
REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF A BREACH OF THE EXECUTIVE MEMBERS’ ETHICS ACT, 1998 AND THE EXECUTIVE ETHICS CODE BY THE MINISTER OF COMMUNICATIONS, GENERAL SIPHWE NYANDA (RET)
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Executive Summary

(i) A member of the National Assembly and leader of the official opposition, the Democratic Alliance (DA), Mr A Trollip (Mr Trollip or the Complainant), requested the Public Protector to investigate whether or not the Minister of Communications, General Siphiwe Nyanda (Ret) (General Nyanda) had acted in breach of the provisions of the Executive Ethics Code (Code of Ethics) and the Executive Members' Ethics Act 1998, (the Executive Members' Ethics Act).

(ii) The original complaint was lodged by a member of the Gauteng Legislature, Mr Jack Bloom, whose legal impediment in the circumstances was that the Executive Members Ethics Act restricts the right to initiate an investigation against a member of the Cabinet under the Code of Ethics, to the President, Members of the National Assembly and Permanent Members of the National Council of Provinces (NCOP).

(iii) The allegations were based on media reports in which it was alleged that Abalozi Security Risk Advisory Services (Abalozi), previously known as General Nyanda Security Risk Advisory Services and GNS Risk Advisory Services, a company in which the Minister of Communications and his family have a 45% shareholding, had been irregularly awarded a contract, for the provision of risk management, advisory and security services, by the Gauteng Department of Public Transport, Roads and Works (GDTRW) on 25 October 2007.

(iv) According to the complaint, the contract in question has not been reviewed by the GDTRW and further that the alleged failure to review the contract itself appears to be irregular and/or could be seen to be related to the senior political position held by General Nyanda.
(v) The complaint also alludes to media reports that also suggested that the award of the contract in question to Abalozi was questionable.

(vi) The Public Protector's findings are that:

(a) Abalozi, a company linked to General Nyanda through his children's trust, the Mphephethwa Trust, was awarded a contract by the GDTRW, in October 2007, without a tender process or any other competitive bidding process being followed by the GDTRW. The deviation was justified then in terms of the deviation provisions of the Treasury regulations.

(b) The value of the contract was not determined or capped and the time frame was not stipulated in the contract although the Project Implementation Plan (PIP) stipulated a 12 month period expiring in June 2008, which was never adhered to.

(c) In view of (b) above, the award of the contract was irregular as it did not comply with the requirement of cost effectiveness as envisaged in section 217 of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the Public Finance Management Act, 1999 (PFMA).

(d) The contracts were reviewed by the GDTRW and it was during such review that certain irregularities were identified and the contracts terminated. It accordingly, cannot be found that the contracts were not reviewed.

(e) No evidence could be found that substantiates the allegation that General Nyanda, a former director of Abalozi, was directly involved in securing the contract, although by its own admission, the
GDTRW did take into consideration his background in the security sector in the award of some of the contracts.

(f) There is accordingly, no basis for finding that General Nyanda’s conduct constitutes a conflict of interest in violation of section 2 of the Executive Members’ Ethics Act and corresponding provisions of section 3 of the Code of Ethics.

(g) The circumstances under which the contract was issued is cause for concern, particularly as there seems to be a growing trend in this direction, with attendant risks regarding the quality and cost effectiveness of goods and services procured under these circumstances as well as the impact on fair competition.

(vii) The Public Protector’s recommendations are that:

(a) The President considers directing the Premier of Gauteng to conduct an investigation into any administrative failures and improper conduct that led to the circumstances under which the GDTRW awarded the contract to Abalozzi and take action against any person whose conduct is found to have been improper;

(b) The President considers directing the Treasury to conduct a systemic investigation into all contracts issued on confinement that exceed a million Rand or a figure to be determined by the President, to establish whether or not there isn’t a systemic abuse of the deviation provisions and the impact of this on cost effectiveness and quality;
(c) The President considers directing the Treasury and the Gauteng Provincial Government to review regulations regarding deviation from standard supply chain requirements;

(d) The President considers directing the Treasury to ensure that the reporting of deviations from standard supply chain requirements is stringently monitored and violations sanctioned, visibly and effectively; and

(e) The President considers directing the Treasury to ensure that timelines for the reporting of deviations from standard supply chain requirements are prompt so that if measures need to be taken to reverse improper decisions, these are taken immediately.
REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF A BREACH OF THE EXECUTIVE MEMBERS' ETHICS ACT, 1998 AND THE EXECUTIVE ETHICS CODE BY THE MINISTER OF COMMUNICATIONS, GENERAL SIPHIWE NYANDA (RET)

1. INTRODUCTION

1.1 This report is submitted to the President of the Republic of South Africa in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 3(2) of the Executive Members' Ethics Act, 1998 (Executive Members' Ethics Act), read with the corresponding sections in the Public Protector Act, 1994 (Public Protector Act).

1.2 The report relates to an investigation into an allegation of a breach of the Executive Members' Ethics Act in particular the provisions relating to conflict of interest by the Minister of Communications, General (Ret) Siphiwe Nyanda (General Nyanda) in relation to the Minister's alleged business interests in Abalozi, formerly known as General Nyanda Security Services and GNS Risk Advisory Services.

