THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 422/10

Of precedential significance only in parts

In the matter between:

THE PUBLIC PROTECTOR **Appellant**

and

MAIL & GUARDIAN LIMITED **First Respondent**

FERIAL HAFFAJEE **Second Respondent**

STEFAANS BRÜMMER **Third Respondent**

SAM SOLE **Fourth Respondent**

Neutral citation: *The Public Protector v Mail & Guardian Ltd* (422/10) [2011] ZASCA 108 (1 JUNE 2011)

Coram: NUGENT, PONNAN, SNYDERS and TSHIQI JJA and PLASKET AJA

Heard: **12 MAY 2011**

Delivered: **1 JUNE 2011**

Summary: **Public Protector – investigation and report – whether properly conducted – set aside on review**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Poswa J sitting as court of first instance):

Paragraphs 2 and 3 of the order of the court below are set aside. Save for that, the appeal is dismissed with costs.

JUDGMENT

NUGENT JA (PONNAN, SNYDERS and TSHIQI JJA and PLASKET AJA concurring)

[1] About six years ago a series of articles was published, over some weeks, in a national weekly newspaper known as the Mail & Guardian (M&G). The series revealed various transactions and events that the newspaper called ‘Oilgate’. The articles were written in collaboration between two journalists employed by the newspaper, Mr S Brümmer (the third respondent) and Mr S

Sole (the fourth respondent), in some cases also with the collaboration of Mr Wisani wa ka Ngobeni (who is not a party to these proceedings). There can be no gainsaying that the revelations that were made in the articles raised matters of profound public importance if they were true. When the first article appeared the matter was raised in the National Assembly and a member of that body asked the Public Protector to conduct an investigation. As the story unfolded over the following weeks the leader of the official opposition in parliament asked the Public Protector on two occasions to expand his investigation to include the further revelations. The Public Protector acceded to the requests and produced a report within a short time. He called a press conference when he released the report, which he said had been necessitated by the importance and enormity of the matter. A spokesman in his office expressed the opinion that it had been the second most important investigation that had been conducted by the Public Protector. The report was tabled in the National Assembly, where it evoked some debate, and it was adopted by a majority of its members.

[2] At the time that is relevant to this appeal the incumbent of the office of the Public Protector was Adv M Mushwana. He was assisted in his investigation by the head of special investigations in his office, Adv C Fourie. Although Adv Fourie undertook much of the work, both say that he did so in close consultation with Adv Mushwana, who properly accepts responsibility for the report.

[3] Promptitude by public functionaries is ordinarily meritorious, but not where that is at the cost of neglecting the task. The promptitude in this case is explained by the paucity of the investigation. A large part of the report was taken up with explaining why much of what had been placed before the Public Protector fell outside his investigatory mandate, and what remained after that

had been excised was decidedly narrow. The approach to the investigation narrowed it even more, and the investigation of the remnants was undertaken as little more than a formality. The Public Protector nonetheless concluded that there had been no impropriety on the part of any of the various functionaries and entities concerned and that is what he reported.

[4] The proprietor of the M&G (Mail & Guardian Limited, the first respondent), its then editor (Ms F Haffajee, the second respondent), and the two journalists, brought review proceedings against the Public Protector in the North Gauteng High Court. They asked for orders setting aside the report and ordering the Public Protector to investigate and report afresh. The orders were granted by Poswa J and the Public Protector now appeals against them with the leave of the learned judge.

[5] The Constitution[1] upon which the nation is founded is a grave and solemn promise to all its citizens. It includes a promise of representative and accountable government functioning within the framework of pockets of independence that are provided by various independent institutions. One of those independent institutions is the office of the Public Protector.

[6] The office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that is capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee.

[7] The constitutional mandate and duty of the Public Protector is stated by implication in the powers that are recited in s 182 of the Constitution:

[1]The Constitution of the Republic of South Africa, 1996.

'(1) The Public Protector has the power, as regulated by national legislation –

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

(b) to report on that conduct; and

(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.'

[8] The office of the Public Protector is declared by the Constitution to be one that is independent and impartial, and the Constitution demands that its powers must be exercised 'without fear, favour or prejudice'.[2] Those words are not mere material for rhetoric, as words of that kind are often used. The words mean what they say. Fulfilling their demands will call for courage at times, but it will always call for vigilance and conviction of purpose.

[9] The national legislation that is referred to in s 182 is the Public Protector Act 23 of 1994. The Act makes it clear that while the functions of the Public Protector include those that are ordinarily associated with an ombudsman[3] they also go much beyond that. The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances. Although the Public Protector may act upon complaints that are made, he or she may also take the initiative to commence an enquiry, and on no more than 'information that has come to his or her knowledge' of maladministration, malfeasance or impropriety in public life.[4]

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[2] Section 181(2).

[3]Concise Oxford Dictionary: 'An official appointed to investigate individuals' complaints against maladministration, especially that of public authorities'.

[4] Section 7 (1)(a) of the Act.

[10] The Act repeats in greater detail the constitutional jurisdiction of the Public Protector over public bodies and functionaries and it also extends that jurisdiction to include other persons and entities in certain circumstances. In broad terms, the Public Protector may investigate, amongst other things, any alleged improper or dishonest conduct with respect to public money,[5] any alleged offence created by specified sections of the Prevention and Combating of Corrupt Activities Act 12 of 2004 with respect to public money,[6] and any alleged improper or unlawful receipt of improper advantage by a person as a result of conduct by various public entities or functionaries.[7]

[11] But although the conduct that may be investigated is circumscribed I think it is important to bear in mind that there is no circumscription of the persons from whom and the bodies from which information may be sought in the course of an investigation. The Act confers upon the Public Protector sweeping powers to discover information from any person at all. He or she may call for explanations, on oath or otherwise, from any person, he or she may require any person to appear for examination, he or she may call for the production of documents by any person,[8] and premises may be searched and material seized upon a warrant issued by a judicial officer.[9] Those powers emphasise once again that the Public Protector has a pro-active function. He or she is expected not to sit back and wait for proof where there are allegations of malfeasance but is enjoined to actively discover the truth.

[5]Section 6(4)(a)(iii).
[6] Section 6(4)(a)(iii). The offences are those referred to in 'Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2' of the Act.
[7] Sections 6(4)(a)(iv) and 6(5)(c).
[8] Section 7(4).
[9] Section 7A(1).

[12] There are a number of important observations that I need to make at the outset concerning matters upon which there must be no misunderstanding.

[13] The first is that we are not called upon to make findings on the matters that were placed before the Public Protector for investigation, or on the veracity or authenticity of material that might have been relevant to his enquiry, and I do not purport in this judgment to do so. We are concerned only with the extent to which that material casts light upon the adequacy or otherwise of the investigation. It needs to be borne in mind that organisations and persons to which the material might relate are not parties to these proceedings and we have not heard what they might have to say. There might be ready answers to or explanations for what the material reveals at first sight, there might be other facts not before us that would impact upon inferences that might otherwise be drawn, and it might be that documents are not authentic or that statements in documents or otherwise are untrue. Those are all matters upon which we are not called upon to pronounce, and I do not purport to do so. So far as I relate what that material shows as if it is fact, I have done so only for convenience of narration.

[14] Following upon that is the approach that is to be taken to the evidence. Courts will generally not rely upon reported statements by persons who do not give evidence (hearsay) for the truth of their contents. Because that is not acceptable evidence upon which the court will rely for factual findings such statements are not admissible in trial proceedings and are liable to be struck out from affidavits in application proceedings. But there are cases in which the relevance of the statement lies in the fact that it was made, irrespective of the truth of the statement. In those cases the statement is not hearsay and is admissible to prove the fact that it was made. In this case many such reported

statements, mainly in documents, have been placed before us. What is relevant to this case is that the document exists or that the statement was made and for that purpose those documents and statements are admissible evidence.

[15] I need to deal specifically with one form of such evidence. In his founding affidavit Mr Brümmer has at times conveyed information that he says was imparted to him by an undisclosed source. The appellant applied to strike out those portions of his evidence but for the reasons I have given that application is misconceived. What is relevant for present purposes is that the reported statements were made, and not that the reported statements are true, and the allegations in the affidavit are admissible proof of that fact.

[16] There is another context in which statements by undisclosed sources play a role in this case. In the various newspaper articles that I refer to later in this judgment the authors have at times again attributed information to undisclosed sources. A theme that runs throughout the answering affidavits is disdain for that information and at times taunting challenges to the respondents to reveal those sources. The disdain that the Public Protector displays is unfortunate because it is misconceived.

[17] The fact that the source of information is not disclosed does not mean that the information is untrue. And the question whether or not it is true will usually be capable of being verified even without resort to the undisclosed source. If it is reported by an undisclosed source that a document is in the possession of A, the Public Protector is quite capable of establishing whether it exists by asking A for the document, and if necessary by searching for it under a warrant. If it is reported that an undisclosed source said that something was done by B, then the Public Protector is quite capable of asking B and others

who may have knowledge of the matter, whether that is true, if necessary under compulsion to answer. It is often in cases of the most important kind that there will be people who fear reprisals if their identities become known. It is precisely in cases of that kind that the arsenal of investigatory tools at the disposal of the Public Protector becomes particularly important. The Public Protector has no place summarily dismissing any information. His or her function is to weigh the importance or otherwise of the information and if appropriate to take steps that are necessary to determine its truth. I repeat that the Public Protector is an investigator and not a mere adjudicator of verified information that must be sought out and placed before him or her by others.

[18] The affidavits filed on his behalf are also replete with challenges to the respondents to demonstrate that what has been said is untrue, and with protestations against the need for corroboration, but I think, once again, that those challenges and protestations are misconceived.

[19] The Public Protector must not only discover the truth but must also inspire confidence that the truth has been discovered. It is no less important for the public to be assured that there has been no malfeasance or impropriety in public life, if there has not been, as it is for malfeasance and impropriety to be exposed where it exists. There is no justification for saying to the public that it must simply accept that there has not been conduct of that kind only because evidence has not been advanced that proves the contrary. Before the Public Protector assures the public that there has not been such conduct he or she must be sure that it has not occurred. And if corroboration is required before he or she can be sure then corroboration must necessarily be found. The function of the Public Protector is as much about public confidence that the truth has been discovered as it is about discovering the truth.

