

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO: 3/2006

**REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF A BREACH
OF THE EXECUTIVE ETHICS CODE BY THE MINISTER OF SOCIAL
DEVELOPMENT, DR Z SKWEIYA**

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Executive summary

The Office of the Public Protector investigated a complaint by a Member of Parliament, lodged in terms of the Executive Members' Ethics Act, 1998 against the Minister of Social Development, Dr Z Skweyiya (the Minister). It was alleged that the Minister acted in breach of the Executive Ethics Code by exposing himself to a situation involving the risk of a conflict between his official responsibilities and his private interests.

The complaint related to a loan that was granted to the Minister's wife by Mr S Majali of Invume Management in December 2003. Media reports, on which the complaint was based, suggested that the loan was granted in order to influence the Minister to ensure that a tender by the I T Lynx Consortium, in which Mr Majali has an interest, for a new social grant administration system for Department of Social Development, was awarded to it.

Evidence obtained during the investigation indicated that:

- The final adjudication of the tender in question took place 1 year and 7 months before the loan was granted to Mrs Skweyiya. It could therefore not have constituted the risk of a conflict of interests as contemplated by the Executive Ethics Code in respect of the Minister's official responsibilities, if any, in respect of the awarding of the tender;
- The contents of the complaint, media reports referred to, correspondence pertaining to the tender, tender documents, letters of demand from attorneys acting on behalf of I T Lynx and the pleadings filed in its civil claim against the State Information Technology Agency and the Minister that were considered during the investigation, contained no indication that Mr Majali or Invume Management was involved in I T Lynx;

- The Minister was not involved in the loan transaction between his wife and Mr Majali. He was only informed about it after the arrangement had been agreed upon. The information obtained during the investigation provided no indication that the evidence in this regard should be viewed with any greater circumspection.

From the investigation it was found that the Minister was probably not aware of Mr Majali's interest in I T Lynx at the time when the loan was granted to his wife or at the time when he approached the Minister of Finance recommending that the contract for the new social grant payment system be implemented. As Mr Majali's interest in I T Lynx is remote and was not disclosed during the tender process, it could also not reasonably have been expected of him to have been aware thereof.

No indication could be found from the investigation that the loan granted by Mr Majali to Mrs Skweyiya in December 2003 had any influence or bearing on the manner in which the Minister performed any of his official responsibilities in respect of the efforts of the Department to replace its social grant administration system and the legal action that has been instituted by I T Lynx in regard thereto.

The Minister conceded during the investigation that he had failed to disclose the benefit of the interest free loan granted to his wife, as required by the Executive Ethics Code.

It is disconcerting that the process of the replacement of the SOCPEN system has been put on hold because of litigation in connection with the said tender, despite the fact that investigations have indicated huge financial losses to the Department as a result of the shortcomings and failures of the current system. The said litigation can take years before it is finalized, while the losses to the

State would continue to increase. The fact that the Department and the National Treasury failed to find a solution to the *impasse* between them relating to the replacement of the SOCPEN system has clearly and might in the future still delay the process further, resulting in unacceptable amount of public money being wasted.

The following key findings were made:

- ❖ The allegation that the loan granted by Mr Majali to Mrs Skweyiya in December 2003 resulted in the Minister of Social Development exposing himself to a situation involving the risk of a conflict of interest which constituted a breach of the Executive Ethics Code, is unfounded; and
- ❖ The failure of the Minister of Social Development to disclose the benefit of the interest free loan granted to his wife by Mr Majali in December 2003 constituted a breach of the Executive Ethics Code.

The Public Protector recommended that:

- The President take urgent steps to ensure that the issues delaying the replacement of the SOCPEN system are resolved in the least costly but most effective manner; and
- The Secretary of the Cabinet take steps to ensure that the Minister of Social Development makes a proper disclosure in terms of the provisions of paragraph 6 of the Executive Ethics Code of the interest free loan granted to his wife by Mr Majali in December 2003.

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF A BREACH OF THE EXECUTIVE ETHICS CODE BY THE MINISTER OF SOCIAL DEVELOPMENT, DR Z SKWEIYA

1. INTRODUCTION

This report is submitted to the President of the Republic of South Africa in terms of the provisions of section 182(1)(b) of the Constitution, 1996 and section 3(2) of the Executive Members' Ethics Act, 1998. It relates to an investigation into an allegation of a breach of the Executive Ethics Code by the Minister of Social Development, Dr Z Skweyiya, concerning a loan granted to his wife by Mr S Majali of a private company, Imvume Management, in December 2003.

PART 1

BACKGROUND

2. On 29 July 2005 the *Report of the Public Protector on an investigation into an allegation of misappropriation of public funds by the Petroleum, Oil and Gas Corporation of South Africa, trading as PetroSA, and matters incidental thereto*¹, (the PetroSA Report) was submitted to Parliament. It related to an investigation of complaints lodged in connection with an advance payment of R15 million made by PetroSA to a private company, Imvume Management (Imvume) in December 2003. The advance payment pertained to a contract for the procurement of oil condensate.
3. The complainants in the said matter alleged, *inter alia*, that:

¹ Report no 30

- 3.1 A large portion of the advance payment by PetroSA was diverted by Imvume to the African National Congress (ANC) instead of the supplier of the oil condensate; and
- 3.2 Imvume made a payment to a construction company (Hartkon Construction) that was renovating the private residence of the Minister of Social Development, Dr Z Skweyiya (the Minister), shortly after the advance was paid by PetroSA.
4. From the investigation it was found, *inter alia*, that:
 - 4.1 The mandate of the Public Protector is by law restricted to the investigation of matters relating to government bodies, public entities, state affairs and dishonesty in respect of public money. Consequently, the allegations in connection with the relationship between Imvume and the ANC, and payments made by Imvume to private entities (including Hartkon Construction) could not be investigated;
 - 4.2 The approval and authorization of the advance payment made by PetroSA to Imvume was lawful, well-founded and properly considered in terms of the legal and policy prescripts that applied to PetroSA;
 - 4.3 The decision to approve Imvume's request, as it was presented to PetroSA, for an advance was not unreasonable under the prevailing circumstances and did not amount to maladministration, abuse of power or the receipt of any unlawful or improper advantage; and
 - 4.4 Imvume's failure to pay the supplier of the oil condensate the full amount due to it could not reasonably have been foreseen or expected by PetroSA.

5. The allegation of the payment of an amount of R65 000 by Invume to Hartkon Construction raised a suspicion of an improper relationship between the Minister and Invume. In the PetroSA Report, it was stated that this suspicion was apparently based on the following²:

- "(a) A payment of R 65 000 by Invume to Hartkon Construction, (which was renovating the Minister's private residence) allegedly made the day after the controversial advance payment by PetroSA was received;*
- (b) Confirmation by the Minister's wife of such a payment, explained by her as a loan which has already been repaid;*
- (c) Confirmation by the attorneys acting on behalf of Invume and Mr Majali of the loan granted to Ms Mazibuko-Skweyiya;*
- (d) Documentation allegedly indicating that Mr Majali was an agent for Cash Paymaster Services (the company that distributes social grants on behalf of some provincial governments) in 2003; and*
- (e) Documentation allegedly indicating that Mr Majali "was working on grandiose plans to build a financial services group under the Permit banner. Invume, Net 1 UEPS and government bodies would have been among the stakeholders. One of Permit's main functions would have been grants distribution. Even though grants distribution was a provincial function, Majali would still have had much*

² See paragraph 5.5.7 of the PetroSA Report

to gain from securing influence with Skweyiya as national minister. At the time, Skweyiya was drawing up policies that led to the creation of the Social Security Agency, which is taking over the function from the provinces.”

6. Considering the said allegations it was found that³:
- *"The said suspicions cast in regard to Dr Skweyiya appear to suggest that Imvume paid an amount of R65 000 to the construction company renovating his house in order to ensure that the Minister would in future use his influence to secure business for Imvume, or one of its sister companies, from the Department of Social Welfare or the Social Security Agency. It therefore clearly points to a corrupt act as contemplated by the provisions of the Corruption Act, 1992 or the Prevention and Combating of Corrupt Activities Act, 2004.*
 - *As indicated above, the affairs and conduct of private entities, such as Imvume and Hartkon fall outside of the ambit of the jurisdiction of the Public Protector, except if the conduct complained of or under suspicion relate to state affairs, improper enrichment or acts of corruption in respect of public money.*
 - *The payment in question clearly did not relate to state affairs as it was made from one private entity to another and involved renovation of a private residence.*
 - *Money paid from Imvume's funds, irrespective of its origin, constitute private and not public money⁴. For as far as the suggested impropriety*

³ See paragraphs 5.5.7.2 to 5.5.7.8 of the PetroSA Report

⁴ See paragraph 5.5.2.5

could constitute a corrupt relationship between the Minister and Imvume, it did not relate to public money. The suggestion of corruption therefore also falls outside of the jurisdiction of the Public Protector to investigate.

