the Period Not Penalised as the basis for settlement. The settlement amount will accordingly range between R744, 464, 770, 02 (amount including sizing) as the high watermark and R419, 452, 346, 65 (amount excluding sizing) as the low watermark.
- 1.9 Save for the other concerns, the fundamental point of departure between the Eskom calculation and the Optimum calculation is the exclusion by Optimum of the sizing parameter in calculating the penalty amount. The Optimum proposal further deducts the penalty already imposed for the Penalised Period from the Period Not Penalised.

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October 2016 Offer

It is our proposal that the ongoing dispute between the parties should be dealt with on this basis.

Total Payments	467,561,134.41
Less payments deducted previously	(158,366,334.77)
Total (amount due) on promissory notes	309,194,799.64
Total Cash to Equity	216,387,190.87

December 2016 Offer

R410-132 346.64 on the rest of the pennings.

4. Below is the summary of the penalties with the detailed calculation for the above.

Month	Al Penalty	C/P Penalty	Adm Penalty	TOTAL
11-Jun	317 611.03		23 715 669.93	24 033 075.03
11-Jul	367 976.30	425 609.64	13 056 774.70	16 424 519.08
11-Aug	331 317.11	731 740.61	44 421 531.03	47 360 374.33
11-Sep	430 645.03	16 508 212.34	32 557 389.11	68 476 144.50
11-Oct	153 971.17	3012 661.14	58 016 574.61	74 323 214.16
11-Nov	371 551.71	3625 295.32	27 712 784.89	31 713 619.64
11-Dec	162 765.83	1513 300.19	1 329 343.64	2 801 308.52
12-Jan	377 161.20	217 905.71		595 300.51
12-Feb	310 284.03	5 734 407.06	10 613 556.82	16 430 250.26
12-Mar	286 431.19	59 552.83	7598 767.93	4348 777.75
12-Apr	340 968.11	2 830 710.11	45 19 517.40	7 411 195.62
12-May	266 374.72	10 445 465.52	16 415 611.16	47 525 761.50
	4 080 708.15	45 975 732.93	322 149 115.94	312 227 140.06
TOTAL PENALTY				322 149 115.94
11 MAY PAYMENT BILANALY 2012 (00)				-15 979 732.37
LESS DEC PENALTY 2012 (FROM SET 13 MAY 16)				-37 371 680.57
TOTAL PENALTY TO BE SETTLED				338 876 276.97
AMOUNT DOES NOT INCLUDE THE PENALTY (READY FOR CLOSURE)				154 180 756.77
TOTAL PENALTY IN MAY 2012 (MAY 2015)				397 262 984.65

TO CONCLUDE

Our settlement amount is therefore R 238 875 225.92

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February 2017 Offer

- a) Our clients do not want to be forced to raise circumstances pursuant to the hardship clause on arbitration and much rather suggest that the parties endeavour to settle the issue of alleged outstanding penalties for which provision was in any event made in the Co-operation Agreement. Supported by the report of the CSIR our clients' liberal calculations suggest that (and for the moment our clients' entitlement to rely on the hardship clause) your client's penalty calculations as per the statement of claim are not correct and a duplication of figures and possible prevailing circumstances. To this end our clients, for purposes of preparing a settlement, assumed, in favour of your client, that your client could have been entitled to deduct penalties in the amount of approximately R368 000 000.00 whilst our client paid R158 000 000.00 by way of deductions from previous payments. Applying an interest factor to the amounts deducted our clients offer to pay R239 000 000.00 in equal monthly instalments commencing 1 March 2017, the last instalment due on the last month of the CSA, as a full and final settlement of the issue pertaining to alleged arrears penalties.
- b) The second issue to be resolved is the quantity of coal to be delivered to Eskom on a monthly basis. We understand the current demand to be 400 000 tons whilst our clients are willing and able to deliver 380 000 tons per month. This request follows the fact that one of our clients' mines will soon be closed down and it will cause a dent in the volumes our clients are able to mine and deliver.
- c) The third issue to be agreed upon is the pricing formula. At present we understand the configuration of the pricing to consist of PPI, CCI and a 10% mark-up. Our clients would like to agree on a different price formula since the aforesaid formula causes it to endure unforeseen and unreasonable hardship. The basis of our offer, in this regard, is to receive your client's approval, in principle, that the price formula can be referred for discussion in order to be resolved within a reasonable period of time.

1.11 The initial offer of October 2016 merely deducts the R158, 386, 758.77 from the penalty

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amount of Optimum without any proper substantiation or rationale.

- 1.12 From the detailed offer of December 2016, the basis for the calculation of the penalty for the period June 2014 to May 2015 is not clear, as no supporting calculation is provided to arrive at R322, 227, 646, 96 as opposed to the R 419,452,346.65 as per Eskom's calculation. It is further not clear what further deduction in respect of CV and "GC" penalty deduction is made to reduce the R322, 227, 646, 96 penalty amount to a further amount of R238 876 226, 92.
- 1.13 On 15 February 2017 Eskom made a counter- settlement proposal to OCM in the amount of R419 452 346.65 as a final offer. The settlement was arrived at by discounting the following –
- 1.13.1 The penalty claim of R1, 432, 085, 841.97 for the sizing specification for the period March 2012 to May 2014. For this period an amount of R158, 386, 758.77 was already deducted in respect of the other quality parameters. Eskom has accordingly discounted R1, 432, 085, 841. 97 on, amongst others, the basis that penalties (R158, 386, 758.77) for the other quality parameters (CV, Al and Ash) were already deducted.
- 1.13.2 The penalty claim of R744 645 770.02 in respect of the sizing specification for the period June 2014 to May 2015, where the basis for such claim is in dispute, and purely in order to resolve the matter, be substituted for the penalty claim amount of R419 452 346.65 for the other quality parameters (CV, Al and Ash) which were out of specification for that period.
- 1.14 The total penalty for the Eskom Claim period is accordingly the following –
- 1.14.1 For March 2012 to May 2014: R158,386,758.77 (already deducted);
- 1.14.2 For June 2014 to May 2015: R419, 452, 346.65
- Total R577, 839, 105.42
- 1.15 OCM has accepted our counter-proposal in the amount of R577, 839, 105.42 subject to the following calculation-

Total Penalty from march 2012 – May 2015	R 577 839 105.42
Less: Penalties already deducted	R 158 386 758.77
Total Penalty	R 419 452 346.65

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Less: CV Penalty (Binary Score M Total Penalties)	- R 126 679 838.80
Less: GC Penalty reduction Sept 2013- May 2014	- R 37 371 688.07
Total payable	R 255 400 819.18

- 1.16 When considering the revised settlement proposal Eskom will be required to verify the calculations for the following amounts –
- 1.16.1 R126, 679, 838.80 in respect of the CV penalty; and
- 1.16.2 R37, 371, 688.67 in respect of the penalty reduction for September 2013 to May 2014.
- 1.17 Should Eskom verify that the aforesaid amounts are justifiable deductions, taking our advice set out above into account, a settlement will be in the interest of both parties
- 1.18 In considering the settlement, it is important to also have regard to –
- 1.18.1.1 OCM's current operating conditions and the need to ensure a sustainable solution for OCM to continue as a going concern;
- 1.18.1.2 Security of supply to the Hendrina Power Station; and
- 1.18.1.3 The interdependent nature of the power station and the mine.
- 1.19 On 5 March 2017 we were provided with a revised calculation of the penalty amount in respect of the Eskom Claim, which reflected amendments to the calculation for both the Penalised Period and the Period Not Penalised. For the Period Not Penalised the calculation was amended from R419, 452, 346.65 to R417 052 292.04. As part of the revised calculation, Eskom has informed us that the amounts set out in 1.16.1 and 1.16.2 were taken into account, but could not provide us with an explanation as to why the amount in 1.16.1 and 1.16.2 should not be deducted from the R419, 452, 346.65 as alleged by Optimum.
- 1.20 On 6 March 2017, we held a meeting with Eskom Finance in order to discuss the penalty calculations and the amounts set out in 1.16.1 and 1.16.2 above. During our discussion




we were advised that there was a calculation error in respect of the AI penalty (for the entire period), which had the effect that the penalties for the Period Not Penalised, excluding sizing, ought to be R 490 002 211, 11 as opposed to R417 052 282.04. We requested Eskom to furnish us with a detailed written explanation on this error in the calculation in order to explain this to Optimum.

- 1.21 The total penalty in the amount of R 490 002 211,11 is the amount payable by Optimum to Eskom, as the R 158 386 758,77 (penalties already deducted), the R126, 679, 838.80 in respect of the CV penalty as well as the R37, 371, 688.67 has already been taken into account as part of the revised penalty calculation for the entire Eskom Claim.
- 1.22 Subsequent to our meeting we requested that Eskom Finance furnish us with the information and/or documents set out below, in order to adequately respond to the opposing attorneys-
 - 1.22.1 An explanation of how the R 158 386 758,77 was calculated (penalties already deducted);
 - 1.22.2 An explanation of the formula error in respect of AI and the correct formula which was now utilised; and
 - 1.22.3 The spreadsheet setting out the additional penalties due to Eskom from June 2015 to date.
- 1.23 On 8 March 2017, Eskom Finance furnished us with various Invoices for the period of March 2012 to February 2015 and advised us that they were unable to verify how the penalties for the Penalised Period in the amount of R158,386,758.77 was calculated and/or the formula or rationale for the calculation. Without Eskom Finance being able to indicate to us how the R158,386,758.77 was calculated, we are unable to test why Optimum is of the view that the amount of R126, 679, 838.80 in respect of the CV penalty and the amount of R37, 371, 688.67 in respect of the penalty reduction for September 2013 to May 2014 should be deducted from the settlement amount.
- 1.24 We were also provided with a further updated calculation of R 441 186 153,30 as the total penalty payable by Optimum, as opposed to the R417 052 282.04 and R 490 002 211.11 provided on 5 and 6 March 2017 respectively. The difficulty experienced by

Eskom in providing us with an accurate and detailed value in respect of the settlement amount based on the CSA indicates to us, save for the other concerns highlighted in our previous advice that the basis for the penalty calculations is susceptible to numerous challenges by Optimum. In addition, any attempt by Eskom as part of the arbitration to rectify clause 3.6 of the first addendum to demonstrate what the intention of the parties in calculating the penalties would be difficult.

