CLOSING REPORT OF THE PUBLIC PROTECTOR 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, 23 OF 1994

PUBLIC PROTECTOR
SOUTH AFRICA

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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE MINISTER OF PUBLIC ENTERPRISE, MR PRAVIN GORDHAN, BOARD OF DIRECTORS OF ESKOM AND ESKOM HOLDINGS SOC LTD TO INVESTIGATE A COMPLAINT RELATING TO VARIOUS ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT AGAINST MR JAN OBERHOLZER AND SUBSEQUENT IMPROPER APPLICATION OF THE PROTECTED DISCLOSURE ACT 26 OF 2000 AS AMENDED

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List of Acronyms

The following abbreviations and acronyms are used throughout this report.

"Complainant"	Mr. Mark Chettiar.
"Eskom"	Eskom Holdings Soc Ltd.
"Aveng (Africa) (Proprietary) Limited"	Aveng Construction.
"SCOPA"	Standing Committee on Public Accounts.
"SAFTU"	South African Federation of Trade Unions.
"BoD"	Board of Directors of Eskom.
"CCMA"	Commission for Conciliation Mediation and Arbitration.
"Commission"	Commission of Inquiry into State Capture.
"Constitution"	The Constitution of the Republic of South Africa, 1996.
"Public Protector Act"	The Public Protector Act, 23 of 1994.
"**PDA**"	Protected Disclosure Act 26 of 2000 as amended.
"LRA"	Labour Relations Act 66 of 1995 as amended.
Prof	Professor
Adv	Advocate
SC	Senior Counsel

CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE MINISTER OF PUBLIC ENTERPRISE, MR PRAVIN GORDHAN, BOARD OF DIRECTORS OF ESKOM AND ESKOM HOLDINGS SOC LTD TO INVESTIGATE A COMPLAINT RELATING TO VARIOUS ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT AGAINST MR JAN OBERHOLZER AND SUBSEQUENT IMPROPER APPLICATION OF THE PROTECTED DISCLOSURE ACT 26 OF 2000 AS AMENDED

1. INTRODUCTION

1.1. This is the Public Protector's closing report issued in terms of section 182(1)(b) of the Constitution and section 8(1) of the Public Protector Act.

1.2. This report relates to an investigation into allegations of failure by the Minister of Public Enterprise, Mr. P Gordhan, Board of Directors of Eskom and Eskom Holdings Soc Ltd (Eskom), to investigate a complaint relating to various allegations of maladministration and improper conduct against Mr. Jan Oberholzer and subsequent improper application of the Protected Disclosure Act 26 of 2000 as amended (PDA).

1.3. This report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of investigation:

1.3.1. Mr. Zwelinzima Vavi;
1.3.2. Mr. Mark Chettiar; and
1.3.3. The Chief Executive Officer, Eskom Holdings Soc Ltd, Mr. Jan Oberholzer.

2. THE COMPLAINT

2.1. The complaint was lodged with the office of the Public Protector on 10 September 2020 by Mr. Zwelinzima Vavi (Mr. Vavi) on behalf of Mr. Mark Chettiar who was an employee of Eskom (the Complainant). In essence the Complainant alleged as follows:

2.1.1. That, he apparently made a protected disclosure in June 2019 to the Commission of Inquiry into State Capture (the Commission) regarding certain contracts entered into between Eskom and a number of construction companies, citing the R42 million contract with Aveng Africa Proprietary Limited (Aveng Construction) as the one which points to corruption, abuse of power, nepotism and corporate mismanagement, for which the Complainant is now being victimised by Eskom;

2.1.2. That, Eskom entered into a contract with Aveng Construction, which obliged Eskom to pay an amount of R42 million to it, although such payment was not warranted. The Commission recommended that Eskom should not pay this claim, and a similar conclusion was arrived at by an internal audit commissioned by the Complainant;

2.1.3. Serious allegations that the Complainant had made against the Chief Operations Officer, Mr. Jan Oberholzer (Mr. Oberholzer) were also not dealt with despite having been brought to the attention of Minister of Public Enterprises, Mr. Pravin Gordhan (Mr. Gordhan);

2.1.4. The Complainant alleged that he sent letters to the Chairperson of the Public Enterprises Portfolio Committee, honourable Mr Khaya Magaxa, MP, and the Chairperson of Standing Committee on Public Accounts (SCOPA), honourable Mr. Mkhuleko Hlengwa, MP, wherein he expressed his concern about the state of affairs at Eskom;

2.1.5. On 12 and 18 March 2020, the South African Federation of Trade Unions (SAFTU) sent correspondences to the Chairperson of the Board of Eskom, Prof. M Makgoba (Prof. Makgoba), requesting that he should act on allegations of misconduct lodged against Mr. Oberholzer;

2.1.6. The allegations levelled against Mr. Oberholzer included *inter alia* that he participated in meetings and supported the extension of a contract between Eskom and Stefanutti Stocks, yet he failed to disclose that he owned shares in that company, and that Mr. Oberholzer had pressed for the payment of R42 million to Aveng Construction by Eskom despite the latter not performing in line with its required contractual obligations;

2.1.7. Following the complaint which the Complainant had lodged with Prof. Makgoba, Eskom appointed Adv. N Cassim SC (Cassim SC) to investigate the allegations of impropriety and corruption levelled against Mr. Oberholzer in various digital media publications in order to prepare and submit a report (Cassim SC Report) with his findings and recommendations to the Board of Directors of Eskom (BoD) within ten (10) working days of receiving the brief;

2.1.8. The Complainant alleged that the Cassim SC Report was full of inconsistencies and contradictions, and he attached a copy of the said report for ease of reference. The Complainant mentioned that Cassim SC recommended that *"to enable a proper ventilation of this issue to be determined. More so, having in mind the intervention of representatives of the Zondo Commission you have made, it would appear, certain preliminary findings on this very issue. Eskom must factor into consideration that such payment is presently part of litigation between Eskom and Aveng. However, in the interest of transparency, accountability and fair play, there is no reason why this issue cannot be subject matter of a disciplinary hearing (sic)";*

2.1.9. After two months of submitting the said report to Eskom, Cassim SC submitted a follow-up report in which he recommended that the disciplinary action proposed

against Mr. Oberholzer be held in abeyance until a High Court litigation initiated by Aveng Construction against Eskom is finalised;

2.1.10. In September 2019, the Complainant lodged a grievance against Mr. Oberholzer in terms of Eskom internal grievance procedure. Subsequently, a disciplinary hearing was held in October 2019, and the outcome of the hearing was submitted to Eskom, wherein both parties considered the matter closed and concluded that the grievance was finalised;

2.1.11. According to the complaint, in January 2020, Mr. Oberholzer charged the Complainant with *"unfounded allegations against the COO during the grievance hearing",* and this was contrary to Eskom's grievance procedure which provides that *"no employee or representative shall suffer any prejudice or victimisation as a consequence of lodging a grievance, or attending to one";*

2.1.12. In late January 2020, the Complainant was on sick leave and Mr. Oberholzer informed him through an email that he has been transferred from Group Capital Division to Human Resources, with effect from 1 February 2020. The Complainant mentioned that his medical condition was as a result of victimisation from work;

2.1.13. Subsequently, the Complainant lodged a complaint of unfair labour practice with the Commission for Conciliation Mediation and Arbitration (CCMA), for his unilateral transfer. The conciliation process of the matter was held on 13 March 2020, wherein Eskom attempted to offer the Complainant compensation provided that he resigns from Eskom;

2.1.14. In April 2020, the Group Human Resources Executive of Eskom, Ms. Elsie Pule (Ms. Pule) informed the Complainant to report to his new portfolio/position and fulfil his new obligations as expected, and failure to do so would result in further disciplinary action against him. The Complainant alleged that throughout his

employment with Eskom, he received an exceeded score for his performance assessment, and his performance was recognised in a form of merit awards;

2.1.15. The Complainant alleged that Mr. Oberholzer and Mr. S Mantshantsha made various statements to the media, wherein they mentioned that the issue concerning the Complainant, was his poor performance at work;

2.1.16. That Eskom made an announcement that it was bringing back sixty (60) white retired engineers as it was facing a shortage of engineering skills, yet it is transferring him with twenty (20) years of technical and strategic experience at Eskom, from operations to Human Resources; and

2.1.17. On 10 September 2020, he approached the Public Protector to intervene and investigate his complaint against Eskom.