- *There is no substantive allegation or indication that the Minister performed any official action or omission that could have favoured Imvume in any way. The suggested corrupt intent clearly speculates in respect of future events that might or might not occur, which obviously cannot be investigated.*
 - *Section 6(4)(c)(i) of the Public Protector Act, 1994 provides that the Public Protector shall be competent, at any time, prior to, during or after an investigation, if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the relevant authority charged with prosecutions.*
 - *The information at the disposal of the Office of the Public Protector and that could be considered and verified in terms of its jurisdiction does not disclose the commission of any offence, but merely comprise suspicions and speculations that have not been substantiated. No substantive reason could therefore be found to refer this matter to the National Prosecuting Authority at the time of the investigation referred to in this report." (emphasis added)*
7. The PetroSA Report was accepted and adopted by the National Assembly.

PART 2

THE FIRST COMPLAINT

8. On 31 January 2006, Adv H Schmidt, a Member of Parliament and the Democratic Alliance's Spokesperson on Minerals and Energy, lodged a further complaint in connection with the payment of the said R65 000 by Invume to Hartkon Construction.
9. In his letter, Adv Schmidt referred to the findings contained in the PetroSA Report and stated that:

"As you are no doubt aware revelations in the Sunday Times newspaper, this past weekend, 29 January 2006, reveal that Mr Sandi Majali-Invume's Chief Executive Officer-filed a lawsuit for R149 million against the State Information Technology Agency (SITA) and, in effect, the Department of Social Development. The suit was filed in June 2005 by the company IT Lynx Consortium, also owned by Mr Majali, because, IT Lynx claimed, it had been allocated a tender to dispense social grants on behalf of the government by SITA and that SITA had later reneged on this agreement. The tender in question had a reported value of R500 million.

This information was not known at the time of your office's investigation.

It is now quite clear that Mr Majali therefore held a substantial interest with both the Department of Social Development and with the Minister of Social Development himself, and that this needs to be taken into consideration when looking at the payment of R65 000 to Hartkon Construction:

At the time that the R65 000 loan was made to Ms Mazibuko-Skweyiya, the wife of Social Development Minister Zola Skweyiya, by Mr Majali, Mr Majali was in the process of trying to secure a R500 million tender with the Department of Social Welfare.

Viewed in this light, and when one considers the R 11 million donation made by Imvume Management to the ANC, using what was effectively public money, this particular transaction needs to be investigated, as Mr Majali clearly had a vested interest in securing the Minister's approval. Certainly, in the light of the tender being sought, it is quite possible that the loan related directly to "state affairs" and "could be regarded as an alleged improper or dishonest act or omission with respect to public money".

I would thus like to request that, in the light of this new information, you office urgently reinvestigate this matter." (first emphasis added)

10. Adv Schmidt's request was responded to on 13 February 2006. Referring to what was found in regard to the matter in the PetroSA Report⁵, it was also stated that:

"The information referred to in your letter under reply was not submitted to us during the investigation and was therefore not considered. It appears to suggest that Mr Majali made a loan to Dr Skweyiya's wife with the intention of improperly influencing Dr Skweyiya to use his powers as the Minister of Social Development to ensure that a contract tendered for by a company in which Mr Majali has an interest, is awarded to it by the

⁵ See paragraph 6 above

Department of Social Development. This allegation points to an act of corruption as indicated in paragraph 5.5.7.2 of our report. As the alleged corrupt payment was made (allegedly on 19 December 2003) prior to the commencement of the Prevention and Combating of Corrupt Activities Act, 2004, it might, if proven to be true, have amounted to a violation of the provisions of section 1 of the Corruption Act, 1992, which is a criminal offence.

Although you are correct in stating that the Public Protector has the power to investigate acts of corruption in respect of public money, such an investigation would focus more on issues of maladministration, abuse of power and improper conduct. However, as the corrupt conduct that is being alleged in your letter points to a criminal offence, an investigation should, in the first instance, be considered by the South African Police Service with a view of prosecuting the guilty parties. The Public Protector does not have the powers to conduct criminal investigations and prosecutions, hence the provisions of section 6(4)(c)(i) of the Public Protector Act, 1994, referred to above.

Should you therefore be of the view that the contents of the newspaper report attached to your letter contains substantive indications of corrupt conduct on the part of the persons mentioned, it is suggested that you lodge a complaint with the South African Police Service at your earliest convenience. Once the criminal investigation has been concluded and a decision taken in respect of prosecution, we will consider an investigation of that part of the alleged conduct that fall within our mandate and jurisdiction.”

PART 3

THE COMPLAINT IN TERMS OF THE EXECUTIVE MEMBERS' ETHICS ACT, 1998

11. The complaint

11.1 Adv Schmidt lodged a further complaint on 15 February 2006 in which he stated that:

"The Sunday Times reported on 12 February 2006 that it was in possession of documents which 'show that (Social Development Minister Zola) Skweyiya campaigned to get the tender to manage the national social grants system awarded to (Sandi) Majali's IT Lynx.' "

The Sunday Times claims to be in possession of a confidential 'government memo' to this effect.

Along with the new evidence I pointed to in my letter of 30 January-that Mr Majali's company IT Lynx was in fact in the process of trying to secure a R500 million tender with the Department of Social Welfare at the time that the R65 000 loan was made by Mr Majali to Ms Mazibuko-Skweyiya, the Minister's wife-the revelation in the Sunday Times raises further questions with regard to the nature and purpose behind the loan."(emphasis added)

11.2 He further contended that:

" Thus, whether or not the purpose behind the loan was to influence Minister Skweyiya, with regard to the R500 million tender for which Mr Majali's company was bidding, Minister Skweyiya seems to have acted in violation of

Section 2(2)(a) and (b), subsections (ii),(iii),(iv) and (v) of the Executive Members Ethics Act⁶.

Thus, in light of the new evidence, I would like formally to request that your office investigate the nature and purpose behind the R65 000 loan made by Mr Majali to the wife of Minister Zola Skweyiya and any possible contravention of the said Act."

12. The article of the *Sunday Times* of 12 February 2006

The heading of the article read: "*How Skweyiya backed oilgate man Majali*". It stated that:

"Documents in the possession of the Sunday Times show that Skweyiya campaigned to get the tender to manage the national social grants system awarded to Majali's IT Lynx, which he described as 'a competent BEE consortium'.

The Treasury, which had budgeted R40 million for the project, stopped the award of the tender because it thought it was too costly. It proposed that the tender be 'restarted' as a public-private partnership.

Skweyiya criticized the Treasury for derailing the tender and called for funds for the project to be made available 'immediately'.

Ironically, Majali's IT Lynx is now suing Skweyiya for R149 million for 'non-performance' on the contract.

⁶ See paragraph 16.3 below

Finance Minister Trevor Manuel is cited in the lawsuit, but no relief is being sought from him.

Skweyiya is defending the action, arguing that 'a mere offer and acceptance of I T Lynx's tender proposal could not constitute a formal contract.'

The contract dispute took place just months after Majali paid the R65 000 for the renovations to Skweyiya's home and offered Skweyiya's wife Thuthukile, a job in another of his companies, Imvume Management. Imvume and Skweyiya have since claimed that this was a loan that had been repaid.

Documents show Skweyiya rejected the Treasury proposal to restart the tender process.

In a letter, he said: 'your proposal to restart the entire process would not only cost an unnecessary R15 million, but also, more importantly, delay this project by a further two years'.

In addition, Skweyiya said his department and the government would be exposed to:

- Legal action from the parties to whom the tender had been awarded and who had 'diligently and in good faith adhered to all the requests made during the tender process';*
- Criticism that 'my department would be derailing the transformation process by not awarding this tender to a competent BEE consortium';*

- *Allegations of continued nondelivery (sic) of grants and promises; and*
- *Failure to complete the overhaul of the social security system.”*

13. The gist of the complaint

From the information provided by Adv Schmidt, it appeared that the gist of his allegations is the following:

13.1 In December 2003, Invume made a payment of R65 000 to a construction company that was renovating the private residence of the Minister;

13.2 The payment was a loan by Mr Majali of Invume to the wife of the Minister;

13.3 According to the Minister the loan was repaid;

13.4 Months after the said loan was granted, a contractual dispute arose between the Minister and Mr Majali in regard to a tender for the dispensing of social grants that was allegedly awarded to IT Lynx, a company owned by Mr Majali;

13.5 The awarding of the tender was stopped by “Treasury” as it was too expensive;

13.6 The Minister campaigned to Treasury for the awarding of the tender to IT Lynx as he was concerned that:

- To restart the entire process would be expensive;

- Legal action could be instituted against the Department of Social Development by the parties to whom the tender had been awarded;
- The Department might be subjected to criticism for not awarding the tender to a competent BEE Consortium; and
- It would be alleged that the Department is continuing its failure to deliver proper services and to overhaul the security system.

13.7 Mr Majali's company, IT Lynx is now suing the Minister for a substantial amount of money for breach of contract.

13.8 It would appear that the purpose of the loan by Mr Majali to Mrs Skweyiya might have been to influence the Minister in regard to the tender "for which Mr Majali's company was bidding". If that was the case then the Minister, by accepting the loan, exposed himself to a situation where there was a risk of a conflict of interest between his private interests and his official responsibilities.