2. THE COMPLAINT

2.1 Mr J Bloom (Mr Bloom), a Member of the Gauteng Provincial Legislature submitted a complaint in writing to the Public Protector in terms of section 3(1) of the Executive Members' Ethics Act. The complaint was dated 29 March 2010.

2.2 The Public Protector requested, in a letter dated 29 March 2010, that should Mr Bloom wish for an investigation to be conducted into a possible violation of the conflict of interest provisions in section 2(b)(iii) of the
Executive Members' Ethics Act by General Nyanda, the complaint be referred to the Public Protector by a member of the National Assembly.¹

2.3 The complaint was, as a consequence of the Public Protector's letter, submitted by Mr Atthol Trollip member of the National Assembly representing the DA and leader of the official opposition, in his capacity as a member of the National Assembly on 1 April 2010.

2.4 Mr Trollip requested the Public Protector in terms of Section 3(1) of the Executive Members' Ethics Act to investigate a possible conflict of interest involving the Minister of Communications, General Siphiwe Nyanda (Ret).

2.5 In his letter, Mr Trollip stated the following:

"I am writing to you in response to the letter sent by your office to Mr Jack Bloom on 29 March 2010. This letter requested that, should Mr Bloom wish for an investigation to be conducted by the Public Protector into the matter of a possible conflict of interest regarding Communications Minister Siphiwe Nyanda, the complaint be referred to the Public Protector by a member of the National Assembly.

I therefore wish to resubmit this complaint for investigation by your office in my capacity as a member of the National Assembly and Parliamentary Leader of the Official Opposition.

Three appendices accompany this letter:

* The e-mail originally sent by Mr Bloom on 29 March 2010, which explains the grounds on which the investigation was requested;

¹ See Section 4(1)(a) of the Executive Members' Ethics Act which provides that the Public Protector must investigate an alleged breach of the Code of Ethics on receipt of a complaint from the President, a member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet Member or Deputy Minister.
• A reply received from the Gauteng MEC for Public Roads and Transport, Mr Bheki Nkosi, in response to a question submitted by Mr Bloom; and

• The response sent by the Public Protector to Mr Bloom on 29 March 2010.

I trust that your office will investigate this complaint and afford it the due consideration a matter of this importance deserves”.

2.6 Attached to Mr Trollip’s letter of complaint were the original complaint submitted by Mr Bloom and a response by the Member of the Executive Council responsible for Public Transport, Roads and Works in the Gauteng Province, Mr Bheki Nkosi (the MEC).

2.7 In his letter of complaint which forms part of Mr Trollip’s referral to the Public Protector, Mr Bloom had stated the following:-

“I wish to refer your attention to the apparent conflict of interest and breach of the Executive Members Ethics Act arising from the continuing benefit obtained by Communications Minister Sphiwe Nyanda from a contract with the Gauteng Department of Roads and Transport.

I enclose a written reply from MEC Bheki Nkosi in which he advises that “a contract relating to services of risk management, advisory services and security services” was awarded to GNS Risk Advisory Services on 25 October 2007.

2 The complaint was subsequently resubmitted by Mr Trollip after the office of the Public Protector pointed out that as the complaint was against a Cabinet Minister it could only be submitted by a member of the National Assembly or a permanent delegate to the National Council of Provinces.
Furthermore, "a tender process was not followed in awarding the contract. The Accounting Officer appointed GNS Risk Advisory Service through a deviation as provided for in terms of Treasury Regulations 16A6.4" and "The value of the contract in respect of the Department and its entities in general was not in all instances of services required from GNS determined in advance and fixed for the period in which the services were rendered ... The irregularity in the award of this tender relates to the fact that no procurement procedures other than the deviation route were followed in terms of advertisements, evaluation and approval of service provider".

I have referred the issue of possible irregularities and fruitless and wasteful expenditure to the Auditor-General for investigation, but the issue that also requires examination is the apparent continuing benefit from this contract by Minister Nyanda.

According to reports, GNS has changed its name to Abalozi Security, 45% of which is owned by a trust which benefits the Nyanda family.

My referral is based on, but not limited to, the following sections of the Act, but other sections may also be applicable.

Section 2(b)(iii) “exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests; “and (v) “acting in a way that may compromise the credibility or integrity of their office or of the government”.

It is of relevance to note that this contract has not been reviewed by the Gauteng Department of Roads and Transport, which looks irregular in itself and in the public mind this could be seen to be related to the senior political position held by Nyanda ...."
2.8 The MEC’s response attached to Mr Trollip’s complaint reads as follows:-

"With reference to question 5 TR 020 tabled by Mr J.B. Bloom of the Democratic Party, I wish to provide the following:

**Question 5. TR 020**

With regards to GNS Risk Advisory Services (Pty) Ltd, will the MEC please indicate:

(i) What contract has been awarded to this company in the past five years;
(ii) What is the value of this contract
(iii) What tender process was followed in awarding this contract
(iv) When were the advertisements placed in the newspapers for this contract
(v) When was this contract awarded
(vi) What other companies were short-listed for this tender
(vii) What were the prices of these other companies
(viii) Why was GNS selected
(ix) Whether there were any irregularities in the award of this tender
(x) Whether any investigation will be made into the award of this contract."

**Reply**

(xi) A contract relating to services of risk management, advisory services and security services were awarded to GNS within the Department of Public Transport, Roads and Works and its entities.

