
PUBLIC PROTECTOR SOUTH AFRICA

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER RECEIPT OF A BRIBE BY MS BALEKA MBETE IN THE FORM OF SHARE ALLOCATION AMOUNTING TO APPROXIMATELY R25 MILLION IN INVICTUS GOLD (PTY) LIMITED, AS WELL AS THE ROLE PLAYED BY THE DEPARTMENT OF MINERAL RESOURCES IN THE 2010 BROAD-BASED BLACK ECONOMIC EMPOWERMENT TRANSACTION CONCLUDED WITH GOLD FIELDS (PTY) LIMITED
1. **INTRODUCTION**

1.1. This is my closing report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, [Act No. 108 of 1996] (the Constitution) and published in terms of section 8(1) of the Public Protector Act, [Act No. 23 of 1994] (the Public Protector Act).

1.2. The report relates to an investigation conducted following a complaint lodged by the Leader of the United Democratic Movement (UDM) and Member of Parliament, Mr Bantu Holomisa, (Mr Holomisa) on 13 May 2016.

1.3. Copies of the closing report are provided to Mr Bantu Holomisa,(the Complainant in the matter), the Chairperson of the Public Investment Corporation Board of Directors, Dr Reuel Khoza, as well as to the Acting Chief Executive Officer of the Public Investment Corporation, Mr Vuyani Hako, in terms of section 8(3) of the Public Protector Act, 1994.

1.4. Mr Holomisa based his request for an investigation on the recommendations made in the Gobodo Forensic and Investigative Accounting (Pty) Ltd’s Draft Forensic Investigation Report issued on 7 August 2015, following an investigation into allegations of impropriety on the part of the Public Investment Corporation and/or its employees relating to an investment of seventy five million rand (R75 million) by the Public Investment Corporation in SacOIL Holdings (Pty) Ltd.

1.5. He requested that an investigation be instituted with a view to determining whether the Public Investment Corporation, an entity which is entrusted with managing public monies on behalf of government employees, Judges, Members of Parliament and others who are paid from the public purse, had indeed implemented the recommendations made in the Gobodo forensic investigation report.
2. Based on the analysis of the complaint and the allegations contained therein, the following issue was identified to inform and focus the investigation:

2.1. Whether the Public Investment Corporation implemented recommendations made in the Gobodo Forensic and Investigative Accounting (Pty) Ltd’s Forensic Investigation Report, and if not so, whether the failure by the Public Investment Corporation to implement the recommendations caused the Public Investment Corporation to incur irregular expenditure.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) 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 as regulated by national legislation—

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

(b) to report on that conduct; and

(c) to take appropriate remedial action."

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.
3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

3.5 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:

3.5.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);

3.5.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (paragraph 82);

3.5.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraph 100 and 101):

(a) Conduct an investigation;
(b) Report on that conduct; and
(c) To take remedial action.

3.5.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (paragraph 104);
3.5.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (Paragraph 105);

3.5.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute *prima facie* findings that point to serious misconduct (paragraph 107 and 108); and

3.5.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112).

3.6 The Public Investment Corporation is an organ of state listed in Part B of Schedule 3 of the Public Finance Management Act, 1999 [Act No. 1 of 1999] and therefore its conduct falls within the Public Protector’s mandate to investigate. The Public Protector’s power and jurisdiction to investigate, report and take appropriate remedial action was not disputed by any of the parties.

4. **THE INVESTIGATION**

4.1. **Methodology**

4.1.1. The Investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute relating to allegations of improper conduct or maladministration.
4.1.3. The investigation process included correspondence and the exchange of documentation between the Public Protector and the former Chairman of the Public Investment Corporation’s Board of Directors, Mr. Sfiso Buthelezi, the former Chief Executive Officer of the Public Investment Corporation, Dr Dan Matjila, the former Acting Chief Executive Officer of the Public Investment Corporation, Ms Matshepo More, the Divisional Director of Gobodo Forensic and Investigative Accounting (Pty) Ltd, Mr Deon Wilson and the current Acting Chief Executive Officer of the Public Investment Corporation, Mr Vuyani Hako.

4.1.4. All relevant documents and correspondence were obtained and analysed, in particular copies of Gobodo Forensic and Investigative Accounting (Pty) Ltd’s Draft and Final Forensic Investigation Reports issued on 7 August 2015 and 17 July 2017 respectively. Relevant laws, policies and related prescripts were also considered and applied throughout the preliminary investigation.

4.1. Approach to the Investigation

4.1.1. The investigation was approached using an enquiry process that seeks to find out:

4.1.1.1. What happened?

4.1.1.2. What should have happened?

4.1.1.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or improper conduct?

4.1.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Public Investment Corporation failed to implement recommendations made in the Gobodo Final Forensic Investigation Report.
4.1.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Public Investment Corporation and/or its employees to prevent maladministration and improper conduct.

4.1.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing consequences of the improper conduct or maladministration.

