

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION
182(1)(b) OF THE CONSTITUTION, 1996, SECTION 3(2) OF
THE EXECUTIVE MEMBERS' ETHICS ACT, 1998 AND
SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO: 2/2006

**REPORT ON AN INVESTIGATION IN CONNECTION WITH COMPLIANCE
BY MINISTERS AND DEPUTY MINISTERS WITH THE PROVISIONS OF
THE EXECUTIVE ETHICS CODE RELATING TO THE DISCLOSURE OF
FINANCIAL INTERESTS**

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Executive summary

The Office of the Public Protector investigated a complaint by a Member of Parliament in connection with possible breaches of the Executive Ethics Code (the Code), issued in terms of the Executive Members' Ethics Act, 1998.

The complaint related to a Report of the Auditor General, submitted to Parliament in February 2006, which stated that a number of Ministers and Deputy Ministers had failed to disclose their financial interests, as required by the Code and the Parliamentary Code of Conduct.

Following the said complaint, the Parliamentary Joint Committee on Ethics and Members' Interests investigated the findings of the Auditor General. It was found that the databases used during the investigation of the Auditor General did not always contain updated information and there was a misunderstanding in regard to the interests that Ministers and Deputy Ministers are obliged to disclose. The Committee's finding was that the Code of Conduct had not been breached by the Ministers and Deputy Ministers concerned.

The investigation of the Public Protector focused on the alleged possible breaches of the Executive Ethics Code.

From the information obtained and the legislation and prescripts considered, it was concluded that the Code requires that Ministers and Deputy Ministers disclose financial interests. It does not provide for the disclosure of interests in non-profit corporate entities or interests of a non-financial nature.

It was also observed that:

- Ministers, Deputy Ministers and their spouses who are directors of companies and/or members of close corporations are by law obliged to inform the respective companies and close corporations when they cease to be a director/member.

- It is the legal responsibility of companies and close corporations to inform the Registrar of Companies and Close Corporations of changes to its directorship or membership.
- Ministers and Deputy Ministers are under no legal obligation to ensure that the database of the Companies and Intellectual Property Registration Office is up to date, simply because of their current or former interests in corporate entities.
- Only financial interests need to be disclosed in terms of the Code. Interests in section 21 companies or corporate entities that bear no financial advantage for its members or directors do not warrant disclosure.

From the investigation it was found that the Ministers and Deputy Ministers referred to in the Report of the Auditor General did not breach the Executive Ethics Code.

The Public Protector recommended that the Secretary of the Cabinet liaise with the Chairperson of the Committee to ensure that:

- (a) the issues of compliance by members who are or were directors of companies and members of close corporations with the provisions of the relevant legislation;
- (b) the definition of what is regarded as a "financial interest" for the purposes of disclosure in terms of the Code; and
- (c) disclosures in terms of the Code of interests in corporate entities in the appropriate sections of the register,

referred to in this report, are also canvassed during the proposed development of guidelines by and the planned conference of the Committee.

REPORT ON AN INVESTIGATION IN CONNECTION WITH COMPLIANCE BY MINISTERS AND DEPUTY MINISTERS WITH THE PROVISIONS OF THE EXECUTIVE ETHICS CODE RELATING TO THE DISCLOSURE OF FINANCIAL INTERESTS

1. INTRODUCTION

This report is submitted to the President of the Republic of South Africa in terms of the provisions of section 182(1)(b) of the Constitution, 1996 section 3(2) of the Executive Members Ethics Act, 1998 and section 8(1) of the Public Protector Act, 1994. It relates to an investigation in connection with compliance by Ministers and Deputy Ministers with the provisions of the Executive Ethics Code pertaining to the disclosure of financial interests.

2. BACKGROUND

2.1 The Report of the Auditor General

2.1.1 The Auditor General submitted his *Report on the declarations of interests by Ministers, Deputy Ministers and Government Employees* to Parliament on 7 February 2006.

2.1.2 As far as Ministers, Deputy Ministers and their spouses are concerned, the Report focused on the disclosure of directorships in companies and membership of close corporations¹.

2.1.3 The *modus operandi* followed by the Office of the Auditor General during its investigation of the said matter, was to compile "exception reports" from the databases of²:

