



PREFACE

1. In our beloved country's current political climate, the wise words of the Anglo-Irish statesman, Edmund Burke, resonates: *"Nobody made a greater mistake than he who did nothing because he could do only a little"*. South African society is overwhelmed by the blight that is corruption and maladministration, albeit in our immediate working environment or emanating from the leadership of our country.
2. No effort can be too little or too insignificant. It is the smallest pebble in the shoe of a giant that will bring it to its knees.
3. For too long our state institutions have been under the control of individuals who claim ignorance and change tune according to their interests. This is about to change as the future of South Africa will be written by the people.
4. To each and every South African that has consciously made the decision to resist state capture and corruption, whether through social media or association with the constitutional principles of this country – we salute you, state capture is about to be defeated by the people.

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SCHEDULES

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INTRODUCTION

5. The Commission of Inquiry into State Capture published its Term of Reference 1.5 (“ToR”) (“**ANNEXURE ENQ1**”) which calls upon interested parties to provide the ZCI with information and/or evidence relating to:¹

“...the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended.”

6. In this regard, OUTA deems it in the interest of society to assist the Commission in achieving its objectives by providing it with information relating, but not limited to, Eskom Holdings SOC Ltd (“Eskom”). In the paragraphs that follow, OUTA will attempt to illustrate instances of state capture that transpired (and likely persists) within one of South Africa’s most crucial national assets namely Eskom.

SYNOPSIS

7. Towards the end of the late 2000’s, political interference proliferated to such a degree that Eskom soon found itself in dire straits and unable to function

¹ See part 1.5 of the Zondo Commission of Inquiry’s Terms of Reference, dated 23 January 2018.

optimally in the continuous supply of electricity to the South African population. Moreover, Eskom's reluctance to distance itself from political interference has resulted in societal ailments such as the hiking of electricity tariffs, deterioration of its infrastructure and most importantly, the unphased wastage of tax payers' money.

8. Ever since Eskom's business practices have since come under increased scrutiny by national media, civil society, energy experts and independent investigations. Maladministration in Stated Owned Entities ("SOE's") are symptoms of corrupt practices by individuals in both the private and public sector. In this regard, OUTA believes that eradication of corrupt practices in SOE's will not only bring the individuals responsible to account but will significantly eliminate maladministration in the value chain.

STATE CAPTURE IN THE BROAD SENSE

9. OUTA construes the definition of state capture as follows, in line with that of Transparency International, as per "**ANNEXURE ENQ2**":

"...a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interest".²

(Own emphasis added).

² Chene M, "State Capture: An Overview", 11 March 2014.

10. This chapter attempts to illustrate the disproportionate influence of interest groups in decision-making processes, where special interest groups manipulated and exploited Eskom's policies and procedures and their shortcomings for personal gain.³
11. Furthermore, this chapter also aims to identify instances of state capture relating to the alignment (be it subtle or explicit) of interests between specific business and political elites through family ties, friendship and co-ownership of economic assets within South Africa's national power utility. The primary risk posed by state capture is that the public interest is regarded as irrelevant in relation to the interest that is subject to and/or being advanced through state capture.⁴ The promoters of such interests are highlighted in this chapter and include key executives within Eskom and the board of directors.
12. The conduct by Eskom representatives is reflected in the effect of economic development, quality of regulatory oversight, provision of public services, infrastructure investment decisions and has also had consequences relating to the environment and public health.⁵

³ Ibid.

⁴ Ibid, page 2.

⁵ Ibid.

ESKOM'S IRREGULAR AWARDING OF BUSINESS TO THIRD PARTIES

MCKINSEY AND TRILLIAN

13. On or about 29 September 2015, McKinsey and Company Africa (Pty) Ltd ("McKinsey")⁶ entered into a professional services agreement with Eskom within the confines of the latter's Supplier Development Program ("SDP").
14. A mandate to negotiate a master service level agreement in relation to consultancy services between McKinsey and Eskom was approved by the board based on its turnaround strategy in June 2015 and on a single source procurement basis. This service level agreement that is attached hereto and marked "**ANNEXURE ENQ3**", included the development of the Top Engineers Program ("TEP") into a consulting unit that would provide world class management consulting services capable of resolving emerging company-wide risks. This would be done by driving savings and unlocking cash. Allegedly this would also reduce Eskom's reliance on external consultants. The agreement stipulates that fees for work were subject to performance and delivery of outcomes.⁷

⁶ See schedule 2 – ENQ3

⁷ See ENQ3, ad section 1.4, p 11.

15. A letter of intent (the initiation phase of the agreement) dated 17 December 2015, as referred to in a chronology memorandum compiled by Cliff Dekker Hofmeyer dated 17 February 2017, is attached hereto and marked **“ANNEXURE ENQ4”**.
16. Andile Dikana (“Dikana”) stated that according to him, the initial Broad Based Black Economic Empowerment (“BBBEE”) partner proposed by McKinsey, was a company called Regiments. Dikana noted that in the instance of the MSA with McKinsey, he was involved in the negotiation phase until the finalisation of the contract in December 2015. During the negotiations, McKinsey and Eskom agreed on a Supplier Development and Localisation plan (“SD&L”). Dikana highlights that no mention was made of Trillian Management Consulting (“Trillian”) as a contracting party at any stage or as McKinsey’s subcontractor.
17. As per the G9 report, attached hereto and marked **“ANNEXURE ENQ5”**, Dikana, who represented Eskom’s SD&L at the time, confirmed that during the negotiation phase he sat in when Mandla Gobinca (“Gobinca”) was not available.⁸
18. Trillian had never entered into an agreement with Eskom for the procurement of consultancy services, but nevertheless requested that Anoj Singh (“Singh”), acting on behalf of Eskom, advance payment for work supposedly done. This is confirmed by the G9 report which found that on 7 June 2016 in an official

⁸ See ENQ5, page 36.

steering committee meeting, Singh was informed by Dr. Weiss of McKinsey that there was no contractual relationship between McKinsey and Trillian.⁹

19. According to the Public Protector, Eskom had allegedly paid Trillian over R400 million for management consulting and advisory services. The Public Protector's report is attached hereto and marked "**ANNEXURE ENQ6**".¹⁰ It should be noted that Trillian is a subsidiary of Trillian Holdings (Pty) Ltd and 25% owned by Zara W (Pty) Ltd ("Zara"). Eric Wood is a director of Zara and is one of the three directors of Trillian; and Trillian is one of the companies that contributed to Tegeta Exploration and Resources (Pty) Ltd's ("Tegeta") acquisition of Optimum Coal Mine ("OCM").

20. According to a report compiled by Eskom entitled: "*Procurement of Services and Payments to McKinsey and Company Africa (Pty) Ltd and Trillian Capital Partners (Pty) Ltd*", payments to McKinsey and Trillian were made in 2016 and 2017 respectively. The report dated 30 August 2017, is attached hereto and marked "**ANNEXURE ENQ7**". These payments were based on contracts between the latter and Eskom, dated September 2015 and January 2016 respectively. Upon consideration of the attached evidence, no separate agreements between Eskom and Trillian existed during this period. OUTA is therefore questioning: On what basis was Eskom making direct payments to Trillian without a valid contract?

⁹ Ibid, page 16.

¹⁰ See ENQ6, ad paragraphs 5.304 to 5.306, page 269.

21. During the course of November 2016, Advocate Geoff Budlender SC (“Budlender SC”) conducted an independent investigation into Trillian irregularities upon original instruction from Tokyo Sexwale (“Sexwale”), the then independent non-executive of Trillian. The report is attached hereto and marked “**ANNEXURE ENQ8**”. In response to an enquiry about the relationship between Trillian and McKinsey, the latter denied any ties between the two entities, stating that:¹¹ *“McKinsey did not work on any projects on which Trillian worked as an SDP or a subcontractor to McKinsey.”*
22. Budlender SC concludes that, given the range of contradictory statements provided by McKinsey in an attempt to explain its position in relation to Trillian, McKinsey’s mere denial of facts amounts to nothing short of avoidance of uncomfortable circumstances.¹² Considering McKinsey’s international persona, its involvement with Trillian – in the context of state capture and the Gupta family in particular – may well be an embarrassment to the company, as pointed out by Budlender SC.¹³
23. Notwithstanding McKinsey’s perceived discontent towards Trillian, it nevertheless stated that:¹⁴ *“Trillian as the development partner is simply a necessary, but unwanted piece of baggage in the awarded contract”.*

¹¹ See ENQ8, ad paragraph 87, page 35.

¹² Ibid, ad paragraph 96, page 38.

¹³ Ibid, ad paragraph 97 pages 38 to 39.

¹⁴ Ibid, ad paragraph 106, page 41.

