
PUBLIC PROTECTOR
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Report on allegations of improper conduct in connection with the appointment of a service provider by the Department of Labour, as well as allegations of maladministration, corruption, fruitless and wasteful expenditure and the misuse of investment money by the Compensation Fund

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT IN CONNECTION WITH THE APPOINTMENT OF A SERVICE PROVIDER BY THE DEPARTMENT OF LABOUR, AS WELL AS ALLEGATIONS OF MALADMINISTRATION, CORRUPTION, FRUITLESS AND WASTEFUL EXPENDITURE AND THE MISUSE OF INVESTMENT MONEY BY THE COMPENSATION FUND
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Executive Summary

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

(ii) The report relates to an investigation into allegations improper conduct in connection with the appointment of a service provider by the Department of Labour (DOL), as well as allegations of maladministration, corruption, fruitless and wasteful expenditure and the misuse of investment money by the Compensation Fund (CF).

(iii) I received a complaint from Mr. Bantu Holomisa, MP and leader of the United Democratic Movement (UDM) (hereinafter referred to as the Complainant), in which complaint he alleged that: -

(aa) **There was maladministration and corruption by the Department of Labour in connection with the irregular appointment of Accenture:** -

- Accenture, a management consulting, technology and outsourcing services company, was appointed to provide IT capability, leverage expertise and specialised knowledge to the Department;

- The former Minister of Labour, Ms Oliphant, enjoyed a close relationship with one of the Directors of the South African division of Accenture;

- There existed a corrupt relationship between the former Minister and her close relative which led to Accenture being awarded a closed tender; and

- The former Minister did not declare her relationship with Accenture.
(bb) **There was maladministration in connection with the appointment of New Integrated Credit Solutions (Pty) Ltd (NICS) by the Compensation Fund, and, as a result, the Compensation Fund (CF) incurred fruitless and wasteful expenditure:**

- The CF appointed an external debt collector, NICS, but despite this, the Debtors' Book increased from R3.3 billion in 2010 to a staggering R8.9 billion in 2013. In addition, it was alleged that the contract awarded to NICS was deliberately manipulated and unilaterally changed as the initial specifications, whereby NICS was supposed to only collect debts older than 180 days, were deviated from;

- In this respect, it was further alleged that there was a duplication of duties as NICS collected on simpler cases to make quick cash whilst the internal staff of the Compensation Fund were also pursuing the same cases; and

- The former Commissioner, Mr Shadrack Mkhonto, ignored legal advice from Senior Counsel that the contract with NICS should be terminated on the basis of poor performance.

(cc) **The CF was misusing investment money:**

- The Complainant alleged that the CF intended to transfer an amount of R2.3 billion to the Department of Agriculture, Forestry and Fisheries (DAFF) under the guise of a social responsibility investment, in order to fund further development projects which were not related to injuries on duty. In addition, it was alleged that the management of the CF had no plan to achieve financial returns on the said investment.
(dd) The former Commissioner, Mr Shadrack Mkhonto, authorised advance payments to private companies to the tune of R546 million without the necessary invoices to reconcile payments.

(iv) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the former Minister had a duty to disclose her relationship with an employee of Accenture at the time when the Department conducted business with Accenture, and if so, whether such failure constituted improper conduct and maladministration;

(b) Whether there were irregularities in the award, extension and contract management of bid DCC08/2008 for Debt Collection and Debtor Management Control Centre Services, as a result of which the Compensation Fund incurred fruitless and wasteful expenditure;

(c) Whether the former Commissioner of the Compensation Fund authorised advance payments to medical service providers without the necessary invoices to reconcile the payments, and as a result of which the Compensation Fund incurred irregular expenditure.

(v) The investigation process was conducted through meetings and interviews with relevant former and current officials from the DOL and the CF, and other individuals who were believed to have information relevant to the investigation; as well as an inspection of all relevant documents and analysis and application of all relevant laws, policies and related prescripts.
(vi) Key laws and policies taken into account to determine if there had been improper conduct and maladministration by the former Minister and by the CF were principally those imposing administrative standards that should have been upheld by them. Those are the following: -

a) Section 96(1) of the Constitution of the Republic of South Africa, 1996, which requires Members of the Executive to act in accordance with a Code of Ethics provided for in national legislation;

b) The Executive Members' Ethics Act, 1998, which provides for a Code of Ethics governing the conduct of Members of the Executive;

c) The Executive Ethics Code which regulates the conduct of Members of the Executive when performing their official responsibilities;

d) Section 217 of the Constitution of the Republic of South Africa, 1996, which sets out the standard to be upheld in State procurement or Supply Chain Management processes, to ensure a fair, equitable, transparent, competitive and cost effective public procurement system; and

e) The Public Finance Management Act, 2000, as well as National Treasury Regulations, which regulates the procurement of goods and services by Public Entities, as well as its financial accountability.

(vii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:
a) Regarding whether the former Minister had a duty to disclose her relationship with an employee of Accenture at the time when the Department conducted business with Accenture, and if so, whether such failure constituted improper conduct and maladministration: -

(aa) The allegation that the former Minister of Labour had a duty to disclose her relationship with an employee of Accenture at the time when the Department conducted business with Accenture, is unsubstantiated;

(bb) The Constitution prohibits Members of the Executive to expose themselves to a situation involving the risk of a conflict of interest. In the circumstances, I am of the view that the situation that the former Minister found herself in, created a perception of a conflict of interest between her official responsibilities and her private interests on an administrative and financial transaction that was concluded through the PFMA and Procurement legislation long before she was appointed as the Minister of Labour in 2010. There is no legislation that clearly compelled the Minister at the time to declare the perceived conflict of interest as this responsibility falls clearly within the key responsibilities of the Accounting Officer;

(cc) Even though in my opinion, Accenture declared that the former Minister's son was employed by the company, I could not find evidence that the former Director-General or any official in the Department was influenced by the Minister to conclude the said transaction as there is also no evidence that was presented to me that the Minister was involved in appointing and extending the contract through the deviation or any other decision that she influenced in these transactions.

b) Regarding whether there were irregularities in the award, extension and contract management of bid DCC08/2008 for Debt Collection and Debtor
Management Control Centre Services, as a result of which the Compensation Fund incurred fruitless and wasteful expenditure: -

(aa) The allegation that there were irregularities in the award, extension and contract management of bid DCC08/2008 for Debt Collection and Debtor Management Control Centre (DMCC) Services, as a result of which the CF incurred fruitless and wasteful expenditure, is substantiated;

(bb) The initial award of the contract was irregular because the establishment of the DMCC was de-scoped, and the CF agreed to the handover of debt which were 60 days and older without the prior approval of the Bid Adjudication Committee (BAC). In addition, the Commissioner could not award the contract as the value of the contract exceeded his financial delegation, which was R30 million;

(cc) The conduct of the CF in the award of bid DCC08/2008 for Debt Collection and DMCC Services, was in contravention of its SCM Policy, and the award exceeded the financial delegation of the Commissioner;

(dd) The data required was given in CSV format and no interface was established between systems. This was a material breach of the SLA entered into between the parties, and should have been approved by the BAC;

(ee) The CF failed to conduct due diligence prior to the award of the contract to ensure that what was required of it in terms of the award and the SLA was implementable. The CF was unable to provide NICS with interface to its financial systems, and such interface requirement should have been clear during the evaluation of the bids by the CF; alternatively, the CF committed itself in the SLA to a requirement which it knew it was unable to deliver on;
(ff) The conduct of the CF constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

(gg) As a result of the irregular award, the CF incurred **irregular expenditure** in the amount of **R213 240 020.00**, being the total amount in commission paid to NICS during the initial three (3) year contract period, as held in the Arbitration Award;

(hh) The BAC of the CF approved the extension of the contract, deviating from a competitive bidding process;

(ii) The deviation from a competitive bidding process was in violation of the National Treasury (NT) Instruction Note of 31 May 2011, in terms of which it required the NT’s approval for the extension above R10 million; and in addition, could only extend the contract to the value of R15 million or 15% of the original contract value; and Treasury Regulation 16A6.4;

(jj) The conduct of the CF in the extension of the contract with NICS constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

(kk) As a result of the failure by the CF to conduct due diligence prior to the award and the failure by the CF to exercise proper contract management over the contract awarded to NICS, the CF incurred **fruitless and wasteful expenditure** in the amount of **R349 159 694.00**;

(ll) The former Commissioner of the CF failed to ensure effective, efficient, economical and transparent use of the financial and other resources of the CF; and further failed to take appropriate steps to prevent irregular, fruitless and wasteful expenditure;
(mm) The conduct of the former Commissioner, Mr Mkhonto, constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

c) Regarding whether the former Commissioner of the Compensation Fund authorised advance payments to medical service providers without the necessary invoices to reconcile the payments, and as a result of which the Compensation Fund incurred irregular expenditure: -

(aa) The allegation that the former Commissioner of the CF authorised advance payments to medical service providers without the necessary invoices to reconcile the payments, as a result of which the CF incurred irregular expenditure, is substantiated;

(bb) By its own admission, the CF made advance payments to five (5) service providers in the amount of R456 866 564.68;

(cc) These payments were made in contravention of the Treasury Regulations and the CF’s SCM Policy, and was therefore irregular;

(dd) The conduct of the CF constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(viii) The appropriate remedial action I am taking in pursuit of section 182(1)(c), with the view to remedying the improper conduct and maladministration, is the following:
The President of the Republic of South Africa to:

(aa) Take cognisance of the findings of improper conduct and maladministration made against the former Minister of Labour, Ms Oliphant, mentioned in this report.

The Minister of Employment and Labour to:

(aa) Take cognisance of the findings of improper conduct, maladministration, irregular and fruitless and wasteful expenditure by the CF as mentioned in this report.

The Directors-General of National Treasury, Office of the Public Service Commission, Department of Public Service and Administration in consultation with the DG in the Presidency to:

(aa) Initiate a process to review the rules relating to declaration of conflict of interest to include the management of relationships by Members of the Executive, specifically situations where a Member of the Executive is related to a person or company which conducts business with Departments falling under their portfolios, and further where relatives of Members of the Executive are appointed to positions in Departments falling under their portfolios. This review should be conducted to ensure that the processes followed in recruitment and procurement processes are open, fair and transparent without prejudicing their family members whose rights cannot be prejudiced by restricting them to do business or to be employed in the public service.

The DG of the Department of Labour to:

(aa) Within fifteen (15) working days from the date of this report, take cognisance of the findings of improper conduct and maladministration by the former
Commissioner of the CF and submit to the Public Protector an Action Plan outlining how the remedial action in this report will be implemented;

(bb) Within thirty (30) days of the date of this report, report to the National Treasury the particulars of the irregular expenditure mentioned in this report and to apply for condonation thereof in terms of the relevant prescripts;

(cc) Within hundred and twenty (120) days from date of this report, ensure that such conduct is not repeated and appropriate action is taken to recover any irregular and fruitless and wasteful expenditure incurred through the conduct of the former Commissioner.

The Compensation Commissioner to:

(aa) Within sixty (60) days from date of this report evaluate the effectiveness of the CF’s internal controls on supply chain management processes and identify systemic deficiencies with a view to take corrective action to prevent a recurrence of the improprieties referred to herein;

(bb) Within sixty (60) days from date of this report evaluate the effectiveness of the CF’s internal controls on contract management, specifically relating to the issues outlined in this report, with a view to take corrective action to prevent a recurrence of the improprieties referred to herein;

(cc) Within ninety (90) working days of the date of this report, take appropriate disciplinary action against all members of the BEC and the BAC who are still in the employ of the CF and who were involved in the evaluation, award and extension of bid DCC08/2008 for Debt Collection and Debtor Management Control Services to the CF, and who further were responsible for exposing the CF to acts of maladministration and financial risk in violation of the provisions of
its Supply Chain Management Policy; the Public Finance Management Act and its concomitant Regulations.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT IN CONNECTION WITH THE APPOINTMENT OF A SERVICE PROVIDER BY THE DEPARTMENT OF LABOUR, AS WELL AS ALLEGATIONS OF MALADMINISTRATION, CORRUPTION, FRUITLESS AND WASTEFUL EXPENDITURE AND THE MISUSE OF INVESTMENT MONEY BY THE COMPENSATION FUND

1. INTRODUCTION

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

1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation:

1.2.1 The President of the Republic of South Africa, His Excellency Mr Cyril Ramaphosa;

1.2.2 The Minister of Employment and Labour, Mr Thulas Nxesi, MP;

1.2.3 The Minister of Public Service and Administration, Mr Senzo Mchunu;

1.2.4 The former Minister of Labour, Ms Mildred Oliphant;

1.2.5 The Director-General of the Department of Labour, Mr Thobile Lamati;

1.2.6 The Director-General of the Department of Public Service and Administration, Prof. Richard Levin;

1.2.7 The Compensation Commissioner, Mr Vuyo Mafata;
1.2.8  The Director-General in Presidency, Dr Cassius Lubisi;

1.2.9  The Director-General for the National Treasury, Mr Dondo Mogajane;

1.2.10 The Director-General of the Office of the Public Service Commission, Dr Dohvani Mamphiswana;

1.2.11 The former Directors-General of the Department of Labour, Messrs. Mzwanele Manyi, Nathi Nhleko and Sam Morotoba;

1.2.12 The former Compensation Commissioner, Mr Shadrack Mkhonto;

1.2.13 The Chairperson of New Integrated Credit Solutions, Mr Baker Maseko; and

1.2.14 The Complainant in the matter, Mr Bantu Holomisa, MP and leader of the United Democratic Movement (UDM).

1.3  Section 7(9) Notices were previously sent to the following individuals to enable them to respond to my intended findings: -

1.3.1  The former Minister of Labour, Ms Mildred Oliphant;

1.3.2  The Director-General of the Department of Labour, Mr Thobile Lamati;

1.3.3  The Compensation Commissioner, Mr Vuyo Mafata;

1.3.4  The former Directors-General of the Department of Labour, Messrs. Mzwanele Manyi, Nathi Nhleko and Sam Morotoba;

1.3.5  The former Compensation Commissioner, Mr Shadrack Mkhonto; and

1.3.6  The Chairperson of New Integrated Credit Solutions, Mr Baker Maseko.
1.4 The report relates to an investigation into allegations of improper conduct in connection with the appointment of a service provider by the Department of Labour; as well as allegations of maladministration, corruption, fruitless and wasteful expenditure and the misuse of investment money by the CF.