¹ See paragraph 2.3 of the Report

² See paragraph 3.1

- 2.1.3.1 The Companies and Intellectual Property Registration Office (CIPRO) as on 30 June 2004;
- 2.1.3.2 The Personnel and Salary System (Persal) payroll data for September 2004; and
- 2.1.3.3 The Basic Accounting System (BAS) for September 2004.
- 2.1.4 According to paragraph 4 of the Report, the Office of the Auditor General did not verify the accuracy and completeness of the exception reports it relied on. It also states that the "*physical documentation supporting the directorships in companies and memberships in close corporations identified in the exception reports... was not obtained. Where applicable, the verification of directorships and memberships was limited to extracting information from the CIPRO website*". The declarations of interest by the designated employees were also limited to declarations for the 2003-2004 financial year.
- 2.1.5 By comparing the information obtained from the exception reports with the declaration of financial interests by Ministers and Deputy Ministers as required by the Ministerial Handbook and the Executive Ethics Code³, it was found that:
- 2.1.5.1 6 Members (Ministers/Deputy Ministers) failed to declare their interests in private companies to the Parliamentary Registrar for Members' Interests (the Registrar) and the Secretary of the Cabinet (the Secretary);
- 2.1.5.2 2 Members failed to declare their interests in close corporations to the Registrar and 3 failed to declare similar interests to the Secretary; and

³ See discussion of the relevant provisions of the Executive Ethics Code in paragraph 6.3 below 8

2.1.5.3 6 Members failed to declare their interests in "section 21 companies"⁴ to both the Registrar and the Secretary.

2.1.6 The Report stated the following in regard to these findings⁵:

"In certain cases, the Ministers and Deputy Ministers provided documentation to the Registrar and the Secretary indicating that they had resigned as directors or members of private companies or close corporations. However, it seems that the CIPRO database was not timeously updated with this information. According to the 'Frequently asked questions' issued by the Office of the Registrar of Members' Interests, members should accept personal responsibility for ensuring that CIPRO processed their resignation/termination of directorships/memberships.

It was further indicated that the oversight as far as section 21 companies are concerned was due to an uncertainty regarding directorships arising from government appointments in relation to government work."
(emphasis added)

2.1.7 It was also found that 3 spouses of Ministers/Deputy Ministers were directors of private companies, 2 of section 21 companies and 3 were members of close corporations⁶. In this regard the Report stated: "*The financial interests of members' spouses are confidential and were therefore forwarded to the Registrar and the Secretary for follow-up.*"

2.1.8 Referring to the comments made by the Registrar and the Secretary during the investigation, the Report states that Ministers and Deputy Ministers who failed to disclose their interests would be requested to do so. "*Both the Registrar and the Secretary indicated that the CIPRO database of directors and members had not been updated timeously as*

⁴ See discussion of section 21 companies in paragraph 10 below

⁵ See paragraphs 5.3.3 and 5.3.4 of the Report

⁶ See paragraph 5.3 of the Report

the database still indicates that certain Ministers and Deputy Ministers are members or directors of companies or close corporations although they had resigned/terminated their directorship and membership'.

2.2 Media reports

The Report of the Auditor General was widely reported on by the media. *The Star*, for example, reported on 20 March 2006 that:

"Reports in Sunday papers disclosed that 14 cabinet ministers and deputy ministers, including Deputy President Phumzile Mlambo-Ngcuka, faced ethics charges for failing to declare directorships in private companies and close corporations on the parliamentary members' register.

The Sunday Times reported that Education Minister Naledi Pandor, Public Works Minister Stella Sigcau and Social Development Minister Zola Skweyiya joined Mlambo-Ngcuka on the list. The report noted that Agriculture Minister Thoko Didiza, Transport Minister Jeff Radebe, Trade and Industry Minister Mandisi Mpahlwa and Safety and Security Minister Charles Nqakula had failed to disclose directorships in section 21 (non-profit) companies."

3. THE COMPLAINT

Mr D Gibson, MP, the Chief Whip of the Democratic Alliance, lodged a compliant based on the said Report of the Auditor General with the Office of the Public Protector on 22 March 2006. He stated, *inter alia*, the following:

"A recent report by the Auditor General includes the names of 14 Cabinet Ministers who have failed to declare all of their private business interests as required by the Parliamentary Code of Conduct.

The Executive Members (sic) Ethics Act, however, also requires that members of the executive in particular disclose all their financial interests to the Cabinet Secretary (sic) and that a separate register be maintained in this regard and in line with the regulations set out in the Executive Ethics Code.

I would like to request that your office investigate whether those interests which required disclosure in the Register of Member's Interests were also registered in the Register of Executive Member's (sic) Interests, as required by the Executive Members (sic) Ethics Act.

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

- 4.1 The Public Protector has the power, in terms of the provisions of section 182(1) of the Constitution, 1996 (the Constitution) 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.
- 4.2 In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation.
- 4.3 The Executive Members' Ethics Act, 1998 (the Executive Members' Ethics Act) provides for a code of ethics governing the conduct of, *inter alia*, members of the Cabinet and Deputy Ministers, which has to include provisions regulating declarations of interests⁷.
- 4.4 Sections 3 and 4 of the Executive Members' Ethics Act provide, *inter alia*, that the Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint by a member of the National Assembly, if the complaint is against a Cabinet member.

