

**REPORT OF THE PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES ON THE  
INQUIRY INTO GOVERNANCE, PROCUREMENT AND THE FINANCIAL  
SUSTAINABILITY OF ESKOM, DATED 28 NOVEMBER 2018**

The Portfolio Committee on Public Enterprises has conducted an oversight inquiry into governance, procurement and the financial sustainability of Eskom as per its resolution of 21 June 2017. The Portfolio Committee reports as follows:

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## **1 Part A: Overview of the Portfolio Committee on Public Enterprises Oversight Inquiry into Eskom**

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### **1.1 Background to the Inquiry**

The Portfolio Committee on Public Enterprises (“the Committee”) held a meeting with the Eskom Board on 23 May 2017 to receive a briefing on the following:

- the process followed in the reappointment of the former Group Chief Executive Officer (GCEO), Mr Brian Molefe;
- the determination of retirement package by the Board to the former GCEO;

This followed widespread concern from the Committee and the public about the Eskom Board’s ability to provide effective leadership to the national electricity utility.

The Committee noted that there was *prima facie* evidence that Eskom’s primary mandate as a national power utility had been compromised owing to weakened governance and management structures and systems. , which ultimately contributed to the Board’s inability to discharge its fiduciary responsibilities.

There appeared to have been flouting of governance rules, laws, codes and conventions. This collective conduct, inter alia:

- rendered Eskom potentially financially unsustainable due to irregular procurement, mismanagement and non-compliance with existing policies;
- saw the purging of highly qualified, experienced and skilled senior staff members in violation of human resource management policies and procedures. In some instances, these purged staff members were replaced, without due consideration for, or compliance with, established recruitment policies.
- facilitated the resignation, reappointment and retirement package for Mr Molefe, in violation of to the Eskom Pension Fund rules.

On 21 June 2017, the Committee unanimously resolved to institute an inquiry into the matter of Mr Molefe’s retirement package and reappointment as Eskom GCEO. The Committee also received a letter from the National Assembly House Chairperson: Committees, Oversight and ICT requesting it to investigate the allegations of state capture reported in the media and in the “#GuptaLeaks” emails. The Committee instituted the oversight inquiry in line with the mandate of Parliament as articulated in section 55 of the Constitution read together with Rules 167 and 227(1)(b)(iv) and (c) of the National Assembly.

## **1.2 Terms of Reference**

The inquiry will investigate governance, procurement and the financial sustainability of Eskom. The inquiry will look into amongst others:

- i. Appointment of board members and executive management
- ii. Early retirement/reappointment of Mr Brian Molefe
- iii. Alleged procurement irregularities:
  - a) Eskom's alleged role in ensuring Tegeta was able to buy Optimum Coal Holdings
    - a. Eskom's award of an estimated R11.7 billion worth of coal-supply contracts at inflated prices to Tegeta Exploration and Resources (Pty) Ltd between 2015 and 2016.
  - b) Eskom's conclusion of a R43 million contract with the Gupta's media company, TNA (Pty) Ltd.
  - c) Eskom's payment to Trillian Capital Partners (Pty) Ltd of over R400 million for management consulting and advisory services.
- iv. Allegations of impropriety regarding Eskom's Acting CEO, Matshela Koko
- v. Financial stability of Eskom
- vi. Any other related matter

The Committee inquiry would assess compliance into the following legislation:

- (a) Public Finance Management Act, 2002
- (b) Eskom Conversion Act, 2012
- (c) Companies Act, 2008
- (d) Pension Funds Act
- (e) Any appropriate legislation applicable to the inquiry

## **1.3 Committee membership**

- i. Thirteen members of Parliament were selected to serve on the Committee, six from the African National Congress ("ANC"), two from the Democratic Alliance ("DA"), one from the Economic Freedom Fighters ("EFF"), one from the African Christian Democratic Party ("ACDP"), one from the Inkatha Freedom Party ("IFP"), and one from the United Democratic Movement ("UDM").

- ii. The following members were selected to serve on the Committee<sup>1</sup>: Hon. D. Rantho, MP (ANC); Hon. M. Tseli, MP (ANC); Hon. M. Gungubele, MP (ANC); Hon. P. Gordhan, MP (ANC); Hon. Z. Luyenge, MP (ANC); Hon. G. Nobanda, MP (ANC); Hon. N. Mazzone, MP (DA); Hon. E. Marais, MP (DA); Hon. M. Dlamini, MP (EFF); Hon. N. Shivambu\*, MP (EFF); Hon. N. Singh, MP (IFP); Hon. N. Kwankwa, MP (UDM); and Hon. S. Swart, MP (ACDP).
- iii. Hon L. Mnganga-Gcabashe, MP (ANC) was elected as the Portfolio Committee Chairperson after the Inquiry had commenced and participated in the proceedings as a member of the Committee.

#### **1.4 Process of the Inquiry**

The Committee unanimously elected Hon Z. Rantho, MP as its Chairperson on 15 November 2016 and adopted the process and approach that the inquiry would follow. The Committee conducted its hearings in compliance with the requirements of fairness and in terms of its mandate provided for in sections 56, 58 and 59 of the Constitution of the Republic of South Africa, Act 108, 1996 (“the Constitution”) and as further set out in the rules of the National Assembly.

As required by the Constitution, the Committee conducted its processes in an open and transparent manner with its meetings open to the public. Witnesses were summonsed to appear before the Committee in terms of sections 14, 15 and 16 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No 4 of 2004 (“the Privileges Act”).

Adv. Ntuthuzelo Vanara was appointed as evidence leader to assist the Committee to gather evidence and to lead witnesses during the inquiry.

#### **1.5 Conditions that the Committee worked under**

- 1.5.1 Parliament and by extension the Committee, have both the power and the duty to hold the Executive and State organs to account and to ensure that their constitutional and statutory obligations are properly executed. This responsibility is an incident of the rule of law and the constitutional values of accountability, responsiveness and openness.
- 1.5.2 The Committee has carried out its oversight work despite facing some hostility and attempts aimed at obstructing it.
- 1.5.3 There were several attempts by persons and organisations to undermine the authority and function of the Committee. These attempts included baseless legal challenges, attempts to delay and subvert investigations by providing irrelevant or incorrect information, public smear campaigns targeting the Committee and its members and threats to the personal security of Committee members, witnesses and their families.

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<sup>1</sup> The asterisks denote alternate members

- 1.5.4 Letters to this effect were received from: Black First Land First (2) (who called the Inquiry a “witch hunt”), Mr Brian Molefe’s lawyers (1), Eskom (3), Gupta family’s lawyers (2), Mr Atul Gupta’s Lawyers (1), Dr Baldwin “Ben” Ngubane (1), Mr Duduzane Zuma (1), Mr Matshela Koko’s Lawyers (1), Minister Lynne Brown (2), Minister Malusi Gigaba (1).
- 1.5.5 Threats to personal safety and security were made by anonymous parties against:
- Inquiry Chairperson, Ms Zukiswa Rantho, including an anonymous threat made to her child that “your mother is making life difficult for us”;
  - Committee member, Ms Natasha Mazzone, whose car and documents were tampered with; and
  - Evidence leader Advocate Ntuthuzelo Vanara.
- 1.5.6 Witnesses appearing before the Committee, including Ms Suzanne Daniels and Mr Abram Masango, also testified to having been intimidated.
- 1.5.7 Attempts were allegedly also made by the erstwhile State Security Minister Bongani Bongo to offer a bribe to Advocate Vanara with a blank cheque to try to derail the work of this Committee.
- 1.5.8 Despite the fact that invitations were duly served on the following persons requesting them to testify in the Inquiry, Ms Dudu Myeni, and Messrs Duduzane Zuma, Rajesh “Tony” Gupta, Atul Gupta and Ajay Gupta failed to appear in Parliament without sufficient cause.

## **1.6 Laws, Regulations and Standards applicable to Eskom**

Eskom's corporate governance refers to the company's implementation of rules, norms, processes, systems, and institutions that direct the way that it is managed, reports and is held accountable, with reference to key legislation, regulations, national and internal policies, and good governance standards. The Constitution in section 195 prescribes the following for public institutions: a high standard of ethics, economic efficiency, support for developmental objectives, fairness, public participation, accountability, transparency, and good human resource management with workforces reflective of the diversity of South Africa. These principles and values are significant because they provide a benchmark against which the actions and outcomes related to Eskom's governance must be tested. Section 217(1) sets out specific requirements for public procurement, which also govern Eskom's procurement.

The key legislation pertaining to Eskom's governance includes:

- Companies Act 71 of 2008 ("Companies Act ")
- Public Finance Management Act 1 of 1999 ("PFMA")
- Eskom Conversion Act 13 of 2001 ("ECA")

In addition to this legislation, Eskom is obligated to uphold the Code of Conduct for Public Servants (“Code of Conduct”), and the Department of Public Enterprises’ Protocol on Corporate Governance

(“Protocol”), which is aligned to the King Code on Corporate Governance (“King Code”). As noted in paragraph 2.1 of the Protocol:

*Corporate governance embodies processes and systems by which corporate enterprises are directed, controlled and held to account. Corporate governance in South Africa was institutionalised by the publication of the King Report on Corporate Governance in November 1994, which report has subsequently been superseded by the King Code of 2002. The purpose of the King Report is to promote the highest standards of corporate governance in South Africa. The Code of Corporate Practices and Conduct contained in the King Report applies, inter alia, to SOEs and agencies that fall under the PFMA.*

Eskom has reported in the *Eskom Integrated Report, 31 March 2017* (“IR 2017”) that it complies with the *King Report of Corporate Governance for South Africa 2009* (“King III”) and is working towards compliance with the *King Report of Corporate Governance for South Africa 2016* (“King IV”). The Terms of Reference (“TOR”) 2016/2017 for all Eskom Board subcommittees, including the Audit and Risk subcommittee, and Tender subcommittee (“BTC”) already make reference to King IV. There is little substantive difference between King III and King IV. However, one important point is that King IV unambiguously focuses not only on whether specific rules were technically implemented, but on the outcomes of such implementation, on the ethics, culture, performance, legitimacy and quality of stakeholder relationships. All subcommittee TORs state:

*The Committee shall, in fulfilling its mandate, apply the relevant King Code [King IV] principles and explain the practices that demonstrate the application of these principles.*

Both King III and King IV go beyond legal compliance, to recommend principles and practices to achieve good governance, including high levels of transparency and accountability to society, broadly. Given this internal alignment and burden of compliance to King IV, it is useful to view corporate governance at Eskom and in Eskom's interactions with relevant ministry and department, in light of this document and its principles.

Eskom’s internal policies and procedures, as well as Treasury regulations and practice notes are aligned to the broader legal and governance environment to which it must comply. These documents, including the Shareholder’s Compact and the Memorandum of Incorporation (“MOI”), provide further specific prescriptions. The Shareholder’s Compact and MOI, respectively, are meant to be updated periodically.

Regardless of the role or responsibility delegated, any Eskom official who witnesses wrongdoing in terms of procurement or other aspects of management must report this wrongdoing. Concerning procurement, Section 45 (c) of the PFMA places a burden of responsibility on all Eskom officials, who:



*Must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure, and fruitless and wasteful expenditure and any other revenue due.*

While particular Eskom officials, or Ministers and officials within the department, may not be directly responsible for acts of wrongdoing, they may still be accountable for these acts and for responsive remedial action. It is of critical importance to note that King IV takes a specific view on accountability, viewing it as: “*The obligation to answer for the execution of responsibilities*”. Furthermore, it clarifies, “*Accountability cannot be delegated, whereas responsibility can be delegated without abdicating accountability for that delegated responsibility*”. In terms of accountability for governance in Eskom, King VI is unambiguous that the Eskom Board – comprising executive and non-executive directors - must answer for its administration and performance, regardless of which other actors have a delegated role or responsibility:

*The governing body is the structure that has primary accountability for the governance and performance of the organisation. Depending on context, it includes, among others, the board of directors of a company, the board of a retirement fund, the accounting authority of a state-owned entity and a municipal council.*

Eskom executives and the Board are accountable to the Minister of Public Enterprises who represents the interests of government, the sole shareholder of Eskom. This relationship is governed by the MOI and by the Shareholder's Compact which must be entered into between the Minister and Eskom. The Minister has the power to hold Eskom and individuals within Eskom to account in line with the MOI, the Shareholder's Compact, the PFMA and the ECA.

The Minister of Public Enterprises is, along with the Board, accountable to Parliament, which executes its oversight role by reviewing financial and non-financial performance and critically assessing various reports, including the integrated report, annual financial statements and the audit reports of the Auditor-General. Financial performance is reviewed by the Standing Committee on Public Accounts ("SCOPA"), and broader performance is overseen by the Portfolio Committee on Public Enterprises. The Committee may also consider the broader social and economic impacts of Eskom's level of performance.

## **2 Part B: Summary of Evidence**

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### **2.1 Overview of Committee's Inquiry into Eskom**

The Inquiry commenced on 17 October 2017. The Committee invited academics and civil society organisations to provide an overview of the allegations of weakened corporate governance, corruption, and capture of some State-owned companies (SOCs) by external parties. The Committee received presentations from Professors Ivor Chipkin and Anton Eberhard representing the State Capacity Research Project, Bishop Malusi Mpumlwana representing the South African Council of Churches (SACC), and Mr Ted Blom representing the Organisation Undoing Tax Abuse (OUTA).

Evidence presented before the Committee at the commencement of the Inquiry, including submissions from some of the aforementioned organisations, shows how Eskom's governance structures and procedures were incapacitated, corrupted, or otherwise undermined over time. The clearest expression of this corruption has been a slew of questionable and irregular procurement decisions and practices, together with the burgeoning costs associated with the utility's capital expenditure programme and operational expenses. Of additional concern to the Committee was the noticeable exodus of competent personnel from Eskom's executive. Eskom received a qualified audit for its 2016/17 Annual Financial Statements. The Interim Financial Statements for November 2017 were released in January 2018 due to Eskom's financial constraints. These further reinforced the understanding that the weakening of corporate governance and corruption at Eskom had negatively impacted the SOC's ability to carry out its core functions, including the Board's ability to effectively discharge its fiduciary duties.

This section presents a summary of evidence considered by the Committee under five broad themes, namely:

- The Tegeta contracts
- Eskom and the Trillian saga
- Eskom and the TNA contract
- Eskom's arrangement of Brian Molefe's resignation and pension
- Eskom's governance

In each of the five themes; the list of witnesses, documents considered, applicable legal and regulatory framework, summary of oral evidence and the Committee's observations are presented.

## **2.2 Witnesses called to testify**

These were the witnesses called to testify to the Committee:

- Mr Brian Dames, Former Eskom CEO
- Mr Sibusiso Luthuli, Eskom Pension and Provident Fund CEO
- Ms Mantuka Maisela, Eskom Pension Fund Chairperson
- Ms Mosilo Mothepu, Former Trillian Financial Advisory CEO
- Mr Piers Marsden, Business Rescue Practitioner for Optimum Coal Holdings
- Ms Bianca Goodson, Former Trillian Management Consulting CEO
- Mr Tshediso Matona, Former DPE Director-General and Eskom CEO
- Ms Erica Johnson, Former Eskom Group Executive Enterprise Development
- Ms Tsholofelo Molefe, Former Eskom CFO
- Ms Suzanne Daniels, Former Eskom Company Secretary and currently Head of Legal and Compliance (on suspension)
- Mr Khulani Qoma, Eskom General Manager in the Office of the Chairperson
- Dr David Fine, Senior Partner, McKinsey London Office
- Ms Devapushpum Naidoo (Viroshini), Former Eskom Board member from 12 December 2014 to 1 July 2016
- Ms Venete Klein, Former Eskom Board member from 12 December 2014 to May 2017
- Mr Brian Molefe, Former CEO of Eskom
- Mr Zola Tsotsi, Former Eskom Board Chairperson (June 2011 to March 2015)
- Mr Zethembe Khoza, Eskom Interim Board Chairperson
- Mr Anton Minnaar, Eskom HR Executive Manager
- Dr Pat Naidoo, Eskom non-executive Board Member
- Mr Sean Maritz, Former Eskom Acting CEO 2017 - 2018
- Ms Lynne Brown, Former Minister of Public Enterprises
- Mr Anoj Singh, Eskom CFO (on suspension)
- Mr Matshela Koko, Former Eskom Acting CEO, and Executive for Generation (on suspension)
- Mr Lucky Montana, Former PRASA CEO
- Mr Mxolisi Mgojo, CEO of Exxaro Resources Limited
- Mr Rajie Murugan, G9 Consulting Services CEO
- Mr Ben Martins, Former Deputy Minister of Public Enterprises
- Mr Abram Masango, Eskom Group Executive: Capital Projects (on suspension)

- Dr Baldwin (Ben) Ngubane, Former Eskom Board Chairperson 2015 – June 2017
- Mr Malusi Gigaba, Former Minister of Public Enterprises

### 2.3 Documentation presented to the Committee

Included in the documentation presented to or called for by the Committee for the purposes of the Inquiry were:

- A Report of the Public Protector, the *State of Capture*, Report 6 of 2016/7 14 October 2016
- Report in terms of Section 34(1)(a) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 by Piers Marsden and Peter van den Steen, signed on 1 July 2016 (Marsden “Section 34 Report”)
- Question for written reply, Question No. PQ 2701, “Ms N W A Mazzone (DA) to ask the Minister of Public Enterprises”, 2 December 2016
- Full Statement by McKinsey On Eskom, 17 October 2017-12-07
- Eskom Statement, “Eskom takes action to recover funds unlawfully paid to McKinsey and Trillian”. 5 October 2017
- Report in respect of the investigation into the status of the business and challenges experiences by Eskom, instituted by the board of Eskom Holdings (SOC) Ltd in terms of a resolution passed on 11 March 2015, 2 July 2015 (“Dentons Report”)
- The PWC report for National Treasury before the Committee, titled, “Preliminary Review into Eskom Coal Procurement Processes National Treasury (Project Ref: 02-53-01-2017)” (“NT PwC Report”)
- “Report for Mr TMG Sexwale, Chairperson Trillian Capital Partners (Pty) Ltd on Allegations with regard to the Trillian Group of Companies and Related Matters” (“Budlender Report”) by Adv. Geoff Budlender, 29 June 2017
- Bowmans “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 Trillian Capital Partners (Pty) Ltd”. 2 August 2017 (“Bowmans Report”)
- Statement by Ms Mosilo Mothepu, “Public Enterprises Portfolio Committee: Inquiry into Eskom, Denel, Transnet and South African Airways (state-owned company) SOC and Trillian Capital Partners (TCP)”. October 2017
- Statement by Ms Bianca Goodson, “Bianca Goodson’s Statement”. 19 October 2017
- Submission prepared by Suzanne Margaret Daniels, Group Executive: Legal and Compliance, “Portfolio Committee on Public Enterprises: Oversight Inquiry into Governance, procurement and financial sustainability of Eskom”. 8 November 2017

- Statement of Khulani Qoma, Eskom General Manager in the Office of the Chairperson “Eskom’s implosion: deliberate, well-orchestrated & shame-free; entire leadership culpability”. 10 November 2017
- Statement by Devapushpum Naidoo (Viroshini), “Portfolio Committee on Public Enterprises Oversight Enquiry into Governance, Procurement and Financial Sustainability of Eskom.” November 2017
- Statement by Venete Klein, Eskom Board member from 12 December 2014 to May 2017. November 2017
- Brian Molefe’s statement of resignation as GCEO of Eskom, 11 November 2016
- Presentation by Minister of Public Enterprises Lynne Brown to the Parliamentary Inquiry into Eskom, 22 November 2017
- Statement of Mr Anoj Singh, “Written Narrative of Evidence to be Presented by Anoj Singh, Financial Director of Eskom, at an Oversight Inquiry into Corporate Governance of State Owned Enterprises, by the Portfolio Committee on Public Enterprises of the Parliament of South Africa, on 5 December 2017” Vol. 1-3
- Written submission of Mr Matshela Koko
- G9 Group, Presentation to the Parliamentary Portfolio Committee of SOE’s: The Trillian Investigation, 27 February 2018 (“G9 Report”)
- Submission by Mr Abram Masango for the Portfolio Committee on Public Enterprises, 27 February 2017, Vol. 1-4

## 2.4 The Tegeta Contracts

### 2.4.1 Background to the Investigation

The Public Protector’s *State of Capture* report, published in October 2016 contains evidence suggesting serious procurement irregularities around Eskom’s relationship with Tegeta Exploration and Resources Pty Ltd. (“Tegeta”). The report provided an illustration of a network of companies, personal relationships and regulatory interventions through which Tegeta was able to access highly lucrative contracts, acquire and profitably operate Optimum Coal Holdings (“OCH”), which it bought from Glencore Plc (“Glencore”). Among those implicated in the Tegeta transaction were former Eskom CEO Brian Molefe, former Eskom executive for Group Technology & Commercial Matshela Koko, previous Board Member Pat Naidoo, and non-executive directors, including Dr Baldwin S. “Ben” Ngubane (“Dr Ngubane”), who would go on to become Chairperson of the Eskom Board. This report revealed to South Africans the extent of the malfeasance and corruption that had been going on at other SOCs in general and Eskom in particular. The report was cited by Mr Molefe as the reason for his public resignation as Eskom GCEO, “in the interests of good governance”.

There was evidence of undue preferential treatment of Tegeta with respect to operational licensing and procurement terms. However, at the centre of the controversy was a highly suspicious “prepayment” for coal from Optimum Coal Mine (“OCM”) made by Eskom in favour of Tegeta. At the time of the payment OCM was in business rescue. Upon viewing a media report on the Tegeta contract in 2016, the business rescue practitioners appointed to oversee the business rescue process at OCM and OCH filed a report in terms of Section 34(1)(a) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004. The business rescue practitioners reported that payments made by Eskom for coal from OCM had never been received by OCM or OCH. What this implied was that Eskom’s payments in favour of Tegeta were used to enable Tegeta to purchase OCH when it otherwise would not have had the money to do so. The nature of events leading up to and following the acquisition of OCM have been identified as unusual and may involve contraventions of Section 217(1) of the Constitution, the Public Finance Management Act (“PFMA”), the National Environmental Management Act (“NEMA”), NEMA Regulations, the Minerals and Petroleum Resources Development Act (MRPDA), the Prevention and Combating of Corrupt Activities Act of 2004, the Prevention of Organised Crime Act of 1998, as well internal Eskom procurement rules and norms.

#### **2.4.2 Witnesses were called to testify**

Witnesses called to testify on this matter:

- Mr Piers Marsden (“Mr Marsden”), Business Rescue Practitioner (“BRP”) overseeing OCH (and Optimum Coal Mine or “OCM”) rehabilitation
- Ms Suzanne Margaret Daniels (“Ms Daniels”), Former Company Secretary and currently Head of Legal and Compliance (on suspension) at Eskom
- Mr Khulani Qoma (“Mr Qoma”), Eskom General Manager in the Office of the Chairperson
- Ms Venete Klein, Eskom non-executive Board member from 12 December 2014 to May 2017
- Ms Devapushpum (Viroshini) Naidoo, Eskom Board member from 12 December 2014 to 1 July 2016
- Mr Brian Molefe, Former Eskom CEO April 2015 - November 2016
- Ms Lynne Brown, Minister of Public Enterprises 2014 - March 2018
- Mr Zethembe Khoza, Eskom Interim Chair
- Dr Pat Naidoo, Eskom Board Member
- Mr Sean Maritz, Eskom Acting CEO 2017 - 2018
- Mr Anoj Singh, Eskom CFO from April 2015 (currently suspended)
- Mr Matshela Koko, Former Eskom Acting CEO, and Executive for Generation
- Mr Mxolisi Mgojo, CEO of Exxaro Resources Limited
- Dr Baldwin (Ben) Ngubane, Former Eskom Board Chairperson 2015 – June 2017

#### 2.4.3 Documentation presented to the Committee

Included, amongst others, in the documentation presented to or called for by the Committee for the purposes of the inquiry:

- Addenda to Coal Supply Agreement between Optimum Collieries and Eskom:
  - First Addendum to Hendrina Coal Supply Agreement between Eskom Holdings Limited and Optimum Coal Holdings Proprietary Limited and Optimum Coal Mine Proprietary Limited
  - Second Addendum to the Hendrina Coal Supply Agreement amongst Eskom Holdings SOC Limited and Optimum Coal Holdings (Proprietary) Limited and Optimum Coal Mine (Proprietary) Limited
  - Third Addendum to the Hendrina Coal Supply Agreement amongst Eskom Holdings SOC Limited and Optimum Coal Holdings (Proprietary) Limited and Optimum Coal Mine (Proprietary) Limited
- Letter between Optimum Coal Mine and Eskom dated 23 April 2013
- Letter between Optimum Coal Mine and Eskom dated 3 July 2013
- Statement of ABSA Bank Ltd
- A Report of the Public Protector “*State of Capture*”, Report 6 of 2016/7 14 October 2016 (“Public Protector “State of Capture” Report”)
- Report in respect of the investigation into the status of the business and challenges experiences by Eskom, instituted by the board of Eskom Holdings (SOC) Ltd in terms of a resolution passed on 11 March 2015, 2 July 2015 (“Dentons Report”)
- The PWC report for National Treasury before the Committee, titled, “Preliminary Review into Eskom Coal Procurement Processes National Treasury (Project Ref: 02-53-01-2017)” (“NT PwC Report”)
- Report in terms of Section 34(1)(a) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 by Piers Marsden and Peter van den Steen, signed on 1 July 2016 (Marsden “Section 34 Report”)
- Eskom Briefing Note: Government Guarantee
- Submission prepared by Suzanne Margaret Daniels, Group Executive: Legal and Compliance, “Portfolio Committee on Public Enterprises: Oversight Inquiry into Governance, procurement and financial sustainability of Eskom”. 8 November 2017
- Statement of Khulani Qoma, Eskom General Manager in the Office of the Chairperson “Eskom’s implosion: deliberate, well-orchestrated & shame-free; entire leadership culpability”. 10 November 2017

- Statement by Devapushpum Naidoo (Viroshini), Eskom Board member from 12 December 2014 to 1 July 2016, “Portfolio Committee on Public Enterprises Oversight Enquiry into Governance, Procurement and Financial Sustainability of Eskom.” November 2017
- Statement by Venete Klein, Eskom Board member from 12 December 2014 to May 2017. November 2017
- Brian Molefe, “STATEMENT” of resignation, 11 November 2016
- Presentation by Minister of Public Enterprises Lynne Brown to the Parliamentary Inquiry into Eskom, 22 November 2017
- Submission by Board of Eskom Holdings SOC Limited (Registration Number 2002/015527/30) to the Portfolio Committee on Public Enterprises Inquiry into Corporate Governance at State Owned Companies. 5 December 2017. (“Submission by Board of Eskom to the Committee”)
- Written Statement of Mxolisi Mgojo, the Chief Executive Officer of Exxaro Resources Limited.

#### 2.4.4 Overview of Events

##### 2.4.4.1 *Optimum Coal Mine’s Coal Supply Agreement with Eskom*

Optimum Collieries owned by BHP Billiton Energy Coal South Africa Ltd (“BECSA”) was contracted by Eskom on 4 January 1993 to provide coal to Hendrina Power Plant under a Coal Supply Agreement (“CSA”). On 8 April 2008, the CSA was ceded to OCM when Optimum Collieries was sold to OCH owned by Glencore Plc. The parties entered into a new agreement with Eskom noted in the first CSA addendum. Two additional addenda, which set out to amend the price and quality specifications of coal delivered by OCM, were agreed to by OCH and Eskom on 12 April 2011 and 11 February 2013, respectively. According to the aforementioned CSA and addenda, Eskom was paying OCM R150 per ton.

##### 2.4.4.2 *Optimum Coal Mine invokes the “hardship clause” contained in the CSA*

OCM experienced difficulties in providing coal in accordance with these agreements. Disputes between OCM and Eskom arose as a result. On 3 July 2013, OCM invoked the hardship clause set out in the CSA, citing a loss of R166.40 per ton on coal supplied to Eskom (approximately R120 million per month). Eskom and OCM initiated negotiations to draft a fourth addendum to the CSA. The parties entered a Cooperation Agreement on 23 May 2014, beginning a settlement process with the aim of concluding a new CSA by 1 January 2015.

The CSA negotiations were protracted. On 25 March 2015, OCM was informed that the Eskom Executive Procurement Committee (“EXCOPS”) had approved the terms of the fourth addendum. The



fourth addendum went on to the Board Procurement Sub-Committee on 15 April 2015, where it was tabled for approval at an Eskom Board Meeting on the 23 April 2015.

#### ***2.4.4.3 Events leading up to OCM and OCH entering into Voluntary Business Rescue***

Mr Brian Molefe was seconded from Transnet to the role of Acting CEO at Eskom on 17 April 2015. Instead of approving the fourth addendum, as expected, the Eskom Board resolved to refer the decision to Mr Molefe. The Public Protector's *State of Capture* report noted that the purpose of this Board resolution was unclear. On 18 May 2015, Mr Molefe informed the Chief Executive Officer ("CEO") of OCM that Eskom rejected the fourth addendum and the preceding negotiations. Mr Molefe formally terminated the settlement process between Eskom and OCM on 10 June 2015.

On 1 July 2015, Glencore received a letter from KPMG indicating that one of their clients, later revealed to be Oakbay Investments (Pty) Ltd ("Oakbay"), owned by the Gupta family, had made an offer to buy OCM for R2 billion. Shortly after receiving this information on 16 July 2015, Eskom informed OCM that they would be levying a penalty in the amount of R2, 176,530,611.99 (~R2.17 billion) on OCM for failing to meet quality specifications set out in the CSA for coal supplied between 1 March 2012 and 31 May 2015. The R2.17 billion claimed by Eskom was an unusually high penalty, the calculation of which has since been demonstrated to be out of line with the applicable mechanism in the coal supply agreement.

On 31 July 2015, the Board of Directors of OCM put the company under voluntary business rescue. Mr Marsden and Mr Petrus Francois van den Steen (Mr Van den Steen) were appointed joint Business Rescue Practitioners ("BRPs") on 4 August 2015.

#### ***2.4.4.4 The negotiation of the sale of OCM/OCH to Tegeta/Oakbay***

Between August and October 2015, the BRPs attempted to negotiate the terms of the CSA with Eskom. Mr Marsden described the negotiations with Eskom as acrimonious. Over this period, various entities (other than Oakbay or Tegeta) indicated an interest or made an offer to acquire a shareholding in OCM from OCH. Notably, bidders included Pembani Development Trust and Endulwini Consortium. Eskom, however, refused to entertain their bids or simply refused to negotiate.

On 23 October 2015, within the context of the above environment the BRPs formally confirmed to Oakbay that they were willing to discuss the sale of OCM. On 13 November 2015, the BRPs confirmed to Eskom that Oakbay had commenced with a due diligence processes to acquire OCM.

During the weekend of 21 to 22 November 2015, several stoppage notices were issued in terms of Section 54 of the Mine Health and Safety Act, 1996 to various mines owned by OCH's parent company, Glencore. These stoppages were allegedly issued under the direction of Mr Mosebenzi Joseph Zwane, then Minister of Mineral Resources.

On 24 November 2015, Eskom indicated that they would not support an offer by Oakbay to purchase only OCM. Instead, Eskom proposed an offer for Oakbay to procure OCM as well as all of OCH's other subsidiaries. The reason provided by Eskom was the dependence of OCM on revenue and guarantees from other OCH concerns, Koorfontein Mine and export allocations from Richards Bay Coal Terminal.

At the end of November, the Oakbay-owned Tegeta made an offer to purchase OCH shares for R1 billion. Tegeta's other major shareholders include Mabengela Investments (Pty) Ltd (Mabengela) (owned by Mr Duduzane Zuma) and Elgasolve (Pty) Ltd (Elgasolve) (owned by Mr Salim Essa), an associate of the Gupta family). Glencore rejected this offer. Following these events, Minister Zwane flew to Switzerland at the end of November 2015 and allegedly met with Glencore CEO Ivan Glasenberg together with Salim Essa and Rajesh 'Tony' Gupta.

In December 2015, Tegeta again approached Glencore with an offer to purchase the OCH shares for R2.15 billion. On 10 December, a Sale of Shares and Claims Agreement was entered into between Glencore, OCH, Oakbay, and Tegeta for the sale of all OCH shares to Tegeta for an amount of R2.1 billion. At the time that this agreement, which required Eskom's support, was signed, multiple Eskom Board Members had various conflicts of interest relating to the sale. This agreement did not finalise the transfer of ownership, however, as it was subject to the fulfilment of suspensive conditions, including approvals by (a) The Lenders and the Security Agent, (b) The Competition Authorities, and (c) The Minister of Mineral Resources in terms of section 11 of the MRPDA. On 10 December 2015, Tegeta and OCM had entered into a Post-Commencement Finance Agreement whereby Tegeta agreed to provide funding for OCM's operating expenses, despite the outstanding approvals.

#### ***2.4.4.5 Eskom facilitates Tegeta's Purchase of OCH Shares and increased operating revenues***

Tegeta had until 8 April 2016 to fulfil the suspensive conditions for the sales agreement. The purchase price was required to be paid three business days later, on 13 April 2016, from Tegeta to Werksmans Attorneys in its capacity as escrow agent. Between 10 December 2015 and 13 April 2016, and from 13 April 2016 onwards, Eskom undertook several decisions to Tegeta's financial advantage. The first decision was a guarantee to buy coal at a specified price and quantity. On the same day that the parties entered into a Sale of Shares and Claims Agreement, on 10 December 2015, Eskom also issued the highly irregular guarantee in the amount of R1.68 billion to Tegeta for an 'in principle' agreement to supply coal.

A 40-year contract between Eskom and Exxaro Resources Limited ("Exxaro"), to supply coal to Arnot power station, was reported to have expired in December 2015. A contract to supply coal to the Arnot power station, which was left with a substantial supply deficit, would be awarded to Tegeta in 2016. However, to create this lucrative opportunity, several unusual or irregular decisions were made. Firstly,

Tegeta was not one of the companies that had responded to the Request for Proposals ("RFP") for the CSA that was issued in August 2015. Secondly, according to Dentons Report, this contract was only due to expire in December 2023. Thirdly, according to Eskom CE Mr Molefe and CFO Mr Anoj Singh, Eskom had been paying Exxaro R1132 per ton. According to the Dentons Report, however, the price at April 2015 was only R686.07. It appears that the representations by Mr Molefe and Mr Singh about this contract are incorrect or inconsistent with other records. This misrepresentation was used to justify contracting Tegeta coal supply to Arnot. As noted by the *State of Capture* report:

*In light of the extensive financial analysis conducted, it appears that the sole purpose of awarding contracts to Tegeta to supply Arnot Power Station, was made solely for the purposes of funding Tegeta and enabling Tegeta to purchase all shares in OCH.*

In January, Eskom reduced the required coal quantity specifications for coal delivered by OCM to below its loss-making contract to supply coal to the Hendrina Power Station (~R150 per ton). From January 2016, Eskom further awarded Tegeta more lucrative coal supply contracts for supply to Arnot Power Station.

- On 13 January 2016, Tegeta contracted OCM for 100,000 tons of coal to be supplied and delivered to Arnot (~R467 per ton) equal to ~R46.7 million.
- On 22 January 2016, Tegeta then offered to supply Eskom with 250 000 tons for three (3) months (~R539 per ton) equal to ~R404.2 million for three months.
- On 18 February 2016, Tegeta contracted OCM for 400 000 tons of steam coal to be supplied and delivered to the Arnot Power Station equal to ~R186.8 million.

OCM was increasingly diverting coal away from Hendrina (through which Tegeta earned R150 per ton of coal) to Arnot (through which Tegeta earned R467 per ton). Additionally, the difference between the rand value that Tegeta paid OCM and Eskom paid Tegeta equals ~R72 per ton. Effectively, Tegeta extracted a transactional "middleman" fee from this arrangement without adding any value (with Eskom's full knowledge). The National Treasury PWC Report, 28 March 2017, found that the contract with Tegeta was at a "*price which is significantly above the price it could have acquired it at in terms of the existing CSA with OCM*".

Coal supplies from OCM to Hendrina have, for all intents and purposes, the same quality and value as those from OCM to Arnot, and do not conform to the quality specifications of Arnot Power Stations. Eskom's disclosures stating otherwise are inaccurate. It is clear that the CSA's between Tegeta and Eskom for coal supply to Arnot Power Station are highly questionable and likely unlawful.

Tegeta went on to secure all necessary approvals for the OCM sale. On 10 February 2016, the Eskom Board Tender Committee resolved that they would consent to the sale of OCH shares to Tegeta along with the cession of the CSA – on condition that the other sale agreement requirements had been met.

On 22 March 2016, Tegeta obtained approval for the sale from the Competition Tribunal of South Africa. On 29 March 2016, the company secured the approval of the Department of Mineral Resources, thus making the sale agreement unconditional. It should be noted, that this kind of approval from the DMR usually takes between one and three years. This process, however, was concluded in a matter of months. On 30 March 2016, the fourth addendum to the Hendrina Power Station CSA was signed, confirming the cession of the agreement to Tegeta.

Between the period 29 January and 13 April 2016, before Tegeta had legal ownership of OCH, Eskom made significant and highly irregular payments to Tegeta amounting to R1 161 953 248.41. The *State of Capture* report states that at least R910 000 000.00 was used by Tegeta to purchase OCH (42% of the total price). Despite these payments, Tegeta was still short ~R600 million. Mr Nazeem Howa (Mr Howa), a director of Tegeta, met with the BRPs to ask for assistance in obtaining a bridging loan from the Consortium of Banks on 11 April 2016. Tegeta's request was denied. The BRPs informed Mr Howa of this at around 15:00.

