

IN THE DISCIPLINARY HEARING OF:

ESKOM HOLDINGS (SOC) LIMITED

Employer

and

SOLLY TSHITANGANO

Employee

FINDINGS

Introduction

1. In evaluating the employee's reliance upon disclosures to trigger the defence based on the Protected Disclosures Act, 26 of 2000 ("the PDA") and the employer's Whistle Blowing Policy, I ruled on a preliminary basis the following:¹

2.

2.1. I would not be doing justice in making a finding on the *bona fides* of the disclosure application until I have given the CPO the opportunity to deal with the Bowmans charges in their

¹ The preliminary ruling and the reasons for such ruling are set out in the document styled "Preliminary Ruling" dated 11 May 2021.

entirety. Charges 4 – 5, in turn, are interlinked with the conduct, so it is alleged, with charges 1 – 3. The genesis appears to be Econ Oil's relationship with Eskom, and the apparent support by the CPO of the continuation of this relationship after he had joined Eskom in early 2019.

2.2. I accordingly direct that I will hear charges 1–5 of the Bowmans charges and rule upon the disclosure application after I have considered these charges. I would then be in a position to determine the main, dominant, proximate, or most likely, cause for the institution of the disciplinary charges.

2.3. In order to do so, I must come to better terms of the Econ Oil transaction and the CPO's conduct in relation thereto. This will not only enable me to determine (if need be) the proportionality of the potential harm to each of the parties in weighing up the disclosure issues and the underlining issues in the Econ Oil transaction.

Charges 1 - 3

3. These charges are encapsulated in paragraph 1 (1.1 up to 1.19), charge 2 (including 2.1 to 2.10, 2.11, 2.11.1 to 2.11.4, 2.12, 2.13, 2.14 and 2.15), charge 3 (including 3.1 and 3.2, 3.3, 3.4, 3.5, 3.5.1 to 3.5.3, 3.6, 3.7

including 3.7.1 to 3.7.6) of the annexure to the notice of disciplinary hearing, i.e. annexure "A". The particularity making up the charges is comprehensive. In my view, it amounts to this. The employee, in his capacity as CPO of Eskom, breached his common law obligations as employee to advance the interest of Econ Oil to the prejudice of Eskom.

4. Eskom (on its version) is the aggrieved party. Its case is that the CPO owes it a fiduciary duty to work in and not against its interests. This duty, in our law, imports an obligation on the employee to pursue the best interests of the employer in accordance with the policy prescribed by the employer. A breach of fiduciary duty can arise from the manner in which the employee performs her/his duties. Thus, there is a breach of the duty where the employee acts towards someone with whom his employer does business in such a way to affect adversely the relationship between that person and the employer.
5. The employer relied on the evidence of two witnesses, namely David De Villiers ("De Villiers"), the author of the forensic reports which forms the basis for the charges and Ms Nerina Otto ("Otto"), the acting senior legal counsel at Eskom. Both witnesses were cross-examined by Advocate Tema, who appears for the employee. At the close of the employer's case, the employee elected not to present any evidence.

He did not testify, and his counsel informed me that it would be argued on his behalf that the employer failed to discharge the onus to prove misconduct on a balance of probabilities.

6. The findings of the forensic reports remain unchallenged. These findings were never put into dispute at any stage upon becoming available to the CPO, nor in the proceedings before me. I will elaborate upon the employee's defence in these findings. For present purposes, I propose to summarise the essential features of the forensic reports in relation to the CPO and Econ Oil.

Econ Oil

7. Mr Tshitangano was appointed the CPO of Eskom on a general managerial level as from 1 January 2019 on a remuneration package of R2,32 million per annum and substantial benefits set out in his offer of employment.
8. On 20 August 2018, Eskom mandated Bowman Gilfillan Attorneys Inc ("Bowmans") to investigate various allegations of corruption, fraud and financial irregularities on the part of Noluthando Patricia Thandi Marah ("Ms Marah"). Ms Marah was a senior manager, business enablement in the commercial department. She was at executive level in procurement which falls under commercial since 1 October 2008.

9. Ms Marah was suspended on 27 December 2018. The investigation against her included disclosures she made of Eskom's confidential information to third parties, failure to disclose her interests and that of her close family in numerous business ventures and legal entities, as well as her close relationship with Eskom suppliers. For purposes of this enquiry, however, there are three aspects of her conduct which impacts on Econ Oil.

