THERE ARE NO HEROES

Report of the Public Protector on an investigation into alleged abuse of power by the Director-General of the Department of Trade and Industry towards the former Commissioner of the National Consumer Commission

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Executive Summary

"Both parties can however take another look at what was envisaged in Chapter 3 of the Constitution as co-operative governance, as they both failed miserably at it."1

I “There are no heroes” is a report of the Public Protector in terms of section 182(1) of the Constitution of the Republic of South Africa Act, 1996 (the Constitution) and section 8(1) and section 8(2A)(a) of the Public Protector Act, 1994 (the Public Protector Act).

II It is the result of an investigation and attempted conciliation process involving allegations of abuse of power submitted by the then Commissioner (the Commissioner) of the National Consumer Commission, Ms Mamodupi Mohlala-Mulauudzi, against the Director-General (DG), Mr Lionel October, of the Department of Trade and Industry (DTI). The national Consumer Commission, an independent statutory body, is South Africa’s cardinal consumer watchdog, which is administratively located in the DTI.

III The Commissioner approached the Public Protector on 28 March 2012 making allegations of abuse of power against the DG of the DTI. The complaint included various allegations of abuse of power, interference in NCC operations and harassment in retaliation to her resistance. The main allegations related to the DG’s alleged co-management of staff of the NCC transferred from the DTI, the main grievance being the DG’s alleged withdrawal of some of these without notice causing disruptions to the NCC’s operations. A related allegation was

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1 See general observations paragraph 10.7.4 page 54.
that the transfer of the staff was not handled properly by the DTI and the transfer agreement was never presented to or signed by the Commissioner.

IV

The Commissioner further alleged that DTI had procured goods and services for the NCC without her consent and made certain payments without her knowledge or authorisation when she was already on board. She further alleged that the DG was interfering in her operational independence by questioning her decisions on motor industry matters on behalf of that industry. She alleged that her resistance to DTI’s interference in her operations had been met with retaliatory action, including withdrawal of needed support, particularly in regard to the procurement of financial systems. She further alleged that she was placed under virtual financial administration and ultimately subjected to multiple investigations and audits, facing at one stage 5 concurrent processes of that nature. The Commissioner also alleged that she had no signed performance agreement.

V

Upon assessment of the complaint, I endeavoured to conciliate between the parties at a meeting held on 25 May 2012. The issues isolated from the complaint and the first conciliation process were the following:

(a) Abuse of power by the DTI and interference in the management of the NCC in respect of HR matters, procurement and finance;

(b) Violation of operational independence;

(c) Harassment by:

(aa) Subjecting the NCC to multiple investigations;
(bb) Withholding support; and

(d) Failure by the Minister to sign a performance agreement with the Commissioner.

VI At the initial conciliation meeting, the DG of DTI made the following counter allegations against the Commissioner, which were later supported by the Minister:

(a) Governance failure especially financial systems and procurement failures; and

(b) Failure to sign staff performance agreements.

VII When it became clear that the conciliation process was not likely to yield any tangible results, I decided to investigate the matter with a view to making a determination or findings as envisaged in the Public Protector Act, 23 of 1994.

VIII In the end, the matters requiring a determination comprised a combination of the four issues raised by the Commissioner and the two issues submitted by the DTI represented by Minister Rob Davis and the DG, Mr Lionel October in various documents and meetings.

IX As part of the investigation process, meetings were held with representatives of the DTI, the Auditor General of South Africa as well as the Minister of Trade and Industry. Documents such as memoranda, letters and e-mails, were perused.
I had to determine the propriety of the conduct of the DTI, primarily the Minister and DG, and in response to the counter claim, the conduct of the Commissioner. The test for proper conduct was constructed from the legal framework, policies and prescripts regulating the operations of the NCC as an independent statutory consumer watchdog and its relationship between with the DTI as the hosting department. The framework revealed that the clearly defined relationship is between the Minister and Commissioner. The Consumer Protection Act, 2008 emerged as the main instrument regulating the relationship. Key among its provisions is the fact that the relationship is between the Commissioner and the Minister. Also worth noting is that the Commissioner is regarded as the Accounting Authority of the NCC, with responsibilities that incorporate those of an Accounting Officer under the PFMA.

The role of the DG of the DTI and consequent relationship with the Commissioner, is principally left to conventions that have emerged over the years around the relationship between the DTI and the parastatals, mainly State Owned Enterprises(SOE) that fall within its remit. It is noteworthy, for example, that although the NCC is not an SOE, being an independent regulatory body, the key administrative instrument regulating its relationship with the DTI is referred to as a Share Holder Compact as is the case with SOEs. It is worth noting though that the shareholder compact is an agreement between the Minister and the Commissioner and does not include the Director-General.

The PFMA on the other hand, specifies the role of Accounting Authorities while also defining the role of the transferring Accounting Officer, referred to as Group Accounting Officer by the DTI. The responsibility of the “Group Accounting officer” regarding the handling of transfers to statutory entities is principally regulated by section 38(1)(j) of the PFMA. The key requirement is that the
Accounting Authority needs to provide a letter certifying that sound financial and related systems have been created before a transfer of funds is made. What happens in the event of a subsequent system failure or suspected system failure is left to DTI conventions. Herein lies the roots of the stormy relationship between the DTI’s Departmental Accounting Officer and the Commissioner as the Accounting Authority of the NCC.

XIII In the search for the ideal relationship between DTI and the NCC, consideration was also given to the broader regulatory framework, including the principles of co-operative governance as envisaged by Section 41(1)(h) of the Constitution which states that all spheres of government and all organs of state must co-operate with one another in mutual trust and good faith by fostering friendly relations and assisting and supporting one another.

XIV My findings are the following:

(a) Maladministration and Abuse of power by the DTI and interference in the management of the NCC in respect of HR matters and finance:

(aa) Interference in Human Resources Management

(i) The signed Shareholder Compact between the NCC and the DTI indicates that the Commissioner should have sufficient freedom to manage the affairs of the NCC balanced against the responsibility to exercise such freedom within the agreed mandate as outlined in the relevant legislation and the framework of effective accountability. This was clearly not the case in the relationship between the NCC and the DTI. My
impression of the relationship between the parties was one of an "overprotective parent not willing to allow an eighteen year old child" to stand on his/her own feet.

(ii) The Shareholder Compact further states that the parties entered into the Compact on the basis of mutual cooperation and good faith. However, no sign of mutual cooperation or good faith was evident during my attempted conciliatory meetings between the parties and their general conduct towards each other.

(iii) The Transfer Agreement of staff indicates that the Commissioner should have been requested to sign the document as the employer department, but she was never requested to sign the agreement and as such she never became a party to the agreement. The DTI ignored the Commissioner and expected her to adhere to the conditions even though she was not given an opportunity to be a signatory to the Transfer Agreement.

(iv) Staff members were seconded and transferred to the NCC with effect from 1 April 2011 and the Minister delegated all HR functions to the Commissioner on 18 April 2011.

(v) When the DG became aware of complaints by the NCC staff regarding working conditions at the NCC he unilaterally decided to transfer them back to DTI via internal memoranda. There is no indication that the Commissioner was consulted or that there
was any formal communication to the Commissioner to inform her that her staff would be removed with immediate effect. The DG clearly abused his authority in this regard.