On the same day, 11 April 2016, Tegeta offered Eskom 1 250 000 tons of coal from OCM for a five-month period (~R429 per ton) which would equal R611 250 000 delivered cost. A submission to the Board Tender Committee was made on 11 April 2016, which included a prepayment of R586 787 500.00 (excluding VAT) to be made to Tegeta to enable them to meet additional coal requirements at Arnot Power Station. The Public Protector in *State of Capture* reports that Ms Ayanda Nteta (Ms Nteta), Mr Edwin Mabelane (Mr Mabelane), and Mr Matshela Koko (Mr Koko) signed and approved the submission. An impromptu Board Tender Committee meeting was convened to discuss the submission at around 21:00, via teleconference, and the pre-payment to Tegeta was approved.

The Public Protector's *State of Capture Report* revealed that Eskom GCE Molefe had been in frequent telephonic contact with Mr Atul Gupta, a shareholder of Tegeta, between August 2015 and March 2016 (with a total of 58 calls), and was in the vicinity of the Gupta residence (19 times) between 5 August and 17 November 2015. Mr Molefe was also in contact with Tegeta Director, Ms Ronica Ragavan (Ms Ragavan), around this time.

On 13 April 2016, the agreement between Tegeta and Eskom regarding the 1 250 000 tons of coal was entered into with a higher per ton price of ~R523 (ostensibly linked to higher calorific value or "CV"), and a prepayment amounting to R578 559 718.75 (R659 558 079.38 incl. VAT) was confirmed. The following day, on 14 April 2016, Tegeta paid R2 084 210 261.10 toward the purchase of all shares held by OCH – even though just three (3) days prior they had notified the BRPs that they were R600 million short. Tegeta then signed contracts with OCM for coal to be supplied at a price of R467 per ton, earning Tegeta a middleman fee of R56 per ton for adding no value.

#### **2.4.5 Procurement irregularities**

**2.4.5.1 Eskom is a major public entity in terms of Schedule 2 of the Public Finance Management Act 1 of 1999 ("PFMA").**

Eskom's procurement must be guided by section 217 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), the PFMA, The Preferential Procurement Policy Framework Act, 2000 ("PPPFA"), *Amendment of Treasury Regulations in terms of Section 76*, published under Government Notice R225 *Government Gazette* 27388 on 15 March 2005 ("the Treasury Regulations"), as well as Eskom's internal SCM policies and procedures.

**2.4.5.2 Eskom imposition of a R2 176 530 611.99 (~R217 billion) penalty on OCM**

Ms Suzanne Daniels testified that she discovered in 2016, that the amount of the penalty imposed on OCM, while owned by Glencore was incorrect:

*... [I asked for] the rationale for the R2.2 billion, and I was presented with a spreadsheet...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 R2.2 billion?", and I call a meeting because 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 start there, because BHP Billiton had ceded the contract to another party, so I knew the contract quite well...The previous time when we had to negotiate the qualities, the very penalty regime that was in place, I was part of the negotiation team that did so. So, the numbers that I was seeing and the manner in which it was calculated were not in line with that methodology...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.'... 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.*

According to Ms Daniels, the person who drew up the spreadsheet had since taken up a position at Glencore. Ms Daniels came to the conclusion that the penalty should have been calculated at R722 million.

Mr Marsden explained that the fine was forward-looking, and had implications for the viability of OCM. For this reason, any plan to avoid liquidation needed to have Eskom's support to find a workable solution. He states:

*"...Eskom was a critical part of any plan to resuscitate the business, for the period of the next effectively two months, a variety of engagements were held not only with Eskom but with also other affected parties in the business rescue process."*

#### **2.4.5.3 Eskom signed an unusual and irregular R1.68 million guarantee to Tegeta on 10 December 2015**

Eskom does not ordinarily grant any guarantees. Government (represented by the Minister of Finance and the Minister of Public Enterprises) provides guarantees to assist Eskom with its CAPEX program. Eskom needs to apply to government to have a liability guaranteed. The value of such a guarantee may not exceed R30 billion per annum. Government has sole discretion to grant this guarantee. The beneficiary of such a guarantee is granted a first-demand guarantee between itself and the DOE. In terms of Article 15.3 of the 2016 MOI, Eskom may not issue a guarantee, indemnity or security or enter into any transactions that bind or may bind Eskom to a future financial commitment unless it complies with section 66 of the PFMA.

A pre-purchase agreement with Tegeta's "proposed owners" for OCH, was unanimously approved by the Board upon circulation of a submission titled, "Urgent Request to approve the Pre-Purchase of Coal from Optimum Coal (Pty) Ltd". The agreement was also reviewed by the Board Investment and Finance Sub-Committee ("IFC") on 9 December, chaired by Mr Pat Naidoo ("Mr Naidoo"), with Ms Venete Klein ("Ms Klein") and Mr Zethembe Khoza ("Mr Khoza") ostensibly constituting a quorum, and with Eskom CFO, Mr Anoj Singh in attendance. Ms Daniels, Eskom Company Secretary, was instructed by the Board Chairperson Dr Ngubane to prepare necessary documentation and convene the requisite Board meetings. The Board unanimously approved the submission in a round robin. Mr Mark Pamensky (Mr Pamensky) recused himself and Mr Molefe was on sick leave.

On 10 December 2015, Ms Caroline Henry (Ms Henry), Senior General Manager (Eskom Treasury) prepared a memorandum, "Guarantee in favour of Tegeta Exploration and Resources Proprietary Ltd (TER)", reportedly to avoid having to pay out R1.6 billion in cash. This action was taken allegedly to prevent a situation in which Eskom paid cash to Tegeta.

Eskom CFO Singh approved this on the same day, without PFMA approval. As Eskom's accounting authority, the board is empowered to issue guarantees in terms of section 66 of the PFMA. However, this is highly unusual. Furthermore, PFMA approval was required as the guarantee was above Eskom's R1.5 billion materiality threshold. In other words, it should have been approved by the Minister. The guarantee was in place until 31 March 2016. Ms Daniels testified,

*In terms of the resolution of the Board, he [Mr Singh] was authorised to take all the necessary steps to give effect to the above [guarantee], 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.*

*She continues, "So in this instance, while the guarantee was probably a better commercial transaction [than a cash payment], it was still irregular".*

In her testimony, Minister Brown offered elucidated on the matter:

*The basis that the transaction did not meet the threshold of the Significant and Materiality framework agreement, I did not receive a request for approval of this deal in terms of section 54(2) of the PFMA. It was a matter within the authority of the Board of Eskom and its executives, in line with the governance framework within Eskom. As the Shareholder I am not privy to contract negotiations, but after the media picked up that Eskom had radically reduced the penalty that forced Glencore to sell the mine in the first place. I asked DG Seleke to write to Eskom to request details of the arbitration settlement.*

Ms Klein testified,

*"...What we got as a round-robin resolution was for the purchase of coal. There was nothing about a guarantee in there". Dr Ngubane confirmed that the Board had authorised a cash prepayment and not a guarantee. He states, "The Board learnt from the press in July 2017 that management had, in fact, converted what was meant to be a prepayment for coal into a guarantee."*

Mr Molefe's testimony does not appear to find fault with the guarantee. He states,

*Eskom did not lose one cent, by March that guarantee was cancelled without being utilised. So, I got briefed about it when I returned, but it was never utilised. I can't say I stopped it. It was never utilised, and in March it lapsed.*

The guarantee may, however, have played an instrumental role in Tegeta's ability to conclude and finance its acquisition of OCM/OCH, regardless of whether the parties called upon the guarantee.

#### ***2.4.5.4 The Eskom Board Tender Committee ("BTC") approved a cash prepayment to Tegeta on 11 April 2016***

Mr Marsden testified, subsequent to rejecting an unsatisfactory offer from Tegeta, that he received an amended offer to purchase OCH on 4 or 5 December 2015:

*"It included a substantially increased purchase price and it had an effective date of 1 January but with four conditions precedent to the transaction which needed to be met by the 31st of March 2016. One of those conditions precedent was the Competition's Tribunal giving their consent to the transaction which was handed down on the 22nd of February. The second was a letter of comfort or a guarantee from the purchaser effectively demonstrating their ability to deliver on their purchase price... And then on the 30th of March, we received the last two which was Eskom's release letter and consent to the transaction as well as the Section 11 consent from the Department of Mineral Resources."*

Mr Marsden testified that he was approached by Oakbay CEO, Mr Howa, on 11 April 2016 who reported that Tegeta was R600 million short of the purchase price, and asked Mr Marsden to negotiate with the Consortium of major banks on behalf of Tegeta for a loan of this amount. By the close of business, no bank had agreed to help meet the shortfall.

Following these events, at 19:30 on 11 April 2016 Ms Daniels was instructed in her capacity as Company Secretary, by Chairperson of Eskom Board Tender Committee (“BTC”), Mr Khoza, to establish an “unusual” emergency BTC meeting for the supply of coal to Arnot Power Station. The meeting was deemed necessary, despite Ms Daniels' protest that (a) a BTC meeting had been scheduled for 13 April and (b) the Arnot “emergency” had been ongoing for three months. Ms Daniels states,

*I actually questioned the efficacy of having a meeting at that late an hour, as I, 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 I, you know, as I attend all board and board Committee meetings to the best of my recollection at the time the emergency was actually declared about 3 months ago so there really was no, you know, there was no, it didn't really meet the requirements of the emergency.*

Mr Koko notes in his statement, (para 100):

*A coal emergency for Arnot Power Station was declared by Eskom's Primary Energy Division Tactical Command Centre on 23 December 2015. The minutes of the meeting at which this occurred is document MMK 26 in the accompanying bundle.*

As Ms Daniels notes,

*the emergency had been ongoing for more than three months at this stage. Mr Mabelane, Eskom Chief Procurement Officer, provided the Supply Chain Management ("SCM") documentation, including an (a) procurement submission and (b) “Modification Report”, ostensibly explaining the deviation from submission.*

Tegeta (through short-term CSA's with OCM) had been supplying Arnot with coal since January 2016, along with nine (9) other suppliers (according to a media statement released by Eskom on 11 June 2016). However, six (6) of these companies had been redirected to supply other power stations in April 2016. Of the remaining four (4) companies, only Umsimbithi Mining and Tegeta (OCM) were discussed for increased supply in the submission to the BTC.



The BTC meeting commenced at 21:00 on 11 April 2016, via teleconference. Present at the BTC meeting were: Zethembe Khoza, Nazia Carrim, Viroshini Naidoo, Chwayita Mabude, Edwin Mabelane, Ayanda Nteta and Matshela Koko. Ms Naidoo testified that she, in her capacity as a Board member, was not aware that the “emergency” need for coal supply security would not be impacted by dealing with the matter on 13 April 2016, in the scheduled Board meeting. Ms Naidoo indicated that she believed management to be responsible for any mistakes related to the coal prepayment.

The BTC resolved to add an addendum to the short-term CSA between various suppliers and Eskom for additional coal to be supplied to Arnot Power Station for a period of five (5) months, while Eskom would conclude a permanent contract. The resolution ostensibly allowed for Tegeta (OCM) and Usimbithi to be contracted to supply additional coal to Arnot Power Station for at least five (5) months. Eskom CFO Singh was ostensibly authorised to approve the extensions as well as a prepayment in the amount of R659 558 079.38 to Tegeta. Usimbithi did not require additional funds to meet production requirements. The resolution also authorised Group Executive for Generation, Mr Koko, to act on behalf of Eskom to conclude the deal, including signing any necessary contracts.

Ms Daniels was excused from the Board meeting scheduled for 13 April 2016 to prepare the necessary documentation in order to ensure that the payment to Tegeta, resulting from the 11 April resolution, could be processed on that day. Referring to the timing of the payment to Tegeta coinciding with the deadline for payment for OCH, Ms Daniels states:

*“It now makes sense as to 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”.*

Absa Bank confirmed in their statement that the bank was contacted by Mr Singh to facilitate the guarantee. Eskom deposited funds into an assigned account in the amount of the guarantee, to be held by Absa.

#### ***2.4.5.5 Eskom’s conduct in relation to Exxaro and Tegeta’s CSA to supply coal to Arnot***

Exxaro Chief Executive, Mxolisi Mgojo (“Mr Mgojo”), testified before the Committee and made two central assertions.

*Firstly, “Eskom has unlawfully pushed Exxaro out of the coal supply space, and contracted with a third party(ies) at a considerably higher cost to the fiscus.” The third party to which this sentence refers is Tegeta. Secondly, Exxaro’s experience and understanding of Eskom’s policies and practices around prepayments for coal directly contradict Eskom’s conduct in relation to Tegeta.*

Mr Koko made a claim, before the Committee, that to make up the 2.1-million-ton coal shortfall at Arnot power station,

*“Only two of the Arnot suppliers, Tegeta and Umsimbithi Mining (Pty) Limited, were able to source and supply the volumes required and meet the delivery time and quality requirements.”*

According to Exxaro, however, this statement is false. Mr Mgojo explained that the Exxaro-owned Arnot mine’s decreased coal supply was due to Eskom’s failure to procure the land that would be mined by Exxaro from 2011, onwards. His statement continues: (para 38)

*“Because of Eskom's failure to acquire the Mooifontein land, from 2011, the mine was only able to deliver to Arnot power station approximately 1.6 million of the agreed 4.02 million tons of coal per year.”*

Decreased volumes led to increased costs, which were communicated to Brian Molefe, GCEO at the time. Cost increases were reportedly worsened by Eskom’s failure to fund the “replacement of critical equipment”. These concerns, for which the Committee was presented with documentary evidence, were raised continually with Eskom’s management (including Brian Molefe and Ms Kiren Maharaj, then Divisional Executive of Eskom’s Primary Energy Division) who would later site escalating costs in terminating Exxaro’s contract to supply Arnot. In contrast with former Minister Zwane’s enthusiastic and possibly irregular assistance of Tegeta in relation to OCM, no correspondence was received when Exxaro wrote to the Minister to ask for intervention. This lack of response was particularly concerning to the company, given the economic consequences and, notably, 1500 job losses associated with the termination of Exxaro-owned Arnot’s CSA. Mr Mgojo’s statement notes other instances of Eskom failing to meet its contractual obligations, leading to commercial difficulties for the company. On the matter of Arnot, he concludes:

*Eskom’s non-performance of its contractual obligations has thus prevented Exxaro from delivering the quantity of coal required by the Arnot CSA and increased the cost of coal. Its termination of the CSA then ended the supply of coal provided by Exxaro. This reduction in supply provided the rationale for Eskom to supplement its reserves with coal supplied by third-party commercial mines.*

Speaking to the issue of Tegeta’s prepayment for coal from Arnot, Mr Mgojo’s statement explained that “cost-plus” power stations:

- are usually built near mining reserves (as is the case with Arnot);
- require CSAs that oblige Eskom to cover the capital and operating expenditure ("capex" and "opex") for mines;
- oblige the mining right holder (e.g. Exxaro) to supply coal to Eskom, exclusively; and

- oblige Eskom to carry environmental rehabilitation costs.

Mr Mgojo noted that cost-plus mines have significant benefits to Eskom, notably, security of coal supply, reduced costs, and that,

*"Eskom has transparency regarding the price of coal sold from a cost-plus mine". He continues, "The margin charged on the coal at the cost-plus mines is usually less than 5% compared to more than 20% at a commercial mine".*

This margin is also relatively stable. By comparison, commercial CSAs are more expensive to Eskom; however, the risks associated with these concerns is also wholly carried by the supplier/mining right holder.

With Exxaro out of the way, what appears to have been preferential treatment of Tegeta, to supply Arnot power station, could commence. Mr Anoj Singh's testimony before the Committee regarding Eskom's prepayment arrangements must be read against Mr Mgojo's. Mr Singh writes:

*Para 107: Prepayment of this nature is not unique and was done in the past and will continue to be done going forward as they form part of the following arrangements*

- *It was part of the mandate approved by the BTC in 2008;*
- *Long-term 40-year supply contracts with cost-plus mines.*

*Para 109: Pre-payment to cost-plus mines in the past amounted to R11.3 billion and over the next five years are projected to be an additional R17.5 billion.*

Mr Singh claimed that such a prepayment arrangement had been made with Exxaro in the past. Mr Matshela Koko's written statement is consistent with Mr Singh's interpretation, noting that a prepayment, "was not out of the ordinary in Eskom's operations". Mr Molefe's testimony was concurrent with his two colleagues':

*By the end of July in August, all the coal that had been bought in terms of that contract had been delivered. So we bought coal for 576 million and the coal was delivered. There is no question that we'd lent money and so on. It was a prepayment. Prepayment was very normal in this business; it had been done over and over again...*

However, for cost-plus CSAs, Mr Mgojo states,

*"The funding of such capital projects does not, however, contemplate any pre-payment. Should a capital project be required at this type of mine, the assessment and approval of this project would flow through Eskom and its coal supplier's respective governance structures. Rather than*

*a prepayment lump sum,” Mr Mgojo states, “Funding is then released in partial payments for work approved and done.”*

Unambiguously contradicting the testimonies of Mr Singh, Mr Koko, and Mr Molefe, Mr Mgojo states unequivocally that,

*As far as Exxaro is aware, Eskom does not make pre-payments to any other major miner in the industry. The so-called pre-payment to Tegeta for coal, of which Exxaro learned through the media, is the only instance to our knowledge where such so-called pre-payment was made.”*

The Eskom Board stated that the recommendation presented to the Board in favour of a prepayment for coal supplied by Tegeta to Arnot from OCM,

*“was approved and signed on 11 April 2016, by Ms Ayanda Nteta, Mr Edwin Mabelane and Matshela Koko”.*

The prepayment was ostensibly justified in terms of Supply Chain Management Policy 32-1034 Rev 2 of 2014 ("SCM 32-1034"). The Board's testimony corroborated the timelines and facts regarding the approval of the prepayment covered in Ms Daniels' testimony. The Board did, however, criticise the *State of Capture* report, stating:

*...the Public Protector speculates that the conduct of Eskom Board, in buying coal from TEGETA, was solely for the benefit of TEGETA. She bases her speculation on the analysis of payments made by Eskom to TEGETA in respect of coal supply. TEGETA was supplying coal to Eskom and Eskom was not entitled to tell TEGETA how to spend the money Eskom was paying to TEGETA.*

Ms Naidoo, who was a member of the Board that approved prepayment against this CSA, testified that the prepayment was unusual and not financially sound. She also testified on the matter of the pricing of Tegeta's CSA:

*In terms of the Tegeta transaction, I was very uncomfortable about that transaction because we were in financial problems and we couldn't afford as a business to prepay somebody.*

*...And especially if you're a corporate entity like Eskom where you are, in my understanding, the biggest purchaser of coal, you should be declaring the prices. And I mean that's the one thing I could not understand why the agreements were sometimes one-sided.*

*...But here you've got, you entering into contracts and agreements with people constantly where you're at the back end of the negotiation and it didn't make sense to me that we would be prepaying anybody that matter, when we, you know, we were buying volume and we didn't need to do that.*

**2.4.5.6 Eskom decided to make a prepayment to Tegeta for coal supplied from an entity it did not own**

Any payments made by Eskom for coal supplied by OCM ordinarily would have been made to the BRPs. Instead, the money was paid directly to Tegeta, which only had a right to purchase OCH. Mr Marsden explained that,

*there was an agreement between OCH and Tegeta while OCH was in business rescue, and "Optimum Coal Mine never supplied coal to Eskom. We supplied coal to Tegeta on 30-day payment terms. So, the prepayment was a transaction between Tegeta and Eskom".*

The sale by Tegeta of coal to Eskom that had been bought from OCM (which was then owned by Tegeta), must be distinguished from the prepayment to Tegeta for coal that Tegeta did not own and to which it had no legal right. At the time of the prepayment, Tegeta merely had the right to purchase OCM/OCH. They would not have been entitled to receive any payments in favour of either of these legal entities. Mr Marsden, speaking on the matter of the prepayment for coal in favour of OCM, testified that he or his colleagues received no payment:

*So, we had no knowledge of the 586 million rand. We were not in control, certainly, of Tegeta. However, as mentioned post the close of the deal, Optimum Coal Mine remained in business rescue from April until 31st of August 2016. As a result, we were certainly in control of that legal entity and Optimum Coal Mine did not receive the 586 million rand subsequent to the close of the transaction Optimum Coal Mine entered into a sale agreement with Tegeta for the supply of coal to the Arnot Colliery.*

Mr Koko defended the prepayment to Tegeta, stating that paying OCH would have been irregular:

*During the interview [on Carte Blanche] Ms Govender asked me whether Eskom had prepaid Optimum (for coal). I responded that it did not. That response was quite correct. Eskom did not prepay Optimum for coal. The agreement that the BTC approved on 11 April 2016 was for prepayment for coal to Tegeta, which was an entity distinct from Optimum, for coal that Tegeta was able to secure and source from Optimum.*

It may be that paying OCH to supply coal in the absence of a contract would be irregular. However, this does not, as claimed by Mr Koko, amount to any justification for Eskom to pay Tegeta for another legal entity's property. If anything, Mr Koko's explanation compounds the irregularity of the prepayments which were made to Tegeta.

Despite the fact that the relevant submission to the Board spoke of Tegeta, Ms Naidoo, in her testimony, claimed the following:

*“My understanding was that we were actually getting the coal from the rescue practitioner; we were paying the rescue practitioner. That is why I asked the question, [...] if we pay the rescue practitioner is there a possibility you would lose our money?”*

When asked why she would agree to a prepayment to the BRPs, when the documentation before the Board only mentioned Tegeta, Ms Naidoo responded, *“Because I was of the impression at that time that Tegeta was in control of the mine.”*

Despite having publicly denied the prepayment, Mr Koko’s statement is crystalline in the matter of Tegeta’s cash prepayment approved on 11 April 2016:

*“The BTC authorised the prepayment on 11 April 2016 for good reason arising from Arnot’s coal supply shortage; I signed the relevant agreement with Tegeta and it was implemented in its terms.”*

#### **2.4.5.7 Eskom’s imposition of penalties related to OCM**

According to Ms Daniels, by the time that she was involved in determining the quantum of the penalty to be imposed on OCM/OCH after it had been transferred from Glencore to Tegeta,

*“At most we [Eskom], would be able to prove around 700 million.... about R248 million of that penalty had already been paid [by Glencore]”.*

During arbitration with the supplier, Ms Daniels notes:

*“The supplier actually was quite disingenuous. It came back and said, ‘We owe you R239 million of which we’ve paid it, so we don’t owe you anything.’”*

Ms Daniels testified

*that she was able to negotiate up to R500 million, at which point she engaged the Board, to determine whether to proceed with a claim against Tegeta of R700 million, which she believed to be a more appropriate claim.*

Ms Daniels continues:

*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.’ [...] 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 not less than 500 million. I instructed the attorneys, ‘Push as hard as you can; [...] 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.*

Mr Khoza confirmed the matter of the R500 million adjusted penalty to the Committee, but claimed that this amount was based on the advice of Eskom officials,

*"With the long debate then I think the resolution [...] of the board tender was said you can settle nothing less than 500 because they said they can justify up to 500".*

#### **2.4.5.8 Tegeta used "Other People's Money" ("OPM") to buy OCM/OCH**

The *State of Capture* Report found that the timing of payments from Eskom in favour of Tegeta allowed Tegeta to purchase OCM/OCH. Eskom's guarantees and payments gave the appearance to investors that Tegeta had the resources to buy the mine when this was not the case. When asked about the timing and purported urgency of the 11 April BTC meeting, Mr Khoza replied,

*"The urgency of the coal at the time because the technical team in terms of coal declared that there will be a shortage of coal three months ago".*

This response did not explain why the meeting was called just two days before 13 April 2016, both the day that Tegeta needed to deliver the purchase price for OCM/OCH and the date for a scheduled Board meeting, which could have accommodated the matters of the 11 April meeting. In his statement, Dr Ngubane denied that Eskom played any improper role in facilitating the purchase of OCM/OCH by Tegeta.

#### **2.4.5.9 Events Following Tegeta's Acquisition of OCH relating to the Mine Rehabilitation Trusts**

In April 2016, a Tegeta director, Ms Ragavan attempted to access the OCM rehabilitation fund through Standard Bank, even though OCM was still under the management of the BRPs. Withdrawing money from mine rehabilitation funds ("environmental trusts") for private purposes is not allowed under NEMA or MRPDA. The BRPs wrote to Tegeta on 24 April 2016, to inform them about the incident and referred them to the relevant legislation. The Department of Mineral Resources, under Minister Zwane, approved the transfer by Tegeta of the Koornfontein and Optimum Mine Rehabilitation Trust Funds to the Indian Bank of Baroda. Tegeta transferred the Koornfontein Trust funds amounting to R280 million to the Bank of Baroda in May 2016, and the Optimum Trust funds amounting to R1.47 billion in June 2016. Despite having been informed of relevant legal requirements regarding the environmental trusts, various large debits and credits have been noted on both accounts. These appear to be irregular and unlawful.

#### **2.4.6 Governance Issues**

#### ***2.4.6.1 Eskom Board members involved in the round robin resolution of 9 December 2015***

The Public Protector's *State of Capture* report identified Board Members who had direct or indirect interests or relationships with Tegeta and its shareholders. These include:

- Dr Ngubane, Eskom Chairperson, had previously shared a directorship with Mr Salim Essa (director of Elgasolve, a Tegeta shareholder);
- Mr Pamensky has/had various interests in entities related to Tegeta and shareholders of Tegeta;
- Ms Devapushpum Viroshini Naidoo's ("Ms Naidoo") spouse is a director of Albatime, which provided funding to Tegeta for the purchase of OCH, and was an advisor to Minister Zwane, who allegedly requested Eskom to undertake procurement negotiations for OCM with Tegeta, as noted in correspondence between Mr Koko and the Department of Mineral Resources from 6 December 2017);
- Ms Nazia Carrim's (Ms Carrim) spouse is related to Mr Salim Essa;
- Mr Romeo Khumalo (Mr Khumalo) shared a directorship with Mr Salim Essa; and
- Ms Mariam Cassim (Ms Cassim) was previously employed by the Gupta owned company, Sahara Computers.

#### ***2.4.6.2 Board members at the BCT meeting of 11 April 2016***

Board Members and Eskom executives invited to the late-night BTC meeting of 11 April 2016 included:

- Mr Zethembe Khoza (linked in the #Guptaleaks and testimony before the Committee to the Gupta family);
- Ms Karim's spouse is related to Mr Salim Essa;
- Ms Naidoo's spouse is a director of Albatime, which provided funding to Tegeta for the purchase of OCH, and was an advisor to Minister Zwane, who allegedly requested Eskom to undertake procurement negotiations for OCM with Tegeta, as noted in correspondence between Mr Koko and the Department of Mineral Resources from 6 December 2017);
- Ms Chwayita Mabude (Ms Mabude, who was removed from the Eskom Board in June 2017 following revelations of her alleged connections to the Guptas in the #Guptaleaks emails);
- Mr Edwin Mabelane;
- Mr Ayanda Nteta;
- Mr Matshela Koko (who seemingly lied on television about having signed off on the Tegeta prepayment)



Ms Naidoo declared her interest in a number of Eskom Board meetings and recused herself from the BTC decision on Tegeta.

#### ***2.4.6.3 The role of Eskom Board members concerning the Eskom guarantee and the Tegeta prepayment for coal***

Eskom's Board members are required to act in good faith and for a proper purpose, in the best interests of the company, and with the degree of care, skill and diligence that may reasonably be expected of them. Eskom directors also have a duty not to allow the company to trade recklessly, with gross negligence or fraudulently. The accounting authority for Eskom is its Board in terms of section 49 of the PFMA. In terms of section 49 and 51, the board must take disciplinary steps against any employee who contravenes the PFMA; or commits an act which undermines the financial management and internal control system of the public entity; or makes or permits an irregular expenditure or a fruitless and wasteful expenditure. Concerning Tegeta, the Board twice approved transactions that appear to be in contravention of the PFMA, including delegating Eskom executive CFO Singh and Mr Koko to conclude these transactions.

In the presentation by Eskom's Board to the Committee, represented by Mr Khoza, Dr Naidoo and Mr Sean Maritz ("Mr Maritz"), the Board's position was to deny a role in the sale of OCM/OCH to Tegeta:

*"I wish to point out that Eskom was not involved in the purchase of Optimum Coal Holding by Tegeta and is therefore is unable to assist the Committee in this regard as this was a commercial transaction between two private companies".*

The Board also defended the use of a prepayment in favour of Tegeta, citing previous examples of 'prepayments'. As explained above, these alleged examples, however, related to cost plus mines and were not prepayments.

Referring to Ms Daniels' statement before the Committee, the Board suggested that Ms Daniels had failed to inform them of the Eskom guarantee in favour of Tegeta. The Board's statement unambiguously claims,

*"At no stage was the board aware of Tegeta or that it was given a guarantee".*

This was contradicted by the Eskom executive directors that they did inform the Board in its quarterly board meeting documents. Mr Molefe was also aware of the guarantee.

#### ***2.4.6.4 Recommendation made to Eskom to take action against Mr Koko***

Mr Qoma noted in his testimony and statement that Mr Koko had lied publically about his role in facilitating the prepayment for coal to Tegeta. He noted that, in his professional opinion, Koko and Minister Lynne Brown's behaviour had serious reputational consequences for Eskom. Mr Koko was not disciplined for his public misdeed. Instead, he was appointed as Acting CEO:

*The Minister was somewhat oblivious of the septic boil caused by the revelations of the State of Capture. Her appointment of Koko served to fast-track Eskom's reputational downward spiral. Then and in hindsight, this decision remains abhorrent and exposes Minister Brown's weak leadership. A grave reputational spiral that resulted is directly attributable to this and other irrational decisions by the Minister.*

Mr Qoma testified that he recommended that action be taken against Mr Koko and Mr Singh. However, none was taken:

*I tried strenuously to persuade Dr Ngubane to rid Eskom of certain executives who were destroying Eskom's reputation; Koko was one of them. While he agreed with me, he never acted. There was a patently clear reluctance to act against Mr Anoj Singh and Koko at Board.*

#### **2.4.6.4.1 The Eskom Board undermined the Dentons investigation**

The Eskom Board had commissioned the Dentons Report. Mr Qoma testified that he recommended that the report be made public and that, following his recommendation in February 2017, the Board agreed and invited the media to a report launch. However, according to Mr Qoma's testimony, the Board's actual response was indicative of a broader pattern of lack of transparency at Eskom:

*In the intervening period, the Board decided to seek a legal opinion on the release of the report, which advised against the release of the report. Instead, it recommended a redacted version via a PAIA process. This was a classic way of managing reputational risks through legal opinions – a dangerous path. My professional protestations fell on deaf ears resulting in a huge backlash when this decision was announced in the press conference (on 7 February 2017).*

Mr Qoma pointed out that the Board had limited the scope of the Dentons investigation to,

*“purposely avoid any action against individuals who were behind the governance lapses”.*

#### **2.4.6.5 Incidences of possible undue influence**

##### **2.4.6.5.1 Eskom placed pressure on Glencore and potential OCM buyers, in favour of a Tegeta purchase**

Business rescue proceedings resulted in OCH and OCM falling under the legal administration of BRPs, who were appointed on 4 August 2015. Mr Marsden explained that OCM and OCH being placed into business rescue had resulted from Eskom's failure to renegotiate OCM's CSA and the imposition of the coal quality penalty,

*"Ultimately those negotiations failed at a very senior level within Eskom, and a penalty was then applied".*

According to Mr Marsden, it became apparent to him in early October 2015 that a negotiated settlement around the CSA was unlikely to happen – the BRPs had received a letter from Eskom that their proposals had been rejected,

*“in terms of restructuring in the entity in its current format, with its current shareholding”.*

In a change of strategy, the BRPs then signed a term sheet with a third-party - Pembani Group - for the sale of OCM. Under conditions with Eskom which were described by Mr Marsden as “acrimonious”, Pembani was unable to conclude contractual negotiations with Eskom.

#### *2.4.6.5.2 Preferential treatment of Tegeta by Eskom*

Mr Marsden testified that he received unsolicited offers to buy OCM, including an unsolicited bid from Gupta-owned Oakbay (a Tegeta shareholder), delivered by KPMG on 1 July 2015. Close to four months later, on 24 November, Mr Koko chaired a meeting between Eskom, Tegeta, and the BRPs, at which Mr Marsden was requested to bundle all assets under OCH to be sold together, “to keep good with bad” as OCM was still operating at a loss of ~R120 million per month and was facing a backdated penalty of R2.17 billion.

It should be noted that under CEO Molefe, Eskom's dismissal of the fourth addendum to the CSA in May 2015, which was the product of lengthy and complex negotiations, termination of the CSA negotiation process in June 2015, and reinstatement of an inflated, backdated penalty in July 2015, likely led to OCH and OCM being put under voluntary business rescue. Furthermore, it may have created the conditions under which the BRPs had to negotiate the sale of OCM, and then OCH.

In contrast to Eskom’s dealings with Glencore and Pembani, Tegeta was offered favourable treatment by Eskom, including a guarantee, short-term CSA’s to supply coal to Arnot Power Station, and ~R600 million prepayment. These financial arrangements gave the appearance of viability and having adequate resources to purchase OCH, when, in fact, Tegeta did not have the necessary funds without these agreements with and payments from Eskom. Furthermore, the National Treasury PwC report finds that Tegeta was offered preferential pricing for coal supplied to Arnot. One of two other coal supply contracts that Eskom cancelled with third parties provided the cheapest coal on SOC's books at R132 per ton.

The National Treasury PwC report also found a contradiction between the Board's claims that Eskom CEO Molefe had no influence over procurement decisions of the Board, given his role in the OCM CSA negotiation process, and his levying of the backdated penalty.

#### *2.4.6.5.3 Key Eskom executives were compromised during Tegeta negotiations*

The testimonies provided by Ms Daniels and Mr Qoma, respectively, suggest that Mr Koko, who played a central role in securing and finalising the Tegeta prepayment, was compromised by his relationship

with the Gupta family and Tegeta shareholders. In her testimony, Ms Daniels described a meeting initiated by Mr Koko on 9 March 2015 at which she encountered Mr Essa at his offices in Melrose Arch. Here, she reports,

*Mr Essa asked, “What needs to be done if you want to suspend people?” She adds that Mr Essa informed her in the presence of Mr Koko that “Mr Matona [then Eskom CEO], Ms Molefe [then Eskom CFO], Mr Marokane and Mr Koko” would be suspended and that the Board would communicate this, along with an investigation into Eskom. The suspensions and investigation described and foretold by Mr Essa subsequently took place. Furthermore, Mr Qoma presented testimony in which he expressed grave concern at the reinstatement of Mr Koko following the television interview in 2016 in which he was caught in a lie, denying that he signed the prepayment in favour of Tegeta for coal for Arnot Power Station.*

#### **2.4.6.6 Possible preferential treatment of Tegeta by the Ministry and Department of Minerals and Resources (“DMR”)**

The National Treasury PwC Report found that “Minister Zwane may have provided Tegeta with an unfair advantage by assisting in the negotiations for the sale of all shares held by OCH when travelling to Switzerland”. The Ministry approved the sale agreement between Glencore, Optimum Coal Holdings, and Oakbay and Tegeta. Approval was completed in just three and a half months when the process usually takes between one (1) and three (3) years. This requires further investigation.

The Committee was presented with information by Ms Daniels that included written correspondence from Mr Koko, then Eskom Executive Generation, to the Director-General for the Department of Mineral Resources, Dr Thibedi Ramontja, on 6 December 2015. In the correspondence titled, “Optimum Coal Mine Propriety Limited coal supply to Hendrina Power Station”, Koko admonishes Glencore for their threats of liquidation of OCM, and calls for the DMR to intervene to resolve the situation by mid-December of 2015:

*The upcoming adversity facing Eskom will 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 assuring 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.*

The reply from the DMR included the assurance that the approvals for the transfer of OCH to Tegeta were being prioritised, and further irregularly includes a suggestion to provide Tegeta with a prepayment for coal supply:

*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 up to 2018 and for driving*

*transformation, we would like to propose that consideration be made for some prepayment to be made for up to 1 year of coal supply, understanding the upfront capital injections to be made to ramp up production to meet coal supply requirements from these mines.*

Mr Khoza, representing the Eskom Board, noted that this correspondence had motivated the Board's decision on the guarantee issued by Eskom to Tegeta:

*On the 8th of December, a round robin resolution was submitted to the board by management. The round robin was accompanied by a submission which contained the motivation for the round robin. The submission was titled 'Pre-purchase of coal from Optimum Mine Limited'. [...]*

Mr Koko, in his capacity as the Group Executive for Generation, on the 6th of December, wrote a letter to the Department of Mineral and Resources. The letter dealt with the security of supply to Hendrina Power Station referring to Optimum the second paragraph of the letter read as follows:

*"In rather dramatic fashion the company was placed under business rescue and Eskom was faced with an intermittent veil threats of liquidation while at the same time the business rescue practitioner purported sort construction...constructive engagement within the parties."*

Mr Koko's tone appears to be in line with observations by Mr Marsden of the "acrimonious" relationship between Eskom and Glencore executives, respectively. No explanation was offered as to why the Minister was being called upon to intervene in an Eskom supplier contract with a private party. According to Mr Khoza's testimony, the instruction to consider a guarantee for OCM came directly from the Director General of the Department of Mineral Resources. Mr Koko acknowledged in his statement that the round robin resolution resulted from this correspondence.

The Board's resolution (included in Ms Daniel's submission to the Committee) with respect to the guarantee in favour of Tegeta directly references this correspondence:

*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 by 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 consents or any other documentation necessary or related thereto.*

Dr Ngubane's statement did not find fault with the Minister of Mineral Resource's intervention to avoid what he described as a "national crisis". He stated that efforts were being made to ensure OCM's financial viability and prevent job losses. However, the same effort had not been made for the mine's

owners at that time, Glencore, or for other Eskom coal suppliers (such as for the Exxaro owned Arnot coal mine).