⁷ See paragraph 6.3 below for a detailed discussion of the relevant provisions of the Executive Code of Ethics

- 4.5 The President must within a reasonable time, but not later than 14 days after receiving a report from the Public Protector on a Cabinet member, submit a copy thereof and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the National Assembly.
- 4.6 The complaint of a possible breach of the Executive Ethics Code by the Ministers and Deputy Ministers referred to by the Auditor General in his Report⁸ fall within the jurisdiction and powers of the Public Protector to investigate.

5. THE INVESTIGATION

The investigation was conducted in terms of sections 3 and 4 of the Executive Members' Ethics Act and section 7 of the Public Protector Act, 1994, and comprised:

- 5.1 Consideration of the *Report of the Auditor General on the Declarations of Interests by Ministers, Deputy Ministers and Government Employees*, dated January 2006;
- 5.2 Evaluation and consideration of the documentation on which the findings of the Auditor General were based in respect of the Ministers and Deputy Ministers referred to in his Report;
- 5.3 Consultation with the officials of the Office of the Auditor General involved in the investigation of the matter;
- 5.4 Correspondence with the Chairperson of the Parliamentary Joint Committee on Ethics and Members' Interests;

⁸ See paragraph 2.1 above

- 5.5 Consideration of the Report of the Parliamentary Joint Committee on Ethics and Members' Interests in connection with the Report of the Auditor General , which was tabled in Parliament on 23 May 2006;
- 5.6 Correspondence and consultation with the Secretary of the Cabinet;
- 5.7 Inspection of the Register of Members' Interests kept by the Secretary of the Cabinet as contemplated by the Executive Ethics Code;
- 5.8 Correspondence with the Deputy Minister of Foreign Affairs, Mr A Pahad; and
- 5.9 Consideration and application of the relevant provisions of the Executive Members' Ethics Act, the Executive Ethics Code, the Companies Act, 1973 and the Close Corporations Act, 1984.

6. THE PROVISIONS REGULATING THE DISCLOSURE BY MINISTERS AND DEPUTY MINISTERS OF THEIR FINANCIAL INTERESTS

6.1 The Constitution

- 6.1.1 Section 96 provides that members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.
- 6.1.2 Members of the Cabinet and Deputy Ministers may not:
 - 6.1.2.1 undertake any other paid work;
 - 6.1.2.2 act in a way that is inconsistent with their office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

6.1.2.3 use their position or any information entrusted to them to enrich themselves or improperly benefit any other person⁹.

6.2 The Executive Members' Ethics Act

6.2.1 Section 2(1) states that the President must publish a code of ethics prescribing the standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and Members of provincial executive councils must comply in performing their official responsibilities.

6.2.2 The code of ethics must, *inter alia*,:

- "(c) *require Cabinet members and Deputy Ministers to disclose to an official in the office of the President designated for this purpose...-*
 - (ii) *all their financial interests when assuming office; and*
 - (iii) *any financial interests acquired after their assumption of office, including any gifts, sponsored foreign travel, pensions, hospitality and other benefits of a material nature received by them or by such persons having a family or other relationship with them as may be determined by the code of ethics; and*
- (d) *prescribe that the financial interests to be disclosed in terms of paragraph (c) must at least include the information, and be under the same conditions of public access thereto, as is required by members of the National Assembly as determined by that House from time to time, but may prescribe the disclosure of additional information."*

⁹ See section 96(2)

6.3 The Executive Ethics Code

6.3.1 The Executive Ethics Code (the Code) was published on 28 July 2000.

6.3.2 The disclosure of financial interests is regulated by paragraph 5 of the Code, which reads as follows:

“5.1 Every Member must disclose to the Secretary particulars of all the financial interests, as set out in paragraph 6¹⁰, of-

a. the Member; and

b. the Member’s spouse, permanent companion or dependent children, to the extent that the Member is aware of those interests.

5.2 The first disclosure must be made within 60 days after the promulgation of this Code or of the Member’s assumption of office, or of a Member becoming aware of such interest, as the case may be.

5.3 After the first disclosure, Members must annually disclose particulars of their financial interests on or before a date determined by the Secretary.

5.4 Cabinet Members and Deputy Ministers who are members of the National Assembly and are required to disclose particulars of their financial interests in terms of the Rules of Parliament, comply with paragraph 5.1-

¹⁰ See paragraph 6.3.3 below

a. by submitting to the Secretary a copy of those particulars on the same date as they are filed with the relevant parliamentary official; and

b. in so far as those particulars do not meet the requirements of paragraph 6 of this Code, by filing with the Secretary a statement containing the necessary additional disclosure.

5.5 Where any doubt exists as to whether particular financial interests must be disclosed, the Member must consult the Secretary.”

6.3.3 In terms of paragraph 6, shares and other financial interests in companies and other corporate entities have to be disclosed by indicating:

6.3.1.1 The number, nature and nominal value of shares of any type in any public or private company;

6.3.1.2 The name of the company; and

6.3.1.3 The nature and value of any other financial interest held in any company or other corporate entity.

6.3.4 Paragraph 7 provides that the Secretary must keep a register of all financial interests disclosed by Members. The register must consist of a public and confidential part.