3. PRELIMINARY INVESTIGATION

3.1. A preliminary investigation into the complaint was conducted in terms of section 7(1) of the Public Protector Act, to determine the merits of the complaint and also decide how the matter concerned should be dealt with.

3.2. The preliminary investigation process included assessment of the complaint, as well as legal research and analysis of relevant documents.

3.3. On 7 October 2020, the Public Protector, Investigation team, Mr. Vavi and Complainant held a virtual meeting to clarify the issues that the Complainant have raised against Eskom.

3.4. During the said meeting, the Complainant mentioned as follows:

3.4.1. That he was unduly influenced by Mr. Oberholzer to appoint a white employee for the Battery Storage Project, subsequently the Complainant was charged for misconduct as Mr. Oberholzer wanted to dismiss him;

3.4.2. Mr. Oberholzer improperly influenced the transfer of his brother-in-law to Cape Town without due processes;

3.4.3. The Black and Beach contract was allegedly awarded to a service provider, and the contractual price later escalated;

3.4.4. The Odendaal Project was delayed for a period of six (6) months before implementation and Mr Oberholzer charged the Complainant for poor work performance;

3.4.5. White managers were preferred more than their black counterparts; and

3.4.6. Complainant was transferred to Human Resources, and Eskom failed to provide him with the tools of trade.

4. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

4.2. Section 182(1) of the Constitution provides that:

"The Public Protector has power as regulated by 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".

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

4.4. The court in the ***Mail & Guardian v Ltd Public Protector***[1] emphasised that the function of the Public Protector is to weigh the importance of information and if appropriate to take steps that are necessary to determine its truth. The court mentioned that the Public Protector is an investigator and not a mere adjudicator of verified information that must be sought out and placed before her by others.

4.5. 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 and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

4.6. Section 6(9) of the Public Protector Act grants the Public Protector discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that the Public Protector took into account to exercise her discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether she would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to

[1] *The Public Protector v Mail & Guardian Ltd* (422/10) [2011] ZASCA 108 (1 JUNE 2011)

the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

4.7. Admittedly, in terms of section 6(9) of the Public Protector Act, the Public Protector is barred from entertaining complaints reported after two years of the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar the Public Protector from investigating the matter. Instead, it is mainly the interest of justice that dictates whether the Public Protector should investigate the matter or not. It is axiomatic that the Public Protector has to identify special circumstances using her discretion should she decide to entertain such a complaint.

4.8. Eskom is an organ of state and its conduct amount to conduct in state affairs, as a result the complaint fall within the ambit of the Public Protector's mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

4.9. The office of the Public Protector is declared by the Constitution to be one that is independent and impartial, and the Constitution demands that its powers must be exercised 'without fear, favour or prejudice'.[2] Those words are not mere rhetoric, as such words are often used. The words mean what they say. Fulfilling their demands will call for courage at times, but it will always call for vigilance and conviction of purpose.

5. THE INVESTIGATION

5.1. Methodology

[2] Section 181(2) of the Consitution.

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

5.1.2. 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.

5.2. **Approach to the investigation**

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

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?
- In the event of maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where they would have been but for the maladministration or improper conduct?

5.3. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on the roles played by the Minister of Public Enterprise, Mr. P Gordhan, Board of Directors of Eskom and Eskom Holdings Soc Ltd, whether it failed to investigate a complaint relating to various allegations of maladministration and improper conduct against Mr. Jan Oberholzer and subsequent improper application of the PDA.

5.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the officials of Eskom.

5.5. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where the Complainant has suffered prejudice, the idea is to place him or her as close as possible to where he would have been had the institutions concerned complied with the regulatory framework setting the applicable standards for good administration.

5.6. **Discretionary Notice issued in terms of rule 42(1) of the Rules Relating to Investigations by the Public Protector**

5.6.1. During the investigation process, the Public Protector issued a Discretionary Notice[3] in terms of rule 42(1) of the Rules Relating to Investigations by the Public Protector (Notice) to the Complainant dated 16 August 2021, to afford him an opportunity to respond to the provisional findings. Complainant was to respond within ten (10) working days after receipt of the Notice. The said Notice was also issued to Mr. Vavi.

5.6.2. The Complainant and Mr. Vavi did not make any submissions nor respond to the Public Protector's Notice issued to them.

5.7. **On analysis of the complaint, the following issue was considered and investigated:**

5.7.1. Whether the Minister of Public Enterprise, Mr. P Gordhan, Board of Directors of Eskom (BoD) and Eskom Holdings SOC Ltd failed to investigate a complaint relating to various allegations of maladministration and improper conduct against Mr. Jan Oberholzer, and improperly applied the PDA, and if so; whether such

[3] Dated 16 August 2021

conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994.

5.8. **The Key Sources of information**

5.8.1. **Documents**

5.8.1.1. Copy of a document entitled *"Grievance Procedure, Ref 32114"* dated 13 September 2019.

5.8.1.2. Copy of a document dated 17 October 2019 entitled *"Grievance meeting stage 2"*.

5.8.1.3. Copy of a letter dated 12 March 2020 from the South African Federation of Trade Unions, addressed to Prof. M Makgoba.

5.8.1.4. Copy of a letter dated 18 March 2020, from the South African Federation of Trade Unions, addressed to Prof. M Makgoba.

5.8.1.5. Copy of a letter dated 11 March 2020 from Corruption Watch, addressed to the Group Chief Executive of Eskom, Mr. Andre de Ruyter.

5.8.1.6. Copy of an undated document entitled *"Terms of reference for the investigation of allegations against the Chief Operating Officer"*.

5.8.1.7. Copy of the Cassim SC Report dated 4 April 2020.

5.8.1.8. Copy of the Cassim SC Supplementary Report dated 22 June 2020.

5.8.1.9. Copy of the CCMA Ruling dated 9 November 2020.

5.8.1.10. Copy of an Eskom Report dated 24 August 2020.

5.8.1.11. Copy of Mr J Oberholzer *Curriculum Vitae.*

5.8.1.12. Copy of a legal opinion dated 29 July 2019, obtained by Eskom from ENSafrica.

5.8.1.13. Copy of a letter dated 6 September 2020 from Prof. Makgoba, addressed to Mr. P Gordhan.

5.8.1.14. Copy of Mr. Jan Oberholzer's declaration of interest forms completed him that he declared his shareholding in Stefanutti Stocks as part of his *FNB* securities portfolio on 7 August 2018 and 26 June 2019, respectively.

5.8.1.15. Copy of the Gauteng Local Division, Johannesburg Judgment relating to a matter between Aveng (Africa) (PROPRIETARY) LIMITED and Eskom.

5.8.1.16. Copy of a document dated 20 May 2019 entitled *"Statement of alleged concerns in Eskom: Group Capital Division- Coal Clean Technology Portfolio"* which the Complainant addressed to the Commission.