10. First, Econ Oil made monetary payments to Ms Marah. On 4 September 2013, Econ Oil paid R10,000.00 to "Women in Dialogue". This was pursuant to a request she made to Ms Nothemba Mlonzi ("Ms Mlonzi") of Econ Oil. In January 2014, Econ Oil hosted officials of Eskom to an ANC gala dinner, which included Ms Marah. The price for the cheapest table was R150,000.00. On 11 April 2014, Ms Marah solicited from Ms Mlonzi a donation towards the ANC's 2014 National Elections Campaign. Econ Oil paid R100,000.00 on 23 April 2014.

11. Secondly, Ms Marah improperly interfered in the process of awarding tenders. Thus, for instance on 28 June 2017, Mr Mashila² alleges that Ms Mlonzi contacted him and requested him to provide Ms Mlonzi with a competitors' prices. The competitor being FFS. On 29 July 2017, Ms Mlonzi received from Ms Marah an email of a spreadsheet with the

² At the material time, Mr Mashila was the Middle Manager Procurement: Fuel Oil, Gas Lubricants and Chemicals.

tendered and negotiated prices of both Econ Oil and FFS to Ms Mlonzi's private Vodamail account. This spreadsheet contained FFS prices and advantaged Econ Oil's.

12. Thirdly, Ms Marah victimised a subordinate who was not prepared to unlawfully promote Econ Oil. Mr Zulu, a buyer (more specifically Sourcing Specialist: Oil and Gas) at the material time, was involved in the contract management of fuel oil. He had strong reservations that Eskom was overcharged by Econ Oil. I deal with the overcharging issue more fully below. Understandably he was not inclined to extend Econ Oil's contract for another 10 years when, in April 2016, Econ Oil requested a further extension of 10 years after its 5-year contract had expired. It is Eskom's case that Ms Marah intimidated Zulu and another subordinate, Mashila, referred to above (who was Zulu's line manager) and caused Zulu to be removed from the project from Megawatt Park to a power station.

Overcharging by Econ Oil

13. There are detailed findings in the Bowmans report as to how Econ Oil was overpaid. During the period 1 April 2012 to 31 March 2016, Econ Oil was, on preliminary investigations, overpaid in an amount of R358,847,766.00 ("R358 million") by Eskom for products supplied to Eskom. This called for further investigation, in particular the exact

quantum of such overpayment. In annexure 24 to the Bowmans report, the quantification of the overcharging amounts to R1,228,485,123.44 (“R1.2 billion”) for the 5-year commencing 1 April 2012 to 31 March 2017 in respect of products supplied to Eskom.

14. A little more about Econ Oil. This company was incorporated on 12 December 2001. Ms Rossette Nothemba Mlonzi was appointed as a director on 12 December 2001. She remains the sole director and sole shareholder of Econ Oil.
15. Econ Oil is a major supplier of heavy fuel oil to various power stations of Eskom. In October 2017, Econ Oil was the tenth largest supplier to Eskom by value in an amount of R830 million. During the period December 2003 to November 2018, Econ Oil was paid an amount of R15,750,445,447.12 by Eskom.
16. The narrative extracted from the Bowmans report on Econ Oil gives the following account as to its genesis and its present-day influence at Eskom:

“5.4.4.3 We located a document dated 13 September 2013, wherein, *inter alia*, the history of the relationship between Eskom (and Marah in particular) and Econ Oil is outlined.

The relationship between Eskom and Econ Oil dates back to 2002 when the Econ Oil MD, Ms Nothemba Mlonzi attended a conference in Durban on Women in Oil and Energy in South Africa (WOESA) where Generation Commercial Managers, Ms Thandi Marah presented opportunities available for BWOs in

Eskom. The conference was hosted by the then Minister of Minerals and Energy, Phumzile Mlambo-Ngcuka.

One of the identified opportunities, was a fuel oil tender which was due to go out to the market and Econ Oil was amongst the few women's businesses that showed interest and responded to the tender.

During this time, Econ Oil established a strategic relationship with Sasol, and Eskom played an additional coaching role – Econ Oil was advised to look for expert who would train, coach and guide the company. Subsequent to that Econ Oil secured the services of one of the retired experts from Sasol to mentor them.

Eskom has recently awarded a long term (5 year) contract to Econ Oil for 3 clusters estimated at R5,290 billion.

In 2013 Econ Oil opened a Blending Plant. Marah was instrumental in arranging that then Minister (DPE), Mr Gigaba, open the facility.

