

COSTLY LETTERS



A report of the Public Protector on an investigation into an allegation of the improper involvement of the Deputy President of the Republic of South Africa in a business transaction with the Islamic Republic of Iran.

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PUBLIC PROTECTOR
SOUTH AFRICA

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EXECUTIVE SUMMARY

- (i) *COSTLY LETTERS* is a Report of the Public Protector on an investigation of an allegation of the improper involvement of the Deputy President of the Republic of South Africa in a business transaction with the Islamic Republic of Iran.
- (ii) Deputy President Motlanthe requested the Public Protector to investigate allegations contained in a *Sunday Times* publication of 11 March 2012, which stated that his life partner, Ms G Mtshali, was *“implicated in soliciting a R104 million bribe to obtain a sanctions-busting deal with Iran.”*
- (iii) The newspaper article stated that Ms Mtshali met with *“associates of Motlanthe”*, including Mr R Masebelanga and representatives of an enterprise called 360 Aviation, at a restaurant in Bryanston, Johannesburg, on 17 February 2011, *“to discuss buying government support”* for 360 Aviation, that intended to do business in Iran.
- (iv) Ms Mtshali was reported as having denied attending a formal meeting with representatives of 360 Aviation.
- (v) Mr Barry Oberholzer of 360 Aviation reportedly told the *Sunday Times* that the purpose of the meeting of 17 February 2011 was to secure a government support letter for the Iran deal from Deputy President Motlanthe, through his associates. This was primarily for political protection from prosecution and assistance at a high level in Iran.
- (vi) The *Sunday Times* further reported that:

“His (Mr Oberholzer’s) explanation is supported by a recording of the meeting, which leaves no doubt that the discussion - held in the presence of the deputy president’s partner - was about how to “buy” government support for a lucrative sanctions-busting opportunity.

The price: an upfront R10-million "consultancy fee" and shares worth an estimated R94-million. Masebelanga clearly spells out his ethos of government support for sale: the R10-million fee to get the ball rolling. 'There is nothing for mahala.'

(vii) Mr Oberholzer is further reported as having stated that: *"The plan, which ultimately collapsed, would have seen a politically connected South African front company, set up by 360 Aviation, win a five-year contract worth at least R450-million a year to supply US-made Bell helicopters and parts to the National Iranian Oil Company."*

(viii) The *Sunday Times* article also stated that in the recording of the meeting:

"...mysterious North West businessman Joe Mboweni says he works "on instructions from mama", which is understood to be Mtshali, and adds that he is "obviously" interested in discussing the profit share. To which Mtshali is heard saying: "Joe will be instructing." Mboweni adds: "When you are a politician you are not just political, you must also look at the commercial side." He says "Rai" (Masebelanga) should negotiate a "relationship agreement" that will define the 'equity and roles of each party' in the deal, then get 'the letter'.

(ix) In addition, the *Sunday Times* reported that:

"Two months later, on April 12, Le Roux signed the "letter of support" saying the Department of Trade and Industry 'supports the initiatives by 360 Aviation' as it 'welcomes the expanding trade and investment relations with the Islamic Republic of Iran'. That same day, Moeketsi took the letter to the Intercontinental Hotel at OR Tambo International Airport and gave it to Barry Oberholzer. On April 18, Moeketsi sent Barry Oberholzer an e-mail headed 'Iran agreement and passport photos.' Attached were copies of Mtshali, Masebelanga and Moeketsi's passports, and the 'commission agreement in respect of consultancy to obtain government support letter'.

The agreement, signed by Moeketsi and Masebelanga, clearly lays out the terms: they will ‘obtain a support letter from the South African government’ in exchange for a fee of R10-million, to be split 50/50 between them. Although Mtshali is not mentioned in that agreement, the recording of the Bryanston meeting suggests she was part of the overall plan. At that recorded meeting, Masebelanga tells Barry Oberholzer that: ‘In this, I am not alone, so I have to discuss this with everyone, and Joe, [who acts for Mtshali], is our point man.’ This suggests that the payments would be shared between all the parties, not just Masebelanga and Moeketsi.

Even though Motlanthe’s associates delivered on their side of the bargain, the deal ultimately collapsed when 360 Aviation could not agree on terms with the National Iranian Oil Company, so it never paid the R10-million fee to Motlanthe’s associates. ‘If the deal had gone through, we would have paid that R10-million,’ Barry Oberholzer told the Sunday Times. But 360 Aviation did use the letter for another deal - to buy, from a US supplier, Bell parts worth R2-million, which are destined for Iran. The Sunday Times understands this is of interest to US intelligence agencies.”

- (x) In her response to the *Sunday Times*, Ms Mtshali denied knowledge of the support letter from the Department of Trade and Industry (DTI). She is reported as having admitted giving Mr Masebelanga her passport, stating that it was not given for purposes of going to Iran, but for travelling to Botswana in connection with a diamond business venture that Masebelanga wanted her to be involved in.
- (xi) The Deputy President denied to the *Sunday Times* any knowledge of the purported deal or of 360 Aviation as reported by the said newspaper, “*or that his associates tried to sell government support for the sanctions-busting deal.*”
- (xii) In his request to the Public Protector referred to above, Deputy President Motlanthe stated that:

“Both I and Ms Mtshali are firmly of the view that we have committed no wrongdoing of any kind in relation to the alleged events described in the story (of

the Sunday Times). My office indicated as much in writing to the Sunday Times prior to its publishing the article

Nevertheless, having regard to the serious nature of the allegations and imputations of the story, I am of the view that the issue should be subject to an investigation by your office.”

- (xiii) The issues investigated by the Public Protector, following an analysis of the request of the Deputy President and the newspaper article on which it was based, are the following;
- (a) Was there a meeting held on 17 February 2011, attended by Deputy President Motlanthe’s life partner, Ms Gugu Mtshali, where the support of the South African Government for a business transaction involving 360 Aviation and the Islamic Republic of Iran was discussed?
 - (b) Did Ms Mtshali solicit or accept a bribe to help 360 Aviation and the Islamic Republic of Iran and if so was this in breach of the Prevention and Combating of Corrupt Activities Act, 2004 or in breach of any law?
 - (c) Was Deputy President Motlanthe involved in assisting 360 Aviation to obtain the support of the South African Government for the business transaction involving the Islamic Republic of Iran?
 - (d) Did the DTI provide 360 Aviation with a letter confirming that the South African Government supported its business with the Islamic Republic of Iran and if so, was the conduct unlawful or improper?
- (xiv) The investigation involved the perusal of the newspaper article referred to, documents and statements obtained from Deputy President Motlanthe and Ms Mtshali, documents obtained from the DTI, interviews with witnesses and officials of the DTI and analyses of a recording of the meeting of 17 February 2011 and the relevant legislative framework.

- (xv) A Provisional Report on the investigation was issued on 8 August 2012 and Deputy President Motlanthe, Ms Mtshali and Messrs Masebelanga, Moeketsi and Oberholzer were afforded an opportunity to respond thereto. The responses received were considered and incorporated in this report.
- (xvi) The Public Protector's **general findings** are that:
- (a) It is common cause that:
- (aa) A meeting between Mr B Oberholzer, representing 360 Aviation, Mr R Masebelanga and Mr J Mboweni, took place at a restaurant in Bryanston, Johannesburg on 17 February 2011.
- (bb) The focus of the meeting was negotiations on a deal involving an undertaking by Messrs Masebelanga and Mboweni to secure government support for 360 Aviation's business venture relating to the trading of civilian aircraft to the National Iranian Oil Company.
- (cc) The agreement reached incorporated payment by the National Iranian Oil Company of an amount of US \$1 million, then translating to R10 million, through Mr B Oberholzer's company, for securing the support of the Government of South Africa to be specifically communicated through a letter of support to be obtained from the Presidency, the Department of Trade and Industry or any other relevant authority.
- (dd) A written version of the agreement was prepared and signed by Messrs Masebelanga and Moeketsi, but never signed by Mr Oberholzer.
- (ee) Ms Mtshali was present during a portion of the meeting and uttered a few words. A copy of her passport was later included among the copies of passports supplied by Mr Moeketsi to Mr Oberholzer with an accompanying note that said: "*Transmitted herewith please find copies of Agreement and passport photos as requested.*"
- (ff) The letter of support was duly obtained from Mr R Le Roux of the DTI, through the intervention of Mr H Moeketsi.

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- (gg) The deal was made at a time when United Nations imposed sanctions against Iran, which included an arms sales embargo, were in place.
- (hh) Deputy President Motlanthe was never involved and Mr B Oberholzer never had any contact with him, neither did he have any direct contact with Ms Mtshali or meet her again.
- (b) What was in dispute was:
- (aa) Whether or not the partially signed agreement reached between 360 Aviation and related acts of the parties involved constitute the solicitation and/or acceptance of a bribe or gratification as envisaged in the Prevention and Combatting of Corrupt Activities Act, read with the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions. Linked to the question is the meaning of the statement “*nothing for mahala*” uttered by Mr Masebelanga at the meeting of 17 February 2011.
- (bb) Whether or not Ms Mtshali’s conduct, particularly her presence during a portion of the 17 February 2011 meeting and uttering a few words, justifies a finding that she participated in the solicitation and/or acceptance of a bribe aimed at corrupting the decision-makers in the Government of South Africa to unduly provide support to 360 Aviation in the contravention of the Prevention and Combatting of Corrupt Activities Act.
- (cc) Whether or not the acts of Messrs B Oberholzer, Masebelanga, Mboweni and Moeketsi amounted to corrupt activities as envisaged in the Prevention and Combatting of Corrupt Activities Act read with the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.
- (dd) The exact words that were uttered by Ms Mtshali during the meeting of 17 February 2011 and whether or not such words are adequate to support a finding that Ms Mtshali participated in the meeting and consequently negotiations over the Iranian deal and alleged bribe.

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- (xvii) The Public Protector's **specific findings** are that:
- (a) Ms Mtshali, was present during a portion of the meeting of 17 February 2011, but did no more than to utter the following words: “No! ... Hey Man Jo, c’ommon Jo..”
 - (b) Ms Mtshali’s presence and utterance of the above few words do not substantiate a finding that she participated in the meeting or the Iranian deal or solicited and/or accepted a bribe or gratification in exchange for influencing the Government of South Africa to support 360 Aviation’s Iranian business venture.
 - (c) An agreement was reached between 360 Aviation’s Mr Oberholzer and Messrs Masebelanga, Moeketsi and Mboweni regarding the procurement by Mr Masebelanga and company of government support for 360 Aviation’s Iranian aircraft trading venture. The amount agreed to was US\$ 1 million or R10 million then.
 - (d) Not enough evidence could be found to justify a finding that the agreement constitutes the solicitation or acceptance or intention to offer a bribe or gratification in violation of section 3 of the Prevention and Combatting of Corrupt Activities Act. The statement “*nothing for mahala*” cannot be conclusively linked to an intention to buy the support and the explanation that this was for facilitation services rendered by Mr Masebelanga and company, was accepted. However, to the extent that the agreement with the Iranians related to the influencing of a South African Government public official, it may constitute a violation of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.
 - (e) Deputy President Motlanthe was never involved in assisting 360 Aviation to obtain the support of the South African Government for the business transaction involving the Islamic Republic of Iran.
 - (f) The issuing of the letter of support by Mr Le Roux, an Acting Deputy Director-General at the DTI, though not unlawful, was ill advised as it risked the potential on unintentionally supporting sanctions busting. This exposed an

urgent need for the DTI to urgently regulate, not only the process, but also the circumstances of issuing such letters of support and designating specific persons to do so.

(xviii) The remedial action to be taken, as envisaged by section 182(1)(c) of the Constitution, 1996 is the following:

(a) The Director-General of the DTI to ensure that the recommendations of the Grant Thornton Report on the forensic investigation into the issuing of the letter of support dated 12 April 2011, commissioned by the department and issued in July 2012, are implemented expeditiously in respect of the developing of a policy framework regulating the issuing of letters of support for companies wishing to do business abroad.

1. INTRODUCTION

1.1 *COSTLY LETTERS* is a Report of the Public Protector prepared in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), read with section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The Report is submitted to:

1.2.1 The Speaker of the National Assembly;

1.2.2 The Chairperson of the National Council of Provinces;

1.2.3 The President of the Republic of South Africa; and

1.2.4 The Deputy President of the Republic of South Africa.

1.3 Copies of the report are also distributed to:

1.3.1 Ms G Mtshali; the life partner of the Deputy President;

1.3.2 Mr B Oberholzer, the owner of 360 Aviation CC (360 Aviation);

1.3.3 Mr R R Masebelanga, the Director of R R Masebelanga Consulting CC;

1.3.4 Mr H Moeketsi, the Director of Ngwana Phosa Dira Trading.CC; and

1.3.5 Mr L October, the Director-General of the Department of Trade and Industry (DTI).

1.4 The Report relates to an investigation by the Public Protector into an allegation of the improper involvement of the Deputy President of the Republic of South Africa in selling government support for a business transaction with the Islamic Republic of Iran.