4.2. The Key Sources of Information

4.2.1. Documents

4.2.1.1. Copy of the Complaint’s complaint document;

4.2.1.2. A copy of Gobodo Forensics and Investigative and Accounting (Pty) Limited Draft Forensic Investigation Report into an investment of R75 million in SacOIL issued on 7 August 2015;

4.2.1.3. A copy of Gobodo Forensics and Investigative and Accounting (Pty) Limited Final Forensic Investigation Report into an investment of R75 million in SacOIL issued on 18 July 2017;

4.2.1.4. A copy of a Parliamentary Question Number 1464 [NW1631E] posed by Mr Bantu Holomisa, MP in the National Assembly on 27 May 2016;

4.2.1.5. A copy of the response by the former Minister of Finance, Mr Nhlanhla Nene to a Parliamentary Question Number 1464 [NW1631E] posed by Mr Bantu Holomisa, MP in the National Assembly on 27 May 2016;

4.2.1.6. A copy of a response letter from the Chief Executive Officer of the Public Investment Corporation, Dr Dan Matjila dated 30 June 2017 addressed to the Public Investment Corporation’s Chairperson of the Board of Directors;
4.2.1.7. A copy of an extract from the Public Investment Corporation’s Board Meeting held on 30 October 2015;

4.2.1.8. A copy of a sanction handed down against Mr Fidelis Madavo dated 5 November 2015;

4.2.1.9. A copy of a letter dated 28 March 2018, from the Financial Services Board’s Directorate of Market Abuse Senior Investigator, Mr Dylan Frank addressed to Mr Nesane advising of the closure of an investigation relating to the SacOIL transaction;

4.2.1.10. A copy of the Public Investment Corporation’ Share Register indicating the number of ordinary shares subscribed by the Public Investment Corporation in SacOIL;

4.2.1.11. Copies of Mr. Fidelis Madavo’s Confidentiality Agreement and a Declaration of Interests indicating that the Public Investment Corporation had revised its policies.

4.2.2. Correspondence Sent and Received

4.2.2.1. A copy of a letter from the Public Protector dated 30 May 2017 addressed to the Chairperson of the Public Investment Corporation’s Board of Directors, Mr Sfiso Buthelezi;

4.2.2.2. A copy of a response letter from the former Public Investment Corporation’s Chairperson of the Board of Directors Mr Sfiso Buthelezi dated 30 June 2017 addressed to the Public Protector;

4.2.2.3. A copy of a letter from the Public Protector dated 25 July 2018 addressed to the former Chief Executive Officer of the Public Investment Corporation, Dr Dan Matjila;
4.2.2.4. A copy of a response letter from the former Chief Executive Officer of the Public Investment Corporation, Dr Dan Matjila addressed to the Public Protector;

4.2.2.5. A copy of a letter from the Public Protector dated 5 February 2019, addressed to the former Acting Chief Executive Officer of the Public Investment Corporation, Ms Matshepo More;

4.2.2.6. A copy of a letter from the Public Protector dated 21 May 2019, addressed to the current Acting Chief Executive Officer of the Public Investment Corporation, Mr Vuyani Hako;

4.2.2.7. A copy of a letter from the Public Protector dated 22 July 2019, addressed to the Chief Financial Officer of the Public Investment Corporation, Mr Brian Mavuka;

4.2.2.8. A copy of a letter from the Public Protector dated 21 November 2019, addressed to the Public Investment Corporation’s Head of Legal: Ms Lindiwe Dlamini;

4.2.2.9. A copy of a response letter from the Public Investment Corporation’s Head of Legal: Ms Lindiwe Dlamini dated 4 December 2019, addressed to the Public Protector;

4.2.3. Legislation and other prescripts

4.2.3.1. The Constitution of the Republic of South Africa, 1996;

4.2.3.2. The Public Protector Act, 1994 (Act 23 of 1994);

4.2.3.3. The Public Investment Corporation Act, 2004 (Act 23 of 2004);

4.2.4. Websites

4.2.4.1. www.treasury.gov.za;
4.2.4.2. www.publicprotector.org;

4.2.4.3. www.Public Investment Corporation.co.za;

4.2.4.4. www.afroenergy.com;


4.2.5. Case Law

4.2.5.1. President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017);

4.2.5.2. National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs 2000 (2) SA 1 (CC)

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS:

5.1. Regarding whether the Public Investment Corporation implemented recommendations made in the Gobodo Forensic and Investigative Accounting (Pty) Ltd’s Forensic Investigation Report, and if not so, whether the failure by the Public Investment Corporation to implement the recommendations caused the Public Investment Corporation to incur irregular expenditure:
Common Cause Issue

5.1.1. It is not disputed that the Public Investment Corporation is a National Government Business Enterprise listed in Part B of Schedule 3 of the Public Finance Management Act, 1999. Its core business is to manage funds for public sector entities, *inter alia*, the Government Employees Pension Fund (GEPF), Unemployment Insurance Fund (UIF), Compensation Commissioner Fund (CC), Compensation Commissioner Pension Fund (CP) and Associated Institutions Pension Fund (AIPF) which focus on provision of social security.

