OPINION PIECE

OFFICE OF THE PUBLIC PROTETOR OF SOUTH AFRICA

In the matter between –

VUYANI NGALWANA **Complainant**

and

ALL DIRECTORS OF ESKOM HOLDINGS SOC LTD and AFFECTED OR IMPLICATED CONTRACTORS **Respondent**

COMPLAINT

A. Introduction

1. It has become crystal clear to me now that one cannot rely on political parties or non-governmental organisations to hold executives (both in government and in State-Owned Enterprises) accountable for improper conduct, including perfidy. A recent judgment of the Pretoria High Court which says complainants are free to **"pick their target from a group of wrongdoers"** opens the door for cherry-picking depending on whatever socio-political or socio-economic agenda one may harbour or wish to promote. A Constitutional Democracy is the worse for it.

2. So, constrained by principle and the inertia of our elected public representatives, I bring this complaint to the Office of the Public Protector in good faith

   2.1 in my personal capacity as a citizen of South Africa and consumer of Eskom electricity at a price that seems higher than it should be and that increases constantly by reason of what seems to be reckless conduct (by commission and omission) by executive and non-executive directors and management at Eskom,
   2.2 in the public interest, and
   2.3 in terms of s 6(1)(b) of the Public Protector Act, 23 of 1994 ("the PP Act").

3. If the Public Protector[1] should prefer that I lodge the complaint by way of a declaration under oath or affirmation I shall do so. There are two reasons why I have not done so.

   3.1 The first is that, on a proper construction, s 6(1) of the PP Act seems to afford a complainant the option to lodge a complaint (1) orally or in writing under oath or (2) by such other means as the Public Protector may in her discretion allow. This flexibility seems intended to make the Office of the Public Protector accessible to members of the public, some of whom may not be able to write or

[1] Throughout this complaint, reference to "Public Protector" is reference to the Office of the Public Protector or the Chapter 9 Institution and not the leadership of the Institution.

speak or see, while others may for whatever reason be unable to access the services of a commissioner of oaths, or simply be disinclined to do so.

3.2 The second reason (and one which finds application here) is that the complaint arises entirely from an online publication that I read on the morning of Monday 1 June 2020 in *City Press* by one Setumo Stone titled **"Eskom dodges question on company that got R5bn overpayment"**.[2] It is also informed by material that I have gathered from media reports, including a video of Eskom's presentation to the Parliament's Appropriations Committee on 27 May 2020 and to which Eskom referred in its media statement of 2 June 2020.[3] that was uploaded on YouTube . As I have absolutely no direct personal knowledge of the facts contained in that news story and media reports to which I refer in this complaint, it seems to me that deposing to an affidavit not swearing to or affirming the correctness or truth of the facts or allegations to which it relates may be an unnecessary exercise and perhaps even inappropriate.

B. <u>Competence and Jurisdiction</u>

4. My invitation to the Public Protector to investigate this complaint based on the facts and allegations that are contained in news media stories is founded on s 6(5) of the PP Act. That section reads:

> *"(5) In addition to the powers referred to in subsection (4), the Public Protector shall on his or her own initiative or on receipt of a complaint be competent to investigate any alleged-*
> *(a) maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act 1 of 1999);*
> *(b) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);*
> *(c) improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution or entity contemplated in paragraph (a); or*
> *(d) act or omission by a person in the employ of an institution or entity contemplated in paragraph (a), which results in unlawful or improper prejudice to any other person."*

5. In terms of sections 2 and 3 of the Eskom Conversion Act, 13 of 2001, Eskom Holdings SOC Ltd ("Eskom") is a public company with its entire share capital held by the state.

6. Eskom is thus the **"institution or entity"** envisaged in s 6(5) of the PP Act. The Public Protector, therefore, has the competence and jurisdiction to investigate this complaint.

C. <u>Factual Basis for the Complaint</u>

[2] https://city-press.news24.com/Business/eskom-dodges-question-on-company-that-got-r5bn-overpayment-20200531

[3] http://www.eskom.co.za/news/Pages/2020Jun2.aspx

7. The media news report that I read in the *City Press* alleges, for purposes of this complaint:

   7.1 that **"[t]he standing committee on appropriations heard last year [2019] during a visit to Eskom that a contractor had been overpaid by R5 billion and there was "an agreement that it was an error"**;

   7.2 that the chairman of the Parliamentary Standing Committee on Appropriations ("the Appropriations Committee") said this week at a briefing with the Department of Public Enterprises and its entities, including Eskom, that **"the committee did not buy the error argument and the matter should not be taken lightly"**;

   7.3 that the chairman asked, **"Who is the lucky contractor? And it cannot be the only one. Who else?"**

   7.4 that the Appropriations Committee has heard from Public Enterprises and Eskom that **"[c]oal contracts constitute the highest cost at Eskom, accounting for 54% of the budget, followed by operations and maintenance at 20%, labour at 10%, levies and taxes at 10% and material at 6%"**;

   7.5 that the chairman of the Appropriations Committee said Eskom **"is paying up to double the market price for coal, adding that the committee wanted to know exactly how much the people of South Africa were paying, compared with what could have been saved"**;

