

**IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]**

CASE NO:

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

MINISTER OF PUBLIC ENTERPRISES

First Respondent

ESKOM HOLDINGS LIMITED

Second Respondent

BRIAN MOLEFE

Third Respondent

NOTICE OF MOTION

PART A: INTERIM RELIEF

TAKE NOTICE THAT the applicant will apply to this Court on **TUESDAY, 30 MAY 2017** (or such other date as may be set by way of special allocation, to be applied for from the Deputy Judge President) at 10:00 or so soon thereafter as counsel may be heard for an order in the following terms:

- 1 The forms and service and ordinary time periods provided for in the rules are dispensed with and this application is dealt with as one of urgency in terms of Rule 6(12).

- 2 Pending the determination of the relief sought in Part B of the notice of motion:
 - 2.1 The third respondent (“Mr Molefe”) is interdicted from performing any duties and/or functions or receiving any benefits or entitlements deriving from or associated with the position of Group Chief Executive at the second respondent (“Eskom”).
 - 2.2 Mr Molefe is interdicted from receiving any payment or sum of money in respect of any purported pension agreement or proposal between him and Eskom.
- 3 The costs of this application are to be paid jointly and severally by any respondent opposing it, alternatively costs in respect of Part A are to be costs in the cause in Part B, alternatively costs for Part A are to be reserved for determination by the Court when deciding Part B of this Notice of Motion.
- 4 Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the accompanying affidavit of **JAMES SELFE** will be used in support of this application.

TAKE NOTICE FURTHER that the applicant has appointed the office of its attorneys, as set out below, as the address at which it will accept notice and service of all

documents in these proceedings and Applicant elects to receive service electronically at the email address, elzanne@mindes.co.za and venashan@kebd.co.za.

TAKE NOTICE FURTHER THAT if you intend to oppose Part A of this application you are required to:

1. Notify the applicant's attorney in writing and by email at elzanne@mindes.co.za and venashan@kebd.co.za of your intention to oppose on or before **WEDNESDAY, 17 MAY 2017**;
2. Appoint an address that complies with the requirements of rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.
3. File your answering affidavit, if any, in respect of your opposition to Part A of this application, on or before 17:00 on **MONDAY, 22 MAY 2017**.

Kindly set the matter down for hearing accordingly.

PART B: FINAL RELIEF

KINDLY TAKE NOTE THAT the applicant intends to make application to this Court on a date to be determined by the Registrar for an order in the following terms:

- 1 The forms and service and ordinary time periods provided for in the rules are dispensed with and this application is dealt with as one of urgency in terms of Rule 6(12).

- 2 The decision by the first respondent to appoint and/or reinstate Mr Molefe to the position of Group Chief Executive at Eskom is reviewed and set aside.
- 3 Any payment or sum of money received to date by Mr Molefe pursuant to any purported pension agreement between him and Eskom is declared to be invalid and Mr Molefe is ordered to repay such amount(s) to Eskom within ten days of this order.
- 4 The costs of this application are to be paid jointly and severally by any respondent opposing it.
- 5 Further and/or alternative relief.

TAKE NOTICE FURTHER THAT in respect of Part B of this application:

- The first second and third respondents are called upon, in terms of Uniform Rule 53(1)(a), to show cause why the decision should not be reviewed and set aside.
- The first respondent is called upon in terms of Rule 53(1)(b) to despatch, **within 10 days** after service of this notice of motion, to the Registrar the record of the decision sought to be reviewed and set aside, together with such reasons as she by law is required or desires to give or make, and to notify the applicant that it has done so.

- In terms of Rule 53(4) of the rules of this Court, the applicant reserves the right to amend, add to or vary the terms of its notice of motion and supplement its founding affidavit **within 7 days** after the Registrar has made the record available to it.
- If you wish to oppose the relief sought you are required **within 20 days** of the expiry of the time referred to in Uniform Rules of Court 53(4), to deliver any affidavits as you may desire in answer to the allegations made by the applicant.

TAKE NOTICE THAT given the urgency of the matter, the applicants have shortened the time periods provided for under uniform rule 53.

TAKE NOTICE FURTHER that the applicant has appointed the office of its attorneys, as set out below, as the address at which it will accept notice and service of all documents in these proceedings and Applicant elects to receive service electronically at the email address, elzanne@mindes.co.za and venashan@kebd.co.za.

TAKE NOTICE FURTHER THAT if no notice to oppose is given, the application for the relief sought in Part B will be made on 18 JULY 2017 at 10h00 or so soon thereafter as counsel may be heard.

DATED and signed at **PRETORIA** on this **15th** day of **MAY 2017**.

MINDE SCHAPIRO & SMITH INC

Applicant's attorneys
Tyger Valley Office Park
Building Number 2,

Cnr Willie van Schoor & Old Oak Roads, Belville

Tel: +27 21 918 9000

Email: elzanne@mindes.co.za

Ref: Elzanne Jonker

C/O KLAGSBRUN EDELSTEIN

BOSMAN DE VRIES INC.