24. The above statement supports the Public Protector's findings that Eskom's procurement activities were irregular. Given the circumstances, it would be reasonable to believe that such agreement would in the normal course of business, not be entered into.
25. However, the conclusion of an agreement with Trillian, seems to have rested on the prospects that a subcontracting agreement would be entered into. Such hope renders the entirety of the initial agreement between Eskom and McKinsey questionable.
26. Confirmation of the Trillian-McKinsey relationship is apparent from a letter addressed to Trillian dated 10 March 2016. The letter is attached hereto and marked "**ANNEXURE ENQ9**". It further confirms that the project to which Trillian was subcontracted to, was the purchasing of Eskom's Duvha Boiler. In pursuit of the inquiries highlighted in the letter, McKinsey, in contradiction to actual fact, refused to contract with Trillian, as the latter could not satisfy McKinsey's risk review.¹⁵
27. In a letter by Singh dated 22 May 2017, it is stated that all payments made by Eskom were made on the basis of the letter of acceptance. The letter is attached hereto and marked "**ANNEXURE ENQ10**".
28. Trillian was not a party to the agreement, and therefore had no obligation towards Eskom for the completion of particular work, but rather towards McKinsey to whom it had been allegedly subcontracted. In turn, Eskom had

¹⁵ Ibid, ad paragraph 76, page 30.

no obligation towards Trillian in the form of payments and/or invoicing for work done. It should be noted that the agreement entered into between Eskom and McKinsey was exactly that – an agreement between these two parties.

29. Furthermore, there seem to be no record that Trillian had been awarded a contract (or even formally participated) in the tender process to procure consulting services for Eskom's Duvha Boiler project. OUTA contends that no justification existed for Trillian to approach Eskom for the payment reflected in **"ANNEXURE ENQ11"** which was subsequently paid by Eskom.
30. A second invoice was presumably provided to Eskom on 10 August 2016, attached hereto and marked **"ANNEXURE ENQ12"**. Both invoices were approved by Prish Govender ("Govender") on 11 August 2016 as per a letter attached hereto and marked **"ANNEXURE ENQ13"**. On or about 14 December 2016 a payment for R134 million was made to Trillian.
31. The letter by Singh notes¹⁶ that that the shortfall associated with payment as per envisaged BEE partner slip was verified by Oliver Wyman. However, **"ANNEXURE ENQ7"** states that a payment, totaling R152,760,000.00 was made to Trillian on 20 December 2016.¹⁷
32. On or about 22 February 2017, R154.6 million was paid as part of the final contract settlement payment.¹⁸

¹⁶ See ENQ10, ad paragraph 15, page 3.

¹⁷ See ENQ7, page 16.

¹⁸ See ENQ10, page 3.

33. In a letter by Singh dated 19 February 2016, Eskom confirms that it is aware of Trillian being McKinsey's BBBEE partner. The letter is attached hereto and marked "**ANNEXURE ENQ14**"

IRREGULAR PAYMENTS BY ESKOM TO TRILLIAN

34. The G9 report indicates that Singh needed to provide responses to allegations made in the report prior to adverse findings being made against him but Singh failed to do so. Thus, OUTA would like to highlight these findings as the alleged conduct by Singh should be investigated by law enforcement agencies.
35. As per "**ANNEXURE ENQ5**", the G9 report, Singh was in contravention of the Eskom Procurement Policy 32-1034 in that he, *inter-alia*, allowed Trillian to provide services to Eskom without a valid contract with McKinsey and also without a valid contract with Eskom. He was notified of this in a letter directed to him and/or his senior management team on the MSA Project by McKinsey; date February 2016.¹⁹
36. The G9 report further details that Trillian had no legitimate or contractual basis to provide any service to Eskom. Nevertheless, Singh took no steps to

¹⁹ See ENQ5, page 69.

suspend or terminate the services of Trillian.²⁰ Singh was thus derelict in his duty as a Chief Financial Officer and allowed Trillian to provide those services with serious and adverse financial implications against Eskom.

37. In effect, Trillian was enriched without any reasonable justification by means of funding flowing from the MSA which McKinsey supposedly contracted to undertake. Irrespective of whether Trillian provided the services or not, Singh was in direct contravention of Eskom's 32-1034 Policy as referred to above.²¹
38. In so doing, Singh has contravened Section 51(1)(b)(ii), read together with section 81(1)(a) and (b) of the Public Finance Management Act, 1999 ("PFMA") in that he allowed for irregular and/or fruitless and wasteful expenditure; specifically, in respect of the Trillian payments. This can be supported by the absence of an exemption in terms of section 92 of the PFMA, which would have exonerated Eskom from certain provisions of the PFMA. OUTA construes this as a demonstration of Singh's failure to discharge his fiduciary duties in terms of the Companies Act and in breach of the PFMA.

²⁰ Ibid.

²¹ See paragraph 35.

TRILLIAN INVOICES: A DETAILED EXAMINATION

THE FIRST CONTRACT WITH MCKINSEY

39. Eskom's letter of acceptance dated 29 September 2015, is attached hereto and marked "**ANNEXURE ENQ15**". It is addressed to Dr Alexander Weiss ("Weiss") and Vikas Sagar ("Sagar") of McKinsey and relates to the: "*notification of acceptance for the provision of consulting services*". It is signed by Matshela Koko ("Koko") on behalf of Eskom and by Weiss of McKinsey.

40. According to its website, of which a screen shot is attached hereto and marked "**ANNEXURE ENQ16**", McKinsey:

"...is a global management consulting firm that serves leading businesses, governments, nongovernmental organisations and not-for-profits".

...

We help our clients make lasting improvements to their performance and realise their most important goals."

41. The former CEO and Executive Director, Mrs Mosilo Motepu ("Motepu"), of Trillian Financial Advisory ("TFA"), a subsidiary of Trillian Holdings, told Budlender SC that McKinsey originally had a contract with Regiments as its local contractor in terms of Eskom's SDP. When Regiments changed

directors, it would seem that Trillian was established (purposefully) to take over the contract.²²

42. McKinsey declined to contract with Trillian as it was informed that the latter's primary shareholder, Salim Essa ("Essa"), was a politically exposed person.
43. The former Chief Executive Officer ("CEO") of Trillian, Bianca Goodson ("Goodson"), told Budlender SC that she discussed this with Wood in April 2016.²³

"He said that she was not to worry, as he would discuss the matter with Mr Anoj Singh of Eskom. He said that Trillian had responded to an Eskom Request for Proposals, and Mr Singh would appoint Trillian through that process. The obvious question which arises is how he could be so confident that Eskom would appoint Trillian."

44. The initial contract value of the first contract was R98,461,228.71, excluding VAT. From 30 October 2015 to January 2016, McKinsey issued eight invoices to Eskom totaling approximately R80 million (including VAT) under the first contract.²⁴
45. On or about 9 February 2016, McKinsey transmitted a letter to Eskom, authorising Trillian to invoice Eskom directly for work performed under the first

²² Ibid, ad paragraph 76, page 30.

²³ Ibid.

²⁴ See ENQ7, page 15.

contract. This was however subject to McKinsey's confirmation on the amounts claimed and work done. The letter is attached hereto and marked "**ANNEXURE ENQ17**".

46. Trillian issued an invoice with a cover letter to Singh for R26,900,000.00. The letter is attached hereto and marked "**ANNEXURE ENQ18**". It appears that the invoice referred to in the letter mentioned above was only sent to Eskom on 12 February 2016 and related to the first contract.
47. The mere request from Trillian to Eskom for a payment in such amount cannot reasonably be justified, as there is no indication that Trillian had submitted a tender for the specific work for which the invoice made provision. Moreover, there exists no evidence that Trillian had in fact performed in terms of the contract in any way. It should be noted, however, that Trillian had not been contracted by Eskom to procure services but was if anything rather subcontracted by McKinsey. Nevertheless, the invoice was signed for payment by Govender and Mabelane ("Mabelane") on 8 April 2016, shortly after Trillian was registered as a vendor on Eskom's supplier database.²⁵
48. The document provided to the G9 Group (which was instructed by Eskom to investigate Trillian) found that Trillian (the so-called BBBEE partner) had 0% Black ownership. OUTA recommends that Trillian must be hold accountable for deriving BBBEE benefits it did not deserve of which is tantamount to fraudulent gains. In addition, the report states that the payment is one of two which did not fall under the traditional MSA payment model employed by

²⁵ See ENQ18.