14. The jurisdiction and powers of the Public Protector to investigate the complaint

14.1 The constitutional mandate

14.1.1 The Public Protector is one of a number of institutions grouped together in Chapter 9 of the Constitution, 1996 (the Constitution) that has the mandate to strengthen and support our constitutional democracy.

14.1.1 Section 182(1) provides that the Public Protector has the power –

14.1.1.1 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;

14.1.1.2 To report on the conduct investigated; and

14.1.1.3 To take appropriate remedial action.

14.1.2 In terms of section 182(2), the Public Protector has the additional powers and functions prescribed by national legislation.

14.2 The Public Protector Act, 1994

14.2.1 Section 6(4) provides that the Public Protector is competent to investigate, *inter alia*, any alleged:

14.2.1.1 Maladministration in connection with the affairs of government at any level;

14.2.1.2 Abuse or unjustifiable exercise of power or other improper conduct by a person performing a public function; or

14.2.1.3 Improper or unlawful enrichment or receipt of any improper advantage by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level.

14.2.2 The format and procedure to be followed in conducting any investigation is determined by the Public Protector⁷.

14.2.3 The Public Protector can at any time, prior to, during or after an investigation make any appropriate recommendation to the affected public body or authority⁸.

14.2.4 Section 8(1) provides that the Public Protector may make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

14.3 The Executive Members' Ethics Act

14.3.1 This Act provides for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of provincial Executive Councils⁹.

14.3.2 Sections 3 and 4 provide, *inter alia*, that the Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint by a member of the National Assembly if the complaint is against a Cabinet member. It also states that when an investigation is conducted in terms of the Act, the Public Protector shall have all the powers vested in him or her in terms of the Public Protector Act.

14.3.3 The President must within a reasonable time, but not later than 14 days after receiving the Public Protector's report on a Cabinet member, submit a copy of the report and any comments thereon, together with a report on

⁷ Section 7(1)(b)(i)

⁸ Section 6(4)(c)(ii)

⁹ See paragraph 16.3 below for a detailed discussion on the Executive Ethics Code

any action taken or to be taken in regard thereto, to the National Assembly¹⁰.

14.4 Conclusion

14.4.1 The complaint in essence alleges that the Minister might have been bribed by Mr Majali to ensure that a tender is awarded to his company by the Department of Social Development. As indicated above and in the PetroSA Report, such allegations point to a criminal offence as contemplated by the Corruption Act, 1992 and the Prevention and Combating of Corrupt Activities Act, 2004, which has to be investigated by the South African Police Service (SAPS). Adv Schmidt was advised accordingly, but was apparently reluctant to lodge a complaint with the SAPS.

14.4.2 However, as the allegations also point to a possible breach of the Executive Ethics Code¹¹, which has to be investigated by the Public Protector, an investigation was conducted, as referred to in this report.

PART 4

THE INVESTIGATION

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

15.1 Consideration and evaluation of the complaint;

¹⁰ Section 3(5)(a)

¹¹ See paragraph 16.3 below

- 15.2 Consideration of the relevant media reports referred to by the complainant;
- 15.3 Correspondence with:
 - 15.3.1 The Minister;
 - 15.3.2 The attorneys acting on behalf of Mr S Majali;
 - 15.3.3 Mrs T Skweyiya;
 - 15.3.4 The Director General of the National Treasury;
 - 15.3.5 The Director General of the Presidency;
 - 15.3.6 Adv Schmidt, the complainant;
 - 15.3.7 The Editor of the *Sunday Times*; and
 - 15.3.8 The Companies and Intellectual Property Registration Office.
- 15.4 Consideration of affidavits relating to the matter investigated submitted by Mrs Skweyiya and Mr Majali;
- 15.5 Consideration of voluminous documentation submitted by the Minister relating to Tender 0082 issued by SITA for the design, development and implementation of a social grant administration information system for the Department of Social Development;

- 15.6 Telephonic discussions with senior officials of SITA, the Department of Social Development and the National Treasury;
- 15.7 Consideration of the correspondence between the parties concerned and the papers filed in the civil claim of *I T Lynx Consortium v The State Information Technology Agency (Pty) Ltd, the Minister of Social Development and the Minister of Finance* in the Transvaal Provincial Division of the High Court, in case no: 21290/05;
- 15.8 Consideration and application of the relevant provisions of the Constitution, 1996, the Executive Members' Ethics Act, 1998 and the Executive Ethics Code; and
- 15.9 Consideration of international perspectives in connection with the principles regulating ethical conduct and conflict of interests relating to executive members of government.

PART 5

THE LEGAL FRAMEWORK REGULATING THE ETHICAL CONDUCT OF MEMBERS OF THE CABINET

16. LEGISLATION

16.1 The Constitution

16.1.1 In terms of section 92, members of the Cabinet must act in accordance with the Constitution. They are accountable to Parliament for the exercise of their powers and the performance of their functions.

16.1.2 Section 96 provides that:

- "(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.*
- (2) Members of the Cabinet and Deputy Ministers may not-*
- (a) undertake any other paid work;*
 - (b) act in a way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or*
 - (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."*

16.2 The Executive Members' Ethics Act

16.2.1 Section 2 provides that the President must publish a code of ethics prescribing the standards and rules, as set out in this section, aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and Members of provincial Executive Councils must comply in performing their official responsibilities.

16.2.2 As indicated above, alleged breaches of the code of ethics have to be investigated by the Public Protector¹².

¹² See paragraph 14.3 above

16.3 The Executive Ethics Code

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

16.3.2 General standards of compliance are contained in paragraph 2, which provides, *inter alia*, that members of the Cabinet must, to the satisfaction of the President:

16.3.2.1 perform their duties and exercise their powers diligently and honestly;

16.3.2.2 act in good faith and in the best interest of good governance, and

16.3.2.3 act in all respects in a manner that is consistent with the integrity of their office or the government.

16.3.3 Paragraph 2.3 provides that Members of the Cabinet may not, *inter alia*:

16.3.3.1 act in a way that is inconsistent with their position;

16.3.3.2 use their position to enrich themselves or improperly benefit any other person; and

16.3.3.3 expose themselves to a situation involving the risk of a conflict between their official responsibilities and their private interests.

16.3.4 Conflict of interest is the subject of paragraph 3 of the Code. The provisions relevant to the investigation of the complaint against the Minister read as follows:

- "3.1 A Member must declare any personal or private financial interest that the Member may have in a matter-
- a. that is before the Cabinet or an Executive Council;
 - b. that is before a Cabinet Committee or Executive Council on which the Member serves; or
 - c. in relation to which the Member is required to take a decision as a Member of the Executive.
- 3.2 A Member must withdraw from the proceedings of any committee of the Cabinet or an Executive Council considering a matter in which the Member has any personal or private financial or business interest, unless the President or the Premier decides that the Member's interest is trivial or not relevant;
- 3.3 If a Member is required to adjudicate upon or decide a matter in which the Member has a personal or financial or business interest, the Member must declare that interest to the President or the Premier, and seek the permission of the President or the Premier to adjudicate upon or decide the matter.
- 3.4 If a Member makes representations to another Member of the Executive with regard to a matter in which the Member has a personal or private financial or business interest, the Member must declare that interest to the other Member.
- 3.5 For the purposes of paragraphs 3.1, 3.2, 3.3, and 3.4, the personal or private financial interest of a Member includes any financial or

business interest which, to the Member's knowledge, the Member's spouse, permanent companion or family member has" (emphasis added).

16.3.5 Every Member must, in terms of paragraph 5, disclose to the Secretary of the Cabinet particulars of all the financial interests, as set out in paragraph 6, of the Member and his or her spouse or dependent children, to the extent that the Member is aware of their interests.

16.3.6 Paragraph 6 includes as financial interests that have to be disclosed, the nature, source and value of any benefit received.

PART 6

CONFLICT OF INTERESTS

17. The avoiding of the risk of a conflict of interests by officials employed by government has been and continues to be the subject of much discussion and debate in most countries. Legislation, regulatory prescripts and guidelines have been published internationally as instruments to deal with and to regulate conflict of interests.
18. In countries such as Canada and Australia much attention has recently been given to the establishment and implementation of best practice principles in respect of the handling of conflicts between the private interests of government officials and their official responsibilities.

19. In a paper entitled "*Conflict of Interest Prevention*", published by Dr G J Levine of the *Canadian Governmental Ethics Law Project*¹³, the following statements, which are of significance to the matter investigated and referred to in this report, were made:

"In public governance and administration conflict of interest is the placing of private interest ahead of public duty. In recent times there has been an increased fear of conflict of interest and of corruption. There has been a growth of cynicism about public service generally and those engaged in it and a concomitant belief that the state is misused for personal ends.