220 Lange Street

Nieuw Muckleneuk

PRETORIA

Tel: 012 452 8900

Fax: 012 452 8901

e-mail: venashan@kebd.co.za

(REF: HUGO STRUWIG / VS / HS000055)

**TO: THE REGISTRAR OF
THE GAUTENG DIVISION, PRETORIA**

AND TO: THE MINISTER OF PUBLIC ENTERPRISES

First Respondent
Care of: THE STATE ATTORNEY
SALU Building
316 Thabo Sehume Street
PRETORIA

AND TO: ESKOM HOLDINGS LTD
Second Respondent
Megawatt Park, 1 Maxwell Drive
Sunninghill, Sandton

AND TO: MR BRIAN MOLEFE
Third Respondent
759 Camelford Road
Cornwall Hill Estate
Irene, Pretoria

**IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]**

CASE NO:

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

MINISTER OF PUBLIC ENTERPRISES

First Respondent

ESKOM HOLDINGS LIMITED

Second Respondent

BRIAN MOLEFE

Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned

JAMES SELFE

do hereby make oath and say:

- 6 I am the chairperson of the Federal Executive of the applicant, the Democratic Alliance of South Africa (“**the DA**”), and I represent it as a Member of the National Assembly of the Parliament of the Republic of South Africa.
- 7 I am duly authorised to depose to this affidavit on behalf of the DA.
- 8 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true and correct, to the best of my knowledge and belief.

- 9 Where I make legal submissions I do so on the advice of the Democratic Alliance's legal representatives.

THE PARTIES

- 10 The applicant is the **DEMOCRATIC ALLIANCE** ("DA"), a political party registered in terms of section 15 of the Electoral Commission Act 51 of 1996 with its head office at Thebe Hosken House, cnr Breda and Mills Street, Cape Town. The DA is the official opposition in Parliament. The DA approaches this Court in terms of sections 38(a) and (d) of the Constitution, acting in its own interest and in the public interest.
- 11 The first respondent is the **MINISTER OF PUBLIC ENTERPRISES** ("the Minister"), cited in her official capacity and served care of the State Attorney, SALU Building, 316 Thabo Sehume Street, PRETORIA, within the jurisdiction of this Court. The Government is the sole shareholder of the shares in the second respondent and the rights attached to those shares are exercised by the Minister. The Minister made the decision to appoint and/or re-instate the third respondent to the position of Group Chief Executive in respect of the second respondent.
- 12 The second respondent is **ESKOM HOLDINGS LIMITED** ("Eskom"), a public company incorporated in terms of the laws of South Africa and in terms of section 3 of the Eskom Conversion Act 13 of 2001, with registration number 2002/015527/06. Eskom's head office is at 1 Maxwell Drive, Sunninghill, Sandton.

- 13 The third respondent is **BRIAN MOLEFE**, cited in his personal capacity at 759 Camelford Road, Cornwall Hill Estate, Irene, Pretoria. Mr Molefe has purportedly been appointed and/or re-instated as the Group Chief Executive of Eskom by the Minister, on the recommendation of Eskom's Board, which appointment (for the reasons set out below and to be advanced in argument) is unlawful and falls to be reviewed and set aside.

OVERVIEW

- 14 This application is brought in two parts. In Part A, the DA seeks interim relief interdicting Mr Molefe from performing any duties and/or functions or receiving any benefits or entitlements deriving from or associated with the position of Group Chief Executive at Eskom pending the determination of the relief sought in Part B of the notice of motion.
- 15 In Part B, the DA seeks an order reviewing and setting aside the Minister's decision to appoint and/or reinstate Mr Molefe to the position of Group Chief Executive at Eskom.
- 16 Mr Molefe was the Group Chief Executive at Eskom. He resigned after the erstwhile Public Protector released her "State of Capture" report, in which he was implicated. He was employed at Eskom for two and a half years.
- 17 The Eskom Board of Directors recommended to the Minister that Mr Molefe be paid R30 million in pension benefits. The Minister rejected the proposal. Instead, the Minister has accepted a proposal to reappoint or re-instate Mr Molefe to the

position of Group Chief Executive because – according to the Minister herself - it “represents a significantly better value proposition to the South African fiscus”.

- 18 Because Mr Molefe’s employment terminated when he resigned previously, the recent decision of the Minister purporting to “re-instate” Mr Molefe amounts to a fresh (purported) appointment of a Group Chief Executive at Eskom. The appointment/reinstatement of Mr Molefe is in breach of the requirements of the relevant legal framework and is irrational.
- 19 The Minister ought instead to have accepted neither the proposal of payment of R30 million in pension benefits to Mr Molefe, nor the proposal that he be reinstated to the position of Group Chief Executive at Eskom. If she had acted lawfully and rationally, we submit that the Minister ought instead to have rejected both options, for they were both unjustifiable and unlawful options.
- 20 In the remainder of this affidavit I shall address the following:
 - 20.1 Factual background.
 - 20.2 Urgency.
 - 20.3 The legal framework.
 - 20.4 The unlawfulness of the Minister’s decision.
 - 20.5 The requirements for interim interdictory relief.

FACTUAL BACKGROUND

21 On 2 November 2016 the Public Protector released a report entitled “State of Capture” concerning an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt awarding of state contracts and benefits to the Gupta family’s businesses.

22 The report made several references to Mr Molefe and made mention of “*persistent allegations regarding an alleged cozy relationship between Mr Brian Molefe and the Gupta family*” (page 17 of the report). Because of its length, and in order to avoid unnecessarily burdening the papers, I have not attached a copy of the Public Protector’s report to this affidavit. However, a copy of the report will be made available to the Court at or before the hearing of this application if necessary or if requested. For the sake of brevity I attach only the relevant portions of the report listed below.

23 In summary, the report noted the following key observations or allegations regarding Mr Molefe’s relationship with the Gupta family and his previous employment at Eskom:

23.1 The Public Protector investigated alleged irregularities in the awarding of contracts by Eskom to Tegeta Exploration and Resources (“Tegeta”) and

contracts awarded by Eskom to Optimum Coal Mine (“Optimum”) (page 53 of the report).

