WHO TAMPERED?

Report on an investigation into alleged maladministration by ESKOM relating to the alleged wrongful disconnection of electricity supply and improper imposition of tampering and reconnection fees

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Executive Summary

“Being customer-centric ties in with the principle of Batho Pele which enjoins us to put people first by improving our efficiency and accountability to the recipients of services that we provide.” - Statement made by Mr Brian Molefe, ESKOM Group Chief Executive on 21 July 2016.

(i) “Who tampered?” is my report as the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act No 23 of 1994.

(ii) The report communicates my findings and the remedial action I am taking in terms of Section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration by the Western Cape Operating Unit of ESKOM Holdings State Owned Company (SOC) Ltd Reg No 2002/0155527/30, (hereinafter referred to as “ESKOM”) for allegedly wrongfully disconnecting the electricity supply to the premises of Mrs S Khumalo (the Complainant) on 29 February 2016, improperly imposing a tampering and reconnection fee of R12 000.00 against her and generally improperly handling the matter involving a faulty prepaid meter and use of unpaid electricity.

(iii) The complaint was lodged by Mr Shorn Khumalo on 01 March 2016, on behalf of his mother, Mrs Simone Khumalo (Mrs Khumalo), a 49 year-old homeowner residing in Bongweni, Khayelitsha and employed as a general worker at a Bus company. Her home is fitted with a pre-paid electricity meter located inside her house, which ordinarily enables ESKOM to obtain revenue in advance for the supply of electricity, and for Mrs Khumalo to use whatever amount of electricity she may have pre-purchased and loaded onto her account.
(iv) The respondent is ESKOM, a critical State Owned Enterprise (SOE) which is entrusted with the responsibility to ensure that the entire electrical energy needs of South Africa are met, economically and efficiently. Its role includes indirect and direct sales of electricity and collection of revenue in respect thereof.

(v) At the inception of the investigation, ESKOM was asked to fix and reconnect the pre-paid meter pending the findings of the Public Protector, but it refused to do so, up until the release of my provisional report in September 2016. The impact was that Mrs Khumalo was unable to purchase prepaid electricity for the period of disconnection from 29 February 2016, until reconnection on 5 September 2016, and was accordingly without the use of electricity at her residence for six months.

(vi) During the six months’ inability to purchase pre-paid electricity, Mrs Khumalo relied on neighbours for some of her electricity needs while using pre-second industrial revolution energy mechanisms for household energy needs. The neighbours assisted Mrs Khumalo with ironing her family’s clothes and charging their cell phones. For cooking, Mrs Khumalo bought a gas stove, and a paraffin heater to boil water.

(vii) The investigation process commenced with an attempted conciliation process in terms of the Public Protector’s power to employ conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism (ADR) to resolve a dispute regarding conduct in state affairs. The conciliation process did not yield a settlement forcing the investigation team and I to investigate the matter with a view to my making a determination whether or not there was improper conduct on the part of ESKOM and if such conduct prejudiced the complainant. On 08 April 2016 a meeting aimed at resolving the matter though Alternative Dispute Resolution methods (ADR) was held between the Complainant and ESKOM, and chaired by the Deputy Public Protector, Advocate K S
Malunga (DPP). ESKOM was represented by Mr D Ockhuis, a Customer Relations Manager, and both the Complainant and Mrs Khumalo were present. The ESKOM representatives who attended the meeting did not, however, have the necessary authorisation to represent ESKOM and bind ESKOM. The meeting was therefore converted into an ordinary meeting to gather information on what happened.

(viii) The conciliation process, however, did shed light on the factual circumstances that led to the complaint. During this process, ESKOM conceded that it did disconnect electricity at Mrs Khumalo's premises on 29 February 2016. ESKOM further conceded that this happened 26 months after Mrs Khumalo had reported a faulty meter to ESKOM advising that such faulty meter was preventing the family from loading pre-paid electricity credit and instead allowing the family to use electricity without paying.

(ix) ESKOM further conceded that a technician was send to the premises of Mrs Khumalo on the same day of receiving the alert from the Khumalos, without prior access arrangements having being made. ESKOM reported that the technician did not find anyone at Mrs Khumalo's house and that he was accordingly unable to fix the faulty meter. No further action was taken by ESKOM until the follow up visit on 26 February 2016, 26 months later, and the subsequent disconnection of the electricity on 29 February 2016.

(x) All parties did not dispute that after ESKOM switched off the pre-paid electricity at Mrs Khumalo's residence, the matter was reported to the National Energy Regulator of South Africa (NERSA), which determined the tampering issue in favour of ESKOM and the payment for used electricity in favour of Mrs Khumalo. NERSA placed a lot of emphasis on previous tampering and the fact that the box where the meter is housed was not sealed at the time the tampering determination was made. Regarding the payment of used electricity, NERSA decided that it was ESKOM's fault that such electricity was illegally consumed and unquantifiable.
EKOM and NERSA further submitted that the Public Protector has no jurisdiction on the matter given the fact that NERSA had duly dealt with it and that if Mrs Khumalo was not happy with NERSA's determination her only option was to approach a court of law.

(xii) It is my considered view and finding that the regiment that the Public Protector has no jurisdiction is inconsistent with the provisions of section 182 of the Constitution, which only excludes court decisions from the Public Protector's remit. In my view the Public Protector is an alternative to the courts, providing people without means such as Mrs Khumalo, whom we fondly refer to as Gogo Dlamini's, with a viable alternative for the scrutiny of actions of state functionaries and righting of administrative wrongs experienced through the conduct of state functionaries. The NERSA Act, which precedes the Constitution cannot trump the Constitution in this regard.

(xiii) I accordingly proceeded to review the acts of both ESKOM and NERSA on the understanding that the Public Protector does have power to review the conduct of state functionaries operating under the auspices of these institutions.

(xiv) The matter for my determination centred on ESKOM's conduct regarding the determination of the cause of the malfunction of the prepaid meter leading to consumption of electricity without pay or quantification, imposition of a tampering fine and termination of access to pre-paid electricity. ESKOM submitted that the meter had been tampered with by the complainant; hence the imposition of a tamper fee and in this regard cited the findings of NERSA. The Complainant insisted that the family had never tampered with the prepaid meter, that the box had not been changed by ESKOM after fixing the damage caused in previous tampering and that had it tampered as alleged, it would not have reported the faulty meter and
advised ESKOM that such meter was preventing the family from loading electricity credits while allowing it to use unpaid electricity.

(xv) On analysis of the complaint, the following issues were considered and investigated:

(aa) Did ESKOM wrongfully disconnect the electricity supply to Mrs Khumalo’s premises on 29 February 2016?

(bb) Did ESKOM improperly impose a tampering and reconnection fee on Mrs Khumalo?

(cc) Did ESKOM improperly handle the alleged prepaid electricity meter malfunction matter and did its conduct amount to maladministration?

(dd) Was the complainant’s mother or any other person prejudiced by the conduct of ESKOM and if so what would it take to place the person(s) where they would have been had ESKOM acted properly?

(xvi) The investigation process included the exchange of correspondence with relevant parties, meetings and interviews with the Complainant and officials of ESKOM and their service operating agents (Mr D Ockhuis, Customer Relations Manager: Group Customer Service Operations, and Mr V Bethanie, Customer Relations Manager: Protea Zone). Relevant documents and photographs were inspected and analysed to corroborate allegations and an inspection in loco was also undertaken. The ESKOM report dated 22 April 2016 as well as the NERSA report forwarded to our office by the Complainant on 4 May 2016 were examined. Further, a response from Suzanne Daniels, General Manager – Legal and Compliance (Acting), ESKOM in response to my Provisional Report on this
matter dated 9 September 2016, in terms of Section 7(9) of the Public Protector Act, was also examined. Subsequent to that a Provisional Report was sent to NERSA on 14 September 2016 in terms of Section 7(9) of the Public Protector Act. On 16 September 2016 a meeting was held between NERSA and my investigation team, and oral evidence elicited and examined.

(xvii) Having determined, on a balance of probabilities, what happened, I contrasted the conduct of ESKOM in this matter with the conduct that was required of ESKOM in terms of the laws and other prescripts that regulate its conduct. The key laws and prescripts that informed my evaluation of ESKOM's conduct were principally those regulating the delivery of pre-paid electricity, principles of administrative justice as envisaged in section 33 of the Constitution, the Promotion of Administrative Justice Act 3 of 2000, and general principles of public administration in section 195 of the Constitution.

(xviii) In this regard, the conduct of ESKOM relating to the alleged wrongful disconnection, imposition of a tampering and reconnection fee and general handling of the matter, had to be in line with the provisions of Section 33 of the Constitution, which incorporate the *audi alteram partem* principle which requires giving an accused person an opportunity to explain themselves before adverse action is taken against them. I also took into account that ESKOM's conduct should have been in line with Section 195 of the Constitution which requires that certain basic standards of public administration, such as accountability and transparency, should be adhered to by all public functionaries. In this regard I was also guided by the Constitutional Court's pronouncement in *Khumalo V MEC for Education KZN* [2013] ZACC 49 at para 35 where it said that a public functionary who is alerted to an irregularity or impending irregularity has a responsibility to take action to arrest such irregularity.
(xix) In view of the matter being about the alleged tampering with the electrical apparatus and/or interference with the supply, I also took into account item 4.1.3.5.11(d) and item 4.5.16.4(b) of Revenue Protection NRS 055:2011 edition 3 which requires that ESKOM should follow due process before adjudicating such matters. In light of the regulatory powers of NERSA¹ I also took into account NRS 047-1:2002 Electricity Supply Quality of Service, which comprises guidelines in respect of the procedure ESKOM should have followed before disconnecting the electricity supply to Mrs Khumalo’s home, and which concur with the Constitutional standards.