   7.6 that the chairman of the Appropriations Committee said **"Eskom's explanation that it was renegotiating the contracts was unsatisfactory and that more questions needed to be cleared, including: 'How did we get here and who benefits?'"**

   7.7 that **"Eskom CEO André de Ruyter told the committee that seven coal suppliers had been identified for charging Eskom too much and that the contracts were being negotiated"**;

   7.8 that a member of the Appropriations Committee said **"private companies that owed Eskom money were treated with kid gloves, 'especially those companies that are doing business with Eskom but are not paying'"**;

   7.9 that Eskom CEO told the Appropriations Committee that **"Eskom was working with various law enforcement agencies to recover money linked to state capture allegations, including R600 million from Trillian and a R5 billion claim against Gupta-linked Tegeta Exploration and Resources"**.

8. These are the facts and allegations that underpin this complaint. I ask that the Public Protector base the investigation on these allegations and any other related facts or allegations that may be discovered either during investigation or from other sources before commencement of the investigation.

D. <u>Questions to be Investigated and Legal Basis for Investigation</u>

9. Before setting out the questions that I am requesting the Public Protector to investigate, and the legal foundations for this investigation, a word on the capacity of the Public Protector.

10. It has been widely reported in the media that the Public Protector's budget may be

limited, and that it may have been further reduced by National Treasury by some R58 million for the 2020/2021 financial year.[4]

11. In the circumstances, should the Office consider that it has no capacity or sufficient resources to pursue this investigation, I ask that the Public Protector consider approaching the President for the establishment of a Commission of Inquiry within a month of the Public Protector's remedial action with terms of reference confined only to the investigation of the specific issues identified in this complaint as described more fully below. Failing the President, I ask that the Public Protector approach the High Court. There is precedent for this as the Public Protector well knows, a process that has been endorsed by the Full Bench of the Pretoria High Court.[5]

12. If the Public Protector should, in the exercise of its discretion, decide to go the Commission of Inquiry route, I ask that the remedial action in that regard include a direction that the chairman of the Commission should be appointed by the Chief Justice in light of unconfirmed reports that the political executive may be in a conflict of interest situation. For example, it has been reported that one of the companies that supply coal to Eskom, the Glencore Group, at some stage had three contracts with Eskom through companies in which the President previously had an interest. These are (1) Shanduka Coal, (2) Optimum Coal and (3) Umcebo Coal. It was also reported that on 26 November 2014, the Presidency said the President's business interests (at that time a Deputy President) had been placed in a trust in line with the executive ethics code.[6] The President denied any conflict of interest at that time, but this has never, to my knowledge, been investigated by an independent institution with powers even approximating those of the Public Protector.

13. I submit that these allegations point to a reasonable possibility that there may exist a conflict of interest. Business interests housed in a trust remain a source of conflict still in the circumstances of this complaint. Should the Public Protector require more grounds for alleging possible conflict of interest, I shall provide them although there are many in the public domain. But this will become necessary only if the Public Protector should consider going the Commission of Inquiry route. It does not arise at this stage.

14. The following are the questions I request the Public Protector to investigate

    14.1 **What are the circumstances surrounding overpayment by Eskom of R5 billion to a contractor or contractors?**

    In this regard, I ask that the Public Protector investigate, specifically,

    (a) When was this payment/s actually made?
    (b) When was the decision/s made to make the payment/s?
    (c) By whom was the decision/s made to make the payment/s?

---

4 https://www.msn.com/en-za/news/other/public-protector-fears-effect-of-r58m-budget-cuts/ar-BB14cpVF

5 President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)

6 https://mybroadband.co.za/news/energy/125118-did-ramaphosa-benefit-from-eskom-coal-deals.html

(d) On whose instruction (if there was an instruction) was the decision/s and/or payment/s made?
(e) What position does or did the person or persons who made the decision/s and/or payment/s hold at Eskom at the time of the decision/s and/or payment/s?
(f) If the decision to make the payment was made at Board level, copies of minutes of the Board meeting, resolution to that effect and the register of attendees should be procured.
(g) Which directors, if any, spoke against the making of the payment/s and which spoke in favour?
(h) If the decision was not made at Board level, when did the Board of directors first become aware of the decision/s and/or overpayment/s?
(i) On becoming aware of the decision/s, what did the Board do and how soon or long after becoming aware of the decision/s and/or overpayment/s?
(j) Assuming that the payment/s was/were made in error, was/were the decision/s to make payment also made in error?
(k) If the decision/s and/or overpayment/s was/were not made at Board level, was the Board misled and by whom?
(l) If the Board was misled, did the internal and/or external auditors pick up the 'error/s' and, if not, why did they not pick this up?
(m) If the auditors did pick this up, when did they report on it and to whom?
(n) Who were members of the Eskom Audit Committee at the time of the decision/s and overpayment/s?
(o) When did the Eskom Audit Committee first discover the overpayment and what was the first thing it did?
(p) Is the Eskom Audit Committee of the time satisfied that it complied with the provisions in s 94(7) of the Companies Act, 2008?
(q) The fact that the contractor/s who received overpayment/s of such enormously large sums (from a State-Owned Enterprise that we are told is struggling financially) did not seem to have raised alarm is itself very telling. (1) Who are these contractors, (2) who are the beneficial shareholders in each of them, (3) who are the managers, (4) when did they discover the overpayment/s, and (5) what did the managers do immediately on discovering the overpayment/s, if anything, (6) what did the Boards (including the internal and external auditors and Audit Committees) of each of these contractors do on discovering the overpayment/s?
(r) Who is/are the contractor/s to which the overpayment/s was/were made?
(s) Assuming this was an accounting entry error, when was the error discovered, by whom, and what were the circumstances of the discovery?
(t) What steps has the Eskom Board taken to ensure recovery of the overpayment/s?