(xii) The value of the contract in respect of the Department and its entities in general was not in all instances of services required from GNS, determined in advance and fixed for the period in which the services were rendered. The expenditure to date in respect of these contracts are: R67 870 619.47. However the value of the contract entered into by
Impophoma Infrastructure Support entity was established at R12 052 990,00 inclusive of VAT, although no payments have been made to date at Impophoma.

(xiii) No, a tender was not followed in awarding the contract. The Accounting Officer appointed GNS Risk Advisory Service through a deviation as provided for in terms of Treasury Regulations 16A6.4.

(xiv) Not applicable as there was not advertisements placed.


(xvi) As there was no tender process followed, no other companies were short listed.

(xvii) As there was no tender process followed, no other companies were short listed.

(xviii) The contract was awarded based on the security needs identified by the HOD and the experience of the firm at the time in respect of implementation of Minimum Information Security Standards and risk advisory experience relating to physical and information security.

(xix) The irregularity in the award of this tender relates to the fact that no procurement procedures other than the deviation route were followed in terms of advertisements, evaluation and approval of service provider.

(xx) The contracts are currently undergoing a thorough review process and progress reports will be given to the Legislature regarding the outcome of the review.

2.8 Media Reports

2.8.1 The issues that form the subject matter of the investigation have been reported widely in several major newspapers. The said media reports suggested that the GDRTW had awarded a security contract to Abalozi, irregularly, without proper tender processes being followed. According to
the media reports in question, Abalozi has also benefited from security contracts with "at least four other Government entities".  

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT

3.1 Section 182(1) of the Constitution provides that the Public Protector has the power to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice. It further mandates the Public Protector to report on the conduct investigated, and to take appropriate remedial action. Section 182(2) of the Constitution provides that the Public Protector has additional powers and functions prescribed by National Legislation.

3.2 Sections 3(1) and 4(1)(a) of the Executive Members’ Ethics Act provide that the Public Protector must, inter alia, investigate any alleged breach of the Code of Ethics on receipt of a complaint by a member of the National Assembly against a member of Cabinet.

3.3 Section 3(4) of the Public Protector Act states that when conducting an investigation under the Executive Members’ Ethics Act, the Public Protector has all his/her powers under the Public Protector Act.

3.4 General Nyanda is a member of the Cabinet as envisaged in the Executive Members’ Ethics Act and the Code of Ethics issued under section 2 of the Executive Members’ Ethics Act.

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3 Cape Times of 2009, the Mail and Guardian of 2010, IT Web article by Nicola Mawson dated 19 March 2010.

4 The Public Protector is also empowered in terms of Section 6 of the Public Protector Act to conduct an investigation into any alleged "improper or dishonest act, or omissions or offences pertaining to the Prevention and Combating of Corrupt Activities Act of 2004 with respect of public money ...".
3.5 The Public Protector has the necessary powers and is obliged to investigate the issues covered by Mr Trollip on behalf of Mr Bloom.

4. THE INVESTIGATION

4.1 Sources of Information

This investigation was conducted in terms of section 3 of the Executive Members’ Ethics Act read with sections 6 and 7 of the Public Protector Act. It comprised the following:

4.1.1 Consideration of Mr Trollip’s complaint and attachments;

4.1.2 Analysis of the relevant media reports;

4.1.3 Consideration of the documentation submitted by Abalozi;

4.1.4 Consideration of Abalozi’s members’ share transfer and share certificates;

4.1.5 Consideration of the documentation submitted by the GDTRW;

4.1.6 Interview with Mr Bloom on 16 April 2010;

4.1.7 Interview with General Nyanda on 30 April 2010 and written correspondence with him;

4.1.8 Interview with Mr Sithole and Mr R Mofokeng of Abalozi and Mr M Ntumba of Ntumba Chartered Accountants Incorporated, auditors to Abalozi;

4.1.9 Interview with officials from the GDTRW;
4.1.10 Interview with officials from Metrorail/PRASA.

4.1.11 Meeting with the Head of Department (HOD) of the GDTRW, Ms B Monama (Ms Monama) on 21 May 2010 in Johannesburg.\(^5\)

4.2 Focus of the Investigation

The investigation focused on the following allegations:-

4.2.1 That Abaloi was awarded a contract by the GDTRW in circumstances where tender processes were "not followed in awarding the contract" and "whether the accounting officers appointed GNS Risk Advisory Services through a deviation as provided for in terms of Treasury Regulations 16A6.4\(^6\) and if so, whether this rendered the award of the contract irregular.

4.2.2 That "the value of the contract in respect of the Department and its entities in general was not in all instances of services required from GNS determined in advance and fixed for the period in which the services were rendered...The irregularity in the award of this tender relates to the fact that no procurement procedures other than the deviation route were followed in terms of advertisement, evaluation and approval of service provider".\(^7\)

4.2.3 That the GDRTW contract had not been reviewed by the Gauteng Department of Roads and Transport which "looks irregular in itself and in

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\(^5\) Ms Monama then helped facilitate interviews with all the GDTRW officials with intimate knowledge of the GDTRW's interaction with Abaloi.

\(^6\) See Letter of Complaint dated 1 April 2010.