2. THE REQUEST OF DEPUTY PRESIDENT MOTLANTHE AND THE ISSUES INVESTIGATED BY THE PUBLIC PROTECTOR

2.1 On 12 March 2012, Deputy President Motlanthe requested the Public Protector to investigate allegations contained in a *Sunday Times* publication of 11 March 2012 entitled, “**NOTHING FOR MAHALA**, Deputy President Kgalema Motlanthe’s partner Gugu Mtshali has been implicated in soliciting a R104 million bribe to obtain a sanctions-busting deal with Iran.”

2.2 In the newspaper article attached by the Deputy President to his request for an investigation, the *Sunday Times* reported that:

“DEPUTY President Kgalema Motlanthe’s partner, Gugu Mtshali, has been implicated in soliciting a R104-million “bribe” to obtain government support for a South African company trying to clinch a R2-billion sanctions-busting deal with Iran.

Mtshali and associates of Motlanthe, including former De Beers executive Raisaka Masebelanga, met delegates of Cape Town-based 360 Aviation at a Bryanston, Joburg, restaurant to discuss “buying” government support for the deal on February 17 2011. Barry Oberholzer, MD of 360 Aviation, said: “We believe we were being asked [for] a bribe ... in exchange for [government] support.”

By then 360 Aviation had been instrumental in supplying Iran with a Bell helicopter, spare parts and three airliners via South Africa through an ingenious sanctions-busting scheme - but the company needed top-level political support to pull off a new deal.”

2.3 The *Sunday Times* further reported that Deputy President Motlanthe denied knowledge of Ms Mtshali’s involvement with 360 Aviation. He further denied having met with representatives of 360 Aviation at any time.

2.4 The *Sunday Times* further stated that according to it, 360 Aviation Director, Mr Marcel Oberholzer had stated that he met Deputy President Motlanthe in June 2011 with Mr Masebelanga at his home in Houghton, but that the deal was not

discussed there. The paper alleged that Mr Oberholzer confirmed that *“he has a ‘meet and greet’ with Motlanthe at a private home in Houghton. Mohlanthe and Mtshali live in Houghton Estate.”*

2.5 The *Sunday Times* also claimed to have established that:

- *“Mtshali was at the Bryanston meeting at which Masebelanga solicited a R10-million “bribe” and a R94-million profit share to obtain “support for the deal” from the government;*
- *Motlanthe's associates followed through on their side of the deal, obtaining a letter signed by Department of Trade and Industry (DTI) acting deputy director-general Riaan le Roux; and*
- *Ms Mtshali planned to fly to Iran with Masebelanga and another close associate of Motlanthe, former Land Bank executive Herman Moeketsi, to clinch the deal.”*

2.6 Ms Mtshali was reported as having denied attending a formal meeting with representatives of 360 Aviation.

2.7 Mr Barry Oberholzer reportedly told the *Sunday Times* that the purpose of the meeting of 17 February 2011 was to secure a government support letter for the Iran deal from Deputy President Motlanthe, through his associates. This was primarily for political protection from prosecution and assistance at a high level in Iran. He allegedly stated in this regard that:

“The purpose of the Bryanston meeting was to secure a support letter for the Iran deal from Motlanthe, through his associates.” This was primarily for political protection from prosecution and assistance at a high level in Iran,”

2.8 The *Sunday Times* further reported that:

“ His (Mr Oberholzer) explanation is supported by a recording of the meeting, which leaves no doubt that the discussion - held in the presence of the deputy

president's partner - was about how to "buy" government support for a lucrative sanctions-busting opportunity.

The price: an upfront R10-million "consultancy fee" and shares worth an estimated R94-million. Masebelanga clearly spells out his ethos of government support for sale: the R10-million fee to get the ball rolling. 'There is nothing for mahala.

2.9 Mr Oberholzer is further reported as having stated that, *"The plan, which ultimately collapsed, would have seen a politically connected South African front company, set up by 360 Aviation, win a five-year contract worth at least R450-million a year to supply US-made Bell helicopters and parts to the National Iranian Oil Company."*

2.10 The *Sunday Times* article also stated that in the recording of the meeting:

"...mysterious North West businessman Joe Mboweni says he works "on instructions from mama", which is understood to be Mtshali, and adds that he is "obviously" interested in discussing the profit share. To which Mtshali is heard saying: "Joe will be instructing." Mboweni adds: "When you are a politician you are not just political, you must also look at the commercial side." He says "Rai" (Masebelanga) should negotiate a "relationship agreement" that will define the 'equity and roles of each party' in the deal, then get 'the letter'.

2.11 In addition, the *Sunday Times* reported that:

"Two months later, on April 12, Le Roux signed the "letter of support" saying the Department of Trade and Industry 'supports the initiatives by 360 Aviation' as it 'welcomes the expanding trade and investment relations with the Islamic Republic of Iran'. That same day, Moeketsi took the letter to the Intercontinental Hotel at OR Tambo International Airport and gave it to Barry Oberholzer. On April 18, Moeketsi sent Barry Oberholzer an e-mail headed 'Iran agreement and passport photos.' Attached were copies of Mtshali, Masebelanga and Moeketsi's passports, and the 'commission agreement in respect of consultancy to obtain government support letter'.

The agreement, signed by Moeketsi and Masebelanga, clearly lays out the terms: they will ‘obtain a support letter from the South African government’ in exchange for a fee of R10-million, to be split 50/50 between them. Although Mtshali is not mentioned in that agreement, the recording of the Bryanston meeting suggests she was part of the overall plan. At that recorded meeting, Masebelanga tells Barry Oberholzer that: ‘In this, I am not alone, so I have to discuss this with everyone, and Joe, [who acts for Mtshali], is our point man.’ This suggests that the payments would be shared between all the parties, not just Masebelanga and Moeketsi.

Even though Motlanthe’s associates delivered on their side of the bargain, the deal ultimately collapsed when 360 Aviation could not agree on terms with the National Iranian Oil Company, so it never paid the R10-million fee to Motlanthe’s associates. ‘If the deal had gone through, we would have paid that R10-million,’ Barry Oberholzer told the Sunday Times. But 360 Aviation did use the letter for another deal - to buy, from a US supplier, Bell parts worth R2-million, which are destined for Iran. The Sunday Times understands this is of interest to US intelligence agencies.”

2.12 In her response to the *Sunday Times*, Ms Mtshali denied knowledge of the letter from the DTI. She is reported as having admitted giving Mr Masebelanga her passport, stating that it was not given for purposes of going to Iran, but for travelling to Botswana in another diamond business venture that Masebelanga wanted her to be involved in.

2.13 The Deputy President denied to the *Sunday Times* any knowledge of the purported deal or of 360 Aviation as reported by the said newspaper, “*or that his associates tried to sell government support for the sanctions-busting deal.*”

2.14 In his request to the Public Protector referred to above, Deputy President Motlanthe stated that:

“Both I and Ms Mtshali are firmly of the view that we have committed no wrongdoing of any kind in relation to the alleged events described in the story (of

the Sunday Times). *My office indicated as much in writing to the Sunday Times prior to its publishing the article*

Nevertheless, having regard to the serious nature of the allegations and imputations of the story, I am of the view that the issue should be subject to an investigation by your office.”

- 2.15 On 19 March 2012, the Public Protector informed Deputy President Motlanthe that she has decided to conduct a preliminary investigation into the allegations with a view to establishing whether anyone in the Presidency or the Department of Trade and Industry might have participated in unlawful conduct involving the use of state resources or power. This would enable her to establish whether there are merits in the allegations that state resources and authority were employed to improperly enrich or advantage anyone for unlawful purposes.
- 2.16 The issues investigated following an analysis of the request of the Deputy President and the newspaper article on which it was based, are the following;
- 2.16.1 Was there a meeting held on 17 February 2011, attended by Deputy President Motlanthe’s life partner, Ms Gugu Mtshali, where the support of the South African Government for a business transaction involving 360 Aviation and the Islamic Republic of Iran was discussed?
- 2.16.2 Did Ms Mtshali solicit or accept a bribe to help 360 Aviation and the Islamic Republic of Iran and if so was this in breach of the Prevention and Combating of Corrupt Activities Act, 2004 or in breach of any law?
- 2.16.3 Was Deputy President Motlanthe involved in assisting 360 Aviation to obtain the support of the South African Government for the business transaction involving the Islamic Republic of Iran?
- 2.16.4 Did the DTI provide 360 Aviation with a letter confirming that the South African Government supported its business with the Islamic Republic of Iran and if so, was the conduct unlawful or improper?

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE MATTER AS REQUESTED BY DEPUTY PRESIDENT MOTLANTHE

3.1 Mandate of the Public Protector

3.1.1 The Public Protector is an independent institution, established under section 181(2) of the Constitution to support and strengthen constitutional democracy by:

3.1.1.1 Investigating 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;

3.1.1.2 Reporting on that conduct; and

3.1.1.3 Taking appropriate remedial action.

3.1.2 Section 182(2) of the Constitution states that the Public Protector has additional powers and functions prescribed by national legislation.

3.1.3 The Public Protector Act 23 of 1994, elaborates on the investigation powers of the Public Protector and section 6(4) of the Public Protector Act specifically provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, any alleged:

3.1.3.1 Maladministration in connection with the affairs of government at any level; or

3.1.3.2 Abuse or unjustifiable exercise of power or other improper conduct by a person performing a public function.

3.1.4 Section 6(4)(c)(i) of the Public Protector Act provides that the Public Protector may, during or after an investigation, if he or she is of the opinion that the facts disclose the commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions.

3.1.5 Section 8(1) of the Public Protector Act, states that the Public Protector may make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

3.1.6 The complaint lodged with the Public Protector and the insinuations made against Deputy President Motlanthe, referred to in this report, relate to allegations of improper conduct or maladministration in state affairs and accordingly fall within the jurisdiction and powers of the Public Protector.

3.2 Approach to the Investigation

3.2.1 The Public Protector's mandate on improper conduct requires an enquiry that transcends scrutinising the lawfulness of conduct in question and also poses questions of justice and correctness of such conduct. Such enquiry has three components

3.2.1.1 What happened?

3.2.1.2 What should have happened?; and

3.2.1.3 Is there a discrepancy between the two and does this constitute improper conduct as envisaged in section 182(1) of the Constitution, maladministration, abuse of power, improper enrichment or conduct resulting in unlawful or improper prejudice to any person, as envisaged in the Public Protector Act, and/or, as in this case, a violation of the Executive Ethics Code?

3.2.2 In determining whether conduct was improper or constituted maladministration or any of the violations envisaged in the Public Protector Act and, in this case, the Executive Ethics Code, the Public Protector compares the conduct in question against the relevant legislation, other prescripts and good practice, including ethical considerations.

3.2.3 The mandate of the Public Protector is not limited to the investigation of complaints, but he/she can also investigate suspicion or allegations of improper conduct on own initiative.

3.2.4 Sections 3(1) and 4(1)(a) of the Executive Members' Ethics Act provide that the Public Protector must investigate any alleged breach of the Executive Ethics Code on receipt of a complaint by a Member of Parliament against a Cabinet member.

3.2.5 No complaint was lodged against Deputy President Motlanthe in connection with allegations of a violation of the Executive Ethics Code. However, the Public Protector deemed it appropriate to make reference to the provisions of the Code by virtue of Deputy President Motlanthe's position as a member of the Cabinet.

3.3 The obligation of the Public Protector to follow due process

3.3.1 If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall, in terms of section 7(9)(a) of the Public Protector Act, afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

3.3.2 Due process was complied with during the course of the investigation referred to in this Provisional Report. Among other things, interested and affected parties were also afforded an opportunity to present their side of the story.

4 THE INVESTIGATION

The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act. Reference was also made to the provisions of the Executive Ethics Code, where applicable.

4.1 Scope of the Investigation

The scope of the investigation was limited to the period January 2008 to May 2012.

4.2 Methods of gathering evidence

The following methods of gathering and analysing information were employed:

4.2.1 Interviews conducted:

Interviews (including telephonic interviews) were conducted with:

4.2.1.1 The Chief of Staff in the office of the Deputy President, Mr Busani Ngcaweni;

4.2.1.2 Messrs Barry and Marcel Oberholzer of *360 Aviation*.

4.2.1.3 The following officials of the DTI:

- (a) The Director-General, Mr Lionel October
- (b) The current Deputy Director-General responsible for Trade and Investment South Africa, Ms Pumla Ncaphayi;
- (c) The former Deputy Director-General responsible for Trade and Investment South Africa, Mr Iqbal Meer Sharma, who resigned from his post in October 2010;
- (d) The Acting Deputy Director-General responsible for Trade and Investment South Africa, at the time of issuing the government support letter in April 2011, Mr Riaan Le Roux;
- (e) The Director Foreign Service Management within the Directorate, Trade and Investment South Africa, Mr Victor Mathale; and
- (f) The Secretary in the office of the Deputy Director-General responsible for Trade and Investment South Africa, Ms Talitha Setshedi.

