TO BE OR NOT TO BE
IN CONFLICT

Report 9 of 2011/2012
of the Public Protector on
an investigation into a complaint
of conflict of interest against Mr. J. Manyi
# INDEX

**Executive Summary**  3

1. **INTRODUCTION**  7

2. **THE COMPLAINT**  8

3. **JURISDICTION OF THE PUBLIC PROTECTOR**  9

4. **THE INVESTIGATION AND SUMMARY OF EVIDENCE**  11

5. **LEGAL AND REGULATORY FRAMEWORK:**  
   LEGISLATION AND POLICY PRESCRIPTS REGULATING  
   THE MANAGEMENT OF CONFLICTS OF INTEREST  
   IN THE PUBLIC SERVICE  29

6. **DISCUSSION OF GENERAL PRINCIPLES RELATING TO  
   CONFLICT OF INTEREST IN THE PUBLIC SERVICE**  34

7. **EVALUATION OF THE COMPLAINTS AGAINST THE  
   EVIDENCE AND REGULATORY FRAMEWORK**  45

8. **FINDINGS**  53

9. **REMEDIAL ACTION**  54

9. **MONITORING**  54
Executive Summary

(i) On 25 May 2010, Adv P Hoffman, Director of the Institute for Accountability in South Africa, (the Complainant) lodged a complaint against the Director General of the Department of Labour (DoL), Mr J Manyi. In the complaint, it was alleged that Mr Manyi had a conflict of interest between his public duties as the DG of the DoL and his private duties as the President of the Black Management Forum (BMF).

(ii) The Complainant raised the following issues in his complaint to support his allegation of conflict of interest in the two positions held by Mr Manyi:

(a) As President of the BMF, Mr Manyi unreservedly criticised the government which he served and represented. During a Constitutional Symposium of the BMF, Mr Manyi, in his capacity as President of the organisation, criticised certain provisions of the Constitution and certain government policies relating to land redistribution on the basis that it failed to support transformation;

(b) Mr Manyi occasionally conflated the requirements of the Employment Equity Act, 1998 which is administered by the DoL, with certain provisions of the Black Economic Empowerment Legislation which falls within the domain of the Department of Trade and Industry. This may be suitable to the aims of the BMF but is not within the function and authority of the DoL; and

(c) As the DG of the DoL, Mr Manyi was constitutionally obliged to execute loyally the lawful policies of government and is required to act in accordance with the values and principles that govern the public administration. In addition, he was required to serve the public impartially, fairly, equitably and without bias.
(iii) On 3 February 2011, Adv Hoffman submitted a second complaint against Mr Manyi based on a press statement issued by the Minister in the Presidency, Mr Collins Chabane, on 2 February 2011, which announced Mr Manyi’s new appointment as the CEO of the GCIS and Cabinet Spokesperson.

(iv) Adv Hoffman reiterated his view that Mr Manyi cannot hold both positions as President of the BMF and Chief Executive Officer (CEO) of the Government Communication and Information System (GCIS) and Cabinet Spokesperson as “he is placing himself in an intractable and irresolvable conflict of interest situation”.

(v) The Public Protector considered the following issues:

(a) Did a conflict of interest exist between Mr Manyi’s public duties and responsibilities as DG of DoL and his private duties and interests as President of the BMF?

(b) If the above was answered affirmatively then the next issue for consideration was whether Mr Manyi’s conflict of interest was appropriately managed by the relevant authorities of the DoL;

(c) Does a conflict of interest exist between Mr Manyi’s public duties and responsibilities as CEO of the GCIS and Cabinet Spokesperson and his private duties and interests as President of the BMF?; and

(d) If the above is answered affirmatively then the next issue for consideration is to establish what appropriate remedial action would have to be taken for the relevant authorities of the GCIS to address the conflict of interest.

(vi) The Public Protector’s findings are the following:
(a) With regard to Mr Manyi's previous position as the DG of the DoL, the Public Protector's finding is that:

(aa) Mr Manyi had a conflict of interest between his personal interests in the BMF and his duty towards the DoL;

(bb) As a senior public official, he failed to comply with the Public Service Code of Conduct and the Rules of the Public Service Commission: Managing Conflicts of Interest Identified through the Financial Disclosure Framework for Senior Managers (the Rules) which required him to manage the conflict effectively by excusing himself from certain duties and responsibilities that resulted or would have resulted in him being influenced by this conflict; and

(cc) The former Minister of Labour, Mr Mdladlana, failed to comply with the relevant provisions of the Code of Conduct and the Rules that required him to manage effectively the said conflict of interest as the relevant Executive Authority of the DoL.

(b) With regard to Mr Manyi's current position as the CEO of the GCIS and Cabinet Spokesperson, the Public Protector's finding is that:

(aa) A perceived conflict of interest exists between these positions and his position at the BMF, which, may lead to an actual conflict of interest if not properly and effectively managed by the relevant Executive Authorities in accordance with the Rules, the Code of Conduct and the Financial Disclosure Framework (FDF).

(vii) Remedial action to be taken in terms of section 182(1) (c) of the Constitution is that the Minister in the Presidency must take urgent steps to:
(a) Establish from the declarations made in terms of the relevant and applicable legislative and policy framework, the existence of a conflict of interest and the declaration thereof; and

(b) Ensure that the conflict of interest is properly and effectively managed in accordance with the relevant and applicable legislative and policy framework and the internal conflict of interest policy of the GCIS. In this regard the appropriateness if implementing one of the following measures to address the conflict of interest must be established:

(aa) Mr Manyi being required to divest himself of the private interest;

(bb) Mr Manyi being excluded from participation in identified decision making processes;

(cc) A permanent change to some or all of Mr Manyi’s official responsibilities.
REPORT ON AN INVESTIGATION INTO A COMPLAINT OF CONFLICT OF INTEREST AGAINST MR J MANYI

1. INTRODUCTION

1.1 This is a report in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 It is submitted to the following persons:

1.2.1 Mr M V Sisulu, Speaker of the National Assembly;

1.2.2 Mr C Chabane, Minister in the Presidency;

1.2.2 Mr J Manyi, former Director-General (DG) of the Department of Labour (DoL) and current Chief Executive Officer (CEO) of Government Communications and Information Systems and Cabinet Spokesperson (GCIS); and

1.2.3 Mr Mdladlana, the former Minister of the DoL.

1.3 A copy of the report is provided to Adv P Hoffman (the Complainant) in terms of section 8(3) of the Public Protector Act.

1.4 The report relates to an investigation into a complaint against Mr J Manyi, relating to the alleged conflict of interest between his position as the President of the Black Management Forum (BMF) and his position:

1.4.1 As former DG of the DoL; and

1.4.2 As the current CEO of the GCIS and Cabinet Spokesperson.
2. THE COMPLAINT

2.1 The first complaint submitted by Adv P Hoffman

2.1.1 On 25 May 2010, the Complainant, Director of the Institute for Accountability in South Africa, lodged a complaint against the DG of the DoL, Mr J Manyi. In the complaint, it was alleged that Mr Manyi had a conflict of interest between his public duties as the DG of the DoL and his private duties as the President of the BMF.

2.1.2 He alleged further that this conflict of interest improperly influenced Mr Manyi’s performance in his official duties and responsibilities and was of the view that he should be requested to choose either position but could not be allowed to continue with both.

2.1.3 The Complainant raised the following issues in his complaint to support his allegation of conflict of interest in the two positions held by Mr Manyi:

2.1.3.1 As President of the BMF, Mr Manyi unreservedly criticised the government which he served and represented. During a Constitutional Symposium of the BMF, Mr Manyi, in his capacity as President of the organisation, criticised certain provisions of the Constitution and certain government policies relating to land redistribution on the basis that it failed to support transformation;

2.1.3.2 Mr Manyi occasionally conflated the requirements of the Employment Equity Act, 1998 which is administered by the DoL, with certain provisions of the Black Economic Empowerment Legislation which falls within the domain of the Department of Trade and Industry. This may be suitable to the aims of the BMF but is not within the function and authority of the DoL; and
2.1.3.3 As the DG of the DoL, Mr Manyi was constitutionally obliged to execute loyally the lawful policies of government and was required to act in accordance with the values and principles that govern the public administration. In addition, he is required to serve the public impartially, fairly, equitably and without bias.

2.2 The second complaint submitted by Adv P Hoffman

2.2.1 On 3 February 2011, Adv Hoffman submitted a second complaint against Mr Manyi based on a press statement issued by the Minister in the Presidency, Mr Collins Chabane, on 2 February 2011, which announced Mr Manyi’s new appointment as the CEO of the GCIS and Cabinet Spokesperson.

