

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION
182(1)(b) OF THE CONSTITUTION, 1996 AND SECTION
8(2)(b) OF THE PUBLIC PROTECTOR ACT, 1994**



REPORT NO 30

**REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF
MISAPPROPRIATION OF PUBLIC FUNDS BY THE PETROLEUM OIL AND GAS
CORPORATION OF SOUTH AFRICA, TRADING AS PetroSA, AND MATTERS
ALLEGEDLY RELATED THERETO**

INDEX

Executive summary	6
1. INTRODUCTION	10
2. BACKGROUND	10
3. THE COMPLAINT BY THE FREEDOM FRONT PLUS	15
4. THE COMPLAINT BY MR T LEON OF THE DEMOCRATIC ALLIANCE	16
5. THE JURISDICTION, POWERS AND FUNCTIONS OF THE PUBLIC PROTECTOR IN RELATION TO THE COMPLAINTS	17
5.1 The legislative framework	17
5.1.1 The provisions of Chapter 9 of the Constitution, 1996	17
5.1.2 The Public Protector Act, 1994	18
5.1.3 Conclusion	20
5.2 The jurisdiction of the Public Protector in respect of the conduct and affairs of PetroSA	21
5.3 The jurisdiction of the Public Protector in respect of the conduct and affairs of Imvume Management	22



5.4	The jurisdiction of the Public Protector in respect of the conduct and affairs of the ANC	23
5.5	The jurisdiction of the Public Protector in regard to the conduct complained of by the Freedom Front Plus and the Democratic Alliance and alleged and reported on by the <i>Mail and Guardian</i>	24
5.5.1	The advance payment made by PetroSA to Imvume Management and its subsequent payment to Glencore International	24
5.5.2	The payment by Imvume of R 11 million to the ANC	25
5.5.3	The payment by Imvume of R 50 000 to Uluntu Investments	29
5.5.4	The payment by Imvume of R 65 000 to Hartkon Construction	29
5.5.5	The improper involvement of Deputy President Mlambo-Ngcuka in PetroSA's advance payment to Imvume	26
5.5.6	The improper involvement of officials of the Department of Minerals and Energy in the advancement of business relations between Imvume and the Iraqi Government and the awarding of a crude oil supply contract to Imvume in March 2002	30
5.5.7	The suspicions raised of an improper relationship between Imvume and Dr Skweyiya, the Minister of Social Development	30
5.6	Conclusion	33
6.	THE INVESTIGATION	34



7.	THE ADVANCE PAYMENT MADE BY PetroSA TO IMVUME AND THE SUBSEQUENT PAYMENT MADE TO GLENCORE	35
7.1	Section 217 of the Constitution, 1996	35
7.2	The provisions of the Public Finance Management Act, 1999	36
7.3	The King Report on Corporate Governance for South Africa-2002	37
7.4	PetroSA's Procurement Policy	39
7.5	Background to the advance payment	40
7.6	The request for an advance	40
7.7	Who authorized the payment?	41
7.8	The reasons advanced for granting the request for an advance payment	41
7.9	What went wrong?	42
7.10	The decision to pay the outstanding amount	43
7.11	The legal action taken against Imvume	43
8.	THE ALLEGED INVOLVEMENT OF DEPUTY PRESIDENT MLAMBO-NGCUKA	45
8.1	The allegations	45



8.2	The response of the Deputy President	46
8.2.1	In regard to the advance payment made to Imvume	46
8.2.2	In respect of the payment made by Imvume to a company that belongs to her brother	47
8.2.3	Relating to the appointment of Mr Mkhize	47
9.	THE ALLEGED IMPROPER INVOLVEMENT OF SENIOR OFFICIALS OF THE DEPARTMENT OF MINERALS AND ENERGY IN THE ADVANCEMENT OF BUSINESS RELATIONS BETWEEN IMVUME AND THE IRAQI GOVERNMENT	49
9.1	The allegation	49
9.2	South Africa's foreign policy towards Iraq	50
9.3	The response by the Director General of Minerals and Energy	51
10.	THE ALLEGED IMPROPRIETIES RELATING TO A CONTRACT AWARDED TO IMVUME BY THE SFF IN MARCH 2002	56
10.1	The allegations	56
10.2	The response by the Central Energy Fund	57
10.3	Media statements by Dr Mokate in connection with the contract awarded to Imvume	61



11. OBSERVATIONS AND FINDINGS	62
11.1 The allegations relating to the affairs of Imvume, the ANC and other private entities	62
11.2 The credibility of the allegations, suggestions and speculation by the <i>Mail and Guardian</i>	63
11.3 The advance payment made by PetroSA to Imvume and the subsequent payment made to Glencore	64
11.4 The alleged involvement of Deputy President Mlambo-Ngcuka	68
11.5 The alleged 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	69
11.6 The alleged improprieties relating to a contract awarded to Imvume by the SFF in March 2002	70
12. KEY FINDINGS	71
13. RECOMMENDATIONS	73



Executive summary

The Office of the Public Protector investigated a complaint by the Freedom Front Plus in connection with an advance payment of R15 million that was made by a public entity, PetroSA, to a private company, Imvume Management (Imvume) in December 2003. The advance payment related to a contract for the procurement of oil condensate.

The complaint was based on allegations published by the *Mail and Guardian* on 20 May 2005. The *Mail and Guardian* subsequently published a series of articles relating to the matter, which was dubbed "oilgate".

It was alleged that:

- A large portion of the advance payment by PetroSA was diverted by Imvume to the African National Congress (ANC), instead of the supplier of the oil condensate (Glencore);
- Deputy President Mlambo-Ngcuka (then the Minister of Minerals and Energy) improperly influenced PetroSA's decision to make the advance payment to Imvume;
- Imvume made payments to a company that belongs to the brother of the Deputy President and a construction company that was renovating the private residence of the Minister of Social Development, shortly after the advance was paid by PetroSA;
- PetroSA subsequently had to pay the supplier of the oil condensate directly, which resulted in a further loss of R15 million;



- PetroSA took legal action against Imvume, but most of the public money misappropriated remained outstanding;
- Imvume was a front for the ANC;
- Senior officials of the Department of Minerals and Energy and the Strategic Fuel Fund (SFF) accompanied Mr Majali of Imvume to Iraq to discuss the procurement of crude oil in September 2001. The intention was that the ANC should benefit financially from these discussions; and
- Imvume subsequently benefited from a contract improperly awarded to it by the SFF in March 2002, for the procurement of crude oil from Iraq.

Shortly after the publication of consecutive editions of the *Mail and Guardian* expanding on the matter, Mr T Leon of the Democratic Alliance lodged complaints with the Public Protector based only on what was stated in the said articles. Mr Spies of the Freedom Front Plus also requested that the investigation of his initial complaint should include the subsequent allegations published.

The Public Protector found that:

- ◆ The mandate of the Public Protector is by law restricted to the investigation of matters relating to government bodies, public entities, state affairs and dishonesty in respect of public money. Consequently, the allegations pertaining to the relationship between Imvume and the ANC, payments made by Imvume to the ANC and private entities and the involvement of the ANC in Mr Majali's business negotiations with the Government of Iraq, could not be investigated;



- ◆ Much of what has been published by the *Mail and Guardian* was factually incorrect, based on incomplete information and documentation and comprised unsubstantiated suggestions and unjustified speculation;
- ◆ 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 and policy prescripts that applied to PetroSA;
- ◆ 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;
- ◆ Imvume's failure to pay Glencore (the supplier) the full amount due to it in respect of the cargo of oil condensate concerned could not reasonably have been foreseen or expected by PetroSA;
- ◆ 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;
- ◆ 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;
- ◆ 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;



- ◆ 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 and that a crude oil supply contract was improperly awarded to Imvume by the SFF in March 2002, are without merit.

It was recommended that:

- ❖ The Board of PetroSA:

In consultation with the CEO and PetroSA's legal advisors, take urgent steps to ensure that the outstanding amount due to PetroSA by Imvume, referred to in this report, is recovered without delay and in compliance with the provisions of sections 50(1)(d) and 51(1)(b)(i) of the Public Finance Management Act, 1999; and

Regularly report to the Minister of Minerals and Energy on the progress made in regard to the recovery of the outstanding amount; and

- ❖ The Minister of Minerals and Energy report to the Cabinet and to Parliament on the steps taken and the progress made to recover the outstanding amount due by Imvume.



REPORT ON AN INVESTIGATION BY THE PUBLIC PROTECTOR INTO AN ALLEGATION OF MISAPPROPRIATION OF PUBLIC FUNDS BY THE PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA, TRADING AS PetroSA AND MATTERS ALLEGEDLY RELATED THERETO

1. INTRODUCTION

This report is submitted to Parliament, the Board of Directors of the Central Energy Fund (Pty) Ltd and the Board of Directors of PetroSA, by virtue of the provisions of section 182(1)(b) of the Constitution, 1996 and section 8(2)(b) of the Public Protector Act, 1994. It relates to an investigation by the Public Protector into an allegation of misappropriation of public funds by PetroSA and matters allegedly related thereto.