4.2.1.4 The following persons who also attended the 17 February 2011 meeting;

- (a) Director of *R R Masebelanga Consulting CC*, Mr Raisaka Masebelanga,
- (b) Director of *Ngwana Phosa Dira Trading Company*, Mr Herman Moeketsi,
- (c) Mr Joe Mboweni; and
- (d) Mr Rainy Mogaki

4.2.2 Documentation studied and its contents considered

4.2.2.1 Documents submitted by Mr Busani Ngcaweni, the Chief of Staff in the office of the Deputy President on behalf of Deputy President Motlanthe, including newspaper clippings and a “*transcription*” of a recording of the meeting held on 17 February 2012;

4.2.2.2 A statement of Deputy President Motlanthe;

4.2.2.3 A statement of Ms Gugu Mtshali;

4.2.2.4 A Commission Agreement between *360 Aviation* acting on behalf of an unnamed “*Payee*” and R R Masebelanga Consulting CC, represented by Mr Raisaka Masebelanga and Ngwana Phosa Dira Trading, duly represented by Mr Herman Moeketsi.

4.2.2.5 Documents submitted by Mr Riaan Le Roux of DTI;

4.2.2.6 A report prepared by Messrs Grant Thornton as commissioned by the DTI titled, “*Final Forensic Report: - Letters of Support to 360 Aviation*” dated May 2012;

4.2.2.7 Documents obtained from Mr Herman Moeketsi; and

4.2.2.8 Documents obtained from Mr Joe Mboweni.

4.2.3 Correspondence

Correspondence between the Public Protector and:

4.2.3.1 Deputy President Kgalema Motlanthe dated 12 and 19 March 2012 respectively;

4.2.3.2 The Chief of Staff in the Deputy President’s office;

4.2.3.3 The Director-General of the Department of Trade and Industry; (the DTI);

4.2.3.4 A former Deputy Director-General of the DTI, Mr Iqbal Sharma.

4.2.4 Legislation and other prescripts

Relevant provisions of the following legislation and other prescripts were considered and applied, where appropriate:

4.2.4.1 The Constitution;

4.2.4.2 The Public Protector Act, 23 of 1994;

4.2.4.3 The Executive Members Ethics Act, 82 of 1998;

4.2.4.4 The Executive Ethics Code, 2000;

4.2.4.5 The Prevention and Combating of Corrupt Activities Act, 12 of 2004; and

4.2.4.6 The OECD Convention on Combatting Bribery of Foreign Officials in International Business Transactions.

5 INFORMATION AND THE EVIDENCE OBTAINED DURING THE INVESTIGATION.

5.1 The transcript of a recording of the meeting

5.1 Attached to the letter of Deputy President Motlanthe requesting the Public Protector to investigate the allegations published by the *Sunday Times* was a copy of a transcript of a recording of the meeting held on 17 February 2011. It transpired during the investigation that the transcript was made by Mr B Oberholzer, who, unbeknown to the other attendees of the meeting made a recording of the proceedings. He also provided a copy of the transcript to the *Sunday Times*, who reported on its contents. Mr Oberholzer explained during the investigation that it was his habit to record his business meetings. A copy of the recording was obtained during the investigation. It was noted during the investigation that the transcript contained two discrepancies when compared to

the recording which are alluded to in paragraphs 5.1.2.11 and 5.1.2.12, below. Apart from these discrepancies, the salient parts of the transcript and the recording are the following:

5.1.1.1 Mr Masebelanga introduced Mr Oberholzer and 360 Aviation to the other attendees. He indicated that he had previously also introduced Mr Oberholzer to the Deputy Minister of Defence, Mr Thabang Makwetla.

5.1.1.2 It is at this stage that Ms Gugu Mtshali arrived at the meeting. Upon her arrival, Mr Masebelanga indicated to Ms Mtshali that they were having two meetings and the one that she was attending would commence later. He informed Ms Mtshali that Mr Oberholzer and his family own an aviation company and he asked him to elaborate on his business. Of note, is the fact that only Mr Masebelanga, of all the attendees at the meeting, appeared to know Mr Oberholzer.

5.1.1.3 Mr Oberholzer explained that his primary business focus was the supply of helicopters to international oil companies for the transportation of crew from shore to oil rigs. He stated that in 2004, he was introduced to Iranian officials who informed him that Iran had a dire need for the supply of aviation spare parts and helicopters.

5.1.1.4 According to Mr Oberholzer, Iran had a big fleet of American helicopters which they were unable to support and maintain due to the international sanctions imposed on them. 360 Aviation considered business opportunities in Iran in this regard. He travelled to Iran during the years 2007/2008 and 2009. 360 Aviation obtained letters of government support in dealing with Iran through the assistance of a former Deputy Director General at the DTI, Mr Iqbal Sharma in 2008.

5.1.1.5 He confirmed having been involved in various business transactions in Iran with different high level companies through the assistance of Iranian Members of Parliament. It included the supply of helicopters, spare parts and three Airbus aircraft. 360 Aviation intended tendering for a contract with the Iranian Oil Company for the supply of helicopters valued at 60 million US dollars a year for a period of five years.

- 5.1.1.6 He concluded by informing the meeting that the contract was previously managed by Petrobras of Brazil and Repsol of Spain who had to pull out because of increased sanctions against Iran, imposed by the UN Security Council in June 2010.
- 5.1.1.7 Mr Oberholzer emphasized that in order for 360 Aviation to tender for the contract, it required a letter from the South African Government indicating its support for his company's business initiative.
- 5.1.1.8 After the conclusion of his address, Mr Masebelanga asked Mr Oberholzer: *"What's the deal on the table?"* To this, Mr Oberholzer responded that his company is unable to secure the contract on their own as the government support letters issued by Mr Iqbal Sharma of the DTI in 2008 were outdated and that Mr Oberholzer at the time did not have any other avenues at the DTI to obtain government support for his business venture. He therefore needed high level support as his company would be the only one to submit a tender proposal for the contract.
- 5.1.1.9 At this juncture, Mr Masebelanga reminded Mr Oberholzer of their previous conversation when a proposal for the payment of a commission in return for obtaining the government letter of support was discussed between the two of them. Mr Oberholzer agreed and Mr Masebelanga confirmed that the deal would be in the form of a commission and shares in 360 Aviation.
- 5.1.1.10 Mr Oberholzer, then confirmed the payment of a commission and a 35% shareholding which was open to discussion between the parties. Mr Masebelanga asked Mr Jo Mboweni whether the proposal meets his interest.
- 5.1.1.11 According to the transcript obtained during the investigation and ostensibly prepared by Mr Oberholzer, Mr Mboweni responded to this question: ***"Obviously, but I work on instruction from "Mama".*** To this Ms Mtshali responded, ***"No Jo will be instructing."*** Mr Mboweni then stated: *"whatever Mama instructs me to do, I will do."*

- 5.1.1.12 However, according to the recording of the meeting Mr Mboweni's response was: **"Man, I'm advisor to Mama..."** Ms Mtshali interrupted him and said: **"No! ... Hey Man Jo, c'ommon Jo.."** Those were the only words uttered by Ms Mtshali throughout the meeting.
- 5.1.1.13 Mr Oberholzer explained that opportunities in Iran are not only related to aviation and he agreed that some of them amounted to violations of the UN sanctions imposed against Iran.
- 5.1.1.14 After further discussions, particularly with Mr Mboweni, Mr Oberholzer reiterated his offer for equity shareholding in his company and confirmed his willingness to consider whatever the parties were looking at. It was mooted that Mr Masebelanga would arrange negotiations with the Oberholzers as a starting point and Mr Mboweni would be tasked with attending to putting together documentation at a fee as he is a *hard task master*.
- 5.1.1.15 Mr Mboweni proposed that the starting point would be to put together a relationship agreement defining the *parameters of the roles of each party and the equity and roles*. He offered to obtain the government support letter. Mr Oberholzer, impressed upon the parties that they should not disclose to anyone what is happening in Iran. He said that he is comfortable with Mr Masebelanga and would put together how their structures will operate and confirmed that they are on *sacred grounds*. After that, Mr Masebelanga requested Mr Oberholzer to forward a *memorandum of understanding* (MOU) to him so as to go through it.
- 5.1.1.16 Mr Masebelanga suggested that the letter that Mr Oberholzer was looking for was similar to the ones that were issued by the DTI in 2008. He further proposed that this government support letter must be obtained from any of the major government departments, either the DTI or the Presidency or Deputy Presidency, which would simply be a *"To whom it may concern"* letter supporting a South African company.
- 5.1.1.17 At this stage Mr Masebelanga stated that Mr Oberholzer knows that there is *"Nothing for Mahala"* and confirmed that the offer he made to him for obtaining such a letter is the payment of a sum of R10 million.

5.1.1.18 Mr Mboweni concluded his contribution to the meeting by stating that: *“if things were to move in the right direction, you are most probably aware there is an aviation licence issued for Africa, from Harare and Bulawayo, to the Middle East. That licence, as we speak, is us. I am not sure how deep you want to dig”* Mr Oberholzer’s response was: *“No sure, we can dig together.*

5.2 Interviews conducted during the course of the investigation

During the investigation of the complaint, the following witnesses were interviewed:

5.2.1 **Mr Barry Oberholzer** is the sole member of 360 Aviation. He was born in the United States of America and has dual US and South African citizenship. The business of 360 Aviation was to provide aviation solutions to a range of clients, including oil companies in the Middle East.

5.2.1.1 When 360 Aviation explored business opportunities in Iran in 2008, it discovered that a letter supporting its business ventures was required from the South African Government. Mr R Masebelanga, a business associate of Mr Oberholzer, arranged for him to meet with a Deputy Director-General of the DTI, Mr I Sharma. The result of this meeting was that 360 Aviation obtained the required formal letter from the DTI that enabled it to do business in Iran.

5.2.1.2 In 2009, his company was involved in the supply of one helicopter to Iran Air, which was imported from Canada, registered in South Africa and then exported to Iran.

5.2.1.3 In January 2011, he was approached by the US Joint Terrorism Task Force who informed him that they were aware of his dealings in Iran and that although it was legal in terms of the South African system, it was a transgression of the US sanctions against Iran. As he was a US citizen, it was therefore illegal for him to be involved in any dealings with Iran. They requested him to provide them with information about his business network inside Iran.

5.2.1.4 In February 2011, the National Iranian Oil Company requested 360 Aviation to provide it with leased helicopters to transport personnel between oil rigs and shore. They wanted his company to go through official channels to tender for the contract and required an official letter from the South African Government supporting it doing business in Iran.

5.2.1.5 Mr Oberholzer approached the DTI in order to obtain the official letter of support but never got a response. In his view, the letter that was provided to him by the DTI in 2008 was outdated as it was obtained under the “*Mbeki government*”.

5.2.1.6 He decided to approach Mr Masebelanga for assistance again. By that time Mr Sharma had left the DTI, but Mr Masebelanga indicated to him that he would arrange a meeting with “*someone very high up in the government*”. He also indicated that this time there will be a fee involved in obtaining the letter as the people they were going to meet would not provide assistance for free. The meeting was arranged to take place at a restaurant in Bryanston, Johannesburg on 17 February 2011.

5.2.1.7 Mr Oberholzer confirmed the discussions of the meeting, as it was recorded by him and as it appeared in the transcript that he made of the recording. He further confirmed that it was his understanding that Mr Masebelanga wanted R10 million for obtaining the letter of support for 360 Aviation and in addition to that, the other parties at the meeting would establish a company which would hold 35% of the shares in 360 Aviation.

5.2.1.8 He denied that he was aware of the fact that Ms Mtshali would be present at the meeting or that he knew her prior to meeting her on that day. She, according to him, only participated in the meeting as reflected in his transcript of the recording referred to in paragraph 5.1.1.7 above

5.2.1.9 Subsequent to the meeting, Mr Masebelanga provided him with a draft *Commission Agreement* in terms of which an amount of R10 million was payable for obtaining the letter of government support. Mr Oberholzer discussed the contents of this agreement with his client in Iran, who in principle agreed to the terms thereof.

5.2.1.10 After discussing the agreement with his client, Mr Oberholzer added the details of 360 Aviation to the draft and returned it to Mr Masebelanga. However, he stated that he did not sign the agreement as he knew that to do so would have amounted to an “act of bribery” He also did not inform Mr Masebelanga that it was illegal as he wanted to see whether he could get the letter.

5.2.1.11 Mr Masebelanga subsequently introduced Mr Oberholzer to Mr Herman Moeketsi, who also wanted to be involved in the deal. Mr Moeketsi informed Mr Oberholzer that Ms Mtshali and Mr Mboweni were very busy and that they could not attend to obtaining the letter of support. He said that he would attend to obtaining the letter through his structures as they are closely affiliated with Mr Motlanthe and that Ms Mtshali would go with Mr Oberholzer, Moeketsi and Masebelanga on a business trip to Iran. Mr Moeketsi subsequently provided him with copies of his passport and that of Mr Masebelanga and Ms Mtshali for the purposes of arranging flight bookings to Iran.

5.2.1.12 On 12 April 2011, Mr Oberholzer met with Mr Moeketsi and Mr Masebelanga at the Intercontinental Hotel at the O R Tambo International Airport where they delivered the letter of support signed by Mr R Le Roux of the DTI as well as a copy of the commission agreement signed by them. Mr Masebelanga informed Mr Oberholzer that Mr Moeketsi was under pressure to pay the people who facilitated obtaining the letter of support and that he must ensure that the R10 million was paid as agreed.

