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Report No:33 of 2017/18

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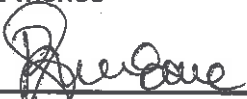
Dear Ms. Mazzone

**INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE EXECUTIVE
MEMBERS ETHICS CODE BY THE MINISTER OF PUBLIC ENTERPRISES, MS
LYNNE BROWN, MP**

Attached hereto is my report on an investigation into the above matter, for your attention.

This report is provided to you in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 and section 8(3) of the Public Protector Act, 1994

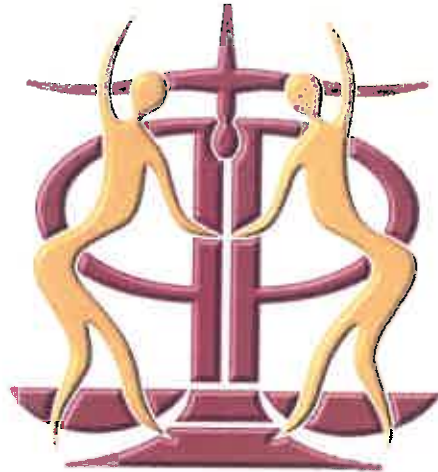
Best wishes


ADV. BUSISIWE MKHWEBANE

PUBLIC PROTECTOR OF SOUTH AFRICA

DATE: 22/02/2018

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF
THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

Report No: 33 of 2017/18

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***“Allegations of a violation of the Executive Ethics Code in the matter between Ms
Natasha Mazzone, MP of the Democratic Alliance (DA), and the Minister of Public
Enterprises, Ms Lynne Brown, MP.”***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE
EXECUTIVE ETHICS CODE BY THE MINISTER OF PUBLIC ENTERPRISES, MS
LYNNE BROWN, MP**



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Executive Summary

- i. This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), section 3(2) of the Executive Members' Ethics Act, (the Executive Members' Ethics Act) and section 8(1) of the Public Protector Act, 1994.
- ii. The report relates to an investigation into the alleged violation of the Executive Ethics Code by the Minister of Public Enterprises, Ms Lynne Brown, MP (Minister Brown). The complaint was lodged with the Public Protector on 22 May 2017 by Ms Natasha Mazzone, MP of the Democratic Alliance (the Complainant) in terms of Section 4(1)(a) of the Executive Members' Ethics Act, 82 of 1998.
- iii. Ms Mazzone attached to her complaint, the following Parliamentary Questions [PQ 2701] posed to Minister Lynne Brown on 2 December 2016:

"(1) What amount did Trillian Capital Partners receive in service fees for allegedly negotiating the settlement of a massive insurance claim involving the explosion of a boiler at the Duhva power plant; (2) did Eskom appoint the specified company to source a new supplier to replace the exploded boiler at the Duhva power plant; if not, why not; if so, what (a) were the fees payable to the specified company in this regard and (b) are the further relevant details; (3) (a) which other contracts of engagement have been concluded between Eskom and the specified company and (b) what are the costs involved in each case?"
- iv. Minister Brown replied that no amount was paid to Trillian Capital Partners for the Duhva Power Plant insurance claim and that Eskom did not appoint Trillian Capital Partners to negotiate the settlement. Minister Brown further asserted that Eskom did not appoint Trillian Capital Partners to source a new supplier to replace the boiler that had exploded

at the Duhva Power Plant and that there were no other contracts of engagement concluded between Eskom and Trillian Capital Partners.

- v. In her complaint Ms. Mazzonne referred to media reports stating that Trillian Capital Partners invoiced Eskom for R266 million and R153 million respectively.
- vi. It is Ms Mazzonne's contention that Minister Brown misled Parliament when she failed to disclose that there were contracts of engagement between Eskom and Trillian Capital Partners, and in so doing breached the Executive Ethics Code.
- vii. On analysis of the complaint, the following issues were identified and investigated:
 - a) Whether Minister Brown deliberately or inadvertently made a misleading statement to the National Assembly when she denied that there were contracts of engagement between Eskom and Trillian Partners; and if so
 - b) Whether Minister Brown's conduct violated the provisions of the Executive Ethics Code.
- viii. The investigation process was conducted by an analysis of the relevant documentation and correspondence with Minister Brown as well as consideration and application of the relevant laws, regulatory framework and prescripts.
- ix. Key laws taken into account to determine whether Minister Brown acted in violation of the Executive Ethics Code were principally the Constitution and the Executive Members' Ethics Act, in particular:
 - a) Section 96(1) of the Constitution that provides that Members of the Cabinet must act in accordance with a code of ethics prescribed by national legislation.