Issues in Dispute

5.1.2. The issue for my determination was whether or not the Public Investment Corporation implemented the recommendations made in the Gobodo Draft Forensic Investigation Report, following an investigation into allegations of impropriety relating to an investment of seventy five million rand (R75 million) by the Public Investment Corporation in SacOIL, and if the recommendations were not implemented, whether the failure caused the Public Investment Corporation to incur irregular expenditure.

5.1.3. In accordance with the provisions of section 7(4)(a) of the Public Protector Act, 1994, a letter requesting a response to the allegations made by Mr Holomisa, as well as the submission of documentation pertinent to the investigation, was issued to the Chairperson of the Public Investment Corporation’s Board of Directors, Mr Sfiso Buthelezi, on 30 May 2017.
Advocate Busisiwe Mkhwebane
The Public Protector of the Republic of South Africa
Private Bag X 677
PRETORIA
0001

By email: mppediak@cprotect.org

Dear Advocate Mkhwebane

Re: INVESTIGATION IN CONNECTION WITH ALLEGATIONS OF FAILURE BY THE CHIEF EXECUTIVE OFFICER TO IMPLEMENT RECOMMENDATIONS MADE IN A FORENSIC REPORT IN RESPECT OF AN INVESTIGATION CONDUCTED BY SIZWE NTSALUBA GOSODO PERTAINING TO AN INVESTMENT OF R75 MILLION IN SACOIL HOLDINGS LIMITED.

Your letter dated 30 May refers.

Subsequent to my letter dated 22 June 2017 I have requested the CEO of the PIC to respond to the Public Protector’s request.

Attached please find the response of the CEO in this regard. I commit to fully interact with this matter with the PIC and the Board at the next Board meeting in July. I shall therefore provide the Public Protector with a full overview of what had transpired and a way forward from the Board’s perspective.

I wish to assure you that this matter will be treated with urgency and within the legal framework as required.

Yours faithfully,

Sfiso Buthelezi, MP
Deputy Minister of Finance
Republic of South Africa

5.1.4. On 30 June 2017, the former Chairperson of the Public Investment Corporation’s Board of Directors, Mr Buthelezi, in response to my enquiries and a request to submit documentation pertinent to the investigation, submitted a letter dated 27 June 2017, from the former Chief Executive Officer of the Public Investment Corporation, Dr Dan Matjila, in which he stated (Dr Dan Matjila) as follows:
"The Public Investment Corporation Management, led by myself and having been concerned about what had transpired as a consequence of SacOil’s own investigation on the above matter, felt it was necessary that the Public Investment Corporation should independently look into the matter for its own purposes and thus decided that the best mechanism to do this would be to institute a forensic investigation.

Gobodo Forensic & Investigative Accounting (Pty) Ltd were considered and procured to undertake the forensic investigation, with a view to establish whether or not the Public Investment Corporation’s own internal processes were impacted by the transaction and to recommend remedial action. Towards October 2015, GFIA delivered their final forensic report with findings and recommendations ("GFIA Report").

As is required in terms of the Public Investment Corporation control practice and relevant delegation, management submitted and addressed the report findings and recommendations to the Public Investment Corporation Board of Directors for deliberations, guidance and implementation mandate. We have attached for the Public Protector’s reference, a copy of the final forensic report as requested, marked as Annexure “A”.

The Board, after having deliberated on the matter and having taken the views of management in consideration, resolved by resolution that management should proceed as recorded in the Board resolution, attached hereln and marked Annexure B. Management duly implemented the resolution of the Board in this regard”.

5.1.5. Dr Matjila continued by stating that,

“It should be noted that the Financial Services Board ("the FSB"), in its capacity as a regulator for Public Investment Corporation as an Asset Manager, has also established its own enquiry into the matter to address questions pertaining to
possible insider trading and other conduct relevant in terms of the legislation they are mandated to manage.

The Public Investment Corporation continues to cooperate with the FSB in the process, and we hereby further wish to confirm our readiness to cooperate with and assist the Public Protector to ensure the exercise of their duties and mandate bestowed upon her office in terms of the applicable law”.

5.1.6. In concluding his response, Dr Matjila stated that: “In the above circumstances, it is therefore the Public Investment Corporation’s submission that I and (in particular the Public Investment Corporation Board) have not, as alleged, failed to implement the recommendations of the GFIA Report”.

5.1.7. It was established during the investigation that, in 2011, the Public Investment Corporation participated in two (2) rounds of capital raising by SacOIL, with the initial investment amounting to approximately seventy million rand (R70 million) made in March 2011, and the second investment amounting to approximately seventy five million rand (R75 million) made in August or about September 2011, ostensibly on behalf of the GEPF.

