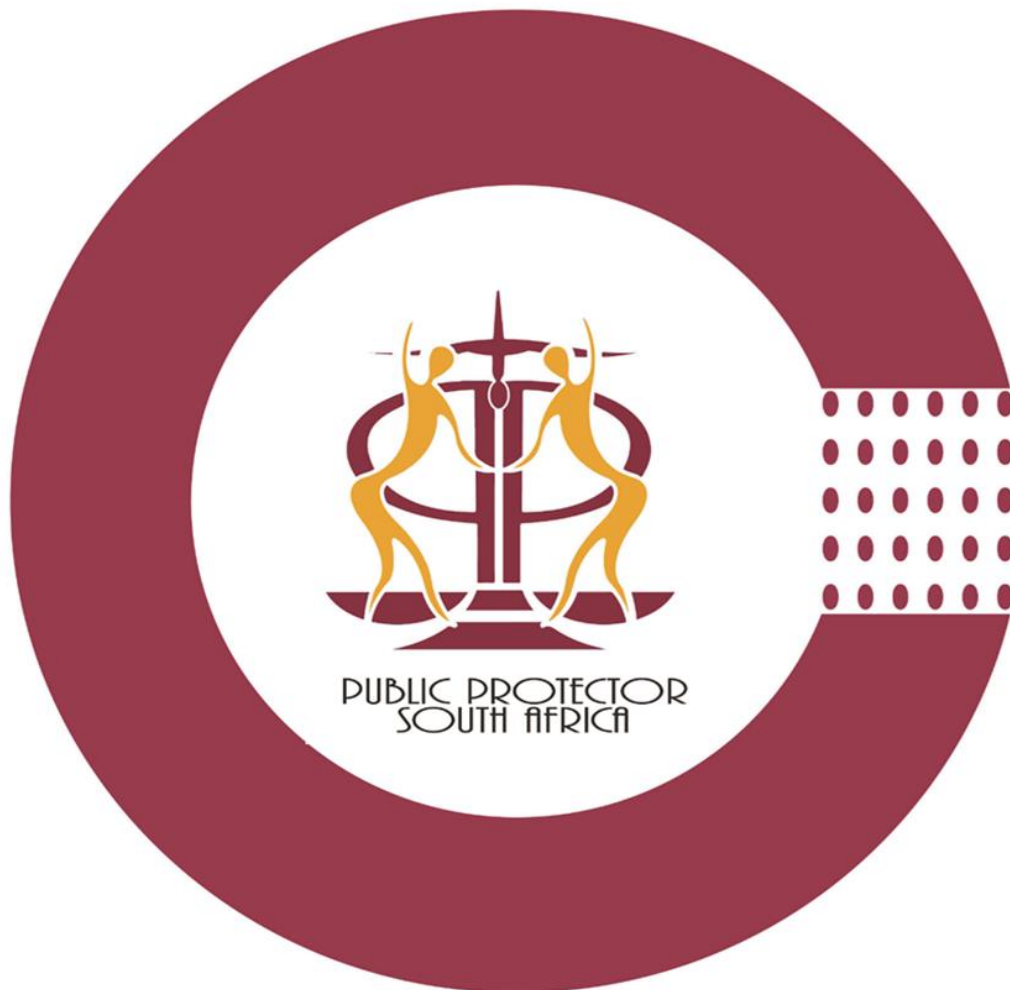


**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1)
OF THE PUBLIC PROTECTOR ACT, 1994**



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**INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT BY THE
FUNCTIONARIES OF ESKOM WHO TERMINATED THE EMPLOYMENT AND THE
PILOT PROJECT OF THE COMPLAINANT, DR GJ AFRIKA**

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LIST OF ACRONYMS/ABBREVIATIONS

ACRONYMS / ABBREVIATIONS	DESCRIPTIONS
Constitution	Constitution of the Republic of South Africa, 1996
Complainant	Dr GJ Afrika (formerly known as Mr GJ Mafereka)
Public Protector Act	Public Protector Act, 1994
Public Protector Rules	Rules relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018, as amended
Public Protector	Public Protector of the Republic of South Africa
VSP	Voluntary Separation Package