2.2.2 Adv Hoffman reiterated his view that Mr Manyi cannot hold both positions as President of the BMF and CEO of the GCIS and Cabinet Spokesperson as “he is placing himself in an intractable and irresoluble conflict of interest situation”.

2.2.3 He requested the Public Protector to investigate the inherent irregularity of allowing Mr Manyi to occupy the incompatible dual roles which are in conflict with the values and principles set out in section 195 of the Constitution.

3. JURISDICTION OF THE PUBLIC PROTECTOR

3.1 Section 182(1) of the Constitution provides that:

“182(1) The Public Protector has the powers as regulated by national legislation-

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

c) to take appropriate remedial action."

3.2 In terms of section 6(4) (a) of the Public Protector Act, the Public Protector is competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged maladministration in connection with the affairs of government, abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function.

3.3 The Public Protector is competent, in terms of section 6(4)(b) to resolve any dispute or to rectify any act or omission by mediation, conciliation, negotiation or any other means expedient in the circumstances.

3.4 Where a person has been implicated in a matter being investigated and where an adverse finding was made in respect of such person, the Public Protector is required, in terms of section 7(9) of the Public Protector Act to afford such person the opportunity to respond to such findings in any manner that may be expedient in the circumstances.

3.5 Both the position of DG of the DoL and CEO of the GCIS derive the power to act from the Constitution and applicable legislation. These positions and the persons who occupy them become organs of state as contemplated by section 239 of the Constitution. Mr Manyi’s conduct therefore, as a public service employee falls within the ambit of ‘public function’ as envisaged by section 6(4) (a) of the Public Protector Act. As a result, the complaints against him fall within the jurisdiction and powers of the Public Protector.
4. **THE INVESTIGATION AND SUMMARY OF EVIDENCE**

4.1 **Focus of the Investigation**

4.1.1 The investigation was conducted in terms of section 182(1) (a) of the Constitution which gives the Public Protector the power to investigate, as supplemented by sections 6 and 7 of the Public Protector Act.

4.1.2 During the investigation into the first complaint, it was established that the former Minister, Mr Mdladlana suspended Mr Manyi, in June 2010, and embarked on disciplinary proceedings against him in order to address specific charges of misconduct. While these charges did not include the charge of conflict of interest, it was noted that the disciplinary proceedings were not finalised and no decision was reached in this respect.

4.1.3 The investigation into the first complaint was finalised in November 2010, however, prior to the finalisation of the report on the outcome of this investigation, the Complainant submitted the second complaint relating to Mr Manyi’s appointment as CEO of the GCIS and Cabinet Spokesperson. As a result the report was deferred pending the investigation into the second complaint.

4.1.4 The investigation into the second complaint focussed on the specific responsibilities of these roles in relation to his role as President of the BMF in order to establish whether a conflict of interest may exist.

4.2 **Issues considered by the Public Protector**

4.2.1 The following legal issues were matters for the Public Protector's consideration:
(i) Did a conflict of interest exist between Mr Manyi’s public duties and responsibilities as DG of the DoL and his private duties and interests as President of the BMF?

(ii) If the above was answered affirmatively, then the next issue for consideration was whether Mr Manyi’s conflict of interest was appropriately managed by the relevant authorities of the DoL;

(iii) Does a conflict of interest exist between Mr Manyi’s public duties and responsibilities as CEO of the GCIS and Cabinet Spokesperson and his private duties and interests as President of the BMF?

(iv) If the above is answered affirmatively, then the next issue for consideration is to establish what appropriate remedial action would have to be taken for the relevant authorities of the GCIS to address the conflict of interest.

4.3 Key sources of information retrieved

4.3.1 Communication with the Complainant

4.3.1.1 The Complainant submitted his complaint to the Public Protector on 25 May 2010.

4.3.1.2 The complaint was assessed and a decision was taken to conduct an investigation. The Complainant was notified of this decision in a letter dated 09 June 2010.
4.3.2 Communication with Mr Manyi

4.3.2.1 On 9 June 2010, Mr Manyi was informed of the complaint made against him and of the decision to embark on an investigation into the allegations contained in the complaint.

4.3.2.2 On 14 July 2010 he was afforded the opportunity to respond to the complaint.

4.3.2.3 On 20 July 2010 Mr Manyi and his attorney Mr Langa, met with the Public Protector to discuss the details of the allegations made against him. He provided a written response to the allegations on 8 September 2010.

4.3.2.4 Mr Manyi was afforded the opportunity to respond to the provisional report and provisional findings on 4 April 2011 and 8 July 2011 respectively, in accordance with section 7(9) the Public Protector Act.

4.3.3 Communication with the former Minister of Labour

4.3.3.1 The former Minister of Labour, Mr Mdladlana, was informed of the investigation into the complaint on 9 June 2010.

4.3.3.2 On 15 July 2010, Mr Mdladlana was requested to provide a written response to the allegations being investigated and additional supporting documentation relevant to the investigation.

4.3.3.3 A written response with the relevant supporting documentation was received from Mr Mdladlana on 29 July 2010.

4.3.3.4 Mr Mdladlana was afforded the opportunity to respond to the provisional report and provisional findings on 14 April 2011 in accordance with section 7(9) of the Public Protector Act, to which he responded on 5 May 2011.
4.3.4. Communication with the Minister in the Presidency

4.3.4.1 As a result of the fact that the Public Protector's findings and the remedial action to be taken would have implications for the Minister in the Presidency as the Executive Authority required to manage any conflict of interest that may be found in the circumstances, the Minister was requested to provide a response to the provisional reports.

4.3.4.2 The provisional reports were as a result forwarded to the Minister on 31 March 2011 and 8 July 2011 and the Minister's responses thereto were received on 14 April 2011 and 13 July 2011, respectively.

4.3.5 Legislation and other prescripts

The relevant provisions of the following legislation and other prescripts were considered and applied where appropriate:

(i) The Constitution

(ii) The Public Protector Act

(iii) The Public Service Act, 1994

(iv) The Public Service Code of Conduct


(vi) The Organisation for Economic Co-operation and Development Guidelines for Managing Conflict of Interest

(vii) The Public Finance Management Act, 1999
(viii) Reports on studies conducted by the Public Service Commission to
Manage Conflicts of interest in the Public Service such as:

(a) Report on the Management of Conflicts of Interest in the
Public Service, July 2006; and

(b) Report on the Management of Conflicts of Interest through
Financial Disclosures.

(ix) Relevant jurisprudence from local and international jurisdiction

4.4 Mr Mdladlana’s response to the complaint

4.4.1 In his response, Mr Mdladlana provided a list of issues relating to Mr Manyi’s
public conduct that resulted in widespread negative media publicity for
Mr Manyi and that were taken note of for purposes of the disciplinary action
taken against him. The list comprised of the following:

(i) While addressing a BMF meeting, in his capacity as BMF President,
he stated that certain provisions of the Constitution should be
redrafted as they ‘did not favour transformation’. He further
criticised the freedom of expression provision of the Constitution
and blamed it for giving the media the unlimited power to criticise
him because of his position at the BMF.

(ii) As President of the BMF he publicly criticised the appointment of a
black woman, as President of Business Unity South Africa (BUSA),
stating that it was a ‘blow against transformation’. BUSA is one of
the major stakeholders of the DoL and South Africa is a member of
the International Labour Organisation since it ratified The Freedom
of Association and Protection of the Right to Organise Convention
87 of 1948 (the Convention). Mr Mdladlana saw this as a reflection
of a conflict of interest stating that while Mr Manyi may criticise the
actions of government and its stakeholders as President of the BMF, as DG of the DoL he is a public official who must ensure that he acts in the interests of maintaining good relations with government stakeholders.

(iii) In May 2010, the Norwegian Ambassador to the Republic of South Africa, Mr C H Tor, lodged a formal complaint against Mr Manyi with the Minister of International Relations and Cooperation. According to the Ambassador, he met with Mr Manyi in March 2010, in order to discuss, amongst other things, Norway’s direct involvement in the International Labour Organisation in South Africa’s “Decent Work Programme”. This would involve the investment by Norwegian companies into this programme. At the meeting, Mr Manyi reportedly tried to promote private business deals with South African Black Economic Empowerment entities instead of focussing on the “Decent Work Programme”. A copy of the letter addressed to the Minister of International Relations and Co-operation from the Ambassador of Norway was provided as supporting documentation.

4.4.2 Mr Mdladlana advised that while Mr Manyi was suspended he was still employed within his probationary period. His probation ended on 30 September 2010. In accordance with the Public Service Act of 1994 and Regulations Mr Manyi’s probationary period was extended for two months to 30 November 2010 for purposes of finalising the disciplinary process. However, the process did not progress and Mr Mdladlana took the decision not to confirm Mr Manyi’s appointment at the end of October 2011. As from 30 November 2010, Mr Manyi’s employment with the DoL was terminated.

