

CLOSING REPORT OF THE PUBLIC PROTECTOR 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.



**PUBLIC PROTECTOR
SOUTH AFRICA**

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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPRIETY IN THE APPROVAL OF A LOAN APPLICATION IN FAVOUR OF AFRICOIL BY THE PUBLIC INVESTMENT CORPORATION (PIC).

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INTRODUCTION

1. This is a report of 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 23 of 1994 (the Public Protector Act).
2. This report communicates findings on an investigation into allegations of impropriety in the approval of a loan application made by a private company called Afric-Oil (Pty) Ltd (Africoil) by the Public Investment Corporation (the PIC).
3. The report is submitted in terms of section 8 of the Public Protector Act to the following parties to inform them of the outcome of the investigation: -
 - 3.1. Dr Zwelini Lawrence Mkhize;
 - 3.2. The Chief Executive Officer of the PIC; and
 - 3.3. Mr Nathaniel Denton Bricknell (the Complainant).

THE COMPLAINT

4. The Complainant in this matter is Mr Nathaniel Denton Bricknell, the Secretary-General of African Democratic Change.
5. The Complainant requested the Public Protector to investigate what was widely reported in the media during June 2018, that Dr Zwelini Lawrence Mkhize (Dr Mkhize) in his capacity as then Treasurer-General of the African

National Congress unduly benefited from a loan transaction to the value of R210 million between Africoil and the PIC.

6. In essence, it was reported in the media that: -
 - 6.1. The attorneys of Zonkizizwe Investments, an entity wholly owned by the African National Congress (the ANC), served a letter of demand to Africoil during October 2017, claiming an amount of R4.5 million for facilitating a loan transaction between Africoil and the PIC.
 - 6.2. It was reported that according to the letter of demand, a meeting took place at Luthuli House during June 2016 where a loan application to the PIC was discussed and the “TG” agreed to promote Africoil's projects, including providing support to facilitate Africoil's loan application to the PIC (it is understood that “TG” refers to the Treasurer-General of the ANC who was at the time, Dr Mkhize and this aspect of the complaint is not disputed).
 - 6.3. According to the reports, the letter of demand stated that Africoil would then proceed to pay a facilitation fee to Dr Mkhize in the amount of R4.5 million for facilitating the loan application between the PIC and the company, but this amount, or any part thereof was never paid.
 - 6.4. The meeting which took place in Luthuli House during June 2016 came after an initial loan application by Africoil had been rejected by the PIC.

Based on an analysis of the complaint and the allegations contained therein and the information obtained from various media reports, the following issue was identified to focus the investigation: -

7. Whether Dr Mkhize improperly interfered in the PIC's processes and procedures which led to the PIC granting a R210 million loan to Africoil, and in so doing, received any payment for facilitating such loan, thus resulting in

impropriety as envisaged in section 182(1) of the Constitution or maladministration as contemplated in section 6(4) of the Public Protector Act.

8. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

8.1. The Public Protector is an independent constitutional institution established in terms of section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

8.2. 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.”

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

8.4. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

8.5. In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others 2018 (2) SA 100 (GP)*, the court held as follows, when confirming the powers of the Public Protector: -

- 8.5.1. The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);
- 8.5.2. The Public Protector has the power to take remedial action, which includes instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (paragraph 82);
- 8.5.3. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (paragraph 100 and 101):
- (a) Conduct an investigation;
 - (b) Report on that conduct; and
 - (c) To take remedial action.
- 8.5.4. The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (paragraph 104);
- 8.5.5. The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (Paragraph 105);
- 8.5.6. The fact that there are no firm findings on the wrong doing does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraph 107 and 108); and
- 8.5.7. *Prima facie* evidence which points to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112).

- 8.6. The PIC is an organ of state and its conduct amounts to conduct in state affairs, as a result, the matter falls within the ambit of the Public Protector's mandate. The jurisdiction of the Public Protector to investigate this matter was not disputed by the parties.

8 THE INVESTIGATION

8.2 The investigation process

- 8.2.1 The investigation was conducted in terms of section 182 of the Constitution read with sections 6 and 7 of the Public Protector, 1994 (the Public Protector Act).

- 8.2.2 In terms of the principles laid down by the courts¹ providing for the manner in which investigations should be conducted, the courts have stated that the Public Protector is not entitled to be passive, supine and static in her approach to investigations. The Courts have emphasised that the Public Protector, as an investigator, is expected to do more than merely to weigh what is placed before him / her and make a decision in favour of the party that produces more evidence. He / she is expected and is under a duty to actively seek out the evidence. Where an investigation is required, it should be conducted as comprehensively as possible, in order to inspire public confidence that the truth has been discovered, that his / her reports are accurate, meaningful and reliable, and that any remedial action that he / she envisages taking, is appropriate under the circumstances.

- 9.1.1 The investigation process included correspondence with the Complainant, Dr Mkhize and the PIC, meetings and interviews held with parties involved in this matter, an analysis of the relevant documentation and information

¹ *Public Protector v Mail & Guardian Ltd* [2011] ZASCA 108; 2011 4 SA 420; *Democratic Alliance v Public Protector*; *Council for the Advancement of the South African Constitution v Public Protector* (11311/2018; 13394/2018) [2019] ZAGPPHC 132.

obtained during the investigation and the consideration and application of relevant laws and prescripts.

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

10.1 Whether Dr Mkhize improperly interfered in the PIC's processes and procedures which led to the PIC granting a R210 million loan to Africoil, and in so doing, received any payment for facilitating such loan, thus resulting in impropriety as envisaged in section 182(1) of the Constitution or maladministration as contemplated in section 6(4) of the Public Protector Act.