Eskom. The first payment for R26,900,000.00 million was allegedly affected for “corporate planning”.²⁶

THE SECOND CONTRACT WITH MCKINSEY

49. According to “**ANNEXURE ENQ7**”,²⁷ the second contract was entered into during January 2016 between Eskom and McKinsey. It was signed by Weiss, on behalf of McKinsey and by Mabelane on behalf of Eskom. In terms of this agreement, approximately R540 million in down-payments are to be paid to McKinsey.²⁸
50. No details of any arrangements in relation to a Broad Based Black Economic Empowerment (“BBBEE”) partner are reflected in the second contract. The report notes that:²⁹

“This amount is well in excess of what had been authorised on 21 October 2016 and so in this respect the Second Contract did to accord with the expenditure authorised in the BTC authorisation. This amounts to financial misconduct and implicates those authorised to conclude the Second

²⁶ See ENQ7, page 15.

²⁷ See ENQ7, page 14.

²⁸ Ibid, page 16.

²⁹ Ibid, footnote 21, page 16.

Contract. It appears that as the contract never became unconditional these down payments were never made.”

51. **ANNEXURE ENQ7** indicates that earlier drafts of the second contract included National Treasury’s approval as a condition but this was omitted upon signature of the final MSA.³⁰ The report also notes that this omission in itself represents financial misconduct for those who motivated the authorising of the conclusion of the McKinsey contract. Those who motivated the authorisation included Koko, Govender and Mabelane.
52. Both Mabelane and Govender, in their respective capacities, intentionally ignored and by-passed a key requirement (to seek and obtain statutory approval from National Treasury, a significant stakeholder, for the deviation in respect of the remuneration model). The evidence is supported by the fact that, during the project in a steering committee meeting, Govender referred to the presence of discomfort within National Treasury, specifically to the Sole Source management.³¹
53. Neither Mabelane nor Govender conducted proper due diligence and market research and other requirements before a sole source could be justified. This is compounded by the fact that it is recognised by Eskom and McKinsey during termination of the second contract that another service provider could potentially pick up from where the MSA left off. This is at odds with the initial

³⁰ See ENQ7, page 16.

³¹ See ENQ5, pages 67 and 68.

postulation by Mabelane and Govender that Mckinsey were the only company to provide this type of services.

54. The Bowman's report (2017) ("the Bowmans Report"), attached hereto and marked "**ANNEXURE ENQ19**", details an initial payment of R800 million to settle the second contract, which was approved in August 2016. The Board Tender Committee ("BTC") submission reflects no indication of potential financial or legal implications.³²
55. The Bowmans' Report highlights that payments made to consultants on this basis is itself likely a breach of National Treasury Instruction and amount to financial misconduct by those motivating for the payment and authorizing of such payment. The individuals responsible for authorising the payments include Govender, Singh and Mabelane.³³
56. Mabelane's interaction with the Gupta family can be traced back to 2015 in the #GuptaLeaks. Confirmation hereof can be seen in an email sent from Mabelane to a certain Santosh Choubey ("Choubey") on 8 November 2015. The email is attached hereto and marked "**ANNEXURE ENQ20**". Mabelane used his private email account (mabelaet@gmail.com) to transmit this email.
57. Furthermore, it is also noted in the Bowmans Report that there is no evidence of any letter (letter of acceptance) to Eskom like the one dated 9 February

³² See ENQ19, ad paragraph 6.4.2.3 page 17.

³³ Ibid.

2015 from McKinsey to Eskom.³⁴ Furthermore, the report illustrates payments made to McKinsey in the amount of R680,524,879.00.³⁵

“10 August 2016 an invoice referenced MC02 R 107 200 00 (excl VAT) is addressed to Ms Maya Bhana (General Manager of the CFO’s Office). This is signed on 11 August 2016 by P Govender on 11 August and E Mabelane (undated)”³⁶

...

10 August 2016 MCO3 R99 353 100 (excl VAT) addressed to Ms Maya Bhana. This is signed on 11 August 2016 by P Govender on 11 August and E Mabelane (undated).”

58. On 12 August 2016, Mdakane sent an email, as per **“ANNEXURE ENQ5”**, to Masedi Skosana (“Skosana”) copying Mr Kalafo Chauke (“Chauke”) and Mokaotedi.³⁷ The email highlighted the fact that all supporting documents would be required for auditing purposes.
59. Mabelane continued to pursue the invoice and added another for Trillian in the amount of R134,000,000.00.³⁸ Skosana refused in this instance and referred Mabelane to Mr Charles Kalima (“Kalima”), General Manager: Commodity Sourcing (acting) of Eskom who should have been responsible for the creation

³⁴ Ibid, ad paragraph 3.3.8, page 6.

³⁵ See ENQ7, payment illustration, page 16.

³⁶ See ENQ19, ad paragraph 3.3.8.2, page 6.

³⁷ See ENQ5, page 35.

³⁸ Ibid.

of the first two invoices. Limited documentation is provided to support the existence of (or legitimate reason for) the two Trillian invoices. Furthermore, neither of the invoices refer to the second contract itself.

60. On or about 9 December 2016 a submission was made to a BTC meeting held on 13 December 2016³⁹ to obtain authorisation for the negotiation and conclusion of the settlement of the McKinsey contract. Part of the authorisation that was sought and given, was for an interim payment to the selected BBBEE partner (Trillian) in the amount of R134 million. On 13 December 2016, the same day as the BTC meeting, Mabelane wrote to Trillian in order to provide them with information pertaining to the termination of the contract.
61. Mabelane stated that:⁴⁰ *“It had been determined that the BBBEE Partner’s portion of the contract has not been settled yet accordingly an amount of R 134 is due to yourself”*. Notwithstanding, Trillian had invoiced Eskom for R152,760,000.00, approximately R18 million (Eighteen Million Rand) more than the BTC approved.
62. The G9 report concluded⁴¹ that Kalima *may* be guilty of misconduct, alternatively that he was grossly negligent in conducting his duties when he instructed Gambushe to formulate an agreement in favor of Trillian when no such agreement existed. In addition, he instructed Gambushe to affect payment in the amount of R134 200 000.00, despite the fact that there was no

³⁹ Ibid, paragraph 3.3.15, page 8.

⁴⁰ Ibid, ad paragraph 3.3.16, page 8.

⁴¹ See ENQ5, page 68.

supporting documentation and/or legitimate agreement between Eskom and Trillian to begin with.

63. Kalima may have potentially contravened Section 51(1)(b)(ii), read together with section 81(1)(a) and (b) of the Public Finance Management Act, 1999 (“PFMA”) in that this payment resulted in irregular and/or fruitless and wasteful expenditure. Effectively, Kalima authorised payment to an entity which had no legitimate claim against Eskom.
64. On 19 December 2016, Ms Gambushe (“Gambushe”), a Senior Advisor at Eskom, was provided with a board submission document and board minutes to create a contract on the SAP system. The documentation was given to her by Kalima. Gambushe indicated that this was not the norm. Kalima stated to her that the contract must be created in favor of Trillian, despite the supporting documentation lacking clarity in terms of who Trillian was and what the company’s function was to be.⁴²
65. The submission only referred to McKinsey’s BBEE Partner. Gambushe complied with this request from her General Manager. On 20 December 2016 a payment of R152,760,000.00 was made to Trillian. This payment appears to follow a letter of demand from Trillian addressed to Govender and dated 27 August 2016, in which it asserts that based on the terms of the McKinsey MSA, it was entitled to “*risk-based payments*”. The letter is attached hereto and marked “**ANNEXURE ENQ21**”

⁴² Ibid, ad paragraph 9.5, page 37.

66. On 4 July 2017, an email was sent by Mr Albert Mokoatedi (“Mokoatedi”) to Ms Masedi Skosana (“Skosana”) copying Andile Mdakane (“Mdakane”). The subject line indicated “PO 307 029 4976”, including an attached purchase order. Mokoatedi stated:⁴³

“Good day, please find the only communication for the Trillion [sic] transaction, I am sorry but it seems it was verbal instructions, Mr Mdakane do you have any prior communication/ instruction. Regards”.

67. Bowmans indicates that a total of R1,593,155,413.01 had been paid by Eskom. Of this amount, R1,028,592,499.72 was paid to McKinsey and R564,562,913.29 to Trillian.
68. Such amounts are accumulative of all settlements and irregular payments affected in terms of the above-mentioned MSA’s.
69. Without any legitimate basis for Eskom to affect such payments as referred to above, OUTA urges the ZCI to make the appropriate recommendations in these circumstances, whether criminal or otherwise.