4.4.3 Mr Mdladlana added that he did not approve any work outside the Public Service at the time of Mr Manyi’s appointment as DG.

4.4.4 In response to the question of whether Mr Manyi excused himself from decisions related to or that may be directly affected by his relationship with
the BMF, Mr Mdladlana stated that Mr Manyi did not excuse himself neither was he required to excuse himself from any decision-making process in these circumstances.

4.4.5 Mr Mdladlana submitted that the BMF improperly interfered with the internal disciplinary procedures taken against Mr Manyi. The Deputy President of the BMF requested to meet with Mr Mdladlana when Mr Manyi was requested to provide a written response to the disciplinary charges levelled against him. A copy of this letter was provided as supporting documentation.

4.5 Mr Manyi’s response to the complaint and to Mr Mdladlana’s submission

4.5.1 Mr Manyi’s response to the complaint was submitted by his legal representative, Mr Langa, dated 8 September 2010, and can be summarised as follows:

(i) The Complainant’s assertion that Mr Manyi “is legally obliged to choose between his presidency of the BMF and his position as DG is incorrect for the reason that section 197(3) of the Constitution provides that:

“No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause”.

(ii) The above section protects Mr Manyi from being victimised or prejudiced for being a public servant who supports the cause of the BMF or for being the President of the BMF.

(iii) Mr Manyi was appointed as DG of the DoL in September 2009 at which stage the DoL was aware of his position at the BMF and the issue of a possible conflict of interest was not raised by the employer prior to his appointment.
The Complainant is incorrect in comparing a non-remunerative position such as that of President of the BMF with a remunerated position such as that of DG. Further, the Complainant forwarded no evidence to substantiate the basis of the complaint. In the absence of such evidence the Complainant arbitrarily deprives Mr Manyi of his right to participate in the advancement of the BMF.

4.5.2 Mr Manyi’s response, dated 20 April 2011, to the Complainant’s allegation that he criticised government was that: “The alleged criticism of government was done under sanitised environment as per public service prescript”. Further, the allegation related to comments he made while he was on leave and he specifically mentioned that he was not speaking as DG of the DoL but rather as President of the BMF. He stated that his conduct was informed by section 7.4 of the SMS Handbook\(^1\) and that his pronouncements were consistent with section 7.6 of the SMS Handbook\(^2\) which stated that “Senior Managers who make public comments in their private capacity must make it clear that they act in their personal capacity”. The Complainant’s allegation in this regard, he said, is an infringement of his constitutional right to “freedom of speech, thought and opinion”.

4.5.3 Mr Manyi’s response to Mr Mdladlana’s submission can be described as follows:

(i) The allegations relating to the Norwegian Ambassador remain unsubstantiated. In his capacity as DG he was an alternate to the Minister of Labour in his (the Minster’s) capacity as a member of the BBBEE (Broad Based Black Economic Empowerment) Presidential Advisory Council in terms of the Black Economic Empowerment Act of 2003.

(ii) He went on to say:

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\(^{1}\) Senior Management Service Handbook, Third Edition, 1/12/2003, Chapter 6: Ethics and Conduct, Clause 7.4

\(^{2}\) Supra 1, clause 7.6
"Moreover, of the seven elements of BBBEE Codes of Good Practice, Employment Equity, a domain of the Department of Labour is one of them. Employment Equity is inextricably linked and is part of BBBEE. To therefore seek to put a “Chinese wall” between employment equity which is in the domain of the DoL and the rest of the elements of BBBEE is a clear demonstration of a lack of appreciation of this intertwined relationship. Employment Equity is not an island but an integral part of BEE and therefore on keeping with the objective of the SMS handbook which outlines the responsibility/tasks of Senior Managers to convert the policy mandate of government into effective department strategic plans and programmes, it was imperative for me to provide a holistic response to the ‘decent work agenda’ that was discussed between myself and the Ambassador. ....the Ambassador complained that their companies were finding it difficult to comply with BBBEE and this is when I offered my expertise to explain to them how it works and assist them to comply."

(iii) With regard to the finalisation of the disciplinary proceeding, Mr Manyi, disagreed with Mr Mdlalana stating that his employment with the public service was continuous and that although he was willing to proceed with the disciplinary hearing the matter was not taken further by Mr Mdlalana.

4.6 Responses received to the Public Protector’s Provisional Report

4.6.1 Mr Manyi’s response to the Provisional Report

4.6.1.1 In accordance with section 7(9) of the Public Protector Act, Mr Manyi was given an opportunity to respond to the provisional findings and to comment on the observations made during the investigation. His response was received on 20 April 2011 and 15 July 2011 respectively. In his response, Mr Manyi firmly rejected the findings made and conclusions drawn from the evidence and information received during the investigation. His responses contained the following significant statements:
(i) His position as President of the BMF was a non-remunerative position and therefore as such does not give rise to a conflict of interest.

(ii) With regard to his failure to excuse himself from duties and responsibilities that may have resulted in him being influenced by a conflict of interest, he stated that his involvement in the BMF was disclosed both in his CV and in the Financial Disclosure documents and that no objections were raised to his involvement with the BMF by the Minister. Mr Manyi advised that neither he nor the BMF sought to conduct any business whatsoever with the DoL and hence the issue of recusal from a meeting never arose. He added that the Minister did not require him to recuse himself from any decision making process.

(iii) He was of the view that section 197 (3) of the Constitution sanctioned his membership of the BMF and went further to say that this section is an “empowering clause that does not circumscribe that one shall not take a leadership position in pursuance of supporting that cause. It is therefore prejudicial to accept an argument that seeks to circumscribe my level of participation in the BMF”. He stated: “Once I am a member of the BMF .... there cannot be any limit to the democratic processes within the BMF with regard to my involvement. My election to become the President of the BMF is a democratic process that is part and parcel of supporting the BMF and cannot be extricated”.

(iv) Mr Manyi contended that his role in the BMF and his position as the DG of the DoL were “complimentary”. He stated that the BMF does not only advocate for black managers but for all races as it has been non-racial since 1989. Further, during his membership he did not receive any personal gain as his involvement was to “uplift others ... The BMF continues to be my social responsibility and national duty, a fact that will never change”.
4.6.2 Mr Mdelalandana’s response to the Provisional Report

4.6.2.1 In accordance with section 7(9) of the Public Protector Act, Mr Mdelalandana was given an opportunity to respond to the findings and to comment on the observations made during the investigation. His response was received on 5 May 2011.

4.6.2.2 Mr Mdelalandana stated that the disciplinary action taken against Mr Manyi was, in his view, a process undertaken in an attempt to manage him as the DG of the DoL since it was done in terms of the Public Service Act, 1994.

4.6.2.3 He submitted that Mr Manyi’s conflict of interest was appropriately managed by him as the Executive Authority of the DoL.

4.6.3 Minister Chabane’s response to the Provisional Report

4.6.3.1 The Minister advised that the Executive Authority in the Presidency had already embarked on steps to address the potential for an actual conflict of interest as addressed in the report. The following steps were taken:

(i) Mr Manyi has recused himself from publicly speaking on behalf of the BMF and as Cabinet spokesperson he does not participate in the decision making processes of Cabinet and does not have any speaking powers.

(ii) Mr Manyi has been advised to exercise discretion as the CEO of the GCIS in instances where Management is expected to discuss any issues that pose a potential or actual conflict of interest with the BMF. If such were to occur he must exempt himself from such decisions.

(iii) Finally, it must be realised that Mr Manyi speaks on behalf of Cabinet and will reflect decisions and discussions of Cabinet, however, he is protected by the Constitution as a citizen and should not be discriminated against for
supporting a particular cause. Necessary precaution will nevertheless be taken to manage any potential or actual conflict of interest that may arise.

4.7 Evaluation of the responses to the Provisional Report

4.7.1 Mr Manyi’s response

4.7.1.1 The reservations about the provisional findings expressed in the response of Mr Manyi were not persuasive enough to warrant amending the findings.

4.7.1.2 The evaluation of his response was restricted to only those issues that were considered key submissions and that had relevance to the provisional findings and remedial action.

4.7.1.3 The general principles of and legislation and policies regulating conflicts of interest in the public service did not appear to be in dispute.