23.2 Mr Molefe was appointed as the Group Chief Executive of Eskom on 25 September 2015 (page 230 of the report).

23.3 President Zuma’s son, Mr Duduzane Zuma, is a business partner of the Gupta family through an entity called Mabengela Investments (“Mabengela”). Mabengela has a 28.5% interest in Tegeta. Mr D. Zuma is a Director of Mabengela. Members of the Gupta family and Mr D. Zuma have secured major contracts with Eskom through Tegeta. Tegeta has secured a 10 year coal supply agreement with Eskom to supply coal to the Majuba Power station. The entity has also secured contracts with Eskom to supply coal to the Hendrina and Arnot power stations (page 86 of the report).

23.4 There are persistent allegations regarding an allegedly cosy relationship between Mr Molefe and the Gupta family. Such allegations are backed by evidence (page 17 of the report).

23.5 Mr Molefe is friends with members of the Gupta family. One member of the family noted that Mr Molefe is a “*very good friend*” and often visits the Gupta family home in Saxonwold (page 86 of the report).

23.6 Between 2 August 2015 and 22 March 2016 Mr Molefe called Mr Ajay Gupta 44 times, while Mr Gupta called Mr Molefe 14 times (page 123 of the report).

- 23.7 Between 23 March 2016 and 30 April 2016, Ms Ragavan made 11 calls and sent 4 text messages to Mr Molefe (page 123 of the report).
- 23.8 Mr Molefe can be placed in the Saxonwold area on 19 occasions between 5 August 2015 and 17 November 2015 (page 123 of the report).
- 23.9 Mr Molefe had a distinct line of communication between the Gupta family and directors of their companies. Mr Molefe did not declare his relationship with the Gupta family (page 303 of the report).
- 23.10 The Public Protector recommended that a judicial commission of inquiry be appointed to investigate the various allegations set out in the State of Capture Report.
- 24 On 11 November 2016 Mr Molefe released a statement relating to the Public Protector's report. In the statement, a copy of which is attached as annexure **JS1**, Mr Molefe indicated *inter alia* that:
- "I have, in the interests of good corporate governance, decided to leave my employ at Eskom from 1 January 2017. I do so voluntarily..."*
(emphasis added)
- and
- "I will take time off to reflect before I decided on my next career move."*
- and
- "I go now, because it is in the interests of Eskom and the public it serves, that I do so."*
- 25 On the same day Eskom released a statement entitled "Eskom GCE Brian Molefe voluntarily steps down" in which it announced "*a decision by Eskom Group Chief Executive Brian Molefe to step down in the interest of good corporate governance*". I attach a copy of the statement as annexure **JS2**.

- 26 Also on the same day, the Minister published a statement entitled “*Public Enterprises Minister Lynne Brown notes resignation of Brian Molefe*” in which she indicated *inter alia* that she respected Mr Molefe’s decision to resign from Eskom. I attach a copy of the press statement as annexure **JS3**.
- 27 On 16 November 2016, the DA announced that it would the following day lay criminal charges against Mr Molefe in terms of the Public Finance Management Act 1 of 1999, the Prevention and Combatting of Corrupt Activities Act 12 of 2004 and the Powers, Privileges and Immunities of Parliament and Provincial Legislature Act 4 of 2004. I attach a copy of the press statement as annexure **JS4**.
- 28 Shortly afterwards, on 30 November 2016, the Minister released a statement indicating *inter alia* that the Minister had approved the Eskom Board’s recommendation to appoint the erstwhile Group Executive: Generation, Mr Matshela Koko, as acting Group Chief Executive of Eskom with effect from 1 December 2016. I attach a copy of the press statement as annexure **JS5**.
- 29 On 1 January 2017 Mr Molefe departed Eskom. He was employed at Eskom for approximately two and a half years. His employment terminated by virtue of his resignation, which was accepted and confirmed by Eskom’s Board and the Minister. All agreed that such termination was in the interest of good governance at Eskom. Having regard to the fact that Eskom, as a public entity using public funds and providing public services, is an organ of state, it is clear that all concerned – including Mr Molefe, Eskom and its board, as well as the Minister, were agreed that Mr Molefe’s departure from office as Group Chief Executive

was in the public interest. [I submit that this was plainly correct, for it was – and is – unacceptable, and contrary to the principles of sound public administration, that a person who is the subject of such serious allegations and concerns as are raised in the Public Protector’s State of Capture Report, which she recommended should be investigated by a judicial Commission of Inquiry, should continue in office until those allegations and concerns were properly and fully investigated and satisfactorily resolved. This is particularly so because the controversial transactions raised in the Report, and other future transactions, involving the expenditure of vast sums of public money, cannot - in an transparent and accountable system of governance - continue to be overseen and influenced by such a person under suspicion and investigation.]

- 30 Eskom duly advertised the position of Chief Executive. The closing date for applications for the position was 20 March 2017. I attach as annexure **JS6** an image of such an advertisement in a newspaper. Presumably Eskom proceeded to receive and consider applications for the appointment of a suitable person to that position.
- 31 It was later reported that Mr Molefe received – or was to receive - a R30 million payment or “golden handshake” from Eskom. I attach as annexure **JS7** an article published on the Sunday Times website on 16 April 2017 alleging that the payment had been made to Mr Molefe.
- 32 The DA requested Mr Molefe’s employment contract on 18 April 2017 in terms of the Promotion to Access to Information Act 2 of 2000 but did not receive a response to the request.

33 On 23 April 2017 the Minister published a statement in which she indicated *inter alia* that she declined a proposal by Eskom to pay Mr Molefe a R30 million pension payout. She also indicated that:

"I found the argument presented by the Board on why the pension arrangement was conceived lacking in legal rationale, and it cannot be substantiated as a performance reward because Mr Molefe has already been granted a performance bonus for his contribution to the turnaround of Eskom."

and

"I have instructed the Board to urgently engage Mr Molefe and report back to me with an appropriate pension proposal within seven days."