1. INTRODUCTION

- 1.1. This is a Report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution), section 8(1) of the Public Protector Act, 1994 (the Public Protector Act) and Rule 40(b) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018*, as amended (the Public Protector Rules) as promulgated in terms of section 7(11) of the Public Protector Act.
- 1.2. The report relates to the outcome of an internal review application lodged with the Public Protector in terms of Rule 44(1) in respect of a matter investigated by the Public Protector Gauteng Provincial Office (the Provincial office), regarding allegations of improper conduct by the functionaries of Eskom to terminate the employment and the pilot project of the Complainant, Dr GJ Afrika (previously known as Mr GJ Mafereka).
- 1.3. In terms of Rule 44(1), Complainants who are dissatisfied with the decision of any official of the Public Protector to close or to refuse the investigation of a complaint, may, except where the Public Protector has released a final report in terms of section 182(1)(b) of the Constitution, 1996, and section 8(1) of the Public Protector Act, request an internal review of that decision.
- 1.4. The report is submitted in terms of Rule 44(4) of the Public Protector Rules, to Dr GJ Afrika (the Complainant) to inform him of the outcome of his internal review request.

2. THE COMPLAINT

- 2.1 The complaint was lodged with the Public Protector, Gauteng Provincial Office on 14 July 2016, by Dr GJ Afrika.

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- 2.2 In essence, the Complainant alleged that:
- 2.2.1 He was employed by Eskom from 1985 to 2015;
- 2.2.2 He was the Chairperson and the founder of a project called EnerKey-SASEI PMC;
- 2.2.3 As a result of maladministration and corruption at Eskom, he was retrenched via a process initiated by Eskom;
- 2.2.4 He lost his job and the pilot studies that he was working on under youth development and job creation at Eskom; and
- 2.2.5 He hired private consultants at his own expense between 1 April 2015 to 31 April 2016 to continue with the pilot projects, but he was not able to implement the projects because Eskom withdrew from the project without providing reasons.
- 2.3 The complaint, as set out above, was investigated by the Gauteng Provincial Office and the investigation culminated in a Closing Report, issued on 31 August 2017.
- 2.4 The Complainant subsequently brought an internal review application, dated 20 February 2023, seeking to review the decision taken by the Gauteng Provincial Office to close his matter, citing *inter alia*, the following reasons:

“The investigator failed to verify the Eskom retrenchment on 31 March 2015; The cash payment was incomplete according to retrenchment procedures; I appeal the closing report and I appeal that the complaint be re-assessed”.
(sic)

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional institution established in terms of 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 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 the additional powers and functions prescribed by national legislation.

3.4 In terms of Rule 44(1), *“Complainants who are dissatisfied with the decision of any official of the Office of the Public Protector or the Public Protector to close or refuse the investigation of a complaint, may, except where the Public Protector has released a final report in terms of section 182(1)(b) of the Constitution, 1996, and section 8(1) of the Act, request an internal review of that decision if –*

- (a) The Complainant is of the opinion that a decision is wrong because it was made based on incomplete or inaccurate evidence or information that contained inaccurate facts, and he or she can show this using readily available information; or*

(b) There is new and relevant information that was not previously available and has a material effect on the decision made.

3.5 Rule 44(4) provides that “*after reviewing the matter, the Public Protector may:*

(a) Uphold the original decision;

(b) Change the original decision; or

(c) Send the matter back to the original or another investigation team for further investigation or a better explanation.”

4. ISSUE IDENTIFIED FOR INVESTIGATION

4.1 On analysis of the complaint, the following issue was identified to inform and focus the investigation.

4.1.1 Whether the functionaries of Eskom improperly terminated the employment and pilot project of the Complainant, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and amounted to maladministration as envisaged in section 6(5)(a) of the Public Protector Act.

5. THE INVESTIGATION

5.1 Methodology

5.1.1 The investigation into the complaint was conducted in accordance with section 182(1) of the Constitution, read with sections 6 and 7 of the Public Protector Act.

5.2 Approach to the investigation

5.2.1 The approach to the investigation included an analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework, and prescripts.

5.2.2 The investigation was approached using an enquiry process that seeks to determine:

5.2.2.1 What happened?

5.2.2.2 What should have happened?

5.2.2.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or improper conduct?

5.2.2.4 In the event of maladministration or improper conduct what would it take to remedy the wrong?

5.2.3 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.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standards that should have been met by the functionaries of Eskom to prevent violation of the Constitution and/or the applicable prescripts to prevent maladministration and prejudice.

5.3 The Investigation Process

5.3.1 The approach to the investigation included an exchange of documentation between the Public Protector, Eskom, and the Complainant. Meetings were also held with the aforesaid parties.

