Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: A49/2021

Before: The Hon. Ms Justice Goliath (Deputy Judge President)
The Hon. Mr Justice Binns-Ward
The Hon. Mrs Justice Steyn

Hearing: 20 July 2021
Judgment: 6 September 2021

In the matter between:

DAWID JOHANNES MALHERBE Appellant

and

THE STATE Respondent

JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 6 September 2021.)

BINNS-WARD J (GOLIATH DJP and STEYN J concurring):

[1] The appellant, an erstwhile longstanding employee and senior manager of Eskom, was convicted in the Specialised Commercial Crimes Court at Bellville on one count of fraud and one count of money laundering in contravention of s 4 read with ss 1 and 8 of the

Prevention of Organised Crimes Act 121 of 1998.[1] He was sentenced to an effective term of 15 years' imprisonment; 10 years in respect each count, with five years of the sentence for money laundering ordered to run concurrently with that imposed in respect of the count of fraud.

[2] The money laundering charge related to the appellant's handling of the profits that had accrued to him though the business operations of Energy Utility Services (Pty) Ltd ('EUS') (a company established by the appellant about which much will be said later in this judgment) in respect of two outsourcing contracts between that company and PN Energy Services (Pty) Ltd ('PNES'). PNES was at the time a wholly owned subsidiary of Eskom Holdings Ltd. The appellant had been seconded by Eskom to serve as the managing director of PNES.

[3] The appellant's role in bringing about the conclusion of the contracts between EUS and PNES provided the foundation for the charge of fraud brought against him. Both sides accepted before this court that if the appellant were successful with his appeal against the fraud conviction, a setting aside of his conviction on the money laundering charge would logically have to follow. In the circumstances counsel confined their oral argument to the appeal against the fraud conviction.

[4] The appellant also faced a charge of having contravened various provisions of the Public Finance Management Act 1 of 1999[2] ('PFMA') ('failing to comply with the fiduciary duties and general responsibilities of the accounting authority').[3] The PFMA-related charges concerned the accused's alleged misfeasance in respect of the management of PNES. The PFMA applied because Eskom is one of the 'major public entities' listed in Schedule 2 to the Act and any subsidiary 'under the ownership control' of a major public entity is also treated for the purposes of the statute as an entity listed in Schedule 2. He was acquitted on that count because the regional magistrate was of the view (misdirectedly) that it was a duplication of the fraud charge.

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[1] It appears from s 4 of Act 121 of 1998 that '*money laundering*', in the sense relevant in the current matter, involves performing any act in respect of property that is or forms part of the proceeds of unlawful activities which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof.

2 Sections 49, 50 and 51.

3 The quotation is from the charge sheet.

[5] The appellant was accused no. 2 in the trial. His co-accused were EUS, as accused no. 1, and Matome Peter Sebola, as accused no. 3. Mr Sebola was the general manager (distribution) for Eskom's Western Region of operations. Sebola was discharged, in terms of s 174 of the Criminal Procedure Act, after the closing of the state's case.

[6] It had originally been the state's intention to join one Jacob Machinjike, who was a general manager in the transmission division of Eskom, as the fourth accused in the case. The charges against Mr Machinjike were withdrawn, however, and he was used instead by the prosecution as a state witness. Indeed, the trial court's conviction of the appellant on the charge of fraud was ultimately founded on its acceptance of the truth of Machinjike's evidence, and its rejection of the appellant's countervailing version of the facts as not reasonably possibly true.

[7] The appellant's application for leave to appeal was dismissed by the trial court and his subsequent petition to the Judge President, in terms of s309C of the Criminal Procedure Act, was also unsuccessful. The refusal of the petition was reversed by the appeal court; see *Malherbe v S* [2019] ZASCA 120 (25 September 2019). It was accordingly with leave granted by the Supreme Court of Appeal that the appeal came before us nearly five years after the appellant had been sentenced. Fortunately, the appellant did not serve any time in prison during that interval. The appeal comes before a panel of three - rather than two – judges, apparently by virtue of a determination by the Judge President in terms of s 14(1)(a) of the Superior Courts Act.[4]

[8] It is convenient to begin by describing the factual backdrop for the charges brought against the appellant and his co-accused.

[9] PNES was established as joint venture company in 1994. It constituted the entity through which Eskom, in partnership with two other companies, one of them British and the other French, embarked on a project for the electrification of the rapidly growing area of Khayelitsha on the Cape Flats. The British company withdrew from the venture in 2002 and the French partner followed suit in 2007, with the result that PNES then became a wholly owned subsidiary of Eskom.

[4] Appeals to this court from the lower courts are ordinarily heard by a panel of two judges, as provided in terms of s 14(3) of the Superior Courts Act 10 of 2013, a third judge being added only if the two judges originally appointed are not in agreement.

[10] In January 2008 Eskom decided that there was no longer any point in PNES's functions - which were a localised subset of those undertaken nationally by Eskom itself - being carried out by a separate company. It was accordingly resolved[5] that PNES should be 'decorporatised',[6] and its operations taken over by the parent company. Eskom's Western Region's distribution division was identified by the board, in May 2008, as the structure into which PNES's operations would be integrated.

[11] The board of directors of PNES at the time comprised Machinjike, who was the chairman, Sebola and the appellant. As already noted, the appellant was the managing director. He had been seconded a few years earlier from another Eskom subsidiary to fill that position. As also already mentioned, Messrs Machinjike and Sebola were also very senior managers in Eskom.

[12] Mr Machinjike was the manager in the Eskom group hierarchy to whom the appellant was directly accountable for PNES's operations. Machinjike was in turn answerable up the line of authority to a certain Mr Mongezi Ntsokolo, the managing director of Eskom (Transmission). Mr Ntsokolo was the person designated by Eskom to represent its shareholder's interest in PNES. He was referred to in the evidence as 'the shareholder representative'.

[13] Mr Sebola enjoyed official recognition within Eskom as a high achieving executive credited with improving the rating of the Western Region distribution division to that of the best performing distribution division nationally. As the general manager of Eskom (Distribution) in the Western Region, Sebola headed the division of Eskom designated to assume the functions of PNES when it was 'decorporatised'. It was perhaps for that reason that he was appointed to the PNES board at the beginning of 2008.

[14] The role played by PNES in respect of the provision and maintenance of electricity services in Khayelitsha was acknowledged by Eskom's management to be a highly important one. The carrying out of PNES's functions in the area required close engagement with the local community. Under the appellant's leadership, PNES's personnel had built up an

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[5] The decision does not appear to have been incorporated in a formally adopted resolution. A factor which appears to have led to some confusion later in determining the status of the decision and what required to be done to formalise it.

[6] Apparently Eskom jargon. Its meaning is imprecise. Eskom's object was that PNES should cease to be a functioning separate corporate entity within the Eskom group. 'Decorporatising' seems to have been a catch-all label to cover any method of achieving that, so the fuzziness of its import is by no means unfitting. The word was used by all sides in the trial court and in the court's judgment. It is so inculcated in the fabric of the case that, like the SCA, we have found it convenient to keep it in use.

intimate knowledge of the Khayelitsha area and established a good working relationship with the community. Eskom's top management was conscious that it was vital that the absorption of PNES's functions by the holding company should happen in a way that would not interrupt or dislocate the services being provided in Khayelitsha. It was appreciated that any hiccups in the transitional process could even lead to local unrest, with the potential for the vandalising and destruction of existing infrastructure. As one of the Eskom witnesses stated, Khayelitsha was '*a volatile area*'.[7] The potential for service-related unrest was regarded by the state-owned company as an especially sensitive matter at that time because the intended winding down of PNES coincided with the lead up to the 2009 general election.

[15] When the Eskom board made its decision, in January 2008, to 'decorporatise' PNES, the intention was that it should be implemented by the end of March of that year. The idea was that PNES should be liquidated, and its assets taken over by Eskom by way of a liquidation dividend in specie. It very soon became apparent, however, that it had not been appreciated that 'decorporatising' PNES would involve a complex undertaking requiring attention to a range of legal, tax and logistical questions. Indeed, the 'decorporatisation' remained a still unfinished project at the time of the appellant's trial in 2015-2016.