(xx) I also took into account considerations of reasonableness, rationality and fairness regarding the conduct of both ESKOM and the complainant’s mother throughout the process from the moment the allegedly faulty prepaid meter was reported, to the date on which ESKOM disconnected the electricity supply.

(xxi) I am grateful for the cooperation rendered by the general manager of ESKOM in the Western Cape, Mr A Lester, and Mr Brian Molefe, the Group Chief Executive Officer of ESKOM, for the steps taken to remedy problems identified at the commencement of the investigation, and for ultimately reconnecting the electricity supply at Mrs Khumalo’s home on receipt of my provisional report.

(xxii) After careful examination of the evidence and information obtained during the investigation and the regulatory framework setting the standard that should have been upheld by ESKOM, my findings are the following:

(aa) **Regarding whether ESKOM wrongfully disconnected the electricity supply to Mrs Khumalo’s premises, I find that:**

¹ National Energy Regulator of South Africa
(i) The allegation that ESKOM wrongfully disconnected the electricity supply of Mrs Khumalo on 29 February 2016 is substantiated.

(ii) ESKOM disconnected Mrs Khumalo’s electricity supply on 29 February 2016, 26 months after she had reported a faulty meter that was refusing to allow her to load pre-paid electricity credit and allowing her to use free electricity.

(iii) The faulty meter reporting by Mrs Khumalo occurred shortly after the meter had been repaired following an admission of tampering by her and payment of a tampering fee imposed by ESKOM.

(iv) Before holding the Complainant accountable and disconnecting her pre-paid electricity supply, which action ESKOM knew would adversely affect her by depriving her of the opportunity to buy and use pre-paid electricity, ESKOM did not engage her, inform her it was considering terminating her access to pre-paid electricity and provide reasons for such intended action, as well as give her an opportunity to speak in her own defence.

(v) While ESKOM has submitted as evidence a notice of intention to disconnect, which it says it could not serve as its technician was chased away by the Khumalos, it has provided no evidence of giving Mrs Khumalo an opportunity to speak in her defence regarding what ESKOM regarded as evidence of tampering, before disconnecting their electricity supply.

(vi) ESKOM found Mrs Khumalo guilty of tampering because the family had previously done so and in jumping to that conclusion, ESKOM unduly placed a lot of weight on the previous tampering thus failing to rationally interrogate the circumstances of the new meter malfunctioning and disregarding the fact that it was Mrs Khumalo that reported the faulty meter shortly after it was fixed following the admitted tampering. There is no
evidence that ESKOM entertained Mrs Khumalo's defence that the box housing the pre-paid meter was not changed by the technician who had fixed the previous tampering.

(vii) ESKOM's action came 26 months after Mrs Khumalo reported to it that her pre-paid meter was faulty. Her electricity supply was reconnected on 12 July 2013 and she reported a faulty meter on 04 September 2013. A consultant was dispatched on the same day at 13h24. On arrival at Mrs Khumalo's residence at 14h58 there was no one at home. The fault was then closed at 14h59 on the same day. Mrs Khumalo proceeded to make a purchase at 17h39. Except for that single unannounced visit on the aforementioned date to Mrs Khumalo's house the day she alerted ESKOM to the faulty meter, no further action was taken by ESKOM until Mrs Khumalo's electricity was disconnected about 26 months after her reporting the fault, on account of ESKOM holding her responsible for tampering with the said meter. The disconnection made it impossible forthwith for Mrs Khumalo to lawfully purchase and use pre-paid electricity.

(viii) Had ESKOM given Mrs Khumalo an opportunity to answer accusations of tampering against her, ESKOM would have had an opportunity to test its assumption that since the family had previously tampered, it had done so again against Mrs Khumalo's assertion that the technician did not change the box. ESKOM's failure to provide Mrs Khumalo with such opportunity to speak in own defence was, accordingly, irrational, unreasonable and unfair. In fact ESKOM unfairly and unduly leveraged the power imbalance arising from its ability to cut electricity supply to arbitrarily resolve a matter that required due process.

(ix) The arbitrary disconnection of the electricity of Mrs Khumalo by ESKOM was in contravention of item 4.1.3.5.11(d), 4.5.16.4(b) of the Revenue Protection as well section 33 of the Constitution and PAJA requiring lawful,
reasonable and procedurally fair administrative action by ESKOM. ESKOM’s conduct in arbitrarily disconnecting Mrs Khumalo’s electricity was also at odds with the principles of administration in section 195 of the Constitution requiring accountability and transparency, among others.

(x) ESKOM’s conduct accordingly constitutes maladministration as envisaged in section 6(4)(a)(i) and abuse of power as envisaged in section 6(4)(a)(ii) of the Public Protector Act, 1994 and amounts to improper conduct as envisaged in Section 182(1) of the Constitution.

(bb) Regarding whether ESKOM improperly imposed a tampering and reconnection fee on Mrs Khumalo, I find that:

(i) The allegation that ESKOM improperly imposed a tampering and reconnection fee on Mrs Khumalo, is substantiated.

(ii) After ESKOM’s disconnection of Mrs Khumalo’s electricity, it imposed a tampering and reconnection fee of R12 000.00 on her on the premise that she was responsible for the tampering. Significantly, on imposing that fine ESKOM had not asked the Complainant if she had indeed tampered and given her an opportunity to proffer her version of what happened despite Mrs Khumalo having been the one who had reported the faulty meter.

(iii) ESKOM’s new defence that it is entitled to impose such tampering fine in the light of NERSA’s findings which confirmed the conclusion that the meter had been tampered with and that the home owner was accountable for such tampering, does not cure ESKOM’s failure to follow due process. Like ESKOM, NERSA did not follow due process and placed undue weight on previous tampering by the Khumalos disregarding the possibility that the technical work following the previous tampering may have been faulty.
(iv) ESKOM has presented evidence of a photograph of an unsealed meter arguing that this proves tampering. This is insufficient is that ESKOM has not presented photographic evidence showing the state of the meter box after the technician fixed it.

(v) While ESKOM’s legal authority to impose fines for tampering is unquestionable and, I may add, in line with its responsibility to prevent and discourage such criminal conduct, which leeches on members of the public who duly pay for their electricity consumption, ESKOM failed to exercise such power in line with the principles of administrative justice as envisaged in section 33 of the Constitution read with Section 3 of PAJA.

(vi) Both the conduct of ESKOM and NERSA, not only failed to comply with principles of administrative justice as envisaged in PAJA and section 33 of the Constitution, they also failed to meet the standard set for good administration in section 195 of the Constitution.

(vii) ESKOM’s conduct constitutes maladministration and abuse of power as envisaged in section 6(4)(a)(1) of the Public Protector Act, 1994 and amounts to improper conduct as envisaged in Section 182(1) of the Constitution.

(cc) Regarding whether ESKOM improperly handled the matter, I find that:

(i) The allegation that ESKOM improperly handled the matter is substantiated.

(ii) For 26 months ESKOM failed to fix a reported pre-paid meter malfunction having been duly warned by Mrs Khumalo that this was allowing unauthorised free use of electricity that should have been prepaid. This also resulted in uncounted for consumption of available electricity at a time when electricity consumption planning has become critical to prevent load-shedding. ESKOM’s argument for imposing a tampering fine underscores
the importance of preventing illegal connections and loss of revenue, which it claims to lose billions to. It is accordingly, unclear how this anomalous situation was allowed to drag for this long with revenue lost in the process.

(iii) Twenty six months of uncollected revenue is tantamount to a dereliction of duty on the part of ESKOM, in violation of Section 195 of the Constitution and Section 51 of the Public Finance Management Act 1 of 1999 (PFMA) in that the conduct of ESKOM is inconsistent with its financial stewardship responsibilities. Section 51 (1)(a)(i) and 51(b)(i) of the PFMA and the provisions of item 4.1.3.5.11(d) and 4.5.16.4(b) of the Revenue Protection, require effective and transparent systems of financial and risk management, and require appropriate steps to be taken to collect all revenue due to the public entity concerned. ESKOM's conduct in the circumstances is clearly not consistent with its statutory responsibilities.

(iv) ESKOM's conduct constitutes maladministration as envisaged in section 6(4)(a)(1) of the Public Protector Act, 1994 and amounts to improper conduct as envisaged in Section 182(1) of the Constitution.

(dd) Regarding whether Mrs Khumalo and or other person(s) were improperly prejudiced by ESKOM's conduct, I find that:

(i) Mrs Khumalo and her family were prejudiced by ESKOM's improper conduct.

(ii) Due to ESKOM's failure to timely attend to the report regarding a malfunctioning pre-paid meter and ensure the family had a functioning meter and did not consume electricity that is not quantified without paying for it, an uncertainty was perpetuated and ESKOM eventually prevented the
family from lawfully buying and using electricity, a situation that persisted for six months.

(iii) The outcome resulted in the family's inability to use convenient and clean energy in violation of section 195 requiring members to be informed in a timely manner about the disconnection of the services. It can also be said that ESKOM's conduct was at odds with Sustainable Development Goal No. 7 requiring access to affordable, reliable, sustainable and modern energy for all, the impact of which is to undermine environmental policies. Needless to say, those who pay for electricity may have been prejudiced by the offsetting of the unpaid electricity against their accounts.

(iv) Regarding what it would take to place Mrs Khumalo where she would have been had ESKOM acted properly, in view of Mrs Khumalo's knowingly consuming unpaid electricity for two years, knowing she was not entitled to free electricity and without taking reasonable steps to mitigate her circumstances by following up or ensuring a follow up on ESKOM, I am unable, with good conscience, to lay the blame entirely on ESKOM or treat Mrs Khumalo and her family as hapless victims of ESKOM's dereliction of duty or improper conduct.

