REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **33051/2017**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: ~~NO~~ YES

(3) REVISED.

25/1/18

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
THE MINISTER OF PUBLIC ENTERPRISE	First Respondent
ESKOM HOLDINGS LIMITED	Second Respondent
BRIAN MOLEFE	Third Respondent

<u>AND</u> **Case No: 34568/2017**

In the matter between:

ECONOMIC FREEDOM FIGHTERS	Applicant
and	
ESKOM HOLDINGS LIMITED	First Respondent
MINISTER OF PUBLIC ENTERPRISE	Second Respondent
BRIAN MOLEFE	Third Respondent
NATIONAL UNION OF MINEWORKERS	Fourth Respondent

AND **Case No: 34042/2017**

In the matter between:

SOLIDARITY TRADE UNION	Applicant
and	
BRIAN MOLEFE	First Respondent
MINISTER OF PUBLIC ENTERPRISES	Second Respondent
ESKOM HOLDINGS SOC LIMITED	Third Respondent

JUDGMENT

MATOJANE J

Introduction

[1] Before us are three separate but consolidated applications brought by the Democratic Alliance ("DA"), Solidarity Trade Union ("Solidarity") and the Economic Freedom Fighters ("EFF"). The applications have a common feature, namely to

review and set aside the decision of the Minister of Public Enterprises to appoint and /or reinstate, the third respondent, Mr. Molefe to the position of Group Chief Executive at Eskom after he had departed from Eskom on a purported early retirement agreement.

[2] On 2 November 2016, the Public Protector released a report entitled "the State of Capture" which was the culmination of the investigation by the Office of the Public Protector into alleged improper and unethical conduct by the President and other state functionaries. The report contains damaging allegations against Mr. Molefe of abusing his position at Eskom to benefit the Gupta family in the improper and possibly corrupt awarding of state contracts and benefits to the Gupta family's businesses.

[3] On 11 November 2016, stung by the contents of the Report and its possible implications to Eskom, Mr. Molefe, announced in a televised press conference that he was leaving his employ at Eskom from 1 January 2017. He stated that he was doing so voluntarily as that would be in the interests of good governance at Eskom to do so. He expressed his confidence in being able to demonstrate, at an appropriate time, that he had done nothing wrong.

[4] It transpired later that on the same day, Mr. Molefe submitted a request for early retirement. The request was granted in the letter dated 24 November 2016, and under it, an early retirement agreement was concluded with Eskom effective on 1 December 2016. The agreement permitted Mr. Molefe to proceed on retirement from age 50, with Eskom making up the shortfall regarding the ten-year service requirement in terms of the rules of the Pension Fund.

[5] The Minister was never informed that Mr. Molefe had applied for early retirement and that such an agreement had been concluded.

[6] On 23 February 2017, Mr. Molefe joined the National Assembly as a member of Parliament representing the African National Congress ("ANC"). Eskom duly advertised the position of Group Chief Executive Officer.

[7] In consequence of his purported early retirement, Mr. Molefe elected to receive one-third of his retirement benefits as a lump sum payout. The Fund has paid a total amount of R10 327 074.53 in pension benefits to Mr. Molefe.

[8] On 16 April 2017, the Sunday Times reported that Mr. Molefe had received an R30.1 million pension pay-outs. Following the media outcry and the intervention of the Minister, the Eskom Board resolved to "rescind" the early retirement agreement and entered into the Reinstatement Agreement with Mr. Molefe. The reinstatement agreement purports to revive Mr. Molefe's terminated contract for him to resume his duties at Eskom. The period he was a parliamentarian was to be regarded as unpaid leave, and Mr. Molefe was to repay to the Eskom Provident Fund ("EPPF") all amounts paid to him.

[9] Mr. Molefe returned to his employment duties on 15 May 2016. The Minister addressed a letter to the Eskom Board directing the Board to rescind its decision to reinstate Mr. Molefe on the basis that "the appropriate process was not followed in the appointment of Mr. Molefe." Eskom subsequently informed Mr. Molefe on 2 June 2017 that the Reinstatement Agreement was rescinded.