2. THE COMPLAINT

2.1 I received a complaint from Mr. Bantu Holomisa, MP and leader of the United Democratic Movement (UDM) (hereinafter referred to as the Complainant), in which complaint he alleged that: -

2.1.1 There was maladministration and corruption by the Department of Labour in connection with the irregular appointment of Accenture: -

2.1.1.1 Accenture, a management consulting, technology and outsourcing services company, was appointed to provide IT capability, leverage expertise and specialised knowledge to the Department;

2.1.1.2 The former Minister of Labour, Ms Oliphant, enjoyed a close relationship with one of the Directors of the South African division of Accenture;

2.1.1.3 There existed a corrupt relationship between the former Minister and her close relative which led to Accenture being awarded a closed tender; and

2.1.1.4 The former Minister did not declare her relationship with Accenture.

2.1.2 There was maladministration in connection with the appointment of New Integrated Credit Solutions (Pty) Ltd (NICS) by the Compensation Fund,
and, as a result, the Compensation Fund (CF) incurred fruitless and wasteful expenditure: -

2.1.2.1 The CF appointed an external debt collector, NICS, but despite this, the Debtors’ Book increased from R3.3 billion in 2010 to a staggering R8.9 billion in 2013. In addition, it was alleged that the contract awarded to NICS was deliberately manipulated and unilaterally changed as the initial specifications, whereby NICS was supposed to only collect debts older than 180 days, were deviated from;

2.1.2.2 In this respect, it was further alleged that there was a duplication of duties as NICS collected on simpler cases to make quick cash whilst the internal staff of the Compensation Fund were also pursuing the same cases; and

2.1.2.3 The former Commissioner, Mr Shadrack Mkhonto, ignored legal advice from Senior Counsel that the contract with NICS should be terminated on the basis of poor performance.

2.1.3 The CF was misusing investment money: -

2.1.3.1 The Complainant alleged that the CF intended to transfer an amount of R2.3 billion to the Department of Agriculture, Forestry and Fisheries (DAFF) under the guise of a social responsibility investment, in order to fund further development projects which were not related to injuries on duty. In addition, it was alleged that the management of the CF had no plan to achieve financial returns on the said investment.

2.1.4 The former Commissioner, Mr Shadrack Mkhonto, authorised advance payments to private companies to the tune of R546 million without the necessary invoices to reconcile payments.
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body 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 In the Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others¹ the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector: -

3.3.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles;²

¹ CCT 143/15; CCT171/15 [2016] ZACC 11, 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC); 31 March 2016.
² Para [65].
3.3.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced;³

3.3.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints which was the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint;⁴

3.3.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow;⁵

3.3.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to;⁶

3.3.6 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of the investigation and the type of findings made;⁷

³ Para [67].
⁴ Para [68].
⁵ Para [69].
⁶ Para [70].
⁷ Para [71].
3.3.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence;\(^8\)

3.3.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation;\(^9\)

3.3.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case.\(^10\)

3.3.10 The remedial action taken by the Public Protector has a binding effect.\(^11\) The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”\(^12\)

3.4 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.5 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state

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\(^8\) Para [71(a)].  
\(^9\) Para [71(d)].  
\(^10\) Para [71(e)].  
\(^11\) Para [76].  
\(^12\) Ibid para [73].
affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate Alternative Dispute Resolution (ADR) mechanisms.

3.6 The Department of Labour and the Compensation Fund are both organs of state and their conduct amount to conduct in state affairs, and as a result, the matter falls within the ambit of the Public Protector's mandate.

3.7 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

3.8 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute 'special circumstances', some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainants and the overall impact of the investigation; whether the prejudice suffered by the Complainants persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitute 'special circumstances' depends on the merits of each case.

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 of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The complaint was classified as a Good Governance and Integrity complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act, 1994.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
  - What happened?
  - What should have happened?
  - Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
  - In the event of maladministration what would it take to remedy the wrong occasioned by the improper conduct and maladministration?

4.2.2 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 to what extent the Minister and the CF fulfilled their statutory responsibilities.
4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by Members of the Executive and the Department or organ of state to prevent improper conduct and maladministration. In this case, key reliance was placed on legislation, prescripts and policies regulating ethnical conduct for Members of the Executive, as well as financial management and procurement by Public Entities.

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

4.3 On analysis of the complaint, the following were issues considered and investigated:

4.3.1 Whether the former Minister had a duty to disclose her relationship with an employee of Accenture at the time when the Department conducted business with Accenture, and if so, whether such failure constituted improper conduct and maladministration;

4.3.2 Whether there were irregularities in the award, extension and contract management of bid DCC08/2008 for Debt Collection and Debtor Management Control Centre Services, as a result of which the Compensation Fund incurred fruitless and wasteful expenditure;

4.3.3 Whether the former Commissioner of the Compensation Fund authorised advance payments to medical service providers without the necessary invoices to reconcile the payments, and as a result of which the Compensation Fund incurred irregular expenditure.

4.4 The Key Sources of information

4.4.1 Documents
4.4.1.1 Declaration of Interest Form completed by Mr Gavin Parsons on behalf of Accenture SA (Pty) Ltd, dated 21 September 2011;

4.4.1.2 Formal response to the allegations with supporting documentation received from the Compensation Fund on 06 November 2017;

4.4.1.3 DBAC documents relating to the appointment of Accenture received from the DG of Labour, Mr Lamati, on 30 August 2018;

4.4.1.4 Report on the appointment of Accenture as a service provider to the Department of Labour, presented to the Public Protector South Africa’s investigation team during the subpoena hearing which was held with the Director-General of the Department of Labour on 30 August 2018;

4.4.1.5 Documents received from Ms Ella Ntshabele, the Project Manager of the NICS project, on 13 February 2019;

4.4.1.6 Documents received from Ms Ella Ntshabele, the Project Manager of the NICS project, on 14 February 2019;

4.4.1.7 Documents received from Ms Ella Ntshabele, the Project Manager of the NICS project, on 18 February 2019

4.4.1.8 Documents received from Mr Shadrack Mkhonto, the former Commissioner of the Compensation Fund, on 19 February 2019;

4.4.1.9 Documents received from De Jager Inc, acting on behalf of New Integrated Credit Solutions, on 22 February 2019;

4.4.1.10 Documents relating to the appointment of Accenture received from Mr Nhleko on 25 February 2019;
4.4.1.11 EXCO Minutes received from the Compensation Fund on 13 March 2019;

4.4.1.12 Formal response to my Notice in terms of section 7(9) of the Public Protector Act, and supporting documents received from Mr Nhleko on 18 July 2019;

4.4.1.13 Combined formal response to my Notice in terms of section 7(9) of the Public Protector Act, and supporting documents received from the Compensation Fund and the Department of Labour on 06 August 2019.

4.4.2 Interviews conducted

4.4.2.1 Subpoena hearing held with the Director-General of the Department of Labour, Mr Lamati, on 30 August 2018;

4.4.2.2 Postponed subpoena hearing held with Messrs. De Jager Inc. on behalf of New Integrated Credit Solutions, on 12 February 2019;

4.4.2.3 Subpoena hearing held with Ms Ella Nthsabele, the Project Manager of the NICS contract, on 13 February 2019;

4.4.2.4 Subpoena hearing held with Mr Shadrack Mkhonto, the former Commissioner of the Compensation Fund, on 13 February 2019;

4.4.2.5 Subpoena hearing held with Mr Baker Maseko, the Chairman of NICS, on 22 February 2019;

4.4.2.6 Meeting held with Mr Nathi Nhleko, former Director-General of the Department of Labour, on 25 February 2019;

4.4.2.7 Subpoena hearing held on 27 February 2019 with Mr Nkululeko Oliphant;
4.4.2.8 Subpoena hearing held with the former Minister of Labour, Ms Mildred Oliphant, on 03 April 2019.

4.4.3 Correspondence sent and received

4.4.3.1 Letter of complaint received from the President of the United Democratic Movement, Mr Bantu Holomisa, dated 14 April 2014;

4.4.3.2 Letter from the Public Protector to the Compensation Commissioner, Mr Mafata, dated 25 October 2017;

4.4.3.3 Letter from the Public Protector to the former Minister of Labour, Ms Oliphant, dated 25 October 2017;

4.4.3.4 Letter from the Public Protector South Africa investigator to the former Chief Executive Officer of Accenture Southern Africa, Mr Mzimba, dated 20 November 2017;

4.4.3.5 Letter from the Public Protector South Africa investigator to the Chairperson of New Integrated Credit Solutions, Mr Maseko, dated 20 November 2017;

4.4.3.6 Letter received by the Public Protector South Africa investigator from the Chairperson of New Integrated Credit Solutions, Mr Maseko, dated 07 December 2017;

4.4.3.7 Letter received by the Public Protector South Africa investigator from Messrs. Werksmans Attorneys, acting on behalf of Accenture South Africa, dated 08 December 2017;

4.4.3.8 Letter from the Public Protector to the former Minister of Labour, Ms Oliphant, dated 13 February 2018;
4.4.3.9 Letter from the Public Protector to the Director-General of the Department of Labour, Mr Lamati, dated 22 March 2018;

4.4.3.10 Letter received by the Public Protector South Africa investigator from the Director-General of the Department of Labour, Mr Lamati, dated 27 August 2018;

4.4.3.11 Letter received by the Public Protector South Africa investigator from Messrs. De Jager Inc. on behalf of New Integrated Credit Solutions, dated 11 February 2019;

4.4.3.12 Email from the Public Protector South Africa investigator to Ms Jordaan of De Jager Inc, dated 11 February 2019;

4.4.3.13 Letter received by the Public Protector South Africa investigator from Messrs. De Jager Inc, dated 12 February 2019;

4.4.3.14 Letter received by the Public Protector South Africa investigator from Messrs. M B A Incorporated, acting on behalf of Mr. Nkululeko Oliphant, dated 11 February 2019;

4.4.3.15 Letter from the Public Protector South Africa to Messrs. M B A Incorporated, acting on behalf of Mr Nkululeko Oliphant, dated 13 February 2019;

4.4.3.16 Letter from the Public Protector South Africa to Messrs. De Jager Inc, acting on behalf of New Integrated Credit Solutions, dated 15 February 2019;

4.4.3.17 Email from the Public Protector South Africa’s investigator to Mr. Asiedu of Messrs. M B A Incorporated, dated 26 February 2019;

4.4.3.18 Email from the Public Protector South Africa’s investigator to Mr Gregory Schneemann, the Chief of Staff of the former Minister of Labour, Ms Oliphant, dated 05 March 2019;
4.4.3.19 Email from the Public Protector South Africa’s investigator to Ms Pamela Salusalu, the Personal Assistant of the former Minister of Labour, Ms Oliphant, dated 22 March 2019;

4.4.3.20 Email from the Public Protector South Africa’s investigator to Ms Pamela Salusalu, the Personal Assistant of the former Minister of Labour, Ms Oliphant, dated 25 March 2019;

4.4.3.21 Section 7(9) Notices issued by the Public Protector to the former Minister of Labour, Ms Oliphant, as well as the former and current Directors-General of the Department of Labour, Messrs. Mzwanele Manyi; Nathi Nhleko; Sam Morotoba and Thobile Lamati; the former and current Compensation Commissioners, Messrs. Shadrack Mkhonto and Vuyo Mafata and the Chairperson of New Integrated Credit Solutions, Mr Baker Maseko;

4.4.3.22 Letter received by the Public Protector South Africa’s investigator from the former Minister of Labour, Ms Oliphant, dated 15 July 2019 and in response to the Public Protector’s Notice in terms of section 7(9) of the Public Protector Act, 1994;

4.4.3.23 Letter received by the Public Protector South Africa’s investigator from the former Compensation Commissioner, Mr Mkhonto, dated 15 July 2019 and in response to the Public Protector’s Notice in terms of section 7(9) of the Public Protector Act, 1994;

4.4.3.24 Letter received by the Public Protector South Africa’s investigator from Messrs. De Jager Inc, acting on behalf of New Integrated Credit Solutions, dated 16 July 2019 and in response to the Public Protector’s Notice in terms of section 7(9) of the Public Protector Act, 1994;
4.4.3.25 Email received by the Public Protector South Africa’s investigator from Mr Mzwanele Manyi, dated 20 August 2019.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution of the Republic of South Africa, 1996;
4.4.4.2 The Executive Members Ethics Act, 1998;
4.4.4.3 The Public Finance Management Act, 1999;
4.4.4.4 The Compensation for Occupational Injuries and Diseases Act, 1993;
4.4.4.5 Treasury Regulations for departments, trading entities, constitutional institutions and public entities, issued in terms of the Public Finance Management Act, 1999, March 2005;
4.4.4.6 Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management, 31 May 2011;
4.4.4.7 Ministerial Handbook: A Handbook for Members of the Executive and Presiding Officers, approved by Cabinet on 07 February 2007;
4.4.4.10 The Compensation Fund’s Supply Chain Management Policy, 2011.

4.4.5 Case Law

4.4.5.1 Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others [2016] ZACC 11, 31 March 2016;
4.4.5.2 President of the Republic of South Africa and Others v South African Rugby Football Union & Others 2000 (1) SA 1 (CC);

4.4.6 Public Protector Touchstones

4.4.6.1 Report 9 of 2011/2012 of the Public Protector on an investigation into a complaint of a conflict of interest against Mr J Manyi; and

4.4.6.2 Report 31 of 2018/19 of the Public Protector on an investigation into a complaint of an alleged breach of the Executive Ethics Code by the Premier of the Western Cape Provincial Government, Hon. Helen Zille.