6.3.5 The details of the financial interests of a Member's spouse, permanent companion or dependent child must be recorded in the confidential part of the register.

6.3.6 Only the President, the Public Protector, the Secretary and staff designated by the Secretary have access to the confidential part of the

register¹¹.

6.3.7 Paragraph 7.4 provides that no person who has access to the confidential part of the register may disclose particulars of any entry in that part to anyone other than the Member concerned or another person who has such access, except where a court or the Public Protector so orders.

7. THE MINISTERS AND DEPUTY MINISTERS IDENTIFIED BY THE INVESTIGATION OF THE OFFICE OF THE AUDITOR GENERAL AS NOT HAVING COMPLIED WITH THE REQUIREMENTS OF THE CODE IN RESPECT OF DISCLOSURE OF THEIR FINANCIAL INTERESTS

The said investigation by the Office the Auditor General discovered that the following Ministers and Deputy Ministers failed to disclose their financial interests, as indicated:

7.1 Deputy President P Mlambo-Ngcuka (formerly the Minister of Minerals and Energy)

Director of *Lesila*, a private company; and

Director of the *Community Peace Foundation*, a section 21 company.

7.2 Mr C Nqakula, the Minister of Safety and Security

Director of *Votani Mawethu*, a private company.

7.3 Ms N Pandor, the Minister of Education

Director of *Luthando Investments* and *Luthando Investment Holdings*, both private companies; and

¹¹ See paragraph 7.3

Director of the *Tertiary Education Fund of South Africa*, a section 21 company.

7.4 The late S Sigcau, the former Minister of Public Works

Director of *Jongilizwe Investment Holdings* and *Jongilizwe Medical*, both private companies.

7.5 Mr J Radebe, the Minister of Transport

Member of *Stand 1993, Houghton Properties*, a close corporation; and

Director of *Jobco*, a section 21 company.

7.6 Dr Z Skweyiya, the Minister of Social Development

Member of *Hoewe 114 Lyttelton Landbouhoewes*, a close corporation.

7.7 Ms M Mabandla, the Minister of Justice and Constitutional Development

Director of the *Community Peace Foundation*, a section 21 company.

7.8 Ms L Sisulu, the Minister of Housing

Director of *Black South African Freedom Songs and Poems*, a section 21 company.

7.9 Ms T Didiza, the Minister of Public Works (former Minister of Agriculture and Land Affairs)

Director of *Jobco*, a section 21 company.

7.10 Mr M K N Gigaba, the Deputy Minister of Home Affairs

Director of *Development Enterprise for Management and Strategic Services*, a private company; and

Director of *Biz Africa 1477*, a section 21 company.

7.11 Mr G Oosthuizen, the Deputy Minister of Sport and Recreation

Director of *Momentum Oil Refinery Exploration and Association* and of *Thaba Drankkelders*, both private companies;

Member of *Braai Spot*, a close corporation; and

Director of *Creative Housing Utility*, a section 21 company.

7.12 Mr R Padayachie, the Deputy Minister of Communication

Director of *South African National NGO Coalition*, a section 21 company.

7.13 Mr M E Surty, the Deputy Minister of Education

Director of *Go Ja Beng Fast Foods* and *Happy Developers*, both private companies.

7.14 Ms L Xingwana, the Deputy Minister of Minerals and Energy

Director of *City Cat Trading*, a private company.

7.15 Ms S Shabangu, the Deputy Minister of Safety and Security

Member of *Western Ocean Investments*, a close corporation.

7.16 Mr D Hanekom, the Deputy Minister of Science and Technology

Member of *Tregoyd*, a close corporation;

Director of *Land and Agricultural Centre*, a section 21 company.

8. SPOUSES OF MINISTERS AND DEPUTY MINISTERS IDENTIFIED DURING THE INVESTIGATION OF THE OFFICE OF THE AUDITOR GENERAL AS HAVING FINANCIAL INTERESTS IN PRIVATE COMPANIES, CLOSE CORPORATIONS AND/OR SECTION 21 COMPANIES

- 8.1 The investigation of the Office of the Auditor General identified 6 spouses of Ministers and Deputy Ministers having interests in corporate entities. However, as the information relating to disclosure in this regard is contained in the confidential part of the register kept by the Secretary¹², the Auditor General could not make any findings in this regard.
- 8.2 As the Public Protector has access to the confidential part of the register, compliance of the Ministers and Deputy Ministers with the prescripts of the Code relating to disclosure of the financial interests of spouses was considered during the investigation of the complaint lodged by Mr Gibson¹³.