5.1.8. Further that, on 22 June 2015, following the conclusion of the second investment (the investment of R75 million by the Public Investment Corporation in SacOIL), the Public Investment Corporation commissioned Gobodo to conduct a forensic investigation into allegations of impropriety in connection with the transaction with a view to determining whether the Public Investment Corporation’s policies and investment processes associated with the transaction were complied with or not. It was noted that, Gobodo made the following findings and recommendations to be implemented by the Public Investment Corporation, *inter alia*:
5.1.8.1. The institution of disciplinary proceedings against Executive Head of the Listed Investments at the Public Investment Corporation, Mr Fidelis Madavo for his failure to execute his duties properly and with the necessary due diligence;

5.1.8.2. The recovery of losses incurred as a result of the Public Investment Corporation investment of R75 million in SacOil from any official of the Public Investment Corporation who may have been implicated and/or was involved in the conclusion of the transaction;

5.1.8.3. The revision of the Public Investment Corporation’s Code of Ethics and the Disciplinary Policies with a view to ensuring that;

5.1.8.3.1. All employees understand and sign-off, that they owe fiduciary duties towards the Public Investment Corporation, and that failure to disclose all relevant information may constitute misconduct which may lead to dismissal;

5.1.8.3.2. Any employee of the Public Investment Corporation, who personally has price sensitive information be required to recuse himself/herself from any meeting where trading is such shares are to be discussed, or any other process where the said individual is supposed to take part in. Failure to recuse himself/herself may constitute misconduct which may lead to dismissal; and

5.1.8.3.3. Any person trading in shares, whether personally or on behalf of the Public Investment Corporation, at a stage when a person has price sensitive insider information may constitute misconduct which may lead to dismissal.

5.1.9. As the report disclosed possible criminal fraud, as well as possible trading in SacOil shares on the basis of price sensitive inside information, the Public Investment Corporation considers obtaining a legal opinion on the appropriate steps to be taken.
5.1.10. It was also noted during the investigation that, following lodging a complaint on 13 May 2016, Mr Holomisa, posed a Parliamentary Question under reference number 1464 [NW1631E] to the former Minister of Finance, Mr Nhlanhla Nene, on 27 May 2016, in which he sought clarity on the following:

5.1.10.1. "Whether an investigation into allegations of impropriety relating to an investment by the Public Investment Corporation of R75 million in SacOil was ever finalised, and if so, what were the final findings and recommendations;

5.1.10.2. Whether the recommendations made in the draft report have been acted upon, if not, why not, if so, what were the relevant details;

5.1.10.3. Whether disciplinary proceedings were instituted against Mr Madavo as recommended in the draft report, if not, why not, if so, what were the outcomes;

5.1.10.4. Whether the possible criminal fraud disclosed by the draft report was reported to the law enforcement agencies, if not, why not, if so, what are the relevant details; and

5.1.10.5. Whether public monies (sic) were recovered from responsible persons as recommended in the draft report, if not, why not, if so, what are the relevant details". (sic)

5.1.11. In his response, the former Minister of Finance stated that he had been informed by the Public Investment Corporation that the questions were based on a highly confidential report following a request from the Public Investment Corporation to Gobodo to conduct a forensic investigation into a certain transaction for the purchasing of SacOil shares. Further that, the Public Investment Corporation stated that it did act on the recommendations made in the report to the satisfaction of the Board of the Public Investment Corporation.
5.1.12. It was also established that, on 30 October 2015, the Public Investment Corporation Board of Directors convened a meeting, following the submission of the draft forensic investigation report by Dr Matjila, wherein the findings and recommendations made were discussed.

5.1.13. As indicated, Gobodo found that Mr Fidelis Madavo had failed to ensure that the Public Investment Corporation complied with the investments policies and procedures and thus failed execute his duties properly and with diligence in connection with the SacOil transaction, and as a consequence, it was recommended that the Public Investment Corporation considers instituting disciplinary proceedings against him.

5.1.14. It was also noted from the minutes of a meeting of the Board of Directors, that following deliberations on the matter and in having taken the views of management into consideration, the Board resolved that a verbal written warning be extended to Mr Madavo for his failure to execute his duties properly and with due diligence. Hereunder an extract from the minutes of a meeting of the Board of Directors:

Resolution

1.10. The Board RESOLVED that:

1.10.1 There was not sufficient proof that the employee in question was part of any fraudulent actions and that there was no breach of processes as such as there was no process in place – although there might have been negligence, there was no Intentional fraudulent actions;

1.10.2. A verbal warning be extended to the employee who is still in PIC’s employ; and that

1.10.3. Mr Maqhawe’s employer be informed of the matter and that PIC will withdraw its funds if no action is taken.
5.1.15. Consequently, on 5 November 2015, following a Board of Directors resolution, Dr Matjila issued Mr Madavo with a written warning relating to his conduct as identified in the Gobodo report and advised that should the conduct and omissions identified by Gobodo recur, a more serious sanction would be imposed.

5 November 2015
Mr Fidelis Madavo
Executive Head: Listed Investments
C/O Public Investment Corporation SOC Limited
Block C, Riverwalk Office Park
Protoosberg Road, Menlo Park

Dear Mr Madavo

SACOIL LIMITED: FINDINGS AND BOARD RECOMMENDATIONS

1 Consequent to the above matter and the recommendation approved by the board, this letter serves as a written Warning to you, in relation to the conducts and omissions on your part, assigned by the findings of the investigation report ("the Report") on the matter.