[underlining added]

34 I attach a copy of the press statement as annexure **JS8**.

35 On 13 May 2017 Eskom published on its website a statement by the Minister regarding the decision by the Eskom Board on the pension of Mr Molefe. I attach a copy of the statement as annexure **JS9**. The statement states as follows:

"This week, the Board of Eskom briefed me on the outcome of its consultations with former Group Chief Executive Mr Brian Molefe following my request that the proposed pension pay-out to Mr Molefe be re-evaluated.

After considering various options, the Board proposed that Mr Molefe returns all monies received on his departure from Eskom on 1 January 2017 and is reinstated as Group Chief Executive with immediate effect.

In terms of the Board's proposal, Mr Molefe agreed to serve out the remainder of his original contract and to reconsider the terms of his contract that resulted in the previous pension arrangement.

I believe that Eskom will benefit from the return to the helm of the man primarily responsible for the company's turnaround in 2015/2016, and that the Board's proposal ultimately represents a significantly better

value proposition to the South African fiscus than the previous pension proposal.

I informed the Board I was satisfied with its re-evaluation process and recognised the merit in its proposal – on the proviso of its legality.

However, this matter has raised an important broader issue relating to State Owned Companies. I have asked my Department to work with the State Owned Companies to ensure that the pension packages negotiated with Executives at State-Owned Companies are in line with the Cabinet approved Remuneration Standards.

In a related development, the Board has briefed me on the status of the investigation into allegations of impropriety regarding Eskom's acting CE, Matshela Koko. The Board appointed a firm of attorneys to conduct the probe independently. The appointed firm has requested more time to complete its work. The Board is of the view that this extra time should be granted. In the interest of the process, the Interim Group Chief Executive has decided to take leave until the investigation is finalised by mid-June. I support the Acting CE's decision.

I would like to assure South Africans that the final investigative report will be transparently handled, and firm action will be taken against Mr Koko should evidence of wrongdoing be discovered.

Finally, I would like to reiterate my call for a decisive investigation into allegations of maladministration raised in various reports, including the former Public Protector's State of Capture report. Clouds of unproven allegations and counter-allegations are doing State Owned Companies and our country a great disservice.” (emphasis added)

36 The remainder of Mr Molefe’s original contract term at Eskom would be two and a half years, as indicated by the Minister at a press conference on 13 May 2017.

The original employment contract term was five years.

37 It appears therefore that Mr Molefe has been “reinstated” to the position of Eskom Group Chief Executive in order to “serve out the remainder of his original

contract” because it is a “significantly better value proposition to the South African fiscus than the previous pension proposal”.

38 I am advised that the decision of the Minister to “re-instate” Mr Molefe on this basis is irrational and is non-compliant with the relevant provisions of the applicable legal framework. Therefore, the decision to re-instate Mr Molefe is unlawful and falls to be reviewed and set aside.

URGENCY

39 This application has been brought on an urgent basis.

40 The Minister’s reinstatement of Mr Molefe to the position of Group Chief Executive at Eskom came to light on Friday, 12 May 2017. Mr Molefe has been re-instated with immediate effect, and will thus return to employment at Eskom imminently.

41 In Part B the DA seeks to review and set aside the decision by the Minister to reinstate Mr Molefe. On Molefe’s own version, it is in the interests of Eskom and good corporate governance, and indeed in the public interest, that Mr Molefe no longer be employed at Eskom.

42 Mr Molefe resigned from Eskom in order to clear his name after the allegations concerning his allegedly “cosy” (which implied inappropriate) relationship with the Gupta family were made by the Public Protector.

- 43 In his statement published on 11 November 2016 Mr Molefe stated categorically that it was in the interests of Eskom and the public that he resigns from Eskom. In its statement published on the same day Eskom noted that Mr Molefe was stepping down in the interest of good corporate governance and indicated that the decision was “understandable”. Also on the same day, the Minister indicated in her statement that she respected Mr Molefe’s decision to resign. It is thus common cause between all the parties to this application that the re-instatement of Mr Molefe to the position of Group Chief Executive at Eskom is not in the public interest, in the interests of good corporate governance or in the interests of Eskom.
- 44 It is therefore common cause that Eskom and the public would suffer harm if Mr Molefe were to remain in (or resume) that position.
- 45 If Mr Molefe is permitted to return to the position of Group Chief Executive at Eskom for any period of time, the DA will be unable to obtain effective redress at a hearing in due course. That is so because the harm which will be caused to Eskom, to the public and to the interests of good corporate governance, by Mr Molefe’s re-instatement will already have been done. Any finding in the DA’s favour at a hearing in due course will be unlikely to undo the harm caused to the South African fiscus and to the interests of Eskom and the public in the meantime.
- 46 It is thus imperative that the relief sought by the DA be determined as quickly as possible in order to negate the imminent and irreparable harm to Eskom, to the public and to the interests of good corporate governance. This is particularly so

in light of the allegations by the Public Protector in her report on state capture of an irregular relationship between Mr Molefe and the Gupta family.

