IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

CASE NO: J1276/2017

In the matter between:

BRIAN MOLEFE	Applicant
and	
ESKOM HOLDINGS SOC LIMITED	First Respondent
MINISTER OF PUBLIC ENTERPRISES	Second Respondent
DEMOCRATIC ALLIANCE	*First Intervening Applicant*
ECONOMIC FREEDOM FIGHTERS	*Second Intervening Applicant*

MR MOLEFE'S HEADS OF ARGUMENT ON THE MAIN APPLICATION

INTRODUCTION

1. This application ("***the main application***") concerns the summary dismissal of the applicant by the first respondent on 2 June 2017. For convenience, the parties will be referred to as "***Mr Molefe***", "***Eskom***" and "***the Minister***".

2. By the time the application is heard, a decision/ruling will have been issued regarding the application by the Democratic Alliance ("***DA***") and the Economic Freedom Fighters ("***EFF***") to intervene in this application. As these heads of argument are prepared before the question of intervention has been decided, we will also deal with the respective contentions of the DA and the EFF on the merits of the application. The submissions in this regard are accordingly provisional, on the basis that the political parties may be granted leave to intervene.

3. In response to a letter addressed to His Lordship the Judge President of this court on 13 June 2017 in which a provisional timetable was proposed for the court's consideration, His Lordship issued a directive dated 14 June 2017 approving provisional timetable and issuing directives regarding the dates for the hearing of the intervention application and the main application, respectively. These heads of argument are submitted in accordance with paragraph 8.5 of the letter of Minde Shapiro & Smith dated 13 June 2017.

4. The following affidavits are before the court:

    4.1. the DA and EFF founding affidavits seeking intervention and dealing with the merits of the main application;

    4.2. separate answers by Mr Molefe to the interventions and on the merits contentions of the DA and EFF;

4.3. a reply by the DA to Mr Molefe's answers;[1]

4.4. an affidavit by Eskom indicating that it abides the decision of this court regarding the merits of the application, save for the costs sought against it;

4.5. a substantive Answering Affidavit by the Minister opposing the application;

4.6. a reply by Mr Molefe to this affidavit.

5. In these heads, we address the following topics:

5.1. the relevant chronological facts;

5.2. the jurisdiction of the Labour Court;

5.3. Mr Molefe's unlawful dismissal (and the relevant sub-themes pertinent thereto);

5.4. the remedy sought by Mr Molefe;

5.5. the reliance on the Public Protector's Report;

5.6. urgency.

[1] The EFF has not filed a reply in its intervention application.

RELEVANT CHRONOLOGICAL FACTS

6. We set out below the salient, historical events and occurrences preceding Mr Molefe's summary dismissal by Eskom on 2 June 2017. Our intention is to provide a chronological view of the events preceding the summary dismissal.

7. In certain instances, an event (for example, the signature of a contract) will be common cause, but one or more parties may contend that the contract was authentic/valid/operative, for some reason. In these instances, we note the qualification to the status of the document or event.

8. After holding the position of Acting Chief Executive from 17 April to 30 September 2015, Mr Molefe concluded a five-year fixed term contract with Eskom on 7 March 2017.[2]

9. Mr Molefe would become a member of Eskom's Pension and Provident Fund with Eskom contributing to the fund on his behalf.[3]

10. On 9 February 2016, the Eskom People and Governance Committee passed a resolution confirming the Eskom Pension and Provident Fund ("*EPPF*") rule that employees may take retirement from age 50 with ten years of service, and that where Executive Directors appointed on a fixed

[2] FA, Vol A, §§ 21 and 22, p 10; DA Intervention FA, Vol B, §§ 103-105, p 182. The EFF does not address this issue.
[3] Molefe A, Vol A, § 23.4, p 12; DA FA Vol B, § 105, p 18. The EFF does not address this issue.

term contract retire, with the result that there was a shortfall regarding the ten-year service rule, Eskom would:

10.1. bridge the gap to make up for the ten years;

10.2. waive penalties applicable to early retirement;

10.3. refund the EPPF the actual costs for additional service added, plus penalties applicable to early retirement.[4]

11. Mr Molefe met with the Minister on 11 November 2016 to explain his decision to step down as Group Chief Executive.[5] Neither the DA nor the EFF were in a position to deal with this event.

12. On the same day Mr Molefe wrote to the chair of Eskom's Board requesting early retirement in terms of the EPPF rules read with the 9 February 2016 resolution.[6]

13. Mr Molefe turned 50 on 28 December 2016.[7]

14. On 24 November 2016 the Chair of the Eskom Board, Dr Ngubane, wrote to Mr Molefe approving his application for early retirement.[8]

15. On the basis of the request and approval, Mr Molefe's last day of service

[4] Molefe FA Vol A, § 27, p 13-14; Annexure "BM6", p 72; DA FA Vol B, § 109, p 183. 1.1. The EFF does not deal with this.
[5] Vol E, § 20, p 464-5; Molefe RA, Vol G, § 9.1, p 753.
[6] Molefe FA, Vol A, § 30, p 14; "BM7" Vol A, p 73; Eskom Affidavit, Vol C, § 11.5, p 328.
[7] Molefe FA, Vol A, § 31.
[8] Molefe FA, § 32-; "BM8" p 74; DA AA § 115, p 184.

was 31 December 2016.[9]

16. On 18 February 2017 Mr Molefe received a letter from the EPPF welcoming him to the fund and setting out his pension benefits.[10]

17. The Minister issued a statement on 23 April 2017 querying the legal rationale for the pension benefits.[11]

18. EPPF rule 24 only permits early retirement at the age of 55, and not 50.[12]

19. At a meeting between the Minister and the Eskom Board on 19 April 2017, the early retirement agreement concluded with Mr Molefe was discussed. The Minister instructed the Board to consult with Mr Molefe and to revert with an appropriate pension proposal.[13]

20. At a subsequent meeting on 9 May 2017 the Eskom Board presented the Minister with four proposals.[14]

21. The Board indicated its preference for the first option, being consensual rescission of the early retirement agreement.[15] The Minister did not oppose this.

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[9] Molefe FA, Vol A, § 34, p 15-16; Certificate of Service from Eskom "BM9"; DA FA Vol B, § 118, p 184.
[10] Molefe FA, Vol A, § 35, p 16; DA FA Vol B, § 119, p 185.
[11] Molefe FA, Vol A, § 36, p 16; Eskom Affidavit, Vol C, § 11.8, p 329; DA FA, Vol B, § 121, p 185.
[12] Molefe FA, Vol A, § 40, p 18; Eskom Affidavit, Vol C, § 11.9, p 329.
[13] Minister's AA, Vol E, § 28, p 466; Molefe RA, § 11, p 756.
[14] Molefe FA, Vol A, § 42, pp 18 and 19; Minister Affidavit Vol E, §§ 29 and 30, p 466.
[15] Molefe FA, Vol A, § 42, p 18-19; Minister --- Vol E, § 31, p 466; DA FA Vol B, § 129, p 187.

22. Eskom passed a resolution to rescind its decision to approve his request for early retirement.[16]

23. On 3 May 2017 Eskom wrote to Mr Molefe advising of the rescission of its decision to grant me early retirement, and calling upon him to resume his duties as Group Chief Executive.[17] A written Reinstatement Agreement was signed by Mr Molefe and Eskom on 11 May 2017.[18]

24. The Minister issued a media statement on 12 May 2017 confirming Mr Molefe's reinstatement as Group Chief Executive, indicating the Minister's satisfaction with the re-evaluation process and recognising the merits of the proposal, on the proviso of its legality.[19]

25. The Minister wrote to the Eskom Board on 31 May 2017 directing the Board to rescind its decision to reinstate me as Group Chief Executive.[20]

26. On 2 June 2017 Mr Molefe was called to a meeting of the Eskom Board at which he was informed by Dr Ngubane that, as directed by the Minister, the Board rescinded the Reinstatement Agreement. Mr Molefe was informed that he was no longer the Group Chief Executive of Eskom.[21]

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[16] Molefe FA, Vol A, p 19; "BM13", Vol A, § 37, p 82.
[17] Molefe FA, Vol A, § 45, p 19-20; "BM15", p 86..
[18] Molefe FA, Vol A, § 47, p 20-21; "BM18", p 94-97, § 82, p 494. The Minister denies the validity of the Reinstatement Agreement- Minister AA, § 86.2, p 496; § 93, p 499
[19] Minister AA, Vol E, § 35, p 46.
[20] Molefe FA, Vol A, § 61, p 25-26; Annexure "BM1" p 34; Minister A, Vol E, § 47, p 471.
[21] Molefe FA, Vol A, § 61, p 25; Annexure "BM1"; Minister AA, Vol E, § 47, p 471.