[20] The second important observation I need to make is that we are not called upon to direct the Public Protector as to the manner in which an investigation is to be conducted and I do not purport to do so in this judgment. A proper investigation might take as many forms as there are proper investigators. It is for the Public Protector to decide what is appropriate to each case and not for this court to supplant that function. To the extent that I have suggested what might have been done in this case it is only to assess what might be expected in the proper performance of the functions of the Public Protector so as to determine the adequacy or otherwise of his investigation.

[21] There is no dispute in this case that an investigation and report of the Public Protector is subject to review by a court. I do not find it necessary to pronounce upon the threshold that will need to be overcome before the work of the Public Protector will be set aside on review. It would be invidious for a court to mark the work of the Public Protector as if it was marking an academic essay. But I think there is nonetheless at least one feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind – which is that the investigation must have been conducted with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all. That is the benchmark against which I have assessed the investigation in this case.

[22] I think that it is necessary to say something about what I mean by an open and enquiring mind. That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not

then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit. How it progresses will vary with the exigencies of the particular case. One question might lead to another, and that question to yet another, and so it might go on. But whatever the state of mind that is finally reached, it must always start out as one that is open and enquiring.

The Standing of the Parties

[23] The Public Protector is there to inspire confidence that all is well in public life. In those circumstances I think it is unfortunate that he should have chosen to challenge the right of the respondents to submit his report to scrutiny. But he has done so and I must perforce deal with that objection at once.

[24] In the founding affidavit, which was deposed to by Mr Brümmer and confirmed by the other respondents, it was said that they had brought the application ‘in the public interest as well as in their own interests’. Their own interest in the matter stems from a curious feature of the report.

[25] Apart from exonerating the public entities and functionaries that were investigated Adv Mushwana discredited the newspaper, saying that ‘much’ that had been published ‘was factually incorrect, based on incomplete information and documentation, and comprised unsubstantiated suggestions and unjustified speculation’. That finding is curious because it is inconsistent with his careful exposition of why much of what had been published could not be and was not investigated. The finding features prominently in the report. It was repeated by Adv Mushwana in a press statement that he issued when he released the report.

Hansard's report of proceedings in the National Assembly when the report was tabled records one member asking of an opposing political party, on the basis of that finding, and to applause, what kind of party it was that relied upon newspaper reports of the M&G for its political interventions. Another described the M&G as 'the choirmaster in the chorus of unsubstantiated allegations'. Yet another said that the report should 'caution us to be ready for what we read in the papers and the credibility of relying on such material as [being] accurate and dependable'.

[26] The newspaper and the journalists say that they have an established reputation for the credibility of their journalism and that the finding of the Public Protector undermines that reputation to their detriment. I think that the remarks made in the National Assembly are ample testimony to that, but in any event it must be correct. A newspaper that publishes a series of articles on matters of great public concern can only be seriously damaged by a finding that much of what was published is not correct or cannot be substantiated.

[27] On the other ground that the respondents relied upon for their right to bring the application their counsel pointed out that the Constitution guarantees the protection of the office of the Public Protector to all inhabitants of the country. Once again that must be correct. He submitted that in those circumstances, when it comes to matters that concern its inhabitants at large, every one of them must be entitled to vindicate that promised protection.

[28] The traditional approach to standing that was taken at common law has seen some expansion in cases that have been founded on the vindication of constitutional rights. I have said that it is not in dispute that the work of the Public Protector is subject to review. The source of that power was not

addressed in argument before us, and I express no view on the matter. But for present purposes I will assume, in favour of the Public Protector, that a person who applies for such review must meet the more conservative test of the common law.

[29] The common law has no fixed rule that determines whether a party has standing to bring litigation and the courts have always taken a flexible and practical approach. The right to bring litigation before the courts is restricted for various reasons: the courts are not there to pronounce upon academic issues; they are not there to pronounce upon matters that have no significant consequences for the initiating party; they are not there for the benefit of busybodies who wish to harass others; and so on. Thus the courts have always required that an initiating litigant should have an interest in the matter. The interest that is required has been expressed in various forms that are collected in *Cabinet of the Transitional Government for the territory of South West Africa v Eins.*[10] It has been expressed as 'an interest in the subject matter of the dispute [that] must be a direct interest', and as 'an interest that is not too remote', and as 'some direct interest in the subject-matter of the litigation or some grievance special to himself', and as 'a direct interest in the matter and not merely the interest which all citizens have'. The finding by the Public Protector discrediting the respondents is manifestly damaging. I am in no doubt that the interest that the respondents have in protecting their reputation is sufficient to have entitled them to commence these proceedings for review and I need not deal with whether they were also entitled to do so in the public interest.

[30] With that disposed of I turn to the merits of this appeal.

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[10] *Cabinet of the Transitional Government for the territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388B-I.

The Requests to Investigate

[31] The requests for an investigation to be made have been referred to often in these papers as ‘complaints’ but that is a misnomer. In each case it was in truth no more than a request for an investigation into alleged conduct that was rightly considered to be of public concern. Nonetheless, I have used those terms interchangeably in this judgment.

[32] The politicians who made the requests had no independent knowledge of the matters to which the requests related. They were prompted to do so by concern at information that had been published by the M&G. The form in which the requests were made merely highlighted what was of particular concern. In the court below Poswa J rightly pointed out that a complaint or request must not be scrutinised as if it is a pleading, which serves to define and circumscribe the issues. What is needed is to extract the substance of the complaint or request. It needs to be kept in mind that the Public Protector is not restricted to investigating what has been placed before him or her. The Act expressly empowers the Public Protector to investigate on his or her own initiative, and on no more than information that comes to his or her knowledge, however that may occur.

[33] For ease of narration it is as well at the outset to describe the principal protagonists. The first is Imvume Management (Pty) Ltd (Imvume). That was a dormant company that was acquired and renamed by Mr Majali in about April or May 2001. The shares in the company were allotted in September 2001. The only shareholders were three newly formed trusts. Each of the trusts had three trustees and in each case Mr Majali was one of the trustees. The objects of the trust in each case were expressed in broad and imprecise terms but they were essentially to engage in social and development programmes of various kinds.

From the events that occurred I think it is clear that Mr Majali exercised full control over the company.

[34] The second is The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd (PetroSA). The report of the Public Protector records that 'PetroSA was formed in July 2000 out of a merger of the business of Mossgas and Soekor as well as parts of the business undertaken by the Strategic Oil Fund, in order to effectively explore, develop, manufacture and trade the crude oil and gaseous hydrocarbon resources of South Africa'. It was wholly owned by CEF (Pty) Ltd,[11] which was a 'Major Public Entity' listed in schedule 2 of the Public Finance Management Act 1 of 1999.

[35] The third protagonist is the SFF[12] Association, an incorporated association that is described in one of the documents as a subsidiary of CEF (Pty) Ltd.

[36] The information that was disclosed in the articles is inter-related and should properly be seen in the context of the articles as a whole. Nonetheless, the report deals with the various requests in isolation of one another and for convenience I will also do so.

The First Request

[37] In the issue of the M&G published on 20 May 2005 an article appeared that had been written jointly by Mr Brümmer, Mr Sole and Mr Wisani wa ka Ngobeni under the heading 'The ANC's Oilgate'. The tenor of the article appears from its opening paragraphs, which are expanded on in the remainder of the article:

[11] Formerly known as Central Energy Fund (Pty) Ltd.
[12] An acronym for the Strategic Fuel Fund.

'A *Mail and Guardian* investigation into covert party funding has revealed how R11-million of public money was diverted to African National Congress coffers ahead of the 2004 election.

In what may be the biggest political funding scandal since 1994 the M&G has established that South Africa's state oil company, PetroSA, irregularly paid R15-million to Imvume Management – a company closely tied to the ANC – at a time when the party was desperate for funds to fight elections.

The *M&G* possesses bank statements and has seen other forensic evidence proving that Imvume transferred the lion's share of this to the ANC within days. PetroSA this week said it was unaware of this. The ANC denied impropriety and said it was not obliged to discuss its funders'

[38] A further article was prepared for publication the following week. Imvume obtained an interdict against its publication but the interdict was lifted the week after and the article was published in the edition that appeared on 10 June 2005. Written under the heading 'The Scandal Spreads' the tenor of the article appears once again from the opening paragraph:

'When Sandi Majali wrote cheques after getting a multimillion-rand advance from the state oil company, two of the first recipients were relatives of Cabinet members.

The ministers – Phumzile Mlambo-Ngcuka of Minerals and Energy and Zola Skweyiya of Social Development – regulate fields in which Majali's companies operated.'

[39] The articles reveal and expand upon facts that are to be found in various documents that are disclosed in the affidavits, more particularly a report of the Auditor General, documents submitted to the Public Protector by PetroSA, and various original documents. I will relate those facts with reference to the documents rather than with reference to the article itself.

[40] That material discloses that in about October 2002 a written contract was concluded between Imvume and PetroSA under which Imvume undertook to deliver to PetroSA cargoes of oil condensate from time to time. The condensate

was to be sourced by Imvume from Glencore International AG (Glencore), a Swiss based commodity trader. The contract provided that PetroSA would pay the price of each cargo direct to the bank account of Glencore within 30 days of the date of the bill of lading. The inference from the evidence is that Imvume would receive a fee from Glencore for each cargo.

[41] Cargoes were duly acquired by Imvume from Glencore and delivered to PetroSA from time to time. On 6 December 2003 the ninth cargo of 314 598 barrels of condensate was loaded for delivery. The cost of the cargo was approximately US$10.2 million. The ordinary terms of payment required the full price to be paid to Glencore by no later than 5 January 2004.

[42] On 18 December 2003 Imvume asked PetroSA to make an ‘advance’ payment to it of R15 million (approximately US$2.3 million) and it gave PetroSA an invoice to that effect. The invoice recorded that the payment was to constitute ‘advance payment invoice of North West Shelf condensate (light crude) loaded per vessel Selendang Sari at Dampier, Australia, Bill of Lading dated 06 December 2003’. According to PetroSA the advance was paid to Imvume on the same day.

[43] I pause for a moment to say that it seems odd on the face of it that Imvume asked for an ‘advance’ on the price of the cargo, bearing in mind that its supply contract provided that PetroSA would pay Glencore direct. I have found no explanation for that in the documents but it is a question that the Public Protector might have asked. Nonetheless, I think I must infer that the parties had come to a new arrangement that PetroSA would pay Imvume and Imvume would pay Glencore. If that was so then I must also infer from what

happened that the due date for payment to Imvume and the due date for payment to Glencore coincided.