5.3.2 All relevant documents and correspondence were obtained and analysed, and relevant laws, policies and related prescripts were considered and applied throughout the investigation.

5.4 Key sources of information

5.4.1 Eskom Circular/Communique to all employees relating to Early Retirement and Cash Separation packages, dated 13 November 2014;

5.4.2 Eskom Certificate of Service for Mr GJ Mafereka, dated 31 March 2015;

5.4.3 Complaint form to the Public Protector, dated 06 April 2016;

5.4.4 Proof of electronic payment of cash benefit to Mr GJ Mafareka's FNB account on 17 April 2015;

5.4.5 Letter from the Public Protector addressed to the erstwhile Group Chief Executive Officer of Eskom, Mr Brian Molefe, dated 29 July 2016;

5.4.6 Letter from the Group Company Secretary, Acting Head: Legal and Compliance, Ms Suzanne Daniels, dated 09 December 2016;

5.4.7 Email from the Public Protector Investigation Team (the Investigation Team) to the Complainant, dated 10 January 2017;

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- 5.4.8 Email from Ms MR Mhlwatika, Senior Legal Advisor, Eskom to the Investigation Team, dated 15 May 2017;
 - 5.4.9 Closing Report, dated 31 August 2017;
 - 5.4.10 Eskom Pension and Provident Fund withdrawal benefit calculation, dated 24 November 2017; and
 - 5.4.11 Internal Review application, dated 20 February 2023.

5.5 Meetings held

- 5.5.1 Meeting held between the Complainant, Ms R Mhlwatike, Eskom Legal Advisor; Mr M Mpye, Eskom official, and the Investigation Team held on 03 March 2017;
- 5.5.2 Meeting held between the Complainant, his legal representative, Mr P Gobodo, and the Investigation Team on 25 April 2017.

5.6 Legislation and other prescripts

- 5.6.1 The Constitution of the Republic of South Africa, 1996;
- 5.6.2 The Public Protector Act, 1994; and
- 5.6.3 The Public Protector Rules relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018, as amended.

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

6.1 Whether the functionaries of Eskom improperly terminated the employment and the pilot project of the Complainant, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and amounted to maladministration as envisaged in section 6(5)(a) of the Public Protector Act

Common Cause

6.1.1 The Complainant was employed by Eskom from 18 March 1985 to 31 March 2015.

Issue in dispute

6.1.2 The issue for determination by the Public Protector is whether the functionaries of Eskom improperly terminated the employment and the pilot project of the Complainant.

The Complainant's version

6.1.3 The Complainant alleged that he was affected by the privatisation retrenchment process at Eskom as a result of maladministration and corruption at Eskom.

6.1.4 He hired private consultants at his own expense between 1 April 2015 to 31 April 2016 to continue with his pilot project, but he was not able to implement the project because Eskom withdrew from the project without providing reasons.

Eskom's version

- 6.1.5 The Investigation Team sent an allegations letter, dated 29 July 2016, to the erstwhile Group Chief Executive Officer of Eskom, Mr Brian Molefe.
- 6.1.6 On 09 December 2016, the Group Company Secretary, Acting Head: Legal and Compliance, Ms Suzanne Daniels, responded *inter alia*, as follows:
- 6.1.6.1 Eskom employees were advised on 13 November 2014 via a Communique/Circular by the Group Executive Human Resources, Ms E Pule, that they could apply for Early Retirement or a Voluntary Separation Package (VSP);
- 6.1.6.2 This was a voluntary process and employees were afforded the opportunity to make an application if they so desired;
- 6.1.6.3 Mr Mafereka (as the Complainant was known then) made an application for the VSP and he opted to receive a cash settlement, which application was approved by Eskom. As a result, his employment with Eskom was terminated on 31 March 2015 by mutual agreement;
- 6.1.6.4 In the Eskom Communique, dated 13 November 2014, all employees were informed that *“no employee shall be coerced by anyone to consider applying for a package, as the process is strictly voluntary. An employee leaving Eskom through a separation package will not be contracted back in a permanent or temporary capacity or as an independent contractor/ consultant after the employee has left”*;
- 6.1.6.5 Based on the foregoing, no further employment or partnership could have been made with Mr Mafereka as that would have been in conflict with the Board-approved process of VSP conditions;

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- 6.1.6.6 Eskom has no knowledge of Mr Mafereka being the founder of EnerKey-SASEI;
- 6.1.6.7 Eskom has no knowledge of a pilot project and cannot comment on the status of such a project;
- 6.1.6.8 To the best of Eskom’s knowledge, this project did not exist; and
- 6.1.6.9 Eskom cannot deny or confirm that Mr Mafereka (Dr Afrika) had to hire a private consultant during the period 01 April 2015 to 31 April 2016. Mr Mafereka was no longer an employee of Eskom during that period, and thus a contractual relationship did not exist between the parties”.