JURISDICTION OF THE LABOUR COURT

27. Mr Molefe seeks relief based on his contractual remedies at common law.[22]

28. The Labour Court enjoys jurisdiction to enforce the terms of his contract of employment concluded with Eskom. The Court's jurisdiction to hear and determine a contractual dispute between Mr Molefe and his employer and to make an order pronouncing on the lawfulness of a breach of contract by his employer stems from section 77(3) of the Basic Conditions of Employment Act 75 of 1997 ("***the BCEA***"). The section grants the Court the necessary jurisdiction to order specific performance the context of an employment contract.[23]

29. In terms of the common law a dismissed employee who believes that his dismissal constitutes a repudiation of the contract of employment may either accept the repudiation and claim damages or reject the repudiation and hold the employer to the contract. As he is entitled to do, Mr Molefe has exercised the latter election. By virtue of section 77(3) of the BCEA, such a cause of action is competent before the Labour Court. In **Langeveldt v Vryburg Transitional Council**,[24] Zondo JP held as follows in this regard:

"*This means that, if the complaint is that the dismissal is*

[22] FA § 17 p9.
[23] **Wiltshire v University of the North** [2006] 1 BLLR 82 (LC) at 91.
[24] 2001 (5) BLLR 501 (LAC).

> *wrongful or unlawful, that that matter may either go to the High Court* ***or the Labour Court****…and will not be competent to be dealt with in terms of the dispute resolution process applicable to fair dismissal dispute under the LRA. If the complaint is that the dismissal is unfair (even if it may be lawful), then a High Court has no jurisdiction to entertain it but it is competent to be dealt with in terms of the unfair dismissal dispute process of the Act*".[25] (emphasis added)

30. The aforesaid judgment must be read with the Constitutional Court's judgment in **Steenkamp**[26] which serves as authority for the proposition that the LRA does not provide remedies for unlawful or invalid dismissals. This is because the LRA does not contemplate a right not to be unlawfully dismissed, nor does it contemplate invalid dismissals or orders declaring dismissals invalid and of no force and effect.

31. As a consequence of the Constitutional Court's interpretation of the LRA in **Steenkamp** to the effect that because the LRA does not provide remedies for unlawful or invalid dismissals, it follows that in the exercise of its jurisdiction under section 77(3) of the BCEA, the Labour Court is vested with the necessary jurisdiction to hear and determine a contractual dispute between Mr Molefe and his employer regarding the lawfulness of a breach of contract and is further entitled in the exercise of that jurisdiction to grant a relief in the form of an order for specific

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[25] At § 48.
[26] **Steenkamp and Others v Edcon Ltd (National Union of Metal Workers intervening)** 2016 37 ILJ 564 (CC).

performance.[27]

32. The Labour Court is therefore entitled to entertain a claim based on an alleged invalid termination of a contract of employment and to make an order for specific performance which is competent relief in the context of a claim based on breach of contract.

33. While the DA accepts that this Court has concurrent jurisdiction[28] with the High Court under section 77(3) of the BCEA,[29] it adopts the argument that Mr Molefe is not entitled to approach both Courts with concurrent jurisdiction on the same issues and in respect of the same facts to obtain relief which mirrors his opposition to the DA application.

34. The point is not well-founded. Mr Molefe did not approach the High Court but was brought there by the DA. There is bar to him approaching this Court under the auspices of its jurisdiction in terms of section 77(3) of the BCEA to challenge his dismissal based on facts which arose only after pleadings had closed before the High Court in the DA application.

35. On the DA's interpretation, this Court's jurisdiction under section 77(3) of the BCEA would be significantly eroded were it to be found that the existence of the pending High Court application launched by the DA precluded Mr Molefe from invoking this Court's jurisdiction. As we show

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[27] **Solidarity and Others v South African Broadcasting Corporation** 2016 (6) SA 73 (LC) at § 47.
[28] The Minister similarly does not dispute this Court's jurisdiction. See Minister AA § 72.1 p485.
[29] DA Intervention FA § 70 p176.

elsewhere in these heads of argument, the issues raised by this application are discrete in their nature and only arose subsequent to the closing of pleadings before the High Court.

36. The Minister, the DA and the EFF further accuse Mr Molefe of forum shopping.[30] This point of criticism cannot be justified. This is because an applicant may formulate his or her claim in different ways and thereby bring it before a forum of his or her choice. This is the consequence of the Labour Court's concurrent jurisdiction under section 77(3) of the BCEA. Any surprise that may be expressed at this notion is misplaced.

37. The point was illustrated as follows by Nugent JA in **Makhanya v University of Zululand**:[31]

> "*The plaintiff might indeed formulate a claim in whatever way he or she chooses – though it might end up that the claim is bad.* ***But if a claim, as formulated by the claimant, is enforceable in a particular court, then the plaintiff is entitled to bring it before that court. And if there are two courts before which it might be brought then that would not evoke surprise, because that is the nature of concurrent jurisdiction.*** *It might be that the claim, as formulated, is a bad claim, and it will be dismissed for that reason, but that is another matter*."
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> (**our emphasis**)

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[30] DA Intervening FA § 72 p176; Minister AA § 72.2 p485; EFF Intervening FA § 19.3 p137.
[31] 2010 (1) SA 62 SCA at § 34; see also **South African Maritime Safety Authority v McKenzie** 2010 (3) SA 601 (SCA).

38. It is therefore not open to the respondents or any of the intervening applicants to prescribe to Mr Molefe where he should litigate. It is sufficient for him to formulate a cognisable claim before this Court so as to trigger its jurisdiction. The enquiry goes no further than determining the nature of the right asserted in support of his claim[32] and provided such a claim is one which the Labour Court has the power to adjudicate upon, that in itself is sufficient to trigger the application of the Labour Court's jurisdiction.[33]

MR MOLEFE'S UNLAWFUL DISMISSAL

The Nature of the Undisputed Objective Facts: There was No Basis to Dismiss Mr Molefe

39. The undisputed facts before this Court demonstrate that Mr Molefe's dismissal was not effected for reasons of conduct, capacity or operational requirements.[34] Until the issue of the Minister's directive, Eskom did not consider it appropriate to remove Mr Molefe from his position as Group Chief Executive.[35]

40. Before the High Court, Dr Ngubane on behalf of Eskom expressed the view that Mr Molefe had played a significant role in stabilising Eskom and

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[32] See **Gallo Africa Ltd and Others v Sting Music** 2010 (6) SA 329 SCA at § 6.
[33] See also **National Union of Mine Workers and VAVI v COSATU** [2014] ZA GP JHC 59 (4 April 2014).
[34] Section 188(1)(a) of the LRA.
[35] "BM19" § 41.3 p99.

that his performance could not be faltered.[36] That Eskom plainly had no reason to dismiss Mr Molefe stems from the fact that it had no difficulty in expressing the view publically that Mr Molefe and his executive management team had turned around the company's operational and financial performance with the result that the country had gone for fifteen months without load shedding.