#### **2.4.7 Additional Matters**

##### ***2.4.7.1 No action by the National Prosecuting Authority (“NPA”)***

Mr Marsden referred to his report filed with the Directorate of Priority Crime Investigation (DPCI) under Section 34 the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004). Mr Marsden reported that he signed two affidavits, one three months after the payment in 2016 and one in June 2017, following contact from an investigator in May 2017. Despite the publicity and seriousness of his allegations, a new investigator only contacted Marsden in November 2017 and the NPA has taken no public action in relation to the subject matter of Mr Marsden's report.

##### ***2.4.7.2 Evidence presented of links between the Ministry of Public Enterprises, Eskom Executive, the Eskom Board and the Gupta family***

Mr Qoma testified that Mr Khoza, informed him, at a meeting 17 June 2017 in his home, that “Minister Brown is captured”. Allegedly, Mr Khoza also told him that four new Board members would be announced at the AGM on 23 June and that these individuals had been selected by the Gupta family.

Mr Qoma also testified that Dr Ngubane had, during his tenure as Chairman of the Board, attempted to suspend Mr Koko in response to a letter listing alleged infractions. He testified that this was stopped by the Guptas, via Minister Brown:

*Just before Dr Ngubane called Koko in to suspend him, he (Khoza) sneaked out to alert a G-brother of the imminent suspension. He said, in turn, a G-brother instructed Minister Brown to cancel the suspension, which Dr Ngubane dutifully cancelled. That’s how he explained the extent of Minister Brown’s capture to me. Dr Ngubane has confirmed to me the key elements of Khoza’s narrative, and more particularly, that he indeed received a call from Minister Brown to not go ahead with the suspension.*

Mr Qoma took, “G brother” to mean a ‘Gupta brother’.

#### **2.4.8 Observations**

***2.4.8.1 It appears that the events that led to OCH being placed under business rescue were the result of irregular and possibly unlawful exercise of public power for the benefit of Tegeta.***

- i. The escalation of the fourth amendment to the Hendrina CSA by the Eskom Board to Acting CE Molefe is out of line with convention and is questionable.

- ii. The motivation for Mr Molefe rejecting the fourth amendment; undermining and terminating the prior negotiations is unclear and questionable, especially when considering the surrounding circumstances.
- iii. The timings of Eskom's imposition of a R2.17 billion penalty, as well as Eskom's valuation of the penalty, were irregular, possibly unlawful and financially prejudicial against OCH.

*2.4.8.2 The role of the Ministry of Mineral Resources in the Tegeta/OCH transaction is unusual and potentially improper.*

- v. If former Minister Zwane's trip to Zurich did include meetings that assisted in the negotiation of the sale of OCH/OCM to Tegeta, this would be improper (as would any benefits he could have received for this).
- vi. The reasons for and timing of various Section 54 mine stoppages at Glencore mines at the time of the negotiation process are highly questionable.
- vii. The facilitation of the approval by the Minister of transfer of OCH to Tegeta was done in a very short period of time, which is unusual.

*2.4.8.3 Eskom executives and the Board acted in an unusual and potentially improper way in their dealings with Tegeta.*

- viii. Eskom's guarantee of R1.6 billion to Tegeta, facilitated by CFO Mr Singh and approved by the Board, is highly questionable and potentially unlawful.
- ix. Eskom Board members' relations with the Gupta family-owned businesses at the time of negotiations and when the sale agreement was reached were likely to raise conflicts of interest that should have resulted in their recusal from approval processes.
- x. Mr Molefe's relationship with Ms Ragavan and the Guptas further complicate his stance towards OCH/OCM while Glencore owned the entity.

*2.4.8.4 The speed of Tegeta related approvals for the purchase of OCM and OCH, as well as Eskom's decisions to enter into the CSAs for Arnot, suggest preferential treatment in contravention with Supply Chain Management ("SCM") policies and the PFMA*

- xi. The speed with which Tegeta received the necessary approvals from the Competition Tribunal of South Africa (2 months) and the Department of Mineral Resources (3.5 months) is unusual.
- xii. It is unclear why Eskom acted against its financial interest, in allowing Tegeta to extract a profit by selling coal to Eskom at a higher price than Tegeta was able to obtain such coal from OCM.
- xiii. The prepayment in favour of Tegeta was highly unusual and outside of SCM processes.

- xiv. The purchase of OCH shares by Tegeta probably would not have been possible without Eskom's prepayment.
- xv. The CSA between Eskom and Tegeta for coal supplied to Arnot was secured outside of required SCM processes.

*2.4.8.5 Tegeta's management of the environmental trusts is possibly illegal.*

- v. The motivation for the Department of Mineral Resources' approval of the transfer of the funds to a bank external to South Africa is unclear.
- vi. According to relevant legislation, namely NEMA and MRPDA, the holder of a mining right is prohibited from using the Rehabilitation Trust Fund for purposes for which it is not intended. However, it appears that a number of large debits and credits were made against the Koornfontein and Optimum Rehabilitation Trust Funds.

## **2.5 Eskom and the Trillian Saga**

### **2.5.1 Background**

In December 2016, Minister Lynne Brown categorically denied in a written response to Parliament that Eskom had any contracts or had conducted any business with the Trillian Capital Partners (Pty) Ltd (2015/111759/07) ("Trillian Capital"). In July 2017, however, it emerged that Eskom had paid Trillian in the region of R600 million ostensibly for 'consulting' work that had been sub-contracted by the global management consulting firm, McKinsey & Company ("McKinsey"), as its BBBEE partner. Eskom's relationship with Trillian Capital had grown out of existing contracts between Eskom and McKinsey, where McKinsey had previously sub-contracted to Regiments Capital Pty Ltd ("Regiments"). McKinsey and Trillian were paid R1.6 billion for work that substantially deviated from standard procurement processes and was never approved by National Treasury. The payments to Trillian were made between April 2016 and 31 March 2017, with no contract between Eskom and Trillian Capital.

Investigations into Eskom's relationship with and payments to Trillian suggest that there may have been numerous contraventions of Section 217(1) of the Constitution, the Public Finance Management Act ("PFMA"), the Companies Act 71 of 2008 ("Companies Act"), the Prevention and Combating of Corrupt Activities Act of 2004, the Prevention of Organised Crime Act of 1998, Eskom's Memorandum of Incorporation 2016 ("MOI"), and other internal Supply Chain Management ("SCM") and governance policies and procedures.

### **2.5.2 Witnesses were called to testify**

Witnesses called to testify on this matter:

- Ms Mosilo Mothepu, Former Trillian Financial Advisory CEO



- Ms Bianca Goodson, Former Trillian Management Consulting CEO
- Ms Tsholofelo Molefe, Former Eskom CFO
- Ms Suzanne Daniels, Eskom Former Company Secretary and currently Head of Legal and Compliance (on suspension)
- Mr Khulani Qoma, Eskom General Manager in the Office of the Chairperson
- Dr David Fine, Senior Partner, McKinsey London Office
- Ms Devapushpam Naidoo (Viroshini), Eskom Board member from 12 December 2014 to 1 July 2016
- Ms Venete Klein, Eskom Board member from 12 December 2014 to May 2017
- Mr Zethembe Khoza, Eskom Interim Board Chairperson
- Dr Pat Naidoo, Eskom non-executive Board Member
- Mr Sean Maritz, Eskom Acting CEO 2017 - 2018
- Ms Lynne Brown, Minister of Public Enterprises
- Mr Anoj Singh, Eskom CFO (on suspension)
- Mr Matshela Koko, Former Eskom Acting CEO, and Executive for Generation (on suspension)
- Mr Rajie Murugan, G9 Consulting Services CEO
- Mr Abram Masango, Eskom Group Executive: Capital Projects (on suspension)

### 2.5.3 Documentation presented to the Committee

Included, amongst others, in the documentation submitted to or called for by the Committee for the purposes of the inquiry were:

- A Report of the Public Protector “*State of Capture*”, Report 6 of 2016/7 14 October 2016 (“Public Protector “State of Capture” Report”)
- Report in terms of Section 34(1)(a) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 by Piers Marsden and Peter van den Steen, signed on 1 July 2016 (Marsden “Section 34 Report”)
- Question for written reply, Question No. PQ 2701, “Ms NWA Mazzone (DA) to ask the Minister of Public Enterprises”, 2 December 2016.
- Media Statement by Trillian Capital Partners, 23 October 2016
- Full Statement by McKinsey On Eskom, 17 October 2017-12-07
- Eskom Statement, “Eskom takes action to recover funds unlawfully paid to McKinsey and Trillian”. 5 October 2017
- “Report for Mr T M G Sexwale, Chairperson Trillian Capital Partners (Pty) Ltd on Allegations with regard to the Trillian Group of Companies and Related Matters” (“Budlender Report”) by Adv. Geoff Budlender, 29 June 2017

- Statement by Ms Mosilo Mothepu, “Public Enterprises Portfolio Committee: Inquiry into Eskom, Denel, Transnet and South African Airways (state-owned company) SOC and Trillian Capital Partners (TCP)”. October 2017
- Statement by Ms Bianca Goodson, “Bianca Goodson’s Statement”. 19 October 2017
- Submission prepared by Suzanne Margaret Daniels, Group Executive: Legal and Compliance, “Portfolio Committee on Public Enterprises: Oversight Inquiry into Governance, procurement and financial sustainability of Eskom”. 8 November 2017
- Statement of Khulani Qoma, Eskom General Manager in the Office of the Chairperson “Eskom’s implosion: deliberate, well-orchestrated & shame-free; entire leadership culpability”. 10 November 2017
- Statement by Devapushpam Naidoo (Viroshini), “Portfolio Committee on Public Enterprises Oversight Enquiry into Governance, Procurement and Financial Sustainability of Eskom.” November 2017
- Statement by Venete Klein, Eskom Board member from 12 December 2014 to May 2017. November 2017
- Presentation by Minister of Public Enterprises Lynne Brown to the Parliamentary Inquiry into Eskom, 22 November 2017
- Statement of Mr Anoj Singh, “Written Narrative of Evidence to be Presented by Anoj Singh, Financial Director of Eskom, at an Oversight Inquiry into Corporate Governance of State-Owned Enterprises, by the Portfolio Committee on Public Enterprises of the Parliament of South Africa, on 5 December 2017" Vol. 1-3.
- Written submission of Mr Matshela Koko
- G9 Group, Presentation to the Parliamentary Portfolio Committee of SOE’s: The Trillian Investigation, 27 February 2018. (“G9 Report”)
- Submission by Mr Abram Masango for the Portfolio Committee on Public Enterprises, 27 February 2017, Vol. 1-4

#### 2.5.4 Trillian Capital is established

Trillian Capital is a financial services and advisory firm established in 2015. Trillian Holdings (Pty) Ltd, which is 100% owned by Mr Salim Essa, owned a 60% shareholding in Trillian Capital at the time of the events in question. Zara W (Pty) Ltd ("Zara W") (2011/104773/07) owned 25%, and employees and other shareholders owned 15%. Trillian Capital has five subsidiaries:

- 1) Trillian Management Consulting (“TMC”)
- 2) Trillian Financial Advisory (“TFA”)
- 3) Trillian Asset Management (“TAM”)
- 4) Trillian Securities (“TS”)

## 5) Trillian Property (“TP”)

Trillian was first established as a company by Clive Angel, Stanley Shane and Marc Chipkin.

### 2.5.5 Trillian’s relationship with Regiments

In its current form, Trillian Capital grew out of a split in Regiments. This split has been the subject of two separate High Court applications between Regiments directors, Dr Eric Wood, Litha Nyhonyha and Maganheran Pillay. In the first case Dr Wood is suing Mr Nyhonyha and Mr Pillay, seeking to declare them delinquent directors under the Companies Act; and in the second, Mr Nyhonyha and Mr Pillay seek the same relief in relation to Dr Wood. Mr Nyhonyha and Mr Pillay argue that they never agreed to sell a majority stake in the company to the Guptas. With Wood citing other issues, the parties agreed to end their relationship, each taking a share of Regiments' assets and work. These negotiations were, however, never concluded. Dr Wood resigned on 29 February 2016, retaining a shareholding in Regiments. Regiments had two divisions, Regiments Management Consulting and Regiments Financial Advisory. When Dr Wood moved to Trillian Capital, he moved with several employees from the Regiments Financial Advisory Division. On 1 March 2016 he was appointed as CEO.

### 2.5.6 Cession of Regiments’ contracts with state-owned companies to Trillian

There were legal disputes ongoing between the three Regiments directors as to who is entitled to the company’s work and clients. By the time Dr Wood moved over to Trillian, Regiments had been working with and had been paid by state-owned companies, including both Transnet and Eskom. Regiments had been working as the "supplier development" partner of McKinsey, undertaking financial advisory work. Despite the disputes between Regiments’ directors, Regiments’ work appears to have been ‘ceded’ to Trillian by both state-owned entities.

### 2.5.7 Trillian payment to Tegeta

The *State of Capture* report found that Trillian Capital “Contributed to the purchase price of OCH”, a deal which was concluded in April 2016. The report details contributions in the following amounts: TA contributed R 95 639 309.00; TAM contributed R 74,784,000.00; and Trillian Capital contributed R65 000 000.00.

### 2.5.8 McKinsey and its supplier development partnership with Trillian

The Budlender Report references a memorandum signed by Vikas Sagar and Alex Weiss of McKinsey, and Clive Angel and Eric Wood of Trillian, "McKinsey-Trillian partnership principles for the Eskom turnaround", dated 15 December 2015. Concerning the relationship between TMC and McKinsey, McKinsey executive, Lorenz Jungling, wrote,

*“The programme does not have a detailed long term plan that will make this explicit. Besides, regardless of TMC resources allocated to projects, TMC will still get their 30%”.*

The only reasonable inference from this is that the contribution expected by McKinsey from Trillian was not defined and that there was no specified relationship between remuneration and output or quality.

Despite having worked with Trillian for Eskom since January 2016, after completing a risk review process, McKinsey formally rejected Trillian as a supplier development partner in March 2016. Only after having faced severe public criticism, McKinsey published a formal statement in October 2017 in which it stated:

*In our eagerness to be responsive to the challenges Eskom faced, we mobilised our teams too quickly and began working alongside employees from Trillian in late 2015, before we later rejected a partnership with them in March 2016. Whilst our risk processes ultimately worked, we should have completed them sooner. We should not have begun to work alongside Trillian before we had completed our due diligence and without a contract in place. Had we fully understood Trillian's ownership structure at the time, we would not have considered working with them.*

It further stated:

*We have set aside our full fee for the Turnaround Programme for repayment [to Eskom].*

#### **2.5.9 Sunday Times allegations from 23 October 2016**

A whistle-blower who was later revealed to be Ms Mosilo Mothepu, former CEO of Trillian Advisory, disclosed information regarding misconduct on the part of the company, as well as its executives. These included allegations of irregularities in Trillian's relationships with and work for state-owned companies, including Eskom. The article also alleges that Trillian executives had used their knowledge of the dismissal of Finance Minister Nhlanhla Nene on 9 December 2015, and appointment of Des van Rooyen as Minister of Finance, for their private commercial benefit. Ms Mothepu cooperated with the Public Protector for the “State of Capture” report. It has also emerged that Regiment's principal, Mohammed Bobat, was appointed as an advisor to Minister Des van Rooyen during his brief tenure as Minister of Finance, and after that, as Minister of Cooperative Governance and Traditional Affairs (COGTA).

Trillian responded by denying all the allegations, attempting to discredit Ms Mothepu, and stated,

*“The Gupta family has no shareholding or other interest whatsoever in Trillian Holdings. It has no link to Trillian Holdings or to any of the other constituent members of the Trillian group of companies”.*

However, it has since been revealed that Mr Essa also owned 21.5% of Tegeta (owned by Gupta-owned Oakbay Investments) through his company Elgasolve. The Budlender Report also found that the *State of Capture* allegations that Trillian contributed to the purchase price for OCH to be “likely”.

#### **2.5.10 McKinsey's contract with Eskom, under which Trillian was paid**

A technical investigation by Oliver Wyman, a New York-based international consultancy firm, in December 2016 recommended an independent legal review of contractual relationships between McKinsey and Eskom. The investigation raised noteworthy concerns with the contract, which allowed McKinsey to charge fees in excess of market rates. In fact, it is not clear whether the contract ever entered into force, because necessary conditions were not met before the Conditions Precedent expired on 31 March 2016. Despite this, both McKinsey and Trillian continued to work with and receive payments from Eskom.

#### **2.5.11 The Minister denies any payments from Eskom to Trillian**

Following media reports, on 2 December 2016, Hon. Ms NWA Mazzone, MP submitted a question to the Minister of Public Enterprises, Lynne Brown:

- (1) What amount did Trillian Capital Partners receive in service fees for allegedly negotiating the settlement of a massive insurance claim involving the explosion of a boiler at the Duvha power plant; (2) Did Eskom appoint the specified company to source a new supplier to replace the exploded boiler at the Duvha power plant; if not, why not; if so, what (a) were the fees payable to the specified company in this regard and (b) are the further relevant details;*
- (3) (a) Which other contracts of engagement have been concluded between Eskom and the specified company and (b) what are the costs involved in each case?*

The Minister provided the following written response:

- (1) No amount was paid to Trillian Capital Partners for the Duvha power plant insurance claim. Eskom did not appoint Trillian Capital Partners to negotiate the settlement for the Duvha Power Plant insurance claim.*
- (2) No, Eskom did not appoint Trillian Capital Partners to source a new supplier to replace the exploded boiler at the Duvha Power Plant. There was no need to appoint any external party to assist with sourcing.*
- (2)(a) Not applicable*
- (2)(b) No other additional relevant detail relating to the above is applicable.*
- (3)(a) None*
- (3)(b) Not applicable*

#### **2.5.12 Budlender investigation, November 2016 – June 2017**

In November 2016, Advocate Geoff Budlender was appointed by Mr TMG Sexwale, Chairperson of Trillian Capital Partners (Pty) Ltd, to investigate allegations about the Trillian Group of Companies. These allegations focused on the cession of work from Regiments, Trillian's alleged political connections, links to the Gupta family and associates and Trillian's role in Tegeta's acquisition of OCH.

In his report, Adv. Budlender found that Trillian executives withheld information and deliberately attempted to undermine his investigation. Adv. Budlender was eventually provided with three Trillian invoices to Eskom, all marked ‘paid’. The invoices amount to R266 136 534.00, inclusive of VAT.

<b>Trillian entity</b>	<b>Date</b>	<b>Amount</b>	<b>Description</b>	<b>For the attention of:</b>
<b>TMC</b>	14 April 2016 (paid 14 April 2016)	R30,666,000.00 (incl. VAT)	ESK2016-MC01 “Professional Fees: Pro-rate share of Eskom Corporate Plan Deliverable”	Anoj Singh
<b>TMC</b>	10 August 2016 (paid 13 August 2016)	R122,208,000.00 (incl. VAT)	ESK2016-MC02 “Professional Fees: Financial Advisory for the following Eskom initiatives: Project Surge, Private Sector Participation, Online Vending Services, Hitachi, Duvha, Short-term Funding Facility, Long-term Funding Facility”	Prish Govender
<b>TMB</b>	10 August 2016 (paid 13 August 2016)	R113,262,534.00 (incl. VAT)	ESK2016-MC03 “Professional Fees: Management Consulting for the Following: Programme Management Office, Procurement, Primary Energy, Claims, Generation”	Prish Govender

No tender was submitted for this work. There was, however, one tender submitted for financial advisory services over a three-year period, which was marked as “awaiting client decision”. Adv. Budlender was assisted by Ms Mothepu and the former CEO of TMC, Ms Bianca Goodson.

#### **2.5.13 Trillian’s role in the Duvha Boiler Tender in March 2017**

The Chinese firm, Dongfang, was awarded a tender through a process that sidelined other bidders despite Dongfang’s proposal being considerably more expensive. Media reports in the *Business Day* reported that Trillian had provided the “risk assessment” that contradicted Eskom executives’ assessments and resulted in Dongfang's selection. A court interdict halted the bid in June 2017.

##### ***2.5.13.1 Eskom denies paying Trillian in May 2017***

In May 2017 Eskom Spokesperson, Mr Khulu Phasiwe, confirmed that Trillian was a registered Eskom supplier. He also said that no payments had been made to the company and that “no services were used”.

##### ***2.5.13.2 Salim Essa announces the sale of shares in Trillian***

On 26 July 2017, Mr Essa announced he would sell his majority shareholding in Trillian to one of the company’s partners.

##### ***2.5.13.3 Eskom admits to releasing false information on Trillian in August 2017***

Eskom initially publically maintained that its dealings with Trillian were all in order, citing an investigation conducted by Oliver Wyman. However, in August of 2017 the power utility admitted that these aforementioned statements were incorrect.

#### **2.5.14 G9 Investigation and the relationship between Eskom and Trillian**

G9 Group was commissioned by Eskom Assurance and Forensic to undertake an investigation in response to an internal whistle blower's report. The anonymous report raised the alarm about a payment made to Trillian Management consulting. In particular, the complaint alleged that Trillian was paid within one day rather than 30 days, as is standard practice for service providers.

A confidential interim report produced by G9 confirmed that Eskom had deviated from procurement processes, and found that there was *prima facie* evidence of criminal conduct in relation to Trillian, including of fraud and money laundering, and that this was cause for criminal investigation. Media reports on leaked documents described alleged plans by McKinsey and Trillian to extract revenues from Eskom of up to R9.4-billion for successive services.

On 29 September 2017, remedial action was taken within Eskom and Anoj Singh (“Mr Singh”) was suspended. His suspension was followed on 2 October by that of Prish Govender (“Mr Govender”), Edwin Mabelane (“Mr Mabelane”) and Charles Kalima (“Mr Kalima”). Charges related to alleged unauthorised expenditure, irregular expenditure, financial misconduct, misrepresentations of procurement matters to the board and failing to uphold their fiduciary duties.

### 2.5.15 Procurement irregularities

Regiments' work for Eskom began in 2014 and was procured outside of proper procurement processes, and the applicable legislative and regulatory requirements.

Ms Tsholofelo Molefe (Ms Molefe) testified that she, in her capacity as CFO and her colleagues prepared a “Business Productivity Programme for Cost-Saving Initiatives” to address Eskom’s financial challenges. After presenting this to the Board, chaired by Mr Zola Tsosti in April 2014, the plan was rejected, and she was tasked with preparing a new plan to be presented to the Minister in June 2014. The Sunday following their presentation to the Board, Ms Molefe attended a meeting called by Collin Matjila, then Eskom's interim CEO. Salim Essa arrived at the meeting and proposed that Regiments could assist with this work. Ms Molefe testified,

*“Salim was then asked to tell us what, 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.”*

At the time that Mr Essa made representations on behalf of Regiments, he did not own any shares in the company, and it is highly suspicious why he undertook to play this role and was granted the opportunity to do so.

The following Monday, a second meeting was held at Eskom’s offices and attended by Ms Molefe, Mr Matjila, Eskom employee Steve Lennon, and Regiments’ Director Eric Wood, along with one of his colleagues. At this meeting, Regiments indicated that they would be working with McKinsey, as they had done at Transnet. According to Ms Molefe’s testimony, she informed Matjila that the work in question would need to be procured through Eskom’s emergency procurement processes, given the urgency of the work. He then rejected her suggestion and stated,

*“I can see you are uncomfortable with this matter. If you are not comfortable, I will sign the agreement with Regiments.”*

Ms Molefe informed Matjila that he could approach the Board to amend procurement delegations so that a contract could be established, which he allegedly refused.

*We, in my discussion with Collin I said if it's an emergency you need to tell them to give it to us in less than 5 days and, however, what happened is that they came back to us within 14 days, if I remember a very well, because one of the things I raised when they sent their proposal. In fact, they did not send a proposal they sent a draft agreement of 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, I actually wrote an email to Mr Matjila because they sent me the agreement and I said to him it is on this basis that this 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, 14 days on an urgent basis and therefore this did not constitute an emergency. He then...I sent him an email, and I said I copied the head of legal then Mr Neo Tsholanku, and I said I suggest that Mr Neo Tsholanku gives 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's got a mandate from the shareholder and the board that certain things that need to happen urgently and we don't have time for wasting, we don't have time to waste with our long-winded procurement processes.*

While Ms Molefe drafted a supplier agreement as instructed by Matjila, in her capacity as CFO, she refused to sign this agreement with Regiments. She put this in writing, addressing concerns to Matjila, the Chairperson of the Eskom Board, Mr Zola Tsotsi, and three non-executive directors of the Board, Mr Mafika Mkhwanazi, Dr Boni Mehlomakulu and Ms Bejabulile Luthuli. Among Ms Molefe's concerns were the process, uncompetitive pricing of Regiments' proposal, and the contents and assumptions therein. Ms Molefe sought the opinion of primary energy experts within Eskom, who also took issue with the proposal.

In her correspondence, she quoted from a memo prepared by Eskom's internal legal counsel, Adv. Neo Tsholanku ("Mr Tsholanku"), referring to section 217 of the Constitution. Tsotsi called a meeting in response to Ms Molefe's email. According to Ms Molefe's testimony, Tsotsi allegedly pressured her saying, "We are wasting time and long-winded procurement processes; and, heads are going to roll." The aforementioned Board members supported Ms Molefe's concerns, but, she indicated that Tsotsi's comments, "Suggest to me that he had no regard for those procurement regulations". The Board did not approve the contract, which had an escalating fee structure, relative to savings delivered to Eskom, and reaching in the region of R500 million. The Board did, however, without a competitive process, approve a high-level desktop review of the proposed initiatives, which was delivered for R800 000.00. When asked what value, if any, was delivered to Eskom, Molefe answered,

*"I would say very little...There must have been ten or 15 initiatives that they put on the table. A number of them, we said that they were not viable."*

#### **2.5.16 Regiments the "Supplier Development" ("SD") partner of McKinsey at Transnet and Eskom**

Dr David Fine testified that the relationship between Regiments and McKinsey began at Transnet. McKinsey was informed that Transnet's existing SD partner, Letsema, was conflicted on a specific project. Transnet then introduced and recommended Regiments to McKinsey, and the partnership commenced in 2013, initially led by Nivan Pillay. Eric Wood took over from Pillay, following a

compromising media report in 2014. By mid-2015, McKinsey was convening weekly meetings to address challenges with Regiments because, as noted by Dr Fine, "the quality of work had declined".

Despite these reported concerns, at this time, McKinsey and Regiments extended their relationship. As testified by Ms Mothepu,

*"The understanding of my reappointment at Regiments [in June 2015] was to lead the Eskom team. Regiments had together with McKinsey submitted a proposal to Eskom and Regiments was supposed to be McKinsey's supply development partner."*

She goes on to describe the relationship between Regiments, McKinsey and Eskom:

*The MSA (Master Service Agreement), was supposed to be between McKinsey and Eskom. Now McKinsey was supposed to as the main contractor earn 70% of the fee and Regiments was supposed to receive 30% of the fee, and this was on if you go to paragraph 3.1.1, I'll just read it; that McKinsey and Regiments Capital had submitted a joint proposal in the first quarter of 2015 where McKinsey and Regiments were supposed to assist Eskom with management consulting services which included cost savings on procurement, generation, primary energy and the establishment of Eskom's Top Engineering Program...Now, Regiments was supposed to lead its own financial advisory transactions with Eskom called 'balance sheet optimisation and cash unlocking initiatives'. Now, because Regiments are financial advisory experts, the fees would be a 95% to Regiments and 5% to McKinsey, and that 5% was an administration fee. It was anticipated because the main contractor was McKinsey, Eskom would pay them directly, and then McKinsey will pay Regiments as a subcontractor.*

Whereas Ms Mothepu suggested this was a subcontracting relationship, Dr Fine stated that as a matter of policy the relationship between McKinsey's SD partner and Transnet or Eskom was direct. This was done ostensibly to allow BBBEE points to accrue to the SOC and not to McKinsey.

Although Regiments had worked with Eskom before, Ms Mothepu testified that her work, through Regiments, commenced at Eskom when Anoj Singh was appointed (the acting) CFO in July 2015. This work followed more informal assistance with a plan for his first 100 days, which, Mothepu testified, was undertaken in various venues around Johannesburg (and not at Eskom's offices). They only started to meet at Eskom offices after he was formally appointed as CFO.

#### **2.5.17 Regiments' relationship with McKinsey**

The relationship between Regiments and McKinsey, made it possible for work to be ceded to Trillian under questionable circumstances. When Trillian was established as a company, it had no apparent initial relationship to Regiments. However, it appears that Essa and Wood's relationship provided a basis for Trillian to take over Regiments' public sector work, even before Essa had no formal financial link to Regiments. As noted above, Essa and Wood had already, together, successfully lobbied Matjila

and Tsotsi for access to work from Eskom for Regiments in 2014, before the relationship described by Ms Mothepu.

Essa, with Wood, formally acquired Regiments' advisory business in 2015, absorbing staff, work and clients under Trillian, which was being established late in 2015. Ms Goodson describes her introduction to the company at this time,

*“My very first introduction to Trillian was through an organisation called Integrated Capital Management, and the individual particularly was Mr Clive Angel... he told me that Integrated Capital Management...was a very small company that was tasked with effectively building or establishing Trillian.”* In addition to Angel, there were two other directors, Mark Chipkin and Stanley Shane.

Trillian Capital was being established with several subsidiaries, as noted above. Ms Goodson would be the CEO of Trillian Management Consulting, a role she occupied from 1 January 2016 – 25 April 2016, having resigned on 19 March. Ms Goodson testified that during this time, she had one employee, her COO, and while she reported to Angel, she understood that Salim Essa was her ultimate boss. When she joined, she was told that Mark Pamensky, who would later join Eskom's Board, would be the head of Trillian Properties, although this did not materialise.

Although Wood was involved in Trillian from the beginning, he moved across formally in March 2016 with his staff, as described by Ms Mothepu:

*“I left regiments on the 29th of February but it was not a resignation, it was a section 197 [transfer] in terms of the Labour Relations Act when Mr Wood and Salim Essa bought Regiments Advisory, and I was transferred from Regiments Capital to Trillian Financial Advisory.”*

The announcement for this acquisition and transfer was made in December 2015, and Trillian only acquired significant staff capacity at this stage on 1 March 2016.

Ms Goodson testified that her role was specifically to build the human resources capacity for Trillian Management Consulting. It was not to seek work, and she was informed that a work stream had already been established with South African SOCs, as she states,

*I was informed very early on that work was secured, so my function would not be to sell work and to go and find work but would it be to be able to build up the human capital and the expertise and the IP within the organisation to fulfil that work.*

Ms Goodson testified that she was informed that Salim Essa was instrumental in procuring work:

*Clive [Angel] then also explained to me that Salim was somewhat operational in the sense that Salim was very involved in the business. He wasn't one of those shareholders that sort of just left it to the CEOs. He would help get us business; Clive made it clear that the relationships that our*

*major shareholder had enabled many opportunities and Salim was the boss, and Salim made the final decisions.*

The work that was secured, however, and as with the Regiments contract with Eskom, fell outside of legally prescribed procurement processes, as set out below.

Dr Fine explains in his testimony how McKinsey came to work with Trillian:

*So, in late 2015 when we raised our concerns about the partnership with Regiments, Mr Vikas Sagar said that the Regiments partnership was splitting and that they were going to separate. The investment banking and property business as I understood it at the time was going to stay with Regiments, and the consulting business was actually going to come out of Regiments and be formed into a company called Trillian. My understanding at the time was that the explanation given by Mr Eric Wood who was going to go with Trillian was that the partners were not all convinced that the consulting business was a priority, that the Regiments people did not want to invest further in this consulting business, and therefore by taking it out of Regiments and starting a new company he would have access to the investment resources and investors to start a truly large and significant black-owned consulting firm in South Africa. At the time that did also sound like an attractive proposition, because we had worked well at the point in time and we want to build strong black-owned consultancies in South Africa, we think that's important. And so, we did consider Trillian.*

McKinsey formally terminated their relationship with Regiments in a letter to Transnet on 26 February 2016, ostensibly because of media reports linking former employee, Mr Mohamed Bobat to the Gupta family. While Dr Fine testified that Trillian was being considered, pending a risk review process, he admitted that in early 2016 he knew that McKinsey and Trillian already had a substantial relationship with Eskom.

#### **2.5.18 McKinsey's contracts with Eskom**

The contracts under which Trillian worked, are questionable and may not be valid. Ms Daniels explains the structure of contracts and relationships between McKinsey, Trillian, and Eskom, in paragraph 127 of her statement:

*It is common cause that payments to McKinsey and Trillian 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 Trillian for this period.*

Daniels statement goes on in paragraph 138-139:

*The Second Contract was entered into on 7 January 2016 between Eskom and McKinsey, signed by Dr Alex Weiss (McKinsey) and Edwin Mabelane. It is called a “Service Level Agreement”. It however also appears to be called the “Master Services Agreement” in certain documents. It authorises approximately R540 million in down-payments.*

Different actors have variably represented the status of the "Master Service Agreement" ("MSA"). Work carried out by McKinsey and Regiments, and McKinsey and Trillian that fell under the Second Contract was ostensibly carried out 'at risk', in advance of any contract being approved by Treasury, as was required because of the deviation from transparent and competitive procurement processes. Ms Mothepu explained,

*We were told that the MSA was being approved by [the] Board, it's being negotiated, it's just a matter of time for it to be approved, and we...Matshela Koko, I remember at one meeting said that he had approached National Treasury to approve the deviation of appointing McKinsey and he had gotten a legal opinion.*

Dr Fine stated that McKinsey worked “in good faith”, believing that there was a valid contract between McKinsey and Eskom for all work invoiced. He appeared to be referring to the First Contract, and it is unclear how a company as sophisticated as McKinsey could have believed that its work was being conducted under the First Contract. McKinsey had sent Eskom eight invoices for approximately R80 million under the First Contract, from 30 October 2015 to January 2016, a period of just three months. Ms Klein's statement raises questions concerning the work that was done and the invoices delivered, as she indicates that the work was intended to be carried out over eight months:

*At the meeting of 10 September 2015, the Board resolved:*

- *to appoint McKinsey as the sole partner for the financial and strategic matters of:*
- *Cash flow and profitability targets for the Financial Year 2016;*
- *Updating the business cases for the Medupi and Kusile [power plants];*
- *Development and dissemination of the new design to cost strategy;*
- *Adapting Eskom's governance model to ensure delivery of the new strategy;*
- *that McKinsey should be contracted on a fixed cost basis with a total contract value of R101 733 124.80 for a period of 8 months*

The Acceptance Letter for the contract was sent by Eskom and signed by Matshela Koko in his capacity as Group Executive: Technology and Commercial, and by Sagar and Weiss of McKinsey.

Mr Rajie Murugan (“Mr Murugan”) of G9 Consulting Services presented the findings of the organisation's investigations into the relationship between Eskom and Trillian (hitherto confidential),

whose scope included an evaluation of the relationship between Eskom and McKinsey, and McKinsey and Trillian. There were also two issues concerning both contracts mentioned in Ms Daniels' testimony: 1) the contract was procured under a "sole source" bidding processes; 2) the remuneration structure was questionable.

As to the question of sole sourcing, the G9 report makes it clear that no evidence was forthcoming of any form of market research or other justification for a sole sourcing arrangement (p76):

*"In respect of Eskom Senior Management, they followed the same route when they engaged McKinsey on the MSA project. This means a Sole-Source and a flouting of policies and processes to engage McKinsey."*

Reviewing recordings of the MSA steering Committee, on which McKinsey and Trillian were represented, G9 observed that Treasury was not satisfied with the sole sourcing arrangement, and there were several other issues that remained unresolved. G9 concludes, *"These are, in our view, the actual reasons why the MSA should not have commenced in the first instance."*

Nonetheless, as the Committee heard from Ms Goodson, Ms Mothepu and Ms Daniels that work under the MSA did commence. Before McKinsey's termination of its relationship with Trillian, it functioned as the *de facto* legitimising vehicle for Trillian's access to Eskom work and payment. G9, in stark contradistinction with Dr Fine's statements, observes that McKinsey's acceptance of Trillian's extraction of fees is problematic (p88), *"...even if there was no criminal intent or conduct on the part of McKinsey, it cannot subjugate its role to one of an innocent by-stander or displace responsibility to Eskom"*. It is highly improbable that a company as sophisticated as McKinsey could, in good faith, have acted on the assumption that a contract based on a sole sourcing arrangement and on the applicable remuneration structure was lawful. In any event, McKinsey's potential use of Trillian to extract rents from Eskom may constitute criminal conduct.

#### **2.5.19 Lack of approval by Treasury for MSA**

Treasury approval was never secured for the MSA, and steps were taken to obfuscate this fact. Further to the matter of the remuneration model for the MSA, the G9 investigation found that while Treasury approval was sought for both the sole sourcing methodology and the remuneration model, no such approval was given (p55, 116). G9 notes (p53) that Mr Aziz Laher ("Mr Laher"), the Eskom Compliance Manager and PFMA specialist had alerted Mr Mabelane, Mr Govender and Mr Singh to the fact that the MSA required Treasury approval. Emails to this effect were included in a submission by the most recent Eskom Board, prepared by Bowman Gilfillan on 14 March 2017. Mr Tsholanku, Eskom's former Head of Legal who was described in Ms Molefe's testimony as a voice of caution, had also done the same, as had Mr Dale Sicard ("Mr Sicard") (p53).

G9 interviewed Mr Dave Gorrie (“Mr Gorrie”) who was one of the senior Eskom managers that sought confirmation of procurement arrangement. Mr Gorrie stated that Treasury approval had been secured for the single source method and remuneration model, offering the following email from Mr Solly Tshitangano of Treasury as evidence thereof:

*Practice Note 3 of 2003 is still applicable until replaced by new instructions after the promulgation of the new Treasury Regulations. The retainer/contingency fee principles are not clearly outlined in the practice note, if you intend applying them, you need to do some further work to ensure that you do not compromise the principles of Section 217 of the Constitution and other legislation.*

It is unclear how this email from Treasury could, in any way, evince that Treasury had approved the single source method and remuneration model.