5.4.4.4 Mlonzi gave a similar narrative in a letter to Eskom on 3 March 2014. Extracts of the said letter are as follows:

In 2001, Eskom sent a delegate to a workshop that was held in Durban under the auspices of WOESA (Women in Oil & Energy South Africa). Having listened to the presentation of this Eskom representative, Nothemba Mlonzi followed her up for a further meeting, as her presentation was following exactly on the interest she had, as she had already registered the company and then marketing and looking for opportunities. She then made a follow up and after the **first meeting the Eskom representative (execution) facilitated a meeting with Eskom technical team to meet with her to explain the technical details and requirements of the supply**. The technical team explained to Nothemba Mlonzi that to qualify for consideration these are the following requirements.

1. Must have a technical person in your company that understands the product, the business of Eskom and the industry;
2. Must be backed by a South Africa Oil major;
3. Must work towards ISO accreditation on all your operations;

On request they gave possible names for mentoring or technical guidance, amongst these names was Johan Loots, who was a retired, having worked for more than 35 years then with Sasol managing the Eskom contract.

Eskom assisted Econ Oil by negotiating with Sasol that Econ Oil be involved in the transportation of fuel oil which is Econ Oil contract. A limited volume of fuel oil was supplied by Econ Oil.

2012 May Econ Oil for the first time was awarded 85% of the volume to supply to Eskom for 5 years.

The reason behind the success in tendering is Eskom policy. Eskom in its tender document puts it categorically that it supports Black Women Owned and Operated entities.

[The Eskom representative referred to above is apparently Marah]

- 5.4.4.5 We interviewed the Chief Engineer (End User), Barker. He was an Eskom bursar and started in Eskom in 1980. He has a Masters degree in Mechanical Engineering, specialising in lubricants and fuels. Barker was involved with the fuel oil contract, since inception.
- 5.4.4.6 Barker informed us that, in his view, Econ Oil did not add any value to the fuel oil process in the beginning, as their offices were located inside Sasol, and all deliveries were done through Sasol. This position has subsequently changed.
- 5.4.4.7 Barker also informed us that during the early 2000s, when Marah was still Purchasing Manager, she was instrumental in bringing Econ Oil on board as a supplier to Eskom. Ms Marah was allegedly also instrumental, together with Mr Charles Kallma, her Line Manager at the time, to move the contract management of Econ Oil from the End User to Commercial.
- 5.4.4.8 Barker informed us that since the early days, Marah played a major role in establishing Econ Oil.
- 5.4.4.9 We were furthermore informed that Marah has been involved with the management of fuel oil contracts even after she was no longer part of the division that dealt with fuel oil.
- 5.4.4.10 Barker further informed us that Marah also tried to influence him to change the technical specifications for the new (2017/2018) tender, by having a requirement that a supplier should have a facility to distil/blend fuel oils. Although Barker did not accede to the request, he is of the view that this would have unduly favoured Econ Oil, *vis-à-vis* other suppliers, and in particular possible new entrants to the market.
- 5.4.4.11 The current Procurement Manager, Mashila, informed us that when he took over from the previous Procurement Manager, Courtney, he started to question/challenge Mlonzi in respect of

various issues. In particular the possible overcharging by Econ Oil. (Courtney retired from Eskom in 2016). As a result of Mashila's actions, his relationship with Mlonzi then started to sour. Mashila further informed us that whenever he took issue with Mlonzi, Marah would come to him, either to resolve the issue, or to reprimand him. He found this to be improper as Marah was supposed to first take the issue up with his Line Manager, Ms Marumo Lekoto, or at least, with Lekoto being present. What was clear to Mashila was that Mlonzi would relay all issues that he had with Econ Oil to Marah and that Marah would then intervene on behalf of Econ Oil. It was further clear to Mashila that Mlonzi and Marah had at least a close relationship. It is, however, of interest to note that Marah did not intervene on behalf of the other supplier, FFS."³

Black empowerment and transformation

17. From the voluminous documentation placed before me, it is clear that Ms Mlonzi and her company, Econ Oil, were earmarked as beneficiaries of Eskom's empowerment and transformation initiatives.
18. Eskom is listed in Schedule 2 as a major public entity in terms of the Public Finance Management Act, 1 of 1999 as amended ("PFMA"). It is an organ of state whose procurement processes involve the exercise of public power as envisaged in section 239 of the Constitution. Eskom is enjoined to initiate and promote black economic empowerment. The preamble to the Broad-Based Black Empowerment Act, 2003 recognises that in order to promote the achievement of the constitutional right to equality, there has to be an increased broad-based and effective participation of black people in the economy. This

³ Bowmans Report dated 29 January 2019.

will promote a higher growth rate, increased employment and more equitable income distribution.