[10] On 4 June 2017, Mr. Molefe launched a parallel application in the Labour Court contending that he was summarily and unlawfully dismissed by Eskom on 2 June 2017. Mr. Molefe did not cite the DA in its application in the Labour Court. The DA was granted leave to intervene in the matter with costs, and the application has been stayed pending the outcome of this application.

[11] The Eskom Pension and Provident Fund ("EPPF") has launched a counter application to reverse its acceptance of Mr. Molefe's retirement should Mr. Molefe's early retirement agreement be set aside.

The relief sought

[12] The DA seeks an order in the following terms;

11.1 Reviewing and setting aside the decision made by the Minister to appoint and reinstate Mr. Molefe to the position of Group Chief Executive at Eskom;

11.2 Declaring that any payment or sum of money received by Mr. Molefe under any purported pension agreement between him and Eskom to be invalid and ordering Mr. Molefe to repay such amounts within ten days of this order.

[13] Solidarity asks for an order declaring as unconstitutional and invalid and setting aside the following decisions which it says were made by the board and the Minister

> "3.1 the decision taken "around" 9 February 2016 to approve a "pension carve out" for Mr. Molefe in terms of which he was "granted significantly greater early retirement benefits than he would otherwise have been entitled to under the Eskom Pension and Provident Fund Rules, and which would come at a significant cost to Eskom
>
> 3.2 the decision taken in November 2016 to accept Mr. Molefe's "early retirement" proposal, and any and all steps were taken under it.
>
> 3.3 the decision was taken "in or about May 2017 to "reinstate" Mr. Molefe to his position as Group Chief Executive of Eskom."

[14] Solidarity also seeks an order directing the Director of Prosecutions to investigate Mr. Molefe's and the Eskom Board's actions in respect of the above-impugned decisions. The DPP has opposed this relief and Solidarity has abandoned it.

[15] The EFF seeks, amongst others the order:

> 13.1 declaring that the decision of the Board to re-appoint Mr. Molefe "as Chief Executive Officer" is irrational, unlawful, unconstitutional and invalid.
>
> 13.2 Declaring that members of the Eskom Board have acted in breach of their fiduciary duties owed to Eskom
>
> 13.3 Directing the Minister to "forthwith" take appropriate steps to remove members of the Board

[16] The Minister and Eskom do not oppose the relief sought by the DA or Solidarity as she avers that she took none of the decisions referred to above, she, however, opposes the relief by EFF that this court should direct her to remove members of the Board. Eskom abides by the Court's decision and the EFF has now abandoned the relief it sought.

[17] Mr. Molefe's case is that he never resigned but instead applied for early retirement. The early retirement agreement was the only reason for his departure from Eskom. He states that there was a common misunderstanding between him and Eskom about his early retirement and pension payments which rendered that

retirement agreement void, with the result that the *status quo* being, his employment as Group Chief Executive Officer- was restored by operation of the law. Consequently, he argues, the Minister neither made nor was she required to make any decision as to his appointment and reinstatement and no question of a review arises.

The factual background

[18] On 11 November 2015, Mr. Molefe signed an open-ended contract of employment with Eskom accepting his appointment as Group Chief Executive Officer with effect from 1 October 2015. He subsequently received notification from the Minister through Dr. Ngubane that his conditions of employment would be altered from an open-ended contract to a fixed term contract.

[19] Mr. Molefe says that one of the concerns he had when he left Transnet (his previous employer) was that he would have to start afresh with a new pension scheme. He was 48 years old at the time. He says that he did not remain in any position for a lengthy period and was not in a position to accumulate pension benefits over time. He was concerned that at the age of 54 when his employment contract at Eskom was set to terminate, he would be a considerably less attractive candidate for employment.

[20] Mr. Molefe raised his concerns with Dr. Ngubane, the chairman of the Board of Eskom and the chair of People and Governance Committee of the Board. Eskom with the involvement of Mr. Molefe formed a plan to afford him early retirement benefits at age 50.

[21] On 15 November 2016 Mr. Minnaar, the Executive Support Manager for Eskom, wrote to the EPPF requesting calculations as to the cost to Eskom to make up for the minimum of 10 years required in terms of the rules of the Pension Fund if Mr. Molefe retires at 54 (i.e., at the end of five-year term) with Eskom waiving penalties. The EPPF advised that Eskom will have to buy service to make up the minimum ten years.