- b) In terms of section 96(2) of the Constitution, Ministers may not act in a way that is inconsistent with their office.
 - c) Paragraph 2.3(a) of the Executive Ethics Code which provides that Members of the Executive may not *"intentionally or inadvertently mislead the President, or the Premier or, as the case may be; the Legislature."*
- x. Having considered the evidence and information obtained during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
- a) **Whether Minister Brown deliberately or inadvertently made a misleading statement to the National Assembly when she denied that there were contracts of engagement between Eskom and Trillian Capital Partners**
 - (aa) The allegation that Minister Brown deliberately or inadvertently made a misleading statement to the National Assembly when she denied that these were contracts of engagement between Eskom and Trillian Capital Partners is substantiated.
 - (bb) In her written reply to the Parliamentary Question, Minister Brown inadvertently misled Parliament in her assertion that there were no other contracts of engagement concluded between Eskom and Trillian Capital Partners.



b) Whether Minister Brown's conduct violated the provisions of the Executive Ethics Code.

(aa) The complaint that Minister Brown acted in breach of the Executive Ethics Code is substantiated.

(bb) By inadvertently misleading Parliament, Minister Brown violated the provisions of paragraph 2.3(a) of the Executive Ethics Code.

(cc) Minister Brown's failure to act responsibly and in accordance with her constitutional and legal obligations to be accountable for Eskom as the Minister of Public Enterprises when she replied to the Parliamentary Question was inconsistent with her office.

(dd) She therefore also violated the provisions of paragraph 2.3(b) of the Executive Ethics Code 96(2) of the Constitution.

xi. In light of the above findings, the Public Protector is taking the following remedial action as contemplated in section 182(1)(c) of the Constitution.

a) The President to take the appropriate action against Minister Brown for violating the Executive Ethics Code and the Constitution.

b) The President must within a reasonable time, but not later than 14 days after receiving this report, submit a copy thereof and any comments thereon together with a report on any action taken or to be taken in regard thereto, to the National Assembly.

xii. The Director-General in the Department of the Presidency, to advise the Public Protector of action taken by the President within 60 days.



REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE EXECUTIVE MEMBERS ETHICS CODE BY THE MINISTER OF PUBLIC ENTERPRISES, MS LYNNE BROWN, MP

1. INTRODUCTION

- 1.1. This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), section 3(2) of the Executive Members' Ethics Act, 1998 (the Executive Members' Ethics Act) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2. The report is submitted in terms of section 3(2)(a) of the Executive Members' Ethics Act to President Matamela Cyril Ramaphosa.
- 1.3. Copies of the report are also provided to Ms Natasha Mazzone, MP of the Democratic Alliance (the Complainant) and the Minister of Public Enterprises, Ms. Lynne Brown, MP (Minister Brown), in terms of section 8(3) of the Public Protector Act.
- 1.4. The report relates to an investigation into the alleged violation of the Executive Ethics Code by Minister Brown.

2. THE COMPLAINT

- 2.1. The complaint was lodged with the Public Protector on 22 May 2017 in terms of Section 4(1)(a) of the Executive Members' Ethics Act.
- 2.2. Ms Mazzone referred in her letter of complaint to written Parliamentary Questions [PQ 2701] that she posed to Minister Brown on 2 December 2016 and her written reply thereto, as follows:



"(1) What amount did Trillian Capital Partners receive in service fees for allegedly negotiating the settlement of a massive insurance claim involving the explosion of a boiler at the Duhva power plant; (2) did Eskom appoint the specified company to source a new supplier to replace the exploded boiler at the Duhva power plant; if not, why not; if so, what (a) were the fees payable to the specified company in this regard and (b) are the further relevant details; (3) (a) which other contracts of engagement have been concluded between Eskom and the specified company and (b) what are the costs involved in each case?"