[16] In his capacity as managing director of PNES, the appellant, having taken professional advice on the practical aspects of implementing the Eskom board's resolution, was proactive in highlighting to his superiors some of the complicated issues that needed to be addressed in the 'decorporatising' exercise. He had sought such advice from, amongst others, a senior partner at Cliffe Dekker attorneys, Mr Alan Jephta. Jephta had been engaged for some years as PNES's attorney. His initial engagement followed on a recommendation by the head of Eskom's legal department. Eskom then decided that Mr Jephta should be jointly engaged to provide ongoing advice to both Eskom and PNES about the steps to be taken to implement the resolution. The appellant also took advice from the company that provided company secretarial services to PNES in respect of the statutory requirements that would need to be complied with by PNES to achieve 'decorporatisation'.

[17] The questions that needed to be addressed in the 'decorporatising' process were regarded as sufficiently complex for the Eskom board to assign a committee known as TEXCO (Transmission Executive Committee) to guide the process. TEXCO was chaired by

[7] The appellant testified, without contradiction, that when he became managing director of PNES in 2002, the company was in a bad state, beset with both staff and community-related problems. He said vehicles were being burnt out and the company's offices were being petrol bombed.

the aforementioned Mr Mongezi Ntsokolo, the managing director of the transmission division of Eskom. Mr Machinjike served as a member of the committee.

[18] The Eskom employee responsible for advising TEXCO on the process was Johanna ('Ohna') Smit, who testified as a state witness at the trial. Ms Smit headed up a task team of Eskom employees drawn from a variety of departments within the company set up for the purpose of dealing with the technical aspects of the 'decorporatisation' of PNES and the takeover of its assets by Eskom.

[19] Ms Smit's evidence showed up vividly the confusion and lack of clarity that prevailed during 2008 as Eskom management worked its way through the morass of practical issues that confronted it in implementing the board's 'decorporatisation' decision. The witness conceded that she had not appreciated some of the practical difficulties with pursuing Eskom's favoured route of liquidating PNES until these were pointed out to her by the appellant. Most important in that connection had been the consideration that any decision by PNES to go into voluntary liquidation would have immediately disabled it from being able to contract with third parties, something that was essential for the continuance of service provision in Khayelitsha until Eskom's Western Region distribution division was ready to fully assume PNES's operational functions. In this regard it seems that PNES used to carry on much of its on-site work in Khayelitsha in terms of ad hoc contracts concluded as required from time to time with various small businesses in the local community.

[20] Ms Smit conceded under cross-examination at the trial that she was in no position to say whether Eskom had the capacity to take over PNES's functions, even by the end of 2009. Other evidence led during the trial established that it was only during 2010 that Eskom was ready to fully take over PNES's operational functions. Indeed, Mr Jannie Ehlers, a regional key account manager in Eskom who was the chairperson of PNES at the time of the trial, who testified for the state, had reported in September 2006 that Eskom did '*not have the resources to perform* [the work being done in Khayelitsha by PNES]' and that to replace PNES '*would require appointing various contractors in the area of Khayelitsha, which could result in higher costs for Eskom (ie the contractors would have to go through a steep learning curve that PN Energy Services (Pty) Ltd has already experienced). This will also have a detrimental effect on Eskom's customers.*' Ehlers' report proceeded '*Alternatively Eskom can appoint its own staff (approximately 47 people) which can also take up to 12 months to train and equip*'. Nothing in the evidence suggested that the circumstances had changed materially between September 2006 and January 2009.

[21] The efficient assumption of PNES's functions by Eskom's Western Region distribution division was obviously a matter of special interest to Mr Sebola in his role as general manager of the division. It will be recalled that Sebola was also a director of PNES. In his capacity as general manager, Sebola constituted a special team headed by Trish da Silva, a business strategy and planning manager within Eskom, to advise on and manage the practical aspects of smoothly transferring PNES's functions to his division. The committee established by Sebola was known as the 'PN Integration Team' or 'PIIT'. The team headed by Ms da Silva operated contemporaneously with that headed by Ms Smit, although it seems that contact between the two teams was limited.

[22] I have already mentioned that PNES's personnel had developed an intimate knowledge of the operational environment in Khayelitsha and established the sort of close relationship with the community that was essential for the effective carrying out of PNES's functions in the area. The staff complement concerned was not employed directly by PNES. It comprised of persons whose services had been provided by Kelly Personnel, a labour brokering business with which PNES had a recurring fixed term contract.[8]

[23] The appellant and his fellow directors on the board of PNES were acutely conscious of the importance of retaining the core of the existing staff complement if the desired object of a smooth transfer of the company's operations to Eskom was to be successfully achieved. The cogency of their views in this regard was not called into question at the trial. However, the feasibility of retaining the experienced staff was at risk once the employees who had been supplied through Kelly Personnel became aware of the imminent restructuring of PNES's operations and grew concerned about the security of their continued engagement. The position was not assisted by Eskom's unwillingness to commit to taking on the staff members hired by PNES through Kelly Personnel. An opinion given by senior counsel advised that Eskom was not legally obligated to offer employment to the operational staff supplied to PNES by Kelly Personnel. Eskom's legal department had also advised against Eskom taking cession of PNES's contract with Kelly Personnel. The appellant became concerned because the resultant uncertainty concerning their future was leading the staff members supplied by Kelly Personnel to begin to look at finding more secure employment elsewhere.

[8] The contract in place at the relevant time was due to expire at the end of December 2009, but was terminable earlier by either party on three months' notice.

[24] On 17 November 2008, Eskom's Investment and Finance Committee (IFC) adopted a resolution concerning the 'Disposal of PN Energy Services (Pty) Ltd' in the following terms (as recorded in the minutes of the IFC meeting on that date):

> 'A submission by the Managing Director (Transmission Division), was considered and discussed.
>
> RESOLVED that
>
> 1. The Investment and Finance Committee approves disposal of PN Energy Services (Pty) Ltd as a going concern through the following transaction steps, subject to PFMA approval:
>
> 1.1 The sale and transfer of the whole or substantial portion of the assets of PNES to and in favour of Eskom as a going concern with defined assets and liabilities. PNES and Eskom elect to apply section 45 of the Income Tax Act.
>
> 1.2 Declaration of dividend to Eskom.
>
> 1.3 Buy-back of shares from Eskom.
>
> 2. Mr MM Ntsokolo, Managing Director (Transmission Division) is authorised[,] with the power to delegate further, to take all the necessary steps to give effect to the above, including the signing of any agreements or other documentation necessary or related thereto.'

It is striking that the resolution was expressed in terms that gave a very wide mandate to those responsible for implementing the decision as to precisely how to go about it. A copy of the IFC resolution was provided to the appellant and Mr Machinjike by the managing director of Eskom's transmission division, Mr Ntsokolo, on 5 December 2008. The appellant thereupon convened a PNES board meeting for 10 December 2008.

[25] The correspondence introduced in evidence at the trial showed that Mr Sebola only obtained sight of the IFC resolution when it was furnished to him at his request by Ms Smit early on the morning of 10 December 2008. Mr Sebola acknowledged receipt of the resolution in an email circulated to unidentified 'colleagues' minutes after Ms Smit provided him with the text of the resolution. The content of Mr Sebola's email indicated an appreciation on his part of a '*need to address the risks of integration seriously*'.

[26] It is also apparent from the contemporaneous correspondence that Mr Sebola discussed the integration process with Ms da Silva at that time because she thereafter produced for Sebola's consideration a draft letter setting out the transmission division's proposals on the integration process to be sent to the appellant in his capacity as managing director of PNES. The draft letter and a diagrammatic attachment thereto depicting a three-phase process was submitted by Ms da Silva on 11 December 2008.

[27] Ms da Silva's draft proposed a three-phase model for the integration of PNES's functions into Eskom. It was a transposition of a model sketched out by Mr Sebola after the latter had received the IFC resolution. The model initially proposed by Ms da Silva showed that she envisaged that PNES would continue to operate during the transitional period using the staff supplied in terms of that company's contract with Kelly Personnel.

[28] After discussions with the appellant in mid-December 2008, Ms da Silva amended the draft integration model to excise reference to the Kelly Personnel contract and instead indicate an outsourcing of PNES's LV and MV functions during the interim phase. The revised model did not identify to which entity the proposed outsourcing would occur, but Ms da Silva conceded in cross-examination that that was not sinister as the non-disclosure of procurement details to persons not directly involved in the procurement process was in line with Eskom corporate governance policy.