\(^7\) See Letter of Complaint dated 1 April 2010.
the public mind this could be seen to be related to the senior position held by Nyanda\textsuperscript{9}

4.2.4 That there was a possible "conflict of interest and breach of the Executive Members' Ethics Act arising from the continuing benefit obtained by Communications Minister Siphiwe Nyanda from a contract with the Gauteng Department of Transport, Roads and Works;\textsuperscript{9}

4.2.5 That General Nyanda's conduct, by continuing to benefit from an allegedly irregular awarded government contract, was in breach of section 3 of the Code of Ethics.

4.3 Interview with Mr Jack Bloom

4.3.1 During the interview, which took place on 16 April 2010, Mr Bloom explained that what had troubled him with the GDTRW contract\textsuperscript{10} was that the allocation of a contract without a tender process being followed, may only happen if it is for a highly specialised service, cannot be easily provided by another company, and is urgent. (Own emphasis)

4.3.2 He contended that the skill which Abalozi allegedly possesses is readily available and is not unique. Secondly, the duration of the contract was not fixed and it had no fixed value and was allowed to roll over indefinitely. In addition, according to Mr Bloom the GDTRW failed to have the contract reviewed after the manner in which it was awarded was questioned. Mr Bloom stated that this could be attributed to General Nyanda's political influence and status. (Own emphasis)

\textsuperscript{9} See Letter of Complaint dated 1 April 2010.
\textsuperscript{9} See Letter of Complaint dated 1 April 2010.
\textsuperscript{10} Including those awarded by its entities
4.3.3 Mr Bloom stated further that General Nyanda’s reputation and political influence could very well have played a role in the decision to appoint Abalozi to provide services of risk management, advisory services and security to the GDRTW. Mr Bloom stated that even though General Nyanda was not a Minister at the time when the contract in question was awarded to Abalozi, the fact that he is still benefiting from the contract through his family trust means that he (General Nyanda) has placed himself in a situation which can be said to amount to a conflict of interest, as his name is still associated with Abalozi through his family’s Trust. (Own emphasis)

4.3.4 Mr Bloom went on to say that because of General Nyanda’s current involvement in government, his involvement in Abalozi amounts to a conflict of interest. Mr Bloom concluded by saying that General Nyanda has to choose between politics and business.

4.4 Interview with General Nyanda

4.4.1 The interview with General Nyanda took place at his offices in Pretoria on 30 April 2010 and dealt with his relationship with Abalozi and the circumstances under which the contested GDTRW contract was awarded, including the nature of his involvement if any.

4.4.2 On the question of his relationship with Abalozi, General Nyanda confirmed that that he was a Director of Abalozi at the time of his appointment into Cabinet as Minister of Communications.

4.4.3 He stated that after his retirement from the South African National Defense Force he did not hold any position in government and was not a political office bearer of any political party.
4.4.4 General Nyanda stated that he was not involved in the day-to-day management and running of Abalozi at the time when he was a director of the company and that Abalozi had its own Chief Executive Officer who had a responsibility of managing and running the company.

4.4.5 General Nyanda specifically mentioned that he was not involved in negotiating the contracts which form the subject of this investigation. At the time when the contracts were awarded he was the Chief Executive Officer of Ngwane Defense Technologies.¹¹

4.4.6 On the question of his shareholding in Abalozi, General Nyanda explained that 45% of Abalozi is currently owned by his children through a trust called Mphephethwa Trust.

4.4.7 On the question of the contract being open-ended, General Nyanda’s response was that he was not involved in negotiating the contract in question with the GDTRW but the nature of the contract (although he did not have personal knowledge of same), could have been the reason why the contract was open-ended (if it was open-ended as alleged). He stated that the GDTRW could have required a continuous service and that this was normal in the security industry.

4.4.8 General Nyanda stated that he resigned from Abalozi on 14 May 2009. This was after his appointment into Cabinet as Minister of Communications.

4.5 Interview with Mr Sylvester Sithole (Abalozi Director)¹²

4.5.1 The interview with Mr Sylvester Sithole, Abalozi Director, was held on 6 May 2010 at Abalozi’s Head Office in Rosebank. The interview was also

¹¹ Ngwane Defence Technologies has interests in the arms manufacturing sector.
¹² Mr Sithole is the only director of Abalozi after General Nyanda’s resignation.
attended by Mr M Ntumba, a director of Abalozi’s auditing firm, Ntumba Chartered Accountants Incorporated, and Mr R Mofokeng, Abalozi’s Chief Operating Officer.

4.5.2 Mr Sithole explained that the nature of the security business Abalozi is involved in, is highly specialised and does not involve the provision of mainstream security services. He stated further that security officials in the employ of Abalozi are specialists in the security sector and are former intelligence operatives and former police officers.

4.5.3 On the question of the alleged irregular award of the GDTRW contact to Abalozi, Mr Sithole and Mr Mofokeng confirmed that Abalozi had been awarded the contract in question by the GDTRW and by Metrorail/PRASA and Urban Transport Fund (UTF). Mr Sithole denied that Abalozi is the provider of specialised security services to Impophoma.13

4.5.4 Mr Sithole stated Abalozi was appointed to inter alia, project manage the GDTRW’s implementation of a Minimum Information Security Standard (MISS) and to implement a Security Policy for the GDRTW. He stated that Abalozi had acted as security advisors to the GDTRW. Mr Sithole stated that it was his understanding that the contracts pertaining to this project had been approved by the GDRTW’s relevant procurement structures.