2 Whilst every effort has been made to ensure that structurally, the conducts and omissions complained of in the Report are not repeated, we have recognise the role you played as a portfolio manager; your reporting line as well as the then delegation of authority and considering the current role you play as Executive Head: Listed Investments, we have determined that a warning of this nature should be appropriate to achieve a mitigation against any future occurrences of the above conduct and/or omissions.

3 Please note that should the conduct and omissions above be repeated such an event may warrant a more serious sanction.
4. You are encouraged to ensure that you view this warning seriously and take the necessary corrective action to adhere to all current policies and procedures of the PIC, diligently as expected from an employee in your office.

Yours sincerely

DR DANIEL MATJILA
CHIEF EXECUTIVE OFFICER
PUBLIC INVESTMENT CORPORATION SOC LIMITED

5.1.16. It was further noted that Gobodo found that, the General Manager: Internally Managed Equities at the time, Mr Maqhawe Dlamini, was found to have traded in SacOIL shares on the basis of him having price sensitive inside information and failed to disclose to the employer that he had purchased the SacOIL shares amounting to approximately seventy thousand rands (R70 000.00).

5.1.17. As a result, Gobodo recommended that, as the report disclosed possible criminal fraud, as well as possible trading in SacOIL shares on the basis of price sensitive inside information, the Public Investment Corporation must consider obtaining a legal opinion on the appropriate steps to be taken.

5.1.18. It was further noted that on 27 July 2015, Mr Maqhawe Dlamini was interviewed by Gobodo. During the interview, he conceded that he had bought the SacOIL shares and also conceded that he did not disclose nor inform the employer about the purchase, as well as obtain approval from the Chief Executive Officer of the Public Investment Corporation as required by the Public Investment Corporation’s policy. He further stated that he had sold the shares at a substantial loss, after his services were terminated by the Public Investment Corporation.
5.1.19. On 30 May 2018, a letter requesting a response on whether the Public Investment Corporation had obtained a legal opinion in connection with the appropriate steps to be taken against Mr Maqhawe Dlamini was sent to Dr Dan Matjila.

5.1.20. A response in this regard was submitted on 28 June 2018, wherein Dr Dan Matjila stated that, the Financial Services Board (now the Financial Sector Conduct Authority), in its capacity as the regulator for Public Investment Corporation as an Asset Manager, established its own enquiry into the matter to address questions pertaining to possible insider trading and other conduct relevant in terms of the legislation they are mandated to manage.

5.1.21. In a letter dated 2 August 2018, following further enquiries, Dr Matjila stated that it is to be noted that the Financial Sector Conduct Authority has concluded its investigation, and found that no legal action will be taken against any individual or entity in this matter.

5.1.22. In this regard, Dr Matjila submitted a copy of a letter from the FSB’ Senior Investigator: Directorate of Market Abuse, Mr Dylan Frank dated 28 March 2018, addressed to the Public Investment Corporation’s Executive Head: Legal Services, Mr Ernest Nesane, which illustrated that the FSB resolved to close the investigation and recommended that no legal action would be taken against any individual or entity in connection with the transaction.
5.1.23. It was noted that, following the advice by the Public Investment Corporation Legal Department that it would not be in the Public Investment Corporation’s interest to institute legal action against the employees who were involved in the transaction, the Board of Directors resolved that Mr Maqhawe Dlamini’s employer, Mvununala Asset Management, be informed of the matter and further that the Public Investment Corporation would withdraw its funding of Mvununala Asset Management if no action is taken.
5.1.24. During the investigation, I endeavoured to obtain a copy of the legal opinion and/or legal advice asserted to have been obtained by the Public Investment Corporation and/or Board of Directors in connection with appropriate steps to be taken against an employee who had traded in SacOil shares on the basis of him having price sensitive inside information, however, same could not be provided on the basis that it could not be found.

5.1.25. As a consequence, on 26 July 2019, a meeting was held between the Public Protector and the Public Investment Corporation’s Acting Head Legal Executive, Ms Lindiwe Dlamini and the Acting Chief Financial Officer, Mr Brian Mavuka, in which the implementation of recommendations made in the Gobodo draft report was discussed and wherein the Public Investment Corporation’s Acting Head Legal Executive, Ms Lindiwe Dlamini committed to provide the Public Protector with a comprehensive implementation report subsequent to tabling same in the Board of Directors’ meeting scheduled for 13 September 2019.

5.1.26. Following the tabling of the recommendations made in the Gobodo report in the Board of Directors’ meeting for discussion, on 24 September 2019, the Chairperson of the Board of Directors, Dr Reuel Khoza, submitted a response in connection with the implementation of recommendations made in the Gobodo report and stated in Paragraph 4 that:

“In light of the appointment of our new Board, and considering that the remedial action taken against certain employees was implemented by the previous Board, we do not believe that we are in a position to deviate from the remedial action implemented by the Board at that time.”
5.1.27. On 21 November 2019, a further letter requesting the Public Investment Corporation to provide a detailed statement and an explanation whether following the finalisation of the forensic investigation conducted by Gobodo Forensic and Investigating Accounting (Pty) Ltd, the Public Investment Corporation obtained a legal opinion as recommended in the draft report, and if not so, what were the reasons for failing to do so.