(x) The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution is:

(aa) The General Manager of ESKOM, Western Cape is to:

(i) Ensure that the tampering fee on Mrs Khumalo's account is reversed, as such was imposed without following due process as required in by items 4.1.1.3.5.11(d) and 4.5.16(b);

(ii) Ensure that Mrs Khumalo's liability with regard to the consumption of electricity without paying for it, from 04 September 2013 to 29 February
2016, is calculated and reasonable terms are agreed to with her for the payment of the debt;

(iii) Ensure that a mechanism is put in place to alert ESKOM to similar incidents where electricity is being supplied without necessary payment being rendered, and to take the necessary remedial action in that regard; and

(iv) Revise the Standard Operating Protocol to ensure that each incident of reported faulty or illicit consumption of electricity is conclusively resolved and that disciplinary action, is taken in future, taken against technicians who abandon a reported incident of fault meters without certifying that such problem has been solved.

(bb) The Acting CEO of NERSA, is to:

(a) Appoint an independent person to determine a fair value to be paid by Ms. Khumalo for tampering.

(b) Redo the investigation process properly, taking into account that the initial process followed by NERSA to adjudicate the matter was flawed.
REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION BY ESKOM RELATING TO THE ALLEGED WRONGFUL DISCONNECTION OF ELECTRICITY SUPPLY, IMPROPER IMPOSING OF A TAMPERING AND RECONNECTION FEE, AND IMPROPER HANDLING OF THE MATTER

1. INTRODUCTION

1.1 "Who tampered" is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 8(1) of the Public Protector Act to the General Manager of ESKOM in the Western Cape Mr A. Lester and Mr Brian Molefe, the Group CEO of ESKOM to implement the outcomes of the investigation.

1.3 A copy of the report is also provided to Mr S. Khumalo, the Complainants and Acting CEO of NERSA Mr. Paseka Nku.

1.4 The report communicates the outcome of an investigation into alleged maladministration by ESKOM relating to the alleged wrongful disconnection of electricity supply, improper imposing of a tampering and reconnection fee, and improper handling of the matter.
2. THE COMPLAINT

2.1 The complaint was lodged by Mr Shorn Khumalo, on behalf of his mother Mrs Simone Khumalo on 01 March 2016 who alleged that Mrs Khumalo’s pre-paid electricity supply had been wrongfully discontinued by ESKOM on account of alleged pre-paid meter tampering and unlawful consumption of unpaid electricity for a period of 16 months.

2.2 Mrs Khumalo is a 49 year-old homeowner residing in Bongweni, Khayelitsha, employed as a general worker at a bus company. Her home is fitted with a pre-paid electricity meter located inside her house, and which ordinarily enables ESKOM to obtain revenue in advance for the supply of electricity, and for Mrs Khumalo to use whatever amount of electricity she may have pre-purchased and loaded onto her account.

2.3 ESKOM is a critical State Owned Enterprise (SOE) which is entrusted with the responsibility to ensure that the entire electrical energy needs of South Africa are met, economically and efficiently. Its role includes indirect and direct sales of electricity and collection of revenue in respect thereof, it is further required to ensure that it ends illegal electricity connections, plan electricity supply to match the country’s consumption needs and to prevent load-shedding.

2.2. The complainant’s e-mail dated 01 March 2016 specifically stated the following:

“I would like to formally log a complaint against ESKOM for wrongfully accusing my mother, Simone Khumalo for tampering with electricity. Thus far the matter stands: Today, they sent their technicians to strip off electricity from our home as a result of what they categorize as tampering. This issue stamps from 2013, when we were caught and fined for
tampering at the time. A procedural Strip off was done and we were left with no electricity at the time. My mother paid the fine and upon receipt of payment a technician was sent to reinstall electricity. However, a few days later we discovered that the units were indicating insufficient funds but electricity was fully functional at our home. My mother immediately made contact with their office and was promised a technician would be sent for assistant (sic). I must highlight that prior to today, I made several calls to ESKOM and spoke to a technician named Sbongiseni or Sbonise (excuse me for misinterpreting the name (sic), I do have it recorded on notes left in my office at work). The technician repeatedly denied that records of us/my mother reporting the matter were in the system. This further baffles me and is a concern. We have never received a visit from their Technicians but today we discovered that their system states otherwise, that someone was sent, did an evaluation and reported "customer fault". I must state that this visit is a claim recorded on the system because we have never had a visitor from ESKOM and pretty sure because he wouldn't have had someone to accommodate his visit due to work commitments from our sides.

Nonetheless, I must take responsibility of the fact that we acknowledge that we haven't bought electricity for two years since reporting the matter due to financial circumstances however had the electricity box been installed correctly and functional then we would have definitely paid for electricity to avoid cut off. What we argue here is labelling our case tampering when the box was incorrectly installed in the first place.

Today, the technicians who were sent by ESKOM under the supervision of Nondumiso did not state "tampering" in their report. Why? 1 of the technician (sic) acknowledged that my mother had bumped into them sometime ago while they were in the area and punted her electricity issue and they advised her to go report to the office. If ESKOM has such glorified staff, why did the Technician not report the matter himself? I know for a fact
that if something affects my line of work, I do not need people to come report to me. I could punt with persons of authority as a Public Service officer...

Further, in Today’s visit to their Klitsha office, we discovered that the technician who reinstalled our electricity back in 2013 was supposed to have change (sic) the old box we use due to its discontinuation and that did not happen, which leaves us (sic) question their professional conduct? I urge that a full investigation be done. I have raised a few points that raise eyes brows on who is at fault over this matter. We refuse to be bullied and we will not pay R12 000 for something we know nothing about.

I acknowledge that they (Khayelitsha office) labelled the issue as tampering (sic) as soon as they found that our box was not sealed, some wires were burnt and the units were indicating 0. Several times we told them that the last technician who touched that box left it unsealed and they said no ESKOM technician would do that. Well, the above mention does not exactly glorify their staff...

Tomorrow we will camp outside their Bellville office for immediate intervention. We are currently cut off and have no electricity. I can’t begin to explain the inconvenience of this, over a matter that is not our fault.

If you may find ESKOM at fault I demand a compensation for time wasted and emotional trauma and a formally (sic) written apology. Also, they need to review their staff training to avoid unnecessary future occurrences. I urge that they start recording work done on Public property be recorded into detail, take photos as part of record keeping as opposed to using short sentences like "customer fault" that could mean plenty things. Today we noted that they take photos when there is fault but fail to do so when work
done is completed. This procedure would assist them and customers who are wrongfully accused”.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

“The Public protector has the power as regulated by the national legislation-

(a) To investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action”

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
3.5 ESKOM is a state owned company and its actions equate to conduct in state affairs, and as a result the matter falls with the ambit of the Public Protector’s mandate.

3.6 The Public Protector’s jurisdiction to investigate and power to take appropriate remedial action was disputed by ESKOM’s General Manager, in her response to my provisional report. The notice was served on the General Manager, in terms of section 7(9) of Public Protector Act on 9 September 2016 to advise her of evidence implicating ESKOM in wrongfully disconnecting the electricity supply to the property of the Complainant, improperly imposing a tampering fee and improperly handling the matter.

3.7 The General Manager advised that the Complainant uses a prepaid electricity meter therefore the electricity supply is governed in terms of an electricity supply agreement. She also made reference to section 3 of the Electricity Regulation Act (ERA) where it is stated that NERSA is the custodian and enforcer of the regulatory framework provided for in the Act. She further quoted section 10 (3) and (4) of the National Energy Regulator Act (NERA) which apply respectively to the decision of NERSA taken in terms of ERA.

3.8 By doing this she seems to imply that the decision of NERSA should have been taken on review in terms of the Promotion of Administrative Justice Act (PAJA) and that any person affected by a decision of NERSA may appeal to the High Court against same. NERSA appears to imply that the Public Protector does not have jurisdiction in the matter and that the only remedy would be to take the matter on appeal or review in terms of the statutory framework provided.

3.9 I have drawn the attention of ESKOM and NERSA to section 6(4)(a)(i) of the Public Protector Act 23 of 1994 which provides “ The Public Protector shall, be competent to investigate, on his or her own initiative or on receipt
of a complaint, any alleged maladministration in connection with state affairs of government at any level”.

3.10 I have further drawn the attention of ESKOM and NERSA to the provisions of section 182 of the Constitution, which specifies matters that the Public Protector is has no power to investigate being court decisions and matters falling outside state affairs. Further alluded to a similar provision in the Public Protector Act which broadens the exclusion to judicial matters.

3.11 In my view the Public protector is a review alternative to the courts, providing people without means such as Mrs Khumalo, whom we fondly refer to as Gogo Dlaminis, with a viable alternative to courts when they need an accessible mechanism to right of wrongs they have experienced through the conduct of state functionaries or state action. The NERSA Act, which precedes the Constitution, cannot trump the Constitution in this regard.

3.12 I accordingly proceeded to review the acts of both ESKOM and NERSA on the understanding that the Public Protector does have power to review the conduct of state functionaries operating under the auspices of these institutions.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.
4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened? If there is a discrepancy, does the conduct amount to improper conduct or maladministration? If there was indeed improper conduct or maladministration, what would be the appropriate remedial action?

4.2.2 The question regarding what happened is resolved through a factual investigation relying on the evidence provided by the parties and independently sourced during the investigation and making a determination on a balance of probabilities. In this case, the factual enquiry focused on whether ESKOM acted improperly, by allegedly wrongfully disconnecting the electricity supply to the premises of Mrs S Khumalo on 29 February 2016 and improperly imposing a tampering and reconnection fee of R12 000.00.