41. At the time of Mr Molefe's early retirement Eskom publically thanked him for his relentless dedication to turning the company around and putting in place a sound growth trajectory.[37]

42. In the answering affidavit filed on behalf of Eskom before the High Court, Dr Ngubane expressed Eskom's position as follows:

> "*Since his appointment as Group Chief Executive of Eskom, Molefe has fulfilled his responsibilities with efficiency and also in a manner which brought stability to Eskom in difficult circumstances. During his tenure, Eskom was able to successfully deal with the significant issues relating to procurement and also achieve stabilisation of the electricity grid, thereby initially reducing the problem of load shedding and eventually avoiding load shedding. The circumstances in which Mr Molefe took over as Group Chief Executive were difficult. Molefe though confronted these difficulties with vigour and were substantially responsible for assisting in restoring stability to the functioning of Eskom, particularly in its most significant function, namely to ensure the continued*

[36] "BM19" § 41.4 p100.
[37] "ESK17" p452.

uninterrupted supply of electricity to South Africa."[38]

43. In her High Court affidavit the Minister not only confirmed that she had had the opportunity to properly familiarise herself with the issues, but admitted to Mr Molefe's achievements as a technocrat.[39] On 11 November 2016 the Minister expressed the view that she was saddened about Mr Molefe's departure and further said that she was sad to lose an executive of Mr Molefe's calibre with him having been instrumental in developing Eskom's turnaround strategy which was beginning to yield positive results.[40]

44. The competence and ability of Mr Molefe was therefore never in question. His dismissal was unrelated to reasons pertaining to his conduct, capacity or any operational requirements.

45. The Minister's attitude towards Mr Molefe however chanced when she realised that her previous endorsement of him was no longer politically palatable to the ANC.

46. On 31 May 2017, the Minister made certain remarks to a Select Parliamentary Committee on Communications and Public Enterprises.[41] The manner in which the Minister commenced with a brief progress report on Eskom provides telling insight into how the Minister arrived at

[38] § 20.
[39] "BM37" pp652-653.
[40] "RA1" p773.
[41] Molefe RA to Minister AA § 16.1 p759.

the decision to issue the directive that resulted in the Board effecting Mr Molefe's dismissal on 2 June 2017. The Minister said:

46.1. "*Firstly, I am a deployee of the ruling party therefore I am subject to the decision of the party*" [emphasis added];

46.2. "*Thirdly, the opposition's court case: I don't want to dwell too much on the matter before the court. Let me just say that I have submitted an affidavit, and instructed my legal team to withdraw my opposition to Part A of the relief sought – that I set aside my appointment of Mr Molefe. I will abide by the court's decision on the legality of Mr Molefe's return. This is consistent with my support for Mr Molefe's return to Eskom on the proviso that his return is legal*".[42]

47. On the same day and following the appointment of an Inter-Ministerial Committee ("***the IMC***") comprising the Ministers of Justice, Finance, Energy and the Minister herself, all of whom had considered the implications of Eskom's decision to reinstate Mr Molefe, the Minister held a meeting with the Eskom Board on 31 May 2017.[43]

48. The ANC itself had issued a statement on 12 May 2017 in terms of which it condemned the decision made by the Eskom Board to reinstate Mr

[42] "RA4" p781.
[43] Minister's Affidavit, Vol E, § 45, p 471.

Molefe as Group Chief Executive.[44] It is therefore clear that the Minister was acting on the instructions of the majority party in the National Assembly and regarded herself as bound by the decisions of the ANC.

49. In having regarded herself as bound by the decisions of the ANC, which was ultimately instrumental in her issuing the directive, the Minister acted unlawfully since such conduct is impermissible in a constitutional democracy. As the Constitutional Court held as recently as Thursday 22 June 2016 in its seminal judgment on the secret ballot issue, members of the National Assembly (of which the Minister is one) are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws of the Republic.[45] The Constitution does not permit them to swear allegiance to their political parties, important players though they are in our constitutional scheme. [46] The Minister is ultimately accountable to Parliament, and through Parliament, to the citizens of South Africa.[47] She is not accountable to the ANC.

50. Until the issue of her directive on 31 May 2017, the Minister similarly appreciated Mr Molefe's competence. She had knowledge of his track record at Eskom[48] and had no difficulty in deposing to an affidavit before the High Court. Therein she stated that whilst she was aware of written allegations made against Mr Molefe in the Public Protector's Report, the

[44] Eskom RA to Minister AA § 16.3 p760; "RA5" p783.
[45] Section 48 of the Constitution read with item 4 of Schedule 2.
[46] **United Democratic Movement v Speaker of the National Assembly and Others** (CCT89/17) [2017] ZACC 21 (22 June 2017) at § 79.
[47] Section 92 of the Constitution.
[48] "BM22" § 42 p103.

status of the Report was a matter being addressed by the Office of the President that she could not possibly pre-judge.[49]

51. In her statement to the Portfolio Committee on Public enterprises as recently as 23 May 2017, she lamented the fact that there was a presumption of guilt, this despite the fact that the Public Protector's Report was the subject of a review. In defending in Mr Molefe, she told the Parliamentary Committee that "*As a society, as politicians, as media, we must be aware of criminalisation by association. Particularly in the absence of anyone having been convicted of a crime…*".[50]

52. Having met with the ANC on 31 May 2017 when it was purportedly decided that it would be in the best interest of Government, Eskom and the country that the Board rescind the decision to reinstate Mr Molefe,[51] no valid reason has been given for this decision. It cannot be otherwise than that the IMC (of which the Minister is a member) was acting exactly conforming to the sentiments expressed by the ANC. The Minister was merely acting in accordance with her statement that she was subject to the decision of the party.[52]

53. On 31 May 2017, the Minister purported to issue a directive to the Eskom Board to rescind the decision to reinstate Mr Molefe as the Group Chief

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[49] "BM22" §§ 43 and 44 p103.
[50] "BM37" p653.
[51] Minister AA § 46 p471.
[52] Molefe RA to Minister AA § 16.5 p761.

Executive Officer.[53] It was at that stage that the Minister for the first time adopted a total change of position and recorded that she believed that the appropriate process was not followed in Mr Molefe's appointment with the result that she instructed the Board to rescind the decision to reinstate him as the Group Chief Executive Officer.[54]

54. The Minister says that Mr Molefe's reinstatement caused a public outcry and resulted in intense media and political scrutiny. This was the basis upon which President Zuma decided to appoint the IMC. She further says that the Government, as the sole Shareholder, had an interest in the goings-on at Eskom. The public interests of the Company resulted in her directive to the Board to rescind Mr Molefe's reinstatement.[55]

55. The Minister tries to 'sugar coat' the ANC's interference as the reason for Mr Molefe's summary dismissal, by presenting Mr Molefe's return as a Government problem. It is not so, it was an ANC problem.

56. This is borne out by the following facts:

56.1. The rumblings of political interference came to the forefront around 12 May 2017, where the ANC in a press statement, stated that it condemned the decision made by the Board of

[53] Molefe FA § 59 p25.
[54] Molefe FA § 60 p25; "BM23" p105.
[55] Minister's AA Vol E § 88.3 p497

Eskom to reinstate Mr Molefe as the Group Chief Executive.[56]

56.2. On 23 May 2017, the Minister appeared before the Portfolio Committee on Public Enterprises. When asked about Mr Molefe, she said that "*I expected that his achievements as a technocrat, the fact that he would be under enormous scrutiny, and the presumption of innocence until proven guilty would bring some balance to the debate*";[57]

56.3. The Minister started distancing herself from her earlier statement when she met with the Select Committee on Communication and Public Enterprises on 31 May 2017. At that meeting, she identified herself as deployee who was subject to the decision of the party;

56.4. By the time she met with the IMC on the same day, she had had a complete change of heart about staying impartial vis-à-vis Mr Molefe's return to Eskom; and

56.5. The decision of the IMC for the Board to rescind Mr Molefe's Reinstatement Agreement was nothing more than rubber-stamping a decision already taken by the ANC more than two weeks prior to that event.