[29] The revised model was presented to the Western Region's regional executive committee meeting on 19 December 2008 and duly endorsed. Ms da Silva, Sebola and the appellant were present at the regional committee meeting. It appeared from Ms da Silva's evidence at the trial that she may not have been astute to the import of the revision of the model that she had originally produced that had expressly referred to the Kelly Personnel contract. Why that should have been so remained unclear, however. The witness was constrained to concede that the revised transitional model could reasonably be interpreted as consistent with the contractual arrangement entered into between PNES and EUS. Objectively considered, the amended model was in fact not inconsistent with the arrangement subsequently put in place between PNES and EUS. And on any approach, the evidence suggested that outsourcing via the Kelly Personnel contract with PNES would not assist a smooth transition if the staff complement that had been provided to PNES through its contract with Kelly dissipated because of uncertainty about their longer-term engagement. Any model proposed by the PIIT would not serve its purpose if it did not realistically address the risks and challenges to which the integration exercise unavoidably gave rise.

[30] Ms da Silva prepared a letter formally recording the revised three-phase model to be sent by Eskom to the appellant in his capacity as managing director of PNES. A copy of the revised diagrammatic summary of the contemplated process was attached to the letter. As noted later in this judgment, a copy of the letter was attached to at least one (and probably both) of the contentious agreements subsequently concluded between PNES and EUS in mid-January 2009.

[31] It is necessary to take a step back in time to contextualise the aforementioned revision by the appellant of the model initially put up by Ms da Silva and to understand how the revised model would have been understood by Mr Sebola in his position effectively as Ms da Silva's principal. The appellant testified that towards the end of 2008 he came to appreciate that perhaps the only way of securing the critical continuity of service to Khayelitsha during a period of transition from PNES to Eskom would be by establishing a separate entity which would take over the personnel, local knowledge and skills necessary to provide the service to be preserved. Such an entity would provide assured employment to the corps of staff used by PNES pursuant to its contract with Kelly Personnel and thereby avoid the dissolution of that group that was threatening because of the continuing uncertainty as to its job security because of Eskom's unwillingness or indecisiveness about committing to its employment when PNES's functions were integrated into those of the parent company.

[32] The appellant understood that the implementation of his proposal would be incompatible with the continuation of his own employment by Eskom, about which there were also uncertainties. He therefore mentioned the proposal to Mr Willem Theron, a general manager in Eskom's transmission division, who at that time had been newly assigned as the manager exercising human relations oversight over him.[9] He did this during a familiarisation visit by Theron to Cape Town in November 2008. The appellant testified that Theron was supportive of his idea, telling him '*to go for it*'.

[33] The appellant also discussed his idea with Ronaldé Truter of Edonai Secretarial Compliance Services, the company that provided company secretarial services to PNES. Ms Truter, who was informed that the appellant intended to take his proposal to the PNES board of directors in early December 2008, advised him that it would be wise to acquire a shelf company right away because if the board accepted the proposal there might be logistical problems in setting up a company at short notice over the end of year holiday season when the CIPRO's service level was reduced.[10] Pursuant to that advice the appellant, on 3 December 2008, at a nominal cost, acquired the shelf company, Bold Moves 449 (Pty) Ltd, which in due course was renamed as EUS.

[34] The appellant put his proposal up to the directors of PNES at a board meeting on 10 December 2008. He had previously discussed it with Mr Sebola in an email exchange

[9] Like Mr Machinjike, Theron also reported directly to Mr Mongezi Ntsokolo up the Eskom chain of command.

[10] The Companies and Intellectual Property Registration Office.

between the two men in early November 2008. They also had a face-to-face meeting to discuss the appellant's idea. The appellant was led to understand that Sebola would discuss the proposal with his team, the PIIT. Mr Machinjike testified that the December board meeting had been specially convened at the instance of the appellant but, like much else in his testimony, his evidence in that regard was unreliable, for it appears that the meeting was that scheduled at the board's previous meeting in May 2008 to take place in November 2008. It is evident from the agenda and minutes of the December meeting that there had not been a board meeting in November and that besides the appellant's proposal there were several matters of ordinary business on the agenda, including the approval of PNES's three-year business plan for 2009 -2012 and the company's annual budget for 2009/2010. According to the minutes, the meeting lasted for three hours.

[35] An outline of the appellant's proposal was included in the document pack provided to the directors ahead of the meeting. The outline indicated, amongst other things, that EUS would become a broad-based black economic empowerment company. The information was contained on one of the pages of the proposal document s.v. 'Energy Utility Services –Key Elements'. The page in question read as follows:

Energy Utility Services –Key Elements'

- *S1 Response and minor MV/LV network incidents/faults*
- *Purchase PN Energy Services related assets at Book value including goodwill – short transfer period*
- *Core functions of Customer Service, Maintenance and Vending not included as to transferred (sic) to Eskom*
- *Renewable 3 year contract (aligned with existing PNES contract)*
- *Broad Based Black Economic Empowerment Company*

- *External share BEE Empowerment*
- *Limited share per Employee Empowerment*

- *Non EUS Employee migration from PNES to Eskom*

The language was plainly that of a proposal – that is of a state of affairs that it was contemplated might be brought into being; it was not couched as a representation of existing fact. The appellant testified that the bullet points were intended to serve as 'talking references' to assist him in structuring his presentation to the board.

[36] The appellant declared his obvious conflict of interest in the proposal by virtue of his '*substantial shareholding*' in EUS. Accordingly, after explaining the proposal to the board, he withdrew from the board meeting to allow the remaining directors, Messrs Machinjike and

Sebola, to consider it in his absence. The appellant testified that he expressly stated in his explanation that Bold Moves/EUS was a shelf company.

[37] The appellant's declaration of interest was duly recorded in the minutes of the meeting. The prosecutor, nevertheless sought to make something at the trial about the alleged non-compliance by the appellant with the prescripts of the 1973 Companies Act in respect of directors' disclosures of interest; in particular, that his disclosure had not been made in writing and that it did not adequately describe the nature and extent of the appellant's interest in EUS. The prosecutor relied in this regard on s 234(3) of the Act, which applies to 'general notices' given by directors.[11] The disclosure made by the appellant was not a 'general notice' within the meaning of s 234(3), and the subsection was therefore *not* of application in the circumstances. Whether there had been any statutory non-compliance or non-adherence to Eskom's pertinent corporate policy in respect of employee disclosures was in any event irrelevant. The appellant was not charged with statutory non-compliance regarding the adequacy of his disclosure of interest. Insofar as a non-disclosure of his interest might have been a factor relevant to establishing his state of mind for the purpose of adjudicating the charge of fraud, a reasonable court could have been left in no doubt that the appellant made an effective disclosure of his interest in the proposal that PNES contract with EUS.

[38] After privately deliberating on the matter, Machinjike and Sebola called the appellant back into the board meeting and expressed a positive interest in PNES pursuing the proposal. They mandated the appellant to obtain a legal opinion on the implications of accepting it for them to consider at a follow-up board meeting in January 2009 and requested that draft contracts be prepared.

[39] The requested legal opinion was provided by the aforementioned Mr Jephta of Cliffe Dekker attorneys in a memorandum forwarded under cover of a letter to the appellant, dated

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[11] Section 234(3) of the Companies Act, 1973, provided:

'(3)(a) For the purposes of subsection (1) a general notice in writing given to the directors of a company by a director thereof to the effect that he is a member of a specified company or firm and is to be regarded as interested in any contract which may after the date of the notice and before the date of its expiry be made with that company or firm, shall be deemed to be a sufficient declaration of interest in relation to any contract or proposed contract so made or to be made, if-

(i) the nature and extent of the interest of the said director in such company or firm is indicated in the said notice; and

(ii) at the time the question of confirming or entering into the contract in question is first considered or at the time such director becomes interested in a contract after it has been entered into, the extent of his interest in such company or firm is not greater than is stated in the notice.

(b) A general notice under paragraph (a) may from time to time be amended and shall not be effective beyond the end of the financial year of the company but may from time to time be renewed.'

5 January 2009. The subject line of the covering letter was '*Winding-Down*'. It is evident from the content of both the covering letter and the memorandum that the advice was furnished with reference to the IFC minute and resolution of 17 November 2008, reports prepared by Trish da Silva concerning the resolution and a report produced by Eskom Distribution in respect of the '*Khayelitsha Transition Model for Integration into Eskom Distribution Western Region*', dated 19 December 2008.

[40] It is not necessary to describe the content of the attorney's memorandum of advice in detail. Suffice it to say that the attorney deduced from the documentation with which he had been instructed that the transition period for the integration of PNES's functions into Eskom distribution would stretch over an anticipated period of 18 months. Provision needed to be made for the purposes of a so-called 'interim model' that would apply during the transition period for the disparate treatment of PNES's 'core functions', which were to be taken over by Eskom at the end of 12 months and its 'non-core functions', which would be absorbed by Eskom after a further six-month period. The attorney understood that the non-core functions would continue to be undertaken on an outsourced basis going forward after the dissolution of PNES. It was also clear that the attorney apprehended that high importance was attached by all concerned to the importance of the uninterrupted supply of services to Khayelitsha during the transition period, with recognition of the critical role that the retention of the Kelly Personnel provided staff would play in the achievement of that.