(vi) In the DG’s own words, “the removal of staff was disruptive” and it is clear that he abused his power in this regard as his conduct went well beyond merely “providing support” to the NCC.

(vii) My finding is that the DG of the DTI, Mr Lionel October, had multiple direct interactions with the NCC staff and eventually authorised the withdrawal of some staff arbitrarily without the Commissioner’s knowledge or approval causing major operational disruptions.

(viii) The conduct of the DTI constitutes a violation of the Commissioner’s operational independence, an unfair labour practice, an act of abuse of power and maladministration.

(bb) Interference in Financial Management:

(i) My finding is that the DG had the authority in terms of section 38(1)(j) of the PFMA and Regulation 8.4.2 of the Treasury Regulations to withhold the transfer of funds to the NCC until such time as the public entity (NCC) met the financial conditions and that the DTI had the authority to withhold the transfer of funds until such time as the NCC had sound financial and related systems in place.
(ii) However, as much as there should be adherence to the prescripts in terms of the PFMA and the Treasury Regulations, I was concerned about the breakdown in the mutual trust and good faith between the DTI and the NCC.

(iii) I'm further concerned about the lack of clarity regarding the day to day roles of the Accounting Authority and the Group Accounting officer.

(iv) The manner in which the authority was exercised, however, fails to meet the test of good administration. Although lawful, the DTI’s conduct was unfair, unreasonable and constitutes maladministration.

(b) Violation of operational independence:

(aa) The DG, Mr Lionel October, did meet with certain role players in the motor industry, wherein the Commissioner’s conduct was discussed. He subsequently requested feedback from the Commissioner on the Ombud Scheme for the Motor Industry and inputs on enquiries received from the Portfolio Committee on Trade and Industry. However, I am unable to find that the DG’s conduct amounted to interference with the mandate of the Commissioner as he did not direct her to do anything.
(c) Harassment through multiple investigations:

(aa) It is correct that the NCC was indeed subjected to multiple enquiries and audit investigations at the same time. While the AGSA was conducting its audit, the Minister also requested an Independent Forensic Audit to be conducted by Grant Thornton as well as an internal audit. The Public Protector investigation was also taking place around the same time, a fact known to the DTI. At a stage when the DG had already withdrawn staff members from the NCC, these audits stretched the NCC staff unduly. This meant that the NCC was unable to execute its functions properly because of being subjected to multiple investigations. While there is nothing wrong with auditing, *per se*, the pressure placed on the Commissioner does amount to abuse of power.

(d) Prejudice suffered because of support withheld:

(aa) I firmly hold the view that when the NCC chose the option to do things independently, some of the support was withheld. In this regard I specifically find that it was improper for the DTI not to provide the NCC with resources for the purchasing of financial systems and advertising of the post of the CFO. I accordingly hold that the DTI's conduct was improper and constitute abuse of power and maladministration.
(e) Failure to sign Performance Agreement:

(aa) Even though a Contract of Employment and a Shareholder Compact was signed between the Minister and the Commissioner, no Performance Agreement was ever signed between the parties.

(bb) The Commissioner submitted a draft agreement to the Minister, albeit 5 months later than expected and the Minister only responded 6 months later by way of a letter to indicate that he is satisfied with the performance agreement, but still without signing the Performance Agreement.

(cc) In a situation where relationships between the parties were already stretched it would have assisted enormously if the Minister ensured that the Commissioner’s Performance Agreement was signed timeously.

(f) Findings on the counter complaint by the DG

(aa) Governance Failure relating to financial systems and internal controls

(i) On alleged Lack of Financial Management Systems, it is clear that the NCC failed to implement proper financial systems until a very late stage of the financial year. However, the DTI is partly responsible for this failure in view of its tardiness in providing resources for the purchasing of financial systems. The auditor General further found mistakes in financial reporting and that
the Audit Committee was only appointed 3 months before the end of the first financial year.

(ii) *On alleged irregular procurement of office accommodation*, the procurement of the office accommodation for the NCC did not comply with the SCM Policy requirements and section 51(1)(b)(ii) of the PFMA in that the accounting authority should prevent irregular expenditure and that the procurement by the NCC should be regarded as irregular expenditure. This was confirmed by the Auditor General's Final Management Report.

(iii) .The acts and omissions of the commissioner regarding financial systems constitute maladministration. However, the context of being a new entity and the lack of support mitigate the severity of the impropriety. The procurement of offices is the subject of a different Public Protector Investigation into various alleged governance and administrative irregularities.

(bb) **Failure to Sign Employee Performance Agreements**

(i) The NCC failed to enter into performance agreements with staff on account of the absence of a signed performance agreement between the Minister and the Commissioner. My view is that by taking a legalistic stance regarding the need for her to have a signed agreement and failing to enter into any agreements even if such could have been regarded as interim agreements, the Commissioner undermined her own ability to manage performance of her staff effectively. Her Draft Performance
agreement and the NCC’s Strategic Plan were adequate to provide guidance.

(ii) While the conduct of the NCC generally and the Commissioner, specifically, was lawful, it was improper and constitutes maladministration.

XV General Observations:

(a) There seems to have been different interpretations of the independence of the NCC in the context of the DTI’s responsibility as a “shareholder”. The law is very specific that the NCC is independent yet the PFMA has certain requirements. The relationship between the Minister and the Commissioner also was defined in one way in principle yet different expectations informed the situation. The notion of “shareholder” appears to have contributed to the distortion.

(b) The relationship between the DG (as accounting officer of DTI) and the Commissioner (as Accounting Authority of NCC) broke down largely because of improperly defined functions and powers. In the end, the broken down relationship was to the detriment of the NCC. The DTI admitted that it allowed the NCC to choose between creating its own systems and leaning on departmental support. But it would appear that as soon as the choice to go for own systems, the attitude of the DTI hardened. The offer to choose reminds me of the option that Henry Ford’s curious offer to the Americans when he said: “Americans can have any car they want in any colour they want as long as it is black.”
(c) The NCC wanted to walk independently whilst it was still learning to crawl, while the DTI wanted a full parental relationship. The reality is that the DTI has vast experience in the establishment of public entities and knew what was required to set up the NCC to ensure that it became a well-functioning public entity. Unfortunately, in its efforts to assist the NCC with its establishment it took the role of a parent unwilling to allow a maturing child to stand on its own feet.

(d) Both parties can however take another look at what was envisaged in Chapter 3 of the Constitution as co-operative government as they both failed miserably at it.

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

(a) The Minister must take urgent steps to ensure that:

(aa) There is a clear definition of the relationship between the DG and the Commissioner as well as the Minister’s role;

(bb) The Commissioner’s role as Accounting Authority is clarified; and

(cc) The HR management processes be clarified.

(b) The NCC should continue its on-going process of tightening its financial accounting and supply chain management processes.
REPORT OF THE PUBLIC PROTECTOR ON AN INVESTIGATION INTO ALLEGED ABUSE OF POWER BY THE DIRECTOR GENERAL OF THE DEPARTMENT OF TRADE AND INDUSTRY TOWARDS THE FORMER COMMISSIONER OF THE NATIONAL CONSUMER COMMISSION

1. INTRODUCTION

1.1 "There are no heroes" is a report of the Public Protector in terms of section 182 (1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8 (1) and section 8 (2A) (a) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 It is submitted to the Minister of Trade and Industry, Dr R Davies (the Minister), and to the Director-General (DG) of the Department of Trade and Industry (DTI), Mr L October.