4.5.5 Worth noting is that Mr Sithole stated that Abalozi had been approached by the GDTRW to submit a proposal for the contract in question and that based on Abalozi’s nature of business, the proposal had been accepted.

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13 Impophoma is a GDTRW owned entity that manages Gauteng construction equipment.
4.5.6 Mr Sithole confirmed that all Abalozi’s contracts with the GDTRW and its entities had been terminated, including the contract that forms the subject of the investigation by the Public Protector.

4.5.7 The reasons for cancellation were not disclosed by Mr Sithole.

4.6 Interview with the GDTRW

4.6.1 The interview with GDTRW was held on 21 May 2010 in Johannesburg. It was attended by Ms Monama, the HOD of the GDTRW.

4.6.2 Ms Monama stated that she had caused all the contracts which the GDTRW had with Abalozi, to be terminated. She was not forthcoming with the reasons for termination or any internal findings on the regularity or otherwise of the contracts in question and referred such questions to officials involved in meetings that she helped facilitate with intimate knowledge of the GDTRW’s dealings with Abalozi.\(^{14}\)

4.6.3 The second interview with the GDTRW was held on 24 May 2010 in Johannesburg and was attended by the GDTRW’s Director of Legal Services, Ms C Noxaka (Ms Noxaka).

4.6.4 Ms Noxaka confirmed that the GDTRW and its entities had entered into a number of security contracts with Abalozi\(^{15}\), the first having been the GDTRW contract awarded on 25 October 2007, for risk advisory services.

4.6.5 She confirmed that Abalozi had been requested to furnish the GDTRW with a project management plan (PMP), that was subsequently approved

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\(^{14}\) Such as Miss C Noxaka, Director of the GDTRW’s Legal Services and Mr Mollo, Head of Procurement (and formerly Head of Department in the office of former HOD of GDTRW, Mr Buthelezi).

\(^{15}\) Mr Buthelezi has since left the employ of the GDTRW.
by the erstwhile HOD of the GDTRW, Mr Buthelezi and that Abalozi was required to assist with the implementation of the MISS.\(^{16}\)

4.6.6 Mr Noxaka advised that Abalozi was paid R19 248 298, 67 for the duration of the MISS contract and further confirmed that the MISS contract awarded to Abalozi was open-ended. She stated that in terms of Abalozi's PMP the end date of the project had been 31 June 2008\(^{17}\), but a review conducted by the GDTRW confirmed that work on the MISS had continued beyond 31 June 2008.

4.6.7 Ms Noxaka confirmed that all the contracts awarded to Abalozi by the GDTRW were terminated by the new HOD of GDTRW, Ms Monama during February 2010 and March 2010, respectively.

4.6.8 Mr Mollo, the GDTRW's Head of Procurement Services and who, at the time when the contested contracts were awarded to Abalozi, was a manager in the office of the GDTRW's former HOD, Mr Buthelezi, was interviewed on 26 April 2010.

4.6.9 Mr Mollo explained that most of the matters that the GDTRW is required to deal with involve issues of a sensitive nature\(^{18}\) and that most of the GDTRW’s security contracts were classified and as such, in most instances it was not always possible to follow open tender processes. Almost all the security service providers first needed to undergo vetting processes by the National Intelligence Agency (NIA) before they could provide a service to the GDTRW.

\(^{16}\) MISS was approved by the Cabinet of the Republic of South Africa in 1996.

\(^{17}\) With the exception of the key national points part of the plan which was ongoing.

\(^{18}\) According to Mr Mollo the Vaal Dam and the G-Fleet fall within the GDTRW’s area of responsibility. To properly secure these assets the GDTRW had needed a security assessment for risk exposure in terms of the National Key Points Act of 1980.
4.6.10 Mr Mollo stated that Abalozi had been vetted by the Gauteng provincial branch of NIA and had been given the go ahead to implement the MISS and other classified security projects\(^{19}\) for the GDTRW and some of its entities.

4.6.11 No information was provided regarding how Abalozi was identified as the sole competent agency to provide the said services and also, who provided the services before Abalozi came into the picture.

4.7 Evaluation of Evidence

4.7.1 From the interviews and documents sourced during the investigation, it was common cause that the GDTRW did award a contract to Abalozi, without going on tender or following any other competitive process.

4.7.2 It was further confirmed that the price of the contract in question was not predetermined or capped.

4.7.3 The GDTRW failed to provide convincing evidence that the only possible way to procure the services entailed in the contested contract could be through confinement, and that the only competent provider in the market was Abalozi. No information was provided on how the market was combed to identify companies with employees who have a similar background to the individuals in Abalozi.

4.7.4 All parties confirmed that the contract in question was terminated in March 2010. The question that arises is how a replacement was found, if it is true that Abalozi was the sole competent service provider in the circumstances.

\(^{19}\) Projects such as management of G-Fleet security and Gauteng's Intelligent Number Plates Security Project (project initiated by UTF).
4.7.5 The GDTW further failed to provide convincing reasons for the open-ended nature of the contract. The argument for continuous service is not adequate as many security and risk contracts are provided throughout government on the basis of fixed term contracts.

4.7.6 On the question of General Nyanda’s involvement, no evidence could be found implicating him in the process of securing the GTRW contract or any of the other contracts, which are not discussed here, as they are the subject of a separate investigation under the Public Protector Act.