[22] On 25 November 2015, two weeks after Mr. Molefe had signed his appointment letter, Dr. Ngubane addressed a letter to the Minister. He proposed

that Mr. Molefe's pension benefits be calculated to age 63 with penalties waived, to compensate for the fact that Mr. Molefe had been *"previously employed on some short contracts and have not been in the position to accumulate pension benefits over time,"* the letter stated:

> *"due to the nature of this engagement in the short term contractual obligations in Mr. Molefe's case, he has not been able to benefit from the growth opportunity in a single pension fund.*
>
> *to bridge this gap, the following contractual stipulations are proposed:*
>
> - *regardless of Mr. Molefe's age after the five-year termination date, he will be allowed to retire from Eskom's service on the basis that he is aged 63.*
> - *That the penalties prescribed by the Eskom Pension and Provident fund ("EPPF") for retirement before age 63, be waived*
> - *That Eskom carries the cost of such penalties (to be paid over to the EPPF)*
> - *if Mr. Molefe's contract is not extended beyond the five-year termination date, he will not be allowed to subscribe to any other SOC or government pension fund.*

[23] Although the Minister's assistant, Ms. K Davids and Mr. K Mhlongo from the Registry of the Ministry of Public Enterprises acknowledged receipt of Dr. Ngubane's letter and undertook to bring the letter to the Minister's attention, the Minister is adamant that the letter never came to her attention, and she was accordingly not aware of the proposal that Mr. Molefe should be permitted to retire on the basis of an age of 63.

[24] Dr. Ngubane's letter of the 25 November 2015 is significant for what it does not mention. Mr. Molefe was previously employed in senior positions at National Treasury for approximately seven years. He was then employed as the CEO of the Public Investment Corporation (SOC) Ltd for approximately seven years. He worked for Transnet for approximately four years before he joined Eskom. Mr. Molefe received significant pension benefits at his previous positions.

[25] In his last year at Transnet in the financial year ended 31 March 2015, Mr. Molefe received a salary of R6 115 000.00, together with "Post-retirement benefit fund contributions" of R561 000. In the same year, Mr. Molefe received a long-term incentive payment of R6 835 000.00 and short-term incentive payments of R1 551 000.00.

[26] In terms of his Executive Employment Contract with Eskom, Mr Molefe received a total annual guaranteed remuneration package of R7 656 000.00. It is thus untrue that Mr. Molefe has not been in a position to accumulate pension benefits over time.

[27] On 9 February 2016, some four months after his appointment as Group Chief Executive Officer, Mr. Molefe attended a meeting of the committee of the Board of Eskom, ("the People and Governance Committee."). Mr. Molefe was not a member of this committee and did not recuse himself from its deliberations. He says that he attended the meeting as an invitee, he, however, failed to disclose his interest in the subject matter of the resolution.

[28] The Committee passed a resolution that in cases were Executive Directors decided to take early retirement and there was a shortfall regarding the EPPF ten years of service rule, Eskom would bridge the gap to make up for the ten years, waive the penalties applicable to early retirement and Eskom would refund the pension fund the actual costs for additional service added plus penalties applicable to early retirement.

[29] In terms of the resolution Mr. Molefe and other executives who were to be appointed on five-year fixed-term contracts would be able to qualify for the early retirement benefits contrary to the rules of the Pension Fund. The resolution is consistent with Dr. Ngubane's proposal in the letter to the Minister of the 25 November 2015. The Minister was not a party to that resolution and was not aware of its adoption. The resolution was never made public. The Minister only came to know of the resolution a year later when Eskom filed its answering affidavit on 22 May 2017.

[30] On 7 March 2016 Mr. Molefe concluded a five-year fixed-term contract with Eskom which replaced his original contract of employment. The contract was to run from 1 October 2015 until its termination on 30 September 2020.

[31] Clause 3.1 of the second contract deals with the period of employment and provides that:

The Executive's employment with the Company is based on a fixed term contract that expires on 30 September 2020 ("the Termination Date"). The employment shall continue until this date subject to either Party being entitled to terminate the employment relationship by giving the other not less than 6 (six) months wrote the notice. The Company may elect to pay the executive instead of notice.