¹² See paragraph 6.3.6 above

¹³ See paragraph 3 above

9. THE INVESTIGATION OF THE PARLIAMENTARY JOINT COMMITTEE ON ETHICS AND MEMBERS' INTERESTS

9.1 The response of the Chairperson to enquiries made during the investigation of the Office of the Public Protector

9.1.1 The Parliamentary Joint Committee on Ethics and Members' Interests (the Committee) conducted an investigation in connection with the findings of the Report of the Auditor General.

9.1.2 During the investigation by the Office of the Public Protector, the Chairperson of the Committee advised, *inter alia*, as follows:

"If I may, I also wish to bring to your attention the fact that the Joint Committee interviewed both the Auditor General and Executive Members of the Companies Intellectual Property Registrations Office (CIPRO) at a meeting held in Parliament. The purpose of the meeting was to:

- 1. ascertain the methodology used by the Auditor General's Office when it conducted its investigation which culminated in this Report; and*
- 2. to ascertain from CIPRO what were the causes of and how serious were the anomalies and inaccuracies in their database.*

In the case of the Auditor General it was agreed that before the Auditor General's Report was tabled in Parliament and published, extensive consultations should have taken place between the Auditor General's Office and the Registrar for Members' Interests (and indeed, between the Auditor General's Office and the Office of the Secretary to the Cabinet, Rev Frank Chikane). This would have helped the Auditor General's Office better understand the Joint Committee's policy or approach with regard to, for example:

- a. *Section 21 (not-for-profit) Companies/Organizations;*
- b. *Property-bearing Closed Corporations (CC's); and*
- c. *Community-based organizations e.g. Lesila Burial Society, in the case of Deputy President Phumzile Mlambo-Ngcuka.*

In the case of CIPRO, however, the Joint Committee's inter-action with their members was most unsatisfactory, particularly since they insisted that their database was accurate, even with proof to the contrary being presented to them in the meeting."

9.2 The Report of the Committee

9.2.1 The Registrar of Members' Interests requested the Ministers and Deputy Ministers involved to respond to the findings contained in the Report of the Auditor General.

9.2.2 In its Report, which was tabled in Parliament on 23 May 2006, the Committee also noted that the National Assembly had adopted a previous report of the Committee, dated 11 November 2005, stating that Members need not disclose their interests in "not for profit entities."

9.2.3 According to the Committee's Report, all the Ministers and Deputy Ministers identified as not having disclosed their financial interests in companies and other corporate entities, responded to the request of the Registrar. Their responses and the findings of the Committee relating to the matters concerned are referred to as follows:

9.2.3.1 Deputy President Mlambo-Ngcuka

- *Lesila* was established in 1999 to provide financial support to needy families in respect of burial expenses. The organization had no profit objective and never operated.

- The *Community Peace Foundation* was a section 21 company, which was deregistered in 1997.

Finding: As *Lesila* was established with no intention of financial gain, there was no breach of the Code of Conduct.

9.2.3.2 Mr C Nqakula, the Minister of Safety and Security

Votani Mawethu was a Non Governmental Organization, which was established to assist people to obtain identity documents for the 1999 general election. The programme of the organization was shut down in 2000. He was not aware that the organization had not been formally disbanded and has taken steps to ensure that it is done.

Finding: The entity concerned was a not for profit organization and therefore did not need to be disclosed.

9.2.3.3 Ms N Pandor, the Minister of Education

She disclosed her interests in the *Luthando* companies in 2003 and 2004. As she resigned her directorships in 2005, she did not deem it necessary to disclose it again.

Finding: Ms Pandor had disclosed her interests in *Luthando* in 2004. There was no breach of the Code of Conduct.

9.2.3.4 The late S Sigcau, the former Minister of Public Works

Ms Sigcau was already deceased at the time of the investigation.

9.2.3.5 Mr J Radebe, the Minister of Transport

His interest in *Stand 1993, Houghton Properties* was declared in the Land and Property Section of the Register.

Finding: There was no breach of the Code of Conduct.

9.2.3.6 Dr Z Skweyiya, the Minister of Social Development

Hoewe 114 Lyttelton was a property holding that owned two holiday flats in Port Edward, which were sold in 2005. His interest in the flats was disclosed in 2004 and 2005 and he has taken steps to terminate his membership of the close corporation.

Finding: There was no breach of the Code of Conduct.

9.2.3.7 Ms M Mabandla, the Minister of Justice and Constitutional Development

The Community Peace Foundation was deregistered in 1997. It was a section 21 company.

Finding: There was no breach of the Code of Conduct.

9.2.3.8 Ms L Sisulu, the Minister of Housing

Black South African Freedom Songs and Poems was a section 21 company that never operated.

Finding: There was no breach of the Code of Conduct.

9.2.3.9 Ms T Didiza, the Minister of Public Works

Her directorship of *Jobco*, a section 21 company, arose from official responsibilities.

Finding: There was no breach of the Code of Conduct.