CONCLUSION

- 1.25 As stated above, it appears the parties have exhausted the settlement discussions, as both parties are steadfast on their respective calculations.
- 1.26 Eskom in considering whether or not to settle the dispute must take into account the additional hurdle in accurately and concisely calculating the accrued penalty amount in accordance with the terms of the CSA. We remind Eskom that a fundamental element for the success of the Eskom Claim is the rectification of clause 3.6 of the first addendum to the CSA (i.e. the method of calculation). The inability to demonstrate what the actual intention of the parties was in calculating the penalty amount reduces the prospects of success with the Eskom Claim.
- 1.27 Based on the aforesaid, Eskom must consider whether the offer by Optimum to settle the dispute relating to Eskom's accrued penalty for the period March 2012 to May 2015 be settled in an amount of R 577 839 105.42 which is calculated as follows –

Total Penalty from March 2012 – May 2015	R 577 839 105.42
Less: Penalties already deducted	R 168 380 758.77
Total Penalty	R 419 452 346.65
Less: CV Penalty (Binary Score M Total Penalties)	- R 126 670 838.80
Less: GC Penalty reduction Sept 2013- May 2014	- R 37 371 688.07
Total payable	R 255 400 819.18

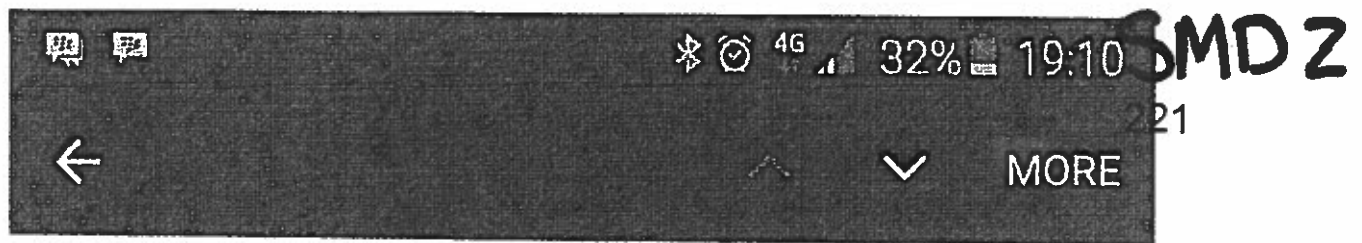
- 1.28 Should you wish to discuss, do not hesitate to contact us.

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C:\Users\carl\Documents\2017\2017\Optimum\Updated Considerations for Purpose of Settlement Discharge\Optimum Coal
Mine - 9 March 2017 excel\06100001.docx Page 1
10 March 2017

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Dear Anoj/Matshela

Please see the query from one of the Board members:

From the current documents does it mean we buying coal at the price in terms of our current agreement.

Confirmed. The coal price is as per the current coal supply agreement with OCM

Further advise if there is any other means of getting coal else where.

There is no other means of getting coal for Hendrina at a price R150/tonne. The open enquiry of the similar coal qualities for Arnot power station has not yielded positive results



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From: Suzanne Daniels
To: Matshela Koko
Date: 08 Dec 2015 at 19:57
Subject: Re: URGENT REQUEST TO APPROVE THE PREPURCHASE OF COAL FROM OPTIMUM COAL (PTY) LTD

Thank you. So far I have received 2 approvals.

Sent from my Samsung Galaxy smartphone.

----- Original message -----

From: Matshela Koko <KokoMM@eskom.co.za>
Date: 2015/12/08 19:22 (GMT+02:00)
To: Anoj Singh <SinghA3@eskom.co.za>
Cc: Suzanne Daniels <DanielSM@eskom.co.za>
Subject: RE: URGENT REQUEST TO APPROVE THE PREPURCHASE OF COAL FROM OPTIMUM COAL (PTY) LTD

Spot price is currently between R 470 and R 530 per tone.

Warm regards

From: Anoj Singh
Sent: Tuesday, December 8, 2015 7:19 PM
To: Matshela Koko
Cc: Suzanne Daniels
Subject: Re: URGENT REQUEST TO APPROVE THE PREPURCHASE OF COAL FROM OPTIMUM COAL (PTY) LTD

Hi S

Actually the prices being proposed are 5% and 9% lower than the current contract prices for the two mines in question for the duration of the pre-purchase agreement.

For the second question I would just add that the only other option is maybe buying on the spot market which is much higher.

Matshela maybe you have the spot price?

Thx

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Sent from my iPhone

On 08 Dec 2015, at 7:10 PM, Matshela Koko <KokoMM@eskom.co.za> wrote:

Where are you

From: Suzanne Daniels

Sent: Tuesday, December 8, 2015 7:10 PM

To: Matshela Koko; Anoj Singh

Subject: Re: URGENT REQUEST TO APPROVE THE PREPURCHASE OF COAL FROM OPTIMUM COAL (PTY) LTD

Thank you

Sincerely yours,

SUZANNE DANIELS

Company Secretary

Eskom Holdings SOC Ltd

Phone: +27 11 800 3091 Mobile: +27 82 580 7832

Fax: +27 86 662 7327

Email: danielsm@eskom.co.za

Sent from my Samsung Galaxy smartphone.

----- Original message -----

From: Matshela Koko <KokoMM@eskom.co.za>

Date: 2015/12/08 19:09 (GMT+02:00)

To: Suzanne Daniels <DanielSM@eskom.co.za>, Anoj Singh <SinghA3@eskom.co.za>

Subject: RE: URGENT REQUEST TO APPROVE THE PREPURCHASE OF COAL FROM

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OPTIMUM COAL (PTY) LTD

From: Suzanne Daniels
Sent: Tuesday, December 8, 2015 6:51 PM
To: Anoj Singh
Cc: Matshela Koko
Subject: FW: URGENT REQUEST TO APPROVE THE PREPURCHASE OF COAL FROM OPTIMUM COAL (PTY) LTD

Dear Anoj/Matshela

Please see the query from one of the Board members:

From the current documents does it mean we buying coal at the price in terms of our current agreement.

Confirmed. The coal price is as per the current coal supply agreement with OCM

Further advise if there is any other means of getting coal else where.

There is no other means of getting coal for Hendrina at a price R150/tonne. The open enquiry of the similar coal qualities for Arnot power station has not yielded positive results

Let me have a reply per return.

Best Regards

SUZANNE DANIELS

Company Secretary

Eskom Holdings SOC Ltd

Phone: +27 11 800 3091 Mobile: +27 82 580 7832 Fax: +27 86 662 7327

Handwritten signature and initials.

Email: daniels.suzanne@eskom.co.za

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From: viroshini naidoo [<mailto:naidooviroshini@gmail.com>]
Sent: Tuesday, December 8, 2015 6:33 PM
To: Suzanne Daniels
Subject: Re: URGENT REQUEST TO APPROVE THE PREPURCHASE OF COAL FROM OPTIMUM COAL (PTY) LTD

Hi

From the current documents does it mean we buying coal at the price in terms of our current agreement.

Further advise if there is any other means of getting coal else where.

Your urgent reply is needed for me to consider the enclosed documents

Regards

Viroshini

On Tuesday, December 8, 2015, Suzanne Daniels <DanielSM@eskom.co.za> wrote:

Good evening Board Members,

The Chairman of the Board hereby requests that you consider the attached submission together with the attachments included in this e-mail for your approval/non-approval.

2


Kindly forward your signed resolutions by 12h00 tomorrow 9 December 2015 to the office of the Company Secretary.

Best Regards

SUZANNE DANIELS

Company Secretary

Eskom Holdings SOC Ltd

Phone: +27 11 800 3091 Mobile: +27 82 580 7832 Fax: +27 86 662 7327

Email: daniels.suzanne@eskom.co.za

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I'm part of the 49Million initiative...