Meetings held

- 6.1.7 On 03 March 2017 and 25 April 2017 respectively, the Investigation Team held meetings with the Complainant, his legal representative, and the legal team of Eskom. The meetings dealt with the issues raised by the Complainant and allowed Eskom to provide him with clarity in respect of the conditions of the VSP.

Closing Report dated 31 August 2017

- 6.1.8 On 31 August 2017, the then Gauteng Provincial Representative, Ms M Manyathela, issued a closing report to the Complainant in respect of the matter, concluding that the complaint was **not substantiated**, based on the following reasons:

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- 6.1.9 The evidence confirmed that the Complainant was not retrenched but that he chose to take a Voluntary Separation Package (VSP) on 31 March 2015, which terminated his employment with Eskom;
- 6.1.10 The Complainant opted to receive a VSP cash settlement, which was paid into his FNB banking account on 17 April 2015. The Public Protector is in possession of proof of payment of the cash settlement to the Complainant;
- 6.1.11 The Eskom Pension and Provident Fund provided the Complainant with a breakdown of the calculation of his VSP cash benefit dated 24 November 2017;
- 6.1.12 The Complainant also received Unemployment Insurance Fund benefits for the period August 2015 to March 2016;
- 6.1.13 The Complainant was no longer an employee of Eskom after 31 March 2015 and thus no contractual relationship existed in any form between Eskom and the Complainant after 31 March 2015;
- 6.1.14 In terms of the VSP conditions, an employee who opted for a voluntary package could not be re-employed or contracted by Eskom again; and
- 6.1.15 Eskom has no knowledge of the pilot project which the Complainant referred to.

Internal review in terms of Rule 44(1) Rules of the Public Protector and Matters Incidental Thereto, 2018 as amended (the Public Protector Rules)

- 6.1.16 On 20 February 2023, the Complainant submitted a request for an internal review of the matter, on the following grounds:

“The investigator failed to verify the Eskom retrenchment on 31 March 2015; The cash payment was incomplete according to retrenchment procedures; I appeal the closing report and I appeal that the complaint be re-assessed”
(sic)

6.1.17 Consequently, the request was assessed and evaluated by the Public Protector in line with Rule 44(4) of the Public Protector Rules, as amended.

6.1.18 The outcome of the review as per the letter dated 16 March 2023 advised the Complainant that, in terms of Rule 44(4) of the Public Protector Rules, as amended, it is concluded that the process adopted by the Investigation Team was fair and adequate to address all the issues raised by the Complainant;

6.1.19 The conclusions reached by the Investigation Team have merit; and

6.1.20 The decision of the Investigation Team was properly explained to the Complainant by means of meetings held between the Complainant and the Eskom Legal Team as well as a closing report addressed to the Complainant.

Applicable law

Public Protector Act, 1994

6.1.21 Section 6(5)(a) provides that *“in addition to the powers referred to in subsection 4, the Public Protector shall on his or her own initiative or on receipt of a complaint be competent to investigate any alleged maladministration in connection with the affairs of any institution in which the state is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act”*.

Public Protector Rules of 2018, as amended

- 6.1.22 Rule 44(1) provides that *“Complainants who are dissatisfied with a decision of any official of the Office of the Public Protector or the Public Protector to close or refuse the investigation of a complaint, may, except where the Public Protector has released a final report in terms of 182(1)(b) of the Constitution, 1996 and Sections 8(1) of the Act, request an internal review of that decision if—*
- (a) the complainant is of the opinion that a decision is wrong because it was made based on incomplete or inaccurate evidence or information that contained inaccurate facts, and he or she can show this using readily available information; or*
 - (b) there is new and relevant information that was not previously available and has a material effect on the decision made.*
- (2) A request for an internal review of a decision must be made in writing on a form that is available from any of the offices of the Public Protector, within ninety (90) days of being informed of the decision.*
- (3) The review will be considered by the Public Protector or his/her delegated official.*
- (4) The person adjudicating the review application shall consider:*
- (a) the process adopted by the investigating team and whether it was fair and adequate to address all the complaint issues raised with the Public Protector,*
 - (b) the merit of the investigating team’s conclusions, and*