9.2.3.10 Mr M K N Gigaba, the Deputy Minister of Home Affairs

He resigned from *Development Enterprise for Management and Strategic Services*. His interest in *Biz Africa*, a section 21 company was in his former capacity as the President of the ANC Youth League.

Finding: Mr Gigaba had disclosed both his interests in 2004. There was no breach of the Code of Conduct.

9.2.3.11 Mr G Oosthuizen, the Deputy Minister of Sport and Recreation

He resigned from *Momentum Oil Refinery Exploration and Association* on 1 January 1985 and from *Creative Housing Utility* on 20 June 1987. *Thaba Drankkelders* and *Braai Spot* were dormant for more than 10 years and were deregistered in November 2005.

Finding: There was no breach of the Code of Conduct.

9.2.3.12 Mr R Padayachie, the Deputy Minister of Communication

He had resigned from *The South African National NGO Coalition*, a section 21 company.

Finding: There was no breach of the Code of Conduct.

9.2.3.13 Mr M E Surty, the Deputy Minister of Education

Go Ja Beng Foods and *Happy Developers* were deregistered on 27 June 2001.

Finding: There was no breach of the Code of Conduct.

9.2.3.14 Ms L Xingwana, the Deputy Minister of Minerals and Energy

She resigned as a director of *City Cat Trading*.

Finding: There was no breach of the Code of Conduct.

9.2.3.15 Ms S Shabangu, the Deputy Minister of Safety and Security

She resigned as a member of *Western Ocean Investments*.

Finding: There was no breach of the Code of Conduct.

9.2.3.16 Mr D Hanekom, the Deputy Minister of Science and Technology

- He resigned from the *Land and Agricultural Centre*, a section 21 company, 10 years ago.
- He had disclosed his interests in *Tregoyd*.

Finding: Mr Hanekom had disclosed his interest in *Tregoyd*. There was no breach of the Code of Conduct.

10. WHAT IS A "SECTION 21" COMPANY?

10.1 "Section 21" refers to section 21 of the Companies Act, 1973 (the Companies Act), which provides that:

"(1) Any association-

- (a) formed or to be formed for any lawful purpose;*
- (b) having the main object of promoting religion, arts, sciences, education charity, recreation, or any other cultural or social activity or communal group interests;*
- (c) which intends to apply its profits (if any) or other income in promoting its said main object;*
- (d) which prohibits the payment of any dividend to its members; and*
- (e) which complies with the requirements of this section in respect to its formation and registration,*

may be incorporated as a company limited by guarantee.

10.2 Section 21(2) of the Companies Act provides that the income and property of the association shall be applied solely towards the promotion of its main object, and no portion thereof shall be paid or transferred by way of a bonus, dividend or otherwise to the members of the association.

11. DISCLOSURE IN TERMS OF THE EXECUTIVE ETHICS CODE

11.1 The Executive Members' Ethics Act and the Executive Ethics Code require of Ministers and Deputy Ministers to disclose all their **financial** interests¹⁴ and that of their spouses as **it exists at the time when disclosure has to be made**, in terms of the Code.

¹⁴ See paragraph 6.3 above

- 11.2 An interest in a dormant entity that is not conducting any business from which a profit could be made or which has not been trading at all cannot be regarded as a “financial interest” as it constitutes no financial advantage for those related to it. However, should the position change and the interests of Ministers, Deputy Ministers and/or their spouses result in financial gain, it has to be disclosed. The mere fact therefore that a person is a director of a company or a member of a close corporation does not necessarily mean that his/her interest is of a financial nature.
- 11.3 There is no indication in the Act or the Code that Ministers and Deputy Ministers are obliged to disclose any other interests that they or their spouses, permanent companions and dependent children may have in corporate entities, such as interests in the social upliftment of our society, cultural development, charity, communal support, etc.
- 11.4 The Secretary has a discretion to decide whether a particular interest could be regarded as ‘financial’ and should be disclosed in terms of the Code¹⁵.
- 11.5 The Secretary was consulted in this regard during the investigation. He indicated that non-financial interests in any entity and particularly interests in section 21 companies, in his view, need not be disclosed in terms of the Code.

¹⁵ See paragraph 6.3.2 above

12. WHO IS RESPONSIBLE FOR ENSURING THAT THE RECORDS OF COMPANIES, CLOSE CORPORATIONS AND CIPRO CONTAIN THE CORRECT INFORMATION IN REGARD TO DIRECTOR- AND MEMBERSHIPS?