[44] The cargo was received by PetroSA on 22 December 2003. On 5 January 2004 – the date that the price of the cargo became payable to Glencore – PetroSA paid to Imvume the balance of the price, which amounted to US$7.9 million. For reasons that are not explained Imvume returned the sum of US$7.4 million to PetroSA on 15 January 2004, retaining the sum of $500 000. On 2 February 2004 PetroSA again paid to Imvume the sum of US$7.4 million, which Imvume paid to Glencore. That left a shortfall that was owing to Glencore of $2.8 million. The shortfall had by then already been paid by PetroSA to Imvume (the advance of $2.3 million plus $500 000 that had been incorporated in the first payment to Imvume of $7.9 million and had not been returned).

[45] The cargo was discharged on 22 December 2003. On 28 January 2004 Glencore invoiced PetroSA for the full amount of the cargo. Glencore told PetroSA that the shortfall had not been paid to it by Imvume, which Imvume admitted to PetroSA. At that stage the next cargo was in transit and Glencore threatened to withhold delivery unless it was paid the shortfall. PetroSA then paid to Glencore the outstanding amount of $2.8 million. The explanation that was given by PetroSA to the Public Protector for paying the debt was that production at its refinery would have been interrupted at substantial cost had the subsequent cargo been withheld.

[46] The net result of those transactions was that PetroSA paid $13 million for the cargo when its purchase price was only $10.2 million. The excess represented the ‘advance’ of $2.3 million (R15 million) that had been paid to

Imvume but not paid over to Glencore, plus the sum of $500 000 that had been withheld by Imvume when it repaid to PetroSA the moneys that it first received.

[47] The ‘scandal’ that was referred to in the article concerned the fate of part of the advance of R15 million that had been paid to Imvume. It was alleged in the article that within days of the R15 million advance having been made to Imvume, Imvume paid R11 million to the governing political party, the African National Congress (ANC). The documents do not disclose the fate of the balance of R4 million that remained in the hands of Imvume, nor the fate of the $500 000 that was retained, but that is not directly relevant to the present case.

[48] The payments that were the subject of the second article were two payments that were alleged to have been made by Imvume on 19 December 2003 (the day after the advance had been received from PetroSA). One was a payment of R50 000 to a company called Uluntu Investments, which was owned by Mr B Mlambo, the brother of the then Minister of Minerals and Energy, Ms P Mlambo-Ngcuka. The other was a payment of R65 000 to Hartkon Construction as part of its price for renovating the private residence of Mr Z Skweyiya, then the Minister of Social Development, and his wife.

[49] For completeness it is convenient to set out briefly what PetroSA did to recover the R15 million ‘advance’ that it had made to Imvume. PetroSA told the Public Protector that the decision to pay Glencore was taken on the basis that PetroSA would immediately take steps to recover the money from Imvume. On 19 February 2004 an acknowledgement of debt was signed by Mr Majali on behalf of Imvume, in which Imvume acknowledged itself to be indebted to PetroSA for the amount of $2.8 million plus interest, which it undertook to pay within 90 days. Imvume failed to pay and, after demand for payment had been

made, PetroSA issued summons for recovery of the debt. Imvume defended the action and PetroSA applied for summary judgment for approximately R18 million on 20 Augst 2004. Imvume opposed the application on spurious grounds. Meanwhile, the parties had entered into settlement negotiations. In August 2004 Imvume paid R1 million and proposed terms for payment of the balance. By August 2005 an amount of approximately R18 million was still outstanding and the parties concluded a written agreement for payment of that amount plus interest in instalments of R500 000 per month. Whether and to what extent that balance had been repaid at the time the Public Protector investigated the matter is not disclosed.

[50] On 3 June 2005 a member of the National Assembly for the Freedom Front Plus, Mr W Spies, asked the Public Protector to investigate the information that had been disclosed in the two articles. It seems that he must have had wind of the second article because at that time it had not yet been published. I set out the letter in full:

'COMPLAINT AGAINST PETROSA AND TWO CABINET MINISTERS

With reference to the above, we hereby give notice of –

1. our formal complaint against the state-controlled petrochemical corporation, PetroSA, for improper conduct and maladministration, in that it used the company Imvume Investments[13] as a conduit to transfer public money to the ANC, as well as
2. a request for an investigation into the exact nature of certain business relationships between close relatives of the Minister of Minerals and Energy and the Minister of Social Development and the company known as Imvume Investments.

Backround to the complaint

We request you to investigate whether the alleged unindebted and unsecured payment of R15 million made by PetroSA to Imvume Investments on 18 December 2003, constituted improper conduct and maladministration by the management of PetroSA.

In particular, given the fact that a further R15 million had to be paid by PetroSA to Glencore International (a Swiss-based resource trader) on 19 February 2004, as a result of

[13] An erroneous reference to Imvume Management.

Imvume Investments' non-performance in terms of its obligations towards Glencore International, we submit that *prima facie*, Imvume Investments was merely used by PetroSA as a conduit to transfer money to the ANC during December 2003.

Kindly also investigate the exact nature of the following alleged payments by Imvume Investments or its CEO, Mr Sandi Majali to the persons and/or entities referred to below:

- R50 000 paid to the company Uluntu Investments o[r] Mr Bonga Mlambo on 19 December 2003;
- R65 000 paid with regard to improvements by the construction company Hartkon to the private residence of the Minister of Social Development on 19 December 2003; and
- R11 million paid to the ANC in tranches of R2 million (twice), R3 million and R4 million respectively, on 23 December 2003.'

It is our respectful submission that, if found to be true and causally related, one or more of the transactions set out above, not only constitute an improper prejudice caused to the *fiscus*, but also amounts to dishonesty and/or improper dealings with respect to public money.'

The Second Request

[51] In its edition published on 25 June 2005 the M&G published two articles as part of what it called 'Oilgate: A special report'. Both were written by Mr Brümmer and Mr Sole. One article was headed 'An ANC front' and once again I quote the opening paragraph as being descriptive of its tenor:

'The African National Congress has misled the nation on the Oilgate scandal. Documents in the possession of the *Mail & Guardian* make it clear that Imvume Management – the company that channeled R11-million in state oil money to the ANC before the 2004 election – was effectively a front for the ruling party.'

Another longer article appeared under the heading 'Trading principle for profit. How the ANC hawked foreign policy for oil'. Here are the opening paragraphs:

'This is the story of how South Africa's ruling party offered solidarity to Saddam Hussein in exchange for crude oil – and how state resources were used to help the party in this ambitious fundraising project.

Two years of effort resulted in little, if any, financial gain for the African National Congress. But the story is important for it reveals not only how the party subordinated principle to profit, but also how it engaged in business through what was effectively a front company'.

[52] The bare facts that were revealed, and expanded upon, in those articles appear from various documents that were in the possession of the M&G. The documents that I refer to were freely available from the M&G's website and readers were invited to download them. Once again I relate what the story was about with reference to those documents.

[53] The events that led to the disclosure of 'Oilgate' can be traced to the imposition of sanctions upon Iraq by the United Nations Security Council in 1990 following upon Iraq's invasion of Kuwait. In 1995 the sanctions were partially lifted so as to allow oil to be purchased from Iraq for the purpose of generating funds to meet the humanitarian needs of the people of that country under a scheme that was to be monitored by the United Nations (the 'Food-for-Oil' programme). Allocations of oil were to be made by the Iraqi authorities but payment was to be made to an account monitored by the United Nations.

[54] In October 2005 an Independent Inquiry Committee (IIC) established by the United Nations released a report titled 'Manipulation of the Oil-for-Food Programme by the Iraqi Regime' that disclosed abuses of the scheme. That report was naturally not available to the Public Protector at the time he wrote his report but I nonetheless refer to it to provide the background against which subsequent events occurred.

[55] The committee reported that numerous individuals and organisations around the world received allocations of oil in return for political influence that they promised to Iraq to have sanctions lifted, and in return for 'surcharges' (a

euphemism for ‘kickbacks’) that were paid to members of the Iraq regime. Two South African companies were listed in the report as having participated in those abuses – Montego Trading (Pty) Ltd and Imvume.

[56] The IIC report recorded that in December 2000 Montego concluded a contract with the State Oil Marketing Organisation of Iraq (SOMO) for the supply to it of 2 million barrels of crude oil for delivery during the period December 2000 to March 2001. The contract was concluded on behalf of Montego by Mr Majali, who described himself as a director. The IIC report contains a copy of a letter from the ‘Oil Minister’ of Iraq recording approval of the contract by SOMO, which refers to Mr Majali as ‘[a]dvisor to the President of South Africa’. It records that the ‘[a]mount of surcharge’ was to be paid during the month after delivery. A due diligence review of Imvume that was conducted by Deloitte & Touche, which I return to later in this judgment, confirmed the transaction in general but not its details. The writer of the due diligence report recorded having been told that Montego was used to secure a crude oil allocation while Imvume was still being ‘conceptualised’. He said that Montego had secured one allocation of oil and had then become dormant, and that thereafter Mr Majali pursued his oil interests through Imvume.

[57] I need not deal with the fate of the transaction. It is sufficient to say that matters apparently did not turn out as planned by Montego with the result that it was left with a debt for the ‘surcharge’. I turn now to the documents that were in the possession of the M&G when it published its articles

[58] On 30 July 2001 Mr Majali wrote a letter on behalf of ‘Imvume SAOE’ to SFF offering to supply about 6 million barrels of Basrah Light (a category of crude oil that emanates from Iraq) for delivery between August and September

2001. The letter recorded that if required by SFF, Imvume was 'in a position to facilitate a direct crude oil Purchase Agreement between SFF and SOMO'. What happened to that offer is not disclosed in the documentation.

[59] By September 2001 an organisation called the South African Business Council for Economic Transformation (SABCET) had been established with Mr Majali as its chairman. The nature of the organisation was described under the hand of Mr Majali in the executive summary of a proposal that was to be submitted under the name of the organisation to the government of Iraq. The document was marked 'TOP SECRET'. It recorded that SABCET had been established 'to facilitate strategic partnership for economic advancement at a political level' and had made an 'unequivocal commitment to open relevant channels and advance the socio-economic support programmes geared towards establishing long lasting relations between South African leadership, the Baath Party and the Iraq Government'. It went on to record that

'South Africa has made an unequivocal commitment to advancing the cause of the people of Iraq at various levels. Such commitment has been demonstrated by a number of actions taken by South Africa as a country, to express its support for that cause'.