2. BACKGROUND

2.1 On 20 May 2005 the *Mail and Guardian* newspaper reported that R11 million of public money had been diverted to the African National Congress (ANC) shortly before the 2004 elections. It was alleged that:

2.1.1 PetroSA irregularly paid R15 million to a company called “Imvume Investments” as an advance in connection with the procurement of oil condensate;

2.1.2 A large portion of these funds was diverted to the ANC instead of the supplier of the condensate;

2.1.3 PetroSA had to cover the shortfall by repeating the payment of R15 million and



- 2.1.4 PetroSA took legal action against Imvume Investments, but most of the money misappropriated remained outstanding.
- 2.2 The media reported on 26 May 2005 that the Johannesburg High Court had granted an interdict in favour of Imvume Management against the *Mail and Guardian* prohibiting it from publishing a follow-up article on the story carried in the newspaper the previous Friday. Judge Soni's ruling was reportedly based on the refusal by the *Mail and Guardian* to reveal its source relating to allegations in connection with the involvement of relatives of Ministers and his view that the public interest in the said article did not outweigh the violation of Imvume's right to privacy.
- 2.3 The Freedom Front Plus raised the said allegations made by the *Mail and Guardian* in the National Assembly on 3 June 2005 and called for an urgent debate on the matter. On the same day, it was reported in the media that a Parliamentary spokesperson indicated that the Parliamentary Portfolio Committee on Minerals and Energy would "call PetroSA to appear before it on this matter in September (2005)."
- 2.4 A Member of Parliament, Mr Willie Spies of the Freedom Front Plus, lodged a complaint in connection with the said allegations with the Public Protector on 6 June 2005. His complaint is referred to and discussed in more detail below.
- 2.5 The *Mail and Guardian* reported on 10 June 2005 that the court order had been lifted as the information that it had been prohibited to publish had been disclosed in Parliament. The controversial article was also published. Apart from repeating the allegations made previously, it was also alleged that:



- 2.5.1 Imvume Management received the advance payment made by PetroSA on 19 December 2003. On the same day, Mr Sandi Majali of Imvume signed company cheques:
- 2.5.1.1 Of R50 000 in favour of Uluntu Investments, a company owned by Mr B Mlambo, the brother of Deputy President Mlambo-Ngcuka (who was then the Minister of Minerals and Energy); and
- 2.5.1.2 Of R65 000 in favour of Hartkon Construction, a construction company that renovated the private residence of the Minister of Social Development, Dr Zola Skweyiya;
- 2.5.2 The Ministry of Minerals and Energy “is responsible for PetroSA, which awarded Imvume the condensate contract in October 2002 and made the controversial payment on that contract in December 2003”;
- 2.5.3 A spokesperson for the Department of Minerals and Energy responded to the allegations and indicated that Imvume’s payment to Mr Mlambo’s company related to a joint business venture in the tourism industry. This was confirmed by the attorneys representing Mr Majali and Imvume;
- 2.5.4 Dr Skweyiya 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-Skweyiya 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;



2.6 The so-called “Oilgate” media saga continued on 15 July 2005 when the *Mail and Guardian* published several articles alleging that Imvume was a front for the ANC. In the main, this allegation was based on:

2.6.1 An alleged project to raise millions of Rands for the ANC by means of “obtaining lucrative oil allocations from Saddam Hussein’s regime under the United Nations Oil for Food programme” that was devised by Mr Majali of Imvume and senior officials of the ANC; and

2.6.2 The alleged involvement of senior officials of the Department of Minerals and Energy and the Strategic Fuel Fund in the said project. In this regard it was reported that:

“When Majali traveled to Iraq for talks with Hussein’s government in 2001 (on 11 September 2001 to be precise), he was accompanied by a top level delegation, including the Director General of Minerals and Energy, Sandile Nogxina, and Mlambo-Ngcuka’s chief of staff, Ayanda Nkuhlu. The Minister personally authorized their trip. Also with them was Riaz Jawoodeen, a director of the SFF, the state body responsible for maintaining South Africa’s strategic fuel stocks. The SFF was also answerable to Mlambo-Ngcuka.

The deal proposed to the Iraqis was startling in its simplicity. The ANC-and, by implication, its officials in government-would support Hussein’s beleaguered regime in exchange for the allocation of oil.”

and

“Imvume’s first deal was a R1-billion contract to restock the state oil reserves held by the SFF with Iraqi crude. Imvume won a controversial



- tender in which Jawoodeen, the SFF director, played a central role. But the oil allocations were not on the scale originally envisaged and proved to be far less profitable.”
- 2.7 On 18 July 2005, Mr T Leon MP lodged a complaint with the Public Protector based on the allegations published by the *Mail and Guardian* on 15 July 2005.
- 2.8 In its 22 July 2005 edition, the *Mail and Guardian* expanded on its allegations in connection with the “controversial contract” for the supply of Iraqi Basrah Light crude oil that was awarded to Imvume by the SFF in March 2002. This time the article stated that the tender process was “riddled with irregularities- all of which favoured Imvume”. Mr Leon lodged a further complaint with the Public Protector based on these allegations.
- 2.9 The Central Energy Fund reportedly responded on behalf of the Strategic Fuel Fund in connection with the alleged controversial tender and stated that:
- “We are convinced that the deal was good for the SFF and good for the country because it saved significant amounts of money. As Mr Jawoodeen is no longer with this company, we are unable to speak on his behalf.”
- 2.10 The allegations published by the *Mail and Guardian* have been the subject of extensive media attention and further speculation.



3. THE COMPLAINT BY THE FREEDOM FRONT PLUS

In his letter addressed to the Public Protector on 6 June 2005, Mr Spies formulated his party's complaint as follows:

"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 Invume Investments 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 Invume Investments.

We request you to investigate whether the alleged unindebted and unsecured payment of R15 million made by PetroSA to Invume 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 Invume Investments' non-performance in terms of its obligations towards Glencore International, we submit that *prime facie*, Invume 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 or 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.”

4. THE COMPLAINT BY MR T LEON OF THE DEMOCRATIC ALLIANCE

4.1 Mr Leon’s letter of complaint was entirely based on the allegations published by the *Mail and Guardian* on 15 July 2005¹. He requested that the investigation by the Office of the Public Protector be broadened to determine “ the extent to which the state was involved in funding and supporting Imvume’s Iraqi oil ventures and travel related thereto”.

4.2 He also stated that:

“It appears that Imvume was set up with the deliberate intention of siphoning off public funds for the purpose of enriching the ANC.”

and

¹ See paragraph 2.6 above



“It is clear that the principles set out in the Public Finance Management Act are jeopardized by the abuse of BEE by companies like Imvume.”

5. THE JURISDICTION, POWERS AND FUNCTIONS OF THE PUBLIC PROTECTOR IN RELATION TO THE COMPLAINTS

5.1 The legislative framework

5.1.1 The provisions of Chapter 9 of the Constitution, 1996

5.1.1.1 The Public Protector is one of a cluster of constitutional institutions established by Chapter 9 of the Constitution, 1996, to strengthen the constitutional democracy of the Republic of South Africa.

5.1.1.2 These institutions are independent, subject only to the Constitution and the law and must be impartial and exercise their powers and perform their functions without fear, favour or prejudice².

5.1.1.3 In terms of section 182(1) of the Constitution, 1996, the Public Protector has the power 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.

5.1.1.4 On conclusion of an investigation, the Public Protector has to report on the conduct investigated and take the appropriate remedial action³.

² See section 181(2)

³ See section 182(1)(b) and (c)



5.1.1.5 The additional powers and functions of the Public Protector are regulated by national legislation, including the Public Protector Act, 1994⁴.

5.1.2 The Public Protector Act, 1994

5.1.2.1 Section 6(4)(a) of the Act provides that the Public Protector is competent to investigate any alleged maladministration in connection with the affairs of government at any level and any alleged abuse of power or other improper conduct by a person performing a public function;

5.1.2.2 The Public Protector is also competent to investigate any alleged improper or dishonest act or omission or offences referred to in Part 1 to 4 or section 17, 20 or 21 (in so far as it relates to the said offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money⁵; and

5.1.2.3 Any alleged improper or unlawful enrichment or receipt of any advantage or promise of such enrichment or advantage by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function⁶.

5.1.2.4 In terms of section 6(5), the Public Protector also has the power to investigate maladministration, unlawful enrichment or the receipt of an improper advantage and other improper conduct relating to the affairs

⁴ See section 182(2)

⁵ Section 6(4)(a)(iii)

⁶ Section 6(4)(a)(iv)



of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999.

5.1.2.5 Section 6(9) provides that:

“Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned.” (emphasis added)

5.1.2.6 The format and procedure to be followed in conducting any investigation is determined by the Public Protector with due regard to the circumstances of each case⁷.

5.1.2.7 In terms of section 7(1)(a) the Public Protector has the power:

“on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6(4) or (5) of this Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.” (emphasis added)

5.1.2.8 Section 8(2)(b) provides that:

⁷ Section 7(1)(b)(i)



"The Public Protector shall, at any time, submit a report to the National Assembly on the findings of a particular investigation if-

- (i) he or she deems it necessary;
- (ii) he or she deems it in the public interest."

5.1.3 Conclusion

From the said provisions of the legislation that established, empowered and regulated the jurisdiction of the Public Protector, it is clear that:

5.1.3.2 The Public Protector (as an institution) does not have inherent jurisdiction in respect of the performance of its powers and functions and can only investigate and consider the conduct of government institutions and public entities that fall within the ambit of its jurisdiction, as provided by its empowering legislation;

5.1.3.3 The affairs of private individuals and entities fall outside of the Public Protector's jurisdiction, except if the conduct complained of or under suspicion relate to:

(a) state affairs;

(b) improper or unlawful enrichment or the receipt or promise of any improper advantage by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or that of a public entity; or



(c) an improper or dishonest act or omission or corruption, in respect of public money;

- 5.1.3.3 A preliminary investigation into any matter that came to the attention of the Public Protector and that falls within his/her jurisdiction can be conducted to determine the merits of the complaint and whether or not it should be investigated further;
- 5.1.3.4 Only in special circumstances can the Public Protector investigate a complaint that is reported more than 2 years after the incident complained of occurred; and
- 5.1.3.5 It is in the public interest that a special report on the investigation of this matter be submitted to Parliament.