12.1 The provisions of the Companies Act, 1973

- 12.1.1 Section 5 of the Act provides for a register of companies to be kept in the Companies Registration Office.
- 12.1.2 CIPRO constitutes a combined administrative office for the registration offices that were established in terms of, *inter alia*, the Companies Act and the Close Corporations Act, 1984.
- 12.1.3 In terms of the Companies Administrative Regulations, made in terms of the Companies Act, CIPRO may convert the documentation relevant to the registration of Companies into an electronic format and make it available to the public at a prescribed fee.
- 12.1.4 The Registrar of Companies is obliged to ensure that the records relating to registered companies contain the correct information in respect of every company, as it was submitted to his/her office, in compliance with the provisions of the Act¹⁶.
- 12.1.5 In practice, the information relating to registered companies are presented to the Registrar in different prescribed forms. The information contained in these forms is available to the public.
- 12.1.6 Section 215 provides that every company shall keep a register of directors and officers of the company which should contain the names and personal details of every director or officer and the particulars of every other company of which such a director is a director. Changes

¹⁶ See sections 5 and 7 of the Companies Act

to the information contained in the register that may occur from time to time, have to be entered in the said register. Failure to keep such a register is a criminal offence.

12.1.7 Directors of companies are obliged, by virtue of section 216, to furnish the company with his/her particulars, as required by section 215,:

12.1.7.1 Within 28 days of having been appointed as a director; and

12.1.7.2 Within 14 days of a change of his/her particulars or of vacating his/her office as director.

12.1.8 A company has to inform the Registrar, in the prescribed form, of the particulars entered into the register of the company and of any changes thereto, including the vacating of his/her office by a director, within 14 days after receipt of the particulars and/or notification of a change¹⁷.

12.1.9 Failure to comply with the provisions of section 216 constitutes a criminal offence.

12.2 The Close Corporations Act, 1984

12.2.1 The Registrar of Close Corporations is responsible for the administration of the Registration Office where records pertaining to close corporations are kept.

12.2.2 In terms of the Close Corporations Administrative Regulations, made in terms of the Close Corporations Act, CIPRO may convert the documentation relevant to the registration of close corporations into

¹⁷ See section 216(2)

an electronic format and make it available to the public at a prescribed fee.

12.2.3 The particulars of the founding members of a close corporation have to be documented in its founding statement that is submitted for registration¹⁸.

12.2.4 Section 15 provides that a close corporation is responsible for amending its founding statement and informing the Registrar when a change to its membership occurs. The notification must be lodged with the Registrar within 28 days of such change.

12.2.5 Failure to inform the Registrar of the changes of membership of a close corporation can result in a penalty imposed on its members by the Registrar, which has the effect of a civil judgment against every member for the amount of the penalty in question¹⁹.

12.3 Conclusion

12.3.1 Directors of companies are obliged by law to inform the company of their particulars and when they vacate their offices.

12.3.2 Companies are responsible for informing the Registrar of Companies of the particulars of its directors and when they vacate their offices.

12.3.3 The Registrar of Companies is responsible for keeping a register that includes the particulars of all directors of companies. Details of directors resigning their positions also have to be entered in the register as and when such information is provided by companies.

12.3.4 Close corporations are obliged to inform the Registrar of Close Corporations of the particulars of its members and when membership

¹⁸ Section 13

¹⁹ Section 15(3)

changes. Members are responsible for ensuring compliance in this regard.

12.3.5 The Registrar of Close Corporations is responsible for keeping a register that includes the particulars of all members of close corporations. Details of members resigning their positions also have to be entered into the register as and when such information is provided by close corporations.

13. DISCLOSURE BY THE MINISTERS AND DEPUTY MINISTERS CONCERNED OF THEIR FINANCIAL INTERESTS IN TERMS OF THE EXECUTIVE ETHICS CODE

13.1 As indicated above²⁰, Ministers and Deputy Ministers are not obliged in terms of the Code to disclose interests in corporate entities which are not of a financial nature.

13.2 From the information contained in the Reports of the Auditor General and the Committee and obtained during the investigation, it became apparent that some of the interests referred to were ostensibly of a financial nature. It therefore had to be determined whether the individuals concerned had declared such interests in the Register kept by the Secretary.

13.3 The Registrar and the Secretary approached the Ministers and Deputy Ministers involved for their responses to the findings contained in the Report of the Auditor General. As their apparent failures applied to both registers concerned, their responses to the Registrar and the Secretary, including supporting documentation, were the same.

²⁰ See paragraph 11

13.4 Ms M Pandor

13.4.1 The CIPRO database indicates that Ms Pandor is a director of Luthando Investments and of Luthando Investment Holdings. She was appointed as such on 19 March 1998 and 2 April 1998, respectively.

13.4.2 In her response, Ms Pandor stated that she had resigned her said directorships in August 1998. The records of the Registrar were clearly not updated accordingly.

13.5 Mr J Radebe

Mr Radebe's interest in Stand 1993 Houghton Properties CC was disclosed in terms of the Code.

13.6 Dr Z Skweyiya

His interest in *Hoewe 114 Lyttelton Landbouhoewes CC* related to his ownership of property, which was disclosed. The property was sold in 2005.