5.1.28. On 4 December 2019, the Public Investment Corporation, through the Head of Legal, Ms Lindwe Dlamini, stated that, the Public Investment Corporation member who had alluded to obtaining a legal opinion has since left the employ of the Public Investment Corporation and as a result, it necessitated a detailed search in all the company’s records for the legal opinion. Notwithstanding their efforts, the legal opinion could not be located.

5.1.29. Ms Dlamini also confirmed that the Public Investment Corporation does not have, in its records, the legal opinion and as a result, the Public Investment Corporation was not in a position to furnish the Public Protector with the requested information.

5.1.30. With regard to the losses incurred by the Public Investment Corporation as a result of an investment by the Public Investment Corporation in SacOil amounting to approximately R75 million, it was noted that Gobodo recommended that the Public Investment Corporation must consider recovering losses from responsible persons.

5.1.31. On 2 August 2018, in response to my enquiries on whether the Public Investment Corporation had recovered losses incurred in connection with the transaction, Dr Dan Matjila stated that, “The subscription of ordinary shares by the Public Investment Corporation in SacOil on behalf of the GEPF, did not amount to a loss to the Public Investment Corporation”.

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5.1.32. In substantiating his response, Dr Matjila submitted a copy of a share register indicating that the Public Investment Corporation had subscribed to one hundred and eleven million nine hundred and forty thousand two hundred and ninety eight (111 940 298) ordinary shares at a share price of R0.67, which amounted to approximately R75 million, which illustrates that the Public Investment Corporation and/or the GEPF did not incur any losses.

**Schedule**

<table>
<thead>
<tr>
<th>Shareholders Name and address for entry in the Company’s share register:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PUBLIC INVESTMENT CORPORATION SOUTH AFRICA</strong></td>
</tr>
<tr>
<td>Number of SecOII ordinary shares</td>
</tr>
<tr>
<td>Issue price per SecOII ordinary share</td>
</tr>
<tr>
<td>Subscription proceeds</td>
</tr>
</tbody>
</table>

5.1.33. In addition, it was noted that the Public Investment Corporation Board of Directors resolved in a meeting held on 30 October 2015, that although there might have been negligence, there was no intentional fraudulent actions and as a consequence, resolved that a verbal written warning must be extended to Mr Madavo for his failure to execute his duties properly and with due diligence. Further that, his employer be informed of the matter, and further that the Public Investment Corporation would withdraw its funds if no action is taken.

5.1.34. It was further noted that Gobodo recommended that the Public Investment Corporation must consider reviewing its Code of Ethics and the Disciplinary Policies with a view to ensuring that:

5.1.34.1. "All employees understand and sign-off, that they owe fiduciary duties towards the Public Investment Corporation, and that failure to disclose all relevant information may constitute misconduct which may lead to dismissal;"
5.1.34.2. Any employee of the Public Investment Corporation, who personally has price sensitive information be required to recuse himself/herself from any meeting where trading is such shares are to be discussed, or any other process where the said individual is supposed to take part in. Failure to recuse himself/herself may constitute misconduct which may lead to dismissal; and

5.1.34.3. Any person trading in shares, whether personally or on behalf of the Public Investment Corporation, at a stage when a person has price sensitive insider information may constitute misconduct which may lead to dismissal”.

5.1.35. On 25 July 2018, a further letter issued in terms of the provisions of section 7(4)(a) of the Public Protector, 1994, was sent to Dr Matjila with a view to obtaining confirmation on whether the Public Investment Corporation had since revised its policies.

5.1.36. The Public Investment Corporation responded on 2 August 2018, and stated, through the CEO, Dr Dan Matjila, that the Public Investment Corporation generally reviewed its policies on a regular basis and that the Code of Ethics Policy and the Disciplinary Code Policy had been revised to reflect the current practices and to ensure the heightened level of compliance, as well as ethical conduct by its employees and directors.

5.1.37. In addition, Dr Matjila stated that all Public Investment Corporation employees were obliged to complete and submit on an annual basis a Confidentiality Agreement and Declaration of Interests. In this regard, Dr Matjila submitted a copy of Mr Madavo’s completed Confidentiality Agreement and Declaration of Interests as an example. The copy is attached hereunder:
5.1.38. He also stated that the Public Investment Corporation has since revised its Code of Ethics Policy to encourage its Directors, as well as its employees at all levels to apply due diligence procedures with a view to eliminate as far as reasonably possible the risk of its clients incurring losses due to, amongst others, theft, fraud, dishonest acts, poor administration, negligence, professional misconduct or culpable omissions.
5.1.39. It was noted from the documentation submitted by the Public Investment Corporation that, in March 2016, the Public Investment Corporation revised its Code of Ethics Policy as recommended in the Gobodo report, in particular, inserted a clause which states as follows:

"All employees are expected to be familiar with their roles and duties and Public Investment Corporation internal policies and procedures, as failure to comply with the policies and procedures will be considered to be misconduct and employees may be subject to disciplinary action that could lead to dismissal. Public Investment Corporation may report the relevant employee to their professional body".