Conflict of interest in and of itself is not problematic. People have interests of all sorts. Their interests may be financial, filial, familial or, more broadly, social and cultural. People act in and of the world. Those who are in the public sector are no different and, while they can be reasonably expected to act in the best interest of the public and with respect to the highest standards of public service, they cannot reasonably be expected to be without worldly interests. *The dilemma occurs when conflicts of interest are either acted upon or disregarded in situations in which the interest may affect or appear to affect both the process of decision making and decisions themselves. Conflict of interest is a precondition for biased or corrupt behaviour. It is not having the interest, though, that is the problem but, rather the problem is what is done about it. If a person acts in their self interest or on their private interest when they perform a public duty they will likely be acting with bias or corruptly. Regulation in some form whether it has been by legislation or administrative guideline has been the response to conflict of interest.* (emphasis added)

¹³ <http://www3.telus.net/GovtEthicsLaw/index.html>

20. The *Public Service Human Resources Management Agency of Canada* (PSHRMA) also recently issued a publication entitled: "*Apparent conflict of Interest*¹⁴" aimed at contributing to a better understanding by public servants of the concept of a conflict of interests. Referring to the international concern relating to the management of conflicts of interests, it states:

"The link between integrity and good government, and the resulting need to properly manage conflicts of interest, including apparent conflicts, are not specifically Canadian concerns. They are shared by other developed democracies. In its 2003 Guidelines for Managing Conflict of Interest in the Public Service, the Organization for Economic Cooperation and Development (OECD) emphasizes the link between integrity and good government, and the need to properly manage conflicts of interest."

21. According to the *OECD Guidelines*, inappropriately managed or resolved conflicts of interest have the potential to undermine the proper functioning of democratic governments by:

- Weakening adherence by public officials to the ideals of legitimacy, impartiality and fairness in public decision-making, and
- Distorting the rule of law, the development and application of policy, the functioning of markets, and the allocation of public resources.

22. *The Australian Independent Commission Against Corruption* distinguishes between actual, perceived or potential conflicts of interest¹⁵. Based on the

¹⁴ http://www.hrma-agrh.gr.ca/veo-bve/puublications/aci-cia_e.asp

¹⁵ See the *Report on Managing Conflicts of Interest in the Public Sector, November 2004*

definition of a conflict of interest as developed by the *OECD*, the following sub-definitions have been adopted by the Commission:

- An actual conflict of interest involves a direct conflict between a public official's current duties and responsibilities and existing private interests.
- A potential conflict of interest arises where a public official has private interests that could conflict with his/her official duties in the future.
- A perceived or apparent conflict of interest can exist where it could be perceived, or appears, that a public official's private interests could improperly influence the performance of his/her duties—whether or not this is in fact the case.

23. The Canadian *Report of the Commission of Enquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M Stevens, 1987*, accepted the flowing definitions as being in accordance with the common law:

- *"A real conflict of interest denotes a situation in which a public official has knowledge of a private economic interest that is sufficient to influence the exercise of his or her public duties and responsibilities.*
- *A potential conflict of interest incorporates a concept of foreseeability: when individuals can foresee that a private interest may someday be sufficient to influence the exercise of their duty, but has not yet, they are in a potential conflict of interest.*

- *An apparent conflict of interest exists when there is a reasonable apprehension, which reasonably well informed persons could properly have, that a conflict of interests exists.”*

24. The test of the nature of the perception that could cause an apparent conflict of interest is, according to PSHRMA, is an objective one:

“...so that irrational flights of fancy are not captured, and those charged with deciding on a situation do not have to be worried about wild allegations of conflict of interest. As stated in Mckendry an apparent conflict of interest 'is not a matter of yielding to public suspicion or malicious criticism'. A 'reasonable perception', or 'reasonable apprehension' as stated by the Supreme Court in N.E.B. and as echoed by Parker (in the Parker Commission Report), seems the appropriate test.”

25. The onus is on public officials to anticipate apparent conflict of interests arising from their actions and to take steps to comply with the relevant rules. Whether a conflict of interests is apparent, potential or real, the consequences can be the same as far as the impact on the integrity of the Government, the Public Service and the officials involved is concerned.

PART 7

THE TENDER FOR THE DESIGN, DEVELOPMENT AND IMPLEMENTATION OF A GRANT ADMINISTRATION SYSTEM FOR THE DEPARTMENT OF SOCIAL DEVELOPMENT: TENDER NO RFT 0082/2001

26. Background

26.1 The difficulties experienced by the former Government in regard to proper and efficient service delivery in respect of social pensions, disability grants and other welfare benefits were one of the challenges that faced the newly elected democratic Government in 1994. From 1996 to 1998 several investigations into social grants administration were commissioned.

26.2 In its *Report on an investigation into the rendering of Social Security Services*, issued in December 1997, the *Public Service Commission* found several shortcomings in, *inter alia*, the Social Grant Payment (SOCPEN) system. The Commission recommended that:

"A decision will have to be taken by the national Department of Welfare in collaboration with the provinces in respect of further modifications to the existing SOCPEN 5 system versus the development of a totally new system."¹⁶

26.3 In 1998 the Department of Welfare (now called the Department of Social Development, hereafter referred to as 'the Department') appointed a consulting firm, called *Anexus*, to evaluate and review the long term suitability of the SOCPEN system and to recommend possible alternatives.

¹⁶ See page 227 of the Report

- In its report, dated April 1998, *Anexus* highlighted the shortcomings found in the SOCPEN system, but recommended that the Department perform a functional evaluation of the system before its replacement is considered.
- 26.4 By 2001, it became apparent that the SOCPEN system would not be able to support the transformation and improvement initiatives of the Department. It was decided to replace it with a new Information Technology (IT) system.
- 26.5 The development of the User Requirement Specification (URS) for the new IT system was subjected to consultation with, *inter alia*, the IT managers of the Departments of Welfare in the provinces and officials of the National Treasury.
- 26.6 During the June 2001 budgeting process, the Department requested approximately R70 million for the replacement of the SOCPEN system for the 2002/2003 financial year. The Medium Term Expenditure Committee however indicated that it would approve a smaller amount as it would be impossible to determine how much the new system would cost before bids on a tender had been received and evaluated.
- 26.7 The Department finalized the URS in September 2001. The tender documents for the new system were drafted with the assistance of experts from the State Information Technology Agency (SITA). The Executive Committee of the Department appointed SITA to procure the new system.
- 26.8 The tender for the new IT system was published by SITA in November 2001. The closing date was 14 December 2001.

26.9 Paragraph 10.8 of the *Request or Tender* stated that: "(t)he administration of the awarded tender will be the sole responsibility of SITA IT Acquisition Centre..."

27. The bid submitted by I T Lynx

27.1 From the tender documents submitted to SITA, it appears that three companies, I T Lynx Placements (Pty) Ltd, Kokeletso Investment Holdings (Pty) Ltd and Net 1 Support Services (Pty) Ltd, entered into a shareholders agreement relating to the tender in question on 13 December 2001. It was agreed, *inter alia*, that:

27.1.1 I T Lynx Placements would submit the tender on behalf of the consortium by not later than 14 December 2001;

27.1.2 The sole business of I T Lynx relating to the tender would be to submit it, to enter into an agreement with SITA if it is awarded to I T Lynx and to appoint Net 1 Support Services to develop the systems which forms the subject matter of the tender;

27.1.3 In the event of the tender having been awarded to I T Lynx, 60% of its entire issued share capital shall be registered in the name of and beneficially owned by Kokeletso and the remaining 40 % shall be registered in the name of and beneficially owned by Net 1;

27.1.4 The initial directors appointed by Kokeletso shall be Thabang Motshohi, Themba Vilakazi and Obbey Mabena;

27.1.5 The initial directors appointed by NET 1 shall be Serge Christian Pierre Belamant and Herman Gideon Kotze.

27.2 I T Lynx submitted the bid for the tender, as agreed, on 13 December 2001.

27.3. Mr T J Motsohi, a Director of I T Lynx Placements (Pty) Ltd and Chairman of Kokeletso Investment Holdings (Pty) Ltd and Mr H Kotze of NET1 Support Services (Pty) Ltd signed the bid on behalf of the respective entities.

28. The evaluation of the bids and the awarding of the tender

28.1 The technical evaluation and competency profiling of the bids received were carried out with the assistance of an inter-departmental team of officials from the Department, the Department of Public Service and Administration and the Department of Home Affairs.

28.2 The final adjudication of the tender was made by SITA's Supplier Selection Authority in May 2002. The said Selection Authority consisted of the SITA's Chief Executive Officer and other independent persons and excluded officials of the Department. On 31 May 2002, the Acting General Manager of the ITAC Division of SITA wrote to the Minister and the Director General of the Department, informing them of the decision to award the tender to the Arivia.com and I T Lynx consortia. He also stated that:

"The Tender Board also indicated that the costing must be confirmed with the department's Accounting Officer to ensure that the cost of the total solution is in line with the budget available."

29. Subsequent events

29.1 In June 2002 the Department approached the National Treasury in terms of regulation 17.3 of the Treasury Regulations issued by virtue of the Public Finance Management Act, 1999, which provides that:

“Institutions may not amend existing or institute new computerized systems that will affect financial administration without the prior written approval of the National Treasury.”