[41] The following paragraph in the attorney's memorandum became of particular relevance in the prosecution of the appellant. It was the basis for the allegation that he had misrepresented EUS's B-BBEE status.

> 'We are advised that a consortium with BEE shareholding close to 45% and that will involve certain members of management and staff under a company Bold-Moves Pty Ltd, registration number 2008/028214/07, and in the process of changing its name to Energy Utility Services Pty Ltd or such name as CIPRO will allow, is seeking to be the third party service supplier that will be used in the interim model as proposed by Eskom Distribution and PNES to take on the outsourcing of the core services and non-core services. This would be an interim step whilst the sale [to Eskom] of the [PNES] business as a going concern is finalized and which will allow for the transfer and integration in due course of the core business into Eskom and then the taking on by Eskom of the outsource contract with the third party service supplier in respect of the non-core services.'

[42] At PNES's director's meeting on 14 January 2009, the appellant again recused himself from the meeting when the legal opinion and draft contracts prepared by Cliffe Dekker attorneys were considered by Machinjike and Sebola. His fellow directors decided at

that meeting to accept the proposal and authorised the conclusion of the agreements with EUS set out in the draft deeds of contract that had been prepared for their consideration. The contracts were not put out for open tender. Mr Machinjike testified that during their deliberations at the January meeting Mr Sebola had informed him that subsequent to the December board meeting he (Sebola) had independently verified the existence of the risks that the appellant had represented could be attenuated by the proposed outsourcing to EUS.

[43] The board of PNES authorised the conclusion of two contracts with PNES. One in respect of the rendering of PNES's so-called 'core services' and the other in respect of its 'non-core services'.[12] The anticipated duration of the contract in respect of the core services was 12 months. The contract in respect of non-core services was to endure until at least 31 December 2012 and would then be automatically renewed for a further period unless either party had given notice to terminate the contract before the initial expiry date. The non-core services contract included an undertaking by PNES to ensure that Eskom took over PNES's rights and obligations under that agreement when Eskom acquired PNES's business in terms of the contemplated intra-group transaction within the meaning of s 45 of the Income Tax Act.[13]

[44] Both deeds of agreement contained an identically worded clause 2, in the nature of a preamble, that recorded the context in which the parties were entering into the agreements. Significantly, the preamble clause expressly referred to the resolution adopted by Eskom's Investment and Finance Committee in respect of the integration of PNES's operations into Eskom and the plan for that to be achieved in a phased process. It also acknowledged the importance of maintaining an uninterrupted service delivery to the Khayelitsha area and the critical importance of retaining the services of the staff complement provided to PNES from Kelly Personnel to the achievement of that object. The preamble read as follows:

> '2. **INTRODUCTION**
>
> 2.1 PNES, a wholly owned subsidiary of Eskom Holdings Limited, is a company registered with the purpose of rendering construction, maintenance, operation, and administration and development services in respect of the reticulation of electricity on behalf of Eskom Holdings

[12] The '*core services*' were defined in the core services agreement as 'customer services integration, vending services integration and routine planned maintenance of the reticulation network in the supply area. The '*non-core services*' were defined in the other agreement as 'the management and operation of the reticulation network in the service area'.

[13] Act 58 of 1962.

Limited to customers in Khayelitsha where Eskom is the holder of the supply rights in respect of electricity in Khayelitsha, as per boundaries of the NERSA Licence area.

2.2 On 17 November 2008 the Investment and Finance Committee ("IFC") of Eskom resolved under delegation of authority of the Board of Eskom to approve the disposal of PNES subject to PFMA approval being obtained. The resolution provides for the sale and transfer of the whole or a substantial portion of the assets or the business of PNES to and in favour of Eskom as a going concern with defined assets and liabilities, and which sale is to include the application of Section 45 of the Income Tax Act to such transaction and the declaration of a dividend to Eskom.

2.3 The Western Region of Eskom being the region in which PNES provides the services described in clause 2.1 above is the division of Eskom responsible for the integration into Eskom Western Region of the business to be sold by PNES.

2.4 Arising out of the integration steps and actions to be undertaken by PNES and the Western Region of Eskom, Eskom requires that as an interim measure the core services provided by PNES are to be integrated into the said division in a phased manner provided that such services are provided in an uninterrupted manner and without any reduction or diminution in the standards by which such core services are rendered to the said customers in Khayelitsha.

2.5 In order to secure the continuation of such services it is necessary to secure the human resource capital, skills, knowledge, expertise and working experience of the workers responsible for the reticulation of electricity in Khayelitsha. The said workers are employees of Kelly Personnel.

2.6 Energy Utility Services is agreeable to employing such workers so as to secure and retain the said skills base if in turn PNES is willing to appoint Energy Utility Services to provide the following:

2.6.1 The core electricity services for and on behalf of PNES until 31 December 2009 or such extended date as agreed to and as provided for in terms of this agreement; and

2.6.2 The non-core electricity services for and on behalf of PNES and its successors until 31 December 2012 and as provided for in terms of the non-core electricity services contract.'

[45] A copy of the abovementioned letter dated 19 December 2008 sent by Trish da Silva to the appellant concerning the implementation of the IFC resolution was attached to the core services agreement as annexure C. It seems that a copy of the letter must also have been attached to the non-core services agreement. The copy of the core services agreement in the appeal record was incomplete and had several pages missing, including the part that must have referred to annexure C. The copy of the non-core services agreement in the record on the other hand contained the clause that referred to annexure C, but did not have the annexure

attached. There is no reason to think that the relevant provisions in the two agreements that referred to and incorporated the said annexure C differed from each other. Both agreements contained a clause 5, each with the subheading '*Appointment*'. Clause 5.3 in the non-core services agreement (which, as I have noted, probably mirrored clause 5.3 in the core services agreement) provided –

> 'EUS hereby accepts the Eskom Western Region interim model as described in the attached organogram, annex "C" hereto, and agrees to the interim model structure that Eskom has submitted to PNES. EUS agrees to carry out the core services for and on behalf of PNES and in terms of the phases set out in the interim model until PNES and Eskom have integrated the core services into Eskom and in any event until 31 December 2009 for such extended date as agreed to.'

[46] In line with the revised model drafted by Ms da Silva after her mid-December 2008 discussions with the appellant, the letter proposed a three-phase integration model to be implemented over a period of 18 months. The first phase would comprise of a 12-month period followed by two three-month phases. The diagrammatic representation of the proposal attached to the letter reflected that during the 12-month phase PNES would 'Manage Outsourced MV/LV contract' and that in the second phase Eskom would '(t)*ake over outsourced contract*' and that in the third phase Eskom would '(r)*eview outsourcing model*'.

[47] I understood it to have been argued by the appellant's legal representatives, consistently with the appellant's (strictly speaking, inadmissible) evidence on his understanding of its import, that the effect of clause 5.3 was that Eskom was at liberty to terminate the non-core services agreement earlier than 31 December 2012 in accordance with the reconsideration of the outsourcing arrangement provided for in the diagram (or 'organogram') attached to annexure C to the agreement. Whether that actually was so or not is a matter of construction. Had it been necessary to determine the question[14] I would probably have answered it adversely to the argument. The contradiction between the provisions expressly regulating the duration of the agreement and the incorporation of the diagrammatic model in terms of clause 5.3 did undoubtedly give rise to an unfortunate ambiguity, however. The appellant did state unequivocally that he had every expectation that

[14] It is unnecessary to answer the question because although an adverse determination of the appellant's legal representative's contentions would imply that the non-core services agreement was *not* aligned to the PIIT model approved at the Western Region executive committee meeting on 19 December 2008, the presentation of the non-core services agreement to Messrs. Sebola and Machinjike for the purpose of the 14 January 2009 PNES board meeting was not a basis for any of the alleged fraudulent misrepresentations relied on in support of the charge of fraud in the charge sheet. Furthermore, there was no evidence that the appellant had, prior to the conclusion of the agreements, made a representation to any of the representees named in the charge sheet that the draft non-core services agreement was in alignment with the PIIT model approved at the 19 December 2008 Western Region Exco meeting.

the non-core services agreement would remain operative beyond the 18-month three-phase period described in the revised model drawn up by Ms da Silva. Indeed, it was apparent from his evidence that it was only in the context of such a longer-term contractual relationship with Eskom that it would have been feasible to attract a BEE partner into a consortium with EUS.