(u) How prevalent is the overpayment of contractors at Eskom? Is this the only contractor that Eskom has overpaid in the last 10 years? If not, who else has been overpaid, when, by whom, in what circumstances, and what has been done (if anything) to recover those overpayments?

14.2 **What are the circumstances surrounding the procurement of coal by Eskom?**

In this regard, given that Eskom claims that coal contracts constitute the highest cost at Eskom, reportedly accounting for 54% of the budget,

(a) According to Eskom's Financial Report for the year ending 31 March 2019, (1) "independent power producers" ("IPPs") seem to account for about 5.18% of Eskom's electricity available for distribution, yet it appears that all Gigawatt hours of electricity supply from IPPs were totally redundant and thus accounted for under **"Technical and other losses"** in Eskom's Audited Financial Statements;[7] (2) Eskom made purchases of 11 344GWh[8] (5.18%) from IPPs at a cost (including a capacity charge) of R26.7 billion during the March 2019 year (up from 9 584GWh at R21.3 billion during the March 2018 year), at an average cost of 235c/kWh (up from 222c/kWh during the March 2018 year),[9] while Eskom's proprietary primary energy cost amounted to 42 cents per kilowatt hour;[10] (3) I am advised that Eskom's coal contracts account for 40% of its total electricity available for distribution (not 54% as claimed to the Appropriations Committee), and the 54% number that Eskom disclosed to the Appropriates Committee seems to include 14% attributable to IPPs which supply only 5.18% of Eskom's total electricity available for distribution. How does the Eskom Board account for this discrepancy between what was conveyed to the Appropriations Committee, on the one hand, and what is contained in Eskom's financial results for the year ended 31 March 2019, on the other?

(b) What is the market price for coal in South Africa and how does that compare with other comparable markets?

(c) How much does Eskom pay each supplier for coal? I pause here to make the following observations:

- While this may arguably be confidential information, it is not privileged. Confidentiality means the information may not be publicly

[7] Eskom Audited Financial Statements for the year ended 31 March 2019, p 26

[8] That is, 5.18% of its total energy generation

[9] See Group Chief Executive's Financial Overview, p 104

[10] https://www.africanews24-7.co.za/index.php/voices/columns/ipp-saga-plausible-grounds-for-ramaphosa-to-be-impeached/

disclosed as, in this context, such disclosure might prejudice a supplier's competitive advantage. But nothing in law bars the disclosure of confidential information or documents to a fact finder (in this case the Public Protector) with a view to discovering facts and making findings of law or conducting an investigation on the basis of those documents or information without the Public Protector publicly disclosing confidential or commercially sensitive information in respect of each supplier. In other words, it is in my view perfectly permissible for the Public Protector to find, after considering the confidential information or documents, that supplier A overcharges Eskom by so much, supplier B undercharges Eskom by so much, and that supplier C charges Eskom market related prices for coal, without mentioning each supplier by name.

- If any supplier should claim privilege, the duty will be on the supplier to prove privilege. The generally applicable principles for privilege have been established by our courts and are now trite.

- The general principle is that a document that was generated for purposes of litigation, either before or during such litigation, is legally privileged. Also privileged, as a general principle, are communications made in professional confidence to and by legal representatives. These would include memoranda of advice and correspondence pertaining to the subject of the litigation or related issues.
- Communications which pass not between a litigant and legal representatives but between a litigant and third parties are <u>not privileged</u> unless: (a) made for the purpose of existing or contemplated litigation; or (b) made in answer to inquiries by the litigant for the purpose of being placed before legal advisors or legal representatives with a view to obtaining legal advice or to enable the legal representatives to conduct litigation.[11]
- Also uncovered by legal privilege are communications between different offices of the same litigant[12] or between an agent and a principal,[13] unless made for either of the purposes listed above.

[11] *Potter v South British Insurance Company Ltd* 1963 (3) SA 5 (W), at 7B-E. See also *Governing Body, Hoerskool Fochville and Others v Centre for Child Law* 2014 (6) SA 561 (GJ), at paras [48]-[51].