4.7.1.4 Mr Manyi’s argument that his membership and non-remunerative position at the BMF does not give rise to a conflict of interest is not sound in law as the Public Service Code of Conduct and the Rules does not exclude non-remunerative positions or non-financial interests when regulating conflicts of interest. The definition of conflicts of interest is wide enough to include both financial and non-financial benefits. (This is discussed further at paragraph 6.1)

4.7.1.5 Mr Manyi contented that it was not necessary for him to excuse himself from any decision making process as he disclosed his involvement with the BMF, there were no objections raised by the Minister and nor he or the BMF sought to conduct any business with the DoL. Both the Public Service Code of Conduct and the Rules require more than just a declaration of an interest. It goes further to require a declaration of a conflict of interest, which includes both a perceived conflict of interest or a potential conflict of interest and the significant purpose for this is to identify and manage a conflict of interest in
order prevent an actual conflict from occurring. (This is discussed further at paragraph 6.2).

4.7.1.6 Mr Manyi’s contention that section 197 (3) of the Constitution is an empowering clause that protects his right to support a cause of his choice amounts to a misunderstanding of the objective of this constitutional provisional. The purpose of section 197 (3) is to ensure that public officials are able to align themselves with a cause of their choice without fear or favour. This provision took into account the fact that while public officials do not act in isolation of their communities and social networks they are nevertheless obliged to act in accordance with the principles of integrity and impartiality and to prevent a situation where the purpose of section 197 (3) is thwarted to suit one’s own circumstances. (This issue is discussed further at paragraph 6.3 and 6.4).

4.7.1.7 Mr Manyi’s contention that his role in the BMF and his position at the DoL was complimentary demonstrates a failure to appreciate the effect a conflict of interest in public administration is said to have on public confidence. While it may be a social responsibility that he finds himself committed to, currently national and international standards regulating the identification and management of conflicts of interest, requires personal and public interests to be appropriately balanced. It is evident from the Rules and the Public Service Code of Conduct that having a conflict of interest is not wrong but rather it is the manner in which the conflict is managed which is significant to the principles of accountability and transparency in state affairs.

4.7.2 Mr Mdladlana’s response

4.7.2.1 Mr Mdladlana’s view that the disciplinary action taken against Mr Manyi was done as an attempt to manage him and further that he managed Mr Manyi’s conflict of interest appropriately, were not substantiated by the evidence
submitted and the information obtained during the investigation. It was established that conflict of interest was not part of the disciplinary charges and although an interest in the BMF was declared, no conflict was declared in respect of this interest. As a result it cannot be correctly concluded that the conflict of interest was appropriately managed if it was not declared at all.

4.7.2.2 Further, the Rules which specifically provides for the management of conflicts of interest, was not adhered to.

4.7.3 **Minister Chabane’s response**

4.7.3.1 Minister Chabane’s response was based on a proper understanding of the Public Service Code of Conduct and the Rules.

4.7.3.2 The Minister undertook to co-operate with the remedial action to be taken and in addition explained the steps that have been taken in order to address the conflict of interest.

4.8 **Additional Evidence and Information obtained and considered**

4.8.1. **Responsibilities and duties of the Director General of the Department of Labour**

4.8.1.1 Mr Manyi was appointed as DG of the DoL in September 2009.

4.8.1.2 The following is a list of duties that Mr Manyi was responsible for as the DG, among other things:

4.8.1.2.1 Contribute to employment creation with specific targets on job creation in both private and public sectors;

4.8.1.2.2 Promote equity in the labour market with specific targets relating to:
(i) Enforcement of the Employment Equity Act and related affirmative action measures;
(ii) Amendment of the Employment Equity Bill and
(iii) Review companies listed on the JSE

4.8.1.2.3 Protect vulnerable workers by:
(i) Enforcing compliance with labour legislation
(ii) Implementing the Decent Work Agenda
(iii) Draft Bills on the LRA and BCEA

4.8.1.2.4 Monitor the impact of labour legislation

4.8.1.2.5 Strengthen the institutional capacity of the DoL

4.8.2 The Role and Functions of the BMF

4.8.2.1 The BMF was founded in 1976 and according to its mission statement\(^3\), is an organisation that strives to develop and empower managerial leadership amongst black people within the corporate structures of South Africa.

4.8.2.2 As an interest group operating within the realm of civil society, it attempts to create managerial structures and processes in order to promote black leadership.

4.8.2.3 The BMF provides the following services:
   (i) Leadership search
   (ii) BBBEE Consulting Services
   (iii) Organisational transformation
   (iv) Management and Leadership Development
   (v) Research services

\(^3\) http://www.bmfonline.co.za
4.8.2.4 Mr Manyi was appointed President of the BMF in September 2006, for a term of three years in accordance with the BMF Constitution and was re-elected in 2009.

4.8.2.5 As President of the BMF he is involved in programmes that ensure:

a) Transformation in the workplace;

b) Drafting and implementation of Affirmative Action policies;

c) The Implementation of BEE policies

d) The analysis of constitutional provisions and it’s shortfalls in respect of transformation;

e) The adaptation of the Employment Equity Act and other labour legislation to advance the interests of black managerial leadership.

4.8.3 The Role of the CEO of the GCIS and Cabinet Spokesperson

4.8.3.1 The CEO of the GCIS implements the primary responsibility of the GCIS which is to provide strategic leadership in communication and coordinating a government communication system that ensures that the public is informed and have access to government programmes and policies that benefit them.

4.8.3.2 The GCIS is also expected to build partnerships around common development objectives and leads the international marketing of the country and provides overall guidance, ensuring that the country is marketed abroad, and promotes media diversity.

4.8.3.3 The Cabinet Spokesperson is authorised by the Minister in the Presidency, to represent Cabinet to the media and serve as an authorised point of contact with the media and is delegated as official spokesperson for the GCIS and Cabinet on all matters that may have an impact on the image of government.
4.8.3.4 With regard to media engagement the CEO must promote and co-ordinate communication between Cabinet and the media in order to facilitate the media understands of Cabinet’s agenda.

4.8.3.5 The GCIS National Strategic Framework, 2009-2010, provides that all media communication representing an employee’s personal opinion as a private citizen, not associated with the department/province, does not require any approval. These opinions must subscribe to the Public Service Act, 1994 and the Code of Conduct for Public Servants, and must not use information acquired while on duty to voice personal opinions.

4.8.4 The Role of the Public Service Commission (PSC)

4.8.4.1 In terms of section 196 of the Constitution the PSC is mandated to promote the values and principles governing public administration. One of these values is to promote and maintain a high standard of professional ethics in the public service as provided for in section 195 (1) (a) of the Constitution.

4.8.4.2 The Public Service Code of Conduct (Code of Conduct) and the Financial Disclosure Framework for senior managers in the public service was produced in compliance with this mandate.

4.8.4.3 The Code of Conduct was the first initiative for managing conflicts interests in the public service. It exemplifies the spirit in which public officials should perform their duties. It also indicates what is expected of public officials in terms of their personal conduct in public and private life. As a result, the Code of Conduct forms a strong basis for setting minimum standards for ethical conduct in the public service.

4.8.4.4 In 2001, the PSC developed, as its second initiative for managing conflicts, the Financial Disclosure Framework (FDF), which requires all senior managers to disclose their financial and other private interests on an annual basis. In addition, the PSC is responsible for the management of the FDF.
4.8.4.5 The PSC recognised the need to develop a system or framework to manage conflicts of interest in the public service and in 2006 released its *Report on Managing Conflicts of Interest in the Public Service* (the 2006 Report).

4.8.4.6 In 2007 the PSC released another *Report on the Management of Conflicts of Interests through Financial Disclosures* (the 2007 Report). This Report was aimed at preventing conflicts of interests by requiring senior managers to disclose their financial and other private interests such as shares, directorship of private companies, etc.

4.8.4.7 The studies done in the 2006 and 2007 Reports, to develop a structured approach to a conflict of interest system, i.e. a framework to manage conflicts of interest, culminated in the third initiative by the PSC to manage conflicts of interest in the public service. In 2009, the *Rules of the PSC on Managing Conflicts of Interests Identified through the Financial Disclosure Framework for Senior Managers* (the Rules) was published in accordance with section 11 of the Public Service Act of 1994 (the Public Service Act).

4.8.4.8 The purpose of the Rules is to provide for a procedure to identify and manage potential conflicts of interest disclosed through the FDF of the senior management service. (The Rules are discussed in more detail at paragraph 5.4 below).

4.8.4.9 According to the PSC therefore, an effective conflict of interest framework rests upon the following three pillars:

(i) A comprehensive Code of Conduct;

(ii) A Financial Disclosure Framework; and

(iii) A framework to manage conflicts of interest.
5. LEGAL AND REGULATORY FRAMEWORK: LEGISLATION AND POLICY
PRESCRIPTS REGULATING THE MANAGEMENT OF CONFLICTS OF
INTEREST IN THE PUBLIC SERVICE

5.1 The Constitution

5.1.1 Section 195 of the Constitution provides the values and principles upon
which the public administration should be based and *inter alia* refers to the
following:

(i) A high standard of professional ethics;
(ii) Provision of services which is impartial, fair, and equitable and
without bias;
(iii) Accountability
(iv) Openness and Transparency
(v) Citizenship participation

5.1.2 Section 197 (3) of the Constitution provides that: "*No employee of the public
service may be favoured or prejudiced only because that person supports a
particular political party or cause*".