Despite the concerns raised by the Treasury over the sole sourcing methodology and the remuneration model, G9 states that Mr Mabelane was of the opinion that all necessary approvals had been secured (p62-64):

*He was confident that Eskom had received Treasury approval; and that all the gate-keepers such as Finance and Legal were agreeable to the Project in the form that it was constituted and executed.*

Mr Govender, who was Project/Contract lead on the MSA contract, also maintained that all approvals had been both sought from Treasury and had been met, but his position became more nuanced in subsequent interviews with G9 (p64-65):

*He [Mr Govender] confirmed in his first interview that Treasury approval for a deviation had been sought and received. However, in his last interview he indicated that the approval was not required and that what he and his team wished to be confirmed, was whether Practice Note 3 of 2003 was still valid.*

Given the response that Mr Gorrie received from Treasury, the claims by Mr Mabelane and Mr Govender show, at best, a gross misunderstanding, and at worst, deliberate falsification.

#### **2.5.20 Payment to Trillian**

Trillian was paid for work under arrangements negotiated between McKinsey and Eskom, but without a contract in place between Trillian and Eskom. Ms Daniels explained the relationship between Trillian's invoices and the contracts mentioned above in paragraph 132:

*Trillian Management Consulting (Pty) Ltd issued an invoice (referenced as MC01) to Mr Anoj Singh on 31 January for R26 900.00 excl. VAT. It appears that this invoice was sent to Eskom on 12 February 2016.” The invoice does not, however, reference the First Contract explicitly.*

The G9 report clarified:

*Our analysis of the NEC contract found no mention of Trillian as a sub-contractor or as an SD&L partner. I did make mention of a requirement for 30% of the contract to be sub-contracted. Whether this is a standard clause in the NEC which was not removed or an agreed clause by McKinsey is not clear.*

*Having said that, there is some recognition by McKinsey that a portion was to be paid over to Trillian. This is in the form of a letter by Mr Vikas Sagar of McKinsey dated 09 February 2016, where h[e] requests [t]hat Trillian be paid directly...There is no other letter from McKinsey instructing Eskom to pay Trillian on the MSA contract.*

The G9 report also found no evidence that, “McKinsey monitored, supervised or signed off on Trillian invoiced, even though McKinsey only invoiced for their 70% share.” In other words, Trillian's work was not conducted as would be expected for a SD&L arrangement and its arrangement with McKinsey was irregular.

The cover letter for this invoice, to which Ms Goodson’s testimony also refers, states that this work is for “the support of the CFO office on the Eskom Procurement Turnaround and defined Benefit Obligations.” Although the letter bears the signature of Ms Goodson, she testified under oath that her signature was used without her knowledge or consent. Furthermore, Ms Daniels stated that whereas McKinsey had issued a letter authorising Trillian to invoice Eskom directly, on the condition that McKinsey confirmed amounts claimed relative to work done, no such confirmation was received.

Daniels continues in paragraph 136-137 of her statement:

*This invoice was signed for payment by Prish Govender and Edwin Mabelane on 8 April 2016. The invoice was date 31 January 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.*

G9 undertook interviews with Eskom officials to establish how payments could be made in favour of Trillian in the absence of proper contracts. It is clear that a purchase order number (which was necessary under Eskom's control mechanisms for any such payment to take place) was created without complete documentation (p47-49). Mr Albert Mokoatedi (Mr Mokoatedi) who created the purchase order number, provided G9 with an affidavit and was interviewed by G9. He claimed that the Acting General Manager, Ms Masedi Skosana (Ms Skosana) and Manager, Mr Andile Mdakane (Mr Mdakane) had



discussed the fact that there were no supporting documents for the creation of a purchase order number. When documents did arrive at the request of Mr Mdakane to Ms Skosana, they were not signed. Mr Mokoatedi, in his affidavit, stated, *“The creation of the Purchase Order in this instance may be irregular and not consistent with policies and/or legislation.”*

G9’s interview with Ms Nokwanda Gambushe (Ms Gambushe), Senior Advisor, shed further light on how Trillian came to be paid without any valid contract in place (p 52, contents confirmed in an affidavit presented to G9):

*She [Ms Gambushe] confirmed that on the 19<sup>th</sup> December 2016, Mr Charles Kalima came to her and provided her with a Board Submission document and Board Minutes to create a contract on the SAP system. She indicated that this was not the norm. She stated that this was not the norm.*

*He stated to her that the contract must be created in favour of Trillian; although it was not clear to her in terms of who Trillian was and what it was doing. The submission only referred to McKinsey's BBBEE Partner. She complied with the request from her General Manager.*

#### **2.5.21 Trillian paid for work that was not done by its employees**

Ms Mothepu testified that Regiments' director and CEO of Trillian Capital, Dr Eric Wood (Dr Wood), established the precedent of invoicing public sector entities without proper agreements being in place and for work not undertaken. This pattern was established while Dr Wood was still at Regiments, in the company's dealings with Transnet:

*So, Eric Wood, while we were still at Regiments proposed an SPV structure and he asked me to go see the Transnet engineering team to essentially propose this SPV structure and how it will financially benefit Transnet. And he asked my team and I to put a proposal, so that is what we did. And then he asked me to ask the...Tebogo Leballo, the finance director to generate a R10 million invoice, and I said no but you can't, I'm not going to do that because well we haven't been appointed and we haven't done any work. So, I gave Mr Clive Angel a copy of the proposal and he sent it to Mr Tham Jiyane on the 22nd of February 2016...no sorry, that was on the 17th of February, so he says Dear Mr Jiyane attached please find, hold on... so, on the 17th of February, pardon me, he sent the proposal to Mr Tham Jiyane, and then on the 22nd of February he sent the R10 million invoice. I would like to place it on record that February Trillian Financial Advisory had no employees Mr Marc Chipkin was the sole director, no work had been done for that invoice.*

This pattern of irregular and potentially unlawful conduct continued at Trillian. On 14 April 2016, TMC was paid R30.7 million by Eskom for a ‘corporate plan’. 14 April 2016 was the same day that Tegeta was required to transfer money to assist Tegeta to purchase OCH. Ms Goodson testified that this invoice was issued for work that was not undertaken by TMC:

*“Up until the point of the 1st of March 2016, Trillian Management Consulting had two employees. There was me and there was my COO. We didn't do billable work.”*

Ms Goodson testified that senior McKinsey employees created the clear impression that Trillian was not required to do work in order to be paid,

*“So, there was one leadership meeting particularly with McKinsey where, and I have minuted it and it is part of my annexures, where one of the very senior partners made very harsh remarks about, ‘well just take your 30% and go’.”*

Ms Goodson’s testimony is referring to the comments of Mr Jungling.

#### **2.5.22 Regiments, Trillian and McKinsey paid for work that may not have been appropriate or required**

In line with concerns noted by Ms Molefe and on the limited value and quality of Regiments’ work, Ms Mothepu testified that it was clear that Eskom had extensive human resources with the necessary skills to carry out much of the work that was being done.

Dr Fine defended the fee charged by McKinsey for work done at Eskom. However, he did concede that the fees charged were "large" and that McKinsey's work may not have been appropriate:

*I'm not going to stay here and deny that it's [large]. I'm not saying we haven't done large programs elsewhere, [...] what worries me more is in retrospect, and I look at the performance of Eskom, firstly, were we working on the right issues? Was Eskom using us in the right way on the right topics? Because the liquidity is compromised now, and the [prices] have gone [up]. Number 2, I don't think I think that that amount of resource on the ground, I don't think that when I look at Eskom, they could absorb that amount of change, and so, in retrospect, you know, I'm not going to sit here and try to defend that number...*

The issue of McKinsey's payment and whether Eskom received value for money was also considered in the G9 investigation. The remuneration model for McKinsey was based on modelled hypothetical cost savings that were attributed to McKinsey's intervention by McKinsey itself. As the remuneration model has remained an unresolved concern, G9 (p113-114) notes that the risk-based remuneration model was used to justify fees at approximately R1.2 billion more than the R243,405 million that McKinsey would have been able to charge at the high end of DPSA consultant rate scales for the equivalent six months. The hypothetical savings were calculated as a mathematical exercise by McKinsey. It is unclear how Eskom officials could lawfully justify the McKinsey remuneration, especially given the financial difficulty experienced by Eskom at the time, without interrogating the veracity of these alleged savings.

#### **2.5.23 Trillian’s BBBEE credentials questionable**

Trillian's BBBEE credentials were not credible, and senior McKinsey staff were complicit in this arrangement. Trillian, like Regiments, was meant to function as an SD partner to McKinsey. As stated by Ms Goodson: "My opinion is that what I was told that Trillian would become, which was a leading black-owned Proudly South African Management Consulting company, I believe that that was a lie." About her concerns, Ms Goodson provided testimony that consulting work was sub-contracted to two Dubai-based companies, E-gateway (which had a contract in place with Trillian), and Cutting Edge (which had no contract in place with Trillian). Ms Goodson provided an example of how this sub-contracting was functioned:

*So, informed by my background in mining, I understood the Duvha replacement project to be very much a EPC-type project where the boiler needed to literally be replaced. So it wasn't a management consulting role. It wasn't a management consulting-type project in any way - it was a EPC project. However, the relationship with Trillian and the Duvha project, was E-Gateway. E-Gateway, Javed specifically, said to me that they are working with...they are doing the Duvha replacement. I saw what I thought was a contract; it's also a part of my annexures, where there's a specific Chinese company - I think it's Hypeg - that was actually...had the relationship with Eskom. I don't understand the relationship between E-Gateway and that organisation at all. But I do know that E-Gateway asked for an audience with Edwin Mabelane to discuss Duvha, that they were bringing people in from Dubai and from India to work on the Duvha project. They...Trillian needed to be...or was requested to be their BEE partner for this work – Trillian Management Consulting Specifically. And Trillian Management Consulting needed to help them get their team members visas. So, I was involved in helping E-Gateway do this work, but Trillian Management Consulting was not going to do the work.*

Ms Goodson had additional concerns about the contradiction between her mandate to set up a black-empowered consultancy and the extensive use of non-South African consultants. In this regard, Ashok Narayan mediated the relationship between Cutting Edge and Trillian. Narayan is a known Gupta associate who has been linked to Homix; a letterbox company allegedly used to move money for, amongst other things, the acquisition of Optimum Coal Holdings by Tegeta.

Dr Fine's testimony, describing the cession of work from Regiments to Trillian, concurs with Ms Goodson:

*In early 2016, I became aware that there was a substantial working relationship between McKinsey and Trillian...The first concern was we had Eric Wood, a white South African, starting a black advisory firm. It wasn't clear to me, where were these other owners?*

The G9 report notes that (p31), "Trillian was registered at Eskom as an EME [Exempted Micro Enterprise] and as a 0% Black owned company in April 2016." Given that Trillian was set to earn 30%

of the MSA contract, and noting its alleged contribution to the purchase price for Optimum Coal Holdings, it is difficult to posit a rationale for an EME classification. This EME status was also used by Mr Wood in his motivation for Trillian to be paid as a matter of urgency in a shorter timeframe than the standard 30 days.

#### **2.5.24 Eskom directors, executives and employees flouted policies and rules in order to contract with and pay Trillian**

The G9 Report (p35, 81) paints a picture of the corporate culture at Eskom in which instructions from Executives and senior manager superseded regulations and rules.

Eskom's directors are required to act in good faith and for a proper purpose, in the best interests of Eskom, and with the degree of care, skill and diligence that may reasonably be expected of them. Additionally, Eskom directors have a duty not to allow the company to trade recklessly, with gross negligence or fraudulently. It appears that the Eskom directors grossly failed to comply with these requirements.

Section 45 (c) of the PFMA further places a burden of responsibility on all Eskom officials, who

*Must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure, and fruitless and wasteful expenditure and any other revenue due.*

Should any employee witness any of the abovementioned actions, it falls to them to report this. This is not, however, what appears to have happened. The Budlender Report, the Wyman Report and the G9 report all found evidence of procurement regulation, policies and procedures being subverted by Eskom officials. The G9 report identifies specific individuals to whom particular acts of wrongdoing can be directly attributed. These individuals whose behaviour was found to be unusual and irregular include:

- Anoj Singh (p129-130), to whom Regiments and Trillian officials, including Mr Wood and Ms Goodson, appeared to have unusually direct access;
- Mr Mabelane (p131-132) and Mr Govender (p132-133), whose signatures enabled Eskom's payment of Trillian invoices, and who appear to have misrepresented facts to G9 consultants;
- Mr Kalima (p134), who was instrumental in paying Trillian by loading the company onto the SAP system.

There are also findings against Ms Masedi Skosana (p130) for failing to raise the alarm regarding Trillian's payment; and Ms Maya Naidoo (p130) for her role in enabling Trillian while serving on the Steering Committee.

Noting McKinsey's culpability, G9's analysis does conclude, *"The manipulation, misrepresentation and calculated introduction of Trillian, is most likely to have emanated from an Eskom Official, rather than*

a McKinsey one." This latter statement is in line with Dr Fine's account, notwithstanding the particular actions of his colleagues, Mr Sagar (who had since resigned), and Mr Lorenz Jüngling. This finding, however, was contradicted by Mr Mabelane, as reported by G9, who maintained that McKinsey had introduced Trillian as their SD&L partner (p63). It should be noted that Regiments had been introduced to McKinsey at Transnet by Transnet officials and that the same officials had been brought in to work with Eskom via Salim Essa. Given that these same officials then became part of Trillian, it is difficult to draw clear lines which would support the idea that McKinsey had introduced Trillian as an unknown entity to Eskom and its officials. In either case, McKinsey would not be absolved of liability if they still unlawfully exploited their relationship with Trillian to access benefits from Eskom.

#### **2.5.25 The role played by Matshela Koko**

Matshela Koko ("Mr Koko") denied facilitating Trillian's interaction with Eskom in his testimony before the Committee. This version of events was presented despite evidence of interfacing with Trillian officials and signing the Acceptance Letter for the MSA contract that was sent by Eskom in his capacity as Group Executive: Technology and Commercial, which was also signed by Sagar and Weiss of McKinsey. In response to a question as to whether he facilitated Trillian's contract and payment, Mr Koko stated, *"I'm on record that I've said no"*. In his statement submitted to the Committee, Mr Koko explains his position on the MSA:

*Para 162: I do not know how Trillian got involved with McKinsey. However, representatives of Trillian, acting on McKinsey's behalf, started participating in functions executed by McKinsey as from some time at the beginning of 2016.*

*Para 163: Trillian apparently submitted an invoice for R30.6 million directly to Eskom early in February 2016. I was not aware of it at the time, but became aware on 10 February 2016 during a meeting that I had with Ms Bianca Goodson, then Trillian's CEO.*

*Para 169: I was not involved in the approval of the now controversial payments that Eskom made to Trillian. I did not approve any such payments and first learnt that direct payment had been made to Trillian through the press.*

These statements directly contradict Ms Daniels' statement. The Trillian contract was only one example of the flouting of procurement rules that have been associated with Mr Koko's career at Eskom. Mr Abraham Masango ("Mr Masango") filed a whistle-blower's report covering, among other things, the conduct of Mr Koko. Mr Masango testified before the Committee, that he was suspended in order to discredit him as a witness during Mr Koko's disciplinary hearing.

#### **2.5.26 Governance issues**

#### **2.5.26.1 Trillian advising on procurement for which it was competing**

Dr Fine testified that Trillian was conflicted in the work it was undertaking on procurement for the Duvha Boiler. Eskom's governance systems failed to identify and remedy this conflict:

*In annexure G, you see that there was another issue that arose with Trillian and which gave us grave concern, which is that they were supposedly part of a Consortium bidding for the Duvha Boiler and at the same time were working alongside us in Eskom advising Eskom on procurement. And we wrote to them twice expressing our very deepest concern and asking for them to respond, which they never did, which was also the basis by which we terminated our relationship...potential relationship with Trillian.*

#### **2.5.26.2 Record keeping by Eskom officials for procurement under the MSA contract**

The G9 report notes that not only were procurement rules flouted by Eskom officials, but detailed documentation appears to have either been “misfiled, missing or withheld” (p12). Available records, “could hardly be seen to be acceptable documentation and source material to sustain a R1.4 billion payment” (p76). Furthermore, G9 notes that the MSA was never signed and that this was commonly understood to have been the case. Ms Lulama Njaza (“Ms Njaza”) was the custodian of the Master Files for the MSA project (p46). However, Ms Njaza did not have a copy of the MSA contract and, “was surprised that one [a signed agreement] exists.”

#### **2.5.26.3 False information provided by Eskom executives about Eskom's relationship with Trillian**

The statement issued by Minister Brown to Hon. Mazzone, MP on 2 December 2016, was based on information provided by Anoj Singh. Mr Qoma's statement notes this, and additionally points out that the Minister did not immediately discipline Singh for this action:

*A response Singh provided to Minister Brown in relation to a question about McKinsey/Trillian ended up causing the Minister to mislead parliament due to the misrepresentation embedded in it. As a result, the DA raised a complaint with parliament and reported the Minister to the Public Protector. In spite the embarrassment that came with this shameful moment, Minister Brown didn't take action against Singh and/or Board. She put her head down and played for time. She only feigned ignorance when Eskom was forced to apologise publicly for having misrepresented the firm's report. You don't need to guess who was behind this misrepresentation.*

Minister Brown, in her statement to the Committee, alleges that Eskom executives deliberately falsified information and made material misrepresentations of fact:

*Soon after the pension debacle the media published information that Eskom had paid millions of Rands to a company called Trillian. This information directly contradicted the response Eskom had given me when the matter was raised in a Parliamentary question in December 2016. (The payments had not come to me for approval, so I was reliant on Eskom for accurate information.) It became clear that I had been manipulated into lying to Parliament, I demanded an explanation from Eskom's CFO Mr Anoj Singh. I subsequently instructed the Board to institute an investigation into the matter.*

*I believe that Eskom deliberately lied to me about the Trillian matter...*

*When I appointed an interim chairperson and brought new blood onto the board following the resignation of Dr Ben Ngubane, my first instruction to the board was to institute investigations into Mr Singh, in respect of Trillian, and Mr Koko.*

#### **2.5.26.4 Trillian used by members of the Eskom Board BTC to influence procurement for the Duvha Boiler**

Eskom not only paid Trillian sizeable amounts but also attempted to use Trillian reports to justify and explain critical procurement decisions. Trillian provided Eskom with a "risk assessment" of bids which had been submitted for the supply of a new boiler at Duvha.

#### **2.5.26.5 Multi-million Rand payments to Trillian**

Eskom Board members claimed that they had no knowledge of multi-million Rand payments to Trillian, whereas the Board Tender Committee ("BTC") played a critical role in Trillian's financial gain. The BTC was required to approve arrangements with McKinsey, Regiments and Trillian. The G9 report states that executives attempted to use this fact to evade responsibility. While the report does not support the executives' position, it does place a degree of responsibility with the BTC. The report notes (p87): "All submissions and approvals were obtained at the BTC level." Ms Naidoo and Ms Klein denied responsibility in their statements to the Committee.

Ms Naidoo stated that the Board did not approve payments to Trillian. She refers to a Tender meeting on 21 October 2015:

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

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

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

Ms Venete Klein concurs with this view, stating:

*I was not aware that Eskom had done any work with Trillion, and I was therefore not uncomfortable when I read in the media that Eskom had apparently indicated to the Minister that Eskom had not paid any amount to [Trillian]. [Trillian] had never been mentioned as part of the McKinsey contract when same was presented to the Board for approval.*

Ms Klein states that the matter was raised with Mr Singh at a meeting of the Board on 29 November 2016. He explained that the payments were authorised because McKinsey had the right to sub-contract work, under the Master Service Agreement (The Second Contract in Ms Daniels' statement). Ms Klein continues, "Management had revisited the MSA with McKinsey, being concerned about procurement on a single source basis," and "The MSA [Master Service Agreement] with McKinsey was subsequently terminated." She states that other work that was undertaken by Trillian, including risk assessments, were not brought to the Board for approval.

#### **2.5.26.6 Role of Eskom executives in Trillian transactions and other procurement irregularities**

The Board failed to sufficiently address the alleged role of Eskom executives in the impugned Trillian transactions and other procurement irregularities and has failed to address the role of Trillian itself.

Section 51 (e) of the PFMA stipulates that the accounting authority for public entities (in the case of Eskom, it is the Board):

Must take effective appropriate disciplinary steps against any employee of the public entity who –

- (i) Contravenes or fails to comply with a provision of this Act;
- (ii) Commits an act which undermines the financial management and internal control system of the public entity; or
- (iii) Makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

By the time that remedial action was taken against Eskom executives implicated in the Trillian saga, many of the relevant facts had been well documented in the media, raised in parliament, and the Board



had had access for several months to incendiary content of the Budlender Report, a report by Oliver Wyman consultants (“Wyman Report”), and the G9 Report. The G9 report notes (p106-107) that the Board BTC was presented with a draft Wyman Report on 13 December 2016, which raised similar concerns over the G9 report over the MSA with McKinsey (and by implication, *de facto*, with Trillian). This report was not acted upon by the Board.

The G9 report’s findings that implicate Mr Singh, Mr Mabelane, Mr Govender and Mr Kalima in wrongdoing concerning Eskom's engagement with McKinsey and Trillian were, similarly, not acted upon by the Board. Mr Qoma’s statement explains:

*All the current processes, including Koko, Singh, Govender, Mabelane and Kalima, are seen as having been imposed on the leadership. They all resulted from sustained pressure from the media. The consequent internal processes have also been grudging and retarded to say the least. Consequently, Matshele Koko, Anoj Singh, Prish Govender, Edwin Mabelane and Charles Kalima have collectively been earning salaries against zero RoI for more than 547 days.*

Mr Qoma points to the actions of the Board and the Minister, in this regard:

*On 16 August 2017, Khoza allegedly instructed the rescission of the suspension of Mabelane and Kalima. These individuals were instrumental in the McKinsey/Trillian transaction. This well-published anomaly didn’t concern the Minister either, as Khoza proceeded in his role without any known probe in this regard.*

Mr Qoma explains that his impression is, in fact, that addressing the Trillian issue is what led to the suspension of Ms Daniels:

*On 6 October 2017, Eskom issued a statement confirming that it had suspended the head of Legal Ms Suzanne Daniels for over-spending on a team outing. The timing of this suspension resulted in a negative public perception since it came just after Ms Daniels had compiled a report implicating senior managers in the Trillian/McKinsey matter and submitted this report to Minister Brown who confirmed that she had received the report. It therefore created the perception that she was facing the repercussions of having compiled the said report.*

In addition, in terms of Section 34 of the Prevention and Combating of Corrupt Activities Act of 2004, an offence of fraud, bribery, corruption and/or theft involving an amount of R100 000 or more must be reported to the Directorate for Priority Crime Investigation ("DPCI") by any person who holds a position of authority and knows or ought reasonably to have known or suspected that any other person has committed such offence. A person in a position of authority includes a member of the board of directors of a company. It is highly likely that various Eskom directors and other persons in positions of authority committed offences under Section 34 of the Prevention and Combating of Corrupt

Activities Act of 2004 for their failure to report various instances of fraud, bribery, corruption and/or theft.

#### **2.5.26.7 *Alleged obstruction of G9's forensic investigation***

Eskom's Board allegedly obstructed G9's forensic investigation. Mr Murugan was accompanied and introduced by Advocate Dumisa Ntsebeza (Adv. Ntsebeza) in presenting the findings of G9 to the Portfolio Committee. Adv. Ntsebeza made the following comments, which indicated that several Eskom officials had been unsupportive of the G9 investigation: *"What struck me of those investigations is how the Eskom's leadership would abruptly terminate the mandate of the investigation at very critical moments"*. He also noted his shock at the extent of corruption, which the investigation was poised to uncover, *"There would have been exposure of the most corrupt practices of leadership at Eskom"*. Mr Murugan noted that several officials had been "evasive" during interviews. He also noted that the scope had been tightly defined and controlled by Eskom and that there were several notable indications of wrongdoing that warranted further investigation.

The G9 Report notes that before the interim findings of the investigation could be presented to the Board on 30 August 2017 (p28-29):

*Although, as far as we understand, our mandate and lines of reporting are to Executive Management, we observed that the Interim Board had become operationally involved; and after one verbal feedback to the Audit and Risk Committee, this investigation was left floundering and without directives, communication or interaction. We find this odd; but we are obliged to comply and await further instructions. As we confirm later in this report, we have been informed to "suspend" or "terminate" [our] investigations.*

The Board to which the G9 Report refers was led by Interim Chair, Mr Zethembe Khoza ("Mr Khoza"). There was no apparent justification for this suspension, other than the fact that members of the Interim Board and several Eskom executives were implicated in ongoing suspicious acts related to Trillian. The G9 report noted that implicated persons should recuse themselves from all matters related to the investigation. Mr Murugan noted that Mr Khoza might be one of those implicated persons. Mr Murugan testified to the Committee that Mr Khoza made some direct threats, *"He would make statements like 'you know people could get killed for doing these types of investigations'."*

#### **2.5.27 Incidences of undue influence**

##### **2.5.27.1 *The role of the Minister in facilitating and approving Eskom's relationship with Trillian***

Ms Daniels testified that Minister Lynne Brown's personal assistant conveyed the Minister's alleged preferences for Eskom's procurement decisions for companies, including Trillian:

*I've never really had direct instructions, but one occasion does stick in my mind. Ms Kim Davids, the PA to Minister Brown, she came up to me at one of these chairpersons' forums and said 'Ma'am,' (she calls... we call Minister Brown Ma'am) ... 'Ma'am has been receiving complaints from suppliers and, you know, she's going to send a letter that you need to give them work.' And then I asked who is the suppliers, and the one that she mentioned was Trillian. I was incredulous at that time because, already, Trillian was in the news, you know [...] and I said 'how would a Minister do that?' I was also surprised that a PA was telling me what to do. And the second one was...she called me and said Ma'am suggested to use Nkonki for the Koko investigation; Nkonki is the auditors.*

#### **2.5.27.2 Introduction of Salim Essa to Eskom executives by Ministerial staff**

Ms Molefe testified that she had been contacted by Nhlanhla Msomi, then Chief of Staff of the former Minister of Public Enterprises, Mr Malusi Gigaba, when she was appointed Financial Director of Eskom. The reason given for this correspondence was to discuss Eskom's transformation strategy. At Mr Msomi's request, Ms Molefe took a meeting with Eskom BBBEE suppliers to discuss their dissatisfaction with Eskom's procurement processes, which they felt were unfair. At this meeting, only Salim Essa was present. She states,

*He [...] then indicated that there are [...] 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 with meeting with people and then directing them to do the right levels. He then said to me that he will make arrangements for me to meet the suppliers that are complaining. When I meet the supplier, it was Salim Essa and when I asked him what company he works for he, he did not divulge the company. He said there are various companies that have been trying to do business with Eskom and they have been turned back.*

#### **2.5.27.3 Trillian's relationship with McKinsey: access to major contract with Public Entities**

McKinsey, specifically directors Vikas Sagar and Alexander Weiss (later suspended), were complicit in and benefitted from Trillian's questionable relationship with Eskom. Sagar and Weiss are alleged to have shared sensitive information with Mr Essa on 11 key projects in Eskom that could have generated R9.4 billion in consulting fees over a 4-year period.

As testified by Goodson:

*So, there was one leadership meeting particularly with McKinsey where, and I have minuted it and it is part of my annexures, where one of the very senior partners made very harsh remarks*

*about, 'well just take your 30% and go'. I escalated that issue to Clive... I noted that in quite a significant note and subsequently presented it back to Salim. Salim then said, 'ok, we're going to fix this'. Because clearly, the supplier development understanding was... it was going nowhere...Salim looked at me, just smiled and he said, 'Bianca, don't worry, it's sorted'. The next morning Vikas [Sagar] phoned and Vikas apologised.*

#### **2.5.27.4 Salim Essa's relationship with Eskom executives**

The testimony of Ms Molefe, as noted above suggests that Salim Essa had a highly unusual level of direct access to Eskom executives. Ms Goodson's testimony, as noted in section 2.5.27.3 confirms this interpretation.

#### **2.5.27.5 Trillian executives' alleged prior knowledge of major political appointments: The Minister of Finance**

Trillian CEO, Eric Wood, and other employees allegedly had prior knowledge of the dismissal of Nhlanhla Nene as Minister of Finance and the appointment of Des van Rooyen, by former President Zuma. Ms Mothepu's testimony clarifies:

*This is a date I think I will never forget, the 26th of October 2015. We were still at Regiments, I normally had informal meetings with Eric in the morning and then he called me into his meeting in his office and he told me that Minister Nhlanhla Nene will be fired. For me, I didn't understand the significance of what he was telling me, there have been many reshuffles of ministers before. I didn't understand why he was telling me because we never dealt with National Treasury or the Minister of Finance, so I didn't ask him 'how do you know' 'why are you telling me'. I just said, "Oh ok". Later on, in that morning he emailed me a document, a Word document, that essentially outlined the initiatives that the new minister was going to approve. There were about 12 of them and the potential fees that, I would say, Regiments at the time was going to earn. Now six Weeks later the nation, of course, is shocked at midnight when indeed the former minister is fired. So, in the morning I tell him, "Oh you were right" and he said, "Yes, I was" and he told me that a certain colleague of mine his name is Mohammad Bobat, was appointed the advisor to the new minister and his role essentially was to channel all the work from whether it's state-owned companies or a National Treasury to Trillian or Regiments because this was in December. So, Mr Bobat was given the courtesy of a driver going to Pretoria every morning, there, Eric had appointed a PR company to write the new minister's speeches. They started working on the finance minister's speech but unfortunately, on the Sunday he was replaced, so he never got a chance to deliver it, so they had to write COGTA speech.*

Whatever channel was delivering highly sensitive political information to Trillian executives remained open. Mothepu continues,

*On the 16th of March, I was in my office. I used to share an office with the financial director Tebogo Leballo and Bianca [Goodson] was there as well and then he told me that Minister Pravin was going to be removed and I couldn't hear him, and he because he was whispering because we had an open plan, and then he wrote it down on my book which I still have.*

Goodson confirmed having seen this note and listed it as one of the factors leading to her resignation.

#### **2.5.27.6 Trillian's alleged access to COGTA Minister and procurement information**

Ms Goodson testified that Trillian had direct access to Minister Des van Rooyen in his capacity as COGTA Minister. She testified that this access was used to commercial benefit for Trillian, and was facilitated by former Regiments employee, Mohammed Bobat. Section 8 of her statement clarifies this relationship:

*8.1 In the first week of January 2016, I received a call from Angel saying that TMC will be working at CoGTA and supporting Bobat.*

*8.2 I found the instruction strange as TMC at that point in time, only had 2 FTEs namely; myself and a COO;*

*8.3 I received a phone call from Wood on 8 January 2016 informing me of a meeting at Regiments Capital on 11 January at 09h00 that I had to attend.*

*8.4 The purpose that this meeting was to discuss and play for the dinner with Gary Pita [...], the meeting with Anoj Singh [...], and the meeting with Mr van Rooyen [...]. At that meeting, I was instructed to compile a business profile for TMC that would be presented to the Minister.*

*8.5 The meeting with the Minister was arranged by Bobat and attended by Wood, De Wit, Hartmann, Bobat, Whitley, the Minister and myself.*

This meeting led to the development of an unsolicited proposal, based on information provided by Bobat:

*8.11 The unsolicited proposal prepared for CoGTA was informed by information sent to me by Bobat. I would find a white envelope on my desk when I arrived at the office in the morning and shortly after, would receive a call from Bobat clarifying the contents thereof. One such envelope contained the Back to Basics 2015-2016 Annual Performance Plan, which would be the source of the proposal scope.*

#### **2.5.28 Additional matters**

#### **2.5.28.1 *Purchase of Optimum Coal Holdings by Tegeta***

Neither Ms Goodson nor Ms Mothepu had first-hand knowledge of Trillian’s contributions to the purchase price for OCH. Ms Goodson did, however, confirm that she opened a bank account in the company’s name, at the Bank of Baroda. The Bank of Baroda has been identified in the “State of Capture” report as the bank through which payments to Tegeta from several companies were made.

#### **2.5.28.2 *Alleged use of knowledge of Ministerial appointments for commercial benefit***

Eric Wood may have used his knowledge of Ministerial appointments to benefit commercially in his personal capacity. Ms Mothepu raised another matter that has not been confirmed. However, in light of alleged incidences of undue influence, noted above, it merits further investigation. She states:

*I'm told, but it's unconfirmed sources, that Eric Wood being a trader, traded on this information [on the replacement of Minister Nene]. So, in November, he bought dollars because he knew that the removal of a finance minister was going to affect the rand. And the day [...] when the announcement was made, while our investments and the rand was crashing, he reversed the trade and apparently made hundreds of millions of Rands... I can't confirm this but this is what I'm told.*

#### **2.5.28.3 *Media reports allege toxic culture and improper relationships***

It was reported that Eskom employees observed an unusual level of familiarity between Trillian director, Eric Wood, and Eskom executives when Mr Wood began to spend time in the executive suites at Eskom's Megawatt Park. Amabhungane, on 11 October 2017, quoted one of their sources from within Eskom as saying,

*“This is when we realised Wood was brought in through the back door to partner with McKinsey, without our knowledge.”*

There were also concerning reports, captured in the G9 Report, that Eskom officials had been pressurised into deviating from procurement policy in order to enable a lucrative exchange for Trillian with the entity.

#### **2.5.28.4 *McKinsey’s role in facilitating Trillian’s payment***

Despite eventually rejecting Trillian as a supplier development partner, McKinsey director, Vikas Sagar, sent correspondence to Eskom’s Prish Govender on 9 February 2016, authorising Trillian to invoice Eskom for “subcontracted” work under the “Professional Services Contract” dated 29 September 2015 (pending further written confirmation that was never delivered).

### **2.5.29 Observations**

#### ***2.5.29.1 Cession of work from Regiments to Trillian***

- i. The cession of work from Regiments to Trillian appears to be unusual, irregular and to involve the granting of benefits to influence the performance of powers, duties or functions improperly.
- ii. The relationship between Trillian, its employees, its owner, and Eskom executive appears to have been unusual and improper.

#### ***2.5.29.2 Eskom's payments to Trillian between 2015 and 2017***

- iii. Trillian worked and was paid outside of SCM processes and in the absence of contracts and proper approvals, which would be in contravention of Section 217(1) of the Constitution, the PFMA, Eskom's internal policies and the principle of legality.
- iv. It appears that Trillian invoiced Eskom for work done by Regiments on 10 August 2016 on the Duvha Boiler claim and the Online Vending Strategy, and on 13 April 2016 for work done on the Eskom Corporate Plan in December 2015 or January 2016. Eskom does not appear to have any lawful basis for any such payments to Trillian.
- v. Trillian and McKinsey were paid for work that was not "value for money", as Eskom officials could do this work internally, or the fee structure employed was above market rates.

#### ***2.5.29.3 Trillian's relationship with Eskom***

- vi. Several Eskom executives and other officials played questionable roles in enabling Trillian's access to and payments from Eskom.
- vii. No evidence was made available that showed that the Eskom Board had used its oversight powers to intervene in Trillian's unusual procurement arrangement and payments.
- viii. The Eskom Board appears to have allowed the Trillian controversy to unfold in the public sphere for several months before taking any action in relation to Eskom's impugned conduct or any precautionary or disciplinary action against compromised executives. There appear to be numerous breaches of the duties of Eskom Board members to act in the best interests of Eskom and act with degrees of skill which may reasonably be expected from such persons.

#### ***2.5.29.4 Prior knowledge of appointment of Cabinet ministers***

- ix. Trillian Executives apparently had prior knowledge of Finance Minister Nhlanhla Nene's dismissal, as well as the appointment of Minister van Rooyen in December 2015.
- x. If it is true that Trillian executives had prior knowledge of Minister Nene's dismissal and the appointment of Minister van Rooyen, this would be highly improper and warrant further criminal and other investigation as to the circumstances by which this knowledge was acquired.
- xi. If Trillian used this knowledge for commercial benefit, it also would also be improper and possibly illegal.

#### ***2.5.29.5 Trillian's and shareholder Salim Essa's involvement in Tegeta's purchase of OCH***

- xii. Trillian Capital appears to have contributed to the purchase price of Optimum Coal Holdings (Pty) Ltd ("OCH") on 14 April 2016 through Bank of Baroda transfers to Tegeta, which would make it party to a questionable and potential illegal transaction, for the apparent benefit of Oakbay shareholders, including the Gupta family and Duduzane Zuma.

#### ***2.5.29.6 Trillian's role in Eskom's procurement decisions***

- xiii. Trillian's role in the selection of Dongfang in the Duvha Boiler tender process is questionable and requires further investigation, including for potentially serious criminal conduct. McKinsey's involvement in this process also requires clarification.

## **2.6 Eskom and the TNA Contract**

### **2.6.1 Background to the Investigation**

Oakbay Investments Pty, a company co-owned by the Gupta family and Duduzane Zuma, sold its shares in TNA Media (Pty) Ltd, publishers of The New Age (TNA) and ANN7 in August of 2017. TNA Media was a lucrative business which had significant government and state-owned company contracts, including subscriptions, advertising and corporate sponsorships that stood at R75 million by 2012, merely two years after its launch. The number is surprising, given that South African Audience Research Foundation recorded TNA Media's daily readership at just 153,000 for the 2013/14 financial period. Comparable news outlets drew in far less investment, under the million-rand mark. Over the past two years, evidence has emerged, which shows how TNA Media came to access state contracts, with Eskom's now well-known R43 million corporate breakfast sponsorship being just one example.