Common cause issues

10.1.1 From the available evidence, it was established that during January 2017, the PIC approved a loan in favour of Africoil in the amount of R210 million.

10.1.2 It was also established that during February 2017, the PIC disbursed the amount of R210 million to the bank account of Africoil.

Issues in dispute

10.1.3 The issue to be determined is whether there was any impropriety in the approval by the PIC of a loan application in the amount of R210 million in favour of Africoil.

10.1.4 The submissions made by the parties in this matter and the allegations levelled by the Complainant indicate that the areas of dispute primarily relate to: -

- 10.1.4.1 Whether Dr Mkhize improperly interfered in the processes of the PIC which then resulted in the improper approval of the loan application in favour of Africoil during January 2017; and
- 10.1.4.2 Whether Dr Mkhize either received or stood to receive any improper payment in return for facilitating the loan application between the PIC and Africoil.
- 10.1.5 During the investigation, the Public Protector obtained a letter of demand addressed to Africoil dated 20 September 2017. This letter was signed by Mr Babatunde Adeyeye of Adeyeye Attorneys, who purports to represent the Noble Company. It is contended in the letter that: -
- 10.1.5.1 Sometime in May 2016, Africoil (represented by its then Chief Executive Officer, Mr Tseke Nkadimeng) approached a company called Noble (represented by its Director, Mr Joseph Nkadimeng) to solicit the latter's assistance in enlisting the support of the "TG" (understood to be in reference to Dr Mkhize during his capacity as the Treasurer-General of the African National Congress) in facilitating the approval of a loan in the amount of R200 000 000.00 (the PIC loan) that Africoil had previously approached the PIC for, but was unsuccessful.
- 10.1.5.2 Africoil required the PIC loan to buy out a company called Pembani Oil and for other purposes, so that the acquisition of Africoil by Sac Oil Limited (Sacoil) could take place.
- 10.1.5.3 Noble agreed to assist Africoil. Noble then proceeded to enlist the services of Zonkizizwe Investments Limited (a company wholly owned by the ANC) to support Noble in the presentation of the PIC loan to the TG.
- 10.1.5.4 Pursuant to the above, a series of meetings took place during 2016 attended by the TG, Messrs. Paul Langa, Billy Masetlha, Joseph Nkadimeng and Tseke Nkadimeng, wherein the PIC loan was extensively discussed.

- 10.1.5.5 It was ultimately agreed that the TG would promote Africoil's projects, including providing support for the facilitation of the PIC loan and the proposed acquisition of the majority interest in Africoil by Sacoil amongst others.
- 10.1.5.6 Africoil granted the TG, Zonkizizwe and Noble a joint mandate to facilitate the PIC loan. Africoil agreed to pay the TG, Zonkizizwe and Noble a fundraising fee equal to 3.5% of the loan amount of the PIC loan, being an amount of R7 000 000.00, upon the execution of a Term Sheet for the PIC loan between Africoil and the PIC.
- 10.1.5.7 It was also agreed that Africoil would conclude a written Capital Raising Agreement with Zonkizizwe on behalf of and for the benefit of itself, the TG and Noble.
- 10.1.5.8 It was further agreed that the fund raising fee would be shared amongst them as follows: R4 500 000.00 (Excl. of VAT) for the TG and R1 250 000.00 (Excl. of VAT) each for Zonkizizwe and Noble.
- 10.1.5.9 Thereafter, the TG, Zonkizizwe and Noble executed their mandate and lobbied the PIC through various channels, which efforts culminated in the PIC approving the PIC loan and the signature of a Term Sheet between the PIC and Africoil sometime in October 2016.
- 10.1.5.10 The PIC loan was eventually disbursed to Africoil by the PIC and the transaction for the acquisition of Africoil by Sacoil was concluded.
- 10.1.5.11 On 13 March 2017, Noble issued and delivered to Africoil, through Mr Tseke Nkadimeng, an invoice for the amount of R1 250 000.00 plus VAT, on account of Noble's portion of the fundraising fee.

- 10.1.5.12 Notwithstanding several follow-ups, Africoil had either failed, refused or neglected to pay the amounts due to Noble.
- 10.2 The Public Protector also obtained responses to the letter of demand from TGR attorneys (TGR) purportedly representing Africoil, dated 02 October 2017 and 03 November 2017, respectively. In the letters, TGR stated that their client, Africoil had no knowledge of the contents of the demand and more specifically, it had no knowledge of any agreement between it and the Noble Company (Noble). In essence, Africoil denied any indebtedness to Noble.
- 10.3 No evidence was presented to the Public Protector during the course of the investigation indicating that this matter proceeded to court nor is there any judgment issued by any court pursuant to this matter.
- 10.4 The Public Protector was also provided with a copy of a presentation titled *“AfricOil Dynamic Performance: Presentation to TG”* dated 23 June 2016 (the Africoil Presentation). It is understood that this document was allegedly used as part of a presentation to the TG (who in this context is understood to be Dr Mkhize at the time) in efforts to solicit his assistance in the PIC loan application.

Dr Mkhize’s response to the allegations.

- 10.5 The Public Protector brought the allegations to the attention of Dr Mkhize through correspondence dated 20 July 2018. The purpose of the letter was to request his response following the complaint lodged by Mr Bricknell.
- 10.6 In his response dated 13 August 2018, Dr Mkhize disputed that he had ever facilitated a PIC loan in favour of Africoil. He contended that he did not have a relationship with Zonkizizwe.
- 10.7 Dr Mkhize also stated that he only found out in the media that there were lawyers who had instituted action against certain parties where his name was

mentioned. He stated that he had not seen such letter of demand nor was there any action pending against him on such a matter.