It said that SABCET

'has the blessing of the South African leadership with its brief being to facilitate and advance economic programmes that are geared towards supporting the ANC's political programmes sourcing finance to fund such programmes'.

[60] A letter that was subsequently written by Mr Majali under the name of SABCET[14] to the director of the Foreign Relations Bureau of the Arab Ba'ath Socialist Party in Baghdad, expressing appreciation for its hospitality on a visit that Mr Majali and others had made to Iraq (of which more later), recorded the following:

[14] The letter was headed 'SABCETT' but I think that it must be taken to have meant SABCET.

‘Allow me to, once again, re-affirm our commitment to support the people of Iraq in their struggle against the economic sanctions, embargo and the proposed smart sanctions by the West.

Please be advised that I have already briefed the leadership of the ANC, through the Secretary-General and the Treasurer-General regarding our visit to Baghdad and discussions with yourselves. They, in turn have undertaken to provide a full briefing to the President of the ANC. Be assured that the ANC remains committed to the co-operation agreement with the Arab Ba’ath Socialist Party. We therefore propose a signing of a Protocol to formalise the relations between our respective parties during your visit to South Africa between the 10th and 20th of October 2001.’

It went on to say:

‘I am further pleased to inform you that I have conveyed the invitation by yourselves to the ANC to join the International Conference that will take place in Baghdad on 12 November 2001 and they have welcomed the invitation. The Secretary-General of the ANC will respond as soon as he receives a formal invitation in this regard.’

[61] Another document, said to have been a speech prepared for delivery by the Secretary General of the ANC, described SABCET as ‘an agent of change duly mandated by the ANC to implement its programmes’ and said that it reported to the Secretary General of the ANC.

[62] Mr Majali was also instrumental in establishing an organisation called the South Africa-Iraq Friendship Association. The nature of that organisation is to be pieced together from various documents. A letter purporting to have been written by Mr Majali, under the name of that organisation, to the chairperson of the Iraq Friendship Association, headed ‘TOP SECRET’, records that ‘[i]t is our desire to finalise discussions on the Iraq-South Africa Friendship Association as a vehicle towards the promotion of socio-economic and political relations between the two countries.’ A protocol that purports to have been concluded

between the Iraqi-South African Friendship Associations of South Africa[15] and Iraq, establishing an organisation bearing that name, records that 'the Protocol between the Arab Ba'ath Socialist Party and the African National Congress which entered into force constitutes the basis for this protocol'. A letter written by the Secretary General of the ANC to the Chairperson of the Iraq Friendship Association commended Mr Majali to them in the following terms:

'His position, therefore, as the Chairperson of the South Africa-Iraq Friendship Association has our full approval and full blessing'.

[63] I think that it can fairly be inferred from those documents, absent facts or explanations to the contrary that might come to light, that SABCET and the South African Iraq Association were organisations that were established to further the interests of the ANC.

[64] I return to the proposal that I referred to earlier. The proposal was prepared in September 2001 under the name of SABCET and was marked 'TOP SECRET'. The proposal recorded that it was being made by 'Mr Sandi Majali ("the Proposer"), a director of Imvume Management (Proprietary) Ltd' to 'His Excellency the Deputy Prime Minister of Iraq, Mr Tariq Aziz'. It proposed an agreement between Imvume and SOMO for the sale and delivery to Imvume of crude oil. It described its shareholder-trusts and recorded that:

'[t]he proceeds from the sale of the crude oil by the Company will be channeled, in addition to the abovementioned trusts, to the South African Business Council for Economic Transformation ("SABCET") and the South Africa Iraq Friendship Association ("SAIFA") in … amounts to be agreed between the parties'.

[65] In the same month Mr Majali travelled to Iraq in the company of the Director-General of the Department of Minerals and Energy (Adv S Nogxina),

[15]In its context I think that the organisation referred to was one and the same as the South Africa-Iraq Friendship Association.

the International Liaison Officer of that department (Mr T Mafoko), the Assistant to the Minister of Minerals and Energy (Mr A Nkuhlu), and a member of the board of directors of SFF (Mr R Jawooden). The visit was approved by the Minister and the expenses of the government officials were paid by the department. I think it is clear that the proposal I have referred to was prepared for presentation in the course of that visit.

[66] In preparation for the visit Mr Majali, writing as chairperson of the South Africa-Iraq Friendship Association, wrote to his counterpart in Baghdad on 10 September 2004, requesting his assistance to host the visit. He described himself as 'Head of Implementation of ANC Economic Transformation programmes and leader of the delegation'. After providing the 'credentials of our delegation' (naming the four officials I have mentioned) he proposed the following programme:

'THURSDAY, 13 SEPTEMBER 2001

- Presentation of a message from the leadership of the ANC by Sandi Majali to His Excellency, Mr T Aziz.[16]
- Sandi Majali meets with the Chairperson of the Iraq Friendship Association to discuss possible friendship with the African National Congress (ANC).
- Discussions between the Director-General of Minerals and Energy (South Africa) and his delegation with his counterpart from the Ministry of Oil (Iraq) regarding government to government relations in relation to oil trade.'

FRIDAY, 14 SEPTEMBER 2001

- Site visits by the South African delegation to areas affected by the sanctions and ravaged by the war, including hospitals.

SATURDAY, 15 SEPTEMBER 2001.

- Meeting with the leadership of the Baath Party to discuss political relations and practical programmes to tighten these.'

[16]Deputy Prime Minister of Iraq.

[67] I referred earlier to a letter written by the Secretary General of the ANC to the Chairperson of the Iraq Friendship Association on 10 September 2001, which commended Mr Majali to them in the following terms:

'As a gesture of our desire to take the programmes agreed to between our respective parties forward, I wish to confirm the ANC's approval of Sandi Majali as a designated person to lead the implementation processes arising out of our economic development programmes. As a leader of this process he is expected to develop and implement a comprehensive Programme of Action aimed at achieving the socio-economic objectives agreed to between our parties and to report to my office on the progress and developments at regular intervals. His position, therefore, as the Chairperson of the South Africa-Iraq Friendship Association has our approval and full blessing.'

[68] Subsequent to the visit, on 20 September 2001, Mr Majali wrote a series of letters that were all marked 'TOP SECRET'. One was written in the name of Imvume to the Deputy Minister of Oil for Iraq. Mr Majali thanked the Deputy Minister for his hospitality to the delegation and recorded what was said to have been discussed at a meeting between them. He said that '[o]n the basis of our discussions we request you to approve an allocation to us of 12 million barrels of Basrah Light in your Phase 11 allocation by the United Nations 661 Committee'. He recorded that '[t]he management and execution of this transaction will be undertaken by Imvume Management (Pty) Ltd on behalf of the South African Department of Minerals and Energy' and it concluded as follows:

'We further wish to confirm our visit to finalise our discussions regarding the details of the lifting as suggested by yourself. Be advised therefor that, if it meets your approval, we would like to return to Baghdad on 10 November 2001 and we are also looking forward to participate in the International Conference in support of the lifting of sanctions, the embargo and resisting the proposed smart sanctions in Baghdad on 12 November 2001. The ANC will be sending a high level delegation to represent the voice of the people of South Africa in support of the freedom of the Iraq people.'

[69] Another was addressed under the name of Imvume to SOMO. It recorded, amongst other things, that Imvume had been 'officially appointed by the South African Department of Minerals and Energy to source crude oil for the government's strategic stock'. Mr Majali said that the required quantity was 12 million barrels of Basrah Light immediately, and that another 21 million barrels might be required by the end of June 2002. He said that discussions had been held with the Iraq Department of Oil in that regard and he sought approval of the request by SOMO.

[70] Another was a letter that I referred to earlier, written by Mr Majali as chairperson of SABCET to the director of the Foreign Relations Bureau of the Arab Ba'ath Socialist Party in Baghdad, expressing appreciation for its hospitality. I have already recited the contents of that letter.

[71] Yet another was addressed, for SABCET, to the President of the Iraq Friendship Association. It recorded:

'We believe the discussions we held were very constructive and progressive and added tremendous value to our relations. We believe there is a need to move speedily towards the implementation of the suggested programmes especially the implementation of an effective political program that will result in an effective strategy geared towards campaigning for the lifting of sanctions and the embargo that have inflicted pain and suffering on the people of Iraq. We fully believe that the people of Iraq do not deserve to be subjected to this kind of oppression by the West. We further believe that a joint effort between the ANC and the Arab Ba'ath Party will add a lot value towards achieving the common political objectives. The programme of action in this regard should be discussed and finalised at a top level by the leadership of both parties. Your visit to South Africa between the 10th and 20th of October 2001 presents a valuable opportunity to deal with these issues.'

The letter went on to express appreciation to the organisation if it would facilitate the transaction referred to in its letter to SOMO which was said to be

to ‘build financial resources to support political programmes’. Mr Majali went on to say:

‘I am convinced that you do appreciate that such financial resources are crucial for the long-term sustainability of the political programmes the parties will be implementing and to run seminars, workshops in order to develop effective political development strategies. On the basis of the aforegoing, we would like to discuss various plans with yourself during your visit to South Africa.’

[72] The documents reflect that a delegation of the Arab Ba’ath Socialist Party visited South Africa in October 2001. Included amongst the papers is a copy of what is said to be a speech that had been prepared for presentation to the delegation by the Secretary General of the ANC. Much of it is taken up with pledging the support of the ANC for the lifting of sanctions against Iraq. It describes the Iraq-South Africa Friendship Association as an association ‘brought into being through the Protocol entered into by the two parties’ which will be ‘empowered to conduct business in the open market through appropriate vehicles and/or companies it sets up or through strategic partners in the private sector’. As for SABCET it says the following:

‘South Africa has established a body known as the South African Business Council for Economic Transformation (SABCET) as a vehicle to facilitate and manage all bilateral and multilateral economic transformation programmes. This relationship, on the South African side is therefore driven and managed by SABCET which reports to the Secretary-General of the ANC … SABCET is therefore an agent of change duly mandated by the ANC to implement its programmes geared towards the economic and socio-political renewal of the African continent and the world.’