Her (Minister Brown's) reply was:

(1) No amount was paid to Trillian Capital Partners for the Duvha power plant insurance claim. Eskom did not appoint Trillion Capital Partners to negotiate the settlement for the Duvha Power plant insurance claim.

(2) No, Eskom did not appoint Trillian Capital Partners to source a new supplier to replace the exploded boiler at the Duvha Power Plant. There was no need to appoint any external party to assist with sourcing.

(2)(a) Not applicable

(2)(b) No other additional relevant detail relating to the above is applicable.

(3)(a) None

(3)(b) Not applicable."

2.3. Further to her complaint, Ms Mazzone stated that "...according to AmaBhungane, an investigative newsgroup, it was established that Trillian or its subsidiary companies had already invoiced Eskom for R266 million prior to this reply. Within days of Brown's statement, Trillian invoiced Eskom for another R153 million."

- 2.4. Ms Mazzone contended that Minister Brown misled Parliament when she failed to disclose that there were contracts of engagement between Eskom and Trillian Capital Partners and in so doing, violated paragraph 2.3(a) of the Executive Ethics Code which provides that:

"Members may not deliberately or inadvertently mislead the President, or the Premier or, as the case may be, the Legislature."

- 2.5. She requested the Public Protector to investigate her complaint.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1. The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

- 3.2. Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action."

- 3.3. Section 182(2) directs that the Public Protector has the additional powers and functions prescribed by national legislation.



-
- 3.4. Section 4(1)(a) of the Executive Members' Ethics Act, provides *inter alia* that, the Public Protector "...must investigate in accordance with section 3, an alleged breach of the Code of Ethics on receipt of a complaint by the President, a Member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet Member or Deputy Minister..."
- 3.5. The complaint was lodged by a Member of the National Assembly against a Cabinet Member and therefore had to be investigated by the Public Protector.
- 3.6. In terms of section 3 of the Executive Members' Ethics Act, the Public Protector must submit a report on the alleged breach of the Executive Ethics Code by a Cabinet Member within 30 days of the receipt of the complaint. If the Public Protector reports at the end of this period that the investigation has not yet been completed, she must submit another report when the investigation has been completed.
- 3.7. The Public Protector accordingly reported to the President on 30 August 2017 that her investigation of the complaint had not been completed and that she would submit the report when it was finalised.
- 3.8. Section 3(5)(a) of the Act provides that the President must within a reasonable time, but not later than 14 days after receiving the report of the Public Protector, submit a copy thereof and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the National Assembly.
- 3.9. In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*¹ the Constitutional Court, per Mogoeng Thomas Reetsang Mogoeng (Chief Justice

¹ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)

Mogoeng) CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: *“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”*

- 3.10 In the above-mentioned judgment, Chief Justice Mogoeng stated the following, when confirming the powers the Public Protector:
- 3.10.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);
- 3.10.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. (para 67);
- 3.10.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as was the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, the Public Protector is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);
- 3.10.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow. (para 69);
- 3.10.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the

time, that would determine the legal effect it has on the person, body or institution it is addressed to. (para 70);

3.10.6 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made. (para 71);

3.10.7 Implicit in the words "*take action*" is that the Public Protector is empowered to decide on and determine the appropriate remedial measure. And "*action*" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that the Public Protector necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence; (para 71(a));

3.10.8 The Public Protector has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.10.9 "*Appropriate*" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.11 The Public Protector's power and jurisdiction to investigate the complaint and take appropriate remedial action was not disputed by Minister Brown.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 3 and 4 of the Executive Members' Ethics Act, read with sections 6 and 7 of the Public Protector Act.



4.1.2. As indicated above, section 4(1)(a) of the Executive Members' Ethics Act, provides that the Public Protector "...must investigate in accordance with section 3, an alleged breach of the Code of Ethics on receipt of a complaint by the President, a Member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet Member or Deputy Minister..."

4.2. Approach to the investigation

4.2.1. The approach to the investigation included analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

4.2.2. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.2.1. What happened?

4.2.2.2. What should have happened?

4.2.2.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to a violation of the Executive Ethics Code?

4.2.2.4. In the event of a violation, what action should be taken?

4.2.3. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct of Minister Brown constitutes a violation of the Executive Ethics Code.