5.2 The jurisdiction of the Public Protector in respect of the conduct and affairs of PetroSA

- 5.2.1 PetroSA was formed in July 2000 out of a merger of the business of Mossgas and Soekor as well as parts of business undertaken by the Strategic Fuel Fund, in order to effectively explore, develop, manufacture and trade the crude oil and gaseous hydrocarbon resources of South Africa.
- 5.2.2 It is involved in the exploration for oil and gas in selected basins around the world, especially in Africa. Approximately 8% of South Africa's liquid fuel requirements in the form of, *inter alia*, petrol, diesel, paraffin, light and heavy alcohols, liquid oxygen and nitrogen, is produced by PetroSA. Different companies under their own brand names distribute these



- products in South Africa. Alcohol and small quantities of transportation fuels are exported worldwide.
- 5.2.3 PetroSA is a wholly owned subsidiary of the Central Energy Fund (Pty) Ltd (the Central Energy Fund or CEF).
- 5.2.4 The Central Energy Fund is referred to in Schedule 2 of the Public Finance Management Act, 1999, as a 'Major Public Entity'. It is also provided that any subsidiary or entity under the ownership or control of a Major Public Entity, forms part of Schedule 2.
- 5.2.5 The Public Protector therefore has jurisdiction to investigate an allegation of impropriety in connection with the affairs and conduct of PetroSA.⁸

5.3 The jurisdiction of the Public Protector in respect of the conduct and affairs of Imvume Management

- 5.3.1 The complaint by the Freedom Front Plus and several media reports referred to the company involved with PetroSA as "Imvume Investments". From the investigation it is clear that the company concerned is Imvume Management (Imvume), a private company, registered in terms of the company laws of the Republic of South Africa.
- 5.3.2 The State does not own the majority or controlling shares in Imvume and it is not listed as a public entity in terms of the Public Finance Management Act, 1999⁹.

⁸ See paragraph 5.1.2.3 above

⁹ See paragraph 5.1.2.3. above



5.3.3 Being a private entity, Imvume does not perform a public function¹⁰.

5.3.4 It therefore follows that the affairs and conduct of Imvume do not resort under the jurisdiction of the Public Protector to investigate and consider.

5.4 The jurisdiction of the Public Protector in respect of the conduct and affairs of the ANC

5.4.1 The distinction between the ruling political party (as an entity) and government (as a body) is a fundamental principle of constitutional law and democracy. Governments at the different levels in South Africa do not only consist of members of the ANC. The fact that the ANC holds the majority of the seats in these governments does not change the position.

5.4.2 The question as to whether or not a political party should be regarded as a public or private body was recently raised in the Cape of Good Hope Provincial Division of the High Court in the case of *Institute for Democracy in Southern Africa v African National Congress and Others*¹¹. The Court had to decide, *inter alia*, whether political parties could be regarded as public or private bodies for the purposes of the Promotion of Access to Information Act, 2000.

5.4.3 Section 1 of the Act defines a public body as:

“(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government or;

¹⁰ See paragraph 5.1.2.2 above

¹¹ Case No 9828/03



- (b) any other functionary or institution when-
 - (ii) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (iii) exercising a public power or performing a public function in terms of any legislation.”

5.4.4 The Court found that a political party could not be regarded as a public body as it does not conform to the said definition and that political parties are not obliged by law to disclose the records of donations made to them.

5.4.5 The meaning ascribed to “a person performing a public function” in the context of the Public Protector Act, 1994 is clearly similar to the definition of a public body in section 1 of the Promotion of Access to Information Act, 2000¹². Consequently, the said judgment confirmed that the Public Protector does not have jurisdiction in respect of the conduct and affairs of political parties as they are regarded as private entities.

5.5 The jurisdiction of the Public Protector in regard to the conduct complained of by the Freedom Front Plus and the Democratic Alliance and alleged and reported on by the *Mail and Guardian*

5.5.1 The advance payment made by PetroSA to Imvume Management and its subsequent payment to Glencore International

5.5.1.1 It is alleged that PetroSA made an advance payment of R15 million to Imvume Management in December 2003 for the procurement of oil

¹² See paragraph 5.1.2.2 above



condensate. Invume Management failed to comply with its agreement with the supplier, Glencore International (Glencore). PetroSA subsequently made a direct payment of R15 million to Glencore.

5.5.1.2 According to the allegations and the complaint of the Freedom Front Plus, the advance payment was intended for the ANC and PetroSA used Invume as a conduit to transfer the money.

5.5.1.3 It is alleged that PetroSA's conduct was irregular and constituted maladministration and misappropriation of public funds.

5.5.1.4 As the affairs and conduct of PetroSA fall under the jurisdiction of the Public Protector¹³ and the conduct complained of is contemplated by the provisions of section 6(5) of the Public Protector Act, 1994¹⁴, the Public Protector has the power to investigate these allegations.

5.5.2 The payment by Invume of R11 million to the ANC

5.5.2.1 It is alleged that Invume transferred R11 million of the money advanced to it by PetroSA, to the ANC on 23 December 2003.

5.5.2.2 As indicated above,¹⁵ the Public Protector does not have jurisdiction in respect of the affairs and conduct of the ANC and Invume, except if the conduct complained of:

(a) relates to "state affairs"¹⁶; or

¹³ See paragraph 5.2.5 above

¹⁴ See paragraph 5.1.2.3 above

¹⁵ See paragraphs 5.1.3.2

¹⁶ See section 182(1)(a) of the Constitution, 1996



- (b) constitutes improper or unlawful enrichment or the receipt or promise of any improper advantage by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or that of a public entity; or
- (c) could be regarded as an alleged improper or dishonest act or omission with respect to public money¹⁷; or
- (d) could be regarded as an alleged offence referred to in Part 1 to 4 or section 17, 20 or 21 of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, with respect to public money.¹⁸.

5.5.2.3 The ANC and Imvume are not public entities, do not perform public functions and are not part of any level of government. The State has no shareholding in Imvume. The alleged payment was clearly made by one private entity to another and could therefore not have had any bearing on “state affairs”. It also had no relation to an act or omission in the public administration or in respect of a public entity.

5.5.2.4 In regard to paragraph 5.5.2.2 (c) and (d) above, it firstly needs to be established whether the alleged payment was made with “public money”. When does public money lose its character and become ‘private money’?

5.5.2.5 The Constitutional Court in the case of *South African Association of Personal Injury Lawyers v Heath and Others*, carefully considered this

¹⁷ See section 6(4)(a)(iii) of the Public Protector Act, 1994

¹⁸ See section 6(4)(a)(iii) of the Public Protector Act, 1994



question¹⁹. On page 908 (from paragraph 53) of the judgment, former Chief Justice Chaskalson stated the following:

“The respondents rely on the definition of “public money’ in the Act (the Special Investigating Units and Special Tribunals Act, 1996), which reads:

‘(A)ny money withdrawn from the National Revenue Fund or a Provincial Revenue Fund, as contemplated in the Constitution, and any money acquired, controlled or paid out, by a State Institution.’

They contend that money paid by the RAF to an attorney in settlement of a client’s claim is money ‘paid out’ by a State institution, and that it remains public money in the hands of the attorney. If that attorney fails to account properly to the client for the money received on the client’s behalf, that, so it is contended, constitutes an ‘unlawful appropriation’ of ‘public money’ within the meaning of s 2(2)(c).

I am prepared to accept for the purposes of this judgment that s 2(2)(c) may linguistically be capable of such an interpretation. In my view, however, the section should not be given such a wide meaning.

.....

When the RAF pays compensation to an attorney as agent for the claimant, the RAF’s obligations to the claimant are thereby fully discharged. In the hands of the attorney it is money lawfully paid and received in which the State institution no longer has a legal interest

¹⁹ 2001(1) SA 883 (CC)



and which the attorney is then obliged to pay to the client in accordance with the contract between them. If the attorney unlawfully appropriates that money, it would be unlawful appropriation of the client's money and not an unlawful appropriation of money of a State institution."

- 5.5.2.6 From the judgment of the Constitutional Court it is clear that once public money is paid to and received by a private entity in terms of an agreement or obligation, the money loses its character and becomes 'private money'.
- 5.5.2.7 In the matter under consideration, the advance in question was paid to Imvume on the basis of its agreement with PetroSA. Imvume was not acting as an agent for PetroSA,²⁰ but had a separate supply contract with Glencore. Once Imvume received the payment from PetroSA, it owned the money. Whether the payment due to Glencore was to be made from this money or other funds of the company is immaterial. Unlawful appropriation of the payment made by Imvume could only have affected Glencore and not PetroSA, who then only had an interest in the delivery of the oil condensate that it had paid for.
- 5.5.2.8 The payment Imvume allegedly made to the ANC therefore did not involve public money. The remainder of the requirements referred to in paragraph 5.5.2.2 (c) and (d) above, consequently warrants no further consideration.
- 5.5.2.9 The Public Protector therefore does not have jurisdiction to investigate the alleged payment by Imvume made to the ANC.

²⁰ See paragraph 7.5 below



5.5.3 The payment by Imvume of R50 000 to Uluntu Investments

As both Imvume and Uluntu Investments are private bodies and as the alleged payment did not relate to state affairs or public money, the Public Protector cannot investigate this allegation, for the same reasons advanced in paragraph 5.5.2 above.