[12] For example, between head office and a branch office

[13] *United Tobacco Companies (South) Ltd v International Tobacco Company of SA Ltd* 1953 (1) SA 66 (T)

- In order to determine the purpose for which communications or documents have been brought into existence, one looks not to the intention of the author thereof but rather to the intention of the person or authority by whom the communications or documents were procured. Here, that would be the Public Protector. In this regard, the Supreme Court of Appeal has said in *Competition Commission v ArcelorMittal (SA) Ltd and Others* 2013 (5) SA 538 (SCA):

  "In my view the flaw in the respondents' approach is that they incorrectly focus on Scaw's motive in composing the leniency application to determine the purpose — whether definite or dominant — instead of focusing on the commission's reason for obtaining or procuring it. The purpose of the document is not to be ascertained by reference to its author, either at the time at which the document was prepared or at the time it is handed over to the litigant or the litigant's legal representative. Instead, the purpose of the document is to be determined by reference to 'the person or authority under whose direction, whether particular or general, it was produced or brought into existence'. In that case it is the intention of the person who procured the document, and not the author's intention, that is relevant for ascertaining the document's purpose. The author need not even have known of possible litigation when the document was prepared."

- Finally, it is the responsibility of the party claiming legal privilege that must advance the basis for the claim.[14] In my view, neither the information that the Public Protector will require in order to ascertain whether Eskom is charged market prices for coal, nor the coal supply contracts in which that information may be contained, meet the privilege standard.

14.3 **The Eskom CEO is quoted in a 31 May 2020 *City Press* news report as having told the Appropriations Committee that seven coal suppliers have been identified for charging Eskom too much and that the contracts are being negotiated**.

This is usually a sign of "kickbacks". In this regard, I ask the Public Protector to investigate specifically the following issues:

[14] *United Tobacco Companies (South) Ltd v International Tobacco Company of SA Ltd* 1953 (1) SA 66 (T) at 74A-C

(a) When did Eskom for the first time come to the realisation that these seven coal suppliers are **"charging Eskom too much"**?
(b) Often this is a sign of "kickbacks". Who receives kickbacks from Eskom suppliers who charge Eskom too much?
(c) When exactly did these negotiations commence?
(d) Who represents Eskom in these negotiations?
(e) What is Eskom's target date, if any, for completion of these negotiations?
(f) What are Eskom's non-negotiables, if any, in these negotiations?
(g) What is Eskom's measure of what is **"too much"**?
(h) How certain is Eskom that there are only seven companies (out of about 27) that are charging Eskom **"too much"**?
(i) According the Eskom 2019 financial results, the group recorded a net loss after tax of R20.7 billion for the year ending 31 March 2019 (up from R2.3 billion in 2018), and EBITDA of R31.5 billion (down from R45.4 billion in 2018).[15] How much of that loss is attributable to Eskom being charged **"too much"** by these **"seven coal suppliers"** identified by Eskom?

14.4 **A member of the Appropriations Committee is quoted in the *City Press* piece referred to above as having said private companies that owe Eskom money are treated with "kid gloves", especially those companies that are doing business with Eskom but are not paying.**

Is this a reference to private companies that consume and supply Eskom power? In this regard, I ask that the Public Protector investigate the following issues:

(a) Who are these companies?
(b) How much does each of these companies owe Eskom?
(c) Over what period has each of these companies owed Eskom?
(d) Has Eskom agreed on payment terms with each of these companies and, if so, what are those payment terms?
(e) What is the interest portion, if any, on each debt that each company owes to Eskom?
(f) What portion of the debts, if any, has prescribed?
(g) Who at Eskom is responsible for collecting these debts?
(h) What steps, if any, did that person or persons take to avert or interrupt prescription of the debt?
(i) What effect does the non-recovery of the combined debt amount that these companies owe to Eskom have on the amount that Eskom periodically extracts from Nersa or National Treasury by way of bailout package?
(j) What effect does the non-recovery of this combined debt have on the tariffs currently paid by household

[15] 2019 Financial Report, p 98

Eskom electricity consumers?

(k) What is an "Evergreen Contract" within the Eskom lexicon?
(l) Who are the contractors who have "Evergreen Contracts" with Eskom?
(m) How long has each of these "Evergreen Contracts" been in place?
(n) What are the advantages and/or disadvantages of the "Evergreen Contracts" to Eskom, its power generation capacity, and ordinary household consumers of electricity in South Africa?
(o) If there are disadvantages, has Eskom endeavoured to renegotiate these "Evergreen Contracts", or any other contracts that Eskom finds disadvantageous to the company, its power generation capacity, and ordinary household consumers of electricity in South Africa?
(p) When did Eskom make such endeavours to renegotiate contracts that it finds disadvantageous to the company, its power generation capacity, and ordinary household consumers of electricity in South Africa?
(q) What are the major sticky points to a successful renegotiation of contracts that Eskom finds disadvantageous to the company, its power generation capacity, and ordinary household consumers of electricity in South Africa?
(r) To what extent has the **"kid gloves"** approach or non-payment by companies doing business with Eskom, on the one hand, and the "evergreen contracts", on the other, contributed to the net loss after tax of R20.7 billion for the year ending 31 March 2019 and R2.3 billion in 2018, and EBITDA of R31.5 billion in 2019 and R45.4 billion in 2018, as recorded in the Eskom 2019 financial report?[16]

14.5 **Eskom CEO is reported as having told the Appropriations Committee that Eskom is working with various law enforcement agencies to recover money linked to state capture allegations, including R600 million from Trillian and a R5 billion claim against Gupta-linked Tegeta Exploration and Resources.**

In this regard, I ask the Public Protector to investigate the following issues with a view to discovering the reliability of the claim that Eskom is doing something to recover these monies:

(a) Who in particular at Eskom is working with law enforcement agencies to this end?
(b) Which law enforcement agencies, exactly, is that Eskom person or are those Eskom persons working with?
(c) Who in particular represents each of these law enforcement agencies in this effort?