4.2.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by Minister Brown to prevent a violation of the Executive Ethics Code.

4.3. **On analysis of the complaint, the following issues were considered and investigated:**

4.3.1 Whether Minister Brown deliberately or inadvertently made a misleading statement to the National Assembly when she denied that there were contracts of engagement between Eskom and Trillian Capital Partners, and if so;

4.3.2 Whether Minister Brown's conduct violated the provisions of the Executive Ethics Code.

4.4. **The Key Sources of information**

4.4.1. **Documents**

The relevant documents obtained and analysed were primarily:

4.4.1.1 National Assembly: questions for written reply dated 2 December 2016: Question no. 2701 asked by Ms Natasha Mazzone, MP to Minister Brown and her written reply;

4.4.1.2 Document titled: *"Alleged Contravention of Clause 4.1.3 and 4.1.4 of the Code of Ethical Conduct and Disclosure of Members' Interest-Response by the Minister of Public Enterprises*, dated 9 June 2017 and signed by Minister Brown on the same date; and



4.4.1.3 Document titled: *"Governance Oversight Role over State Owned Entities (SOE's)"* issued by National Treasury on 25 November 2005; and

4.4.1.4 Document titled: *"Eskom Enquiry Reference Book: A Resource for Parliament's Public Enterprises Inquiry, Civil Society, Journalists and engaged citizens"*, issued by the University of Cape Town's Graduate School of Business in August 2017.

4.4.2. Correspondence sent and received

4.4.2.1 Letter from Eskom's former Chief Financial Officer, Mr. Anoj Singh to the Director-General of the Department of Public Enterprises, Mr Mogokare Seleke, dated 22 May 2017, under the heading *"Briefing on the McKincey and Co Master Service Level Agreement"*;

4.4.2.2 Letter from Minister Brown to the Acting Registrar of Members' Interest, dated 25 May 2017, under the heading: *"Alleged contravention of clause 4.1.3 and 4.1.4 of the Code of Ethical Conduct and Disclosure of Members' Interests"*;

4.4.2.3 Letter from the Public Protector to Minister Brown, dated 30 June 2017, requesting her response to the complaint;

4.4.2.4 Response received from Minister Brown addressed to the Public Protector, dated 10 July 2017;

4.4.2.5 Letter from the Public Protector to Minister Brown, dated 07 August 2017;

4.4.2.6 Response received from Minister Brown addressed to the Public Protector, dated 23 August 2017;

4.4.2.7 Letter from Eskom Interim Chairperson, Mr Zethembe Khoza to Minister Brown, dated 21 September 2017, under the heading: *"Parliamentary Question 2701"*; and



4.4.2.8 Letter from Minister Brown to the Public Protector, dated 22 September 2017;

4.4.2.9 A notice in terms of section 7(9)(a) of the Public Protector Act, 1994 issued on 30 October 2017 to Minister Brown; and

4.4.2.10 Response from Minister Brown to the Public Protector's section 7(9) notice, dated 09 November 2017.

4.4.3. Interview conducted

4.4.3.1 The Public Protector interviewed Minister Brown and the Director-General of the Department of Enterprises, Mr M Seleke, on 15 September 2017.

4.4.4. Websites consulted/ electronic sources

4.4.4.1 <https://www.fin24.com/Companies/Investment-Holdings/whistleblower-how-gupta-linked-firm-scored-big-by-connecting-officials-and-consultants-20170927>;

"Whistleblower: How Gupta-linked firm scored big by connecting officials and consultants", by Susan Comrie/amaBhungane, 27 September 2017.

4.4.4.2 <https://www.businesslive.co.za/bd/companies/financial-services/2017-09-19-gupta-family-has-never-been-our-client-mckinsey-says/>; *"Gupta family has never been our client, McKinsey says"* by Graeme Hosken, 19 September 2017.