5.8.1.17. Copy of a document entitled *"Notice to attend an incapacity investigation"* dated 6 August 2020.

5.8.1.18. Copy of a document dated 29 September 2020 from Ndungu Attorneys INC.

5.8.1.19. Copy of the Complainant's letter of resignation dated 9 November 2020.

5.8.1.20. Copy of a complaint letter dated 5 September 2020 from Mr. Z Vavi addressed to the Public Protector.

5.8.2. **Correspondence sent and received**

5.8.2.1. Copy of a letter dated 17 November 2020 from the Public Protector addressed to the Group Chief Executive of Eskom, Mr. Andre de Ruyter, addressed to the Public Protector.

5.8.2.2. Copy of a response letter dated 11 January 2021 from the Group Chief Executive of Eskom, Mr. Andre de Ruyter, addressed to the Public Protector.

5.8.2.3. Copy of a Notice from the Public Protector dated 16 August 2021.

5.8.3. **Legislation and other prescripts**

5.8.3.1. The Constitution of the Republic of South Africa, 1996.
5.8.3.2. The Public Protector Act 23 of 1994.
5.8.3.3. Protector Disclosure Act 26 of 2000 as amended.
5.8.3.4. Labour Relations Act 66 of 1995 as amended.

5.8.4. **Case Law**

5.8.4.1. The Public Protector v Mail & Guardian Ltd (422/10) [2011] ZASCA 108 (1 JUNE 2011.

5.8.4.2. Aveng (Africa) (Proprietary) Limited v Eskom Holdings SOC Limited, Case no: 19/ 28187.

6. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

6.1. **Whether the Minister of Public Enterprise, Mr. P Gordhan, Board of Directors of Eskom (BoD) and Eskom Holdings SOC Ltd failed to investigate a complaint relating to various allegations of maladministration and improper conduct against Mr. Jan Oberholzer, and improperly applied the PDA, and if so; whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994.**

Common cause issues

6.1.1. The Complainant acted in the position of a General Manager, Coal and Clean Technology Projects from 1 May 2018 until 31 December 2018. The Complainant was appointed permanently into this position effective from 1 January 2019, reporting to Mr. Oberholzer. The Complainant occupied this position until he was transferred to Eskom Human Resources Division on 1 February 2020.

6.1.2. In June 2019, the Complainant made a protected disclosure with the Commission relating to various allegations of maladministration and improper conduct against Mr. Oberholzer.

6.1.3. On 18 February 2020, the Complainant referred a complaint to the CCMA relating to unfair labour practice, the matter remained unresolved and on 23 March 2020, a request for arbitration was filed with the CCMA. On 27 October 2020, the matter was set down for arbitration at the CCMA offices in Johannesburg.

6.1.4. The Complainant subsequently resigned from Eskom through a letter dated 9 November 2020.

Issues in dispute

6.1.5. The issue for determination was whether the Mr. Pravin Gordhan, Board of Directors of Eskom and Eskom failed to investigate a complaint relating to various allegations of maladministration and improper conduct against Mr. Oberholzer and also improperly applied the PDA.

6.1.6. Through a letter dated 11 January 2021 to the Public Protector, the Group Chief Executive, Eskom, Mr. Andre de Ruyter (Mr. de Ruyter) submitted that during the said period, Eskom's coal and clean technology projects had significant non-performance challenges, which led to meetings held between Mr. Oberholzer and the Complainant, to support, advise and guide the Complainant relating to the expectations and deliverables expected of this portfolio.

6.1.7. Mr. de Ruyter submitted further that majority of the projects that the Complainant was responsible for were running late/delayed, which led to negative outcomes, resulting in significant risks to both the financial and operational performance, and referred to the Camdesh Ash Dam, Majuba Rail Loadout and Ankerlig Transmission Koeberg Second Supply (ATKSS) as projects that were delayed due to the poor performance by the Complainant.

6.1.8. These delays resulted in Eskom incurring wasteful and unnecessary cost escalations. The said power stations are key contributors of energy to the grid and delays to the projects directly contributed to load shedding in South Africa.

6.1.9. Mr. de Ruyter submitted that as a result of the poor project management and leadership on the Camdesh Ash Facility project, Camden power station was shut down due to the safety risk associated with it. The shutdown caused a loss of an average of 1 200MW to the grid, necessitating the usage of Open Cycle Gas

Turbines (OCGT). Each OCGT of 150MW burns R650 000.00 of diesel per hour, an estimate of more than R1.2 billion over the shutdown period.

6.1.10. Mr. de Ruyter submitted further that Eskom could have avoided Stage one of load shedding during the period of July, August and September 2020. Eskom has spent more than R80 million removing and transporting ash from the facility in order to ensure the safe usage of the ash dam to commence electricity generation operations at the station.

6.1.11. Mr. de Ruyter mentioned further that due to poor project performance and leadership on the Majuba Rail Coal handling facility project at the Majuba power station where Aveng Construction was involved, there were on average 1 200 trucks which delivered coal to the station.

6.1.12. This was due to the fact that Majuba rail project was incomplete, and due to the ongoing project delays and non-performance, cost amounted to R300 000.00 a day, that is more than R110 million since December 2019 were accumulated. This resulted in a risk of a R120 million claim on monthly basis from Transnet SOC Ltd, as a result of the underutilisation of the railway line.

6.1.13. The continued non-performance referred to led to Mr. Oberholzer informing the Complainant telephonically on 5 September 2019 that the performance of majority of the projects under the Complainant's portfolio were not improving, and requested him to go and think "*whether he is cut out for this job*".

6.1.14. This was after the contractor's costs at the Camden power station ash dam project doubled from R144 million to R284 million, as well commensurate time extension. Subsequently, on 6 September 2019, the Complainant informed Mr. Oberholzer that he was on sick leave.

6.1.15. Mr. de Ruyter highlighted that on 13 September 2019, the Complainant filed a grievance against Mr. Oberholzer. Mr. Oberholzer provided the Public Protector

with a document entitled *"Grievance Procedure, Ref 32114"*. In terms of this document, the Complainant lodged a grievance against Mr. Oberholzer wherein he alleged *inter alia* as follows:

"9.1 Mr. Chettiar believed that Mr. Oberholzer was out of line by stating that his projects are not performing;

9.2 Mr. Chettiar was put under pressure to pay Aveng R40 million;

9.3 Mr. Oberholzer used the f-word;

9.4 Mr. Oberholzer appointed his brother-in-law;

9.5 Mr. Chettiar insinuated that Mr. Oberholzer had chosen to act as Group Executive: Group Capital to promote corruption,

9.6 Mr. Chettiar was confidentially issued with a contract amendment for group 5 Ltd, a contractor on the ATKSS project, which was only signed by Mr. Oberholzer. Mr. Chettiar claimed that there was total disregard for governance and protocol and openly stated that he was never involved in this- Mr Chettiar subsequently conceded at the start of the grievance hearing that this was false, and he withdrew the statement".

6.1.16. Mr. de Ruyter highlighted further that following receipt of the said grievance, Eskom's erstwhile Acting Group Chief Executive and Chairman, the late, Mr. Jabu Mabuza (Mr. Mabuza) instructed Eskom's Legal & Compliance Department to appoint an external Senior Counsel to preside over the grievance. Subsequently, Advocate Eric Mkhawane SC (Mkhawane SC) was appointed to chair the grievance hearing.

6.1.17. Mr. de Ruyter referred the Public Protector to a document entitled *"Grievance Meeting"* wherein Mkhawane SC issued his findings and recommendations

(Mkhawane SC Report) on 31 October 2019. In his findings, Mkhawane SC mentioned that the Complainant had made a number of unsubstantiated allegations in his grievance, which he retracted at the beginning of the grievance hearing. Upon considering the submissions made by the Complainant and Mr. Oberholzer, Mkhawane SC made the following findings:

"It is important to state that at the hearing on 17 October 2019, Mr Chettiar was afforded the opportunity to substantiate and provide proof for each of the allegations made in his grievance. With the exception of Mr. Oberholzer using the f-word, Mr Chettiar could not prove any of the serious allegations he made in writing in his grievance against Mr Oberholzer.