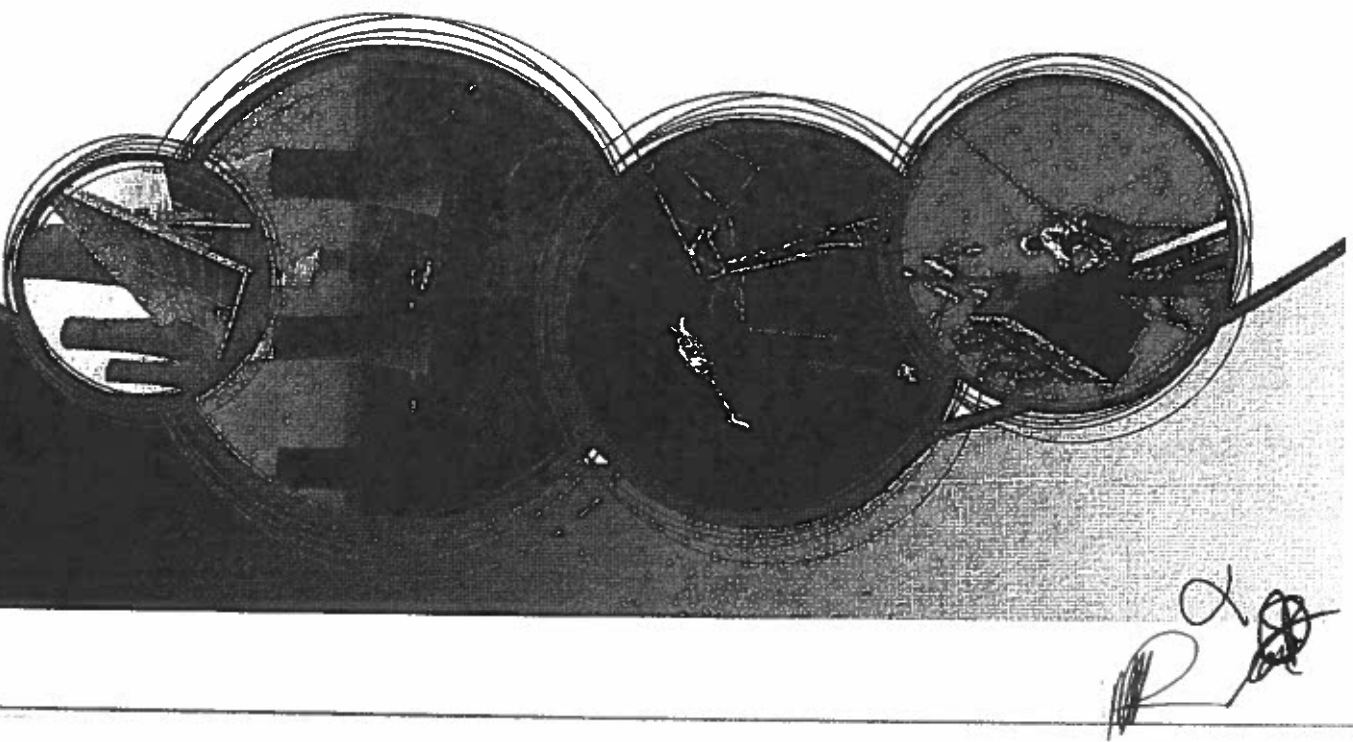
<http://www.49Million.co.za>

NB: This Email and its contents are subject to the Eskom Holdings SOC Limited EMAIL LEGAL NOTICE which can be viewed at http://www.eskom.co.za/Pages/Email_Legal_Spam_Disclaimer.aspx

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Presentation to SCOPA

- PWC Coal Quality Management Review
- National Treasury review of coal contracts



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Contents



1. Context of Eskom's Coal procurement
2. Findings from the PwC 2015 and 2016 Report
3. Advice from Counsel on the Draft National Treasury Report
4. Summary of Draft 2017 National Treasury Report Conclusions and Eskom Comments
5. Possible implications on Eskom's business
6. Conclusion

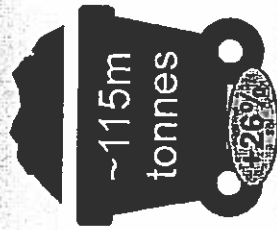
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Eskom purchases ~115 mt p.a. of coal which drives ~30% of the operating cost base

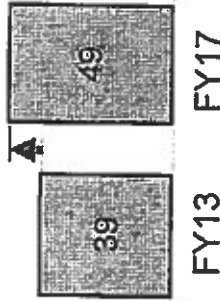


Overview of Eskom coal

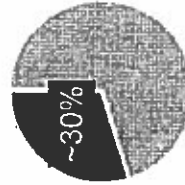
Eskom is the largest buyer of coal in the continent



Eskom spends ~R50 billion on coal supply per annum

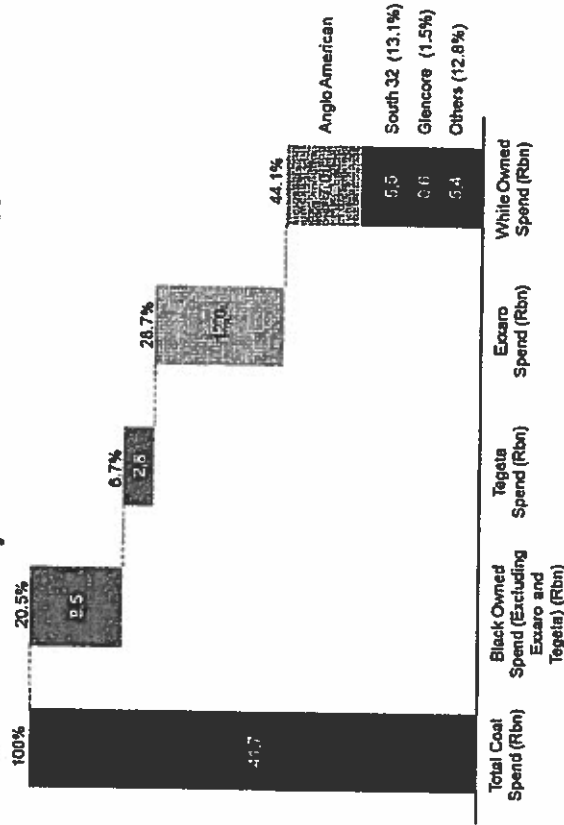


Coal cost is ~30% of Eskom's total cost and a large portion of the tariff that Eskom charges customers

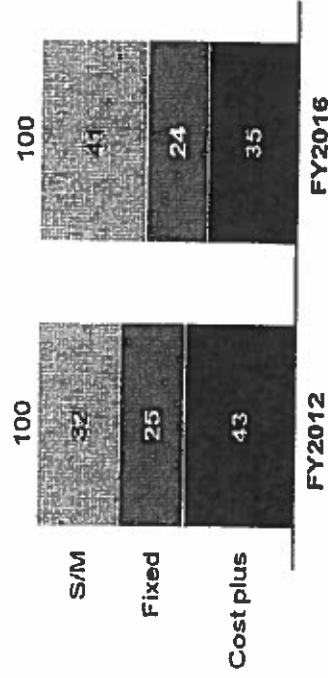


Eskom's coal and logistics spend contributes 0.66% to SA's GDP

FY2017 Coal Spend Breakdown²



Eskom coal mix Percentage



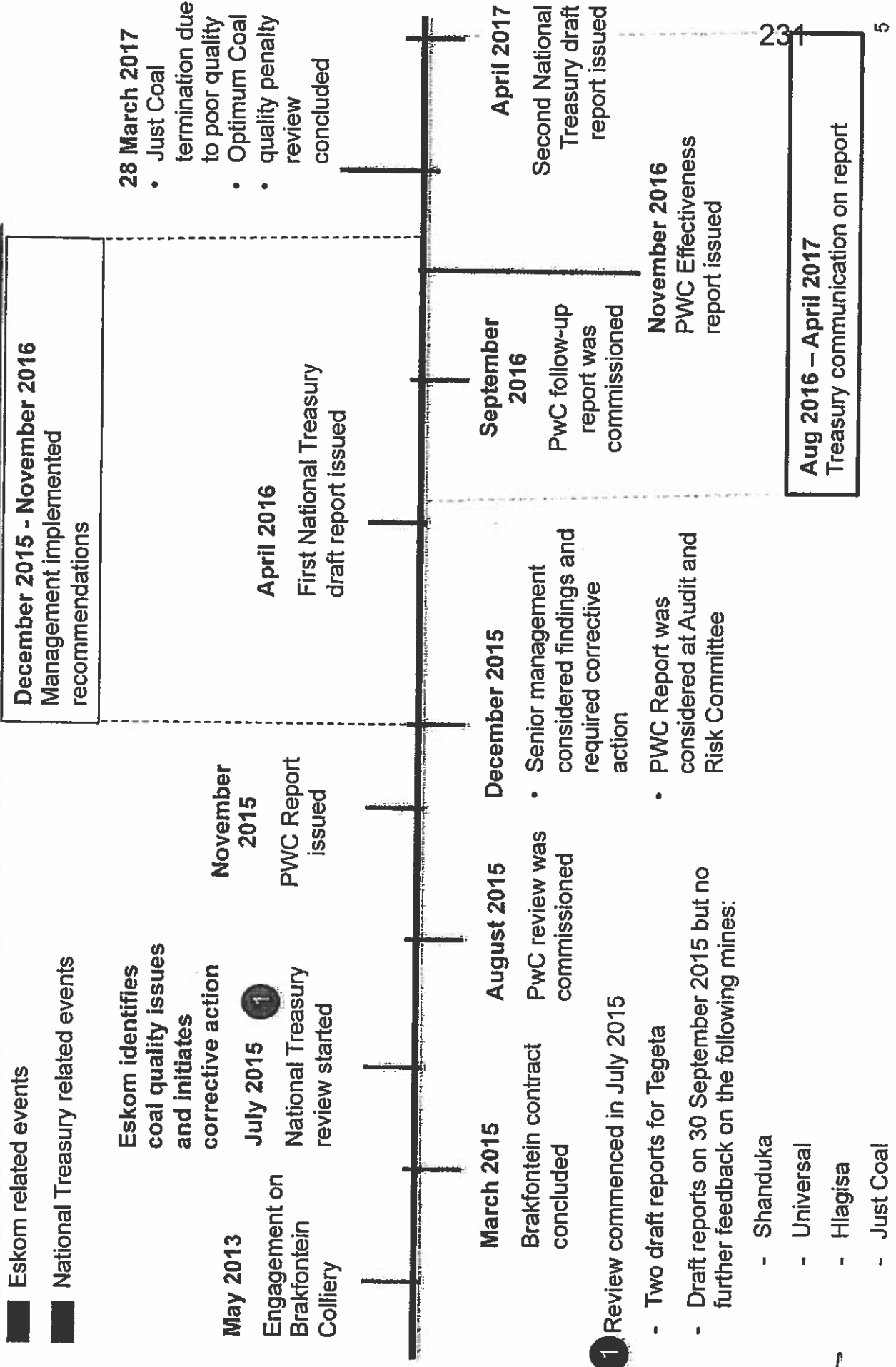
229

¹ Implied coal purchase target based on NERSA electricity cost escalation allowance