19. This, however, is subject to two limitations. First, the initiatives must fall within the regulatory framework (*ACSA v Imperial Group Ltd & Others* 2020 (4) SA 17 (SCA) (31 January 2020)). Otherwise there is a recipe for abuse and corruption.⁴ Secondly, I would argue, the good intentions of the Constitution and legislation promoting transformation and an increase in the effective participation of the majority of South Africans in the economy, would be negated, if not violated, should black empowerment result in a few becoming super wealthy at the cost of the majority. In more basic terms, in all our endeavours we must ensure that our major institutions (both public and private) are arranged so as to achieve the greatest net balance for all individuals. This is embodied in the principles of utilitarianism and Ubuntu.⁵
20. Econ Oil was overpaid by R1.2 billion. This was during its first 5-year contract for the period 1 April 2012 to 31 March 2017. The new tender process for the 5-year period July 2017 to June 2022 which was for reasons (probably contrived, but I need not make a finding on this issue) scrapped and Eskom, under emergency procurement processes,

⁴ *Allpay Consolidated v CEO, SASSA* 2014 (1) SA 604 – paragraph 27

⁵ John Rawls: Theory of Justice – page 15

continued to access fuel oil predominantly from Econ Oil during the period 1 April 2017 to 30 June 2017. A little background may be useful. For the 5-year period referred to above, 14 power stations were allocated to Econ Oil and 2 power stations allocated to FFS. For the period 1 April 2017 to 30 June 2017, the principles on which fuel oil was sourced was on the basis of the previous 5-year contract.

21. On 17 May 2017, Eskom's Broad Tender Committee (BTC) granted approval for a closed tender for 1 year from 1 July 2017 to 30 June 2018. Only Econ Oil and FFS were requested to bid for the 16 power stations. Econ Oil was allocated 9 power stations and FFS allocated 7 power stations.
22. During the latter part of 2018, a whistle blower sent an email to Eskom's chairperson, the CEO and the COO alleging corruption in the tender process of fuel oil. As I understand the position, Eskom's forensic and assurance unit found that the allegations were meritless.
23. As at January 2019, however, Econ Oil continued delivering to 9 power stations and FFS to 7 power stations.

Eskom behaved badly

24. The conduct of Eskom's Board is not the subject matter of scrutiny before me. I will, however, be remiss in my duties not to make certain

observations about the Board's conduct in relation to Econ Oil. I have been appointed as the chairperson of an internal disciplinary hearing on the conduct of the CPO, Tshitangano, and his relationship with Econ Oil. It is thus fundamental, from my position, that I deal with the matter surrounding Econ Oil holistically and with a view to bring in an improved culture and performance at Eskom.

25. In August 2019, Generation Division recommended to the chairperson of the Investment Finance Committee the conclusion for a 5-year period on an *"as and when required for the supply, delivery and offloading of fuel oil to all Eskom's coal fire power stations"*.⁶ Econ Oil was invited to tender and thereafter awarded a contract.
26. On 28 October 2019, the Board of Eskom authorised the conclusion of contracts for the supply of fuel oil as stated above and this includes Econ Oil as one of the suppliers.
27. But by 28 August 2018, Eskom had mandated Bowmans to investigate various acts of allegations of corruption and financial irregularities involving Ms Marah and Econ Oil. On 29 January 2019, the first Bowmans report is provided which documented an improper, if not corrupt, relationship between Ms Marah and Econ Oil. Ms Mlonzi was already manipulating senior employees at Eskom through her

⁶ Bowmans report – annexure 13

relationship with Ms Marah to promote the interests of Econ Oil at the expense of Eskom.

28. How then does Eskom continue doing business with Econ Oil?
29. The findings of the Bowmans investigation in respect of Econ Oil has not been refuted nor disputed by the CPO before me. In fact, nobody at Eskom has challenged these findings. The CPO pursued complaints to the Board of Eskom, the Minister of Public Enterprises and the President of the Republic of South Africa, but never challenged the findings of the investigations concerning his conduct in relation to Econ Oil.
30. Bribery is a form of corrupt conduct that will not be countenanced by any court of law. It follows that the agreement whereby the bribery was established is to be regarded as immoral and thus void. No claim to enforce performance by either of the parties would be entertained (Nienaber JA in *Extel Industrial (Pty) Ltd & Another v Crown Mills (Pty) Ltd* 1999 (2) SA 719). In this case, however, Eskom is in the same position as Crown Mills because it is an innocent party. Eskom may elect either to enforce the contract or to cancel. The agreement is not void but voidable. The agreement between the briber and the person bribed is void. The follow up agreements between the briber and the innocent party is voidable (page 729I – 730B).