4.4.4.3 <http://amabhungane.co.za/article/2017-05-18-exclusive-gupta-mine-grab-how-brown-misled-parliament>; *"Gupta mine grab: how Brown misled Parliament"* by Susan Comrie, Sam Sole and Stefaans Brümmer, 18 May 2017

4.4.5. Legislation and other prescripts

4.4.5.1 The Constitution of the Republic of South Africa, 1996.

4.4.5.2 The Public Protector Act, No 23 of 1994.

4.4.5.3 The Public Finance Management Act, No 1 of 1999.

4.4.5.4 The Executive Members' Ethics Act, No 82 of 1998.

4.4.5.5 The Executive Ethics Code.

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS.

5.1 Whether Minister Brown deliberately or inadvertently made a misleading statement to the National Assembly when she denied that there were contracts of engagement between Eskom and Trillian Capital Partners

Common cause issues

5.1.1. It is not in dispute that Ms N Mazzone asked the following written Parliamentary Questions to Minister Brown under reference number, PQ 2701 on 2 December 2016:

“(1) What amount did Trillian Capital Partners receive in service fees for allegedly negotiating the settlement of a massive insurance claim involving the explosion of a boiler at the Duvha power plant;

(2) Did Eskom appoint the specified company to source a new supplier to replace the exploded boiler at the Duvha power plant; if not, why not; if so,

2(a) What were the fees payable to the specified company in this regard and

2(b) are the further relevant details (sic);

(3)(a) Which other contracts of engagement have been concluded between Eskom and the specified company and;

3(b) What are the costs involved in each case?"

5.1.2. In her written reply, Minister Brown stated that:

"(1) No amount was paid to Trillian Capital Partners for the Duvha power plant insurance claim. Eskom did not appoint Trillian Capital Partners to negotiate the settlement for the Duvha Power Plant insurance claim;

(2) No. Eskom did not appoint Trillian Capital Partners to source a new supplier to replace the exploded boiler at the Duvha Power Plant. There was no need to appoint any external party to assist with sourcing.

2(a) Not applicable

2(b) No other additional relevant detail relating to the above is applicable;

3(a) None

3(b) Not applicable."

5.1.3. Plainly put, Minister Brown was asked whether Eskom had any contractual engagements with Trillian Capital Partners. Her response was: "none".

Issues in dispute

- 5.1.4. The Public Protector had to determine whether Minister Brown's response to Ms. Mazzonne's question in the National Assembly was deliberately or inadvertently misleading.
- 5.1.5. The Complainant contends that Minister Brown misled Parliament when she responded to question 3(a) and (b) of Parliamentary Question 2701; that there were no contracts of engagement between Eskom and Trillian Capital Partners.
- 5.1.6. In her response to the complaint dated 23 August 2017, Minister Brown stated that the Department of Public Enterprises has a formalised process in terms of which Parliamentary Questions are managed.
- 5.1.7. This process entails that Parliamentary Questions are communicated to the office of the Director-General of Public Enterprises as well as the office of the relevant Chief Executive Officer of the State Own Enterprise (SOE) involved. Their response is submitted to the Deputy Director-General of the Department of Public Enterprises, who analyses it, signs it off and submits the response to the office of the Director-General. If the Director-General is satisfied, it is submitted to the Parliamentary Liaison Officer in the Ministry for the Minister's approval.
- 5.1.8. According to Minister Brown this process was followed in respect of her reply to the Parliamentary Question that is the subject of this report.
- 5.1.9. She further stated that:*I relied on the information received from Eskom when responding to the Parliamentary Question. I exercise shareholder oversight on Eskom and I am not involved in the day to day operations of the company. Thus, it cannot be expected that I will have first-hand information on whether any amount was*

paid to Trillian. I relied on the Board of Eskom for information, to enable me to provide a response to the Parliamentary Question."