² Excluding FCA Transport costs, Medupi and non-cash items

1. Context of Eskom's Coal procurement
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6. Conclusion

An overview of coal contracts in Eskom by National Treasury and Eskom



PWC Report was commissioned by Eskom in 2015 in response to coal quality concerns



Context of the PWC Report 2015

- PwC was appointed by **ESKOM** pursuant to concerns related to the quality of coal supplied to conduct a review of:
 - The appointment process relating to coal suppliers
 - The Coal Quality Management processes that related to pre-certification of coal quality
 - **Tshedza Mine, Keaton Mine, Tegeta Mine** and **Universal Coal** were selected as sample mines for the review
 - Eskom Contracted Laboratories ("Labs")
 - Optimum (Glencore) was excluded due to the coal quality issues were being disputed
- The review includes:
 - identifying the areas of non conformance;
 - assessing the adequacy of existing protocols and guidelines;
 - And developing a "Blueprint", including suggested areas for improvements to existing controls to enhance effectiveness.

Context of the PWC Report 2016

- **ESKOM** further commissioned PWC to return and assess the progress to date on the recommendations made by PWC in 2015.
- Based on the assessment conducted to date, including interviews held, documentation reviewed, walk-throughs performed, as well as testing of certain controls within the specific sub-processes, **the controls were considered to be adequate and no material gaps were identified.**

The PWC report maue 48 recommendations in review against allegations against Eskom



Recommendations by category, Number	Focus of recommendation
Commercial Process for coal contracting	<ul style="list-style-type: none"> All Commercial processes for coal contracting must be compliant with Procedure 32-1034
Documentation	<ul style="list-style-type: none"> Adequate safeguarding of documentation processes
Non-conformances regarding laboratories	<ul style="list-style-type: none"> Adequate monitoring and reporting of non-conformances at Laboratories
Training	<ul style="list-style-type: none"> All PED staff to attend mandatory training
Handover of contracted mines to contract manager	<ul style="list-style-type: none"> All completed contracts must follow a documented handover process
Coal Procurement strategy	<ul style="list-style-type: none"> All Coal Supply processes to adhere to the Coal Procurement strategy/governance requirements
Total	

233

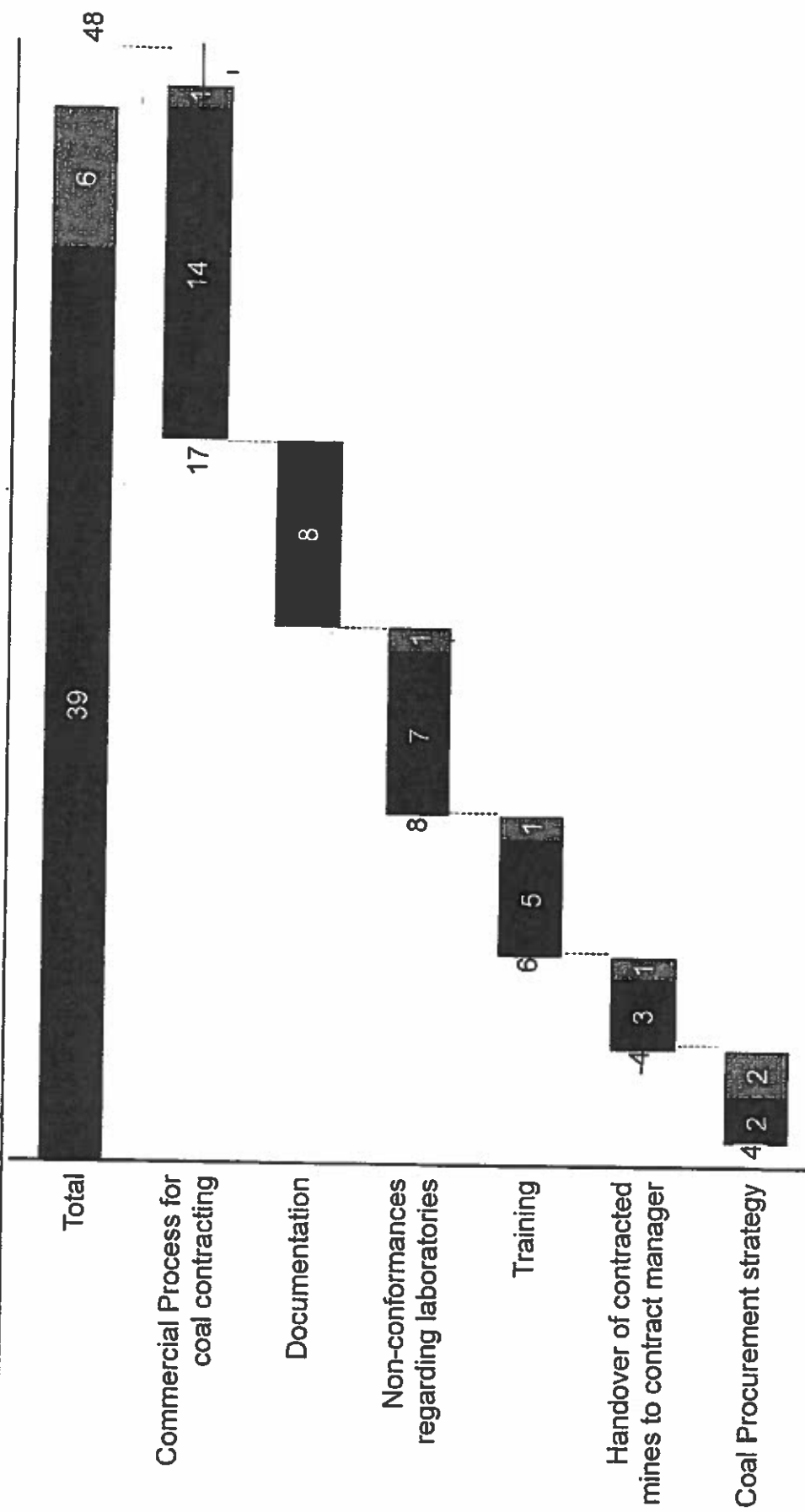
SOURCE: PWC Coal Quality Management Review , October 2016

39 controls implemented fully, 6 being partially implemented, and 3 remaining will be addressed in the near future



■ Fully implemented ■ Partially implemented ■ Implementation date in future

Recommendations by category, Number



6 of the 9 open actions have subsequently been implemented



Partially implemented Close to completion Closed

Finding previously considered not implemented	Current status of finding in November 2016	Status
Non-compliance to Eskom's Procurement and Supply Chain Management Procedure 32-1034	BTC Minutes for 10/2/2016 outstanding	
Inadequate handover process between fuel sourcing and coal operations	Brakfontein CSA not sent to Eskom Legal	
Coal procurement strategy/governance	BTC Minutes for 10/2/2016 outstanding	
Coal procurement strategy	BTC Minutes for 10/2/2016 outstanding	
Non-compliance to Eskom's Procurement and Supply Chain Management Procedure 32-1034	<ol style="list-style-type: none"> 1. RFP process for Labs not started as current contracts will end 31/3/2017. 2. Technical returnables to include accreditation status, once new RFP process begins for contracts ending 31/3/2017. 	
Non-compliance to the Laboratory Audit Procedures	PED is liaising with HR for a Legal person to assist on Contracts, once the new RFP process commences for Lab contracts ending 31/3/20-17.	
Mandatory training not completed	IDP has not been done	
Inadequate document management	RFP process for Labs not started, as current contracts are only ending 31/3/2017.	