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

5.1 Regarding whether the former Minister of Labour had a duty to disclose her relationship with an employee of Accenture at the time when the Department conducted business with Accenture, and if so, whether such failure constituted improper conduct and maladministration:

Common cause facts

5.1.1 In 2002, the Department of Labour entered into a ten (10) year Public-Private Partnership (PPP) with Siemens Business Services. The contract came to an end in November 2012.

5.1.2 In May 2011, Mr Nkosinathi (Nathi) Nhleko took over as the Director-General (DG) of the Department of Labour (DOL), (hereinafter referred to as the former DG). By this time, the Exit and Services Plan which had to be set in place in terms
of the PPP within six months after concluding the agreement, had not been set in place. The termination period in terms of the PPP was set to start in November 2011.

5.1.3 Due to the urgency of the matter and the fact that the time to prepare for termination support was too close, the DOL engaged various Government Departments to solicit advice and to identify a suitable service provider. Based on these engagements, Accenture, the IT service provider providing services to the South African Revenue Services (SARS), was identified as being suitable to assist the DOL.

5.1.4 On 30 August 2011, approval for a deviation from the normal supply chain management (SCM) processes was sought from the DG of the DOL, and on 30 September 2011, the Departmental Bid Adjudication Committee (DBAC) granted approval for the deviation from the normal procurement process. The DOL then appointed Accenture in terms of Treasury Regulation 16A6.4.

5.1.5 Accenture was initially appointed for a period of eighteen (18) months, for the amount of R2 736 000.00, ostensibly to conduct an analysis of the then current IT environment and to assist with the PPP exit plan.

5.1.6 The Service Level Agreement (SLA) between the parties was signed on 2 December 2011. At all relevant times, Accenture was represented by a Mr Busi Radebe, a Senior Executive. Around March 2012, the contract with Accenture was extended for Phase II, at a cost of R8 870 084.64, for the provision of IT services.

5.1.7 Ms Oliphant, was appointed as the Minister of Labour on 01 November 2010.
Issues in dispute

5.1.8 The issue for my determination was whether the alleged close relationship between the former Minister of Labour and an employee of Accenture resulted in the award of the tender to Accenture; and in addition, whether the Minister had a duty to disclose her relationship with an employee of Accenture at the time when the Department conducted business with Accenture.

5.1.9 The Complainant alleged that there was a relationship between the former Minister and a Director of Accenture, which led to Accenture being awarded the tender. In addition, the Complainant alleged that the Minister failed to disclose her relationship with this employee of Accenture.

5.1.10 On 20 November 2017, my investigator wrote to Mr William Mzimba, the then Chief Executive Officer of Accenture South Africa, and requested a response to the allegation(s).

5.1.11 On 8 December 2017, Accenture responded through its Attorneys of Record, Werksmans Attorneys, and indicated that:

"4.1 Since around 2009, as part of Accenture South Africa’s business development initiatives, Busi Radebe, then a Senior Executive but who has since left Accenture South Africa, engaged a number of officials within the Department of Labour, including the commissioners of the Unemployment Insurance Fund (UIF) and the Compensation Fund (CF). The purpose of those meetings was to understand the different challenges the department was facing and to see how Accenture SA could assist in addressing those challenges.

4.2 Mr Nkululeko Oliphant was employed by our client as a Senior Manager: Systems Integration on 1 January 2010 until 31 March 2012, when he left to
take up employment with Deloitte SA. During his employment, Mr Nkululeko Oliphant assisted Mr Radebe with the discussions with the Department of Labour. (own emphasis)

4.3 Ms Mildred Oliphant was appointed Minister of Labour in November 2010;

4.4 In mid-2011 –

4.4.1 Accenture was approached by the Department of Labour ("DoL") which was coming to the end of a 10 year Public/Private Partnership ("PPP") deal with Siemens;

4.4.2 DoL required our client's services in light of this fact to formulate a future strategy for its IT Department and there was little time before the end of the Siemens deal to start a Request for Proposal ("RFP") process;

4.4.3 DoL obtained the requisite consent to deviate from normal procurement procedures to retain our client on a sole source basis;

4.5 On 30 September 2011 our client received notification from the Departmental Bid Adjudication Committee approving deviation from normal bid procedures to appoint our client to assist the DoL with IT services regarding the PPP agreement, for a period of 18 months;

4.6 On 19 October 2011 our client delivered to Mr Nkosinathi Nhleko (the Director-General at DoL) a copy of its engagement letter and its standard business terms together with a declaration of interest letter regarding Mr Oliphant's involvement on the project.” (own emphasis)

5.1.12 The letter referred to by Accenture, allegedly states the following: -

“In November 2010, the South African President announced a cabinet reshuffle. The President appointed Ms Mildred Oliphant as the new Minister of Labour. Minister Oliphant is related to Nkululeko Oliphant. As part of Accenture’s
Code of Business Ethics, I would like to declare Nkululeko’s relationship to the Minister. Given that Nkululeko and I started engaging the department before the appointment of Ms Oliphant as the Minister, Nkululeko will continue to work with me as we continue to engage the different officials within the Department of Labour. (own emphasis)

We would very much appreciate your communication of this notification to other relevant parties both within the Department of Labour and, if you deem this appropriate, the National Treasury or if you would guide us on further disclosures you deem appropriate and necessary for us make in order to ensure full transparency as would meet any requirements that Government’s procurement processes or policy may require.”

5.1.13 According to Accenture, the said letter was hand delivered to the DG, but it received no response. Accenture further indicated that the Minister was not involved in the decision to retain Accenture, and Mr Oliphant was not involved in the process that led to the appointment of Accenture.

5.1.14 I interviewed Ms Oliphant on Wednesday, 03 April 2019. She indicated to me that, when she was deployed, she decided to not participate in any administrative issues, as this fell under the responsibilities of the DG, as the Accounting Officer. She did not participate in any procurement related processes. In fact, according to her, she was not even aware of the process in which the DOL approached Accenture. She further informed me that she had not been briefed about this process by her then DG at any stage.

5.1.15 Ms Oliphant acknowledged that her son worked for Accenture, and stated that he started working there long before she was appointed as the Minister of Labour albeit she was unsure of the exact date of his appointment.
5.1.16 On the question relating to whether she had a duty to declare this relationship, the former Minister indicated that she would have declared if she had been part of the procurement process, but in this instance, she was not even aware of the project and she was not involved in the procurement process.

5.1.17 The letter which was written by Accenture to the then DG, she alluded, was never brought to her attention.

5.1.18 The former Minister indicated further that she would only have been aware of the project had there been challenges and if, for instance, the Auditor-General raised a query. The investigation team understood this evidence to suggest that she would not be involved in any project whilst it is underway, and would only get involved should there be issues around delivery and / or performance.

5.1.19 The information that I have, suggested that the situation within the DOL at that stage was that DOL did not have any IT capacity. It was dependent on an external service provider to deliver on a key component of its business. By the time the 10 year PPP with Siemens came to an end, the service provider had not delivered most of the deliverables in terms of the 10 year PPP. With no capacity to take over the role, Siemens was appointed to fulfil it, the DOL found itself in a challenging situation. By the former Minister’s own evidence then, this situation would have been brought to her attention when she took office, as well as the processes which the DOL intended to embark on to address same.

5.1.20 Prior to my engagement with the former Minister, I also interviewed the then DG, Mr Nkosinathi Nhleko, on 25 February 2019. He indicated that Ms Oliphant had not been involved in procurement matters, and stated that at no stage did the former Minister attempt to influence the process of appointing Accenture.

5.1.21 According to his recollection however, he did brief the former Minister from time to time about the developments relating to the DOL approaching Accenture with
regard to its IT challenges. He further indicated that he indeed received the letter from Accenture disclosing the relationship between the former Minister and her son, but deemed same as an act of good governance on the part of Accenture. He further indicated that he could not recall whether he disclosed receipt of the letter from Accenture to Ms Oliphant, but suspected that he did.

5.1.22 My investigation team interviewed Mr Nkululeko Oliphant on 27 February 2019. He indicated that, after his graduation from the University of KwaZulu-Natal, he was employed by Accenture in 2001 as an Analyst. He left as a Consultant around 2004, where after he took up employment with Standard Bank until around 2008.

5.1.23 He re-joined Accenture in 2009 as a Manager, and left around 2012 to take up employment at Deloitte, where he is currently a Partner and Director. He explained the structure of Accenture, indicating that Managers report to Senior Managers, and are not required to recruit clients and have no signing powers.

5.1.24 Around 2011, his mother was appointed as the Minister of Labour. According to his recollection, Accenture was already assisting DOL from as far back as 2008. In 2011, he was asked by his Senior Manager to prepare a slide deck / presentation around the then current status of the DOL. He indicated that this was the only thing he ever did with regard to the DOL. The evidence suggests that the presentation dated 31 October 2011 was prepared by Accenture.

5.1.25 Mr Oliphant further indicated that his mother was aware of his employment with Accenture, but he doubted whether she was aware of what exactly his employment entailed. According to his knowledge, his mother never involved herself in the administration of the Department. When he left Accenture to join Deloitte, the contract between the DOL and Accenture was still ongoing.
5.1.26 He was not aware of the correspondence which was sent to the DOL by Accenture disclosing the relationship, but according to him, it made sense, since Accenture subscribed to a high standard of ethics.

5.1.27 The evidence submitted indicated that Accenture was negotiating contract terms with the DOL when Ms Oliphant was appointed as the Minister of Labour on 01 November 2010. At that stage, the Minister’s son was employed by Accenture, and according to the evidence, later compiled a slide deck in the project which Accenture was appointed to deliver to the DOL. According to the former Minister, she had no duty to disclose this familial relationship when she became the Minister of Labour, as she was not aware that the DOL approached Accenture and she did not participate in the procurement process.

5.1.28 Accenture however, in line with its own Code of Business Ethics did see the need to disclose this relationship, and did so by informing the DG of the DOL that a person in their employ, who is related to the Minister, was working on the project which it was appointed to deliver to the DOL.

**Ms Oliphant’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994**

5.1.29 In her response to my Notice in terms of section 7(9) of the Public Protector Act, 1994, Ms Oliphant indicated that she wanted to correct the impression that she knowingly and wilfully flouted the Constitution and the Code of Ethics by not declaring her relationship with her step-son, Mr Nkululeko Oliphant, who was an employee of Accenture at the time when Accenture was appointed as a service provider to the DOL.

5.1.30 According to Ms Oliphant, during her tenure as the Minister of Labour, she understood her role, responsibilities and powers as dictated by legislation and relevant prescripts, and as such, she did not involve herself in the DOL’s
administrative functions and processes. Her expectation was that the DG would implement policy directives, and in so doing, she sought to hold the DG's accountable through regular relevant reporting and briefings. She reiterated that she did not expect or receive minutiae detail on the implementation of policy directives and the DOL's administrative processes.

5.1.31 Ms Oliphant submitted that, as a Member of the Executive, she conducted her affairs fully cognisant to the Executive Ethics Code, including the provisions contained therein relating to conflict of interest. According to her, she was not privy to the meetings and engagements between Accenture and officials from the DOL referred to in my Notice, and that the former DG, Mr Nhleko, did not inform her about the letter which he received from Accenture disclosing the relationship between herself and Mr Nkululeko Oliphant.

5.1.32 For these reasons, she submitted there was no conflict of interest on her part given her distance from the administrative and procurement processes.

5.1.33 She further indicated that she hoped that my final report will take into account that she did not wilfully and intentionally set out to contravene the law by not disclosing her relationship with Mr Nkululeko Oliphant.

Application of the relevant law

5.1.34 Section 92(2) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), provides that Members of Cabinet are, collectively and individually, accountable to Parliament for the exercise of their powers and the performance of their functions.

5.1.35 Section 92(3) of the Constitution obliges Cabinet Members to act in accordance with the Constitution. In addition, they are further obliged to provide Parliament with full and regular reports concerning matters under their control.
5.1.36 Section 96 of the Constitution further provides that:

“(2) Members of Cabinet and Deputy Ministers may not –

(b) act in any 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; and (own emphasis)

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.”

5.1.37 Section 96 also requires Members of Cabinet to act in accordance with a code of ethics prescribed by national legislation.

5.1.38 The Executive Members’ Ethics Act, 1998, was thereafter promulgated, in terms of which the President had to publish a code of ethics prescribing standards and rules aimed at promoting an open, democratic and accountable government, and with which Cabinet Members are obliged to comply when performing their official responsibilities. The code of ethics forms part of the Ministerial Handbook: A Handbook for Members of the Executive and Presiding Officers, which was approved by Cabinet on 07 February 2007.

5.1.39 The Executive Ethics Code affirms and commits to uphold section 96 of the Constitution, setting the vision behind it, as well as outlining the conduct to be upheld by members of the Executive in their official capacity.

5.1.40 Paragraph 2.1 of the Executive Ethics Code obliges Members to –

(a) Perform their duties and exercise their powers diligently and honestly;

(b) Fulfil all the obligations imposed upon them by the Constitution and law;
(c) Act in good faith and in the best interest of good governance; and
(d) Act in all respects in a manner that is consistent with the integrity of their office
or the government.

5.1.41 The requirements set out in paragraph 2.1 of the Code, such as honesty, good
faith and integrity, all point to the level of ethical standards of behaviour that a
Member of the Executive is expected to uphold. These values should guide the
conduct, provide clarity on acceptable conduct and set clear rules on how public
representatives should conduct themselves – with dignity and decorum, and in a
manner which upholds the integrity of their office.

5.1.42 Paragraph 2.3 of the Executive Ethics Code states that Members may not expose
themselves to any situation involving the risk of a conflict between their official
responsibilities and their financial and / or personal interests.

5.1.43 Section 195 (1)(a) of the Constitution further provides that public administration
must be governed by the democratic values and principles enshrined in the
Constitution, including the principle that a high standard of professional ethics
must be promoted and maintained.