5.5.4 The payment by Imvume of R65 000 to Hartkon Construction

It is alleged that this payment related to renovations made to the private residence of the Minister of Social Development. As both Imvume and Hartkon Construction are private bodies and as the alleged payment did not relate to state affairs or public money, the Public Protector cannot investigate this allegation, for the same reasons advanced in paragraph 5.5.2 above.

5.5.5 The improper involvement of Deputy President Mlambo-Ngcuka in PetroSA's advance payment to Imvume

As any Minister's (as Ms Mlambo-Ngcuka was at all relevant times) official conduct relate to state affairs and government, the suggested improper conduct of the Deputy President falls within the ambit of the jurisdiction of the Public Protector.



5.5.6 The improper involvement of officials of the Department of Minerals and Energy in the advancement of business relations between Imvume and the Iraqi Government and the awarding of a crude oil supply contract to Imvume in March 2002

5.5.6.1 The alleged joint visit to the Republic of Iraq (Iraq) by senior officials of the Department of Minerals and Energy, the Strategic Fuel Fund and Mr Majali of Imvume, and the awarding of the said contract to Imvume took place more than 2 years ago. However, the allegations of the *Mail and Guardian* suggested a link between these events and the advance payment made by PetroSA to Imvume in December 2003.

5.5.6.2 The conduct of the officials allegedly involved and the affairs of the Department of Minerals and Energy and the SFF resort under the jurisdiction of the Public Protector.

5.5.7 The suspicions raised of an improper relationship between Imvume and Dr Skweyiya, the Minister of Social Development

5.5.7.1 The complaint of the Freedom Front Plus in this regard was clearly founded only on suspicions raised by the *Mail and Guardian*, which were apparently based on the following:

(a) A payment of R 65 000 by Imvume to Hartkon Construction, (which was renovating the Minister's private residence) allegedly made the day after the controversial advance payment by PetroSA was received;

(b) Confirmation by the Minister's wife of such a payment, explained by her as a loan which has already been repaid;



- (c) Confirmation by the attorneys acting on behalf of Imvume and Mr Majali of the loan granted to Ms Mazibuko-Skwiya;
- (d) Documentation allegedly indicating that Mr Majali was an agent for Cash Paymaster Services (the company that distributes social grants on behalf of some provincial governments) in 2003; and
- (e) Documentation allegedly indicating that Mr Majali “was working on grandiose plans to build a financial services group under the Permit banner. Imvume, Net 1 UEPS and government bodies would have been among the stakeholders. One of Permit’s main functions would have been grants distribution. Even though grants distribution was a provincial function, Majali would still have had much to gain from securing influence with Skweyiya as national minister. At the time, Skweyiya was drawing up policies that led to the creation of the Social Security Agency, which is taking over the function from the provinces.”

5.5.7.2 The said suspicions cast in regard to Dr Swkeyiya appear to suggest that Imvume paid an amount of R65 000 to the construction company renovating his house in order to ensure that the Minister would in future use his influence to secure business for Imvume, or one of its sister companies, from the Department of Social Welfare or the Social Security Agency. It therefore clearly points to a corrupt act as contemplated by the provisions of the Corruption Act, 1992 or the Prevention and Combating of Corrupt Activities Act, 2004.



- 5.5.7.3 As indicated above, the affairs and conduct of private entities, such as Imvume and Hartkon fall outside of the ambit of the jurisdiction of the Public Protector, except if the conduct complained of or under suspicion relate to state affairs, improper enrichment or acts of corruption in respect of public money²¹.
- 5.5.7.4 The payment in question clearly did not relate to state affairs as it was made from one private entity to another and involved renovation of a private residence.
- 5.5.7.5 Money paid from Imvume's funds, irrespective of its origin, constitute private and not public money²². For as far as the suggested impropriety could constitute a corrupt relationship between the Minister and Imvume, it did not relate to public money. The suggestion of corruption therefore also falls outside of the jurisdiction of the Public Protector to investigate.
- 5.5.7.6 There is 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 respect of future events that might or might not occur, which obviously cannot be investigated.
- 5.5.7.7 Section 6(4)(c)(i) of the Public Protector Act, 1994 provides that the Public Protector shall be competent, at any time, prior to, during or after an investigation, if he or she is of the opinion that the facts disclose the commission an offence by any person, bring the matter to the relevant authority charged with prosecutions.

²¹ See paragraph 5.5.2.2

²² See paragraph 5.5.2.5



5.5.7.8 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. No substantive reason could therefore be found to refer this matter to the National Prosecuting Authority at the time of the investigation referred to in this report.

5.6 Conclusion

5.6.1 For the reasons advanced above, the Public Protector has jurisdiction to investigate the alleged improper conduct by PetroSA and the alleged improper involvement of Deputy President Mlambo-Ngcuka in the advance payment that was made to Imvume.

5.6.2 The alleged involvement of senior officials of the Department of Minerals and Energy in the advancement of business relations between Imvume and the Iraqi Government and the alleged improprieties relating to the awarding in March 2002 by the SFF of a crude oil supply contract to Imvume, fall within jurisdiction of the Public Protector. These events occurred more than 2 years ago and the allegations were published when the investigation of the complaint referred to in paragraph 3 above, was already at an advance stage. It was however, regarded in the public interest to make enquiries into these allegations to determine the merits thereof and whether or not it warranted further consideration and investigation.²³

²³ See paragraphs 5.1.2.4 and 5.1.2.6 above



6. THE INVESTIGATION

The investigation was conducted in terms of section 7 of the Public Protector Act, 1994 and comprised:

- 6.1 Consideration and evaluation of the complaints and related media reports;
- 6.2 Correspondence with Deputy President Mlambo-Ngcuka;
- 6.3 Correspondence with the Chief Executive Officer of PetroSA;
- 6.4 Studying the papers filed in the High Court action between Imvume and PetroSA;
- 6.5 Correspondence with the Director General of Minerals and Energy;
- 6.6 Correspondence with the Chief Executive Officer of the Central Energy Fund;
- 6.7 Evaluation of the information submitted by the Deputy President, the Chief Executive Officers of PetroSA and the Central Energy Fund and the Director General of Minerals and Energy;
- 6.8 Interpretation and application of the legislation regulating the jurisdiction, powers and functions of the Public Protector;
- 6.9 Studying and interpreting the provisions of the Constitution, 1996, and the Public Finance Management Act, 1999 relevant to procurement and financial management by public entities;



- 6.10 Studying the contents of the King Report on Corporate Governance –2002 relevant to the matter under consideration;
- 6.11 Evaluation and interpretation of the Procurement Policy of PetroSA; and
- 6.12 Studying publications in connection with the South African Government's foreign policy towards Iraq.

7. THE ADVANCE PAYMENT MADE BY PetroSA TO IMVUME AND THE SUBSEQUENT PAYMENT MADE TO GLENCORE

7.1 Section 217 of the Constitution, 1996

This section provides that:

- “(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons disadvantaged by unfair discrimination.”



7.2 The provisions of the Public Finance Management Act, 1999

7.2.1 PetroSA is listed as a major public entity in terms of Schedule 2 and is therefore subject to the provisions of Chapter 6 of the Act²⁴.

7.2.2 In terms of section 49, every public entity must have an authority, which must be accountable for the purposes of this Act. If the public entity has a board or other controlling body, that board or body is the accounting authority²⁵.

7.2.3 The accounting authority for a public entity may, in writing, delegate any of its powers in terms of the Act, to an official, subject to any limitation or condition it may wish to impose²⁶. However, section 56(2)(c) provides that a delegation does not divest the accounting authority of the responsibility concerning the exercise of the delegated power.

7.2.4 Section 50 deals with the fiduciary duties of accounting authorities and provides, *inter alia*, as follows:

“(1) The accounting authority for a public entity must-

(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;

²⁴ See section 46 of the Act

²⁵ Section 49(2)(a)

²⁶ Section 56(1)



(c) ...

(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.

7.2.5 The accounting authority for a public entity must take effective steps to collect all revenue due to it.²⁷

7.2.6 In terms of section 51, an accounting authority for a public entity must ensure and maintain, *inter alia*, an appropriate procurement and provisioning system that is fair, equitable, transparent, competitive and cost-effective. It must also take effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure and expenditure not complying with the operational policies of the public entity.

7.2.7 The executive authority of a public entity is the Cabinet member who is accountable to Parliament for it or in whose portfolio it falls²⁸.

7.3 The King Report on Corporate Governance for South Africa-2002

7.3.1 The King Committee on Corporate Governance was formed in 1992, under the auspices of the Institute of Directors. Its mandate was to consider corporate governance in the South African context of profound social and political transformation at the time.

²⁷ Section 51(1)(b)(ii)

²⁸ See definition of "executive authority" in section 1



7.3.2 The findings and recommendations of the King Committee are encapsulated in the *King Report on Corporate Governance, 2002* (the King Report). Its stated purpose was to promote the highest standards of corporate governance in South Africa.

7.3.3 Chapter 2 of Section 4 of the King Report focused on stakeholder relations. It stated emphatically that:

"The essential principle advanced by the Commonwealth Association for Corporate Governance that '*directors and boards owe their duty to the company and thereby are accountable to shareowners, as owners of the corporation's capital*' remains paramount. However, it must be acknowledged that global awareness is growing that any company's long-term commercial success is inextricably linked to the sustainable development of the social and economic communities within which it operates."²⁹

7.3.4 The King Report also emphasized that there is growing pressure from society on companies to acknowledge their duty as corporate citizens³⁰.

7.3.5 In respect of Black Economic Empowerment, the King Report stated³¹:

- "Over and above measures to facilitate empowerment through employment practices, companies can make a significant contribution in this regard that go beyond their employment practices, through, for example, procurement and investment policies.