The speech concludes as follows:

‘It is therefore on the basis of the aforegoing that the ANC, through [SABCET] has presented a proposal to secure a contract for the lifting of 25 million barrels of Basrah Light oil per annum over a 10-year period as an initial measure to foster such political relations.’

[73] A letter written by Mr Majali, for Imvume, on 17 October 2001, to the Deputy Minister of Oil of Iraq, confirms discussions with the delegation as follows:

'Please be advised that we have received confirmation of your positive response to our correspondence dated 20 September 2001 regarding a crude oil allocation through Dr Monther Abdul Hameed and his delegation during their visit to South Africa. We are indeed very pleased with the turn of events in this regard.'

The letter proceeds to deal with details of the proposed lifting of oil at various times. It proposed lifting 6 million barrels in three tranches during December 2001 and the remainder in tranches during January 2002.

[74] There are some contradictions in the various documents, and there are gaps in the narrative, but I think that, when viewed as a whole, they tell a tale of Mr Majali, with the support and assistance of the ANC, attempting to secure allocations of Basrah Light crude oil that would be sold to the state. The proposed programme for the visit to Iraq records that the officials who accompanied Mr Majali were there to discuss 'government to government relations in relation to oil trade' but the documents make it clear that any oil that was allocated would be supplied to South Africa through the medium of Imvume, so as to produce income for the ANC. What was offered in return for allocations was political support from the ANC for the lifting of sanctions. Although it was expressed as being support from the party, counsel for the respondents submitted, I think correctly, that political influence in the United Nations can be expected to be exerted only by member states, and thus it can be inferred that the ANC was to exercise its promised influence through the medium of the state.

[75] That was the essence of the story that was told in the series of articles published in the M&G, considerably supplemented by other allegations and

inferences. I think it will be obvious that the documents alone, without resort to information from undisclosed sources, provided a considerable basis for the story that was told. Whether or not the documents are authentic is another matter, and is not material to this case.

[76] The publication of the articles prompted the leader of the official opposition in parliament, Mr T Leon, to ask the Public Protector to expand his enquiry. In a letter that was written on 18 July 2005 the request was made as follows:

'**Request for broadening of investigation into "Oilgate" to include the state's involvement with Imvume.**

I am approaching your office with the specific request that… your office broadens its existing inquiry into the so-called "Oilgate affair" (public funds are alleged to have been deliberately channeled to the ruling party through a BEE company, Imvume) by determining the extent to which the state was involved in funding and supporting Imvume's Iraqi oil ventures and travel related thereto.'

It then summarised allegations that had been made in the newspaper articles, motivated the request, and concluded as follows:

'In light of the above, the extent of the state's involvement in funding and assisting Imvume's oil ventures in Iraq are relevant to a full exploration of the Oilgate affair.'

The Third Request

[77] A further article by Mr Brümmer and Mr Sole appeared in the issue of the M&G that was published on 22 July 2005. The article related to a tender that had been awarded to Imvume by SFF. The headings were 'Oilgate: The next instalment' and 'R1bn tender was "fixed"'. I quote again the opening paragraphs:

'A R1-billion crude oil tender – one of South Africa's largest ever – went to African National Congress-linked company Imvume Management after an extraordinary series of interventions that suggest the tender was rigged.

This emerges from a *Mail & Guardian* investigation of the 2001/02 tender process, which resulted in Imvume supplying the Strategic Fuel Fund Association (SFF) with four billion [sic] barrels of Iraqi oil. The SFF was the state agency that managed the country's strategic stocks.'

[78] Once again I relate what that article was about with reference to documents that are disclosed in the affidavits. The story that they tell is that on 5 December 2001 the SFF invited tenders for the supply of 4 million barrels of Basrah Light, in two cargoes of 2 million barrels each to be delivered to Saldanha Bay from January 2002. The invitation to tender required the FOB price to be reflected as 'either a discount or a premium of Dated Brent price' Dated Brent price was described as the 'mean of dated Brent quotations as published in Platts crude oil marketwire'.

[79] Tenders were opened at a meeting held on 3 January 2002. There was an evaluation team of six and Mr Jawooden (who had accompanied Mr Majali to Iraq) was one of the members. The minute of the meeting reflects that there were 14 tenders, one of which was from Imvume. Of nine bidders who quoted prices in accordance with the tender,[17] Imvume's was the second highest, and a 'first short list' placed it eighth in line. The minute records that the bidders were invited to re-submit their prices, on this occasion relative to SOMO prices. A document emanating from SFF reflects that bidders were then invited to submit a 'Revised or a Reconfirmation' of prices relative to Dated Brent. At the end of the process a company referred to as Leokoane Oil topped the list and it was resolved that it be awarded the contract, subject to it furnishing a performance bond, and the satisfactory outcome of a due diligence review.

[17]Four bidders submitted prices relative to SOMO prices.

[80] The minute of a board meeting of SFF held on 18 January 2002 reflects that Leokoane Oil had not been able to furnish the guarantee, and that the diligence review disclosed that it was a company of no substance, and it was accordingly disqualified. The contract was then awarded to Imvume on the same conditions.

[81] On the same day the Chief Executive Officer of SFF, Dr R. Mokate, addressed a letter to Mr M Mandela of 'Imvume Resources', in which she advised that it had been selected as the preferred bidder, subject to it furnishing a performance bond for US$1 million, and to the outcome of a due diligence review. On 28 January 2002 she wrote to him advising that the failure to submit a performance bond complying with the terms of the tender by 25 January 2002 had 'led to an automatic disqualification to the crude oil procurement process'. Mr Majali must have contested the disqualification because the following day Dr Mokate wrote to him and dealt extensively with various issues that had been raised, particularly in relation to the performance bond. Whether the required performance bond was ultimately furnished by Imvume is not clear.

[82] Dr Mokate was subsequently suspended, and then dismissed, from SFF on unrelated grounds. She wrote an article that was published in Business Day on 30 October 2002 in defence of the conduct that led to her dismissal, in which she also said that 'when I would not sign an agreement between the SFF and Imvume Management Resources until all the conditions stipulated in the contract had been met, [Mr Damane, the chairman of SFF] accused me of being obstructionist and threatened to fire me'.

[83] Included in the record of the investigation is a report of a limited due diligence review of Imvume that was conducted by Deloitte & Touche in

January 2002. I think it can be inferred that the review was conducted for purposes of evaluating whether the contract should be awarded to Imvume. The report records that the information that it contained was obtained from attorneys Bell Dewar and Hall, and at a meeting attended by two attorneys from that firm, and by Mr Majali (who was described as the Chairman of Imvume) and a representative of an entity referred to as SOPAK. SOPAK was described as a wholly owned subsidiary of Glencore.

[84] The review revealed that the sole shareholders of Imvume were the trusts that I referred to earlier, and that the trusts had no assets or financial ability, and 'no ability to assist Imvume in its contractual obligations'. Imvume had no employees or existing infrastructure, it had no management structure (Deloitte & Touche was told that it had 'a full management team in waiting' but no details were furnished), and it was being financed by SOPAK on an undefined 'grant basis'. It had four directors, of whom Mr Majali was one,[18] and was said to have a 'strategic relationship' with SOPAK but the details were not disclosed.

[85] Imvume was awarded the contract. It seems that it fulfilled its obligations to supply, at least partly, because a document addressed to Imvume by Glencore records a contract between them under which Glencore sold to Imvume 2 million barrels of Basrah Light for delivery to SFF on 6 March 2002.

[86] Those facts form the basis of the disclosures that were made by the M&G, which were filled out in the article. The publication of the article prompted yet another request by Mr Leon for the investigation to be broadened further. He made the request in a letter that he wrote to the Public Protector on 22 July 2005, which commenced as follows:

[18] The others were Nomdakazana Tibelo Marion Mbina, Elliot Madela Mahile, and Mphumzi Mhatu.

'Further to my correspondence with you on 18 July 2005 regarding the "Oilgate affair", I am approaching the Office of the Public Protector requesting that the Office further broadens its existing inquiry to include the role played by the Strategic Fuel Fund (SFF) in a tender process for Iraqi crude oil in 2001-2002 in which the bid of Imvume Investment Holdings (Pty) Ltd[19] was selected in apparent violation of the law.'

The letter went on to explain the background to the request, and to set out at some length the irregularities that were alleged to have occurred and the legal issues that were said to be relevant, and it concluded:

'In light of the above, the irregularities in the SFF tender process are relevant to a full exploration of the Oilgate affair'.

The investigation and report

[87] I will deal with the investigation and the report in the order in which the requests were made.

Payment by PetroSA to Imvume

[88] The core of the article that prompted the first request was the allegation that a portion of the money that had been paid to Imvume by PetroSA had been 'diverted' or 'channeled' by Imvume to the ANC. Although the article was directed at the 'diversion' of the money by Imvume, the request by Mr Spies was directed instead at the conduct of PetroSA in paying the money.

[89] Mr Spies wanted to know whether PetroSA had intended the ANC to receive the money and had used Imvume as the conduit for that purpose. That is apparent from his notice of 'our formal complaint against … PetroSA, for improper conduct and maladministration, in that it used the company [Imvume] as a conduit to transfer public money to the ANC'. Expanding on that complaint, he submitted that '*prima facie*, [Imvume] was merely used by PetroSA as a conduit to transfer money to the ANC …'.

[19] An erroneous reference to Imvume Management (Pty) Ltd.

[90] That request is perfectly plain and the Public Protector was under no misapprehension as to what was required. In his report he recorded the complaint that had been made by Mr Spies as follows:

'According to the allegations and the complaint of [Mr Spies] the advance payment was intended for the ANC and PetroSA used Imvume as a conduit to transfer the money… It is alleged that PetroSA's conduct was irregular and constituted maladministration and misappropriation of public finds.'

He also acknowledged, correctly, that the investigation of that 'complaint' fell within his investigatory powers:

'As the affairs and conduct of PetroSA fall under the jurisdiction of the Public Protector and the conduct complained of is contemplated by the provisions of section 6(5) of the Public Protector Act, 1994, the Public Protector has the power to investigate these allegations.'