5.1.3 Section 9 (1) of the Constitution provides that: "*Everyone is equal before the
law and has the right to protection and equal benefit of the law.*" While
section 9 (3) provides that: "*The state may not unfairly discriminate directly
or indirectly against anyone on one or more grounds, including race....*"

5.2 The Public Service Act, 1994

5.2.1 During May 2001, the Minister for Public Service and Administration
(MPSA), in terms of section 4(1) (d) of the Public Service Act (as amended),
approved Chapter 3 of the Public Service Regulations (the Regulations)
which compels all Heads of Departments and all members of the Senior Management Service (SMS) to disclose their financial interests.

5.2.2 In terms of the Regulations, every SMS member must, not later than 30 April of each year, disclose to the relevant Executive Authority, particulars of all her or his registrable interests in respect of the previous financial year.

5.2.3 Furthermore, the Regulations stipulate that any person who assumes duty as a designated employee after 1 April in a year should make such disclosure within 30 days after assumption of duty in respect of the period of 12 months preceding his or her assumption of duty.

5.2.4 Directorships, partnerships and remunerative work outside the public service are examples of two kinds of interests referred to as registrable interests that must be disclosed.

5.3 The Public Service Code of Conduct

5.3.1 In South Africa the Code of Conduct governs the conduct of every employee in the public service, although it is not absolute.

5.3.2 It acts as a guideline to employees as to what is expected of them from an ethical point of view, both in their individual conduct and in their relationship with others.

5.3.3 Compliance with the Code of Conduct is expected to enhance professionalism and help to ensure confidence in the public service. The relevant provisions of the Code of Conduct are:

5.3.3.1 B.1: The need exists to provide direction to employees with regard to their relationship with the legislature, political and executive office bearers, other employees and the public and to indicate the spirit in which employees should perform their duties, what should be done to avoid conflicts of
interest and what is expected of them in their personal conduct in public and private life;

5.3.3.2 C1.2: An employee puts the public interest first in the execution of her or his daily tasks;

5.3.3.3 C1.5: An employee must co-operate with public institutions established under legislation and the Constitution in promoting public interest;

5.3.3.4 C4.6: An employee will excuse herself or himself from any official action or decision-making process, which may result in improper personal gain and the employee should properly declare this;

5.3.3.5 C5.4: An employee does not use or disclose any official information for personal gain or the gain of others; and

5.3.3.6 C5.5: An employee does not, without approval, undertake remunerative work outside her or his official duties or use office equipment for such work.

5.4 Rules of the Public Service Commission: Managing Conflicts of Interest Identified through the Financial Disclosure Framework for Senior Managers (the Rules)

5.4.1 The PSC published the Rules in terms of Government Notice 865 of 2009.

5.4.2 Conflict of interest is defined in section A(1) of the Rules as follows:

5.4.2.1 Any financial or other private interest or undertaking that could directly or indirectly compromise the performance of a public servant's duties, or the reputation of a public servant's department in its relationship with stakeholders;
5.4.3 The Rules go further to distinguish between the following three types of interest:

5.4.3.1 A perceived conflict of interest: where a public official is in a position that appears to be influenced by his/her private interests when doing his/her job;

5.4.3.2 A potential conflict of interest: where a public official is in a position where he/she may be influenced by his/her private interest when doing his/her job; and

5.4.3.3 An actual conflict of interest: where a public official is in a position to be influenced by his/her private interests when doing his/her job.

5.4.4 The purpose of the Rules according to Section B(1), is to provide a procedure to identify and manage potential conflicts of interest disclosed through the Financial Disclosure Framework of the Senior Management Service as prescribed in Chapter 3 of the Regulations.

5.4.5 The primary responsibility for managing conflicts of interest through scrutiny of the contents of financial disclosure forms is that of Executive Authorities. An Executive Authority may designate a person to execute the functions associated with the effective implementation of the provisions of the FDF. The functions may include the following:

5.4.5.1 Establishing an internal process to advise the Executive Authority on potential, perceived or actual conflicts of interests of designated employees;

5.4.5.2 Through the established process, identifying perceived, potential and actual conflicts of interest of designated employees;

5.4.5.3 Where an activity is identified as having the potential for conflict of interest, discussing the relevant concerns with the designated employee to determine
whether the potential conflict of interest can be managed or whether it is an actual conflict of interest that requires immediate intervention;

5.4.5.4 Where a designated employee’s activities in relation to the potential conflict of interest is seen to serve the interest of the Department and it can be managed in a manner that would withstand the test of reasonable and independent scrutiny, advise the Executive Authority and obtain his/her approval to implement a suitable method of monitoring and managing the conflict before the designated employee is free to proceed with the activity;

5.4.5.5 Providing the designated employee with the terms and conditions under which an activity associated with the potential conflict of interest will be conducted and managed, after obtaining the Executive Authority’s approval for such terms and conditions;

5.4.5.6 In cases where an activity is assessed as having the potential for conflict of interest and the continued performance of the activity by the designated employee involved does not serve the interest of the department or cannot be appropriately managed and therefore will not withstand the test of reasonable and independent scrutiny, or is an actual conflict of interest, inform the Executive Authority and obtaining his or her approval not to allow the designated employee to proceed with the activity;

5.4.5.7 Informing the employee performing an activity that constitutes a conflict of interest to stop performing the activity, reassigning duties attached to the potential or actual conflict of interest;

5.4.5.8 Documenting all related matters and maintaining records sufficient to address any audit queries or allegations of conflicts of interest that might arise; and

5.4.5.9 Keeping the Commission informed through six monthly reports, at the end of September and at the end of March of each year, of all instances where
potential conflicts of interest of designated employees in his/her department have been identified and how this has been managed.

5.5 The Public Finance Management Act, 1999

5.5.1 A member of an accounting authority may not, in terms of section 50(2), act in a way that is inconsistent with the responsibilities assigned to the accounting authority or use the position of or confidential information obtained as accounting authority for personal gain or to benefit improperly another person.

5.5.2 Section 50(3) states in relation to the issue of conflict of interests that:

“A member of an accounting authority must

(a) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and

(b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member’s direct or indirect interest in the matter is trivial or irrelevant.”

6. DISCUSSION OF GENERAL PRINCIPLES RELATING TO CONFLICT OF INTEREST IN THE PUBLIC SERVICE

6.1 Identifying a conflict of interest

6.1.1 Conflict of interest continues to be a significant and crucial matter for public administration. Public confidence in public administration is dependent on public officials acting fairly and impartially and in the best interest of the society which they serve.
6.1.2 Ensuring that the integrity of decision-making in government is not compromised by the private interests of public officials, is a growing public concern. New forms of partnerships between government and the private and non-profit sectors present new challenges for policy-makers and public managers.

6.1.3 The Organisation for Economic Co-operation and Development (OECD) with which South Africa has an enhanced engagement provides the following in its Guidelines for Managing Conflict of Interest (the OECD Guidelines):

"Conflict of interest arises when public officials have to make decisions at work that may affect their private interests. It can be defined as: ‘a conflict between the public duties and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities." ⁴

6.1.4 Identifying conflicts of interest can be challenging. It can be a pecuniary interest, i.e. a financial benefit or a non-pecuniary interest, where there is no financial benefit. Non-pecuniary interests can be just as damaging to public trust in government as pecuniary interests as it also poses its challenges. For example, a public official is a director of an organisation but he does not receive any remuneration.

6.1.5 The OECD Guidelines developed four core principles⁵ for public officials to follow when dealing with conflict of interest situations in order to maintain trust in public institutions:

6.1.5.1 Serving the public interest: Public officials should make decisions and provide advice without regard for personal gain. The decision-maker’s religious, professional, party-political, ethnic, family, or other personal preferences should not affect the integrity of official decision-making. At the

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⁵ OECD Guidelines, supra, at page 4-5
same time, public officials should dispose of, or restrict the operation of, private financial interests, personal relationships or affiliations that could compromise official decisions in which they are involved.

6.1.5.2 Supporting transparency and scrutiny: Public officials and public organisations are expected to act in a way that will bear the closest public scrutiny. Public officials should disclose any private interests and affiliations that could compromise the disinterested performance of public duties when taking up office and afterwards if circumstances change, to enable adequate control and management of the situation.