4.7.7 Evidence could also not be found that suggests that General Nyanda has any direct involvement with, or was benefiting from Abaloi. What was confirmed is the information already in the public domain, which indicates that General Nyanda’s children’s trust, the Mphephethwa Trust, to which he donated his shares on becoming a Minister, owns a 45% shareholding in Abaloi.

5. THE LEGAL AND POLICY FRAMEWORK REGULATING ETHICAL CONDUCT BY MEMBERS OF THE EXECUTIVE AND STATE PROCUREMENT

5.1 The Constitution

5.1.1 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.

5.1.2 In terms of section 96(2) of the Constitution members of the Cabinet may not undertake any other paid work and may not act in a 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. In addition, section 96(2) specifically states that members of Cabinet may not use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

5.1.3 Section 217(1) of the Constitution provides that:

“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.”

5.1.4 The constitutional provisions that are relevant in this matter are those that regulate the standard of ethical conduct to which General Nyanda as a member of the Cabinet should be held. The specific provisions that are relevant to this matter are the provisions of section 96 which deal with conflict of interest prohibitions for members of the Cabinet.

5.1.5 It is important to bear in mind though that the standards in question apply from the point at which General Nyanda was appointed as Minister of Communications on 11 May 2010.

5.1.6 Constitutional provisions relevant to the regularity or otherwise of the contested GDTRW contract are those in section 217 which specifically require the state procurement system to be “fair, equitable, transparent, competitive and cost effective”.

5.2 The Public Finance Management Act, 1999 (PFMA)

5.2.1 The PFMA gives effect to section 216(1) of the Constitution which requires National Legislation to “establish a national treasury and prescribe
measures to ensure both transparency and expenditure control in each sphere of government, by introducing-

(a) generally recognised accounting practice;

(b) uniform expenditure classifications; and

(c) uniform treasury norms and standards."

5.2.2 Section 38(1)(a)(iii) of the PFMA provides as follows:

"38. General responsibilities of accounting officers:

(1) The accounting officers for a department ...20

(a) must ensure that the department ... has and maintains

(i) ...

(ii) ...

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;"

5.2.3 Section 76(4) of the PFMA provides as follows:

"76. Treasury regulations and instructions

...

(4) The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning —

(a) ...

(b) ...

20 Defined in Section 1 of the PFMA to mean a "national or provincial department or a national or provincial component".
(c) The determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;"

5.2.4 Section 3 of the PFMA lists institutions to which it applies, which includes "departments"\(^{21}\), and "department" is defined in section 1 to include a provincial department\(^{22}\).

5.2.5 The Treasury Regulations promulgated under section 76 of the PFMA expressly provide for an exemption from the competitive bid requirement which must usually accompany all public procurement where it is impractical to engage in a competitive tendering process. Regulation 16A6.4 provides as follows:-

"If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means and provided that the reasons for deviating from inviting competitive bids must be recorded and applied."

5.2.6 It is important that an interpretation of the PFMA requirements to organs of state, including treasury regulations issued in pursuit of the PFMA, transcends a mechanical adherence to the letter of the law and is aligned with the spirit and purpose of section 217 of the Constitution.

5.2.7 An assessment of whether the GDTRW contract was compliant with the PFMA and related treasury regulations, is a substantive one that looks at whether or not this and similar contracts are indeed the occasional deviations that the drafters of the Constitution can be said to have wanted

\(^{21}\) Section 3(1)(a)
\(^{22}\) Such as the GDTRW, Parastatal institutions such as Metrorail/PRASA are also covered by the PFMA under the definition of "national public entity".
to encourage in the spirit of promoting a system that "is fair, equitable, transparent, competitive and cost-effective".

5.3 The Executive Members' Ethics Act

5.3.1 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.

5.3.2 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.

5.3.3 The Code of Ethics must, in terms of section 2(2)(b)(iii) of the Executive Members' Ethics Act, inter alia, include provisions prohibiting members of the Cabinet from exposing themselves to a situation involving the risk of a conflict between their official responsibilities and their private interests.

5.3.4 The Executive Members' Ethics Act envisages a Code of Ethics that will provide that members of the Executive are prohibited from "exposing themselves to a situation involving the risk of a conflict between their official responsibilities and their private interests...." (Section 2(2)(b)(iii)) or "acting in a way that may compromise the credibility or integrity of their office or of the government." (Section 2(2)(b)(v)).

5.3.5 The Public Protector has previously indicated that in evaluating or encouraging ethical conduct in the public sector, particularly the avoidance of conflict of interest, it is important not only to avoid actual conflict of
interest but also to eschew, as far as possible, situations that are bound to give rise to a perception of conflict of interest.\(^\text{23}\)

5.4 The Executive Ethics Code (Code of Ethics)

5.4.1 The Code of Ethics contemplated by the Executive Members’ Ethics Act was published by the President of the republic in the Government Gazette No. 21399-41 on 28 July 2000.

5.4.2 The relevant provisions of the Code of Ethics with which Cabinet Ministers, Deputy Ministers and Members of Provincial Executive Councils must comply in performing their official responsibilities, provide as follows:

"2. General Standards

2.1 Members of the Executive must to the satisfaction of the President or the Premier, as the case may be
(a) ...
(b) ...
(c) ...
(d) act in all respects in a manner that is consistent with the integrity of their office or the government" ...