Mr Oberholzer accepted without any discussion that he used the f-word and apologised to Mr Chettiar in the presence of Adv. Eric Mkhawane and Masingita Rikhotso from Eskom Industrial Relations. Mr. Chettiar accepted the apology".

6.1.18. Mr. de Ruyter mentioned that clause 11 of the report and recommendations from Mkhawane SC Report provides as follows:

"*11 Mr Chettiar in reply agrees with the challenges put forth by Mr Oberholzer and he was also open to be moved if need be.*

17 With regards to the challenges being experienced in Mr Chettiar's portfolio, there should be constant feedback and parties should be free to explore different mechanisms so that the business performance is not adversely affected. Mr Chettiar has indicated willingness to engage and explore alternatives with regards to his role in the portfolio".

6.1.19. Mr. de Ruyter referred the Public Protector further to a document dated 17 October 2019 entitled *"Grievance meeting stage 2"*. In terms of this document,

the Complainant accepted Mkhawane SC Report and confirmed that the grievance was resolved. Subsequently, the Complainant signed acceptance of the report. The Complainant signed the said document on 3 November 2019, whereas Mkhawane SC signed on 31 October 2019.

6.1.20. Mr. de Ruyter referred the Public Protector further to the two (2) letters that SAFTU addressed to the Chairperson of the Eskom BoD, Prof Makgoba and himself dated 12 March 2020 and 18 March 2020 respectively. Corruption Watch addressed a letter dated 11 March 2020 to the BoD of Eskom relating to *inter alia* alleged victimisation of the Complainant as a whistle blower arising from reports he made at the Commission to the effect that there was corruption at Eskom.

6.1.21. He mentioned further that in view of the seriousness of the allegations levelled against Eskom and himself, the BoD of Eskom commissioned an investigation into the Complainant's allegations. Subsequently, Eskom appointed Adv. Nazeer Cassim SC (Cassim SC) to conduct the said investigation. In support thereof, Mr. Oberholzer provided the Public Protector with a document entitled *"Terms of reference for the investigation of allegations against the Chief Operating Officer"*.

6.1.22. In terms of the said document, the scope of the investigations as set out in the terms of reference was focused on various allegations made against Mr. Oberholzer in various print and electronic media.

6.1.23. The terms of reference for the investigation of allegations against Mr Oberholzer were as follows:

TERMS OF REFERENCE FOR THE INVESTIGATION OF ALLEGATIONS AGAINST THE CHIEF OPERATING OFFICER

The Board of directors of Eskom (Board) and the Group Chief Executive, André de Ruyter (GCE) have noted with concern the serious allegations made against the Chief Operating Officer, Jan Oberholzer (COO) in various print and electronic media.

To this end, the Board and the GCE have decided to appoint Senior Counsel to investigate all the allegations made against the COO.

Senior Counsel's brief is to investigate the allegations of impropriety and corruption leveled against Eskom's COO in various digital and print media publications and to prepare and submit a report to Board within 10 (ten) working days of receiving the brief with his findings and recommendations.

During the investigation the COO will not be placed on suspension as he will not interfere with the investigation conducted by Senior Counsel.

Senior Counsel is entitled to interview any person and to review any documentation he deems appropriate for purposes of the investigation, including interviews with and review of documentation received from Eskom employees and third parties.

Senior Counsel is briefed to investigate specifically the following issues:

1. Whether there is any undisclosed conflict of interest by the COO pertaining to Stefanutti Stocks or any other entity, which may potentially result in breaches of the Conflict of Interest Policy of Eskom.
2. Whether since his return to Eskom in 2018, the COO in his dealings with any of the functionaries of Stefanutti Stocks breached his fiduciary duties and any policies of Eskom.
3. Whether there is any corruption and/or personal benefit derived by Mr. Oberholzer arising from his placement of the Black & Veatch contract originally at a value of R114m, which has since escalated to over R14bn after several modifications.

4. Whether the proffering of disciplinary charges by the COO against Mr. Valiathum Sankariah Chettiar (Mr. Mark Chettiar) pursuant to a grievance Mr. Mark Chettiar lodged against Mr. Oberholzer amounts to victimization of Mr. Mark Chettiar as a whistle-blower in terms of the Protected Disclosures Act No. 26 of 2000.
5. Circumstances, which led to Mr. Mark Chettiar being transferred from his position as General Manager: Mega Projects (Group Capital Division) to the Human Resources Department and whether such transfer was done in accordance with the applicable Human Resources policies of Eskom.
6. Merits of the CCMA unfair labour practice dispute referred by Mr. Mark Chettiar against the COO and Eskom on 18 February 2020.

6.1.24. Cassim SC conducted the said investigation and all implicated and interested parties and the Complainant were provided with an opportunity to meet with him independently, that is, without any Eskom personnel present. At the conclusion of the investigation, Cassim SC issued a report, which was later supplemented, having regard to the fact that the Aveng contract was at the time of the investigation the subject of a court case.

6.1.25. Mr. de Ruyter referred the Public Protector to the Cassim SC Report dated 4 April 2020. The said report found that in relation to the allegations raised in paragraphs one (1) and two (2) of the terms of reference for the investigation of allegations against Mr Oberholzer *"I find that Mr. Oberholzer made proper disclosure of his shareholding in Stefanutti Stocks in conformity with the applicable policies of Eskom. In relation to his failure to recuse himself from all matters involving Stefanutti Stocks, I conclude that he breached the applicable provisions of Eskom's policy. In this regard, if Oberholzer accepts that he erred, I recommend that he be counselled.*

6.1.26. *In so far as paragraphs 4,5 and 6 of my terms of reference is concerned, I conclude that the genesis of the matters raised in these paragraphs … that Oberholzer acted contrary to the interests of Eskom in authorising or promoting payment of R42 million to Aveng. To placate the concerns raised in these paragraph and to come to terms with the underlying issue in dispute is the very issue as to whether Oberholzer promoted the interest of the third party, namely, Aveng, unfairly and unduly and to the prejudice of Eskom. Needless to say, Oberholzer owes the duty of good faith in favour of his employer.*

6.1.27. *I recommend that a disciplinary process be initiated in order to enable a proper ventilation of this issue to be determined in a disciplinary hearing. More so, having in mind the intervention of representatives of the Zondo Commission who have made, it would appear, certain preliminary findings on this very issue. Eskom must factor into consideration that such payment is presently part of litigation between Eskom and Aveng. However, in the interest of transparency, accountability and fair play, there is no reason why this issue cannot be the subject matter of a disciplinary hearing".*

6.1.28. Mr. de Ruyter also referred the Public Protector to the Cassim SC Report dated 22 June 2020, entitled *"Supplementary Report". Herein below is the copy of the said report:*

In the matter of:

ESKOM SOC LIMITED Eskom

and

JAN OBERHOLZER Oberholzer

SUPPLEMENTARY REPORT

1. I furnished a report dated 4 April 2020 pursuant to terms of reference issued by the Board of Directors of Eskom concerning allegations of corruption made against Mr Jan Oberholzer ("Oberholzer"), the Chief Operating Officer of Eskom, in various print and electronic media.

2. In paragraph 40, I recommended a disciplinary process in relation to the payment of R42-million to Aveng by Eskom. I refer in this regard to the contents of paragraphs 39 and 40 of my report. Subsequently, it came to my notice that the opposed application in the matter of *Aveng (Africa) (Pty) Limited v Eskom SOC Limited* in Case No: 19/28187 was heard by the High Court, Johannesburg on 18 May 2020. I gathered this information from the Society of Advocates' website which publishes the cases to be heard on a weekly basis.