29.2 The Director General of National Treasury responded on 26 July 2002, referring to a memorandum of the Chief Directorate: Social Services of the National Treasury relating to the replacement of the SOCPEN system and requesting a meeting with the Director General of the Department to discuss the matter. The said memorandum raised a number of concerns in regard to the proposed solution for the replacement of the SOCPEN system. It highlighted, *inter alia*, that *“the proposed solution is in the nature of a public-private partnership arrangement as defined in Treasury Regulation 16 and therefore needs to go through the process as outlined in Regulation 16.”*

29.3 Regulation 16 of the Treasury Regulations regulates public private partnerships between a government institution and private parties in terms of which the private party performs an institutional function on behalf of the institution. It provides that to determine whether a proposed public private partnership is in the best interests of the institution, the accounting officer must undertake a feasibility study, as contemplated by regulation 16.4, to the satisfaction of the National Treasury. He/she is obliged to appoint a “transaction adviser” to assist and advise the

institution in connection with a public private partnership, when requested to do so by the National Treasury¹⁷.

29.4 The memorandum referred to in paragraph 29.2 above, recommended that the National Treasury and the Department of Public Service and Administration support the Department of Social Development in:

29.4.1 Procuring the services of a Transaction Adviser to conduct an options and analysis feasibility study, which should inform the selection of the preferred option for the replacement of the SOCPEN system; and

29.4.2 Negotiating an agreement with SITA to ensure an improvement in the functionality of SOCPEN until such time as a new system could be implemented.

29.5 A senior official of the Department submitted a memorandum to the Minister, responding to the concerns raised and recommendations made in connection with the replacement of the SOCPEN system by the National Treasury. He stated, *inter alia*, that:

“The Department is of the opinion that the Treasury arguments do not constitute valid reasons for holding the replacement of the SOCPEN system in abeyance, but appreciates that the Treasury failed to use earlier opportunities to play an active role in the replacement of SOCPEN.”

29.6 The memorandum to the Minister proposed that:

29.6.1 A Transaction Adviser is urgently appointed; and

¹⁷ See regulation 16.3.1

29.6.2 A feasibility study and option analysis is completed within 6 weeks.

29.7 Several meetings and further interaction took place between officials of the Department and the National Treasury in connection with the matter concerned, from September 2002 to March 2003.

29.8 After several months of exchanging different opinions on what was considered to be the best procurement option for replacing the SOCPEN system, the Minister of Finance addressed a letter to the Minister of Social Development, confirming the National Treasury's views relating to a public private partnership and his Department's support of such a process.

29.9 In November 2003, the Minister received a letter from attorneys acting on behalf of the I T Lynx consortium, demanding that the contract that was awarded to their client for the replacement of the SOCPEN system is implemented.

29.10 The tender for the appointment of a Transaction Advisor¹⁸ was advertised in October 2003. The Director General of the Department was however, not satisfied with the bids received and no appointment was made.

29.11 In August 2004, SITA informed the Department that the weakness of the SOCPEN system was causing serious financial losses to the Department. The extent of fraud that was committed because of insufficient controls was estimated at more than R 2 billion.

29.12 Further letters of demand were addressed to the Minister by I T Lynx's attorneys in August 2004.

¹⁸ See paragraph 29.4 above

29.13 On 8 October 2004, the Minister wrote to the Minister of Finance in connection with the matter. After having summarized the events relating to the proposed replacement of the SOCPEN system, the Minister continued as follows:

“The SITA’s Supplier Selection Authority, in accordance with the recommendations of the Supplier Selection Board awarded the tender to two companies, namely Arivia.com and I T Lynx Consortium. This awarding of the tender was communicated to my Department in a letter from SITA, dated 25 May 2001 (sic).

Owing to differences of opinion between our respective departments in respect of, amongst others, the veracity of the SITA tender process, the National Treasury has to date not supported the outcome thereof and, consequently, this matter has still not been finalized.

Meanwhile, on 11 August 2004, my department received a letter from Barry Aaron & Associates Attorneys, acting on behalf of I T Lynx Consortium, demanding from my Department and SITA that we must give effect to the tender awarded by SITA.

As you are aware, more than 2 years have elapsed since the awarding of the tender on 31 May 2001 (sic), despite attempts at enhancing the SOCPEN, all risks associated with the unreliability of the SOCPEN data and the system’s incapacity to handle the growing number of beneficiaries and SOCPEN remain unabated.

There is little doubt at this stage that the public private partnership route preferred by the National Treasury will not deliver a solution to SOCPEN replacement as expeditiously as needed.

In view of all the above I recommend that the National Treasury should grant approval for the awarding of the tender as recommended by SITA and make available finances for such procurement.

Should there be any difficulties with financing, it may be prudent for us to consider the successful bidders to explore financing options as specified in the tender.”

29.14 The Minister of Finance responded to Dr Skweyiya’s letter of 8 October 2004, on 3 November 2004. He stated his appreciation of the fact that there is an urgent need to replace the SOCPEN system, but reiterated the views of the National Treasury on the process that should be followed. Minister Manuel concluded:

“I am advised, that for reasons unbeknown to the National Treasury and despite the assistance afforded by the National Treasury, the DoSD (the Department) has failed to appoint the transaction advisors to commence with the feasibility study.

I am further advised that the feasibility study is fundamental in helping reach decisions about the funding model and the precise nature of the solution that needs to be procured.

For the reasons set out above, I cannot accede to your request that the National Treasury grant approval for the awarding of the tender and

bearing in mind that the National Treasury is in any event not competent to do so.

I am also in receipt of a letter received from Barry Aaron and Associates to which I am responding through the Office of the State Attorney.

I recommend that our respective Directors-General meet as a matter of urgency to decide the way forward."

- 29.15 The replacement of the SOCPEN system was subsequently put on hold, pending the outcome of the civil claim brought against SITA and the Minister by I T Lynx.

PART 8

CIVIL ACTION INSTITUTED BY THE I T LYNX CONSORTIUM

30. The I T Lynx Consortium issued summons in the Transvaal Provincial Division of the High Court against SITA, the Minister and the Minister of Finance, on 29 June 2005.
31. The basis of the main claim is that part of the tender referred to above was awarded by SITA to I T Lynx and that SITA has failed to implement the contractual agreement between it and I T Lynx.
32. In the first alternative claim, it is alleged that SITA and/or the Minister had failed to take the necessary administrative steps to allow I T Lynx to perform the work tendered for and allocated to it.
33. The second alternative claim alleges that SITA and/or the Minister breached the agreement that was concluded between SITA and I T Lynx

when the tender was allocated to the latter as a result of which I T Lynx suffered damages.

34. I T Lynx therefore claims the following relief:

34.1 An order declaring that I T Lynx and SITA have entered into a legally binding and enforceable contract and an order directing SITA to implement the agreement and accept I T Lynx's services as tendered;

Alternatively

34.2 A *mandamus* directing SITA to give effect to its decision to allocate the tender to I T Lynx and to enter into service level agreements with it;

Alternatively

34.3 Cancellation of the agreement and an order directing SITA and the Minister to jointly and severally pay damages to I T Lynx in the amount of R 149 256 285.

35. SITA and the Minister are defending the civil action on the basis, *inter alia* that, in terms of the conditions of the tender, the mere acceptance of an offer did not constitute a contract between SITA and I T Lynx.

36. The litigation is currently still in process and the matters raised in the pleadings are therefore *sub judice*.

PART 9

THE LOAN OF R 65 000 TO MRS SKWEIYA

37. The explanation provided by Mrs T Skweyiya

37.1 During the investigation an affidavit was obtained from the Minister's wife, Mrs T Skweyiya, in connection with the allegations that Mr S Majali of Invume granted her a loan of R 65 000 in December 2003.

37.2 She stated that in 2003 she had been South Africa's Ambassador to France.

37.3 During that year (2003) she and the Minister contracted the services of Hartkon Construction (the construction company) to carry out specified renovations at their private residence in Pretoria.

37.4 *"The renovations originally specified were modest, the cost of which fell squarely within a budget my husband and I could finance directly from our savings and disposable income. However, towards the end of 2003, my husband and I revised the original renovations plan and decided to modernize the entire property, using the services of the same construction company.*

The costs associated with the revised renovations plan exceeded our private savings and disposable income. Accordingly, in or about October 2003, my husband and I applied for a bond from the Home Loan Division of Standard Bank to cover the costs of the renovations.

Meanwhile, pending the approval and transfer of the new bond money, my husband and I continued to pay the invoices out of our savings and disposable income.

During December 2003, my husband and I received an invoice for payment of R 65 000, which amount was payable by not later than 15 December 2003 when the construction industry generally closes for the year. In December 2003, our savings and disposable income were no longer sufficient to cover the costs of the invoice and other household expenses.

Our bond application having been approved in November 2003, we sincerely believed that the new bond money would be transferred into our account in time to pay the invoiced amount by not later than 15 December 2003. Unfortunately, as it then dawned upon us, the new bond money would only be transferred into our account in 2004 owing to protracted bond registration procedures. The new bond money was only transferred in February 2004.

In the premises, it was incumbent upon my husband and I to raise the R 65 000 by not later than 15 December 2003. As part of that effort, I telephonically contacted in South Africa, from Paris, a few of my personal friends to raise the money as a stopgap measure.”

37.5 Mrs Skweyiya responded to pertinent questions put to her during the investigation as follows:

37.5.1 Who applied for the loan in question, when and where, what was the amount involved and what was the purpose of the loan?