[91] There was a subsidiary part to the request that was made by Mr Spies. He asked the Public Protector to also investigate 'the exact nature of the following alleged payments by Imvume Investments or its CEO, Mr Sandi Majali', and he referred to one such payment as 'R11 million paid to the ANC in tranches of R2 million (twice), R3 million and R4 million respectively, on 23 December 2003'.

[92] A considerable part of the report is taken up with an analysis by the Public Protector of what conduct fell within and what conduct fell outside his investigatory mandate. I have pointed out that the mandate of the Public Protector is, in general, confined to investigating the conduct of public bodies and functionaries. Adv Mushwana concluded that Imvume and the ANC were not public bodies, and had not been performing a public function, and there can be no quarrel with that. But the Public Protector may also investigate the conduct of other bodies and persons in specified circumstances. Amongst other things, he or she may investigate any alleged:

'improper or dishonest act, or omission … with respect to public money' [20]

and also any alleged

'offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention of Corrupt Activities Act, 2004, with respect to public money'[21]

and also any alleged

'improper or unlawful enrichment … by a person as a result of an act or omission in connection with the affairs of an institution or entity contemplated in paragraph (a).'[22]

[93] Two of those provisions confine the conduct that is subject to investigation to conduct 'with respect to public money'. In his report the Public Protector posed the question 'When does public money lose its character and become private money?' Relying upon what was said in *South African Association of Personal Injury Lawyers v Heath*,[23] he concluded that once the money came into the hands of Imvume it ceased to be 'public money'. As I understand his analysis that led him to the view that all conduct by Imvume and the ANC in relation to the money fell outside his investigatory mandate, and he made no investigation of that conduct.

[94] It needs to be borne in mind that *South African Association of Personal Injury Lawyers*, which was decided in another context, was not concerned with public money that had been improperly obtained. It was concerned only with the propriety of its distribution thereafter. This is an entirely different case. The primary complaint in this case was not concerned with the propriety of the payment of private money by Imvume to the ANC. It was concerned with the

[20] Section 6(4)(a)(iii).
[21] Section 6(4)(a)(iii).
[22] Section 6(5)(c). The institutions and entities referred to in that paragraph are 'any institution in which the State is the majority or controlling shareholder or of any public entity as defined n section 1 of the Public Finance Management Act, 1999'. It is not disputed that PetroSA is one such institution.
[23] *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

propriety of its conversion from public money into private money in the first place. That step in the transaction was overlooked altogether in the analysis.

[95] The conversion of public money into private money occurs through a bilateral transaction of payment and receipt. I would be most surprised if the legislation envisaged that one side of that bilateral transaction of conversion may be investigated but not the other. To improperly pay public money, and to improperly receive public money, each seems to me to be quintessentially an 'improper … act … with respect to public money'. I also see no immediate reason why the improper receipt of public money is not 'improper … enrichment' by a person resulting from an act in connection with the affairs of the public body. And if the act constitutes one of the specified offences under the Prevention of Corrupt Activities Act it is also not immediately apparent to me why that is not an offence 'with respect to public money'. It needs to be borne in mind that that is a broad term that does not require a direct relationship with the money.

[96] The omission from the analysis of that step in the transaction, which was the step that was material to the complaint, meant that no consideration was given to whether the receipt of the money by Imvume, and, indeed, by the ANC, fell within the terms of those provisions. Whether or not they do was not addressed in argument before us and I make no findings in that regard. But the omission of that step in the analysis, with the resultant failure to consider those questions, seems to me to have been a material misdirection.

[97] But that apart, it is not clear to me why the analysis was required at all, at least as far as the primary complaint was concerned. That enquiry was directed to the propriety of the conversion of the money from public to private money. I

cannot see how the circumstances of that conversion could be properly investigated with consideration to only one side of the transaction, if only to ensure that the pieces fell into place. If the conduct of the receiver of the money was indeed beyond the mandate of the Public Protector, that did not make the receiver immune from furnishing information relevant to an investigation of the conduct of the payer. To erect a wall between payment and receipt, and investigate only part of the transaction, which is what the Public Protector did, was wholly artificial. Indeed, the artificiality of the wall is demonstrated by the manner in which the investigation was conducted.

[98] The investigation of only one side of the transaction led the Public Protector to conduct the investigation as if the money had been paid to a supplier in the ordinary course of business. But that begged the primary question whether it was indeed paid in that way, which was not investigated at all. It is then not surprising that the report does not purport to answer the question whether PetroSA intended the money to reach the ANC, though we are told by Adv Fourie, opportunistically in my view, that the question was answered by inference from a passage that is buried in the body of the report. Indeed, the question was not even asked of PetroSA.

[99] So the Public Protector examined whether PetroSA was authorised to advance money to a supplier, whether the payment of such an advance fell within the authority of the person who had authorised it, whether it had adhered to principles of good corporate governance, and whether it had exercised sound commercial judgment. In relation to those questions he considered the Public Finance Management Act 1999, the ‘King’ principles of corporate governance, the terms in which the authority of the board to incur expenditure had been

delegated, and the procurement policy of PetroSA particularly so far as it related to black economic empowerment.

[100] Having approached the matter in that way all the findings in the report are directed towards the propriety of the payment as if it had been an ordinary commercial transaction. These were what the Public Protector called his 'key findings':

'1. The approval and authorization on 18 December 2003 by the Acting CEO of PetroSA of an advance payment of R15-million to Imvume was lawful, well-founded and properly considered in terms of the legal vehicle and policy prescripts that applied to PetroSA;
2. The decision to approve Imvume's request, as it was presented to PetroSA, for an advance was not unreasonable under the prevailing circumstances and did not amount to maladministration, abuse of power or the receipt of any unlawful or improper advantage;
3. Imvume's failure to pay Glencore the full amount due to it in respect of the cargo concerned could not reasonably have been foreseen or expected by PetroSA;
4. PetroSA's payment of an amount of USD2,8 million (plus interest) to Glencore on 23 February 2004 was in the public interest and complied with its legal obligations in terms of the Public Finance Management Act, 1999;
5. The subsequent actions taken by PetroSA to recover from Imvume the amount paid to Glencore was taken without delay and in compliance with its legal obligations in terms of the Public Finance Management Act, 1999;
6. The allegations and suggestions of improper influence made against Deputy President Mlambo-Ngcuka in relation to the advance payment were not substantiated and are without merit ....'

[101] Although that all begged the question whether PetroSA had indeed paid the money in the belief that it was doing so in the ordinary course of business, even on its terms the investigation was so sparse as to be no investigation at all.

[102] The investigation amounted to no more than a written request to PetroSA for its response to aspects of the article, and formal follow up of that response,

and a similar written request to the Minister. The responses that were received were accepted without question and formed the basis for the findings.

[103] The request to PetroSA was made in a letter addressed by Adv Fourie to Mr Mkhize, the CEO of PetroSA, on 10 June 2005. I set it out in full:

'COMPLAINT: IRREGULAR PAYMENTS TO IMVUME INVESTMENTS

We have received a complaint from the Freedom Front Plus in connection with an alleged irregular payment of R15-million that was made by PetroSA to Imvume Investments on 18 December 2003. It is alleged that the payment was made as an advance and that it related to a shipment of condensate required by PetroSA that was to be delivered by Glencore International. Instead of complying with its commitment to Glencore, Imvume apparently paid most of the R15 million to the ANC and relatives of Members of the Cabinet. PetroSA subsequently made a further payment of R15 million to Glencore to ensure delivery of the condensate.

As you are aware, this matter has received extensive media attention in the past weeks. We are of the view that it would be in the public interest that we conclude our investigation of the complaint and report thereon as quickly as possible.

It would be appreciated if you could urgently provide us with:

1. Your detailed comments on the allegations to enable us to determine the merits of the matter;
2. A copy of the report(s) on the internal investigations that PetroSA conducted into the matter;
3. Details of PetroSA's civil claim against Imvume Investments and the current status thereof. A copy of the pleadings filed would be of assistance to us in regard to the reasons for the action taken against Imvume and their response thereto; and
4. Details of any steps that had been taken by PetroSA to prevent a recurrence of such advance payments, if it was in fact irregular.

Kindly also advise whether the Minister of Minerals and Energy was in any way involved in the matter, and if so, to what extent.'

[104] Mr Mkhize replied to the letter on 23 June 2005, enclosing various documents. The only relevant enclosures for present purposes are what were

titled ‘comments on the allegations in the media’ and a ‘[r]eport sent to PetroSA Board of directors’. Mr Mkhize commented in his letter that ‘Support Initiatives’ (for BEE companies) were allowed by the procurement policy.

[105] The former document recorded that

‘[a]fter developing a solid track record through delivery of over 70% of the contractual supplies, Imvume requested PetroSA for an advance payment when the ninth cargo was due. PetroSA considered the request and elected to grant the advance payment in view of the fact that:

- cargo in question was en route to the Mossel Bay refinery and that there was no risk that the cargo will not be delivered.
- The advance payment was allowed in terms of the procurement policy.’

It proceeded to detail what had occurred thereafter and explained why PetroSA had paid the outstanding balance to Glencore:

‘PetroSA evaluated the prospect of standing its ground with Glencore and take legal action against them, with the minimum delay being 20 days if disturbed production at the refinery. The cost of disturbing production at the refinery would be $ 1 million per day over 20 days, total $ 20 million. This did not include any start up cost in the event that PetroSA were to shutdown the refinery in view of the shortage of the feedstock/raw material (condensate) required for the operation.’

The report to the board took the matter no further.

[106] What I find to be startling is that PetroSA was not asked whether it knew the purpose for which the ‘advance’ was required by Imvume, nor whether PetroSA asked Imvume that question. Instead Adv Fourie wrote again to Mr Mkhize on 28 June 2005 asking only for a copy of the request for advance payment, and asking who had authorised the payment, and raising queries relating to how the payment fitted into the support initiatives allowed by PetroSA’s procurement policy, with no apparent interest in the purpose for which the advance had been requested. He went about the investigation as if it

was self-evident that the advance had been requested for a legitimate business purpose without ever having asked whether that was so.

[107] It was only when Mr Mkhize replied that the purpose for which Mr Majali allegedly said he wanted the advance first emerged, and then only by happenstance. Mr Mkhize replied on 6 July 2005. As to the first query he said:

'The request from Imvume for an advance payment on the basis for part of the money that would be due to them on delivery of the cargo was in the form of an invoice, attached hereto as Annexure A.