The TNA contract has raised questions about external influence by private actors over Eskom's procurement, while Collin Matjila was an Eskom board member, Board Tender Committee Chair, and Acting GCEO. Evidence before the Committee places him at the centre of this controversy. Investigations into Eskom's relationship with, and payments to, TNA suggest that there may have been contraventions of Section 217(1) of the Constitution, the Public Finance Management Act ("PFMA"), the Companies Act 71 of 2008 ("Companies Act"), the Prevention and Combating of Corrupt Activities Act of 2004, the Prevention of Organised Crime Act of 1998, Eskom's Memorandum of Incorporation 2016 ("MOI"), and other internal Supply Chain Management ("SCM") and governance policies and procedures.

A preliminary analysis of these events suggests:



- a. The New Age sponsorship contracts were secured under highly unusual or irregular conditions, including circumventing procurement processes, operating without the proper approvals, being compensated for services incommensurate with fees and the circulation of the publication.
- b. The Oakbay group of companies owned by the Gupta family appears to have influenced the appointment and decisions of key leadership at Eskom, and the fulfilment of the TNA Media contract.
- c. The New Age contract was used as a mechanism to transmit money to most notably, Oakbay Investments (Pty).

#### 2.6.2 Witnesses were called to testify

Witnesses called to testify on this matter:

- Ms Tsholofelo Molefe, Former Eskom CFO
- Mr Tshediso Matona, Former Eskom CEO
- Ms Erica Johnson, Former Eskom Executive
- Ms Devapushpum Naidoo (Viroshini), Eskom Board member from 12 December 2014 to 1 July 2016
- Ms Venete Klein, Eskom Board member from 12 December 2014 to May 2017
- Mr Zethembe Khoza, Current Eskom Interim Chair
- Mr Sean Maritz, Acting Eskom CEO
- Dr Pat Naidoo, Eskom Board Member
- Mr Lucky Montana, Former Prasa CEO
- Mr Zola Tsotsi, Former Chairman of the Eskom Board

#### 2.6.3 Documentation presented to Committee

Included in the documentation presented to or called for by the Committee for the purposes of the inquiry were the following documents:

- The Public Protector's "*State of Capture*" report; Report 6 of 2016/7 14 October 2016 ("Public Protector 'State of Capture' Report")
- #Guptaleaks emails:
  - Salim Essa, Email dated, March 22, 2014 (CV to Tony Gupta and Srikanth Singhal)
  - Salim Essa, Email dated, March 22, 2014 (CV to Duduzane Zuma & Sahara employee)
- Submission by Erica Johnson, "A submission prepared for the Portfolio Committee on Public Enterprises". 7 November 2017

- Statement by Venete Klein. 21 November 2017
- Statement by Zola Tsotsi, “Statement to Portfolio Committee on Public Enterprises”. 21 November 2017
- Eskom Statement, “Eskom takes action to recover funds unlawfully paid to McKinsey and Trillian”. 5 October 2017

#### 2.6.4 The New Age is launched in 2010

TNA Media was established in June of 2010, with the first issue of *The New Age* print and online newspaper published by December. The Board comprised Nazeem Howa, CEO of Oakbay Investments, and Gary Naidoo. The business model relied heavily on government advertising spend and subscriptions, with limited private sector spend. The *State of Capture* report notes that TNA had even secured business with provincial governments and with state-owned companies, of which the most notable deals were with SAA and Eskom. Between 2011 and 2014 TNA Media secured sponsorships with Eskom for ten corporate breakfasts which amounted to R12 million. This amount was more than other similar events for more established media houses. These deals were procured during Collin Matjila's tenure as Board Tender Committee (BTC) chairman (2011-2014).

#### 2.6.5 Collin Matjila ascended to CEO in March 2014

The #Guptaleaks emails released in 2017 showed possible Gupta influence in the appointment of Collin Matjila, formerly head of NERSA, to the role of Acting CEO following the departure of Brian Dames. Salim Essa apparently forwarded Mr Matjila's CV to Rajesh ‘Tony’ Gupta and Srikant Singhala (Atul Gupta's son). He apparently forwarded the mail to Duduzane Zuma and a Sahara employee just six days prior to his appointment. He would remain in his acting role from April 2014 – Oct 2014. By the time Mr Matjila was appointed, he was already followed by controversy, having overseen questionable procurement for the Koeberg Power Station's steam generator, and having been involved in suspicious transactions as CE of Cosatu's investment company, Kopano Ke Matla.

#### 2.6.6 TNA Media's contracts at Eskom balloon

Once acting CEO, Mr Matjila approached the Eskom Board with another deal to sponsor TNA breakfasts, amounting to R14 million over one year. TNA Director Mr Howa appears to have sent the initial proposal directly to Sahara executive, Ashu Chawla. Addressed to Chose Choeu (Eskom Corporate Affairs Executive), the proposal requested the expansion of TNA's contracts with Eskom: *“It is with pleasure that we submit the following proposal for the period 1 April 2014 to 31 March 2015 for sponsorship of 12 Business Briefings for a total investment of R14 400 000.00, excluding VAT and agency commission.”* These were broadcast on SABC, sponsored by state-owned entities and attended by persons from the business fraternity.

Over the following weeks, this deal ballooned to R43 million over a three-year term. The deal was met with internal opposition from Eskom executives, the Board and legal counsel, and many persons attempted to halt it or improve Eskom's benefit from it. However, the deal was secured as structured by Mr Matjila, outside of the formal procurement procedures that would have stopped it. Eskom's procurement policies are unambiguous: all procurement over R5-million requires Board Tender Committee approval. Acting beyond his delegated authority, Mr Matjila concluded this imprudent contract on 30 April 2014. Following correspondence with TNA's Wiedaad Taliep, Choeu confirmed that Matjila had signed the contract for R43 million. At this time, Eskom also procured a bulk subscription to the New Age for R4 096,000 (4000 copies, plus delivery) with no discount for a bulk order.

#### **2.6.7 No action was taken against Collin Matjila**

The Board commissioned a forensic review of the TNA breakfast deal, which confirmed the irregularity of the contract as well as Mr Matjila's culpability in the matter. In October 2014, Eskom's appointed auditors, SizweNtsalubaGobodo, deemed the deal to be a "reportable irregularity" in the entity's interim financial results. It was revealed that several Board members, including Zola Tsotsi and Chwayita Mabude, had attempted to avoid publishing this information. The deal was especially contentious, given Eskom's dire financial position at the time. The release of the results preceded a critical bond-raising roadshow. It was reported in the media that the deal had divided Eskom's Board. Several members were motivating for Mr Matjila to be disciplined in response to the forensic review's recommendations that the Minister was required to remove him and lay criminal charges against him.

Minister Lynne Brown, having commenced her tenure as Minister in 2014, did not enforce the auditor's recommendations. Two Board members serving on the Audit and Risk subcommittee, Ms Bejabulile Luthuli and Ms Yasmin Masithela, tendered their resignations as a result of this governance failure. Not long after, Minister Brown made wholesale changes to the remaining Board on 11 December 2014, in which only Mr Tsotsi and Ms Mabude survived. There were no legal consequences for Mr Matjila. The new Board approved the TNA deal, despite glaringly obvious evidence of its illegality.

#### **2.6.8 R43 million multi-year sponsorship deal with The New Age**

Collin Matjila constructed the dubious multi-year R43 million sponsorship deal with The New Age newspaper while Eskom was grappling with financial constraints. The Committee heard from former Eskom Group Executive Enterprise Development, Erica Johnson, that upon commencing his short but impactful term as Acting CEO, Collin Matjila was insistent on contracting with TNA Media. In her statement, she says:

*In April 2014, Colin Matjila became the Interim CEO of Eskom, moving from his board role to an executive position. Within that month, he requested a sponsorship contract for one year with*

*the New Age at the cost of R1.2million per breakfast event. The Head of Corporate Affairs and the Head of Legal were dealing with the contract.*

*I was involved in terms of the rationale for the contract. We tried very hard to meet the Interim CEO's request – despite it being a difficult time financially, we tried to justify the contract on the grounds that we needed to engage key decision-makers and opinion-shapers and shift the understanding around Eskom's' long-term sustainability.*

Additionally, Mr Matjila developed the contract so that the terms were in TNA's favour, allowing the scope to balloon from one to three years, and removing Eskom's exit clause. The exit clause was particularly relevant because executives were in the process of devising strategic responses to financial constraints, which may have impacts for procurement decisions. Former Financial Director, Ms Tsholofelo Molefe, informed the Committee in detail of these cost-saving measures underway, under the oversight of Chairperson of the Board, Mr Zola Tsotsi. Ms Molefe says Mr Matjila was unmoved by this rationale:

*...As the month of April progressed, the Interim CEO, changed the request from 1 year to 3 years and removed the standard exit clause in the contract. As the corporate team, we wanted an exit clause to ensure that the new permanent CE, expected in October 2014, could have the space to drive their own conversation on the company's strategic priorities without being constrained by a three-year binding breakfast program. Despite attempts to persuade Mr Matjila, he was adamant about the three-year time period and the removal of the exit clause in the contract.*

Ms Molefe explained that the TNA contract fell under the budget for Corporate Affairs, managed by Mr Chose Choeu, who reported to Ms Johnson. Ms Molefe explained that she did not sign off on the contract. The TNA sponsorship came at a time when Eskom had no formal policy on sponsorship but was in the process of developing one:

*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 be able to do such a deal. They had that discussion with me to say, "We've been asked to do this we don't think we have budget for it, and one of the problems we have is that we have not had a policy in the past on this matter. We're in the process of drafting a policy for the board to approve so that we could decide, from a sponsorship and other 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, 12 million left of the budget for the year. And thereafter, we had decided that we would not do anymore sponsorship given the financial challenges that the company was going through.*

## **2.6.9 Procurement of TNA's services**

TNA's services were procured outside of proper procurement processes, and this was inconsistent with the applicable legislative and regulatory requirements. Ms Johnson informed the Committee of Eskom's requirements for the TNA contract, stating that two executive signatures were required. However, given that Ms Molefe refused to sign off on the contract as amended by Mr Matjila, he signed off on it himself. She says, *"The FD (Financial Director) at the time refused to sign it. The interim CEO went ahead and signed the contract."*

Ms Molefe confirmed Ms Johnson's version of events. She informed the Committee that her relationship with Mr Matjila changed when he moved from Chair of the Board Tender Committee (BTC) to Acting CEO in April 2014. At the time, Ms Molefe was the head of the executive procurement Committee. She reported that the two employees would work closely to present major procurement decisions for Board approval. As alleged by Ms Molefe, Mr Matjila ascended to Acting CEO with a clear procurement agenda and particular companies in mind for Eskom contracts, including Regiments Capital and TNA Media. She explained the irregularities with the TNA process in detail. Firstly, Ms Molefe's testimony implicates certain Eskom officials in the signing of the contract:

*The next time I saw it [the TNA contract] was [...] it had already been signed and it had been signed by Mr Matjila himself. It had been witnessed by two of our executives Mr Freddy Ndou and Mr Chose Choeu. In fact, it was Mr Chose Choeu who sent it to me and 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 response to them to say, "[...] I'm not sure if you are aware that Mr Matjila cannot sign a contract of R43 million on his own, because [...] it should have gone through a process of approval...*

Ms Molefe also informed Mr Matjila of the irregularity of his actions in approving the TNA deal. In the course of her correspondence with other Eskom officials, she encountered opposition to Mr Matjila's actions from Eskom's legal department and from the Board. She informed the Committee:

*... I copied Mr Matjila on the matter to say... 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 they want 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 me that he was aware of it, he had been pushing back on it [...] because the contract was signed in such a way that it had no exit clause. So, it was a three-year contract for R43 million, with no exit clause...He was concerned about the legal implication for Eskom as well, and [...] he had already had a discussion with the chairperson of the audit Committee on the matter. On the same day, I happen to have a meeting with the chairperson of the investment*

*Committee, Mr Mafika Mkhwanazi, on the matter...He did not sit in the audit Committee, if I recall, but he did indicate that he is aware of it and the board will be starting an investigation, has requested that the company secretary consult with Gobodo Forensic Investigation to start the investigation on the matter.*

## **2.6.10 Governance issues**

### **2.6.10.1 Eskom Chairperson, Zola Tsotsi, delays interim financial statements**

Ms Johnson told the Committee that the TNA deal was flagged internally: *"This [irregularity] was then picked up in October/November 2014 after our half-yearly audit as an irregular activity."* Ms Molefe confirmed this and added that, as there were "obvious" indications of wrongdoing by Mr Matjila, he stepped down as Acting CEO. The auditors reported these findings in the company's interim financial statements. Ms Molefe testified to the urgency of having these financials signed off, given that she was about to develop a prospectus and undertake due diligence to raise international bonds, *"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 scheduled a meeting to approve the financial statements, including the advice of the external auditors. According to Ms Molefe, Mr Tsotsi intervened:

*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... And I asked him why, because he knows that we need to [...] sign this result so that we can go to the market. He said that 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 sign off on these financials before the results announcement, because we cannot have the results announcement if the auditors have not signed off and therefore they must approve the financials. So the board members were aligned with my thinking, they supported ...The meeting did take place ... without Mr Zola Tsotsi.*

According to Ms Molefe, the Board approved the financials. However, because Mr Tsotsi had cancelled the meeting, the approval was nullified. Mr Tsotsi allegedly delayed announcing the financials in order to discuss them with the Minister. Ms Molefe continues,

*"But he [Mr Tsotsi] was not aware that I was having a meeting with the Minister myself at the time...I then called the board members... and they did approve the financials".*

### **2.6.10.2 Procurement irregularities identified by Eskom's auditors**

According to Ms Molefe, legal action against Mr Matjila was recommended by Eskom's auditors. However, he was not dismissed but instead redeployed to his previous role as a member of the Board.

As a member of the Board, certain internal disciplinary measures were not available, and Ms Molefe explained,

*Because Mr Matjila was no longer a member of the executive Committee, there was very little recourse in terms of disciplinary measures. Therefore, they needed to explore whether they want to take criminal charges against him, or whether they wanted to claim the amount that had been procured with TNA...and also report the matter to the Minister.*

It is, however, clear that other disciplinary measures were available. In addition, in terms of section 34 of the Prevention and Combating of Corrupt Activities Act of 2004 an offence of fraud, bribery, corruption and/or theft involving an amount of R100 000 or more must be reported to the Directorate for Priority Crime Investigation (DPCI) by any person who holds a position of authority and knows or ought reasonably to have known or suspected that any other person has committed such offence. A person in a position of authority includes a member of the board of directors of a company. It is highly likely that in failing to report the matter involving the TNA contract to the DPCI, Eskom directors and other persons in positions of authority committed offences under section 34 of the Prevention and Combating of Corrupt Activities Act of 2004.

Former Eskom board member, Ms Venete Klein, told the Committee that she refused to sign the Board's report on the New Age deal. According to her statement and testimony, the TNA contract was discussed during November and December 2014, prior to her appointment. She told the Committee that Chairperson, Zola Tsotsi remained deliberately neutral on the TNA matter until March 2015, at which point the Board reached the conclusion that no action would be taken against Mr Matjila, who had stepped down by then. Ms Klein clearly stated that she did not believe that the board was acting in Eskom's best interests:

*My first and only engagement on the issue came about on 2 March 2015, when a resolution proposing to ratify the expense incurred in this regard and resolving not to take any action against Mr (Collin) Matjila (as he was no longer a member of the board) was circulated for approval by way of round robin.*

*I categorically refused to sign the resolution as I did not agree with its contents, particularly as Mr Chose Choeu was still employed by Eskom at the time, and I believed that action needed to be taken against him.*

*My position in relation to the proposed round robin resolution regarding the TNA matter is reflected in the minutes of the board in-Committee meeting of 19 March 2015. These minutes record that the chairman of the board indicated that he would speak to me regarding this issue, which never happened.*

*Despite my disagreement, the round robin was accepted as (to my knowledge) I was the only board member who refused to support and/or sign the resolution.*

*In addition to the aforesaid, it was noted by the board that the contract with TNA was of a commercial nature, and therefore could not simply be rescinded by Eskom at its own volition.*

*It was accordingly agreed that all future contracts of that nature should have an early termination clause included for Eskom's benefit. A resolution to this effect was ratified at the Board meeting of 28 May 2015.*

*My main consideration in taking the position that I did in relation to the TNA matter was that, owing to the information at hand, I did not believe that the approach proposed in the round robin resolution was in the best interests of Eskom.*

Mr Zethembe Khoza, Dr Pat Naidoo and Mr Sean Maritz made representations to the Committee on behalf of Eskom's Board. The submission to the Committee did not reflect any of the complexity indicated by Ms Johnson, Ms Molefe and Mr Tsotsi. The submission states:

*The Board through its Committees, established that Matjila had acted ultra vires and committed Eskom to a sponsorship fee that was not budgeted for in that financial year.*

SizweNtsalubaGobodo (SNG) was instructed to carry out a forensic review of the sponsorship deal. SNG confirmed that Matjila had exceeded his powers by committing Eskom to an amount of R 3 600 000.00 (three million, six hundred thousand rand) without consulting the Executive Committee ("Exco") of Eskom and committing Eskom regardless of the absence of budget from which the fee would be paid in that financial year. SNG characterised this expenditure as irregular expenditure.

SNG, further, found that the sponsorship agreement between Eskom and TNA Media did not have an exit clause for Eskom, despite the fact that the legal department of Eskom had recommended that an exit clause be inserted to protect Eskom. Ledwaba Mazwai Attorneys confirmed the findings of SNG.

The submission fails to indicate that criminal investigations were recommended and confirms, "The Board decided not to take any action against Mr Matjila because he was no longer an employee of Eskom." Inexplicably, given legal recommendations by the auditors, as well as the media furore in which the credibility of Eskom's executives, Board and the Minister were called into question, the submission offers "legal and reputational consequences" as reasons for ratifying the TNA contract in 2015.

#### **2.6.10.3 Ministerial oversight**

In line with media reports from 2014 and 2015, the Minister's involvement is unclear. Minister Brown appears to have played no active role in remediating the TNA contractual arrangements. Ms Molefe



stated, *“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... To my knowledge...all attempts with the Minister had failed, and that's all that she said”*. The *“Presentation by Minister of Public Enterprises Lynne Brown to the Parliamentary Inquiry into Eskom”* on 22 November did not address the TNA deal, nor did she speak to this matter during her testimony.

#### **2.6.10.4 External influence on the Eskom Board and procurement processes**

Collin Matjila's links to the Gupta-related companies including Sahara, were raised with the Committee. Ms Molefe testified that in 2014, Mr Matjila connected her to Salim Essa after an initial meeting set up by Chief of Staff of Minister Brown, Mr Nhlanhla Msomi:

*“So when I met him [Salim Essa] for the second time, I was being introduced to him then by Collin Matjila. That's when I realised that I have, I have, met him before here”*.

Mr Tshediso Matona, who succeeded Mr Matjila as Eskom CEO, explained that the reshuffle of the Board in December 2014 was in response to the TNA deal, which was one of the issues that rendered it, in his words, “dysfunctional”:

*...By the time I arrived at Eskom, there was significant tension you could call it, you could call it turmoil, but there was serious infighting within the...within the board. It was infighting over a range of issues likely to do with procurement, so, so there were all these fights about various procurements and then I think there was also the issue of the 43 million that the acting CEO, who I took over, had signed off to The New Age. So, there were a few of these things that, you know, divided the board and almost rendered that that board dysfunctional in many ways and I think therefore that could have been one of the reasons why the shareholder, you know, chose to rotate that board.*

In other words, while, no remedial action was taken on the TNA contract, it appears to have been used as part of the rationale for Minister Brown's December 2014 Board reshuffle, which introduced several new Board members to Eskom.

With regard to the relationship between Minister Brown, Rajesh Gupta and Salim Essa, Mr Tsotsi stated,

*“There is a clear association between Minister Brown and the Gupta family,” he said.*

Elaborating on Minister Brown's December 2014 Board reshuffle, Mr Tsotsi told the Committee,

*“Tony Gupta and Salim Essa were present,” at a meeting to which the Minister had invited him.*

He stated that,

*“Salim Essa would draw up his idea of board allocations up and send it to the Minister.”*

This list would reportedly state which Board members would on which subcommittees, including the BTC, which ratified procurement decisions. Mr Tsotsi continues,

*“I got a list and I changed the list on the basis of what I thought it should be. I sent it to the minister to get her concurrence. She changed it back to what it was when she originally sent it.”*

Mr Tsotsi also implicated President Zuma, whom he says the Guptas referred to as “Baba”. According to Mr Tsotsi, the Guptas’ relationship with “Baba” was the source of the family’s power:

*“When I had the occasion to discuss something with him, and when I was not able to give it to him, he turned around and he said he must report me to Baba (President Jacob Zuma) ... The impression he gave me was that he had a very close relationship with Baba and that he could do anything.”*

Mr Tsotsi indicated that the Guptas had made requests for changes in Eskom leadership and access to procurement. The TNA deal was one of the contracts they had requested. Mr Tsotsi maintained that he had not assisted the Guptas in any of these matters.

Referring to Mr Tsotsi’s attempts to delay releasing Eskom’s interim financial statements with the auditors’ findings on the TNA deal, Ms Molefe stated, however,

*“When I asked him why he wants to cancel the board meeting to sign off the financials he indicated that he's under pressure from people outside.”*

Who these external people were is not clear.

#### ***2.6.10.5 Evidence of TNA's penetration of the broader network of SOCs***

Former Prasa CEO, Mr Lucky Montana, appearing before the Committee testified that Prasa officials saw the TNA Business Breakfasts as an opportunity to promote their work. He explained that in his negotiations with Mr Howa of TNA Media, it was necessary to ask then-Transport Minister Ben Martins to intervene. Reportedly, his R3 million budget would only secure Prasa limited airtime. Unable to reach a satisfactory deal, Mr Montana instructed his staff to cancel the sponsorship of the TNA Business Breakfast.

#### **2.6.11 Observations**

##### ***2.6.11.1 TNA Media was paid amounts that were incommensurate with the value they offered Eskom.***

- i. Given the limited circulation of the New Age, it does not seem clear why Eskom would direct so much of its advertising spend to this organisation between 2011 and 2014.

***2.6.11.2 It appears Collin Matjila acted improperly in the awarding of the R43 million TNA business breakfast contract.***

- ii. Collin Matjila went against the advice of his colleagues to push through a deal which had highly questionable value for Eskom.
- iii. Collin Matjila acted outside of the scope of his powers and subverted SCM processes in order to ensure that Eskom and TNA entered into a contract, which was very likely in contravention of Section 217(1) of the Constitution, the PFMA, and Eskom's internal policies.

***2.6.11.3 The Minister failed to take remedial action.***

- iv. The Minister's lack of any remedial intervention following the forensic review of the TNA contract is highly questionable, especially in light of the recommendation for criminal investigations.

***2.6.11.4 It appears that the Board did not act in the best interests of Eskom.***

- v. Eskom's directors are required to act in good faith and for a proper purpose, in the best interests of Eskom, and with the degree of care, skill and diligence that may reasonably be expected of them. In addition, Eskom directors have a duty not to allow the company to trade recklessly, with gross negligence or fraudulently. It appears that the Eskom Board members failed in these duties.
- vi. It is unclear why the new Board appointed in December 2014 ratified the TNA deal, and how this could be justified.
- vii. It is unclear why the two consecutive Boards did not implement the findings of SizweNtsalubaGobodo, and it appears that there was a failure to fulfil fiduciary duty in each respective instance.

## **2.7 Eskom's arrangement of Brian Molefe's resignation and pension**

### **2.7.1 Background to the Investigation**

On 11 November 2016, Brian Molefe, then CEO of Eskom, publically tendered his resignation with effect from 1 January 2017 following the release of the Public Protector's *State of Capture* report which provided evidence of Mr Molefe's connection to the Gupta family, as well as his potential role in facilitating the Gupta-owned businesses' questionable transactions with Eskom, primarily through Tegeta Exploration and Resources (Pty) Ltd. (Tegeta). While questioning the veracity of the *State of Capture* report and the credibility of the outgoing Public Protector, Thuli Madonsela, he stated:

*"I have, in the interests of good corporate governance, decided to leave my employ at Eskom from 1 January 2017. I do so voluntarily: indeed, I wish to pay tribute to the unfailing support I*

*have had since I took up office from the chairman, the Board, and with those with whom it has been my privilege to work. Together we brought Eskom back from the brink.”*

Despite this public resignation, the South African media exposed how Molefe went on to receive a pension valued at R30.1 million following just 16 months of service at Eskom. The pension arrangement ostensibly relied on a letter sent by Board chairperson at the time, Ben Ngubane. This letter posited that Molefe had “retired”, rather than resigned. After pension pay-outs to Mr Molefe commenced in February 2017, conflicting narratives emerged in the media about the termination of Mr Molefe's employment. Mr Molefe became a Member of Parliament from 23 February 2017 till 14 May 2017. The Minister of Public Enterprises was called to account to the Committee over the peculiarity and possible illegality of Molefe's pension pay-out. Eskom attempted to resolve the matter by appointing Molefe once again as CEO. However, further political pressure resulted in his dismissal on 31 May 2017. The decision did not originate within Eskom but was made by an Inter-Ministerial Committee established by former President Jacob Zuma, and implemented by Minister Brown. On 25 January 2018, the High Court of South Africa, Gauteng Division, Pretoria ("Pretoria High Court") ruled that Molefe would have to return his pay-out to Eskom, calling it a “deliberate scheme”.

A preliminary analysis of these events suggests:

- a. Brian Molefe did not retire, but resigned, publically. Eskom's claims to the contrary appear to have been deliberately misleading and an unlawful attempt to benefit Brian Molefe.
- b. Brian Molefe was never eligible to be enlisted as a member of the Eskom Pension Fund, which only manages funds for permanent employees of Eskom. These rules were well established and known at the time of his secondment to Eskom.
- c. Brian Molefe's conditions for early retirement and subsequent pension pay-out were determined in 2015, well in advance of his resignation in November 2016.
- d. The role of the Minister of Public Enterprises in facilitating Brian Molefe's pension pay-out and reappointment is in question, and contradictory evidence has been presented before parliament.
- e. Eskom's Board and Chairperson appear to have played a critical role in facilitating Mr Molefe's pay-out.

#### **2.7.2 Witnesses were called to testify**

Witnesses called to testify on this matter:

- Mr Sibusiso Luthuli, Eskom Pension and Provident Fund CEO
- Ms Mantuka Maisela, Eskom Pension Fund Chairperson
- Mr Khulani Qoma, Eskom General Manager in the Office of the Chairperson

- Ms Suzanne Daniels, Eskom Former Company Secretary and currently Head of Legal and Compliance (on suspension)
- Ms Venete Klein, Eskom Board member from 12 December 2014 to May 2017
- Mr Brian Molefe, Former Eskom CEO April 2015- November 2016
- Ms Lynne Brown, Minister of Public Enterprises
- Mr Anton Minnaar, Eskom Executive Support Manager
- Mr Zethembe Khoza
- Dr Pat Naidoo

### 2.7.3 Documentation presented to the Committee

Included in the documentation submitted to or called for by the Committee for the purposes of the inquiry:

- Letter from Ben Ngubane addressed to Minister Lynne Brown, “Retirement Arrangements – Brian Molefe”. 25 November 2015
- A Report of the Public Protector “*State of Capture*”, Report 6 of 2016/7 14 October 2016 (“Public Protector “State of Capture” Report”)
- Committee Meeting notes, “Minister of Public Enterprises and Eskom Board on reappointment of Brian Molefe as GCEO”. 23 May 2017
- Brian Molefe, “STATEMENT” of resignation, 11 November 2016
- Public Enterprises Minister Lynne Brown, Statement to the Portfolio Committee on Public Enterprises, 23 May 2017
- Submission: Eskom Pension and Provident Fund, “Retirement Pay-out: Brian Molefe”. 20 October 2017
- Submission prepared by Suzanne Margaret Daniels, Group Executive: Legal and Compliance, “Portfolio Committee on Public Enterprises: Oversight Inquiry into Governance, procurement and financial sustainability of Eskom”. 8 November 2017
- Statement of Khulani Qoma, Eskom General Manager in the Office of the Chairperson “Eskom’s implosion: deliberate, well-orchestrated & shame-free; entire leadership culpability”. 10 November 2017
- Statement by Venete Klein, Eskom Board member from 12 December 2014 to May 2017. November 2017
- Statement of Anton Minnaar, Eskom Executive Support Manager. 5 December 2017.
- Submission by Board of Eskom Holdings SOC Limited (Registration Number 2002/015527/30) to

- The Portfolio Committee on Public Enterprises Inquiry into Corporate Governance at State Owned Companies. 5 December 2017. (“Submission by Board of Eskom to the Committee”)
- Presentation by Minister of Public Enterprises Lynne Brown to the Parliamentary Inquiry into Eskom. 22 November 2017
- Gauteng High Court Judgement: Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018).

#### **2.7.4 Brian Molefe is seconded to Eskom from Transnet in April 2016**

Following the resignations of Eskom CEO, Brian Dames and CFO, Paul O’Flaherty, Eskom Chair, Zola Tsotsi, suspended four top executives in the first quarter of 2015. The newly appointed CEO, Tshediso Matona was among those suspended. Minister Brown then seconded Brian Molefe and Anoj Singh from Transnet to address apparent management issues and enduring load-shedding challenges at Eskom. Mr Molefe was appointed as acting CEO in May, and then was appointed on a five-year fixed term contract in October. Minister Brown also replaced Mr Tsotsi with Dr Baldwin (Ben) Ngubane who presided as Chairperson of the Board for Molefe’s entire appointment, resignation, retirement, unpaid leave, reappointment and dismissal.

#### **2.7.5 Ben Ngubane lays the groundwork for Molefe’s pension**

Correspondence between Dr Ngubane and Minister Brown, dated 25 November 2015 lay out the conditions for Mr Molefe’s retirement benefits. The letter requested her input to finalise the terms of Mr Molefe’s contract. Three conditions were stipulated in the letter:

- Early retirement: Mr Molefe is allowed to retire after his five-year contract, as if he were 63 years of age, regardless of his actual age.
- Waiving penalties: penalties prescribed by the EPPF for early retirement should be waived.
- Eskom’s liability: the costs resulting from any penalties should be borne by Eskom.

Three people in Minister Brown’s office received this correspondence: the DPE registry officer, the department’s chief director of governance and Minister Brown’s former personal assistant, Kim Davids. In her affidavit submitted to the Pretoria High Court, and subsequent representations to parliament, Minister Brown denies any knowledge of this letter and its contents.

#### **2.7.6 Molefe resigns in November 2016**

Molefe’s very public resignation on 11 November 2016 was met with equally public expressions of sadness from Eskom and Minister Brown. Ms Brown told the media,

*“Mr Molefe has been instrumental in developing Eskom’s turnaround strategy which is beginning to yield positive results and it is disappointing that he will not be present to see it to complete fruition.”*

Court proceedings have revealed that processes to secure Board approval for Mr Molefe’s early retirement began shortly after his announcement. Furthermore, the date for his resignation, 1 January 2017, is significant because it was after his fiftieth birthday. Had the resignation come into effect any earlier, his plans for retirement would have been frustrated by EPPF rules. Mr Molefe’s request for early retirement was submitted on the day of his resignation and approved by the Board ten days later on 21 November 2016.

#### **2.7.7 Molefe is sworn in as an MP, and his pension benefits are initiated**

After leaving Eskom, Mr Molefe was sworn in as a Member of Parliament in February 2017. Following administrative processes, the EPPF paid Molefe one-third of his total pension in a lump sum and commenced monthly pension payments. News of the pension, valued at R30 million after just 16 months of service drew the ire of several sectors of society. Formal petitions were levied by, among others, Corruption Watch. On the face of it, the pension appeared to be highly unusual, irregular and possibly illegal. The Eskom Executive, Board, and Minister Brown found themselves in the firing line as lines of accountability were wrought from the obfuscated and contradictory versions of events that were put forward by key actors.

#### **2.7.8 Molefe is reinstated as Eskom’s CEO following the Board’s petition to Minister Brown**

By May 2017, Molefe’s pension had become politically untenable. Minister Brown had maintained her ignorance of the arrangement throughout. She publically stated that she had operated under the assumption that Mr Molefe had resigned and not retired. Minister Brown called a meeting with the Eskom Board on 19 April 2017, after which the Board was asked to resolve the pension matter in one of four ways: “consensual rescission” in which Molefe returns the pension and returns as CEO; “non-consensual rescission”; rescinding Mr Molefe’s retirement and offering standard benefits under a resignation agreement; rescinding Mr Molefe’s retirement with a payment in settlement of dispute.

Eskom's Board agreed with Brown's assessment in their reappointment of Molefe that they characterised as a "reinstatement". They sent Ms Brown a letter stating,

*“As this is simply a reinstatement of his employment, counsel has advised that neither you nor Cabinet’s formal approval is required for Mr Molefe to resume his duties as an employee. However, given our relationship and to avoid any misunderstanding your approval is nevertheless requested.”*

Mr Molefe was informed the early retirement agreement was rescinded on 3 May 2017, and was invited to “return” as CEO having been formally considered to have been on “unpaid leave”. On 12 May,

Minister Brown announced that she had accepted the Board's request on the basis that it made better financial sense than paying out a R30 million pension. By 14 May, Mr Molefe stepped down as a Member of Parliament.

#### **2.7.9 Minister Brown and Dr Ngubane's answers to the Portfolio Committee on Public Enterprises, 23 May 2017**

The Portfolio Committee on Public Enterprises invited the minister and Board to explain the circumstances of Mr Molefe's resignation, retirement, pension, leave and reappointment. Minister Brown and Eskom Chair, Dr Ngubane were both called upon to make representations to parliament. Here, Minister Brown maintained her position of ignorance regarding Mr Molefe's pension and defended her affirmation of his 'reappointment'. As justification, she cited Eskom's Memoranda of Incorporation (MOI), which is required by the Eskom Conversion Act, 13 of 2001, Section 6 (2), to be published by the Minister. Subsequent versions of these MOIs may be materially different, as noted by the Minister:

*"Eskom is governed by various pieces of legislation, including the Eskom Conversion Act 13 of 2001. Section 6 (2) of the Act requires me, from time to time, to publish memoranda and articles of association. Two different Memoranda of Incorporation are relevant to Mr Molefe's situation: One passed and adopted before his arrival at Eskom, and the other during his tenure.*

*Material differences between the two documents included that the 2014 version did not require the Minister to be noted as a party to the employment agreement of the Group Chief Executive (noting the Minister was required in the 2016 version); and the 2014 document did not provide the Minister with the power to remove the Chief Executive (as the 2016 version does).*

*The executive employment contract concluded by Mr Molefe and Dr Ngubane in March 2016 was concluded in terms of the 2014 agreement. It didn't have to be shown to me.*

*When Mr Molefe quit Eskom in November 2016 I was under the impression that he had resigned. I was not aware that he had applied for early retirement. This I only learned in April 2017, after reading in the media that Mr Molefe was receiving a R30m pay-out from Eskom, and asking Eskom's Board to make a more prudent deal."*

In short, as she maintained that she was legally obligated to keep a distance from Mr Molefe's conditions of employment, the Minister stated that she was therefore not liable for any of the ensuing controversy. Furthermore, although she reported that she had been kept in the dark over Molefe's pension, having read about it in a *Sunday Times* report in April, she confirmed that, in her view, the Board had acted within their rights to negotiate Mr Molefe's reappointment. Dr Ngubane confirmed



Minister Brown representations, giving no indication of any problem in relation to the role played by Eskom in the facilitation of Mr Molefe's pension. He admitted that "We bought him ten years".

#### **2.7.10 An inter-ministerial committee finds fault with Molefe's pension arrangement, and Molefe is dismissed from Eskom in June 2017**

Former President Jacob Zuma established a Cabinet Inter-Ministerial Committee on 1 June 2017, comprising Finance Minister Malusi Gigaba, Justice Minister Michael Masutha, Brown and Energy Minister Mmamoloko Kubayi. The Committee found that Eskom had mistakenly paid Mr Molefe his pension and proposed that, despite evidence suggesting otherwise, the "Mistakes were made in good faith". The Committee found that both the pension payment and the reappointment of Mr Molefe should be rescinded. Minister Brown implemented the Committee's findings, sending instructions to the Eskom Board to revoke all pension and appointment arrangements.

#### **2.7.11 Ben Ngubane resigns from Eskom in June 2017**

Both Minister Brown and Dr Ngubane have maintained that their respective actions were legal and were taken in "good faith". However, the Eskom Chair resigned with immediate effect on 12 June 2017.

#### **2.7.12 Challenge to the legality of Molefe's pension in November 2017**

A legal application against Mr Molefe's pension was launched in the Pretoria High Court. Minister Brown filed explanatory affidavits stating that Eskom had appointed Mr Molefe under conditions that differed from those contained in the letter sent to her office by Dr Ngubane. She stated:

*"In the meanwhile on 15 November 2015 the board addressed a letter to the minister in which it proposed a pension arrangement for Molefe different from that captured in the letter of appointment."*

She also said that the pension arrangements were approved by the Board on 9 February 2016 without her knowledge or approval. The Board approved the conditions for early retirement for Eskom executives.