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Remedial actions of coal quality issues identified by internal and external audits



Date	Event	Outcomes and Consequences
July 2013	<ul style="list-style-type: none"> Tegeta coal quality concern raised 	<ul style="list-style-type: none"> Collusion between labs and Eskom employees Tegeta coal was rejected unjustifiably based on reports from labs Tegeta CSA reinstated One employee's contract terminated
August 2015	<ul style="list-style-type: none"> Tegeta CSA suspended due to quality concerns Two labs suspended Four employees suspended 	<ul style="list-style-type: none"> One employee still following disciplinary processes Remaining two employees returned to service One lab returned to service Services with the other lab was terminated
October 2015	<ul style="list-style-type: none"> Internal and external audits conducted at the two labs 	
November 2015	<ul style="list-style-type: none"> Non-conformances communicated to one lab to correct 	
February 2016	<ul style="list-style-type: none"> Suspension of one of the labs lifted 	

Contents



1. Context of Eskom's Coal procurement
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Eskom Comments

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6. Conclusion

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regarding National Treasury

conclusions



Draft NT Report conclusions



The legal perspective

- Supplier appointed in a biased way that was not conducted in a fair, equitable, transparent, competitive and cost-effective manner;
- Tegeta provided poor coal and was paid above agreed rates and definitely above prevailing market rates. Eskom must assess the implicated transactions and treat the variance in accordance with guidelines on fruitless and wasteful expenditure;
- Eskom did not enforce the conditions of the coal supply agreement and must take action against responsible staff members and institute remedial action to prevent reoccurrence of such instances;
- Gross violation of environmental laws, compliance to water licensing agreements and general disregard for considerations pertaining to the environment.

- The power of investigation and oversight is aimed at enabling Treasury to **investigate and intervene at a general and system-wide level** – not that Treasury must micromanage the details of an entity's procurement or contract management activities on a case-by-case level.
- The **conclusions** regarding the **standard of coal, the price paid for it and enforcement of the provision of the coal contract do not relate** to any particular provision of the **SCM framework**.
- Though Treasury is correct that the concept of Supply Chain Management is not restricted to what it calls the pre-tender and tender phases, the subsequent ("post-tender") phase is not currently the subject of detailed regulation by the SCM framework.
- As regards the post-tender phase the framework is confined to matters such as the prescription of standard contracts. **Treasury is unable to point to any provision of the framework that has been breached.**
- The same goes to the allegations concerning an alleged breach of environmental laws. As far as is relevant to the SCM framework, this amounts to an allegation that Eskom failed to enforce certain provisions of its contract with Tegeta that required drainage tests. As far as is relevant to the SCM framework, this amounts to an allegation that Eskom failed to enforce certain provisions of its contract with Tegeta that required drainage tests.

238

conclusions...continued regarding National Treasury



Draft NT Report conclusions



The legal perspective

- Eskom processed an advance payment to Tegeta that is highly inconsistent with provisions of Treasury Regulations and prevailing contract management practices of the State. Eskom needs to assess the transaction in terms of guidelines for irregular expenditure;
- Contract management in general is poor - this finding has been highlighted by Eskom's external auditors for consecutive years already and is a prominent finding in the draft report;
- Gross violation of environmental laws, compliance to water licensing agreements and general disregard for considerations pertaining to the environment.

- While the other conclusions outlined in the letter, fall more plausibly within the scope of the SCM Framework they are at odds with the requirement that **Treasury should confine itself to issues of general and system-wide compliance with the Framework rather than to individual cases.** It is only the conclusions as to "Eskom's contract management in general" that could comfortably be accommodated within the scope of Treasury's mandate under the PFMA.
- In light of the limits to the powers of Treasury, **the findings of Treasury that certain payments to Tegeta constitutes fruitless and wasteful expenditure or irregular expenditure cannot be regarded as authoritative or definitive** and Eskom could not be compelled to take the steps that are contemplated in the PFMA for dealing with such expenditure.
- **The responsibility for the classification of expenditure as fruitless and wasteful or irregular is that of the accounting authority** in consultation with the Auditor-General.
- Eskom must give due regard to that opinion but cannot, in the event of an intractable dispute as to its correctness, be compelled to give effect to it.

regarding National Treasury conclusions... continued



In conclusion ...

- In conclusion, for the reasons set out above, ~~in my opinion~~ **Treasury lacks specific statutory powers of investigation and power to order remediation of the specificities of the conclusion and subsequent management of the Tegeta contracts.** In the event of an intractable difference of opinion between Treasury and Eskom, Treasury would thus be unable to enforce Eskom's co-operation with that investigation and compliance with its recommendations.
- That said, **Eskom** as an organ of state owes a duty of comity to its fellow organs of state. As a recipient of public funds Eskom has a duty to comply with the PFMA and to co-operate in good faith with the efforts of Treasury to monitor such compliance. This is indeed the theme of Treasury's letter which does not rely on an assertion that Treasury has any powers of compulsion but rather appeals to Eskom's duty as a good constitutional citizen to co-operate with it in the interests of the sound financial management of public funds. ~~I do not understand~~ **Eskom is not disputing this duty** and indeed it **has co-operated fully with Treasury's investigation despite its misgivings about aspects of it and its apparent direction.**
- Stemming from the principle of comity, organs of state should attempt to avoid litigation and should attempt to resolve disputes by alternative means such as by mediation or reference to an independent investigation. ~~I point this out~~ **This is highlighted because a litigious dispute between Eskom and Treasury** on this matter, which would undoubtedly be conducted under a glare of **adverse publicity, is unlikely** to be to the **benefit of either entity.**

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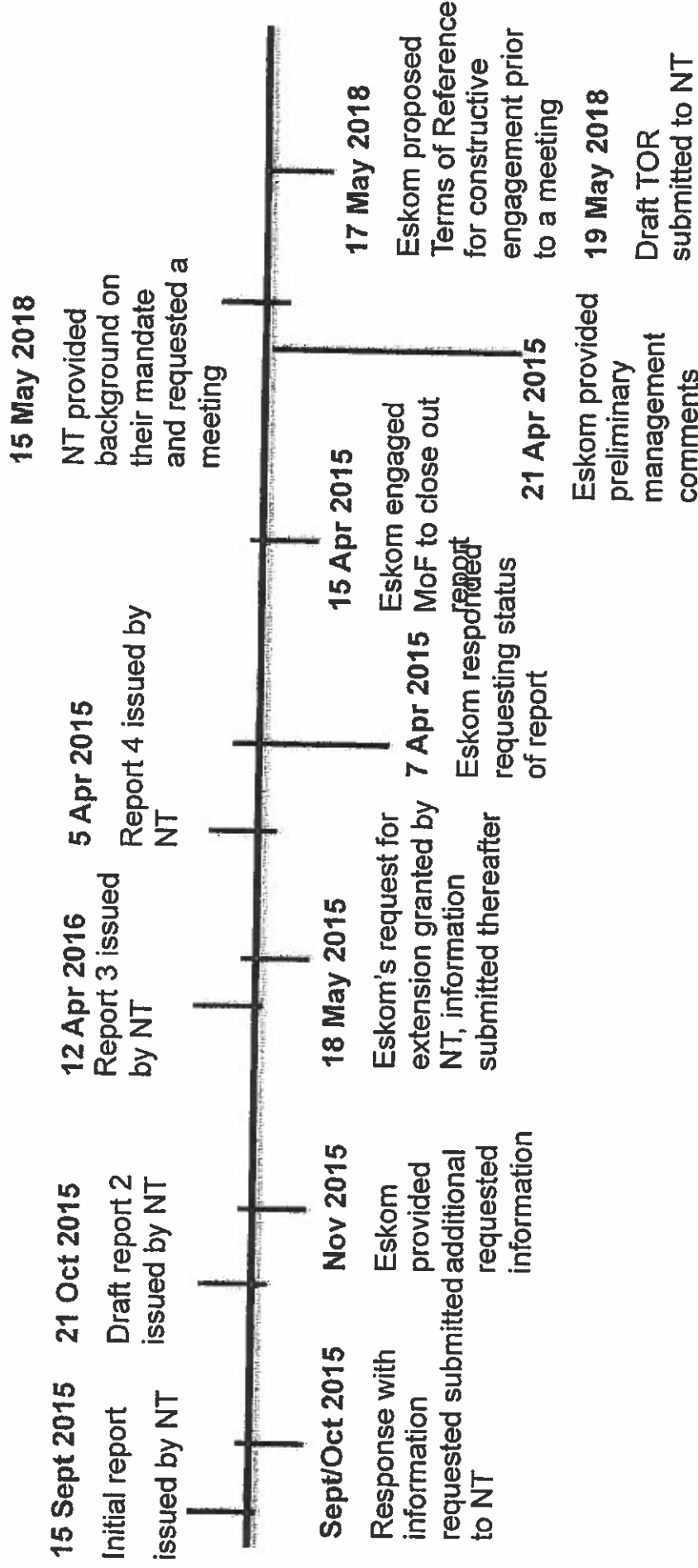
Contents



1. Context of Eskom's Coal procurement
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Eskom has had continuous engagements with National Treasury regarding Tegeta CSA review



• All necessary supporting documents, required explanations and other information was shared with National Treasury for their consideration

• However, it should be noted that National Treasury has never discussed with Eskom any of their concerns or comments or interpretation of our documentation.

Summary of Draft 2017 National Treasury Report Conclusions and Eskom Comments



Findings

The procurement of coal from Tegeta was undertaken in terms of the 2008 Board of Director's mandate

Whether Eskom's contract with Tegeta was pursuant to an unsolicited bid

Was Tegeta was the only company considered and evaluated.