5.1.44 In President of the Republic of South Africa and others v South African Rugby
Football Union & Others\textsuperscript{13} the court held that: -

"[…] The importance of ensuring that the administration observes fundamental
rights and acts both ethically and accountably should not be understated. […]"

5.1.45 A conflict of interest generally involves a conflict between the public duty and the
private interest of a public official, in which the official's private capacity interest
could improperly influence the performance of their official duties and responsibilities.\textsuperscript{14}

5.1.46 During my interview with her on 3 April 2019, the former Minister submitted that she was not aware that the DOL approached Accenture, and secondly, that she was not in any way involved in the procurement process which ultimately led to the appointment of Accenture. By her own admission though, the former Minister indicated that she was aware that her son was employed by Accenture. She also submitted that she would only have become aware that the DOL conducted business with Accenture if the Auditor-General (AG) raised a query about it.

5.1.47 This evidence was however contradicted by the evidence presented by the former DG, Mr Nhleko, who indicated to my investigation team that he did indeed brief the former Minister of the fact that the DOL approached Accenture to assist the DOL with IT related services, and in addition, that there were similar queries from the AG.

5.1.48 In July 2006, the Public Service Commission\textsuperscript{15} indicated that perceived conflict of interest exists when a public official is in a position to appear to be influenced by his / her private interests when doing his / her job. It then goes on to give the following example:

\begin{quote}
"The wife of one of the senior managers of the Office of the Public Service Commission is the owner of a stationary company who is a service provider for the government."
\end{quote}

5.1.49 The Report then further states that:

"Conflicts of interest are not wrong in themselves. It is how they are managed that is important."\(^6\)

5.1.50 The high standards of ethical conduct expected from the Executive as envisaged under section 96 of the Constitution, and paragraphs 2.1 and 2.3 of the Executive Ethics Code, seek to create and foster a culture of integrity and reduce the opportunity for corruption and malfeasance arising from any perception of favouritism shown to relatives or close friends by those with power to influence.

5.1.51 To determine whether a risk of a conflict of interest, perceived or actual, exists, we use an objective, rather than a subjective test. This means that a Minister should consider the situation from the perspective of an outsider, and should consider whether a relationship of such a nature could raise an allegation of an actual or apparent conflict of interest, and then err on the side of caution and transparency. The reasoning behind using an objective test is because the existence of a conflict of interest also includes situations of a perceived or potential conflict of interest, in other words from a third party perspective.

5.1.52 This approach is consistent with previous findings of the Public Protector that an appearance of a conflict of interest may be said to exist when a reasonable person would conclude that a public office bearer, while performing official duties, conducted him / herself in a manner that is perceived or has the potential to benefit another person by virtue of his / her relationship with the office bearer.\(^7\)

\(^6\) Page 18 of the Report.
\(^7\) Report 9 of 2011/12 of the Public Protector on an investigation into a complaint of a conflict of interest against Mr J Manyi; Report 31 of 2018/19 of the Public Protector on an investigation into a complaint of an alleged breach of the Executive Ethics Code by the Premier of the Western Cape Provincial Government, Hon. Helen Zille.
5.1.53 The management of conflicts of interests should then be guided by how best the integrity of policy and administrative decisions which are made by those in power, can be maintained.

5.1.54 The fact that a company at which the former Minister's son was employed was appointed as a service provider to the Department falling under her portfolio without going through a competitive bidding process, created suspicions and perceptions regarding how the company was appointed, specifically a perception of undue influence.

5.1.55 Accenture realised this, and immediately made a disclosure regarding the relationship between its employee and the former Minister, therewith demonstrating its commitment to subscribe to high ethical values.

5.1.56 I have noted that the Executive Ethics Code extensively regulates the disclosure of situations where the Members of the Executive are decision-makers, where Members receive gifts and financial interests of Members.

5.1.57 However, having regard to the evidence submitted to me in this matter, specifically the fact that the former Minister was not a decision-maker in the procurement process, as well as the law which regulates conflicts of interest, I have noted that even though the Executive Ethics Code prohibits conflicts of interest, the Ministerial Handbook is silent on how best a situation such as the one that I am required to adjudicate on in this matter, should be dealt.

**Conclusion**

5.1.58 I could not find any evidence to suggest the tender was awarded to Accenture as a result of the relationship between the Minister and her son.
5.1.59 In the circumstances, I am of the view that the situation that the former Minister found herself in, created a perception of a conflict of interest between her official responsibilities and her private interests. There is however no tool which enabled the former Minister to manage this conflict.

5.2 Regarding whether there were irregularities in the award, extension and contract management of bid DCC08/2008 for Debt Collection and Debtor Management Control Centre Services, as a result of which the Compensation Fund incurred fruitless and wasteful expenditure: -

Common cause facts

5.2.1 Bid 08/2008 was advertised by the Compensation Fund (CF) on 29 August 2008. The closing date for the tender was 19 September 2008. The scope was outlined as follows in the Request for Proposal (RFP) document:

5.2.2 The establishment of a Debtor Management Control Centre (DMCC) to collect on accounts in arrears between thirty (30) and ninety (90) days;

5.2.3 Debt collection services on accounts in arrears for more than hundred and eighty (180) days.

5.2.4 The CF received thirteen (13) bids. The appointment of New Integrated Credit Solutions (NICS) was approved by the Bid Adjudication Committee (BAC) on 17 December 2009. On 1 February 2010, the CF appointed NICS as the successful bidder on bid DCC08/2008 for the provision of debt collection and debtor management control centre services.

5.2.5 On 19 April 2010, the Compensation Fund (CF) entered into a Service Level Agreement with NICS for a period of three (3) years. The contract was later extended to 17 October 2014.
Issues in dispute

5.2.6 The issue for my determination is whether there were irregularities in the award, extension and contract management of bid DCC08/2008 for Debt Collection and Debtor Management Control Centre Services, as a result of which the Compensation Fund incurred fruitless and wasteful expenditure.

5.2.7 In its formal response to my enquiries regarding the appointment of NICS by the CF, the CF indicated that, from the information at its disposal, the tender was advertised to invite prospective bidders. A briefing session was held and all other supply chain management processes were followed.

5.2.8 An extract from the Bid Evaluation Committee’s evaluation of the bids, NICS seemingly scored the highest during the evaluation of the bids with a score of 80.26. The BEC recommended the best three (3) service providers, in sequence of preference as:

a) NICS (Pty) Ltd;
b) Credit Management Services; and
c) Trans Union ITC Receivable.

5.2.9 On 19 November 2009, a request to obtain approval for the deviation from supply chain management processes to appoint a debt collection service provider, was submitted to the Compensation Commissioner for approval. The memorandum recorded the following:

"2.4 The Bid Adjudication Committee (BAC) sat on 13 November 2009 to adjudicate on the matter of debt collection after the BEC had shortlisted three companies. It later transpired that out of the three companies that
were shortlisted only one NICS complied with the requirements as per the specification.

2.5 The BAC then recommended that the Compensation Commissioner approves the deviation from the SCM process and appoint NICS as a preferred bidder.

2.6 Based on the information that was provided the BAC has satisfied itself that NICS is in a position to deliver on the mandate to collect debt on behalf of the Compensation Fund.”

5.2.10 On 17 December 2009, the following was recorded during the BAC meeting 26/2009 regarding the above tender: -

“7.2 Debt Collection Services

a) A submission was made to the Commission, requesting permission to appoint NICS (Pty) Ltd through deviation.

b) The Commissioner confirmed that it was not necessary to request for deviation since a bid for this service was already advertised, out of which NICS (Pty) Ltd was the only fully complying service provider.

c) The service provider will be responsible for collecting an estimated R4.1 billion for the Fund, and will receive a fixed percentage of the amount they collect, regardless of the size of our debtors' book.

d) [...]  
e) [...]  
f) It was agreed that NICS (Pty) Ltd be appointed for this service, and that the BAC approval confirmation document will be circulated to all attending members soon for signature.”
5.2.11 The Bid Adjudication Approval Form recorded the following on the 17th of December 2009:

"The BAC recommended to approve the appointment of NICS (Pty) Ltd. [...] This is based on the fact that NICS (Pty) Ltd complied with all the requirements of supply chain management."

5.2.12 The SLA entered into between the parties determined inter alia that:

"5. DURATION OF THE AGREEMENT

5.2 Either party shall, after the expiry period of 3 (three) years and within 6 (six) months notification period, notify either party of their intentions. Should either party submit no notification of termination, it is deemed that the contract shall continue for an indefinite period until such notification is given."

5.2.13 The SLA entered into between the parties further provided that the fee payable to NICS in respect of services rendered would be a percentage commission of all money collected by NICS, and the percentage agreed upon was 10% (excl. VAT) of the successfully recovered revenue, and in addition, a 10% levy (excl. VAT) if monies were allocated from a suspense account due to NICS’ intervention. The amount commissionable to NICS was the gross amount, inclusive of penalties and interest.

5.2.14 The scope of the tender was set out as follows in the SLA signed between the parties:

"8. EXTENT OF COLLECTION INSTRUCTIONS"
8.1 CF further instructs the COLLECTOR to assist in the management and recovery of debt aged between 60 days plus, which is due and payable to the Compensation Fund on an outsourced basis.

8.2 Neither party will withhold from each other any relevant and available data and information which is necessary from the due fulfilment of their respective obligations under this Agreement.

8.3 The parties shall within 72 hours of written request by the other Party, supply such relevant data, documentation and information in a format and time frame to be mutually agreed upon, inclusive of electronic, integrated information and data transfer.

9 SYSTEM INTEGRATION

9.1 The COLLECTOR shall ensure that their collections system is technologically compatible and able to interface with the CF's financial system. CF will further allow reasonable development and testing phase to ensure successful integration between the two systems.

9.2 The COLLECTOR shall provide all hardware, software and training for the smooth functioning of the integration at no cost to CF."

5.2.15 When my Investigation Team conducted interviews with relevant parties, it became apparent that the scope of the tender was simply not clear. I will elaborate more on this as the evidence progresses.

5.2.16 Ms Ntshabele, who was the Project Manager on behalf of the CF, and who was interviewed on 13 February 2019, confirmed that the scope of the tender was firstly, the establishment of a Debt Management Control Centre (DMCC), and
secondly, the provision of debt collection services on accounts in the Debtors' Book. According to her, the DMCC was to be tasked to do follow-ups on debts aged between thirty (30) and ninety (90) days, and the debt collection services was for collection on debts older than hundred and eighty (180) days.

5.2.17 Ms Ntshabele suggested further in her evidence that NICS indicated that because the establishment of the DMCC did not materialise, they suffered loss of revenue as a result, they should be able to collect on debts older than 60 days, and not the 180 days as initially agreed. Hence the SLA provided for collection services on debts older than 60 days.

5.2.18 In addition, she submitted that the information and technology services of the CF was outsourced and the handover of the Debtors' Book coincided with the move of the CF from the AXS One system to the Siemens system. She indicated that the CF had no access to the system, but could only transact on the system. Accordingly, the CF provided NICS with the data on a compact disc, as allegedly agreed between the parties during a meeting which was held on 04 February 2010. The master data was provided during June 2010 and the transactional data during July 2010. The data was provided in a read only format.

5.2.19 According to Ms Ntshabele, NICS complained that it could not check whether there had been payments made on accounts that it was managing. It was agreed then that data would be provided to NICS on a monthly basis. It was further indicated that, even though NICS could, from the monthly data, pick up which accounts aged to 60 days during the month, NICS was not allowed to recover on such accounts as it did not form part of the initial Debtors' Book which was handed over. Mr Mkhonto, the former Commissioner of the CF, concurred during his interview on 13 February 2019 that the scope of the tender was that NICS was to collect on accounts older than 60 days, but only on accounts which formed part of the Debtors' Book which was initially handed over to them.
5.2.20 According to Ms Ntshabele however, NICS' interpretation of this clause in the SLA was that it was entitled to manage debts that were 60 days old, and charge for the recovery, irrespective of the fact that it had not been formally handed over to it. She stated that she observed that NICS prioritised new accounts which turned 60 days, and were not officially handed over, ultimately resulting in NICS and CF officials pursuing the same cases. On 25 June 2014, she reported the following in connection with the 60 day issue:

- "87% of the debt book was already sitting in the 365 days bucket of the age analysis.
- The clearing of the assessment backlogs resulted in the creation of the new debt (less than 60 days) for the same employers that were already handed over to NICS. This caused confusion as it ended up that both the Fund and NICS were pursuing the same employer for current debt and old debt respectively. The allocation of moneys paid by these employer (sic) complicated the matter further which resulted in commission payment disputes as it was difficult to find common ground on whose efforts (between internal staff and NICS) resulted in the recovery of debt. The resolution was that NICS would recover both the old and new debt from all employers that have been outsourced as per clause 8.1, however, they shall not be entitled to any commission relating to the new debt."

5.2.21 During my investigation team's interview with Mr Baker Maseko and his legal team on 22 February 2019, Mr Maseko stated that the interface between the systems was never established. The interface between NICS' and its clients' computer systems seemingly was essential for NICS to be effective in its debt collecting services.
5.2.22 He concurred that NICS did not receive any files to do recoveries until June 2010. He further indicated that NICS had about 50 plus employees at the CF, who for months, could not collect anything because of the delays. According to him, the data received from the CF was not up to date. A significant portion of the 60 days plus accounts were not handed over to NICS. Mr Maseko denied that NICS and the CF were collecting on the same accounts, as according to him, the CF conceded during the arbitration process that it could only activate four accounts a day.

5.2.23 The apparent reason why the interface between the systems was never established was because access was granted to the CF’s financial systems, any person who would have such access, would have to first be vetted by the State Security Agency. The vetting results were only provided in August 2011.

5.2.24 Mkhonto, the former Commissioner of the CF, indicated during his interview with my investigation team on 13 February 2019 that, a couple of months after the award to NICS, he was invited to a meeting with NICS, during which meeting he received a complaint that NICS had no access to the Debtors’ Book. According to him, he met with Siemens, and received no further complaints from NICS.