2.3 Members of the Executive may not
(a) ...
(b) ...
(c) ...
(d) ...

\(^{23}\) See Public Protector’s Report No19 of 2010 on An Investigation into An Allegation of A Breach of The Executive Members’ Ethics Act, 1998 and the Executive Ethics Code by General (RET) S Nyanda, Minister of Communications. Also see the Public Protector’s reports on Minister Mohamed Valli Moosa and Geraldine Fraser Moleketi (www.publicprotector.org).
(e) ... 

(f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests; ...

3. Conflict of interest

3.1 ...

3.2 ...

3.3 ...

3.4 ...

3.5 ...

3.6 Where a member holds any financial or business interest in a company or corporate entity or profit-making enterprise which may give rise to a conflict of interest in the performance of that member’s functions as a member of the Executive, the member must, within two months of the promulgation of this Code, or within two months of assuming office, or within two months of acquiring such interests, as the case may be, or within such longer period as the President or, if the member is a member on an Executive Council, the Premier determines —

(a) dispose of such interest; or

(b) place the administration of the interest under the control of an independent and professional person or agency.”

6. OBSERVATIONS

6.1 In essence, the basis of the complaint against General Nyanda is that a company, Abalcozi, in which he currently has an indirect interest, was awarded a contract by the GDTRW contrary to the provisions of section 217 of the Constitution, the PFMA, Treasury Regulations on Supply Chain Management and the internal procurement provisions of the GDTRW.
6.2 The contract is attacked on several fronts, including the fact that it was not put on tender or any competitive bidding process followed; the value was not pre-determined and the contract was open-ended with regard to the time frame for its existence.

6.3 Incidentally, evidence gathered during the investigation, with specific reference to Mr Mollo's interview, indicates that the PIP submitted by Abalozi initially had a one year time scale, which time scale was exceeded or ignored during the implementation.

6.4 While the alleged offending parties in relation to the contested contract are the GDTRW and Abalozi, General Nyanda is being brought into the picture on the argument that the contract was awarded irregularly while he partiy owned and was a director in Abalozi, the contract continues to subsist and that, as a Cabinet member who needs to protect the interests of government, he is now placed in a situation where his personal interests (in Abalozi) is in conflict with his responsibilities as a Cabinet member.

6.5 Representatives of Abalozi and GDTRW contended throughout the investigation that the contract was indeed issued under the factual circumstances outlined in the above but that this did not make the contract irregular as the deviation was within the confines of Treasury Regulations. They further confirmed General Nyanda's assertion that he was never personally involved in the award of the contract in question.

6.6 General Nyanda's own submission included a legitimate contention that, in addition to a lack of personal involvement on his part at the time of the award of the GDTRW contract, the incident occurred before he became a Cabinet member, at a time when he was an ordinary citizen allowed by law to do business with anyone, including the state.
6.7 The investigation sought to make a finding on whether or not the contract was indeed irregular and if so whether or not there was any wrong doing by General Nyanda of a nature that substantiates the allegation that his conduct amounted to conflict of interest as envisaged in the Constitution and applicable law and constitutes a breach of the relevant sections of the Executive Members' Ethics Act and the Code of Ethics.

6.8 On the question of the contract's compliance with applicable law and procurement prescripts, it is important to note, as indicated earlier that the envisaged compliance is not mechanical. Compliance entails giving effect to the spirit of the Constitution and the law. In other words the duty on public officials and office bearers incorporates sincerity in the pursuit of constitutional and legislative objectives.

6.9 This duty was described by Sachs J in Matatiele Municipality & Others v President of the Republic of South Africa & Others 2006(5) SA 47 (CC) as follows:-

"[T]he Constitution requires candour on the part of Government. What is involved is not simply a matter of showing courtesy to the public and the Courts, desirable though that always is. It is a question of maintaining respect for the Constitutional injunction to be accountable, responsive and open".

6.10 It is the Public Protector’s view that a similar duty obtains in the case of other organs of states such as the GDTRW.

6.11 The response of the MEC responsible for Public Transport, Roads and Works to the Provincial Legislature, and from which the Complainant draws heavily, suggests some form of irregularly in that he admits that in the award of the contract by the GDTRW "no tender procurement
procedures other than the deviation route were followed in terms of advertisements, evaluation and approval of service providers ...”.

6.12 While it is not contested that in awarding the contract to Abaloi, the former HOD of the GDTRW lawfully relied on the letter of the law, with specific reference to Practice Note No5 and Treasury Regulation 16A6.4\textsuperscript{25}, it cannot be said that this was the only avenue available to the GDTRW to meet its urgent and specialised needs within the spirit of the Constitution’s section 217, which requires a procurement system that is “fair, equitable, transparent, competitive and cost effective”.

6.13 The point must further be made that the process of awarding contracts, particularly contracts worth millions of Rands, as is the case in point, through deviations must be discouraged as it is open to abuse.

6.14 There is no suggestion that the use of Treasury Regulation 16A6.4 necessarily renders a deviation from procurement policies irregular. For a deviation to withstand constitutional and legislative scrutiny it must be shown that it is impractical to invite competitive bids and the reasons must be recorded and applied. However, in almost all of the contracts awarded it would appear that emphasis was placed on the unique but unsubstantiated exclusive expertise which Abaloi allegedly possess.