Award of CSA
in terms of
2008 mandate

Eskom Comments

- Agree
- Coal was acquired under the Board approved 2008 Medium Term Coal Procurement Mandate.
- The Medium Term Mandate approved in 2008 was based on Eskom's procurement policy 32-188 at the time, which was compliant to the PFMA.
- The mandate was granted to mitigate security of supply risk that existed in 2008 that lead to load shedding.
- The mandate pre-dated PPPFA and its regulations as well as Eskom's current Procurement Procedure (32-1034).
- The supplier approached Eskom with an unsolicited proposal as allowed in the Board approved 2008 Medium Term Coal Procurement Mandate.
- 33 other suppliers followed a similar process allowed for in terms of the medium term mandate.
- Other alternative suppliers in the area did not approach Eskom with proposals for supply of coal
- To date none of the alternative suppliers in the area have approached Eskom to complain about the contract award to Tegeta or offer additional tons to Eskom on acceptable conditions
- It is be noted that no open RFP has been issued since 2008 for coal procurement
- The current Board has resolved to issue open RPFs for coal purchases

Summary of Draft 2017 National Treasury Report Conclusions and Eskom Comments...continued



Findings	Eskom Comments
<p>Was price reasonable?</p> <p>Price negotiations process which led to Eskom paying R13.50GJ</p>	<ul style="list-style-type: none"> • Agree • The negotiations for Brakfontein Colliery commenced in May 2012. The price was negotiated over several meetings, key of which were: • 23rd January 2015, Eskom re-iterated to Tegeta that the prices offered were high. The prices were R17/GJ for the 4 seam lower and R15/GJ for the blended product. • 30 January 2015, Eskom stated that the parties were far apart in terms of the price offered. Tegeta justified its high price based the need to finance the BBBEE partners as well as changes in environmental law as well as royalties. • Tegeta then revised their price offer after discussions with their board to R13.50/GJ. The parties agreed to the revised offer as it was a competitive offer based on the price per gigajoule when compared to other available coal for Majuba Power Station. • The Tegeta price was compared to 10 other suppliers for both road and rail and appeared reasonable
<p>In the absence of any valid explanation, any cent above R13.50 should be regarded as fruitless and wasteful expenditure and be recovered from the relevant Eskom officials or Tegeta.</p>	<ul style="list-style-type: none"> • Disagree. • Clause 16.1 with table 2 and clause 17 of the coal supply agreement provides that "the Price determined in accordance with clause 16.1 (R13.50/GJ) shall be adjusted upwards or downwards on the first Business Day of each month." for diesel only. • The price adjustment provisions are a standard clause in all CSAs • Any price adjustment to Tegeta was in accordance with the Coal Supply Agreement being diesel monthly and the annual agreed escalations.

Pricing of coal per the CSA

Summary of Draft 2011 National Treasury Report Conclusions and Eskom Comments...continued



Findings

Would the coal supplied by Tegeta be described as "reject coal"? If so, what are the implications of this?

Quality of coal per the CSA

Eskom Comments

- Disagree
- Internal audit reports indicate that no coal was paid for as per the CSA
- PWC report in 2016 confirms that the coal quality process controls are effective
- Collusion and lab competency impacted Tegeta quality tests
- In terms of the CSA, if Tegeta supplies coal which deviates from the prescribed quality parameters, then that coal will be categorized as Reject Coal. Eskom is entitled to burn or dispose of the Reject Coal and pay an amount of R1.40 per GJ for such coal if the deviation is within 10% of the prescribed quality parameters. If the Reject Coal deviates more than 10% from the prescribed quality parameters, Eskom will not be liable to pay for such coal. Where Eskom disposes of the Reject Coal Tegeta will be required to pay for the demonstrable and reasonable costs of disposal, including transportation of that coal to the power station.
- The pre-certification of coal and how to deal with Reject Coal is governed by the terms of the Coal Supply Agreement.

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Summary of Draft 2017 National Treasury Report Conclusions and Eskom Comments...continued



Findings

Would the coal supplied by Tegeta be described as "reject coal"? If so, what are the implications of this?

Quality of coal per the CSA... continued

Eskom Comments

- As part of the contract management process for coal, any Reject Coal is not paid for by Eskom. Eskom provided National Treasury with various documents which demonstrates that the coal consignments not classified as Contract Coal were rejected and not paid for.
- All the coal that is supplied to Eskom in relation to Brakfontein Colliery is pre-certified as per the provisions of the CSA. Pre-certification is a process that involves the creation, sampling and management of stockpiles. This process ensures that coal that does not meet the required specification does not get dispatched from the mine. The stockpiles are classified as pre-certified if they meet the coal quality that conforms to Eskom's standards only after the results of the samples are received from the laboratory that confirm that the coal is of suitable quality. The quantity and quality of all approved coal deliveries are recorded on quality control sheets signed off by Eskom (only coal)

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Summary of Draft 2011 National Treasury Report Conclusions and Eskom Comments...continued



Findings	Eskom Comments
<p>Various findings made with regards to the Advance Payment to Tegeta Exploration and Resources (Pty) Ltd.</p> <p>Advance Payment to Tegeta Exploration and Resources (Pty) Ltd</p>	<ul style="list-style-type: none"> Disagree Business needs The procurement of 1.2 million tons of coal from Tegeta was executed under the 2008 mandate To ensure security of supply and to prevent load shedding during winter An assessment of the winter supply plan was conducted and this indicated a shortfall of 2 million tons of coal to meet production requirements at Arnot All existing suppliers were approached to mitigate the above volume risk Time and quality of coal were the overriding factors that would have determined the successful suppliers Only two suppliers namely Tegeta and Umsimbithi were able to increase volumes and meet the time and quality requirements The prepayment was made in terms of the Board approved 2008 mandate in respect of coal prepayments - R659 million (incl. VAT) Several other prepayments to suppliers have been made since 2008 - ranging from R100 million to R400 million Cost plus mines also enjoy upfront investments of capital into their mining operations - Future investment requirement R 38 billion The latest cost plus request for capital approval by the Board on 27 September 2016 was for Exarro - Matla mine - R1.8 billion Other than coal prepayments, Eskom had prepaid other suppliers an amount of R3.5 billion at 31 March 2016 This enabled Eskom to overcome the winter challenge without load shedding and very expensive diesel usage

Summary of Draft 2017 National Treasury Report Conclusions and Eskom Comments...continued



Findings

- Various findings made with regards to the Advance Payment to Tegeta Exploration and Resources (Pty) Ltd ... continued



Eskom Comments

Financial Considerations

- The coal purchased was budgeted for and in line with the Corporate Plan;
- Liquidity risk was mitigated by available cash and the future liquidity risk was assessed in terms of the available cash flow forecasts and associated funding plans.
- Based on information provided the price of coal was bench-marked and found to be commercially acceptable;
- A 3.5% discount was negotiated with Tegeta for early payment of 6 months which translates into a 7% annual discount;
- A 4% negative cost of carry benefit accrued to Eskom due to the surplus cash on hand;
- The next best option to acquiring coal would be to burn diesel to ensure no load shedding in winter. This option would have been the most expensive option as the cost of production of coal is R277/MWh and the cost of diesel is R2245/MWh;
- A further consideration was the record of decision issued by NERSA on Eskom's 2013/2014 Revenue claw back application in which the Regulator completely disallowed costs of diesel used to generate electricity as a cost recoverable from the consumer. Consequently, the use of diesel had to be the last option;
- Adequate and appropriate security had been provided by Tegeta in the form of a limited guarantee and pledge of the issued shares of Tegeta;
- This was accepted after careful consideration of the net asset value of Tegeta as contained in their latest approved annual financial statements and a review of their latest management accounts;
- Additional security was derived from the underlying contracts from the coal supply of Tegeta with Eskom – e.g. Brakfontein contract over 10 years approximately R4 billion.
- An internal audit verification conducted revealed that the quantum of the prepayment was fully recovered by coal delivered by Tegeta by 31 August 2016

Summary of Draft 2017 National Treasury Report Conclusions and Eskom Comments...continued



Findings	Eskom Comments
<p>• Non-compliances with Water Use License (WUL) conditions identified by the audit conducted by DWS on the 20th to 22nd of July 2016.</p>	<ul style="list-style-type: none"> • Disagree • Department of Water and Sanitation (DWS) has responsibility to enforce adherence to WUL conditions. • WUL per the CSA is valid and in place, no further obligations on Eskom
<p>• Eskom failed to enforce clause 22.10 of the CSA which requires drainage tests to be conducted by not later than 30 days after the first delivery of contract coal.</p>	<ul style="list-style-type: none"> • Agreed • Tests subsequently done and results satisfactory. However test to be redone to verify results. • Root cause: contract management
<p>• Eskom allowed coal supply to commence before the supplier had completed and reported a successful combustion test.</p>	<ul style="list-style-type: none"> • Disagree • Eskom conducted the combustion tests in August 2014 and March 2015 • Acceptable to Eskom's technical standards
<p>• There is no evidence that Eskom took appropriate steps after receiving the report from Dr. Alphen dated 5th October 2015.</p>	<ul style="list-style-type: none"> • Disagree • Dr. Alphen is an Eskom employee therefore his recommendations are subject to senior management review prior to implementation • Eskom has reviewed the report and the recommendations are being considered by management for implementation within the ambit of the existing Coal Supply Agreement. • Some recommendations are not appropriate as they are more suited to Cost Plus mines and not medium term contracts

Summary of Draft 2017 National Treasury Report Conclusions and Eskom Comments...continued