[16] 2019 Financial Report, p 98

(d) When, exactly, did the collaboration between Eskom and each of these law enforcement agencies commence to recover money linked to state capture allegations?
(e) How much of that money had been recovered as at 31 May 2020 (when Eskom executives appeared before the Parliamentary Appropriations Committee), and how much to date, if any?

14.6 **It was reported in March 2015 that then Minister of Public Enterprises refused to disclose to Parliament the prices that companies (at the time 27) that supply Eskom charged Eskom for supplies.[17] This is an outrage.**

(a) Parliament is entitled to this information, otherwise how does it effectively hold the Minister of Energy and the Minister of Public Enterprises to account for what happens in that State-Owned Enterprise and, specifically, the state of its finances?
(b) I ask that the Public Protector directs both Ministers to disclose these details to Parliament forthwith and unconditionally. While these may be confidential as among competitors, they are not privileged information. I have discussed the difference above.

14.7 **What are the circumstances surrounding the procurement of other forms of power sources in South Africa such as renewable energy, nuclear, etc with IPPs?**

In this regard I point out that the erstwhile Energy Minister refused to disclose the identity of these IPPs, their beneficial shareholders and the composition of their Boards of directors.[18] The South African public is entitled to this information as it will most certainly impact – one way or another – the price of electricity that domestic consumers of Eskom power will pay, Eskom's own financial position, and the regularity with which government is called upon to bail out Eskom. I thus ask that the Public Protector investigates the following:

(a) What is the identity of these IPPs?
(b) Who are the beneficial shareholders in each of them, including representative shareholders and beneficiaries in shareholders that are trusts, if any?
(c) What price does each of these IPPs currently charge Eskom or the South African government? According to the March 2019 financial results Eskom paid on average 235c/kWh (R26.7 billion) to IPPs for 5.18% of its total energy procurement from them. By how much has that cost changed and what are the factors informing such change, whether upward or downward?
(d) Who negotiated these IPP contracts with on behalf of Eskom of the South African government?

[17] https://www.fin24.com/Companies/Industrial/Brown-names-Eskoms-27-coal-suppliers-20150308

[18] https://ewn.co.za/2018/10/01/radebe-won-t-release-names-of-new-ipp-owners

(e) When were these contracts concluded and what is their envisaged duration?

14.8 **What is the true nature and use of the funds recouped by Eskom through its annual Regulatory Clearing Account ("RCA") application to Nersa? How is it accounted for in the Eskom financial statements, if at all?**

In this regard, it appears that Eskom may be using the RCA tariff as accrued expense in order to cover shortfall of energy that it purchases from IPPs, thereby concealing the costs that it incurs to IPPs from its financial statements.

15. I ask the Public Protector to investigate each of these issues, make such findings and take such remedial action as the Public Protector considers appropriate.

16. In addition, and to the extent that the Public Protector considers it within the Public Protector's jurisdiction or competence so to do, I ask that an investigation be done into the fitness to be a director or directors of the person or persons who participated in the making of one or more of these decisions should the Public Protector find that any of these decisions, or conduct of any director or directors – whether executive or non-executive – meet the requirements for declaring a director to be delinquent in terms of s 162(5) of the Companies Act, 71 of 2008.[19]

17. For ease of reference I reproduce the provisions of the relevant provisions of the Companies Act in this relation. Section 162(5) reads as follows:

"(5) A court must make an order declaring a person to be a delinquent director if the person-

(a) consented to serve as a director, or acted in the capacity of a director or prescribed officer, while ineligible or disqualified in terms of section 69, unless the person was acting-

(i) under the protection of a court order contemplated in section 69 (11); or

(ii) as a director as contemplated in section 69 (12);

(b) while under an order of probation in terms of this section or section 47 of the Close Corporations Act, 1984 (Act 69 of 1984), acted as a director in a manner that contravened that order;

(c) while a director-

(i) grossly abused the position of director;

(ii) took personal advantage of information or an opportunity, contrary to section 76 (2) (a);

(iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76 (2) (a);

(iv) acted in a manner-

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or

(bb) contemplated in section 77 (3) (a), (b) or (c);

(d) has repeatedly been personally subject to a compliance notice or similar enforcement mechanism,

[19] The Public Protector will note that, in terms of s 162(2) of the Companies Act, 2008, a delinquency application can only be brought against current directors and persons who were directors within 24 months immediately preceding the delinquency application.

for substantially similar conduct, in terms of any legislation;

(e) has at least twice been personally convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation; or

(f) within a period of five years, was a director of one or more companies or a managing member of one or more close corporations, or controlled or participated in the control of a juristic person, irrespective of whether concurrently, sequentially or at unrelated times, that were convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation, and-

(i) the person was a director of each such company, or a managing member of each such close corporation or was responsible for the management of each such juristic person, at the time of the contravention that resulted in the conviction, administrative fine or other penalty; and

(ii) the court is satisfied that the declaration of delinquency is justified, having regard to the nature of the contraventions, and the person's conduct in relation to the management, business or property of any company, close corporation or juristic person at the time."