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

1.4 The report communicates the Public Protector’s findings and remedial action directed following an investigation and attempted conciliation process involving allegations of abuse of power submitted by the former Commissioner (the Commissioner) of the National Consumer Commission (NCC), Ms M Mohlala-Muladzi, against the DG of the DTI.
2. THE COMPLAINT

2.1 The Public Protector was approached by the Commissioner on 28 March 2012, with a complaint of abuse of power against the DG of the DTI. The allegations against the DG are *inter alia* that the DG made it difficult for the Commissioner to perform her functions as the Accounting Authority of the NCC in that:

2.1.1 She lacked full financial control over the funds of the NCC as all funds were not transferred into the NCC bank account until September 2011;

2.1.2 There was financial interference with the NCC as certain assets were purchased by the DTI on behalf of the NCC without the Commissioner’s knowledge;

2.1.3 The DG interfered with Human Resource matters of the NCC;

2.1.4 The DG interfered with the mandate of the NCC;

2.2 The Commissioner further alleged that there was no performance agreement signed between her and the Minister.

2.3 During the Public Protector’s attempt to conciliate, a counter complaint was lodged by the DG of the DTI against the Commissioner alleging that:

2.3.1 The Commissioner failed to implement proper financial systems;
2.3.2 The Commissioner followed irregular procurement processes to procure new premises for the NCC; and that she

2.3.3 Failed to sign proper performance agreements with the staff of NCC.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1 The Public Protector was established under section 181 of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 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, to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.4 The Public Protector Act further gives power to the Public Protector to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 The complaint relates to the conduct of the DTI, which is an organ of state. The conduct accordingly amounts to conduct in state affairs, and therefore falls within the jurisdiction and powers of the Public Protector to investigate.
3.6 The jurisdiction of the Public Protector was not disputed by any of the parties.

4. **THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR**

4.1 The following issues isolated from the complaint and the first conciliation process were considered by the Public Protector and investigated:

4.1.1 **Issues arising from the Complaint by the Commissioner**

4.1.1.1 Abuse of power by the DTI and interference in the management of the NCC in respect of HR matters and finance;

4.1.1.2 Violation of operational independence;

4.1.1.3 Harassment by subjecting the NCC to multiple investigations and withholding support; and

4.1.1.4 Failure by the Minister to sign the Commissioner’s Performance Agreement.

4.1.2 **Counter-issues raised by the DG of the DTI against the Commissioner:**

4.1.2.1 Governance failure relating to financial systems;

4.1.2.2 The Commissioners failure to sign staff performance agreements; and

4.1.2.2 The Commissioner followed irregular procurement processes to procure new premises for the NCC.
4.2 The issue relating to the allegation that the Commissioner followed irregular procurement processes to procure new premises for the NCC does not form part of this report as it is currently pending a separate investigation by the Public Protector.

5. THE INVESTIGATION

5.1 The investigation was conducted in terms of section 7 of the Public Protector Act and involved the following key sources of information:

5.1.1 Documents

5.1.1.1 Submission and supplementary submissions from the Complainant;

5.1.1.2 DTI's submission in response to Public Protector's Document and Information Request (DIR);

5.1.1.3 Final Management Report of the Auditor-General of South Africa (AGSA) dated 31 March 2011;

5.1.1.4 Draft Forensic report into the affairs of the NCC; and

5.1.1.5 Copies of documents and correspondence received from all the parties concerned. (List of documents available on request)
5.1.2 Meetings:

5.1.2.1 Conciliation meeting held on 25 May 2012 between the Commissioner and the DG;

5.1.2.2 A follow up meeting with a team of officials from the DTI, namely the DG, the Deputy Director-General for Consumer and Corporate Regulation, officials from the Legal Unit, Internal Audit, the Chief Financial Officer and officials from the Agency Management Unit;

5.1.2.3 A further meeting with the Minister and the DG;

5.1.2.4 Meetings with officials from the Auditor-General; and

5.1.2.5 Meetings with officials from National Treasury.

5.1.3 Legislation and other prescripts

5.1.3.1 The Constitution, 1996;

5.1.3.2 The Consumer Protection Act, 2008;

5.1.3.3 The Public Finance Management Act, 1999;

5.1.3.4 The Treasury Regulations; and
5.1.3.4 The Shareholder Compact signed between the Minister and the Commissioner on 12 July 2011.

5.2 When it became clear, during the conciliation process, that an agreement between the parties could not be reached, the Public Protector decided to conduct a full investigation. The initial response from both parties was that there was no wrongdoing on either side and that each party suffered abuse in its interactions with the other. The Commissioner undertook to provide further information regarding the procurement processes followed in securing new premises for the NCC and the DG was to provide clarity on the financial expenditure incurred on behalf of the NCC and the delay in the appointment of a Chief Financial Officer for the NCC.

5.3 The purpose of these meetings was to simplify the investigation steps of the Public Protector by looking at:

5.3.1 *What happened?* This entails a reconstruction of probable events that led to the complaints. All evidence, including oral accounts, correspondence and other documents are used to determine, on a balance of probabilities, what happened.

5.3.2 *What should have happened?* This focuses on the requirements of the Constitution, the law, prescripts and good practice regarding administrative actions of the State;

5.3.3 *Is there a discrepancy between what happened and what should have happened and does such discrepancy constitute improper conduct or maladministration?* This focuses on gaps between the standard of conduct
that was appropriate or proper in the circumstances based on the above and the standard that actually obtained and which led to the complaints.

5.3.4 If there was improper conduct or maladministration on the part of the State, did the Complainant suffer any prejudice?

5.3.5 If prejudice was suffered the next step is to establish what it would take to place the Complainant as close as possible to where she would have been had the State acted properly or without maladministration in the first instance.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 The Commissioner's submissions

6.1.1 The Commissioner submitted that the NCC was launched and became operational as a legal entity from 1 April 2011. The Complainant was appointed in her position as Commissioner as from 1 November 2010 even though the NCC did not exist at that time. The Minister formally delegated HR functions to her by a letter dated 18 April 2011, on the condition that DTI policies are adopted in the interim until such time as the NCC could develop its own policies.

6.1.2 She further submitted that before the NCC became a legal entity on 1 April 2011, the DG of DTI sent a letter to her, dated 29 March 2011, advising that section 38(1)(j) of the PFMA requires that the DTI must obtain a written assurance from the NCC that it has implemented effective, efficient and
transparent financial management and internal control systems before any funds could be transferred to the NCC’s bank account.

6.1.3 In terms of the Consumer Protection Act, the Commissioner became the Accounting Authority of the NCC on 1 April 2011. As such the Commissioner became responsible for all income and expenditure, revenue collected, assets and discharge of all liabilities of the Commission as well as the proper implementation of the PFMA and Treasury Regulations.

6.1.4 The Commissioner alleged that on 28 July 2011 she sent a written assurance to the Minister that the NCC has taken steps to comply with the PFMA.

6.1.5 She further alleged that despite the written assurance given, the DG withheld the transfer payment stating that he may withhold such payment until he is satisfied that the conditions attached to the transfer payment had been complied with.