#### **2.7.13 The Pretoria High Court rules against Molefe and Eskom in January 2018**

A full bench of judges in the Pretoria High Court found against Molefe, who was ordered to return the pension funds and pay legal costs within 10 days. The judgement stands in stark contrast with the findings of the Inter-Ministerial Committee. Far from "good faith", the court found, "a deliberate scheme" had been devised by Eskom with the involvement of Mr Molefe to afford him pension benefits to which he was not entitled. Key facts found by the court are as follows:

*Paragraph 4-5: It transpired later that on the same day [as his resignation], Mr Molefe submitted a request for early retirement. The request was granted in the letter dated 24 November 2016, and under it, an early retirement agreement was concluded with Eskom effective on 1 December*

*2016. The agreement permitted Mr Molefe to proceed on retirement from age 50, with Eskom making up the shortfall regarding the ten-year service requirement in terms of the rules of the Pension Fund.*

The Minister was never informed that Mr Molefe had applied for early retirement and that such an agreement had been concluded.

*Paragraph 18: On 11 November 2015, Mr Molefe signed an open-ended contract of employment with Eskom accepting his appointment as Group Chief Executive Officer with effect from 1 October 2015. He subsequently received notification from the Minister through Dr Ngubane that his conditions of employment would be altered from an open-ended contract to a fixed term contract.*

The judgement goes on to state that, despite having full knowledge of Mr Molefe's fixed term appointment, Dr Ngubane had contrived the early retirement plan in response to Mr Molefe's concerns about this employability at the age of 54, at which time his employment at Eskom would lapse. Molefe's contractual negotiations concluded with him signing a five-year contract on 7 March 2016, which ran from 1 October 2015 until 30 September 2020. Under this contract, Mr Molefe was not eligible for membership of the EPPF, which is reserved for permanent employees only.

Despite Minister Brown's argument that Eskom's 2014 MOI governed her lack of intervention in Dr Molefe's appointment in 2016 and reappointment in 2017, the Pretoria High Court found otherwise. The Court found:

*Paragraph 56: "There is a strong inference to be drawn from the above factors that the early retirement agreement was deliberate scheme devised by Eskom with the involvement of Mr Molefe to afford him pension benefits he was not entitled to. The scheme permitted Mr Molefe to proceed to early retirement at age 50 by buying him extra pensionable service. The scheme was started soon after Mr Molefe's permanent employment and was deployed after he had publicly stated that he was voluntarily leaving Eskom's employ."*

*Paragraph 65: Mr Molefe voluntarily resigned and did not retire.*

*Paragraph 73: Minister Brown, of the view that there was no legal basis for Mr Molefe's pension, was under no obligation to fulfil its conditions. Subsequently, she was also under no obligation to "exchange" his reinstatement for repayment of monies unlawfully received.*

*Paragraph 82: "We also find that Mr Molefe was never entitled to receive any pension benefits from Eskom Pension Fund and any payments made in lieu of such benefits were patently unlawful."*

The High Court's judgement calls into question the governance practices and motives of the Eskom Executive and Board, as well as the Ministry:

*Paragraph 80: The allegations are highly relevant to Mr Molefe's suitability to be reinstatement as GCEO. They are a dead weight that he must carry until he is cleared. In the absence of new facts that arose in the interim to lift the dead weight that motivated the need for Mr Molefe to resign in the first place, the allegations in the Public Protector's report cannot just be ignored by the Minister or Eskom. The Minister and Eskom acted irrationally in ignoring the damning allegations in the Public Protector's report.*

#### 2.7.14 Governance issues

##### 2.7.14.1 Eskom's executive misleads the EPPF to enlist Mr Molefe as a member

The first parties to be called by the Committee to deal with the matter of Mr Molefe's pension were the EPPF CEO, Sibusiso Luthuli and Chairperson of the Board, Mantuka Maisela. Mr Luthuli and Mrs Malisela made a joint representation to the Committee, adding detail to the story that had been unfolding in parallel through investigative journalism and legal proceedings. The Committee was told that legal action had been taken by the EPPF to reclaim monies which had been disbursed to Mr Molefe. The fund's rules were reiterated, and it was noted that only permanent employees of Eskom and its subsidiaries are eligible.

Mr Luthuli explained in detail that there was a longstanding convention on how to load new members onto the Fund's system with detailed information exchanged monthly between Eskom and the EPPF in a "lack file". Mr Luthuli stated,

*"Eskom knows the rules, they know how the rules should be applied and, you know, and we rely on them to make sure that the rules are applied because they have the source documentation which we as a fund unfortunately do not have."*

Being aware of these rules and well-established conventions, when the EPPF received Mr Molefe's information, it clearly indicated his eligibility in line with the Fund's rules:

*This code says PPX and in our agreement with Eskom according to us, PPX means that you are permanent, and you are an executive, at an f-band level at Eskom. So, when we didn't...when he first came in in September and we did our recons we checked that; to say is he permanent, he's on permanent fix term, he is an executive? So, we can tick the box to say that we've satisfied ourselves that what Eskom is giving us they are confirming that this member is an eligible member...*

Mr Luthuli indicated that the perception of Mr Molefe's eligibility was reinforced at a meeting on 29 September 2015 between a Mr Nzibande, client manager for the EPPF, and Mr Anton Minnaar and Mr Brian Molefe from Eskom. This meeting dealt with the matter of the management of Mr Molefe's previous pension contributions while he was an employee at Transnet. Mr Luthuli went on to explain that the EPPF relies on the accountability and governance within Eskom to fulfil its role:

*I think it's important that I also highlight that as a fund we operate on a good faith relationship with the employer. This good faith relationship with the employer is quite crucial and very important because without this good faith relationship it will become very difficult for the fund to be able to verify certain information. For example, in the instance of members that are joining the fund, the fund does not have access to documents for a member that joins the fund. We never get to see an employment contract, we never get to see the terms and conditions under which the member has been appointed by the employer.*

Ms Venete Klein testified that the uncertainty surrounding Mr Molefe contract with Eskom originated with the contract that was drafted internally, overseen by Ms Suzanne Daniels:

*On the 9th of November Dr Ben [Ngubane] hands Brian Molefe a contract, it's called a fixed term contract, which Brian signs and in that it talks about his pension benefits, his medical aid benefits, etc. It's pretty important to note the date, that's on the 9<sup>th</sup>. It talks of a fixed term. There's no term in it, which means a term could be 10 years, 15, 20...there is no term. It's considered if you ask the people in Eskom what does it mean...it meant a full-time job, not a 5-year job. I have in this week received an email that was sent from the Department to Ms Daniels dated the 4th of November, remember Dr Ben had already gotten Mr Molefe to sign this fixed term contract with no contract...with no term on it, on the 09th. On the 4th of November, the letter that we had been waiting for confirming the tenure of 5 year[s] arrives with Ms Daniels. On the morning of the 9th of November Ms Daniels writes to the executive of remuneration asking him to do the contract with what Minister has said, for 5 years. The difficulty is the letter or the contract that gets given to by Dr Ngubane to Mr Molefe does not state a term.*

In summary, although the contract was always designated, "fixed term", the lack of specification of a term in the version signed by Mr Molefe on 9 November, despite Ms Daniels' knowledge that the Minister had approved a five-year term, may have led to the impression for some people that the term was "permanent". Ms Daniels, in her testimony before the Committee, acknowledges receipt of a letter from Minister Brown, limiting Mr Molefe's term to five years.

Mr Minnaar confirmed the failure of the contract to expressly specify a term in the correspondence from the Minister of which he had sight. He also explained that he had already uploaded Mr Molefe as an employee by this time on Eskom's SAP system:

*"I was advised by Secretariat to appoint Mr Molefe. The appointment was done on SAP and Eskom communication of the Minister did her announcement on 28th September 2015."*

Mr Molefe confirmed this version of events:

*The pension payment from Eskom Pension Fund: In April 2015 I was seconded from Transnet to Eskom as Group Chief Executive Officer in an acting capacity. On the 2nd of October 2015 I received a letter from the Minister of Public Enterprises appointing me as Chief Executive Officer of Eskom and ex officio member of the Eskom board. The letter did not have a limitation on the period of employment.*

Mr Molefe was therefore employed under three different arrangements during his tenure. Despite all evidence to the contrary, noted above, Mr Minnaar made the controversial and possibly perjurious statement,

*"It is clear in my view, that we appointed him as a permanent employee. We have never been advised differently." He, in his capacity an experienced professional, maintained that he believed that Molefe was, paradoxically, a permanent employee with a term.*

#### **2.7.15 Dr Ben Ngubane and Anton Minnaar lay the groundwork to facilitate Brian Molefe's early resignation and pension pay-out**

The Committee was presented with evidence that suggested that Mr Molefe's early retirement was a deliberate and carefully planned action. Mr Luthuli testified:

*...There was various correspondence where Mr Minnaar, I think as early as November 2015 was requesting the fund to do calculations in respect of Molefe's overall pension payments and any early retirement costs in the event that Mr Molefe where to retire 5 years later when he was aged 54 and what will be the cost implications if the penalties were waived. We calculated those benefits, you know, then at different days and different times there were these requests that came through via email to say now calculate what happens from the age of 55, what happens at the age of 63, and all of this took place around about November 2015 where we then calculated, did various calculations. And I think in one of the emails that was sent to us we were put under pressure as the fund to say, you know, we need this information urgently because it was saying that calculate these numbers as information is required to finalize the issue with the minister. So, we don't know what minister they were referring to because it didn't say what minister, but it just said we need this information to finalize the issue with the minister.*

Ahead of Mr Molefe's resignation, Mr Luthuli informed the Committee that the matter of Mr Molefe's early retirement was addressed in written correspondence between Mr Minnaar and the EPPF between August 2016 and December 2016:

*I think specifically on the 18th of August 2016 we received again a request from Minnaar, Anton Minnaar, at Eskom now requiring the fund to do early calculation for early retirement costs if Molefe were to be retired at the age of 50, with penalties being waived and additional years of service being bought up to the age of 63. Again, the fund calculated those benefits and then gave the information back to Mr Minnaar. I think at the time, the cost of the benefit we had calculated it in August to be around 25.9 million.*

Ms Daniels confirmed receipt of this information within Eskom.

Ms Klein testified that in response to Mr Molefe being moved from an indefinite fixed-term contract to a five-year fixed term, she and other Board members discussed ways of ensuring a financially beneficial retirement for Mr Molefe. At a meeting of the People and Governance Committee on 9 February 2016, Ms Klein testified that Mr Minnaar presented the method by which Mr Molefe would be retired from Eskom:

*He said well there is a rule that says if you've been in the organisation for 10 years and you are 50 years old the organisation would then pay for certain things, pay for certain waivers of penalties etc. that had been done before. So, we said ok. Looking at that then after 5 years Mr Molefe would be 55 then that same rule could apply except he wouldn't be there for 10 years. So we discussed it and we took it to P&G where Mr Minnaar came and did the presentation to P&G to explain to us that this had been done on numerous occasions for other CEOs and told us about the rule in 1992 or 1999 where Jan Maree actually said any CEO who leaves gets an additional 5 years in pension.*

None of this was applicable to Mr Molefe because he was at no point a permanent employee of Eskom. Mr Molefe also explained to the Committee:

*Also in early October 2015 I received and signed the executive employment contract," that is attached in page 35 to 49, "from Eskom which specified the commencement date of my employment as the 1st of October 2015 and the contract specified that employment was to continue for an indefinite period," clause 3.1 of the contract which is on page 39 of the documents. "In November 2015 my membership of the Eskom Pension Fund was finalised. I also transferred proceeds from my Transnet Pension Fund to the Eskom Pension Fund which was about 4.3 million rand. The Eskom pension fund loaded my membership in their system as 'PPX' meaning that I was a permanent employee. On the 1st of November 2015 the Minister wrote a letter to Dr Ngubane informing him of a cabinet decision to employ all the parastatal executives." This is an edit that I would like to, but I just said there 'all the parastatal executives, but its parastatal executive directors, which is the parastatal's executive directors, which is Eskom's executive directors on 5 year contracts.*

It appears that by the time that Mr Molefe was uploaded on the EPPF system, Eskom was already aware or should have been aware that he was not eligible for membership of the fund. In his testimony to the Committee, which preceded the High Court judgement, Mr Molefe maintained his correctness in becoming a member of the EPPF:

*So, at the date when I became first became a member of the pension fund I was an eligible employee, but I don't know if your point, therefore, is that in March when I signed that contract that applied retrospectively my membership of the Pension Fund should have been revoked retrospectively.*

The Submission by Board of Eskom Sections 6.13-6.14 to the Committee notes:

*6.13 On the 7th of March 2016 a formal employment contract was drafted and signed by both Eskom and Mr Molefe. This contract was based on a five year fixed term and on the basis of the resolution dated 9th of February 2016, in terms of which early retirement would be permissible upon termination of the fixed term contract. On the 6th of September 2016 it was decided to increase the long term incentive award for Mr Molefe to two times the annual pensionable earnings as the amount was relatively low based on the benchmark against similar long term incentive awards to Chief Executive at this level.*

*6.14 On the 24th of October 2016, the Eskom People and Governance Committee approved the additional award in the form of an increase of Molefe's long-term incentive to two times the annual pensionable earnings.*

Under normal circumstances, EPPF members may:

- Retire at 55.
- Retire at 50, if they have worked for Eskom for 10 years, with penalties paid, reducing total benefits.

On 11 November 2016, the day of his resignation, Mr Molefe requested early retirement, as noted by Ms Daniels *"in line with the EPPF rules as read with the resolution of the People and Governance subcommittee dated 9 February 2016"*. On this day, Eskom as well as the Minister issued official statements confirming that Mr Molefe had resigned. Ms Daniels testified that Dr Ngubane approved the early retirement request on 24 November 2016. His decision was motivated with reference to the EPPF rules, and the Board resolution of 9 February 2016.

Mr Khoza testified that the Board was not called upon to vet or sanction the approval, which was sent to Mr Molefe. The letter was read to the Board's People and Governance subcommittee, but not approved, "It was read to this particular meeting, it was not a submission". Mr Khoza also testified that the Board did not have sight of Mr Molefe's request for early retirement of 11 November 2016.

Mr Luthuli testified that on 19 December 2016, Mr Nzibande was called to a meeting with a Ms Marinda Botha who works in Mr Minnaar's office, to collect documents dealing with Mr Molefe's retirement and exit from the EPPF. These documents included:

- A form completed by Mr Molefe and Eskom that, "ticked the relevant boxes to say Mr Molefe is being retired using early retirement".
- A letter signed by Dr Ngubane, in his capacity as Eskom Chairperson of the Board.

The letter was clear regarding the terms for retiring Mr Molefe:

*"Mr Molefe, your application for early retirement has been approved and we are invoking rule 28 as well as rule 21 (4)". So, there was no ambiguity in terms of which rules Eskom wanted the fund to apply, in terms of rule 28 and rule 21(4). And then it further stated that any penalties would be waived. It further stated that they would, you know, purchase additional service for Mr Molefe of 13 years, which then took him to age 63 because he was turning age 50 in December.*

The conditions indicated to the EPPF in December 2016 brought the content of Dr Ngubane's letter to the Minister from November 2015 to fruition. Rule 28 was invoked to enable early retirement. However, because Mr Molefe did not have the required 10 years of service to apply this rule, Eskom invoked Rule 21(4), which allows Eskom to pay in additional contributions, effectively buying years of service on behalf of an employee. Having worked for 16 months, Eskom needed to purchase eight years and eight months of service. None of this does apply to employees, such as Mr Molefe, who never qualified for EPPF membership. Eskom purchased Mr Molefe 156 months of contributions, added to his 16 months. Mr Minnaar confirmed his role in structuring the conditions for Mr Molefe's early retirement.

In his testimony, Mr Khoza stated that there was an investigation into the destruction of documentary evidence regarding Mr Molefe's pension:

*There is an investigation that was investigated in terms of destruction of the documents [...] a person that was doing the investigation to check all the documents [...], including that particular incident, and that document had found that [...] Minnaar [...] did not act properly and also from the company secretary it [said] as well that they did not follow the process. There was an investigation that found that out.*

#### **2.7.16 The EPPF's methodology for calculating Molefe's pay-out**

The EPPF, having earlier made the assessment that Mr Molefe's early retirement pension benefit would be in the region of R25.9 million, recalculated this benefit based on the received information noted above. This information included Mr Molefe's increased annual salary of R5.6 million, as well as the age of his spouse, who is more than five years younger than him (a factor that affects benefits). These factors, as well as the waiving of all penalties by Eskom, saw Mr Molefe's benefit increase to R30.1



million. He requested one third (less tax) be paid in a lump sum, while the rest would be paid in monthly payments, commencing in February 2017, backdated to January 2017. The lump sum amounted to R7.9 million (less tax). Mr Molefe also opted to take one third of his Transnet contributions in cash, which amount to R1.7 million (less tax).

#### **2.7.17 Eskom's Board failed in their oversight of executives in the matter of Molefe's pay-out**

Ms Venete Klein testified that the Eskom Board and in particular the People and Governance Committee, never approved the Molefe pension. She argues that they noted the possibility of retiring Mr Molefe after five years but did not resolve to approve such retirement. Ms Daniels' statement clarifies this matter. The minutes for the Board meeting of 9 February 2016 request, with reference to "the current rule that staff of over 50 years of age with at least ten years' service were entitled to retire as per the Eskom Pension and Provident Fund Rules":

*"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"*

In terms of the motivation for Molefe's pension, Ms Klein offered the following, which echoes the sentiment articulated by Minister Brown, Dr Ngubane and Mr Minnaar: *"The entire board, including me, was in awe of what Mr Molefe had been able to deliver, especially as he had done so with substantially the same executive team who had previously not known how to turn the load shedding situation around."* She did not agree that the Board had failed in any way but passed responsibility on to Ms Daniels and Mr Minnaar.

The Submission by Board of Eskom Sections 6.15-6.17 to the Committee notes:

*6.15 On the 7<sup>th</sup> of March 2016 a formal employment contract was drafted and signed by both Eskom and Mr Molefe. This contract was based on a five-year fixed term and on the basis of the resolution dated 9<sup>th</sup> of February 2016, in terms of which early retirement would be permissible upon termination of the fixed term contract. On the 6<sup>th</sup> of September 2016 it was decided to increase the long term incentive award for Mr Molefe to two times the annual pensionable earnings as the amount was relatively low based on the benchmark against similar long term incentive awards to Chief Executive at this level.*

*6.16 On the 24<sup>th</sup> of October 2016, the Eskom People and Governance Committee approved the additional award in the form of an increase of Molefe's long-term incentive to two times the annual pensionable earnings.*

*6.17 On or about the 13th of April 2017, the Chairperson of the People and Governance Committee was made aware by a Journalist that alleged payments in the amount of R30 000*

*000.00 were made to Mr Molefe from the Eskom Pension and Provident Fund. This is the first time that Eskom became aware of a potential leakage of confidential information regarding Molefe's early retirement.*

Despite the fact that there was no reply on the matter of Molefe's pension, having deemed the matter to have been of material relevance for the Minister, the Board still discussed the matter as laid out in the letter from Dr Ngubane to the Minister, dated 25 November 2015. This Board meeting took place on 23 February 2016.

Mr Khoza's testimony before the Committee indicated that Board approval of Mr Molefe's pension rested on EPPF approval. However, this directly contradicts Mr Luthuli's view that EPPF approval rests on Eskom's understanding of the rules and provision of accurate information.

The EPPF Rules were never amended as suggested. However, it was not up to Eskom to amend the rules, but the EPPF to do so. No such request was submitted to the EPPF.

#### **2.7.18 Due diligence failure**

The matter of Mr Molefe's pension was never raised with the EPPF Board, who contacted Mr Luthuli upon reading the Sunday Times media report. Mr Luthuli explained:

*So currently there is a board that is in place, the board that is in place came into effect on the 1st of June 2016. Once the board exercises control and governance over the fund, it's however not practical that the board can attend to day-to-day activities. So the board has then, the fund as a management team which then attends to these day-to-day activities in terms of running and managing the fund and executing on board resolutions and board decisions and board mandates. The management team is led by myself as the chief executive of the fund as well as the principal office of the fund. I then have an Exco that assists me in terms of the day-to-day running of the fund.*

He also stated that he, as CEO, was not required to sign off on the pension because of formal delegations in place. He reported that Mr Nzibande was called into a meeting with Eskom, but that rather than meet with Mr Minnaar at Eskom's offices, he met with a Mr Adil Patel and Ms Venete Klein in Midrand. The veracity of the EPPF's calculation of Mr Molefe's pension was questioned and tested by Sizwe Ntsaluba Gobodo, auditors appointed by Eskom. The calculation was found to be technically correct, on the assumption that Mr Molefe was eligible for EPPF membership. However, it remained highly irregular, a consideration that was missed by the EPPF's governance structures. At an EPPF Board meeting, on 19 April 2017, the EPPF management was required for the first time to explain how Mr Molefe's pension had been arranged.

The EPPF requested a legal opinion from Norton Rose on their process for approving Mr Molefe's pension. Mr Luthuli explains:

*What they [Norton Rose] then raised, was if you read rule 28, especially route 28 (3), it does indicate that this should be done at the discretion of the board. So they then indicated that this should have actually been presented to the pension fund board to apply its discretion. So by virtue of it not having been presented to the pension fund board, it then meant that this retirement was actually ultra vires...*

In other words, the delegation that allowed EPPF managers to sign off on Mr Molefe's pension without CEO or Board approval was not proper. Committee members did raise the responsibility of the Board to report possibly corrupt actions under the Prevention and Combating of Corrupt Activities of 2004. In terms of section 34 of the Prevention and Combating of Corrupt Activities Act of 2004 an offence of fraud, bribery, corruption and/or theft involving an amount of R100 000 or more must be reported to the Directorate for Priority Crime Investigation ("DPCI") by any person who holds a position of authority and knows or ought reasonably to have known or suspected that any other person has committed such offence. A person in a position of authority includes a member of the board of directors of a company. Responding to a question on corporate governance, with specific reference to the failure of the Eskom Board to take disciplinary action or to lay criminal charges against members of the management team who were implicated in corruption, Ms Maisela replied:

*To answer your question, management did not deliberately make the decision. They made the decision on the basis of the delegation of authority given to them. So, as a board we did not discipline anybody because there was a whole full paper trail of why management did that and they had done it in the past based on the delegation of authority that was given to them.*

#### **2.7.19 Eskom executives obfuscate status of Brian Molefe's termination of employment and subsequent reappointment**

Ms Suzanne Daniels wrote a letter to the EPPF, dated 12 May 2017, requesting that the pension payments to Mr Molefe be ceased. She testified that she, Dr Ngubane, Ms Klein and Mr Minnaar had been instructed by the Minister on 19 April 2017 to "re-evaluate the 'pension payment'". On 28 April, Ms Daniels states, Eskom received unspecified legal counsel indicating that Mr Molefe's pension arrangement was not lawful.

Eskom sent a letter to Mr Molefe, dated 3 May 2017, requesting that he "resume his duties", implying that his retirement had not taken effect, and setting aside his very public resignation.

At a Board meeting with the Minister on 9 May 2017, Minister Brown testified that, "[The Board] said the [pension] agreement had been based on what they termed a shared misunderstanding". Minister Brown reported that Eskom presented her with four options for rescinding Mr Molefe's pension, expressing a preference for his reinstatement. She states,

*I applied my mind to the matter, accepting the Board's bona fides that it had obtained advice from senior counsel and also accepting the correctness of this advice. Since the meeting, however, officials from the Department requested a copy of this opinion and have been repeatedly rebuffed by the former Company Secretary Ms Daniels, and the Board.*

The second letter from Eskom to Mr Molefe dated 11 May 2017 restated the rescinding of retirement benefits as well as a request for him to resume his duties.

Mr Luthuli continues:

*"Again, we then got a letter telling us that he had been re-employed at Eskom and then indicating that the period that he had left up to the period of re-employment would be taken as unpaid leave and then we must stop paying the pension."*

Mr Molefe explained:

*The reinstatement agreement did not seek to reinstate me. The fact that my pension arrangements or my pension agreement was void ab initio means that my contract of employment was still in existence and that is what the legal advice that we obtained. And so the reinstatement agreement just regulated the manner in which I would return to Eskom on the date that had been specified by the Chairman of the board.*

Mr Khulani Qoma testified as to his professional assessment of the reputational risk of Mr Molefe's return to Eskom in Section 3.14 of his statement:

*When it became apparent that Molefe was returning to work following Mzikazi Wa Africa's R30m story, I registered my reputational protest, albeit feeble protest. It was feeble due to the fact that I didn't record it in writing; a part I regret sincerely. I deluded myself in thinking that Minister Brown would not grant authorisation to the patently wrong decision.*

#### **2.7.20 Eskom offers to pay for legal counsel for the EPPF**

Eskom sent correspondence, dated 25 July 2017, to the EPPF, stating that it would cover any legal expenses incurred by the Fund in preparing to make its representation to the Committee. Eskom writes,

*You are reminded that you have a right to your own legal counsel during this process. Eskom is agreeable to paying your reasonable legal fees connected with the enquiry. However, this is subject to Eskom obtaining the necessary written consent from its insurers in this regard. You should also note that in terms of Eskom's management liability insurance policy, the insurer who will be paying your legal fees connected with the Parliamentary enquiry, is entitled to recover those costs.*

Ms Maisela, as Chairperson of the EPPF Board, responded,

*“At the current time the Fund is not in a position to accept such offer as it does not wish to be placed in a position of a potential conflict of interest”.*

Ms Maisela stated to the Committee that she deemed Eskom’s offer to have been inappropriate.

#### **2.7.21 Minister Brown’s role is called into question following the revelation of correspondence with Ben Ngubane**

Mr Molefe’s appointment under his fixed term contract as CEO did indeed take place three months before the adoption of the 2016 MOI. Although, as noted above, this is irrelevant to Minister Brown’s lack of remedial action in relation to Mr Molefe’s pension, nor is it sufficient in explaining her rationale for allowing Mr Molefe’s reappointment.

Evidence presented by Mr Luthuli is consistent with the findings of the Pretoria High Court and suggests close collaboration between Mr Minnaar and Dr Ngubane, who was the author of the letter to Minister Lynne Brown, “Retirement Arrangements – Brian Molefe”, dated 25 November 2015. Testifying before the Committee, Mr Minnaar defended his actions, stating that Mr Molefe had earned his pension by defeating load shedding. Mr Minnaar explained why he had drafted the letter, which bore Dr Ngubane’s signature:

*On 20 November as well the issue of early retirement was discussed with the people and governance committee members. I informed the chairperson of the people and governance committee that it would be important to get Ministerial input on this issue before we finalise the issues on retirement. I drafted the letter to the Minister, the one that’s being referred to, from our side to the chairperson of the people and governance committee for review for inputs and discussed. That letter was later signed by the chairperson of the board and it was given to the Minister and they accept it as well. I think the reason why we raised it is the first time that we actually worked with a 5-year term contract and contracts got major implications. And from our understanding it was permanent and I thought it would just be important that the Minister is aware of the retirement arrangements that we’re trying to calculate for Mr Molefe as he’s been moving over and over so he didn’t have time to actually build up a pension either.*

Ms Klein confirmed that the Board never received any responses from the Minister on this matter. Mr Molefe, however, in his testimony notes that at least two people in the Minister’s office were aware of the letter, including Ms Davids:

*The letter of the 25th of November 2015, which specified this new pension arrangement was sent by the Eskom company secretary Ms Suzanne Daniels to Ms Kim Davids the Minister’s PA, Orcilla Ruthnam and Z Mbalazi at the Department of Public Enterprises. The letter was emailed at 20 hours 33 on the 25th of November 2015 by Ms Daniels,” and the proof of that is on page 57 of the documents. “At 21:05 on the 25th of November 2015 Ms K Davids acknowledged receipt*

*of the letter and undertook to bring the letter to the Minister's attention," and this acknowledgement is on page 57 of these documents. "On the 26th of November 2015 Kay Mhlongo sent an email to Ms S Daniels confirming that the letter will be brought to the Minister's attention," and that is on page 59. "Also Orcilla Ruthnam noted the letter," and her email is on page 60 of these documents.*

Mr Qoma testified:

*Had the Sunday Times not broken the well-orchestrated corporate Ponzi scheme, Molefe would have received his generous pay-out for his unrivalled Gupta performance. This scheme has Minister Brown's fingerprints all over it. When this was broken by the Sunday Times, she pretended as though she didn't know about it when she received a letter with a subject line "Retirement Arrangements – Brian Molefe" on 25 November 2015. As usual, Minister Brown feigned ignorance when the Sunday Times published the story in this regard. She had more than enough time to stop this Ponzi scheme before it became a festering wound that it currently is. It has caused immeasurable damage to Eskom as a brand. We all need to pause to thank the Sunday Times for saving this country so much money; not Minister Brown who was clearly complicit in the entire fiasco.*

Minister Brown addressed the Committee on 22 November 2017, speaking to the issues surrounding Mr Molefe's appointment, pension and related matters. She states:

*It is regrettable that the inquiry did not take the opportunity to obtain more details from Ms Daniels, wearing both her hats as head of legal and company secretary, on the subject of Mr Molefe's pension benefits and departure from Eskom.*

*You might have compared her version to that given to the Portfolio Committee on 23 May 2017. It would have been particularly useful to obtain the legal opinion Eskom claims to have used to reinstate Mr Molefe. After requesting to see the opinion on numerous occasions, I can only conclude that it is phantom.*

In support of her claim of ignorance in relation to Eskom's actions regarding Mr Molefe's pension, Minister Brown, she stated:

*On 8 March 2017 I sent a letter to Eskom requesting a resolution recording Molefe's resignation and the formal appointment of Mr Koko as the Acting CEO. The Department was duly furnished with Mr Koko's appointment letter but no resolution on Molefe's resignation or retirement.*

Minister Brown maintained that she was deliberately misled by Eskom executives, including Ms Daniels:

*Then, my dealings with Eskom have taught me, there is stuff I thought I knew because someone had misinformed me – and some stuff that is difficult to know because it is being actively concealed.*

*Over the past eight or nine months – as more allegations have been leaked into the public domain – it has become increasingly apparent that I could no longer rely on information that Eskom was supplying me.*

*It began with the Brian Molefe pension matter. Until then, the questions that I asked Eskom had received plausible answers. But when I intervened to ask the Board to come to a more appropriate arrangement it opened a can of worms.*

## **2.7.22 Incidences of undue influence**

### **2.7.22.1 Ben Ngubane's relationship with Brian Molefe**

Dr Ben Ngubane's relationship with Mr Molefe appeared to afford him special treatment. Mr Qoma presented an interpretation of Brian Molefe's pension pay-out in which he saw it as compensation for value generated for the Gupta family, rather than for Eskom and for South Africa. He also testified that his interaction with Dr Ngubane had led him to question whether his relationship with Mr Molefe was proper:

*...On the evening of his dismissal (on 2 June 2017), Dr Ngubane asked to be accompanied to Molefe's house to provide him with moral support. About thirty minutes were spent with him, with Dr Ngubane leaving a few minutes earlier to, as he said, head to his meeting with the President. Certainly in my career, I hadn't seen a situation when an employer fires an employee and the follow him to his home to console same. There a general lack of duty of care. This also manifested when Dr Ngubane pushed for the employment of Carl Niehaus to assist me with Board messages, on 19 May 2017. With increasing pressure in the ensuing days, I pushed back by raising the risks associated with the decision given Niehaus' infamy. I saw a reputational risk and wasteful expenditure in the decision.*

## **2.7.23 Observations**

### **2.7.23.1 Eligibility of Brian Molefe for a pension pay-out from the EPPF**

- i. While Brian Molefe may have initially moved to Eskom on the assumption that he would be a permanent employee, the fact that he was appointed on a fixed term contract was fully known by the Eskom Board and the Minister.

- ii. Mr Molefe was never eligible for membership of the EPPF, and the Eskom Board and the Minister knew this. It is not clear why the Board and the Minister went along with this arrangement.

**2.7.23.2 Ben Ngubane and Anton Minnaar played key roles in facilitating Molefe's pension payment**

- iii. Mr Molefe's pension would not have been possible without the actions of Anton Minnaar and Ben Ngubane, who had full knowledge of the conditions of his employment.

**2.7.23.3 High Court rules Eskom Board's decision on Brian Molefe's pension was not in good faith**

- iv. The Pretoria High Court's findings that Eskom did not act "in good faith", but rather, "deliberately" implies its actions were not a mistake.

**2.7.23.4 Minister acted irrationally in ignoring the damning allegations in the Public Protector's report**

- v. As the shareholder representative of the government, Minister Brown should have intervened in the matter of Mr Molefe's pension once she became aware of the said matter.
- vi. It is unclear what Minister Brown's rationale was for confirming the reappointment of Mr Molefe in 2017, given that she relied on the prescripts of the then defunct 2014 MOI to defend her previous lack of intervention.

**2.7.23.5 Eskom's Board appears to have failed to protect the Company's interests in favour of Molefe's**

- i. No evidence was presented to the Committee that indicated that the Board was proactive in its oversight concerning Mr Molefe's pension, despite the terms of his contract being new and unusual in the context of Eskom's operations. In line with the Pretoria High Court's judgement in relation to the governance failure by the Minister and Chair regarding the reappointment of a severely compromised individual as CEO, it appears that this irrationality extends to the Board as a whole. Eskom's Board acted against the interests of the company, whether known by Minister Brown, and/or in blatant disregard of their accountability to the Minister.

**2.7.23.6 Given that R30 million is incommensurate with a 16-month employment term, it begs the question of what value was exchanged for this sum.**

- ii. Mr Molefe's pension, Dr Ngubane's role in securing it, and the implication of both parties in the *State of Capture* report, present a set of facts that suggest that, while Mr Molefe created questionable value for Eskom, he appears to have been instrumental in creating excessive value



for companies such as Tegeta Exploration and Resources Pty Ltd (“Tegeta”) and Trillian Capital Partners (Pty) Ltd (2015/111759/07) (“Trillian Capital”).

## **2.8 Eskom’s Governance**

### **2.8.1 Evidence of Breaches in Corporate Governance**

The performance and governance of Eskom have been in decline for some time with notable shifts occurring periodically. Responses to questions asked in parliament regarding corporate governance matters and corruption at Eskom (notably, former Minister Lynne Brown's answers on Trillian), and Eskom official statements have misled parliament and the South African public as to maladministration and performance in the SOC. However, since the publication of the Public Protector’s State of Capture Report, several other internal and external reports (Budlender Report, Dentons Report, NT PwC Report, Bowmans Report, G9 Report etc.), along with the #Guptaleaks emails have shed light on the degree of divergence in the form and substance of governance from those benchmarks set out in applicable laws, regulations, standards and codes.

### **2.8.2 Mr Malusi Gigaba is appointed Minister of Public Enterprises**

In November 2010, former Minister Malusi Gigaba (“Minister Gigaba”) was appointed as Minister of Public Enterprises. He declined to approve the Eskom Board’s procurement decision to award Westinghouse a tender to replace Koeberg nuclear power station’s six steam generators. When the procurement process was undertaken again in 2012, the bulk of the contract was, following proper procurement decisions, determined by the Eskom Executive Procurement Sub-Committee (“EXCOPS”) to be awarded to Westinghouse.

Minister Gigaba overhauled the Board in June of 2011, with only two members remaining from the previous board, Bernie Fanaroff, and Boni Mehlomakulu. Mr Zola Tsotsi (“Mr Tsotsi”) was appointed Eskom chairperson together with Queendy Gungubele, Neo Lesela, Bejabulile Luthuli, Chwayita Mabude, Yasmin Masithela, Collin Matjila, Mafika Mkwana (concurrently Chairperson of Transnet), Phenyane Sedibe and Lily Zondo as non-executive Board members. The new Board oversaw several incidences of procurement, including overriding the EXCOPS decision on Westinghouse noted above.

### **2.8.3 Minister Lynne Brown appointed Minister of Public Enterprises in May 2014**

Former Minister Lynne Brown (“Minister Brown”) appointed eight new Board members in December 2014, six of whom were revealed in the Public Protector’s *State of Capture* report to have connections to the Gupta family. It was alleged in the course of the Inquiry that Gupta family associate, Mr Salim Essa, became a conduit for the exercise of external influence over Board appointments. It was allegedly that Mr Essa played an intermediary role between the Guptas and Minister Brown. Mr Tsotsi resigned on 31 March 2015, allegedly following a draft Board announcement of this fact being sent from Mr

Nazeem Howa (“Mr Howa”). Dr Baldwin “Ben” Ngubane (“Dr Ngubane”) who had previously served as a Board member at the SABC and Land Bank was then appointed as Chair of Eskom.

It was the newly appointed Board (appointed by Minister Brown in 2014) that oversaw Eskom’s interactions with and procurement from Tegeta and Trillian. The Board oversaw some questionable procurement decisions, including the resolution taken on 9 December 2015 regarding an unprecedented prepayment to Tegeta ahead of its acquisition of OCH, documented in the *State of Capture* report.

It is a matter of paramount importance that the Shareholder, duly represented by Minister Brown, has access to accurate information provided by the Board on both routine and critical issues. However, Minister Brown has claimed that Eskom executive and non-executive directors misled her on the matter of Brian Molefe's ("Mr Molefe") pension, as well as payments to Trillian.

Minister Brown introduced new Board members in June 2017, including Pulane Molokwane, Simphiwe Dingaan, Banothile Makhubela, and Sathiaselan Gounden. These changes followed the removal of Chwayita Mabude following revelations of alleged links to the Gupta family, as well as other resignations. On 11 March 2017, Cabinet appointed an Interim Board that was chaired by Mr Khoza (Interim Chair). The interim Board compromised the following non-executive directors: Dr Pat Naidoo, Giovanni Leonardi, Dr Pulane Molokwane, Simphiwe Dingaan, Dr Banothile Makhubela and Sathiaselan Gounden, and two new board members, Professor Malegapuru Makgoba and Professor Tshepo Mongalo.

## **2.8.4 The form, function and purpose of offices and Board Committees**

### *2.8.4.1.1 The Board Tender Committee*

From 2010, the Board Tender Committee (BTC) approved various critical decisions, these included those that were necessary to carry out the Koeberg procurement, the TNA breakfast deal, the Tegeta transactions, and Trillian and McKinsey transactions. Board Members and Eskom executives were invited to an unscheduled late-night BTC meeting of 11 April 2016.