3. In my view, it would be inappropriate to conduct any disciplinary hearing at this stage, bearing in mind that the dispute has already been heard in the High Court and judgment is pending. This would have an impact on the contemplated disciplinary process. It would be prudent, reasonable and fair to all concerned to await the findings of the Court. Otherwise, valuable resources would be employed in circumstances where the very issue has been ventilated in Court.

NAZEER CASSIM SC

Chambers, Sandton
22 June 2020

6.1.29. Mr. de Ruyter proceeded and provided that with regard to the issue of transferring the Complainant to Eskom's Human Resources department, there was non-performance with the Complainant's project portfolio. Performance meetings were held with him, however his performance did not improve. As a result thereof, a decision was taken to engage the Complainant to discuss alternative options and also to assist and guide him on Eskom's process of accommodating him elsewhere within Eskom.

6.1.30. Following consultation with the Complainant, he agreed to be transferred. Subsequently, he was transferred to the position of a General Manager in Human Resources, reporting directly to the Group Executive, Human Resources: Eskom effective from 1 February 2020. The transfer did not affect the Complainant's grade and/or remuneration package. The following critical issues were considered in the decision to transfer the Complainant.

"18.1 Mr Chettiar's environment was fraught with people issues- two (2) Senior Managers reporting to Mr Chettiar, filed grievance against him, and one of the Senior Managers had taken his case to the CCMA. In addition to this,

two organised labour unions, NUMSA and NUM, also filed grievance against Mr Chettiar.

Despite several attempts in facilitating meetings between Mr Chettiar and the organised labour unions mentioned above, the unions continued to be unhappy with Chettiar due to his people management skills and most specifically, on the appointments that were made in his environment that were not aligned to Eskom's equity policy.

The situation was becoming untenable, notwithstanding the non-performance of Mr Chettiar's projects, and its negative ripple effects on the department, the division, Eskom, and the country as a whole, hence an urgent decision had to be made to ensure stability, sustainability and continuity of the department, and the company, including the wellbeing of Mr Chettiar".

6.1.31. Mr. de Ruyter provided further that the Complainant was unfortunately ill for the period 28 January 2020 until 30 September 2020. The Complainant accepted his transfer and assumed his role in the Human Resources division on 1 October 2020. The Complainant continued to work in this role until his resignation, when an agreement was reached between the Group Executive, Human Resources that the Complainant would do a handover and would not be required to render his service during his notice period.

6.1.32. Mr. de Ruyter highlighted that during the grievance process dated 13 September 2019, the Complainant made serious allegations against Mr. Oberholzer, which he subsequently retracted during the said process, wherein the Complainant accepted that there were no basis for the allegations.

6.1.33. A decision was taken to institute disciplinary action against the Complainant for making these unfounded allegations. This was done as Eskom cannot condone

employees utilising its grievance process to malign other employees in order to settle personal scores.

6.1.34. The charge sheet was served on the Complainant on or about 22 January 2020. The disciplinary hearing could however not be held as the Complainant was on sick leave from 28 January 2020 until 30 September 2020, even though he was expected to return to work on 24 February 2020.

6.1.35. The Complainant had on 18 February 2020, whilst on sick leave, referred a dispute to the CCMA, in which he alleged that he was victimised for allegedly making a protected disclosure and alleged unfair labour practice on the part of Eskom for instituting a disciplinary action against him. The Complainant through his legal representatives, requested Eskom to hold the disciplinary action in abeyance pending the outcome of the CCMA arbitration. Eskom agreed as a matter of good faith.

6.1.36. Mr. de Ruyter provided the Public Protector with a copy of a Ruling from the CCMA, wherein it was indicated that the CCMA issued a ruling dismissing the Complainant's allegations on 9 November 2020. Eskom had not taken any step to proceed with the disciplinary action against the Complainant after the finalisation of the CCMA dispute, as the Complainant resigned from the employ of Eskom through a letter dated 9 November 2020.

6.1.37. Mr de Ruyter mentioned further that Eskom cannot comment on the issue of whether serious allegations made against Mr. Oberholzer were not dealt with despite having been brought to the attention of Mr. Gordhan, the Chairperson of the Public Enterprises Portfolio Committee, Mr. Khaya Magaxa and Chairperson of SCOPA, Mr. Mkhuleko Hlengwa, as these were complaints made outside of Eskom.

6.1.38. However, Eskom complied with the request made by Mr. Gordhan, for an investigation to be conducted into serious allegations against Mr. Oberholzer. The

BoD of Eskom considered the request by Mr. Gordhan and in view of the fact that Mr. Oberholzer reported to the Group Chief Executive (GCE), the BoD referred the matter to the GCE for investigation. Subsequently, Eskom commissioned an investigation, and a report (Eskom Report) dated 24 August 2020 was sent to Mr. Gordhan in this regard.

6.1.39. Mr. de Ruyter provided the Public Protector with a copy of the Eskom Report. The background of the report entailed that Mr. Gordhan had addressed a letter to the interim Chairperson of the BoD of Eskom which required the BoD to consider and report on matters relating to various allegations made against Mr. Oberholzer. Mr. Gordhan requested the BoD of Eskom to pay specific attention to the following:

"Alleged failure by the COO to declare shareholdings in Stefanutti Stocks, and his participation in decisions regarding the contractor, and whether or not the sanction proposed by Advocate Cassim SC is appropriate, considering that the standard for compliance should be higher for Exco members.

Very significant increases in the contract value of a contract awarded to Black and Veatch, and an investigation whether or not the COO had played a role in these expansions.

The role played by the COO in the offer of a settlement with Aveng, which offer was subsequently withdrawn on advice of the Zondo Commission, and which is currently a matter before the court, the Minister indicated that he was in agreement with the recommendation made by Adv. Cassim SC that a decision on whether or not to institute disciplinary action against the COO be held in abeyance pending the outcome of the said court action".

6.1.40. Mr. Gordhan also referenced to allegations of victimisation, nepotism and corruption made against Mr. Oberholzer by the Complainant, and made the BoD aware that he received a letter from SAFTU relating to the said allegations.

6.1.41. The conclusions and findings of the Eskom Report were as follows:

CONCLUSIONS AND FINDINGS

With regard to the questions posed to the Board by the Minister of Public Enterprises with reference to allegations against the COO, the investigation conducted by the Group Chief Executive finds as follows:

1. The COO did in fact properly declare his interests in accordance with the relevant Eskom policy.

2. While he maintained and declared interests in Stefanutti Stocks by virtue of his shareholding, he did not in any way act in a manner that would suggest that he has sought to benefit from his position by attempting to influence Eskom's stance towards Stefanutti Stocks. On the contrary, through his personal involvement of collaborating with Bowmans and the SIU, supporting and pursuing claims against Stefanutti Stocks and his failure to trade in the shares, even while in possession of privileged knowledge that he must have known would have a negative impact on the value of the shares, he has demonstrated an unbiased and even-handed approach to representing Eskom's best interests, to the point where largely, as a result of his own personal actions, the value of his shareholding was reduced to insignificance.

3. With regard to the question on whether or not the sanction proposed by Adv Cassim SC, viz. counselling, was appropriate, having regard to the COO being a member of Exco, for whom the compliance standard should be higher, the Board is advised that:

    a. The conduct of the COO in regard to engagements with Stefanutti Stocks does not reveal any bias attributable to his declared interest, and as pointed out in (2) above, he acted contrary to his own financial interest by vigorously pursuing claims against the contractor. It is instructive to contemplate if Eskom and the SIU would have pursued claims against Stefanutti Stocks if the COO had not initiated and pursued such claims.

b. The number of shares held by the COO, and the value of such shares, was found by Adv Cassim SC to be "insubstantial" (p 7, par 18 of Final Report). At the time of selling the shares, the realised net value to the COO amounted to R2 894,30, which is de minimis.

c. In view of the considerations in 3(a) and (b) above, it is recommended that the sanction of counselling as proposed by Adv Cassim SC is deemed appropriate by the board, having regard to the seniority of the COO and his actions.