²⁹ See paragraph 2 on page 103 of the Report

³⁰ Paragraph 9 on page 105 of the Report

³¹ See paragraph 8.3 on page 125 of the Report



- Black economic empowerment should be aimed at redressing the continued unequal distribution of ownership, management and control of South Africa's financial and economic resources. It will achieve this by ensuring broader participation of black people in the formal economy in order to achieve sustainable development and prosperity, both at the corporate level and in the national interest.
- At the heart of black economic empowerment should be initiatives that will advance black people economically on a large scale (including job creation, rural development, poverty alleviation, and access to finance for the purpose of conducting business), rather than the enrichment of a few."

7.4 PetroSA's Procurement Policy

7.4.1 On 11 March 2003, PetroSA issued a Procurement Policy (the Policy). In its Statement of Intent, the Policy, *inter alia*, stated that PetroSA is committed to promoting its role as a responsible corporate citizen in the context of Black Economic Empowerment (BEE).

7.4.2 BEE is defined in item 6.1 as "a deliberate socio-economic process or intervention strategy designed to redress the imbalances of the past and to facilitate the participation of Black people in the economy."

7.4.3 Item 7.2 of the Policy relates to support initiatives to assist BEE enterprises. The following is, *inter alia*, provided for:

7.4.3.1 Assistance with tendering;

7.4.3.2 Training;



7.4.3.3 Financial assistance; and

7.4.3.4 Any other reasonable assistance that could be provided, which does not conflict and compromise PetroSA's overall objectives.

7.5 Background to the advance payment

From the investigation it transpired that:

7.5.1 In October 2002, PetroSA entered into a procurement contract with Imvume (a BEE) for the supply of oil condensate required for its operations.

7.5.2 Imvume had a 'back-to-back agreement' with a condensate supplier, Glencore International AG (Glencore) in terms of which Glencore would source the condensate on behalf of Imvume for onward delivery to PetroSA.

7.5.3 In terms of the agreement referred to in paragraph 7.5.1 above, PetroSA purchased from Imvume 314,598,06 barrels of condensate to be delivered to Mossel Bay under a Bill of Lading dated 6 December 2003. The agreed contract price was US \$ 10 215 942, 80.

7.6 The request for an advance

7.6.1 According to PetroSA's records, Imvume requested an advance of R 15 million on the said purchase price on 18 December 2003, by means of an invoice.



7.6.2 Mr S Majali, the Executive Chairman of Imvume, explained the reason for the request as cash flow problems relating to the company's monthly commitments.

7.7 Who authorized the advance payment?

7.7.1 The investigation revealed that the advance payment requested by Imvume was authorized on 18 December 2003 by Mr S Mehlomakulu, the General Manager: Trading, Supply and Logistics, in his capacity as acting Chief Executive Officer.

7.7.2 Mr Siphon Mkhize, the Chief Executive Officer (CEO) and President of PetroSA was on leave from 15 December 2003 to 28 December 2003 and Mr Mehlomakulu acted by virtue of a written acting authority, granted to him on 12 December 2003.

7.7.3 The CEO has been granted a delegated authority, by virtue of the provisions of section 56 of the Public Finance Management Act, 1999, to approve advances in respect of budgeted projects (contracts) up to an amount of R50 million, without informing the Board.

7.8 The reasons advanced for granting the request for an advance payment

During the investigation, the CEO explained that the following considerations were taken into account in respect of the request by Imvume for an advance payment:

7.8.2 "It was in PetroSA's interest to assist our BEE supplier, Imvume, so that it can continue to supply condensate to PetroSA. When PetroSA awarded



- the contract for the supply of condensate to Imvume it was making a conscious contribution to the advancement of BEE in South Africa.”;
- 7.8.3 Imvume had an excellent track record of performance in the delivery of the product and doing so on time. At the time of the request, it had already successfully delivered 7 of the contracted 9 cargos;
- 7.8.4 The advance related to a cargo that was due within a few days. The request was made on 18 December 2003 and the cargo received on 22 December 2003;
- 7.8.5 The amount requested as an advance amounted to only 28% of the full invoice amount for the cargo concerned;
- 7.8.6 PetroSA's Procurement Policy provided for financial assistance to BEE suppliers; and
- 7.8.7 The authorization of an advance payment was within the delegated authority of the CEO.

7.9 What went wrong?

From the investigation it transpired that:

- 7.9.2 On 28 January 2004, Glencore informed PetroSA that it had not been paid in full for the cargo delivered on 22 December 2003. Imvume was in arrears in the amount of US\$ 2.8 million.
- 7.9.3 The matter was raised with Imvume, which conceded that it had failed to make the full payment.



7.9.4 Glencore subsequently warned that it intended putting a financial hold on the next cargo of condensate that was already in transit to Mossel Bay, until the outstanding amount was paid.

7.10 The decision to pay the outstanding amount

7.10.2 Glencore's threat to put a hold on the discharging of the cargo in transit put PetroSA in a predicament. It had to decide either to stand its ground against Glencore and take legal action or to pay the outstanding amount and take legal action against Imvume.

7.10.3 A delay in the delivery of condensate would have resulted in a disruption of production at PetroSA's Mossel Bay refinery at a cost of US\$ 1million per day. Over a minimum of 20 days it would have caused a loss of \$ 20 million, excluding start-up costs in the event of a shutdown.

7.10.4 Management consulted the Board and it was decided to pay the outstanding amount and claim it back from Imvume.

7.10.5 PetroSA consequently paid an amount of \$ 2.8 million plus interest thereon of \$ 40 000 to Glencore on 23 February 2004.

7.11 The legal action taken against Imvume

7.11.2 The Legal Department of PetroSA was instructed to recover the money paid to Glencore, from Imvume.

7.11.3 From an analysis of Imvume's financial position, it appeared that the company did not have significant assets to attach and that the cash and



revenue streams available would not be sufficient to cover a once-off payment of the debt. However, Imvume indicated that it would soon be awarded a contract that would enable it to pay the debt.

7.11.4 On 19 February 2004, the CEO and the Executive Chairman of Imvume entered into a written agreement of acknowledgement of debt and cession, the material terms of which included, *inter alia*, the following:

7.11.4.1 Imvume acknowledged that it was lawfully indebted to PetroSA an amount of \$ 2.8 million, plus interest;

7.11.4.2 Imvume irrevocably and unconditionally undertook that it will pay the debt within 90 days from the date of the agreement;

7.11.4.3 As security for the payment of the debt, Imvume ceded its right and title in and to all its book debts and revenue contracts, both present and future, which would endure until the debt was fully paid.

7.11.5 When Imvume failed to comply with the agreement of acknowledgement of debt within 90 days, a letter of demand was sent, followed by the issuing of summons in the Johannesburg High Court in July 2004.

7.11.6 Imvume filed a notice of intention to defend the High Court action. However, a further settlement agreement was proposed in terms of which Imvume would pay its debt in monthly or quarterly installments. Imvume delayed the finalization of the details of the settlement agreement and PetroSA insisted on immediate payment.



7.11.7 Imvume paid an amount of R1 million in August 2004 and R 333 333 in November 2004. Further payments of R1,666 665 and R3 million was made on 13 June 2005 and 30 June 2005, respectively.

7.11.8 It is expected that the total outstanding debt would be paid by January 2008, if the settlement proposal put forward by Imvume is approved by the Board of PetroSA.

7.11.9 The total outstanding amount on 12 July 2005 was R16 796 964, 54.

8. THE ALLEGED INVOLVEMENT OF DEPUTY PRESIDENT MLAMBO-NGCUKA

8.1 The allegations

8.1.1 The complaint of the Freedom Front Plus related to allegations and suggestions contained in articles published by the *Mail and Guardian*³². In the main, these allegations and suggestions pointed at the possible involvement of Ms Mlambo-Ngcuka based on the following:

8.1.1.1 The fact that Ms Mlambo-Ngcuka was the Minister of Minerals and Energy at the time when the advance payment in question was made. As the executive authority of PetroSA, she was, according to the allegations, in a position to influence PetroSA's decision;

8.1.1.2 Ms Mlambo-Ngcuka is a prominent member of the ANC, which benefited from the advance payment to Imvume; and

³² See paragraphs 2 and 3 above



8.1.1.3 Shortly after Imvume received the advance payment, it paid an amount of R 50 000 to a company that belongs to Ms Mlambo-Ngcuka's brother.

8.1.2 In a subsequent edition, published on 24 June 2005, the *Mail and Guardian* alleged that Ms Mlambo-Ngcuka interfered at PetroSA. The article stated:

"At the time of the Oilgate payments Mkhize, who had been brought in by Mlambo-Ngcuka as chairperson of the PetroSA board, was acting as chief executive following the unexpected departure of Mpumelelo Tshume. Now evidence has emerged that, in the wake of the double payment debacle, Mlambo-Ngcuka intervened decisively to secure Mkhize's permanent appointment as chief executive, overruling the PetroSA board in the process." (emphasis added)

8.2 The response of the Deputy President

During the investigation, Deputy President Mlambo-Ngcuka was given an opportunity to respond to the allegations made against her. She indicated that:

8.2.1 In regard to the advance payment made to Imvume:

8.2.1.1 Public entities, such as PetroSA, are subject to the principles of corporate governance;

8.2.1.2 PetroSA is governed by an independent Board of Directors and an executive administrative structure;



- 8.2.1.3 PetroSA would, when regarded as necessary, report to the Minister of Minerals and Energy, as its executive authority, on strategic issues. However, daily operational issues are left in the hands of the Board;
- 8.2.1.4 The advance payment in question was an operational issue and she had not been informed or consulted, either about the request for the advance or the payment thereof;
- 8.2.1.5 However, when the failure of Imvume to pay Glencore resulted in a crises for PetroSA (because of the risk involved in the shutting down of the Mossel Bay refinery), it became a strategic issue and she was briefed by the management of PetroSA; and
- 8.2.1.6 She was further informed by the management of the proposed solution that would be submitted to the Board for approval, which she supported.