[48] Both contracts were subject to a condition that EUS secure the services of the majority of the personnel supplied to PNES by Kelly Personnel by no later than 1 April 2009 or such extended date as agreed to. It was not in contention that all or at least most of the Kelly staff did take up employment with EUS.

[49] It is apparent from the evidence of Ms da Silva that she had not been privy to the idea considered by the PNES board at its meeting on 10 December 2008. She testified that she became aware of the scheme to outsource PNES's functions to EUS only on 27 January 2009, when she had a discussion with the appellant. Ms da Silva then informed the other members of PIIT of the scheme via email. Her email sketched the arrangement put in place between PNES and EUS without raising any concerns that it did not align with the IFC resolution or indeed making any suggestion that it was problematic in any other way. Under cross-examination, she conceded that having had the rationale for the completion of the agreements explained to her in separate meetings that she had with Mr Sebola and the appellant, she had no problem with their effectiveness in addressing the operational aspects of the integration exercise. Her only concerns were that there was an obvious conflict between the appellant's roles as managing director of PNES and also chief executive of EUS and the extended timeline of the contract for EUS to render non-core services until at least the end of 2012. She said that the appellant had put her mind at rest on the first of those considerations by explaining that his resignation from Eskom and PNES was in the course of being processed, as was in fact the case. She was not asked whether she had discussed the second concern with either the appellant or Mr Sebola.

[50] Upon the acceptance of the proposal by the PNES board, the appellant immediately put in train steps to achieve his resignation from Eskom before the commencement of the contracts that PNES had concluded with EUS. His dealings in this regard were with the aforementioned Willem Theron. He telephoned Theron on 15 January 2009 to tell him that the contracts had been signed so that Theron could arrange the termination of his (the appellant's) employment by Eskom. Theron was concerned that the appellant had not completed a pro forma written declaration of interest as provided for in terms of Eskom's standard policies and procedures. The appellant rectified the position and provided Theron

with a duly completed Eskom form in which, amongst other things, he expressly disclosed his 100% shareholding in EUS.

[51] Inconsistently with the encouragement he had given the appellant regarding the proposal when he saw him in November 2008, Theron, who by all accounts had no responsibility for PNES's operations, seems to have taken a dim view of the conclusion of the contracts. Theron did not however say anything to the appellant to suggest that he considered that the appellant had acted unlawfully. Indeed, according to Johanna Smit, Theron requested her not to speak to the appellant about the matter when she discussed the PNES/EUS contracts with Theron during February 2009. Theron did, however, request Machinjike and Sebola to provide him with an explanation of the rationale for PNES's decision to conclude the contracts. He seemed to be concerned that the conclusion of the contracts was inconsistent with Eskom's Internal Finance Committee's resolution concerning the 'decorporatisation' of PNES.

[52] Machinjike's response to Theron was given in an email dated 17 February 2009. It bears extensive quotation because its content provides an almost contemporaneous exposition of the reasoning of the PNES board in support of accepting the appellant's proposal:

> 'The outsourcing of activities to Energy Utility Services does not contradict the above resolution [ie IFC resolution] and it forms a crucial part of PN Energy Services board's reason for following this particular risk mitigation strategy in response to risks identified, to ensure a smooth implementation and integration of the business of PN Energy Services as a going concern into the local Eskom distribution region.
>
> The bulk of current staff utilised by PN Energy is employed through a labour broker "Kelly" and the position conveyed by the local Eskom region and confirmed by PN Energy's legal counsel is that no legal obligation rests on Eskom to employ the staff. This gave rise to the untenable situation in that PN Energy Services is required to maintain its services during the course of the integration using the Kelly staff whilst no commitment of employment exists. Energy Utility Services were prepared to offer employment to the affected staff to ensure stability of the resource, an action which neither PN Energy Services nor Eskom were prepared to commit to.
>
> The local Eskom region conveyed to PN Energy Services in writing their need, due to resource and integration period constraints, to address the integration in two phases.
>
> The first being the integration of the customers service-related activities (core) to be concluded by the end of this year [2009].
>
> The second phase second being the integration of the fault management and construction activities during 2010 as an out-sourced contract.

> Energy Utility Services being fully conversant with PN Energy Services' business operations were in the best position to offer these services seamlessly to PN Energy Services whose contract expires end 2009.
>
> Based on the above request from the Eskom region and the risks of continuity of service from a staffing resource perspective and seen in the light of the intent of Eskom Holdings, the PN Energy Services board taking due care and consideration of the above resolution, ensured the effective management and conclusion of the course of action as determined by Eskom Holdings and the local Eskom Region.'

That remained Machinjike's view when he deposed to an affidavit for Eskom Forensic in August 2009. At para 13 of the affidavit, Machinjike answered Forensic's question '*Please confirm for Forensic if Eskom's Investment and Finance Committee (IFC) gave PNES a mandate or approval to conclude agreements with* [EUS]? *If so please explain why?*' as follows: '*Eskom's Investment and Finance Committee did not give the mandate. This was deemed to be a PNES operational matter, as regards all other operational contracts concluded by PNES over the years. The decision to conclude on agreements is not seen as contravening the IFC resolution.*' At para 40 he responded to a question asking him to explain '*why the PNES Board concluded contracts with* [EUS] *when the Eskom IFC made a decision on 17 November 2008 to dissolve PNES*' as follows: '*The contracting strategy was seen as in line with the resolutions. This was a mechanism to address risks in the efforts to implement the resolution*'.

[53] The contracts were thereafter duly implemented, and by all accounts successfully. So much so that service delivery in Khayelitsha was actually improved.[15] The operation of the non-core services agreement was extended for three months beyond the end of 2009 because

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[15] The trial court held that '*the actual loss caused was proven beyond reasonable doubt. Eskom and PNES lost more than 10,2 million in profits between February '09 and March 2010, and accused 1 and 2 benefitted more than 65 million (sic) from the award of these contracts*'. The magistrate's assessment in this respect was wholly misdirected in my view. It was by no means clear that PNES would have made any profit at all during the period had it not entered into the contracts with EUS. On the contrary, the dubiousness of PNES's ability to discharge its functions if it lost its experienced personnel was highlighted by the evidence. The evidence also showed that the dissipation of the core personnel supplied by Kelly Personnel was perceived by all the informed parties to be a real risk in the face of the uncertainty created by the 'decorporatisation' process. The evidence also established that Eskom was not ready to take on PNES's functions during 2009. An interruption of PNES's operations due to the loss of the core personnel during the extended 'decorporatisation' was considered likely to lead to unrest with associated vandalism of the company's and Eskom's infrastructure. The magistrate completely ignored the import of the evidence on these aspects. She also overlooked the concession that the efficient discharge of its contractual obligations by EUS had had an enhancing influence on Eskom's revenue flow. The R65 million referred to by the magistrate did not constitute 'a benefit' in EUS's hands, the sum represented the company's operational revenue. The company's profit was a small fraction of it. If Eskom or PNES suffered any loss in consequence of the conclusion of the contracts (which is by no means clear), the sum thereof remained unquantified. It was unrealistic to predicate an estimate of PNES's profit during the period in issue on the company's past performance in quite distinguishable circumstances or on the profit earned by EUS in the context of the contracts specially entered into for the purpose of mitigating the risks attendant on the 'decorporatisation' of PNES.

Eskom was not ready by then to fully take over those functions. In January 2010, however, Eskom unilaterally terminated the contracts. In 2011 Eskom obtained an order declaring that the contracts were unlawful and null and void. The judgment in the nullity suit was not part of the appeal record, but we were informed from the bar that the ratio was that the agreements offended against certain regulatory legislation that was applicable. The setting aside of the contracts had no connection with the allegedly fraudulent conduct of the appellant.