However, Mr Majali did explain that Imvume had [temporary] cash flow problems and wanted to pay their monthly payment commitments. He also claimed that Imvume could not delay these payments because it was December, a holiday month.'(1137)

He also attached a copy of the delegation that had conferred authority on the acting CEO, Mr Mehlomakulu (who had authorised the payment), repeated that the advance payment was allowed by the procurement policy, and provided a short explanation in that regard.

[108] On 11 July Adv Fourie asked Mr Mkhize for a copy of the delegated authority of the board to the CEO, and for the outstanding amount of the debt and the prognosis for its recovery, and that information was provided. That ended the enquiry that was made of PetroSA.

[109] On 28 June 2005 Adv Mushwana wrote to the Minister and once more I find it necessary to set out the letter in full:

'COMPLAINT: PetroSA

As you are aware, we are currently investigating a complaint in connection with an advance payment that was made by PetroSA to Imvume Management in December 2003. The payment related to a contract between the two companies for the procurement of oil condensate.

It has been alleged that the said advance payment was intended for the ANC, your brother and the Minister of Social Development and that Imvume Management was merely used as a conduit to transfer the public money concerned. Imvume subsequently failed to comply with its commitment relating to the said contract and PetroSA had to make a further payment to the supplier to ensure uninterrupted production at its Mossel Bay plant. Media reports suggested that you had been involved. These suggestions appear to be based on the following:

1. The fact that you were the Minister of Minerals and Energy at the time when the payment in question was made and were allegedly consulted by PetroSA in regard to the said advance;
2. An amount of R50 000 that was allegedly paid by Imvume to your brother, Mr B Mlambo, shortly after the advance payment was made;
3. Your alleged interference in regard to the appointment of Mr Mkhize as the CEO of PetroSA, which was made shortly before the advance payment to Imvume was effected.

We have noted your reported responses in the media to these allegations and suggestions. It would however, be appreciated if you could provide us with your official response and comments for the purposes of our investigation and to enable us to conclude this matter on direct and reliable evidence.'

[110] Ms Mlambo-Ngcuka replied on 29 June 2005. It is not necessary to recite everything that was said. So far as the issue now before us is concerned she said that 'PetroSA never consulted me in regard to the advance payment to Imvume when it was requested and approved as alleged, as this was an operational matter'. She continued to say that when it came to whether to pay Glencore she was indeed consulted and agreed with the recommendation to pay on the basis outlined above. That was the end of the enquiry made of the Minister.

[111] In various parts of his affidavits Adv Fourie made clear his disdain for acting upon anything but original evidence from disclosed sources. On this occasion he seems to have made an exception. Mr Mkhize was on leave when the advance was authorised (thus its authorisation by the acting CEO) and, on

the face of it, had no direct knowledge of the circumstances in which the advance was made. The source of the information that he conveyed was not disclosed in the documents. Adv Fourie made no enquiry as to who had provided the information and, naturally, he made no enquiry of those who had direct knowledge of what had occurred.

[112] The explanation that was advanced in the documents that were furnished by Mr Mkhize raises questions for even a mildly enquiring mind, but one in particular jumps out like a jack-in-the-box. The money was said to have been asked for as an 'advance', meaning, presumably, an advance of money that would become payable to Imvume three weeks hence. But PetroSA was well aware that Imvume would simultaneously become liable to pay Glencore the full amount of the cargo. The question that might be expected to have been asked of PetroSA is whether it asked Mr Majali how he would pay Glencore the price of the cargo if part had already been spent to meet Imvume's 'commitments'? And the next question that would arise is whether it had given thought to what would happen if Glencore was indeed not paid? And if Glencore was not paid, and the money had been spent, how and when would Imvume repay PetroSA?

[113] PetroSA might also have been asked whether it had queried the nature of Imvume's 'monthly payment commitments'? Mr Mkhize later told a parliamentary committee that PetroSA had been 'under the impression that [Imvume] needed to pay its employees their end of year remuneration including cash bonuses'. But the question that then springs to mind is how PetroSA could have thought that the monthly payroll of Imvume (even including bonuses) amounted to R15 million, bearing in mind particularly that barely a year earlier Imvume had no employees at all?

[114] And so the questions might go on if an open and enquiring mind is brought to bear on the matter, because the explanation that was given certainly did not bring all the pieces into place. Yet not one question of that kind was asked in the course of the investigation. The explanation found its way into the report and was the sole basis upon which findings were made. As for the Minister, she had said no more than that she had not been consulted on the matter, but it does not follow that she was unaware of the purpose to which the 'advance' was to be put. She was never pertinently asked that question, nor any other questions in that regard.

[115] The explanations that were given, without more, provide no proper basis for finding that the payment of the advance was 'well founded and properly considered', nor for finding that it was 'not unreasonable under the prevailing circumstances' for the payment to have been made. They also provide no proper basis for finding that Imvume's failure to pay Glencore 'could not reasonably have been foreseen or expected'. The only reasonable findings that could have been made on that scant information were no less than that the payment was reckless, and that default by Imvume was virtually guaranteed.

[116] On this part of the case I think it is clear that there was no investigation of the primary complaint. So far as the Public Protector purported to investigate and report on associated matters the investigation was so scant as not to have been an investigation, and there was no proper basis for any of the findings that were made.

The Payments to Uluntu and Hartkon Construction

[117] The investigation of these payments can be disposed of briefly. It was alleged that Imvume had paid R50 000 to Uluntu Investments, a company owned by Mr B Mlambo, a brother of the Minister of Minerals and Energy, and had paid R65 000 to Hartkon Construction towards the cost of renovating the private residence of Dr Skweyiya and his wife. Mr Spies asked the Public Protector to investigate 'the nature of those transactions'.

[118] I find the conclusions of the Public Protector in that regard to be rather confusing. He concluded that because Imvume, Uluntu and Hartkon were all private bodies, and that the payments did not relate to state affairs or public money, he could not investigate their conduct. He nonetheless purported to investigate what he called 'suspicions raised of an improper relationship between Imvume and Dr Sweyiya', and whether there had been any impropriety on the part of the Minister of Minerals and Energy. He absolved both ministers of impropriety.

[119] With regard to the alleged payment to Hartkon Construction the report records that:

'Dr Sweyiya referred questions with regard to the allegations of payment to Hartkon Construction to his wife. He also denied any conflict of interest in respect of the payment concerned. Ms Mazibuko-Sweyiya confirmed the payment, but explained that it represented a loan that had already been repaid. This explanation was also confirmed by the said attorneys of Mr Majali and Imvume.'

[120] That is all that the investigation entailed. The 'key findings' do not include a finding on the issue but in the body of the report the Public Protector said the following:

'There was no substantive allegation or indication that the Minister performed any official action or omission that could have favoured Imvume in any way. The suggested corrupt

intent clearly speculates in relation to future events that might or might not occur, which obviously cannot be investigated'.

He went on to say that

'the information at the disposal of the Office of the Public Protector and that could be considered and verified in terms of its jurisdiction does not disclose the commission of any offence, but merely comprise suspicions and speculations that have not been substantiated'.

[121] The question that called for an answer was not whether the money was paid as a gift or a loan. The question was why Imvume was paying money for the benefit a minister of state, whether as a loan or otherwise. There was no investigation of that at all. It is apparent from the report that not Imvume, nor the Minister, nor his wife, nor anyone else for that matter, was even asked what had motivated the payment. If it was the understanding of the Public Protector that he was not entitled to make enquiries of the persons concerned, if necessary under compulsion to answer, which is what he seems to suggest, then he was clearly wrong. There was no investigation of the matter at all.

[122] With regard to the payment to Uluntu the Minister of Minerals and Energy told the Public Protector, in reply to his letter that I referred to earlier, that:

'[I] am not aware of all business deals my family members are involved in. I have however, upon enquiry established that Bonga Mlambo my brother and Sandi Majali were at some stage involved in a toursm related business which tried to bid for a hotel at St Lucia, KwaZulu Natal. It is in this context I have been informed, that a sum of R50 000,00 was paid by Imvume towards the defrayment of costs incurred in the bidding process. Such payment had nothing to do with the relationship between my brother and I on the one hand, and PetroSA and Imvume on the other hand.

More importantly the payment between Bonga Mlambo and Sandi Majali related to a tourism venture, which is evidently outside the Mineral and Energy sector, and thus I fail to see any real or potential conflict of interest.'

[123] The report contains no more on that issue than a summary of that response. A refrain throughout the affidavit deposed to by Adv Fourie is that he was not required to be suspicious of everything he was told and to look for corroboration, but I have already said why that misses the point. The Public Protector is not there to determine whether an onus has been discharged. He or she must be satisfied that the truth has or has not been told. In this case no information was sought from Imvume or from Mr Mlambo or from anyone else to clear up what had motivated Imvume to make the payment. Once again, that was no investigation at all.

The Second Request

[124] The Public Protector drew attention in his report to the separation of party and state, which he correctly called a 'fundamental principle of constitutional law and democracy'. That is precisely what this complaint was about. The story that was told in the articles that prompted this request was a story of the governing party and the state coming together in pursuit of the financial interests of the party. It was in that context that the Public Protector was asked to 'determine the extent to which the state was involved in funding and supporting Imvume's Iraq oil ventures and travel related thereto.'

[125] The tale that was told in the articles emerges as much from the documentation I have referred to, all of which was available on the website of the M&G. Yet the only enquiry of any substance was in a letter written by Adv Fourie to the Director-General of the Department of Minerals and Energy on 18 July 2005. He referred the Director-General to the article that had been published on 15 July 2005 and said that it 'appears to allege that you, in your capacity as the Director General of the Department of Minerals and Energy,

were improperly involved in dealings between Mr Majali and the Government of Iraq.' He went on to say:

'According to the said article, you and Mr Nkhulu of your department, "accompanied" Mr Majali in September 2001 to Iraq : "for talks with Hussein's government". The Minister of Minerals and Energy allegedly approved your trip. Mr Jawoodeen of the SFF apparently joined the "delegation". An extract of the Minster's approval, dated 7 August 2001, was also published.

We have noted your response to these allegations that was published as part of the said article.

It would be appreciated if you could provide us with your detailed official response to the allegations referred to above as well as any other comments on the contents of the said article that could be of assistance to us in our investigation. If you in fact travelled to Iraq, as alleged, kindly also provide us with a copy of the memorandum submitted to the Minister for her approval in this regard.'