### *2.8.4.1.2 The Audit and Risk Committee*

Tasked to manage Eskom's significant exposure to various risks, the Audit and Risk Committee failed to sufficiently flag or manage the financial and governance risks that led to Eskom's credit rating downgrades in 2017 and 2018. Furthermore, in July 2017, Eskom received its first qualified audit.

### *2.8.4.1.3 Executive Committee on Procurement*

The Executive Committee on Procurement was gradually displaced in authority by the BTC. Executive decisions were overturned, new contenders for procurement contracts introduced and deviations from mandated procedures and processes were introduced.

### *2.8.4.1.4 The office of the Group Executive: Technology and Commercial*

According to Eskom's Procurement Policy, Clause 3.5 - 3.6, the Board delegated significant centralised power to the group executive: Technology and Commercial, with authority for all approvals related to procurement and supply chain management ("SCM") activities. The Risk/Governance Department also falls under the same executive, tasked to implement checks and balances on various aspects of the procurement and supply chain processes to manage compliance.

#### *2.8.4.1.5 Internal assurance*

Eskom's internal assurance function was used to cover up possible irregularities. For example, in September 2016, Eskom's assurance and forensics department found that Eskom followed the correct procurement processes for the prepayment to Tegeta and that all policies and procedures were followed.

#### *2.8.4.1.6 Eskom gradually closes channels of accountability*

Whereas Eskom's public communications had previously been used to convey matters of public interest and importance aligned to national policy, this function was used to announce matters that should have first gone through the Minister's office (e.g. Mr Molefe's pension), and to misrepresent facts concerning significant financial transactions, including those in respect of Tegeta and Trillian. Minister Brown claims to have been misled by executives and Board members on both of the above matters.

### **2.8.5 Board and Executive Management interference in large procurement processes**

#### *2.8.5.1.1 Ministerial oversight*

According to Eskom's MOI, the chairperson of Eskom's Board is appointed by and accountable to the Shareholder, duly represented by the Minister. During her tenure, Minister Brown appointed three chairs. She also oversaw the appointment of six different CEOs. Eskom's financial position deteriorated from an already weak starting point, and it received its first qualified audit.

#### *2.8.5.1.2 Board oversight*

Board members failed to prevent unusual or irregular expenditure, and may have misrepresented information on relevant transactions to Minister Brown, Parliament and the South African public. Particular failures concerning managing investigations of wrongdoing and instituting credible and legitimate disciplinary processes are detailed below.

### **2.8.6 Patterns of stunted investigations related to the State of Capture Report and other reports**

In 2015, the Dentons probe, which investigated possible governance failures and other issues at Eskom, was prematurely terminated seven weeks after it began (it was initially envisaged as at least a three month or 12-week process). The Board then instructed Dentons to remove all the names of implicated individuals and anything that Dentons could not (or had not yet had enough time to) corroborate in finalising the report. The Board also ordered that all copies of the interim report presented to the board at the end of June be destroyed. The report was then shared with Minister Brown.

#### **2.8.7 Internal disciplinary processes were delayed and may have been manipulated to improper ends**

Mr Matshela Koko (Mr Koko) was promoted to Acting CEO, following Mr Molefe's dismissal in 2017. Mr Koko was suspended in July 2017, but returned on 15 December 2017, having been vindicated in an Eskom disciplinary process. On 29 September 2017 the Chief Finance Officer (CFO) Mr Anoj Singh ("Mr Singh") was suspended. His suspension was followed on 2 October 2017 by that of Mr Prish Govender ("Mr Govender"), Mr Edwin Mabelane ("Mr Mabelane") and Mr Charles Kalima ("Mr Kalima"). These suspensions differ in procedural rapidity and outcome with those that saw the removal of Mr Matona, Ms Molefe, and Mr Marokane in March 2015. It is critical to note that the Bowmans report recommended the suspension of key individuals, including Mr Singh and his colleagues suspended on 29 September and 2 October, respectively, on 2 August 2017.

The investigations undertaken by G9 did not proceed unhindered as the recommendation to suspend the implicated executives was not implemented. The G9 report also details the evasive and either negligently or deliberately falsified accounts of facts that they were forced to contend with from Eskom executives and senior managers during their investigation.

#### **2.8.8 Media reports allege improper relationships between Eskom officials and external parties**

There have been several allegations of improper relationships between the Gupta family, its associates, Eskom officials and Cabinet ministers. It was alleged that the Guptas organised and funded the travel to Dubai or India for several individuals, including Mr Koko and Mr Singh. When confronted with evidence from the #Guptaleaks, both Mr Koko and Mr Singh denied that their trips were paid for or organised by the Guptas, while Minister Brown denied any knowledge of her personal assistant's trip to Dubai which was allegedly paid by the Guptas.

#### **2.8.9 Collapse of systems of oversight and accountability**

The matters of procurement that preceded allegations of state capture certainly impacted on Eskom's reputation. However, these allegations differ in scale and reach from those that began to emerge with the publication of the *State of Capture* report and #Guptaleaks, as well as other reports, such as the Dentons Report, Bowmans Report (Trillian), Budlender Report (Trillian), PWC Report (Tegeta/coal) and G9 Report (Trillian). The damage to Eskom's integrity was made evident in its appointment of Mr Khulani Qoma ("Mr Qoma"). He explained the motivation for his appointment to the Committee:

*Consequent to Ms Thuli Madonsela's [...] State of Capture report, [the] Eskom Board, through Mrs Venete Klein, approached me to come in as reputation adviser and a spokesperson for the Board of Directors of Eskom. I understood my role to be highly strategic and proactive for the optimal fulfilment of the stated objectives. I would therefore scan and interpret the material environment to derive early warnings and concrete stakeholder/reputational plans.*

However, Mr Qoma points to the actions of Minister Brown that prevented him from doing the job he was appointed to do. He referred, specifically, to the television interview in which Mr Koko denied having signed any prepayment to Optimum Mine:

*Notwithstanding the appearance on Carte Blanche, where he was caught out publicly lying, and other serious allegations of corruption, Minister Brown appointed Koko as acting GCE. Expectedly, media and commentators protested this reckless appointment. It was an irrational decision with a scarce demonstration of the requisite duty of care. The Minister was somewhat oblivious of the septic boil caused by the revelations of the State of Capture. Her appointment of Koko served to fast-track Eskom's reputational downward spiral.*

#### **2.8.10 Eskom Board's promotion of compliance with applicable laws and adopted, non-binding rules, standards and codes (such as King IV)**

Representatives of the Eskom Board appearing before the Committee all failed to articulate their individual and collective accountability for the poor performance and weak governance at Eskom. These representatives included: Ms Venete Klein ("Ms Klein"), Ms Devapushpum (Viroshini) Naidoo ("Ms Naidoo"), Mr Zethembe Khoza ("Mr Khoza") who was the Eskom Interim Board Chairperson, Dr Pat Naidoo ("Dr Naidoo") and Mr Sean Maritz ("Mr Maritz"), who was Eskom Acting CEO between 2017 – 2018.

#### **2.8.11 Board appointments**

Board appointments made from 2010 onwards, introduced individuals into the Board that failed to master either the competences or the ethics required to prevent the governance and procurement failures that have characterised Eskom's administration between 2011 and 2017, and which led to the company receiving its first qualified audit in 2017.

#### **2.8.12 Checks and balances of power on Eskom's Board**

The Board Tender Committee (BTC) appears to have acted at times with a high degree of independence, pushing through unusual transactions such as the Tegeta guarantee and pre-purchase. Furthermore, the Board has been unable to respond to questions about the involvement of the GCEO in procurement decisions. In his capacity as GCEO, Brian Molefe intervened in the Optimum Coal Mine contract renegotiation. In his capacity as GCEO, Mr Matjila signed procurement arrangements that were outside of his delegation.

#### **2.8.13 Clarity of roles within Eskom's executive structures**

It appears to be an illogical arrangement that the Group Executive: Technology and Commercial is simultaneously responsible for signing off on major procurement decisions, and, as pointed out in the G9 Report, oversees the audit and risk functions of the business, including the management of whistle-

blowers' reports. In effect, this combines procurement and oversight within the same procurement line function.

Other functions necessary to ensure regulatory compliance appear to have been functionally undermined. The G9 Report states that Eskom's group compliance manager, Mr Aziz Laher ("Mr Laher"), warned his colleagues that the contracts entered into with McKinsey, under which Trillian was engaged and paid, could not go ahead without National Treasury's approval. This took place in December 2015. Mr Neo Tsholanku ("Mr Tsholanku") issued an internal legal opinion, which did not suit the aims of Eskom managers, Mr Edwin Mabelane ("Mr Mabelane") and Mr Prish Govender ("Mr Govender"), who were leading negotiations with McKinsey. Being unconvinced of Mr Tsholanku's opinion, they made a call to consult Eskom's external legal counsel. The external counsel's opinion was consistent with Mr Tsholanku's view. It was not the first time that Mr Tsholanku's legal advice within Eskom was undermined. Ms Molefe testified that Mr Matjila similarly disregarded Mr Tsholanku's opinion regarding the contract with Regiments:

*I sent him an email and [...] I copied the head of legal, then Mr Neo Tsholanku, and I said I suggest that Mr Neo Tsholanku gives 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's got a mandate from the Shareholder and the Board that certain things that need to happen urgently and we don't have time for wasting. We don't have time to waste with our long-winded procurement processes.*

The long-winded processes in question are those mandated by the PFMA, the Eskom MOI and SCM procedures, and Treasury regulations and practice notes. In other words, these processes were not optional.

#### **2.8.14 Eskom's risk management**

Mr Zethembe Khoza ("Mr Khoza"), the Interim Chairperson of the Eskom Board, prefaces Eskom's IR 2017 with the following,

*The execution of our strategy is dependent on three key enablers, namely governance that drives accountability, successful stakeholder management and effective risk mitigation strategies, particularly to respond to lower than budgeted tariffs.*

The research, statements, testimony and evidence presented to the Committee stand in stark contrast with this aspirational vision, with Mr Khoza himself implicated in questionable and possibly illegal actions detailed below. The organisation's strategic objectives are specified on page 15 of the IR 2017:

1. *Provide reliable and predictable electricity in line with regulatory methodology, while striving for cost containment and improved operational efficiencies* □
2. *Ensure and maintain a financially viable and sustainable company* □
3. *Reduce Eskom's impact on the environment through identifying, implementing or supporting options for low carbon-emitting generation and transportation opportunities*
4. *Consolidate our socio-economic contribution to ensure alignment to national transformation imperatives to unlock growth, drive industrialisation, create employment and support skills development* □

It is unclear how widespread unauthorised, unusual or irregular spending, together with inflated prices for coal and other services (such as the TNA breakfast sponsorships) support the realisation of these objectives - and the Board is required to account for these actions - as well as the adverse consequences for Eskom and South Africa. These consequences include the credit rating downgrades of Eskom. No representative of the Board has accounted for these consequences before the Committee.

The G9 report, presented to the Committee by Mr Rajie Murugan ("Mr Murugan") includes information that indicates that the report was undermined by several executives, who were evasive and failed to support the investigation. Mr Murguan referred specifically to the actions of Mr Khoza (p28-29):

*Although, as far as we understand, our mandate and lines of reporting are to Executive Management, we observed that the Interim Board had become operationally involved; and after one verbal feedback to the Audit and Risk Committee, this investigation was left floundering and without directives, communication or interaction. We find this odd; but we are obliged to comply and await further instructions. As we confirm later in this report, we have been informed to "suspend" or "terminate" [our] investigations.*

Mr Qoma also indicated that where actions were eventually taken against specific individuals, these actions were overturned. Mr Qoma pointed to the actions of the Board and the Minister, in this regard:

*On 16 August 2017, Mr Khoza allegedly instructed the rescission of the suspension of Mabelane and Kalima. These individuals were instrumental in the McKinsey/Trillian transaction. This well-published anomaly didn't concern the Minister either, as Khoza proceeded in his role without any known probe in this regard.*

At the time that G9 was undertaking their investigation, other reports, namely the Dentons Report and the Bowmans Report had already met unfruitful ends. The Bowmans Report, which investigated Eskom's contracts with McKinsey under which the SOC also engaged with Trillian was made available to the Committee. It makes its damning findings explicit (see sections 2.8.6 and 2.8.7). It is unclear how the conclusions could be ignored by any engaged, responsible, ethical or accountable Board.

The pattern of stymied investigations followed by a lack of consequences for implicated persons appeared to have been ignored or actively supported by members of Eskom's Board. This cannot reasonably be seen as effectively managing the entity's exposure to reputational, financial, or legal risk.

#### **2.8.15 Maintaining fair and transparent remuneration practices**

The Minister maintained that she was not aware of the specifics of Brian Molefe's financial terms of employment, and further that she was not obligated to be made aware. Even if this was technically true, it is not exemplary of King IV's expectation for fair and transparent practices regarding remuneration. The fact that the amount for the pension was entirely out of line with historical precedents, given the brevity of Mr Molefe's service to Eskom demanded redress, which was not forthcoming from Minister Brown. Despite eventually being dismissed, no one was held accountable for Mr Molefe's payment. Despite Minister Brown's argument that Eskom's 2014 MOI governed her lack of intervention in Mr Molefe's appointment in 2016 and reappointment in 2017, the Gauteng High Court found otherwise. The Gauteng High Court Judgement: Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018), Court found:

*Paragraph 56: There is a strong inference to be drawn from the above factors that the early retirement agreement was deliberate scheme devised by Eskom with the involvement of Mr Molefe to afford him pension benefits to which he was not entitled. The scheme permitted Mr Molefe to proceed to early retirement at age 50 by buying him extra pensionable service. The scheme was started soon after Mr Molefe's permanent employment and was deployed after he had publicly stated that he was voluntarily leaving Eskom's employ.*

*Paragraph 65: Mr Molefe voluntarily resigned and did not retire.*

*Paragraph 73: Minister Brown, of the view that there was no legal basis for Mr Molefe's pension, was under no obligation to fulfil its conditions. Subsequently, she was also under no obligation to "exchange" his reinstatement for repayment of monies unlawfully received.*

*Paragraph 82: We also find that Mr Molefe was never entitled to receive any pension benefits from Eskom Pension Fund and any payments made in lieu of such benefits were patently unlawful.*

#### **2.8.16 Board's performance in line with applicable laws, regulations, standards and codes**

The practices whereby the Board has defended its actions have been questionable, and it has not been clarified during the process of the Inquiry, what the processes have been whereby the performance of the Board has come to be assessed internally.



The G9 investigation found evidence of poor record-keeping whereby documentation that is required by law to legitimise major procurement was either misplaced, never filed, never signed, or never existed. The Bowmans Report (para 3.3.9), referring to the Trillian payments, found, “Limited ‘supporting’ documentation is provided for these two Trillian invoices”. Whereas contracting processes that follow proper procedures also require extensive evidence of any potential supplier to meet the legal and professional requirements to meet Eskom’s procurement needs, such documentation requirements are undermined by the parallel negotiation processes that appear to have taken place for the Regiments, TNA, Trillian, McKinsey, and Tegeta contracts. Minister Brown also stated,

*I believe that Eskom deliberately lied to me about the Trillian matter. It was not a matter that came to me at any stage for approval.*

#### **2.8.17 Eskom's public reporting**

There has been evidence of falsification of information, whether deliberate or by negligence or having been misled, on the part of Minister Brown, Eskom executives (notably Mr Koko, Mr Singh, Mr Molefe, and Dr Ngubane). Minister Brown has accused Eskom executives of lying to her. Both Minister Gigaba and Minister Brown have laid responsibility for unusual or irregular procurement at the feet of the respective Boards they appointed, suggesting a breakdown in communication, transparency and accountability. Mr Qoma shed light on the relationship between Eskom and the media, citing concerning attitudes that he attributed to Mr Molefe, Mr Koko and Minister Brown:

*Molefe had left a sewer of bad media relations in his wake. He treated as enemies those journalists or commentators who aggressively disagreed with him/Eskom. For instance, Chris Yelland of EE Publishers had been blacklisted and so he was blocked to Eskom's Twitter account and media releases and related collateral. Corporate Affairs had keenly gone along with this ludicrous action.*

*In response to my position on the matter, Koko said blocking Yelland had lowered his stress levels by a substantial percentage, and he didn't desire to entertain the matter. I then engaged Chairman Dr Ben Ngubane, who in turn authorised the lifting of the blacklisting. When Molefe returned following the R30m fiasco, Corporate Affairs sought to restore the blacklisting by raising it with Molefe. It was said that since his unblocking, Eskom's Social Media outlook had taken a huge knock. I chimed to tell Molefe that Dr Ngubane had approved the unblocking and that it was ill-advised to blacklist journalists in a democracy. He let it pass.*

*Mr Sikonathi Mantshantsha's (Financial Mail) pursuit of the Dentons report revealed Eskom's aversion to playing open cards with South Africans, as in the face of damaging media criticism, the Board stubbornly refused to release the report. While they eventually agreed to release it, a last minute decision was made to release a heavily redacted report. This decision further eroded*

*trust between the Board and the media. I don't remember Minister Brown making a public pronouncement, as part of her trademark, demanding the Board to release the report. The Board's motive in this regard only became apparent post-facto. When convenient, Minister Brown makes operational announcements but revert to "It's an operational matter" when it doesn't suit her motives.*

*I was told that Minister Brown apparently complained about my lack of understanding of government communication. This was a petty comment by a clueless Minister who dabbles in spaces that barely require her. I also figured that her spokesperson, Mr Colin Cruywagen, had probably complained to her about my disinclination to take his generally irrational instructions about how to handle specific media challenges. My experience working with him hasn't left an impression of a person who knows much about reputation management. I therefore tended to frustrate him with questions which were out of reach for him.*

Minister Brown was not in agreement, suggesting that representatives of the media were trying undermine SOCs:

*Like a rare stellar event, disparate forces including members of the ruling party, opposition parties, business and media are in alignment to try and influence these events. State-Owned Companies are their chosen battleground.*

Minister Brown has also, by her own account, found out about major alleged irregularities and transgressions (including the Tegeta transactions, the Trillian payments, and Mr Molefe's pension) from the media.

In an effort to hold Eskom executives and the Board members accountable for the entity's poor performance and implication in state capture allegations, as part of the Inquiry process, the Committee requested several documents from the Eskom board. However, several of the requested documents were only brought forth following the appointment of several new Board members in December 2017 in a submission by the most recent Eskom Board, prepared by Bowman Gilfillan on 14 March 2018. It is unclear why the previous Board was unable to produce the documents, as requested.

Given all the evidence now before the Committee, it is unclear how Eskom's IR 2017 can make the claim that the entity aligns its practices to the King Code. Furthermore, there is an absence in the integrated Annual Report of a clear and direct response to the various aspects of King III which, taken together with a more generalised lack of transparency, has compromised the ability of the relevant Ministers, the Committee, Parliament and the South African public to adequately and comprehensively assess the entity's performance.

#### **2.8.18 Eskom executives and the Board actions to hold service providers accountable**

Eskom executives had a range of high-value contracts with Gupta-connected entities -TNA, Tegeta and Trillian - all implicated in potentially illegal transactions. Both the Bowmans Report and the G9 Report call on the Eskom Board to initiate criminal investigations into possibly fraudulent activity within Trillian. Not only did Eskom's due diligence mechanisms fail to exclude procurement interactions with these entities, the Board also failed to undertake remedial and disciplinary actions against officials in this regard. It is clear that interactions with each of these entities were not in favour of Eskom, government, or the South African people.

Regarding TNA, Ms Erica Johnson (“Ms Johnson”) stated that she and other executives expressed concern over Eskom’s contract with TNA. However, Mr Collin Matjila (“Mr Matjila”), pushed for this contract. She testified to the Committee:

*I was disturbed by it [the terms of the contract with TNA]. I think what we really wanted to do was to have a chance to, I mean, to try and work with a new CEO. And I think earlier people said, you know, if you have a new boss, if you have to see, do you fit around the table still? Are you part of the team? And that is what we were working with Mr Matjila, to try and meet his needs to see where he wanted to go, as you would give people the benefit of the doubt. But I think clearly once the three-year contract, the exit clause, the fact that the finance director refused to sign it and that he then proceeded to sign it by himself, I think shows you that as a team we were saying that this was not how we wanted to run contracts. So, we were making a statement.*

Ms Tsholofelo Molefe (“Ms Molefe”), who was the finance director to whom Ms Johnson refers above made similar observations regarding Mr Matjila’s insistence on contracting with Regiments, which was connected to Mr Salim Essa (“Mr Essa”). Minister Gigaba did not adequately promote or enforce compliance with applicable laws and adopted, non-binding rules, standards and codes (such as King IV)

Minister Gigaba’s testimony before the Committee, in defence of his Board appointments, relied on recounting the “normal” procedure he followed. However, what he failed to address was the outcome of that procedure for which he, in his capacity as Minister, was responsible:

*Relating to governance, I would like to outline for the Committee the general process followed by the DPE, during my tenure, in appointing the SOC Boards, Board Subcommittees and Executives. I would also like to deal with the extent to which the DPE Ministers are involved in Procurement. What I am about to set out is the normal practice. There is usually some deviation relating to the processes in various SOC's depending on their MOIs.*

*In respect of Board appointments, the process commences in the run-up to the AGM of the relevant SOC. Prior to the AGM, the Minister is presented with a motion relating to certain Board appointments, which will become part of the resolutions taken at the AGM [...] When the*

*Department conducts skills audits, and discovers that there are skills gaps on the Boards, the Department also recommends candidates to fill those positions. The names of candidates are sourced widely. When the Department recommends candidates to the Minister, it does so by providing a rationale for the proposed appointment, and the Minister is also provided with the resumes of the candidates. Once the Minister has applied his mind to these candidates, and given his approval, the preferred candidate's profile then serves before the relevant Cabinet Committee, and only then does it serve before Cabinet. Cabinet approves all Board appointments, including executive directors who are ex-officio board members.*

In terms of motivating his overhaul of the Eskom Board, Minister Gigaba stated the following:

*After having had sight of the presentation, I was of the view that the board needed rotation, in order to comply with good corporate governance, with respect to two issues. Firstly, was the rotation of board members who had served for a lengthy period. Second, was revising the mandate of the Executive Chairman to be a Non-Executive Director and Chairman, to avoid overlap between the role of Board Chairperson and CEO of the entity.*

Minister Gigaba did not consider how his choice of Board appointees fared in their roles, notably Ms Mabude was removed by Minister Brown in 2017 and Mr Matjila both of whom were linked to the Gupta family businesses in the #Guptaleaks emails. Minister Gigaba also did not address how the integrity of Board members was assessed at appointment and during their tenure. The Minister also spoke to the constitution of Board subcommittees, given that the role of the BTC in the Board he appointed has been questioned, especially in relation to the Koeberg steam generators' procurement and TNA.

*I then also deem it necessary to set out how sub-Committees are constituted, in order to dispel any notion of interface by me in the establishment of allegedly problematic sub-Committees at Eskom, Denel and Transnet. All sub-Committees are the business of, and are recommended by the Board. This is consistent with the Companies Act. The only Committee that comes to the DPE Minister's attention is the audit and risk sub-Committee, because the SOC's memorandums of incorporation (MOIs) provide that, at the AGMs, the Boards must present for my approval the members and the Chair of the audit and risk subcommittee. It is standard practice and common courtesy for the Chair of the relevant SOC to send a letter to the DPE, after the AGMs, setting out how the relevant sub-Committees are constituted but those letters hardly ever reach the Minister's attention – primarily because the Minister has no practical interest in who is on what Committee. This is because, if the Minister wishes to interact with an SOC, that Minister will either meet the Chair or call a special general meeting – the Minister does not engage with sub-Committees because sub-Committees are the domain of the Board.*

While it is unreasonable to extend responsibility for the procurement approvals of the BTC to Minister Gigaba given that these responsibilities are duly delegated to the Board, the Minister was unable to account for these actions or to explain how his actions at the time were constitutive of good governance, rather than merely legal or not illegal. Minister Gigaba's testimony also stands in contradiction to Minister Brown's, who indicated that the Minister does have a practical interest in the constitution of board sub-Committees.

In terms of procurement and in relation to his actions rejecting the EXCOPS decision for the Koeberg steam generators tender, Minister Gigaba stated, *"There is no scope for interference. When the Minister considers the approval, he simply considers the business case before him, and either approves or rejects the request on that basis alone."* Although Mr Koko defended the procurement process that ensued post Minister Gigaba's intervention, he did state, however, *"This was a contract that was adjudicated at Koeberg and was awarded and it went for a PFMA application and Minister Gigaba declined it."* In other words, contrary to Mr Gigaba's testimony, Mr Koko claimed that his intervention was critical in determining the outcome of the procurement process.

Minister Gigaba definitively denied facilitating any relationship between the Gupta family and SOCs. Regarding TNA, Minister Gigaba stated that he issued written instructions to route requests for sponsorships through the Department of Public Enterprises ("DPE") to prevent such a costly arrangement. However, he places sole responsibility for these arrangements with the Board.

Although Minister Gigaba denied any connection to the Gupta family, Ms Molefe testified that it was through an individual in Minister Gigaba's office that she came to interact with Mr Essa.

#### **2.8.19 Minister Brown's role in enforcing compliance with applicable laws and adopted, non-binding rules, standards and codes (King VI)**

Minister Brown's tenure as Minister of Public Enterprises coincided with major incidences of unauthorised, unusual or irregular expenditure. Minister Brown also did not intervene in the reappointment of Mr Molefe to the position of CEO following his resignation, illegal pension pay-out, and the serious allegations of wrongdoing that were alleged in the *State of Capture Report*.

Minister Brown oversaw the actions of Eskom's Board, including the following: the unlawful Molefe pension pay-out, the Tegeta deal covered in the *State of Capture* report, and the Trillian payments. She pleaded ignorance at various points in her dealings with Parliament and with the media about Eskom's inner workings, despite her Ministerial responsibility to assess its performance. Mr Qoma, appointed to remedy the damage done to Eskom's reputation in his statement to the Committee stated:

*Minister Brown's 'I was lied to', 'I didn't know' strategy is a public admission of incompetence. A worthy leader creates capacity for due diligence so as to increase prudent leadership. But she routinely tells the citizens that she was lied to or something to that lousy effect.*

The groundwork was laid for Mr Molefe's illegal pension by Dr Ngubane and Mr Anton Minnaar. There is evidence that three people in Minister Brown's office received correspondence from Dr Ngubane confirming pension arrangements for Mr Molefe: the DPE registry officer, the department's chief director of governance and Minister Brown's former personal assistant, Ms Kim Davids. In her affidavit submitted to the North Gauteng High Court, and subsequent representations to parliament, Minister Brown denies any knowledge of this letter and its contents. In terms of her lack of involvement in Mr Molefe's terms of employment Minister Brown stated, "The executive employment contract concluded by Mr Molefe and Dr Ngubane in March 2016 was concluded in terms of the 2014 agreement. It didn't have to be shown to me." Minister Brown also stated:

*When Mr Molefe quit Eskom in November 2016 I was under the impression that he had resigned. I was not aware that he had applied for early retirement. This I only learned in April 2017, after reading in the media that Mr Molefe was receiving a R30m pay-out from Eskom, and asking Eskom's Board to make a more prudent deal.*

Given this sequence of events, it is not clear why it was deemed an acceptable outcome by Minister Brown that Mr Molefe should be appointed as CEO, subject to the reversal of this decision by an Inter-Ministerial Committee rather than Minister Brown's own judgement of the situation. It is pertinent to refer to the Gauteng High Court's judgement, which calls the governance practices and motives of the Eskom Executive and Board as well as the Ministry into question:

*Paragraph 80: The allegations are highly relevant to Mr Molefe's suitability to be reinstatement as CEO. They are a dead weight that he must carry until he is cleared. In the absence of new facts that arose in the interim to lift the dead weight that motivated the need for Mr Molefe to resign in the first place, the allegations in the Public Protector's report cannot just be ignored by the Minister or Eskom. The Minister and Eskom acted irrationally in ignoring the damning allegations in the Public Protector's report.*

Following Minister Brown's enforcement of the findings of the abovementioned Inter-Ministerial Committee, she then sent an instruction to the Board to appoint Mr Koko:

*On 8 March 2017, I sent a letter to Eskom requesting a resolution recording Molefe's resignation and the formal appointment of Mr Koko as the Acting CEO. The Department was duly furnished with Mr Koko's appointment letter but no resolution on Molefe's resignation or retirement.*

Minister Brown's appointment of Mr Koko, like her appointment of Mr Molefe, happened despite mounting *prima facie* evidence of his involvement in highly questionable procurement decisions.

Mr Qoma and Mr Zola Tsotsi (“Mr Tsotsi”) testified before the Committee that they believed Minister Brown had directly or indirectly (through an instruction delivered or reported by another DPE or Eskom employee) to be connected to the Gupta family.

Mr Qoma also testified that Dr Ngubane during his tenure as Chairman of the Board, attempted to suspend Mr Koko in response to a letter listing alleged infractions. He testified that this was stopped by the Guptas via Minister Brown.

Dr Ngubane was able to confirm that Minister Brown called him on that particular day, ahead of his decision to move against the suspension of Mr Koko, but asserted that the call had not been about Mr Koko but Eskom business.

Mr Tsotsi stated in his testimony that he had in fact been called into a meeting with a Gupta brother and Mr Salim Essa (“Mr Essa”) at Minister Brown’s residence:

*At some point, I can’t recall exactly when it was shortly after the Minister came on board, I think she, sorry... shortly after the new board came on board, it was in the beginning of December. And the Minister called me to her home and when I arrived there she was with two individuals, one Tony Gupta and the other was...*

The other person Mr Tsotsi allegedly met was Salim Essa. In his written statement, Mr Tsotsi also alleges that at the same time that Minister Brown was questioning his leadership, Mr “Tony” Gupta approached him:

*The very same afternoon, I was approached by Tony Gupta (Tony) who requested that we meet. At the meeting, Tony told me “Chairman, you are not helping us with anything. We are the ones who put you in the position you are in. We are the ones who can take you out!” My response was “Do what you have to do, and let me carry on with the job that the Cabinet appointed me to do!” So ended that meeting.*

## **2.8.20 Observations**

### ***2.8.20.1 Minister Gigaba’s overhaul of the Eskom Board and appointment of one made up of almost entirely new members***

- i. It appears that Minister Gigaba’s overhaul of the Eskom Board introduced patterns of instability.
- ii. It is not apparent that the Board appointed by Minister Gigaba had been sufficiently vetted in terms of integrity, collective skills and experience to govern Eskom and execute their fiduciary responsibility.

- iii. The actions of the Board on Minister Gigaba's apparent instructions to reverse a procurement decision taken by the previous Board seem to blur the lines of its accountability for its decisions and oversight by the Minister as the Shareholder.

#### ***2.8.20.2 Minister Brown's responsibility and accountability***

- i. It is not apparent that the successive Boards appointed by Minister Brown had been sufficiently vetted in terms of integrity, collective skills and experience to govern Eskom and execute their fiduciary responsibility.
- ii. Minister Brown's oversight over the actions of the executive and non-executive directors was inadequate, leading to gross breaches in fiduciary duty and potentially illegal acts.

#### ***2.8.20.3 The Board's responsibility to uphold fiduciary duty and their oversight of Eskom, its executives and its financial and non-financial performance***

- iii. Eskom's Board oversaw the systematic erosion of rules governing the entity's procurement and allowing for massive unauthorised, improper or irregular expenditure.
- iv. Eskom's Board failed to support the investigation of improper procurement undertaken by various committees and officials.
- v. Eskom's Board has failed to hold executive directors to account, for example, on the reappointment of Mr Molefe in the midst of his pension controversy and his implication in the *State of Capture* Report.

#### ***2.8.20.4 The BTC appears to have been particularly conflicted and compromised***

- vi. Eskom's BTC, playing a particularly influential role in determining procurement decisions, has disregarded the conflicts of interest of its members, notably concerning transactions with Trillian and Tegeta.
- vii. Eskom's BTC functioned as a mechanism to undermine the expertise of the EXCOPS in taking good procurement decisions in the best interests of Eskom.

#### ***2.8.20.5 It is apparent that Eskom executives undermined governance procedures, rules and norms to facilitate a number of unusual or irregular financial transactions***

- viii. Eskom executives failed to uphold their fiduciary responsibility, participating in decision making processes that led to unauthorised, improper or irregular expenditure.

#### ***2.8.20.6 Eskom officials have undermined transparency and therefore lines of accountability within the SOC***

- ix. Incidences of inaccurate information on Eskom's performance being communicated by the Minister to parliament and in other forums, notably in official statements and in statements



made by executives to the media, evidence a deterioration of transparency required to maintain accountability.

***2.8.20.7 Independent investigations into unusual or irregular activities appear to have been undermined***

- x. Public reports together with reports leaked to the public demonstrate that Eskom's Board had sound knowledge and *prima facie* evidence of wrongdoing in the organisation, which were not acted upon as required by the MOI.

***2.8.20.8 Internal disciplinary processes may have been manipulated to improper ends***

- xi. Internal disciplinary procedures have shown a lack of consistency in form and outcome for different individuals.
- xii. The reappointment of Mr Molefe and appointment of Mr Koko as GCEO in the face of *prima facie* evidence of wrongdoing were never satisfactorily explained, nor do they appear to be reasonable or defensible.

***2.8.20.9 Improper relationships appear to have allowed for external influence over Eskom's operations and spending***

- xiii. Evidence of improper relationships, understood together with unauthorised, improper or irregular expenditure detailed in the *State of Capture Report* and elsewhere, show that these relationships are *prima facie* connected to and are likely to have influenced those decisions.

## **2.9 Conclusion**

The Inquiry has confirmed possible contraventions of the Eskom Conversion Act, the Public Finance Management Act, internal and external governance requirements (e.g. King IV), as well as other relevant legislation, regulations and internal processes. It is also patently clear that there was undue influence by private individuals and companies over the appointment of Eskom Board members as well as some procurement decisions.

### **3 Part C: Findings**

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#### **3.1 Eskom served the interests of private firms and individuals**

##### **3.1.1 Evidence paints a disturbing picture of capture and repurposing of Eskom**

The Committee heard evidence which illustrated the extent to which public procurement processes at Eskom and the exercise of public power had been used to serve the interests of private businesses and individuals. The abuse of public resources to benefit these private interests stands in direct contradiction to Eskom's constitutional obligation to ensure that its procurement processes are equitable, transparent, fair, competitive and cost-effective. The Eskom Board failed dismally in its responsibility to ensure that Eskom complied with the applicable laws and SCM processes. In addition, various Eskom Board members were conflicted in their dealings with some of the private businesses and may have acted unlawfully together with senior management to benefit a network that sought to achieve the capture of Eskom.

Evidence was placed before the Committee that various Eskom directors and senior employees acted inconsistently with their responsibilities in terms of various legislation, including the PFMA. It appears that such persons abused their positions and may have exploited confidential information for personal gain or to benefit other persons improperly. As set out above, key Eskom personnel failed to act with fidelity, honesty, integrity and in the best interests of Eskom. Various responsible persons, including Eskom Board members, failed to investigate allegations of corruption, improper conduct, or failure to comply with the supply chain management system and failed to take appropriate steps in relation to such allegations. Evidence before the Committee also showed how persons entrusted with key public powers acted inconsistently with their responsibilities.

The corruption at Eskom has undoubtedly contributed to the substantial loss of public funds and in various instances resulted in severe job losses in some companies competing with the Gupta family-owned companies, hampered transformation and may have caused environmental damage.

##### **3.1.2 Leadership of Eskom Board and Executives**

Judging whether individuals or entities have displayed ethical and effective leadership can be done with reference to the definition provided by King IV:

*Ethical leadership is exemplified by integrity, competence, responsibility, accountability, fairness and transparency. It involves the anticipation and prevention, or otherwise amelioration, of the negative consequences of the organisation's activities and outputs on the economy, society and the environment and the capitals that it uses and effects.*

Based on the evidence before the Committee, it is patently clear that individual and collective actions taken by the Board and executives at Eskom have allowed successive unusual or irregular procurement,

undermined investigations into wrongdoing, and failed to hold individuals accountable for potentially illegal actions. These actions amount to a failure to uphold their fiduciary responsibility.

### **3.2 Brian Molefe's resignation, reinstatement and "early retirement"**

3.2.1 The Committee welcomes the January 2018 judgment by the High Court in Pretoria which rejected Brian Molefe's assertion that he never resigned from Eskom but took "early retirement". The Committee acknowledges the court's judgement that reviewed and set aside the decision of the Board of Eskom to accept Molefe's "early retirement" as well as the decision of former Public Enterprises Minister Lynne Brown to reappoint Molefe as GCEO.

3.2.2 The Committee welcomes the court order that Molefe must pay back the estimated R11-million he had already received as part of the total R30.1-million pension pay-out as it gives clarity to all the parties concerned with regard to the rules of the Eskom Pension and Provident Fund.

### **3.3 Access to information**

3.3.1 The Committee finds that despite the various mandatory reporting and disclosure obligations, Eskom's operations have been shrouded in inordinate secrecy, which has undermined Eskom's internal governance and controls, as well as the oversight function of the Ministry of Public Enterprises and Parliament.

3.3.2 The various Eskom Boards failed to ensure reasonable protection of Eskom's records as required by section 50 of the PFMA, and failed to keep full and proper records of the financial affairs of Eskom as required by section 40 of the PFMA.

3.3.3 The existence, terms of reference, activities, reports and outcomes of various investigations into a wide range of impugned Eskom conduct have all too often remained hidden from oversight and scrutiny.

3.3.4 The Committee heard evidence of multiple instances that suggest that Eskom staff, the Eskom Board (executive and non-executive directors), actively obstructed various oversight and investigative processes, or used these processes to cover up malfeasance at Eskom.