4.2.2 The question regarding what should have happened, on the other hand, relates to the rules and standards that the conduct in question should have complied with by ESKOM to prevent maladministration and prejudice.
4.3 On an analysis of the complaint, the following issues were considered and investigated:

4.3.1 Did ESKOM wrongfully disconnect the electricity supply to Mrs Khumalo’s premises on 29 February 2016?

4.3.2 Did ESKOM improperly impose a tampering and reconnection fee on Mrs Khumalo?

4.3.3 Did ESKOM improperly handle the alleged prepaid electricity meter malfunction matter and did their conduct amount to maladministration?

4.3.4 Was the complainant’s mother or any other person prejudiced by the conduct of ESKOM and if so what would it take to place the person(s) to where they would have been had ESKOM acted properly?

4.4 The Key Sources of Information

4.4.1 Documents

4.4.1.1 The Complainant’s e-mail stating the complaint and background to the same.
4.4.1.3 Unsigned copy of Standard Conditions of Supply for Small Supplies with Pre-Payment Metering rev November 2014.
4.4.1.5 Photographs of the meter box taken on 3 March 2016 and received from ESKOM.
4.4.1.6 Investigation Report issued by ESKOM on 22 April 2016.
4.4.1.7 NERSA Report emailed to our office by the Complainant on 4 May 2016.

4.4.2 Interviews conducted

4.4.2.1 Interview with the Complainant on 08 March 2016. 4.4.2.1 ADR Session in terms of Section 6(4)(b)(i)² of the Public Protector Act in that on:

a. On 08 April 2016 a meeting was held between the Complainant and ESKOM, and chaired by the Deputy Public Protector, Advocate K Malunga (DPP). ESKOM was represented by Mr David Ockhuis, who is a Customer Relations Manager, and both the Complainant and Mrs Khumalo were present. The purpose of the meeting was to attempt to resolve the complaint through alternative dispute resolution (ADR). The ESKOM representatives who attended the meeting did, however, not have the necessary authorisation to represent ESKOM in an ADR. The meeting was therefore converted into an ordinary meeting to gather information on what happened.

b. The DPP proposed that ESKOM considers reconnecting the electricity supply whilst the matter is being investigated and they were tasked to provide feedback on or before 15 April 2016 in this regard. It was also resolved that ESKOM should provide a report on or before 22 April 2016. On 15 April 2015 ESKOM advised that the request for temporary reconnection is declined, because ESKOM maintained that if this request was acceded to they would be opening themselves up to risk, as they will be compromising their revenue loss and revenue strategies which would be an amount of R 14 060.07 in this matter.

² Section 6(4)(b)(i) stipulates that the Public Protector shall be competent “to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by—

(i) Mediation, conciliation or negotiation,...”
4.4.3 Correspondence sent and received

4.4.3.1 Letters from Mr D Ockhuis, Customer Relations Manager: Group Customer Service Operations,) dated 10 March 2016 and 22 April 2016, responding to the allegations.

4.4.3.2 Response received from Suzanne Daniels, General Manager - Legal and Compliance (Acting), ESKOM in response to the Provisional Report dated 9 September 2016.

4.4.4 Meetings

Meeting between Investigation team and NERSA on 16 September 2016

4.4.5 Legislation and other prescripts

4.4.5.1 The Constitution of the Republic of South Africa, 1996
4.4.5.2 The Public Protector Act, 1994
4.4.5.3 Promotion of Access to Justice Act No 3 of 2000.
4.4.5.4 Khumalo V MEC for Education KZN [2013] ZACC 49
4.4.5.5 Revenue Protection Specification NRS 055: 2011
4.4.5.7 UN Sustainable Development Goals, specifically goals relating to access to clean energy and environmental justice.
4.4.5.8 Public Protector Touchstones or principles articulated in previous Public Protector Reports on similar issues.
5 EVIDENCE AND INFORMATION OBTAINED DURING INVESTIGATION

5.1 The following issues are not in dispute:

5.1.1 On 5 July 2013 Mrs Khumalo was issued with a tampering notice. She admitted guilt for the tampering and paid a tampering fine of R2 120.00, and thereafter the electricity supply was reconnected to the house. At the time the tampering was caused by a direct connection to her geyser and the meter was not tampered with.

5.1.2 On 04 September 2013 Mrs Khumalo reported a faulty meter to ESKOM.

5.1.3 Mrs Khumalo purchased electricity on 4 September 2013 at 17:39 and there is no record of further purchases being made until 24 February 2016.

5.1.4 On 26 February 2016, CG Metering, a contractor working for ESKOM went to the premises of the Complainant but was refused access to the premises. A note was then left that they would return on 29 February 2016.

5.1.5 On 29 February 2016 ESKOM disconnected Mrs Khumalo's electricity and imposed a tampering and/or reconnection fee of R12 000 on her.

5.2 Regarding whether ESKOM wrongfully disconnected electricity supply to the premises of Mrs Khumalo on 29 February 2016

5.2.1 ESKOM reported that electricity was purchased in small quantities from date of connection for the first tamper (12 July 2013) till 17 July 2013, and thereafter no further electricity purchases were made. ESKOM confirmed that Mrs Khumalo contacted them to report the fault on 04 September 2013. A work order 501-5858281 was issued on 04 September 2013 and a technician was dispatched at 13h24 on that day. On the technician's arrival at the Khumalo residence at 14h58 there was no one at home and they
were unable to gain access to the premises. The fault was closed at 14h59 on the same day. Mrs Khumalo however proceeded to make a purchase at 17h39 on 4 September 2013.

5.2.2 In 2016 Mrs Khumalo applied for a second meter and then the local ESKOM office was alerted to a second incident of tampering at her premises by the Design Applicator. The local office dispatched a CG Metering Consultant to investigate the tampering who was refused access to the premises. The consultant left a note at the premises to return on 29 February 2016.

5.2.3 Evidence above was corroborated by NERSA’s submission that on the 24th of February 2014 the Khumalos made a second application for a meter while still having a meter that has not been repaired. The person deployed by Eskom to do an assessment noticed that the units were 00:00KW on the existing meter but the house had electricity. It was further submitted that on the same day the Khumalos bought R20.00 electricity knowing that Eskom would be visiting their premises to do an assessment.

5.2.4 On 29 February 2016 CG Metering Consultants together with representatives of the Customer Network Centre returned to the premises and this time Mrs Khumalo was home. They found the meter box to be in tamper mode as it reflected 0.00 units but the power was fully functional. The CG Metering Consultant proceeded to switch off the breaker and found that Mrs Khumalo’s supply was still on. They decided to have a call logged to ascertain whether Mrs Khumalo was affected by incorrect coupling problems.

5.2.5 ESKOM also provided several photographs, taken during the visit on 29 February 2016, depicting the condition of the meter in question. The photographs show there were burn marks on the meter. The technicians
after assessing the situation came to the conclusion that the meter had been tampered with.

5.2.6 ESKOM's Service Agent investigated the customer's purchase history and found that the most recent purchases were done on 24 February 2016, since 4 September 2013.

5.2.7 At the meeting of 8 March 2016 ESKOM indicated that after the initial tamper in 2013, there was no need to replace the box as the initial tamper was external and the meter was still in working order.

5.2.8 It is evident that the disconnection was a culmination of events that started a long time ago. In its meeting with my team on 16 September 2016, NERSA stated that the Khumalo's admitted that they were guilty in the first tampering. NERSA stated that when it looked at the February 2016 incident, it took in to account events of 2013 when the Khumalo's were found guilty of tampering and paid an admission of guilt fine for wrongful connection.

5.2.9 It is NERSA's view that Eskom did not wrongfully disconnect the Khumalo family. NERSA stated that Eskom has an obligation to provide electricity to customers in a manner that is safe, secure and reliable and should be able to recover its cost of supply.

5.2.10 A Provisional Report was handed over to NERSA on the 14th of September 2016. NERSA was thereby made aware of evidence implicating it regarding the process it followed in investigating the alleged tempering at the Khumalo residence. Subsequently, a meeting was held between NERSA and my investigation team on the 16th of September 2016 in order to obtain NERSA's response to my Provisional Report.
5.2.11 In the above-mentioned meeting NERSA, led by Acting Chief Executive Officer Mr Paseka Nku made various submissions. On the issue as to whether Eskom wrongfully disconnected power at the Khumalo residence, NERSA responded as follows:

a) That disconnection was a culmination of events that started a long time ago. It stated that the Khumalos admitted that they were guilty in the first tampering. NERSA stated that when it looked at the February 2016 incident, it took in to account events of 2013 when the Khumalos were found guilty of tampering and paid an admission of guilt fine for wrongful connection.

b) It is NERSA's view that ESKOM did not wrongfully disconnect the Khumalo family. The license carries conditions from the regulator, and there are guidelines that regulate the industry. NERSA stated that ESKOM has an obligation to provide electricity to customers in a manner that is safe, secure and reliable and should be able to recover its cost of supply.

c) NERSA submitted that in terms of Revenue Protection NRS 055:2011 clause 4.1.3.3.3, which states that whenever a utility member finds a tampered meter, it is essential that the illegal act be reported as soon as possible to the correct authority and that remedial actions are taken in accordance with revenue protection or credit control policy of the utility. Furthermore, clause 4.1.3.3.4 of the same states that there are two options available to RP Operators (including auditors, technicians or electricians) with regards to the disconnection of a tampered meter, that is: (a) to disconnect the supply and remove the tamper (remove the tampering device for safekeeping purposes); or (b) to disconnect the supply and seal the tamper in (leave the tampering device in place and remove it only during the normalising process). There are specific coloured seals for this purpose as recommended in NRS 096-1 (blue or red)
d) Clause 4.1.3.4.1 states that investigations in respect of tampering and fraud shall be aligned with local by-laws or relevant legislations or service level agreements.

e) Clause 4.1.3.4.7 stipulates that in the case of metered installations where significant loss of value is identified, the following action should be taken:

(a) Ensure that all evidence is securely sealed and stored pending the outcome of the legal action or the satisfactory recovery of all outstanding funds;

(b) It is recommended that the meters be retained, as required and that this arrangement be identified in the utility’s policies or local by-laws;

(c) In the event of proceedings with a criminal charge that are taking place, the evidence should be retained until the case has been satisfactorily concluded

5.2.12 NERSA further submitted a copy of the Standard Conditions of Supply for Small Suppliers with Pre-payment metering, clause 15.1 of which states that Eskom may disconnect supply immediately if the customer has allowed the accommodation for Eskom’s equipment or any part of its electrical installation to become defective so as in the opinion of Eskom’s representative to be a danger to life or property. Eskom shall notify the customer in writing of the disconnection and shall restore the supply once the cause of disconnection has been remedied.