10.8 Dr Mkhize also stated in his response that: -

“In my tenure as the ANC Treasurer-General I met with various companies who would brief me on their operations, strategies or plans. This is no way meant that my intervention or influence was required when they pursued their operations or business deals. At no stage did I enter into an agreement to facilitate PIC loans for a fee.

I have never engaged any PIC official regarding the granting of the AfricOil loan. In fact I learnt through the statement issued by the PIC that its relationship with AfricOil dates back to 2014 and it holds a direct equity stake of 29%. It is therefore difficult for me to understand why it would be alleged that a third party would attempt to influence the granting of a loan, in which a financial institution already has direct exposure in, and has a better understanding of its operations and performance.”

10.9 Dr Mkhize also stated in his response that he had received the Africoil Presentation which is alleged to be the presentation that was made to him in his capacity as the Treasurer-General of the ANC in relation to the Africoil loan application.

10.10 Dr Mkhize stated that he had analysed the document and he contended that he had only received a general presentation about the company profile from Africoil where the gas sector and economic transformation were broadly discussed in a manner in which they frequently engage with many other companies that had sought audience with him in his capacity as the Treasurer-General. He contended that the document that was furnished to him, however (the Africoil Presentation), contained information that was never presented to him.

- 10.11 Dr Mkhize contended that he had never discussed the issues contained in the Africoil Presentation nor was he in a meeting where they were discussed in his presence. It is his submission that the document is fraudulent and not authentic. Dr Mkhize did not however indicate in his response, when he had met with Africoil.
- 10.12 It appears from his response to the allegations that Dr Mkhize in essence disputes that he agreed to facilitate any Africoil loan application to the PIC for a fee. He disputes that he engaged any PIC official regarding the granting of a loan to Africoil. He also denies knowledge of the Africoil presentation. It is his submission that the presentation that was presented to him was a general presentation about the company profile of Africoil where the gas sector and economic transformation were discussed broadly and not the Africoil Presentation.
- 10.13 On 18 September 2018, the Public Protector obtained a certificate issued by the Commissioner of Companies and Intellectual Property Commission (the CIPC) concerning the company profile of Zonkizizwe Investments (Pty) Ltd. It was established that the Directors of Zonkizizwe are Ms Gertrude Ntiti Shope, Mr John K Nkadimeng and Mr Paul Mangaliso Langa.

Interviews conducted during the investigation.

- 10.14 On 03 October 2018, the investigation team interviewed Mr Khumbu Luthuli (Mr Luthuli), the then interim Chief Executive Officer (CEO) of Africoil. At this interview, Mr Luthuli disputed that Africoil had approached Dr Mkhize to solicit his assistance to facilitate the PIC loan application. During the interview, Mr Luthuli was also furnished with the document which was allegedly presented to Dr Mkhize (the Africoil Presentation). He inspected the document and stated that he had no knowledge of it and further disputed that it was prepared by Africoil.

- 10.15 On 29 October 2018, the investigation team interviewed Mr Tseke Nkadimeng, the former CEO of Africoil. Mr Tseke Nkadimeng is alleged to have approached Noble to solicit assistance in enlisting the support of the TG in facilitating approval of the PIC loan after Africoil was unsuccessful in its first attempt to secure the loan from the PIC. He is also alleged to have been part of the meetings with the TG where the PIC loan was discussed and an agreement reached that the TG would promote Africoil's projects, including providing support for facilitation of the PIC loan.
- 10.16 During the interview, Mr Tseke Nkadimeng disputed that he had met with Dr Mkhize to solicit his assistance to facilitate the PIC loan application. Mr Tseke Nkadimeng is a cousin to Mr Joseph Nkadimeng, but he did not corroborate any of the latter's contentions.
- 10.17 On 18 July 2019, the investigation team interviewed Mr Joseph Nkadimeng. Mr Joseph Nkadimeng contended that Africoil was indeed indebted to Noble in the amount of R1 250 000.00 (plus VAT) on account of Noble's portion of the fundraising fee, which had not been paid.
- 10.18 Mr Joseph Nkadimeng could not however provide any evidence confirming the allegation that he had met with Dr Mkhize or Messrs. Paul Langa, Billy Masetlha, Joseph Nkadimeng and Tseke Nkadimeng pursuant to the PIC loan or that Dr Mkhize had assisted in facilitating such a loan.
- 10.19 The parties interviewed during the investigation did not provide any evidence reflecting how or when Dr Mkhize interfered with, or intervened in the processes of the PIC in order to assist Africoil with the PIC loan. Mr Joseph Nkadimeng also did not provide any details or any evidence regarding the manner and extent of the assistance that Noble or Zonkizizwe supposedly provided to Africoil.

- 10.20 Mr Joseph Nkadimeng did not provide evidence of the Term Sheet or the Capital raising Agreement as was contended in the letter of demand his attorney delivered to Africoil's attorneys.
- 10.21 None of the parties interviewed provided evidence confirming the authenticity of the Africoil Presentation which was allegedly presented to Dr Mkhize in his capacity as TG of the ANC during 2016. While Dr Mkhize did not dispute in his response that he had met with Africoil. He stated that he had received a general presentation about Africoil's company profile from the company where the gas sector and economic transformation were broadly discussed in a manner in which they frequently engage with many other companies that had sought audience with him in his capacity as the TG.
- 10.22 He however disputed the authenticity of the Africoil Presentation and contended that it contained information that was never presented to him. Dr Mkhize also contended that he had never discussed the issues contained in the document nor was he in a meeting where they were discussed in his presence.
- 10.23 Two former CEO's of Africoil, including Mr Tseke Nkadimeng also disputed the authenticity of the Africoil Presentation in their respective interviews.