⁴³ See ENQ5, page 35

ESKOM'S COAL SUPPLY AGREEMENTS

BRAKFORTEIN COLLIERY

70. On or about 26 October 2010, the mining right for Brakfontein Colliery was registered to Tegeta Exploration and Resources (Pty) Ltd ("Tegeta"). Tegeta was formed in 2006 to identify and develop mining assets on behalf of the Oakbay Investments group, especially with regard to coal. This is illustrated in a Mining Review article dated 19 November 2015, attached hereto and marked "**ANNEXURE ENQ22**".
71. Eskom and Tegeta entered into a coal supply agreement ("CSA") on 10 March 2015 for the supply of coal from the Brakfontein Colliery to Majuba power station. The CSA is attached hereto and marked "**ANNEXURE ENQ23**". The agreement would terminate once the total energy quantity had been delivered to the mine unless it was to be extended or terminated earlier. The contract was concluded envisioning the procurement of approximately 12% of Majuba's coal supply requirement at a base price of R13.50/GJ.
72. The peculiarity of Eskom's coal procurement is that the majority of its CSA's with various entities are entered into on an unsolicited basis – meaning that no particular tender was advertised for the procurement of coal. The practice

of unsolicited tenders⁴⁴ was confirmed in the Draft report by National Treasury, attached hereto and marked “**ANNEXURE ENQ24**”. In addition, Eskom procured coal outside the scope of its relevant procurement policies and in terms of a medium-term mandate in the form of a board resolution.⁴⁵

73. Given the fact that Eskom procured coal on an unsolicited basis, Tegeta approached Eskom’s for the supply of coal to various of the latter’s power stations. Negotiations for the procurement of coal between Eskom and Tegeta may be traced back as far as 2012, even though the CSA in question was only entered into in 2015.⁴⁶

74. It should be noted that the starting point of the CSA in question stems from negotiations held on 23 September 2014. The minutes is attached hereto and marked “**ANNEXURE ENQ25**”. According to the minutes, Eskom was concerned about some of the coal characteristics at Tegeta’s mines. The following concern is referenced:⁴⁷

“It was also stressed that Eskom would only be able to consider the seam 4 Lower of Brakfontein as the 4 Upper seam did not meet Eskom’s requirements as per the sample provided.

...

⁴⁴ See ENQ25, ad paragraph 5.22.2, page 233.

⁴⁵ See paragraph 100 below.

⁴⁶ Ibid, ad paragraph 5.24.1, page 236.

⁴⁷ See ENQ25, page 2.

RN mentioned the possibility of blending the 4 seam with the higher quality seam 3; PM stated the potential problems that could occur with blending and also the fact that a new offer would have to be submitted.

...

SM queried if there are incentives for supplying improved qualities i.e. higher CV coal, AN responded stating that the supplier should provide a proposal on this. Some concerns were raised over the possible contamination of the seam 4 lower with the seam 4 upper; Tegeta would have to present plans on how they plan to prevent the contamination.”

75. The parties previously agreed to the coal specifications as required by Majuba power station. The coal supplied by Tegeta had to conform to a Calorific Value (“CV”) of 21.10 megajoules per kilogram (“MJ/kg”), with a rejection limit below 20.0 MJ/kg.
76. In the paragraphs that follow, a series of investigative reports will be highlighted dealing with the CSA between Eskom and Tegeta. For brevity’s sake, only the findings of various investigative reports relating to Brakfontein Colliery will be referred to as the contents of the investigative reports are self-explanatory.

SECOND DRAFT NATIONAL TREASURY REPORT

77. One off the most significant findings by National Treasury, as per “**ANNEXURE ENQ24**”, is that during the registration of Tegeta to Eskom’s supplier database, Eskom had already concluded the CSA. The contract was, according to Ayanda Nteta (“Nteta”), awarded to Tegeta on 12 February 2015, before any recommendations were made in terms of Eskom’s 1032-34 Procurement Policy.⁴⁸
78. Nevertheless, the agreement was entered into on 10 March 2015, without fulfilment of a condition precedent that a combustion test be conducted prior to the conclusion of the agreement. In terms of an RT & D report dated August 2014, only seam 4 lower (of the Brakfontein Colliery’s available coal resource) could be considered for Eskom’s Majuba power station. All subsequent tests concurred that a blend of coal sourced from both Brakfontein’s seam 4 upper and seam 4 lower coal deposit was not a suitable product for Majuba.⁴⁹
79. As per “**ANNEXURE ENQ24**”, Eskom accepted that the coal from seam 4 upper at the Brakfontein Colliery complied with its requirements. During the subsequent phases of negotiations which took place on 23 January 2015, Eskom confirmed that its test results showed that the coal from the seam 4 lower was suitable for its requirements and that the coal from the seam 4 upper

⁴⁸ See ENQ26, ad paragraph 5.87.1.1, page 290.

⁴⁹ Ibid, ad paragraph 3.87.1.8., page 291.

and the blended product were unsuitable for its requirements: *“because of the high Abrasive Index and Marginal Hard Growth Index”*.

80. Prior to the negotiations on 23 January 2015, Eskom had conveyed to Tegeta that the mixed product of seam 4 upper and seam 4 lower is not suitable for any of its power stations and that a full report on the coal quality ought to have been ready by 12 December 2014. Attached hereto and marked “**ANNEXURE ENQ26**” is email correspondence between Nteta and Ravindra Nath (“Nath”) to this effect.
81. Nath responded in an email that the unsatisfactory results from the combustion test for the combined seam was due to weathering. The email is attached hereto and marked “**ANNEXURE ENQ27**”. In response, Ntshanga reiterated that a combined coal product is not suitable for their power stations as per the email dated 3 December 2014. The email is attached hereto and marked “**ANNEXURE ENQ28**”.
82. OUTA attaches hereto an additional set of official correspondence between Eskom and Tegeta illustrating the deviations from agreed coal price, quantity and subsequent amendments to the CSA post conclusion. The correspondence is accordingly marked “**ANNEXURE ENQ29**” to “**ANNEXURE ENQ36**”.
83. Notwithstanding the above, the CSA was entered into for a mixed product of both seam 4 upper and seam 4 lower. National Treasury records the total irregular expenditure as R1,299,513,526.52.

FINDINGS BY PRICEWATERHOUSECOOPERS

84. An investigative report compiled by PriceWaterhouseCoopers (“PWC”) is attached hereto and marked “**ANNEXURE ENQ37**”.

THE DENTONS REPORT

85. The Dentons report is attached hereto and marked “**ANNEXURE ENQ38**”.

ESKOM’S BIAS TOWARDS TEGETA

86. On 31 August 2015, Koko suspended the supply of coal from the Guptas’ Brakfontein Colliery to Eskom’s Majuba power station. The suspension letter is attached hereto and marked “**ANNEXURE ENQ39**”. On or about 4 September 2015, Tegeta responded to the suspension of the CSA in a letter disputing Eskom’s version of the quality of coal supplied. The response is attached hereto and marked “**ANNEXURE ENQ40**”.
87. A laboratory test report conducted by Sibonisiwe Coal Laboratory Services CC (“Sibonisiwe”), attached hereto and marked “**ANNEXURE ENQ41**”, reveal inconsistencies in the quality of coal which is the coal source for the

CSA. Samples from 24 August 2015 to 26 August 2015 were used to compile the report – which is a week prior to the suspension of the CSA.

88. Considering the inconsistencies of coal supplied by Tegeta and specifically the alleged nonconformity of 21.10 MJ/kg, suspension of the CSA seemed justified. However, on or about 5 September 2015, Koko lifted the suspension in a letter addressed to Tegeta. The letter is attached hereto and marked “**ANNEXURE ENQ42**”. The suspension had been lifted notwithstanding Tegeta’s inconsistent coal supply.
89. On or about 30 October 2015, Just Coal (Pty) Ltd (“Just Coal”) responded to a suspension (effective from 31 October 2015) of their CSA by Eskom. The letter is attached hereto and marked “**ANNEXURE ENQ43**”. Just Coal is a majority supplier of coal to Eskom. According to the “**ANNEXURE ENQ38**”, Just Coal had two medium term CSA’s with Eskom. Presumably, the letter in question addresses the suspension of the CSA which was to supply Arnot power station. The CSA was concluded on 1 May 2015 and would have lapsed on 31 October 2015.
90. According to the letter “**ANNEXURE ENQ43**”, breach of contract was not Just Coal’s fault, but at that of Eskom. Eskom had allegedly obstructed Just Coal from properly performing and delivering the right quantities of coal as per the CSA. Delivery was thus made impossible by Eskom, which resulted in potential loss for Just Coal. On 4 November 2015, Koko, using the email address of “*matshela2010@yahoo.com*”, sent Just Coal’s letter to Richard Seleke (“Seleke”). As part of the #GuptaLeaks, OUTA has established that “*infoportal1@zoho.com*” is an email address frequently used by Seleke. In

addition, Seleke's commonly used alias is that of '*Business Man*', which is affiliated with the email address above. The email is attached hereto and marked "**ANNEXURE ENQ44A**". In this regard, there would be no legitimate reason for Koko to have relayed the letter to Seleke.