[54] So much for the factual context. It is time now to examine the character of the allegations of fraud made against the appellant and his co-accused in count one of the charge sheet. The charge was ineptly drafted. It bears setting out in full because its content demonstrates the muddled conceptualisation upon which the prosecution proceeded. The charge was formulated as follows:

> '**NOW THEREFORE** the Accused are guilty of the offences hereunder read with the relevant provisions of the Criminal Law Amendment Act 105 of 1997:
>
> **COUNT 1: FRAUD**
>
> In that during the period February 2008 till January 2009 at or near Bellville in the Regional Division of the Cape and various places in Johannesburg in the Regional Division of Johannesburg the accused unlawfully, falsely and with intent to defraud misrepresented to Trish da Silva, Johanna Smit, Willem Theron, Awie Lester, MacGloria Mdingi and/or Eskom and/or PNES:
>
> - Accused 2 had disclosed his conflict of interest in the outsourcing of work as contemplated in Eskom's integration and decorporatization plan of Accused 1 (sic) at the appropriate time and in accordance with the Companies Act and PFMA
> - That he (*sic*) had obtained prior approval from Willem Theron or the PIIT to enter into contracts with PNES for the outsourcing of PNES's core and non-core activities
> - That the contracts presented were aligned to the PIIT integration plan
> - That the contracts were in the best interests of ensuring smooth integration of PNES's activities into Eskom

- That Accused 1 was a broad based Black Economic Empowerment Company and/or it was 45% Black owned
- That the award of the contracts complied with Eskom and PNES's procurement policies and procedures.
- That the award of the contracts were (sic) in the best interests of PNES and/or Eskom.

to the loss and or potential prejudice of Eskom in the amount of **R65 184 259.04** and the reputational damage emanating from the irregular award of the contract

Whereas the Accused well knew that

- Accused 2 deliberately omitted to disclose his conflict of interest at the appropriate time as he would have not obtained approval to continue and/or he would have been excluded from the processes relating to the integration.
- The accused misused sensitive information for the personal benefit of Accused 1 and 2.
- Accused 1 omitted to exclude himself from all deliberations and processes where his personal interests were in conflict with that (*sic*) of PNES and/or Eskom
- Accused 2 did not have prior approval from either Willem Theron and/or the PIIT to propose to the board of PNES and/or enter into any contracts for the outsourcing of work as proposed by the PIIT either in his personal capacity or on behalf of Accused 1
- The contracts were not aligned to the PIIT integration plan
- The contracts were not in the best interests of PNES and/or Eskom as they lost the profit that would ordinarily be earned by PNES.
- The accused did not have shareholder approval to enter into the contracts with accused 1 and 2.
- Eskom and PNES's procurement processes were deliberately subverted to favour Accused 1 and 2.
- Accused 1 was not a broad based Black Economic Empowerment Company as Accused 2 was its sole shareholder

Thus the accused committed the crime of Fraud.'

[55] The way in which the charge sheet was framed and certain aspects of the conduct of the trial make it appropriate to recapitulate the elements of the common law crime of fraud.

As Heher JA observed in *S v Gardener and Another* 2011 (1) SACR 570 (SCA) at para 29, '*It is trite that: "Fraud consists in unlawfully making, with the intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another". JRL Milton South African* Criminal Law and Procedure *3 ed. Vol 2 at 702. And see* S v Van den Berg *1991 (1) SACR 104 (T) at 106b.*' The phrase '*with the intent to defraud*' relates to the intention to cause actual or potential prejudice that the fraudster must have when he makes the misrepresentation.

[56] The alleged prejudice in the current matter was the conclusion of the contracts between PNES and EUS with allegedly adverse financial consequences for PNES or Eskom. The prosecutor who framed the charge must surely have known, when making the decision to prosecute, that the conclusion of the contracts in question was authorised by PNES's board (constituted for the purpose only by Machinjike and Sebola) in response to a proposal by the appellant. The PNES board was persuaded to authorise the conclusion of the contracts by virtue of the representations made to it. The board did not make any representations in order to conclude the contracts. Sebola and Machinjike were the representees, not the representors. That should have been obvious to the framer of the charge. What then was the basis for the charge of fraud against Sebola and Machinjike? There was none, and that should have been appreciated by the prosecution from the outset.

[57] The alleged failure by the appellant to disclose his interest in the conclusion of the contracts (for which there was no factual foundation in the evidence) could not on any approach be regarded as a fraudulent misrepresentation by Sebola or Machinjike, who were accused 3 and 4, respectively, when the charge was framed. If established, such non-disclosure might, depending on the circumstances, amount to a fraudulent misrepresentation by the appellant, but how could it possibly amount to a fraudulent misrepresentation by Sebola or Machinjike? The charge sheet does not explain, and a sensible answer does not suggest itself.

[58] Considering that it was the representations made *to PNES's board of directors* that led to that company concluding the contracts with EUS, allegedly prejudicially, it is difficult to conceive how the charge sheet's allegation that the accused misrepresented that '*Accused 2* [i.e. the appellant] *had disclosed his conflict of interest in the outsourcing of work as contemplated in Eskom's integration and decorporatization* (sic) *plan of Accused 1* (sic) *at the appropriate time and in accordance with the Companies Act and PFMA*' could bear meaningfully as a representation bearing on the conclusion of the contracts. If established, it

would be a representation that could sensibly pertain only by way of an ex post facto justification of a decision by the PNES board to authorise the conclusion of the contracts, whereas the charge of fraud was predicated on alleged misrepresentations *inducing* the conclusion of the contracts.

[59] It is also impossible to understand how diverse misrepresentations by different persons to different persons at different times and places, which is the import of the charge as framed, could competently be brought within the ambit of a single count of fraud against four accused charged jointly. Absent allegations of common purpose or agency, each accused should have been charged separately in respect of the misrepresentations allegedly made by him or it, and in relation to the date and place, and with reference to whom specifically it was made. The manner in which a mélange of alleged representations by a gallery of alleged representors to an assortment of representees was indiscriminately advanced in a single charge against all of the representors was wholly unacceptable. I have little doubt that it contributed materially to the lack of direction and exploration of irrelevant matter that characterised the conduct of too much of the lengthy trial.[16]

[60] Some of the alleged misrepresentations were also plainly recognisable as expressions of opinion rather than representations of fact. All the various human representees identified in the charge were employees of Eskom who were involved in or knowledgeable about the 'decorporatisation' project. With the knowledge at their disposal, they were as capable as the appellant or Sebola or Machinjike of forming their own opinions as to the degree of alignment of the appellant's proposal with the PIIT integration plan or of the extent to which the conclusion of the contracts might or might not be in the best interests of Eskom or PNES. In the given circumstances it was misguided of the prosecution to rely on expressions of opinion by certain employees of Eskom to other employees of Eskom who were sufficiently equipped to form their own opinions on the issues involved as fraudulent misrepresentations. The lack of attention in the formulation of the charge in this regard was underscored by the evidence that the opinions concerned were not expressed to any of the human representees named in charge before the conclusion of the contracts in question, they were instead representations by the appellant to Sebola (accused 3) and Machinjike (accused 4 when the charge was formulated).

[16] The trial ran in fits and starts over two years and gave rise to a record on appeal running to 69 volumes.

[61] I have dwelt at some length on the defective formulation of the fraud charge because the professional and effective prosecution of white-collar crime is a significant concern in the aftermath of state capture which has featured prominently in the public conversation about the revelations emanating from the Commission of Inquiry into Allegations of State Capture that feature almost daily in the news media. Ironically, many of those revelations have been concerned with Eskom. And the scale of the reported depredations makes the alleged irregularities regarding the contracts between PNES and EUS that informed the charges against the accused in the current matter small beer. It is accordingly desirable as a matter of national importance that the prosecuting authority take particular care to avoid repetitions of the shortcomings that characterised the current matter. Drafting charge sheets and indictments with care and focussed attention is of vital importance in the selection of the right cases to prosecute, the efficient conduct of the trials and improving the prospects of soundly based convictions. It is therefore only right for us to voice our concerns when it appears that material deficiencies have manifested in these areas.

[62] All but one of the seven alleged misrepresentations relied on by the state in the charge sheet can be disposed of summarily.

[63] The evidence established clearly that the appellant did disclose his interest in the conclusion of the contracts. The fact is borne out in the minutes of the relevant meetings.

[64] The evidence did not establish that the appellant had represented that he had the approval of Willem Theron or the PIIT for the proposal that PNES contract with EUS. He did not require such approval, nor had he sought it. The conversation that the appellant had with Theron concerning his thoughts about establishing his own company to undertake the Khayelitsha operation during the 'decorporatisation' of PNES did not amount to seeking Theron's permission. If the appellant referred to such conversation, including Theron's words of encouragement, in his presentation to the PNES board, which is not clear, it would not have constituted a misrepresentation. There is in any event nothing to suggest that Sebola or Machinjike would have regarded Theron's opinion as particularly relevant. Theron was not involved in or responsible for operational matters in Khayelitsha. Eskom's 'shareholder representative' in PNES was Mr Ntsokolo, to whom Mr Machinjike was also directly accountable in the Eskom hierarchy. Machinjike testified that it was to Ntsokolo that he would refer any issues of concern related to PNES that could affect Eskom. Ntsokolo would furnish Machinjike with a proxy to represent Eskom as sole shareholder at PNES's annual general meetings.