5.1.40. With regard to the revision of the Disciplinary Policy, it was noted that the Public Investment Corporation has since inserted a sanction in the policy, which provides that failure to put the employer's interests first in the execution of his/her duties would, if it is:

5.1.40.1. First offence amount to a written warning,

5.1.40.2. Second warning it would amount to a final warning, and

5.1.40.3. Third offence, it would amount to dismissal". (sic)

Application of the relevant law and prescripts

5.1.41. The Public Investment Corporation Act, 2004 Act No. 23 of 2004] (the Act), which repealed the Public Investment Commissioners Act, 1984 [Act No. 45 of 1984] and terminated the term of office of commissioners, is the key legislation providing for, inter alia, the establishment of a juristic person known as the Public Investment Corporation and for the transfer of the rights, obligations and assets of the commissioners to the corporation.
5.1.41.1. Section 1 of the Act provides that, "in this Act, unless the context indicates otherwise, a "board" means the board of directors of the corporation".

5.1.41.2. Section 6(1) and (3) of the Act provides that, "The Minister must, in consultation with Cabinet, determine and appoint the members of the board. The members of the board must be appointed on the grounds of their knowledge and experience, with due regard to the Financial Advisory and Intermediary Services Act, which, when considered collectively, should enable the board to attain the objects of the corporation".

5.1.41.3. Section 8 of the Act provides that, "subject to the provisions of this Act, the board must control the business of the corporation, direct the operations of the corporation and exercise all such powers of the corporation that are not required to be exercised by the shareholders of the corporation".

5.1.42. The Companies Act, 2008 [Act No. 71 of 2008] (the Act), is the key legislation providing for, inter alia, the incorporation, registration, organisation and management of companies. Section 9(1) of the Act provides that; "Subject to section 5(4) and (5), any provision of this Act that applies to a public company applies also to a state-owned company, except to the extent that the Minister has granted an exemption in terms of subsection (3)".

5.1.42.1. Section 66(1) thereof provides that; "the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise".
5.1.43. The Public Finance Management Act, 1999 [Act No. 1 of 1999], is the main legal instrument that regulates financial management and procurement in the public service. Its objectives are to regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments.

5.1.44. Section 1 of the PFMA, 1999, defines irregular expenditure "as expenditure, other than unauthorised expenditure incurred in contravention of or that is not in accordance with a requirement of any applicable legislation".

5.1.45. The evidence discussed above indicates that, on 22 June 2015, the Public Investment Corporation commissioned an investigation which was conducted by Gobodo Forensic and Investigative Accounting (Pty) Ltd with a view to determining whether there was any impropriety on the part of the Public Investment Corporation and/or its employees relating to an investment of seventy five million rand (R75 million) by the Public Investment Corporation in SacOIL Holdings (Pty) Ltd.

5.1.46. The evidence also indicates that, Gobodo Forensic and Investigative Accounting (Pty) Ltd made the following recommendations following the completion of its investigation:

5.1.46.1. The Public Investment Corporation considers instituting disciplinary proceedings against Executive Head of the Listed Investments at the time, Mr Fidelis Madavo for his failure to execute his duties properly and with the necessary due diligence;
5.1.46.2. Consider recovering any losses incurred from any official of the Public Investment Corporation who may have been implicated and/or was involved in the conclusion of the transaction;

5.1.46.3. Revise the Public Investment Corporation’s Code of Ethics and the Disciplinary Policies; and

5.1.46.4. As the report disclosed possible criminal fraud, as well as possible trading in SacOIL shares on the basis of price sensitive inside information, the Public Investment Corporation considers obtaining a legal opinion on the appropriate steps to be taken.

Conclusions

5.1.47. Based on the information and evidence obtained during the investigation and the application of the legal framework to the facts of the matter, it can be concluded that:

5.1.47.1. The Public Investment Corporation Board of Directors resolved that Mr Fidelis Madavo be subjected to a disciplinary proceedings which resulted in him being issued with a written warning for his failure to execute his duties properly and with due diligence in respect of an investment of seventy five million rand (R75 million) by the Public Investment Corporation in SacOIL (Pty) Ltd;

5.1.47.2. The Public Investment Corporation subscribed to one hundred and eleven million nine hundred and forty thousand two hundred and ninety eight (111 940 298) ordinary shares at a share price of R0.67, which amounted to approximately seventy five million rand R75 million, which illustrates that the Public Investment Corporation and/or the GEPF did not incur any losses;
5.1.47.3. Following the legal advice obtained from its internal Legal Department, the Public Investment Corporation Board of Directors resolved that, although there might have been negligence, there was no intentional fraudulent actions on the part of its employees. As a consequence, it was resolved that a verbal written warning must be extended to Mr Fidelis Madavo for his failure to execute his duties properly and with due diligence and that Mr Maqhawe Dlamini's employer be informed of his conduct relating to trading in SacOil shares based of him having inside price sensitive information, failure to which the Public Investment Corporation would withdraw its funds if no action is taken.