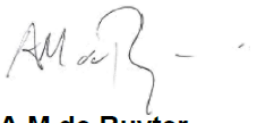
4. The proposed settlement amount of R40 million to conclude a claim by Aveng was arrived at through an extensive and proper governance process in Eskom, including obtaining legal advice from external attorneys corroborating and supporting the payment of the claim in full and final settlement. No malfeasance of any nature whatsoever was found or suspected with regard to the actions of the COO in this regard. While the Cassim report did recommend a disciplinary process to be initiated in order to enable a proper ventilation of this issue to be determined in a disciplinary hearing, it must be noted that nowhere in the report is there an inference of instituting a disciplinary hearing specifically against the COO. This must be read in conjunction with point 43 in Section E in respect of the formal meeting held on 27 July 2020 with the Eskom GCE, André de Ruyter, and the Eskom Acting Group Executive, Legal & Compliance, Bartlett Hewu, and Adv. Cassim to air the COO's contention on the Aveng issue. In hindsight, the actions of the COO were rational and commercial to settle a claim and avoid protracted legal action, which has now ensued owing to the evidence of the alleged whistle-blower.

5. While the COO was initially involved ex officio in the award of a contract to Black and Veatch, the major increases in the value of the contract occurred during the period when he was not in the employ of Eskom. The very substantial increases in the value of the Black and Veatch contract are clear grounds for further investigation. However, the evidence considered in this investigation does not support taking any action against the COO with regard to the Black and Veatch contract. A forensic investigation into the Black and Veatch contract has been conducted, and further investigations are required to establish the reasons for the escalation in contract value. These investigations have already been initiated.

Based on the evidence presented in this report, it is recommended that the Board does not institute further disciplinary proceedings against the COO. It is apparent from the sequence of events emanating from the documentation that an underperforming employee, when held to account for significant performance issues in his area of responsibility, sought to portray himself as a victimised whistle-blower, presumably in order to prolong the period of his employment. The alleged whistle-blower has in the process inflicted substantial reputational damage on the COO, with his allegations not corroborated by the facts or evidence.

The present report is the third investigation into the alleged actions of the COO as presented by Mr Chettiar. None of the investigations found any substance to the allegations of wrongdoing as put forward by Mr Chettiar. It is recommended that the Board endorses the COO's actions as having been fair, transparent, procedural and professional in upholding and fulfilling his contractual mandate in serving the interests of his employer Eskom, and that note is taken of an emerging pattern of underperformers to style themselves as whistle-blowers

when called to account, a trend that is entirely at odds with the desired high-performance culture that Eskom is seeking to inculcate in its employees.



A M de Ruyter
GROUP CHIEF EXECUTIVE
Eskom Holdings SOC Limited
07 September 2020

6.1.42. Mr. de Ruyter highlighted that Eskom informed Mr. Gordhan through a letter dated 9 September 2020 about the outcome of the said investigation. In this letter, Prof Makgoba informed Mr. Gordhan that *"The Report has also considered in detail the allegations made by Mr. Mark Chettiar against the COO, and makes certain findings and conclusions pertaining thereto on page 21. The Board is of the view that no further action is required regarding allegations of victimisation of Mr Chettiar by Eskom management".*

6.1.43. Mr. de Ruyter submitted that Mr. Oberholzer was appointed as a COO on 16 July 2018, and his previous employment at Stefanutti Stocks was disclosed, discussed and acknowledged during his interview with the BoD of Eskom. It appeared from Mr. Oberholzer's *Curriculum Vitae* that he was employed at Stefanutti Stocks as a Managing Director, Mechanical, Electrical and Power from January 2009 until February 2014.

6.1.44. It appeared on the declaration of interest form completed by Mr. Oberholzer that he declared his shareholding in Stefanutti Stocks as part of his *FNB* securities portfolio on 7 August 2018 and 26 June 2019, respectively. The issue was also dealt with in Cassim SC Report.

6.1.45. Mr. de Ruyter submitted further than on 21 July 2019, Mr Oberholzer and the erstwhile Acting General Manager Legal & Compliance, Eskom, Mr. Jerome

Mthembu requested an external independent opinion from Edward Nathan Sonnebergs Attorneys on whether Aveng Construction was legally entitled to be paid an amount of R40 million. The Complainant was requested to compile a memorandum pertaining to that, and a legal opinion was obtained from the said firm of attorneys on 29 July 2019, which confirmed that Eskom should pay an amount of R40 million to Aveng Construction.

6.1.46. On 23 August 2019, Eskom received a report from the Commission recommending that Aveng Construction should not be paid due to possible irregularities. Despite this, on 28 August 2019, the Complainant prepared a memorandum requesting approval of the payment of R40 million to Aveng Construction and submitted the said memorandum to Mr. Oberholzer.

6.1.47. Mr. Oberholzer rejected the memorandum based on the decision made by Eskom's leadership due to the recommendations from the Commission. Subsequently a judgment was issued by the South Gauteng High Court wherein Eskom was ordered to pay Aveng Construction the amount claimed.

6.1.48. Mr. de Ruyter highlighted that regarding the allegation that the Complainant was influenced by Mr. Oberholzer to appoint a white employee for Battery Storage Project, it appears from Eskom's records that the said employee referred to was Mr. Pieter Underhay, and in the grievance lodged by the Complainant it was stated as follows:

"I have it on good authority that a certain Mr. Pieter Underhay has made a statement to one of my colleagues, that the COO is "not happy" with his Boss meaning me. This is defamatory; my question is why the COO has not approached me on this "not happy" sentiment. On many occasions, the COO asked me that I use Mr Underhay as the Battery Storage Project Manager. Mr Underhay did play his role after the COO's initial request but I chose to use Mr. Lonwabo Limba who is more than capable. Recently, I was asked again by the

COO about Mr Underhay's role as the Battery Storage Project Manager. Not sure why this comes up in and I feel like I am being dictated to".

6.1.49. During the grievance hearing dated 17 October 2019, Mr. Oberholzer responded to these issues as follows:

"Regarding capacity as Battery Storage, Mr Oberholzer stated that he recommended Pieter Underhay to Mr Chettiar primarily for the following reasons:

- *Pieter Underhay was a Senior Manager, employed in the same Division (Group Capital) as Mr Chettiar; (Pieter has since retired at the end of March 2020).*
- *Pieter has over 30 years Eskom related experience, including in-depth experience in electrification (Distribution Division) and this bedrock knowledge is crucial to manage the Battery Storage Project.*
- *A very seasoned and experienced Project Manager, executing high value and complex projects;*
- *The BESS Project Value is approximately 16 B$ ($16 billion), and it is crucial that Eskom ensures that the person/ persons filling the role has the necessary knowledge, skills and competencies to manage this significant portfolio. Mr Chettiar disagreed on the recommendation to consider Pieter Underhay believing that Mr. Lwambo Limba was more capable.*
- *COO respected Mr Chettiar's decision, and recommended that Mr Chettiar considers Pieter to coach and mentor the staff".*

6.1.50. Mr. de Ruyter highlighted further that there was no basis to the allegation that Mr. Oberholzer unduly influenced the Complainant to appoint a white person on the Battery Storage Project. The allegation that Mr. Oberholzer allegedly influenced the transfer of his brother-in-law to Cape Town without due processes was investigated by Cassim SC, and he found that there was no basis to the allegation.