6.1.5.3 Promoting individual responsibility and personal example: Public officials, particularly public officeholders and senior managers, should act in a manner that demonstrates integrity and thus serve as an example to other officials and the public. When dealing with individual cases, senior officials and managers should balance the interests of the organisation, the individual and the public.

6.1.5.4 Creating an Organisational Culture: Public organisations should create an organisational culture that does not tolerate conflict of interest. This can be done in a number of ways, such as raising awareness by publishing the conflict of interest policy, giving regular reminders, developing learning tools to help employees apply and integrate the policy and by providing concrete advice when the need arises.

6.1.6 In the 2007 Report, the PSC acknowledged the following:

* It is safe to assume that....public officials have a wide variety of interests. Such interest could be complimentary or they could be competing interests. The nature of such interest could be political, personal and economic. These interests, once in competition with the work environment of a person may pose a problem to any organisation. ......another important point to understand is that senior public officials are entrusted with public funds. They need to maintain the highest standard of professional ethics. Their
integrity and that of their departments must be beyond question. Bearing this in mind regulations on financial disclosures are aimed at preventing incidence of conflicts of interests before they occur, thereby striving to promote a high degree of integrity, not only within an individual but also within government itself.\textsuperscript{6}

It is against this background that the Rules were published on 2009.

\section*{6.2 Managing conflict of interest}

\subsection*{6.2.1 Another crisp issue for consideration is the issue of whether or not it is wrong to have a conflict of interest. The following important observations can be made from the 2006 Report which was the outcome of a comprehensive study into occurrence and management of conflict of interests in the public service:}

"Conflicts of interest are not wrong in themselves. It is how they are managed that is important. In this regard it should be noted that public officials are also private individuals, and there will be occasions when an official's own private interests may come into conflict with his/her public duty which is to put public interest first at all times. Where reasonably possible, a public official should avoid conflicts between his/her personal interest and the public interest. However, where conflicts of interest cannot reasonably be avoided, an official has a responsibility to identify and effectively manage any conflicts of interest he/she may have, in consultation with his/her supervisor.\textsuperscript{7}"

\subsection*{6.2.2 A conflict of interest must be declared. The main outcome of a declaration is the exclusion or recusal of the public official from decision making processes on the grounds of a conflict of interest. The superior or Executive Authority

\begin{footnotesize}

\footnote{7} Report on Managing Conflicts of Interest in the Public Service, Public Service Commission, July 2006, page 20
\end{footnotesize}
will be responsible for disqualifying the public official from participation or the public official him or herself may resign from participation in the decision making process.

6.2.3 If a conflict between the public officials responsibilities and a personal interest is substantial and enduring it may be necessary to consider a permanent change to some or all of the official’s responsibilities.

6.2.4 Where a conflict of interest is significant and pervasive, the official may need to divest himself or herself of the interest, especially where that interest is seen to conflict with governmental policy or legislation.

6.2.5 A too-strict approach to controlling private interests may conflict with other rights or be unworkable or deter experienced and competent potential candidates from entering public office or public service.

6.2.6 Effectively managing conflicts of interest requires a balanced approach. This would entail a conflict of interest policy that seeks to strike a balance by: identifying risks; prohibiting unacceptable forms of private interest; raising awareness of the circumstances in which conflicts can arise; and ensuring effective procedures to resolve conflict of interest situations.

6.2.7 Since particular risks are attached to certain officials, especially policymakers and the most senior public officials, an actual conflict of interest must be prevented.

6.2.8 Compliance with policies and procedures is significant to effectively manage conflicts of interest in the public service, however, good policy alone cannot achieve its underlying purpose. Therefore, organisational culture must transform and adapt to ensure that the issue of conflict of interest remains integral to every government organisation’s consciousness.
6.2.9 One of the core functions of the PSC is to build strong relationships with administrative departments to strengthen their internal ethics. This, according to the Australian Development Review Agency involves “nurturing a culture of transparency and accountability by way of rigorous education focussed initiatives”.  

6.2.10 Therefore, a conflict of interest policy must be enforced by procedures to establish a conflict of interest and consequences for non-compliance, including disciplinary sanctions. Monitoring mechanisms should be in place to detect breaches of the policy while it is also essential to provide mechanisms for recognising and rewarding exemplary behaviour related to consistent compliance with the policy.  

6.2.11 These prevention and enforcement measures must be integrated into a coherent institutional framework.

6.3 The Role of Civil Society Organisations

6.3.1 The term 'civil society' describes “a relationship between society and the state where voluntary organisations and private individuals interact with the state but are separate from both the power structures of the state and from the mediating institutions in political society, even though they are all still somehow interconnected. These organisations are able to defend interests which touch them as individuals and as members of organised groups.”

6.3.2 Civil Society is made-up of various community-based organisations, organised business, organised labour, NGOs, religious groupings, stokvels and so forth. While their agendas and perspectives differ markedly from

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9 OECD Guidelines, supra, page 6
each other, these organisations are interested in governance because they believe they have an important role to play as watchdogs of government and development partners.\textsuperscript{11}

6.3.3 The involvement of civil society can have a positive impact on government accountability through social accountability mechanisms that are aimed at motivating effective performance and at evaluating the performance or quality of government services.

6.3.4 Social accountability plays an important role in the creation of a more transparent and representative government and holds public institutions to their obligation to meet the expectations of its citizens. In addition, it allows civil society to interact with government in a manner that acknowledges the limitations that both face and accepts that collaboration is necessary for effective and sustainable development.

6.3.5 The World Bank defines social accountability as an approach towards "building accountability that relies on civic engagement in which ordinary citizens and/or civil society organisations participate directly or indirectly in exacting accountability". The importance of social accountability, according to the World Bank, is that it is an essential component of and contributes directly to good governance\textsuperscript{12}.

6.3.6 Social accountability mechanisms refer to a broad range of actions (beyond voting) that citizens, communities, civil society organisations, and other interest groups can use to hold public officials and administrators accountable. Various policy instruments, some of which are universally recognised, demand accountability, transparency and responsiveness by the State whilst in the process empowering citizens to influence policies that

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\textsuperscript{12} From Social Accountability: A Key Element of Effective Service Delivery By Gugu Nuba Mgwebi http://www.afesis.org.za/Local-Governance-Articles/social-accountability-a-key-element-of-effective-service-delivery
promote their interests and reflect their priorities. These include citizen participation in public policy making, participatory budgeting, public expenditure tracking, citizen monitoring of public service delivery, citizen advisory boards, lobbying and advocacy campaigns.

6.3.7 When civil society is promoting social accountability through public participation, it is crucial to acknowledge that they:

- Occupy their constitutionally provided spaces and utilise them for the promotion of equal participation, the realisation of human rights and a transparent government that promotes democracy and good governance.

- Take advantage of the opportunities provided by the constitution and other legislation to participate in their own government and development processes.

- Demand accountability, justifications and explanations, including corrective action in the case of misuse or abuse of public resources.

- Be in a position to distinguish between outright corruption and administrative shortfalls resulting from weak capacity, and then prioritise and design their responses accordingly.

- Continuously demand accountability and corrective action where legislative requirements have not been strictly complied with, particularly when the State is facilitating development processes

6.4 The Ethical and Moral Dilemma

6.4.1 Ethics and values are important for public officials in order to ensure public trust and confidence in government. It is especially important for those officials making policy or taking policy decisions.

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13 From Social Accountability: A Key Element of Effective Service Delivery, supra. 9
6.4.2 The ultimate consequence of a conflict of interest is that there is a conflict between advancing the public interest, which a public official has a duty to do, and advancing one's self-interest. There is a duty to ensure that the public interest comes first and that one does not advance his personal interest at the expense of the public. It is realised that, as human beings, it is often difficult to separate personal and public interests.

6.4.3 While the Constitution requires public service officials to be non-political, section 197 (3) of the Constitution acknowledges that some officials may be appointed for political and policy reasons as some officials do not act in isolation of their public positions and community networks.

6.4.4 Section 197 (3) of the Constitution recognizes the importance of the public service to be impartial and non-political while at the same time acknowledging that some public officials should be given positions in government because of their close association with other political parties or because of their support for particular interests or interest groups, as their participation in decision making allows government to consider varied political and diverse viewpoints when reaching a collective decision.14

6.4.5 Nevertheless, public officials should take care to ensure that their associations or interests do not conflict with that of government to the extent that the purpose and objectives of section 197 (3) of the Constitution is blurred.