91. In his email to Seleke, Koko states that the letter be given to "*the Boss*" and that the fight has commenced. This phrase should, however, be understood within the context of Tegeta's acquisition of Optimum Coal Mine ("OCM"), which will be explained in more detail below.⁵⁰ On 4 November 2015 and at 23h36, Seleke forwarded Koko's email with the attached letter to "*wdrsa1@gmail.com*", which OUTA has determined to be an email address belonging to Tony Gupta. The latter forwarded the letter to Ashu Chawla, on or about 7 November 2015. The email is attached hereto and marked "**ANNEXURE ENQ44B**".
92. The Guptas' only reasonable interest in receiving the letter is that Just Coal is a competitor of Tegeta in supplying coal to Eskom. As per the illustration in the Dentons report,⁵¹ Tegeta was to supply Eskom with coal conforming to a CV of 22.77 MJ/kg.⁵² This was notwithstanding the availability of adequate coal from Just Coal. It should be noted that on 31 December 2015, Eskom's CSA with Exxaro came to an end as the agreement had lapsed. Exxaro supplied coal to Eskom's Arnot power station.

⁵⁰ Ad paragraph 121 below.

⁵¹ See ENQ38, page 194.

⁵² See ENQ6, ad paragraph 47.

93. Koko, acting on behalf of Eskom, did not reinstate Just Coal's CSA (although the latter had sufficient resources) – creating Eskom's own coal stockpile emergency for Arnot power station. This in turn, resulted in an orchestrated demand for the procurement of CSA's to third parties in terms of Eskom's emergency coal procurement mandate, which OUTA considers to be unlawful.⁵³
94. It would further appear that Koko used his position as Group Executive: Technology and Commercial ("GE:T&C") to remove a coal supplier and justify procurement from Tegeta for the exact same resource of coal. OUTA reiterates that it is unaware of all technicalities relating to the quality of coal from Just Coal. Moreover, the fact that Eskom had suspended such CSA with Just Coal, presumably due to substandard coal supply but upheld the CSA with Tegeta, clearly illustrates a bias towards the latter.

ESKOM'S MEDIUM-TERM COAL PROCUREMENT MANDATE

95. On or about 18 October 2017, OUTA submitted its report titled "*Unplugging Corruption at Eskom*" to the Parliamentary Portfolio Committee on Public Enterprises. The report is attached hereto and marked "**ANNEXURE ENQ45**". Although OUTA's report highlights a series of operational deficiencies, OUTA nevertheless deems it prudent that the Commission of Inquiry into State Capture be in possession of such report.

⁵³ See paragraph 102 below.

96. With reference to Eskom's CSA with Tegeta,⁵⁴ the legal basis upon which such agreement was entered into, was not in terms of emergency procurement procedures as set out in Eskom's 1032-34 Procedure, but rather in terms of a medium-term mandate, attached hereto and marked "**ANNEXURE ENQ46**".
97. In this regard, OUTA attaches hereto a report compiled by Adv Steven Davies entitled, "*Cleaning up Coal Supply at Eskom*", marked "**ANNEXURE ENQ47**", illustrating the illegitimacy of Eskom's procurement practices. OUTA submits that Eskom's deviation from applicable procurement procedures as referred to in the report, does not only render the agreements entered into invalid *ab initio*, but also obligates Eskom to pursue monetary claims that arose from the conclusion of such agreements.

OPTIMUM COAL HOLDINGS (PTY) LTD

98. There has been widespread speculation that political influence assisted the Gupta family to secure OCM. The following paragraphs will discuss Tegeta's acquisition of OCM. As per "**ANNEXURE ENQ6**"⁵⁵: "*The Group Executive: Generation [Koko] requested an emergency plan to increase stock level and to increase the stockpile as soon as possible before 1 January 2016.*" Based on the fact that Koko suspended several CSAs (considering his position as

⁵⁴ See paragraph 66 above.

⁵⁵ See ENQ6, ad paragraph 52.

GCEO at the time), he should have been aware of Eskom's anticipated coal shortfall as early as August 2015 and thus had ample opportunity to negotiate new terms with Optimum Coal Holding (Pty) Ltd ("OCH").

99. On or about 17 September 2015, while OCH was under business rescue, the Business Rescue Practitioners ("BRP") proposed that the matter surrounding the penalty (the factor that primarily lead to OCH commencing proceedings in the first place) be settled and emphasised OCH's financial difficulties. It should be noted that during the course of the business rescue proceedings, Glencore was in control of OCH.
100. According to the PPSA Report, after placing OCH under business rescue, the BRP developed a business rescue plan to ultimately sell OCH once it was no longer under financial distress. The BRP concluded that the most viable option for rescuing the business is that another company acquire OCM. During this process Tegeta was identified as a potential purchaser.
101. Pursuant to Tegeta being identified as the purchaser of OCM, the BRP and Tegeta approached Eskom for its consent to the cession of the CSA between Eskom and OCH (at the time under the control of Glencore) to a CSA between Eskom and Tegeta, upon the latter's acquisition of OCM. This would, however, circumvent Eskom's procurement requirement in appointment of a new coal supplier. Tegeta subsequently agreed to supply Eskom's Arnot power station with the coal, so obtained via the proposed purchase of OCM at a reduced rate. It should be noted that Eskom did not entertain similar proposal(s) by Glencore – clearly reflecting Eskom's bias towards Tegeta. This could possibly

have alleviated the levied penalty and ultimately “rescued” OCH without having to sell its shares to Tegeta.

102. According to an email sent by Koko on 26 November 2015, a meeting was held on 24 November 2015 between all the relevant parties. The email is attached hereto and marked “**ANNEXURE ENQ48**”. According to the minutes, Koko reiterated that Eskom would not support the acquisition of OCM but would be willing to consider the acquisition of both OCM and OCH by Tegeta. Furthermore, Koko insisted that Eskom will not waive the penalty claim as levied on OCH. Koko emphasised that Eskom expects OCH to honour the CSA until it lapsed in 2018 as OCH had allegedly breached the CSA (which gave rise to the penalty).
103. According to the PPSA Report, OCH continued to supply Eskom with coal (for the latter’s Hendrina power station) after it had been placed under business rescue. Eskom withheld payment for the coal delivered, notwithstanding OCH willingness to supply it at a reduced rate. On 9 December 2015, Tegeta as the controlling entity of OCH, addressed a letter to Koko, attached hereto and marked “**ANNEXURE ENQ49**”. In the letter, Tegeta requested that confirmation be sent regarding: *“payment for supply of coal amounting to R1,680,000,000 (Rand one billion six hundred and eighty million)”*.
104. The letter referred to above suggests that Koko was considering to “invest” in an asset which Eskom had previously deemed as not suitable for its power stations. Thus, it would seem that Koko was willing to affect payment to Tegeta for the supply of coal from the exact same resource for which Glencore was penalised.

105. The letter also notes that a meeting was held between Tegeta and Koko. This implies that Koko was aware of Tegeta's intentions to obtain OCH and subsequently supply Eskom with coal. It is important to note that Eskom had only declared a coal stockpile emergency on 23 December 2015, shortly after Tegeta took control of OCH. In anticipation of the so-called stockpile emergency, Eskom issued Requests for Proposals ("RFPs") for the procurement of coal to Arnot power station in August 2015.
106. No successful bidders were identified as per a memorandum compiled by Advocate Luderitz SC ("Luderitz SC"), attached hereto and marked "**ANNEXURE ENQ50**".
107. In addition to Koko's conduct as detailed above, there is also evidence to correlate the close relationship Koko had with the Guptas. In this regard, Suzanne Daniels ("Daniels"), Eskom Legal Secretary at the time testified at the Eskom Enquiry regarding her first interaction with Salim Essa. The transcript of her testimony is attached hereto and marked "**ANNEXURE ENQ51**".
108. Daniels stated that Koko had called her to meet at Melrose Arch on March 9, 2015.⁵⁶ According to a media article by Fin24, attached hereto and marked "**ANNEXURE ENQ52**", Koko met her at the restaurant JB Rivers, and then they walked to what she now knows is Essa's office.

⁵⁶ See ENQ51.

109. She said Essa asked her how disciplinary procedures work. She explained that if an employee was to be disciplined, they should be given a hearing:⁵⁷

“He got specific and asked what must be done to suspend people...”

110. Daniels then explained that a valid reason is needed to suspend employees, and that employee should be given a chance to respond. She continued by stating:

“Then he proceeded in the presence of Matshela Koko to sketch out what will happen in the next couple of days...”