LEGAL FRAMEWORK

47 Eskom is a Major Public Entity listed in Schedule 2 of the Public Finance Management Act 1 of 1999 (“PFMA”).

48 In terms of section 49(2)(a) of the PFMA, the Board of Eskom is its accounting authority.

49 Section 50 of the PFMA provides for the fiduciary duties of accounting authorities for public entities as follows:

“50 Fiduciary duties of accounting authorities

- (1) *The accounting authority for a public entity must-*
 - (a) *exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;*
 - (b) *act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;*
 - (c) *on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and*
 - (d) *seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.*
- (2) *A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not-*

- (a) *act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or*
 - (b) *use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.*
- (3) *A member of an accounting authority must-*
- (a) *disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and*
 - (b) *withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant.” (own emphasis)*

50 Section 51 of the PFMA provides for the general responsibilities of accounting authorities of public entities as follows:

“51 General responsibilities of accounting authorities

- (1) *An accounting authority for a public entity-*
- (a) *must ensure that that public entity has and maintains-*
 - (i) *effective, efficient and transparent systems of financial and risk management and internal control;*
 - (ii) *a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and*
 - (iii) *an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;*
 - (iv) *a system for properly evaluating all major capital projects prior to a final decision on the project;*
 - (b) *must take effective and appropriate steps to-*
 - (i) *collect all revenue due to the public entity concerned; and*

- (ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and
 - (iii) manage available working capital efficiently and economically;
 - (c) *is responsible for the management, including the safeguarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;*
 - (d) *must comply with any tax, levy, duty, pension and audit commitments as required by legislation;*
 - (e) must take effective and appropriate disciplinary steps against any employee of the public entity who-
 - (i) *contravenes or fails to comply with a provision of this Act;*
 - (ii) commits an act which undermines the financial management and internal control system of the public entity; or
 - (iii) *makes or permits an irregular expenditure or a fruitless and wasteful expenditure;*
 - (f) *is responsible for the submission by the public entity of all reports, returns, notices and other information to Parliament or the relevant provincial legislature and to the relevant executive authority or treasury, as may be required by this Act;*
 - (g) *must promptly inform the National Treasury on any new entity which that public entity intends to establish or in the establishment of which it takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal establishment; and*
 - (h) *must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity.*
- (2) *If an accounting authority is unable to comply with any of the responsibilities determined for an accounting authority in this Part, the accounting authority must promptly report the inability, together with reasons, to the relevant executive authority and treasury.” (own emphasis)*

51 Section 3(1) of the Eskom Conversion Act 13 of 2001 provides that Eskom is deemed to be a public company incorporated in terms of the Companies Act 1973.

52 Section 6 of the Eskom Conversion Act provides as follows:

6 Memorandum and articles of association of Eskom

- (1) The Registrar of Companies, appointed in terms of section 7 of the Companies Act, must, on the date of conversion, register the memorandum and the articles of association of Eskom in terms of section 63 (1) of the Companies Act, but no fee is payable in respect of such registration.*
- (2) The memorandum and the articles of association of Eskom must be as determined by the Minister.*
- (3) The Minister may publish such articles of association in the Gazette for public comment and must table them before Parliament.*
- (4) The Minister must enter into a Shareholder compact with Eskom Holdings Limited.*
- (5) When entering into the Shareholder compact as well as in determining the articles of association, the Minister must take into account the following:
 - (a) The developmental role of Eskom Holdings Limited; and*
 - (b) the promotion of universal access to, and the provision of, affordable electricity, taking into account the cost of electricity, financial sustainability and the competitiveness of Eskom.”**

53 I attach a copy of Eskom’s Memorandum of Incorporation (“MOI”) as annexure **JS10**. In terms of the MOI, the Government is the sole shareholder of Eskom and the rights attached to those shares are exercised by the Minister.

54 Clause 3.6 of the MOI provides that:

- “3.6 The Company [Eskom] shall not:*
3.6.1 appoint to or remove a Director from the Board; or

- 3.6.2 appoint or remove the Chairperson of the Board, Group Chief Executive or Group Chief Financial Officer other than as provided for in terms of this MOI.” (own emphasis)

55 Clause 14.3 of the MOI provides that:

“14.3 Process of appointment and removal of the Group Chief Executive

- 14.3.1 *The Shareholder shall, on behalf of the Company, have the exclusive power, in exercising its Ownership Control pursuant to the provisions of sec 63 (2) of the PFMA, to appoint and remove the CE as an employee of the Company in accordance with the Guidelines*
- 14.3.2 *The Shareholder may request the Board to identify, nominate and evaluate potential candidates for appointment as the Group Chief Executive in accordance with the Guidelines and to submit a shortlist of candidates to the Shareholder to assist the Shareholder with the appointment.*
- 14.3.3 *The Shareholder’s act of appointment of the Group Chief Executive binds the Company to the exclusion of the Board.*
- 14.3.4 *The Minister shall be noted as a party to any contract of employment between the Company and the Group Chief Executive.*
- 14.3.5 *The Group Chief Executive shall report to the Board and shall only become an executive Director of the Company if appointed to the Board by the Shareholder in terms of clause 14.1.1 of this MOI.*
- 14.3.6 *The Shareholder shall, on behalf of the Company have the exclusive power to remove the Group Chief Executive as an employee of the Company which removal would constitute a dismissal as envisaged in terms of Section 186(1)(a) of the Labour Relations Act 66 of 1995 (“LRA”). Consequently, the provisions of the LRA apply to any such removal.”*

56 The Eskom Pension and Provident Fund (“EPPF”) is a defined benefit pension fund that is registered as a self-administered pension fund in terms of the Pension Funds Act 24 of 1956 and approved as a pension fund in terms of the Income Tax Act 58 of 1962. I attach a copy of the Revised Rules of the EPPF (in

relevant part) as annexure **JS11**. A complete copy of the Rules can be made available to the Court at or before the hearing of this application if necessary or if requested.

57 The Rules provide for the calculation of member contributions in section 17. Rule 17(1) provides that every member shall contribute to the fund 7.3% of their pensionable emoluments. Rule 21 (1) provides that Eskom will contribute to the fund up to 13.5% of their pensionable emoluments. Eskom will contribute to the fund 12.25% of their pensionable emoluments with an addition 1.25% of the pensionable emoluments of certain employees.