6.1.51. In his submission to the Public Protector, Mr. de Ruyter mentioned that the issue relating to the contractual price escalation of the Black and Veatch was also investigated by Cassim SC, wherein it was acknowledged that there was a 79.6% of the escalation in the Black and Veatch contract cost during the period of 31 December 2008 and 16 July 2018. During the said period Mr. Oberholzer was not in the employ of Eskom, and had no influence over the contract.

6.1.52. A preliminary investigation by Eskom's Audit & Forensic Team found that the expansion of the contract value during that time constituted irregular expenditure. The BoD of Eskom agreed that the increase in contract value warrants further investigation and Mr. de Ruyter was instructed to commence an investigation with immediate effect.

6.1.53. Regarding the allegation relating to the delayed project of the Odendaal Project, which subsequently led to the Complainant being charged with poor work performance, Mr. de Ruyter provided that Eskom does not have a project with this name, as such he cannot provide a meaningful answer to this allegation.

6.1.54. Mr. de Ruyter mentioned that relating to the allegation that white managers were preferred more than their black counterpart, Eskom could not comment on this as specific context is required in order to respond appropriately. However, he indicated that Eskom does not promote such conduct as it promotes and implements Employment Equity in the workplace.

6.1.55. He mentioned further that there was no victimisation, intimidation or any other conduct that maybe viewed as an occupational detriment against the Complainant, and that the disciplinary proceedings that were instituted against the Complainant will not proceed as he resigned from Eskom.

6.1.56. Mr. de Ruyter submitted that Eskom did not receive any protected disclosure from the Complainant as required by the PDA. Eskom received letters from SAFTU in March 2020 in which various allegations were made. Subsequently, Eskom instituted an investigation which was conducted by Cassim SC, who found no basis to the allegations.

6.1.57. Some of the allegations contained in this complaint were made by the Complainant through internal grievance process. Eskom has taken adequate steps to address the issues raised and that the Complainant failed to show that there was basis for his allegations.

6.1.58. He submitted further that Eskom encourages its employees to disclose any conduct which involves corruption, maladministration and breach of its policies and procedures through its whistleblowing policy, which sets out the process that an employee should follow in making protected disclosures.

6.1.59. Mr. de Ruyter provided that there was no investigation conducted against the Complainant, as the charges levelled against him emanate from allegations that he made in a grievance that he lodged against Mr. Oberholzer.

Additional information obtained:

6.1.60. Through an email dated 7 December 2020, the Complainant provided the Public Protector with a document dated 20 May 2019 entitled *"Statement of alleged concerns in Eskom: Group Capital Division- Coal Clean Technology Portfolio"* which the Complainant addressed to the Commission when he lodged his complaint with it.

6.1.61. In his complaint to the Commission, the Complainant raised the issue of Aveng Construction which related to alleged payments of R40 million claimed from Eskom by Aveng Construction, which Aveng Construction was not entitled to.

6.1.62. The Complainant also provided the Public Protector with a copy of a notice to attend an incapacity investigation dated 6 August 2020, that he received from Eskom. In terms of this notice, the Complainant was informed to attend an incapacity investigation on 11 September 2020.

6.1.63. The notice provided that *"In terms of the Procedure for the Management of Sickness Absence, Document Identifier: 240- 102796274, a continuous sickness absence of four weeks and more or a GSAR equal to or greater than 3% requires that an Incapacity Assessment is conducted. Your sick absence has reached a trigger point of 4 weeks and your GSAR is 14%".*

6.1.64. The Complainant also provided the Public Protector with a copy of a letter dated 29 September 2020, which Ndungu Attorneys INC, legal representatives of the Complainant (Complainant's legal representatives) addressed to Eskom in response to allegations made against the Complainant in the Eskom Report. The Complainant's legal representatives attached a document entitled *"Response by Mark Chettiar to allegations made in the Eskom Investigation Report on alleged misconduct by Eskom Chief Operating Officer: 24 August 2020"* to the letter to Eskom.

6.1.65. In terms of the said document, the Complainant made a submission to Eskom about *inter alia* issues of Aveng Construction which related to alleged payments claimed from Eskom by Aveng Construction, and which Aveng Construction was not entitled to, and victimisation as well as nepotism. In this document, the Complainant submitted that in June 2019 he made a protected disclosure to the Commission relating to allegations of corruption at Eskom, which included the Aveng Construction and his victimisation by Eskom.

6.1.66. Subsequently, the Commission recommended that Eskom should not pay Aveng Construction's claim against Eskom and that those individuals who acted without authority should be held accountable. The Complainant highlighted that the

matter was investigated by Eskom's internal audit unit, and the outcome of the investigation recommended that the claim should not be paid.

6.1.67. The Complainant provided the Public Protector with a copy of his resignation letter dated 9 November 2020. Herein below is a copy of the Complainant's resignation letter:

Eskom Holdings

Elsie Pule

Human Resources Group Executive

Dear Elsie,

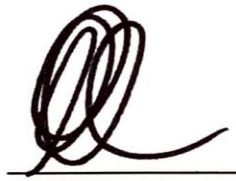
Letter of resignation: Valiathum Sankariah Chettiar (Mark)

I hereby tender my resignation from Eskom with effect from 01 December 2020. My last day in service will be 31 December 2020. Eskom as an organisation has served me well during the 22 years of my employment. I have always achieved exceed performance ratings and awards for, integrity, leadership, people development, etc. My life style audit conducted in 2019 has yielded a clean record.

My resignation is not an easy decision and one that I make based on principle and under severe duress due to the prevailing issues.

I am willing to discuss a voluntary separation package on the separation principles that was implemented with other employees on 31 March 2020, as opposed to a resignation.

All the best with the challenging task of turning Eskom around.



9 Nov 2020

Mark Chettiar
General Manager
Eskom Holdings

Date

Application of the relevant law:

6.1.68. Section 23(1) of the Constitution, 1996 provides that everyone has the right to fair labour practice.

6.1.69. The Labour Relations Act 66 of 1995 (LRA) gives effect to section 23 of the Constitution and seeks to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose.

6.1.70. Section 141(1) of the LRA provides that if a dispute remains unresolved after conciliation, the Commission must arbitrate the dispute if a party to the dispute would otherwise be entitled to refer the dispute to the Labour Court for adjudication and, instead, all the parties agree in writing to arbitration under the auspices of the Commission.

6.1.71. Section 141(4) of the LRA provides that any party to the arbitration agreement may apply to the Labour Court at any time to vary or set aside that agreement, which the Court may do on good cause.

6.1.72. Section 157(1) of the LRA provides that subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law, are to be determined by the Labour Court.

6.1.73. Section 157(2)(a) of the LRA provides that the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the

Republic of South Africa, 1996, and arising from employment and labour relations.

6.1.74. Section 186(2)(a) of the LRA provides that unfair labour practice means any unfair or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissal for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.

6.1.75. Section 6(6) of the Public Protector Act provides that *"Nothing in subsection (4) and (5) shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law".*

6.1.76. The facts and evidence discussed above indicate that the Complainant lodged a protected disclosure with the Commission through a document entitled "*"Statement of alleged concerns in Eskom: Group Capital Division- Coal Clean Technology Portfolio"* dated 20 May 2019, and not June 2019 as it appeared from his complaint letter that he addressed to the Public Protector when he lodged his complaint, dated 5 September 2020.The disclosure related to *inter alia* allegations of payment claimed from Eskom by Aveng Construction, which Aveng was not entitled to.

6.1.77. The evidence before the Public Protector revealed that on 13 September 2019, the Complainant lodged a grievance with Eskom relating to various allegations of improper conduct and maladministration against Mr. Oberholzer. Subsequently, Mr. Mabuza commissioned Mkhawane SC to investigate the matter and issue a report, which report was issued on 31 October 2019.

6.1.78. The said report found that the various allegations of improper conduct and maladministration which the Complainant levelled against Mr. Oberholzer were not substantiated.