[32] Clause 10 is headed PENSION AND PROVIDENT FUND and provides

The Executive shall continue as a member of the Eskom Pension and Provident Fund or any other fund established or participated in by the Company from time to time, subject to the rules thereof. (own uñderlining)

[33] Clause 1.2.15 defines "Termination Date" as "the date upon which the Executive's employment by the Company ceases or is terminated for any reason whatsoever."

[34] Clause 21 deals with resignation. It states:

"On the termination date, the Executive will *ipso facto* be deemed to have resigned as a director of the Company and any other Group Company of which he is a director at that date."

[35] Clause 19.4 is the whole agreement clause and reads:

"This agreement constitutes the whole agreement between the Parties and no warranties or representations whether express or implied have been given or made by the Company to the Executive."

[36] Mr. Molefe argues that his new contract of employment for a fixed, five-year period did not alter his entitlement to membership of the EPPF. He relies upon his original contract of employment which permitted his membership of the Fund which membership he submits was not altered by the new contract of employment.

[37] A whole agreement clause, like any other clause in the agreement must be interpreted by the intentions of the parties as reflected in words used in their ordinary and grammatical meaning having regard to surrounding circumstances known to the parties at the time of formation of the contract in order to determine what the parties intended. The purpose of the whole agreement clause is that the obligations of the parties will be determined by the written terms of the contract and not by terms of a prior contract that have not been acknowledged in the new contract which may be contradictory and irreconcilable. A "whole agreement clause" and a "no

representation clause" mean what they say. Mr. Molefe cannot rely on his original contract of employment because it is not legally relevant to the subsequent contract he concluded. See **De Villiers v McKay NO.**[1]

[38] The alteration of Mr. Molefe's term of employment to five years meant that he was now a *Temporary Employee*[2] and not an *Eligible Employee*[3] as defined. Although he was under pensionable age, he was a temporary employee as defined and was disqualified from being a member of the Eskom Pension Fund.

[39] The decision by Eskom to waive penalties and buy Mr. Molefe an extra 13 years of service totaling R30.1-million after only 15 months service at the age of 50 stretches incredulity and is unlawful for want of compliance with the rule of the EPPF. What is most disturbing is the total lack of dignity and shame by people in leadership positions who abuse public funds with naked greed for their own benefit without a moments consideration of the circumtances of fellow citizens who live in absolute squalor throughout the country with no basic services.

The early retirement agreement

[40] In terms of section 3(1) of the **Eskom Conversion Act**[4], Eskom is deemed to be a public company incorporated in terms of the Companies Act, 1973. Section 6 of the Act provides that the Registrar of Companies must, on the date of conversion register the Memorandum and articles of association of Eskom in terms of section 63(1) of the Companies Act, and provides that the Memorandum and Articles must be "as determined by the Minister."

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[1] 2008 (4) SA 161 SCA

[2] "Temporary Employee" is a person who is appointed for a specific purpose and whose employment will end when that purpose has been accomplished, or who is appointed for a specific period and whose employment will end at the end of that period.

"Eligible employee" means an employee who:

(i) At the date of becoming a member, is under a pensionable age

(ii) Is not a Temporary Employee or an employee on the London Office of Staff of an Employer.

[4] Act 13 of 2001

[41] The second Memorandum of Incorporation that was passed and adopted by Eskom on 1 July 2016 ("The 2016 MOI). applies in respect of the decision by Eskom to approve Mr. Molefe's early retirement on 24 November 2016 and to conclude the "early retirement agreement." The MOI locate the power to appoint and remove the Group Chief Executive Officer on the government (represented by the Minister) to the exclusion of the Board.

[42] Section 63(2) of the PFMA provides that:

"The executive authority responsible for a public entity under the ownership control of the national or a provincial executive must exercise that executive's ownership control powers to ensure that that public entity complies with this Act and the financial policies of that executive."

[43] Clause 3.6 of the 2016 MOI provides that:

> "3.6 The Company [Eskom] shall not:
>
> 3.6.1 appoint to or remove a Director from the Board; or
>
> 3.6.2 appoint or remove the Chairperson of the Board, Group Chief Executive or Group Chief Financial Officer other than as provided for in terms of this MOI."