Findings	Eskom Comments
<p>• Eskom failed to enforce clause 22.2 read together with clause 20.8.1.1 (auto-mechanical sampling) and clause 21.5.3 (manual resampling of stockpiles).</p>	<ul style="list-style-type: none"> • Agree • The Coal Supply Agreement does not prohibit the use of manual sampling of coal. • Eskom agreed to continue with the manual sampling of coal until such time as Tegeta was able to set-up the automatic sampler. This is not unique to Tegeta, as suppliers are afforded a grace period in terms of the CSA. • The auto-mechanical sampler is now operational for Tegeta • Root cause : contract management
<p>• Eskom signed a 10 year Coal Supply Agreement expiring in 2025 knowing that the Mining Right expires 2020.</p>	<ul style="list-style-type: none"> • Disagree • National Treasury was provided with documents as part of the review process which clearly sets out the rationale for the 10 year contract. • Eskom conducted technical due diligences on the Brakfontein resource and prefers to contract for Life of Mine where it is beneficial and cost effective to do so which was the case in this instance. • The mining rights are granted with the option of renewal. • CSA also warrants the supplier to ensure they comply with the applicable laws – mining rights – termination of contract will result in non-compliance

Coal Supply Agreement (CSA)

X

Summary of Draft 2017 National Treasury Report Conclusions and Eskom Comments...continued



Findings	Eskom Comments
<p>The CEO gave assurance that Brakfontein supplies and continues to supply coal that conforms to the CSA despite ample evidence available that there was non compliance.</p>	<ul style="list-style-type: none"> Disagree Eskom has not received sufficient evidence from NT regarding the context of their conclusion The comment made by the CEO on the 31 August 2016 in Parliament related to coal qualities and as has been discussed in this presentation coal qualities for the Brakfontein mine comply with the CSA
<p>Eskom made payments to Tegeta before correcting the non-compliance with conditions of the CSA and payments made to Tegeta for Brakfontein coal should be regarded as irregular expenditure.</p>	<ul style="list-style-type: none"> Disagree Refer to Senior Council opinion above Eskom's legal perspective has been explained The payments are regulated by the clauses in the Coal Supply Agreement. All the coal that is supplied to Eskom in relation to Brakfontein Colliery is pre-certified as per the provisions of the CSA. As part of the contract management process for coal, any Reject Coal was not paid for by Eskom. Eskom provided National Treasury with various documents which demonstrates that the coal consignments not classified as Contract Coal were rejected and not paid for.



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Summary of Draft 2017 National Treasury Report Conclusions and Eskom Comments...continued



Findings	Response
<p>Reference was made to the coal possibly having to be washed in order for it to be suitable for Eskom's power station. Will this not have a significant impact on the country's environmental constraints in terms of water shortages? Did Eskom take this into account?</p>	<ul style="list-style-type: none"> • Disagree • One of the requirements for entering into a Coal Supply Agreement with Eskom is the submission of a valid Water Use License. • Water Use License's are granted by the Department of Water and Sanitation ("DWS") and the granting of the license considers the impact of water usage in line with the department's requirements.
<p>What are the specific policies, regulations and laws (including the SCM legal framework) that Eskom did not follow in terms of the issues raised in the report?</p>	<ul style="list-style-type: none"> • Disagree • Refer to Senior Council opinion above-Eskom's legal perspective has been explained

252

Summary of Draft 2017 National Treasury Report Conclusions and Eskom Comments...continued



Findings	Response
Do Eskom's actions constitute a transgression of the provisions of the PFMA?	<ul style="list-style-type: none"> • No • Refer to Senior Council opinion above-Eskom's legal perspective is explained earlier • The transaction is within line with PFMA as per the Board approved 2008 Mandate for the supply of coal
Was the 2015 PWC report considered by Eskom Senior Management.	<ul style="list-style-type: none"> • Yes • The report was taken into consideration by Eskom Senior Management
Which effective and appropriate steps were implemented by Eskom Senior Management.	<ul style="list-style-type: none"> • The 2016 follow up PWC report was initiated after the 2015 report was reviewed and implemented by management.
Was the 2015 PWC report considered by Eskom Audit Committee.	<ul style="list-style-type: none"> • A summarised version of the report was tabled at the December 2015 Audit and Risk Committee

253

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Summary of Draft 2017 National Treasury Report Conclusions and Eskom Comments...continued



Findings	Response
Which effective and appropriate steps were recommended by the Audit Committee.	<ul style="list-style-type: none"> • Yes • The Primary Energy team considered and implemented the findings of the 2015 PWC report with supervision from the Audit Committee
Was the 2015 PWC report considered by Eskom Board.	<ul style="list-style-type: none"> • No • However the Audit and Risk Committee is a sub committee of Board
Was the 2015 PWC report considered by external auditors of Eskom.	<ul style="list-style-type: none"> • Yes, the report was provided to the external auditors of Eskom
Was the Coal Supply Agreement red flagged in the 2015/2016 audited annual financial statements.	<ul style="list-style-type: none"> • No – there was no reason for the CSA to be red flagged in the annual financial statements as the National Treasury report issued in April 2016 was a draft report consequently

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Contents



1. Context of Eskom's Coal procurement
2. Findings from the PwC 2015 and 2016 Report
3. Senior Counsel opinion on the Draft National Treasury Report
4. Summary of Draft 2017 National Treasury Report Conclusions and

Eskom Comments

5. Possible implications on Eskom's business

6. Conclusion

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Implementing the National Treasury recommendations a R513.25m negotiated saving was lost and Majuba coal cost escalated by 12% introducing security of supply risk



Station	National Treasury recommendation	Eskom Action taken	Tonnage required	Price variation		Concern
				Pre NT	Post NT	
Arnot	<ul style="list-style-type: none"> Declined request Issue a closed RFP to 4 suppliers 	<ul style="list-style-type: none"> Issued closed RFP 3 responses received and 2 shortlisted NT outcomes of verification outstanding 	1.5Mt	R852m	R3.9bn (8.8Mt)	<ul style="list-style-type: none"> Security of supply
	<ul style="list-style-type: none"> Exxaro Coal Negotiation Team invited to a meeting 	<ul style="list-style-type: none"> Meeting scheduled for 30/31 May 2017 				<ul style="list-style-type: none"> Security of supply
	<ul style="list-style-type: none"> Request supply from Exxaro and other suppliers at stipulated price for 6 months 	<ul style="list-style-type: none"> Modification of Exxaro NBC contract underway for Arnot and Tutuka supply 	2.9Mt	R1.3bn	R396m (1Mt)	<ul style="list-style-type: none"> Security of supply
Majuba	<ul style="list-style-type: none"> Approval granted Suppliers should be contracted at the same rates 	<ul style="list-style-type: none"> 6 potential suppliers responded and are currently undergoing technical evaluation Eskom awaiting National Treasury response on Brakfontein extension 	1.2Mt	R655m	R742m	<ul style="list-style-type: none"> Security of supply R266.48m additional cost due to delay in Brakfontein extension approval
Tutuka	<ul style="list-style-type: none"> Approval granted Submit list of suppliers 	<ul style="list-style-type: none"> List of suppliers submitted Letters sent out to 32 suppliers requesting coal. 	1.6Mt	R745m		<ul style="list-style-type: none"> Security of supply

Implementing the National Treasury recommendations a R513.25m negotiated saving was lost and Majuba coal cost escalated by 12% introducing security of supply risk... continued



Station	National Treasury recommendation	Eskom Action taken	Tonnage required	Price variation		Concern
				Pre NT	Post NT	
Camden	<ul style="list-style-type: none"> Approval granted Suppliers to be within the proximity of Camden 	<ul style="list-style-type: none"> Only one offer received for suppliers within 50Km Requesting suppliers within 100km radius 	2.0Mt	R1bn		<ul style="list-style-type: none"> Security of supply
Kusile	<ul style="list-style-type: none"> Approval to improve coal specification of existing volumes Reprocessing of Eskom owned coal at Kangala mine. 10% discount negotiated on the base price of the CSA 	<ul style="list-style-type: none"> 10% discount was subject to the supply of additional volumes Modification of CSA underway to benefit existing volumes and re-process Eskom owned coal 	12Mt	N/A	N/A	<ul style="list-style-type: none"> R513.25M negotiated savings loss

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Contents



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- ✓ The CSA was concluded in term of the Board approved 2008 Medium-Term Coal Mandate
- ✓ Price appears reasonable when compared to other suppliers
- ✓ Quality issues addressed by the PWC review process initiated by management
- ✓ Contract management issues identified by National Treasury have been resolved or where outstanding are in the process of being resolved.