[65] The PIIT was Sebola's own team. Not only was permission not required from the PIIT, but it is also inherently improbable that the appellant would fraudulently misrepresent to Sebola the views or opinions of a body constituted by Sebola to advise him directly. He would expect the PIIT to convey its views directly to Sebola; after all that was the very purpose of the PIIT. As it was, as already mentioned, when Trish da Silva, who headed the PIIT, became aware of the contracts in January 2009 – that is before they came into operation – she raised no concerns about their supposed incompatibility with the PIIT integration plan.

[66] As already touched upon, any statement by the appellant to Sebola or Machinjike concerning the extent to which his proposal concerning the conclusion of the contracts between PNES and EUS would align with the PIIT integration plan or best serve the interests of Eskom or PNES would, in the circumstances of the positions held by Sebola and Machinjike and their respective involvement in the implementation of the integration exercise, be plainly recognisable by them as expressions of opinion rather than representations of fact. The facts upon which any such opinions could be based were common knowledge to each of the three members of the PNES board. The appellant's declaration of interest served to alert his fellow directors to the need for them to give appropriately critical scrutiny to any of his opinions. The unchallenged evidence was that Mr Sebola did take the opportunity during the interval between the December and January PNES board meetings to interrogate the proposal.

[67] It was not established that the appellant misrepresented that the conclusion of the contracts complied with the applicable procurement policies. Sebola and Machinjike were expected to have been as knowledgeable and cognisant of such policies as the appellant. The three directors were, after all, jointly responsible, in terms of s 51 of the PFMA, to ensure that PNES had and maintained '*an appropriate procurement and provisioning system which* [was] *fair, equitable, transparent, competitive and cost-effective*'. There was no evidence before the court a quo that established exactly what PNES's procurement policy was. Machinjike was apparently not fully astute to his PFMA-imposed responsibilities as a director, for he testified in evidence in chief that he was not aware of how the procurement processes worked in PNES.

[68] There was much talk at the trial about the incidence of the Preferential Procurement Policy Framework Act 5 of 2000. It was also referred to in the magistrate's judgment. No-one involved in the trial appears to have appreciated that the Procurement Act did not apply to Eskom or PNES in 2008 or 2009. The Act applies to national and provincial departments,

Parliament and provincial legislatures and constitutional institutions. It applies to organs of state such as Eskom only if '*recognised by the Minister by notice in the Government Gazette as an institution ... to which* [the] *Act applies*'.[17] The Minister of Finance published a notice making the Act applicable to all public entities listed in Schedules 2 and 3 of the PFMA (which include Eskom and its subsidiaries) only on 6 June 2011. The recognition became effective as of 7 December 2011.[18]

[69] Eskom and PNES were nevertheless subject to the provisions of the PFMA and the Broad-Based Black Economic Empowerment Act 53 of 2003 ('B-BBEEA') in respect of matters of procurement. Section 51(1)(a)(iii) of the PFMA imposed a responsibility on the board of PNES to ensure that the company had and maintained an appropriate procurement and provisioning system. Section 76(4) of the Act empowers the National Treasury to make regulations and issue instructions to all institutions to which the Act applies concerning, amongst other matters, '*the determination of a framework for an appropriate procurement and provisioning system*'. Our attention was not directed to any applicable regulation that required an open tender process to be followed by a public entity where it would be impractical to invite competitive bids. The 2005 Treasury Regulations, although they were not applicable to Eskom or its subsidiaries in the relevant respect,[19] expressly permitted procurement '*by other means*' in such circumstances.[20] Mr Machinjike confirmed in the course of his evidence that EUS was (for quite obvious reasons[21]) regarded by the board of PNES as 'a sole source supplier'. The fact that the board of PNES authorised the conclusion of the contracts without putting them out for open tender was in any event not germane to the allegations of fraud against the appellant.

[70] Section 10 of the B-BBEEA required every organ of state to apply any relevant code of good practice issued in terms of s 9 of that Act in the development and implementation of

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[17] See s 1(f) of Act 5 of 2000. A provision in regulations made by the National Treasury in 2005 (GN R225 of 2005 published in GG 27388 of 15 March 2005) that a public entity's supply chain management system must be consistent with, amongst other things, the Preferential Procurement Policy Framework Act, 2000 (see reg 16A3.2) could obviously not apply to an entity to which that Act did not apply. That much is recognised in regulation 1.2.1(c), which sets forth the limited extent to which the 2005 Treasury Regulations apply to public entities listed in Schedule 2 to the PFMA such as Eskom and its subsidiaries.

[18] GN R501; GG 34350 dated 8 June 2011.

[19] See note 6 above.

[20] Regulation 16A6.4.

[21] Several of which were identified in a memorandum produced for Mr Sebola by Cliffe Dekker attorneys in June 2009 that was referred to in evidence at the trial and also in Mr Machinjike's written response in August 2009 to questions put to him by Eskom Forensics.

a preferential procurement policy. The Code of Good Practice issued by the Minister of Trade and Industry on 9 February 2007[22] applied to all public entities listed in Schedule 2 to the PFMA.[23]

[71] Notwithstanding the absence of any clear evidence concerning the content of PNES's procurement system, the unchallenged evidence was that B-BBEE criteria did form part of it. That is borne out by the appellant's inclusion of black empowerment considerations in the proposal he submitted to PNES's board at the December 2008 board meeting. It was in that context that the alleged misrepresentation that EUS was a broad based black economic empowerment company and/or it was 45% Black owned became relevant. It will be recalled that the statement was contained in the legal opinion dated 5 January 2009 rendered to the PNES board for consideration at the directors' meeting on 14 January at which the decision was made to authorise the conclusion of the contracts between PNES and EUS.

[72] It appears from the judgment of the court a quo that it was only in respect of the alleged misrepresentation about the B-BBEE status of EUS that the magistrate found that the state had established its case on the count of fraud. The state's case was reliant in this respect on the evidence of Mr Machinjike, even though he was not one of the representees named in the charge sheet. As the appeal court observed in its judgment in the appeal from the decision of two judges of this court refusing the appellant's petition for leave to appeal, Machinjike's evidence on this issue was inconsistent and self-contradictory. It was not for the appeal court to make any determinative finding, but its judgment leaves no doubt that it was the identifiably dubious quality of Machinjike's evidence that led that court to conclude that an appeal by the appellant against his conviction would enjoy reasonable prospects of success.[24]

[73] As already mentioned, the statement that EUS was 45% black owned was contained in the opinion given by Mr Jephta of Cliffe Dekker attorneys, dated 5 January 2009. It was conceded that the opinion was drafted based on the instructions provided to Mr Jephta by the appellant. The appellant's evidence was that the opinion had incorrectly stated his BEE-related future intentions for EUS as if they were existing fact. The appellant also appeared to concede that nothing had been said at the board meeting on 14 January 2009 to point out the

[22] GN 112 of 2007 published in Government Gazette 29617 dated 9 February 2007.

[23] Para 3.1.1 of the Code of Good Practice (2007).

[24] *Malherbe v S* supra, in para 7-9.

mistake in Jephta's opinion. He testified that it had not been material to do so because both Machinjike and Sebola were aware that EUS was a shelf company which he had recently acquired. Mr Machinjike conceded under cross-examination that he had been aware that Bold Moves/EUS was not an established business, but an entity that the appellant would use to establish the business that would undertake the work outsourced by PNES.

[74] On the common cause facts, the representation that EUS was 45% black owned was made by the attorneys, not by the appellant. Properly considered, the relevant question was therefore not whether *the appellant* had positively misrepresented the position, but rather whether, by failing to point out the apparent error, he had made himself guilty of a fraudulent non-disclosure. The essence of his defence in this regard was that he had not been under a duty to speak up because of the directors' own knowledge of the facts and that his silence on the point had in any event not been informed by any intention to defraud. The applicable test did not require the trial court to believe his evidence; he was entitled to an acquittal if there was a reasonable possibility that his evidence could be true.

[75] Machinjike's evidence was, to say the least, fuzzy on the point of his understanding of EUS's BEE status. He initially testified that he was led to believe that EUS was a B-BBEE company. He materially qualified that evidence under cross-examination by maintaining that whilst he had appreciated at the 10 December 2008 board meeting that that was not the case, he thought that everything had been done to make it so by the 14 January 2009 meeting.[25] He did not refer to anything – let alone any representation by Malherbe - that could have informed his professed belief as to what might have transpired between 10 December and 14 January to change the BEE status of EUS.