8.2.2 In respect of the payment made by Imvume to a company that belongs to her brother:

The payment of R 50 000 made by Imvume to a company belonging to her brother, Mr B Mlambo, related to a tourism venture of the two companies and had nothing to do with her or PetroSA. She was not aware of the payment at the time and was only informed about it upon subsequent enquiry.

8.2.3 Relating to the appointment of Mr Mkhize:

- 8.2.3.1 The Minister of Minerals and Energy is the executive authority of PetroSA, and as the Government is the main shareholder of the



company, she had to solicit the Cabinet's approval for the appointment of the successful candidate for the post of CEO, replacing Mr Tshume;

8.2.3.2 She was briefed on the outcome of the selection process and informed that:

(a) A sub-committee of the Board of PetroSA had enlisted the services of a consultant to assist with the search for and selection of appropriate candidates;

(b) The sub-committee had short-listed and interviewed 5 candidates, including Mr Mkhize, who was the acting CEO at the time;

(c) The 3 candidates that made the final short-list that was submitted to the Board did not include Mr Mkhize;

(d) When the Board considered the final short-list, they were made aware of a minority report of some members of the said sub-committee, casting aspersions on the process to arrive at the final short-list; and

(e) The Board accepted the recommendations from the majority of the sub-committee.

8.2.3.3 The fact that the acting CEO (MR Mkhize) had the required qualifications and experience and had performed excellently as CEO as well as the said doubts cast in respect of the propriety of the selection process that excluded him from the final short-list, made her feel uncomfortable to make a recommendation to the Cabinet.



- 8.2.3.4 She decided to request the Central Energy Fund (of which PetroSA is a subsidiary) to take over the process of selecting a CEO, to re-interview the 5 candidates on the initial shortlist and to make a recommendation to her;
- 8.2.3.5 The Central Energy Fund recommended Mr Mkhize and his selection was endorsed by the Cabinet. PetroSA's Board concurred and he was appointed; and
- 8.2.3.6 There was nothing untoward in her decision to question the process and to involve the Central Energy Fund, as the only shareholder of PetroSA, on behalf of the Government.

9. THE ALLEGED IMPROPER INVOLVEMENT OF SENIOR OFFICIALS OF THE DEPARTMENT OF MINERALS AND ENERGY IN THE ADVANCEMENT OF BUSINESS RELATIONS BETWEEN IMVUME AND THE IRAQI GOVERNMENT

9.1 The allegation

According to the *Mail and Guardian*³³:

- 9.1.1 The Director General of Minerals and Energy, the "chief of staff" of the Department and Mr R Jawoodeen of SFF "accompanied" Mr Majali of Imvume to Iraq to discuss a deal in terms of which the ANC would oppose sanctions against Iraq in exchange for crude oil;

³³ See paragraph 2.6 above



9.1.2 The then Minister of Minerals and Energy (now the Deputy President) approved the trip of the officials of the Department; and

9.1.3 Imvume improperly benefited from a tender for the procurement of crude oil from Iraq that was subsequently awarded to it by the SFF.

9.2 South Africa's foreign policy towards Iraq

9.2.1 The Middle East is an important economic region as it occupies a unique geopolitical position in the tri-continental hub of Europe, Asia and Africa. It is the source of 67% of the world's petroleum reserves and commands two of the most strategically important waterways in the world. South Africa places strong emphasis on the expansion of diplomatic representation and activities in this region, where it was formerly underrepresented, particularly in the area of trade, which has grown significantly since 1994.³⁴

9.2.2 South Africa's foreign policy towards Iraq has been described as complex and controversial. Despite its geographic distance and relative commercial insignificance to South Africa, the country's high profile stance on the Iraq war underscored a number of key policy principles and challenges. Due to sanctions imposed on Iraq and its international isolation after its invasion of Kuwait in 1990, South Africa's engagement with the country has been curtailed.³⁵

9.2.3 In contrast with other Gulf States, diplomatic links between Iraq and South Africa were only established in 1997. The UN oil embargo on Iraq

³⁴ *South Africa Year Book 2004/2005*, Government Communications (GCIS) 2004, page 304

³⁵ *Harmony and discord in South African foreign policy making* by Tim Hughes- Konrad-Adenauer-Stiftung, 2004, page 177



meant that South Africa's only commercial trade with Iraq was the securing of a United Nations-endorsed oil for food quota. This was however, not achieved by direct import, but rather by means of private commercial transactions.³⁶

9.2.4 South Africa's political approach to the crises in Iraq has been strongly influenced by its chairing of the Non-Aligned Movement from 1998 to early 2003. This was a critical period for Iraq as it coincided with the departure of United Nations weapons inspectors from the country in 1998 and the final decision of the United States to invade Iraq in 2003. Moreover, South Africa assumed the Chair of the African Union in July 2002, adding further responsibility to its multilateral commitments, particularly in relation to the strengthening of Afro-Arab relations³⁷.

9.2.5 South Africa's foreign policy towards Iraq was also informed by its concern over the negative impact a war would have on Africa and NEPAD in particular. President Mbeki established a ministerial committee comprising the Ministers of Finance, Foreign Affairs, Trade and Industry and Minerals and Energy, to address the matter³⁸.

9.3 The response by the Director General of Minerals and Energy

During the investigation, the Director General of the Department of Minerals and Energy, Adv S Nogxina, was provided with an opportunity to respond to the allegations referred to in this paragraph. From his reply it appeared that:

³⁶ Hughes, *supra*, 177

³⁷ Hughes, *supra* 177

³⁸ Hughes, *supra* 179



9.3.1 The Deputy Minister of Foreign Affairs, Mr A Pahad, led a delegation of South African officials to Iraq from 7 to 10 April 2001. The purpose of this visit was explained in a media statement issued by the Department of Foreign Affairs on 11 April 2001, which *inter alia* stated that:

“During the visit the Deputy Minister met with the Iraq Deputy Prime Minister, Mr Tareq Azziz, the Under-Secretary of Foreign Affairs, Mr Nizar Hamdoon, the senior Deputy Minister of Oil, Mr T H Mosa and the Commissioner of the Iraq Electricity Commission, Mr S F Mahjoob.

During the bilateral discussions with senior Government officials emphasis was placed on the need to enhance the economic relations between South Africa and Iraq. In this context detailed deliberations were held between representatives of Eskom and the Iraq Electricity Commission on the basis of the Minute of Understanding concluded in September 2000 in Pretoria. Discussions were also held on ways and means to improve the cooperation between South Africa and Iraq in the oil industry.

There was agreement that our private sectors and parastatals are not exploiting the tremendous potential that exists to develop our bilateral economic relations.

The two sides welcomed the intended humanitarian flight from South Africa to Iraq to deliver humanitarian assistance arranged by the civil society organizer under the umbrella of the Iraq Action Committee. It was agreed that the humanitarian flight to Iraq would take place in the middle of May 2001.

The other important issue discussed by the two sides was the question of the suffering and damage to Iraq caused by international sanctions



- against Iraq. They deplored the deepening humanitarian crises resulting from these sanctions. Both sides agreed on the imperative of lifting of the sanctions to halt further destructions of the fabric of Iraq society. They called for the normalization of the Middle East region and the resolution of all the problems associated with the Middle East.”
- 9.3.2 The “humanitarian flight” referred to in the said media statement included a number of BEE companies that were approved by the United Nations (UN) in terms of its ‘Iraq Oil for Food Programme’;
- 9.3.3 During the period 10 to 14 June 2001, the former Minister of Public Enterprises, Mr J Radebe, led a follow-up humanitarian flight to Iraq, accompanied by the Deputy Minister of Foreign Affairs, government officials and a business delegation. The purpose of this visit was to provide assistance to the people of Iraq in the light of the catastrophic humanitarian situation that prevailed as a result of the imposition of sanctions and to explore trade relations under the UN Iraq Oil for Food Programme;
- 9.3.4 It was against the background as set out above that he approached the Minister of Minerals and Energy to approve a visit to Iraq by himself, Mr A Nkuhlu (Director: Ministerial Services), and Mr T Mafoko (of the International Liaison section) for the period 10 to 14 September 2001. A copy of the memorandum submitted to the Minister on 7 September 2001 was provided with the Director General’s response to the said allegations. From this document it appears that the request for the approval of the visit to Iraq was motivated as follows:



"A South African delegation comprising of business organizations and parastatals had previously visited Iraq in a move to develop trade and commercial relations under the UN 's Oil for Food programme.

Bilateral relations between the two countries have not developed to satisfactory level and this visit would strive to focus on achieving economic benefit for South Africa.

Eskom has been in negotiations with the Iraq Electricity Commission over the rehabilitation and construction of a power station to the tune of US\$ 500 million over two years. A follow-up regarding the deal will be undertaken during this visit.

There is room for expansion for more trade by South Africa under the 'Oil for Food (UN) programme and to the present a total of US\$ 70 million has been calculated. It is recommended that the right political atmosphere between Iraq and South Africa be created in order to win more business.