6.1.6 She also alleged that NCC funds were only transferred into the NCC bank account in September 2011.

6.1.7 The Commissioner alleged that the DG interfered with HR matters by removing seconded staff from the NCC without any prior consultation with her. She further alleged irregular payment by DTI of performance bonuses of certain staff members without her consent or authority as employer and accounting authority.
6.1.8 She further alleged that DTI procured and paid for goods and services on behalf of the NCC, namely a website and education materials, without consulting with or obtaining authority from the Commissioner as the accounting authority.

6.1.9 She further alleged that the NCC was harassed by the DTI by submitting it to multiple investigations such as an internal audit, an audit by the Auditor-General and a forensic audit all at the same time.

6.1.10 The Commissioner alleged that the Minister had failed to sign her Performance Agreement, explaining that six months after submitting her Performance Agreement to the Minister, all she received was a letter stating that the Minister was satisfied with the Agreement.

6.2 The DG's submissions

6.2.1 The DG submitted that the DTI is the “mother" company of quite a number of public entities, such as the NCC. In order to assist these public entities in its establishment requirements, the DTI develops implementation plans long before the actual coming into being of the public entity.

6.2.2 In response to allegations of irregular procurement on behalf of the NCC, he submitted that the NCC’s implementation plan was developed by the DTI in 2009. In this regard the DTI would procure certain services on behalf of the entity before it came into being to ensure that by the time that the entity starts operating, it would not be bogged down with procurement of those activities.
6.2.3 The DG indicated that the DTI procured a website and a service provider to provide Change Management to staff, which was to be seconded to the NCC from the DTI, before the NCC was officially launched. He denied paying for anything from NCC funds without authorisation.

6.2.4 The DG confirmed that he was the Accounting Officer for the NCC up to the date when it became a legal entity, on 1 April 2011. According to his testimony, no further procurements were done on behalf of the NCC after that date, as the Commissioner became the Accounting Authority of the NCC with effect from 1 April 2011, in terms of section 87(4) of the Consumer Protection Act. The DTI was now the transferring department in respect of the funds of the NCC.

6.2.5 The evidence indicates that the DG wrote a letter dated 29 March 2011, in which he listed eleven (11) financial control requirements that had to be put in place by the NCC before the funds could be transferred.

6.2.6 In the said letter, the DG offered assistance to the Commissioner to provide guidance and assistance in the accomplishment of the requirements set out before funds could be transferred in terms of section 38 (1)(j) of the PFMA. A dedicated official in the DG's office was also made available to the Commissioner to provide her with guidance on the conditions to be met.

6.2.7 The evidence indicates that the Chief Financial Officer (CFO) of the DTI assisted the NCC during January 2011 to open a bank account at Nedbank and that bank account was operational since then.
6.2.8 The DG alleged that even though the DTI was not satisfied that the NCC complied with all the requirements in terms of section 38 (1)(j) of the PFMA and the Treasury Regulations, a limited transfer of funds took place on 13 August 2011.

6.2.9 The DG indicated that the Commissioner resubmitted the section 38(1)(j) compliance letter on 13 September 2011 and confirmed that the NCC’s funds were thereafter released on 21 September 2011.

6.2.10 The DG further indicated that the post structure of the NCC was also established as part of the original implementation plan. The post structure made provision for a financial manager, but not for a Chief Financial Officer.

6.2.11 The evidence indicates that there was a Transfer Agreement in place between the DTI and its staff regarding their transfer or secondment to the NCC before they were moved. This Agreement was signed on 17 March 2011. The negotiations between the staff (as represented by the Union) and the employer Department took place before the formal establishment of the NCC. It is not clear from the evidence whether or not the Commissioner was personally involved in these negotiations.

6.2.12 The DG submitted that there was a request by staff members (represented by the Union) for the DTI to obtain the services of a change management service provider before staff could be transferred or seconded to NCC.

6.2.13 He further submitted that as the Commissioner did not give approval for this process after 1 April 2012, no payments were made on behalf of NCC to the service provider.
6.2.14 The DG alleged that he received complaints from staff members working at the NCC by letters dated 8 June 2011, 28 September 2011 and 26 October 2011 regarding unfavourable working conditions and confirmed that he subsequently sent an internal memorandum to staff at the NCC, in August 2011, which indicated that they will be transferred back to the DTI. The DG further alleged that he informed the Commissioner about the complaints from NEHAWU in a letter dated 8 July 2011.

6.2.15 Regarding the allegation violation of operational independence, conceding that he had a meeting with some of the motor industry captains who expressed concerns regarding alleged treatment of that industry by the Commissioner. He further conceded that he sent a letter to the Commissioner on 18 October 2011 requesting to be updated on the accreditation of the Ombud Scheme for the Motor Industry.

6.2.16 The DG further submitted that he also requested a response from the Commissioner on enquiries received from the Chairperson of the Portfolio Committee on Trade and Industry, in a letter dated 28 February 2012.

6.2.17 Regarding irregular procurement of goods and services for the NCC without the authority of the Commissioner, DG indicated that the establishment of a website for the NCC was part of the original “implementation plan” before the NCC became a legal entity on 1 April 2011.

6.2.19 He further submitted that the Commissioner, as end-user, was requested to design the content and the architecture of the Website.
6.2.20 The DG alleged that before the launch of the Website the Commissioner withdrew from that process. Accordingly, the DTI made no payments to the service provider after 1 April 2011 as the Commissioner was the Accounting Authority of NCC after 1 April 2011.

6.2.18 In his counter arguments the DG submitted that the NCC had no proper financial systems in place and that there were no signed performance agreements with seconded staff at the NCC.

6.3 **Interview with the Minister**

6.3.1 During the meeting with the Minister he confirmed that a Contract of Employment was signed on 16 July 2011 (which commenced on 1 November 2010 with a termination date of 3 September 2012) and that the Shareholder Compact was formally signed with the Commissioner on 12 July 2011. He further indicated that the Commissioner sent a draft Performance Agreement to him on 24 October 2011 but, even though he responded to her by letter dated 5 April 2012, indicating that he is satisfied with the Agreement, the Performance Agreement was never formally signed by him.

6.3.2 The Minister indicated that in terms of the Shareholder Compact signed between the Commissioner and him, it is the DTI's primary responsibility to monitor the NCC's adherence to the PFMA, Treasury Regulations, Corporate Governance Principles and the Consumer Protection Act.

6.3.3 He also indicated that in terms of the relationship between him, as the Executive Authority, and the Commissioner, as the Accounting Authority of the NCC, established by the Protocol on Corporate Governance and the
Shareholder Compact, he may take appropriate remedial action where he thought that the Commissioner did not achieve the objectives of the Shareholder Compact.

6.3.4 The Minister justified all actions taken by the DTI.

6.4 Independent Sources of Information and evidence

6.4.1 In meetings held with officials from the National Treasury and officials from the Auditor-General, it was emphasised that section 8.4.2 of the Treasury Regulations provides that the Accounting Officer (DG) may withhold transfer payments to an entity if he is satisfied that conditions attached to the transfer have not been complied with. It was also emphasised that the DG has the authority in terms of section 38(1)(j) of the PFMA, to withhold the transfer of funds until such time as the public entity met the financial conditions and that the DTI had authority to withhold the transfer of funds until such time as the NCC had sound financial and related systems in place.