"In December 2003, while in Paris, France, I telephoned a personal friend, Mr Sandi Majali, and requested him to advance me a personal loan of money in the amount of R 65 000. The loan was to be used to pay Hartkon Construction in respect of renovations work then being carried out at the residence. Mr Majali kindly agreed to assist."

37.5.2 Was Dr Skweyiya aware of the loan agreement at the time when it was entered into? If not, how and when was he made aware of the loan and what was his reaction?

"My husband was aware that I was contacting some friends with a view to raising a loan to pay the invoiced amount by not later than 15 December 2003. I informed my husband some time after my telephone conversation with Mr Majali that I had successfully raised a personal loan from Mr Majali. To the best of my recollection, I did not notice or observe anything unusual in his manner. Accordingly, I would say, that his reaction was typically indifferent."

37.5.3 What were the terms of the loan agreement in respect of payment of installments, interest, etc?

"Upon making the request for the loan, I informed Mr Majali that my husband and I were awaiting the transfer of money already approved by the Home Loans Division of Standard Bank. To my mind, it was understood between Mr Majali and I that the loan was personal, from one friend to another, repayable as soon as possible. Accordingly, no installments and interest were mentioned or agreed."

37.5.4 To whom was the loan paid? It was alleged in this regard that it was paid by Imvume to Hartkon Construction.

"Seeing that I was in Paris, I requested Mr Majali to pay the amount of the personal loan, on my behalf, directly to Hartkon Construction in order to obviate any delay that might otherwise result. At all material times, I understood that the personal loan was granted by Mr Majali personally and not by any of the companies he is associated with. I learnt for the first time in 2005 from media reports, in particular the Mail and Guardian that the money paid on my behalf to Hartkon Construction came from a company known as Imvume and not from Mr Majali's personal account. I have no personal knowledge of the true facts in this regard and, accordingly, cannot comment intelligibly on the matter."

37.5.5 Has the loan been repaid and if so when?

"The loan has been fully repaid in six installments in 2004."

37.6 In her response to the allegation that Mr Majali had made the loan with the intent of improperly influencing Dr Skweyiya¹⁹, Mrs Skweyiya stated:

"I vehemently deny that Mr Majali made a personal loan to me with the intent of improperly influencing my husband to:

- Abuse his position or act improperly as Minister of Social Development to influence the awarding of the contract to I T Lynx or to prevent a lawsuit against himself or his department; or*

¹⁹ See paragraph 11 above

- *Improperly involve himself in acting in Mr Majali's interests in return for his favour in respect of the loan he granted to me and him offering me a position in Imvume Management."*

37.7 Mrs Skweyiya also submitted a letter from the Standard Bank, Sandton, signed by the Personal Relations Manager, dated 15 June 2005, which states that:

37.7.1 Dr Skweyiya and his wife applied to raise the bond on their private residence in Pretoria on 22 October 2003 in order to, *inter alia*, undertake renovations to the property;

37.7.2 Their application was approved on 27 October 2003. Attorneys were instructed on 17 November to register the bond;

37.7.3 Registration of the bond was delayed because of administrative difficulties and the backlog experienced by the Deeds Office; and

37.7.4 The bond was registered on 3 February 2004.

37.8 From a statement typed on a letterhead of Mr Sandi Majali, dated 1 July 2004 and addressed to Mrs T M Skweyiya, which was attached to her affidavit submitted during the investigation, it appeared that cash payments in respect of the said loan of R 65 000 were made to Mr Majali as follows:

31 January 2004	R 12 000
1 March 2004	R 10 000

2 April 2004	R 5000
4 May 2004	R 13 000
3 June 2004	R 15 000
30 June 2004	R 10 000

38. The evidence of Mr Sandi Majali

38.1 Mr Sandi Majali, the Managing Director of Invume Management (Pty) Ltd and other companies within the Invume Group, responded to the allegations referred to above²⁰ by means of an affidavit in which he stated that:

"Suggestions have been made in the media that a personal loan, which I made to Mrs T Skweyiya, the wife of the Minister of Social Development, Dr Skweyiya, in December 2003, was improper and that, in making the loan, I tried to influence Dr Skweyiya to use his influence, as Minister of Social Development, to benefit a company in which I have an interest in respect of the so called "SITA SOCPEN" contract. I also understand that the issue is under investigation by the Public Prosecutor (sic) in terms of the Executive Members' Ethics Act, 1988 (sic).

In refuting these allegations, I provide the following information:

- *Whilst in Paris, on business in approximately October 2003, I met Mrs Skweyiya, a longstanding family friend. She informed me that*

²⁰ See paragraph 11 above

she would be returning to South Africa later that year and would be leaving the diplomatic service. She mentioned the possibility that she may require a short bridging loan, in an unspecified amount, to assist in the payment of certain home renovations. As a long-standing family friend, I told her that I would consider making such a loan and the matter went no further. Brief mention was also made at the time of her employment plans, once she returned to South Africa. Bantering comments were exchanged regarding her joining the Imvume Group, but no further mention was ever made of this issue at any time thereafter, nor had there ever been any real or serious intention to carry the issue through;

- Some weeks later and after I had returned to South Africa, Mrs Skweyiya telephoned me (from Paris I believe) and again raised the issue of a possible loan of R 65 000, which she said she required in December 2003. I told her that I was uncertain whether I would have the money but if I could help her, I would. I asked Mrs Skweyiya when she would repay the loan and she told me the loan would be repaid by mid-2004. No mention was made of interest because of my personal relationship and long-standing family friendship with Mrs Skweyiya, I certainly did not expect the loan to bear any interest. I told her that I would require her to sign an I-owe-u. She said she would send it through in anticipation. I provided her with my office telefax number and she sent through a hand-written, one-page telefax, which stated something along the lines of 'IOU R 65 000' (signed) Mrs T Skweyiya.*
- In the early part of December 2003, Mrs Skweyiya contacted me and enquired whether I would have the money available, which she needed to pay the contractors renovating her home by the time the*

builders closed for the builders' holidays for the year. I told her that I did not yet have the money but hoped to have funds by mid-December 2003. She gave me the details of the construction company, Hartcon (sic) Construction and I made a note of it and its banking details to enable me to prepare a cheque as and when the funds became available;

- In mid December 2003, the funds became available and I caused Imvume Management (Propriety) Limited to issue a cheque, on my behalf to Hartcon (sic) Construction for R 65 000 and which was deposited directly into its account;*
- Within the first half of 2004, the personal loan which I made to Mrs Skweyiya in the sum of R 65 000 was repaid to me in periodic lumpsum payments of around R 10 000 to R 15 000, at a time, in cash and, by the middle of the year, the debt had been repaid in full, as promised.*
- As the loan was repaid in full, I did not retain a copy of the 'IOU' there being no purpose in doing so."*

38.2 Mr Majali denied ever having discussed the loan with Dr Skweyiya. He stated that he has no personal relationship with Dr Skweyiya, save through the latter's wife and that the loan was nothing more than a personal loan to a friend in need. *"It had no bearing on any of my business activities or the business activities of any company with which I was involved within the Imvume Group or otherwise."*

38.3 As far as the tender referred to in this report is concerned, Mr Majali stated that the I T Lynx Consortium consists of three separate consortia.

Invume Resources (Pty) Ltd was one of the entities comprising but one of those consortia. He confirmed being the Managing Director of Invume Resources (Pty) Ltd at the time of the tender, but stated that he was not a beneficial shareholder of the company.

- 38.4 Mr Majali further stated that he had no direct or indirect involvement in the bid presented to SITA. As far as he knew, the tender had been awarded by SITA to I T Lynx Consortium in mid 2002. He concluded that:

"The 'lead' individuals in I T Lynx Consortium were the representatives of Net-1 Aplitec (the technology supplier in respect of the tender) and Obbey Mabena, the lead individual in respect of the BEE participation in I T Lynx Consortium. The first time I became involved in the matter in any meaningful way was in 2004, when Mr Mabena approached me to discuss new attorneys to take over the representation of IT Lynx Consortium from the attorneys that Mr Mabena had been instructing to procure the implementation of the tender which, as far as I was aware, had already been awarded by SITA. Prior to this, I had little or no involvement in respect of the SITA SOCPEN tender in any way at all.

My involvement and the involvement of Invume Group in I T Lynx Consortium or the SOCPEN project generally, was not disclosed in the tender document at all, nor do I believe that anyone other than the Consortium members were even aware that I or the Invume Group were involved, as a Consortium member of one of the three consortia, at all. I would be highly surprised to learn that Dr Skweyiya was at all aware that either I or any company within the Invume Group was involved in the I T Lynx Consortium or the SITA SOCPEN tender. I would go so far as to state that he was in fact unaware of my or the Invume Group's participation in the matter in any manner whatsoever."