5.2.13 NERSA further submitted as part of evidence a document titled Remedial Charge – Tamper Fee (240-96245281). This document outlines tampering fees to be R 6 000.00 as first tamper fee payable for pre-paid users. It further indicates second tamper fee to be R 12 000.00.
5.2.14 NERSA stated that illegal connections affect the quality of supply to other customers, and the total capacity supply conditions. The Electricity Regulations Act places an onus on the licensee to provide that any damage or injury suffered by a person or customer is borne by the licensee (ESKOM).

5.2.15 The customer is issued with a first notice on first tampering, indicating that further tampering could lead to removal of the meter without notice. In this instance, we are dealing with a customer that has tampered before. On the occasion when the first tampering was discovered, the Khumalo family was advised that any further tampering would lead to removal of the installation without notice. The Khumalos signed the first notice issued in 2013.

5.2.16 The second notice on second tampering is given on the spot, upon disconnection of the customer. To support its argument, NERSA submitted documents indicating that notice was given on the day of disconnection but the Khumalos refused to sign it, and chased the ESKOM inspector away.

5.2.17 Regarding the third issue, the Public Protector only addresses the issue from a Promotion of Administrative Justice Act point of view. It is NERSA's view that if regulatory frameworks governing the electricity industry are not merged with PAJA it will create a problem in future regarding electricity regulations. If tampering is discovered Eskom will disconnect the customer without any notice because of the harm that this will cause to the utility. Eskom addresses the issue of tampering as raised in the contract between Eskom and the Customer. In NERSA's view, the Khumalos breached the contract by tampering with the meter.

5.2.18 It is NERSA's view that the undesirable conduct of the customer forced ESKOM to disconnect them, and the notice would not have averted the loss of revenue, supply to other customers and injuries to any other person.
5.2.19 NERSA submitted that this was an abnormal situation that had to be averted using an instrument dealing with abnormal circumstances, and that this is separate from a 14 days’ notice given to a customer in the event of normal situations.

5.2.20 NERSA stated that the Khumalos were reconnected on 12 of July 2013. They made a purchase of R20.00; it further stated that whether R20.00 can run a household of more than three people in a day is something that can be debated. NERSA stated that the Khumalos purchased electricity until 16 July 2013, just for four days after reconnection; no other purchase was made thereafter.

5.2.21 NERSA submitted that on 24 February 2016, the Khumalos made a second application for a meter while still having a meter that had not been repaired. The person deployed by Eskom to undertake an assessment noticed that the units were 00:00 KW on the existing meter but the house had electricity.

5.2.22 On the day of inspection of 24 February 2016, the Khumalos bought electricity of R20.00, knowing that Eskom was visiting them to do assessment. NERSA asked why one would buy electricity for a faulty meter.

5.2.23 NERSA stated that the next purchase after 16 July 2013 was only made on 4 September 2013. NERSA indicated that this means that the Khumalos spent two months without buying electricity.

5.2.24 NERSA further stated that on 29 February 2016, the Khumalos bought electricity again for R20.00, for a faulty meter, but at no point are the Khumalos raising a claim of R60.00 in their complaint. It is NERSA’s view that the Khumalos knew that what they were doing was illegal. NERSA indicated that what ESKOM did was necessary to avert the tampering situation because this was an abnormal situation and that the idea was to
protect loss of the revenue, and safety to other customers. Loss of revenue would have serious impact on the tariffs increase application of Eskom.

5.2.25 NERSA submitted that it is factually incorrect to state that I do not understand the rationale behind the refusal to reconnect given the fact that any continuous consumption would have been on the basis of pre-paid electricity, which would not have meant any loss of revenue. The meter was faulty but working, this explains why the Khumalos did not buy electricity for the last two years, and it is NERSA’s view that the family was consuming electricity illegally.

5.2.26 NERSA submitted that what the Khumalos did was to connect the geyser directly from the power supply outside the house, but the lights in the house were consuming electricity from the meter. The fixing that was done by ESKOM was to reconnect the geyser to the meter. In NERSA’s view, the situation was not caused by a faulty meter, but rather that the meter was damaged when it was pulled off the wall so that the Khumalos could access it and short circuit the meter in order to get electricity for free.

5.2.27 However, during a meeting between NERSA and my investigation team, NERSA submitted that in both instances when Eskom disconnected the Khumalo family it did serve them with a notice, as part of the evidence NERSA submitted the following notices:
Action against Dr. Mr. Ma

In terms of Eskom’s Conditions of Supply for small supplies
With reference to the above mentioned document you are notified that you have unlawfully tampered with Eskom’s equipment and that you are held liable for the cost of repairing the electric meter. You are advised to apply for reconnection in terms of the Electricity Act, number 41 of 1989, as amended, and the supply of your installation has been disconnected and the meter removed.

Installationsadresse

Einreihenadresse

Methode

Einmischer (Wh) per meter

Noewing van skade aan installasie / Description of damage to installation:

Naam / Name

Verteenwoordigers om representatives

Handtekening / Signature

Datum / Date

Note to Customer:
Application for reconnection can be made at Eskom’s Customer Service Centre in Bellville. This form, as well as a valid identity document must be produced by the applicant before reconnection fees can be calculated.

The reconnection fee is payable in cash on submission of application form.

FOR OFFICE USE

soek ingedien

Datum / Date

Deur wie-ontvang

Received by

betaalbaar

payable
5.3 Regarding whether ESKOM improperly imposed a tampering and reconnection fee against Mrs Khumalo

5.3.1 The Complainant and his mother have maintained throughout that while the Khumalo family tempered with the pre-paid electricity meter in 2013, Mrs Khumalo admitted the wrong-doing and paid the fine duly imposed by ESKOM, it never tempered again.

The Complainant submitted that on discovering a few weeks after the tempering damage had been fixed by ESKOM that the meter was refusing to take prepaid meter credit and allowing the family to use electricity without paying, Mrs Khumalo reported the faulty meter to ESKOM immediately.

Regarding the argument that the box was not sealed, the Complainant submitted that the box had not been replaced by the ESKOM technician as required and not sealed. It is worth noting that though ESKOM submitted evidence showing that the box and meter showed signs of tempering, one such sign being a photograph showing that when the faulty metre was discovered in February 2016, its box was not sealed, ESKOM did not submit any evidence showing the state of the box after it was fixed by the technician to prove that when the technician left a new or sealed box had been installed.

The Complainant argued that ESKOM simply put a lot of eight on previous tempering and assumed the same had happened again despite the Khumalos having been the ones to report the fault and ESKOM only attempting to go into the residence once immediately after the fault was reported and doing so without prior arrangement of access then disappearing for 26 months.
5.3.2 ESKOM's version did not contradict the Khumalo version that said the previous box had never been replaced. ESKOM's version focussed on the appearance of the metre at the time when it discovered it and imposed the second tampering fee. ESKOM submitted that the signs it took into account were the following:

5.3.2.1 Anti-theft seals and wires were removed by tamper;

5.3.2.2 The meter was not secure on the back plate.

5.3.2.3 Burn marks that were detected on the meter.

5.3.2.4 Low purchase history – the purchase history indicates that the first purchase was made on 17 July 2013 another on 4 September 2013 and the next purchase was made on 26 February 2016.

5.3.2.5 ESKOM reported that tampering with meters is costing them millions and results in significant revenue loss on a daily basis. The illegal and unsafe use of electricity is viewed in a very serious light by them.

5.3.2.6 It argued that, Mrs Khumalo tampered before, a fact not denied by Mrs Khumalo. It further said the area of Bongweni is known syndicates connecting customers illegally and at a minimal fee and that its technicians and contactors are experienced and knowledgeable in the field of meters and tampering. The two Revenue Protection staff that attended to the 2016 tamper incident completed ORHVS regulations and their experience in the field is 22 years and 6 years respectively. The 2013 site visit was conducted by two Khayelitsha CNC technicians and they had 4 and 3 years’ experience, respectively, at the time. It is worth noting that no attention was paid to the significance of the reporting and a possible human error on the part of a technician no matter how experienced.

5.3.3 ESKOM estimated bill for the period between 4 September 2013 and 24 February 2016, where no purchases of electricity were made by Mrs Khumalo, i.e. for approximately 29 months, is R14 000. Significantly, no
tangible explanation was given regarding why if ESKOM is concerned about lost revenue it never followed on the technician's report that indicated that the problem had not been fixed. It's not clear why ESKOM waited for 26 months to fix a problem it could have fixed earlier and in the process allowed Mrs Khumalo to lawfully consume pre-paid electricity.