The PIC's response to the allegations.

- 10.24 On 05 September 2018, the Public Protector addressed a letter to Dr Daniel Matjila, the then Chief Executive Officer of the PIC (Dr Matjila) requesting a response to the allegations made by the Complainant.
- 10.25 The PIC responded to the Public Protector in a letter dated 19 September 2018 signed by Dr Matjila.
- 10.26 According to the PIC's response, the media reports alleging that the PIC received an "*initial loan application*" from Africoil which was declined by the

PIC are factually incorrect and untrue. The PIC contended that they only received one application in 2016 from Africoil for the amount of R210 million intended to facilitate the company's expansion plans.

10.27 The evidence provided by the PIC indicates that during September 2014, the PIC on behalf of the Compensation Fund “*approved funding such that the PIC subscribed for a 29% direct equity stake in Africoil for R97 million*”. The PIC's equity stake in Africoil would later decrease to 28%. According to the documents provided by the PIC, its equity stake in Africoil decreased to 28% because one of the conditions precedent to the approval of the Africoil loan application was that 5% equity shareholding be contributed to the PIC's Ikwezi Trust. Pursuant to the negotiations with Africoil, the PIC's participation decreased from R100 million to R97 million for an equity stake of 28% instead of the initial 29%, once the Ikwezi Trust had been set up and the shareholders had agreed to make a contribution of 3% to the Ikwezi Trust.

10.28 This evidence lends less credibility to the complaint. If the PIC and Africoil had a pre-existing relationship dating back to 2014, why would Africoil deem it necessary to approach Noble, Zonkizizwe and Dr Mkhize for them to lobby the PIC on its behalf? It is the Public Protector's view that Africoil would have been in a position to approach the PIC unassisted.

10.29 The Public Protector also did not obtain any evidence supporting the contention reported by the media that the PIC received an “*initial loan application*” from Africoil which it rejected or declined, which then precipitated Africoil to approach Noble, Zonkizizwe and Dr Mkhize for assistance. It was therefore independently verified that the PIC only received one application in 2016 from Africoil for R210 million and there was no evidence of previously declined applications.

10.30 It is important to recall at this stage that media reports had contended that Africoil had approached Noble for assistance after an initial loan application had been rejected by the PIC.

10.31 If the loan application by Africoil was approved by the PIC on the first instance, there would be no basis for Africoil to approach Noble, Zonkizizwe or Dr Mkhize for them to lobby the PIC on its behalf.

The PIC loan application process

10.32 The PIC's response dated 19 September 2018 included documentary evidence reflecting the process that was undertaken by the PIC in approving the Africoil loan application: -

10.24.1 A due diligence presentation date stamped 18 June 2018 indicates that Africoil's strategy was to raise R200 million of fresh capital to purchase an entity called Bigred, the immovable properties and licenses of an entity called Turquoise Moon and the vehicles of Redlex, collectively called the Forever fuels transaction.

10.24.2 It is unclear when Africoil submitted the application for funding to the PIC. It is however observed that Mr Royith Rajdhar the then Executive Head: Developmental Investments acknowledged receipt of the loan application in a letter dated 29 August 2016.

10.24.3 A submission prepared by Mr/Ms Lufuno Netshikweta and Ms Bridgette Layloo on 20 September 2016, who at the time were both Investment Analysts titled "*Developmental Investments Scoping Report: Afric Oil September 2016*" recorded the following in its executive summary: -

"Afric Oil (Pty) Ltd ("Afric Oil or the Company"), a petroleum products distribution company, has approached the PIC for funding of R200 million for expansion plans that include growing the logistics network and recapitalizing Afric Oil Zimbabwe. Furthermore, the PIC has been approached to provide funding of R100 million to Moopong to purchase 75% of Pembani Oil (Pty) Ltd ("Pembani") from Pembani Group."

- 10.24.4 The purpose of the above submission addressed to the Portfolio Management Committee: Unlisted Investments (PMC: UI) was to request that the *“PMC (UI) approves the team to proceed to the due diligence phase of Afric Oil with the intention of providing funding amounting to R200 million that will be used to facilitate the expansion plans of the Company as set out in the growth strategy and provide Moopong with funding of R100 million to acquire an equity stake of 75% in Pembani Oil.”*
- 10.24.5 The submission was reviewed by Mr Tshepo Rapudi in his capacity as a SAICA Trainee Accountant on 20 August 2016 and recommended by Mr Royith Rajdhar on the same date.
- 10.24.6 According to an extract from the minutes of a meeting of the PMC-UI held on 26 September 2016, the committee approved in principle for the deal team to proceed to the due diligence phase of Africoil subject to the Risk Department confirming that they are comfortable with the 53% PIC exposure. The minutes were signed by Ms Wilna Louw in her capacity as then Board Secretary of the PIC.
- 10.24.7 An engagement letter in respect of the application for funding by Africoil in the amount of R200million was signed by Mr Royith Rajdhar on 10 October 2016. The letter was acknowledged by Mr Tseke Nkadimeng of Afric Oil on the same day.
- 10.24.8 A document by Mr Rajdhar dated 27 October 2016 and titled *“Indicative Term Sheet Issued by the Public Investment Corporation SOC Limited (“PIC”) to Afric Oil Proprietary Limited (“Afric Oil”)* recorded amongst other things, certain documentation required by the PIC from Africoil.
- 10.24.9 These documents referred to as *“Initial Conditions Precedent” (CP)*, included the signed Finance and Security documents; Valid Tax clearance certificate; Audited Financial Statements for the financial year ending December 2015;

Compliance with all regulatory requirements, Satisfactory completion of due diligence; Capacity legal opinions; Evidence that all documents creating and evidencing the security have been duly executed and registered; Delivery of the Draw Down notice and Resolutions passed by the Board of Directors of Africoil.