6.4.2 The evidence obtained from documents and all parties indicates that during February 2012 the Minister called for an independent forensic investigation by Grant Thornton into the state of affairs at the NCC following complaints relating to concerns raised by staff members at the NCC.
7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1 Common Cause issues

7.1.1 It is common cause that the NCC became operational as a legal entity on 1 April 2011. It is further common cause that the Commissioner became the Accounting Authority of the NCC in terms of section 87(4) of the Consumer Protection Act on the same date and that staff members from the DTI were seconded to the NCC.

7.1.2 It is also common cause that the Minister formally delegated HR functions to the Commissioner by a letter dated 18 April 2011, on condition that DTI policies are adopted in the interim until such time as the NCC can develop its own.

7.1.3 It is also common cause that the DG wrote a letter to the Commissioner dated 29 March 2011, advising of the conditions that had to be met in terms of section 38(1)(j) of the PFMA before any funds could be transferred to the NCC’s bank account.

7.1.4 It is common cause that the NCC’s funds were released into the NCC’s bank account in September 2011 but later the DTI withdrew authority from the NCC retaining funds in its confers and requiring the NCC to request funds on a case by case basis.

7.1.5 It is also common cause that no performance agreement was signed between the Commissioner and the Minister and that in turn no performance agreements were signed with NCC employees.
7.2 Issues not disputed

7.2.1 It is not disputed that a Contract of Employment between the Commissioner and the Minister was signed on 16 July 2011, which commenced on 1 November 2010 with a termination date of 3 September 2012. It is further not disputed that a Shareholder Compact between the Commissioner and the Minister was signed on 12 July 2011.

7.2.1 On the question of abuse of power regarding finances, the NCC did not deny that the DG wrote a letter dated 29 March 2011 in which he listed eleven (11) financial control requirements which had to be put in place by the NCC before the funds could be transferred. He further offered assistance to the Commissioner to provide guidance and assistance in the accomplishment of the requirements set out before the funds could be transferred in terms of section 38(1)(j) of the PFMA and also availed a dedicated official from his office to the Commissioner to provide her with guidance on the conditions to be met in terms of the PMFA. He further advised the Commissioner that she had a choice between using the DTI’s financial systems on an interim basis and procuring her own financial systems. She was also given an option to outsource internal audit.

7.2.2 It is not disputed that the NCC operated without a Chief Financial Officer for a while owing to confusion regarding whether or not the approved structure made a provision for such or only provided for a Financial Manager. It is further not disputed that it took a while for funds to be transferred to the NCC and that the Commissioner finally sent a written assurance to the Minister on 28 July 2011 stating that the NCC had taken steps to comply with the PFMA the provision of section 38(10)(j) of the PFMA.
7.2.3 It is not disputed that the CFO of the DTI assisted the NCC during January 2011 to open a bank account and that bank account was operational since then. It is also not disputed that the post structure of the NCC makes provision for a Financial Manager but not a CFO. What is disputed is who dropped the ball regarding the employment of the CFO and the acquisition of digital financial and HR systems.

7.2.4 It is further not disputed that there was a Transfer Agreement between the DTI and its staff regarding their transfer or secondment to the NCC before they were moved and further that the Commissioner was not a signatory to the Transfer Agreement between DTI and its staff seconded or transferred to the NCC.

7.2.4 It is also not in dispute that the NCC was subjected to concurrent auditing and investigation processes by the Public Protector, Auditor General, Internal Audit and a DTI Forensic audit.

7.2.5 It was also not disputed that the DG authorised employees transferred to the NCC from the DTI to return to the DTI if they so wished provided the internal DTI managers consented to having them back.

7.2.6 There was also no disagreement regarding the fact that the DTI did procure a website and a change management expert to facilitate the integration of transferred employees and that the Commissioner was not a signatory to the transfer agreement.

7.2.7 It is neither disputed that the DG sent a letter to the Commissioner on 18 October 2011 requesting to be updated on the accreditation of the Ombud
Scheme for the Motor Industry nor that the DG requested a response from the Commissioner on enquiries received from the Chairperson of the Portfolio Committee on Trade and Industry, in a letter dated 28 February 2012. What was in dispute was whether or not the DG had interfered in the work of the NCC by operating as a go-between between the NCC and an industry regulated by it instead of promoting direct communication between the NCC and its stakeholders.

7.2.8 Further disputed is the propriety of the DG liaising between Parliament and the NCC when the law makes provision for direct accountability.

7.2.9 It is not disputed that the DG received complaints from staff members working at the NCC by letters dated 8 June 2011, 28 September 2011 and 26 October 2011 regarding unfavourable working conditions and that he subsequently sent an internal memo’s to staff at the NCC, in August 2011, in which he indicated that they will be transferred back to the DTI. It is further not disputed that the DG informed the Commissioner about the complaints from NEHAWU in a letter dated 8 July 2011. What is in dispute is whether or not it was up to the DG to release employees from their NCC obligations after the Minister transferred HR authority to the Commissioner. Further disputed is the manner in which such staff withdrawals were carried out and the propriety thereof.

7.2.10 It is not disputed that there was a request by staff members (represented by the Union) for the DTI to obtain the services of a change management service provider before staff could be transferred or seconded to NCC. What was in dispute is the manner in which the procurement processes unfolded.
and the account from whether or not any payments were made and if so from which account.

7.2.11 It is not disputed that the establishment of a website for the NCC was part of the original “implementation plan” before the NCC became a legal entity on 1 April 2011. What is in dispute is whether or not once on board the Commissioner was properly consulted and given the opportunity to own the process. DTI’s submissions insist that she was consulted while she maintains that she was not. What was contested was whether or not the NCC’s budget was used after 1 April 2011 without the Commissioners knowledge or approval as the accounting officer.

7.2.12 It is not disputed that there was an audit of the NCC by the Auditor-General. It was also not disputed that the Minister called for an independent forensic investigation by Grant Thornton during February 2012 and that at the same time there was an internal audit of the NCC by DTI as the NCC did not have its own internal auditors yet. It was further not disputed that at that stage the DG had already withdrawn the DTI staff members from the NCC and these audit stretched the NCC staff unduly. It is also not disputed that around the same time the Public Protector was conducting an investigation while the NCC’s internal audit unit was also executing its functions.

7.3 Issues in dispute

7.3.1 It is noted that the Commissioner alleged that despite the written assurance given to the Minister on 28 July 2011 the DG withheld the transfer of payment stating that he may withhold such payment until he is satisfied that the conditions attached to the transfer of payment have been complied with. The
Commissioner however, failed to rebut the DG’s allegation that although the DTI was not satisfied that the NCC complied with all the requirements in terms of section 38(1)(j) of the PMFA and the Treasury Regulations, a limited transfer of funds were made to the NCC on 13 August 2011.

7.3.2 It is also noted that the DG indicated that the Commissioner resubmitted a section 38(1)(j) compliance letter on 13 September 2011 and the remainder of the NCC’s funds were released on 21 September 2011.

7.3.3 While the DG’s contention that he could not transfer funds without satisfying himself that the NCC did in fact have the systems as envisaged in section 38(j) of the PFMA, the NCC maintained that all that was required of the DTI was to receive and consider the letter issued by the Commissioner certifying that the adequate systems required under section 38(j) had been put in place. A reasonable interpretation appears to be that of the DTI. But if it is true that the absence of the systems or part thereof was the DTI’s fault, it cannot be fair for the DTI to have its cake and eat it. After assessing all evidence presented, including documentary evidence, the Public Protector is convinced that it is the DTI that dropped the ball regarding the expeditious employment of the CFO and the acquisition of the electronic financial and HR systems.