[44] Clause 14.3 deals with the process of appointment and removal of the Group Chief Executive and states:

> 14.3.1 The Shareholder shall, on behalf of the Company, have the exclusive power, in exercising its Ownership Control under the provisions of sec 63 (2) of the PFMA, <u>to appoint and remove the CE</u> as an employee of the Company by the Guidelines (own underling)
>
> 14.3.3 The Shareholder's act of appointment of the Group Chief Executive binds the Company to the exclusion of the Board.
>
> 14.3.4 The Minister shall be noted as a party to any contract of employment between the Company and the Group Chief Executive.
>
> 14.3.5 The Group Chief Executive shall report to the Board and shall only become an Executive Director of the Company is appointed to the Board by the Shareholder in terms of clause 14. 1. 1 of this MOI.

14.3.6 The Shareholder shall, on behalf of the Company have the exclusive power to remove the Group Chief Executive as an employee of the Company which removal would constitute a dismissal as envisaged in terms of Section 186(1)(a) of the Labour Relations Act 66 of 1995 ("LRA'). Consequently, the provisions of the LRA apply to any such removal."

[45] The decision by Eskom to approve Mr. Molefe's early retirement and to conclude the early retirement contract is *ultra vires* and void for non-compliance with the 2016 MOI.

[46] Despite the knowledge that Mr. Molefe was a temporary employee on a five-year fixed term executive employment contract, thus not eligible to be a member of the Pension Fund and that he was not being retrenched, Eskom provided the Fund with information that Mr. Molefe was appointed as permanent employee and requested the Fund to grant Mr. Molefe extra service in accordance with the provisions of Rule 21.4[5] of the EPPF rules. The associated costs amounted to R30,1 million. Eskom paid this amount to the Fund.

[47] Among the documents submitted by Eskom to the Fund included a letter from Dr. Ngubane dated 24 November 2016 addressed to Mr. Molefe stating that Mr. Molefe's early retirement had been approved "in terms of Rule 28 and Rule 21.4 and that penalties will be waived and potential service to age 63 has been granted to Mr. Molefe". Attached to the affidavit was also a certain annexure "SA1" reflecting code "PPX" which it is common cause indicates permanent executive employment in the F-band.

[48] The Eskom Pension and Provident Fund is a defined benefit pension fund that is registered as a self-administered pension fund in terms of the **Pension Funds Act[6] 24** and approved as a pension fund in terms of the **Income Tax Act 58 of 1962**. Section 13 of the Pension Fund Act is headed "Binding force of rules" and states:

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[5] "An EMPLOYER may make special payment to the FUND in order to add to the PENSIONABLE SEVICE of a MEMBER in his employ such period of past SERVICE as the BOARD, after consulting the ACTUARY, determine."

[6] 24 of 1956

"Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders, and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming."

[49] Rule 28[7] deals with retrenchment, not early retirement. It applies in circumstances where the member is below the age of 65 years and is retired from service of the employer for operational reasons, namely a reduction in or reorganization of staff, the abolition of his office or post, to facilitate improvements in efficiency or organization or retrenchment generally.

[50] Rule 28(3)[8] which applies only if a member has satisfied the requirements of Rule 28(1) require consultation between an employer and the Board of EPPF before the EPPF can be satisfied that the employee in question is entitled to retirement as contemplated in Rule 28(1). The EFFP never consulted with Eskom before it exercised its discretion as contemplated in Rule 28(3).

[51] Rule 24[9] deals with early retirement and sets out the circumstances under which employees are entitled to early retirement benefits. To qualify for such benefits an employee had to, amongst others, have been in the employ of Eskom for at least ten years and must have reached an age of 55 years.

[52] Mr. Molefe does not fall within the category of section 28(1) as he was not "retrenched," nor had he completed not less than ten years' pensionable service. Rules 23 and 24 could not be applied as Mr. Molefe had not reached the age of 55 years. He was 50 and not a permanent employee.

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[7] "(1) Subject to the provisions of subsections (2), (3) and (4) if a Member who has not attained the pensionable age is retired from the service owing to a reduction in or reorganization of staff, or to the abolition of his office or post, or in order to facilitate improvements in efficiency or organization or to retrenchment generally, he shall be paid a benefit equal to three times his contributions plus ten per cent of his final average emoluments for each year of pensionable service before January 1950..