5.2.25 According to Ms Ntshabele, the CF at some stage obtained a legal opinion on the 60 days issue, which opinion indicated that it related only to the accounts older than 60 days which were already handed over to NICS at the commencement of the contract. Ms. Ntshabele evidenced further that the CF had to verify work done, but was struggling with capacity. At some stage there were about 11 000 transactions which had to be verified before NICS could invoice.

5.2.26 During the same time, concerns were raised about the growing Debtors’ Book. Around June 2011, the parties agreed that the SLA should be amended. The CF specifically wanted the 60 day period to be scrapped. According to Ms Ntshabele, she received no support from the CF’s Legal Section in this regard. From the
documentary evidence submitted, it appears that by 19 April 2012, the SLA between the parties had not been amended in accordance with the discussions.

5.2.27 According to Ms Ntshabele, the CF created a moving target, as the Debtors’ Book was not static.

5.2.28 Mr Mkhonto indicated that the Internal Audit Committee raised questions about the initial award, specifically as the Commissioner, in awarding the tender to NICS, exceeded his financial delegation which was R30 million.

5.2.29 The SLA further provided that the CF had a right to withdraw an account from NICS if the instruction was given due to an administrative error on the CF’s part or any other reason. NICS was however still entitled to commission if the debtor had commenced with payment as a result of the actions / steps taken by NICS. In addition, the CF had a right to withdraw accounts which had been with NICS for a period of eighteen (18) months and on which NICS had no success. According to the evidence presented by Ms. Ntshabele during her interview, NICS recovered about R1.2 billion at the end of the three year contract term. This amount was recovered of the initial R4.5 billion Debtors’ Book initially handed over. In the documents submitted to my investigation team, it appeared that Ms Ntshabele alluded that she withdrew more than 146 000 accounts, valued in excess of R3.4 billion that NICS failed to recover during the three year contract.

5.2.30 It appears that, on this basis, NICS requested an extension of the contract for a period of between eighteen (18) and twenty-four (24) months in an effort to eliminate or minimise the scope of this withdrawal. On 25 October 2012, an ad hoc BAC meeting resolved that the debt collection contract between the CF and NICS be extended for a period of eighteen (18) months from 18 April 2013 to 14 October 2015. The Minutes of the meeting reflected the status of the contract as follows: -
"She also added the challenges they experience in managing the contract. Most of the challenges are internal challenges. One of the challenges is the system link which is the major part of the contract and also the delay. The switchover to SAP also causes the delay.

Early last year there were amendments which they agreed upon together with NICS which had to be incorporated or the contract to be amended. Little support from legal services was received to assist Director: Income in implementing those amendments. As off (sic) today, 25 October 2012, 16 months later we still battle to have those amendments done. SAP also comes with its own challenges in a sense that there was a delay with the migration and programs which were not running successfully like interest and penalties. The total amount that is paid is R1 330 000.00 [...]"

5.2.31 According to Ms. Ntshabele, the Auditor-General and the Audit Committee raised concerns about the CF deriving value for money from the contract, as the Debtors' Book increased to around R6 billion. She reiterated this in a memorandum dated 08 April 2013 to the Commissioner and ACFO entitled "REQUEST FOR AN EXECUTIVE DECISION ON WHETHER OR NOT TO PAY SUPPLEMENTARY INVOICES SUBMITTED BY THE DEBT COLLECTOR FOR THE PERIOD OCTOBER 2011 TO SEPTEMBER 2012."

5.2.32 She further indicated that she was advised by the then Chief Financial Officer (CFO), Mr Brian Leshnich, to recommend the extension of the contract. After discussing her reservations with him beforehand, she submitted a memorandum to the BAC requesting approval for the extension of the contract. She indicated that she was compelled to motivate for the extension, whilst she had actually requested an executive decision on whether or not the contract should be extended. According to her evidence, the extension of the contract was irregular,
as the CF needed approval from Treasury, which was never obtained, but the contract was extended based on her submission to the BAC.

5.2.33 Mr Maseko indicated that the extension was actually an Addendum to the original SLA, in which the CF acknowledged its internal shortcomings which led to the delay in the implementation of the contract and the difficulties in the management of the contract. He contended that NICS was deprived of its contractual entitlements, which led to a loss of revenue.

5.2.34 In a memorandum, dated 15 April 2013, entitled “REQUEST FOR APPROVAL TO TERMINATE THE DEBT COLLECTION SERVICE LEVEL AGREEMENT ENTERED INTO BETWEEN DEPARTMENT OF LABOUR – COMPENSATION FUND AND NEW INTEGRATED CREDIT SOLUTIONS (NICS),” the following was recorded with regard to the extension of the contract between the parties:-

“At the recent audit steering committee meeting, the head of Internal Audit expressed concern and indicated that the extension of the original debt collection contract is null and void. Her argument is based on the supply chain procedures followed in arriving at the decision to approve the extension of the service level agreement. She argued that the supply chain process was flawed. The main argument is that (1) the Bid Adjudication Committee (BAC) did not form a quorum to legitimise the seating of BAC, (2) The chairperson had vested interest in the debt collection contract as it falls under his supervision and did not recuse himself from the meeting, by virtue of him being the acting CFO and lastly, only two legitimate members of the committee had signed the approval documents.”

5.2.35 The problems relating to the management of this contract was summarised as follows by Mr Maseko, the Chairman of NICS in a letter to the CF dated 15 August 2013:
"We are sitting with no less than 50 people managing a meagre 47 000 accounts whereas the Fund is sitting with no more than 12 less experienced collectors managing over 130 000 accounts. This can certainly not be in the interest of meeting the fundamental objectives of the Fund, but to the detriment of the Fund."

5.2.36 In the same memorandum, dated 15 April 2013, entitled "REQUEST FOR APPROVAL TO TERMINATE THE DEBT COLLECTION SERVICE LEVEL AGREEMENT ENTERED INTO BETWEEN DEPARTMENT OF LABOUR – COMPENSATION FUND AND NEW INTEGRATED CREDIT SOLUTIONS (NICS)," Ms Ntshabele alluded that the original Debtors' Book handed over was R4 billion, but at 31 March 2013, it had doubled to almost R8 billion.

5.2.37 According to Mr Maseko, of the R5 billion Debtors' Book which was handed over, NICS managed to collect around R3 billion. The reason for the increase in the Debtors' Book was mainly because of the CF's failure to deal with internal queries, which resulted in accumulated penalties and interest.

5.2.38 On 25 June 2014, the Directorate: Income of the CF reported the following regarding the NICS tender as at 31 March 2013:

| Outstanding balance by employers (Debt Book) for the period 31 March 2011 to 31 March 2013 |
|-----------------------------------------------|-----------------|-----------------|
| 31 March 2011                                | 31 March 2012   | 31 March 2013   |
| R4 721 614 069.10*                           | R5 563 031.64*  | R8 532 345.79*  |
| *Inclusive of interest and penalties         |

5.2.39 In the same report, the following was further reported: -
### Debt Collections Impact Analysis

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<th>March 2011</th>
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<td>CF Collections</td>
<td>NICS Collections</td>
<td>Commission (10%)</td>
<td>Total Commission (VAT inclusive)</td>
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<td></td>
<td>3 118 606 929.30</td>
<td>854 266 408.68</td>
<td>85 426 640.88</td>
<td>97 386 370.58</td>
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<tr>
<td><strong>31 March 2012</strong></td>
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<tr>
<td>CF Collections</td>
<td>3 074 342 303.05</td>
<td>768 040 991.88</td>
<td>76 804 099.19</td>
<td>87 556 673.07</td>
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<tr>
<td>NICS Collections</td>
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<td>Commission (10%)</td>
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<tr>
<td><strong>31 March 2013</strong></td>
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<tr>
<td>CF Collections</td>
<td>5 279 138 332.85</td>
<td>507 287 978.09</td>
<td>50 728 797.81</td>
<td>57 830 829.50</td>
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<tr>
<td>NICS Collections</td>
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<td>Total Commission (VAT inclusive)</td>
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5.2.40 In February 2013, NICS submitted to the CF supplementary invoices for the period October 2011 to September 2012. The amount claimed by NICS was **R26 735 692.58**. Ms Ntshabele contended that she was concerned about the fact that the invoices were raised in the wrong accounting period. NICS, she alleged, obtained information directly from KPMG (the IT service provider of the CF at that stage), which information was not signed off by the Income Directorate. The supplementary invoices consisted of invoices for the period October 2011 to March 2012 in the amount of **R9 784 530.27**; and in addition, an amount of **R16 951 162.31** for the period February 2012 to September 2012 relating to what was alleged to be an under reporting in NICS’s collection performance since the inception of the SAP system.
5.2.41 According to the evidence presented by Ms Ntshabele during her interview on 13 February 2019, the Income Directorate of the CF spent around six (6) months doing a verification of the above invoices submitted.

5.2.42 On how the R26 million invoices came about, Mr Maseko, during his interview on 22 February 2019 indicated that NICS approached KPMG on advice from the then Acting CFO of the CF, Mr Brian Leshnick. When the CF changed systems from Siemens to KPMG, the references of the employer accounts changed, and KPMG was able to match the old references with the new ones. Once this was done, NICS realised that payments were made on some accounts which NICS had not invoiced for. According to him, the payments were made as a result of NICS’s efforts, and as such, NICS was entitled to claim commission.

5.2.43 In a memorandum submitted to the Compensation Commissioner dated 08 April 2013 entitled “REQUEST FOR AN EXECUTIVE DECISION ON WHETHER OR NOT TO PAY SUPPLEMENTARY INVOICES SUBMITTED BY THE DEBT COLLECTOR FOR THE PERIOD OCTOBER 2011 TO SEPTEMBER 2012” Ms Ntshabele indicated:

“I understand the diversion of our agreed process followed a meeting held in January 2013 with the acting CFO and the Commissioner. Unfortunately the minutes of this meeting have not been provided to the Income Directorate. NICS maintain that there was an undertaking made at the said meeting to pay all the invoices raised by NICS.”

5.2.44 A memorandum submitted to the then Compensation Commissioner on 14 July 2013 under the subject “REQUEST FOR AN URGENT INTERVENTION AND SUPPORT ON THE DEBT COLLECTION SERVICE LEVEL AGREEMENT ENTERED INTO BETWEEN DEPARTMENT OF LABOUR – COMPENSATION
"FUND AND NEW INTEGRATED CREDIT SOLUTIONS (NICS)" she highlighted that:

"During the interim audit for the year under review, the Auditor-General had also reported a finding on non-compliance with Treasury Regulations and PFMA on the extension of the debt collection service level agreement.

[...]

The delayed decision-making process has resulted in non-accrual and non-disclosure of the amount of R26 735 692.58 in the financial statements of the year under review by the Auditor-General.

5.2.45 Ms Ntshabele indicated that, on 15 August 2013, the CF received what she described as a "Letter of Demand" from Mr Maseko of NICS in connection with the R26 million invoices.

5.2.46 On 2 September 2013, the CF obtained a legal opinion from Adv. D B Ntzebeza, SC, entitled "WHETHER FAILURE BY THE FUND TO FURNISH NICS DATA AND INTERFACE CONSTITUTES A BREACH OF CONTRACT". The legal opinion expressed the view that the Fund was in breach of the SLA entered into between the parties and urged the CF to pay all amounts owed to NICS at that point. The legal opinion however, further indicated that:

"Moreover, at this stage, we have not had full consultation with the relevant officials of the Fund who were involved in the procurement process."

5.2.47 And later, it indicated that the conclusion reached in the legal opinion "presupposes that the extension was validly entered into, a position we hold to so, on our current instructions," An email sent by Ms Ntshabele to Mr Solwande
on 10 September 2013 upon receipt of the legal opinion obtained recommending payment of the invoices amounting to R26 million by the CF to NICS, suggested that she was in disagreement with the opinion obtained and suggested that Counsel had not been briefed properly on the matter.

5.2.48 Following this, the CF and NICS had a meeting on 11 and 12 September 2013, specifically to discuss the issue of the invoices submitted by NICS amounting to R26 million. The Minutes of the meeting held on 11 September 2013, recorded that:

"R9 million

[...]

After the deliberations on the exclusions both parties agreed that the supplementary invoices for the following months have already been paid in the prior years:
- October 2011
- November 2011
- December 2011
- January 2012

[...]

The R16 million

[...]

NICS explained that the supplementary invoices of R6.3 million included the 14 numbers which had been previously excluded in the original report.
Mr Kalimashe indicated that NICS cannot claim on the 14 numbers as the 14 numbers were generated on SAP F1 and at that time there had been no official hand over of the data generated on SAP F1. The last hand over was done in February 2011.

[...]

Ms Ntshabele reminded the meeting of the resolution taken at the meeting of 6 June 2011 where NICS agreed to remain with the February 2011 debt book.”

5.2.49 The Minutes of the 12th of September 2013 recorded the following: -

“R9 million

➢ NICS confirmed that the information submitted to Compensation Fund for R9 million verification is incorrect and new data will be compiled. Therefore invoice submitted is invalid.

[...]

R16 Million

➢ R16 million was presented however a discrepancy on the amounts submitted for verification and invoice submitted was highlighted by Mr Molotsi.

➢ Caleb confirmed that report format included what has already been invoiced before and was duly paid, however NICS will resubmit only what needs to be verified according to the claims invoiced [...].

[...]

Throughout this meeting CF delegation was complaining of effort, time and resources used to work (sic) on the verification of incorrect data provided by NICS to substantiate the R26 million invoices. No undertaking was made by CF to
accept and prioritise the second set of information that NICS had said they will re-submit."

5.2.50 Ms Ntshabele alluded that, albeit the Minutes were not signed by NICS, the contents thereof were never disputed. Mr Maseko however, during his interview with my investigation team on 22 February 2019, indicated that NICS did not sign the Minutes as it did not agree with the content as was captured therein.