5.3.4 However, it must be noted that Mrs Khumalo and her family did not come with "clean hands" or cannot be said to have been hapless victims of ESKOM in that a reasonable person in her position would have followed up with ESKOM to avoid a continued consumption of unpaid electricity knowing that such electricity could only be lawfully consumed if prepaid.

5.3.5 While, evidence regarding who tampered with the prepaid meter which is located in Mrs Khumalo's house is inconclusive, by consuming unpaid electricity for over two years, Mrs Khumalo can be said to have participated in the authorship or at the very least, exacerbation of her own misfortune. Mention Mrs Khumalo said they had not bought electricity for 2 years due to financial circumstances. 6.3.10 NERSA further submitted as part of evidence a document titled Remedial Charge – Tamper Fee (240-96245281), this document outlined tampering fees to be R 6 000.00 as first tamper fee payable for pre-paid users. It further indicates the second tamper fee to be R 12 000.00

5.3.6 Issues relating to the questions of whether ESKOM improperly handled the alleged prepaid electricity meter malfunction and whether Mrs Khumalo was prejudiced by the conduct of ESKOM have been dealt with in the evidence relating to the issues contained in paragraphs 6.2 and 6.3 above.

5.3.7 Is the Public Protector precluded from investigating ESKOM's conduct in view of NERSA's regulatory mandate and powers
5.3.8 Complainant lodged a complaint with NERSA's on 14 April 2016 relating to his dispute against ESKOM and they investigated the matter on the basis of information received from both parties.

5.3.9 NERSA made the following findings:

"According to ESKOM their system reflects that during the period from 17 July 2013 till 26 February 2016 there were no electricity purchases done on the meter and this was confirmed by Mr Khumalo.

Mrs Khumalo reported a faulty meter to ESKOM on 4 September 2013 Ref: 92514102. According to the customer ESKOM never attended to the problem reported. No follow-ups were done by the customer.

On 26 February 2016, an ESKOM contractor visited the Khumalo residence to do a meter audit after they had applied for a second point, that is when the second tamper was discovered.

Mrs Khumalo, after having reported the faulty meter did not make follow ups with ESKOM to ensure that the problem is attended to.

Mrs Khumalo continued having an uninterrupted power supply for a period of 2 years and 7 months, which she did not pay for.

ESKOM, after a faulty meter was reported did not correct the problem immediately.

ESKOM failed to act on the fact that the system showed that there was consumption on a meter that was not purchasing for a period of 2 years and 7 months."
NERSA then resolved the matter as such.

Both ESKOM and the customer was at fault.

It is the responsibility of the customer to pay for a service that was rendered as well as to make follow-ups with the supplier if there is a problem with the supply.

It is the responsibility of the supplier to ensure that the metering equipment is in good working order as well as to respond immediately when the fault is reported.

ESKOM cannot claim any revenue lost during 2 years and 7 months period, because they should have dealt with the matter then.

The customer has to pay the tamper fee of R 12 000.00 raised by ESKOM because of the compelling evidence presented to NERSA.

After the payment of the tamper fee has been made, a new prepaid meter will have to be installed at the customer’s premises to avoid any future repetitions of this kind.

ESKOM has to do a customer education session with the customer to create awareness of the dangers of tampering.

In the response to my intended findings and remedial action in the Provisional Report, ESKOM’s general manager states that:

In terms of section 3 of the Electricity Regulation Act (ERA) where it is stated that NERSA is the custodian and enforcer of the regulatory
framework provided for in the Act and also the supervisory authority of electricity supply licensees including ESKOM.

Section 10 (3) and (4) of the National Energy Regulator Act (NERA) which apply respectively to the decision of NERSA taken in terms of ERA.

That Section 10(3) of NERA provides that the decision of Nersa may be taken on review in terms of the PAJA.

That Section 10(4) of the NERA provides that any person affected by the decision of Nersa sitting as a tribunal may appeal to the High Court against such decision”.

6
THE ADMINISTRATIVE STANDARDS THAT SHOULD HAVE BEEN COMPLIED WITH BY ESKOM

6.1 Regarding whether ESKOM wrongfully disconnected electricity supply to Mrs Khumalo’s on 29 February 2016

6.1.1 The issue I had to adjudicate in this instance was the alleged wrongfulness of the process followed by ESKOM in disconnecting Mrs Khumalo’s electricity. As such, I had to establish whether the procedure followed by ESKOM was lawful, reasonable and procedurally fair as the conduct of ESKOM to disconnect her electricity supply amounts to an adverse administrative action as envisaged in section 33 of the Constitution and PAJA.

6.1.2 In terms of Section 33 (1) and (2), read with section 3 of PAJA, the procedure followed by ESKOM in disconnecting Mrs Khumalo’s electricity supply should have been lawful, reasonable and procedurally fair. To meet this standard, ESKOM’s conduct should have included giving Mrs Khumalo
or her family the opportunity to present their side of what happened *(audire alteram partem)*. In presenting that opportunity, ESKOM was further enjoined to advise Mrs Khumalo of planned adverse action in the event of not being satisfied with her explanation for the alleged tampering and unlawful consumption of electricity without paying it considered her responsible for. ESKOM’s conduct clearly did not meet this requirement.

6.1.3 ESKOM’s conduct also failed to comply with Section 195 (1) (d), (f) and (g) which outline basic standards of public administration and stipulates that ESKOM as a public entity should provide its services in an impartial, fair, equitably and without bias, and in an accountable and transparent manner. Arbitrarily determining that Mrs Khumalo had tampered and imposing a fine without giving her an opportunity to explain herself cannot be said to be conduct that is accountable and transparent. Of particular significance is the duty ESKOM had to ensure proper service delivery to Mrs Khumalo, which duty was contravened when ESKOM failed to comply with the aforementioned constitutional principles and statutory provisions of by, among others, failing to timely attend to the prepaid meter that was reported as faulty, enabling Mrs Khumalo to lawfully purchase prepaid electricity.

6.1.4 Though ESKOM has the right to disconnect electricity supply on suspicion of tampering as per item 4.1.3.3.4, items 4.1.3.5.11 (d) and 4.5.16.4(b) of the Revenue Protection reinforce the requirement of due process to be followed before disconnection could be effected. The provision in question required that due notice should have been given to Mrs Khumalo before her electricity supply could be disconnected, and to provide her with an opportunity to dispute the alleged tampering.
6.1.5 ESKOM’s disconnection of Mrs Khumalo’s electricity supply on 29 February 2016 without issuing her with a notice intention to do so or advising her of having done so and providing reasons for such action and informing her of the opportunity to dispute same and the procedure for adjudicating the dispute, deprived Mrs Khumalo of her right and opportunity to challenge or respond to its intended actions.

6.1.6 ESKOM’s defence that it relied on the inspection of the box and the purchase history to determine the tampering is invalid as the suspected tampering did not negate the need for fair procedural justice as envisaged in section 33 of the Constitution, PAJA and its own institutional rules.

6.1.7 I am accordingly unable to arrive at a conclusion other than that ESKOM failed to properly exercise its power, and if I may add, responsibility to disconnect illicit or unauthorised consumption of electricity, by failing to follow due process. ESKOM does have the right to disconnect electricity in instances where tampering is suspected. However, such power should be exercised in a reasonable, lawful and procedurally fair manner and in this instance, was not.

6.1.8 ESKOM therefore wrongfully and arbitrarily disconnected Mrs Khumalo’s electricity in direct violation of sections 33 and 195 of the Constitution, PAJA and its own institutional regulatory framework.

6.1.9 I also do not understand the rationale behind ESKOM’s refusal to reconnect Mrs Khumalo back on the grid pending the Public Protector investigation given the fact that any continued consumption would have been of prepaid electricity which would not have meant further loss of revenue to it. Such conduct is at odds with ESKOM”s duty to provide electricity and was further unreasonable and unfair in the circumstances.
6.1.10 It is important to note the existence of the electricity supply agreement between the Complainant and ESKOM was enquired on 25 July 2016 however same was never provided and was not provided by the general manager in her response to my provisional report. The complainant also did not provide same and we resorted to the website standard version. Clause 28(3) of the standard contract however indicates that the supply of electricity cannot be discontinued without prior notification aforesaid. We accept that there would not have been a reason to deviate from the standard contract which would also require prior notification in terms of Clause 28(3) of the standard contract.

6.1.11 The general manager further implies that PAJA is not applicable as it deals with fair administrative action which may adversely affect a person and that tampering is a criminal offence in terms of common and/or statutory law. The general manager further support that logic supports the action taken by ESKOM in that section 3(4) is not applicable to criminal action, in that giving notice to the complainant in the case of tampering would have defeated the purpose of the exercise and would have left ESKOM with no guarantee as to whether or not the tampering or the illegal consumption would continue.

6.1.12 Therefore, the *audi alteram partem* rule does not apply in this instance. However it must be borne in mind that the right to administrative action that is fair is entrenched in the Constitution of the Republic and the enabling legislation which is PAJA. The stance of the parastatal seems to be in stark contrast of item 4.1.3.5.11(d) of the Revenue Protection which stipulates that “Written advice to the customer advising of the pending adjustment to his or her account to be effected within a stated period as determined by the utility and giving him or her an opportunity to dispute the tampering or adjustment (or both) and substantiate the basis for the dispute”. This provision reinforces that the person who might be adversely affected by the action of the Parastatal be given an opportunity to dispute the tampering,
which gives effect to section 3 of PAJA and the principle of *audi alteram partem*.

6.2 **Regarding whether ESKOM improperly imposed a tampering and reconnection fee on Mrs Khumalo**

6.2.1 ESKOM's decision to impose a tampering and reconnection fee on Mrs Khumalo, also constitutes administrative action.