7.3.4 The Commissioner alleged that the DG interfered with HR matters by removing seconded staff from the NCC without any prior consultation with her. On the other hand the DG contended that he sent internal memo’s to staff at the NCC in August 2011 which indicated that they will be transferred to the DTI after he received complaints regarding unfavourable working conditions at the NCC. There is no clear provision in the Transfer Agreement
made provision for the withdrawal of staff back to the DTI by the DG. In the absence of such a provision the DG cannot be legally entitled to retransfer the staff at the NCC back to the DTI.

7.3.5 In any event, it was not the withdrawal itself that was the issue. The issue was that the process was arbitrary, disruptive and an act constituting an unfair labour practice with regard to the Commissioner as a person relying on uninterrupted performance of her employees to discharge her own responsibilities.

7.3.6 While the Commissioner did not deny that she was informed about complaints from employees originally from DTI, no evidence could be produced by the DG to indicate that the Commissioner was informed or consulted on the decision to withdraw some of these and the date on which such withdrawal would take effect. The DTI did not dispute that one day when she showed up for work and a significant portion of her core operations staff were not at work and on enquiry she was told they had gone back to the DTI.

8. **LEGAL AND REGULATORY FRAMEWORK**

8.1 **The Constitution**

8.1.1 Section 41(1)(h) of the Constitution prescribes that all spheres of government and all organs of state within each sphere must –

"… co-operate with one another in mutual trust and good faith by –

(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.”

8.1.2 Section 33 of the Constitution

8.2 The Consumer Protection Act 68 of 2008

8.2.1 The Commissioner is the Accounting Authority of the NCC in terms of section 87 of the Consumer Protection Act. As such she is responsible for all income and expenditure, revenue collected, assets and discharge of all liabilities of the Commission as well as the proper implementation of the PFMA.

8.3 The Public Finance Management Act, 1 of 1999

8.3.1 In terms of Section 36 of the Public Finance Management Act (PFMA) the DG of DTI is the Accounting officer for the Department of Trade and Industry.

8.3.2 Section 38(1)(j) of the PFMA provides that:

“The accounting officer for a department, trading entity or constitutional institution –

Before transferring any funds to an entity within or outside government, must obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control
systems, or, if such written assurance is not or cannot be given, render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems;...” (My emphasis)

8.3.3 Section 51(1) provides that an accounting authority must ensure effective, efficient and transparent systems of financial, risk management and internal control.

8.4 The Treasury Regulations

8.4.1 Section 8.4.2 of the Treasury Regulations provides that an Accounting Officer (DG) may withhold a transfer payment if he is satisfied that conditions attached to the transfer have not been complied with.

8.5 The Shareholder Compact

8.5.1 According to section 3.10 of the Compact:

“The Shareholder Compact is based on the underlying principles of the Protocol, which require sufficient freedom of the Commissioner to manage the affairs of the NCC balanced against the responsibility to exercise such freedom within the agreed mandate as outlined in the relevant legislation and the framework of effective accountability.” (My emphasis)

8.5.2 In terms of Section 12 of the Shareholder Compact it is the DTI’s primary responsibility to:
“12.1.1 monitor adherence by the NCC to the PFMA, Treasury Regulations, Corporate Governance Principles and the Act;
12.1.2 review management accounts on a monthly basis;
12.1.3 review quarterly reports and provide feedback to NCC…”

8.5.3 Undertakings by the DTI and the NCC in terms of the Shareholder Compact is described in Part VI of the Agreement and provides *inter alia*:

“That the DTI will not restrict or impede in any way the discretion of the NCC regarding matters falling within the NCC authority, as provided in the Shareholder Compact and the Act;
The NCC to *inter alia* maintain effective governance and the highest standards of ethics and principles of the PFMA, establish an Audit and Risk Management Committee and not to enter into any transactions outside the Supply Chain Management Policy of the NCC and Procurement delegations.”

9. **ANALYSIS AND CONCLUSION**

9.1.1 Abuse of power by the DTI and interference in the management of the NCC in respect of HR matters and finance

9.1.1.1 Section 41(1)(h) of the Constitution requires all spheres of government and all organs of state within each sphere to co-operate with one another in mutual trust and good faith by among others fostering friendly relations, assisting and supporting one another and informing one another of and consulting one another on, matters of common interest.
9.1.2 There does not seem to be any disagreement that there was a poisoned relationship between the DTI and the NCC. Evidence suggests that the tension was primarily between the Commissioner and the DG, later spilling over to the Minister and resulting in litigation. Evidence further suggests that some the power struggle arose during the early interactions between the Commissioner and the DTI’s staff that had controlled the set up project of the NCC before the Commissioner came. While each blames the other, evidence indicates that it was a case of too many bulls in one kraal with none willing to give way in the interests of progress.

9.1.3 On the question of human resources management, the shareholder compact clearly assigns the Commissioner full powers regarding employee management. The Minister confirmed this in his letter to the Commissioner in March 2011. Regarding the transferred staff, a transfer agreement existed but its validity was contested by the Commissioner is not a signatory with no evidence provided by DTI supporting that she was consulted on it. But does the fact that the Commissioner was not a signatory to the agreement allow the DTI to act arbitrarily? The DG and the Minister argued that the employees were unhappy and DTI had a responsibility towards them although he provided evidence of letters from NCC employees dated 8 June 2011, 28 September 2011 and 26 October 2011 alleging unfavourable working conditions. He further submitted that he informed the Commissioner about the letters but could not recall or provide evidence of informing the Commissioner about the withdrawal, particularly the date thereof. This cannot be right.

9.1.4 In the absence of specific provisions regarding a possible retransfer of staff, section 33 of the Constitution must provide guidance. Section 33 requires
administrative actions to be fair, reasonable and lawful. In other words administrative action cannot be arbitrary, unreasonable or unlawful. Can we honestly say the abrupt withdrawal of critical staff was fair reasonable and lawful? The conduct was clearly disruptive and therefore unfair. It cannot be said to have been reasonable. The fact that the staff was unhappy and the Commissioner probably informed about such unhappiness did not justify abrupt withdrawal. Doing that was certainly not reasonable.

9.1.1.5 The failure by the DG to consult with the Commissioner cannot be consistent with the provisions of section 41(1)(h) of the Constitution which obliges him among others to co-operate with the Commissioner in mutual trust and good faith and consult her on, matters of common interest.

9.1.1.6 Such conduct further cannot be consistent with section 33 of the Constitution, which enshrines the right to just administrative action.

9.1.2 Section 38(1)(j) of the PMFA provides that the accounting officer for a department, trading entity or constitutional institution before transferring any funds to an entity within or outside Government, must obtain a written assurance from the entity that the entity implements effective, efficient and transparent financial management and internal control systems. Section 38(1)(j) of the PMFA further provides that if such a written assurance is not or cannot be given, the accounting officer must render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems. Either way the DG would have expected the NCC to comply with conditions and remedial measures requiring it to establish and
implement effective, efficient and transparent financial management and internal control systems before releasing any funds to it.