A surcharge imposed by the Iraqi's on their oil allocation makes it difficult for South African companies, especially Black Empowerment Groups to break into the market. This is one of the issues that need to be addressed by both parties. Future trade relations in the oil sector will be discussed in order to diversify South Africa's crude oil supply."

The Minister approved the undertaking of the proposed visit, on 7 September 2001.

- 9.3.5 One of the aims of the visit to Iraq was to explore the possibility of a government-to-government oil supply deal for South Africa's strategic oil stocks;



- 9.3.6 The delegation included a representative of the SFF, the state institution charged with managing strategic oil stocks on behalf of the South African Government;
- 9.3.7 Shortly before their departure, Mr Majali contacted his office and indicated that he had learned from the Iraqi Embassy of the intended visit. Mr Majali explained that he represented a BEE and requested to join the delegation as he held the view that it would be helpful if the delegation could explain the South African Government's BEE policy to the Iraqi Government. He also indicated that he has had previous dealings with the Iraqis.
- 9.3.8 As a result of the tense situation immediately following the 11 September 2001 terrorist attack in the United States of America, the South African delegation found it difficult to meet with Iraqi officials. However, Mr Majali managed to secure a meeting for the delegation with the Deputy Minister for Oil through the so-called South African Friendship Association;
- 9.3.9 The intended meetings with the Electricity Commission to pursue the negotiations initiated by Eskom did not take place due to the aftermath of the events of 11 September 2001; and
- 9.3.10 It is normal practice for government officials undertaking official visits abroad to be accompanied by a business delegation to assist in the facilitation of trade negotiations.



10. THE ALLEGED IMPROPRIETIES RELATING TO A CONTRACT AWARDED TO INVUME BY THE SFF IN MARCH 2002

10.1 The allegations

In its 22 July edition, the *Mial and Guardian*, in the main, alleged that:

- 10.1.1 The SFF issued a tender for the supply of 4 million barrels of Iraqi Basrah Light crude oil on 5 December 2001;
- 10.1.2 Conditions of the tender included that offers could not be changed and that a US\$ 1 million performance bond had to be submitted within 10 days of acceptance of the tender.
- 10.1.3 Invume was amongst the tenderers. Its offer was the most expensive;
- 10.1.4 The Evaluation Committee requested further quotes from the bidders after the closing date for the submission of tenders;
- 10.1.5 Invume was placed third in terms of its quote and the tender was awarded to Leokoane Oil Industries on 4 January 2002, subject to a positive due diligence report and the submission of a \$1 million performance bond;
- 10.1.6 Leokoane failed to comply with the said conditions and was disqualified;
- 10.1.7 The tender was subsequently jointly awarded to World Wide Africa and Invume, but World Wide withdrew;



- 10.1.8 On 23 January 2002, Imvume's attorneys furnished the SFF with a letter from a bank in London which undertook to issue the required performance bond;
- 10.1.9 The then Chief Executive Officer of the SFF, Dr R Mokate, was not satisfied and disqualified Imvume from the tender on 28 January 2002 for not complying with the conditions;
- 10.1.10 However, Dr Mokate subsequently invited Imvume to a meeting to discuss the performance bond and the draft contract on 31 January 2002. Her change in attitude towards Imvume was allegedly the result of her having been rebuked by the Chairperson of the SFF;
- 10.1.11 It appears from "a partial draft" of a due diligence report that Imvume had certain shortcomings;
- 10.1.12 The contract between Imvume and the SFF was signed on 6 March 2003; and
- 10.1.13 Dr Mokate was later dismissed on charges of dereliction of duty and financial management involving a loss to the State of R 70-million. These charges did not relate to the matters discussed in this report.

10.2 The response by the Central Energy Fund

The Chief Executive Officer of the CEF responded, at the request of the Public Protector, to the said allegations and stated that:

- 10.2.1 "The SFF association is a subsidiary of CEF (Pty) Ltd, a statutory company established to acquire, exploit, generate, manufacture, market and



distribute any energy form and conduct research relating to the energy sector. The SFF's specific mandate is to procure and store crude oil as well as manage the strategic crude oil stocks for South Africa.

The government of South Africa took a strategic decision in 1999 to relocate its strategic stocks from Ogies to Saldanha. This decision was taken in order to:

- locate strategic crude oil stocks where the majority of the country's refineries can have easy access;
- take advantage of the location and storage of the Saldanha storage terminal with its easy access to international waterways and its size;
- ensure that the country had in storage crude oil stocks that are appropriate to its needs and are of known quality.

Based on this decision the Minister of Minerals and Energy approved the selling off of the stocks that were in Ogies due to the fact that they were a mixed crude oil and also that it had been stored for close to thirty years.

With the existing stock being sold off, the SFF embarked on a process of replacing it.

In order to facilitate the smooth running of the replacement process, a sub-committee was established and given three tasks to accomplish:



(i) To review and articulate the SFF's strategy with regard to the replacement of and management of strategic stocks. To this end three methods of purchasing strategic stock were identified:

- Open tender;
- Government to government contracts;
- Spot market purchases

Each of these had its advantages under specified market and trading conditions.

(ii) To undertake an analysis of what the appropriate crude oil types to keep as strategic stocks are. The sub-committee concluded and recommended to the Board that the Nigerian Bonny Light and the Iraqi Basrah Light were the two suitable types based on two considerations:

- The utilization by local refineries based on their specification;
- The range of products, which would be produced from the processing of such crude, relative to the country's consumption profile.

(iii) To design a comprehensive and fair tender process, including the appropriate process."

10.2.2 In July 2001 the SFF invited companies with an interest in supplying crude oil, to submit their profiles for inclusion in its database of suppliers;



- 10.2.3 On 5 December 2001 the SFF issued a tender calling for proposals for the supply of Iraqi Basrah Light crude oil, chosen for its quality and price. The tender was advertised in major newspapers and simultaneously sent to companies on the SFF's database of suppliers. The closing date for the tender was 14 December 2001 and delivery anticipated in January-February 2002;
- 10.2.4 A special sub-committee was mandated to evaluate and rate the tender proposals on predetermined criteria, which included price, BEE composition and capacity to deliver the service effectively;
- 10.2.5 Proposals were received from 21 companies, 2 of which were immediately disqualified as they offered a different product from the one designated;
- 10.2.6 Basrah Light was priced by the United Nations at an official selling price (OSP) which was calculated at the Brent price less a discount;
- 10.2.7 The Brent price submitted by all the bidders included large built-in premiums to cover market risks that were not transparent. Not all the bidders reflected the Brent price and OSP in their offers;
- 10.2.8 All the bidders had an equal opportunity to reduce their offers when they were requested by the sub-committee to clarify their offers by submitting OSP related prices;
- 10.2.9 Invume was not the SFF's first choice and it came out third in the bidding process. However, the other two parties failed to comply with the conditions of the tender and it was ultimately awarded to Invume;



10.2.10 Dr Mokate had no role to play in the said procurement strategy. Her unilateral decision to disqualify Imvume countermanded a decision of the SFF Board. She subsequently accepted that she had been wrong and publicly confirmed that the tender process was above board. Imvume complied with the conditions of the tender; and

10.2.11 The State suffered oil-trading losses of R70 million as a result of the incompetence of Dr Mokate and she was dismissed as the Chief Executive Officer of the SFF.

10.3 Media statements by Dr Mokate in connection with the contract awarded to Imvume

10.3.1 On 5 April 2002 the *Sowetan* reported that:

“She (Dr Mokate) said Imvume was chosen because it met all criteria stipulated in the tender document including competitive pricing, black empowerment credentials and the capacity to deliver, which has been enhanced by the partnership with Glencore.”

10.3.2 The *Business Day* of 5 April 2002 reported Dr Mokate as having stated:

“We (the SFF) are satisfied that Imvume has the necessary capacity to deliver the required service effectively. It is also significant to us that through this tender there will be meaningful participation of black business in one of the most strategic industries. We are therefore pleased that we have achieved one of the key objectives of our government.”

10.3.3 According to the *Citizen* of 10 April 2002, Dr Mokate stated:



"There is nothing controversial about this tender awarding process that was diligently followed by the selection committee under strict and precise guidelines. The process has been transparent and above board."

11. OBSERVATIONS AND FINDINGS

The following observations and findings have been made from the investigation:

11.1 The allegations relating to the affairs of Imvume, the ANC and other private entities

11.1.1 The mandate of the Public Protector is by law restricted to the investigation of matters relating to government bodies, public entities, state affairs and dishonesty in respect of public money. Consequently, the allegations, suggestions and suspicions published by the *Mail and Guardian* in regard to the following could not be investigated:

11.1.1.1 The relationship between Imvume and the ANC;

11.1.1.2 Payments made by Imvume to the ANC;

11.1.1.3 Payments made by Imvume to private entities; and

11.1.1.4 The involvement of the ANC in Mr Majali's business negotiations with the Government of Iraq.



11.2 The credibility of the allegations, suggestions and speculation published by the *Mail and Guardian*

11.2.1 The allegations, suggestions and speculation published by the *Mail and Guardian*, referred to in this report, were mostly based on:

11.2.1.1 Information allegedly obtained from undisclosed sources;

11.2.1.2 “Extensive documentation”, including a “partial draft” of a report, the origin of which was not disclosed;

11.2.1.3 Several statements purporting to be correct, the verification of which was claimed, for example, as:

- “A well placed (but undisclosed) SFF source charged that...”
- “It is understood that...”;
- “SFF (undisclosed) sources said...”;
- “Majali seems to get promise of oil from Iraqi’s” (emphasis added);
- “The *M&G* has been unable to confirm (undisclosed) allegations that Majali’s Iraqi oil business at that time already was aimed at funding the party.”