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- (c) *whether the decision was properly explained to the complainant(s).*
 - (4) *After reviewing the matter the Public Protector may:*
 - (a) *uphold the original decision;*
 - (b) *change the original decision; or*
 - (c) *send the matter back to the original or another investigating team for further investigation or a better explanation.*
 - (5) *Should the complainant still not be satisfied with the decision of the Public Protector, he or she may, within thirty (30) days of receipt of the decision, approach any competent court with jurisdiction to review the decision to close the investigation or refuse to investigate a complaint”.*

Analysis

- 6.1.23 Based on the evidence during the course of the investigation, it was established that the Complainant was not retrenched by Eskom but he had voluntarily successfully applied for VSP in terms of an Eskom Communique dated 13 November 2014. ESKOM paid the VSP in the form of a cash settlement as agreed upon by the parties.
- 6.1.24 The condition of the VPS as contained in the Communique clearly stated that employees of Eskom who opted for VSP will not be contracted back in a permanent or temporary or contractual capacity. As a result, the employment relationship between the Complainant and ESKOM terminated when his application for VPS was approved.

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- 6.1.25 The Complainant's service with Eskom terminated on 31 March 2015 and he received a cash benefit into his FNB account on 17 April 2015.
- 6.1.26 A full breakdown and calculation of his cash benefit was provided to the Complainant by the Eskom Pension and Provident Fund.
- 6.1.27 There is no evidence before the Public Protector that the functionaries of Eskom acted improperly, as the employment contract was terminated by mutual consent.
- 6.1.28 In terms of the Board approved process of VSP, the Complainant could not have been re-employed or contracted at Eskom after his services were terminated. Eskom contended that it has no knowledge of any pilot project that the Complainant allegedly engaged in with ESKOM after his VSP was approved as such a relationship would have been in contravention of the conditions and objectives of the VPS.

Conclusion

- 6.1.29 Based on the evidence before the Public Protector, no new information has been advanced by the Complainant to substantiate that the conduct of the functionaries of ESKOM was irregular. Furthermore, the Public Protector could not establish any evidence that ESKOM and/or its functionaries failed to honour the contractual obligations in terms of an agreement that was allegedly concluded by the partis after his employment relationship with ESKOM was mutually terminated.

7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard ESKOM should have complied with and the impact thereof on the Complainant, the Public Protector makes the following findings:

7.1 **Whether the functionaries of Eskom improperly terminated the employment and the pilot project of the Complainant, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and amounted to maladministration as envisaged in section 6(5)(a) of the Public Protector Act**

7.1.1 The allegation that the functionaries of Eskom improperly terminated the employment and the pilot project of the Complainant, is **unsubstantiated**.

7.1.2 It is clear from the evidence in the possession of the Public Protector that the Complainant responded to the invitation for VSP applications, which was subsequently approved by ESKOM. As a result, the employment relationship between ESKOM and the Complainant was terminated after his application for VSP was approved and payment of his service benefits was affected.

7.1.3 Therefore, the Public Protector could also not establish any evidence to substantiate the contention that ESKOM functionaries irregularly terminated the employment relationship with the Complainant.

7.1.4 Furthermore, there is no evidence that ESKOM entered into an agreement with the Complainant relating to a pilot project which has resulted in the Complainant suffering prejudice due to ESKOM's withdrawal from the project without providing reasons. The Complaint did not provide any information or evidence to rebut ESKOM's contention that such an agreement could not have been entered into with the Complainant as such conduct would have contravened the conditions of the VPS which entailed that ESKOM

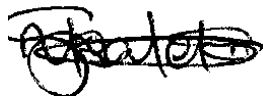
employees who took a voluntary severance package could not be re-employed or contracted by Eskom again.

7.1.5 Lastly, the Complainant has not provided any new information to substantiate that the decision to close the investigation into this matter was based on incomplete or inaccurate evidence or information that contained inaccurate facts, and/or that there is new and relevant information that was not previously available and has a material effect on the decision made as provided in Rule 44(4) of the Public Protector Rules.

8. CONCLUSION

8.1. Having considered the evidence obtained during the investigation, the Public Protector considers this matter finalised and cannot take it any further.

8.2. The Public Protector further confirms that the application for an internal review, is unsuccessful.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA
DATE: 29 SEPTEMBER 2023

Assisted by: Ms Nthoriseng Motsitsi
Executive Manager: PII Inland