- 10.24.10 On 31 October 2016, Mr Tseke Nkadimeng signed the *Indicative Term Sheet* in his capacity as Chief Executive Officer (CEO) of Africoil, indicating his acceptance of the terms and conditions of the document.
- 10.25 The Public Protector enquired with the PIC whether the “*Initial Conditions Precedent*” (CP) documents were provided as per the Indicative Term Sheet.
- 10.26 In a response dated 28 August 2020, the PIC stated that the CP as per the Indicative Term Sheet were not the final CP of the transaction. According to the PIC, term sheets are by their nature, indicative and not binding nor are they final. According to the PIC, the standard practice at the time was that the Term Sheet was signed by the parties prior to the approval of the PIC’s investment committees. Therefore, the PIC’s investment committees had *cart blanche* to add to the list of the CP’s which are already contained in the Term Sheet or even form a whole new list of the CP’s.
- 10.27 The PIC stated that this was the case in the Africoil transaction, stemming from the investment committees, the transaction was approved with a new list of CP’s of which are included in clause 2.1 of the Preference Share Subscription Agreement. The Public Protector perused the agreement referred to in the response and particularly the clause in question and is satisfied with the response provided.
- 10.28 Returning to the process followed in the loan application, it was noted that on 16 November 2016, a submission prepared by Mr/Ms Lufuno Netshikweta the then Investment Analyst and Ms Bridgette Layloo, the then Investment

Associate, titled *Developmental Investments Appraisal Report: Afric Oil November 2016* recorded the following in its executive summary: -

“Afric Oil (Pty) Ltd (“Afric Oil or Group”), a petroleum products distribution company, has approached the PIC for funding of R210 million for expansion plans that include growing the logistics network and recapitalizing Afric Oil Zimbabwe. Furthermore, the PIC has been approached to provide funding of R90 million to NewCo which is 100% owned by Moopong Investments Holding (Pty) Ltd (“Moopong”) to purchase 75% of Pembani Oil (Pty) Ltd (“Pembani”) from Pembani Group.”

- 10.29 The purpose of this submission was to request the PMC: UI to recommend the transaction to the Private Equity Priority Sector and Small Medium Enterprises Fund Investment Panel (“PEPSS-FIP”) for approval.
- 10.30 The submission was reviewed by Mr Tshepo Rapudi and Ms Kentse Yende the then Associate Principal, both on 16 November 2016 respectively and recommended by Mr Royith Rajdhar on the same date.
- 10.31 The same submission was also prepared by Mr/Ms Lufuno Netshikweta and Ms Bridgette Layloo but this time directed to the PMC: UI.
- 10.32 The purpose of the latter submission was to request the PMC: UI to approve the proposed transaction with a view to providing a R210 million senior debt facility to Afric Oil and R90 million to NewCo to bring total funding facilities to R300 million.
- 10.33 The submission was reviewed by Mr Tshepo Rapudi and Ms Kentse Yende on 16 November 2016 respectively and approved by Dr Daniel Matjila on 07 December 2016.

- 10.34 According to an extract of the minutes of the meeting of the PMC-UI held on 22 November 2016, the committee resolved to approve the proposed transaction subject to the following conditions: -
- “The deal team should firm up on the evaluation issues; the deal team should highlight key arrears (sic) where the R210 million expansion will be utilised on; the document should be amended to reflect that the transaction is for final approval by the PMC, and; that no disbursements should take place until the ESG, Legal and Risk conditions are fulfilled.”*
- 10.35 The minutes were signed but undated by Ms Wilna Louw in her capacity as then Board Secretary of the PIC.
- 10.36 Africoil was informed of the approval of the funding application through a letter signed by Mr Rajdhar and dated 30 November 2016. The letter also stated that the approval granted by the PIC is subject to fulfilment of all *“Conditions Precedence”* (CPs), including but not limited to all CPs required by the PIC’s Legal, Environmental, Social and Governance (ESG) and Risk and any other CPs as required by and to the satisfaction of the PIC.
- 10.37 Comments on the risk assessment of Africoil were provided to the PMC: UI and the Private Equity, Priority Sector, Small and Medium Enterprises (PEPSS) – Fund Investment Panel (FIP) in documents compiled by Tshepo Mathibela a Graduate: Investment Risk and Mr/Ms Itumeleng Mekwa a Senior Investment Risk Analyst and reviewed and recommended by Mr Paul Magula the Executive Head: Risk on 21 November 2016 and 13 January 2017 respectively.
- 10.38 An Environmental, Social and Governance Report (ESG) dated October 2016 was also conducted on the Africoil funding application.
- 10.39 Legal Reports on the Africoil funding application were compiled by Ms Boitumelo Leroke a Legal Advisor and recommended by Mr Ernest Nesane

the Executive Head: Legal Counsel, Governance and Compliance on 21 November 2016 and 13 January 2017 respectively. The latter report ultimately recommended that the proposed funding application to Africoil be considered for approval by the PEPSS FIP.