[56] B Molefe's RA Vol G § 16.3 p760 Annexure RA3 p778
[57] B Molefe's RA Vol G § 15.2 pp758-759 Annexure RA3 p778

57. While our Courts have not specifically pronounced on political parties' interference in matters that are within the purview of local, provincial or national governments, guidance can be found in the decision of **Matatiele Municipality and Others v President of the RSA and Others**.[58] In that case, the Constitutional Court warned against political interference in matters that it said were clearly within the sphere of government. In particular, the CC emphasised the independence of the Demarcation Board, a body created to determine municipal boundaries.[59] In that regard, the Court stated as follows:

> *"[I]f municipalities were to be established along party lines or if there were to be political interference in their establishment, this would undermine our multi-party system of democratic government."*[60]

58. Thus, undue political interference has the potential to undermine the

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[58] 2006 (5) SA 47 (CC). The few instances where Courts have examined the impact of political interference on the functioning of a government entity, it was in relation to the independence of the investigative units. **McBride v Minister of Police (Council for the Advancement of the South African Constitution and Helen Suzman Foundation as Amicus Curiae)** 2016 JDR 0028 (GP) succinctly summarises the CC's position in **Glenister President of the Republic of South Africa** 2011 (3) SA 347 (CC) at §§ 215 and 216 and **Helen Suzman Foundation v President of the RSA; Glenister v President of the RSA** 2015 (2) SA 1 (CC) at § 18, when the Pretoria High Court when it stated as follows:

> "[28] In Glenister II and Helen Suzman Foundation, the Constitutional Court held that the DPCI is not required to be absolutely independent, but must be "adequately independent". This means that it must have "sufficient structural and operational autonomy to protect itself from political influence" and "to ensure that it 'discharges its responsibilities effectively'". Adequate independence "does not require insulation from political accountability", but it does require "insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit."

[59] **Matatiele** at § 40

[60] Matatiele at § 41; and applied in Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, Kwazulu-Natal v President of the Republic of South Africa and Others 2000 (1) SA 661 (CC) at § 50.

effective functioning of local, provincial, national governments and other government entities. All of them need to work within the prescripts of the law, ensuring that their decisions can withstand legal scrutiny. However, when there is political interference, this may result in a government functionary being manipulated by political actors; the result being that the implementation of the decisions brought to bear on that functionary, may not be legally defensible.[61]

59. This point was made by the CC in the secret ballot case, **United Democratic Movement v Speaker of Parliament and Others**.[62] The CC emphasised that "*in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking [is] to in effect serve the people … through the Constitution*."[63] Therefore, prioritising the Constitution above party politics is crucial in our democratic society. By inference, this principle equally applies to political parties prioritising the rule of law above party politics.

60. The Minister was willing to abide by the High Court's decision regarding Mr Molefe's return to Eskom. However, in her about turn, she has now acted inconsistently by instructing the Board to rescind the decision to reinstate Mr Molefe.

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[61] **MEC for Health, Eastern Cape & Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute** 2014 (3) SA 481 (CC) at § 69 to 71, p79.
[62] Case number CCT 89/17
[63] UDM (secret ballot case) at § 79

The Events of 2 June 2017

61. Mr Molefe was handed a letter signed by Dr Ngubane dated 2 June 2017 as well as a copy of the Board Resolution of the same date coupled with a copy of the Minister's directive.[64]

62. He had been summoned to attend an urgent meeting of the Board and after having recused himself from the meeting he was advised on his return by Dr Ngubane that as directed by the Minister, the Board had resolved to rescind the Reinstatement Agreement concluded between him and Eskom on 11 May 2017.[65]

63. Giving effect to the directive from the Minister, the Board had resolved to rescind the Reinstatement Agreement as a consequence of which Mr Molefe was no longer the Group Chief Executive Officer.[66] The letter from Dr Ngubane advanced no substantive reasons for Mr Molefe's dismissal which was not preceded by any form of disciplinary enquiry.[67]

The legal nature of Mr Molefe's employment relationship

64. Mr Molefe does not dispute that his appointment or dismissal as Group Chief Executive of Eskom is required to comply with Eskom's MOI, particularly Article 14.3. The Minister has the exclusive power to appoint

[64] Molefe FA § 61 pp25-26.
[65] Molefe FA § 61 p25.
[66] Molefe FA § 62 p26.
[67] "BM1" p34.

or remove the Group Chief Executive. It is further accepted that the public sector is subject to constitutional oversight. However, it is quite another matter to ignore (as the EFF seeks to do), or to minimise (as the DA seeks to do) the common law contractual principles of Mr Molefe's employment relationship with Eskom. As we will demonstrate, the contractual principles governing the employment relationship fit comfortably beneath the public law and statutory scheme.

65. "*Everything, though, is not administrative law*", said Harms JA in delivering a unanimous decision of the SCA in **Steenkamp NO v Provincial Tender Board, Eastern Cape.**[68] In **Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others** ("**Cape Metropolitan**")[69], the SCA was required to determine if the contractual relationship of the parties was governed by the common law or administrative law, even though the administration was empowered to terminate the contracts of employment.[70] The Court decided that in that instance, the contractual relationship between the public authority and the employees, was governed exclusively by the common law. It held:

> *"The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent*

[68] 2006 (3) SA 151 (SCA) at § 12. The Court concluded that "once the tender is awarded, the relationship of the parties is that of ordinary contracting parties, although in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship." This was confirmed in **Steenkamp NO Provincial Tender Board, Eastern Cape** 2007 (3) SA 121 (CC) in the majority judgment of Moseneke DJP where at § 50, he stated that "Once the tender is awarded the State and the tenderer are no more than equal contracting parties in an imminent sale".
[69] 2001 (3) SA 1013 (SCA).
[70] **Cape Metropolitan** at § 11.

> *from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was, therefore, not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not by virtue of its being a public authority, find itself in a stronger position, than the position it would have been in, had it been a private institution. When it purported to cancel the contract, it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties, in respect of a commercial contract. In all these circumstances, it cannot be said that the appellant was exercising a public power."*[71]

66. The Constitutional Court has recognised that it is not always clear which law should be applicable, and noted in **KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others** ("***KwaZulu-Natal Joint Liaison Committee***"),[72] that *"[t]he potential interplay between principles of contract law and those of administrative law is a contested and controversial subject on which, I think it is fair to*

[71] **Cape Metropolitan** at § 18. This approach was approved in **Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd** 2009 (1) SA 163 (SCA) at § 18**, Bullock NO and others v Provincial Government of North West Province and Another** 2004 (5) SA 262 (SCA) at §§ 10 and 11.
[72] 2013 (4) SA 262 (CC).

say, the final word has yet to be spoken."[73]

67. The SCA made a similar pronouncement in **President of the Republic of South Africa and others v Reinecke** ("***Reinecke***")**,**[74] where Wallis JA stated as follows:

> "*It is true that in Mustapha v Receiver of Revenue, Lichtenburg this court held that relationships entered into under statutory powers or with statutory bodies could nonetheless, when disputes arose, be dealt with as being purely contractual in nature … The correct view is that one cannot divorce a contract arising from the performance of statutory functions and the exercise of statutory powers from its statutory background. Sometimes the contractual aspects will be crucial and sometimes the statutory. Which are the more important will depend upon the facts giving rise to the dispute. When there is a breach of the basis upon which the magistrate's employment (in the broad sense) is regulated, if the magistr*ate *is an employee of the state it will often be difficult to determine whether the remedies for that breach are to be found in contract or in public law*."[75] [emphasis added]

68. We submit that the present case, based on its particular facts, falls to be determined primarily on common law principles of contract law. Because the DA and the EFF's analysis of the Reinstatement Agreement proceeds from the premise that this constituted re-employment or re-appointment

[73] **KwaZulu-Natal Joint Liaison Committee** at §§ 101-105.
[74] 2014 (3) SA 205 (SCA).
[75] **Reinecke** at § 16.

(which we demonstrate below is not the case), administrative law finds limited application in this case.