18. I specifically ask the Public Protector to investigate each Eskom director's fitness based on the provisions in

18.1 s 162(5)(c) of the Companies Act, 2008

18.2 the Public Finance Management Act, 1999

18.3 the Financial Institutions (Protection of Funds) Act, 2001

and such other provisions of any other piece of legislation, Eskom's governance prescripts, the King Code on Corporate Governance, the Rules of the Johannesburg Securities Exchange (to the extent applicable) or the common law as the Public Protector may consider applicable.

19. Section 76 of the Companies Act, 2008, deals with the standard of conduct that is expected of company directors and s 77 deals with directors' liabilities. I reproduce them for ease of reference as I believe they may be helpful to the Public Protector in determining a part of this complaint. They are self-explanatory:

*"**76 Standards of directors conduct***

(1) In this section, 'director' includes an alternate director, and-

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the company's board.

(2) A director of a company must-

(a) not use the position of director, or any information obtained while acting in the capacity of a director-

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company; and

(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director-

(i) reasonably believes that the information is-

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person-

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company-

(a) will have satisfied the obligations of subsection (3) (b) and (c) if-

(i) the director has taken reasonably diligent steps to become informed about the matter;

(ii) either-

(aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or

(bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and

(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and

(b) is entitled to rely on-

(i) the performance by any of the persons-

(aa) referred to in subsection (5); or

(bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

(ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

(5) To the extent contemplated in subsection (4) (b), a director is entitled to rely on-

(a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;

(b) legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters-

(i) within the particular person's professional or expert competence; or

(ii) as to which the particular person merits confidence; or

(c) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

77 Liability of directors and prescribed officers

(1) In this section, 'director' includes an alternate director, and-

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the company's board.

(2) A director of a company may be held liable-

(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76 (2) or 76 (3) (a) or (b); or

(b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of-

(i) a duty contemplated in section 76 (3) (c);

(ii) any provision of this Act not otherwise mentioned in this section; or

(iii) any provision of the company's Memorandum of Incorporation.

(3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having-

(a) acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;

(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22 (1);

(c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;

(d) signed, consented to, or authorised, the publication of-

(i) any financial statements that were false or misleading in a material respect; or

(ii) a prospectus, or a written statement contemplated in section 101, that contained-

(aa) an 'untrue statement' as defined and described in section 95; or

(bb) a statement to the effect that a person had consented to be a director of the company, when no such consent had been given,

despite knowing that the statement was false, misleading or untrue, as the case may be, but the provisions of section 104 (3), read with the changes required by the context, apply to limit the liability of a director in terms of this paragraph; or

(e) been present at a meeting, or participated in the making of a decision in terms of section 74, and failed to vote against-

(i) the issuing of any unauthorised shares, despite knowing that those shares had not been authorised in accordance with section 36;

(ii) the issuing of any authorised securities, despite knowing that the issue of those securities was inconsistent with section 41;

(iii) the granting of options to any person contemplated in section 42(4), despite knowing that any shares-

(aa) for which the options could be exercised; or

(bb) into which any securities could be converted,

had not been authorised in terms of section 36;

(iv) the provision of financial assistance to any person contemplated in section 44 for the acquisition of securities of the company, despite knowing that the provision of financial assistance was

inconsistent with section 44 or the company's Memorandum of Incorporation;

(v) the provision of financial assistance to a director for a purpose contemplated in section 45, despite knowing that the provision of financial assistance was inconsistent with that section or the company's Memorandum of Incorporation;

(vi) a resolution approving a distribution, despite knowing that the distribution was contrary to section 46, subject to subsection (4);

(vii) the acquisition by the company of any of its shares, or the shares of its holding company, despite knowing that the acquisition was contrary to section 46 or 48; or

(viii) an allotment by the company, despite knowing that the allotment was contrary to any provision of Chapter 4.

(4) The liability of a director in terms of subsection (3) (e) (vi) as a consequence of the director having failed to vote against a distribution in contravention of section 46-

(a) arises only if-

(i) immediately after making all of the distribution contemplated in a resolution in terms of section 46, the company does not satisfy the solvency and liquidity test; and

(ii) it was unreasonable at the time of the decision to conclude that the company would satisfy the solvency and liquidity test after making the relevant distribution; and

(b) does not exceed, in aggregate, the difference between-

(i) the amount by which the value of the distribution exceeded the amount that could have been distributed without causing the company to fail to satisfy the solvency and liquidity test; and

(ii) the amount, if any, recovered by the company from persons to whom the distribution was made.

(5) If the board of a company has made a decision in a manner that contravened this Act, as contemplated in subsection (3) (e)-

(a) the company, or any director who has been or may be held liable in terms of subsection (3) (e), may apply to a court for an order setting aside the decision of the board; and

(b) the court may make-

(i) an order setting aside the decision in whole or in part, absolutely or conditionally; and

(ii) any further order that is just and equitable in the circumstances, including an order-

(aa) to rectify the decision, reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the decision of the board; and

(bb) requiring the company to indemnify any director who has

been or may be held liable in terms of this section, including indemnification for the costs of the proceedings under this subsection.