6.15 Paradoxically, relying on General Nyanda’s security expertise and military history, as the GDTRW presented as one of the key factors that influenced the award of this and other contracts on confinement, defeats the argument consistently given by the same GDTRW, Abaloi and General Nyanda himself, that his identity did not influence the award of this and other contested contracts.

\textsuperscript{24} See attachments to the Letter of Complaint.

\textsuperscript{25} As aforrestated Treasury Regulation 16A6.4 was enacted to give effect to the PFMA.
6.16 As regards the contract, it was conceded by Ms Noxaka that the contract for the provision of the MISS was open-ended\textsuperscript{26} and that this fact was discovered when the GDTRW undertook its own review of the contracts. However, as alluded to earlier, most of the contracts were on a month-to-month basis.

6.17 Regarding the continued benefit from the contract, the point made in the previous report on General Nyanda, that he is only benefiting indirectly through his children’s trust, complies with the law and general practice, also applies here. But more fundamentally, it must be noted that around the time that the investigation commenced, which was in March 2010, the GDTRW terminated this and other Abalozi contracts.\textsuperscript{27}

6.18 In view of the termination of the contract, General Nyanda can therefore not be said to be continuing to benefit from the contracts. At most, the Mphephethwa Trust whose beneficiaries are his children may still benefit if dividends are declared by Abalozi.

6.19 The award of contracts of huge financial value seems to a growing and worrying trend. While the practice may not necessarily be unlawful, the use of this avenue in many of the circumstances, including the present, does not seem justified. Not only do such practices undermine fair competition, there is no doubt that there is a growing negative impact on quality and cost effective pricing, and accordingly, the objectives of section 217 of the Constitution.

\textsuperscript{26} This assertion is borne out by the contracts perused.
\textsuperscript{27} The GDTRW is said to have terminated the Abalozi contracts between February and March 2010. The request by COPE’s Ms J Kilian received on 19 March 2010. The contracts had already been the subject of parliamentary question in the Gauteng Legislature around 19 February 2010.
6.20 By its own admission, the GDTRW has since come to the conclusion that the award of the contract in question was not only irregular but that the services could have been procured more cost effectively elsewhere.\(^{28}\)

7. KEY FINDINGS

The Public Protector’s findings are that:

7.1 Abalozi, a company linked to General Nyanda through his children’s Trust, the Mphephethwa Trust, was awarded a contract by the GDTRW, in October 2007, without a tender process or any other competitive bidding process being followed. The deviation was justified then in terms of the deviation provisions provided for in the Treasury Regulations.

7.2 The value of the contract was not determined or capped and the time frame was not stipulated in the contract although the PIP stipulated a 12 month period expiring in June 2008, which was never adhered to.

7.3 In view of 7.2 above, the award of the contract was irregular as it did not comply with the requirement of cost effectiveness as envisaged in section 217 of the Constitution and the PFMA.

7.4 The contracts were reviewed by the GDTRW and it was during such review that certain irregularities were identified and the contracts terminated. It accordingly, cannot be found that the contracts were not reviewed.

7.5 No evidence could be found to substantiate the allegation that General Nyanda, a former director of Abalozi, was directly involved in securing the contract, although by its own admission, the GDTRW did take into

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\(^{28}\) Statement attributed to MEC Bheki Nkosi, *Sowetan* Thursday August 5 2010, p 5.
consideration his background in the security sector in the award of some of the contracts.

7.6 There is accordingly, no basis for finding that General Nyanda’s conduct constitutes a conflict of interest in violation of section 2 of the Executive Members’ Ethics Act and corresponding provisions of section 3 of the Code of Ethics.

7.7 The circumstances under which the contract was awarded is cause for concern, particularly as there seems to be a growing trend in this direction, with attendant risks regarding the quality and cost effectiveness of goods and services procured under these circumstances as well as the impact on fair competition.

8. RECOMMENDATIONS

The Public Protector’s recommendations are that:

8.1 The President considers directing the Premier of Gauteng to conduct an investigation into any administrative failures and improper conduct that led to the circumstances under which the GDTRW awarded the contract to Abalozi and take action against any person whose conduct is found to have been improper;

8.2 The President considers directing the Treasury to conduct a systemic investigation into all contracts issued on confinement that exceed a million Rand or a figure to be determined by the President, to establish whether or not there isn’t a systemic abuse of the deviation provisions and the impact of this on cost effectiveness and quality;
8.3 The President considers directing the Treasury and the Gauteng Provincial Government to review regulations regarding deviation from standard supply chain requirements;

8.4 The President considers directing the Treasury to ensure that the reporting of deviations from standard supply chain requirements is stringently monitored and violations sanctioned, visibly and effectively; and

8.5 The President considers directing the Treasury to ensure that timelines for the reporting of deviations from standard supply chain requirements are prompt so that if measures need to be taken to reverse improper decisions, these are taken immediately.

9. MONITORING

9.1 Parliament to be advised within 14 days after receipt of the report, as envisaged in section 3(5)(a) of the Executive Ethics Act, on action to be taken in response to the report.

9.2 The Public Protector will monitor the implementation process over a period of 6 months.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 06 August 2010

Assisted by: Adv. Sicelo Mthethwa