- 5.1.10. At a meeting held with the Public Protector on 15 September 2017, Minister Brown stated *inter alia*, that: "... (she) *did not lie to Parliament. Eskom did not have a direct contract with Trillian. Eskom had a contract with McKinsey...*"
- 5.1.11. The Director-General of the Department of Public Enterprises, Mr M Seleke stated during this meeting that, "... *Trillian was a BEE partner which McKinsey introduced to them [Eskom]...*"
- 5.1.12. It was noted that in a letter addressed to the Director-General of Public Enterprises on 22 May 2017 by the former Eskom Chief Financial Officer, it was stated that Trillian was being evaluated as a potential BEE partner by McKinsey, under the Master Service Level Agreement (MSA) between Eskom and McKinsey, but that this partnership, which represented a key parameter in the MSA was never concluded.
- 5.1.13. During the meeting with the Public Protector, the Director-General stated that there was no direct contract between Trillian and Eskom. According to him, there were "...*relationship issues and McKinsey wrote to them [Eskom] to pay Trillian directly.*"
- 5.1.14. However, in his letter referred to above, Mr Singh stated that, "*All payments made by Eskom to Trillian were made on the basis of the letter of acceptance, compliant with Eskom's assessment that they met MSA principles and in anticipation of a subcontracting agreement signed with Trillian as a BEE partner under the MSA and approved by the Board. These payments were made for work completed and benefits delivered.*" (emphasis added)

5.1.15. The payments to Trillian were illustrated by Mr. Singh as follows:

Date	Payment to Trillian excluding Vat	Comments
11 August 2016	R206.5 million	Progress Payment
14 December 2016	R134 million	Shortfall Associated with Payment as per envisaged BEE partner split, verified by Oliver Wyman
22 February 2017	R154.6 million	Final Contract Settlement Payment

5.1.16. According to Mr Singh's letter the Eskom Board had already cancelled the MSA in May 2016. The payments to Trillian were thus made thereafter.

5.1.17. In a letter addressed to the Public Protector on 22 September 2017, Minister Brown stated that:

"Subsequent to our meeting, (on 15 September 2017) I met with the Acting Chairperson and Interim Group Chief Executive of Eskom to solicit further clarity on Eskom's relationship with Trillian.

It became clear in the meetings that the explanation I have been provided with, which I used to explain my response to Parliamentary Question 2701 to yourself and to the Parliamentary Ethics Committee, was incorrect and misleading. It is clear that the company understood from the onset that the question was broader than Duvha Power Station but decided to withhold this information from me. Subsequent event (sic) seem to suggest that Eskom withheld this information because there may be something untoward about the relationship between Eskom and Trillian which I have asked the Special Investigating Unit to investigate." (emphasis added)

5.1.18. Minister Brown further stated that:

"The Acting (Interim) Chairperson of Eskom wrote me a letter dated 21 September 2017 (attached hereto) which clearly indicates that incorrect and insufficient information was submitted to me when I responded to the Parliamentary Question".

5.1.19. In his letter addressed to Minister Brown on 21 September 2017, the Interim Chairperson of the Eskom Board stated that:

"The crux of the matter seems to be twofold:- (a) that that Member of Parliament asked about Trillian Capital Partners (TCP), however Eskom had dealings with Trillian Management Consultants who are (sic) a subsidiary to TCP, (b) That the Member of Parliament is asking about contracts concluded between Eskom and TCP, however, Eskom had dealings with TMC (Trillian Management Consultants) without any contracts concluded. It is therefore advisable that Eskom should have indicated to the Minister, that although the question is asking about TCP, there were dealings with TMC who are (sic) a subsidiary of TCP and this was not founded on formal signed agreements."

5.1.20. Minister Brown therefore conceded during the investigation that her written response to the Parliamentary Question put to her by Ms Mazzone was incorrect and misleading. However, she submitted that when she misled the National Assembly, she did so inadvertently, as she relied on incorrect information provided to her by Eskom, that was later found to be incorrect.

5.2 Whether Minister Brown's conduct violated the provisions of the Executive Ethics Code.

5.2.1 Eskom is a State Owned Company and a major public entity listed in Schedule 2 of the Public Finance Management Act, 1999.

- 5.2.2 Section 91(2) of the Constitution provides that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
- 5.2.3 In terms of section 91(3), members of the Cabinet must provide Parliament with full and regular reports concerning matters under their control.
- 5.2.4 Minister Brown is the Member of the Cabinet responsible for Public Enterprises, including Eskom.
- 5.2.5 As the Minister of Public Enterprises, Minister Brown is the Executive Authority responsible for Eskom as a public entity, as contemplated by section 63 of the Public Finance Management Act, 1999.
- 5.2.6 Section 63(2) of the Public Finance Management Act, 1999 provides that:
- “The executive authority responsible for a public entity under the ownership and control of the national or a provincial executive must exercise that executive’s ownership control powers to ensure that the public entity complies with this Act and the financial policies of that executive.”*
- 5.2.7 The Parliamentary Question put to Minister Brown related to Eskom’s contractual engagements and therefore financial commitments.
- 5.2.8 Minister Brown was accordingly obliged by law to have provided a proper and responsible response in accordance with her public responsibility and accountability to Parliament for Eskom’s affairs.
- 5.2.9 Section 96(1) of the Constitution provides that Members of the Cabinet must act in accordance with a code of ethics prescribed by national legislation.