(6) The liability of a person in terms of this section is joint and several with any other person who is or may be held liable for the same act.

(7) Proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that gave rise to that liability.

(8) In addition to the liability set out elsewhere in this section, any person who would be so liable is jointly and severally liable with all other such persons-

(a) to pay the costs of all parties in the court in a proceeding contemplated in this section unless the proceedings are abandoned, or exculpate that person; and

(b) to restore to the company any amount improperly paid by the company as a consequence of the impugned act, and not recoverable in terms of this Act.

(9) In any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may relieve the director, either wholly or partly, from any liability set out in this section, on any terms the court considers just if it appears to the court that-

(a) the director is or may be liable, but has acted honestly and reasonably; or

(b) having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director.

(10) A director who has reason to apprehend that a claim may be made alleging that the director is liable, other than for wilful misconduct or wilful breach of trust, may apply to a court for relief, and the court may grant relief to the director on the same grounds as if the matter had come before the court in terms of subsection (9)."

20. Should the Public Protector find evidence that any of the Eskom directors – and those of any of the contractors with which Eskom does business – is or are by reason of their conduct (whether by commission or by omission) considered against the standard set by the prescripts referred to in paragraphs 18 and 19 above, unfit to serve as directors of any company, I ask that the Public Protector consider instituting proceedings in the High Court for the declaration of delinquency of such directors as may be found to be unfit.

21. I rely in this regard on the recent judgment of the Pretoria High Court in *OUTA v Myeni* (15996/2017) [2020] ZAGPPHC 169 (27 May 2020) to the extent that it is sound in law.

22. In particular, I draw the following observations of Tolmay J to the attention of the Public Protector:

> *"[A] higher duty rests on non-executive directors of SOE's who are appointed by the government of the day as the shareholder. It is a matter of public knowledge that [the SOE] received billions in government guarantees, leaving government liable should [the SOE] default on any of its liabilities. Not only the courts, but also government should hold Board members of SOE's accountable when they fail to execute their duties."*

23. In that case, the SOE in question was SAA. To the extent that Eskom also receives guarantees and/or bailouts from government, whether through tariff increases by Nersa or directly from National Treasury or other government source, I submit that these observations are of equal application to directors at Eskom (and at any of the contractors with which Eskom does business). I can conceive of no reason in law why non-executive directors should be singled out, however, since all directors of SOEs – whether executive or non-executive – are appointed by government in one form or another. I thus submit that this *"higher duty"* (to the extent that this standard is sound in law) rests with executive directors and other prescribed officers of Eskom as much as it does with non-executive directors at Eskom.

24. I also draw the Public Protector's attention to the following excerpt from the judgment:

> *"The evidence … does not reveal one single legitimate reason why Ms Myeni, frustrated and ultimately caused the demise of the lucrative Emirates deal, which if it could not have saved SAA, could at least have strengthened its financial position considerably and would have limited some of the financial fall out. It might even have been in a position to whether [sic] the storm that it is facing now. Her evidence explaining the events and her actions during the course of this deal was unconvincing and were both inexplicable and reckless."*

25. If the explanation attributed to Eskom in the media report for the overpayment of the R5 billion to an unnamed contractor is any indication, then what the Learned Judge says in this excerpt could be just as applicable to Eskom directors who participated in the making of that decision or payment/s, or who were reckless as regards the harm that such an **"error"** would cause (and perhaps even did cause) to Eskom's financial position, Eskom's power generation capacity and, by extension, the household or domestic Eskom electricity consumer. So, too, the failure to renegotiate long-term contracts in terms of which Eskom supplies power to at least seven companies at commercially unsustainable rates, while it purchases coal at commercially ruinous rates. This, by any business reckoning, is reckless and has deleterious effects not only on the finances of Eskom but ultimately on the affordability of electricity by ordinary South Africans who consume Eskom's product domestically and have to endure intermittent unplanned load-shedding aimed at easing demand on Eskom's grid, an experience that would likely not be had if Eskom collected what is owed to it by large companies and purchased coal at reasonable market related rates.

26. As regards the Public Protector's standing in seeking an order declaring directors of Eskom delinquent, I rely on s 157(1)(d) of the Companies Act, 2008, again to the extent that the High Court was correct in so doing in paragraph 9 of the *OUTA v Myeni* judgment in affording standing to OUTA. If the Public Protector were minded to institute such proceedings, she would be doing so in the public interest but would first have to obtain leave from the court.

E. Summary

27. In summary, the main headings that I am requesting the Public Protector to investigate are, among others,

27.1 The circumstances surrounding Overpayment/s by Eskom of R5 billion to a contractor/s.

27.2 The circumstances surrounding the procurement of coal by Eskom.

27.3 The circumstances surrounding the conclusion of contracts with IPPs.

27.4 The circumstances surrounding attempts, if any, by Eskom to recover monies owing to it by various companies in collaboration with law enforcement agencies.