10.40 A third *Developmental Investments Appraisal Report: Afric Oil* dated January 2017 on the same loan application was prepared by Mr/Ms Lufuno Netshikweta and Ms Bridgette Layloo on 11 January 2017, reviewed by Mr Tshepo Rapudi and Ms Kentse Yende on the same date, recommended by Mr Rajdhar on 12 January 2017 and approved by Dr Matjila on the same date.

10.41 The purpose of this submission was to request the PEPSS-FIP to approve the proposed transaction with a view to providing a R210 million senior debt facility to Afric Oil and R90 million to NewCo to bring total funding facilities to R300 million.

10.42 According to an extract of minutes of a meeting of the PEPSS FIP held on 27 January 2017, the panel resolved to approve that the PIC be authorised to provide funding in the amount of R210 million for expansion plans that include growing the logistics network and recapitalising Afric Oil Zimbabwe and to provide funding of R90 million to NewCo to purchase 75% of Pembani Oil from the Pembani Group subject to the following conditions: -

“All legal concerns raised to be addressed to the satisfaction of PIC’s Legal Team prior to PIC disbursement; All risk concerns raised to be addressed to the satisfaction of PIC’s Risk Team prior to PIC disbursement, and; All Environmental, Social and Governance (ESG) concerns raised, to be addressed to the satisfaction of PIC’s ESG Team prior to PIC disbursement. And further subject to: Submission of the latest Audited Financial Statements; Submission of the recent Management Accounts, and; Confirmation that the company is a going concern.”

- 10.43 These minutes were signed but undated by Ms Wilna Louw in her capacity as then Board Secretary of the PIC.
- 10.44 It was also noted that in addition to the resolution taken to approve the loan application on 27 January 2017, it was resolved that Dr Matjila or his duly appointed designate were authorised to negotiate, agree and sign all documents pursuant to such resolution. The resolution was signed by Mr Roshan Morar, the then Chairman of the PEPSS FIP as well as by Dr Matjila.
- 10.45 A Term Loan Facility Agreement between the Unemployment Insurance Fund (UIF) and Afric Oil recording the terms of the loan was signed by the UIF duly represented by Dr Matjila on 3 February 2017 and signed but undated by the then CEO of Africoil, Mr Tseke Nkadimeng.
- 10.46 In a memorandum compiled by Ms Bridgette Layloo an Investment Associate and signed on 08 February 2017, Dr Matjila was requested to approve the payment of R210 million in respect of Africoil relating to the transaction where the PIC approved funding in the form of a senior debt facility to the company.
- 10.47 In the discussion paragraph of the submission, the following is recorded: -
- “11. We here by confirm that all relevant officials from affected area (sic) have signed off the disbursement as evidenced by the disbursement checklist attached (refer Annexure A); 12. We have received confirmation that all conditions precedents have been met as evidenced by the sign-off from our legal unit and we can therefore proceed with the disbursement.”*
- 10.48 The submission culminated with the recommendation that Dr Matjila approve the payment of R210 million in respect of the Africoil loan application.
- 10.49 A perusal of a checklist attached to the memorandum reflects the following signatories: -

Name and designation	Confirm / no not confirm	Date of signature
Rubeena Solomon: Investment Management	Confirmed	undated
Ernest Nesane: Executive Head: Legal Counsel, Governance and Compliance	Confirmed	14 February 2017
Roy Rajdhar: Executive Head: Developmental Investments	Confirmed	13 February 2017
Paul Magula: Executive Head: Risk	Confirmed	14 February 2017
Brian Mavuka: General Manager: Finance	Confirmed	14 February 2017
Matshepo More: Chief Financial Officer	Recommended	14 February 2017

10.50 The submission was approved by Dr Matjila on 13 February 2017.

10.51 According to a document titled “*Standard Bank of South Africa: Customer All Payments Interim Audit Report*” three amounts to the tune of R10 million, R100 million and another R100 million were transferred to Africoil on 14 February 2017.

Perceived discrepancies in the PIC loan application process.

- 10.52 During the course of the document analysis by the investigation team, perceived discrepancies were noted which required further clarity from the PIC. Firstly, the reasons for the discrepancies between the Developmental Investments Scoping Report dated September 2016 and the Developmental Investments Appraisal Reports dated November 2016 and January 2017, respectively.
- 10.53 In the former, a request for funding in the amount of R200 million to Africoil and R100 million to Moopong respectively is made. Whereas in the latter Scoping Reports, the details have changed to an amount of R210 million to Africoil and R90 million to NewCo as opposed to Moopong.
- 10.54 These discrepancies were brought to the attention of Dr Reuel Khoza, the Chairperson of the Board of the PIC in a letter dated 19 May 2020. In a response dated 28 August 2020, the PIC stated that a Scoping Report is prepared before the transaction team conducts due diligence. Post due diligence, the team updates any new information acquired during due diligence in the Appraisal Report.
- 10.55 According to the PIC, given that the process to fund Africoil took several months, the volumes that the business was selling and revenue they were generating increased significantly. For that reason, the acquisition price of the assets of the Forever Fuels increased from R200million to R210million, hence the increase in the funding to Africoil.
- 10.56 The PIC further stated that the funding to Moopong was to acquire shares in Pembani Oil. During the structuring of the transaction, Moopong proposed to conduct the transaction through Newco, a new entity 100% owned by Moopong. Given the increase in the funding to Africoil, the team had asked Mr Tseke Nkadimeng to renegotiate the price for the shares in Pembani Oil, hence the decrease in the funding to Newco from R100million to R90million.