111. She further stated that Essa had informed her that four of Eskom’s executives would be suspended, including former CEO Tshediso Matona (“Matona”) and Koko. There would also be an investigation and that the board would communicate this in due course. Daniels further told the enquiry that she again met Essa at Eskom’s premises, where he congratulated her on her position as company secretary.

112. On or about 3 January 2016, an email with a reservation at the Oberoi Hotel for “*Matshela Koko*” under the confirmation number 467415, along with a confirmation letter was shared with Ashu Chawla (“Chawla”) of Sahara Computers. The email chain and relevant attachment is attached hereto and marked “**ANNEXURE ENQ53**”. A reasonable observation of the attached email confirmation indicates that a booking was made by the Gupta family to

⁵⁷ Ibid.

the benefit of Koko. Accordingly, Koko's accommodation for the following dates were covered by Sahara Computers between 4 January 2016 to 5 January 2016.

113. Prior to Koko's stay at the Oberoi Hotel, similar bookings were made in favour of Singh. Booking confirmation for Singh's stay at the Oberoi Hotel between 17 December 2015 and 24 December 2015 is attached hereto and marked "**ANNEXURE ENQ54**".
114. Failing to settle the accounts for accommodation bookings, the Oberoi Hotel forwarded outstanding invoices to Chawla on or about 24 February 2016. The email and relevant invoices are attached hereto and marked "**ANNEXURE ENQ55**". It should be noted that by implication, Koko and Singh had in fact stayed at the hotel, as the invoices in question reflect such stay *ex post facto*. Moreover, the invoice dated 23 February 2016 reflects that Siyabonga Gama stayed at the Oberoi Hotel between 22 January 2016 and 24 January 2016.
115. Gama was CEO of Transnet at the time of his stay at the Oberoi Hotel as referred to above.
116. It should be borne in mind that periods during which Koko and Singh stayed at the Oberoi Hotel preceded the sequence of events that lead to Tegeta's acquisition of Optimum Coal Mine ("OCM").

THE ACQUISITION OF OPTIMUM COAL MINE

117. As per “**ANNEXURE ENQ6**”,⁵⁸ Tegeta entered into a share purchasing agreement with the BRP (on behalf of OCH) for R2,15 billion on or about 10 December 2015. During this period, Glencore owed approximately R2,948,479,663.00 to a Consortium of Banks. The latter consists collectively of Nedbank Ltd (“Nedbank”), Rand Merchant Ltd (“Rand Merchant Bank”) and Investec Ltd (“Investec”) and referred to as the “Consortium of Banks”. This debt consisted of a revolving loan that was obtained in 2011, subject to security of the entire share capital of OCH.
118. Tegeta’s purchase price for OCH totaled R2,15 billion, whereas Glencore would initially pay approximately R400 million (Four Hundred Million Rand) in respect of settling the debt owed by OCH/Glencore to the Consortium of Banks. On or about 4 March 2016, the Bank of Baroda issued a letter to First Rand Bank, confirming that Tegeta had sufficient funds to continue with the purchase. This amount consists of deposits in at least 14 different bank accounts.⁵⁹
119. On or about 14 April 2016, Tegeta paid the amount of R2,084,210,260.10 to settle its portion of debt owed to the Consortium of Banks.⁶⁰ This was the amount outstanding (payable by Tegeta in terms of the purchasing

⁵⁸ See ENQ6, ad paragraph 5.207, page 165.

⁵⁹ Ibid, ad paragraph 5.329, page 274.

⁶⁰ Ibid, ad paragraph 5.334, page 276.

agreement) in order to complete the transfer of OCH. OCH/G was ultimately responsible for an amount of approximately R864,269,457.16 which covered the remainder of the debt owed.

120. The PPSA Report further stated that, R910,000,000.00 of the R2,084,210,260.10 paid by the Bank of Baroda on behalf of Tegeta in respect of the sale agreement, was allegedly funded by Eskom. Between 29 January 2016 and 13 April 2016, Tegeta received a total of R1,161,953,248.41 in payments from Eskom.
121. The most significant of these payments, is the amount paid on 13 April 2016 in the amount of R659,558,079.38. The latter payment was made one day prior to the payment by the Bank of Baroda which settled the debt owed to the Consortium of Banks.
122. An offer was made by Tegeta to supply Eskom with additional coal for its Arnot power station on or about 8 April 2016. The source of this coal would be from OCM.⁶¹
123. It should be noted, however, that at this stage Tegeta had not yet acquired ownership of OCH but was controlling OCH. The proposed CSA was subject to the advancement of a prepayment of approximately R600 million by Eskom. The prepayment would purportedly enable Tegeta to operationalise its plant and equipment. Initially, Tegeta proposed settling R800 million of the debt

⁶¹ Ibid, ad paragraph 69, page 226.

owed to the Consortium of Banks. The latter rejected this offer and indicated that Tegeta settle the full amount owed.

124. On or about 11 April 2016, the BRP informed the Consortium of Banks that Tegeta was short some R600 million (Six Hundred Million Rand).⁶² It was proposed that payment of this amount be deferred or that a loan be granted for the same amount. The Consortium of Banks rejected the proposal and reiterated that Tegeta settle the full amount. Full payment was affected on 14 April 2016. On 13 April 2016, Eskom effected the prepayment in the amount of R659,558,079.38 into Tegeta's First National Bank ("FNB") account, with account number 62117356990.⁶³
125. The above-mentioned amount falls within the proximity of Tegeta's shortfall. Upon receipt of this amount, Tegeta was placed in the financial position to be able to conclude the purchase. As part of the share purchase agreement, Tegeta would be the controlling shareholder of OCH, ensuring sustainability of the business pending the finalisation of the business rescue proceedings. Thus, no procurement procedures were required as Tegeta merely substituted OCH in its CSA.
126. According to Eskom's Intergrated report 2016, attached hereto and marked "**ANNEXURE ENQ56**", the Eskom Board at the time of the OCH acquisition consisted of, *inter alia*, the following persons:

⁶² Ibid, ad paragraph 5.254, page 178.

⁶³ Ibid, paragraph 5.338, page 277.

- 126.1. Ben Ngubane (“Ngubane”);
- 126.2. Brian Molefe (“Molefe”);
- 126.3. Singh; and
- 126.4. Koko.

127. It should be borne in mind that Brown transferred both Brian Molefe and Singh from Transnet to Eskom. During April 2015, Molefe was appointed as Eskom’s acting CEO, while Singh was appointed as acting CFO in August 2015. Both appointments were made permanent in October 2015.
128. In this regard, it should be noted that both Singh and Molefe’s appointment directly coincides with the interactions between Eskom and the Gupta family.
129. Considering the composition of Eskom’s board during the period in which Tegeta had acquired OCM, it is reasonable to assume that no coincidence existed. Moreover, and given the circumstances, it is irrefutable that Eskom’s facilitation of Tegeta’s acquisition of OCM was instead wrongly attributed to the security of coal supply.

ESKOM’S WAIVER OF THE PENALTY CLAIM AGAINST GLENCORE/OCH

130. Throughout OCH’s business rescue proceedings, Eskom insisted that the penalty will not be waived. During the course of June 2017, Afribusiness requested information in terms of the Promotion of Access to Information Act

2 of 2000 (“PAIA”) from Eskom. In the request, Afribusiness sought information relating to the fine imposed by Eskom on OCH/Glencore.

131. Eskom refused Afribusiness access. They stated that it is a mandatory refusal to protect confidential records. On or about 19 July 2017, Eskom held a press briefing in which they clarified the payment surrounding the imposed penalty. Eskom’s interim Chairperson at the time, Zethembe Khoza (“Khoza”), told the briefing that: *“...on the Tegeta matter, the arbitration award, the final one was R577 million.”*

132. It was alleged that Eskom’s sampling equipment was faulty, and that the penalty’s calculation was inaccurate.

133. The penalty (as previously levied against Glencore) was significantly reduced, but only after Tegeta had acquired OCM. Khoza further stated that:

“The R2.1 billion was the full – let’s say it is the full value of the claim. About R1.1 billion or so of that related to this, let’s call it false positive element, which means it was about R1.1 billion that was left over. R577 million of that is around 50% of that value. The contract manager believed that, excluding the crusher issue, the claim would have been in the region of about R700 million, so if you take R700 million over the R600 million that’s almost around 75-80% of the value of the claim, and that is the basis on which we believed that that was a reasonable amount for us to have settled with Tegeta.”

134. The levying of the penalty during July 2015 was arguably the primary reason why OCH/Glencore initiated business rescue proceedings. It would seem,

however, that such penalty was imposed by Koko to frustrate the CSA with OCH/Glencore. The penalty levied by Eskom, was instrumental as it held OCH/Glencore at ransom and forced them into business rescue, only to be reduced at a later stage when ownership had changed.