58 Rule 23 provides that a member who has attained a pensionable age (65) shall retire from the service and cease to be a member. Rule 24 provides that the annual pension payable to a retired member shall be 1,085/600 of their final average emoluments per month of pensionable service.

59 Mr Molefe has not yet reached pensionable age.

60 Rule 24 provides for early retirement as follows:

“24 *Notwithstanding the provisions of rule 23, a MEMBER may retire from the SERVICE after attaining the age of 55 years, in which case he shall be entitled, as from the date of his retirement, to a PENSION in respect of his PENSIONABLE SERVICE to the date of retirement calculated in terms of rule 22 reduced by a factor equal to thirteen-fortieths of one per cent for each month by which the period from the date of his retirement to the date on which he would have attained the PENSIONABLE AGE exceeds twenty-four months...*”

61 Mr Molefe could not have taken early retirement as he has not turned 55 yet. Mr Molefe is currently 50 years old. Therefore, Mr Molefe could not have retired or taken early retirement. He did not purport, at the time, to take early retirement, nor could this have been done legally. The evidence – in particular the statements of Mr Molefe himself, Eskom and the Minister - shows that Mr Molefe did not take early retirement, but that in fact he resigned.

62 Therefore, Rule 30 is applicable. Rule 30(1) 1. provides as follows:

“RESIGNATION

30(1) 1. Subject to the provisions of subsection (2), if a MEMBER resigns voluntarily from the SERVICE before attaining PENSIONABLE AGE, or leaves the SERVICE for any reason other than those detailed elsewhere in these rules, he shall, subject to the provisions of rule 40, be entitled to a benefit equal to the amount of his ACCUMULATED CONTRIBUTIONS; provided that the payment of a resignation benefit for MEMBER’S [sic] aged 55 years and older shall be subject to the South African Revenue’s Services General Note 4 and or any other General or Practice Note as shall be published by the South African Revenue Service from time to time.

...

2. If a MEMBER becomes entitled to a benefit in terms of this rules, he may elect instead that the BOARD shall pay to him an amount not exceeding the amount which can be taken as a tax-free withdrawal benefit in terms of the Income Tax Act, and that the balance of the actuarial value in respect of his SERVICE, as determined by the ACTUARY be deemed to be a voluntary contribution made by him on the date of leaving the SERVICE. Provided that in such circumstances the MEMBER shall become a DEFERRED PENSIONER and his deemed voluntary contributions shall be dealt with in terms of the provisions of rule 18(7).” (own emphasis)

63 “Accumulated Contributions” are defined in the Rules as “*the MEMBER’S CONTRIBUTIONS with interest determined at such rates and on such basis as,*

acting on the advice of the ACTUARY, the BOARD may from time to time determine”.

64 “Contributions” are defined in the Rules as the *“amounts paid or payable by a MEMBER to the FUND, exclusive of interest and exclusive of contributions paid in terms of rule 18”.*

65 Rule 37(2) provides that *“No person shall have any claim concerning the FUND either upon the FUND or against the BOARD or an EMPLOYER except in accordance with these RULES.”*

66 The following is clear from the factual background and legal framework set out above:

66.1 Mr Molefe resigned from Eskom. His resignation was accepted by the Minister, and his position was advertised. In addition, an acting Group Chief Executive was appointed by the Minister.

66.2 Despite the employment relationship between Mr Molefe and Eskom coming to an end and steps being taken to appoint someone in his place, the Minister has sought to resuscitate the employment relationship and “re-instate” Mr Molefe without following any formal appointment process.

66.3 She does so purely as an alternative to paying Mr Molefe a R30 million pension because, according to her, it would be a “significantly better value proposition”.

- 66.4 In terms of the EPPF Rules, however, Mr Molefe is only entitled to his accumulated pension fund contributions because he resigned voluntarily. It is highly unlikely – if not inconceivable - that Mr Molefe’s accumulated contributions would amount to R30 million in approximately two and a half years. Therefore, Mr Molefe could not have been entitled to a R30 million pension payout. This is reinforced by the fact that the proposal for the R30 million payout was never claimed (at least in the public statements released) to be an automatic entitlement but rather a mere Board proposal requiring the Minister’s approval. If it had been an automatic entitlement, there would have been no need for or basis for the Minister’s approval. In any event, the Minister cannot lawfully approve a payment of pension benefits which is not in accordance with the EPPF rules. Those rules cannot be interpreted to entitle Mr Molefe to anything of the order of a R30 million payout.
- 66.5 Even if Mr Molefe were somehow arguably entitled to such a high pension payout (which we deny), the EPPF Rules make no provision for Mr Molefe’s reinstatement as an alternative to receiving a pension payout.
- 67 Accordingly, the Minister’s decision to appoint and/or reinstate Mr Molefe to the position of Group Chief Executive at Eskom is unlawful and falls to be reviewed and set aside on the grounds which are set out below.

THE DECISION IS UNLAWFUL

68 The Minister's decision to appoint Mr Molefe to the position of Group Chief Executive at Eskom is unlawful on at least two grounds:

68.1 First, the Minister is not empowered to do so by the relevant legal framework and empowering provisions.

68.2 The appointment of Mr Molefe is irrational because it is not rationally connected to the purpose for which it was taken.

The Minister has acted in breach of the relevant empowering provisions

69 The Minister's "re-instatement" of Mr Molefe breaches the provisions of Eskom's MOI and the EPPF Rules.

70 The Minister's decision purports effectively to appoint Mr Molefe afresh to the position of Group Chief Executive at Eskom. The Minister has, in doing so, purported to resuscitate an employment relationship which was terminated voluntarily by the employee, Mr Molefe – by his resignation, which was accepted and confirmed, and acted upon.