- 10.57 Secondly, the reasons why the PEPSS FIP approved the loan application on 27 January 2017 when the PMC: UI had already resolved to approve the application in a meeting held on 22 November 2016, and also whether in approving the loan application, the PEPSS FIP was operating within its delegated authority.
- 10.58 In response, the PIC stated that the PEPSS FIP was operating as per the Delegations of Authority in approving the loan application. According to the PIC, there had been some confusion as to which committee was supposed to approve the transaction. The transaction team had prepared a report requesting the PMC: UI to recommend the transaction to the PEPSS FIP. However, during the PMC: UI meeting, it was decided that the transaction was an infrastructure transaction. Therefore, the approving committee was the PMC: UI. Based on these deliberations, the committee then requested an updated report reflecting a request for approval from PMC: UI which report was subsequently prepared and submitted.
- 10.59 The PIC further stated that subsequent to the PMC: UI meeting, the transaction team received further clarity on the appropriate section of the Delegations of Authority applicable to the transaction and consensus had been reached that the transaction should be approved by the PEPSS FIP. Therefore, the transaction team had updated the Appraisal Report, and submitted same to the PEPSS FIP in January 2017.
- 10.60 According to the PIC, the PEPSS FIP approval became the final approval as per the minutes of the PEPSS FIP meeting. The PIC also stated that the various assurance provider teams (Credit Risk report, Legal Report and ESG Report) had also re-submitted their reports to the PEPSS FIP in January 2017.
- 10.61 The third perceived discrepancy related to Dr Matjila's date of signature on the memorandum approving the payment of R210 million in respect of the Africoil loan application.

- 10.62 The date on the submission was 13 February 2017 yet the dates of signature of the confirmers and the recommender of the memorandum, namely Messrs. Ernest Nesane, Paul Magula, Brian Mavuka and Ms Matshepo More respectively, were 14 February 2017. The question posed to the PIC is how could the date of approval precede the dates of the confirmers and recommender of the memorandum?
- 10.63 In the response dated 28 August 2020, the PIC stated that the process in Dr Matjila's office at the time was that all submissions to his office would be recorded in the register immediately after sign off by the CEO before being distributed to the officials who made such submissions.
- 10.64 Officials would be required to sign the register on collection of their submissions. According to the PIC, A copy of the register related to Africoil reflects that the submission was entered into the register on 14 February 2017. There was a standard rule in the office of the CEO that no submissions would be accepted without all the required officials having appended their signatures as the signatories preceding the CEO's signature serves to provide assurance. The PIC submitted that there is a high probability that Dr Matjila could have mistakenly dated the memorandum 13 February 2017 instead of 14 February 2017.
- 10.65 The explanation provided by the PIC is considered justifiable. The register was also considered and it was confirmed that the memorandum was indeed submitted to Dr Matjila's office on 14 February 2017.

Further steps taken during the investigation.

- 10.66 During March 2021, the officials who were part of the transaction team were requested to submit affidavits regarding their respective roles in the Africoil loan application. All affidavits submitted were analysed, confirming their respective roles. In the affidavits, the relevant officials did not contend, nor

did they submit any evidence indicating that they were coerced or in any way subjected to undue influence to circumvent the PIC's processes in the Africoil loan application.

10.67 In addition, on or about 18 February 2021, subpoenas were also issued to major South African banks requesting the bank records of Dr Mkhize, Noble and Zonkizizwe. The subpoenas were issued and served on ABSA bank, First National Bank, Standard Bank and Nedbank.

10.68 Responses were received from the banks during February and March 2021. The banks provided the Public Protector with the requested bank account records, with the exception of Standard bank, which confirmed that they did not hold any accounts for the individuals and entities listed in the subpoena.

10.69 The account records were reviewed and no evidence of a connection could be found between Dr Mkhize, Noble or Zonkizizwe relating to the Africoil loan application during 2016.

10.70 Mr Joseph Nkadimeng had also stated during interviews that he was not aware of any funds having being paid in relation to the Africoil loan application.

Application of the relevant law

Pertaining to Dr Mkhize's conduct.

10.71 It is not in dispute that during 2016, Dr Mkhize was the Treasurer-General of the ANC. It is not contentious that during the scope of his duties, he would have met with various companies from different sectors who would brief him on their operations, strategies and plans. While Dr Mkhize did not dispute having met with Africoil during his tenure as Treasurer-General of the ANC. He disputed it related to the Africoil loan application to the PIC.

10.72 Dr Mkhize also disputed the authenticity of the presentation relating to the Africoil loan application allegedly presented to him. He stated in his response to the Public Protector that he had only received a general presentation about the company profile from Africoil where the gas sector and economic transformation broadly were discussed in a manner in which he would frequently engaged with companies that had sought audience with him as Treasurer-General. The authenticity of the presentation was also disputed by both former CEO's of Africoil and one of them, Mr Tseke Nkadimeng is the cousin of Mr Joseph Nkadimeng.

10.73 The fact that Dr Mkhize may have met with Africoil would not itself have been suspicious as it related to the internal business of the party, unless it could be shown in evidence that Dr Mkhize used his influence to unduly facilitate the granting of the loan application by the PIC which is a state owned institution. Dr Mkhize categorically disputed this contention, and at this stage, there is no evidence indicating that he facilitated such a loan application.