PART 10

THE RESPONSE OF THE MINISTER TO THE ALLEGATIONS

39. During the investigation, the Minister was afforded an opportunity to respond to the allegations referred to in paragraphs 11, 12 and 13 above. He stated that:

"I deny the allegations that appeared in the media suggesting my involvement in the I T Lynx Consortium, save to state that officials from the Department, as they were entitled to do, participated in the inter-departmental teams together with officials from the National Treasury, the Department of Public Service & Administration, the Department of Home Affairs and SITA. According to the SITA process, the client Department is expected to participate in the technical evaluation and competency profiling of bids by the Technical Evaluation Team (TET) and the Supplier Selection Board (SSB), respectively. However, SITA's Supplier Selection Authority (SSA) which consists of SITA's CEO and other independent persons, did the final adjudication. The Department was not at all represented on the SSA. Ordinarily, the SSA concludes the final adjudication of a tender after a due diligence on, amongst other things:

- a. The veracity of processes followed by both the TET and SSB;*
- b. The reasons for the recommendation for the awarding of the tender;
and*
- c. The confirmation of the costing and the availability of budget.*

In this case, it appears that the SSA was satisfied with (a) above but not with (c). Consequently, the SSA made an award that was subject to confirmation of costing and availability of budget.”

40. The Minister denied the allegation that he campaigned that the contract should be awarded to I T Lynx, despite National Treasury’s views in regard to the proposed public private partnership. He responded as follows to the allegations in this regard:

“According to my records, there is only one letter from me to Minister Trevor Manuel, dated 8 October 2004²¹ requesting that the National Treasury make available finances and grant approval for the awarding of the tender as recommended by SITA for the following reasons:

(a) It had been more than two years since the final adjudication of the tender by SITA’s SSA, yet the SOCPEN system had still not been replaced;

(b) On the one hand, according to the tender adjudicated by SITA, the successful bidder(s) would have completed the proof of concept of the solution within six months of the signing of the contract with SITA. On the other hand, the PPP (public private partnership) route preferred by the National Treasury would require no less than 18 months for a feasibility study to be done, let alone the amount of time that would be required to put together the solution to replace the SOCPEN system;

(c) At all material times hereto, financial losses associated with the weaknesses of the SOCPEN systems were estimated to be in excess of

²¹ See paragraph 29.13 above

R1,5 billion per annum. Consequently, by these estimates, between the period June 2002 and October 2004, government had lost far in excess of R 3 billion through leakages associated with the weaknesses of the SOCPEN system. Any further delays in the replacement of SOCPEN would harm government's finances more rather than save them. Accordingly, the losses already incurred between 31 May 2002 and 8 October 2004, and the potential further losses to be incurred while the 18 months feasibility study is underway and the processes that would follow it, in my view, defied the logic of the National Treasury's refusal to grant R 300 million over the MTEF period for the procurement of a solution to be delivered within six months;

(d) I had made promises to Parliament and the South African public that the SOCPEN system will be replaced as soon as possible in order to obviate the problems and financial losses associated with it. The amount of time lapsed did not augur well for my political credibility as a Minister of Cabinet;

(e) At the time, I believed that the Department was exposed to risky litigation, based on SITA's letter dated 31 May 2002. As it happens, in June 2005, one of the tenderers, I T Lynx Consortium, commenced proceedings against the Department and SITA out of the High Court. The Department is defending the matter."

41. Dr Skweyiya denied the allegations that he abused his position as Minister and that he was at any time acting in the interest of Mr Majali for whatever reason.

42. He confirmed that Mr Majali is a personal friend of Mrs Skweyiya and that he granted her a loan of R 65 000 in December 2003. However, he stated that the loan was granted without his prior knowledge or approval.
43. Dr Skweyiya furthermore confirmed the circumstances under which the loan in question was granted, as set out in Mrs Skweyiya's affidavit referred to in paragraph 37 above. He also confirmed that the total amount was paid back by the end of June 2004.
44. He emphasized that as a Minister he does not get involved in the issuing and evaluation of any tenders as such matters fall within the area of responsibility of the Director General.
45. The Minister concluded by stating that he was not aware of Mr Majali's interest in I T Lynx until reports about it appeared in the media in 2005.
46. Dr Skweyiya admitted that the loan was interest free and that it therefore could be regarded as a material benefit accruing to his spouse that had to be disclosed in terms of the ethical prescripts regulating the conduct of Members of the Cabinet. He conceded that he failed to disclose the benefit as required, but indicated that he had reported his failure to the Chairperson of the Parliamentary Joint Committee on Ethics and Members' Interests.
47. In his letter addressed to the Chairperson of the said Committee on 9 March 2006, the Minister set out the circumstances under which the loan to his wife was granted and stated that:



"At all material times, it never occurred to me that the loan in question, which was repaid without interest, constituted a material benefit accruing to a spouse as contemplated in the Act and the Code of Conduct.

Following notification to myself by the Office of the Public Protector of a complaint that has been lodged at his office in terms of section 4 of the Executive Members' Ethics Act, 1998, I have taken legal advice on the matter. I am advised that to the extent that the loan in question was interest free, such interest, depending on the amount involved, may constitute a benefit requiring disclosure.

Having carefully examined the provisions of the Act and the Code, I have come to the conclusion that, to the extent that my omission to declare the interest accruing to my wife in respect of the loan granted to her by her personal friend constitutes a violation of the Act and the Code, I take full responsibility for it. Accordingly I hereby tender my unreserved apology to Parliament for any violation of the law on my part in this regard."

PART 11

APPROACHING THE MEDIA FOR ASSISTANCE

48. The Editor of the *Sunday Times* was approached for assistance during the investigation. Referring to the article that appeared in the *Sunday Times* of 12 February 2006²², which was apparently based on "*documents in the possession of the Sunday Times*", the request for assistance, dated 22 May 2006, stated:

²² See paragraph 12 above

"You will appreciate that in order for us (the Office of the Public Protector) to ensure that the complaint concerned is properly investigated, we have to consider and evaluate all the evidence that is available or that could be obtained. The documents referred to in the said article of your newspaper are obviously of importance in this regard and it would therefore be appreciated if you could kindly provide me with copies thereof at your earliest convenience."

49. The only response received from the *Sunday Times* was dated 9 June 2006 and signed by the Deputy Managing Editor: Production. It stated that:

"We regret that we are unable to assist you in your enquiry."

PART 12

ANALYSIS OF THE EVIDENCE SUBMITTED AND THE INFORMATION OBTAINED DURING THE INVESTIGATION

50. The provisions of the Executive Ethics Code allegedly breached by the Minister

- 50.1 In his complaint, Adv Schmidt averred that the loan that Mr Majali had made to Mrs Skweyiya caused the Minister to have acted in violation of sections 2(2)(a) and 2(2)(b) of the Executive Members' Ethics Act, 1998. These provisions do not in itself regulate the conduct of Members of the Cabinet, but provide for a code of ethics to do so.

- 50.2 The provisions referred to by Adv Schmidt have been incorporated in paragraph 2.3 of the Code²³.
- 50.3 The complaint suggests that the said loan may have caused the Minister to expose himself to a “situation involving the risk of a conflict between” his official responsibilities and his private interests. By having exposed himself, as alleged, the Minister therefore acted in a manner that is inconsistent with his position and office, not in good faith and in the interests of good governance, compromised the integrity of his office and of the Government and used his position to improperly benefit Mr Majali.
- 50.4 Central to the complaint is therefore the question as to whether or not the Minister exposed himself to a situation involving the risk of a conflict between his private interests and official responsibilities.
- 50.5 From the wording of paragraph 2.3.1(e) of the Code (read with paragraph 3 that deals with the declaration of interests), it is clear that what is regulated, is a real or actual and a potential conflict of interest.²⁴
- 50.6 In order for a real or actual conflict of interest of a Member of the Cabinet to arise, the following has to be present:
- 50.6.1 A current private interest that the Member involved is aware of;
- 50.6.2 An official responsibility assigned to the Member that relates to his or her private interest or to a person or entity involved in the private interest;

²³ See paragraph 16.3.3 above

²⁴ See Part 6 above

50.6.3 Sufficient prominence or importance of the private interest to cause the risk of influencing the Member in the exercise of his or her public duties; and

50.6.4 An awareness of the Member of the situation causing the conflicting interest, or a reasonable expectation that the Member should have been aware of the situation and the risk.

50.7 A situation would be causing the risk of a potential conflict of interest when:

50.7.1A Member has obtained or intends to obtain a private interest that might in the future be sufficient to cause the risk of influencing the him or her in the exercising of his or her official duties; and

50.7.2 An awareness of the Member of, or a reasonable expectation that he or she should have been aware of the potential of the said risk.