6.2.2 This entails that administrative justice imperatives applicable in relation to ESKOM's termination of the prepaid electricity supply opportunity to Mrs Khumalo were applicable to its decision to impose a tampering and reconnection fee on her.

6.2.3 The implication is that ESKOM had a duty under section 33 of the Constitution and PAJA to give Mrs Khumalo a notice of intention to impose a tampering and reconnection fee on her, reasons for the intended action and to inform her of her right to oppose the intended action and the time line within which to do so. The due process duty is again reiterated in the rules and standards in terms of the Revenue Protection stated above.

6.2.4 It is my considered view that ESKOM's conduct amounted to summarily and arbitrarily finding Mrs Khumalo guilty of tampering with her pre-paid meter and imposing a fine on her without an opportunity to speak in her defence, in violation of her right to just administrative action as envisaged in section 33 of the Constitution and PAJA.

6.2.5 ESKOM's conduct also fell short of the professionalism and related principles of public administration outlined in section 195 of the Constitution.
6.2.6 It must be said that not only was ESKOM’s conduct at odds with principles of natural justice, but also a violation of a human right guaranteed in the Constitution and the Universal Declaration of Human Rights.

6.2.7 Had there been a law authorising ESKOM to presume owners of buildings with pre-paid meters guilty of tampering on account of the relevant box being inside their buildings, the situation may have been different. However, such law might still have faced a constitutional challenge in light of the right to be presumed innocent until proven guilty as per section 35(3)(h) of the Constitution.

6.2.8 The failure of ESKOM to give Mrs Khumalo the opportunity to respond renders the imposition of the tampering and reconnection fee on discovery of what it believed to be her fault or that of her family is accordingly, unlawful, unreasonable and procedurally unfair.

6.2.9 The rationality of ESKOM’s conduct is also doubtful given the fact that what it considered to constitute tampering happened soon after the meter in question had been fixed by its technician and was reported shortly thereafter by the Khumalo’s as faulty and allowing consumption of unpaid electricity. Surely, the possibility that the meter may not have been properly or sustainably repaired should have been considered. This scenario could have been particularly considered given the fact that no picture of the fixed and sealed meter was taken, the only picture being that of the apparently tampered one.

6.2.10 In the response to my intended findings and remedial action in the Provisional Report, the Parastatal also averred that it was concerned that the evidence relied on was collected informally and not under oath as required by section 7(4)(a)(6) and(7) of the Public Protector Act.
It may be noted that in the wording of these subsections that it is not mandatory for evidence to be collected under oath or on an affidavit, by the use of the word "may". It must also be noted issues investigated in this report are common cause issues which transpired on 29 February 2016 which relate to the disconnection of electricity supply to the Complainant's property.

6.2.11 The general manager indicated that there was overwhelming evidence of tampering, and that the parastatal was entitled to disconnect the electricity supply in terms of item 4.1.3.4 of the Revenue Protection. In this regard it must be noted that I did not make a finding on whether there meter was tampered or not as I do not have the expertise to do so.

6.2.12 Lastly, the general manager remarked that Nersa made a ruling regarding the loss of revenue suffered in the 2 years and 7 months of illegal electricity consumption by the complainant’s mother, ESKOM has accepted this finding and will not be appealing it. Also quantifying the lost revenue as instructed by my office would serve not only to counter the ruling of Nersa, but also contradicts the underlying assumption of my provisional report, that ESKOM acted unlawfully in the disconnection of the electricity supply herein and the imposing of the tampering fee. This point is dealt with in my findings on the fourth issue.

6.3 Regarding whether that ESKOM improperly handled the matter

6.3.1 Given that ESKOM clearly did not bother to establish if Mrs Khumalo’s meter was fixed and no electricity was being consumed unlawfully after returning to her house just once the day her report on the faulty meter was made, could it's conduct be said to be consistent with its responsibilities under the law? Could ESKOM’s conduct be regarded as reasonable action expected of those with responsibility to look after public resources and provide services
with the highest level of professionalism in an accountable and transparent manner?

6.3.2 ESKOM's conduct clearly cannot be said to be reasonable or within the professional level dictated by section 195 of the Constitution. Going by the Constitutional court's finding in Khumalo V MEC for Education KZN [2013] ZACC 49 at par 35 that section 195 imposes a responsibility on a public functionary who is becomes aware of an irregularity or impending irregularity is duty bound to take measures to arrest the same, it is fair to conclude that ESKOM's conduct fell short of its responsibly under section 195 of the Constitution.

6.3.3 Similarly defying logic, I respectfully believe, is the explanation proffered by ESKOM that it did nothing after that single futile visit in response to Mrs Khumalo's report of a faulty meter because it had concluded that the meter in question had been subsequently fixed because there was a once off electricity purchase around 4 September 2013. If the purchase was once off as submitted, to what did ESKOM attribute the supply of electricity for the rest of the period in question, which was a period over two years?

6.3.4 There is no gainsaying that ESKOM allowed the irregularity and uncertainty involving the unauthorised consumption of an undefined amount of what should have been pre-paid electricity in violation of it's the revenue collection rules

6.3.5 The conduct of ESKOM is also not consistent with its financial stewardship responsibilities under section 50 and most specifically section 51(1)(a)(i) and 51(b)(i) of the PFMA, which require effective and transparent systems of financial and risk management, and require appropriate steps to be taken to collect all revenue due to the public entity concerned and such conduct is clearly not consistent with the section 195 of the Constitution, among others.
6.3.6 It must also be said that ESKOM's conduct is not consistent with the country's responsibilities regarding the pursuit and intended achievement of Sustainable Development Goal 7 dealing with access to sustainable energy.

6.4 Regarding whether the Complainant's mother or others were improperly prejudiced by the conduct of ESKOM;

6.4.1 An obvious conclusion is that by not fixing the pre-paid electricity meter Mrs Khumalo was prevented from the ability to purchase and use pre-paid electricity credits despite her having reported the faulty meter. Did this amount to prejudice given the fact that the faulty meter enabled her to use electricity without paying for it?

6.4.2 In my view the answer lies in whether or not ESKOM owed Mrs Khumalo any duty in the circumstances. In terms of the rules and section 195 of the Constitution, Mrs Khumalo was indeed owed a duty of timely information regarding the service she was entitled to and by not fixing the meter ESKOM failed to fulfil that duty?

6.4.3 Because of the uncertainty that ESKOM had a duty to prevent and which it failed tp prevent, Mrs Khumalo not only is in a position where she has no idea how much she owes ESKOM, the faulty meter disempowered from lawfully loading prepaid electricity credits.

6.4.4 Mrs Khumalo was also clearly improperly prejudiced by ESKOM's failure to follow due process in that she was unduly denied an opportunity to present her version of what happened and have such impartially and rationally evaluated and adjudicated before her fate was determined in contravention of her right to just administrative action.
6.4.5 But what is to be made of the fact that the dispute regarding the alleged tampering was referred by the Complainant to NERSA and that the latter determined the tampering allegation and validity of the tampering and reconnection fee, in favour of ESKOM?

6.4.6 In view of the fact that NERSA itself presumed that the absence of a seal automatically meant that Mrs Khumalo or her family were responsible for tampering, such outcome cannot be validly relied on by ESKOM. This is because that process also failed to rationally consider the possibility that there may not have been a seal and that the repair of the tampered meter may have been shoddy or faulty leading to the problem that was reported soon thereafter.

6.4.7 Again NERSA's failure to explore other reasonable explanations for the Khumalo's reported anomaly and their access to unauthorised electricity, shortly thereafter, cannot be said to be rational, fair and reasonable as envisaged in section 33 and PAJA.

6.4.8 The implications of Mrs Khumalo knowingly having used ESKOM's electricity without paying for 26 months, from 04 September 2013 to 29 February 2016. Worth noting is the admission in the written Complaint of 01 March 2016, that such unauthorised consumption was done due to financial constraints.

6.4.9 In this regard would it be unreasonable or unfair to conclude that Mrs Khumalo was partially responsible for her own misfortune regarding ending up with a bill that could not be accurately ascertained? Did she have no responsibility to follow up with ESKOM so as to avoid consuming what she was not legally entitled to? Must she be considered entitled to a total write-off of the R14 000 that ESKOM has since estimated, she must have spent based on past consumption patterns? I do not think so as that would not be fair towards other energy users.
7 FINDINGS

After careful examination of the evidence obtained during the investigation and the regulatory framework setting the standard that should have been upheld by ESKOM, my findings are the following:

7.1 Regarding whether ESKOM wrongfully disconnected the electricity supply to Mrs Khumalo’s premises, I find that:

7.1.1 The allegation that ESKOM wrongfully disconnected the electricity supply of Mrs Khumalo on 29 February 2016 is substantiated.

7.1.2 ESKOM disconnected Mrs Khumalo’s electricity supply on 29 February 2016, 26 months after she had reported a faulty meter that was refusing to allow her to load pre-paid electricity credit and allowing her to use free electricity.

7.1.3 The faulty meter reporting by Mrs Khumalo occurred shortly after the meter had been repaired following an admission of tampering by her and payment of a tampering fee imposed by ESKOM.

7.1.4 Before holding the Complainant accountable and disconnecting her pre-paid electricity supply, which action ESKOM knew would adversely affect her by depriving her of the opportunity to buy and use pre-paid electricity, ESKOM did not engage her, inform her it was considering terminating her access to pre-paid electricity and provide reasons for such intended action, as well as give her an opportunity to speak in her own defence.