6.1.79. However, some of the allegations against Mr. Oberholzer were retracted by the Complainant during the investigation process, with the exception of the *f- word*, which Mr. Oberholzer accepted and apologised to the Complainant.

6.1.80. The evidence before the Public Protector revealed further that the Complainant accepted Mkhawane SC report and confirmed that the grievance that he lodged on 13 September 2019 against Mr. Oberholzer was resolved. The Complainant thus appended his signature on the said report on 3 November 2019.

6.1.81. Indeed Eskom received two (2) letters dated 12 March 2020 and 18 March 2020, respectively from SAFTU, and another letter from Corruption Watch dated 11 March 2020, relating to *inter alia* alleged victimisation of the Complainant as a result of his protected disclosure lodged with the Commission. As a result thereof, Eskom commissioned Cassim SC to conduct an investigation into the said allegations. Subsequently, Cassim SC issued a report dated 4 April 2020.

6.1.82. It is evident that Mr. Oberholzer declared his shareholding in Stefanutti Stocks as part of his FNB securities portfolio in the Eskom declaration of interest form dated 7 August 2018 and 26 June 2019, respectively, which Mr. de Ruyter submitted in his response to the Public Protector dated 11 January 2021.

6.1.83. Moreover, some of the findings of the Cassim SC Report were that Mr. Oberholzer's failure to recuse himself during discussions on matters involving Stefanutti Stocks constituted breach of the applicable provisions of Eskom's policy. As such Cassim SC recommended that Mr. Oberholzer be counselled.

6.1.84. The Cassim SC Report acknowledged that there was a 79.6% of the escalation in the Black and Veatch contract cost during the period of 31 December 2008 and 16 July 2018. However, during said period, Mr. Oberholzer was not in the employ of Eskom, and he could not have influenced the contract in this regard.

6.1.85. Relating to a dispute of alleged authorisation of R42 million payment to Aveng construction, Cassim SC recommended that disciplinary process be initiated against Mr. Oberholzer, in order to enable a proper ventilation of this issue in a disciplinary hearing. However, Cassim SC took into consideration that the said dispute was part of the litigation between Eskom and Aveng Construction.

6.1.86. It is noted that Cassim SC later issued a supplementary report dated 22 June 2020 wherein he mentioned that the opposed application in the Aveng Construction matter against Eskom was scheduled to be heard on 18 May 2020, as such it would be inappropriate to conduct a disciplinary hearing at that stage bearing in mind that the dispute has already been heard in the high court and judgment was pending.

6.1.87. From a copy of a judgment obtained from Eskom relating to a matter between **Aveng (Africa) (Proprietary) Limited v Eskom Holdings SOC Limited, Case no: 19/ 28187**, the Public Protector noted that the court directed Eskom to pay Aveng Construction the amount of R40 087 353.06, together with interest.

6.1.88. On 18 February 2020, the Complainant lodged a dispute against Eskom with the CCMA relating to unfair labour practice. The matter remained unresolved, and on 23 March 2020, the Complainant filed a request for arbitration at the CCMA. The CCMA issued a ruling (CCMA Ruling) on 9 November 2020.

6.1.89. The Public Protector noted that the CCMA Ruling dealt with the issue relating to allegations of the Complainant being subjected to occupational detriment due to the fact that he lodged a protected disclosure at the Commission.

6.1.90. In this regard, the CCMA held that ***"there was no evidence before it to suggest that there was an unfair act or omission involving an occupational detriment".*** The application failed to satisfy the parameters set out in the PDA.

6.1.91. Eskom received a request from Mr. Gordhan to investigate various allegations levelled against Mr. Oberholzer, which the Public Protector has alluded to above. In this regard, Eskom commissioned the investigation and issued a report to Mr Gordhan dated 24 August 2020. The findings and recommendation of the Eskom Report exonerated Mr. Oberholzer on charges against him.

6.1.92. The evidence before the Public Protector revealed that the Eskom Report recommended that the BoD of Eskom should endorse Mr. Oberholzer's actions as having been fair, transparent, procedural and professional in upholding and fulfilling his contractual mandate in serving the interest of Eskom.

6.1.93. With regards to the dispute relating to the Odendaal Project, Eskom submitted that it does not have a project with this name, as such it cannot comment, nor provide a meaningful answer to this allegation.

6.1.94. It should be noted that the Complainant voluntarily resigned from the employ of Eskom in a letter dated 9 November 2020.

Conclusion

6.1.95. Based on the information and documentation obtained during the investigation, and the application of the legal framework to the facts of the matter, it is concluded that Eskom has taken appropriate steps with a view to remedy the allegations which related to the Complainant's matter.

6.1.96. The Public Protector took into consideration all the steps taken by Eskom through the internal steps and tribunal which had been commissioned to address the allegations referred to in the complaint, including the CCMA.

6.1.97. It is common cause that the institution of the Public Protector may be used as a check and balance only in ensuring a constitutional order as mandated by the

Constitution and the various relevant legislation and not for unjustifiable tampering of powers and functions of other state institutions.

6.1.98. Where the state institution has taken proper actions in dealing with any acts of malpractices within its sphere of administration, and is continuing to take further action to address the issues impeding efficiency and effectiveness within its departments, it would not be prudent for the Public Protector to interfere with the process concerned, unless where improper conduct or maladministration, through an act of commission or omission manifests.

6.2. The Complainant and Mr Vavi were issued with a Discretionary notice on 16 August 2021 to afford them an opportunity to respond to the provisional findings, to which they did not reply.

7. REASONS FOR CLOSURE

7.1.1. The allegation that Minister of Public Enterprise, Mr. P Gordhan, BoD of Eskom and Eskom failed to investigate a complaint relating to various allegations of maladministration and improper conduct against Mr. Oberlhozer**,** and subsequent improper application of the PDA, **is unsubstantiated.**

7.1.2. Eskom investigated complaints lodged by the Complainant relating to various allegation of maladministration and improper conduct against Mr. Oberholzer, and issued three (3) reports, which were Mkhawane SC Report dated 31 October 2019, Cassim SC Report dated 4 April 2020, and Eskom Report dated 24 August 2020, respectively. The said reports exonerated Mr. Oberholzer of various allegations levelled against him.

7.1.3. The Complainant referred the issue of unfair labour practice and alleged subsequent occupational detriment suffered after he lodged a protected disclosure

to the CCMA on 18 February 2020. The CCMA issued a Ruling on 9 November 2020. The matter was dealt with by the CCMA in line with the provisions of section 141(1) of the LRA.

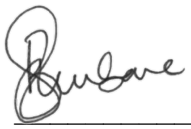
7.1.4. If the Complainant is not satisfied with the outcome of the CCMA Ruling, he should refer the matter to Labour Court as required by section 141(4) of the LRA. Therefore, the Public Protector does not have jurisdiction to review the Ruling of the CCMA.

7.1.5. Consequently, the issue relating to the allegations that Eskom entered into a contract with Aveng Construction, which obliged Eskom to pay an amount of R42 million to it, although such payment was not warranted, was decided by the South Gauteng High Court on 11 September 2020, wherein Eskom was directed to pay Aveng Construction the amount of R40 087 353.06, together with interest. By virtue of Section 6(6) of the PPA, the Public Protector cannot investigate court decisions.

7.1.6. Further, Eskom denied that they ever had any project named Odendaal Project, as such it could not comment on this issue.

7.1.7. Therefore, the Public Protector could not find that the conduct of Eskom constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration or abuse of power as envisaged in section 6(4)(a)(i)& (ii) of the Public Protector Act.

7.1.8. In light of the afore-going, the Public Protector has therefore decided not to pursue the matter any further and thus finalise it by means of a closing report.



ADV .BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 30/11/2021