69. Eskom is a state-owned company. It is bound by the EPPF rules. Mr Molefe have not yet reached 55, the minimum age for early retirement in terms of rule 24, when Eskom and Mr Molefe concluded the early retirement agreement. Eskom did not, on any basis, have the power to conclude the early retirement agreement with Mr Molefe. It was thus void *ab initio* due to a common mistake.

70. A common mistake requires both contracting parties to be *ad idem* and to share the same mistake.[76] This was explained in **Van Reenen v Smith NO and Another:**[77]

> *"A common mistake is said to be present where both parties to an agreement labour under the same incorrect perception of a fact external to the minds of the parties. Such a mistake, of course, does not lead to dissensus: the parties are in complete agreement, although their consensus is based on an incorrect assumption or supposition. This kind of mistake can be related to the concept of a common underlying supposition ('veronderstelling') on which the parties base their contract. In this manner, the parties can introduce a common motive into the (terms of the) contract so that a mistake in their common motive will render the contract without further*

[76] **Tshivhase Royal Council and Another v Tshivhase and Another** 1992 (4) SA 852 (A) at p863.
[77] 2002 (4) SA 264 (SCA).

effect."[78] [Emphasis added]

71. The factual evidence regarding the sequence of events from early 2016 until May 2016 shows that both Eskom and Mr Molefe were *ad idem*, albeit mistaken, that Mr Molefe was eligible for early retirement.

72. A contract which is concluded based upon a common mistake is void *ab initio* where it gives rise to a contract that is objectively/absolutely impossible to perform at the time that the contract was concluded, regardless of whether such impossibility is factual or legal.[79]

73. As Mr Molefe was not eligible for early retirement in terms of the EPPF rules, it was not legally possible to perform the early retirement agreement at the time when it was concluded. As a result, Mr Molefe's 7 March 2016 employment contract did not come to an end and remained extant.

74. The conclusion of the Reinstatement Agreement did not more than regulate the consequences arising out of the implementation of the early retirement, which was at a time prior to Eskom and Mr Molefe understanding that the early retirement agreement was void.

75. If a contract is void *ab initio* it is a nullity. No act is necessary to set it

[78] At § [12], quoting **Van der Merwe Contract: General Principles**.
[79] **Peters Flamman & Co v Kockstad Municipality** 1919 AD 427 at 434. See also **Wilson v Smith and Another** 1956 (1) SA 393 (W) at 396.

aside.[80] This carries with it the necessary consequence that Mr Molefe's 7 March 2016 employment contract did not come to an end and remained extant throughout.

76. It was not necessary or required for the Eskom Board to resolve to rescind the early retirement agreement for it to become a nullity. It was a nullity from its inception, as it was illegal to perform. The Eskom Board resolution was merely a contemporaneous confirmation of what had occurred as a matter of law, and has no substantive legal consequence.

77. Equally, the Reinstatement Agreement was not legally required to declare that the early retirement agreement was legally a nullity. This is because the parties performed at a time when they mistakenly thought that their agreement was valid when it was actually a nullity. However, the consequences- and particularly the financial consequences- had to be dealt with. This is particularly so as restitution is not a natural consequence of a void agreement.[81]

78. It is plain from the terms of the Reinstatement Agreement that all it did was to regulate an unwinding of the financial consequences of Eskom and Mr Molefe having performed in terms of the early retirement agreement at a time when they both thought it was valid. It had no legal consequences beyond this. The Reinstatement Agreement is not

[80] **Dickinson Motors (Pty) Ltd v Oberholzer** 1952 (1) SA 443 (A) at 450.
[81] See: **Laco Parts (Pty) Ltd t/a ACA Clutch v Turners Shipping (Pty) Ltd** 2008 (1) SA 279 (W) at 285G.

unlawful.

79. The result is that:

79.1. the early retirement agreement was a nullity;

79.2. Mr Molefe's 7 March 2016 employment contract did not come to an end on 31 December 2016, or at all;

79.3. neither the Eskom Board resolution to rescind the early retirement agreement nor the Reinstatement Agreement involved a legally recognisable decision by the Minister;

79.4. Mr Molefe's return to Eskom on 15 May 2017 was pursuant to his valid and extant 7 March 2016 employment contract, and was not an appointment by either the Eskom Board or the Minister in terms of the MOI or otherwise.

Legal consequences

80. We submit that these legal consequences constitute a complete answer to the DA and EFF's contentions that Mr Molefe did not validly return to Eskom in May 2017.

81. When the Minister, having been informed of the situation regarding the invalid Reinstatement Agreement accepted Mr Molefe's resumption of duties, she made a decision. This decision had consequences and may

not be ignored until properly set aside.[82] This is fundamental to the rule of law. In **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** [2004] 3 All SA 1 (SCA) at paragraph 27 the Supreme Court of Appeal explained the aforesaid principle with reference to the following passage from the decision of the House of Lords in **Smith v East Elloe Rural District Council** [1956] AC 736 (HL) 769-70:

> *"An [administrative] order…is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."*

82. Both Eskom and Mr Molefe believed, mistakenly as it transpired, that Mr Molefe was entitled to be granted early retirement at the age of 50. Because this belief was based upon a common belief that the rules of the Eskom Pension Fund permitted this, the view was that no permission was required from the Minister. When the Minister exercised her prerogative to query the suitability of this arrangement, the common mistake was discovered. The Minister elected to accept Mr Molefe's resumption of duties.

83. We submit that the DA's attempt to view the Reinstatement Agreement through the prism of irrationality is not well founded. The reliance upon

[82] **MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd** 2014 ZACC 6 at § 103.

the Public Protector's report to support the public law argument advanced should not be entertained.

84. The EFF argues that the early retirement agreement concluded between Eskom and Mr Molefe constituted a scheme which was unlawful because it is inconsistent with section 195(1) of the Constitution.[83] Both Eskom and Mr Molefe accept that the early retirement agreement was not permissible in terms of the Eskom Pension Fund Rules. The Reinstatement Agreement makes provision for Mr Molefe to repay to the pension fund all amounts paid to him pursuant to the early retirement agreement[84] and Eskom acknowledges that amounts paid by Eskom would have to be repaid to it in order to restore the *status quo*.[85]

The Unlawful Dismissal

85. The decision the board took on Friday 2 June 2017 effectively brought about Mr Molefe's summary dismissal from the employ of Eskom. The decision was unlawful in a number of respects.

86. Firstly, the board had no power to remove him from the position of Group Chief Executive. This power is exclusively entrusted to the Minister as appears from clause 14.3.6 of the MOI. The board accordingly acted in breach of the contract of employment read with the applicable provision of the MOI in that it purported to dismiss Mr Molefe in circumstances

[83] See EFF FA, Vol B, §§ 27 to 29, p139 to p140.
[84] Annexure "BM9" Vol 5 clause 6 p427.
[85] Eskom AA Vol 3 § 37 p267.

where it simply did not have the power to do so.

87. While the Minister has the right to appoint or remove the Chief Executive Officer of Eskom in terms of the 2016 MOI,[86] she says she directed the Board to rescind Mr Molefe's Reinstatement Agreement. She said she followed this course because there had been no valid appointment after Mr Molefe's resignation on 11 November 2016.[87]

88. The Minister fails to appreciate that the rescission of Eskom's decision to approve Mr Molefe's request for early retirement, had the consequence of restoring the status *quo*. The early retirement agreement concluded between Eskom and Mr Molefe was based on a common fundamental mistake of the rules of the pension fund. As a result of the mistake, the early retirement agreement is void. The contract of employment Mr Molefe entered into in March 2016 therefore did not come to an end, and he continued to remain employed as the Group Chief Executive.[88]

89. The Minister relies on a document entitled "Guidelines for the appointment of a Chief Executive Office for a State-Owned Enterprise" in attempting to justify why Mr Molefe's return to Eskom is not a restoration of his employment.[89] This document is irrelevant because when Mr Molefe returned to Eskom in May 2017, he did not need to be re-

[86] In terms of clause 14.3.1, the Minister has the exclusive power to appoint and remove the Chief Executive as an employee of the Eskom.
[87] Minister's AA Vol E § 66 p484
[88] B Molefe FA Vol A § 50 p21
[89] Minister's AA Vol E § 66 p484

employed, as the Minister suggests. He was already an employee.