7.1.5 While ESKOM has submitted as evidence a notice of intention to disconnect, which it says it could not serve as its technician was chased
away by the Khumalos, it has provided no evidence of giving Mrs Khumalo an opportunity to speak in her defence regarding what ESKOM regarded as evidence of tampering, before disconnecting their electricity supply.

7.1.6 ESKOM found Mrs Khumalo guilty of tampering because the family had previously done so and in jumping to that conclusion, ESKOM unduly placed a lot of weight on the previous tampering thus failing to rationally interrogate the circumstances of the new meter malfunctioning and disregarding the fact that it was Mrs Khumalo that reported the faulty meter shortly after it was fixed following the admitted tampering. There is no evidence that ESKOM entertained Mrs Khumalo’s defence that the box housing the pre-paid meter was not changed by the technician who had fixed the previous tampering.

7.1.7 ESKOM’s action came 26 months after Mrs Khumalo reported to it that her pre-paid meter was faulty. Her electricity supply was reconnected on 12 July 2013 and she reported a faulty meter on 04 September 2013. A consultant was dispatched on the same day at 13h24. On arrival at Mrs Khumalo’s residence at 14h58 there was no one at home. The fault was then closed at 14h59 on the same day. Mrs Khumalo proceeded to make a purchase at 17h39. Except for that single unannounced visit on the aforementioned date to Mrs Khumalo’s house the day she alerted ESKOM to the faulty meter, no further action was taken by ESKOM until Mrs Khumalo’s electricity was disconnected about 26 months after her reporting the fault, on account of ESKOM holding her responsible for tampering with the said meter. The disconnection made it impossible forthwith for Mrs Khumalo to lawfully purchase and use pre-paid electricity.

7.1.8 Had ESKOM given Mrs Khumalo an opportunity to answer accusations of tampering against her, ESKOM would have had an opportunity to test its assumption that since the family had previously tampered, it had done so
again against Mrs Khumalo’s assertion that the technician did not change the box. ESKOM’s failure to provide Mrs Khumalo with such opportunity to speak in own defence was, accordingly, irrational, unreasonable and unfair. In fact ESKOM unfairly and unduly leveraged the power imbalance arising from its ability to cut electricity supply to arbitrarily resolve a matter that required due process.

7.1.9 The arbitrary disconnection of the electricity of Mrs Khumalo by ESKOM was in contravention of item 4.1.3.5.11(d), 4.5.16.4(b) of the Revenue Protection as well section 33 of the Constitution and PAJA requiring lawful, reasonable and procedurally fair administrative action by ESKOM. ESKOM’s conduct in arbitrarily disconnecting Mrs Khumalo’s electricity was also at odds with the principles of administration in section 195 of the Constitution requiring accountability and transparency, among others.

7.1.10 ESKOM’s conduct accordingly constitutes maladministration as envisaged in section 6(4)(a)(i) and abuse of power as envisaged in section 6(4)(a)(ii) of the Public Protector Act, 1994 and amounts to improper conduct as envisaged in Section 182(1) of the Constitution.

7.2 Regarding whether ESKOM improperly imposed a tampering and reconnection fee on Mrs Khumalo, I find that:

7.2.1 The allegation that ESKOM improperly imposed a tampering and reconnection fee on Mrs Khumalo, is substantiated.

7.2.2 After ESKOM’s disconnection of Mrs Khumalo’s electricity, it imposed a tampering and reconnection fee of R12 000.00 on her on the premise that she was responsible for the tampering. Significantly, on imposing that fine ESKOM had not asked the Complainant if she had indeed tampered and given her an opportunity to proffer her version of what happened despite Mrs Khumalo having been the one who had reported the faulty meter.
7.2.3 ESKOM’s new defence that it is entitled to impose such tampering fine in the light of NERSA’s findings which confirmed the conclusion that the meter had been tampered with and that the home owner was accountable for such tampering, does not cure ESKOM’s failure to follow due process. Like ESKOM, NERSA did not follow due process and placed undue weight on previous tampering by the Khumalos disregarding the possibility that the technical work following the previous tampering may have been faulty.

7.2.4 ESKOM has presented evidence of a photograph of an unsealed meter arguing that this proves tampering. This is insufficient is that ESKOM has not presented photographic evidence showing the state of the meter box after the technician fixed it.

7.2.5 While ESKOM’s legal authority to impose fines for tampering is unquestionable and, I may add, in line with its responsibility to prevent and discourage such criminal conduct, which leeches on members of the public who duly pay for their electricity consumption, ESKOM failed to exercise such power in line with the principles of administrative justice as envisaged in section 33 of the Constitution read with Section 3 of PAJA.

7.2.6 Both the conduct of ESKOM and NERSA, not only failed to comply with principles of administrative justice as envisaged in PAJA and section 33 of the Constitution, they also failed to meet the standard set for good administration in section 195 of the Constitution.

7.2.7 ESKOM’s conduct constitutes maladministration and abuse of power as envisaged in section 6(4)(a)(1) of the Public Protector Act, 1994 and amounts to improper conduct as envisaged in Section 182(1) of the Constitution.

7.3 Regarding whether ESKOM improperly handled the matter, I find that:
7.3.1 The allegation that ESKOM improperly handled the matter is substantiated.

7.3.2 For 26 months ESKOM failed to fix a reported pre-paid meter malfunction having been duly warned by Mrs Khumalo that this was allowing unauthorised free use of electricity that should have been prepaid. This also resulted in uncounted for consumption of available electricity at a time when electricity consumption planning has become critical to prevent load-shedding. ESKOM’s argument for imposing a tampering fine underscores the importance of preventing illegal connections and loss of revenue, which it claims to lose billions to. It is accordingly, unclear how this anomalous situation was allowed to drag for this long with revenue lost in the process.

7.3.3 Twenty six months of uncollected revenue is tantamount to a dereliction of duty on the part of ESKOM, in violation of Section 195 of the Constitution and Section 51 of the Public Finance Management Act 1 of 1999 (PFMA) in that the conduct of ESKOM is inconsistent with its financial stewardship responsibilities. Section 51 (1)(a)(i) and 51(b)(i) of the PFMA and the provisions of item 4.1.3.5.11(d) and 4.5.16.4(b) of the Revenue Protection, require effective and transparent systems of financial and risk management, and require appropriate steps to be taken to collect all revenue due to the public entity concerned. ESKOM’s conduct in the circumstances is clearly not consistent with its statutory responsibilities.

7.3.4 ESKOM’s conduct constitutes maladministration as envisaged in section 6(4)(a)(1) of the Public Protector Act, 1994 and amounts to improper conduct as envisaged in Section 182(1) of the Constitution conduct as envisaged in Section 182(1) of the Constitution.
7.4 Regarding whether Mrs Khumalo and or other person(s) were improperly prejudiced by ESKOM’s conduct, I find that:

7.4.1 Mrs Khumalo and her family were prejudiced by ESKOM’s improper conduct.

7.4.2 Due to ESKOM’s failure to timely attend to the report regarding a malfunctioning pre-paid meter and ensure the family had a functioning meter and did not consume electricity that is not quantified without paying for it, an uncertainty was perpetuated and ESKOM eventually prevented the family from lawfully buying and using electricity, a situation that persisted for six months.

7.4.3 The outcome resulted in the family’s inability to use convenient and clean energy in violation of section 195 requiring members to be informed in a timely manner about the disconnection of the services. It can also be said that ESKOM’s conduct was at odds with Sustainable Development Goal No. 7 requiring access to affordable, reliable, sustainable and modern energy for all, the impact of which is to undermine environmental policies. Needless to say, those who pay for electricity may have been prejudiced by the offsetting of the unpaid electricity against their accounts.

7.4.4 Regarding what it would take to place Mrs Khumalo where she would have been had ESKOM acted properly, in view of Mrs Khumalo’s knowingly consuming unpaid electricity for two years, knowing she was not entitled to free electricity and without taking reasonable steps to mitigate her circumstances by following up or ensuring a follow up on ESKOM, I am unable, with good conscience, to lay the blame entirely on ESKOM or treat Mrs Khumalo and her family as hapless victims of ESKOM’s dereliction of duty or improper conduct.

8. REMEDIAL ACTION
The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

8.1 The General Manager of ESKOM, Western Cape is to:

8.1.1 Ensure that the tampering fee on Mrs Khumalo’s account is reversed, as such was imposed without following due process as required in by items 4.1.1.3.5.11(d) and 4.5.16(b);

8.1.2 Ensure that Mrs Khumalo’s liability with regard to the consumption of electricity without paying for it, from 04 September 2013 to 29 February 2016, is calculated and reasonable terms are agreed to with her for the payment of the debt;

8.1.3 Ensure that a mechanism is put in place to alert ESKOM to similar incidents where electricity is being supplied without necessary payment being rendered, and to take the necessary remedial action in that regard; and

8.1.4 Revise the Standard Operating Protocol to ensure that each incident of reported faulty or illicit consumption of electricity is conclusively resolved and that disciplinary action, is taken in future, taken against technicians who abandon a reported incident of fault meters without certifying that such problem has been solved.

8.2 The Acting CEO of NERSA, is to:

8.2.1 Appoint an independent person to determine a fair value to be paid by Ms. Khumalo for tampering.

8.2.2 Redo the investigation process properly, taking into account that the initial process followed by NERSA to adjudicate the matter was flawed.
9. MONITORING

9.1 The GCEO of ESKOM and NERSA are to advise the Public Protector on their response to this report, including planned action, indicating the time lines, within 30 days of issuing this report.

9.2 The implementation of the remedial action should be finalised within six months of the date of this report.

9.3 Bi-monthly reports are to be submitted to the Public Protector. A final report should be submitted within six months of the date of the report.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 27 September 2016