5.2.10 In terms of section 96(2), Ministers may not act in a way that is inconsistent with their office.

5.2.11 The Executive Members' Ethics Act provides for a code of ethics governing ethical conduct of Members of the Cabinet, Deputy Ministers and Members of Provincial Executive Councils.

5.2.12 Paragraph 2.3(a) of the Executive Ethics Code states that Members of the Executive may not *"deliberately or inadvertently mislead the President, or the Premier or, as the case may be; the Legislature."*

5.2.13 In terms of paragraph 2.3(b) of the Executive Ethics Code Members may not act in a way that is inconsistent with their position.

5.2.14 Minister Brown has conceded during the investigation that in replying to the Parliamentary Question she had misled Parliament.

5.2.15 It appears from her evidence and the information that she provided that her response was based on the information that was provided to her office by Eskom, via the Department of Public Enterprises.

5.2.16 The object of the Parliamentary Question clearly related to very serious concerns pertaining to Eskom's financial affairs.

5.2.17 There is no indication that Minister Brown, in terms of her responsibility as the Member of the Executive responsible and accountable for Eskom properly applied her mind and considered her reply, before it was sent off to Parliament, as she was expected to have done.

5.2.18 No evidence or information could be found or was submitted during the investigation that Minister Brown deliberately intended to mislead Parliament and the public with her written reply.

5.2.19 Although she had conceded to have inadvertently misled Parliament, this and the repercussions of her reply would have been avoided, had she acted in accordance with her responsibilities and accountability.

5.2.20 Minister Brown therefore acted in a manner that is inconsistent with her position, in violation of the provisions of the Constitution and the Executive Ethics Code.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

6.1. Whether Minister Brown deliberately or inadvertently made a misleading statement to the National Assembly when she denied that there were contracts of engagement between Eskom and Trillian Capital Partners.

6.1.1. The allegation that Minister Brown deliberately or inadvertently made a misleading statement to the National Assembly when she denied that these were contracts of engagement between Eskom and Trillian Capital Partners is substantiated.

6.1.2. In her written reply to the Parliamentary Question, Minister Brown inadvertently misled Parliament in her assertion that there were no other contracts of engagement concluded between Eskom and Trillian Capital Partners.

6.2. Whether Minister Brown's conduct violated the provisions of the Executive Ethics Code.

- 6.2.1. The complaint that Minister Brown acted in breach of the Executive Ethics Code is substantiated.
- 6.2.2. By inadvertently misleading Parliament, Minister Brown violated the provisions of paragraph 2.3(a) of the Executive Ethics Code.
- 6.2.3. Minister Brown's failure to act responsibly and in accordance with her constitutional and legal obligations to be accountable for Eskom as the Minister of Public Enterprises when she replied to the Parliamentary Question was inconsistent with her position.
- 6.2.4. She therefore also violated the provisions of paragraph 2.3(b) of the Executive Ethics Code 96(2) of the Constitution.

7 REMEDIAL ACTION

- 7.1 The remedial action to be taken, as envisaged by section 182(1)(c) of the Constitution, 1996, is as follows:
 - 7.1.1 The President to take the appropriate action against Minister Brown for violating the Executive Ethics Code and the Constitution.
 - 7.1.2 The President must, in terms of section 3(5)(a) of the Executive Members' Ethics Act, within a reasonable time, but not later than 14 days after receiving this report, submit a copy thereof and any comments thereon together with a report on any action taken or to be taken in regard thereto, to the National Assembly.

February 2018

8 MONITORING

- 8.1 The Director-General in the Presidency to advise the Public Protector of action taken by the President within 60 days of the date of this report.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 21/02/2018

Assisted by: Good Governance and Integrity