3.3.5 Minister Brown, the Department of Public Enterprises, the Eskom Board, and Eskom officials submitted or relayed misleading and/or false information to Parliament.

3.3.6 Eskom's spokespersons and executives provided false information in relation to contracts and payments to Gupta-linked companies, including Tegeta and Trillian.

3.3.7 Eskom officials provided incomplete and incorrect information during internal and independent investigation processes. This severely hampered Eskom's governance mechanisms and controls, and covered up what appears to be unusual, unauthorised, irregular and unlawful procurement.

3.3.8 The documentation formalising the relationship between Eskom and the Ministry for Public Enterprises was inadequate. In some instances, the Ministry of Public Enterprises failed to

provide elucidatory documentation relating to its historic engagement with the Eskom Board and senior staff, as well as in the undertaking of key functions (e.g. appointment of Board members and executives).

- 3.3.9 Evidence suggests that unclear or unheeded lines of accountability within Eskom acted to inhibit access to information by the relevant oversight functionaries.
- 3.3.10 Minister Brown claimed, before Parliament, that Eskom officials lied to her regarding at least two critical matters, including the illegal pension payment to Mr Brian Molefe, and irregular, wasteful and otherwise unlawful payments to Gupta-linked Trillian.
- 3.3.11 It was common in Eskom for procurement related documents to contain misleading, inaccurate information, or documents not signed which form the basis for various irregular and unlawful actions by Eskom.
- 3.3.12 In an effort to hold Eskom executives and its Board members accountable for the entity's poor performance and its implication in corruption and private corporate capture allegations, the Committee made multiple requests for information from Eskom, but was not forthcoming. Some Eskom executives and board members deliberately attempted to frustrate the Committee's ability to access information to which it was lawfully entitled. In addition, when Eskom did share information, such information was often incomplete and illegible. Many of the requested documents were only furnished by Eskom on 14 March 2018.
- 3.3.13 The previous Board's failure to disclose such documents to parliament may constitute a criminal offence in terms of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004.

#### **3.4 Inconsistent and contradictory evidence provided to the Committee**

The Committee finds the evidence that was presented by some witnesses who had occupied senior leadership positions at Eskom inconsistent and contradictory. The evidence of the following witnesses failed to illuminate the extent of corporate capture, absence of ethical leadership and management, flouting of governance rules, laws, codes and conventions that govern Eskom. The flouting of these laws and applicable policies; as well as irregular procurement rendered Eskom potentially financially unsustainable.

- Dr Baldwin (Ben) Ngubane, Former Eskom Board Chairperson 2015 – June 2017
- Mr Zola Tsotsi, Former Eskom Board (June 2011 to March 2015)
- Mr Zethembe Khoza, Eskom Interim Board Chairperson
- Ms Devapushpam Naidoo (Viroshini), Former Eskom Board member
- Dr Pat Naidoo, Eskom non-executive Board Member
- Mr Brian Molefe, Former CEO of Eskom
- Mr Anton Minnaar, Eskom HR Executive Manager

- Mr Sean Maritz, Former Eskom Acting CEO
- Mr Anoj Singh, Former Eskom CFO
- Mr Matshela Koko, Former Eskom Acting CEO, and Executive for Generation

### **3.5 Failure to maintain clear lines of accountability in the Eskom Board and management**

- 3.5.1 The Committee finds that from about 2011, Eskom's Board failed to maintain clear lines of responsibility and accountability. Board members were allowed to interfere in the business of management (especially through the seemingly unbounded mandate of the Board Tender Committee - BTC), and often usurped the roles of group executives. This undermined the tenets of good governance established through the Public Finance Management Act, 1999 and the Companies Act, 2008, and other relevant legislation and protocols. It resulted in official lines of communication being circumvented, and a deep informational inequality among Board members. Key decision-making authorities, such as the Eskom Executive Procurement Sub-Committee ("EXCOPS") and Eskom's internal legal support services were deliberately sidelined in order to introduce and act on external opinions to benefit certain private companies.
- 3.5.2 The Committee has found that Eskom Board members, and other persons who held positions of authority at various times, failed to report acts of fraud, bribery, corruption and/or theft, despite their reporting obligations under the Prevention and Combating of Corrupt Activities Act, 2004. Such persons knew, or reasonably ought to have known, or suspected, that such offences had been committed and their failure to report such conduct may constitute criminal conduct (section 34 of PRECCA). Specifically, such failures relate to the following contracts:
- Koeberg steam generators replacement;
  - Duvha boiler replacement;
  - TNA Breakfast sponsorship;
  - McKinsey, Regiments, and Trillian consulting & advisory contracts and services,
  - Tegeta coal supply (and related) contracts and agreements.
- 3.5.3 Many Eskom officials failed to take effective and appropriate steps to prevent, within their areas of responsibility, unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure, as required by section 45 (c) of the PFMA. In some cases, evidence heard by the Committee suggests that this failure was the result of a culture of fear and intimidation, as well as the abuse of public powers by a group of Eskom officials and Board members.
- 3.5.4 Evidence before the Committee suggests that Eskom's internal assurance function was used to cover up possible irregularities that would fail to stand up to external scrutiny. This is exemplified in Eskom's assurance and forensics departments findings related to the Tegeta

prepayment and McKinsey/Trillian contracts and payments. These have since been proven to be flawed by independent reviews and the evidence considered by the Committee.

3.5.5 The Committee is concerned that even when external and independent reviews, investigations and reports regarding unusual, unauthorised, or irregular expenditure, or otherwise unlawful actions were brought before the Board, such investigations were often curtailed, subverted or undermined, including the following:

- The Dentons Investigation;
- National Treasury's investigation into select coal contracts (focusing on Tegeta);
- The Oliver Wyman investigation on the McKinsey/Trillian Contract;
- The Bowmans investigation on the McKinsey/Trillian Contract; and,
- The G9 investigation on the McKinsey/Trillian Contract;

3.5.6 The Committee is of the view that the findings of these external and independent reviews, investigations and reports, were deliberately withheld, censored and/or ignored by the Board. The Committee confirms that it has never been furnished with a full list of such investigations and recommendations, despite requesting all reports submitted to the former Eskom Board.

3.5.7 Evidence presented to the Committee suggests that a number of Eskom Board members and executives were not held accountable for the collapse of good governance and the poor financial performance of Eskom. This applies in particular to the following people, who largely escaped censure despite having been named in various investigations, including the Parliamentary Inquiry, as possibly having acted in ways that undermined good governance and the company's financial performance:

- Mr Collin Matjila;
- Ms Chwayita Mabude;
- Mr Zola Tsotsi;
- Dr Baldwin "Ben" Ngubane;
- Mr Zethembe Khoza;
- Mr Mark Pamensky;
- Mr Anoj Singh;
- Mr Brian Molefe;
- Mr Matshela Koko;
- Mr Sean Maritz;
- Mr Edwin Mabelane;
- Mr Prish Govender;
- Ms Ayanda Nteta; and
- Mr Charles Kalima.

### **3.6 The developmental role of Eskom**

3.6.1 The Committee is gravely concerned, based on witness testimony to the Inquiry, that the policy of transforming Eskom and using its considerable procurement budget to empower emerging, black businesses was used as a pretext to corrupt the procurement processes at Eskom in order to serve the interests of a network of companies and individuals linked to the Gupta family in particular.

Such actions included:

- The acceptance of apparently fraudulent BEE certificates for Tegeta and Trillian, in terms of which Tegeta and Trillian were designated as exempted micro-enterprises,
- The rampant failure to interrogate the sub-contracting of Eskom contracts, including payments to Trillian - of which 77% was subcontracted to non-South African consultants and possible shell companies (including e-Gateway Consultants in Dubai and T-Systems);
- The misuse of formal or informal policies relating to transformation to the benefit particularly of Gupta-owned companies.

3.6.2 In general, the Committee finds that Eskom's implementation of transformation related policies has not been uniform or transparent. In some instances, it has failed to deliver a fair and equitable distribution of contracts which were supportive of transformation objectives. It has also exposed Eskom to escalating costs and considerable risk that stand in direct opposition to the broader goal of authentic transformation and development.

### **3.7 The Eskom Contracts**

3.7.1 Based on the evidence presented to the Inquiry, the Committee finds that the Koeberg steam generator tender process was irregular, and there is evidence to suggest there was corruption or otherwise unlawful conduct. Specifically, the Committee is concerned by the highly unusual circumstances which saw Eskom award a steam generator tender to Area in 2014, at a premium of R1billion and at the further cost of increased nuclear safety risks.

3.7.2 Based on the evidence before the Committee, we find that the Duvha boiler refurbishment tender process was irregular, involved alleged corruption. Specifically, the Committee is concerned by:

- Regiments' possible involvement in the insurance claim process.

- The highly unusual circumstances which saw Eskom award the refurbishment contract to Chinese firm Dongfang electric, at R1billion premium, despite various compliance issues. Concern was raised in the Committee about the report which recommended that the Duvha contract be awarded to Dongfang, despite the material concerns raised by Eskom's executive staff and independent reviewers.

3.7.3 Based on the evidence before the Committee, we find that the TNA breakfast contract was unauthorised and irregular, and there is evidence to suggest that it may have involved corruption; specifically, as it pertains to:

- Eskom's relationship with TNA between 2010 and 2014, which involved newspaper subscriptions and the contracting of 10 breakfast shows.
- Eskom's business with TNA between 2014 and 2017, relating to the TNA breakfast show sponsorship – which cost Eskom a total of R 43 million – and the continuation of the newspaper subscriptions.
- The Eskom board and Ministry of Public Enterprises' failure to take action in light of the recommendations of a forensic audit into the R 43 million contract conducted in 2014.

3.7.4 The Committee finds that certain services rendered by, contracts entered into, and/or payments made to McKinsey, Regiments and Trillian (including those relating to the Top Engineers Programme) were unauthorised, irregular, and there is evidence to suggest that it may have involved corruption. Specifically, we refer to:

- A R800 000.00 contract with Regiments, awarded without competitive process in 2014.
- McKinsey's supplier-development 'partnerships' with Regiments and Trillian, and the related irregular, fruitless and wasteful, corrupt and otherwise unlawful benefits provided by Eskom to McKinsey and Trillian.
- Eskom's award of various contracts and payments of substantial quantum of funds without following the requisite tender processes.
- All payments made by Eskom to Trillian, especially those made without a contract.
- All advisory functions undertaken by Trillian, whether paid or not, including support provided to the CFO's office and the high-level report on the Duvha tender process.
- The Eskom board and Ministry of Public Enterprises' failure to action the recommendations of various investigative reports in relation to the impugned contracts.



3.7.5 Based on the evidence before the Committee, we find that Eskom's relationship with Tegeta was questionable and that various related contracts and payments were unauthorised, irregular, and/or were otherwise unlawful. In particular:

- Eskom's involvement in the sale of Optimum Coal Holdings to Tegeta, including the termination of the CSA negotiation and the settlement process with Optimum Coal Mine (OCM) (May-June 2015), the levying of an irregular and unusual fine against OCM (July 2015), various actions of Eskom executives in the negotiation process - including in communication with the Ministry and Department of Mineral Resources (prejudicing other interested parties), a coal pre-purchase agreement in the amount of R1.6 billion - and an ostensibly associated guarantee thereof (9-10 December 2015), the premature cancellation of existing contracts for supply of coal to Eskom's Arnot power station (prejudicing Exxaro and other coal suppliers and creating the opportunity to award coal supply contracts for Arnot power station to Tegeta (December 2015, January-April 2016)), a prepayment amounting to R659 million (April 2016), Eskom's decision to pay Tegeta inflated prices for coal produced by OCM prior to Tegeta acquiring ownership of OCM, and Tegeta's transfer of shares and contracts to Shiva Coal.
- The Eskom Board's mismanagement of various investigative reports into these issues, including those conducted by National Treasury.

3.7.6 The companies that were mentioned by witnesses during the course of the Inquiry as having played various roles in the impugned contracts with Eskom were the ones listed below:

- Trillian
- Tegeta
- Oakbay
- E-Gateway Consultants
- Mabengela
- Elgasolve
- Shiva Coal
- Zara W
- Regiments
- Bank of Baroda
- Albatime

### **3.8 Loss of institutional capacity**

3.8.1 Over the past decade, the calibre of Eskom's Board and Executive has steadily decreased. This weakening of capacity was both the result and an enabler of the various instances of unlawful actions perpetrated at Eskom.

3.8.2 Evidence before the Committee shows how Eskom's internal policies and procedures were applied in bad faith to victimise or side-line long standing, competent and/or law-abiding executives, senior staff and experts, including those listed below. The Committee heard how Eskom took indiscriminate and unsubstantiated actions against inter alia:

- Mr Brian Dames;
- Mr Steve Lennon;
- Mr Paul O'Flaherty;
- Ms Erica Johnson;
- Ms Caroline Henry;
- Mr Dan Marokane;
- Ms Tsholofelo Molefe;
- Mr Tshediso Matona;
- Ms Kiren Maharaj;
- Mr Johann Bester;
- Mr Sal Laher;
- Mr Kennan Lakmeharan;
- Mr Abram Masango;
- Mr Johnny Dladla;
- Mr Mark van der Riet;
- Ms Charlotte Ramavhona;
- Adv. Neo Tsholanku;
- Mr Aziz Laher.

3.8.3 The Committee heard from multiple witnesses who made allegations of phone tapping, other forms of surveillance, and even the use of death threats to intimidate and silence them. A culture of fear and mistrust had flourished at Eskom, and unethical decision-making has thrived.

### **3.9 The responsibility to uphold good governance**

3.9.1 The Committee heard evidence which shows official governance structures were undermined within Eskom and with respect to its.

- 3.9.2 While the Minister, Board, and Executive each have explicit areas of accountability, the Inquiry has exposed a set of external persons who appear to have played a role in the internal decision making processes at Eskom.
- 3.9.3 A comprehensive list of individuals who were reported to the Committee to have conducted themselves unethically and possibly criminally is presented below. The substantial evidence collected by the Committee's fact-finding Inquiry makes it necessary to provide a public list, so as to assist the relevant authorities (including possibly the Directorate for Priority Crime Investigation, the Special Investigating Unit and other law enforcement agencies) to focus their investigations on the evidence presented to the Committee.

*3.9.3.1 Ministry Advisors and Public Enterprises Employees*

- Mr Siyabonga Mahlangu
- Mr Thamsanqa Msomi
- Ms Kim Davids (PA to Minister of Public Enterprises)

*3.9.3.2 Eskom Board Chairpersons*

- Mr Zola Tsotsi
- Dr Ben Ngubane
- Mr Zethembe Khoza

*3.9.3.3 Eskom Non-Executive Board Members*

- Ms Chwayita Mabude
- Mr Mafika Mkwanaazi
- Mr Mark Pamensky
- Ms Devapushpum Viroshini Naidoo
- Ms Nazia Carrim
- Mr Romeo Khumalo
- Ms Mariam Cassim

*3.9.3.4 Eskom Staff & Executives*

- Mr Collin Matjila
- Mr Brian Molefe
- Mr Anoj Singh
- Mr Matshela Koko
- Mr Edwin Mabelane
- Mr Charles Kalima
- Mr Prish Govender

- Ms Ayanda Nteta
- Mr Sean Maritz
- Mr Abram Masango
- Ms Suzanne Daniels
- Mr Vusi Mboweni

*3.9.3.5 Companies and persons who, according to the evidence before the Committee, may have benefited unduly from contracts with Eskom:*

- Mr Eric Wood
- Mr Vikas Sagar
- Mr Alexander Weiss
- Mr Clive Angel
- McKinsey & Company
- Regiments
- Trillian
- Tegeta Exploration and Resources (Pty) Ltd

### **3.10 Lacklustre performance of the Shareholder**

- 3.10.1 There were inconsistencies in the accounts on the relationship of the Shareholder with Eskom by former Public Enterprises ministers Malusi Gigaba and Lynne Brown. This was also manifest in their understanding of the scope of their powers, oversight capabilities and their approaches to accountability.
- 3.10.2 Minister Gigaba's testimony seemed to indicate he had adopted an interventionist approach, while he vehemently denied being involved in Eskom's procurement processes.
- 3.10.3 In spite of there being ample evidence of wrongdoing being raised frequently about Eskom in Parliament and in the public domain, Minister Brown often failed to take appropriate action, responsibility or accountability for a large set of impugned decisions taken by the Board and management of Eskom.
- 3.10.4 While the two former ministers pleaded ignorance regarding the irregular, and possibly criminal acts committed by the Executive and non-executive Board members they appointed; the King Code stipulates clearly that while ministers and officials within the department may not be directly responsible for acts of wrongdoing, they may still be accountable for these acts. King IV takes a specific view on accountability, viewing it as: *"The obligation to answer for the execution of responsibilities"*. Furthermore, it clarifies that, *"Accountability cannot be delegated, whereas responsibility can be delegated without abdicating accountability for that delegated responsibility"*. In terms of accountability for governance in Eskom, King VI is

unambiguous that the Eskom Board – comprising executive and non-executive directors - must answer for its administration and performance, regardless of which other actors have a delegated role or responsibility:

*The governing body is the structure that has primary accountability for the governance and performance of the organisation. Depending on context, it includes, among others, the board of directors of a company, the board of a retirement fund, the accounting authority of a state-owned entity and a municipal council.*

3.10.5 The Committee finds that the Executive arm of government represented by the two former ministers – Gigaba and Brown – was grossly negligent in carrying out its responsibility as the sole Shareholder of Eskom.

3.10.6 On the basis of the evidence presented in the Inquiry, the Committee finds that the legislation and policies that regulate the Shareholder's relationship with Eskom may have left room for interpretation that led to the inconsistencies mentioned above.

### **3.11 Questionable awarding of Contracts**

The Inquiry has revealed that the corruption of procurement processes at Eskom would not have been possible, if not for the guise of integrity and legitimacy that some erstwhile reputable entities afforded certain Eskom decisions. Such entities benefited greatly from the tainted contracts and enjoyed advantageous relationships with the implicated companies.

#### **3.11.1 McKinsey's Partnership with Regiments & Trillian:**

- McKinsey partnered with Regiments and Trillian under questionable circumstances;
- McKinsey employees worked alongside Trillian ahead of any completed due diligence, which was only undertaken in response to media reports (initiated by Dr David Fine);
- McKinsey authorised Eskom payments to Trillian despite having no contract with the company;
- McKinsey benefited from an unusual sole proprietor status for various financial and strategic matters;
- McKinsey was allowed to determine - with the programme Steerco - what fees it and Trillian would earn on an irregular, unjustifiable and unlawful risk based remuneration model which had not been approved by Treasury;
- McKinsey was paid ~R 1 billion for a contract that should have never been actioned as it seemingly never entered into force (a number of conditions were not met before the Conditions Precedent expired on 31 March 2016) and there is some question as to whether it was duly authorised;

- Numerous reports (Oliver Wyman, G9, Bowmans) raised questions over the value for money of the deals McKinsey was involved in - specifically, that McKinsey was allowed to charge fees in excess of market rates;
- McKinsey's role and the roles of its senior employees, Vikas Sagar, Alex Weiss and Lorenz Jungling are highly questionable, and warrant further investigation, including for potentially serious criminal conduct.

3.11.2 The Committee welcomes the payment to Eskom of the amount of R902million McKinsey earned for the contract, which was never approved by the Treasury. The commitment to pay back this amount was made by a representative of McKinsey in the Inquiry. The Committee also welcomes the confirmation of the payment of R99.5million in interest from McKinsey to Eskom.

### **3.12 Mr Koko's disciplinary hearing**

Evidence before the Committee calls into question Mr Matshela Koko's disciplinary process. Such requires further investigation by the Eskom Board, including on the roles played by, and information before, Cliffe Dekker Hoffmeyr & Nkonki.

### **3.13 Confirmation of State of Capture report's findings and observations**

3.13.1 Many of the findings and observations of the Public Protector's *State of Capture* report have time and again been corroborated by the evidence before and the testimony of witnesses that appeared before the Committee.

3.13.2 Critically, the Committee was informed that there were various meetings at which confidential Eskom business was reportedly discussed between ministerial and departmental support staff, Eskom board members, executives, and senior staff, and various interested private sector agents, including:

- A meeting at former Minister Brown's residence (denied by Minister Brown), attended by a Gupta brother, Mr Salim Essa, and Mr Tsotsi (who claimed he was unaware that a Gupta brother and Mr Essa would be present);
- Mr Koko reportedly called numerous meetings that were attended by Eskom senior officials (Ms Daniela, Mr Masango, and others) and Mr Essa in the second week of March 2015;
- Meetings were arranged by Mr Matjila, between Mr Essa and Eskom executives - including Ms Tsholofelo Molefe (who claimed she was unaware that Mr Essa would be present);

- Meetings were arranged by Mr Msomi between Mr Essa and Eskom executives - including Ms Tsholofelo Molefe;
  - Mr Tsotsi confirmed that he met with Mr Rajesh “Tony” Gupta.
- 3.13.3 Evidence reviewed by the Committee also indicates that confidential information was shared by Eskom officials with various private business persons.
- 3.13.4 A number of witnesses that appeared before the Committee confirmed that they had met with or engaged members of the Gupta family and their associates under dubious circumstances, numerous Eskom board members, executives, and senior officials. When confronted with documentary evidence regarding trips to Dubai which suggests that such trips were funded and organised by the Gupta family and their associates, witnesses (Mr Koko and Mr Singh) denied that such trips were funded by companies that did business with Eskom.
- 3.13.5 The Committee finds that there was a corrupt relationship between the Gupta family, their associates and key State functionaries, various gratifications were provided and accepted in order to influence Eskom board members and employees to act unlawfully and to induce Eskom to enter into a number of business contracts.
- 3.13.6 The external persons who, according to evidence obtained from witnesses in the Inquiry, may have unduly influenced Eskom decisions included:
- Mr Salim Essa
  - Mr Rajesh ‘Tony’ Gupta
  - Mr Ajay Gupta
  - Mr Atul Gupta
  - Mr Duduzane Zuma
  - Mr Nazeem Howa
  - Mr Ravindra Nath
  - Ms Ronica Ragavan
  - Mr Kuben Moodley
  - Mr Ashu Chawla
- 3.13.7 In addition, the Committee heard evidence of meetings where parties with no legitimate mandate to actively interfere in Eskom’s operational matters allegedly did just that. According to one witness (Mr Tsotsi), at a meeting called by Ms Dudu Myeni (and attended by Mr Nick Linnell and Mr Tsotsi himself) at former President Jacob Zuma’s Durban residence on 8 March 2015, former President Zuma intimated that it was his wish that an independent inquiry into Eskom be undertaken and that a number of executives be suspended. As a consequence of this meeting, Mr Tsotsi claimed that he presented the President’s wishes at an urgent board meeting the following day, even though he was aware that the President was not in a position to give

lawful instructions to the Board. When the Board voiced concerns about the unlawful interference in its functions, Minister Brown intervened in support of the inquiry and the suspensions.

- 3.13.8 The Committee has uncovered substantial and compelling evidence that a number of corporate entities amassed substantial illicit private gains – many of which have reportedly been funnelled out of South Africa through shell companies and private accounts in Dubai and Hong Kong. The Committee heard evidence which shows how these contracts and agreements were reached through the weakening of governance structures at Eskom, coordinated with actors in government, private sector and in the Eskom board, executive and management. The weakening of corporate governance at Eskom has severely undermined the financial stability of the State-owned company and has eroded its public standing.
- 3.13.9 The Committee finds that in general, the various laws, regulations, codes, frameworks, and other agreements that together constitute the basis of Eskom’s governance infrastructure had been distorted, circumvented, misused, applied in a non-uniform and non-transparent manner, and have thus ultimately failed to support Eskom in fulfilling its developmental mandate. The applicable governance framework has failed to protect Eskom from external interference and corporate capture, leading to the financial and governance crisis the utility now finds itself in.

### **3.14 Weakening of Institutions**

- 3.14.1 The Committee notes the many examples of institutional and oversight failure that have allowed private interests to benefit unduly from business with Eskom over the past decade with great concern. It is disconcerting that it seems the relevant authorities have not yet acted, in light of the allegations that have been brought to their through disclosures, the press, the courts, Auditor General and Parliament.
- 3.14.2 With knowledge of various submissions made to the Directorate for Priority Crime Investigation (DPCI or “the Hawks”) relating to Eskom, the Committee is concerned that such reports appear not to have been given urgent attention.
- 3.14.3 The Committee is concerned about the specific instances where the DPCI (and quite possibly the National Prosecuting Authority) failed to act expediently on various submissions or matters formally brought to their attention.
- 3.14.4 Evidence before the Committee indicates that many of the transactions Eskom entered into which were the subject of the Inquiry, as well as the seemingly improper relationships between public officials and private actors, involved bribery and corruption, money laundering and other financial crimes of the most serious kind.
- 3.14.5 It remains unclear why law enforcement agencies seem to have delayed conducting investigations or instituting action in relation to widespread allegations of criminal conduct by individuals at Eskom, Tegeta and their associates.



## **4 Part D: Recommendations**

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### **4.1 Change of leadership and management at Eskom and commencement of Zondo Commission**

#### **4.1.1 Notwithstanding the fact that:**

- (a) a new Board of non-executive directors was appointed to lead Eskom while the process of the Inquiry was still ongoing,
- (b) some of the implicated Executive Directors have been suspended or resigned, and
- (c) many other implicated persons are no longer directly associated with Eskom; the Committee is of the view that:
  - i. Appropriate remedial action for wrongdoing must be pursued by the relevant authorities against all the implicated individuals and companies.
  - ii. The Board and executives of Eskom are expected to continue seeking to uncover and act on other incidences of corruption and state capture that may have been perpetrated by private individuals and firms in collaboration with officials and/or former Board members, but not identified by the Committee's Inquiry. These must be brought to the attention of the relevant authorities for criminal and other investigations.

#### **4.1.2 The Committee acknowledges the commencement of the Judicial Commission of Inquiry into allegations of state capture led by Deputy Chief Justice Raymond Zondo. Most of the matters the Portfolio Committee's Inquiry into Eskom dealt with are also found in the terms of reference of the Zondo Commission. This implies that the work done by the Committee could serve as a basis for further investigation by the Zondo Commission in order to uncover the full extent of wrongdoing in Eskom.**

#### **4.1.3 The recommendations below refer to specific findings outlined in **Part C** of this report.**

### **4.2 The resignation, reinstatement and "early retirement" of Mr Brian Molefe**

#### **4.2.1 The Committee recommends, that the Eskom Board must review the rules and procedures of the Eskom Pension and Provident Fund to ensure that incidents of the nature of the payments made to Mr Molefe in lieu of benefits for which he did not qualify, which the High Court described as "*patently unlawful*", will never happen again.**

### **4.3 Concerning the difficulties the Committee encountered when it was seeking access to information from Eskom,**

#### **4.3.1 The culture whereby Eskom's operations have been shrouded in inordinate secrecy, which has cast a shadow over and undermined its internal governance and controls, as well as the oversight function of the Ministry and Department of Public Enterprises and Parliament must be changed.**

4.3.2 The Eskom Board must ensure reasonable protection of Eskom's records in terms of section 50 of the PFMA and keep proper records of the financial affairs of the company in line with section 40 of the PFMA.

4.3.3 The Committee recommends that adequate steps must be taken by government to strengthen the legislative and policy framework applicable to Eskom, and documentation formalising the relationship between Eskom and the Ministry and Department of Public Enterprises. This will help to deal with weaknesses that include inadequate governance and oversight systems and a lack of clarity on the role of Eskom's executive authority.

#### **4.4 Witnesses in senior leadership positions at Eskom who presented conflicting evidence to the Committee**

4.4.1 The committee recommends to the National Assembly that the witnesses mentioned below must be requested to present themselves to the Zondo Commission of Inquiry in order for them to shed more light on the allegations of corruption and state capture at Eskom during their tenure:

- Mr Zola Tsotsi, Former Eskom Board Chairperson (June 2011 to March 2015)
- Dr Baldwin (Ben) Ngubane, Former Eskom Board Chairperson 2015 – June 2017
- Mr Zethembe Khoza, Eskom Interim Board Chairperson
- Ms Devapushpum (Viroshini) Naidoo, Former Eskom Board member
- Dr Pat Naidoo, Eskom non-executive Board Member
- Mr Brian Molefe, Former CEO of Eskom
- Mr Anton Minnaar, Eskom HR Executive Manager
- Mr Sean Maritz, Former Eskom Acting CEO
- Mr Anoj Singh, Former Eskom CFO
- Mr Matshela Koko, Former Eskom Acting CEO, and Executive for Generation

4.4.2 These include the officials who failed, without sufficient cause, to answer fully and honestly all the questions put to them under oath or affirmation, particularly those who misrepresented Eskom's internal policies in an attempt to legitimise conduct which has been found by internal investigations (including the Bowmans' and the G9 Reports) to involve unusual, unauthorised and/or irregular expenditure; and those who told falsehoods and selective facts to justify unusual, unauthorised, irregular and/or otherwise unlawful expenditure.

4.4.3 The former Board members who for months frustrated the efforts of the Committee to access crucial document and only furnished them on 14 March 2018 must be held accountable for the conduct that appears to be criminal.

4.4.4 The Speaker of the National Assembly with the assistance of Parliament's Legal Services Unit, should be requested within 60 days from the adoption of this report by the National Assembly,

to refer any individuals who may have misled the Committee during their evidence to the relevant authorities for further investigation.

#### **4.5 Concerning governance,**

- 4.5.1 The Committee recommends that investigations currently underway at Eskom and/or undertaken by other institutions including all reports presented to management or the Board prior to final Board approval must be presented to the Portfolio Committee. This recommendation is based on the detailed findings that reveal the failure of successive Eskom Boards to fulfil their statutory responsibilities set out in the Companies Act 2009 and the Public Finance Management Act 1999, as well as failure to adhere to the King Code on Corporate Governance and other regulations.
- 4.5.2 The Committee recommends to government to request the National Treasury to review and strengthen the regulations on procurement, pertaining to State-owned companies, particularly those with large procurement budgets such as Eskom.
- 4.5.3 A full review of Eskom's policies and procedures, as well as the policies and procedures of the Ministry of Public Enterprises to assess their compliance with relevant legislation, for all material concerns, including procurement and procedures for the appointment of Executives and Board members. This is meant to prevent the recurrence of corruption and corporate capture that the Committee's Inquiry has illuminated.
- 4.5.4 Government's policies of using the large procurement budgets of SOC's to contribute towards the necessary economic transformation and empowerment of small black-owned companies must be implemented in a uniform and transparent manner at Eskom.
- 4.5.5 The Eskom Board must prevent the recurrence of contracts that have exposed the company to escalating costs and considerable risk that stand in direct opposition to the broader goal of authentic economic transformation and development.

#### **4.6 Concerning the contracts identified in the findings,**

- 4.6.1 Criminal investigations into possible cases of fraud, corruption, and/or other unlawful conduct must be pursued by the South African Police Service, Directorate for Priority Crime Investigation (DPCI), Special Investigative Unit (SIU), National Prosecuting Authority (NPA) and other law enforcement agencies.
- 4.6.2 In order to ensure that Eskom is set on a fundamentally new growth and development trajectory, whereby its decisions serve the interests of the company and the people of South Africa; the Board must undertake to review all the short, medium and long-term contracts of private service providers with Eskom. The Department must oversee this review and within a period of 12 months after the adoption of this report by the National Assembly, report back to the Portfolio

Committee on Public Enterprises. This recommendation must be captured in the legacy report of the Committee so that the 6<sup>th</sup> Parliament can oversee its implementation.

- 4.6.3 The Committee recommends to Parliament to request the Financial Intelligence Centre to assist Eskom in terms of its mandate to identify the proceeds of crime, combat money laundering, supervise and enforce compliance with the FIC Act; share information with law enforcement authorities, supervisory bodies, intelligence services, the South African Revenue Service, and other local and international agencies.
- 4.6.4 Eskom must seek to recover the proceeds of corruption, and report to the relevant authorities any violations of the law.

#### **4.7 Regularising previous decisions**

In light of the overwhelming evidence of external interference and non-compliance with the relevant legislation and applicable supply chain management procedures in relation to Trillian, Regiments and McKinsey, the Committee recommends that the Eskom Board must take reasonable steps to regularise previous decisions involving Trillian, Regiments, McKinsey and other companies that may pose a financial or legal risk.

#### **4.8 Financial management**

- 4.8.1 The Committee recommends that the new Eskom Board should urgently engage the Auditor-General to address all possible irregular, fruitless and wasteful expenditure, as well as to initiate disciplinary steps against any officials as required by section 51(1)(e)(iii) of the PFMA, who made and/or permitted irregular, fruitless and wasteful expenditure.
- 4.8.2 The new Board should institute an independent forensic investigation into questionable and irregularly-awarded contracts referred to in this report or any other matter which it deems necessary.
- 4.8.3 The Committee recommends that upon conclusion of the forensic investigations into all financial irregularities (e.g. irregularly awarded contracts, as well as suspicious transactions, entered into) appropriate steps must be taken against any current and/or former employees and Board members who are found to have been complicit in the wasteful expenditure as a result of these irregular activities. The Committee recommends that the new Board should ensure that a comprehensive progress report relating to all pending investigations, including those related to the Eskom's financial sustainability, is compiled and submitted to Parliament.

#### **4.9 The loss of experienced leadership and staff with integrity**

- 4.9.1 The Board of Eskom must improve the entity's Human Resources management in order to attract and retain staff and managers who are capable and not prone to corruption and capture by private interests.

- 4.9.2 The Eskom executive management must reverse the culture whereby internal labour relations policies and procedures have been applied in bad faith to victimise or side-line long standing, competent and/or law-abiding executives, senior staff and experts.
- 4.9.3 The Board must ensure that disciplinary measures are taken against professionals such as scientists and engineers who acted unethically, and who through their wilful and/or grossly negligent actions, caused financial losses and reputational damage to Eskom.

#### **4.10 The undermining of the principles and structures that ensure good governance**

- 4.10.1 The Inquiry has exposed a set of executives and senior staff that appear to have been part of a network that actively participated in irregular, corrupt and/or otherwise unlawful contracts and processes at Eskom. Lifestyle audits of implicated individuals must be conducted, reports to relevant professional associations, where necessary reports to legal, regulatory, and investigative authorities.
- 4.10.2 The list includes Ministry Advisors and Public Enterprises employees, Eskom non-executive Board Members, Eskom staff & executives, external persons who unduly influenced Eskom decisions, companies and persons who benefited unduly from contracts with Eskom.
- 4.10.3 The Committee recommends criminal investigations into possible cases of fraud, corruption, and other unlawful conduct with respect to the actions of the listed individuals and firms; and the possibility of financial crimes.
- 4.10.4 South African law enforcement agencies must review or conduct independent audits of implicated companies (specifically those that had dealings with Eskom), and, where necessary, institute the following action(s) - blacklisting, recovery of unlawful proceeds, and reporting to relevant authorities.
- 4.10.5 Eskom must make applications in terms of section 162 of the Companies Act 71 of 2008 (“the Companies Act”) to have any former Board member who acted within the immediately preceding 24 months, and implicated in fraud, corruption, and/or other unlawful behaviour, declared delinquent directors.

#### **4.11 Strengthening oversight capacity and clarifying the role of the Shareholder**

- 4.11.1 In the light of the findings of the Inquiry into Eskom, the Committee recommends to the Department of Public Enterprises and Cabinet that they should review the legislative and regulatory framework governing State-owned companies. This review must include a consultative process that is inclusive of a broad range of stakeholders and also takes into account the evidence of corruption and state capture uncovered in recent years by the Public Protector, the Eskom parliamentary Inquiry and other bodies.
- 4.11.2 The Executive must introduce the Shareholder Management Bill that was supposed to be introduced to Parliament in the 2017/18 financial year as promised by former minister Lynne

Brown in her last budget speech. This piece of legislation is essential for strengthening oversight and defining the roles of SOCs and the Shareholder.

- 4.11.3 The Department must ensure that there is clear and shared understanding of the provisions in the Shareholder's Compact and the Memorandum of Incorporation ("MOI") of Eskom among all stakeholders, and update these where necessary.
- 4.11.4 The Committee recommends that the two former Public Enterprises ministers Gigaba and Brown must make presentations to the Zondo Commission in order to share insights into the roles they played as Shareholder representatives during the period of corruption and corporate capture that flourished at Eskom.

#### **4.12 Strengthening the powers of Parliament to hold individuals and institutions accountable**

- 4.12.1 The Committee recommends to Parliament to develop mechanisms through which individuals and institutions that refuse to appear before parliamentary portfolio committees after being duly summonsed in terms of section 56 of the Constitution, sections 14, 15 and 16 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No 4 of 2004 and Rule 167 of the National Assembly Rules, could face consequences.
- 4.12.2 The Committee recommends to the National Assembly Speaker to institute action against Ms Dudu Myeni, Mr Duduzane Zuma, Mr Rajesh "Tony" Gupta, Mr Atul Gupta, and Mr Ajay Gupta, all of whom failed to honour their invitations to appear before the Inquiry. The Committee further recommends to the National Assembly that the Judicial Commission of Inquiry into allegations of state capture headed by Deputy Chief Justice Raymond Zondo should be requested to summons these individuals to appear before it.

#### **4.13 Report to Zondo Commission**

The Portfolio Committee recommends to Parliament to hand over this report, together with the documentation and the entire record of evidence collected in the course of the Inquiry to the Zondo Commission of Inquiry for further investigation.

#### **4.14 Monitoring and implementation**

Feedback needs to be provided on the implementation of these recommendations by all organs of state mentioned in the report to the Portfolio Committee on Public Enterprises on a quarterly basis, starting from mid-March 2019.

**Report to be considered.**