90. While the Minister has the exclusive power to appoint and remove the Group Chief Executive of Eskom, the ANC appropriated that right, and the Minister instructed the Board to implement it.

91. The decision to remove the Group Chief Executive is a discretionary decision and the Minister is the only person who is empowered to make it. That decision was however, taken by the ANC and communicated to the IMC, which in turn was communicated to the Minister, and ultimately to the Board by the Minister. The ANC is not empowered to make a decision to remove the Group Chief Executive of Eskom. The Minister has not even alleged that she applied her mind to the removal of the Group Chief Executive before she directed the Board to remove him. She merely acted under the dictation of the ANC to implement a decision, whose authority she could not have been able to delegate.

92. Furthermore, the Minister did not at any point communicate with Mr Molefe before she directed the Board to implement the decision. *Audi alteram partem* was not observed.

93. Secondly, Mr Molefe's dismissal was required to be effected in terms of section 186(1)(a) of the LRA and as appears from the express wording of clause 14.3.6 of the MOI. The provisions of the LRA therefore applied to his removal from office as the Group Chief Executive. Clause 5.3 of the

contract of employment only permits summary dismissal where there is a suspicion of misconduct that justifies dismissal. His dismissal was not affected because of reasons that related to his conduct, capacity or because of operational requirements. Eskom can therefore point to no grounds upon which his dismissal can be said to have been effected in a manner which were substantially fair. In addition, no fair procedure was followed before effecting his dismissal. This was plainly in breach of his employment contract read with clause 14.3.6 of the MOI.

94. Thirdly, and even if it is accepted that Mr Molefe's summary dismissal was effected at the instance of the Minister to bring the dismissal within the purview of clause 14.3.6 of the MOI (which is denied), the Minister plainly had no authority to do so. We say so for two reasons:

94.1. her conduct amounted to an unlawful repudiation of Mr Molefe's contract of employment as she had no legal grounds premised on either capacity, operational or misconduct reasons to affect his dismissal but was in fact motivated by political considerations which did not amount to lawful grounds on any possible construction;

94.2. the Minister failed to follow the mandatory requirement laid down by clause 14.3.6 which stipulates that the LRA applies to any removal of the Group Chief Executive Officer and which at the very least, required the Minister to give Mr Molefe a proper

hearing in compliance with the requirements of procedural fairness laid down in the LRA.

95. The 2016 MOI states further that the removal of the Group Chief Executive constitutes a dismissal in terms of section 186(1)(a) of the LRA, which provides that –

> *"186 Meaning of dismissal and unfair labour practice*
>
> *Dismissal means that -*
> *(a) an employer has terminated employment with or without notice"*

96. The provisions of sub-clause 14.3.6 being peremptory, means that the only way the Minister could have proceeded under the circumstances, was to utilise the Human Resource mechanisms within Eskom, in order to remove Mr Molefe as the Group Chief Executive. A rescission of a reinstatement is not contemplated in any of the provisions of the 2016 MOI that relate to the Group Chief Executive, and thus, could not have been an option she could have pursued. [90]

97. Finally, the Minister was not entitled to rescind the Reinstatement Agreement. In having elected to accept the Reinstatement Agreement, the Minister in effect exercised an election to honour the contract of employment concluded with Mr Molefe in March 2016 and in so doing

[90] **Denel v Vorster** [2005] 4 BLLR 313 (SCA).

divested herself of any right which she may have had to dismiss him.

98. In the context of a contract of employment, the exercise of an *"election"* would typically arise when one party is faced with repudiation by the other. In these circumstances, the innocent party can elect to abide by the contract (specific performance) or to *"accept"* the repudiation and cancel the contract.[91]

99. The doctrine of election is not however limited to the sphere of repudiation and cancellation of contracts. It is a principle of general application.[92] It arises wherever a party to a contract is faced with two inconsistent courses of action. Once having chosen one course of action, that party is not entitled (without the leave of the other), to reverse that election. That is known as *"approbating and reprobating"*.

100. Hoexter JA in **Chamber of Mines v NUM** 1987 (1) SA 668 (A) said the following at p 690 E-G:

> *"One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application. A useful illustration of the principle is offered in the relationship between master and servant when there*

[91] **Stewart Wrightson v Thorpe** 1977 (2) SA 943 (A) at pp 953-954.
[92] **Hlatswayo v Mare and Deas 1912 AD 242 at p 259; Administrator, Orange Free State and Others v Mokopaenele and Another** 1990 (3) SA 780 (A) at p 787 G – 788 G.

comes to the knowledge of the former some conduct on the part of the latter justifying the servant's dismissal. The position in which the master then finds himself is thus described by Bristowe J in Angehrn and Piel v Federal Storage Co 1908 TS 761 at 786:

'It seems to me that as soon as an act or group of acts clearly ***justifying dismissal comes to the knowledge of the employer it is for him to elect whether he will determine the contract or retain the servant.... He must be allowed a reasonable time within which to make his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another. Quod semel placuit in electionibus amplius displicere non polest (see Coke Litt 146, and Dig 30.1.84.9; 18.3.4.2; 45.1.112). If an unequivocal act has been performed, that is, an act which necessarily supposes an election in a particular direction, that is conclusive proof of the election having taken place'.'"*** **(Our emphasis)**

101. Indeed, the doctrine of election involves the doctrine of waiver. The party who chooses one of two inconsistent remedies, waives the right to rely on the other.[93] One of the *naturalia* of Mr Molefe's contract of employment is the obligation to act in good faith towards him and to refrain from conducting itself in a manner which was calculated to

[93] **Bowditch v Peel & Magill** 1921 AD 561 at p 572; **Administrator, Orange Free State and Others v Mokopaenele and Another** 1990 (3) SA 780 (A) at p 787 G-I; **Mgoqi v Cape Town and Another** 2006 (4) SA 355 (C) at p 394, §§ 135-137.

detrimentally affect the relationship of trust and confidence essential to the employment relationship.[94]

102. This obligation precluded the Minister from taking a decision different to the one exercised previously and which was binding on her.

THE RELIANCE ON THE PUBLIC PROTECTOR'S REPORT

103. The Public Protector's Report is no cause to act against Mr Molefe and certainly no reason to deny him the relief which he seeks in this application. The reliance thereon by the DA, the EFF and the Minister (the latter in a *volte farce* particular for the first time before this Court) is not only misplaced, but highly opportunistic.

104. While the Minister has now altered her stance by adopting the DA's summary of the Report with apparent approval,[95] this must be contrasted to her more circumspect approach previously adopted.[96]

105. Paragraph 7 of the Public Protector's Report is entitled "OBSERVATIONS" and contains the following considered qualification:

> *"Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following observations:"* [emphasis added]

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[94] **Council for Scientific and Industrial Research v Fijen** 1996 (2) SA 1 at p 10.
[95] Minister AA § 16, p463.
[96] "BM37" p653.

106. This is followed by nine separate sub-paragraphs which are phrased in the form of interrogatories, commencing with the word "*whether*". These sub-paragraphs principally constitute queries posed regarding the conduct of President Zuma, as well as queries regarding whether any state functionary in any organ of state or other person acting unlawfully, improperly or corruptly in connection with appointment or removal of Ministers and Boards of Directors of SOE's, in connection with the award of state contracts or tenders to Gupta-linked companies or persons, or with the extension of state-provided business financing facilities to give Gupta-linked companies or persons.

107. In paragraph 8 entitled "*REMEDIAL ACTION*"[97] the Public Protector informs the President that her "*investigation*" has proven that given the extent of issues her office needs to traverse and resources necessary to execute, it is incapable of being executed fully by the Public Protector. The Report goes on to refer to how the investigation *"has been hamstrung by the late release [of requested resources] which caused the investigation to commence later than planned. The situation was compounded by the inadequacy of the allocated funds (R1.5 million)."*[98] The Report then requires the President to appoint, within 30 days, a Commission of Inquiry headed by a judge solely selected by the Chief

[97] Public Protector's Report commencing at p353 of the DA application.
[98] Public Protector's Report commencing at p353 of the DA application.