5.2.1.13 Shortly thereafter, it appeared that no agreement could be reached between 360 Aviation and the National Iranian Oil Company and the proposed deal was cancelled. 360 Aviation never used the letter of support for any other business and no money was paid to Messrs Masebelanga and Moeketsi. The proposed business trip to Iran, accordingly never materialized.

5.2.1.14 He concluded by saying that he has never had any relations with either Deputy President Motlanthe or his life partner, Ms Mtshali. He also denied that 360 Aviation was ever involved in any arms dealing. Mr Oberholzer confirmed that he

provided the *Sunday Times* with the recording of the meeting held on 17 February 2011 and the transcript thereof that he prepared.

5.2.2 **Mr Marcel Oberholzer** is a private businessman who was the Managing Director of 360 Aviation until September 2010, when he resigned from the company and transferred his shares to his brother, Mr B Oberholzer. He was not involved in the matters referred to in this report. He further denied that he ever met with Deputy President Motlanthe, as was alleged by the *Sunday Times* (see paragraph 2.4 above.)

5.2.3 **Mr Raisaka Masebelanga**, is a private businessman involved in a number of business ventures including mining, as he was at the time an Executive at De Beers. He confirmed that he met Mr Oberholzer through a friend. He introduced the concept of aviation to him, which was quite interesting.

5.2.3.1 Mr Masebelanga invited Mr Oberholzer to a meeting on 17 February 2011 held at a restaurant situated at 10 Bompas Road, Dunkeld West, Johannesburg, so that he could introduce him to his business partners. He stated that: *“On inviting him, and whilst I thought I was just namedropping, I mentioned the name of Ms Mtshali as being one of my business associates who would be attending the meeting.”*

5.2.3.2 The primary purpose for Mr Masebelanga to be at the meeting was to discuss with Ms Mtshali, Mr Mogaki and Mr Mboweni an abattoir investment prospect, which Mr Mboweni wanted to introduce to them. All four of them knew each other from their involvement with the African National Congress.

5.2.3.3 Mr Oberholzer arrived at the meeting and Mr Masebelanga introduced him to his business associates. Ms Mtshali arrived a little later.

5.2.3.4 The issue of obtaining the government support letter for Mr Oberholzer was discussed and Mr Masebelanga undertook to ensure that he obtains the letter from the DTI. It was agreed by the parties at the meeting that a new company would be formed that would serve as a *special purpose vehicle* for the proposed deal with Iran and that it would have a 35 % shareholding in *360 Aviation*.

5.2.3.5 Mr Masebelanga admitted that other than the shareholding discussions, it was agreed that Mr Oberholzer or his client would pay a R10 million commission in return for obtaining the letter of support.

5.2.3.6 He then approached his cousin, Mr Herman Moeketsi to assist in obtaining the letter as the latter had many high profile contacts in government that he could utilize.

5.2.3.7 After he obtained the letter, Mr Moeketsi forwarded it to Mr Oberholzer who then presented them with the *Commission Agreement* for signatures. Mr Oberholzer also requested copies of Messrs Masebelanga, Moeketsi and Ms Mtshali's passports so as to arrange a business trip to Iran. Mr Masebelanga had a copy of Ms Mtshali's passport in his possession which had been forwarded, together with his own, to Mr Oberholzer.

5.2.3.8 He concluded his interview by stating that: *"When we sent the agreement to him he asked that we sign it and that he will sign it after he had shown it to his attorneys. At that time we did not realise what we were getting ourselves into. Subsequently, Barry (Mr Oberholzer) disappeared and he did not pay us as promised and we decided as well that we should back down on this as it was suspicious."*

5.2.3.9 A year later, Mr Oberholzer reported the matter to the *Sunday Times*, the purpose of which, according to Mr Masebelanga, remains unknown. At no stage did Ms Mtshali attend the meeting for purposes reported in the media. Instead, she was at the meeting for purposes as explained earlier in the interview. He stated that, at no stage did they ever meet the Deputy President.

5.2.4 **Herman Moeketsi**, is a private businessman who confirmed having obtained the support letter from the DTI as requested by 360 Aviation.

5.2.4.1 He stated that he was not part of the meeting held in Johannesburg on 17 February 2011, where the issue regarding obtaining the letter was discussed. He further confirmed that he got involved in the matter on the invitation of his cousin,

Mr Masebelanga, who introduced Mr Oberholzer to him at a meeting held at the Southern Sun Hotel in Johannesburg.

5.2.4.2 He was advised by the said two gentlemen that 360 Aviation was in the business of refurbishing of old aircraft for use as ambulances. He stated that Mr Oberholzer was working with some colleagues in Canada. Mr Oberholzer advised him that he needed a government letter of support for this project to enable him to procure business in Iran for that purpose. He was offered 26% shares in 360 Aviation and a R5 million commission in return for obtaining the government support letter.

5.2.4.3 Mr Moeketsi further confirmed that he approached Mr Riaan Le Roux, the Acting Deputy Director-General responsible for Trade and Investment South Africa at the DTI, for assistance in obtaining the letter. Mr Le Roux then approached Mr Victor Mathale of the DTI for advice on whether he could issue the letter. Mr Mathale in an e-mail addressed to Mr Le Roux on 11 April 2011, advised him that: *“the same generic letter be written referring Herman (Mr Moeketsi) to the South African Embassy in Teheran should they need further support”* On the strength of that advice, Mr Le Roux issued the letter of government support for 360 Aviation on 12 April 2011.

5.2.4.4 After the letter was issued, Mr Moeketsi forwarded it to Mr Oberholzer who then presented him in an e-mail, dated 14 April 2012, with the *Commission Agreement* for signature in terms of which 360 Aviation’s client would pay R10 million commission in return for obtaining the letter. Mr Oberholzer also requested Mr Moeketsi in another e-mail of the same date to attach copies of his, Mr Masebelanga’s and Ms Mtshali’s passports to arrange a business trip to Iran. He response in an e-mail dated 18 April 2011, stating that: *“Transmitted herewith please find copies of Agreement and passport photos as requested.”*

5.2.4.5 Mr Moeketsi stated in his interview that he did not know what the purpose was of forwarding a copy of Ms Mtshali’s passport as she was not party to the deal, as far as he knew. When Mr Moeketsi enquired with Mr Masebelanga regarding the request for a copy of Ms Mtshali’s passport, he told him that: *“Barry (Mr Oberholzer) is obsessed with Gugu (Ms Mtshali).”*

5.2.5 **Mr Jo Mboweni** is a private businessman based in Rustenburg in the North West Province.

5.2.5.1 He confirmed that he attended the meeting of 17 February 2011 in connection with an investment opportunity in the abattoir industry. He invited all the other parties to the meeting, except Mr Oberholzer.

5.2.5.2 Mr Mboweni further confirmed that the meeting was a follow up on discussions held at a wedding at the Hartebeespoort Dam in December 2010. On his way to the meeting, Mr Mboweni was telephonically informed by Mr Masebelanga that they would also be discussing aviation business at the meeting, with his friend from Cape Town. When he arrived at the venue, he was introduced to Mr Oberholzer by Mr Masebelanga as his friend and business partner. Ms Mtshali arrived a little later at the meeting.

5.2.5.3 During the meeting, Mr Oberholzer introduced a concept in aviation, which Mr Mboweni found to be interesting, particularly because he was also involved in aviation in countries such as Zimbabwe and Kenya. He is also part of a group of businessmen who has an aviation licence and his group tasked him with finding an investor in that regard.

5.2.5.4 Mr Mboweni stated that he just participated in the meeting because of his interest in aviation and that he had no intention to become involved in any deal. His participation in the discussions was *bona fide*. He remembered that when Mr Oberholzer talked about a deal in Iran, he warned him that he might be playing on the dangerous terrain of sanctions-busting.

5.2.5.5 With regard to his reference to Ms Mtshali as “*Mama*” during the meeting, Mr Mboweni indicated that he may have said so jokingly. He stated that he was not involved in any business venture with Ms Mtshali and that the proposed abattoir business would have been the first.

5.2.5.6 He concluded by saying that when he participated in the meeting, he was under the impression that Mr Oberholzer wanted a company to serve as a special

purpose vehicle, which would qualify in terms of the BEE requirements and that he wanted BEE partners as they could not be awarded business in government without black empowerment credentials.

5.2.5.7 Mr Mboweni stated that Mr Oberholzer presented himself as a young entrepreneur. After he read the newspaper article relating to the meeting, he felt that he was made a fool of for ulterior purposes and that he was used to look like he betrayed his country which he fought for in the struggle whilst, he was in exile in countries such as Russia. He concluded by saying that Messrs Oberholzer and Masebelanga were the ones who knew about this deal.

5.2.6 **Mr Rainy Mogaki**, is a private businessman residing in Rustenburg in the North West Province. During the interview, he stated that he is involved in farming and the construction industry. He has and never had an interest in aviation whatsoever.

5.2.6.1 The meeting held on 17 February 2011 was the result of a discussion which he held with Messrs Masebelanga, Mboweni and Ms Mtshali at a wedding held at Hartebeespoort Dam in December 2010.

5.2.6.2 At the said wedding, Mr Mboweni introduced to the three of them a business opportunity to invest in an abattoir in Rustenburg. The group was going to buy an empowerment stake in the abattoir business. They advised Mr Mboweni that they are interested in the opportunity and thus decided that they would pursue it further at the beginning of 2011.

5.2.6.3 He attended the meeting with Mr Mboweni and they found Mr Masebelanga already at the venue. Whilst they were having a conversation, Mr Masebelanga went out to meet someone and came back with a man who was unknown to him, whom he introduced as Mr Oberholzer.

5.2.6.4 Whilst introducing him, Ms Mtshali arrived and came to sit next to him on his right hand side. They were seated at the far right of the restaurant. It was the first time that he met with Mr Oberholzer on that day.

5.2.6.5 According to his understanding, the sole reason for being at the restaurant was to discuss the abattoir business. He said that he was not even interested in the discussions as he was not part of it and cannot recall what was said.

5.2.6.6 He was having a separate conversation with Ms Mtshali where they were seated and she also took no interest in what was discussed by the other parties in relation to Mr Oberholzer's business.

5.2.6.7 He confirmed that he was aware of the fact that Mr Mboweni had business interests in aviation. He further confirmed that he knew that Mr Mboweni and his other business partners had an aviation licence relating to the transporting of goods to other countries in Africa by air.

5.2.6.8 Mr Mogaki could recall Mr Mboweni saying "Mama" and that Ms Mtshali retorted, but he did not make anything of it, as Mr Mboweni is someone who likes joking and he was not concentrating on what was discussed by the other three gentlemen. The only person in that meeting who appeared to have known Mr Oberholzer, was Mr Masebelanga.

5.2.6.9 He concluded by stating that Mr Masebelanga ushered Mr Oberholzer out of the meeting after they finished their discussions and the meeting concerning the abattoir business then proceeded. He stated that he neither knew Mr Herman Moeketsi nor anything about his involvement in obtaining a letter of support for 360 Aviation.

5.2.7 **Mr Riaan Le Roux**, was an Acting Director-General responsible for Trade and Investment South Africa at the DTI at the time of issuing the 12 April 2011 government letter of support to 360 Aviation, which was signed by him. The letter confirmed the South African Government's support for the business initiatives of 360 Aviation in the Islamic Republic of Iran.

5.2.7.1 He stated that he followed due process before issuing the letter and gave the following account of the sequence of events leading thereto:

-
- (a) On 9 February 2011, his Executive Assistant, Ms Talitha Setshedi forwarded an e-mail to him that she received from Mr Barry Oberholzer of 360 Aviation. In the e-mail, Mr Oberholzer requested that his company be issued with a government support letter.
- (b) He explained that his predecessor, Mr Iqbal Sharma had issued his company with two such letters in 2008, one addressed to Mr Oberholzer and the other addressed to Dr Mansouriam of Iran Air, both of which were, according to Mr Oberholzer, outdated.
- (c) Mr Le Roux explained having requested that Mr Oberholzer furnish him with copies of the letters issued in 2008, with a view to considering his request. Since then, he never heard from Mr Oberholzer until he was approached by a Mr Herman Moeketsi on 4 April 2011, informing him that he is an equity partner in 360 Aviation and that they request the Department to issue them with a support letter. To his request, Mr Moeketsi attached copies of letters that were issued by his predecessor, Mr Iqbal Sharma, in February and September 2008, respectively.
- (d) On receipt thereof, so stated Mr Le Roux, he informed Mr Moeketsi that after consulting his colleagues on the matter, he was of the view that the 2008 letters were still valid. He directed Mr Moeketsi to the SA Embassy in Tehran for any further assistance on the matter.
- (e) Mr Le Roux explained further that afterwards, he approached the DTI's Senior Manager responsible for Foreign Services Management, Mr Victor Mathale, for advice on whether he should issue the requested letters or not. This he did because he was not entirely familiar with the process followed as he was just acting in the position at the time.
- (f) On 11 April 2011, Mr Mathale recommended to Mr Le Roux that, after he spoke to Mr Moeketsi, he was of the view that the requested letter may be issued. He furnished Mr Le Roux with a copy of the company's update on developments in Iran.