5.1.47.4. The Public Investment Corporation has since revised its Code of Ethics Policy as recommended in the Gobodo report, in particular, by inserting a clause which states as follows:

"All employees are expected to be familiar with their roles and duties and Public Investment Corporation internal policies and procedures, as failure to comply with the policies and procedures will be considered to be misconduct and employees may be subject to disciplinary action that could lead to dismissal. Public Investment Corporation may report the relevant employee to their professional body". (sic)

5.1.47.5. Further to that, the Public Investment Corporation has since revised its Disciplinary Policy and inserted a sanction which provides that failure by an employee of the Public Investment Corporation to put the employer's interests first in the execution of his/her duties would, if it is:

5.1.47.6. "First offence amount to a written warning,

5.1.47.7. Second warning it would amount to a final warning, and

5.1.47.8. Third offence, it would amount to dismissal". (sic)
6. FINDINGS

Having considered the evidence obtained during the investigation weighed against the relevant regulatory framework as well as the complaint received when weighed against the standard that was expected to be upheld by the Public Investment Corporation, I now make the following findings:

6.1 Regarding whether the Public Investment Corporation did not implement recommendations made in the Gobodo Forensic Investigation Report, and if not so, whether the failure by the Public Investment Corporation to implement the recommendations caused the Public Investment Corporation to incur irregular expenditure:

6.1.1. The allegation that the Public Investment Corporation did not implement the recommendations made in the Gobodo Draft Forensic Investigation Report issued on 7 August 2015, is not substantiated.

6.1.2. The information obtained during the investigation indicates that, Mr Madavo was subjected to a disciplinary process for his failure to execute his duties with due diligence in connection with the SacOil transaction as recommended in the Gobodo draft forensic investigation report.

6.1.3. The information also indicates that the Public Investment Corporation subscribed to one hundred eleven million nine hundred and forty thousand two hundred and ninety eight (111 940 298) ordinary shares at a share price of R0.67, which amounted to approximately R75 million, which illustrates that neither the Public Investment Corporation nor the GEPF incurred any losses.
6.1.4. It was noted that the Public Investment Corporation obtained legal advice from its Legal Department in connection with a recommendation that the Public Investment Corporation must consider obtaining a legal opinion on the appropriate steps to be taken against an employee who traded in SacOIL shares on the basis of him having price sensitive inside information.

6.1.5. The information further indicates that the Public Investment Corporation has since revised its Code of Ethics Policy, as well as its Disciplinary Policy with a view encouraging its Directors, as well as its employees at all levels to apply due diligence procedures with a view to eliminating as far as reasonably possible the risk of its clients incurring losses due to, inter alia, theft, fraud, dishonest acts, poor administration, negligence, professional misconduct or culpable omissions.

6.1.6. In the circumstances, I am inclined to conclude that the Public Investment Corporation had implemented recommendations made in the Gobodo Forensic Investigative and Accounting (Pty) Ltd's Forensic Investigation Report. As a corollary to this, I am not making a finding and taking any appropriate remedial action as envisaged by section 182(1)(a) of the Constitution, 1996 and section 6(4)(a)(i) of the Public Protector Act, 1994.

7. **REASONS FOR CLOSURE**

7.1. In terms of section 7(1)(a) of the Public Protector Act, the Public Protector had to determine on the basis of what was found from the preliminary investigation, how the matter should be dealt with.
7.2. The pursuance of the matter and remedial action that I may consider should adverse findings be made from a further investigation will serve no judicious purpose on the basis that, the Accounting Authority and the Chief Executive Officer of the Public Investment Corporation would not be able to take any action against Mr Maqhawe Dlamini and Dr Dan Matjila, since they are no longer in the employ of the Public Investment Corporation.

7.3. In addition, the Minister of Finance would not be able to take any action against the Accounting Authority on the basis that a new Accounting Authority has since been appointed by the Minister of Finance, Mr Tito Mboweni and therefore the matter has become moot.

7.4. The principle of mootness was echoed in the Constitutional Court in a matter between the National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs\(^1\) para 21 footnote 18 remarked, "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law".

7.5. Notice in terms of Rule 42(1) of the Public Protector Investigation Rules published in Government Gazette No. 41903 dated 14 September 2018, was issued to Mr Bantu Holomisa on 15 January 2020, with the return date for the submission of a response set for 4 February 2020, affording him the opportunity to submit further representations on why I should not proceed to close this matter.

\(^1\) 2000 (2) SA 1 (CC)
7.6. On 20 January 2020, Mr Holomisa, through his Personal Assistant, Ms Pelokazi Danti, submitted a response to a Rule 42(1) Notice and stated that he had noted the massive cover up by Public Investment Corporation Management and Board.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 20/01/2020