27.5 "Evergreen Contracts" that Eskom has with contractors and what impact these have on Eskom's finances, the price that ordinary domestic consumers of electricity pay to Eskom and National Treasury (or Nersa) that is often called upon to bail out Eskom or inject funds into Eskom.

27.6 The identity of companies which have "evergreen contracts" with Eskom.

27.7 The prices that each of the suppliers to Eskom charge Eskom and what impact these prices have on Eskom's finances, the price that ordinary domestic consumers of electricity pay to Eskom and National Treasury (or Nersa) that is often called upon to bail out Eskom or inject funds into Eskom.

27.8 What Eskom uses the RCA tariff for exactly and how it accounts for it in its financial statements.

F. Remedial Action

28. As part of the remedial action that the Public Protector may consider appropriate, I propose that it includes (but not limited to) the following. By so doing I am not prescribing to the Public Protector – merely making a proposal which may be accepted or rejected or attenuated or expanded upon at the Public Protector's sole discretion:

28.1 **That the Minister of Public Enterprises and the Minister of Energy disclose to the Public Protector, within such period as the Public Protector may consider appropriate, the prices that each of the companies that supply Eskom charge Eskom.**

This information is necessary to enable the Public Protector to perform constitutional obligations and functions and, in particular, so that the Public Protector can determine whether each such price is market-related and what impact it has on Eskom's financial stability and, by extension, on Eskom's power generation capacity.

28.2 **That the Minister of Energy discloses to the Public Protector the details of the contracts that the South African government has concluded with IPPs, including the beneficial shareholders of each, the directors of each, the duration of each contract, the prices that each charges for the power produced.**

This information is necessary to enable the Public Protector to perform constitutional obligations and functions and, in particular, so that the Public Protector can determine, among other things, (1) whether there is any conflict of interest, (2) whether each such price is market-related, (3) what impact the price charged by each power producer has on Eskom's financial stability and, by extension, on Eskom's power generation capacity.

28.3 **That the R5 billion overpayment issue be referred to the National Prosecuting Authority to investigate any possible criminal conduct on the part of any employee or manager or director at Eskom and at the contractor/s so overpaid.**

28.4 **That the R5 billion overpayment issue be referred to the Independent Regulatory Board for Auditors (IRBA) to investigate any possible professional misconduct on the part of any registered auditor both at Eskom and at all the contractor/s said to have received the overpayment/s in the auditing of the Eskom or the contractor/s financial statements.**

28.5 **That the R5 billion overpayment issue be referred to the South African Institute of Chartered Accountants (SAICA) to investigate any possible professional misconduct on the part of any Chartered Accountant both at Eskom and at all the contractor/s said to have received the overpayment/s.**

28.6 **That the R5 billion overpayment issue be referred to the Institute of Internal Auditors South Africa (IIASA) to investigate any possible professional misconduct on the part of any internal auditor both at Eskom and at all the contractor/s said to have received the overpayment/s.**

28.7 **That each of the directors at Eskom who, by conduct (whether commission or omission), enabled the overpayment of R5 billion to unnamed contractor/s, show cause to the Public Protector within 30 days of the remedial action why the Public Protector should not, in the public interest in terms of s 157(1)(d) read together with s 162(5) of the Companies Act, 2008, approach the High Court in the public interest for an order declaring those directors as being delinquent directors for such period as the Public Protector considers appropriate.[20]**

28.8 **That each of the directors at the contractor/s said to have received overpayment/s of R5 billion from Eskom who, by conduct (whether commission or omission), failed to draw attention to what should have been an obviously undeserved largesse, show cause to the Public Protector within 30 days of the remedial action why the Public Protector should not, in the public interest in terms of s**

[20] Bearing in mind the provisions of s 162(2)(a) of the Companies Act, 2008 (see footnote 18 above)

157(1)(d) read together with s 162(5) of the Companies Act, 2008, approach the High Court for an order declaring those directors as being delinquent directors for such period as the Public Protector considers appropriate.[21]

28.9 **That Eskom management and directors show cause to the Public Protector within 30 days of the remedial action why all contracts (and not only those that Eskom has itself identified) that Eskom has with any company that are financially disadvantageous to Eskom should not be terminated on sound legal bases, including *contra bonos mores* and inequity, and more advantageous, fair and market based contracts negotiated and concluded in their stead within such period as the Public Protector may consider appropriate.**

28.10 **That, in the event of resource constraints beyond the control of the Public Protector, that the Public Protector approach the President of South Africa, failing him the High Court, to establish a Commission of Inquiry (of short duration and in any event not longer than 3 months) to conduct the investigation on all the issues raised in this complaint, subject to the chairman being appointed by the Chief Justice and the terms of reference being strictly informed by the Public Protector's observations, findings and remedial action**.

G. Conclusion

29. For ease of reference the full judgment of the High Court in *OUTA v Myeni* available on my law website at www.anchoredinlaw.net under "Cases of Interest".

30. I also attach the Eskom Integrated Report for the year ending 31 March 2019.

31. I await the Public Protector's acknowledgement of receipt and investigation of these issues…

VUYANI NGALWANA SC

Chambers, Sandton
5 June 2020

[21] Bearing in mind the provisions of s 162(2)(a) of the Companies Act, 2008 (see footnote 19 above)