(g) Mr Mathale suggested to Mr Le Roux that the same generic letter as the one issued in 2008, be issued also referring Mr Moeketsi to the South African Embassy in Iran. On the strength of the advice and recommendations obtained from Mr Mathale, Mr Le Roux drafted the letter of support, signed and had it issued and delivered to Mr Moeketsi.

5.2.7.2 He stated that he *bona fide* issued the said letter, convinced that he was doing the right thing. It never crossed his mind that such a letter could be used for other ulterior and illegal purposes. Mr Le Roux said he had a *bona fide* belief that having obtained advice and recommendations from colleagues who had been in the Trade and Investment Section before, he could issue the letter.

5.2.8 **Mr Victor Mathale**, is the DTI's Senior Manager responsible for Foreign Services Management.

5.2.8.1 He confirmed having been requested by a colleague, Mr Riaan Le Roux, to assist Mr Moeketsi. He initially advised Mr Le Roux that the 2008 letters were still valid. However, Mr Le Roux told him that Mr Moeketsi was of the view that the letters were outdated and requested him to meet with Mr Moeketsi.

5.2.8.2 Mr Mathale confirmed having spoken to Mr Moeketsi on 8 April 2011, advising him to furnish the DTI with letters supporting their request so as to establish whether it was an investment that the government would support. It is common practice for the DTI to issue such letters, but due process has to be followed.

5.2.8.3 Mr Moeketsi provided him with a letter from 360 Aviation regarding, an update on the developments in Iran, particularly concerning its involvement in that country. On receipt thereof, he suggested to Mr Le Roux, in an e-mail dated 11 April 2011, that the *"same generic letter be written referring Herman to the South African Embassy in Teheran should they need further support"* On the strength of that advice, Mr Le Roux issued the letter on 12 April 2011. It was however, noted that in the letter there was no mention of 360 Aviation having to approach the SA Embassy in the event that it required further support.

5.3 The government support letters issued by Mr Iqbal Sharma of the DTI on 5 February and 3 September 2008, respectively for 360 Aviation CC.

5.3.1 According to the information and documentation obtained during the investigation, by the 4th of February 2008, 360 Aviation was in a process of obtaining a government support letter from the DTI in connection with its intended business venture with Iran Air.

5.3.2 On that date, Mr Marcel Oberholzer sent an e-mail to Mr Iqbal Sharma, the DTI's Deputy Director-General responsible for Trade and Investment South Africa at the time, enquiring about Mr Sharma's request for a contact person with Iran Air. In his e-mail, Mr Marcel Oberholzer wrote, "*Raisaka mentioned that you requested the address for the contact person, which is...*

Dr Mansourian

Iran Air

Tehran

Iran "

In his e-mail, Mr Marcel Oberholzer also requested Mr Sharma to "please scan and email the final letter to me I will then forward to Dr Mansourian."

5.3.3 On 5 February 2008, Ms Talitha Setshedi of Mr Sharma's office forwarded a copy of the letter of the same date, which was addressed to Dr Mansourian of Iran Air, Tehran in the Islamic Republic of Iran, to Messrs Marcel and Barry Oberholzer. The contents of the letter read as follows;

"Dear Dr Mansourian,

I write this letter to you in relation to the possible business structure you may establish with a South African company, Three60 Aviation (sic). The dti (sic) welcomes this initiative against the backdrop of our strong political relationship and growing economic relationship. We would welcome your delegation's visit to South Africa and would be very happy to meet with you to discuss how the dti

could assist in ensuring a successful venture between Iran Air and Three60 Aviation.”

- 5.3.4 On 3 September 2008, Mr Sharma, issued another government support letter to 360 Aviation addressed to Mr Barry Oberholzer which read as follows;

“ *To whom it may Concern:*

*The South African Department of Trade and Industry (**the dti**) met with Three 60 Aviation a South African company in the Aviation Industry. Three 60 Aviation has been looking keenly at establishing business relationships with leading relevant enterprises in the Islamic Republic of Tehran. The SA government welcomes the expanding trade and investment relations with the Islamic Republic of Tehran.*

Your support to Three 60 Aviation in developing mutual trade between our countries would be appreciated.”

5.4 The government support letter issued by Mr Riaan Le Roux of the DTI on 12 April 2011 for 360 Aviation.

- 5.4.1 On 4 February 2011, Mr Barry Oberholzer wrote to Ms Talitha Setshedi of the DTI’s office of the Deputy Director-General responsible for Trade and Investment South Africa, in an e-mail under the subject, *“Iran letter.”* In his electronic correspondence, to which a copy of the support letter issued in 2008 was attached, Mr Oberholzer stated as follows;

“As you know, Iqbal was kind enough to issue us with a letter of support to trade with Iranian companies and it has assisted us a lot in the past. Seeing that the letter is now almost 3 years old I would like to request whether a new letter can be issued stating the strong relations between SA and Iran and the SA Govt stance on trading between the 2 countries. We have 2 large tenders in for work there and this letter will assist us tremendously.”

- 5.4.2 Ms Setshedi forwarded Mr Oberholzer's e-mail to Mr Riaan Le Roux on 9 February 2011, who was the Acting Deputy Director-General responsible for Trade and Investment South Africa, following the resignation of Mr Iqbal Sharma.
- 5.4.3 According to Ms Setshedi, she advised Mr Oberholzer that she would forward his request to the Acting Deputy Director-General as she *"does not have powers to sign supporting letters"*. However, Mr Oberholzer persisted with his requests for her to issue the letter, until she referred him to Mr Yunus Hoosen of the Department for assistance in that regard.
- 5.4.4 No evidence could be found indicating that Mr Oberholzer received any assistance from Mr Hoosen between February 2011 and March 2011. Instead, Mr Oberholzer complained to Ms Setshedi on 22 March 2011 that he tried to contact the person referred to but that he does not answer his phone. In his e-mail correspondence, Mr Oberholzer enquired whether *"there is any other person which (sic) can assist in this regard for the letter. As you know, the Iranian Foreign Minister visited the Dept of International Relations 10 days ago and I am sure somewhere somebody must be able to give us a letter."* There is no indication of further communication between the two after that correspondence.
- 5.4.5 In his quest to obtain the support letter for 360 Aviation, as alluded to above, Mr Moeketsi approached the DTI telephonically and was advised to provide the letters issued in 2008. The records of the DTI show that on 4 April 2011, he forwarded an e-mail to Mr Le Roux, requesting that he be issued with the letter. In his request, Mr Moeketsi stated that following :
- "Transmitted herewith please find copies of two letters as received from your office in 2008 as discussed. Chief, it would be appreciated if you would please issue new letters as the aforementioned 2008 ones are already outdated"*
- 5.4.6 On 7 April 2011 and in reply thereto, Mr Le Roux informed Mr Moeketsi that he *"consulted with colleagues on this and wish to advise that these letters are still valid and can be used as such. I am copying this to our office in Tehran to assist you with whatever assistance you may require on the ground"*.

5.4.7 No evidence could be found indicating that Mr Moeketsi approached the South African Embassy in Tehran requesting that he be issued with the letters. According to e-mail correspondence during the period, 8 to 12 March 2012, exchanged between Messrs Yusuf Timol and Fariborz Farzaneh who were at the time based at the SA Embassy in Tehran, no trade enquiry from 360 Aviation could be found. Mr Farzaneh in an e-mail to Mr Timol dated 11 March 2012 stated that he has never held any interaction with the said company whether in a form of a meeting or otherwise.

5.4.8 During the investigation, it transpired that on Friday 8 April 2011, Mr Moeketsi had a telephonic discussion with Mr Victor Mathale of the DTI in connection with the issuing of the government support letter to 360 Aviation. On Monday, 11 April 2011, Mr Mathale sent an e-mail to Mr Le Roux regarding this discussion as follows:

“Riaan I spoke to Herman Moeketsi as requested on Friday. He still feels that he should get an updated letter. I further requested him to provide an update on the developments in Iran to establish whether there is a need for us to re-issue the letter.”

5.4.9 In his e-mail, Mr Mathale attached a copy of the letter forwarded to him by Mr Moeketsi in support of their request for a government support letter to be issued to him. The letter that was attached bearing a 360 Aviation logo, dated 8 April 2011 and signed by Barry H Oberholzer Jr, the Managing Director of 360 Aviation read as follows:

“
To Whom It May Concern:

We refer to our current and historic dealings with companies within the Islamic Republic of Iran. Since we received the indicated support letters from the Department of Trade and Industry we have been successful in the following transactions:

- *Delivery of a Bell 212 HP helicopter for our client, Heli Kish. They are currently using this helicopter for offshore oil rig support services, much like Petro SA uses the SAAF at the moment for operations in Mossel Bay.*

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- Setup of a local company, Tigris International SA (Pty) Ltd, who then purchased 3 Airbus A300 aircraft from China Southern Airlines and they are now in operation with Saha Airlines in Iran. We assisted them in the import/export of these goods
 - Supply of helicopter spare parts to Persian Aviation Gulf Services
 - Setup of a local company for one of the largest Iranian Oil Firms, Fateh Sanat Kimia. They will be using this company for investment in Africa.
 - Supply of consultant services to Iran Air on how to structure their airline to maximize profits and how to procure spare parts and lease of aircraft through leading suppliers in the industry.

We are planning a trip to Iran in May 2011 in order to finalize the following future opportunities:

- Various investment programs for Iran Investment Company (IIC)
- Advising Mahan Airlines on proper procurement to refleet their airline
- Advising and brokering fleet procurement for Aseman Airlines
- Providing the National Iranian Oil Company (NIOC) of support services of spare parts and aviation services to maximize oil extraction in the Persian Gulf.

We will be accompanied on this trip by our equity partners Mr. Raisaka Masebelanga and Mr. Herman Moeketsi. We trust that the above has given an insight of our capabilities to further strengthen the relationship between the two countries by way of completing the above-mentioned projects which will succeed by your full support.”

5.4.10 In conclusion, Mr Mathale and in his e-mail referred to in paragraph 5.5.8 made the following suggestion to Mr Le Roux ;

“I suggest that the same generic letter be written but referring Herman to the South African Embassy in Teheran should they need further support. Lets (sic) discuss the matter as I have indicated to Herman that I will revert to him”

5.4.11 The letter issued by Mr Le Roux on 12 April 2011, apparently on the advice of Mr Mathale, read as follows:

“

TO WHOM IT MAY CONCERN

This letter serves to confirm that the Department of Trade and Industry in the Republic of South Africa support the initiatives by the Three 60 Aviation.

Three 60 Aviation has established business relationship with leading enterprises in the Islamic Republic of Iran. The South African government welcomes the expanding trade and investment relations with the Islamic Republic of Iran.”

5.4.12 As indicated in the evidence above, , Mr Le Roux transmitted a copy of the letter on the same day by e-mail to Mr Moeketsi who in turn delivered it to Mr Barry Oberholzer at the InterContinental Hotel at the O R Tambo International Airport.

5.5 The explanation obtained from the DTI’s former Deputy Director-General responsible for Trade and Investment South Africa, Mr Iqbal Sharma regarding the issuing of government support letters for 360 Aviation in February and September 2008, respectively.

5.5.1 During the investigation of the matter, Mr Sharma was requested to explain the circumstances surrounding the issuing by the DTI of the 2008 letters of support to *360 Aviation*.

5.5.2 In his response, Mr Sharma stated that Mr Masebelanga was referred to his office by the office of the Director-General at the DTI, with a specific request for assistance with pursuing business in Iran.

5.5.3 He stated that it is part of the mandate of the DTI to assist South African companies seeking to do business abroad and to assist foreign companies seeking to do business in South Africa or with South African companies.

5.5.4 It was in this context that he met Messrs Masebelanga and Oberholzer at the time whilst in Cape Town, who explained to him that they were negotiating contracts to supply helicopters and other aircraft to Iran. The two gentlemen required the assistance of the DTI to meet with the representatives of Iran Air on their proposed visit to South Africa.