71 The Minister has failed to comply with the requirements and guidelines in Eskom's MOI in respect of the appointment of a Group Chief Executive.

72 In addition, the provisions of the EPPF Rules do not provide for re-instatement of employment as an alternative to receiving a pension payout. The only

alternative to receiving a pension benefit which is provided for in the EPPF Rules is contained in Rule 30(2). In terms of that Rule, a member may instead elect to receive a different amount, comprising an amount not exceeding an amount which can be taken as a tax-free withdrawal benefit in the terms of the Income Tax Act and a balance deemed to be a voluntary contribution.

73 Therefore, the Minister is not empowered unilaterally to re-instate Mr Molefe's terminated employment contract as an alternative to payment of an unacceptably high pension benefit due to him.

74 In any event, Mr Molefe does not appear to be entitled to a pension benefit of R30 million. Mr Molefe's pension benefit must be calculated in accordance with the EPPF Rules.

74.1 Mr Molefe is entitled to a pension benefit equal to the amount of his accumulated contributions because he resigned voluntarily.

74.2 Accumulated contributions are the member's contributions with interest.

74.3 Rule 17(1) provides that in respect of member contributions, every member shall contribute to the fund 7.3% of their pensionable emoluments.

74.4 It is inconceivable – and it is specifically disputed - that Mr Molefe's accumulated contributions could lawfully amount to R30 million over the period of two and a half years at which he was employed at Eskom as the Group Chief Executive.

- 75 The Minister is not empowered to appoint Mr Molefe to the position of Group Chief Executive at Eskom as an alternative to payment of a pension benefit to him. She has further breached the relevant empowering provisions by appointing Mr Molefe without following the correct process and guidelines.
- 76 However, even if Mr Molefe's appointment arguably did not breach any empowering provisions, his appointment is nevertheless irrational and falls to be reviewed and set aside on that basis too, an aspect to which we now turn.

The Minister's decision is irrational

- 77 I am advised that the Minister's decision constitutes an exercise of public power and must therefore be rational. The Minister's appointment of Mr Molefe to the position of Group Chief Executive is irrational.
- 78 I am advised that in order to be rational the Minister's decision must be rationally related to the objective sought to be achieved.
- 79 The Minister has indicated that the objective of appointing Mr Molefe is to ensure a better value proposition for the South African fiscus. His appointment however is not rationally related to benefitting the South African fiscus. On the contrary, the appointment of Mr Molefe to the position of Group Chief Executive is harmful to the South African fiscus.
- 80 It is common cause – and particularly apparent from the statements issued at the time of his resignation by Mr Molefe himself, Eskom's Board and the Minister -

that the re-instatement of Mr Molefe to the position of Group Chief Executive at Eskom is not in the public interest, in the interests of good corporate governance or in the interests of Eskom. Nothing has changed since the public statements were made, to change that fact. Therefore, the re-instatement of Mr Molefe cannot be beneficial to the South African fiscus. This is particularly so where Mr Molefe has no entitlement to the R30 million payout.

81 The re-instatement of Mr Molefe is thus inimical to the purpose for which the Minister re-instated him. The decision of the Minister to appoint Mr Molefe to the position of Group Chief Executive at Eskom is thus irrational.

82 The Minister acted irrationally in choosing to reinstate Mr Molefe as an alternative, “better value proposition”. The Minister has stated publicly that she “cannot support” the Eskom Board’s proposed pension payout for Mr Molefe. She stated on 23 April 2017 that:

“I found the argument presented by the Board on why the pension arrangement was conceived lacking in legal rationale, and it cannot be substantiated as a performance reward because Mr Molefe has already been granted a performance bonus for his contribution to the turnaround of Eskom. Nor is the proposed pension payout justifiable in light of the current financial challenges faced not only by State-Owned Companies (SOCs), but by the country as a whole.”

83 The Minister therefore had a third alternative – which was the only realistic rational option - available to her in considering the Board’s proposal of a R30 million pension payout. Given that there was no legal rationale for the pension arrangement and it was unjustifiable, the Minister could have, and should have, simply refused to approve the pension arrangement. There is no rational reason why the Minister was required to find a “better value proposition” or alternative

solution to an unlawful proposal. The correct approach ought to have been for the Minister to refuse approval of the pension payout proposal outright, without any reinstatement or re-appointment.

84 If the R30 million pension proposal had no legal rationale and was unlawful, it could not properly be regarded as constituting a burden on the South African fiscus, nor could any reinstatement of Mr Molefe be regarded rationally as a “better value proposition”. There was no obligation on the Minister to incur either burden on behalf of Eskom.

85 Therefore, the Minister’s decision to reinstate Mr Molefe as an alternative to an unlawful pension payout is irrational.

86 It is unclear from the public statements which have been issued, as well as media reports which have been published, whether Mr Molefe may in fact already have received part or possibly all of the R30 million payout – despite the fact that there is no lawful basis for it, and in any event approval was never granted for the proposed payout by the Minister. The Respondents are called upon to clarify the true factual position in this regard. To the extent that any such payment has been made, it was unlawful and should be repaid forthwith. An appropriate prayer for such repayment is included in the Notice of Motion.

THE REQUIREMENTS FOR INTERIM RELIEF (NOTICE OF MOTION PART A)

87 I am advised that in order to be successful in an application for interim interdictory relief, the DA must establish that it has a prima facie right, that it has a reasonable

apprehension that it will suffer irreparable harm if relief is not granted, that the balance of convenience favours the granting of interim relief and that it has no satisfactory alternative remedy. Each of these requirements is addressed in turn below.