6.4.6 The objective of section 197(3) of the Constitution is to protect the freedom of public servants, like all employees, to align themselves freely with a political party or cause of their choice without fear or adverse consequences. This is in line with the freedom of choice and opinion provided for in section 19(1) of the Electoral Act, 1998 as well as section 186 of the LRA. As with all rights, this freedom is however, not absolute and will constitute an ethical dilemma when the activities and commitments of

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14 Pierre de Vos, A Decision to Promote Impartial Civil Service, Jan 24, 2011, Constitutionally Speaking.co.za
the employee towards his/her private (and political) interests are sufficient
or perceived to be sufficient to influence the exercise of official duties. 15

6.4.7 Public officials should take cognizance of the values of society and its
communities and not substitute their own value choices for those of the
society; in other words, they should in all respects be publicly accountable
for their actions, even to the extent of their personal relationships with
elected political office-bearers (their political masters), their relationships
with pressure groups, their political activities and the supplementing of their
incomes. 16

6.4.8 It must be borne in mind that as public officials operate within a democratic
system they are obliged to carry out the will of the people and uphold the
public interest in compliance with principles of integrity, impartiality and
equality. Their conduct should therefore refrain from promoting the
advantage or disadvantage of any political party, person or group.

6.4.9 Further, they are obliged to adhere to the principles of the Constitution that
includes the principle of equality and not discriminate for reasons such as
language, religion, philosophical belief, political belief, race, sex, etc. while
performing their duty or providing services and to restrain themselves from
acting in a manner that violates or restricts human rights or obstructs equal
opportunity.

6.4.10 As Michael Josephson said: "When it comes to public trust, perception is
reality. It is not enough that we do no wrong, we must also try to assure that
others believe we have done no wrong".17

6.4.11 Public officials should make every effort to avoid even the appearance of a
conflict of interest. This should be applicable on a case by case basis. When

and Company Ltd, 2005
16 Ethics in the Public Service By Prof. Joseph Ayee, Second Pan-African Conference of the
17 Quoted by the NC Board of Ethics, Volume 4 Issue 6, July 2001
a reasonable person would conclude from the circumstances that the officials' ability to protect the public interest or perform public duties is compromised by personal interest then an appearance of a conflict of interest exists.  

6.4.12 For example, an appearance of a conflict of interest may reasonably be said to exist where there is a perception that because a government official partners with an advocacy group, its members will receive a benefit that non-members will not. Such perception undermines public confidence that the official is acting in the best interest of the public as a whole as required by the Code of Conduct.

6.4.13 The public behaviour of a public official should build a reputation, whether in the execution of his public duty or not, that is deserving of public trust and confidence. He should thus avoid any such behaviour, even if done in a private capacity, that is oppressive, insulting or threatening or that displays double standards and impartiality, thus raising doubts and harming the sense of confidence of the community in his or her public service.

6.4.14 From the approach used by the Ombudsman of Victoria, Australia, a balanced approach can be seen where a conflict of interest may be said to exist when a public official, in the performance of an official function, could be influenced or could be reasonably perceived to be influenced by a private interest. The Ombudsman shifts the focus on actual wrongdoing to one that considers the impact of the conduct on the reasonable perception of others. This approach provides a mechanism to prevent misconduct before it occurs.  

6.4.15 It is worth noting that with the Victorian Ombudsman's approach the reasonable perception of a third party is recognised as the appropriate test for the existence of a conflict of interest.

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18 NC Board of Ethics, Volume 2, April 2002
EVALUATION OF THE COMPLAINTS AGAINST THE EVIDENCE AND REGULATORY FRAMEWORK

7.1 Did a conflict of interest exist between Mr Manyi’s public duties and responsibilities as DG of Labour and his private duties and interests as President of the BMF?

7.1.1 The complaint was that Mr Manyi’s interest with the BMF conflicted with his responsibilities as DG of the DoL.

7.1.2 The basis for this view was that Mr Manyi may have used his position as DG to influence his interests in promoting the cause of the BMF which is to advance the employment and other interests of black people.

7.1.3 This was seen to have a detrimental effect on the interest of the public at large as it was perceived that he experienced difficulty in balancing two competing interests. One, the Constitutional duties required in sections 197 and 195 of the Constitution to put the public interest first, ensure the provision of public services in an impartial, fair and equitable way to the total community and loyally execute the lawful policies of the government of the day, and two, his commitments and actions to exclusively promote the employment interests of a specific portion of the South African Society, namely black people.

7.1.4 Mr Manyi maintained the view that his position at the BMF did not give rise to a conflict of interest with his duties as the DG of the DoL in the circumstances. In this regard he submitted that he disclosed his position at the BMF at the time of his appointment as DG and that he was not required to relinquish his position at the BMF at the time of his employment.20

7.1.5 The former Minister, Mr Mdladlana, stated that he was aware of Mr Manyi’s position at the BMF, however, he did not approve any outside work for him.

20 See paragraph 4.3 above
However, it was clear from the evidence that no objections were raised at the time of appointing Mr Manyi.

7.1.6 As indicated in the analysis of a conflict of interest\(^{21}\), the fact that an interest was disclosed does not mean that there was no conflict of interest that had to be managed in relation to issues that were dealt with by the DoL and specifically by the DG during his official duties.

7.1.7 Mr Manyi contended that he was protected by section 197 (3) of the Constitution not to be prejudiced merely because he supports the cause of a particular organisation.

7.1.8 Section 197(3) of the Constitution does not however, allow an employee to use his or her position in the public service in order to promote or prejudice the interest of any political party or interest group, or even to become involved in matters which could be perceived as favouring one group over another. As far as the public service is concerned, all its clients must be served equally in accordance with the policies of the government of the day. An employee must therefore clearly understand the difference between his or her responsibilities towards government and becoming directly involved in party political issues.\(^{22}\)

7.1.9 In addition, Mr Manyi, however, not only supports the cause of the BMF but as President of the organisation he forms an integral part of its leadership and actively promotes and advocates its interests as part of the social accountability mechanisms in civil society. This is further distinguishable on the basis that as a functionary in both the public service and the BMF he owes a duty of good faith to both organisations. This duty entailed that he was obliged not to work against the interests of government as his employer and not to place himself in a position where his interests in civil society conflicted with that of the State.\(^{23}\)

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\(^{21}\) See paragraph 6 above

\(^{22}\) Explanatory Manual On The Code Of Conduct For The Public Service

\(^{23}\) Ganis and another v Telecom Namibia Ltd [2004] 2 All SA 609 (SCA)
7.1.10 The Code of Conduct recognises that there are various conflicts of interests that exist among public service employees and therefore an existing conflict of interest is not wrong, it is how this conflict is managed that is important.\textsuperscript{24}

7.1.11 The issue for consideration was whether Mr Manyi had a duty to the DoL that conflicted with a duty owed to the BMF. Was his interest in the purpose, function, values and approach of the BMF perceived to have an influence on his objectivity when he participated in decisions and other duties associated with the functions of the DG of the DoL?

7.1.12 The Rules and the Code of Conduct are based on current international standards on identifying and managing conflicts of interest in the public service. The concept is defined in an unambiguous and wide manner and attempts to cover all types of interest that could affect or be perceived to affect the objectivity of a decision-maker.

7.1.13 What is more clear from the Rules and other international guidelines is that one's integrity may be compromised even when the conflict did not have an actual impact on one's objectivity but could only have been perceived as having such an effect. The Rules extend a warning to employees that their positions of conflict might result in perceptions of conflicts and further extended a responsibility to Executive Authorities to take action to prevent the actual conflict or at least manage the conflict effectively.

7.1.14 There can be no doubt that Mr Manyi, as President of the BMF, owed a duty to the BMF to act in its best interest both financially, strategically and otherwise. Likewise, as the DG of Labour it was expected of him to act in the best interest of the DoL, the government of South Africa and the public at large.

7.1.15 As the leader of an organisation that strives to develop and influence the current legislative framework and policies to benefit the employment,
financial and economic interests of black South Africans, this gives rise to a private interest that could have both directly and indirectly compromised his integrity and the reputation of the Department at which he was employed.

7.1.16 From an analysis of evidence received, a reasonable perception of not just a perceived conflict but an actual conflict arises. The public perception of a conflict of interest grew greater each day as the issue was raised continuously, since April 2010, by journalists and other members of the public, who based their perceptions on a number of incidents where Mr Manyi, as DG of the DoL promoted the interests of the BMF or as President of the BMF criticised the policies of government. Their views essentially form the basis of a reasonable perception of bias.

7.1.17 On an application of the reasonable perception test, Mr Manyi should have considered what the reasonable, well informed member of the public would perceive, while he performed certain duties as President of the BMF and conducted himself in a manner that conflicted with the interests of government and the values which he was meant to promote as the DG of the DoL. The conclusion is therefore drawn that Mr Manyi’s interest in the BMF was perceived to have an actual effect on his objectivity and discretion while he was required to act in the best interest of the people and the government he served.