- 5.5.5 The context of any support to business initiatives with Iran were based against the strategic importance of Iran as a market for South African goods and services and as a source of inward investment.
- 5.5.6 After consultation with the Department of Foreign Affairs, now known as the Department of International Relations and Cooperation, the DTI had opened an office in Tehran for trade and investment promotion and in good faith, his office sought to assist the aviation venture proposed by Messrs Masebelanga and Oberholzer.
- 5.5.7 He stated that at the time, there were no UN sanctions imposed against the Republic of Iran and therefore, no further and intense scrutiny was required. Large South African corporates like SASOL and MTN were already in the Iranian market. The meeting with Iran Air and the DTI did not materialize and Mr Oberholzer indicated that they would reschedule, however, in the interim they had advanced their project and wanted a letter to confirm that he had met with the DTI and that it was aware of their intentions to do business in Iran.
- 5.5.8 A second letter of support was issued in September 2008. Thereafter, Mr Sharma had no contact with either Messrs. Masebelanga or Oberholzer. He subsequently resigned from the DTI in October 2010.
- 5.5.9 According to Mr Sharma, the letters that were provided to 360 Aviation were bland and generic and did not pronounce any opinion on the standing of the enterprise or commit the Department to any action. It was his belief that senior officials should have delegated authority to communicate with companies in SA and abroad in writing and discretion and sound judgment should be applied in wording the letters appropriately.
- 5.5.10 When it comes to providing government letters of support that articulates the credibility of a company or that will bind the Department to any sort of decision, it would, in Mr Sharma's view, be prudent to develop a value chain that recommends and finally approves that such letter can be signed on behalf of the

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- Department. The legal division of the department should certainly be part of the decision chain.
- 5.5.11 It would also be imperative that as part of the decision making process, appropriate checks are made on the company to ensure that the DTI is not misled.
- 5.5.12 He concluded by stating that communication between government and business should not be over bureaucratized in the interest of timely communication. However, support letters where one party would depend on Government's opinion and support should follow a process that ensures that the Department is not exposed to abuse or reputational damage, and in this regard a clear policy should be developed.
- 5.6 The Commission Agreement, dated 13 April 2011, between 360 Aviation, R R Masebelanga Consulting CC and Ngwana Phosa Dira Trading in respect of consultancy to obtain a government support letter.**
- 5.6.1 As indicated above, the information and evidence obtained during the investigation indicate that following the meeting held on 17 February 2011, Mr Moeketsi obtained the letter of support for the business dealings of 360 Aviation from the DTI and forwarded same to Mr Oberholzer.
- 5.6.2 On the morning of 14 April 2011, two days after he received the government support letter, Mr Barry Oberholzer forwarded a copy of a completed draft commission agreement to Mr Moeketsi.
- 5.6.3 The document, a copy of which was obtained during the investigation, is titled: *“Commission Agreement dated 13 April 2011 in respect of: Consultancy to obtain Government Support Letter.”*
- 5.6.4 The parties to the agreement were *“360 Aviation (Pty) Ltd, acting on behalf of the payee and R R Masebelanga Consulting CC duly represented by Raisaka R Masebelanga as well as H T R Moeketsi, duly representing Ngwana Phosa Dira Trading.”*

- 5.6.5 The agreement was signed by Messrs Masebelanga and Moeketsi on 15 April 2011, but not by Mr Oberholzer.
- 5.6.6 Attached to the Commission Agreement were copies of passports bearing the names and photographs of *Ronald Raisaka Masebe, Prudence Zerah Mtshali and Herman Timothy Rammilo Moeketsi*.
- 5.6.7 According to the preamble to the agreement, *360 Aviation* requested assistance to obtain a support letter from the South African Government and was, in doing so, acting on behalf of an unnamed “Payee”.
- 5.6.8 It is further stated that the agreement supersedes any previous agreements between the parties, their affiliates, directors or shareholders. It was a material term of the agreement that R R Masebelanga Consulting CC and Ngwana Phosa Dira Trading would receive 50% equal sharing of the commission arising out of the agreement to obtain the government support concerned. In addition thereto, the following were other terms of the agreement:
- “The Payee agrees to pay an equal amount of 10 000 000 (Ten Million South African rand) (the ‘Commission Fee’)*
- The Commission Fee will be paid by the Payee within a reasonable timeframe to allow for arrangements of payment.*
- All payments including but not limited to the balance of the Commission Fee shall be made by SWIFT transfer in immediate available funds to the bank account of the Seller, details of which are as follows:”* The two companies then provided their Standard and First National Bank account numbers respectively.
- 5.6.9 During the investigation, it was further established that on 18 April 2011, Mr Oberholzer continued with the arrangements of a business trip to Iran and requested Mr Moeketsi to arrange flights to leave Johannesburg on 2 May 2011, arriving in Tehran the following day. According to the travelling arrangements made, the parties concerned would return to South Africa on 8 May 2011.

5.7 The response of Deputy President Motlanthe to the allegations investigated

- 5.7.1 On 3 April 2012, the attorneys representing Deputy President Motlanthe, submitted his formal response to the allegations referred to in paragraph 2 above, to the Public Protector.
- 5.7.2 He stated that he stands by the contents of his letter forwarded to the *Sunday Times* on 9 March 2012.
- 5.7.3 Deputy President Motlanthe confirmed that Ms Gugu Mtshali is his life partner and that he resides with her in a private residence in Houghton, Johannesburg. He stated that despite Ms Mtshali being regarded as his life partner, she receives no benefit from the State.
- 5.7.4 In his said response to the *Sunday Times*, Deputy President Motlanthe denied knowledge *360 Aviation* and that he had met representatives of the enterprise, as was alleged. He had no knowledge of the letter of support from the DTI for 360 Aviation prior to his office receiving enquiries from a journalist of the *Sunday Times* on 7 March 2012. Deputy President Motlanthe denied having discussed the matter with anyone, including the DTI.
- 5.7.5 Deputy President Motlanthe also denied having been party to any agreement with 360 Aviation and that he received any money from 360 Aviation, directly or indirectly. However, he admitted that he knows Mr Masebelanga, but stated that he has never discussed *360 Aviation* with him, nor has he ever discussed 360 Aviation with Ms Mtshali save for purposes of responding to enquiries made by *Sunday Times*.
- 5.7.6 According to Deputy President Motlanthe, there is no basis whatsoever to link him to the allegations involving 360 Aviation, including its interactions with the DTI. With regard to Ms Mtshali, he further stated that “*Ms Mtshali has never arranged or attended a formal meeting with 360 Aviation. She had no knowledge of the letter from the Department of Trade and Industry for 360 Aviation prior to enquiries made by the Sunday Times. She also had at no stage discussed such a matter*”.

5.7.7 Deputy President Motlanthe further denied that Ms Mtshali was a party to any agreement with 360 Aviation, or that she received any money from it, directly or indirectly. He stated that Ms Mtshali was not aware of any agreement between 360 Aviation and any other person. He confirmed that Ms Mtshali provided a copy of her passport to Mr Masebelanga in order for him to arrange for her to travel to Botswana and indicated that the a trip was not related to 360 Aviation and in any event did not take place. She was also not aware that a copy of her passport had been forwarded to 360 Aviation and for what purpose.

5.7.8 He concluded by stating that there is equally no basis whatsoever to link Ms Mtshali to the allegations concerning 360 Aviation including its interactions with the DTI.

5.8 The response of Ms Gugu Mtshali to the allegations investigated

5.8.1 In her response to the Public Protector, dated 3 April 2012, Ms Mtshali stated in the main that:

“First and foremost, I place on record that I dismiss these allegations and inferences with the contempt that they deserve and will in this explanation provide the true facts to the extent of my knowledge, and I wish it noted that I do so both freely and voluntarily. In terms of this explanation and the information requested by the Public Protector, I have answered the questions that relate to either myself directly and to my personal relationship with the Deputy President, however I have refrained from addressing those queries addressed to the Deputy President

THE DEPUTY PRESIDENT:

I am indeed in a personal relationship with the Deputy President, and we currently reside at our joint abode in Houghton. I am the Deputy President’s life partner and confirm that I do not receive any state benefit/privilege due to my relationship with the Deputy President.

THE STATE:

As detailed in the aforementioned Sunday Times article, I have previously worked for the African National Congress; however I currently have no direct dealings or business association with the State, or any associated state organ, nor do I receive any assistance from the State in terms of my commercial endeavors.

BUSINESS CONCERNS:

I confirm that I do not have any operational/formal dealings or partnerships with any of the individuals referred to in terms of the meeting that forms the subject of this letter.”

5.8.2 Ms Mtshali attached to her statement confirmation from her auditors and chartered accountants in respect of her shareholding in and directorship of certain business entities that do not include 360 Aviation. She also attached a copy of a Memorandum of Agreement in respect of her previously intended involvement with Rustenburg Abattoir (Pty) Ltd, trading as Marico Meats.

5.8.3 With regard to the meeting of 17 February 2011, Ms Mtshali stated *inter alia* as follows:

“On 17 February 2011 at approximately 13H30, I arrived at 10 Bompas Road, Dunkeld West, Johannesburg in order to attend a meeting. Contrary to statements in the media, I was not there to attend a meeting with Barry Oberholzer or to discuss any transaction whatsoever with Mr Oberholzer or Three60 Aviation. Prior to that day, I had never met Mr Oberholzer and was not aware of his business.

My presence at the meeting was as a result of having met the three gentlemen, Mr Mboweni, Mr Mogaki and Mr Masebelanga at a wedding in December 2010, where possible future business dealings were mooted. In this vein, Mr Mboweni had introduced a possible investment opportunity to me involving the acquisition of an abattoir. Prior to the Ten Bompas meeting, I had been given a copy of a memorandum of agreement detailing how the possible abattoir investment could

work, and it was for this purpose that I arrived at Ten Bompas to discuss the abattoir investment with the three gentlemen identified.

Upon my arrival at the restaurant, I recognized the three gentlemen I was meeting and noted that there was a fourth white gentleman currently engaged in discussions with them. I proceeded to greet the party and took a seat so as not to interrupt the meeting. At this juncture, Mr Masebelanga continued with the meeting, explaining that the meeting I was to attend would follow the current one, and proceeded to point to the white gentleman, and introduced him as Barry. From this point on I sat quietly awaiting the end of their meeting and the commencement of the one I had been invited to. While awaiting my meeting, I sat opposite Mr Mogaki furthest from the meeting that was taking place between Mr Masebelanga, Mr Mboweni and Mr Oberholzer.

During the conversation which I was not party to, I was surprised by a loud reference made by Mr Mboweni which seemed intended to refer to me. The reference used was 'MAMA', which he had never used before and was intended to involve me in the conversation. I then responded expressing my embarrassment and discomfort with being drawn into a conversation I had no knowledge of or interest in. They thereafter continued with their discussions, to which I never contributed either directly or indirectly, and that was the last time I interacted with them on this matter.

Upon concluding their meeting, Mr Masebelanga explained that Mr Oberholzer had flown from Cape Town for the meeting, which according to Mr Masebelanga was why the meeting couldn't be postponed. At that juncture, Mr Oberholzer left and we commenced the originally scheduled meeting dealing with the abattoir.

As a matter of record, neither Mr Mboweni, Mr Raisaka Masebelanga nor Mr Rainy Mogaki hold any form of brief or instruction from myself on any matters of business or otherwise. Furthermore, I was and am not involved in any Iran related business, helicopter dealings, or oil and gas nor do I have any other business dealings with the respective parties.

STATEMENTS ATTRIBUTED TO ME:

The Sunday Times attributes the statement ‘Joe will be instructing’ to me. I said no such thing during the course of the meeting. Moreover, I point out that neither I nor my advisors can hear any version of such a statement in the recording provided by the Sunday Times. In any event, I do not know whether such recording is genuine and whether it has been altered.

THE COMMISSION AGREEMENT:

I have no knowledge of the Commission Agreement, its drafting, purpose or author, and the only knowledge that I do have is as a consequence of the Sunday Times article. Further, at no stage was I informed that a ‘commission agreement’ would be part of my intended meeting agenda. Hence I have no knowledge, nor any intention or expectation to benefit either directly or indirectly from the alleged ‘commission’.

PASSPORT:

The Commission Agreement has been linked by the Sunday Times to a copy of my passport, allegedly with a view to travelling to Iran. Firstly, I did not give Mr Oberholzer a copy of my passport, nor have I ever intended to travel to Iran. Secondly, I do not know and have never met Mr Herman Moeketsi, who is allegedly the individual who provided Mr Oberholzer with the copy of my passport.

I cannot explain how a copy of my passport was included in correspondence with Mr Oberholzer (if it was); bar to say that approximately four months earlier, Mr Masebelanga approached me looking for South African investors for a possible acquisition prospect, being a 10-20% interest in a diamond mine in Botswana known as BK-11. Given that I was aware of Mr Masebelanga’s experience in the mining industry, I agreed to review the opportunity, and it was mooted that a trip to Botswana would be required. In this regard I provided Mr Masebelanga with a

copy of my passport, for travel purposes of exploring a diamond mine acquisition and nothing else.

THE DTI LETTERS:

I have no knowledge as to the nature and extent of these letters, nor do I have any knowledge of their intended purpose or use.”

5.9 Response by the DTI to questions posed by the Sunday Times.

5.9.1 According to the records of the DTI, the *Sunday Times* posed a number of questions to it on 7 March 2012 in connection with the support letter for 360 Aviation issued on 12 April 2011. In its response, the DTI stated that:

“The Department does not issue letters of support without ensuring that a proper process is followed to ensure the correct use of such a letter. In some countries across the globe, doing business without support from Government is difficult and sometimes impossible. South African companies do not pay for this assistance. 360 Aviation approached the Department with a request to assist them in trying to expand their business in Iran. Before issuing the letter of support, a due diligence was done on 360 Aviation.

Under no circumstances was there any contact between Mr Riaan Le Roux and any official of 360 Aviation other than professional contact. There are very strict rules applicable for the issuing of a letter of support and in this particular case, the letter was issued as a bona fide attempt to assist a South African company operating in a challenging environment. There was never an attempt from 360 Aviation to solicit the letter in exchange for monetary favours nor was it solicited from 360 Aviation.

5.9.2 In respect of soliciting a payment in return for the letter of support, the DTI stated that: *“Mr Le Roux did not know that there was a deal for a payment to be made in returning for the provision of the letter of support.”*

5.9.3 With regard to the issuing of such support letters to South African companies doing business abroad, the DTI stated that it supports South African companies doing business abroad, particularly in countries where doing business with government support becomes necessary. This is part of its normal trade-and investment activities and is a free service. In this regard the Department follows a specific methodology before issuing a letter of support.