13.7 Mr M K N Gigaba

He resigned his directorship of *Development Enterprise for Management and Strategic Services* in August 2004. His resignation was however only recorded in CIPRO's database in March 2006.

13.8 Mr G Oosthuizen

Mr Oosthuizen resigned from *Momentum Oil Refinery Exploration and Association*, but the company apparently failed to inform the Registrar accordingly. *Braai Spot* was a redundant entity for more than 10 years.

13.9 Mr M E Surty

The two companies in which Mr Surty had interests, according to the CIPRO database, were deregistered in 2001.

13.10 Ms L Xingwana

Her non-disclosure of her interests in *City Cat Trading*, trading as *Lebone La Sechaba* was considered by the Committee in November 2004. The Committee recorded that she submitted documentation indicating that she had resigned as director of the company. Her resignation was however only recorded on the CIPRO database in March 2006.

13.11 Ms S Shabangu

Documents were filed with the Registrar of Companies terminating her directorship of *Western Ocean Investments*, which is a close corporation. The Registrar could therefore not comply with her request initially, but the correct information has subsequently been submitted to terminate her membership. It appears from the documents that the said close corporation was dormant.

13.12 Mr D Hanekom

His interest in *Tregoyd CC* was disclosed.

14. DISCLOSURE BY MINISTERS AND DEPUTY MINISTERS OF THE FINANCIAL INTERESTS OF THEIR SPOUSES, IN TERMS OF THE EXECUTIVE ETHICS CODE

14.1 The information obtained from the records of the Office of the Auditor General relating to the interests of spouses of Ministers and Deputy Ministers referred to in its report, indicated that the only interest that

might have had to be declared related to the spouse of the Deputy Minister of Foreign Affairs, Mr A Pahad.

- 14.2 Mr Pahad explained during the investigation that the interest referred to was of a non-financial nature and therefore warranted no disclosure.

15. OBSERVATIONS MADE FROM THE INVESTIGATION

The following significant observations have been made from the investigation:

- 15.1 Ministers, Deputy Ministers and their spouses who are directors of companies and/or members of close corporations are by law obliged to inform the respective companies and close corporations when they cease to be a director/member.
- 15.2 It is the legal responsibility of companies and close corporations to inform the Registrar of Companies and Close Corporations of changes to its directorship or membership.
- 15.3 Ministers and Deputy Ministers are under no legal obligation to ensure that CIPRO's database is up to date, simply because of their current of former interests in corporate entities.
- 15.4 The interests of Ministers and Deputy Ministers are not always disclosed in the appropriate section of the Register of Members' Interests. Ownership of a property which belongs to a close corporation of which a Minister is a member would, for example, be disclosed under the Property Section of the Register, instead of under the Director-and Memberships Section.
- 15.5 Where Ministers and Deputy Ministers and their spouses have financial interests in the same corporate entity, it must be disclosed in the

public and confidential parts of the register.

- 15.6 Only financial interests need to be disclosed in terms of the Code. Interests in section 21 companies or corporate entities that bear no financial advantage for its members or directors do not warrant disclosure. However, it would be advisable to be cautious in this regard and to seek the advice of the Secretary when in doubt whether or not to disclose.

16. KEY FINDING

The Ministers and Deputy Ministers referred to in the *Report of the Auditor General on the declarations of interests by Ministers, Deputy Ministers and Government Employees* did not breach the Executive Ethics Code.

17. RECOMMENDATION

- 17.1 In its report to Parliament, the Committee concluded that:

“The Committee notes that the purpose of the Code is to ensure that the member discloses his or her financial or pecuniary interest. In the cases outlined above there are no current active financial interests that have not been disclosed. The Committee is also mindful that the purpose of the Code is to promote ethical conduct.

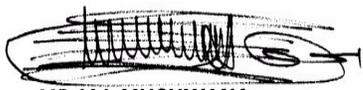
In its consideration of these matters, the Committee has concluded that it must develop further guidelines to assist members. To this end the Committee hopes to host a series of workshops within Parliament to promote debate on the issue of ethics and examine various systems of accountability for elected representatives. The Committee will also host a conference on ethics in public life to obtain expert view and facilitate public comment on the issues.”

17.2 In the light of the actions proposed by the Committee to facilitate better understanding of issues relating to ethical conduct, including the disclosure of financial interests, and the observations made from the investigations referred to in this report, it is recommended that:

17.2.1 The Secretary of the Cabinet liaise with the Chairperson of the Committee to ensure that:

- (a) the issues of compliance by members who are or were directors of companies and members of close corporations with the provisions of the relevant legislation;
- (b) the definition of what is regarded as a "financial interest" for the purposes of disclosure in terms of the Code; and
- (c) disclosures in terms of the Code of interests in corporate entities in the appropriate sections of the register,

referred to in this report, are also canvassed during the proposed development of guidelines by and conference of the Committee.



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

26 October 2006