10.74 Pertaining to the internal business of political parties, it was held in the case of *President of the Republic of South Africa and Another v the Public Protector and Others* [2020] ZAGPPH 9 (10 March 2020) that the activities of the CR-I 7 campaign were by nature: -

“...the activities of members of a private group of people, and not a statutory body, in furtherance of a matter that concerned their relationship with their party.”

10.75 The Court further held that: -

“These activities are internal matters of each political party. Therefore, it is these parties which are best placed to determine how members would participate in internal activities ... the conduct of political party members in

conformity with their party structures and in furtherance of their own personal party ambitions is squarely within the private domain.”

10.76 The Public Protector in contrast, is guided by the dictates of the Constitution and particularly sections 181(1)(a) and 182(1) of the Constitution. Section 182(1) provides for the competency of the institution to investigate 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.

Pertaining to the PIC’s conduct.

10.77 It is not in dispute that the PIC is a juristic person established in terms of section 2 of the Public Investment Corporation Act, 2004. It is also not disputed that the PIC is an organ of State as contemplated in sections 239 of the Constitution.

10.78 Like all organs of State, the PIC is required to discharge all of its duties and functions in accordance with the law. The PIC’s conduct should be beyond reproach and it is expected to measure up to policy considerations and legislative prescripts that regulate its conduct. These requirements must also be understood together with the basic values governing public administration in section 195(1) of the Constitution.

10.79 According to a document provided by the PIC titled the *“Unlisted Investment Process”*, the process to be followed in the consideration of loan applications is that a transaction team of the PIC prepares a Scoping Report which must be signed off by the Executive Head (EH). It is then presented at the PMC; UI for consideration and approval. The support/assurance teams are not involved in the Scoping Report process.

10.80 After the approval of the Scoping Report is obtained from the PMC: UI, permission is given to proceed to the due diligence phase of the process.

- 10.81 The support/assurance teams join the transaction team in conducting the due diligence phase of the process. The support teams comprise of the Legal, Risk, Environmental, Social and Governance (ESG) units of the PIC.
- 10.82 The support teams all compile independent reports that serve at both the PMC: UI and PEPSS FIP.
- 10.83 According to the PIC, at the approval stage, the various teams typically propose conditions that should be met before the PIC disburses cash into a transaction. These are assessed by a committee, and the approved conditions are then recorded in the legal agreements. A process is undertaken to get proof that all the conditions have been met. After such confirmation that all the conditions have been met, waved or deferred, the disbursement can be made.
- 10.84 The PIC also provided a document titled the “*Delegation of Authority for Unlisted Investments*” dated July 2015 (the DoA which was applicable at the time).
- 10.85 According to the DoA, the PEPSS FIP has authority to approve infrastructure projects where the value exceeds R100million. It is a requirement however, that the Executive Head: Developmental Investments must have initiated the process and the Executive Heads of Legal and Risk must have agreed prior to approval by the PEPSS FIP.
- 10.86 The evidence reflects that the value of the loan amounted to R210million and it was approved by the PEPPS FIP on 27 January 2017. Prior to approval however, the Executive Heads of Legal and Risk had recommended approval of the loan on 13 January 2017. There is no evidence that the PIC deviated from its DoA in approving the Africoil loan application.

Conclusion

- 10.87 There is no evidence to support the allegation that Dr Mkhize interfered in the PIC's processes and procedures in his capacity as the Treasurer-General of the ANC during 2016, which led to the PIC granting a R210 million loan to Africoil, and in so doing, improperly received a payment for facilitating such loan.
- 10.88 This conclusion is also supported by the fact that there was no initial loan application which was declined by the PIC as was alleged in the complaint and reported in the media. This is a critical component of the complaint as the allegation was that Africoil only approached Noble, Zonkizizwe and Dr Mkhize for assistance after an initial loan application was declined by the PIC.
- 10.89 The evidence also indicates that the disbursements of the funds to Africoil was not arbitrary, but followed a due diligence and approval process that was in line with the PIC's document on the "*Unlisted Investment Process*" as well as the "*Delegations of Authority for Unlisted Investments*" dated July 2015.
- 10.90 The PIC officials who were involved in the due diligence process did not provide any evidence indicating that they were unduly influenced to deviate from the processes of the PIC in processing the Africoil loan application.

Discretionary Notice issued to the Complainant in terms of section 8(1) of the Public Protector Act, read with rule 42(1) of the Public Protector Rules.

- 11 Rule 42(1) of the "*Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018*" (the Public Protector Rules) provides that when the Public Protector intends concluding a complaint by means of a closing report provided for in rule 41(b), the Complainant shall be informed in writing accordingly and be given an opportunity to make representations in

connection with the intended closure of the complaint within 14 (fourteen) days of delivery of the notification (Discretionary Notice or Notice).

12 The Complainant was accordingly served with a Discretionary Notice on 22 June 2021. He was given the opportunity to respond to the preliminary findings or to provide any evidence which contradicts the findings contained in the Notice by no later than 06 July 2021.

13 The Complainant acknowledged receipt of the Notice on 23 June 2021.

14 From the date of this report, the Complainant had not submitted any information or evidence that contradicts the Public Protector's findings.

15 REASONS FOR CLOSURE OF THE INVESTIGATION

15.1 Based on the evidence availed by the PIC and considered, the allegations are not substantiated.

15.2 Therefore, a finding of impropriety as envisaged in section 182(1) of the Constitution or maladministration in terms of section 6(4) of the Public Protector Act cannot be made in this investigation.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE:26/09/2021