[8] "if a member who had attained the age of 50 years... and has not less than ten years' pensionable service, he may instead be granted at the discretion of the Board after consulting the employer, as from the date of his leaving the service of his employer, a pension in respect of his pensionable service calculated in terms of rule 22, without reduction in terms of rule 24'."

[9] "24 Notwithstanding the provisions of rule 23, a MEMBER may retire from the service after attaining the age of 55 years in which case he shall be entitled, as from the date of his retirement, to a PENSION in respect of his PENSIONABLE SERVICE to the date of retirement calculated in terms of rule 22 reduced by a factor equal to thirteen-fortieths of one per cent for each month by which the period from the date of his retirement to the date on which he would have-attained the PENSIONABLE AGE exceeds twenty-four months".

[53] The Fund avers that it relied on the relationship of trust it had with Eskom and was satisfied on the basis of formal information provided by Eskom that Mr. Molefe had retired from service for reasons listed in Rule 28 and that the entry conditions contained in Rule 28(1) had been met and effected payment accordingly. This explanation extends incredulity.

[54] The Fund failed to independently assess whether Mr. Molefe's application for early retirement fell within Rule 28. Clause 1(2)(b) of the Constitution of the Fund stipulates that its operations shall have as its main objectives, among others, sound governance and faultless administration. The Fund has failed to comply with the Pension Fund Act or with the Rules of the EPPF.

[55] It has subsequently become common cause between the parties that the early retirement agreement which purported to permit Mr. Molefe to retire from Eskom on full pension benefits after only 15 months service at the age of 50 was unlawful in that it breached the Rules of the Eskom Pension Fund.

[56] There is a strong inference to be drawn from the above factors that the early retirement agreement was deliberate scheme devised by Eskom with the involvement of Mr. Molefe to afford him pension benefits he was not entitled to. The scheme permitted Mr. Molefe to proceed to early retirement at age 50 by buying him extra pensionable service. The scheme was started soon after Mr. Molefe's permanent employment and was deployed after he had publicly stated that he was voluntarily leaving Eskom's employ.

Whether Mr. Molefe resigned

[57] Mr. Molefe states that he was under a mistaken impression, common to him and Eskom regarding the age at which he could take early retirement in terms of Rule 24 of the EPPF. He says that he relied on the EPPF Guide to Benefits which refers to early retirement (not retrenchment or retirement from service) being possible from the age of 50. He submits that his original contract of employment did not come to an end because when it was discovered that the Retirement Agreement was unlawful, the *status quo,* being his employment as Group Chief Executive - was restored by operation of the law.

[58] On his version, the mistake relates to his entitlement to early retirement, not his resignation which became effective on 31 December 2016. An application for early retirement is a resignation. An employee cannot retire and resign. Mr. Molefe's decision to leave was not conditional in any way and had nothing to do with the early retirement agreement; the agreement had not yet been concluded when he announced that he would leave Eskom and he had no reason to believe that the Board would accept his application for early retirement. If the application was refused, he would not have been entitled to return to Eskom as the employment relationship had terminated.

[59] In terms of clause 21 of the employment contract, Mr. Molefe is deemed to have resigned as a director of Eskom on the termination date.

[60] Mr. Molefe could not lawfully be appointed a member of Parliament if he was in the service of the state in terms of section 47(1)(a)[10] of the **Constitution**, accordingly, the alleged common mistake, if any, could not have impacted on his decision to resign. His reasons for leaving Eskom is indicated in his statement of 11 November 2016, namely

> "I have, in the interest of good corporate governance, decided to leave my employ Eskom from 1 January 2017. I do so voluntarily.
>
> ....
>
> I will take time off to reflect before I decide on my next career move.
>
> ...
>
> I go now because it is in the interest of Eskom and the public it serves that I do so (emphasis added)

[61] He, correctly in our view, wanted to avert the harm that will be done to Eskom if he remained in office while these allegations remain unresolved. He stated that he

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[10] 47. Every citizen who is qualifed to vote for the National Assembly is eligible to be a member of the Assembly, except—

1. (a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than ...

left Eskom for purposes of clearing his name on the assumption that he would be able to do so within a reasonable time. Mr. Molefe noted that the process of establishing a Commission of Inquiry might take time and that:

> "In the meantime, harm is done - to the institution; it has been my honor to lead the most difficult times, to its reputation and my own. I say nothing of the harm, too, to others close to me."