31. Eskom could and should have severed its relationship with Econ Oil in the least. By this time, it had no contract with Econ Oil. It is egregious that Eskom would continue doing business with Econ Oil. In electing not to do business with Econ Oil, Eskom would be exercising a contractual right and not a public power. Contractually, Econ Oil has behaved unlawfully entitling Eskom to terminate the relationship and not to do business with it in the future.⁷
32. In my view, all those who supported Eskom in continuing to do business with Econ Oil after the release of the January 2019 report were either naïve to the extent that their capacity to hold office as director or senior employee be revisited or had an ulterior purpose.
33. **The conduct of the CPO**
34. Mr Tshitangano commences work at Eskom on 2 January 2019 in the position of CPO. Mr De Ruiter is appointed as CEO on 6 January 2020.
35. This is what I gather from the documentation of Eskom made available to me in this enquiry. First on 6 January 2019, the CPO is copied in an email in which Jan Oberholzer describes as a critical issue and it centres around the awaited investigative report of Bowmans into the investigation of Ms Marah and Econ Oil. The CPO was invited to a

⁷ *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others* 2001 (3) SA 1013 SCA at paragraph 18

meeting by way of email dated 7 January 2019 from the then senior legal advisor, Barlett Hewu, on the progress on awarding fuel oil contracts. Secondly on 23 January 2019, Scheepers prepared a submission to Eskom's Board on the *"feedback on procurement transactions that were conditionally approved by the Board at the meeting of 16 October 2018"*. Under item 3.1.5 of this submission dated 30 January 2019 appears the following:

"The transactions where the Board had expressed concern regarding possible impropriety were referred to Eskom's Assurance and Forensic Division as well as Corporate Legal for review and/or advice."

36. Further in item 3.1.7, after making reference to the fact that Eskom's Assurance and Forensic Division, found no impropriety:

"However, after the review by A&F, there were new allegations against an Eskom Senior Manager and one of the companies (Econ Oil Energy (Pty) Limited) recommended for the award of the new fuel oil contract. This matter is still under investigation by Bowman and Gilfillan and a report is expected by 23 January 2019. In the meantime, Econ Oil has been suspended from supplying fuel to Eskom. Only one company, i.e. FFS (Pty) Limited is currently supplying Eskom with fuel oil for all the coal fired power stations on a month-to-month emergency basis until new contracts are approved."

37. Thirdly, the CPO joined the board meeting of 30 January 2019. There was a discussion concerning *"conflict of procurement transaction approval"* and the CPO was mandated by the Board *"to consider each of the contracts in their entirety, taking into consideration the risk to*

the business and, if assured, to make recommendations to the Board for approval and round robin resolution". The CPO was further required to review the fuel oil contracts.

38. Fourthly, Ms Marah, a senior official in procurement, was allowed to retire or resign as at 31 January 2019, leaving intact her pension and other benefits. Fifthly, the Bowmans investigation was suspended by Eskom in the latter part of February 2019.
39. Sixthly, on 20 March 2019, Eskom issued a closed Request For Quotation ("RFQ") to Econ Oil and FFS for the supply of fuel oil. Eskom then concluded shorter contracts with both Econ Oil and FFS for the period 16 May to 15 August 2019.
40. I have to assess the conduct of the CPO in relation to the factors I have stated above bearing in mind clear indications of material irregularities in the relationship between Econ Oil and senior officials of Eskom. In this context, I reiterate that the findings in the Bowmans report on which I rely are unchallenged. In particular, by 29 January 2019, it is recorded that Zulu was concerned that Econ Oil may have been overcharging Eskom. McKinsey's calculations for the period 1 April 2012 to 1 March 2016 demonstrated an overpayment of R358,847,766.00.

41. The CPO did not testify. The version put to Eskom's two employees was to the effect that he was never forwarded the Bowmans report and therefore did not know of the findings adverse to Econ Oil. Both witnesses found this alarming as he was the CPO and the individual in charge of and in control of all material matters affecting procurement. I reject this defence. The objective documents prove that he had knowledge implicating Econ Oil in improper and irregular behaviour. In any event, to date he seems to contend that these irregularities be ignored until, as he argues, a court pronounces thereupon.