5.2.51 The documentary evidence submitted to my office however suggested that, on 13 September 2013, Mr Caleb Makakaba of NICS wrote an email indicating the following:-

"If that’s the case we can therefore consider the minutes accepted."

5.2.52 During my investigation team’s interview with the former Commissioner, Mr Mkhonto, he indicated that a second opinion was later obtained from Adv. Ntsebeza, which opinion indicated that the contract between the parties should be cancelled. According to him, the instruction from the then Acting DG, Mr Morotoba, was that the CF should terminate and in his recollection, the State Attorney wrote to NICS and advised it that the contract was null and void. This was confirmed by the documentary evidence obtained which included the second opinion from Adv. Ntsebeza, SC, dated 14 October 2013, which recommended the immediate termination of the extension of the contract as the extension was invalid for lack of compliance with procurement procedures. NICS was officially notified of the termination in February 2014.

5.2.53 According to Ms Ntshabele, NICS was evicted from the CF’s premises on 23 December 2013, and the CF also suspended its access to the SAP system. NICS submitted that it did not receive any payment for services rendered during the period of extension.
5.2.54 On 09 March 2016, NICS obtained an Arbitration Award in the amount of R349 159 694.00, together with interest *a tempora mora* on this amount from the date of the award to date of payment. The arbitration process was initiated because of NICS' belief that the CF failed to fully account for and pay over commission due to NICS. This originated from the R26 million invoices which were submitted by NICS to the CF in February 2013.

5.2.55 There were suggestions in the evidence presented that the arbitration award given against the CF was a direct consequence of the conduct of the former Commissioner, Mr Mkhonto. During her oral evidence presented before my investigation team, Ms Ntshabele highlighted that she was pressured by the former Commissioner to simply make the payment of the invoices amounting to R26 million.

5.2.56 From the documentary evidence submitted to my investigation team during the course of the investigation, it appeared that on 17 March 2015, Adv. Ntsebeza wrote an email to *inter alia* certain officials of the CF. An extract of the said email read as follows:

"[...]

_The Plaintiffs here---NICS and whoever, but NICS in particular, NEVER had a case, and the only case they have is the one they have been given by the Commission on a platter, through the recalcitrance of the Commission’s Comrade Shadrack Mkhonto---whom I have copied on this email because I would like him to have an opportunity to vindicate himself, if he can._

_From the very word go, Comrade Mkhonto just did not want to sign Affidavits which ONLY he could have signed, and that always made us unable to meet_
deadlines imposed upon us by the Rules of the Court, or to put our best foot forward in the litigation."

NICS’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

5.2.57 NICS responded to my section 7(9) Notice on 16 July 2019 through its Attorneys of Record, De Jager Inc. In the response, NICS simply recorded that there were no adverse findings against it, that my report contained factual inaccurate information, and that it reserved its rights.

5.2.58 No attempt was made to highlight and/or address the alleged factual inaccurate information contained in my Notice.

Mr Mkhonto’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

5.2.59 Mr Mkhonto indicated that he left the CF in 2015, and that he did not have any records, notes or other documents related to the matter. When he was called for an interview in February 2019, he requested the information from the CF and received few documents. He indicated that, despite my undertaking to copy and return these records, he had not received them, and thus found it extremely difficult to answer specific details as my section 7(9) Notice related to incidents which occurred between 2008 and 2012.

5.2.60 Mr Mkhonto indicated that the evidence presented in my section 7(9) Notice suggested that the Debtors’ Book increased from an amount of R3.3 billion in 2010 to an amount of R8.9 billion in 2013. No mention was however made of the fact that in this period the CF moved from a manual system to an electronic system with an online portal for submission of assessments. The impact of this
on the Debt Book of the CF was massive, as debtors were for the first time automatically assessed and taxed. The manual assessment process was years behind and one of the reasons why the online system was necessitated was to clear the manual backlog.

5.2.61 According to Mr Mkhonto, my Notice further suggested that he did not adhere to legal advice that the contract with NICS should be terminated, but that was incorrect. The State Attorney was informed to terminate the contract with NICS. He was then told that there was an urgent application to Court, and that all such relevant documentation can be obtained from the Office of the State Attorney. Mr Mkhonto indicated that he was informed that the State Attorney did not succeed with this application. In addition, he alleged that there was a letter of cancellation and an application for the termination of the contract.

5.2.62 With regard to the NICS contract, Mr Mkhonto advised that, according to his knowledge, the tender was formally advertised and went through an elaborate and lengthy tender process. The tenders went through the BAC, which provided him with a recommendation to appoint a service provider. He indicated that he acted on the recommendation of the BAC and signed the contract which was presented to him by the legal department. He reiterated that he was not part of the tender process and only signed the document which was presented to him with the knowledge that proper internal processes had been followed.

5.2.63 He submitted further that both the contract and the extension went through the same process, and the extension, so he alleged, was recommended and motivated for by Ms Ntshabele. According to him, Ms Ntshabele’s suggestion that she was in any way pressurised, was blatantly false. Mr Mkhonto emphasised his evidence that he was involved in a serious car accident and in hospital for several months with a long recovery. He indicated that he returned to work shortly before the extension of the contract was presented to him for signature by Ms Ntshabele. According to Mr Mkhonto, he was requested to sign the Addendum for the
extension based on the recommendation of the BAC. The legal department drafted the Addendum and checked the legal requirements. He submitted that he only signed on request.

5.2.64 Mr Mkhonto submitted that he did not agree with my method of investigation. He indicated that a very short interview was held with him without him having the benefit of relevant correspondence and records from the CF. He suggested that my Notice painted a very biased picture and contained factual mistakes, and his suggestion was that I should also interview the former Chief Financial Officers (CFO’s) to ascertain which recommendations were made to him as the then Commissioner.

5.2.65 Mr Mkhonto submitted that Ms Ntshabele’s contention that the Terms of Reference were changed prior to the conclusion of the SLA, to make provision for the collection on debts 60 days and older, cannot be correct, as the SLA was drafted by the legal department and concluded prior to the appointment of NICS. NICS was simply requested to sign the documents drafted by the legal department. According to his recollection, all the debts collected were older than a year, as employers only get taxed annually.

5.2.66 The system integration between NICS and the CF did not materialise as the parties agreed to provide the electronic data on a CD to enable NICS to know the outstanding payment information of the debtors. He recalled that the CF worked on the AXS One System supported by Siemens and then migrated to SAP, supported by KPMG. It was not true that the CF did not have access to its own system. He further confirmed that he instructed Siemens to assist NICS with the data in the format they required to overcome the integration problem, as both parties agreed to this solution.

5.2.67 The change from the AXS One System to the SAP system caused some problems with the CF’s financial and billing system. To Mr Mkhonto’s knowledge,
the amounts referred to in the memorandum dated 08 April 2013, were amounts which accumulated from October 2011 to September 2012. He submitted that the invoices could not be formally issued by NICS until the amounts were verified, and that he was not aware of what the problems with the verifications were. He further submitted that he did not bear any knowledge of the conversation between Ms Ntshabele and Mr Leshnick.

5.2.68 According to Mr Mkhonto, he did not recall that Ms Ntshabele ever indicating to him that she was not satisfied with the assistance she received from the legal department, as she was the person administering the contract and the person who dealt with and instructed the internal legal department, as well as the Office of the State Attorney.

5.2.69 He agreed that the Debtors' Book was not static. Accrual of interest and penalties on a monthly basis constantly increased the Debtors' Book.

5.2.70 In respect of the supplementary invoices in the amount of R26 735 692.58, Mr Mkhonto indicated that same formed part of the arbitration proceedings, and that, as far as he recalled, they were never paid. According to him, the access which was granted to NICS to the KPMG system, was on advice of Adv. Ntsebeza, who appeared on behalf of the CF during the arbitration proceedings. Later, during December 2013, employees of NICS were “locked out,” and a further arbitration process ensued during which the CF was also represented by the same Counsel. According to him, he acted as instructed by Counsel, and Adv. Ntsebeza advised the CF to take the arbitration on review, which according to Mr Mkhonto, continued.

5.2.71 According to Mr Mkhonto, it was important to highlight the legal proceedings which took place between 23 December 2013 and 09 March 2016, as my Notice failed to provide an explanation as to what transpired during this time. He indicated that, according to his knowledge, the arbitration did not only related to
the non-payment of the R26 million supplementary invoices, but also the apparent refusal by the CF to provide NICS with data.

5.2.72 Mr Mkhonto further invited me to indicate what "suggestions" were made that the arbitration award given was a direct consequence of his actions, and indicated that he was subpoenaed by the representatives of NICS to give evidence during the arbitration proceedings, and further that he testified truthfully. Prior to the arbitration hearing in December 2015, he also consulted with Adv. Pat Ellis.

5.2.73 Mr Mkhonto reiterated that the CF acted in accordance with advice from its legal team, and that he was not the person in whose knowledge the contractual functionalities were, as he was normally only required to sign a supporting affidavit. To his knowledge, he submitted, Ms Ntshabele signed the documents. Mr Mkhonto further indicated that my conclusion that there were irregularities in the award, extension and contract management of bid DCC08/2008, was incorrect, that the bulk of the contractual disputes were addressed in the protracted legal process from September 2013 to March 2016, at which time, he already left the employ of the CF.

5.2.74 Mr Mkhonto submitted that the contract did not have a figure attached to it, but payment was based on the percentage collected. If no debt was collected, then there would be no payment. According to him, money cannot be paid which had not been collected by the CF. Furthermore, he contended that it was impossible to determine a budget amount where the amount of instructions to be handed over to the debt collector was not determined and it was unsure how much they will collect.

5.2.75 Mr Mkhonto concluded his representations on this issue by indicating that he did not recall being examined and cross-examined on the problems which I mentioned in my Notice, during the arbitration process.
Mr Nhleko’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

5.2.76 Mr Nhleko provided his response to my Notice in terms of section 7(9) of the Public Protector Act on 18 July 2019. He indicated that, during the time of the award of the contract to NICS, he was not in the employ of the DOL, but he only joined the Department as DG in May 2011, and that I was therefore wrong to cite him in any wrongdoing insofar as the appointment of NICS was concerned.

5.2.77 He indicated that my findings suggested that, as the Accounting Officer for the CF, he had procedural knowledge about the matter, and should therefore be held accountable, but that such finding was incorrect, as he only joined the DOL in May 2011.

5.2.78 With regard to my intended finding that, as the Accounting Officer, he failed to perform his oversight function, he submitted a substantial amount of documentary evidence outlining the initiatives he embarked on as the then DG to address systemic deficiencies at the CF.

5.2.79 It appeared that on 28 November 2012, Mr Nhleko reported the following to the CF Board, the Audit Committee and the CF Management with regard to revenue management:

"The business of the Fund is considered 'money in and money out.' The Fund has demonstrated inability to effectively and efficiently deal with both legs. There are no appropriate structures and systems to manage assessment revenue. This area has not been properly managed and has led to increased debts in excess of +R5.billion." (sic)

5.2.80 Some of the interventions which he submitted he undertook included:
5.2.80.1 Approval of the appointment of EOH in December 2012 to assist with claims adjudication and medical service provider processing services to deal with an estimated 600 000 unpaid claims;

5.2.80.2 The appointment of a project team in December 2012, to deal with challenges identified in the CF, including those highlighted by the Public Protector,\(^{18}\) Internal Audit, the Auditor-General, the Standing Committee on Public Accounts and survey findings, and to develop and implement a turnaround strategy for the CF;

5.2.80.3 In January 2013, Mr Nhleko requested the secondment of Mrs N Sewpersadh from the Road Accident Fund to provide project support to this project;

5.2.80.4 On 21 January 2013, the project team met for a brainstorming session at Roodevlei, and the following was reported with regard to revenue management:

- Current operations were unable to issue assessments;
- Operational efficiency in assessments stood at 50%;
- No enforcement activities were in place;
- Letters of Good Standing were issued to employers who were in default;
- Rebates to complying employers were not processed; and
- There were unallocated contributions;

5.2.80.5 He wrote to the Director-General of the National Treasury, the Accountant-General, the Public Protector South Africa and the Auditor-General on 11

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February 2013, informing them of the establishment of the project team and requesting support and advice;

5.2.80.6 He requested the appointment of independent external evaluators to conduct the evaluation of the tenders received for the turnaround strategy and the forensic audit into the CF;

5.2.80.7 This seemingly resulted in a stalemate between the Mr Nhleko and the Commissioner, Mr Mkhonto, who refused to approve the appointments of the independent evaluators, resulting in the DG ultimately writing to the Commissioner on 29 July 2013, informing him of the DG’s intention to suspend him. The Minister seemingly intervened on 31 July 2013, writing to the DG and indicating that the CF was an entity which accounted directly to the Minister and therefore the BAC should refrain from awarding any tender relating the turnaround strategy and forensic audit and that the letter which was served on the Commissioner should be withdrawn with immediate effect.

5.2.80.8 On 07 August 2013, Mr Nhleko responded to the letter which he received from the Minister by inter alia setting out rational for his decision. He there after stated that: -

“Having stated the above, and deducing the fact that there are serious operational, administrative and legal implications arising out of the Honourable Minister’s decision:

- It is clear to me that the Honourable Minister is interfering with the function of the administration of the Department;

- The administration and Accountability (sic) of the Fund is going to be seriously compromised if it is to function without an Accounting Officer and;"
• As Accounting Officer of the Department, I am going to find it extremely difficult to maintain sanity and discipline in the department from now and into the future."

5.2.80.9 A letter informing the then Public Protector of the directive issued by the then Minister to terminate the forensic audit and the turnaround initiatives at the CF was received from Mr Nhleko on 19 August 2013.

5.2.81 Mr Nhleko noted further that he had various one on one meetings with the then Minister during which he had raised issues and attached documents relating to the operational functionality of the CF, including but not limited to meetings held on 14 February 2013; 03 June 2013; 27 June 2013; 20 July 2013 and 29 July 2013.