[62] Mr. Molefe's resignation was accepted by the Minister, who is the only representative shareholder of Eskom, she indicated in her statement on the same day that she respected Mr. Molefe's decision to resign. Mr. Molefe never corrected the Minister on her understanding that he had resigned. He never informed her that he was leaving his employ as a result of an early retirement agreement he concluded with Eskom. The alleged common mistake was in any event between Mr. Molefe and Eskom and not with the Minister who is the representative of the employer.

[63] On the same day, Eskom issued a Media Statement headed "Eskom GCE Brian Molefe voluntarily steps down." Eskom announced its "great sense of loss and regret" that Mr. Molefe had decided to "step down in the interest of good corporate governance... To clear his name following the release of former Public Protector Thuli Madonsela's report on her 'observations' about the so-called state capture."

[64] Eskom also accepted that Mr. Molefe had resigned. It submitted to the Companies and Intellectual Property Commission ("CIPC") the minutes of the Board meeting dated 29 November 2016 recording that the Board had resolved to accept Mr. Molefe's resignation.

[65] In our view, Mr. Molefe terminated his employment relationship with Eskom either by retirement or resignation. The contention that Mr. Molefe's original contract of employment did not come to an end is a contrived and is manifestly false.

Whether the purported Reinstatement Agreement was lawful.

[66] Mr. Molefe contends that his return to Eskom did not involve the decision by the Minister, but a restoration of the *status quo* as a matter of law as a consequence of a common mistake. This he argues did not constitute an appointment as contemplated in clause 14.3.1 of the Memorandum of Incorporation.

[67] The early Retirement Agreement and the Reinstatement Agreement are employment contracts subject to the provisions of the 2016 MOI. It is the government represented by the Minister that has the power to appoint the Group Chief Executive Officer to the exclusion of the Board. The Minister was not noted as a party to the Agreements as required in terms of clause 14.3.4 of the 2016 MOI. Eskom did not obtain the Minister's consent or approval before concluding the Reinstatement Agreement. The Reinstatement Agreement is accordingly *ultra vires* and unlawful.

[68] It is trite that the exercise of public power is only legitimate where it is lawful and where a rational relationship exists between the exercise of the power and the purpose for which the power was given. In **Pharmaceutical Manufacturers Association of SA & another: In Re Ex Parte President of the Republic of South Africa & others**[11] Chaskalson CJ said the following:

"It is a requirement of the law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

[69] In **Affordable Medicines Trust v Minister of Health**[12]Ngcobo J held:

"The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."

[70] The Minister stated that the R30.1 million pension payment proposal had no legal rationale and was unlawful. She requested Eskom to renegotiate a package with Mr. Molefe which would be less expensive and which would also ameliorate Mr. Molefe's financial prejudice. Eskom subsequently presented the Minister with four options.

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[11] **[2000] ZACC 1; 2000 (2) SA 674** (CC) para 85

[12] 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49

[71] The Board indicated that its preferred option was consensual rescission which would, according to the Board, mean that there would be a restoration of the *status quo ante.* Eskom ignored the allegations against Mr. Molefe contained in the Public Protector's report because it regarded them as irrelevant to whether or not he should be reinstated as Group Chief Executive officer because they were "not findings" and the Public Protector did not take any remedial action against Mr. Molefe.

[72] The Minister accepted rescission of the early retirement agreement and the restoration of the *status quo ante,* as it was a better "value proposition for the South African *fiscus.*" She stated that Mr. Molefe was reinstated "in exchange" for repayment of the monies that he had received under the early retirement agreement. There is no rational reason to reinstate Mr. Molefe in exchange for the return of an unlawfully received benefit.

[73] Having concluded that there was no legal rationale for the pension arrangement and that it was unjustifiable, it was irrational for the Minister to approve the reinstatement of Mr. Molefe as a better value proposition to an unlawful pension proposal. The correct approach would have been to refuse the pension payout proposal out of hand. There was no obligation on the Minister to incur the burden of an unlawful obligation on behalf of Eskom.