11.2.2 The investigation could obviously not rely on unverified information provided by undisclosed sources. From the responses by and the records of the government bodies, public entities and officials involved that was obtained and studied during the investigation, it transpired that much of



what has been stated in the said publications was factually incorrect, based on incomplete information and documentation and comprised unsubstantiated suggestions and unjustified speculation.

11.2.3 The impression created by the reports of the *Mail and Guardian* that the advance paid by Imvume to PetroSA, the visit to Iraq by officials of the Department of Minerals and Energy and the SFF and the contract awarded by the SFF to Imvume in March 2002 were covered by a veil of secrecy, was also unfounded and unjustified. The investigation found that the documents relevant to these matters and explanations by the officials involved were readily available. The *Mail and Guardian* applied for access to the relevant documents at the Department of Minerals and Energy in terms of the Promotion of Access to Information Act, 2000, which was granted in September 2004. However, only selected references were made to official documents in the said publications.

11.3 The advance payment made by PetroSA to Imvume and the subsequent payment made to Glencore

11.3.1 The contractual relationship for the procurement of oil condensate between PetroSA and Imvume was regulated by the provisions of the Constitution, 1996, the Public Finance Management Act, 1999, the accepted standards of corporate governance in South Africa and PetroSA's Procurement Policy;

11.3.2 In terms of these prescripts, PetroSA was obliged to:

11.3.2.1 Implement a procurement policy that would ensure the advancement of BEE's;



11.3.2.2 Provide Imvume with financial and other reasonable assistance, provided that it did not compromise PetroSA's overall objectives;

11.3.3 The CEO of PetroSA had been granted a delegated authority by the Board to approve an advance of up to an amount of R50 million;

11.3.4 The advance requested by Imvume on 18 December 2003 was approved and authorized by Mr S Mehlomakulu, the General Manager: Trading Supply and Logistics, who acted as CEO at the time, by virtue of a written authority;

11.3.5 The request for the advance and its authorization was documented in the records of PetroSA;

11.3.6 The approval and authorization of the advance was founded on:

11.3.6.1 An indication by the Executive Chairman of Imvume that the company was experiencing short-term cash flow problems at the time. Whether or not this had in fact been the case could not be determined during the investigation because of the limited mandate of the Public Protector alluded to above³⁹;

11.3.6.2 The Acting CEO's view that it was in PetroSA's interest to assist Imvume, both in terms of its corporate responsibilities and constitutional and social obligations in respect of the advancement of BEE's;

³⁹ See paragraph 5 above



- 11.3.6.3 Imvume's unblemished track record of delivering the product procured on time;
- 11.3.6.4 The fact that the amount requested represented less than one third of the total amount of the shipment concerned; and
- 11.3.6.5 The fact that the shipment related to the requested advance was due within a few days when the full payment by PetroSA would be made;
- 11.3.7 PetroSA had no control over the affairs and interests of and payments made by Imvume, except in regard to the procurement of condensate as per the contract between them;
- 11.3.8 The cargo of condensate in respect of which the advance payment was made, was successfully delivered on 22 December 2003;
- 11.3.9 Glencore approached PetroSA late in January 2004, indicating that Imvume had failed to pay the full amount for the shipment delivered on 22 December 2003 and that it would be withholding delivery of the next shipment already in transit;
- 11.3.10 Under the circumstances PetroSA could not rely on Imvume to immediately settle the outstanding amount;
- 11.3.11 The decision to pay the outstanding amount directly to Glencore was based on:
 - 11.3.11.1 The losses that PetroSA would incur if the shipment due was not delivered on time;



11.3.11.2 The prospects of timeous and successful legal action against Glencore;
and

11.3.11.3 PetroSA's legal obligation in terms of the Public Finance Management Act, 1999 to protect the company's assets⁴⁰.

11.3.12 An acknowledgement of debt agreement was entered into between PetroSA and Imvume in respect of the arrears amount paid to Glencore, shortly before payment was made. The agreement was necessary as:

11.3.12.1 Imvume was not in a financial position at the time to cover the said debt in one payment;

11.3.12.2 There appeared to be a prospect of an improvement in Imvume's financial position in the immediate future;

11.3.12.3 Imvume did not possess sufficient assets that would cover a debt judgment against them for the amount in question; and

11.3.12.4 PetroSA had to ensure that it obtains a cession of Imvume's rights to debts and revenue contracts as security for the outstanding amount;

11.3.13 When Imvume failed to comply with the terms of the acknowledgement of debt agreement, PetroSA took legal action against it, which is currently the subject of further settlement negotiations;

11.3.14 Imvume has paid approximately R6 million of the amount in question to PetroSA, but a substantial amount remains outstanding; and

⁴⁰ See paragraph 7.2.4 above



11.3.15 The responsibility of recovering the outstanding amount is that of the Board of PetroSA.

11.4 The alleged involvement of Deputy President Mlambo-Ngcuka

11.4.1 No evidence was submitted or could be found to substantiate the allegation that Ms Mlambo-Ngcuka was aware of:

11.4.1.1 Imvume's request for an advance payment when it was approved; and/or;

11.4.1.2 The payment of R50 000 when Imvume made it to Uluntu Investments.

11.4.2 Neither the provisions of the Constitution, 1996, nor the legislation and prescripts regulating the ethical conduct of members of the executive oblige or expect of a member to keep abreast of the business interests of members of his or her family, such as independent children, brothers, sisters, in-laws, etc. The Executive Member's Ethics Code, for example, narrowed the definition of "family member" down to "a parent, spouse, companion or dependent child". It could therefore not have been expected of the Deputy President to have been aware of her brother's business deals with Imvume, simply because of the latter's unrelated involvement with PetroSA.

11.4.3 Ms Mlambo-Ngcuka's briefing by PetroSA on the predicament it faced relating to Glencore's threat to put a hold on the delivery of the shipment of condensate due in February 2004, was justified and required, as she was the executive authority responsible for PetroSA. Representing the



main shareholder of the company, the Minister of Minerals and Energy should, in terms of the accepted principles and norms of corporate governance, be informed of all strategic matters that could have a significant impact on its operations. It was also in the public interest that she was informed.

11.4.4 The CEO, Mr Mkhize, did not approve Imvume's request for an advance. He was on leave at the time. The suggestion that Ms Mlambo-Ngcuka influenced the decision of the Board of PetroSA to appoint Mr Mkhize as CEO and that her alleged interference in this regard related to the approval of the advance payment to the advantage of the ANC, is also without substance.

11.5 The alleged 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

11.5.1 South Africa's foreign policy towards Iraq in 2001 provided for the strengthening of trade relations between the two countries, including trade in the oil industry;

11.5.2 Ministers and several high ranking officials were involved in the implementation of the foreign policy towards Iraq;

11.5.3 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;



11.5.4 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;

11.5.5 No substance could be found for the suggestion that the Iraqi Government seemed to have promised Mr Majali business in the oil trade, during the said visit.

11.6 The alleged improprieties relating to a contract awarded to Imvume by the SFF in March 2002

11.6.1 The tender issued by the SFF on 5 December 2001 for the supply of Iraqi Basrah Light crude oil complied with a decision of the South African Government, taken in 1999, in respect of the location and quality of strategic crude oil stocks.

11.6.2 The tender process and evaluation of the bids were regulated and controlled by a specially mandated sub-committee of the SFF.

11.6.3 All the bidders did not include the official selling price in their offers. The sub-committee decided to request the qualifying companies to clarify their offers in order to ensure that it could be evaluated on comparable information. They were all invited to provide quotes on OSP prices as at the time of the request. This request for clarification gave all the bidders an equal opportunity to reduce their quotes.



11.6.4 The sub-committee did not prefer Imvume as the supplier in terms of the tender. It was number 3 on the shortlist and was only awarded the contract when the successful bidder could not comply with the conditions of the tender and the company rated second withdrew.

11.6.5 The then CEO of the SFF publicly and repeatedly confirmed that the tender process was fair and above board.

11.6.6 No substance could be found for the suggestion that Imvume had an unfair advantage in respect of the tender because of Mr Majali's visit to Iraq in September 2001.

12. KEY FINDINGS

The following key findings have been made from the investigation:

12.1 In terms of its constitutional mandate, the Office of the Public Protector could not investigate all the allegations made in regard to the so-called "oilgate" affair. The investigation only considered the alleged improper conduct of the government departments, public entities and officials involved.

12.2 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 and policy prescripts that applied to PetroSA;

12.3 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;
- 12.4 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;
- 12.5 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;
- 12.6 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;
- 12.7 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; and
- 12.8 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 and that a crude oil supply contract was improperly awarded to Imvume by the SFF in March 2002, are without merit.



13. RECOMMENDATIONS

In terms of section 182(1)(c) of the Constitution, 1996 and section 6(4)(c)(ii) of the Public Protector Act, 1994, it is recommended that:

13.1 The Board of PetroSA:

13.1.1 In consultation with the CEO and PetroSA's legal advisors, take urgent steps to ensure that the outstanding amount due to PetroSA by Imvume, referred to in this report, is recovered without delay and in compliance with the provisions of sections 50(1)(d) and 51(1)(b)(i) of the Public Finance Management Act, 1999; and

13.1.2 Regularly report to the Minister of Minerals and Energy on the progress made in regard to the actions taken in compliance with paragraph 13.1.1 above; and

13.2 The Minister of Minerals and Energy report to the Cabinet and to Parliament on the steps taken and the progress made to recover the outstanding amount due by Imvume.

A handwritten signature in black ink, appearing to read 'Mushwana'.

**ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA**

29 July 2005