

10 December 2020

TO: THE PRINCIPAL EXECUTIVE OFFICER
GOVERNMENT EMPLOYEES PENSION FUND.
Abel.Sithole@gepf.co.za/Ronette.Hartze@gepf.co.za

AND TO: THE HEAD, CORPORATE AFFAIRS
PUBLIC INVESTMENT CORPORATION.
deon.botha@PIC.gov.za

AND TO: OFFICE OF THE EXECUTIVE DIRECTOR
NEDLAC
Nolwazi@nedlac.org.za

RE: COSATU'S PROPOSED ESKOM BAIL-OUT

1. We refer to the above and confirm that we are acting on behalf of our members employed in the public sector.
2. We would like to make it clear from the outset that this letter is not intended to be exhaustive, but we reserve our right to ventilate any relevant matter at the appropriate time and in the appropriate forum should it become necessary to do so.
3. We are a registered trade union that champions the rights of employees within both the public and the private sector. During the past decade we



www.solidariteit.co.za

Solidariteit Hoofkantoor | Solidarity Head Office

T: 012 644 4300

H.v. DF Malanrylaan en Eendrachtstaat, Kloofsig | Cnr DF Malan and Eendracht Streets, Kloofsig

have been forced to venture into the realm of litigation in various courts to protect not only the rights of our members but also those of the larger public during a time when state capture, as it is currently known, depleted all, or most, of the government's funds and reserves. These are also the de facto funds and reserves of the South African taxpayers. We acted for employees within State Security, Denel and lastly SAA, wherein relief was sought from the courts to protect and preserve employment on behalf of our members, as well as all employees within the public and the private sector.

4. It has come to our attention that an Eskom Social Compact framework agreement was signed on the 09th of December 2020, at the annual summit of the National Economic Development and Labour Council ("NEDLAC"), which ostensibly paves the way for the conversion of R100bn worth of Eskom bonds held by the Public Investment Corporation (PIC) into equity. With banks and other financiers becoming increasingly reluctant to fund Eskom, there is apparently a willingness to consider development finance institutions and other bodies like the state pension fund (GEPF) and the Public Investment Corporation (PIC) as sources of finance.
5. We therefore address this letter to yourselves, as representatives of members of the GEPF who are gravely concerned that their pension money, that was earned through years of hard work, would be used to assist Eskom in its current debt predicament without the necessary attention to and consideration of the negative implications such decision would have on the individual members of the GEPF.

FIDUCIARY DUTIES

6. We would like to point out to you, as the governing bodies of the GEPF and the PIC, the well-known concept of fiduciary duties. These duties have always been and still are governed by the South African common law, which dictates that governing bodies must act in utmost good faith and in the best interest of the companies, institutions and/or individuals from whom they receive their mandate. This would include the need to exercise care, skill and diligence so as to promote success for the companies, institutions and/or individuals through independent judgement. It is further also well known that failure to properly perform these common law duties would result in individuals who are part of such governing bodies being rendered personally liable for damages as a result thereof.



www.solidariteit.co.za

Solidariteit Hoofkantoor | Solidarity Head Office

T: 012 644 4300

H.v. DF Malanrylaan en Eendrachtstaat, Kloofsig | Cnr DF Malan and Eendracht Streets, Kloofsig

7. It is further submitted that section 76 of the Companies Act, No 71 of 2008, addresses the standard of conduct expected from directors of a company and even extends it beyond the common law by compelling them to act honestly, in good faith and in a manner they reasonably believe to be in the best interests and for the benefit of their companies. Furthermore, they should perform their functions and exercise their powers with a degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as carried out by that director, and having the general knowledge, skill and experience of that director.
8. The Act further states in section 77(2) that a director of a company may be held liable for any loss, damages or costs sustained by the company as a consequence of any breach by the director contemplated, inter alia, in section 76 of the Act.
9. In the General Provisions of the Financial Advisory and Intermediary Services Act, no 37 of 2002, in terms of which the PIC is registered, the Act stipulates that a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.
10. The aforementioned duty of utmost care, we submit, is explicitly, alternatively implicitly, incorporated into the GEP Law of 1996 and its regulations.
11. We submit further that the aforesaid fiduciary duty places an obligation on the GEPF and the PIC to act decisively against any person/party/entity which unduly influences, or attempts to unduly influence, said party in the fulfilment of their statutory obligation. We submit that Eskom Social Compact framework agreement, and the parties thereto, attempts to unduly influence the GEPF and the PIC in the aforementioned obligations.



www.solidariteit.co.za

Solidariteit Hoofkantoor | Solidarity Head Office

T: 012 644 4300

H.v. DF Malanrylaan en Eendrachtstaat, Kloofsig | Cnr DF Malan and Eendracht Streets, Kloofsig

DEMAND

12. We would therefore like to highlight and reiterate that a decision to provide funding out of employees' pension funds in order to assist Eskom in its debt debacle, when banks and other financiers are becoming increasingly reluctant to fund the utility, should not be taken lightly. We would further like to reiterate that the responsibility and repercussions of such a decision also rest on the shoulders of the individual members of the governing bodies of this fund and/or company.
13. As stakeholders of the GEPF we would not hesitate to hold the individual members of the said governing bodies personally liable in the event that funding towards Eskom was approved, without these individuals having adequately complied with their fiduciary duties while evaluating and approving the decision and the GEPF and/or its stakeholders suffer any damages as a result thereof.
14. The purpose of this letter is therefore to inform you that any steps or actions taken to implement any plan to utilise employees' pension funds to service the debt and/or a possible bail-out of Eskom (or the bail-out of any other badly administered SOC) will be in breach of the mandate of the GEPF and the PIC, their contractual obligations and statutory obligations towards their members.
15. Any such steps or actions to implement the Eskom Social Compact framework agreement would be challenged by way of legal action, including urgent legal action. In this regard, we therefore request you to confirm, by no later than close of business on Tuesday, 15 December 2020, that no such steps will be taken to use the pension monies as administered by yourselves in servicing the debt of Eskom and/or any other SOC. It would not be an investment. It would be a travesty.
16. Lastly, we demand from you, by no later than close of business on Tuesday, 15 December 2020, that you will act against Nedlac and the relevant parties to the Eskom Social Compact framework agreement, in order to desist from their actions to unduly influence the GEPF and the PIC in the execution of their statutory/fiduciary obligations.
17. Our rights herein remain strictly reserved.



www.solidariteit.co.za

Solidariteit Hoofkantoor | Solidarity Head Office

T: 012 644 4300

H.v. DF Malanrylaan en Eendrachtstaat, Kloofsig | Cnr DF Malan and Eendracht Streets, Kloofsig

Yours sincerely



Dr. Dirk Hermann
Chief Executive Officer
Solidarity



www.solidariteit.co.za

Solidariteit Hoofkantoor | Solidarity Head Office

T: 012 644 4300

H.v. DF Malanrylaan en Eendrachtstaat, Kloofsig | Cnr DF Malan and Eendracht Streets, Kloofsig

Deel van die Solidariteit Beweging