ESKOM'S BUSINESS WITH AFFILIATES TO THE NATIONAL EXECUTIVE

135. Ingrid Tufvesson, Brown's alleged romantic partner, is the sole director of a company that secured questionable support from Eskom. An extract by amaBungane is attached hereto and marked "**ANNEXURE ENQ57**".
136. On or about 23 January 2017, Mabelane issued Tufvesson with a signed letter stating that Eskom welcomes Tufvesson's proposed coal projects. The letter is attached hereto and marked "**ANNEXURE ENQ58**". Tufvesson is an academic who has no experience in mining and maintains that Brown is not involved in her private business ventures.
137. Hereafter, a second draft letter was handed to Eskom, "*...to put on a letterhead*". The letter was then submitted to Mabelane, presumably as if drafted by an Eskom official. The letter listed a short-term contract to be negotiated. The following points from the agreement are highlighted by Amabhungane:

“You are bidding for 600,000 tons to be supplied over a 12-month period to commence 1 March 2017, or as soon as practicable thereafter.

...

You are bidding for between three million and six million tons per annum to be supplied for a period of no less than 7 years commencing by September 2017 or sooner if practicable.

...

Your coal sales price is confirmed at +-R30/g joule”, which did not include transport costs for the coal.

...

R50-million rolling cash facility [that] will be advanced to be repaid over the 12-month duration of the first contract.”.

138. Considering Tuvfesson’s affiliation with Brown (whether romantic or otherwise), a conflict of interest remained present. To OUTA’s knowledge, no evidence suggesting a declaration by Tuvfesson of a conflict of interest exists. Even though Brown was not an Eskom official at the time, she nevertheless remained the national executive to which Eskom reported to.

139. OUTA submits that it is unclear whether any contracts were subsequently awarded to Tuvfesson but that such possibility warrants further investigation.

ESKOM'S BUSINESS WITH NEW AGE MEDIA

140. According to an Eskom Inquiry Reference Book, attached hereto and marked **"ANNEXURE ENQ59"**, Eskom spent approximately R43 million on 10 TNA business breakfasts. This amount flows from a R43 million business breakfast deal Eskom entered into with The New Age Media (Pty) Ltd ("TNA") during April 2014.
141. During the course of negotiations with TNA, Collin Matjila ("Matjila") served as Eskom's interim Chief Executive Officer ("CEO") between the departure of Brian Dames ("Dames") in March 2014 and the appointment of Tsedisio Matona ("Matona") in October 2014.
142. Matjila's relationship with the Gupta family can be illustrated as follows as per an email chain attached hereto and marked **"ANNEXURE ENQ60"**:
 - 142.1. On or about 22 March 2014, Essa sent Matjila's *curriculum vitae* to Tony Gupta and his (Gupta) nephew, Srikant Singhala;
 - 142.2. The *curriculum vitae* was then forwarded to an employee of the Guptas' Sahara Computers and Duduzane Zuma. Matjila has shared directorships with Mr Essa, in Inca Energy (Pty) Ltd - 2009/022231/07 and Nu Age Energy (Pty) Ltd - 2010/024567/07; and

- 142.3. Matjila shares directorship with Oakbay's Ronica Ragavan as apparent from the directorship report attached hereto and marked **"ANNEXURE ENQ61"**.
143. The contract referred to in paragraph 147 above is attached hereto and marked **"ANNEXURE ENQ62"**. On or about 4 April 2014, an email for the renewal and expansion of Eskom's sponsorship of the business breakfasts was sent from Nazeem Howa, the CEO of Gupta-owned Oakbay Investments, to another Gupta employee, Ashu Chawla.
144. The proposal is dated the previous month (March 2014) and is addressed to Chose Choeu ("Choeu"), Eskom's executive for corporate affairs, the email states the following:
- "It is with pleasure that we submit the following proposal for the period 1 April 2014 to 31 March 2015 for sponsorship of 12 Business Briefings for a total investment of R14,400,000.00, excluding VAT and agency commission."*
145. Email correspondence, attached hereto and marked **"ANNEXURE ENQ63"** and dated approximately a month after the proposal was circulated, indicates that TNA Media's business development manager, Wiedaad Taliep ("Taliep") and Eskom's Choeu arranged a meeting to: *"...discuss the breakfasts logistics and related issues"*.
146. Chose further stated that the agreement had been signed by Eskom's CEO, referring to the business breakfasts, which was then forwarded to Atul Gupta. Despite interventions by the board and members of the executive when the

contract increased to R43 million, this new proposal was vetted by the Guptas before being sent on to Choeu and approved by Matjila. This was purportedly done outside the scope of his authority and against the council of the executive management including the legal department.

147. A letter signed and dated on or about 9 April 2014, written by Choeu to Matija, Interim Chief Executive officer is attached hereto and marked “**ANNEXURE ENQ64**”.
148. Eskom’s auditors labelled the R43 million deal as a reportable irregularity, according to an article by Mail & Guardian, attached hereto and marked “**ANNEXURE ENQ65**”. The external auditor’s review statement accompanying Eskom’s interim financials confirms that they have reason to believe that certain alleged unlawful acts or omissions have been committed by a member (understood to be Matjila) of the accounting authority of Eskom. During the Eskom Inquiry Tsotsi testified to Matjila’s actions:⁶⁴

“On my arrival at Eskom in 2011, there was an existing New Age contract that was due to expire in June 2014. At the time of its expiry, Collin Matjila was CEO. He acceded to renewing the contract.

...

He failed to apply delegation of responsibility to deal with sponsorship through a committee, thus bypassing a process and acting outside his responsibility.

⁶⁴ See paragraph 156 below.

...

Mr Matjila disputed this position and proceeded to sign the contract. A whistle blower reported this to the audit and risk committee, which was brought to the board”.

149. From 1 April 2012 to 31 April 2017, the following individuals met with Gupta affiliates in relation to the TNA contract, according to Parliamentary question PQ1085, attached hereto and marked “**ANNEXURE ENQ66**”:
- 149.1. Between 1 April 2012 to 31 March 2012 - Chose Choeu; Nazeem Howa; Jacques Roux; Pieter Pretorius; and Donald Lephoko; and
- 149.2. 1 May 2014 to 31 April 2017 – Chose Choeu; Nazeem Howa; and Wiedaad Taliep
150. As both Choeu and Matjila was in the employ of Eskom at the time of the meetings as stipulated above, it is reasonable to conclude that Eskom’s business relationship (and ultimately the agreement entered into) can be directly attributed to his (Choeu) influence and relationship with the Gupta family.
151. OUTA submits that in the absence of a lawful tender process in the conclusion of a media contract with TNA (and the purported renewal thereof), Eskom intentionally contravened section 51 of the PFMA, as the monies affected

towards TNA in terms of such contract may potentially constitute irregular and wasteful expenditure.

152. Furthermore, OUTA is unaware whether any form of prosecution and/or disciplinary steps have been taken against Choeu and Matjila *in lieu* of their conduct as illustrated above.

TESTIMONY BY ZOLA TSOTSI AT THE ESKOM INQUIRY BY THE PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES

153. On or about 22 November 2017, during an inquiry into Eskom by the Parliamentary Portfolio Committee on Public Enterprises, Zola Tsotsi (“Tsotsi”), former Eskom Chairperson was questioned on, *inter alia*, his relationship with Brown.
154. During his cross examination, Tsotsi stated that he was summoned to a variety of meetings with Tony Gupta and subsequently threatened if not compliant with orders given by the Gupta family.
155. The following averments were made by Tsotsi, as per the transcripts of his cross examination attached hereto and marked “**ANNEXURE ENQ67**”:
- 155.1. Essa had previously provided him with a list of preferred candidates which Essa ‘suggested’ be appointed to the Eskom board at that time; and,

- 155.2. Suggested that Brown took instructions directly from the Gupta family and that his duties as chairperson were compromised by Essa's involvement.
156. From Tsotsi's statement attached hereto and marked "**ANNEXURE ENQ68**", it is reasonable to assume a manipulation by the Gupta family regarding appointments to the Eskom board during the period of 2014 to 2015 when vacancies became available after the suspension of Eskom's board members.
157. In this regard, the appointment of both Molefe and Singh in April 2015 and August 2015 respectively, is not by any means coincidental.

ESKOM'S DISREGARD FOR THE RULES OF ESKOM PENSION AND PROVIDENT FUND

158. On or about 1 October 2015, Molefe was appointed as CEO by Eskom. His total remuneration package comprised of a guaranteed R7,656,00.00. Attached hereto is a letter from Eskom addressed to the Minister of Public Enterprises confirming Brian Molefe's appointment, marked "**ANNEXURE ENQ69**".
159. Molefe's employment contract stipulated an employment period of 5 years but was brought to abrupt halt when he voluntarily resigned on 11 November 2016. Molefe made a public statement, attached hereto and marked "**ANNEXURE ENQ70**", wherein he stated 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...”