51. Facts not in dispute

From the complaint lodged by Adv Schmidt and the information obtained during the investigation, it appeared that the following is not disputed:

51.1 The SOCPEN system of the Department has to be replaced;

51.2 The Minister has a constitutional duty to ensure that the SOCPEN system is replaced. He is accountable to Parliament for the failures of the SOCPEN system and the financial losses suffered by the State as a result thereof;

51.3 The Department appointed SITA to procure a new IT system;

- 51.4 SITA issued invitations to tender for the IT system in November 2001;
- 51.5 The I T Lynx Consortium submitted a tender in December 2001;
- 51.6 SITA awarded part of the tender to the I T Lynx Consortium, subject to confirmation of the funding that is available, in May 2002;
- 51.7 A dispute concerning the implementation of the tender arose between the Department and National Treasury in July 2002;
- 51.8 The dispute between the Department and National Treasury did not relate to the identity of the consortia who were successful with their bids, but related to the application of Treasury Regulations in regard to the proposed public private partnership;
- 51.9 The Minister received the first letter of demand from attorneys acting on behalf of I T Lynx in November 2003;
- 51.10 In December 2003 Mr S Majali of Invume granted a loan of R 65 000 to Mrs Skweyiya (according to the *PetroSA Report*, the amount was paid on 19 December 2003);
- 51.11 The loan was repaid at the end of June 2004;
- 51.12 Further letters of demand were sent to the Minister by I T Lynx's attorneys in August 2004;

51.13 The Minister wrote to the Minister of Finance in October 2004 recommending that National Treasury grant its approval for the awarding of the tender by SITA;

51.14 The Minister of Finance refused;

51.15 The dispute between the Department and the National Treasury has not been resolved;

51.16 I T Lynx instituted a civil action in the High Court against SITA for a declaratory order or *mandamus* directing it to implement the agreement constituted when the tender was awarded. In the alternative, I T Lynx claims damages from SITA and the Minister.

52. Could the loan granted by Mr Majali to Mrs Skweyiya have caused a situation involving the risk of a conflict between the private interests of the Minister and his official responsibilities at the time when bids for the tender were evaluated and the decision to award part of the tender to I T Lynx was taken?

52.1 According the Accounts Manager of SITA responsible for the Department of Social Development the Minister was at no stage involved in the tender process. The other officials that were involved in SITA's Supplier Selection Authority that adjudicated the bids have subsequently left the organization.

52.2 The final adjudication of the tender took place in May 2002, i.e. 1 year and 7 months before the loan was granted. It could therefore not have constituted the risk of a conflict of interests as contemplated by the

provisions of the Code in respect of the Minister's official responsibilities, if any, in respect of the awarding of the tender.

53. Could the loan have caused a direct or potential conflict of interests between the Minister's official responsibilities in regard to the replacement of the SOCPEN system and his private financial interests, after it was granted in December 2003?

53.1 The answer hereto could only be in the affirmative if it could be found that the Minister was aware that Mr Majali was involved in a business enterprise linked to I T Lynx or that it could reasonably have been expected of him to be aware thereof or that it was objectively or subjectively foreseeable.

53.2 In October 2003 the Minister and his wife decided to obtain financing for the renovations that were being made at their private residence. Ms Skweyiya apparently discussed the possibility of a private loan with Mr Majali, but she and her husband eventually decided to apply for a bond at a commercial bank, which was approved. The amount requested in respect of the bond was in excess of what was required for the said renovations, as it was also their intention to repay a bond on another property.

53.3 When it became evident in December 2003 that the approved bond would not be registered by the time that the contractor involved in the renovations required payment, Ms Skweyiya approached Mr Majali for a loan, which he granted.

- 53.4 No indication could be found of any suggestion or evidence that the Minister was involved in the discussions or the agreement relating to the loan between Ms Skweyiya and Mr Majali.
- 53.5 It is not clear why the outstanding amount of the loan was not paid to Mr Majali when the bond was registered in February 2004, but it can safely be assumed that the fact the loan did not carry any interest was a deciding factor in this regard. It was in any event a private arrangement between two private individuals, which did not oblige Ms Skweyiya to repay the loan at that time
- 53.6 The information obtained during the investigation provided no indication that the evidence of Mr Majali, Mrs Skweyiya and the Minister in connection with the loan should be viewed with any greater circumspection.
- 53.7 The Minister and Mr Majali both denied that the Minister was aware of Imvume or Mr Majali's involvement with I T Lynx.
- 53.8 No indication could be found from contents of the complaint, the media reports referred to, the correspondence pertaining to the matter that was considered during the investigation or in any of the tender documents relating to the tender concerned, that the I T Lynx Consortium disclosed or was expected to disclose Imvume's interest in one of its consortia. Mr Majali's name or that of Imvume also does appear in any of the documents that was obtained and studied during the investigation.

53.9 Mr Majali is not a director of any of the companies referred to in the tender documents as part of the I T Lynx Consortium.²⁵

53.10 There is also no indication in the letters of demand that the Minister received from the attorneys acting on behalf of I T Lynx or the pleadings filed in the civil claim against SITA and the Minister, that Invume or Mr Majali is involved in I T Lynx.

PART 13

FINDINGS

54. From the investigation, the following findings have been made:

54.1 The allegation that I T Lynx is a company owned by Mr Majali is incorrect. Mr Majali has a remote interest in I T Lynx by virtue of him being the Managing Director of Invume, a company that forms part of a consortium that has an interest in the I T Lynx Consortium;

54.2 The allegation that a contractual dispute arose between Mr Majali and the Minister in connection with the awarding of the tender referred to in this report, is incorrect. The dispute, which is the basis of the civil claim referred to above²⁶, is between the I T Lynx Consortium and SITA. The Minister is cited in the alternative, should the main claim against SITA not succeed. Mr Majali's has only an indirect interest in the dispute because of Invume's interest in a consortium linked to the I T Lynx Consortium;

54.3 The awarding of the tender was not "stopped" by National Treasury because it was too expensive, as alleged. The dispute between the

²⁵ See paragraph 27 above

²⁶ See Part 8 above

Department and National Treasury relates to the application of and compliance with Treasury Regulations;

54.4 The allegation that the Minister campaigned to the National Treasury for the awarding of the tender to I T Lynx, is unfounded. The tender was (conditionally) awarded by SITA to two consortia, one of which is the I T

Lynx Consortium. Senior officials of the Department advised the Minister in connection with National Treasury's view that the proposed public private partnership should be subjected to further enquiries and he acted accordingly. SITA's report on the losses suffered by the State as a result of the failures of the SOCPEN system, the threatened legal action against the Department in connection with the tender and the fact that the Minister is accountable to Parliament for the failures of his Department, seem to have prompted him to approach the Minister of Finance in regard to the replacement of the SOCPEN system. There is no substantiated indication in the complaint and no evidence could be found that the Minister's insistence that the said system should be urgently replaced or that the tender should be awarded as recommended, was motivated by personal interests.

54.5 The allegation that "Mr Majali's company" is suing the Minister, is unfounded, as indicated above.

54.6 The Minister was probably not aware of Mr Majali's interest in I T Lynx at the time when the loan was granted to his wife or at the time when he approached the Minister of Finance recommending that the contract awarded by SITA be implemented. As Mr Majali's interest in I T Lynx is remote and was not disclosed during the tender process, it could also not reasonably have been expected of him to have been aware thereof.

- 54.7 No indication could be found that the loan granted by Mr Majali to Mrs Skweyiya in December 2003 had any influence or bearing on the manner in which the Minister performed any of his official responsibilities in respect of the efforts of the Department to replace the SOCPEN system and the legal action that has been instituted by I T Lynx in regard thereto.
- 54.8 Media reports in connection with the matter investigated created the perception of a conflict between the private interests of the Minister and his official responsibilities. These reports were however not based on a reasonable apprehension of the true facts of the matter, which were readily available, and can therefore not be regarded as having constituted a justifiable apparent conflict of interest.²⁷
- 54.9 The Minister failed to disclose the benefit of the interest free loan that was granted to his wife as required by paragraph 6 of the Executive Ethics Code. In this regard it was noted that he has apologized to Parliament for not disclosing the said benefit to the Registrar of Members' Interests.
- 54.10 It is disconcerting that the process of the replacement of the SOCPEN system has been put on hold because of litigation in connection with the tender, despite the fact that investigations have indicated huge financial losses to the Department as a result of the shortcomings and failures of the current system. The said litigation can take years before it is finalized, while the losses to the State would continue to increase. The fact that the Department and the National Treasury failed to find a common solution to the *impasse* between them relating to the replacement of the SOCPEN

²⁷ See paragraph 24 above

system has clearly and might in the future still delay the process further, resulting in unacceptable amount of public money being wasted.

PART 14

KEY FINDINGS

The key findings made from the investigation are that:

55. The allegation that the loan granted by Mr Majali to Mrs Skweyiya in December 2003 resulted in the Minister of Social Development exposing himself to a situation involving the risk of a conflict of interest which constituted a breach of the Executive Ethics Code, is unfounded; and
56. The failure of the Minister of Social Development to disclose the benefit of the interest free loan granted to his wife by Mr Majali in December 2003 constituted a breach of the Executive Ethics Code.

PART 15

RECOMMENDATIONS

57. In terms of section 182(1)(c) of the Constitution, 1996 and section 6(4)(c)(ii) of the Public Protector Act, 1994, it is recommended that:
 - 57.1 The President take urgent steps to ensure that issues delaying the replacement of the SOCPEN system are resolved in the least costly but most effective manner; and

57.2 The Secretary of the Cabinet take steps to ensure that the Minister of Social Development makes a proper disclosure in terms of the provisions of paragraph 6 of the Executive Ethics Code of the interest free loan granted to his wife by Mr Majali in December 2003.



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

26 October 2006

Assisted by:

Adv C H Fourie

Head: Special Investigations

Office of the Public Protector