42. From the employer's perspective with the knowledge that Econ Oil, as a major supplier, had engaged in irregular, improper and dishonest conduct raised serious concerns on the conduct of the CPO. This is how the CPO behaved:

42.1. Ms Marah should not have been allowed to take retirement. On the contrary, she should have been prosecuted for corruption and like issues. Ours is democratic state (or we conveniently say so). In a constitutional democratic state, wrongdoers are prosecuted on the basis of principles of accountability, transparency and in the quest to distribute the resources of this country to all and not a few select. It is a sad reflection that in January 2019, some years after the Gupta

saga and, in particular the looting of Eskom, that Ms Marah is permitted to walk away with her pension. It may be so that the police are inept in prosecuting her. This does not provide any justification for Eskom failing to take appropriate steps to seize her pension and other civil processes to recover losses which she contributed towards. Without deterrence and accountability, there is little scope for law and order. The CPO, as the head of the department, must take liability.

- 42.2. On 20 March 2019, the CPO permitted further contracts to be awarded to Econ Oil by way of RFQ.
- 42.3. On 18 July 2019, the CPO supported a recommendation to negotiate and conclude a 5-year contract with Econ Oil at a value in excess of R850 million.
43. On the objective facts, the employer was and is entitled to feel aggrieved at the conduct of the CPO. This CPO promoted the interests of Econ Oil to the prejudice of his employer.
44. The chronology of material events objectively further demonstrates that the CPO was intent on promoting the interests of Econ Oil. The CPO signed the recommendation in support of the submission to the Exco chairperson and to the chairperson of the Investment Finance

Committee (“IFC”) in the latter part of July 2019 that the new contract with Econ Oil be concluded. I find it disturbing that senior people in the capacity as the chairperson of the IFC and Exco would not have intervened to prevent further business with Econ Oil. Either they were misled or simply not being alert to what was happening at Eskom.

45. Arising (as I understand the position) from the aforesaid recommendation, Eskom’s Board resolved on 4 November 2019 to award the contract for the supply of 11 power stations to Econ Oil under Corp4786 (“the Corp4786 award”). The CPO took no steps to prevent this. He should have because by now the improper relationship between Econ Oil and Ms Merah as well as the overcharging was well documented. This has a material impact on procurement processes at Eskom and generally Eskom’s reputation. First, the improper relationship tainted the contracts previously awarded to Econ Oil. She had manipulated matters to favour Econ Oil. Not only was this adverse to the interests of Eskom, but to the other tenderers and to the public at large. Secondly, Eskom had overpaid Econ Oil. This, in the wake of substantial abuse by the Gupta saga in relation to Eskom, which forms a substantial portion of public hearings in the Zondo Capture Commission.

46. The suggestions emanating from the documents and questions put by counsel representing the CPO that the irregularities were in relation to a previous tender and not Corp4786 demonstrates the inability of the CPO to come to grips with his responsibilities as a CPO of a major state institution.

The events unfolding in early 2020

47. On 6 January 2020, De Ruiter was appointed as Eskom's Group Chief Executive ("GCE"). This was pursuant to a vigorously debated process in the public domain arising from the problems Eskom found itself in terms of its delivery performance and perverted corruption within its own structures. Under the chairmanship of Ngubane, Eskom was the subject matter of public criticism concerning Eskom's coal contracts being irregularly advanced for the benefit of the Gupta family. In recent reports, the steps taken against Abraham Masango by the authorities reveals the extent of corruption, bribery and wholesale theft by Eskom officials prior to the advent of De Ruiter's appointment.
48. De Ruiter was appointed in the context of the public being assured that electricity supply would be restored and that wastage at Eskom will be abated. This was the public mandate on which De Ruiter took up the appointment at Eskom – a challenging task that requires firm and ruthless execution.

49. The CPO must have been very concerned. Any new scandal at Eskom would be frowned upon by all South Africans. At the end of December 2018, Econ Oil had not been approved as a supplier of product to Eskom. Having regard to the findings of the Bowmans report, this should have been the beginning of Eskom taking legal steps to recover overpayments to Econ Oil. Instead and fortunately for Econ Oil, Tshitangano was appointed as CPO on 2 January 2019. He set on a course to resuscitate Econ Oil as a major supplier of fuel oil to Eskom.
50. Jerome Nthembu, then head of legal at Eskom, terminated the Bowmans investigation in 2019. The CPO was party to this decision. Why? In my view, to promote the interests of Econ Oil. On 14 July 2020, Trengove SC submitted a report to the Eskom Board in which is recorded strong suspicion of collusion between Eskom and Econ Oil worthy of investigation. Trengove SC observed *“Eskom ought not to have awarded a fresh contract to Econ without getting to the bottom of the incriminating evidence. That was all the more so in this case where a large contract was awarded to Econ without any proper technical or financial evaluation of the competing bids.”*
51. In August 2020, Econ Oil embarks on litigation against Eskom. On 19 May 2020 and 12 October 2020, there are two further Bowmans reports implicating Econ Oil in irregular conduct and no action is taken

by the CPO in response thereto. On the contrary, his stance appears to be that until there is a finding by a court of law declaring the contracts with Econ Oil to be improper, he and Eskom are in law dutybound to continue trading with Econ Oil. This is warped reasoning and clearly convenient for the CPO in pursuing the interests of Econ Oil.