[74] One of the four options provided to the Minister by the Board was to review the Reinstatement Agreement in court proceedings. As an organ of state Eskom is obliged by the Constitution to approach a court to have its unconstitutional act or decision declared invalid and set aside. The Constitutional Court in **State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited**[13] held that PAJA does not apply to an organ of state seeking to review its own decision. An organ of state must instead do so under the principle of legality as [Section 33 of the Constitution creates the right to just administrative action to be enjoyed by private persons only as the State is the bearer of obligations under that

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[13] (CCT254/16) [2017] ZACC 40 (14 November 2017)

section and cannot be a beneficiary of the rights under Section 33 (being rights to administrative action that is lawful, reasonable and procedurally fair.

[75] The Reinstatement Agreement is irrational because the Minister was deceived about the nature of the decision that was being taken and its legal and factual background. The Minister says "*I was under the impression that this was a case of unilateral resignation and nothing more.*" The Minister was not aware that the early retirement agreement had been concluded, she knew nothing about Mr. Molefe's R30 million pension payout and Dr. Ngubane had already signed the Reinstatement Agreement when he sent it to the Minister.

[76] Mr. Molefe accepted that the allegations against him were so serious that they warranted his resignation in the interest of Eskom and good corporate governance. The allegations are directly relevant to the rationality and legality of his reinstatement as Group Chief Executive officer. Eskom acted irrationally in failing to consider how his reinstatement could now be in the interest of Eskom and good governance after Mr. Molefe acknowledged that the serious allegations were a reason for his resignation.

[77] Eskom says that it would have been inappropriate to have acted against Mr. Molefe on the basis of the untested allegations contained in the Public Protectors report. At the time of announcing his resignation, Mr Molefe, Eskom and the Minister correctly in our view, conveyed an acceptance that the allegations against Mr. Molefe were so serious as to warrant his immediate resignation so that he could have an opportunity to clear his name, and that his immediate resignation was in the interest of Eskom and good corporate governance.

[78] It was not possible for Eskom to take a rational decision about whether to reinstate Mr. Molefe without at least investigating the veracity of the allegations as it has control over all the relevant evidence and the allegations are plainly material to Mr. Molefe's suitability for the position of Group Chief Executive Officer of Eskom.

[79] Mr. Molefe contends that the Public Protector's report contains observations, not binding findings. He argues that the observations, framed by the Public Protector as interrogatories, were intended to be determined by the Judicial Commission of

Enquiry and he was not given an opportunity to respond to the Public Protector's observations before the report was published.

[80] The allegations against Mr. Molefe contained in the Public Protectors are so serious that they were the reason for his resignation. The allegations are highly relevant to Mr. Molefe's suitability to be reinstatement as GCEO. They are a dead weight that he must carry until he is cleared. In the absence of new facts that arose in the interim to lift the dead weight that motivated the need for Mr. Molefe to resign in the first place, the allegations in the Public Protector's report cannot just be ignored by the Minister or Eskom. The Minister and Eskom acted irrationally in ignoring the damning allegations in the Public Protector's report.

[81] We find that the reinstatement of Mr. Molefe as Group Chief Executive Officer at Eskom is at variance with the principle of legality and is invalid and falls to be set aside.

[82] We also find that Mr.Molefe was never entitled to receive any pension benefits from from Eskom Pension Fund and any payments made in lieu of such benefits were patently unlawful.

[82] In the result, the following order is made

a. the decision taken by the Board of Eskom in November 2016 to accept Mr. Molefe's "early retirement" proposal is reviewed and set aside.

b. The decision made by the Minister to appoint and reinstate Mr. Molefe to the position of Group Chief Executive at Eskom is reviewed and set aside.

c. It is declared that any payment or sum of money received by Mr. Molefe under any purported pension agreement between him and Eskom is invalid and Mr. Molefe is ordered to repay such amounts within ten days of this order.

d. Mr. Molefe is ordered to pay the costs including the costs of two counsel where employed.

K E MATOJANE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree:

H J FABRICIUS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree:

S S MPHAHLELE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON	29 AND 30 NOVEMBER 2017
JUDGMENT DATE	
FOR THE DEMOCRATIC ALLIANCE	P KENNEDY SC
	with N FERREIRA, K HARDING
	AND L ZIKALALA
INSTRUCTED BY	
FOR THE SOLIDARITY TRADE UNION	
INSTRUCTED BY	