7.2 Was Mr Manyi’s conflict of interest appropriately managed by the relevant authorities of the DoL?

7.2.1 In line with the national and international standards on the management of conflicts of interests, it is again acknowledged that conflicts of interest are not prohibited, the important issue is how the conflict is managed that determines whether or not the conduct of the public official was improper.
7.2.2 The Rules and the FDF require the declaration of financial interests and other employment outside the public service that may amount to a conflict of interest.

7.2.3 From the evidence submitted by the former Minister it was established that Mr Manyi submitted the financial disclosure documents in compliance with the financial disclosure regulations. From the information it was clear that he declared relevant interests, including his interest in the BMF.

7.2.4 Relevant legislation required that a conflict of interest must be declared, however, a mere declaration of an interest does not amount to a declaration of a conflict of interest. The legislation goes further to state that where a conflict arises, the official concerned must excuse himself or herself from any deliberations dealing with the conflict concerned. The former Minister stated in his response that Mr Manyi did not excuse himself neither was he required to excuse himself from deliberations that may have involved or did in fact involve a conflict of interest between his two positions.

7.2.5 As a senior official in the public service, it was reasonably expected of Mr Manyi to have led by example and complied with the Rules and the Code of Conduct by excusing himself in these circumstances.

7.2.6 The failure to excuse himself in these circumstances created a reasonable perception that he may have been biased in respect of interests of the DoL and that of the BMF that were interrelated.

7.2.7 Especially significant is that the former Minister, as the Executive Authority, was required to ensure compliance with the applicable legislative framework and ensure Mr Manyi's exclusion in these circumstances. It was noted that conflict of interest was not included in the charges brought against Mr Manyi as part of the disciplinary action.
7.3 Does a conflict of interest exist between Mr Manyi’s public duties and responsibilities as CEO of the GCIS and Cabinet Spokesperson and his private duties and interests as President of the BMF?

7.3.1 The complaint was that Mr Manyi’s interests with the BMF conflicted with his responsibilities as CEO of the GCIS and Cabinet Spokesperson for the same reasons that it conflicted with his position as DG of the DoL.

7.3.2 The basis for this view was that Mr Manyi was likely to use his position to influence his personal interests in promoting the cause of the BMF which is to advance the employment and other interests of black people.

7.3.3 Mr Manyi publicly maintained the view that his position at the BMF did not give rise to a conflict of interest with the duties and responsibilities of his new appointment.

7.3.4 The complaint was submitted at the same time that Mr Manyi was appointed. Additional evidence was submitted to support the complaint and separate incidents submitted to demonstrate a difficulty in balancing his private interests with the interests of the GCIS and the public.

7.3.5 While the GCIS may be aware of Mr Manyi’s interests in the BMF and while his new role may differ from that of his previous role at the DoL, this should not necessarily mean that there is no conflict of interest that is required to be managed by the relevant authorities of the GCIS.

7.3.6 The issue for consideration then is whether Mr Manyi has a duty to the GCIS and Cabinet as its Spokesperson that conflicts with a duty owed to the BMF. Can his interests in the purpose, function, values and approach of the BMF be perceived to have an influence on his objectivity when he performs his duties and other associated functions of the GCIS and Cabinet Spokesperson?
7.3.7 While Mr Manyi may be protected by section 197 (3) of the Constitution in that he supports the cause of a particular organisation, it is reiterated that he not only supports the cause of the BMF but as President of the organisation he forms an integral part of its leadership and actively promotes and advocates its interests as part of the social accountability mechanisms in civil society. This is further distinguishable on the basis that as a functionary in both the public service and the BMF he owes a duty of good faith to both organisations. Paragraph 7.1.8 above is in addition reiterated.

7.3.8 In this respect, the Rules and other international guidelines, require us to consider again the issue of whether one's integrity could be compromised even when a conflict does not have an actual impact on one's objectivity but could only have been perceived as having such an effect. This includes the further responsibility on Executive Authorities to take action to prevent the actual conflict or at least manage the conflict effectively.

7.3.9 While Mr Manyi continues to owe a duty to the BMF to act in its best interest both financially, strategically and otherwise, as CEO of the GCIS and Cabinet Spokesperson he is required to act in the best interest of government by supporting its interests and protecting its image.

7.3.10 The GCIS is government’s communication system that is primarily responsible for communication between government and its citizens. As the CEO of the GCIS, Mr Manyi is responsible for effective media relations to ensure co-ordinated government messaging. As spokesperson for Cabinet he is responsible for promoting its image, serving the needs of the people and facilitating the participation of all citizens in the use of information and the activities of government. As such he must be proficient in handling public scrutiny of government and its activities in the interest of promoting democracy and efficiency. This is considered an important and significant strategy element for good service delivery.
7.3.11 Public perception of a conflict of interest in respect of this position appears to be based on incidents where Mr Manyi conducts himself in manner that compromises his integrity as a public official and creates a reasonable perception that he is unable to adequately support and promote the integrity of government.

7.3.12 An appearance of a conflict of interest may be said to exist when a reasonable person would conclude that Mr Manyi’s ability to protect the public interest and adhere to the principles of impartiality while facilitating on efficient government communication and media relations may be compromised by his personal interests in the BMF.

7.4 Role and Responsibility of the Executive Authority in managing a conflict of interest

7.4.1 The Rules recognise a perceived conflict of interest as a form of conflict that may arise. This is when it could be perceived or appears that private interests could improperly influence the performance of duties.

7.4.2 The evidence gathered during this investigation leads to the conclusion that a perceived conflict of interest may exist.

7.4.3 As seen above, Mr Manyi owes a duty of good faith to both the BMF and government. This may give rise to difficulties in acting objectively and in the best interest of government while executing his official public duties.

7.4.4 It is for this reason that the Rules and the FDF require a declaration of interests and a declaration of a conflict of interest, be it a potential, actual or perceived conflict. Once a conflict of interest is declared, appropriate measures should be taken to manage the conflict so as to ensure that the integrity of the public official concerned is not compromised in the circumstances.
7.4.5. An institutional framework to give effect to and enforce the legislative and policy framework for the management of conflicts of interest should be developed and utilised to establish whether a conflict is effectively managed and to establish what would be the most appropriate measure in the circumstances.

8. FINDINGS

8.1 With regard to Mr Manyi’s previous position as the DG of the DoL, the Public Protector finds that:

8.1.1 Mr Manyi had a conflict of interest between his personal interests in the BMF and his Constitutional duty towards the DoL and the people of South Africa;

8.1.2 As a senior public official, he failed to comply with the Code of Conduct and the Rules which required him to manage the conflict effectively by excusing himself from certain duties and responsibilities that resulted or would have resulted in him being influenced by this conflict; and

8.1.3 The former Minister, Mr Mdlalana, failed to comply with the relevant provisions of the Code of Conduct and the Rules that required him to manage effectively the said conflict of interest as the relevant Executive Authority of the DoL.

8.2 With regard to Mr Manyi’s current position as the CEO of the GCIS and Cabinet Spokesperson, the Public Protector finds that:

8.2.1 A perceived conflict of interest exists between these positions and his position at the BMF, which, may lead to an actual conflict of interest if not properly and effectively managed by the relevant Executive Authorities in accordance with the Rules, the Code of Conduct and the FDF.
9. **REMEDIAL ACTION**

The appropriate remedial action to be taken in terms of section 182 (1) (c) of the Constitution is that the Minister in the Presidency must take urgent steps to:

9.1. Ensure from the declarations made in terms of the relevant and applicable legislative and policy framework, that the existence of a conflict of interest is recorded and declared; and

9.2. Ensure that the conflict of interest is properly and effectively managed in accordance with the relevant and applicable legislative and policy framework and the internal conflict of interest policy of the GCIS. In this regard the appropriateness of implementing one or more of the following measures to address the conflict of interest must be established:

9.2.1 Mr Manyi being required to divest himself of the private interest; or

9.2.2 Mr Manyi being excluded from participation in identified decision making processes; and/or

9.2.3 A permanent change to some or all of Mr Manyi’s official responsibilities.

10. **MONITORING**

10.1 The Public Protector will:

10.1.1 Require an implementation plan in respect of the remedial action to be taken in terms of paragraph 9.1 and 9.2 above from the Minister within 21 days of the date of this Report;
10.1.2 Require a progress report from the Minister on the progress made with regard to the implementation of the remedial action to be taken in terms of paragraph 9 above within 1 month from the date of this Report;

10.1.3 Monitor the progress made with regard to the implementation of the remedial action dealt with in paragraph 9 above over the next six (6) months following the date of this Report.

ADV TN MADONSELA
PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA

DATE: 27/09/2011

Assisted by: Ms C N Pillay, Senior Investigator: Service Delivery

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