52. On 6 November 2020, Ben Theron brought the 12 October 2020 Bowmans report pertinently to the attention of the CPO. A copy of the report was sent to each member of the Supplier Reconsideration Committee on 11 November 2020. On 24 November 2020, Eskom reported the conduct of Ms Marah to the police in terms of section 34 of PRECCA.⁸ The CPO's response was that these were mere allegations and that Econ Oil ought not to be prejudiced thereby. The CPO advised in writing on 23 December 2020 that an urgent RFQ to obtain fuel oil for January and February 2021 should be issued to Econ Oil.

53. On 16 December 2020, Otto forwarded an email to the CPO, in which she makes reference to the Bowmans report of 12 October 2020 and other documents concerning issues with Econ Oil, and in her new found capacity as Acting Head of Legal required feedback as to

⁸ Prevention and Combatting of Corrupt Activities Act 12 of 2004

whether Econ Oil had been suspended in the interim and as to what legal action was contemplated against Econ Oil.

54. The CPO, as indicated above, must have been concerned that De Ruiter would revisit the business with Econ Oil since January 2019 and from which it would be apparent that the CPO was the prominent proponent of the initiatives. He cleverly sought the assistance of De Ruiter in an email of 12 January 2020. He specifically requested De Ruiter to assist him to appoint experts to evaluate fuel oil tenders – he claimed that he had attempted to do that from February 2019. The rest is documented. De Ruiter suggested Werner Mouton, a former employee of Sasol. The CPO supported the appointment. This is dealt with fully in paragraph 16 of my preliminary ruling dated 11 May 2021. For completeness sake, I repeat the contents of paragraphs 16.1 to 16.3 below:

“16.1 De Ruiter was appointed GCE of Eskom in the early part of January 2020 (his appointment was the subject of extensive public debate in the press and in civil society, Eskom was placed under significant pressure to find a leader which will deal with widespread corruption that had permeated within Eskom in the Gupta years. The South African public were disheartened by what had happened in Eskom *apropos* the McKinsey and Trillion transactions, the Gupta controlled on the functioning of Eskom and the huge losses suffered at Eskom at the hands of corrupt officials and avarice business entities. De Ruiter was given the difficult task of putting this organisation back on a footing which could serve the national interest).

16.2 Mouton was recruited to analyse fuel oil bid documents with a view to cancel unworthy contracts and to obtain product for Eskom at a competitive price.

- 16.3 The CPO signed Mouton's fixed-term employment contract on 14 January 2020. The process giving rise to the appointment of Mouton involved the input of the Corporate Specialist: Human Resources, one Dorcas Moloji, who on 8 January 2020 compiled the motivating memorandum and supported his appointment. The appointment was also supported by the CPO on 20 January 2020 and approved by Group Executive: Human Resources, Ms Elsie Pule, a day later."

The disclosures

55. It is in this context the CPO then resorts to finding salvation in the PDA. He communicates and, from his perspective, made disclosures to the chairperson of the Board of Eskom, the Minister of Public Enterprises, the Presidency as well as Parliament represented by Scopa. In his first complaint of 16 February 2020 to Professor Makgoba, he is rather selective in not revealing his own instrumental role in the appointment of Mouton. In my view, the first disclosure or complaint of 7 pages is an attempt by the CPO to divert the attention from his own involvement in the Econ Oil transactions.

The South African way of things

56. It appears that as soon as the CPO came to grips that his claim to innocence would not be an easy ride, he changed gears. In the letter to Minister Gordhan dated 4 January 2021, the issue becomes racial. There is a direct attack on De Ruiter – this is what the CPO says:

“The activities that are taking place in Eskom reminds me of the painful past which I thought it is behind us, that period where colour was the determining factor on how one is treated and which rights one will enjoy.”