160. Shortly after Molefe’s resignation he was appointed as an ANC MP to the National Assembly – amid volatile political circumstances. Brown was then informed of the developments surrounding Molefe’s alleged pension pay-out and had refused that such an amount be paid to him.
161. As controversial as it might seem, Brown had been approached by the Eskom Board to either rescind Brian Molefe’s resignation, though it been done voluntarily, and in effect “reinstate” him as Eskom’s CEO or approve a pension pay-out of approximately R 30 000 000.00 which is unlawful in any event.
162. Subsequently, Brown purportedly “chose” to adhere to the Eskom Board’s ultimatum and reinstate Brian Molefe as Eskom’s CEO. In pursuit of halting an irrational reappointment, the Democratic Alliance (“DA”) filed an urgent application in the High Court of South Africa, Gauteng Division, Pretoria, under case number 33051/17, asking the court that the decision of the Minister to reinstate Brian Molefe be reviewed and set aside (Part B of the DA’s notice of motion). The DA’s application is attached hereto and marked “**ANNEXURE ENQ71**”.
163. Prior to commencement of service with Eskom, Molefe was in the employ of Transnet, effectively a member of the latter’s pension scheme from 21 February 2011. Molefe enjoyed pension membership to this fund until 1

October 2015, meaning that Molefe's pensionable services accumulated to approximately 4 years with Transnet.

164. Molefe started his tenure at Eskom on 25 September 2015, fixed (purportedly) at an annual basic salary of R468,930.00 per month, although this amount had been altered on various occasions following his initial appointment.
165. Based on the fact that Molefe had been appointed to an executive position within Eskom, he was eligible to become a member of the Eskom Pension and Provident Fund ("EPPF"). Molefe's membership to the EPPF had commenced on 25 September 2015.
166. Upon Brian Molefe becoming a member of the EPPF, the Transnet Pension Fund (to which Molefe was a member) transferred an amount of R4,264 575.34 to the EPPF for Molefe's benefit. See attached hereto a letter from the Transnet Retirement Fund, marked "**ANNEXURE ENQ72**".
167. Receipt of this amount was confirmed by Eskom and stated that the sum thereof had been added as capital to Molefe's "*Additional Benefit Scheme*" as would be apparent in "**ANNEXURE ENQ73**" attached hereto.
168. It should be noted that the EPPF is governed by a legal framework comprised of a consolidated set of rules, simply known as the EPPF Rules. OUTA has omitted the attachment of all the EPPF Rules for convenience sake, however, the relevant extract from the Rules is attached in subsequent paragraphs as far as it relates to the applicable rule.

169. Following the announcement of his resignation, Molefe submitted an “Application for Retirement Benefits”, Form 1, to the EPPF which was received on 20 December 2016, attached hereto and marked “**ANNEXURE ENQ74**”. It should be noted that Brian Molefe indicated “Early Retirement (no penalties) with potential service (Rule 28)” as the reason for applying for retirement benefits.
170. This would seem rather peculiar, as rule 28 specifically deals with retrenchment. As noted in paragraph 159 above, Brian Molefe had in fact resigned and did so voluntarily – his departure from Eskom was not a result of being retrenched.
171. Attached in this regard is Eskom’s current account statement, reflecting an amount of R30,106.915.62 as credited (employer’s contribution in terms of the EPPF Rules), marked “**ANNEXURE ENQ75**” and “**ANNEXURE ENQ76**” respectively. Payment for this amount was authorised on 16 March 2017, as would be apparent from “**ANNEXURE ENQ77**”.
172. On 5 May 2017 and upon a request from Suzanne Daniels, the EPPF confirmed payments made to Brian Molefe up to 28 April 2017. EPPF confirmed that the following payments had been made to Brian Molefe (Nett amount):
- 172.1. R7,792,767.91, effected on 1 February 2017;
 - 172.2. R124,228.95, effected on 9 February 2017;
 - 172.3. R59,804.67, effected on 28 February 2017;
 - 172.4. R63,703.67, effected on 31 March 2017; and

- 172.5. R73,905.07, effected on 28 April 2017.
173. The nett amount received by Molefe as at 28 April 2017 totals R8,114,410.27 according the EPPF's calculation. It should be noted that Molefe had received arrear pension benefits as described above, notwithstanding the fact that he had voluntarily resigned, effective from 1 January 2017.
174. Furthermore, it would seem, however, that EPPF processed Molefe's pension pay-out in terms of rule 21 – and not in terms of rule 28 as Molefe had initially indicated on his application form. Molefe was reinstated by Eskom on 11 May 2017 as apparent from the reinstatement agreement, attached hereto and marked "**ANNEXURE ENQ78**".
175. On or about 9 February 2016, Eskom's People and Governance Committee resolved to, *inter alia*, amend the EPPF Rules to make provision for situations where executive directors had not attained pensionable age, but nevertheless wish to take early retirement, and that Eskom would then "bridge the gap" for such shortfall, and contribute to the EPPF the costs and liabilities surrounding such bridging. Attached hereto is copy of the resolution, marked "**ANNEXURE ENQ79**".
176. It should be noted that the most recent amendment to the EPPF Rules does not make provision for the situation as envisioned in paragraph 20 above. It is OUTA's interpretation of the governing legal framework, that only the EPPF Board as constituted in terms of rule 3.3 may resolve that the EPPF Rules be amended. It is therefore contested that a resolution to the same effect made by the People and Governance Committee of Eskom is *ultra vires*.

177. When one considers the circumstances surrounding Brian Molefe's resignation, it amounts to early retirement as contemplated in rule 24, as correctly interpreted by the EPPF officials – resulting in a pension benefit of approximately R10 million, based on the applicable methodology when rule 24 is applicable.
178. Should rule 28 apply, it would entail the multiplication of the pension benefit as envisioned in rule 24 by 3 – resulting in an approximate of R30 million. It may seem peculiar that the amount approved by Eskom to serve as an employer's benefits and "cover the shortfall" of the applicable provision amounts to R30,106,915.62 which effectively "purchased" the additional benefit that would have accrued had rule 28 actually applied.
179. OUTA contends that Molefe intentionally formulated his benefit application form to extract a superfluous benefit (maximum) from the EPPF, knowing that the specific rule cannot be applicable in his situation as he had not been retrenched. It is suspicious that Molefe stated in "**ANNEXURE ENQ70**" that his departure is in the interest of good corporate governance – which may be deemed as: *"to facilitate improvements in efficiency or organization..."*, justifying the application of rule 28 to such extent.
180. Molefe's reinstatement is in direct contravention of what the departure aimed to achieve – good corporate governance. The only logical conclusion that one can make in such circumstances, is that the reason given by Molefe was a mere smoke screen to justify the application of an EPPF rule that would potentially yield a greater pension benefit.

181. Considering the illustration of events as set out above, Molefe had potentially committed fraud in pursuit of enriching himself. Furthermore, and by virtue of his executive position held at the time, Molefe, as part of Eskom's Accounting Authority contravened the PFMA, and may well be found guilty of financial misconduct.
182. OUTA submits that the illustration of Molefe's manipulation of the EPPF's rules are not *per se* related to state capture, but ought to be considered a symptom thereof by virtue of his influence over Eskom at the time.

MOSEBENZI JOSEPH ZWANE

183. Mosebenzi Joseph Zwane ("Zwane") was appointed as Minister of Mineral Resources on 23 September 2015, less than a month after being sworn in as a member of the National Assembly on 2 September 2015. Zwane had no experience in mining or in national government and was not a member of the ANC's national executive committee.
184. He had previously served as MEC for Agriculture and Rural Development (2014 – 2015) and MEC for Economic Development, Tourism and Environmental Affairs (2009 – 2013) in the Free State province, under Premier Elias Sekgobelo "Ace" Magashule.
185. We will demonstrate in a separate submission how the Gupta family captured Zwane, the former Minister of Mineral Resources.

CONCLUSION

186. In consideration of the illustrations as set out above, it is apparent that Eskom has been captured through systematic engagements with the Gupta family, particularly stemming from coordinated procurement practices – which are not only irregular, but criminal.
187. Although the network of malpractice and corruption may become convoluted in an abundance of facts, one should not neglect to appreciate the fact that both state and private entities cannot act for themselves. It is individuals who enable such entities to engage in business practices detrimental to the South African public.
188. For this reason, it is not Eskom that is inherently crippled, but individuals such as Singh, Koko and members of Gupta family that contributed to its demise.