5.9.4 On a question regarding the issuing of the letter for a business involving supplying of helicopters of US origin to Iran thus potentially, constituting sanctions-busting activity, the Department stated that: *“the request letter of support from 360 Aviation only stated helicopters for civilian use and that the DTI cannot issue a letter of support in contravention of specific international agreements as it does not engage in sanctions-busting.”*

5.9.5 In conclusion, the Department raised concerns that its letter which was issued with *bona fide* intentions could be used to allegedly solicit bribes or to contravene international agreements to which South Africa subscribes and confirmed that it would investigate the matter on receipt of a formal complaint.

5.10 A report on an investigation conducted by Grant Thornton Business Risk Services commissioned by the DTI into a letter of support issued to 360 Aviation in April 2011

5.10.1 On 10 May 2012, and following the allegations published by the *Sunday Times*, referred to in paragraph 2 above, the DTI commissioned a forensic investigation into the circumstances surrounding and the processes followed in issuing of the government support letter to 360 Aviation on 12 April 2012. Grant Thornton Business Risk Services was appointed to conduct the Investigation and a report was issued in July 2012.

5.10.2 It was noted that this report also found that the international sanctions imposed on Iran at the time when the letter of support was issued for *360 Aviation* it related only to military vehicles, aircraft, warships and other armaments. There was no

ban on civil trading in respect of United Nations Member States that endorsed the sanctions.

5.10.3 A copy of the report was obtained during the investigation, which found that Mr. Le Roux may be considered to have been grossly negligent in that he did not:

- (a) Follow the DTI rule to remain neutral and not issue such a letter at all as he ought to have known of this neutrality;
- (b) Seriously have regarded the sanctions imposed on Iran by UNSC Resolution 1929 before issuing the letter;
- (c) Compare all possible future and previous operations of 360 Aviation against the list of sanctions imposed against Iran and the possible consequence for South Africa should the sanctions be contradicted.
- (d) Consult or request advice and input from other senior DTI officials, his subordinates, his peers management, the DTI Executive Board, the Director-General, Minister and other government departments such as Office of the Presidency and Regulatory Authorities such as the Defence Export Council and/ or the National Convention Arms Control Committee;
- (e) Consult or seek advice from the DTI division responsible for International Trade and Economic Development, in this instance Mr. Daryl Hudson, who is responsible for Government to Government Relations between South Africa and Iran (Bilateral Trade Relations) and who could have advised Mr. Le Roux on all industrial sanctions imposed against Iran.
- (f) Listen to advice from Mr. Mathale to rather refer 360 Aviation to the South African Embassy in Teheran;
- (g) Make sure that 360 Aviation and its directors/ shareholders/liquidity/financial position/credibility/profile/reasons for support/ future operations were properly validated and vetted;
- (h) Protect the good image and reputation of the DTI and government in general;

- (i) Exercise due professional care and integrity, vigilance and professionalism when making the decision to issue and sign the letter;
- (j) Take possible future risk exposure of the DTI and government into consideration;
- (k) Display sound judgment to build confidence and trust in the Public Service; and
- (l) Act responsibly in the circumstances.

5.10.4 The report recommended that:

“Mr Le Roux should be subjected to a disciplinary enquiry in terms of the Public Finance Management Act, 1999, Public Service Regulations-Code of Conduct, the DTI Ethics Management Framework and SMS Handbook and held accountable for bringing the DTI and public sector into disrepute and for the possible reputational risk South Africa and the DTI is facing in anticipation of all investigations being conducted.”

5.10.5 It was further recommended that should the issuing of support letters become part of the DTI's mandate and core service, a proper policy and standard operating procedure should be developed, implemented and reviewed regularly.

5.10.6 In its response to the findings and recommendations of the report the DTI confirmed that disciplinary action will be taken against Mr Le Roux, a proper policy and standard operating procedure will be developed and implemented by the end of 2012 with regard to the issuing of letters of support.

6 EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION.

6.1 Was there a meeting held on 17 February 2011, attended by Deputy President Motlanthe's life partner, Ms Gugu Mtshali where the support of the South African Government for a business transaction involving 360 Aviation and the Islamic Republic of Iran was discussed?

- 6.1.1 It is not in dispute that on 17 February 2011, Ms Mtshali attended a business meeting held at 10 Bompas Street in Dunkeld West, Johannesburg at the invitation of Mr Jo Mboweni , who indicated that the purpose of the meeting was to explore investment opportunities in the abattoir industry in South Africa.
- 6.1.2 It is also not in dispute that the support of the South African Government for a business transaction involving 360 Aviation and the Islamic Republic of Iran was discussed by some of the parties that were invited for the meeting that Ms Mtshali attended, with Mr B Oberholzer of 360 Aviation at the same venue.
- 6.1.3 The evidence of all the witnesses that attended the meeting, as supported by the transcript of the recording made by Mr Oberholzer and the information provided by Ms Mtshali, indicate that she did not participate in the discussion in connection with the support of the South African Government that was required for the business ventures of 360 Aviation in Iran. She did no more than to utter the words: “No!..Hey man Jo, c’ommon Jo..”

6.2 Did Ms Mtshali solicit or accept a bribe to help 360 Aviation and the Islamic Republic of Iran and if so, was this in breach of the Prevention and Combatting of Corrupt Activities Act, 2004 or in breach of any law?

- 6.2.1 According to the allegations and suggestions published by the *Sunday Times*, which were the subject of the Deputy President’s request for an investigation, Ms Mtshali was implicated in soliciting a bribe in return for obtaining a letter of government support for 360 Aviation, due to the fact that she was present at a meeting where the issue was discussed and the payment of a fee for obtaining such letter was agreed to by Messrs Oberholzer and Masebelanga. She was further implicated by the transcript of the recording of the meeting by Mr Oberholzer, which, according to the *Sunday Times*, reflected that Mr Mboweni would be taking instructions in regard to the matter from Ms Mtshali.
- 6.2.2 The information and evidence obtained during the investigation indicate that Ms Mtshali was invited to the meeting by Mr Jo Mboweni, her acquaintance. It was not disputed that the purpose of Ms Mtshali’s attendance of the meeting was to

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- discuss her involvement in an abattoir business as previously agreed with her associates in December 2010.
- 6.2.3 After Messrs Masebelanga, Mboweni, Mogaki, and Oberhozer and Ms Mtshali arrived at the venue of the meeting to which Ms Mtshali was invited, a deal was discussed in connection with the payment of a sum of R10 million and shares in 360 Aviation in return for obtaining a government support letter for 360 Aviation to enter into a business transaction in Iran.
- 6.2.4 According to the transcript of the recording of the meeting, made by Mr Oberholzer, only three attendees were involved in this discussion, who were Messrs Masebelanga, Oberholzer and Mboweni. The only involvement of Ms Mtshali was when Mr Mboweni attempted to draw her into the discussion by saying he is working on instructions from “*Mama*”, ostensibly in reference to Ms Mtshali.
- 6.2.5 However, from the investigation it was found that there are material differences between what was recorded in this regard by Mr Oberholzer and his transcript thereof. According to the recording, Mr Mboweni stated during the discussion that he was an advisor to Ms Mtshali, upon which she retorted and said “*No, hey man Jo, c’mmon Jo*”
- 6.2.6 Neither the evidence of the witnesses that attended the meeting, nor the recording and the transcript thereof indicated any further involvement of Ms Mtshali in the discussions.
- 6.2.7 According to Mr Mogaki, he was seated with Ms Mtshali and they were having a separate conversation, whilst the discussion between Messrs Oberholzer, Masebelanga and Mboweni, in which they had no interest, were taking place.
- 6.2.8 The evidence of Mr Mogaki furthermore supports that of Ms Mtshali that she took no interest in the discussions between Messrs Oberholzer, Masebelanga and Mboweni, until she heard a reference to her, when she retorted and expressed her discomfort with being drawn into the discussions, which she was not party to.

- 6.2.9 A further implication of Ms Mtshali in the soliciting of a bribe, as alleged by the article of the *Sunday Times*, referred to in this report was that she intended to accompany Messrs Oberholzer, Masebelanga and Moeketsi on a business trip to Iran.
- 6.2.10 However, the evidence of Mr Oberholzer in this regard was that this information was provided to him by Mr Moeketsi and not by Ms Mtshali. She explained in this regard that Mr Masebelanga was in possession of a copy of her passport as he was supposed to have arranged a business trip involving her in another matter. No evidence or information could be found during the investigation that Ms Mtshali was even aware of the intentions of Messrs Moeketsi, Masebelanga and Oberholzer to involve her in a business trip to Iran.
- 6.2.11 The letter from Mr Oberholzer, dated 8 April 2011, addressed to the DTI in support of the request of 360 Aviation for a letter of support referred to 360 Aviation's planned business trip to Iran. It stated that *360 Aviation* would be accompanied by its "equity partners Mr Raisaka Masebelanga and Mr Herman Moeketsi." No reference was made in this letter to Ms Mtshali.
- 6.2.12 None of the witnesses interviewed during the investigation could provide any evidence that Ms Mtshali was involved in assisting 360 Aviation to obtain a letter of government support for its business ventures in Iran or that she was in any manner involved in the soliciting of a bribe or the accepting of a bribe or gratification in this regard.
- 6.2.13 However, Messrs Oberholzer, Moeketsi and Masebelanga conceded during the investigation that they agreed that an amount of R10 million would be paid by a client of 360 Aviation to entities owned by Messrs Moeketsi and Masebelanga, in return for obtaining a government support letter through their structures, associates and contacts in the South African Government. This agreement was recorded in a Commission Agreement, which was signed by Messrs Moeketsi and Masebelanga.

6.3 Was Deputy President Motlanthe involved in assisting 360 Aviation to obtain the support of the South African Government for the business transaction involving the Islamic Republic of Iran?

6.3.1 No evidence was presented or could be found during the investigation indicating or suggesting that Deputy President Motlanthe was involved in assisting 360 Aviation to obtain the support of the South African Government for the business transaction involving the Islamic Republic of Iran.

6.3.2 The only mention made of the office of the Deputy President was by Mr Masebelanga, when he made a proposal that that *“the support letter must be obtained from any of the major government departments, either the DTI or the Presidency or Deputy Presidency”*

6.3.3 Mr Barry Oberholzer also denied having met with the Deputy President as was alleged.

6.3.4 During the investigation, Deputy President Motlanthe on his part denied any personal knowledge of 360 Aviation, except for what was published by the media, and having met any of its representatives.

6.4 Did the Department of Trade and Industry provide 360 Aviation with a letter confirming that the South African Government supported its business with the Islamic Republic of Iran, and if so, was the conduct unlawful or improper?

6.4.1 It was not in dispute during the investigation that the DTI provided 360 Aviation with letters confirming that the South African Government supported its business with Iran in 2008 and 2011.

6.4.2 In this regard, it was noted that the DTI commissioned a separate forensic investigation by *Grant Thornton Business Risk Services* into the issuing by Mr Le Roux of the letter of support for 360 Aviation on 12 April 2011.

6.4.3 From the evidence and information obtained in the investigation referred to in this report, the officials of the DTI issued letters of support without any policy framework, guidance or formal procedures regulating the issuing of support letters for entities that intend doing business abroad. The Public Protector had to determine whether such conduct was unlawful, improper or an act of maladministration. The Public Protector's point of view in this regard, is captured in the findings contained in paragraph 14 below. Such point of view has also taken into account the findings of the Grant Thornton report.

6.4.4 The Public Protector has noted that the DTI has already indicated in its response to the forensic report that a policy framework will be developed and implemented by the end of 2012 as remedial action.

7. THE LEGAL AND POLICY FRAMEWORK

7.1 The Constitution

7.1.1 Section 96(1) of the Constitution provides that members of the Cabinet must act in accordance with a Code of Ethics prescribed by National Legislation.

7.1.2 In terms of section 96(2), members of the Cabinet may not:

- “(a) undertake any other paid work;*
- (b) act in **any way that is inconsistent with their office**, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or*

- (b) **use their position** or any information entrusted to them, **to enrich themselves or improperly benefit any other person.**” (emphases added)*

7.2 The Executive Members' Ethics Act

7.2.1 The preamble to the Act states that its aim is to provide for a Code of Ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of Provincial Executive Councils. In terms of section 2, the President

must publish a Code of Ethics prescribing standards and rules aimed at promoting open, democratic and accountable government.

7.3 The Executive Ethics Code

7.3.1 The Executive Ethics Code contemplated by the Executive Members' Ethics Act was published by the President on 28 July 2000 and amended on 7 February 2007.

7.3.2 The relevant provisions of the Code with which Members of the Executive must comply in performing their official responsibilities, provide as follows:

“General Standards

2.1 *Members of the Executive **must** to the satisfaction of the President-*

(a) perform their duties and exercise their powers diligently and honestly;

(b) fulfill all the obligations imposed upon them by the Constitution and law;

(c) act in good faith and in the best interest of good governance, and

(d) act in all respects in a manner that is consistent with the integrity of their office or the government.