5.2.82 According to Mr Nhleko, the former Minister of Labour then appointed an Acting DG with effect from 06 November 2013. On 11 November 2013, he received a letter from the former Minister of Public Service and Administration, Ms Lindiwe Sisulu, requesting his consent to be seconded to the Department of Public Service and Administration (DPSA). He consented to the secondment on the same date.

The CF's and the DOL's response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

AD the award to NICS

5.2.83 On 06 August 2019, the CF and the DOL submitted a combined response to my Notice in terms of section 7(9) of the Public Protector Act. In its response, it indicated that, according to the information at its disposal, the CF followed due tender processes with regard to the award of bid DCC 08/2008 in terms of which
NICS’ appointment was approved by the BAC on 17 December 2009, and on 01 February 2010, the CF appointed NICS as the successful bidder. The SLA was signed by the then Commissioner on 15 April 2010.

5.2.84 The CF further submitted that there was no need for a deviation, since all the supply chain prescripts were complied with and the outcome of which was that NICS was the only fully complying service provider.

5.2.85 According to the Request For Proposals (RFP) Document, it was clear that the CF wanted a service provider to set up a call centre to administer the 90-180 days debtors and the accounts older than 180 days were to be outsourced on a risk basis, meaning cases would be outsourced for a maximum of six months unless the service provider was able to activate these cases as paying cases, in which event, the cases would remain with the service provider until finalisation.

5.2.86 The CF conceded that there was a de-scoping in terms of which the CF agreed to hand over debts which were 60 days and older without the prior approval of the BAC. The CF then submitted that the initial award to NICS complied with all the relevant prescripts and therefore could not be said to have been awarded irregularly. It further submitted that it was not the Commissioner who awarded the contract, but that the contract was awarded to NICS as per compliance with relevant prescripts, and therefore, the CF’s conduct was not in contravention of its Supply Chain Management Policy.

5.2.87 The CF further conceded that the value of the contract exceeded the financial delegation of the Commissioner, which was R30 million, and further conceded that the then Commissioner therefore had no financial delegation to sign the contract. In terms of the Financial Delegations 2010, applicable at the time of the signing of the contract, the DG had the delegation to sign contracts that were over the value of R30 million.
5.2.88 Although the value of the contract was not stipulated in the tender documents or the SLA, the bid was awarded on a 10% (excluding VAT) of the successfully recovered revenue. The Minutes of the BAC meeting held on 20 December 2009 recorded that bidders were verbally informed during the Briefing Session that the Debtors’ Book was an estimated R2.9 billion. Accordingly, the financial delegation to sign the contract was with the DG.

5.2.89 Based on the fact that the former Commissioner did not have the financial delegation to sign the contract, the contract was null and void. According to the CF, it continued to make payments in terms of a contract which was invalid. It did however acknowledge that services were rendered to the CF, which had to be paid for. The CF acknowledged that, because the contract was invalid due to the fact that the Commissioner did not have the required financial delegation, the payments made in respect of the contract can be regarded as irregular expenditure, and had to be reported to the NT through the Office of the DG, which had not been done.

5.2.90 Accordingly, the CF’s contention was that my finding that the initial award of the tender was irregular cannot be substantiated, except for the fact that the payments which were made could be regarded as irregular payments.

5.2.91 The CF conceded further that there was no interface between the systems of the CF and NICS, and that the data required was provided to NICS in CSV format. However, various attempts were made to address this challenge. Because NICS would be granted access to the CF’s financial system, the employees first needed to be vetted by the State Security Agency, and the vetting results were only received by the CF in August 2011.

5.2.92 It was agreed that due diligence should have been conducted prior to the award of the contract to ensure implementation. The CF contended that it was of the view that it would be able to deliver on this requirement. From the information at
the CF’s disposal, there was a KPMG contract in place which was ending on 30 April 2013, and which had been of great assistance with SAP in so far as the extraction of debtors’ age analysis was concerned and in the compilation of certain monthly reports.

**AD the extension**

5.2.93 According to the CF, the challenges experienced as indicated with regard to the implementation of the SLA, was sought to be rectified by the extension of the SLA for a period of eighteen (18) months, from 18 April 2013 to 14 October 2014. This led to the signing of an Addendum, which was signed by the former Commissioner of the CF on 30 January 2013. The CF further conceded that an open tender process did not precede the Addendum containing the extension, and that the provisions of Treasury Regulation 16A6.4 were not complied with. In addition, the CF alluded that the former Commissioner also did not have the financial delegation to sign the Addendum, which again exceeded his signing powers.

5.2.94 From the information at its disposal, the CF concluded that indeed, the extension exceeded the 15% or R15 million threshold set in Treasury Instruction Note (31 May 2011), as the debt book at the time of the extension was R8 billion and the collection commission payable would have been R800 million.

5.2.95 The CF agreed that it incurred fruitless and wasteful expenditure in the amount of R349 159 694.00, as a result of its failure to conduct due diligence prior to the award, and its failure to exercise reasonable care and proper contract management over the contract. It further indicated that, with regard to the exercising of proper contract management, the interfacing of the systems posed huge difficulties and much was done to attempt to establish the interface, but due to challenges beyond the control of the CF, the contract could not be managed
although attempts were made to do so. The CF’s various attempts to address the challenges demonstrated that it acted in good faith.

5.2.96 The CF agreed to my finding that the former Commissioner of the Fund failed to ensure effective, efficient, economical and transparent use of the financial and other resources of the CF, and further that he failed to take appropriate steps to prevent irregular, fruitless and wasteful expenditure.

**AD the intended finding that the former DG, Mr Sam Morotoba, as the Accounting Officer, failed to exercise effective oversight over the CF**

5.2.97 In this regard, Mr Morotoba indicated that the tender process commenced in August 2008, and that he was not the Acting Director-General (ADG) during August 2008. The BAC approved the appointment of NICS as the successful bidder on 17 December 2009, and his acting appointment which was made on 24 August 2009, was terminated in August 2009 with the appointment of Mr Mzwaynele Manyi as the DG for the DOL. Mr Morotoba was thus not the ADG during December 2009.

5.2.98 The SLA commenced on 19 April 2010 for a period of three years (19 April 2010 to 18 April 2013). Mr Morotoba was appointed as ADG on 04 June 2010 to 09 May 2011, and he was thus not the ADG at the time of the commencement of the SLA and accordingly, had no knowledge thereof.

5.2.99 An *ad hoc* BAC approved the extension of the SLA on 25 October 2012, and during this time Mr Morotoba was not ADG. The Addendum was signed by the former Commissioner on 30 January 2013 for a period of eighteen (18) months, which was from 18 April 2013 to 14 October 2014. Mr Morotoba was not ADG on 30 January 2013, but was only appointed on 06 November 2013 as ADG, until further notice.
5.2.100 It conceded that the former Commissioner informed Mr Morotoba that the CF should cancel the contract upon the advice of a legal opinion from Senior Counsel, Adv. Ntsebeza, which opinion recommended the immediate termination of the extension of the contract, as the extension was invalid due to lack of compliance with procurement procedures. Mr Morotoba gave the instruction for the termination of the contract. The State Attorney thereafter wrote to NICS and advised that the contract was null and void.

5.2.101 This legal opinion from Adv Ntsebeza was dated October 2013 and was drafted before Mr Morotoba became ADG in November 2013. However, Mr Morotoba was appointed ADG shortly after the legal opinion was drafted. NICS was officially informed of the termination of the contract in February 2014, which was during the acting appointment of Mr Morotoba, which means that he did exercise his oversight role when he was made aware of the unlawful extension of the SLA.

5.2.102 It was further contended that no proof could be obtained of any submissions which were forwarded to Mr Morotoba at any time during his acting appointments, including submissions informing him of the SLA, the challenges experienced with regard to the management of the contract, nor the extension of the SLA.

5.2.103 In conclusion, it submitted in its response to my Notice in terms of section 7(9) that Mr Morotoba was not aware of the SLA, as he was not ADG at the time of signing thereof, nor was he made aware of the SLA during his various acting appointments. He was also not made aware of the challenges during the first year of the SLA when he was ADG from 04 June 2010 to 09 May 2011.

5.2.104 Mr Mototoba could therefore not be said to have failed to exercise oversight over the administration of the CF, as this matter was not brought to his attention. In addition, it was contended that, for me to say that Mr Morotoba
failed to exercise oversight over the administration of the entire CF is drastic and inaccurate, as the CF was operating smoothly in other aspects.

Mr Manyi’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

5.2.105 Mr Manyi responded to my Notice in terms of section 7(9) of the Public Protector Act, 1994, on 20 August 2019. In his response, he indicated that the conceptualisation of engaging NICS as a service provider happened before he became the DG of the DOL. In addition, the putting together of the bid specifications for the advert for the NICS bid, and the advertisement of the bid on 29 August 2008, also happened before he became the DG of the DOL.

5.2.106 Mr Manyi indicated that he was appointed as the DG of the DOL on 01 September 2009, and by the time he arrived, the Commissioner for the Fund had already been operating like a de facto accounting officer of the Fund. He denied that he ever delegated any authority to the Commissioner, and referred me to former Minister Mdladlana.

5.2.107 According to Mr Manyi’s submission, he was never briefed about the appointment of NICS, or about any challenges related to the NICS contract. The BAC never met with him to discuss the matter at any stage, and it was only with the reading of my Notice in terms of section 7(9) that he became aware of the fact that the CF and NICS entered into a SLA on 19 April 2010.

5.2.108 Mr Manyi submitted that he did not sign the SLA as the DG of Labour, and a few weeks after the SLA was entered into, on 4 June 2010, he was suspended as the DG of Labour for matters unrelated to the CF. This suspension deprived him of an opportunity to receive reports from the CF, so strictly speaking the
overlap between the execution of the SLA and me being present in the system is just a mere couple of weeks.

5.2.109 According to Mr Manyi, it was absurd that he be mired in this matter now. It was his strong contention that he had absolutely nothing to do with this matter. He emphasised that he was not involved in the conceptualisation and on-boarding process at all, and indicated further that he was not even briefed about it on his arrival.

5.2.110 In the absence of a complaint then or a disclosure by the then Commissioner during their meetings, Mr Manyi indicated that he had no way of finding out whether such a transaction was taking place behind the scenes. Mr Manyi further contended that he was not involved in the execution of the contract as he was suspended when the execution effectively took place and he was subsequently moved to the Government Communications & Information Systems (GCIS) on 3 February 2011.

5.2.111 Mr Manyi further submitted that his signature, concurring or even noting anything in connection with this matter, did not appear anywhere. The figure quoted as R3.3 billion in 2010 and growing to R8.9 billion in 2013, happened when he was not in the department.

5.2.112 Mr Manyi further indicated that he heard about this saga for the first time when he received my Notice in terms of section 7(9), and that he was not called to respond to anything specific, correctly so, as he had nothing to say on the matter, as it did not involve him.

Application of the relevant law

5.2.113 The Compensation Fund is a Public Entity listed in Schedule 3 of the Public Finance Management Act, 1999 (hereinafter referred to as the PFMA).
5.2.114 Section 217 of the Constitution of the Republic of South Africa, 1996, provides that, when an organ of state in the national, provincial or local sphere of government, or any institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

5.2.115 Section 1 of the PFMA defines fruitless and wasteful expenditure as expenditure which was made in vain and would have been avoided had reasonable care been exercised. Irregular expenditure is defined as expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation.

5.2.116 In terms of section 2(1) of the Compensation for Occupational Injuries and Diseases Act, 1993 (hereinafter referred to as COIDA), the Director-General of the Department of Labour is the Accounting Officer for the Compensation Fund.

5.2.117 In terms of section 38(1)(a) of the PFMA, the Accounting Officer of a Department must ensure that that Department has and maintains an effective, efficient and transparent system of financial and risk management and internal control. In addition, the Accounting Officer is required to ensure that the Department has an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

5.2.118 Section 50 of the PFMA provides that:

"(1) The accounting authority for a public entity must –

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;"
5.2.119 In terms of section 50(1)(a) of the PFMA, a department, trading entity, constitutional institution or public entity must have and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.

5.2.120 Section 51(1)(b)(ii) further provides that an accounting authority must take effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure.

5.2.121 In terms of section 51(1)(e)(iii), the accounting authority must take effective and appropriate disciplinary steps against any employee who makes or permits an irregular or a fruitless and wasteful expenditure.

5.2.122 Section 57 of the PFMA, provides that: -

"An official in a public entity –

(b) is responsible for the effective, efficient, economical and transparent use of financial and other resources with that official’s area of responsibility;

(c) must take effective and appropriate steps to prevent, within that official’s area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(e) is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official’s area of responsibility."

5.2.123 Section 83 further provides that: -

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“(1) The accounting authority for a public entity commits and act of financial misconduct of that accounting authority wilfully or negligently -

(b) makes or permits an irregular expenditure or a fruitless and wasteful expenditure.”

5.2.124 Regulation 16A6.4 of the Treasury Regulations,\(^\text{19}\) provides that: -

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

5.2.125 Regulation 16A9 of the Treasury Regulations provides that: -

“16A9.1 The accounting officer or accounting authority must –

(a) take all reasonable steps to prevent abuse of the supply chain management system;

(b) investigate any allegations against any official or other role player of corruption, improper conduct or failure to comply with the supply chain management system,”

5.2.126 Regulation 33.1 obliges the accounting authority of a public entity to ensure an investigation is conducted into any allegations of financial misconduct levelled

\(^{19}\) Treasury Regulations for departments, trading entities, constitutional institutions and public entities, issued in terms of the Public Finance Management Act, March 2005.
against any employee, and if such allegations are confirmed, to hold a
disciplinary hearing in accordance with the relevant prescripts. This
investigation must be instituted within thirty (30) days from the date of
discovery of the financial misconduct.