Justice, who would provide one name to the President.[99]

108. These excerpts clearly demonstrate that the Public Protector was aware of the limitations which the identified constraints had imposed upon her ability to conduct an investigation as contemplated in section 7 of the Public Protector Act 23 of 1994.

109. Section 8(3) of the Public Protector Act provides:

> "*(3) The findings of an investigation by the Public Protector shall, when he or she deems it fit but as soon as possible, be made available to the complainant and to any person implicated thereby."* [emphasis added]

110. This imperative imposed is in contrast to the permissive nature of section 8(1), which provides:

> *"(1) The Public Protector may, subject to the provisions of sub-section (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her."* [Emphasis added]

111. The important difference between these two sub-sections lies in the distinction created between a finding, a point of view or recommendation, as referred to in section 8(1). The linguistic difference between a finding, a point of view or a recommendation is emphasized by the use of the

[99] Public Protector's Report commencing at § 8.4 p353 of the DA application.

disjunctive "*or*". Of further relevance is section 8(2)(b) which permits the Public Protector to submit a report to the National Assembly on the findings of a particular investigation in the circumstances listed.[100]

112. We submit this important statutory distinction between findings, points of view or recommendations was recognised by the Public Protector in her Report. This is reflected in her observations, deliberately phrased as interrogatories, for determination by the Judicial Commission of Inquiry. Manifestly these observations do not constitute findings as contemplated in the Public Protector Act. The deliberately qualified language of the Public Protector is apparent from her frequent use of the word "*appears*", "*it can only be inferred*" and "*there may have been*" supports this point.

113. There have been recent instances where reports of the Public Protector have received the attention of our Superior Courts.

114. In **South African Broadcasting Corporation SOC Limited & Others v Democratic Alliance & Others** ("***Motsoeneng***")[101] the Supreme Court of Appeal considered a report of the Public Protector into the appointment of Mr Motsoeneng as Acting Chief Operations Officer of the SABC, in

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[100] The full text reads:

"The Public Protector shall, at any time, submit a report to the National Assembly on the findings of a particular investigation if –

(i) he or she deems it necessary;
(ii) he or she deems it in the public interest;
(iii) it requires the urgent attention of, or an intervention by, the National Assembly;
(iv) he or she is requested to do so by the Speaker of the National Assembly; or
(v) *he or she is requested to do so by the Chairperson of the National Council of Provinces".*

[101] 2016 (2) SA 522 (SCA).

which report the Public Protector investigated maladministration of the SABC and interference by the Minister of Communications.

115. The Public Protector investigated, and wrote a report containing her findings, particularly that Mr Motsoeneng's appointment was irregular, and that he had acted unlawfully. She prescribed remedial actions for the SABC's Board to take, including the instituting of disciplinary proceedings against Mr Motsoeneng. Dealing with the appeal by the SABC again an interim order granted by the Western Cape Division of the High Court, the SCA extensively reviewed the importance and import of Chapter 9 institutions such as the Office of the Public Protector, in the context of the constitutional and legislative framework.[102] In reaching the conclusion that the Minister and the SABC were not entitled to ignore the Public Protector's Report the court said:

> *"once she [the Public Protector] has finally spoken, following upon a full investigation, where those affected have been afforded a proper hearing, as happened here, there should have been compliance."*[103] [emphasis added]

116. This illustrates cardinal differences between the report of the Public Protector into Mr Motsoeneng's employment, and the State of Capture Report:

116.1. First, the State of Capture Report contained only qualified

[102] **Motsoeneng** at §§ 23-43.
[103] **Motsoeneng** at § 48.

observations, not findings.

116.2. Second, Mr Molefe, who was implicated to his detriment as is contemplated in section 7(9)(a) of the Public Protector Act, was not given an opportunity to respond.[104] This provided in material part.

116.3. Third, the Public Protector unmistakeably contemplated that her recommendations would be dealt with fully by the Judicial Commission of Inquiry.

117. In **Economic Freedom Fighters v Speaker, National Assembly & Others** ("***Nkandla***")[105] the Constitutional Court, sitting in a matter concerning its exclusive constitutional jurisdiction, examined the nature of the Public Protector's remedial powers, as rooted in the Constitution.

118. The Public Protector had furnished the National Assembly with her report, which contained unfavourable findings and the remedial action taken against the President.[106] Although the primary focus of the Constitutional Court fell on the remedial action, it is significant that the binding nature of the remedial action, was expressly coupled to the

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[104] The text of this sub-section reads:

"(9)(a) If it appears to the Public Protector during the course of an investigation that <u>any person is being implicated</u> in the matter being investigated and that <u>such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result</u>, the Public Protector <u>shall</u> afford such person an opportunity to respond in connection therewith, in any matter that may be expedient under the circumstances." [emphasis added]

[105] 2016 (3) SA 580 (CC).

[106] **Nkandla** at § 42. In submitting this report, the Public Protector would have acted pursuant to section 8(2)(b) of the Act.

findings of the Public Protector concerning expenditure incurred in respect of the President's private residence.[107] The court unanimously found that the National Assembly was not entitled effectively to nullify the findings made and the remedial action taken by the Public Protector, and that this was inconsistent with the Constitution and unlawful.[108]

119. In common with the judgment of the Supreme Court of Appeal in **Motsoeneng**, a mainstay supporting the reasoning of the Constitutional Court was that the Public Protector had delivered a report containing findings, coupled with remedial action. There is no indication in the judgment of the Constitutional Court in **Nkandla** that the Public Protector had suffered the timing and budgetary constraints identified in her State of Capture Report. Similarly, there's no indication of any such constraints in the judgment of the SCA in **Motsoeneng**.

120. The judgment of the Constitutional Court in **Democratic Alliance v President of the Republic of South Africa & Others** ("***Simelane***")[109] concerned the decision of the President to appoint Mr Simelane as the National Director of Public Prosecutions. Although the matter did not concern any action by the Public Protector, one of the issues before the court concerned the President's treatment of the findings of Dr Ginwala, contained in a document entitled *"Report of the Inquiry into the Fitness of Advocate V P Pikoli to Hold the Office of National Director of Public*

[107] **Nkandla** at §§ 42 and 55.
[108] **Nkandla** at §§ 98 and 99.
[109] 2013 (1) SA 248 (CC).

Prosecutions".[110] At the time of the inquiry Mr Simelane was the Director-General of the Department for Justice and Constitutional Development, and was ultimately found by the Constitutional Court to have been "*intimately involved*" in a dispute concerning the role of the National Director of Public Prosecutions, Adv Vusi Pikoli.[111] Dr Ginwala was critical of the conduct of Mr Simelane, specifically regarding certain features of his evidence before the Commission (found to be contradictory and without basis in fact or in law), the finding that allegations levelled against Adv Pikoli were baseless, and that he was forced to concede under cross-examination that allegations he made were without foundation.[112]

121. Three distinctive features of this judgment are relevant:

121.1. First, Mr Simelane was represented by counsel at the inquiry, and was examined and cross-examined.

121.2. Second, Yacoob ADCJ noted that although the Commission was not a court, it was "*about as important a non-judicial <u>fact-finding</u> forum as can be imagined*"[113] [emphasis added].

121.3. Third, having heard evidence, the Commission made <u>findings,</u> highly critical of integrity and credibility of Mr Simelane.

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[110] **Simelane** at § 50.
[111] **Simelane** at §§ 67-69.
[112] **Simelane** at §§ 50 and 51.
[113] **Simelane** at § 84.