9.1.2.1 From the evaluation of the evidence it is common cause that the DG wrote to the Commissioner in a letter dated 29 March 2011 advising her of the conditions that had to be met in terms of sections 38(1)(j) of the PFMA before any funds could be transferred to the NCC’s bank account. It is also noted that the DG offered to provide assistance and guidance to the Commissioner in the accomplishment of the requirements set out before the funds could be transferred in terms section 38(1)(j) of the PFMA and also availed a dedicated official from his office in that regard. A disturbing aspect is that no evidence could be produced to the DTI confirming that after the Commissioner chose the option of independent systems DTI continued to assist the NCC enthusiastically to procure such systems, particularly the electronic financial and human resources management systems as well as the CFO.

9.1.2.2 Evidence indicates that DTI indeed did continue to withhold the transfer of funds despite the letter of assurance required by section 38 of the PFMA. There seems to be merit in the DTI's submission that despite the letter, the aspect of mandatory financial systems was still outstanding, including an electronic system and an Audit and risk Committee. Was the Act of withholding the full transfer and making a limited transfer in August and making the final transfer only in September, justified or fair in the circumstances? Of particular concern is the action taken by DTI early in 2012 to once again withhold NCR funds.
9.1.2.3 The Auditor-General and the Treasury who were consulted in this matter advised that DTI’s actions were justified. But is this really what section 38(1)(j) envisages? What about the provision that envisages the possibility of putting the entity receiving the transfer on terms? Section 8.4.2 of the Treasury Regulations provides that the DG may withhold a transfer payment if he is satisfied that the conditions attached to the transfer have not been complied with. This clearly seems to authorise the DG to do what he did. But the nagging question of lack of support remains. In that regard the DG’s action may have been lawful but was it fair or reasonable? Was it the right thing to do?

9.1.2.4 Section 12.1.1 of the Shareholder Compact also provides that it is the DTI’s primary responsibility to monitor adherence by the NCC to the PFMA, Treasury Regulations, Corporate Governance Principles and the Act. Clearly this again provides the DTI with some authority and responsibility as argued by the DG and the Minister. But it still does not provide adequate guidance on what measures of assistance should have been implemented once the NCC opted to acquire its own systems having been given by the DTI the option to do so.

9.2 Violation of operational independence

9.2.1 The evidence backs the DG’s submission that he only sent a letter to the Commissioner on 18 October 2011 requesting to be updated on the accreditation of the Ombud Scheme for the Motor Industry and that he requested a response from the Commissioner on enquiries received from the Chairperson of the Portfolio Committee on Trade and Industry in a letter dated 28 February 2012.
9.2.2 The DG contended that his letter regarding the accreditation of the Ombud Scheme of the Motor Industry was merely an enquiry and that his letter requesting input on enquiries received from the Portfolio Committee on Trade and Industry was because he was unable to respond on behalf of the NCC.

9.2.3 The legal question for the Public Protector was whether or not the DG’s conduct in acting as a go-between between the NCC and its stakeholders amounted to a violation of the entities institutional and operational independence.

9.2.4 The question of interference cannot be dealt with without going into the nature of the NCC. The NCC is an important national consumer watchdog whose perceived and real independence is critical for credibility and legitimacy. The arm’s length required between the DTI and the NCC is clearly more of an issue than the trading entities attached to the DTI. But did the conduct of the DG threaten independence in any way? Legally there was no law against it. However, it is important that the need for avoiding perceptions of lack of independence need to be borne in mind in all DTI actions in relation to the NCC and other DTI attached watchdogs.

9.3 Harassment by subjecting the NCC to multiple investigations and withholding support

9.3.1 As it was not disputed that the NCC was subjected to concurrent multiple investigations, the issue for determination was the propriety thereof.
9.3.2 Form the point of view of legality, there is clearly no legal impediment to the DTI doing what it did. It must also be indicated that the Auditor-General’s process and that of the Public Protector were not commissioned by the DTI.

9.3.3 At issue in regard to the DTI was the commissioning of a forensic audit and that its own internal audit audits the NCC’s books despite the NCC having its own internal audit function.

9.3.4 Both the Treasury and Auditor General personnel consulted on the propriety of the DTI’s actions saw no wrong doing. But was the action fair or even reasonable? Were these agencies incapable of arriving at the same answers? It is particularly difficult to understand the rationale for two internal audits. Did DTI not trust the NCC’s internal audit? If so was the suspicion reasonable and just in the absence of an objective evaluation process?

9.3.5 It must be understood that at that stage the staff compliment of the NCC had been reduced due to the DG’s withdrawal of the DTI staff from the NCC. In the circumstances the NCC staff was unduly stretched by the investigations and audit referred to above. As a consequence the NCC was unable to execute its duties and functions properly. The investigations and audit placed enormous pressure on the NCC. There was no justification on the part of the Minister and the DG for subjecting the NCC to multiple investigations and audit at the same time without providing support.

9.4 Failure to sign the Commissioner’s performance agreement

9.4.1 No party denied that the agreement had not been signed or that the processes had been slow. At no stage did the Minister or DTI provide a valid
explanation regarding why the agreement was not signed. The DTI submission pointed out that the agreement arrived 7 months late. But was that the basis for not signing?

9.4.2 The Public Protector had to determine the propriety of the Minister's conduct. In doing so guidance was sought from the regulatory framework being the Act and the shareholder compact. In terms of these, the Minister had a duty to enter into a signed performance with the Commissioner. Since he did not sign such agreement, he was clearly in breach of his duty.

10. FINDINGS

My findings are the following:

10.1 Maladministration and Abuse of power by the DTI and interference in the management of the NCC in respect of HR matters and finance:

10.1.1 Interference in Human Resources Management

10.1.1.1 The signed Shareholder Compact between the NCC and the DTI indicates that the Commissioner should have sufficient freedom to manage the affairs of the NCC balanced against the responsibility to exercise such freedom within the agreed mandate as outlined in the relevant legislation and the framework of effective accountability. This was clearly not the case in the relationship between the NCC and the DTI. My impression of the relationship between the parties was one of an "overprotective parent not willing to allow an eighteen year old child" to stand on his/her own feet.
10.1.1.2 The Shareholder Compact further states that the parties entered into the Compact on the basis of mutual co-operation and good faith. However, no sign of mutual co-operation or good faith was visible during my attempted conciliatory meetings between the parties and their general actions towards each other.

10.1.1.3 The Transfer Agreement of staff indicates that the Commissioner should have been requested to sign the document as the employer department, but she was never requested to sign the agreement and as such she never became a party to the agreement. The DTI ignored the Commissioner and expected her to adhere to the conditions even though she was not given an opportunity to be a signatory to the Transfer Agreement.

10.1.1.4 Staff members were seconded and transferred to the NCC with effect from 1 April 2011 and the Minister delegated all HR functions to the Commissioner on 18 April 2011.

10.1.1.5 When the DG became aware of complaints by the NCC staff regarding working conditions at the NCC he unilaterally decided to transfer them back to DTI via internal memoranda. There is no indication that the Commissioner was consulted or that there was any formal communication to the Commissioner to inform her that her staff would be removed with immediate effect. The DG clearly abused his authority in this regard.

10.1.1.6 In the DG’s own words, “the removal of staff was disruptive” and it is clear that he abused his power in this regard as his conduct went well beyond merely “providing support” to the NCC.
10.1.1.7 My finding is that the DG of the DTI, Mr Lionel October, had multiple direct interactions with the NCC staff and eventually authorised the withdrawal of some staff arbitrarily without the Commissioner’s knowledge or approval causing major operational disruptions.