5.2.127 National Treasury’s **Instruction Note on Enhancing Compliance**
**Monitoring and Improving Transparency and Accountability in Supply**
**Chain Management**, 31 May 2011, provides that all contracts in excess of
R10 million requires the approval of National Treasury. In addition, paragraph
3.9.3 of the same Instruction Note provides that contracts may not be
expanded by more than 15% or R15 million of the original value of the contract,
whichever is the lower amount.

5.2.128 Paragraph 6.2 of the Compensation Fund’s Supply Chain Management Policy
of 2011, obliges officials to take appropriate steps to prevent any unauthorised,
irregular, fruitless and wasteful expenditure in his/her area of responsibility.

5.2.129 Paragraph 25.6 of the Fund’s Supply Chain Management Policy further
provides that: -

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25.6.1 The Accounting Officer or delegate must monitor the performance
of the contractor under the contract or agreement on a monthly
basis.

25.6.2 The Accounting Officer must regularly report to the Council on the
management of the contract or agreement and the performance of
the contractor.

[...]
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25.6.6 Regular meetings with contractors to discuss progress, deliverables, foreseeable problems and/or amendments must be held during the contract period."

5.2.130 In terms of paragraph 25.14.1 of the same Policy, a contract procured through the SCM Policy of the CF may be amended if:

a) The reasons for the proposed amendment have been tabled in the BAC;
b) The local community has been invited to submit representations to the Fund;
c) Amendments may not materially alter the original objective, as such amendments should form part of a new bid invitation;
d) All contractual parties must agree to the amendments in writing; and
a) No contract may be amended after the original contract has ceased to exist.

Conclusion

5.2.131 There were irregularities in the award, extension and contract management of bid DCC08/2008 for Debt Collection and Debtor Management Control Centre Services.

5.3 Regarding whether the former Commissioner of the Compensation Fund authorised advance payments to medical service providers without the necessary invoices to reconcile the payments, as a result of which the Compensation Fund incurred irregular expenditure:

Common cause facts

5.3.1 During July 2012, the CF entered into agreements with five (5) medical service providers, namely Mediclinic, Compsol, CoidLink, Life Care and Netcare. In terms of the agreements signed between the CF and the medical service providers, the
CF undertook to pay the service provider a Pre-Validation Amount in respect of each claim prior to the validation, processing and payment of such a claim; and after the CF had validated the claim and paid the service provider in the ordinary course of the CF’s business, the service provider had to pay back to the Fund the relevant Pre-Validation Amount.

5.3.2 In its formal response to my letter of enquiry to the CF, the CF responded on 06 November 2017 and indicated that:

"3.8 The allegation on advance payment is correct except the amount mentioned. The correct amount was R456 866 564.68. At the time the Fund introduced the ICM system aimed at improving and modernising validation and payment processes. However, it was discovered that the system was not working perfectly and optimally thereby causing backlog in validation, processing and payment of claims.

3.9 As a result, service providers were not paid and it had significant adverse implications in their businesses. A decision was then taken to advance payment to the service providers and the Fund will validate claims in the ordinary course of business. After validations, the service providers were required refund (sic) the Fund for all claims which were not validated. Agreements were signed with all the service providers to that effect. However, it later transpired that those advance payments were identified as irregular by the Auditor-General’s office."

Mr Mkhonto’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

5.3.3 In his response to my Notice in terms of section 7(9) of the Public Protector Act, 1994, Mr Mkhonto indicated that, prior to July 2012, the CF was completely overrun by payments to medical service providers whose invoices and payments
had not been electronically captured. Almost on a daily basis, judgments were granted against the CF due to non-payment. Similarly, service providers refused to accept or treat patients who sustained injuries on duty and had to undergo treatment. This created an untenable situation where critical services were withheld from the general public.

5.3.4 Mr Mkhonto further submitted that it was not true that any payments were made without validation. He contended that, in the recommendation submitted to him by the then CFO, the medical service providers would simply provide an electronic copy of the claim(s) already submitted. The electronic copies put the CF in a position to search for specific invoices and expedite the verification, and also possibly, eliminate duplication of claims. The system, he alleged, also made it possible for the CF to do set-off against any erroneous payment.

5.3.5 According to Mr Mkhonto, all payments were made on invoices already submitted, and in most cases, these invoices were submitted multiple times. According to him then, no advance payments were made, and he submitted his disagreement with my findings relating to this issue.

The CF's response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

5.3.6 In its response to my Notice issued in terms of section 7(9) of the Public Protector Act, 1994, which I received on 06 August 2019, the CF indicated:

"Regarding the advance payment given to the five (5) medical service providers, namely Mediclinic, Compsol, Coidlink, Life Care and Netcare, the CF does not dispute that they were irregular expenses in nature. The office of the Auditor-General also identified those advanced payments as irregular."
The former Commissioner of the CF authorised those advance payments to the medical service providers without the necessary invoices to reconcile payments, and, as a result, irregular payments were incurred.

However, the Fund has already started the litigious processes of recouping those monies from the medical service providers. Summons were issued against them and in order to avoid costly legal costs, the medical service providers are willing to negotiate and in some instances, have agreed to set-off debts against what is owed to them by the Fund."

Application of the relevant law

5.3.7 Treasury Regulation 31.1.1 states that the Accounting Authority of a Schedule 3 Public Entity is responsible for establishing procedures and processes to ensure sufficient and effective cash management. In this regard, sound cash management included to avoid making pre-payments for goods and services, i.e. payments in advance of the receipt of the goods and services.

5.3.8 Paragraph 25.8 of the Compensation Fund’s Supply Chain Management Policy, 2011, provides that: -

"25.8.1 Under normal circumstances payment is made for supplies in accordance with the contract conditions only after it has been delivered and, where applicable, installed, in good working order.

[...]

25.8.3 Sound cash management include avoiding pre-payment or advance payment for good/services (i.e. payments in advance of the receipt of the goods/services), unless required by the contractual obligations). (sic)
25.8.3 Where a contractor requires an advance payment or a progress payment and this is not a contract condition, payment may be made only with the prior approval of Accounting Officer or the delegate.

25.8.4 The conditions for advance payment would normally have to include a letter of credit as a counter commitment to the advance.”

5.3.9 Paragraph 25.9 of the same Policy obliges the Accounting Officer to, promptly inform the Council upon discovery of irregular or any fruitless and wasteful expenditure, and in return, the Council should inform the Auditor-General (AG) in writing, outlining the particulars of the expenditure, as well as the steps which had been taken to recover the expenditure and to prevent a recurrence of the expenditure.

Conclusion

5.3.10 The former Commissioner of the Compensation Fund authorised advance payments to medical service providers without the necessary invoices to reconcile the payments, and, as a result of which the Compensation Fund incurred irregular expenditure.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:

6.1 Regarding whether the former Minister of Labour had a duty to disclose her relationship with an employee of Accenture at the time when the Department conducted business with Accenture, and if so, whether such failure constituted improper conduct and maladministration:
6.1.1 The allegation that the former Minister of Labour had a duty to disclose her relationship with an employee of Accenture at the time when the Department conducted business with Accenture, is unsubstantiated;

6.1.2 The Constitution prohibits Members of the Executive from exposing themselves to a situation involving the risk of a conflict of interest. In the circumstances, I am of the view that the situation that the former Minister found herself in, created a perception of a conflict of interest between her official responsibilities and her private interests on an administrative and financial transaction that was concluded through the PFMA and Procurement legislation long before she was appointed as the Minister of Labour in 2010. There is no legislation that clearly compelled the Minister at the time to declare the perceived conflict of interest as this responsibility falls clearly within the key responsibilities of the Accounting Officer.

6.1.3 Even though in my opinion, Accenture declared that the former Minister’s son was employed by the company, I could not find evidence that the former Director-General or any official in the Department was influenced by the Minister to conclude the said transaction as there is also no evidence that was presented to me that the Minister was involved in appointing and extending the contract through the deviation or any other decision that she influenced in these transactions.

6.2 Regarding whether there were irregularities in the award, extension and contract management of bid DCC08/2008 for Debt Collection and Debtor Management Control Centre Services, as a result of which the Compensation Fund incurred fruitless and wasteful expenditure:
6.2.1 The allegation that there were irregularities in the award, extension and contract management of bid DCC08/2008 for Debt Collection and Debtor Management Control Centre (DMCC) Services, as a result of which the CF incurred fruitless and wasteful expenditure, is substantiated;

6.2.2 The initial award of the contract was irregular because the establishment of the DMCC was de-scoped, and the CF agreed to the handover of debt which were 60 days and older without the prior approval of the Bid Adjudication Committee (BAC). In addition, the Commissioner could not award the contract as the value of the contract exceeded his financial delegation, which was R30 million;

6.2.3 The conduct of the CF in the award of bid DCC08/2008 for Debt Collection and DMCC Services, was in contravention of its SCM Policy, and the award exceeded the financial delegation of the Commissioner;

6.2.4 The data required was given in CSV format and no interface was established between systems. This was a material breach of the SLA entered into between the parties, and should have been approved by the BAC;

6.2.5 The CF failed to conduct due diligence prior to the award of the contract to ensure that what was required of it in terms of the award and the SLA was implementable. The CF was unable to provide NICS with interface to its financial systems, and such interface requirement should have been clear during the evaluation of the bids by the CF; alternatively, the CF committed itself in the SLA to a requirement which it knew it was unable to deliver on;

6.2.6 The conduct of the CF constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;
6.2.7 As a result of the irregular award, the CF incurred *irregular expenditure* in the amount of **R213 240 020.00**, being the total amount in commission paid to NICS during the initial three (3) year contract period, as held in the Arbitration Award;

6.2.8 The BAC of the CF approved the extension of the contract, deviating from a competitive bidding process;

6.2.9 The deviation from a competitive bidding process was in violation of the National Treasury (NT) Instruction Note of 31 May 2011, in terms of which it required the NT’s approval for the extension above R10 million; and in addition, could only extend the contract to the value of R15 million or 15% of the original contract value; and Treasury Regulation 16A6.4;

6.2.10 The conduct of the CF in the extension of the contract with NICS constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

6.2.11 As a result of the failure by the CF to conduct due diligence prior to the award and the failure by the CF to exercise proper contract management over the contract awarded to NICS, the CF incurred *fruitless and wasteful expenditure* in the amount of **R349 159 694.00**;

6.2.12 The former Commissioner of the CF failed to ensure effective, efficient, economical and transparent use of the financial and other resources of the CF; and further failed to take appropriate steps to prevent irregular, fruitless and wasteful expenditure;

6.2.13 The conduct of the former Commissioner, Mr Mkhonto, constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
6.3 Regarding whether the former Commissioner of the Compensation Fund authorised advance payments to medical service providers without the necessary invoices to reconcile the payments, as a result of which the Compensation Fund incurred irregular expenditure:

6.3.1 The allegation that the former Commissioner of the CF authorised advance payments to medical service providers without the necessary invoices to reconcile the payments, as a result of which the CF incurred irregular expenditure, is substantiated;

6.3.2 By its own admission, the CF made advance payments to five (5) service providers in the amount of R456 866 564.68;

6.3.3 These payments were made in contravention of the Treasury Regulations and the CF’s SCM Policy, and was therefore irregular;

6.3.4 The conduct of the CF constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of addressing the improper conduct and maladministration, is the following:

The President of the Republic of South Africa to:

7.1 Take cognisance of the findings of improper conduct and maladministration made against the former Minister of Labour, Ms Oliphant, mentioned in this report.
The Minister of Employment and Labour to:

7.2 Take cognisance of the findings of improper conduct, maladministration, irregular and fruitless and wasteful expenditure by the CF as mentioned in this report.

The Directors-General of National Treasury, Office of the Public Service Commission, Department of Public Service and Administration in consultation with the DG in the Presidency to:

7.3 Initiate a process to review the rules relating to declaration of conflict of interest to include the management of relationships by Members of the Executive, specifically situations where a Member of the Executive is related to a person or company which conducts business with Departments falling under their portfolios, and further where relatives of Members of the Executive are appointed to positions in Departments falling under their portfolios. This review should be conducted to ensure that the processes followed in recruitment and procurement processes are open, fair and transparent without prejudicing their family members whose rights cannot be prejudiced by restricting them to do business or to be employed in the public service.

The DG of the Department of Labour to:

7.4 Within fifteen (15) working days from the date of this report, take cognisance of the findings of improper conduct and maladministration by the former Commissioner of the CF and submit to the Public Protector an Action Plan outlining how the remedial action in this report will be implemented;

7.5 Within thirty (30) days of the date of this report, report to the National Treasury the particulars of the irregular expenditure mentioned in this report and to apply for condonation thereof in terms of the relevant prescripts;
7.6 Within hundred and twenty (120) days from date of this report, ensure that such conduct is not repeated and appropriate action is taken to recover any irregular and fruitless and wasteful expenditure incurred through the conduct of the former Commissioner.

The Compensation Commissioner to:

7.7 Within sixty (60) days from date of this report evaluate the effectiveness of the CF’s internal controls on supply chain management processes and identify systemic deficiencies with a view to take corrective action to prevent a recurrence of the improprieties referred to herein;

7.8 Within sixty (60) days from date of this report evaluate the effectiveness of the CF’s internal controls on contract management, specifically relating to the issues outlined in this report, with a view to take corrective action to prevent a recurrence of the improprieties referred to herein;

7.9 Within ninety (90) working days of the date of this report, take appropriate disciplinary action against all members of the BEC and the BAC who are still in the employ of the CF and who were involved in the evaluation, award and extension of bid DCC08/2008 for Debt Collection and Debtor Management Control Services to the CF, and who further were responsible for exposing the CF to acts of maladministration and financial risk in violation of the provisions of its Supply Chain Management Policy; the Public Finance Management Act and its concomitant Regulations.

8. MONITORING

8.1 I shall monitor the implementation of my remedial action on a monthly basis until such time as it has been complied with in full.
8.2 Unless the remedial actions taken by the Public Protector are reviewed and set aside by the Court of law, compliance is not optional and same must be complied with within the stated period.

ADV. BUSISWE MKHWEBANE  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA  
DATE: 03/09/2019