2.2 *In deciding whether members complied with the provisions of clause (paragraph) 2.1 above, the President.... **must take into account the promotion of an open, democratic and accountable government.***

2.3 *Members **may not-***

(a) Deliberately or inadvertently mislead the President;

(b) act in a way that is inconsistent with their position;

(c) using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person; ...”

8 THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR

8.1 The Public Protector issued a Provisional Report on the matters investigated on 8 August 2012. The Provisional Report was presented for comments to Deputy President Motlanthe, Ms Mtshali, and Messrs Masebelanga, Moeketsi and Oberholzer.

9 DEPUTY PRESIDENT MOTLANTHE'S RESPONSE TO THE PROVISIONAL REPORT

9.1 The essence of Deputy President Motlanthe response, dated 20 August 2012, was that he and Ms Mtshali accept the general and specific findings contained in the Provisional Report (which were similar to the general and specific findings made in this report).

10 MR B OBERHOLZER'S RESPONSE TO THE PROVISIONAL REPORT

10.1 Mr W Booth, an attorney assisting Mr Oberholzer in his response to the Provisional Report, submitted his comments on 17 August 2012, in which he, stated that:

"We wish to record that there was no basis on which the Public Protector should have conducted an investigation into the affairs of Mr Oberholzer.

In respect of the other persons who were the subject of your report were (sic) also clearly private individuals.

In terms of your mandate we submit that this report has no legal validity."

11 THE RESPONSE OF MESSRS MASEBELANGA AND MOEKETSI TO THE PROVISIONAL REPORT

11.1 Messrs Masebelanga and Moeketsi submitted a joint response, dated 16 August 2012. On 6 September 2012, Messrs Masebelanga and Moeketsi duly assisted by

their legal representatives, met with the Public Protector to make presentations on their response submitted on 16 August 2012.

11.2 The salient points raised in their response were the following:

11.2.1 No offence in terms of section 3 of the Prevention and Combatting of Corrupt Activities Act was committed. In this regard, they stated that Mr Le Roux of the Department, who issued the letter of government support that was required, was not improperly influenced to abuse his position of authority or to act in violation of a legal duty.

11.2.2 The evidence and information presented to the Public Protector by Mr B Oberholzer is unreliable and should be regarded with suspicion. The reasons advanced for this contention is that Mr Oberholzer recorded the meeting of 17 February 2011 and that it was found that there is a material difference between the recording and the transcript made by him.

11.2.3 The “*Commission Agreement*” in terms of which 360 Aviation’s client in Iran would pay an amount of R10 million to R R Masebelanga Consulting and Ngwana Phosa Dira Trading, in equal parts, for obtaining the “*government support letter*” is “*legal nonsense*”. In this regard reference was made to the fact that 360 Aviation entered into the agreement acting on behalf of “*the payee*”. According to Messrs Masebelanga and Moeketsi “*payee*” means a person receiving payment, whilst the context of the said agreement was that the “*payee*” would be making the payment.

11.2.4 Messrs Masebelanga and Moeketsi further argued that the Commission Agreement makes no sense as:

“It is incomprehensible that a person looking for the assurance that someone is in good standing and has a letter of support from the Department of Trade and Industry would pay for such an artificially arrived at assurance. Surely it would be 360 Aviation which was the party wishing to do business with Iran that would be willing to pay money to get a certificate of good standing, or a letter of support, so that 360 Aviation could indicate to a potential Iranian business partner, or

contracting partner, that it was a worthy company to do business with i.e. it had the support of the Department of Trade and Industry.”

11.2.5 The Commission Agreement was drawn up in a hurry and formed part of “*another agreement which had real commercial terms*”. The other agreement, the existence of which is, according to Messrs Masebelanga and Moeketsi “*dupliciously denied by Oberholzer*” was signed by them at the same time when the Commission Agreement was signed.

11.2.6 Mr Moeketsi was brought into the deal with 360 Aviation, not because of his “*high level political contacts*”, but because there was “*talk with 360 Aviation not only of aviation related business but of trading in maize and sugar.*”

11.2.7 The amount of R 10 million that would be paid by 360 Aviation to the entities owned by Messrs Masebelanga and Moeketsi was not only for obtaining the government letter of support, but was also to be paid “*in lieu of work already done and to be done in relation to the broader business arrangement already referred to in this response.*”

12 CONCLUSIONS MADE FROM THE RESPONSES TO THE PROVISIONAL REPORT

12.1 The issues investigated by the Public Protector, as referred to in paragraph 2.16 above related to suggestions and allegations of the improper obtaining of a letter of government support for 360 Aviation to conduct business in Iran. The issuing of a letter stating that the South African Government supports a business venture in a foreign country, constitutes state affairs. As indicated in paragraph 3.1.1 above, the Public Protector has the powers, by virtue of section 182 of the Constitution, to investigate, *inter alia*, any conduct in state affairs or in the public administration that is alleged or suspected to be improper.

12.2 Mr B Oberholzer was directly involved in the request for the letter of government support for his company. According to his evidence, he represented a client in Iran, who was willing to pay R10 million in return for obtaining the letter. He was

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- furthermore present at the meeting on 17 February 2011 where a bribe was allegedly solicited in the presence of the Deputy President's life partner to obtain the letter of government support.
- 12.3 The investigation by the Public Protector did not relate to the separate and private affairs of Mr Oberholzer. It focussed on the allegations and suggestions of impropriety pertaining to state affairs in which Mr Oberholzer was a key role player. His conduct, for as far as it related to the state affairs under investigation, was subject to the jurisdiction and powers of the Public Protector.
- 12.4 The suggestion by Mr Oberholzer's attorney that the report of the Public Protector has no legal validity, therefore does not accord with the mandate of the Public Protector as it was executed during the investigation referred to in this report.
- 12.5 It was noted that Mr Oberholzer did not dispute any part of the evidence or the findings referred to in the Provisional Report, which are materially the same as those made in this report. The Public Protector made no finding in the Provisional Report that Messrs Oberholzer, Masebelanga and Moeketsi committed any offence.
- 12.6 The argument raised by Messrs Masebelanga and Moeketsi in respect of the reliability of Mr Oberholzer's evidence, cannot be accepted. Mr Oberholzer explained during his interview that it was his habit to record his business meetings, to enable him to have a record thereof and to share what was discussed with his business partners. The fact that there is a discrepancy between the transcript that he made and his recording of the meeting of 17 February 2011, in itself does not make his evidence as a whole unreliable, especially as it is in essence supported by the evidence of other witnesses and the information obtained during the investigation.
- 12.7 It was noted that neither Messrs Masebelanga and Moeketsi, nor Mr Oberholzer denied that they entered into the Commission Agreement or that it was signed. Messrs Masebelanga and Moeketsi also did not deny that they signed the agreement, despite the fact that they now regard it as "*legal nonsense*". They also could not provide a copy of the other agreement of which the Commission

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- Agreement, according to them, was a part. Mr Oberholzer furthermore did not refer to the other agreement in his evidence.
- 12.8 As indicated in paragraph 5.6 above, the contents of the Commission Agreement clearly states that it:
- 12.8.1 Related directly to the obtaining of a government support letter for 360 Aviation;
- 12.8.2 Superseded any other agreements entered into between the parties;
- 12.8.3 The payable amount of R10 million was a “*commission fee*”. No reference was made in the agreement that it was for any other work performed for 360 Aviation by Messrs Masebelanga and Moeketsi or the entities that they represented.
- 12.9 Although the drafting of the Commission Agreement might be regarded as clumsy, there can be no doubt as to the intention of the parties thereto.
- 12.10 It was further noted that Messrs Masebelanga and Moeketsi argued in their response to the Provisional Report that it was actually 360 Aviation that was willing to pay the R10 million for the letter of government support, and not its Iranian client.

13 GENERAL FINDINGS

- The Public Protector’s general findings are that:
- 13.1 It is common cause that:
- 13.1.1 A meeting between Mr B Oberholzer, representing 360 Aviation, Mr R Masebelanga and Mr J Mboweni, took place at a restaurant in Bryanston, Johannesburg on 17 February 2011.
- 13.1.2 The focus of the meeting was negotiations on a deal involving an undertaking by Messrs Masebelanga and Mboweni to secure government support for 360

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- Aviation's business venture relating to the trading of civilian aircraft to the National Iranian Oil Company.
- 13.1.3 The agreement reached incorporated payment by the National Iranian Oil Company of an amount of US \$1 million, then translating to R10 million, through Mr B Oberholzer's company, for securing the support of the Government of South Africa to be specifically communicated through a letter of support to be obtained from the Presidency, the DTI or any other relevant authority.
- 13.1.4 A written version of the agreement was prepared and signed by Messrs Masebelanga and Moeketsi, but never signed by Mr Oberholzer.
- 13.1.5 Ms Mtshali was present during a portion of the meeting and uttered a few words. A copy of her passport was later included among the copies of passports supplied by Mr Moeketsi to Mr Oberholzer with an accompanying note that said: *"Transmitted herewith please find copies of Agreement and passport photos as requested."*
- 13.1.6 The letter of support was duly obtained from Mr R Le Roux of the DTI, through the intervention of Mr H Moeketsi.
- 13.1.7 The deal was made at a time when United Nations imposed sanctions against Iran, which included an arms sales embargo, were in place.
- 13.1.8 Deputy President Motlanthe was never involved and Mr B Oberholzer never had any contact with him, neither did he have any direct contact with Ms Mtshali or meet her again.
- 13.2 What was in dispute was:
- 13.2.1 Whether or not the partially signed agreement reached between 360 Aviation and related acts of the parties involved constitute the solicitation and/or acceptance of a bribe or gratification as envisaged in the Prevention and Combatting of Corrupt Activities Act, read with the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions. Linked to the question is the meaning of the statement *"nothing for mahala"* uttered by Mr Masebelanga at the meeting of 17 February 2011.

- 13.2.2 Whether or not Ms Mtshali's conduct, particularly her presence during a portion of the 17 February 2011 meeting and uttering a few words, justifies a finding that she participated in the solicitation and/or acceptance of a bribe aimed at corrupting the decision-makers in the Government of South Africa to unduly provide support to 360 Aviation in the contravention of the Prevention and Combatting of Corrupt Activities Act.
- 13.2.3 Whether or not the acts of Messrs B Oberholzer, Masebelanga, Mboweni and Moeketsi amounted to corrupt activities as envisaged in the Prevention and Combatting of Corrupt Activities Act read with the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.
- 13.2.4 The exact words that were uttered by Ms Mtshali during the meeting of 17 February 2011 and whether or not such words are adequate to support a finding that Ms Mtshali participated in the meeting and consequently negotiations over the Iranian deal and alleged bribe.

14 SPECIFIC FINDINGS

The Public Protector's specific findings are that:

- 14.1 Ms Mtshali, was present during a portion of the meeting of 17 February 2011, but did no more than to utter the following words: *"No! ... Hey Man Jo, c'ommon Jo.."*
- 14.2 Ms Mtshali's presence and utterance of the above few words do not substantiate a finding that she participated in the meeting or the Iranian deal or solicited and/or accepted a bribe or gratification in exchange for influencing the Government of South Africa to support 360 Aviation's Iranian business venture.
- 14.3 An agreement was reached between 360 Aviation's Mr Oberholzer and Messrs Masebelanga, Moeketsi and Mboweni regarding the procurement by Mr Masebelanga and company of government support for 360 Aviation's Iranian

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- aircraft trading venture. The amount agreed to was US\$ 1 million or R10 million then.
- 14.4 Not enough evidence could be found to justify a finding that the agreement constitutes the solicitation or acceptance or intention to offer a bribe or gratification in violation of section 3 of the Prevention and Combatting of Corrupt Activities Act. The statement “*nothing for mahala*” cannot be conclusively linked to an intention to buy the support and the explanation that this was for facilitation services rendered by Mr Masebelanga and company, was accepted. However, to the extent that the agreement with the Iranians related to the influencing of a South African Government public official, it may constitute a violation of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.
- 14.5 Deputy President Motlanthe was never involved in assisting 360 Aviation to obtain the support of the South African Government for the business transaction involving the Islamic Republic of Iran.
- 14.6 The issuing of the letter of support by Mr Le Roux, an Acting Deputy Director-General at the DTI, though not unlawful, was ill advised as it risked the potential on unintentionally supporting sanctions busting. This exposed an urgent need for the DTI to urgently regulate, not only the process, but also the circumstances of issuing such letters of support and designating specific persons to do so.

15 REMEDIAL ACTION

The remedial action to be taken, as envisaged by section 182(1)(c) of the Constitution, is the following:

- 15.1 The Director-General of the DTI to ensure that the recommendations of the Grant Thornton Report on the forensic investigation into the issuing of the letter of support dated 12 April 2011, commissioned by the department and issued in July 2012, are implemented expeditiously in respect of the developing of a policy framework regulating the issuing of letters of support for companies wishing to do business abroad.

16 MONITORING.

- 16.1 The Director-General of the DTI to submit a report to the Public Protector on the implementation of the remedial action referred to in paragraph 15.1 above within 90 days of the date of the issuing of this report.



ADV. D. N. MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Date: 28 September 2012