122. Advancing its submissions on the rationality of the Eskom Board in deciding to "*reinstate*" Mr Molefe, reference is made by the DA to the Simelane matter, which it is said bears a "*striking similarity*" to the instant matter.[114] This proposition is both unfounded and inaccurate. Justice Yacoob characterised the Ginwala Commission as a non-judicial fact-finding forum of considerable importance. This conclusion was inevitably based the procedural process followed by the Commission, examination and cross-examination, legal representation for Mr Simelane (who was not an accused person, but a witness),[115] closing legal argument, and findings by the Commissioner based on the evidence before her. These are critical procedural processes which distinguish the limited investigation formed by the Public Protector leading to her Report into State Capture and her observation, from the inquisitorial/adversarial process at the Ginwala Commission.

123. The suggestion is that the Public Protector's Report raised questions about Mr Molefe's credibility, integrity and suitability for the position of Group Chief Executive. These are sought to be elevated to an evidential status which, the DA would have it, ineluctably requires Mr Molefe's suspension, and ultimately the termination of his employment with Eskom. This is not legally sustainable.

124. For similar reasons, reliance on the Judgment of the Gauteng High Court

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[114] DA's Heads of Argument §§ 65 and 66 pp32-34.
[115] **Simelane** at 289 H-I.

in **Helen Suzman Foundation & Another v Minister of Police & Others ("*Helen Suzman*")**[116] into the suitability of Gen Ntlemeza is inapposite. Here the full court relied upon the findings of a prior judgment by Matojane J in which he criticised Gen Ntlemeza in a number of respects.[117] These were, as stated by the court, serious findings of fact which bore on the General's trustworthiness, honesty and integrity, which were regarded as definitive.[118] Such evidential quality cannot be attributed to the observations of the Public Protector in the State of Capture Report.

125. The true position is that there are no final findings against Mr Molefe, but rather qualified observations set out for proper consideration by the proposed Judicial Commission of Inquiry. What the DA and EFF ask this Honourable Court to do is to conclude, on the basis of the observations (which Mr Molefe was not given an opportunity to answer) that he is unfit to hold the position of Group Chief Executive. In effect, this Honourable Court is asked to elevate the Public Protector's observations to an evidential status which is not justified. This is with respect not necessary for the Court in the exercise of its discretion under section 77(3) of the BCEA.

126. This approach to the status of the Public Protector's Report is neither an attack upon the office of the Public Protector, nor upon the important

[116] (23199/16) [2017] ZAGPPHC 68 (17 March 2017).
[117] **Helen Suzman** at § 14.4, §§ 21 and 22.
[118] **Helen Suzman** at § 36.

status as a Chapter 9 institution, expressly recognised by the judgments of the Supreme Court of Appeal and the Constitutional Court referred to above. Rather, it is recognition of the constraints identified by the Public Protector in her Report which resulted in an inability to reach final findings. To request this Honourable Court to draw conclusions, even on a *prima facie* basis, as to suitability of Mr Molefe to hold the position of Group Chief Executive could have far-reaching implications for the integrity of the office of the Public Protector.

THE APPROPRIATE REMEDY

127. Since Mr Molefe does not rely on any remedy provided for by the LRA, but asserts a claim premised on the rejection of the unlawful termination of his contract of employment, it follows that he is entitled to enforce his contract of employment and set aside his unlawful dismissal. The Minister rather surprisingly contends that Mr Molefe is not entitled to a claim for specific performance.[119] There is no merit in this contention.

128. The Labour Court has on numerous occasions in the past made orders for specific performance compelling an employer to honour its contractual obligations. In **Ngubeni v National Youth Development Agency and Another**[120] the Court held as follows at paragraph 19:

"*Insofar as it may be contended that the remedy of specific*

[119] Minister Answering § 74.8 p488.
[120] 2014 (35) ILJ 1356 (LC).

> *performance is either unavailable or inappropriate, the starting point is to note that the section 77A(e) of the BCEA specifically empowers this court to make such order. In Santos Professional Football Club (Pty) Ltd v Igesund and Another 2003 (5) SA 73 (C), the court noted that courts in general should be slow and cautious in not enforcing contracts, and that performance should be refused only where a recognised hardship to the defaulting party is proved*."[121]

129. The Minister's resistance to an order for specific performance on this score is devoid of substance. Nowhere in her answering affidavit does she suggest hardship to Eskom if Mr Molefe's dismissal is set aside.

130. We respectfully submit that the appropriate relief in the circumstances of this case, given that the claim is premised on the unlawfulness of the decision to terminate Mr Molefe's employment on 2 June 2017, is that his dismissal should be nullified. In **Steenkamp,** the Constitutional Court expressed itself as follows on the consequences of an unlawful dismissal:

> "*An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer…*"[122]

131. Mr Molefe therefore does not require an order for his reinstatement since

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[121] At § 19. See also **Dyakala v City of Tshwane Metropolitan Municipality** [2015] ZALCHP 104 (23 March 2015).
[122] At § 189 and referred to with approval in **Solidarity v SABC** at § 71.

the effect of an order declaring his dismissal to have been invalid, will have the legal effect that his dismissal never took place.[123]

132. No facts have been put forward before this Court by his employer to demonstrate why he should be deprived of this relief. One would have thought that if Eskom was genuinely concerned that a recognised hardship would ensue if Mr Molefe was permitted to have his dismissal set aside, that Eskom would have raised such matters before this Court in its affidavits.

133. By having instead elected to abide the decision of this Court, it has deliberately not placed any facts before this Court from which it could be concluded that it would suffer hardship should Mr Molefe's dismissal be set aside.

134. We also point out that regardless of the approach adopted by the DA and EFF and irrespective of the public perception of Mr Molefe's conduct while at the helm of Eskom, this does justify a denial of his basic contractual rights.

135. Eskom is naturally entitled to take disciplinary action against him to the extent that it is of the view that a *prima facie* case of misconduct exists (which does not appear from the papers before this Court), but it must necessarily comply with its obligations under the contract of employment

[123] **Solidarity v SABC** at § 72.

read with the MOI before doing so. It cannot circumvent its obligations to Mr Molefe nor can the Minister act in blatant disregard of his rights for the sake of point scoring or because it is found to be expedient in the current political climate.

URGENCY

136. This application was at first launched as a matter of extreme urgency on the basis that Mr Molefe was dismissed on Friday 2 June 2017, before the High Court application set down for 6 and 7 June 2017.

137. As appears from the order agreed to by the various parties to the DA application and made an order of court on 6 June 2017 before Basson J, the DA application was postponed pending the outcome of this application.

138. The postponement of the DA application by no means rendered this application less urgent. The application remains urgent by its very nature.

139. Mr Molefe occupies a senior position with Eskom, an important state-owned enterprise that fulfils a critical public function in generating and supplying electricity to the people of South Africa. The need for legal certainty regarding his employment status is not only a matter that concerns him personally, but of considerable importance to Eskom who cannot appoint a new Group Chief Executive Officer until such time as

this application and the DA application are finally determined.

140. It appears that Eskom has already taken steps to advertise the position with the consequence that there is a real risk that the position will have been filled by the time this application is heard in the ordinary course. A hearing in due course will therefore not only adversely impact on his position but also the position of any third-party candidate for the position of Group Chief Executive Officer.

141. At a personal level, the effect of his summary dismissal is that Mr Molefe has been left unemployed and without a source of income to provide for his family. Absent an opportunity to set aside his dismissal as a matter of urgency[124] so as to permit him to once again enter the fray in the DA application, a cloud of suspicion will continue to hang over his head without leaving him adequate redress to clear his name.[125]

CONCLUSION

142. For all of the reasons set out above, we submit that a proper case has been made out for an order as prayed for in the notice of motion. The legal issues in this matter are not without challenge. It was a reasonable precaution for Mr Molefe to employ the services of three counsel.[126]

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[124] See for instance **Gama v Transnet Limited** 2010 JDR 0059 (GSJ).
[125] See Molefe suppl aff, Vol A, p116 to p119.
[126] **Judin v Wedgewood and Another** 2003 (5) SA 472 (W) at p 476, § 18; **Enslin v Vereeniging Town Council** 1976 (3) SA 443 (T) at p 453 G.

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23 June 2017