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- The current Board has resolved to issue open RFPs for coal purchases
- PFMA issues are ~~working~~ work-in progress with external auditors, guided by advice from Counsel appointed by Eskom legal team
- Security of supply risk and delays affecting cost needs to be mitigated
- Eskom will continue to actively engage National Treasury to conclude on the Tegeta and the three other investigations
- Eskom will further engage with National Treasury to mitigate leakages of information at National Treasury

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Revenue

Please follow this up

Duvha 3	R	5 000 000 000,00	✓
CPI Investigations (3)	R	800 000 000,00	✓
(3) Mkinsey	R	10 000 000 000,00	✓
Balance Plus	TBC		
Funding Restructure	R	600 000 000,00	
Maintenance Management	TBC		
Security Guarding	R	2 500 000 000,00	✓
Key Points Fencing and CCTV	R	2 100 000 000,00	✓
OGGT Maintenance	R	700 000 000,00	
Diesel to Gas Conversion	R	2 000 000 000,00	
✓ Project Libra Anglo <i>we could buy</i>	TBC	<i>Give me a fixed price, I give you the partner</i>	
Part ① Rrotek HR Kelly Group <i>we could buy</i>	R	5 000 000 000,00	✓
③ Load Management <i>we could buy</i>	R	1 000 000 000,00	✓
outsourc ⑥ IT Support Services	R	2 000 000 000,00	
✓ Fiber Lease Cash unlock	R	4 000 000 000,00	✓
④ Online Vending Cash Unlock	R	35 000 000 000,00	
Desktop Support MSA <i>Transnet copy</i>	R	2 500 000 000,00	
Laptop and Hardware Supply Lease	R	1 500 000 000,00	
Komatie Replacement 1000MW	R	15 000 000 000,00	
		R 89 700 000 000,00	

ZerHo

Stop paying T guys.
F.

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The Honourable Ms Lynne Brown MP
Minister of Public Enterprises
Private bag X15
HATFIELD
0028

Dear Minister Brown

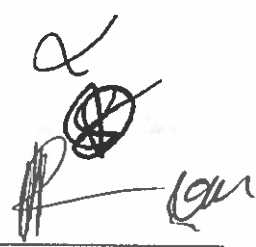
APPOINTMENT OF CHIEF EXECUTIVE OFFICER

The above matter has reference.

At the last sitting of Eskom's People and Governance Committee on 28 May 2015, which is the subcommittee of the Board of Directors tasked with dealing with the appointment of senior executive managers within Eskom, it was resolved that the appointment of Brian Molefe to the position of Chief Executive of Eskom, be confirmed as soon as possible.

The rationale for the appointment of Mr Molefe as a permanent employee, rather than on a secondment basis, is based on the following considerations:

- i) He has a well-known track record in the market both nationally and abroad for being able to turnaround ailing companies and this experience has been demonstrated in the stability and marked improvement in performance he has brought to Eskom since he joined 63 days ago;
- ii) His hands on approach to operational matters, particularly with regard to maintenance and load shedding, at the time of crisis which the company found itself in, has made high performance in Eskom, not negotiable;
- iii) To support this culture, he has already revisited the approach to performance management so as to instil appropriate levels of accountability at all levels of staff thereby raising the bar on all fronts for his executive management team to follow;
- iv) At the same time he has succeeded in harnessing the know-hows and experience of the current executive management committee in the most optimal manner to address the issues that have bedeviled the company for too long a time;
- v) During his short tenure, he has successfully taken the Board into his confidence by presenting a turnaround plan at its meeting of 28 May 2015, which was also endorsed by the Board;
- vi) His academic background and more particularly, his considerable financial acumen has already been demonstrated in the more positive outlook Eskom, and consequently South Africa, enjoys with the ratings agencies which are key to addressing the liquidity issues;
- vii) Certainty of leadership at the top would allow for stabilising the management team internally together with allowing him to be able to attract the requisite skilled professional talent outside of Eskom to take up critical roles in Eskom which are vacant at present or may occur in the future and thereby create the confidence and predictability required of Eskom at this time;



- viii) His further ability to meaningfully engage the various stakeholders of Eskom, including the media, has really stood us in great stead; and
- ix) Public confidence has increased exponentially in the period since the commencement of his secondment to Eskom.

Given the fact that Eskom is the core driving force of the South African economy, we are of one mind that no other person would at this point be able to maintain the current upward trajectory that Brian has placed the company on since his secondment in April this year. It is with this in mind that the board unanimously supports his appointment.

Fully cognisant of the process and procedural issues that will need to be addressed in securing such an appointment in the most effective and efficient manner, the Acting Chairperson of the People and Governance Committee was tasked with obtaining the requisite legal opinion on the most optimal route to be followed to give effect to the resolution.

The legal opinion indicates that the process to be followed in the appointment of the Chief Executive is set out in the Memorandum of Incorporation. While the Memorandum of Incorporation contemplates that the Board must identify potential candidates, it does not preclude the Board from identifying, nominating and evaluating one candidate as the Shareholder, represented by the Honourable Minister in this instance, would still have discretion on whether or not to appoint the preferred candidate. The Memorandum of Incorporation also does not have as a requirement that the candidate should be publicly invited to apply for the position.

Based on the foregoing, and whilst we appreciate that this process may demand some time, it may be prudent to extend the duration of the secondment agreement from Transnet in order to ensure that we do not have a period where he is not contracted to either Eskom or Transnet. As a matter of course, the first prize for Eskom would be a seamless transition from Transnet to Eskom with the effective date being 1 July 2015. I am available at the Minister's convenience to engage my Transnet counterpart on the issues and finalise the terms and conditions of the appointment.

Accordingly, I hereby request Minister's support and endorsement for the permanent appointment of Brian Molefe as chief executive officer of Eskom.

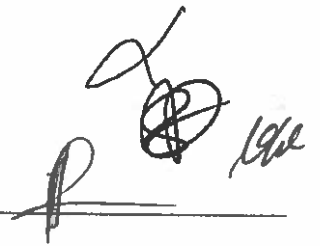
Should Minister require any other information prior to taking a decision on the matter, please let me know.

Yours sincerely

Dr Ben Ngubane
INTERIM CHAIRMAN

Date: 19 June 2015

Not signed as electronically submitted

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Anton Minnaar

SMD 6

264

From: Anton Minnaar
Sent: 20 November 2015 01:57 PM
To: vanele@kleininc.co.za
Cc: Brian Melcfe
Subject: STRICTLY CONFIDENTIAL
Attachments: Retirement.docx

Importance: High

Dear Ms Klein

Attached is a draft letter to the minister as discussed earlier. Please let me have your comments.

With kind regards
Anton



Dear Minister

RETIREMENT ARRANGEMENTS – BRIAN MOLEFE

As requested by the minister, Eskom is currently drafting the Group Chief Executive's 5 year contract for the minister's input.

As part of the drafting process, however, an important principle regarding Mr Molefe's retirement fund needs to be addressed and I request the minister's prior approval before we submit the draft contract for further input.

It is a fact that the growth in retirement investments and pension funds start off slow but increases exponentially towards the end of an employee's working life. Mr. Molefe has served in numerous high ranking South African organisations at executive level, essentially to stabilise and ensure the future sustainability and performance of those organisations. Due to the nature of these engagements and the short term contractual obligations in Mr Molefe's case, he has been deprived of the growth opportunity in a single pension fund.

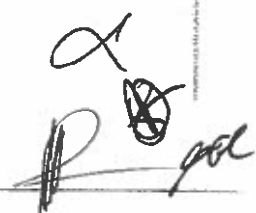
To breach this gap, the following contractual stipulations are proposed:

- Regardless of Mr Molefe age after the 5 year termination date, he be allowed to retire from Eskom's service on the basis that he is aged 63.
- That the penalties prescribed by the Eskom Pension and Provident Fund (EPPF) for retirement prior to age 63, be waived.
- That Eskom carries the cost of such penalties (to be paid over to the EPPF).

I trust that this will receive the minister's favorable approval.

Kind regards

CHAIRMAN

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① Affirm's Competition Commission

② Court cases:

• IMPULSE INTERN - initially R49 mill added emergency in Mar 2016

then modified for add R93 and Jan 2017,

12 mths modification for R122 mill

TOTAL R226 mill with 24 months

• Stein Moller R1111 contract - sole source

• Wasteful + fruitless expand - Group

• Anoj has to send Abram on leave or suspend him.

α

Ⓟ

are

From: Suzanne Daniels
Sent: Tuesday, 08 December 2015 20:03
To: viroshini naidoo
Subject: Re: Response to Questions attached

Yes please for record purposes. I will also write up the responses.

Regards
Suzanne

Sincerely yours,

SUZANNE DANIELS
Company Secretary
Eskom Holdings SOC Ltd
Phone: +27 11 800 3091 Mobile: +27 82 580 7832
Fax: +27 86 662 7327
Email: danielSM@eskom.co.za

Sent from my Samsung Galaxy smartphone.

----- Original message -----

From: viroshini naidoo <naidooviroshini@gmail.com>
Date: 2015/12/08 19:30 (GMT+02:00)
To: Suzanne Daniels <DanielSM@eskom.co.za>
Subject: Re: Response to Questions attached

Hi

I confirm I support the round robin.

Kindly ensure :

1. all governance issues is complied with in terms of PFMA and other statutory regulations. Does the value requires consent from DPE ?
2. that IFC committee has approved the purchase.
3. Cession contracts are in place for the coal.

Do you still need me to sign the document, I don't have access to a printer just now.

Regards
Viroshini

On Tuesday, December 8, 2015, Suzanne Daniels <DanielSM@eskom.co.za> wrote:

Sincerely yours,

SUZANNE DANIELS

Company Secretary

Eskom Holdings SOC Ltd

Phone: +27 11 800 3091 Mobile: +27 82 580 7832

Fax: +27 86 662 7327

Email: danielsm@eskom.co.za

Sent from my Samsung Galaxy smartphone.

I'm part of the 49Million initiative...

<http://www.49Million.co.za>

NB: This Email and its contents are subject to the Eskom Holdings SOC Limited EMAIL LEGAL NOTICE which can be viewed at http://www.eskom.co.za/Pages/Email_Legal_Spam_Disclaimer.aspx

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