10.1.1.8 The conduct of the DTI constitutes a violation of the Commissioner’s operational independence, an unfair labour practice, an act of abuse of power and maladministration.

10.1.2 Interference in Financial Management:

10.1.2.1 My finding is that the DG had the authority in terms of section 38(1)(j) of the PFMA and Regulation 8.4.2 of the Treasury Regulations to withhold the transfer of funds to the NCC until such time as the public entity (NCC) met the financial conditions that the DTI had and until such time as the NCC had sound financial and related systems in place.

10.1.2.2 However, as much as there should be adherence to the prescripts in terms of the PFMA and the Treasury Regulations, I was concerned about the breakdown in the mutual trust and good faith between the DTI and the NCC.

10.1.2.3 I’m further concerned about the lack of clarity regarding the day to day roles of the Accounting Authority and the Group Accounting officer.

10.1.2.4 The manner, in which the authority was exercised, however, fails to meet the test of good administration. Although lawful, the DTI’s conduct was unfair, unreasonable and constitutes maladministration.
10.2 Violation of operational independence:

10.2.1 The DG, Mr Lionel October, did meet with certain role players in the motor industry, wherein the Commissioner’s conduct was discussed. He subsequently requested feedback from the Commissioner on the Ombud Scheme for the Motor Industry and inputs on enquiries received from the Portfolio Committee on Trade and Industry. However, I am unable to find that the DG’s conduct amounted to interference with the mandate of the Commissioner as he did not direct her to do anything.

10.3 Harassment through multiple investigations:

10.3.1 It is correct that the NCC was indeed subjected to multiple enquiries and audit investigations at the same time. While the Auditor-General was conducting its audit, the Minister also requested an Independent Forensic Audit to be conducted by Grant Thornton as well as an internal audit. The Public Protector investigation was also taking place around the same time, a fact known to the DTI. At a stage when the DG had already withdrawn staff members from the NCC, these audits stretched the NCC staff unduly. This meant that the NCC was unable to execute its functions properly because of being subjected to multiple investigations. While there is nothing wrong with auditing, per se, the pressure placed on the Commissioner does amount to abuse of power.

10.4 Prejudice suffered because of support withheld:

10.4.1 I firmly hold the view that when the NCC chose the option to do things independently, some of the support was withheld. In this regard I specifically
find that it was improper for the DTI not to provide the NCC with resources for the purchasing of financial systems and advertising of the post of the CFO. I accordingly hold that the DTI’s conduct was improper and constitute abuse of power and maladministration.

10.5 Failure to sign Performance Agreement:

10.5.1 Even though a Contract of Employment and a Shareholder Compact was signed between the Minister and the Commissioner, no Performance Agreement was ever signed between the parties.

10.5.2 The Commissioner submitted a draft agreement to the Minister, albeit 5 months later than expected, and the Minister only responded 6 months later by way of a letter to indicate that he is satisfied with the performance agreement, but still without signing the Performance Agreement.

10.5.3 In a situation where relationships between the parties were already stretched it would have assisted enormously if the Minister ensured that the Commissioner’s Performance Agreement was signed timeously.

10.6 Findings on the counter complaint by the DG

10.6.1 Governance Failure relating to financial systems and internal controls

10.6.1.1 On alleged Lack of Financial Management Systems, it is clear that the NCC failed to implement proper financial systems until a very late stage of the financial year. However, the DTI is partly responsible for this failure in view of its tardiness in providing resources for the purchasing of financial systems.
The auditor General further found mistakes in financial reporting and that the Audit Committee was only appointed 3 months before the end of the first financial year.

10.6.1.2 On alleged irregular procurement of office accommodation, the procurement of the office accommodation for the NCC did not comply with the SCM Policy requirements and section 51(1)(b)(ii) of the PFMA in that the accounting authority should prevent irregular expenditure and thus the procurement by the NCC should be regarded as irregular expenditure. This was confirmed by the Auditor General's Final Management Report.

10.6.1.3 The acts and omissions of the Commissioner regarding financial systems constitute maladministration. However, the context of being a new entity and the lack of support mitigate the severity of the impropriety. The procurement of offices is the subject of a different Public Protector Investigation into various alleged governance and administrative irregularities.

10.6.2 Failure to Sign Employee Performance Agreements

10.6.2.1 The NCC failed to enter into performance agreements with staff on account of the absence of a signed performance agreement between the Minister and the Commissioner. My view is that by taking a legalistic stance regarding the need for her to have a signed agreement and failing to enter into any agreements even if such could have been regarded as interim agreements, the Commissioner undermined her own ability to manage performance effectively. Her Draft Performance Agreement and the NCC's Strategic Plan were adequate to provide guidance.
10.6.2.2 While the conduct of the NCC generally and the Commissioner, specifically, was lawful, it was improper and constitutes maladministration.

10.7 **General Observations:**

10.7.1 There seems to have been different interpretations of the independence of the NCC in the context of the DTI's responsibility as a "shareholder". The law is very specific that the NCC is independent yet the PFMA has certain requirements. The relationship between the Minister and the Commissioner also was defined in one way in principle yet different expectations informed the situation. The notion of "shareholder" appears to have contributed to the distortion.

10.7.2 The relationship between the DG (as accounting officer of DTI) and the Commissioner (as Accounting Authority of NCC) broke down largely because of improperly defined functions and powers. In the end, the broken down relationship was to the detriment of the NCC. The DTI admitted that it allowed the NCC to choose between creating its own systems and leaning on departmental support. But it would appear that as soon as the choice to go for own systems, the attitude of the DTI hardened. The offer to choose reminds me of the option that Henry Ford's curious offer to the Americans when he said: "Americans can have any car they want in any colour they want as long as it is black."

10.7.3 The NCC wanted to walk independently whilst it was still learning to crawl. while the DTI wanted a full parental relationship. The reality is that the DTI has vast experience in the establishment of public entities and knew what was required to set up the NCC to ensure that it became a well-functioning
public entity. Unfortunately, in its efforts to assist the NCC with its establishment it took the role of a parent unwilling to allow a maturing child to stand on its own feet.

10.7.4 Both parties can however take another look at what was envisaged in Chapter 3 of the Constitution as co-operative governance as they both failed miserably at it.

11. REMEDIAL ACTION

Remedial action to be taken, as envisaged in section 182(1) (c) of the Constitution is the following:

11.1 The Minister must take urgent steps to ensure that:

11.1.1 There is a clear definition of the relationship between the DG and the Commissioner as well as the Minister’s role;

11.1.2 The Commissioner’s role as Accounting Authority is clarified; and

11.1.3 The HR management processes be clarified.

11.1.4 The NCC should continue its on-going process of tightening its financial accounting and supply chain management processes.
12. MONITORING

The Public Protector will require from the Minister:

12.1 An implementation plan on the manner in which the remedial action referred to in paragraph 11 above will be implemented within 30 days from the date of this report; and

12.2 A progress report on the implementation of the remedial action referred to in paragraph 11 above within 60 days from the date of this report.

12.3 The Public Protector will monitor the progress made in this regard over regular intervals.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Date: 24/04/2013

Assisted by Adv. E de Waal Chief Investigator: Service Delivery