[126] The Director-General, Adv Nogxina, replied on 19 July 2005. He described various contacts that had been made between the Department of Foreign Affairs and the government of Iraq and said:

'It is against this background that in September of the same year, we undertook an official trip to Iraq on a mission to further strengthen bilateral relations between the two countries. In particular, we were supposed to explore the possibility of a government to government oil supply deal for our Strategic Stocks….

During our preparations for the visit, a person in the name of Mr Sandi Majali who is a representative of a black owned company called my office requesting to join us, having learned from the Iraqi Embassy that we would be embarking on the visit. Mr Majali thought it would be helpful for the delegation to explain the BEE policy to the Iraqi's, and thus facilitate his negotiations for an oil deal. Mr Majali had had previous dealings with the Iraqi's and was at his final stages of negotiations….

I wish to emphasize that it is normal practise for visits undertaken by Government Departments, to take business delegations with them and to assist, in the course of such visits, in the facilitation of business relationships between the entrepreneurs of both countries.'

[127] An internal memo, addressed to the Chief Financial Officer by the executive assistant to the Director-General, requesting an advance of R15 000 for the trip, together with related documents, was sent to Adv Fourie.

[128] Apart from making some observations upon this country's foreign policy towards Iraq, the report does little more than to recite in full the response from the Director-General, and then to paraphrase parts of the letter as findings, in the following terms:

'The visit by the Director General of Minerals and energy and officials of the department and the SFF to Iraq, in September 2001, related directly to the Government's expressed commitment to improve trade relations with Iraq. The then Minister of Minerals and Energy was properly informed of the intention of the visit and she approved it accordingly.

The South African delegation was accompanied by Mr Majali, at his request. The involvement of representatives of the South African business sector in discussions with the Iraqi Government in connection with the improvement of trade was necessary and justified in terms of South Africa's Foreign Policy.'

[129] The 'key finding' on this aspect of the matter was:

'The allegations of improper involvement of senior officials of the Department of Minerals and Energy and the SFF in the advancement of business relations between Imvume and the Iraqi Government … are without merit.'

[130] The letter that was written by Adv Fourie to the Director-General gives a parsimonious account of what was conveyed in the articles. I have pointed out that they told a tale of the state and its resources being used to secure contracts for Imvume that would benefit the ANC. The visit to Iraq was an element of the tale but was not the tale itself. Nor was the tale confined to the incurring of expenses by the officials on the visit to Iraq. The gravamen of the tale was that the nation's stature in the forums of international affairs was 'hawked' in pursuit

of party financial gain. The tenor is apparent from the various headings under which the ‘special report’ was made: ‘Trading principle for profit’; ‘How the ANC hawked foreign policy for oil’; ‘Hawking foreign policy for oil’.

[131] If he had read the articles, and I must assume that he did, I cannot see how the Public Protector could have thought that what concerned Mr Leon was whether the officials had the permission of the Minister to visit Iraq, and whether they had completed the appropriate forms for subsistence and travel, which is really all that he queried. Once again, the gravamen of the request was not investigated at all.

[132] The reason that an enquiring mind is called for in an investigation is demonstrable from what occurred in this case. I have already recited the considerable documentation that supports the substance of the articles, all of which was freely available on the M&G website. Adv Fourie was challenged in the affidavits on why he had not downloaded them from the M&G website. His reply was that ‘the said documents effectively form part of the article and were considered as such when the allegation referred to was investigated’. I think that unusual reply must be taken to mean that he did not read the documents. Indeed, had he read the documents, his report so far as it relates to this issue, would be astonishing.

[133] He would have seen immediately from the documents that they painted a picture of the visit to Iraq that was altogether different to the picture that was painted by the Director-General. They do not paint a picture of Mr Majali discovering coincidentally from the embassy that government officials were planning to visit Iraq. They do not present a picture of a businessman tagging on to a government delegation. They do not present a picture of government-to-

government contracts being negotiated. They present a picture of Mr Majali taking charge of a venture to access oil that was to be channeled to the state through the medium of Imvume. That contrast would have presented many questions to an enquiring mind.

[134] I think I need say no more about this aspect of the investigation. I think it is manifest that the substance of the request was not investigated at all.

The Third Request

[135] The third request concerned the contract that was awarded to Imvume by SFF after tenders had been invited. Mr Leon asked for the enquiry to be broadened 'to include the role played by the Strategic Fuel Fund (SFF) in a tender process for Iraqi crude oil in 2001-2002 in which the bid of Imvume Investment Holdings (Pty) Ltd[24] was selected in apparent violation of the law'.

[136] In his letter Mr Leon provided the context in which the request was made. Amongst other things, he said that the award of the contract

'was allegedly done as part of an elaborate ANC fundraising scheme … in which Imvume was established as a front company for the ANC and would help it raise money through sales of Iraqi oil obtained in violation of the UN Oil-For-Food Programme'.

I think that makes it clear that what was being called for was an investigation of the tender, not in isolation, but in the context that I have already described. Needless to say, it cannot be said that the Public Protector investigated the tender in that context, when he failed to investigate the context at all.

[137] But even when viewed in isolation, certain features of the tender were highlighted in particular. Those were, in summary, first, that Mr Jawoodeen, who had accompanied Mr Majali to Iraq, was on the evaluation panel; secondly,

[24] An erroneous reference to Imvume Management (Pty) Ltd.

that on two occasions after the tenders had been opened the bidders were invited again to submit prices, which resulted in Imvume moving up the list; thirdly, that Leokoane Oil had been disqualified for not furnishing a performance bond, and for want of an acceptable due diligence review, but Imvume had not been disqualified when it was in the same position; fourthly, that Dr Mokate had said that pressure had been brought to bear on her by the chairperson of SFF and the Minister to award the contract to Imvume; and fifthly, that the type of oil that was called for was the type of oil that Mr Majali had been seeking in Iraq.

[138] The report records that the Public Protector asked SFF to respond to the contents of the article, and the report reproduced the response of the CEO in full. The response did not deal with all the concerns that the request had raised, and so far as they were dealt with, that was done only cursorily. No further enquiry was made, not even whether Imvume had met the conditions for award of the contract that had disqualified Leokokane Oil, yet on that sparse information alone the 'key finding' was that:

'[t]he allegations … that a crude oil supply contract was improperly awarded to Imvume by the SFF in March 2002, are without merit.'

[139] I think that it is manifest that this was no investigation at all and that there was no proper basis for that finding.

Conclusions

[140] The story that unfolded over the weeks that the articles were published was a story of alleged impropriety on various related fronts. The view that the Public Protector took of his investigatory powers had the effect of disemboweling the complaints right from the start. The manner in which he then went about investigating the remainder narrowed it even further. By the

end there was in truth no investigation of the substance of the various complaints.

[141] But even so far as the Public Protector purported to investigate the remnants with which he was left, the investigation was so scant as not to be an investigation at all. Much of that can be attributed to the state of mind in which the purported investigation was conducted, which is revealed both in the manner in which the Public Protector went about the task, and in the tone of the affidavits deposed to by Adv Fourie. That state of mind is exemplified by a passage to which we were referred by counsel for the respondents.

[142] In his supplementary affidavit that was filed after the record of the investigation was produced Mr Brümmer said that the response that Adv Fourie received from the Director-General 'was effectively accepted without question by the respondent and was conveyed in the Report as the factually correct version'. This is how Adv Fourie replied:

'The deponent does not say why the Director-General's explanation had to be corroborated by others on the trip or by further documentation. He does not produce evidence that contradicts [the Director General's] explanation and does not indicate why his response should have been regarded with suspicion. A Director General of a government department is a person of high integrity with expert knowledge and experience of the matters of his/her department engages in. His views and opinions on matter cannot be questioned simply because a certain journalist, for reasons of their own, might not believe him'.

[143] Truth and deceit know no status or occupation. One expects integrity from high office but experience shows that at times it is not there. And while experience shows that journalists can be cavalier there are times when they are

not. It is the material that determines the veracity of the speaker and not the other way round, and that applies universally across status and occupation. It is the hallmark of this investigation that responses were sought from people in high office and recited without question as if they were fact. An investigation that is conducted in that state of mind might just as well not be conducted at all. The investigator is then no more than a spokesman, who adds his or her imprimatur to what has been said, which is all that really occurred in this case. I have said before that an investigation calls for an open and enquiring mind. There is no evidence of that state of mind in this investigation.

[144] I have pointed out that the Public Protector made prominent findings discrediting the respondents and I think I must deal briefly with them as well, bearing in mind that I have found that the respondents were entitled to bring these proceedings to controvert those findings at least. In this judgment I have related the essential facts that were revealed in each of the articles with reference to outside material and not with reference to the articles themselves. By doing so I think I have already demonstrated that the substance of each of the articles was constructed upon an ample base. There might well be some errors in the various articles, there might be some unsupportable inferences, and there might be some unjustified speculation. But I think it is abundantly clear from the material that I have used for relating the substance of each of the articles, that the Public Protector had no basis for discrediting the newspaper as he did. Whether that material is authentic, and whether it is true, is another matter. That was not the ground upon which the newspaper was discredited. Nor could it be discredited on those grounds, because there was no investigation in that regard.

[145] I have no doubt that the court below was correct in finding that there was no proper investigation and in setting aside the report. But I have some difficulty with the further order that was made. Before the court below, and before us, it was accepted on behalf of the Public Protector that if the report is set aside then an order directing a fresh investigation should follow, and the court below cannot be faulted for having made that order (and an ancillary order). But I do not think that a court should make an order, thereby exposing the litigant to the penalties for contempt if it is not obeyed, unless the order is clear and unambiguous as to what is required. There was no suggestion on behalf of the Public Protector that the investigation will not be opened afresh and the views expressed by Adv Mushwana himself of the enormity and importance of the matter give every reason to think that that will indeed occur. It is not open to us to supplant the Public Protector by directing with precision what is required for a proper investigation. That will inevitably be dictated by the exigencies that might arise. In those circumstances I do not think those orders should stand and the Public Protector must be left to determine what is required in order to fulfil his or her duty.

[146] Paragraphs 2 and 3 of the order of the court below are accordingly set aside. Save for that, the appeal is dismissed with costs.

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R W NUGENT

JUDGE OF APPEAL

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