57. In paragraphs 4 and 5 of that letter, there is the express averment that white-owned companies are treated more favourably and *“that the black-owned company is presumed guilty until it proves its innocence”*. This is a reference in Econ Oil and the CPO’s blatant support of Econ Oil. In paragraph 5, he states that Ben Theron and Werner Mouton used the colour of their skin to undermine his authority. It is clear from the contents of this letter that the CPO is aggrieved at the action being taken against Econ Oil.
58. It is this same letter that is also addressed to the President of the Republic of South Africa and it is disconcerting that the CPO can actually complain about the decision of the Eskom Board to cancel the 5-year contract with Econ Oil in March 2020.
59. The CPO was also given an audience by Scopa. Whether this was orally or by way of written representations is unclear to me, but again the theme is to discredit De Ruiters on racial grounds and the typical South African excuse when a person in the capacity of the CPO is confronted with wrongdoing, namely to play the race card. Race has nothing to do with this matter. This matter is about dishonesty and

corruption. It is about competence and the kind of society we wish to live in and future generations to succeed or fail.

60. It is a sad reflection of this country that we are so fragile that we cannot rid ourselves of subjective inadequacies in dealing with issues of efficiency and performance. The issue in this matter is the interests of Eskom and to permit the CPO to use racial overtones to undermine a proper investigation into the contracts awarded to Econ Oil and his own conduct demonstrates weakness on the part of the Board of Eskom. I cannot understand the basis of setting up a commission of enquiry to investigate racial issues arising from the complaints of the CPO. His is but excuses and reasons to deviate from the truth. How on this basis can the Board of Eskom shirk its responsibility in dealing with the real issues by appointing a commission of enquiry into racism at Eskom escapes me? It defies common sense and to do what is right. The CPO uses the racial card successfully, it would appear, to divert attention of his own wrongdoing. To this extent, the Eskom Board is fragile, if not weak in the execution of its duties.

Conclusion

61. I find Tshitangano guilty on charges 1, 2 and 3 as formulated in the charge sheet. This is misconduct and amounts to the employee promoting the interests of Econ Oil, a supplier to Eskom, above the

interests of Eskom. This, in my finding, was intentional and it is serious misconduct. The CPO was remiss in carrying out his functions as articulated in charge 1 of the charge sheet. Not only did he not investigate Ms Marah but his conduct was consistent in promoting the interests of Econ Oil. He committed misconduct in failing to carry out his responsibilities as fully described in charge 2 and he was acting against the interests of Eskom in failing to take steps to ensure that the Supplier Reconsideration Committee takes proactive action against Econ Oil.

62. The CPO committed common law offences of misconduct, as well as contravening the provisions of the PFMA and Eskom's Disciplinary Code as fully articulated in charges 1, 2 and 3 of annexure "A" to the notice of disciplinary hearing: charges.
63. I also consider the CPO of having contravened Eskom's code in respect of charge 4. The CPO's approach to the chairperson of the Eskom Board, the Minister, the Presidency and Scopa were unwarranted in that matters which should have been dealt with internally were externalised for an ulterior purpose. The CPO made allegations against De Ruiter and others which are unfounded and part of a ruse to divert attention of his own wrongdoing. Charge 5 has an overlap with charge 4 and I think it more appropriate to make a finding that the CPO

is guilty of charge 4 read together with charge 5. In both instances, he divulged confidential information (and wrong information) and without following proper grievance procedure, but this is understandable because he had another agenda in mind, namely to divert attention from his own wrongdoing.

64. In the result, I find that the employer has proven misconduct on a balance of probabilities in respect of charges 1, 2 and 3 as well 4 and 5 read together.

Appropriate sanction

65. The employee's legal representatives are correct in pointing out in their heads of argument in paragraph 49 that a number of individuals failed Eskom. They point out that the Board behaved badly by awarding tenders to Econ Oil. Similar criticism is rightly directed at members of the Supplier Review Committee, in particular its secretariat, and to then legal advisor, Mr Hewu.
66. However, this enquiry is focussed on the CPO. He made serious disparaging allegations based upon racial content and thereby injured the dignity of De Ruiter, Mouton and Theron. He did not testify before me to deal with this. It is clear that the relationship between him and

De Rooter is irretrievably destroyed and the trust relationship between him and Eskom is irretrievably destroyed.

67. Tshitangano acted dishonourably and has exhibited all the qualities that makes him unsuitable for the position he occupies. He declined the opportunity to deal frankly with serious allegations of misconduct and which impacts on the employment relationship. To require mitigation or a further hearing would be putting form above substance. I recommend his immediate dismissal and I further recommend that Eskom take appropriate steps against all those involved improperly in the Econ Oil saga. In particular, legal steps must be taken to recover losses and those Board members who facilitated wrongdoing must be held accountable.

NA Cassim

NAZEER CASSIM SC
Chairperson

Chambers, Sandton
28 May 2021