[76] The indications are that Machinjike actually did not concern himself with the B-BBEE requirements. He showed no interest in the matter until asked questions about it by

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[25] In answer to a proposition put to him in cross-examination by the appellant's attorney that he (Machinjike) was aware that making EUS B-BBEE compliant was '*a process that had to happen and that ... even after 14th January 2009, that had still to happen*', the witness replied '*Your Worship I was clearly aware that there would be certain steps that was in December 2008 but as for 14th January 2009 I was under the impression that all that was in place*'. Later in his evidence, Machinjike further contradicted himself on this point in the following exchange with the appellant's attorney:

'Mr GESS: *...on this aspect you said "If I had known there was no BEE involvement I would not have consented to the approval", alright?*

Mr MACHINJIKE: *Yes*

Mr GESS: *But that it was going to be happening post that time, after the 14th January?*

Mr MACHINJIKE: *The implementation and the paperwork, yes.*'

Eskom Forensics. It is evident from his answers at that stage that he was content to authorise PNES to proceed with the contracts based on his understanding that a B-BBEE component would be introduced as part of EUS's business model. As described above, that, according to the appellant, is precisely what the appellant had represented.

[77] Machinjike professed to be concerned to be satisfied that B-BBEE requirements would be complied with, and at some stage in his evidence he seemed to suggest that he would not have supported the conclusion of the agreements with EUS if he had appreciated that the appellant was the sole shareholder and director of EUS. It is notable, however, that he did not at any stage request any substantiating particularity about what he supposedly thought was the BEE interest in EUS. He gave no indication of compliance with paragraph 2.6 of the applicable Code of Practice issued in terms of the Broad B-BBEEA, which stated:

> 'Any representation made by an Entity about its B-BBEE compliance must be supported by suitable evidence or documentation. An Entity that does not provide evidence or documentation supporting any initiative, must not receive any recognition for that initiative.'

The fact that there was no evidence that Sebola or Machinjike required such evidence or documentation supported the reasonable possibility, indeed the probability, that the appellant's evidence that they were not brought under any misapprehension about existing black shareholding in EUS was truthful. The magistrate gave no attention to this in her judgment. She also appears to have overlooked that, in his written declaration of conflict of interest provided at the insistence of Theron, the appellant declared that he held a 100% shareholding in EUS. That express declaration, made before the two contracts between PNES and EUS came into operation, was inconsistent with any intention by him at any stage to misrepresent that the company was 45% black owned.

[78] The trial court treated of Machinjike's evidence in a single one-sentence paragraph in its judgment:

> The court found that state witness and director, Machinjike, told the truth when he testified that accused 2 informed the PNES board that accused 1 was (already) a Broad-Based Economic Empowerment Company and/or it was 45% black owned.

The magistrate made no acknowledgement of the many shortcomings and contradictions in the witness's evidence, which extended well beyond those I have chosen to specifically identify for illustrative purposes in this judgment. She also did not explain how, in the face of them, she was able to reject the appellant's evidence that Machinjike and Sebola were both fully aware that EUS, as a start-up enterprise, did not yet have a black ownership component

and of the appellant's intention to take steps to address that if the proposed contracts with PNES were concluded and put into effect. It was evident from the questions put to Machinjike in cross-examination, without objection from the prosecutor, that Mr Sebola had explained in written answers to questions put to him Eskom Forensics that he was aware, when the conclusion of the contracts was approved by the PNES board, that EUS had still to establish a B-BBEE component to its business.

[79] The magistrate was also misdirected in her finding that the appellant did not deny that he had informed his fellow directors that EUS was 45% black owned. Indeed, her treatment of the subject (again in a single-sentence paragraph) was internally contradictory: '*Accused 2 does not deny that he informed the PNES board of those facts, he only added that he told the board that was his future BEE plan for his company EUS*'.

[80] For all these reasons the conviction on the count of fraud cannot be sustained and the appeal against it must be upheld.

[81] Whether EUS in fact qualified in terms of the B-BBEEA to be awarded the contract work was not material because the appellant was charged with fraud, not with non-compliance with the B-BBEEA. B-BBEE status verification is a specialist field, but the fact that the appellant was the sole shareholder in EUS when PNES's board authorised PNES to contract with it was in any event probably not legally problematic at the time. As a start-up enterprise, EUS qualified, in terms of paragraph 6 of the 2007 Code of Good Practice, for a deemed B-BBEE status of 'Level Four Contributor' with a B-BBEE procurement recognition of 100%. It should perhaps also be recorded that the appellant did arrange the establishment of a shareholding trust for the benefit of the employees of EUS, the vast majority of whom were black.[26] Dividends were paid to the employees as beneficiaries of the trust. Furthermore, the appellant's evidence that in late 2009 and early 2010 he had been in discussion with a number of black-owned businesses about a joint venture arrangement with EUS was not challenged or contradicted. He said that those discussions had been undertaken with a view to expanding EUS's base of operations. The discussions ended when PNES terminated its contract with EUS and thereby eliminated any attractiveness for involvement in EUS by outside concerns.

[82] Before us, the prosecutor contended that the conclusion of the contracts between PNES and EUS had nevertheless not complied with the Code of Good Practice because a

26 The appellant testified that 29 out of the 31employees supplied to PNES by Kelly Personnel were black. He used the term 'previously disadvantaged'.

generic score card had not been submitted, as prescribed in terms of paragraph 6.4 of the Code. The point was well made. Indeed, it seems to me that it may not have been the only instance of non-compliance involved. However, establishing non-compliance with certain aspects of the Code went no way towards justifying the appellant's conviction on the charge of fraud.

[83] As mentioned at the outset, it was accepted that if the fraud conviction were set aside, the foundation for the conviction on the money laundering charge would also fall away. It follows that the appeal against the conviction on count three must aslo be upheld. Whilst strictly unnecessary in the circumstances to do so, I think it would nevertheless be appropriate to remark that I consider that the state in any event failed to establish a case of money laundering. Quite apart from the fact that it was not proven that the appellant believed or reasonably should have known that EUS's discharge of its contractual obligations to PNES constituted 'unlawful activity' as defined,[27] I do not think that the evidence concerning the appellant's dealing with the profits that accrued to him from EUS's operations established that they were undertaken with the intention to conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof. The funds were invested in property and entities in which the appellant had an open and undisguised interest, and his evidence that the transactions were fully documented in a readily accessible paper trail was not challenged.

[84] There is no appeal before us by EUS regarding the company's conviction on counts one and two. The company was sentenced to a fine on both counts, such being conditionally suspended for a period of five years. The magistrate's judgment does not make the basis on which she convicted the company clear. There was no justification for convicting the company on the count of fraud. The evidence did not establish that EUS made any representations inducing the contracts. The representations were made by the appellant at a time that EUS was a dormant shelf company in which he happened to hold all the shares. It was only if his proposal were accepted that he would employ EUS for the purpose of the implementing his proposed scheme. Likewise on the money laundering charge, the conduct on which the charge was founded was that of the appellant, not EUS. It is patent that the company was wrongly convicted. In the circumstances it would be appropriate for this court,

[27] 'Unlawful activity' is defined in s 1 of Act 121 of 1998 as meaning '*conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere*'.

in the interests of justice, also to exercise its review jurisdiction to set aside the conviction and associated sentences in respect of EUS.

[85] The following orders are made:

1. The appeal is upheld.

2. The orders by the court a quo convicting and sentencing the appellant on counts one (fraud) and three (money laundering) are set aside and replaced with an order in the following terms:

   '**Accused no. 2 is acquitted and discharged on counts one and three.**'

3. The orders made by the Specialised Commercial Crimes Court (Bellville) in case no. SH7/77/13 convicting and sentencing accused no. 1 (Energy Utility Services (Pty) Ltd) on on counts one (fraud) and three (money laundering) are reviewed set aside and replaced with an order in the following terms:

   '**Accused no. 1 is acquitted and discharged on counts one and three.**'

A.G BINNS-WARD
Judge of the High Court

P.L. GOLIATH
Deputy Judge President

E.T. STEYN
Judge of the High Court

APPEARANCES

Appellant's counsel:	**C. Webster SC**
Appellant's attorneys:	**Keith Gess Attorney** **Cape Town**
Respondent's counsel:	**M. Govender** **Directorate of Public Prosecutions** **Western Cape, Cape Town**