Prima facie right

88 I am advised that the DA has established a strong prima facie right to review and set aside the decision of the Minister to appoint and/or reinstate Mr Molefe to the position of Group Chief Executive at Eskom on the basis that the decision is unlawful and irrational.

Reasonable apprehension of irreparable harm

89 It is common cause that it is in the interests of Eskom and good corporate governance, and indeed in the public interest, that Mr Molefe no longer be employed at Eskom. Therefore, it is common cause that there is a reasonable apprehension that harm will occur to Eskom, the public interest and the interests of good corporate governance if Mr Molefe continues to be employed at Eskom.

90 Mr Molefe resigned from Eskom in order to clear his name after the allegations concerning his allegedly cosy (that is, improper) relationship with the Gupta family were made by the Public Protector. He has not yet done so, nor has he sought to review the Public Protector's report. Therefore, there is in addition still a reasonable apprehension, based on the as yet uncontradicted observations of the Public Protector in her state capture report, that Mr Molefe may have an

inappropriate relationship with the Gupta family from which the Gupta family may stand to benefit at the expense of Eskom and the public purse.

- 91 In a press conference on 13 May 2017, the Minister herself indicated in response to a question from a reporter regarding whether Mr Molefe had her support, that *“Well, I mean, I can’t give anyone unequivocal support. I say you come back, you do your job well, when you prove your job well done then I give you my support.”* It is thus apparent that even the Minister cannot yet give full support to Mr Molefe’s appointment, but instead intends to allow him to prove himself.
- 92 If Mr Molefe is permitted to return to Eskom as the Group Chief Executive, his employment in that position will present a significant threat to the good corporate governance of Eskom.
- 93 Mr Molefe resigned from Eskom in order to clear his name, but he has not yet done so. The allegations of an irregular relationship between Mr Molefe and the Gupta family remain unchallenged. The Minister herself has reiterated that the Public Protector’s report calls for an investigation into Mr Molefe’s conduct. Mr Molefe’s role as Group Chief Executive at Eskom has already been marred by controversy and allegations of impropriety. By his own admission his continued employment at Eskom would be detrimental to the entity’s good corporate governance. Therefore, Mr Molefe’s reinstatement at Eskom jeopardises the good governance of the entity by exposing all future exercises of power and performance of functions by Mr Molefe to the same scrutiny and potential for unlawfulness.

- 94 If it is found that Mr Molefe acted unlawfully in the exercise of any of his powers or performance of any of his functions as Group Chief Executive at Eskom at a later stage, it may be difficult or impossible for the Board or the Minister to correct, rescind or change any unlawful decisions or actions by Mr Molefe.
- 95 It is unconscionable and inappropriate that a Group Chief Executive should continue to perform functions and exercise powers while he is under investigation. The decision of the Minister to reinstate Mr Molefe presupposes that he will resume his duties and will not be suspended pending investigation. This itself contravenes principles of good governance, and is inimical to the requirements and spirit of the PFMA, as well as the basic values and principles governing public administration laid down in s 195 of the Constitution of the Republic of South Africa, 1996.
- 96 The Public Protector and the Minister have called for full investigations into transactions overseen by Mr Molefe. The reinstatement of Mr Molefe to the position of Group Chief Executive places Mr Molefe in a position to frustrate or obstruct any such investigations against him.
- 97 The reinstatement of Mr Molefe also directly contravenes the fiduciary duties of the Eskom Board as the accounting authority for the entity. By reinstating a Group Chief Executive whose name has not been cleared and requires investigation, and who is by his own admission a threat to the good governance of Eskom, the Board would not be acting in the best interests of the public entity.

- 98 The Board would further fail in its general responsibility to maintain effective, efficient and transparent risk management systems within Eskom, or its responsibility to take appropriate disciplinary steps against an employee who has undermined the financial management of the entity. The Minister has already indicated that Mr Molefe will be required to return all monies received by him from Eskom since his departure on 1 January 2017. The Board will be obliged to enforce that obligation, which will further jeopardise the good governance of the entity by creating a conflict of interests between the Board and the Group Chief Executive.
- 99 Therefore, if interim relief is not granted and Mr Molefe is reinstated as the Group Chief Executive at Eskom, the Board will have been permitted to breach its fiduciary and general duties twice – first by entering into an unlawful agreement in terms of which Mr Molefe sought a R30 million pension payout and then by reinstating Mr Molefe to the position of Group Chief Executive. There is thus a reasonable apprehension that Mr Molefe’s reinstatement may cause irreparable harm to Eskom’s good governance.

The balance of convenience favours the granting of interim relief

- 100 If interim interdictory relief is granted, Mr Molefe will be prevented from performing any duties and/or functions or receiving any benefits or entitlements deriving from or associated with the position of Group Chief Executive at Eskom.
- 101 Mr Molefe voluntarily resigned from the same position at Eskom last year. On his own version, Mr Molefe’s resignation was in the interests of Eskom, the interests

of good corporate governance, and the public interest. That fact remains unchanged. If interim interdictory relief is granted, the status quo (Mr Molefe's voluntary resignation from Eskom) will be maintained.

102 On the other hand, if interim interdictory relief is not granted, Mr Molefe will be reinstated to the position of Group Chief Executive at Eskom, a state of affairs which Mr Molefe agrees will not be in the interests of Eskom, good governance or the public.

No satisfactory alternative remedy

103 In terms of Eskom's MOI, the Minister has the exclusive power to appoint and remove the Group Chief Executive as an employee of Eskom. The MOI makes no provision for any challenge to such a decision.

104 The DA thus has no alternative but to approach this Court for relief.

WHEREFORE the DA prays for an order as set out in the notice of motion.

JAMES SELFE

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at **CAPE TOWN** on this the _____ day of **MAY**

2017, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS