IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 2263/06

DATE:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 29 July 2009 SIGNATURE

IN THE MATTER BETWEEN

M & G MEDIA LIMITED	1ST APPLICANT
FERIAL HAFFAJEE	2ND APPLICANT
STEFAANS BRUMMER	3RD APPLICANT
SAM SOLE	4TH APPLICANT
AND	
THE PUBLIC PROTECTOR	RESPONDENT

JUDGMENT

POSWA, J

Parties

[1] The first applicant is a company that publishes the *Mail & Guardian* newspaper and the *Mail & Guardian Online*. It will, from time to time, be referred to also as the *Mail & Guardian*. The second applicant is an adult female who was, at all relevant times, employed as the editor of the *Mail & Guardian* at all relevant

times. The third and fourth applicants were, at all relevant times, journalists employed by the *Mail & Guardian*. The deponent to the founding affidavit states that he and the fourth applicant "*were primarily responsible for researching and writing the articles that [as will later appear in this judgment] were published in the **Mail & Guardian** and which led to the respondent's investigation and the report [which will later be referred to in the judgment] that forms the subject-matter of this application.*" The respondent is a Public Protector appointed in terms of s.1(a) of the Public Protector Act 23 of 1994 ("the Public Protector Act"), read with s.181 and 193 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

Background to and History of the Application

[2] It is, in my view, essential for a proper understanding of this application that a brief background and history of events preceding it be stated.

The United Nations Security Council's concerns about and reaction to Iraq's invasion of Kuwait in August 1990

[3] Information on which the background and history of this application (with regard to this subheading) is based is in annexures "**SB12**" to "**SB21**", referred to in paragraphs 47 to 58 of the applicants' founding affidavit. The respondent, in paragraph 42.1 of his answering affidavit [**p745**], states, with regard to these paragraphs:

"*I do not have personal knowledge of the averments made in these paragraphs. For the purpose of the presentation* ***I do not dispute them.***" (Emphasis added.)

The following is a list of what emerges from these annexures ("SB12" to "SB21"):

1. On 2 August 1990, 6 August 1990 and 9 August 1990, respectively, the Security Council passed resolutions with regard to the situation between Iraq and Kuwait. In Resolution 60 (1990), of 2 August 1990, the Security Council commented as follows: "*Alarmed by the invasion of Kuwait on 2 August 1990 by the military forces of Iraq ...*" It then sets out what the Security Council had resolved. In Resolution 661 (1990), of 6 August 1990, the Security Council reaffirms Resolution 660 (1990) and further resolves in respects set out therein. It makes various decisions, the net effect whereof to restrict relations between UN member-states and the government of Iraq to affairs that were "*exclusively for strictly medical or humanitarian purposes and, in humanitarian instances, foodstuffs*". Even non-member states were, in paragraph 5 of Resolution 661 (1990), called upon to join UN member-states and "*to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or licence granted before the date of the present resolution*".

   The Security Council then-

"6. *Decide[d] to establish, in accordance with rule 28 of the provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council, to undertake the following tasks and to report on its work to the Council with its observations and recommendations:*

(a) To examine the reports on the progress of the implementation of the present resolution which will be submitted by the Secretary-General;

(b) To seek from all States further information regarding the action taken by them concerning the effective implementation of the provisions laid down in the present resolution;"

The Resolution went on to set out further decisions designed for ensuring strict compliance with the embargo on Iraq.

2. After almost six years, on 14 April 1995, the Security Council relaxed its embargo on Iraq previously imposed by Resolution 661 (1990). The relevant portion of Resolution 986 (1995), of 14 April 1995, reads:

"*The Security Council,*

...

1. *Authorises States, notwithstanding the provisions of paragraphs 3(a), 3(b) and 4 of resolution 661 (1990) and subsequent relevant resolutions,* ***to permit the import of petroleum and petroleum products originating in Iraq, including financial and other essential transactions directly relating thereto****, sufficient to produce a sum not exceeding a total of one billion United States dollars every 90 days for the purposes set out in this resolution and subject to the following conditions: ...*" (Emphasis added.)

It is not necessary to repeat those conditions for purposes of this background.

3. A United Nations program to implement the provisions of Resolution 986 (1995) was named the Oil-for-Food Program ("OFF"), effective from 1996. According to the OFF, Iraq was permitted to sell crude oil, to cater for the humanitarian needs of the people of Iraq.

4. The Security Council and the Government of Iraq signed a Memorandum of Understanding, on 20 May 1996, "*on the implementation of Security Council resolution 986 (1995) of 14 April 1995*" ("**SB40**"). According to

the OFF program, Iraq was entitled to select companies and/or persons to whom it would make allocations of crude oil, subject to UN oversight. The Memorandum of Understanding set out the terms and conditions under which the Iraqi State 0il Marketing 0rganisation ("SOMO") would contract with such companies or individuals, having sought UN approval in accordance with rules set out in the Memorandum of Understanding. [**Paras 48 and 49, FA, p20.**]

5. It is the UN's view that, because the OFF program was not destined to benefit the Iraqi regime, the government of Iraq found ways of benefiting itself out of the OFF program. It used a system of clawbacks, kickbacks and retroactive pricing. The latter system is described in detail at pp12-14 of "**SB15**" [pp240-269(e)], which is titled "SOURCES OF REVENUE FOR SADDAM & SONS". As stated in earlier reports, even large western governments were involved in this practice of undermining the OFF program. In that regard, I quote the following under a heading titled "***Clawbacks, kickbacks and retroactive pricing***":

> *"A kickback is the payment of a minor portion, usually five to ten percent, of the price of a good by one party in a transaction with another. It is* ***a form of bribery*** *or extortion that is tolerated by the party making the kickback so as to clinch a deal. The recipient is usually a government official in position to either block or facilitate the transaction.* ***Kickbacks have been a hallmark of***

trade with the regime of Saddam Hussein since its grasp of power in the late 1970s. *While the practice has usually been associated with weapons procurement, it was also a regular feature of the Reagan administration's agricultural support program to Iraq, as administered by the US Department of Agriculture's Commodity Credit Corporation (CCC).*"

6. "SB15" lists a number of instances where the Iraqi government is said to have made attempts to obtain the UN approval of various sales of Iraqi oil at "*prices below the market trade*", which attempts were always turned down by the UN. There is reference to, for instance, an arrangement between the Iraqi and Syrian governments, in terms whereof:

> "*the Iraq-Syrian pipeline had begun carrying Iraqi oil for the first time in nearly 20 years, meaning that Iraq had another potentially lucrative market for its production. Because the Syria-bound oil was and is sold outside of the Oil-for-Food program, the proceeds from these sanctions-busting sales bypass the UN's BNP bank account and go straight into Iraqi coffers.*"

7. A major occurrence in this regard, which is aptly summarised in paragraph 52 of the founding affidavit, took place at the beginning of January 2004:

> "*52. An Iraqi newspaper, Al Mada, published a report on 25 January 2004 to the effect that the former Iraqi regime*

*had bestowed lucrative crude oil allocations under the OFF on certain parties in exchange for support for the regime. Copies of the relevant pages of Al Mada are attached as **'SB16'**. They are written in Arabic but a copy of a translation by the Global Policy Forum is attached as **'SB17'**. Annexure **SB13** alleges that the OFF was corrupt. [I could not find this allegation in **SB13**.] Al Mada published a list of allocation recipients under the OFF. This list included Imvume (called 'Infiom Management/Sandy Majali') and Montega Trading (Pty) Ltd ('Montega'), another company associated with Majali (referred to as 'Montica')."*

8. The allegations or assertions by *Al Mada* (in "**SB17**") sparked an international outcry and aroused the UN's vigilance and circumspection about the alleged abuse of the OFF program by the Iraqi Government, in conjunction with other countries or individuals from other countries. The Independent Inquiry Committee ("the IIC"), which was formed to inquire into the performance of the United Nations 0il-for-Food program, was, in April 2004, "*charged by the Secretary-General and the Security Council with the task of thoroughly reviewing the management of the United Nations 0il-for-Food Programme*". That report is titled "*The Management of the United Nations 0il-for-Food Programme*". 0n 27 0ctober 2005 the

IIC produced another report on "*Manipulation of the Oil-for-Food Programme by the Iraqi regime*" [pp327-355(d) of the papers]

9. In a chapter headed "*Summary of Report*", the following is stated (at page 1 of the October, 2005 IIC Report), [p334 of the papers]:

> *"Today, the Independent Inquiry Committee ('the Committee') issues its fifth and final substantive report concerning the United Nations Oil-for-Food Programme ('the Programme'). This Report illustrates the manner in which Iraq manipulated the Programme to dispense contracts on the basis of political preference and to derive illicit payments from companies that obtained oil and humanitarian goods contracts. Today's Report complements the Committee's recent report addressing the adequacy of the Programme's management by the United Nations.*
>
> *Under the Programme, the Government of Iraq sold $64.2 billion of oil to 248 companies. In turn, 3,614 companies sold $34.5 billion of humanitarian goods to Iraq. Beyond the narrative set forth in this volume, the Committee releases today a set of eight comprehensive tables identifying contractors under the Programme and other actors of significance to Programme transactions (such as non-contractual beneficiaries of Iraqi oil*

allocations and parties that financed oil transactions). These tables can be accessed at the Committee's website: ...

Several of the tables identify specific illicit payments made in connection with oil and humanitarian contracts under the Programme. Oil surcharges were paid in connection with the contracts of 139 companies, and humanitarian kickbacks were paid in connection with the contracts of 2,253 companies. The tables identify whether and, if known, how much was paid to the Government of Iraq with respect to particular Programme contracts. The principal basis for this ***illicit payment data*** *is information received from various ministries of the Government of Iraq, as well as data retrieved from numerous banking institutions and, in some cases, from the company contractors themselves.*

A preface to the tables explains the basis for the Committee's calculations. ***The Committee emphasises that the identification of a particular company's contract as having been the subject of an illicit payment does not necessarily mean that such company – as opposed to an agent or secondary purchaser with an interest in the transaction – made, authorised or knew about an illicit payment.***" (Emphasis added.)

10. In this 27 0ctober 2005 Report, the IIC recaptures the situation with regard to the Program as follows:

> *"Following six years of international economic sanctions, Iraq resumed its export of crude oil in December 1996 under the 0il-for-Food Programme.* ***Under the rules of the Programme, Iraq was free to sell its oil so long as it was sold at what the United Nations decided was a fair market price and the proceeds of each sale were deposited to a UN-controlled escrow account to be used only for humanitarian and other purposes allowed by the Security Council.***
>
> *It was a basic assumption of the Programme that Iraq – not the United Nations – would choose its oil buyers. Yet the decision to allow Iraq to choose its buyers empowered Iraq with economic and political leverage to advance its broader* ***interest in overturning the sanctions regime. Iraq selected oil recipients in order to influence foreign policy and international public opinion in its favor.*** *Several years into the Programme, Iraq realised that it could generate illicit income outside of the United Nations' oversight* ***by requiring its oil buyers to pay 'surcharges'*** *of generally between ten to thirty cents per barrel of oil.*
>
> ...

During the two years that the illicit surcharge scheme persisted, Iraq's State Oil Marketing Organisation ('SOMO') assessed surcharges of between ten and thirty cent per barrel. Every contracting customer, if not each beneficiary, was advised of the requirement. Surcharges were levied on each barrel lifted, that is, loaded by a tanker at the port.

Iraq's attempt to impose a fifty-cent surcharge rate at the end of 2000 sparked a crisis in the market for Iraqi crude oil as the United Nations oil overseers warned traders and companies that such payments were illegal. After many of Iraq's regular customers balked at buying Iraqi oil, a group of four oil traders took a much greater role in the market during Phase IX of the Programme from December 2000 to July 2001. These four companies were Bayoil Supply & Trading Limited ('Bayoil'), the Taurus Group ('Taurus'), ***Glencore International AG ('Glencore')****, and the Vitol Group ('Vitol').*

All four had had limited access to direct contracts under the Programme, and had used intermediaries to maintain their access to Iraqi crude. In Phase IX, these companies purchased crude oil through intermediary entities: ... ***Glencore through its own Swiss-based company,*** *..."* (Emphasis added.)

(I have omitted the remaining details with regard to the other three companies because, as will later appear in the judgment, it is only Glencore that is of relevance to this application.)

Specific Reference to South Africa

11. The IIC devoted ten pages of its 27 October 2005 report, on Programme Manipulation, to Mr Sandi Majali, Montega Trading (Pty) Ltd ("Montega") and Imvume Management (Pty) Ltd ("Imvume") of South Africa. In the very first paragraph of the report in this regard, the following adverse statement is made:

> "*One example in the Programme of exploitation of the symbiotic relationship between a country's closely aligned political and business figures and the Government of Iraq, is that of Montega Trading (Pty) Ltd ('Montega Trading') and Imvume Management (Pty) Ltd ('Imvume'). As described below,* ***the principals of these two companies used their relationships with South African political leaders to obtain oil allocations under the Programme.***
>
> *Throughout the Programme, South Africa and Iraq were actively developing business and political ties. In late November 1999, South Africa's Deputy Foreign Minister Aziz Pahad led a delegation of 30 South African companies with interests in oil,*

electricity, and other sectors to Iraq. One purpose of the visit was 'to expose South African businesses with already established interests in the so-called "oil-for-food" programme with Iraq to the processes involved in winning such UN-approved contracts.'

Deputy Prime Minister [of Iraq] Tariq Aziz and other Iraqi officials were also interested in gaining the political support of South Africa and its leaders. At the time, South Africa chaired several influential political alliances. South African President Thabo Mbeki was Chair of the Non-Aligned Movement ('NAM') and had been the President of South Africa's ruling party, the African National Congress ('ANC'), sine 1997. He was also Chairman of the African Union. Within weeks after Mr Pahad returned from his trip, Iraq established its Embassy in Pretoria, and, by 2001, Iraq had accredited a full Ambassador to South Africa using Iraqi funds that had been frozen until then.

South African officials also pushed to improve trade relations. In October 2002, the South African Department of Foreign Affairs ('DFA') sent a delegation of senior officials to Iraq. Both sides reportedly expressed satisfaction with the state of relations between their respective countries, which had been boosted by Mr Aziz's then recent visit to South Africa. Later that month, the

DFA issued a statement that Mr Pahad would visit Iraq to represent South Africa at the annual Baghdad International Trade Fair in November. During his visit, Mr Pahad reportedly met with Saddam Hussein and conveyed a message to him from President Mbeki. He also met with Mr Ramadan and Mr Aziz, and the Foreign Minister, the Minister of Trade, and the Minister of Electricity. According to the public statement of Mr Pahad, Saddam Hussein told South African officials that he would instruct his ministers to 'observe special care' with respect to economic, technical, and scientific relations with South Africa.

Mr Aziz perceived that South Africa could be supportive of Iraq. During his July 2002 official visit of Mr Aziz to South Africa, Mr Aziz attended ***a farewell dinner hosted by the ANC*** *with members of South Africa-Iraq Friendship Association ('SAIFA') and the business community at the Cabanga Conference Center,* ***which was funded by Imvume****, which – as described below –* ***had been purchasing oil from Iraq under the Programme****."*
(Emphasis added.)

12. There is no doubt that the effect of the contents of the section dealing with South Africa is to depict South Africa – acting through the Department of Foreign Affairs and the influential position occupied by its erstwhile

President, Mr Mbeki - through also Montega and Imvume, as represented by Mr Sandi Majali and the ANC, through some of its senior officials, such as its erstwhile Secretary-General, Mr Kalema Motlanthe, as corrupt country, with a corrupt President, a corrupt Department, corrupt Cabinet, Ministers and Senior Government officials and a corrupt ANC, the organisation to which the bulk of the members of Parliament and the Cabinet – including the President – belong.

13. Mr Majali is depicted, right through this Report, as having held very high and influential positions in the country. Apart from his position in Imvume, he was the chairperson of SAIFA and a newly-formed South African Business Council for Economic Transformation ("SABCETT"). Initially, Mr Majali received oil allocations from Iraqi through Montega Trading. Of Montega Trading the following is stated in the Report:

> *"An Iraqi-American, Shakir Al-Khafaji, helped facilitate the granting of oil allocations to Sandi Majali, a self-proclaimed* ***advisor to the ANC and President Mbeki****, through his joint venture with Mr Majali and Rodney Hemphill, a South African businessman, called Montega Trading Limited. Mr Al-Khafaji had access to Mr Aziz; indeed, Mr Aziz specifically asked Mr Al-Khafaji* ***to help strengthen the ties between Iraq and South Africa****. In December 2000, Mr Al-Khafaji travelled to Baghdad with Mr Majali and Mr Hemphill to meet with Iraqi officials.*

During their meetings in Iraq, ***Mr Majali described himself as an adviser to both the ANC and President Mbeki.*** *After several days of meetings, Mr Majali was allocated two million barrels of oil. The SOMO* [Iraq's state oil marketing organisation*] contract of approval explicitly referenced 'Sandi Majali –* ***Advisor to the President of South Africa.'***

...

Mr Majali used Montega Trading as the contracting company to purchase the oil. Montega Trading arranged to sell the oil through Sopak SA ('Sopak'), a wholly-owned subsidiary of Glencore. Glencore financed the contract with a $46,585,093 letter of credit through BNP, and it arranged for lifting and selling the oil. Although Glencore was backing Montega Trading's SOMO contract, ***the company insisted that its name be concealed from disclosure to any third parties.***" **[p106 of the IIC Report, p347(d) of the papers]** (Emphasis added.)

14. Without going into further details, it is alleged that an incident occurred between Montega and Glencore, in which Glencore did not deliver oil that was to have been shipped to the United States, on behalf of Montega, but, instead, shipped it to Singapore. That resulted in excessive costs being incurred by Montega for that delivery. **[p107 of the IIC Report, p347(e) of the papers]**

The Report proceeds further thus, in this regard:

> *"After the shipping incident, Mr Majali continued to receive oil allocations* ***through a new company, Imvume****. Because Montega Trading had failed to pay the outstanding surcharges, SOMO refused to sell oil to Mr Majali in Phase X. When Mr Majali complained to Iraq officials, SOMO was ordered to allocate oil to Mr Majali in Phase XI. Imvume managed to obtain two Iraqi oil contracts in Phases XI and XII."*

I pause to mention that the parties do not give a history of the relationship between Montega, Imvume and Mr Majali. The only account in this regard is that given above, from the Report.

> *"Prior to the renewal of his oil allocations, Mr Majali* ***had been very involved in strengthening ties between South Africa and Iraq****. In September 2001, as Chairperson of both the SAIFA and the South African Business Council for Economic Transformation ('SABCETT'), Mr Majali led a South African delegation to Baghdad, which included officials from the South African Strategic Fuel Fund Association and South African Department of Minerals and Energy. The delegation was involved in discussions on strengthening ties between the ANC and the Iraq Friendship*

Association and Arab Ba'ath Socialist Party ('Ba'ath Party'), as well as building better oil trade relationships between the two countries. Mr Majali undertook the trip as a ***recognised representative of the ANC****. In a letter to the Iraq Friendship Association, Mr Motlanthe stated that Mr Majali's position as Chairperson of SAIFA had the ANC's 'full approval and blessing'. He also confirmed the ANC's approval of Mr Majali 'as a designated person to lead the implementation process arising out of our economic development programmes.'"* **[p108 of the IIC Report, p347(f) of the papers]**

15. After the meeting in Baghdad, Mr Majali is said to have written two letters, on 20 September 2001, the one being to the President of the Iraqi Friendship Association – Mr Majali writing in his capacity as "Chairman" of SABCETT – and the other, on the Imvume letterhead, to Mr Saddam Z Hassan. In both letters, he was requesting an allocation of 12 million barrels of oil. According to the Report, at p109, p347(g) of the papers, "*These increased allocations do not appear to have been granted.*" In the second letter:

> "*Mr Majali requested allocations of 12 million barrels to be lifted in December 2001 and February 2002, noting that the order for oil 'is required by the South African government for its strategic reserves and ...* ***it will be undertaken by Imvume on behalf of the***

> ***South African Department of Minerals and Energy.'*** *Mr Majali also expressed an interest in attending the conference in Baghdad in support of lifting the Iraq sanctions held in November 2001 and that the 'ANC will be sending a high level delegation."* (Emphasis added.)

16. From the next excerpt, it appears that Imvume had some difficulties with regard to due diligence during the bidding process. The Report goes as follows:

> *"A couple of months later, Imvume obtained a contract to supply two million barrels of oil to the South African Strategic Fuel Fund Association. This association is responsible for the procurement and management of the strategic crude oil and petroleum products of South Africa. Because of* ***concerns raised during the comprehensive due diligence of Imvume in the bidding process,*** *Glencore sent a letter to the South African Strategic Fuel Fund Association ('SFF') representing that it backed Imvume 'as its strategic partner'. As part of the contract conditions, Glencore was liable for performance of the contract, and Imvume needed approval to lift oil from SOMO by March 2002."*

17. The Report proceeds to discuss, in detail, Mr Majali's and Imvume's difficulties in obtaining further oil from Baghdad, in view of the debt owing to Montega, an amount of $464,000. According to the Report –

> "*Mr Majali promised to settle this debt in two installments with the proceeds from the sale of the crude oil that he hoped to get from Iraq. In early March 2002, SOMO confirmed that Imvume had been allocated two million barrels of oil.*"

18. Although Mr Majali is reported to have explicitly represented, in a letter, "*that he would 'undertake to perform [his] obligation accordingly [sic] to SOMO's requirements regarding the return money ... for the quantity of 2.0 million barrels,*'" he is reported to have denied, during an interview with a representative of IIC on 30 June 2005, "*paying surcharges on any oil contracts during the Programme*". The Report continues as follows:

> "*He stated that he made his refusal to pay surcharges clear to Mr Aziz. Mr Majali, however, has admitted that he told Mr Aziz that he was unable to pay surcharges* ***unless he was allocated additional oil at a sufficiently discounted price.***" [Emphasis added.]

The implication, as I understand it, is that Mr Majali was not averse, in principle, to paying the surcharges, on his own version, except that he wanted them to be on the basis of an allocation of additional oil at a

discounted price. That, of course, does not place him outside the alleged Programme Manipulation that the Report is dealing with which includes South African Cabinet Ministers, senior Government officials and the ANC.

Facts

[4] In paragraph 43 of the founding affidavit, the applicants refer to nine articles that were published in the *Mail & Guardian*, by the "applicants" on various dates. They are respectively entitled as follows:

- "*South African-Iraq oil deal shrouded in controversy*" 5-11 April 2002 ("**SB3**");
- "*How the ANC fell for Saddam's crude diplomacy*" 6-12 February 2004 ("**SB4**");
- "*The ANC's 0ilgate; 'How they responded'*" 20-26 May 2005 ("**SB5**");
- "*Majali: Adviser to the ANC*" 3-9 June 2005 ("**SB6**");
- "*The scandal spreads*" 10-16 June 2005 ("**SB7**");
- "*Free to print, and more hard questions*" 10-16 June 2005 ("**SB8**");
- "*Mlambo-Ngcuka 'interfered' at PetroSA*"; "*Deputy President's brother: Explanation still on thin ice*" 24-30 June 2005 ("**SB9**");
- "*An ANC front*", "*What the players have to say*"; "*Trading principle for profit*" 15-21 July 2005 ("**SB10**");
- "*0ilgate: How R1bn tender was 'fixed'*" 22-28 July 2005 ("**SB11**").

From the articles, it would seem that the *Mail & Guardian* was dealing with the issues raised by the IIC in the reports. There is, however, no reference in any of these annexures to the IIC reports, an indication that the applicants were, perhaps, not aware thereof at the time of the writing of the reports – perhaps relying on other sources. The interim report of 3 February 2005 came long after "**SB3**" and "**SB4**" were published, so also the remaining two reports, ie the "Management of the 0il-for-Food Programme" of 7 September 2005 and the "Manipulation of the 0il-for-Food Programme by the Iraqi Regime" of 27 0ctober 2005. There is no doubt, however, that the *Mail & Guardian* had access to the same sources or similar sources of information to which the IIC had access. For purposes of the background that I have already outlined in this judgment, I prefer to rely more on the IIC report because it is, firstly, more objective than the *Mail & Guardian* may be perceived to be and, secondly, the applicants did not challenge the correctness of its contents.

[5] A lot of what is alleged in the *Mail & Guardian*'s articles is contained in the IIC reports. For purposes of this judgment, neither the contents of the IIC reports nor those of the *Mail & Guardian* articles are regarded as being true. By virtue of the nature of his occupation or job, I would expect that the contents of the IIC reports and those of "**SB3**" to "**SB10**" – which date between 5 April 2002 and 21 July 2005 – were read by the respondent before he received complaints, which I shall allude to shortly, with regard to the so-called "0ilgate". The applicants, referring

to the respondent's Report, to which I shall later make reference, say the following of "0ilgate":

> "*12. The Report arose from a number of articles published in the Mail & Guardian relating to what has become known as '0ilgate'. Broadly speaking, these articles raised allegations regarding the dealings between a private company, Imvume Management (Pty) Ltd ('**Imvume**') and high-ranking officials within the African National Congress ('**the ANC**'), the Department of Minerals and Energy ('**DME**'), the Strategic Fuel Fund Association ('**the SFF**') and the Petroleum, 0il and Gas Corporation of South Africa ('**PetroSA**'). Both the SFF and PetroSA are state-owned corporations. The allegations are essentially that (a) Imvume and its chief executive officer, Sandi Majali ('**Majali**'), obtained lucrative contracts for Iraqi oil with the support of high-ranking ANC and government officials, (b) on the understanding that the proceeds would benefit the ANC, and (c) that the ANC would use its position as the ruling party in Government to oppose sanctions against Iraq on the international plane. (d) In the course of this, the SFF irregularly awarded a contract to Imvume for the supply of Iraqi oil.* ***[letters (a) to (d) added]***

13. *PetroSA irregularly advanced R15-million to Imvume. Rather than using the money for its intended purpose, which was to pay a supplier for a cargo of oil condensate destined for PetroSA, Imvume channeled the bulk of this to the ANC (which received R11-million and others. When Imvume was unable as a result to pay the supplier of the oil condensate, PetroSA paid the same amount (and more) again. The effect was that PetroSA was R18-million out of pocket and that public money had been transferred to, amongst others, the ANC."*

That, in essence, is what the applicants mean when they refer to the "Oilgate".

Complaints Addressed to the Respondent

[6] In paragraph 20 of its answering affidavit, the respondent, responding to the allegation by the applicants, in paragraph 12 of their founding affidavit, that his Report arose from a number of articles published in the *Mail & Guardian*, disputes that allegation. He states:

"*20.1 ... The report arose from the written complaints lodged with the respondent by two members of parliament, Mr W Spies and Mr T Leon. Copies of the complaints are annexed hereto and marked 'AA5' and 'AA6'.*

20.2 Those who lodged statutory complaints referred to some of the allegations in the articles published by the first applicant."

Mr Spies's Complaint

[7] On 6 June 2005, Mr Willie Spies, MP for the Freedom Front Plus ("FFP"), wrote a letter of complaint addressed to the "Office of the Public Protector". The letter reads as follows:

> "***COMPLAINT AGAINST PETROSA AND TWO CABINET MINISTERS***
>
> *With reference to the above, we hereby give notice of-*
>
> *1. our formal complaint against the state-controlled petrochemical corporation, PetroSA, for improper conduct and maladministration, in that it used the company Imvume Investments as a conduit to transfer public money to the ANC, as well as*
>
> *2. a request for an investigation into the exact nature of certain business relationships between close relatives of the Minister of Minerals and Energy and the Minister of Social Development and the company known as Imvume Investments.*
>
> ***Background to the complaint***
>
> *We request you to investigate whether the alleged unindebted and unsecured payment of R15 million made by PetroSA to Imvume Investments on 18 December 2003, constituted improper conduct and maladministration by the management of PetroSA.*

In particular, given the fact that a further R15 million had to be paid by PetroSA to Glencore International (a Swiss-based resource trader) on 19 February 2004, as a result of Imvume Investments' non-performance in terms of its obligations towards Glencore International, we submit that ***prima facie****, Imvume Investments was merely used by PetroSA as a conduit to transfer public money to the ANC during December 2003.*

Kindly also investigate the exact nature of the following alleged payments by Imvume Investments or its CEO, Mr Sandi Majali to the persons and/or entities referred to below:

- *R50 000 paid to the company Ulumtu Investments of Mr Bonga Mlambo on 19 December 2003;*
- *R65 000 paid with regard to improvements by the construction company Hartkon to the private residence of the Minister of Social Development on 19 December 2003; and*
- *R11 million paid to the ANC in tranches of R2 million (twice), R3 million and R4 million respectively, on 23 December 2003.*

It is our respectful submission that, if found to be true and causally related, one or more of the transactions set out above, not only constitute an improper prejudice caused to the fiscus, but also amounts to dishonesty and/or improper dealings with respect to public money.

The Public Protector's authority to Investigate the matter

We respectfully submit that the office of the public protector is the appropriate forum to take this matter further, since the complaints relate to the actions of a state-controlled corporation (PetroSA) and two public officials (the two cabinet members) and involves public money.

We thank you for considering the matter.

Yours faithfully

WILLIE SPIES, MP"

On 28 July 2005, Mr Spies wrote a follow-up letter to the respondent, mentioning that there had been no response to the letter of 6 June 2005 and furnishing his fax number. He added that he would like the enquiry to be broadened, so as to include issues raised in the *Mail & Guardian* of 15 July and 22 July 2005. It seems to me that he was referring to the *Mail & Guardian* of 15 to 21 July 2005, as those are the dates for "**SB10**".

Mr Leon's Complaint

[8] Before there was a response to Mr Spies's complaint, Mr A J Leon, then MP for the Democratic Alliance ("DA") party, wrote a complaint addressed to the respondent, which reads as follows:

"***Request for broadening of investigation into '0ilgate' to include the state's involvement with Imvume***

I am approaching your office with the specific request that, as constitutionally mandated to

> *investigate matters and to protect the public against matters such as maladministration in connection with the affairs of government, improper conduct by a person performing a public function, improper acts with respect to public money, improper or unlawful enrichment of a person performing a public function and an act or omission by a person performing a public function resulting in improper prejudice to another person* ***(110-114 of the Constitution of the Republic of South Africa, 1993 {Act No 200 of 1993}),***

your office broadens its existing inquiry into the so-called '0ilgate affair' (where public funds are alleged to have been deliberately channelled to the ruling party through a BEE company, Imvume) by determining the extent to which the state was involved in funding and supporting Imvume's Iraqi oil ventures and travel related thereto.

1. Background

1.1 Newspaper reports suggest that Kgalema Motlanthe travelled in September 2001 to Iraq with a delegation that

included Imvume CEO Sandi Majali, who concluded a deal with former Iraqi dictator Saddam Hussein to supply millions of barrels of oil to the South African market in violation of the United Nations Oil-For-Food Programme.

1.2 The allegation made in these reports is that the ANC had set up Imvume as a front company to raise money for the party. The ANC allegedly hoped to gain billions of rands through oil deals with Saddam Hussein.

1.3 In return, it offered him the assurances of the South African government to oppose sanctions and other international actions against the Iraqi regime – and the government, indeed, duly did so.

2. Justification

2.1 ...

2.2 Imvume is a company headed by Sandi Majali who was described by the then Minister of Minerals and Energy, Phumzile Mlambo-Ngcuka, as the 'Head of Implementation of ANC Economic Transformation programmes' in her letter introducing a South African delegation which visited Iraq in 2001.

2.3 Public entities are charged with the duty to ensure that there is an 'appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective' and further that 'irregular expenditure' and 'losses resulting from criminal conduct' must be prevented. (Public Finance Management Act, No 1 of 1999).

2.4 It is clear that the principles set out in the Public Finance Management Act are jeopardised by the abuse of BEE by companies like Imvume.

In light of the above, the extent of the state's involvement in funding and assisting Imvume's oil ventures in Iraq are relevant to a full exploration of the Oilgate affair.

Your swift action in the investigation of these affairs, and your reversion to me at your earliest convenience, is greatly appreciated.

Yours sincerely

A J LEON MP
Leader of the Official Opposition"

The Respondent's Report on the Complaints

[9] As has already been indicated in this judgment, the respondent investigated the complaints by Messrs Spies and Leon and, thereafter, produced his Report, annexure "**SB1**", dated 25 July, 2005.

In making his findings on the complaints, the respondent gave what, in my view, is a correct statement of the legislative framework in respect whereof the Public Protector performs his duties. Consequently, I shall quote verbatim and extensively what is stated in paragraph 5.1 of the Report:

> "***5.1 The legislative framework***
>
> *5.1.1 The provisions of Chapter 9 of the Constitution, 1996*
>
> *5.1.1.1 The Public Protector is one of a cluster of constitutional institutions established by Chapter 9 of the Constitution, 1996, to strengthen the constitutional democracy of the Republic of South Africa.*
>
> *5.1.1.2 These institutions are independent, subject only to the Constitution and the law and must be impartial and exercise their powers and perform their functions without fear, favour or prejudice.* ***[s.181(2)]***
>
> *5.1.1.3 In terms of section 182(1) of the Constitution, 1996, the Public Protector has the power 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.

5.1.1.4 On conclusion of an investigation, the Public Protector has to report on the conduct investigated and take the appropriate remedial action. ***[s.182(1)(b) and (c)]***

5.1.1.5 The additional powers and functions of the Public Protector are regulated by national legislation, including the Public Protector Act, 1994. ***[s.182(2)]***

5.1.2 The Public Protector Act, 1994

5.1.2.1 Section 6(4)(a) of the Act provides that the Public Protector is competent to investigate any alleged maladministration in connection with the affairs of government at any level and any alleged abuse of power or other improper conduct by a person performing a public function;

5.1.2.2 The Public Protector is also competent to investigate any alleged improper or dishonest act or omission or offences referred to in Part 1 to 4 or section[s] 17, 20 or 21 (in so far as it relates to the said offences) of Chapter 2 of the Prevention and Combating of

Corrupt Activities Act, 2004, with respect to public money; ***[s.6(4)(a)(iii)]*** *and*

5.1.2.3 Any alleged improper or unlawful enrichment or receipt of any advantage or promise of such enrichment or 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 or of a person performing a public function. ***[s.6(4)(a)(iv)]***

5.1.2.4 In terms of section 6(5), the Public Protector also has the power to investigate maladministration, unlawful enrichment or the receipt of an improper advantage and other improper conduct relating to the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999.

5.1.2.5 Section 6(9) provides that:

> *'Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public*

Protector within two years from the occurrence of the incident or matter concerned.' (Emphasis added)

5.1.2.6 The format and procedure to be followed in conducting any investigation is determined by the Public Protector with due regard to the circumstances of each case. ***[s.7(1)(b)(i)]***

5.1.2.7 In terms of section 7(1)(a) the Public Protector has the power:

*'**on his or her own initiative** or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6(4) or (5) of this Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.' (Emphasis added)*

5.1.2.8 Section 8(2)(b) provides that:

'The Public Protector shall, at any time, submit a report to the National Assembly on the findings of a particular investigation if-

(i) he or she deems it necessary;

(ii) he or she deems it in the public interest."

(All emphasis, except "*on his or her own initiative*" under para 5.1.2.7, added by the respondent.)

After his correct statement of the legislative framework from which his powers and obligations flow, the respondent concluded as follows, regarding his interpretation of the effect of relevant enactments:

"*5.1.3.2* *The Public Protector (as an institution) does not have inherent jurisdiction in respect of the performance of its powers and functions and can only investigate and consider the conduct of government institutions and public entities that fall within the ambit of its jurisdiction, as provided by its empowering legislation;*

5.1.3.3 *The affairs of private individuals and entities fall outside of the Public Protector's jurisdiction, except if the conduct complained of or under suspicion relate[s] to:*

(a) *state affairs;*

(b) *improper or unlawful enrichment or the receipt of promise 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 or that of a public entity; or*

(c) an improper or dishonest act or omission or corruption, in respect of public money;

5.1.3.3 A preliminary investigation into any matter that came to the attention of the Public Protector and that falls within his/her jurisdiction can be conducted to determine the merits of the complaint and whether or not it should be investigated further;

5.1.3.4 Only in special circumstances can the Public Protector investigate a complaint that is reported more than 2 years after the incident complained of occurred; and

5.1.3.5 It is in the public interest that a special report of the investigation of this matter be submitted to Parliament."

[10] After restating or summarising the two complaints, the respondent made his findings and stated the following:

"*The Public Protector found that:*

•*[a] 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 pertaining to the relationship*

between Imvume and the ANC, payments made by Imvume to the ANC and private entities and the involvement of the ANC in Mr Majali's business negotiations with the Government of Iraq, ***could not be investigated****;*

•*[b] Much of what has been published by the* ***Mail and Guardian*** *was factually incorrect, based on incomplete information and documentation and comprised unsubstantiated suggestions and unjustified speculation;*

•*[c] The approval and authorisation on 18 December 2003 by the Acting CEO of PetroSA of an advance payment of R15 million to Imvume was lawful, well-founded and properly considered in terms of the legal and policy prescripts that applied to PetroSA;*

•*[d] 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;*

•*[e] Imvume's failure to pay Glencore (the supplier) the full amount due to it in respect of the cargo of oil condensate concerned could not reasonably have been foreseen or expected by PetroSA;*

•*[f] PetroSA's payment of an amount of USD2,8 million (plus interest) to Glencore on 23 February 2004 was in the public interest and complied with its legal obligations in terms of the Public Finance Management Act, 1999;*

•*[g] The subsequent action taken by PetroSA to recover from Imvume the amount paid to Glencore was taken without delay and in compliance with its legal obligations in terms of the Public Finance Management Act, 1999;*

•*[h] The allegations and suggestions of improper influence made against Deputy President Mlambo-Ngcuka in relation to the advance payment were not substantiated and are without merit;*

•*[i] The allegations of improper involvement of senior officials of the Department of Minerals and Energy and the SFF in the advancement of business relations between Imvume and the Iraqi Government and that a crude oil supply contract was improperly*

awarded to Imvume by the SFF in March 2002, are without merit.

(Numbering, [a] to [i], is added.)

It was recommended that:

**[a] The Board of PetroSA:*

in consultation with the CEO and PetroSA's legal advisors, take urgent steps to ensure that the outstanding amount due to PetroSA by Imvume, referred to in this report, is recovered without delay and in compliance with the provisions of sections 50(1)(d) and 51(1)(b)(i) of the Public Finance Management Act, 1999; and

Regularly report to the Minister of Minerals and Energy on the progress made in regard to the recovery of the outstanding amount; and

**[b] The Minister of Minerals and Energy report to the Cabinet and to Parliament on the steps taken and the progress made to recover the outstanding amount due by Imvume."*

(Emphasis and numbering [a] and [b] are added.)

The Applicants' Challenge of the Report

[11] The applicants challenged the respondent's Report. Paragraph 1, including subparagraphs 1.1 to1.4, of the notice of motion, reads thus:

> "*1. The applicants intend to apply to this Court for an order in the following terms:*
>
> *1.1 The respondent's report titled* ***'Report on an Investigation into an Allegation of Misappropriation of Public Funds by the Petroleum 0il and Gas Corporation of South Africa, trading as PetroSA, and matters allegedly related thereto'*** *dated 29 July 2005 (the Report) is reviewed and set aside.*
>
> *1.2 The respondent is ordered* ***to redo his investigation of and report on the matters that gave rise to the Report.***
>
> *1.3 The respondent is ordered to pay the applicants' costs.*
>
> *1.4 The applicants are afforded further and/or alternative relief.*" (Emphasis in subparagraph 1.2 added.)

It should be mentioned that, in paragraph 38 of its replying affidavit (at pp958-959 of the papers) the applicants now pray that "*the matter should not be referred back to the Public Protector for re-determination*". Yet, in paragraph 281.4 of their Heads of Argument, the applicants seem to be still contemplating referral of

the matter to the Public Protector, the respondent, for re-investigation. Referring to the question of the respondent's failure to investigate some of the complaints, Mr Maleka, making submissions on the respondent's behalf in paragraph 111 (pp59-60) of the respondent's Heads of Argument, makes the following submission:

> "*111. We emphasise, in this regard, that the setting aside of the respondent's decision not to investigate the ANC payment and similar complaints, would be academic, in the light of the order sought by the applicants. They have made it clear that they do not seek any consequential order, arising from an order reviewing and setting the respondent's decision. An order which merely reviews and set* ***[sic]*** *aside the respondent's decision not to investigate these complaints would not only be academic, but would also not be just and equitable.*"

It would appear that this submission on the respondent's behalf is based on the averment in paragraph 38 of the applicants' replying affidavit, already referred to herein. I shall return to this aspect in due course.

[12] In their founding affidavit, the applicants consider the respondent's task as having entailed –

> "*14. ... an investigation into these allegations, which involve [a] claims of abuse of power, [b] conflicts of interest, [c] improper financial*

management, [d] inappropriate political influence and [e] even corruption within the DME, the SFF, PetroSA and the ANC. [f] The respondent produced the Report following a perfunctory and wholly inadequate investigation, undertaken in a surprisingly short period of time." **[p8] [The numbering [a] to [f] is added.]**

In paragraphs 14 to 17, the applicants criticise the respondent's report as follows:

"*14. ... The respondent produced the Report following a perfunctory and wholly inadequate investigation, undertaken in a surprisingly short period of time.*

15. The investigation was completed, and the Report compiled, without either consulting with the applicants or giving them an opportunity to make representations, notwithstanding the fact that the articles published by the applicants were the source of the allegations that formed the subject of the investigation and Report.

16. In the Report, the respondent adopted the position that he is not entitled to investigate many of the transactions that form the basis of the Oilgate scandal, as these payments were not out of 'public funds' *and were made between* 'private entities'. *The respondent also found that he was not entitled to investigate the relationship between the ANC and Imvume. According to the respondent, these*

issues fell outside his investigative powers. I am advised and accordingly submit that ***this finding of the respondent constitutes a misdirection as to his powers.***

17. In respect of those aspects of Oilgate which the respondent considered to fall within the scope of his investigative powers, the Report broadly speaking found that there was no substance in any allegations of impropriety." (Emphasis added.)

[13] In paragraph 19 of their founding affidavit, the applicants give the basis for their challenge of the respondent's report as follows:

"*19. The applicants challenge the Report in terms of the Constitution, the Promotion of Administrative Justice Act, 2000 (**'PAJA'**) and the Public Protector Act. The Report must be set aside for the following reasons:*

19.1 The respondent misconstrued the nature of his powers under the Public Protector Act read with the Constitution. This amounts to a material error of law under PAJA and ***breaches the constitutional principle of legality.*** (Emphasis added.)

19.2 [a] The respondent failed to comply with the requirements of procedural fairness in terms of section 9(7)(a) of the Public Protector Act, the Constitution and PAJA. [b] The respondent made serious findings against the ***Mail & Guardian*** *(and, by implication, all the applicants) without giving them an opportunity to make representations on those findings or on the subject of the investigation.* ***[The numbering [a] and [b] is added.]***

19.3 The respondent failed to undertake a proper investigation, as required by section 181(2) of the Constitution read with the Public Protector Act. Instead, he conducted a superficial and inadequate investigation.

19.4 The Report is vitiated by bias and partiality on the part of the respondent. This renders the Report in breach of the respondent's duty to perform his functions without ***'fear, favour or prejudice'*** *as contemplated in section 181(2) of the Constitution and makes the Report reviewable under PAJA. It also amounts to the exercise of a public power in bad faith."*

[14] The applicants discussed each of the aspects raised in paragraphs 14 to 19.4 of their founding affidavit in detail in subsequent paragraphs of that affidavit, ie from paragraph 20 to paragraph 304.5, pp10-107.

Applicants' Grounds on which the Report Must be Set Aside

[15] From the outset, it is evident that the applicants challenge the respondent's Report, on the basis of PAJA, the Constitution (in particular **the principle of legality**) and the Public Protector Act (paras 260-263 of the founding affidavit). The applicants' submissions in this regard have, in my view, to be considered together with their submissions under the heading "*The respondent's misdirection regarding his own powers*" discussed in paragraphs 264-266.1.3 of the founding affidavit. It is, therefore, instructive to understand what the applicants submit in the latter paragraphs, which read:

> *"264. Part 3 of this affidavit deals in great detail with the manner in which the respondent **failed to exercise his powers of investigation** over a substantial number of the allegations made in terms of the complaints brought before him.*
>
> *265. I will not repeat the applicants' contentions why the allegations in fact fall within the jurisdiction of the respondent. These are dealt with in paragraphs 147 to 179 above.*

266. The respondent misdirected himself ***in limiting his own powers of investigation*** *in this manner. This misdirection renders the Report liable to be set aside on the following grounds:*

266.1.1 The report was materially influenced by an error of law within the meaning of section 6(2)(d) of PAJA.

266.1.2 The respondent took into account irrelevant considerations and failed to take into account relevant considerations in formulating the Report within the meaning of section 6(2)(e)(iii) of PAJA;

266.1.3 The misdirection ***contravenes the principle of legality*** *embodied in the rule of law in section 1(c) of the Constitution, read with section 182 of the Constitution and the Public Protector Act."* (Emphasis added.)

[16] Earlier in the founding affidavit, dealing with the respondent's failure to investigate many of the allegations, the applicants submit the following regarding the respondent's approach:

"147. The approach followed by the respondent in his Report was ***to interpret his own mandate narrowly*** *so as to exclude most of the*

subject matter of the complaints before him from his own jurisdiction.

148. *The respondent held that he was* ***not empowered to investigate*** *the following allegations:*

-[1] the ANC Payment Complaint (paragraph 5.5.2 of the Report);

-[2] the Uluntu Complaint (paragraph 5.5.3);

- the Hartkon Complaint (paragraph 5.5.4)

-[3] the Skweyiya complaint (paragraph 5.5.7)

-[4] the relationship between Imvume and the ANC (paragraph 11.1.1.1; and

-[5] the involvement of the ANC in Majali's business negotiations with the Government of Iraq (paragraph 11.1.1.4). ***[The numbering of the above items from [1] to [5] and emphasis are added.]***

149. *I am advised that* ***the respondent erred in adopting this approach****. The respondent is empowered to investigate each of these complaints. His misdirection is unduly limiting his own powers of investigation and oversight vitiated the Report. If the applicants are right that he ought not to have limited his jurisdiction over the*

allegations, then the entire process in terms of which the report was investigated and written would be set aside."

The applicants' list of allegations which the respondent himself was not empowered to investigate, as set out in para 148 above, is correct.

0ther subheadings in terms whereof criticism of or attack on the Report is made are:

- "***The failure to comply with the principle of procedural fairness***" (paragraphs 267-270.2, pp93-94);
- "***No proper investigation was done***" (paragraphs 271-287.6, pp94-101);
- "***The respondent's bias and lack of impartiality***" (paragraphs 288-304.5, pp101-103).

Voluminous papers

[17] The papers in this application are excessively voluminous. The applicants attached 77 annexures to its founding affidavit. After being furnished with detailed information that they had sought from the respondent, as part of their notice of application, the applicants filed a supplementary affidavit of 37 pages (pp661-698) with 7 further annexures.

[18] The respondent filed a 74-page affidavit, with 13 annexures. He then filed a further answering affidavit, covering 78 pages (pp795-873). He, after receiving

the applicants' supplementary affidavit, filed an answering affidavit thereto, totalling 67 pages (pp874-941). The applicants filed a 62 page replying affidavit with a further 7 annexures, covering 42 pages (pp1008-1050). I have deliberately omitted reference to confirmatory affidavits, which were quite short.

[19] The applicants' heads of argument are 116 pages, whilst the respondent's are 80 pages. The parties then addressed the Court at the hearing of the application over three days. The transcript of submissions by both counsel covered five volumes, over 444 pages. The papers, inclusive of pleadings and annexures, total 1056 pages. In making this judgment, I have had regard to every page of the papers, every page of the parties' heads of argument and every page of the transcript of the submissions made on behalf of the parties during argument.

The Respondent's Defence

[20] The applicants made issue of the fact that the deponent to the respondent's answering affidavit, Mr Christoffel Hendrik Fourie, "Head of Special Investigations in the Office of the Public Protector of the Republic of South Africa", states that he "*investigated the complaints referred to in the Report, which is annexure 'SB1' of the founding affidavit*". In that very subparagraph, the deponent states that he did what he did in the investigation "*under the direction control of the respondent*". He further states, in paragraph 1.4, that-

"Elsewhere in this affidavit [he makes] submissions on matters of law. [He does] so on the advice of the respondent's legal representatives, which [he accepts] and [believes] to be correct."

Furthermore, it is common cause between the parties that the respondent is entitled, in terms of the provisions of the Public Protector Act ("PPA"), to delegate someone, such as the deponent, to do investigation on his behalf. I find that the attack of the Report on this basis is without substance.

[21] In paragraphs 2 to 4 of the answering affidavit, the respondent sets out the basis on which he opposes the application. He states:

"2. *The respondent has resolved to oppose the relief sought in the notice of motion, on the grounds set out more fully below. Before I respond to the averments in the founding affidavit, I draw attention to the following aspects of the application.*

3. *The office of the Public Protector was established on 1 October 1995, pursuant to the provisions of sections 181(1)(a) and 182 of the Constitution of the Republic of South Africa Act, 108 of 1996, as amended ('**the Constitution**'), and the Public Protector Act, 23 of 1994, as amended ('**the PP Act**'). The office of the Public Protector is one of the state institutions that are established and*

*required to strengthen constitutional democracy in the Republic of South Africa ('**the Republic**').*

*4. The constitutional responsibility of the respondent is to investigate conduct in the affairs of the state or public administration which is alleged or suspected to be improper or to bring about impropriety or prejudice, to report on that conduct, and where necessary to take remedial action. The powers of the respondent to conduct investigations and report on his findings are set out in the **PP Act**. As a statutory functionary, the respondent can lawfully and properly exercise only those powers conferred, and discharge only those functions and duties imposed, upon him in terms of **the PP Act**, and **the Constitution**."*

It is on the basis of his approach, as outlined above, that the respondent investigated some of the complaints placed before him and not others. In paragraph 60 of the respondent's heads of argument it is stated thus:

"The parties differ sharply on the jurisdiction of the respondent, in respect of some of the complaints that were submitted to the respondent."

[22] As I have already stated, the applicants are of the view that the respondent narrowly interpreted his mandate, which interpretation resulted in his incorrectly excluding the investigation of the four aspects I have mentioned. The applicants

further submit that, if and when the respondent investigates the outstanding four complaints, it is well possible, in fact likely, that he will find a relationship between these aspects and the others in respect whereof he has already made findings adverse to the applicants. The applicants further submit that, although the respondent purports to have made a finding with regard to the complaint involving Dr Skweyiya, he did not, in fact, on a proper construction of what happened, conduct an investigation in that regard.

[23] This specific complaint is one lodged by Mr Spies, wherein he sought an investigation into the circumstances which led to Imvume paying R65 000,00 with regard to improvements by Hartkon to the private residence of the Minister of Social Development, Dr Skweyiya, on 19 December 2003, a day after Imvume had received payment of R15 million from PetroSA, a state-controlled company. Due to the manner in which the respondent gave his Report with regard to latter complaint, the applicants are of the view that he did not, in fact – either himself or through Mr Fourie – investigate the complaint. It should be recalled that he says the following in his report:

> "*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.***" (Emphasis added.) **[p145]**

The respondent then concluded this aspect as follows:

> "*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 [sic] 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.)

[24] It could, indeed, understandably be argued that the underlined words in the first quotation connote that the respondent found no basis for an investigation. Similarly, the underlined words in the second quotation could be interpreted to mean that the "*information at the disposal of the office of the Public Protector*" was not considered and verified because it "*does not disclose the commission of any offence*". If the wording had been "*that was considered and verified*" that would clearly indicate that the information was so considered and verified. In my view, however, there is no basis for gainsaying the respondent's averments, under oath, that the complaint involving Dr Skweyiya was investigated, simply on account of a speculative inference based on the wording in the report. Consequently, I approach this matter on the basis that this is one of the items investigated by the Public Prosecutor, the respondent. It only remains to determine whether it, like the others that were investigated, **was properly investigated** as averred by the respondent.

The Respondent's Arrangement and Compartmentalisation of matters before him for Investigation

[25] I have found the respondent's arrangement of his Report somewhat difficult to understand in some respects. He decided to deal with the matters before him on the basis of four particles, viz,

1. "*5.2* ***The jurisdiction of the Public Protector in respect of the conduct and affairs of PetroSA***" [5.2 – 5.2.5, pp134-135];

"*5.3* ***The jurisdiction of the Public Protector in respect of the conduct and affairs of Imvume Management***" [5.3 - 5.3.4, pp135-136];

"*5.4* ***The jurisdiction of the Public Protector in respect of the conduct and affairs of the ANC***" [5.4 - 5.4.5, pp136-137];

"*5.5.* ***The jurisdiction of the Public Protector in regard to the conduct complained of by the Freedom Front Plus and the Democratic Alliance and alleged and reported on by the*** **Mail and Guardian**" [5.5 – 5.5.7.8, pp137-146].

[26] His conclusion, in paragraph 5.6, after discussing these four categories of complaints before him, is set out as follows:

"*5.6.1 For the reasons advanced above, **[1]** the Public Protector has jurisdiction to investigate **[a]** the alleged improper conduct by PetroSA and **[b]** the alleged improper involvement of Deputy President Mlambo-Ngcuka in the advance payment that was made to Imvume.*

*5.6.2 **[2]** The alleged involvement of senior officials of the Department of Minerals and Energy in the advancement of business relations between Imvume and the Iraqi Government and the alleged improprieties relating to the awarding in March 2002 by the SFF of a crude oil supply contract to Imvume, **fall within the jurisdiction of the Public Protector**. These events **occurred more than 2 years ago** and the allegations were published when the investigation of the complaint referred to in paragraph 3 above, was already at an advance[d] stage. It was however, **regarded in the public interest to make enquiries into these allegations** to determine the merits thereof and whether or not it warranted further consideration and investigation."* **[the numbering under 5.6.1 and 5.6.2 is not original but added]**

[27] I have already mentioned that I find the respondent's structural approach, in dealing with the complaints, difficult to follow. It would seem, however, that the respondent considers the first three categories as flowing from the fourth

category, viz **the complaints by Mr Spies of the Freedom Front Plus and Mr Leon of the Democratic Alliance**. I say so because, as already pointed out, the respondent's answering affidavit clearly states that the application flows exclusively from the complaints by Mr Spies and Mr Leon, respectively. Under the fourth category, "**5.5 the jurisdiction of the Public Protector in regard to the conduct complained of by the Freedom Front Plus and the Democratic Alliance**", the respondent has further sub-categories viz:

(a) "*5.5.1 The advance payment made by PetroSA to Imvume Management and its subsequent payment to Glencore International*"
[paragraphs 5.5.1 – 5.5.1.4, pp137–138];

(b) "*5.5.2 The payment by Imvume of R11 million to the ANC*"
[paragraphs 5.5.2 – 5.5.2.4, pp138-141];

(c) "*5.5.3 The payment by Imvume of R50 000 to Uluntu Investments*"
[only paragraph 5.5.3, p142];

(d) "*5.5.4 The payment by Imvume of R65 000 to Hartkon Construction*"
[only paragraph 5.5.4, p142];

(e) "*5.5.5 The improper involvement of Deputy President Mlambo-Ngcuka in PetroSA's advance payment to Imvume*"

[only paragraph 5.5.5, p142].

Reasons for Finding that the Conduct and Affairs of Imvume Management do not Fall Within the Respondent's Jurisdiction

[28] The respondent states that Imvume is a private company, that the state does not own the majority or controlling shares in it and that it is not listed as a public entity in terms of the Public Finance Management Act, 1999. As such, Imvume "*does not perform a public function*" [para 5.3.3, p136].

Reasons for the Conduct and Affairs of the ANC not Falling Within the Respondent's Jurisdiction

[29] In paragraph 5.4.1 the respondent states the following:

> "*5.4.1 The distinction between the ruling political party (as an entity) and government (as a body) is a fundamental principle of constitutional law and democracy. Governments at the different levels in South Africa do not only consist of members of the ANC. The fact that the ANC holds the majority of the seats in these governments does not change the position.*"

The respondent then continues as follows, in subparagraphs 5.4.2 to 5.4.4:

> "*5.4.2 The question as to whether or not a political party should be regarded as a public or private body was recently raised in the Cape of Good Hope Provincial Division of the High Court in the*

case of ***Institute for Democracy in Southern Africa v African National Congress and Others*** *[cited by the respondent, in footnote 11, as 'case no 9828/03', otherwise reported under 2005(5) SA 39 (C) and referred to as such by Mr Maleka and Mr Budlender in their respective addresses to the Court.] The Court had to decide,* ***inter alia****, whether political parties could be regarded as public or private bodies for the purposes of the Promotion of Access to Information Act, 2000.*

5.4.3 Section 1 of the Act defines a public body as:

'(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government or;

(b) any other functionary or institution when-

[no sub-para (i) in the Report];

(ii) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(iii) exercising a public power or performing a public function in terms of any legislation.'

5.4.4 The Court found that a political party could not be regarded as a public body as it does not conform to the said definition and that ***political parties are not obliged by law to disclose the records of donations made to them.***

5.4.5 The meaning ascribed to 'a person performing a public function' in the context of the Public Protector Act, 1994 is clearly similar to the definition of a public body in section 1 of the Promotion of Access to Information Act, 2000. Consequently, the said judgment confirmed that ***the Public Protector does not have jurisdiction in respect of the conduct and affairs of political parties as they are regarded as private entities.***" (Emphasis added.)

I shall return to this aspect later in the judgment.

Reasons for the Respondent not Having Jurisdiction to Investigate the alleged Payment of R11 million by Imvume to the ANC

[30] In subparagraph 5.5.2.2 [pp138-139] the respondent says the following:

"*5.5.2.2 As indicated above, the Public Protector does not have jurisdiction in respect of the affairs and conduct of the ANC and Imvume, except if the conduct complained of:*

(a) relates to 'state affairs'; or

(b) constitutes improper or unlawful enrichment of the receipt or promise 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 or that of a public entity; or

*(c) could be regarded as an alleged improper or dishonest act or omission with respect to public money; **[reference is to s. 6(4)(a)(iii) of the PPA]**; or*

(d) could be regarded as an alleged offence referred to in Part 1 to 4 or section[s] 17, 20 or 21 of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, with respect to public money."

Consequently, having come to the conclusion that neither the ANC nor Imvume is a public entity, the respondent made the following conclusion in paragraph 5.5.2.3:

"*5.5.2.3 ... The alleged payment was clearly made by one private entity to another and could therefore not have had any bearing on 'state affairs'. It also had no relation to an act or omission in the public administration or in respect of a public entity.*"

He went further to submit, in paragraph 5.5.2.4 that:

> "*5.5.2.4* ... *it firstly needs to be established whether the alleged payment was made with 'public money'. When does public money lose its character and become 'private money'?*"

The respondent then places reliance on the case of ***South African Association of Personal Injury Lawyers v Heath and 0thers***, [2001(1) SA 883 (CC)]. He then purports to be quoting from p908 (at paragraph 53) "*of the judgment of the former Chief Justice CHASKALSON*". He proceeds to quote from the judgment without listing the paragraphs from which he quotes, which are [56], [57] and [59]. I pause here to comment that the Public Protector, being an advocate of the High Court of South Africa and occupying a senior position provided by the Constitution, should ensure that he refers appropriately to authorities, just as a judge or magistrate would do. In continuing with the quotation from the Report, therefore, in paragraphs 5.5.2.5, I insert the relevant paragraphs from the judgment:

> "*[56] The respondents rely on the definition of 'public money' in the Act (the Special Investigating Units and Special Tribunals Act, 1996), which reads:*
>
> *'(A)ny money withdrawn from the National Revenue Fund or a Provincial Revenue Fund, as contemplated in the Constitution, and any money acquired, controlled or paid out, by a State Institution.'*

They contend that money paid by the RAF to an attorney in settlement of a client's claim is money 'paid out' by a State institution, and that it remains public money in the hands of the attorney. If that attorney fails to account properly to the client for the money received on the client's behalf, that, so it is contended, constitutes an 'unlawful appropriation' of 'public money' within the meaning of s 2(2)(c).

[57] I am prepared to accept for the purposes of this judgment that s 2(2)(c) may linguistically be capable of such an interpretation. In my view, however, the section should not be given such a wide meaning.

[58] ...

[59] When the RAF pays compensation to an attorney as agent for the claimant, the RAF's obligations to the claimant are thereby fully discharged. In the hands of the attorney it is money lawfully paid and received in which the State institution no longer has a legal interest and which the attorney is then obliged to pay to the client in accordance with the contract between them. If the attorney unlawfully appropriates that money, it would be an unlawful

appropriation of the client's money and not an unlawful appropriation of money of a State institution."

[31] Comparing the situation in the ***South African Association of Personal Injury Lawyers*** case and the payment of R11 million by Imvume to the ANC, after the former had received R15 million from PetroSA, the respondent concluded as follows in paragraphs 5.5.2.7 to 5.5.2.9:

"*5.5.2.7* *In the matter under consideration, the advance in question was paid to Imvume* ***on the basis of its agreement with PetroSA. Imvume was not acting as an agent for PetroSA****, but had a separate supply contract with Glencore.* ***Once Imvume received the payment from PetroSA, it owned the money****. Whether the payment due to Glencore was to be made from this money or other funds of the company is immaterial. Unlawful appropriation of the payment made by Imvume could only have affected Glencore and not PetroSA, who* ***(sic)*** *then only had an interest in the delivery of the oil condensate that it had paid for.*

5.5.2.8 *The payment Imvume allegedly made to the ANC therefore* ***did not involve public money****. ...*

5.5.2.9 *The Public Protector therefore* ***does not have jurisdiction to investigate the alleged payment by Imvume made to the*** *ANC.*" (Emphasis added.)

I shall return to this aspect later in the judgment.

The Respondent's Reasons for Finding that he had no Jurisdiction to Investigate the Imvume Payment of R50 000,00 to Uluntu Investments [par 5.5.3, p142] and R65 000,00 to Hartcon Construction [par 5.5.4, p142]

[32] For the same reasons that he came to the conclusion that he had no jurisdiction to investigate the alleged payment by Imvume to the ANC, the respondent was of the view that he was not entitled to investigate these two payments.

[33] The applicants challenge the respondent's decision that he had no jurisdiction to investigate the conduct and the affairs of the Imvume Management, the conduct and the affairs of the ANC and the payments made by Imvume to the ANC, Uluntu Investments and Hartcon Construction, respectively. Before I deal with the applicants' submissions in this regard, however, it is necessary to first discuss the respondent's objection to the applicants' standing in this matter.

Standing

[34] In his heads of argument, the respondent submits [in paragraph 28, p16], correctly, in my view, that the applicants bring their review in their own interests

as well as in the public interest, relying on the applicants' averments in paragraph 35 of their founding affidavit. In a detailed but well-argued submission by Mr Maleka on the respondent's behalf and on the question of the applicants' entitlement to bring the application in their own interests, he submits that they have no special entitlement to do so. He base his submission on the fact that the applicants base their interests mainly on the fact that the respondent criticised the articles they wrote in the *Mail & Guardian* and did so without affording them opportunity to respond to his views in that regard. The applicants, in fact, allege in the founding affidavit that the respondent's remarks are highly damaging and defamatory of and concerning them. During argument, Mr Budlender submitted that the applicants would no longer rely on defamation as a basis for their bringing the application. He did not, however, abandon the applicants' submission that they were entitled to a hearing by the respondent before he published remarks that were critical of their complaints. The respondent points out in, *inter alia*, paragraph 32 of his heads of argument that:

> "*32. The applicants do not claim at all that the critical remarks they complain about violate or infringe their rights to freedom of expression, including the freedom of the press. Despite the critical remarks, the applicants have been able to exercise their freedom of expression, and have been able to do so vigorously. For instance, the applicants have published articles, subsequent to* ***the Report****, in which they expressed critical views about the respondent, without being constrained, in pursuit of their right to freedom of*

expression, and the freedom of the media, and to freely publish those views. [The heads of argument, footnote 31, refers to annexures 'AA7', 'AA8' and 'AA9', ***all of which were written after the Report and in which the applicants vehemently criticise the Report.]*** *This is not a case of persons who are unable to exercise their fundamental right or pursue their chosen career, because of the contents of* ***the Report****."*

[35] I find the respondent's submissions compelling in this regard. I, however, am of the view that the applicants are entitled, as persons who were entitled to and did lay complaints about matters dealt with by the respondent and which formed the basis of his Report, to complain when they are of the view that their complaints were either not investigated or not appropriately investigated. The respondent does not contend – neither could he contend, in my view – that the applicants were not entitled, in law, to complain as they did to him. Why then would they not be entitled to bring an application if they were unhappy with his conduct? I, therefore, find that the applicants are perfectly entitled to bring this application on that basis alone.

[36] In passing, I wish to comment about the manner in which the applicants criticised the Report (annexure "AA2" pp796-804 – which is inexplicably duplicated by the respondent on pp837-842) abusive of and insulting to the Office of the Public Protector and the respondent, personally. I refer to headlines such as "*Anatomy of*

a whitewash", "*Dismal. Depressing. Disingenuous.*", "*The Public what?*". On p799, under the title "*Eina!*", the following appears:

> "*... it is now common cause that Mushwana dodged his responsibilities and sought to protect power rather than the public. The 73-page report is littered with the term, '... the Public Protector cannot investigate this allegation'.*
>
> *That is how Mushwana has explained how he investigated a payment from PetroSA that ended up in the ANC's coffers and hardly considered the dangers inherent in crony capitalism and tender shenanigans with which this Oilgate story so brims.*"

By isolating the phrase "*the Public Protector cannot investigate this allegation*" from the reasoning that precedes it, the writer does the respondent an immense injustice on a sensitive issue. In my view, the Office of the Public Protector, being a direct creation of the Constitution, and the holder thereof, are entitled to more respect than was shown by the applicants in their criticism of the respondent's Report. Just as a magistrate or a judge can make a mistake in his or her judgment, so can a Public Protector make a mistake in the exercise of a discretion with which he is bestowed by the Constitution and the Public Protector Act. The question as to whether or not the Public Protector has erred in his or her discretion cannot be determined otherwise than by a Court of law. Institutions such as these must, in my view, be implicitly respected, regardless of who the incumbents

thereof are. That does not, however, amount to saying that there should not be appropriate criticism of such institutions.

[37] I am in agreement with the respondent's conclusion, based on the authority of ***Institute for Democracy in Southern Africa v African National Congress & Others***, that the conduct and affairs of the ANC, a political party, are outside the scope of his jurisdiction. I do not, however, regard the applicants' approach to the respondent as having been for him to investigate merely "the conduct and affairs" of the ANC. I understand that the applicants raised the conduct and affairs of the ANC in relation to its perceived relationship with Imvume and Mr Majali, which two were also perceived to be having an improper relationship with PetroSA and the Government of the Republic of South Africa, in the context of what was subsequently referred to by the *Mail & Guardian* as the "Oilgate". That, in my view, distinguishes the facts of the present case from those in the ***Institute for Democracy in Southern Africa v African National Congress & Others***.

[38] In his argument, Mr Budlender disagreed, correctly so in my view, with the respondent's submission that, on the basis of ***South African Association of Personal Injury Lawyers*** the R11 million paid by PetroSA to Imvume was no longer state funds.

[39] Regarding the respondent declaring **the affairs and conduct of Imvume** as being outside his jurisdiction, I am similarly of the view that he misconstrued the

manner in which he was approached to investigate those affairs. Although it is not disputed that Imvume is a private company, the applicants aver that it was being used by PetroSA as a front for the ANC. In other words, according to them, it was being used to siphon public funds to the ANC, in an endeavour to fund the latter. It is further alleged by the applicants that Mr Majali, through Imvume, was involved in efforts to bring relief to the Iraqi Government from the international isolation that it was going through after its attack on Kuwait. As I have already stated, there is no indication in the papers that the Office of the Public Protector was aware, as at the time of its receiving the complaints from Messrs Spies and Leon, of the existence of the IIC reports, regarding the alleged improper involvement of, *inter alia*, Mr Majali and Imvume, in attempts to improperly assist the Iraqi Government avoid the negative consequences arising from deliberate sanctions, against it, by the UN. Inconceivable as that may seem, I approach this case on the assumption that the Office of the Public Protector was completely oblivious of what was happening internationally in that regard.

[40] There was, in my view, sufficient information in the articles that were in the *Mail & Guardian* and which, on the respondent's own version in the papers, the respondent read. I quote from one of those, "**SB10**" (at p211), the following:

> "*The African National Congress has misled the nation on the Oilgate scandal.*
>
> *Documents in the possession of the* ***Mail & Guardian*** *make it clear that Imvume Management – the company that channelled R11-million in state*

oil money to the ANC before the 2004 election – was effectively a front for the ruling party.

The relationship between the ANC and Imvume is central to Oilgate.

*When the **M&G** broke the Oilgate story two months ago, ANC spokesperson Smuts Ngonyama claimed Imvume was an independent firm from which the ANC was perfectly entitled **to accept donations**. 'We do not ask donors where their money comes from,' he said. The point was echoed by ANC secretary general Kgalema Motlanthe, who said: 'A distinction should be made between the ANC and private companies.'*

*Both officials suggested the transaction was an arm's-length donation from an ordinary private concern – which meant the ANC could not have known that the R11-million **came from the parastatal PetroSA**, which had prepaid Imvume for part of a supply contract.*

*But the documents, some marked 'Top Secret' and which the **M&G** gathered over three years, make a mockery of that defence. Instead, they show how close the ANC and Imvume really were.*

They show that as early as 2001 Motlanthe and, to an extent, party treasurer Mendi Msimang, were intimately entangled with Imvume boss Sandi Majali.

The evidence suggests that together they hatched an ambitious project to raise millions of rands for the ANC by obtaining lucrative oil allocations from Saddam Hussein's regime under the United Nations Oil for Food (OFF) programme.

OFF was an exception to UN sanctions [which] allowed Iraq to export oil to pay for humanitarian needs.

In turn Motlanthe and Majali, on behalf of the ANC, would extend political solidarity to the Iraqi dictator and ***campaign for the lifting of sanctions.***

The documents include a letter from Motlanthe to the Iraqis, confirming Majali as the ANC's designated representative for this project.

...

The information obtained by the ***M&G carries implications for the government as well.*** *It shows that* ***senior representatives from the Ministry and the Department of Minerals and Energy, as well as the state-owned Strategic Fuel Fund (SFF), participated in this project – to an extent that suggests their boss, former minister Phumzile Mlambo-Ngcuka, must have been aware of the plan.***

Mlambo-Ngcuka and her officials have denied any such collusion, but have declined to comment on the allegation that Majali was effectively an agent for the ANC.

...

When Majali travelled to Iraq for talks with Hussein's government in 2001, he was accompanied by a top-level delegation, including the Director General of Minerals and Energy, Sandile Nogxina, and Mlambo-Ngcuka's chief of staff, Ayanda Nkuhlu. The minister personally authorised their trip.

> ***Also with them was Riaz Jawoodeen**, a director of the SFF, the state body responsible for maintaining South Africa's strategic fuel stocks. **The SFF was also answerable to Mlambo-Ngcuka.***
>
> *The deal proposed to the Iraqis was startling in its simplicity. The ANC – and, **by implication, its officials in government** – would support Hussein's beleaguered regime in exchange for the allocation of oil. The oil trade between Iraq **and the South African authorities** would be handled by Majali, who was introduced as the ANC's agent. Some of Majali's profits would go to an ANC funding front, controlled by him.*" (Emphasis added.)

[41] It will be observed that the contents of "**SB10**", as quoted herein, remarkably resemble the contents of the IIC reports that are contained in the background and history of this application. Even if, therefore, the respondent had not been aware of the IIC reports, he, in my view, had adequate damning information before him when considering the complaints by Messrs Spies and Leon. Without suggesting that the allegations, either as contained in the IIC or, for instance, "**SB10**", are correct, they are, in my view, sufficiently damning to the Government of the country, the ministers and senior officials mentioned therein and to the ANC to merit serious attention. Although the ANC is not, itself, part of the Government, the respondent must have been aware that the then cabinet ministers implicated by the *Mail & Guardian* articles were members of the ANC. The respondent, therefore, owed it to all these interested groups to investigate complaints that cast them in very poor light, ie if the respondent had legal authority to investigate the

complaints. This raises the question as to whether the respondent correctly interpreted the parameters of his authority, based on the Constitution and the PPA. That, in turn, raises the principle of legality, to which I shall refer later in the judgment. I am in agreement with Mr Budlender in his submission that the respondent's reliance on the decision in the ***South African Association of Personal Injury Lawyers v Heath*** 2000(10) BCLR 1131 (T), with regard to the funds that were used by Imvume to make payment to the ANC (R11 million), Uluntu Investments (R50 000,00) and Hartcon Construction (R65 000,00) involving public money, is misplaced. The propriety of the transaction between the RAF and the attorneys concerned, in ***South African Association of Personal Injury Lawyers*** was not disputed. That is evident from the following passage in the judgment by CHASKALSON, P at para [55]:

> "*[55]* ... ***There is no suggestion that payments made by the RAF to attorneys, on behalf of their clients, were in any way improper or unlawful, or that the investigation can possibly give rise to the recovery of any money on behalf of the State.*** *On the face of it,* ***the investigation is not concerned with the appropriation or expenditure of public money.***" **(908A-D)** [Emphasis added.]

In the current matter the very basis on which PetroSA made payment to Imvume was challenged by the applicants, contending that it was an improper siphoning of State funds from PetroSA to the ANC, via Imvume. Seeing that these are State funds the respondent was obliged to investigate that complaint.

[42] Seeing that the respondent's decision that **payments made to Uluntu Investments and Hartcon Construction**, respectively, were similarly out of his jurisdiction for the reasons given in respect of the payment by Imvume to the ANC, it follows that that decision is similarly affected by the distinction made between the present matter and that in ***South African Association of Personal Injury Lawyers***. It should be borne in mind that, with regard to each of these two complaints (Uluntu Investments and Hartcon Construction), the respondent said:

"*The alleged payment did not relate to State affairs or public money.*"

[43] From the aforegoing, it follows that I am of the view that the respondent's decision that the investigation in respect of the conduct and affairs of Imvume Management and of the ANC is beyond his powers and his finding that the payment by Imvume of R11 million to the ANC, R50 000,00 to Uluntu Investments and R65 000,00 to Hartcon Construction, (shortly after receiving an advanced payment of R15 million from PetroSA), were appropriate, are incorrect.

What the PetroSA payment Entails

[44] In view of the importance of this aspect of the case, it is necessary to give a brief summary of what it entailed. In October 2002, PetroSA entered into a documented contract with Imvume, a BEE company, for the supply of oil condensate required for PetroSA's operation. Imvume had a "*back-to-back agreement*" with a condensate supplier, Glencore International AG ("Glencore")

in terms whereof Glencore would source the condensate on Imvume's behalf, for the latter to supply PetroSA. PetroSA duly purchased 314,598,06 barrels of condensate which was to be delivered to Mossel Bay under a bill of lading dated 06 December 2003, on an agreed contract price of USD10 215 942,80. On 18 December 2003, Imvume requested an advance payment of R15 million from PetroSA. According to Mr S Majali, the executive chairman of Imvume, the reason for the request was cash-flow problems relating to Imvume's monthly commitments.

The CEO of Imvume, Mr Sipho Mkhize, was, by virtue of the provisions of s.56 of the Public Finance Management Act, 1999, granted delegated authority to approve advances in respect of budgeted projects (contracts) up to an amount of R50 million, without informing the Companies Board. Before the CEO went on leave, from 15 December 2003 to 28 December 2003, Mr S Mehlomakulu was delegated written authority, as acting CEO, on 12 December 2003. It was during the absence of the CEO, Mr Mkhize, that the acting CEO, Mr Mehlomakulu, authorised the advance payment to Imvume, on 18 December 2003. The above information was obtained during the respondent's investigation. During such investigation, the respondent was given the following explanation with regard to the considerations that led to the granting of the request, as stated in para 7.8.2, p154, of the Report:

> "*7.8.2 'It was in PetroSA's interest to assist our BEE supplier, Imvume, so that it can continue to supply condensate to PetroSA. When*

PetroSA awarded the contract for the supply of condensate to Imvume it was making a conscious contribution to the advancement of BEE in South Africa.'"

Other considerations given are:

1. the authorisation of an advance payment was within the delegated authority of the CEO;
2. PetroSA's Procurement Policy provided for financial assistance to BEE suppliers;
3. the amount requested was only 28% of the full invoice amount of the cargo concerned;
4. the advance related to cargo that was due on 22 December 2003, a matter of four days from 18 December 2003;
5. Imvume had an excellent track record of performance in its delivery of products to PetroSA, having already successfully delivered certain of the nine contracted cargos.

The respondent's Default in Payment

[45] On 28 January 2004, Glencore informed PetroSA that it had not been paid in full for the cargo delivered on 22 December 2003, Imvume being in arrears in the total amount of USD 2.8 million. PetroSA confirmed that with Imvume. Glencore subsequently threatened to put a financial hold on the next cargo of condensate already in transit to Mossel Bay, unless the outstanding amount was

paid. That meant that PetroSA would not be in a position to fulfil its own obligations if Imvume would be unable to supply it with condensate. As I understand the position, the contract that was being breached was between Glencore and Imvume, there being no contract between Glencore and PetroSA. Consequently I have difficulty with the following passage, in para 7.10.2 of the Report:

> "*Glencore's threat to put a hold on the discharging of the cargo in transit put PetroSA in a predicament. It had to decide either* ***to stand its ground against Glencore and take legal action*** *or to pay the outstanding amount and take legal action against Imvume.*" (Emphasis added.)

It is not clear to me on what basis PetroSA could have taken legal action against Glencore, when Imvume was responsible for Glencore threatening to stop the supply of condensate to Imvume and not PetroSA. What is understandable to me is what follows in para 7.10.3 of the Report, viz, that delay in the delivery of condensate would have resulted in a disruption of production at PetroSA's Mossel Bay refinery, at a cost of USD 1 million per day. In the event of a shut-down, there would be start-up costs.

[46] Having had the Board's approval, PetroSA decided to pay Imvume's outstanding debt to Glencore, an amount of USD 2,8 million plus interest thereon of USD 40 000 on 23 February 2004. PetroSA would claim the entire amount from Imvume.

Legal Action by PetroSA against Imvume

[47] Although PetroSA's legal department was instructed to recover from Imvume the money paid to Glencore, it transpired, from an analysis of Imvume's financial position, that the company had no significant assets to attach and that its cash and revenue streams available would be insufficient to cover a once-off payment of the debt. Moreover, Imvume stated that it would soon be awarded a contract from which it would be in a position to pay the debt. Quite clearly, PetroSA was not keen to sue for Imvume's liquidation. On 19 February 2004, a written agreement of acknowledgement of debt and cession was entered into between PetroSA and Imvume, in terms whereof, *inter alia*:

1. Imvume acknowledged that it was lawfully indebted to PetroSA in an amount of USD 2.8 million, plus interest;
2. Imvume irrevocably and unconditionally undertook to pay the debt within ninety days from the date of the agreement;
3. as security for the payment of the debt, Imvume ceded its right and title in and to all its book debts and revenue contracts, both present and future, which would endure until the debt was fully paid.

Imvume defaulted on the agreement of acknowledgement of debt, resulting in PetroSA writing a letter of demand, followed by issue of summons in the Johannesburg High Court in July 2004. Imvume had the temerity to file a notice of intention to defend the action. That notwithstanding, the respondent records

that "*a further settlement agreement was proposed [no indication whom by] in terms of which Imvume would pay its debt in monthly or quarterly instalments. Imvume delayed the finalisation of the details of the settlement agreement and PetroSA insisted on immediate payment.*" [para 7.11.6 of the Report, p157]

[48] From what appears in para 7.11.7 to 7.11.9 of the Report, it is quite evident that Imvume was in dire financial straits:

> "*7.11.7 Imvume paid an amount of R1 million in August 2004 and R333 333 in November 2004. Further payments of R1,666 665 and R3 million was* ***[sic]*** *made on 13 June 2005 and 30 June 2005, respectively.*
>
> *7.11.8 It is expected that the total outstanding debt would be paid by January 2008, if the settlement proposal put forward by Imvume is approved by the Board of PetroSA.*
>
> *7.11.9 The total outstanding amount on 12 July 2005 was R16 796 964,54.*"

[49] The explanation given as to why PetroSA was reluctant to file for Imvume's sequestration is that it is, in principle, opposed to having BEE companies sequestrated. Whilst this may well be a true explanation for that omission, it seems to me that the respondent was called upon to do more, by way of

investigation, to determine whether or not the reason might not be that Imvume was, indeed, formed in order to be used as a conduit of funds from PetroSA to ANC. I agree with Mr Budlender that a number of persons who could have been approached and questioned about the entire episode were not questioned by the respondent. They might, if so questioned, have confirmed the explanation given. On the other hand, they might not have done so. A further question that arises, in my mind, is how Imvume could, in the very difficult financial circumstances that it was obviously in, have afforded to pay R11 million, as a donation, to the ANC, R50 000,00 to Uluntu Investments and R65 000,00 to Hartcon Construction. In the context of the allegations made by the applicants, with regard to what they thought was the reason for such payments, I am of the view that the respondent did not investigate this aspect sufficiently. The respondent confined himself to Mr Mkhize's letter, in response to his queries. In para 233 of the applicants' heads of argument, the following is submitted:

> "*233.* *Fourie* [the deponent to the respondent's answering affidavit, who was delegated by the respondent to do the actual investigation] *did not even attempt [to] test the correctness of the Mkhize's responses by seeking to obtain information from anyone else such as PetroSA (such as Mehlomakulu, who with others signed the PetroSA invoice), Majali or others from Imvume, the Auditor-General who had already investigated the advance payment, any persons from the leadership of the ANC who may have had knowledge of the advance payment, or any of the applicants.*"

In my view that submission has merit. So, indeed, does the submission in paragraph 234 of the same heads of argument which reads:

> "*234. Fourie made no effort at all to investigate whether representatives of PetroSA were aware that the advance payment would in part be paid to the ANC, or whether improper pressure was brought to bear on PetroSA to make the payment for that reason.*"

[50] In para 36 of the applicants' founding affidavit (at pp15-16), the following submissions are made in this regard:

> "*36. The Public Protector's investigation and the Report dealt with matters of overwhelming public interest. The respondent is an important institution that is mandated to support constitutional democracy. Its investigations can be far-reaching and its reports carry significant weight. Its reports are not simply the views of an expert, but are those of a body with great institutional credibility. They are often relied upon by both the public and public officials as being determinative of issues that it investigates.*"

I pause to state that it is common cause that the Report was accepted by the Parliamentary Portfolio Committee on Minerals and Energy and the National Assembly and was endorsed by the Government.

The following appears in the statement of the Cabinet at a meeting on 3 August 2005:

> "*Cabinet noted and accepted the Report of the Public Protector on the matter pertaining to PetroSA and its contractual relations with Imvume. While Government had always understood that the allegations of improper conduct on the part of state officials were unfounded, we do appreciate that this matter, as it relates to Government, has been laid to rest. Cabinet respects the authority and integrity of the constitutional bodies set up to protect our democracy, and we hope that the same principles will be observed by other institutions in our society.*"

[51] I find the response to this averment, as stated in para 27 of the respondent's answering affidavit, a bit strange. It reads:

> "*27.* ***Ad paragraph 36***
>
> *The averments in this paragraph are admitted. It is not clear why the deponent apparently holds the view that this information, which was submitted to the respondent by the President and Chief Executive of PetroSA should have been regarded with suspicion. The applicants also do not appear to have evidence that contradicts the information provided by Mr Mkhize.*"

The respondent is of the view that he needed to regard the response by Mr Mkhize "*with suspicion*" in order for him to verify its correctness. For the respondent to

expect the very applicants who request him to investigate the correctness or otherwise of their impression to be the ones to produce evidence to contradict Mr Mkhize's response is, to say the least, odd. Unlike a judicial officer, the Public Protector, as an investigator, is expected to do more than merely to weigh what is placed before him and make a decision in favour of the party that produces more evidence. By virtue of his powers, he is, in my view, expected and is under a duty to actually look for evidence either way. Where, therefore, the party complaining does not have sufficient information, it is incumbent upon the Public Protector, in my view, to actually search for it if the circumstances warrant that. I am of the view that the circumstances warranted more investigation of the PetroSA payment to Imvume and the latter's payment to ANC than the respondent did.

The Alleged Involvement of the erstwhile Deputy President Mlambo-Ngcuka

[52] The erstwhile Deputy President, Ms Mlambo-Ngcuka, is accused of improper involvement in a number of instances. They concern the advanced payment made by PetroSA to Imvume, payment made by Imvume to Uluntu Investments, in which her brother had a major financial interest and the appointment of Mr Mkhize, formerly an acting CEO, as CEO for PetroSA. The respondent wrote her a letter to respond to allegations or accusations made against her in respect of these matters. The approach to her was on the basis that, being the then Minister of Minerals and Energy, under whose ministry PetroSA fell, she might have been aware of these developments.

[53] With reference to her brother's matter, she wrote, in response, that she had made enquiries and had established that the reason for the payment to Uluntu, by Imvume, was that her brother and Mr Majali, of Imvume, "*were at some stage involved in a tourism related business which tried to bid for a hotel in St Lucia, KwaZulu-Natal. It is in this context, I have been informed, that a sum of R50 000,00 was paid by Imvume towards the defrayment of costs incurred in the bidding process.*" The suggestion, of course, was that Imvume paid it because it was part of that project. The respondent accepted that explanation without much ado – certainly without interviewing anybody else who might have given information in that regard, whether in confirmation or contradiction of the Deputy President's explanation. She is exonerated by the respondent in the Report. The applicants list, in paras 53.1 to 53.6, a number of persons who could have been interviewed by the respondent in this regard. They are:

- her own brother Mr Bonga Mlambo,
- Mr Joseph Amindazeh, the head of the office that prepared the St Lucia tourism development bid for the Uluntu Consortium, who is mentioned in annexure "**SB9**" to the founding affidavit,
- the Greater St Lucia Wetlands Park Authority, which adjudicated on the bids and whose relevance I shall later mention,
- Mr Majali or any other representative of Imvume who might have been aware of the payment to Uluntu.

[54] As it turned out, both Mr Joseph Amindazeh and the Greater St Lucia Wetlands Park Authority stated that the only shareholders involved in the bid were Old Mutual Properties and Uluntu, with neither Mr Majali nor Imvume being also involved. That then raises the question as why Imvume would make a payment to Uluntu Investments, which involved only the Deputy President's brother and not Imvume. Admittedly, the Deputy President might not have been aware of this inaccuracy when she gave the response. Had the respondent investigated in the manner suggested, such information would have been given to him and he would have been in the position to bounce it back on the Deputy President for her further response. Further developments in that process might have revealed more than was before the respondent and he might not have exonerated the Deputy President. On the other hand, further information might have confirmed her reply. Such information might even have provided an explanation as to why the documents did not reveal Mr Majali's or Imvume's involvement in the bid at St Lucia and that they were, indeed, involved.

[55] Concerning the **advance payment made by PetroSA to Imvume**, the Deputy President responded that she was informed of the crisis only at a stage when Glencore threatened to stop the flow of oil, resulting in serious risk of the Mossel Bay refinery being shut down. It then became a strategic issue. She was being briefed by management of PetroSA on how they proposed to solve the problem. She supported the suggested way i.e. that PetroSA would pay to Glencore and that it would later sue Imvume for the amount so paid. None of the other persons

involved or with knowledge was interviewed by the respondent in this regard. Consequently, the Deputy President was, once more, exonerated in circumstances where there was, in my view, inadequate information.

[56] In saying that there was inadequate information, I am not unmindful of the following submission by the respondent. In para 11.4.4 of his answering affidavit, the respondent points out that the CEO, Mr Mkhize, did not personally approve Imvume's request for an advance payment, being, at the time, away on leave. The implication is obviously that, if Mr Mkhize was important in ensuring that PetroSA transmitted funds to Imvume – with the ultimate end thereof being the ANC – the then acting CEO, Mr Mehlomakulu, was free to decline the request, there being no pressure from Mr Mkhize. That explanation is, in my view, too speculative. If Mr Mkhize was, indeed, specifically chosen to come and facilitate the flow of funds from PetroSA to ANC, nothing could have prevented him being hands on, even when away on leave, in matters that entailed assistance to Imvume. Only a more detailed investigation than was done could, in my view, have enabled the respondent to comfortably come to the conclusion which he reached regarding Mr Mkhize's appointment as CEO.

[57] Concerning the appointment of Mr Mkhize as a CEO, very detailed and damaging information was contained in "**SB9**". It is evident from the papers, especially the respondent's answering affidavit, that he read "**SB9**". For purposes of this judgment it is not necessary for me to go into all the detail contained in that

newspaper article from the *Mail & Guardian*, dated 24 to 30 June, 2005. In summary it contained the following:

1. After the unexpected departure of the then Chief Executive Officer of PetroSA, Mr Mpumelelo Tshume, the Deputy President, then Minister of Minerals & Energy, intervened decisively to secure Mr Mkhize's permanent appointment as Chief Executive Officer. Mr Mkhize had been acting CEO after the departure of the CEO, Mr Tshume.

2. A recruitment agency, Leadership Unlimited, was assigned the task of interviewing candidates for appointment as CEO.

3. Mr Mkhize was also interviewed, he was not short-listed, much to the Deputy President's chagrin. Notwithstanding the fact that the Board of PetroSA had finalised the short-listing, the Minister intervened and caused the Central Energy Fund ("CEF") Board, which is a holding company for PetroSA, to take over the short-listing process and explore the possibility of re-interviewing all the short-listed candidates. There was talk that she had cast aspersion on the process followed by the sub-committee of the Board in doing its work.

4. There never was a complaint to Leadership Unlimited concerning the process.

5. In a manner not explained, Mr Mkhize was appointed CEO. According to "**SB9**", "*Questions remain about what processes was finally followed to appoint Mkhize*".

6. Those members of the Board who resisted Mr Mkhize's appointment have since departed.

[58] In the Report, the following, *inter alia*, is given as the Deputy President's explanation with regard to the appointment of Mr Mkhize:

"*8.2.3.2* ...

(c) The 3 candidates that made the final short-list that was submitted to the Board did not include Mr Mkhize;

(d) When the Board considered the final short-list, they were made aware of a minority report of some members of the said sub-committee, casting aspersions on the process to arrive at the final short-list; and

(e) The Board accepted the recommendations from the majority of the sub-committee.

8.2.3.3 The fact that the acting CEO (Mr Mkhize) had the required qualifications and experience and had performed excellently as CEO as well as the said doubts cast in respect of the propriety of

the selection process that excluded him from the final short-list, made her feel uncomfortable to make a recommendation to the Cabinet.

8.2.3.4 She decided to request the Central Energy Fund (of which PetroSA is a subsidiary) to take over the process of selecting a CEO, to re-interview the 5 candidates on the initial shortlist and to make a recommendation to her;

8.2.3.5 The Central Energy Fund recommended Mr Mkhize and his selection was endorsed by the Cabinet. PetroSA's Board concurred and he was appointed; and

8.2.3.6 There was nothing untoward in her decision to question the process and to involve the Central Energy Fund, as the only shareholder of PetroSA, on behalf of the Government."

The last paragraph is evidently the respondent's finding.

[59] The Minister's response, as reported by the respondent above, seems to tally with the contents of "**SB9**". The only difference is that the presentation in "**SB9**" is in a negative form whilst the Minister's response is in a manner that explains how she acted in the manner alleged.

[60] In para 12.5 of his Report, dealing with "KEY FINDINGS", the respondent concludes that the payment by PetroSA to Glencore, of the amount of USD 2.8 million (plus interest), on 23 February 2004, *"was **in the public interest** and complied with its **legal obligations** in terms of the Public Finance Management Act, 1999;"* Although "*public interest*", once Imvume had failed to pay Glencore's money and Glencore was threatening to stop the supply of oil to PetroSA, is understandable, the circumstances concerning the manner in which Imvume was seemingly handled with soft gloves, at a stage when it was simply not complying with any of its obligations – even to the extent of opposing PetroSA's legal action to recover the funds – needed to be investigated and explained. The reason for that conduct might not simply be that which was stated, viz, PetroSA's reluctance to have BEE companies sequestrated. In view of Dr Mokate's deviant conduct, attitude and qualification concerning Imvume's disqualification for the tender she is one person who, in my view, certainly should have been interviewed about Imvume's relationship with PetroSA.

[61] In paras 102-104 of the founding affidavit, the applicants make some telling averments in respect of Dr Mokate. Before going further on this aspect, I feel I should make a comment that applies to this and other aspects of the case. It is conceivable that a lot of the information contained in the applicants' founding affidavit and its annexures, in the applicants' supplementary affidavit and annexures and in the applicants' replying affidavit and its annexures was unknown

to the respondent at the time of his investigating and subsequently making his Report. The point, however, is that he would, in my view, have come across quite a substantial portion of that information if he had made further investigations. The more disturbing point, in my view, is the fact that, even after he had obtained the information from the documents I have mentioned, he continued to oppose the application, rather than to offer to re-investigate the complaints or some of them. The information in paras 102-104 of the founding affidavit is one such piece of evidence that, in my view, called for a re-assessment by the respondent. It reads:

"*102 During the course of subsequent contract negotiations between the SFF and Imvume, Mokate informed Imvume that it was disqualified for failing to submit the required performance bond. This was set out in Mokate's letters to Imvume of 25, 28 and 29 January 2002, copies of which are respectively attached as 'SB44', 'SB45' and 'SB46'. As appears from these letters, Mokate also had a number of other objections to Imvume's negotiating positions.*

103. However, Mokate backed down on Imvume's disqualification after she came under pressure to do so. The applicants were told by sources, with whom we had agreements of confidentiality, that the pressure was from, among others, Mputhumi Damane ('Damane') who, at that time, was chairperson of the SFF.

104. After Renosi Mokate ('Mokate') was suspended on 29 August 2002 (on unrelated charges) from her then position as chief executive of the SFF, confidential sources told us that the action against her was at least partly motivated by the fact that she had opposed the award of the aforementioned SFF contract to Imvume. Mokate also repeated these allegations in an article in Business Day *of 30 October 2002. A copy of her article is attached as 'SB47'. Mokate, now a Deputy Governor of the Reserve Bank, was later dismissed from her position after a disciplinary inquiry."*

[62] I now proceed to quote, in full, the respondent's response to paras 102-104 of the founding affidavit. It reads as follows: [pp754-755]

"*62. Ad paragraph 102*

I admit that the letters which appear as annexures 'SB44' to 'SB46' were exchanged between SFF and Imvume.

63. Ad paragraph 103

The averments in this paragraph constitute inadmissible evidence. I request that they be struck out on the grounds set out in the respondent's application to strike out.

64. Ad paragraph 104

64.1 I admit that Ms Mokate was suspended. On the applicants' version the suspension and subsequent dismissal of Ms Mokate was ***(sic)*** *unrelated to the tender awarded to Imvume. The dismissal resulted from an inquiry which investigated charges brought against Ms Mokate.*

64.2 The sinister conclusion sought to be drawn by the applicants, relying on undisclosed sources, that the actions taken against Ms Mokate were connected to her objection to the award of the contract to Imvume, is unfounded.

64.3 The respondent requests that the allegations made in this paragraph to support that conclusion ***be struck out****, in terms of his application to strike out.*

64.4 It is also curious that the applicants make the allegations in this paragraph without following their approach to describe the allegations they rely on according to 'chronological episodes'." (Underlining by the respondent.)

[63] I pause to mention that the respondent did, indeed, make an application to strike out certain portions of the applicants' founding affidavit, including the portions mentioned in para 63 of the answering affidavit. That application was not,

however, pursued during the hearing of the main application. In opposing the application, the applicants had submitted, *inter alia*, that the information sought to be struck out was subsequently confirmed in documents contained in the Rule 53 record. A striking example of such confirmation is found in an undated document bearing the name of M B Damane, CEO: CEF (which name and title are handwritten) on pp79-80 of the Rule 53 record. I read it in its entirety:

"*REBUTTAL OF MAIL & GUARDIAN*

...

Imvume was not SFF's first choice as it came out third in the bidding process. But the first two parties failed on fulfilling preconditions of the tender process, namely to provide SFF with $1 million performance bond and satisfactorily complete a due diligence.

The sub-committee of the Board chosen to oversee the repurchase of the crude oil was selected because of the lack of capacity by Dr Mokate and her management role was always peripheral at best in the whole repurchase strategy.

She is correct to say that she was severely rebuked by the Chairman Mr Mputumi Damane. She had no role in the whole strategy but countermanded a decision of the board by unilaterally disqualifying Imvume after it had been awarded the tender. Imvume had, in fact, unbeknown to her, fulfilled the last remaining condition – supply (**sic**) *a*

*performance bond of $1 million. Dr Mokate was on a learning curve and she accepted that she had been in error and the process was always above board. The attached statements by her at the time indicate firmly that (***sic***).*

That she is now singing another tune is obviously due to the fact that she was later dismissed as CEO for incompetence after she caused oil trading losses of R70 million."

[64] It is evident that the extract from the Rule 53 record corroborates the applicants' averments in para 52. I find it odd that the respondent prepared an application to strike out, *inter alia*, the aspect I have just referred to, when he had in his possession the document from which I have just quoted, which confirms the information obtained from the "*confidential sources*". I also find it interesting that Dr Mokate found employment as a Deputy Governor General of the Reserve Bank after being "*dismissed as CEO for incompetence after she caused oil trading losses of R70 million*". In my view, Dr Mokate should have been interviewed by the respondent with regard to the SFF bid.

[65] With the wide powers at his disposal, it is strange that the respondent did not consider asking the applicants to disclose their "*confidential sources*". Had they refused, after being so asked, the respondent would have had the option of either taking action to compel disclosure or refusing to proceed with investigation where

such non-disclosure was hampering his efforts. I am unable to find that the respondent was aware of the decision in *Munusamy v Hefer NO & Others (Freedom of Expression Institute and Others as* amici curiae*)* 2004 5 SA 112 (OPD), the judgment of MALHERBE, JP and LOMBARD, J. In that judgment MALHERBE, JP said the following at 120D:

> "*I do not find a clear statement in these judgments that a journalist* qua *journalist has the right to be called as a witness only as a last resort.*"

[66] Whilst I do not intend adding my voice as to whether or not there is such *'a clear statement'*, the possibility exists that the respondent did not think that it would be worth pursuing information held confidentially by the applicants, in their capacity as journalists. That notwithstanding, I am of the view that the respondent was wrong in not following up the pressure allegedly brought to bear upon Dr Mokate. In passing, I should point out that the *Munusamy* case was relied on by Mr Maleka, the respondent's counsel, in his submission to the effect that the applicants should not have sought to rely on confidential sources and that they ought to have endeavoured to have affidavits from the confidential sources.

[67] With regard to "***THE ALLEGED IMPROPRIETIES RELATING TO A CONTRACT AWARDED TO IMVUME BY THE SFF IN MARCH 2002,***" the respondent, in spite of pertinently starting with reference to the "*22 July edition [of] the* ***Mail and Guardian***" (which is "**SB11**"), has made no attempt to deal with the issues raised in that newspaper. Apart from stating what has already been

said, in this judgment, about Dr Mokate, he quoted a lengthy explanation by the Chief Executive of the CEF (Pty) Ltd of which the SFF is a subsidiary.

[68] To appreciate the extent to which the respondent did not deal with the issues in question I quote extensively from "**SB11**". The relevant portion reads thus:

> "*Last week the **M&G** revealed that Imvume was effectively an ANC front. The party promoted the company, as an oil purchaser, to the Iraqis in return for diplomatic support, and senior government officials travelled to Iraq with Imvume boss Sandi Majali in September 2001 to ask for oil. It appears that Majali was promised large oil allocations.*
>
> *Three months later the SFF issued a tender to buy Iraqi crude. Evidence, including extensive documentation collected by the **M&G**, shows that the tender process **was riddled with irregularities** – all of which favoured Imvume.*
>
> *The only party-pooper was Renosi Mokate, the then SFF chief executive. **She came under intense pressure after she disqualified Imvume for what she said was its failure to meet tender requirements**. Her decision was abruptly reversed.*
>
> *Among the irregularities were:*

- *Imvume initially quoted the highest in terms of the stipulated price measure, but bidders were allowed to change their bids twice, in violation of tender rules;*
- ***A key figure on the SFF adjudication panel, Riaz Jawoodeen, had a prior, undisclosed association with Imvume;***
- *Iraqi Basrah Light was specified in the tender documents, though it was known Saddam Hussein was demanding the payment of 'surcharges' – illegal kickbacks – for oil;*
- ***Factors that led to the disqualification of another empowerment bidder** – including a negative due diligence report – **appear to have been overlooked in Imvume's case.***

The Jawoodeen factor

*Central to the affair is former SFF board member Jawoodeen, who last year branded as 'a lie' **M&G** suggestions that the tender was tainted.*

Jawoodeen was part of the top-level government delegation that travelled with Majali to Iraq on September 11 2001 to ask for oil.

*Accounts, including from a former SFF director, suggest that Jawoodeen knew **the ANC, or an ANC trust, the Stalwarts Research Trust, had been secretly intended to benefit from the oil allocations through Imvume.** Three months later, when Imvume emerged as a bidder in the tender to*

supply Iraq oil, ***Jawoodeen*** *– far from recusing himself –* ***played a leading role on the tender evaluation panel****. A well-placed SFF source charged that while Jawoodeen was open about his own part in the mission to Iraq,* ***he never disclosed Majali's presence on that crucial trip****.*

Indeed, it was Jawoodeen who set the tender process in motion the day after he returned from Iraq on September 18*.*

SFF correspondence shows that on September 19 Jawoodeen briefed the SFF trading committee on the need to go out on tender for the Iraqi purchase – ***and that he helped draw up the tender specifications****, including that it be Iraqi Basra Light oil.*

Jawoodeen also knew that the Iraqis were ***demanding 'surcharges'*** *– in fact kickbacks, which* ***were illegal under the United Nations Oil for Food programme for Iraq*** *– when it sold oil. He allegedly cited this as the* ***reason a government-to-government deal was not an option and the oil had to be bought through a private company****.*

Said one SFF source: 'He said the Iraqis would need "favours" from the South African government in return [for an oil allocation] and therefore it could not work.'"

It is not clear what is meant in the last quoted paragraph. It seems to suggest that it would be embarrassing for a government to openly flout UN resolutions on the 0il for Food Programme for Iraq.

[69] Much more appears in "**SB11**". However, the portion I have cited is adequate for purposes of demonstrating the point I am making with regard to the respondent's failure to deal with most of the issues raised in "**SB11**", as reflected in the quotation. To do justice to the respondent in that regard, it is imperative that I quote verbatim most of what he says in his response. In paras 10.1-10.1.8 he says the following:

> "*10.1* ***The allegations***
>
> *In its 22 July edition, the* ***Mail and Guardian****, in the main, alleged that:*
>
> *10.1.1 The SFF issued a tender for the supply of 4 million barrels of Iraqi Basrah Light crude oil on 5 December 2001;*
>
> *10.1.2 Conditions of the tender included that offers could not be changed and that a US$ 1 million performance bond had to be submitted within 10 days of acceptance of the tender.*
>
> *10.1.3 Imvume was amongst the tenderers. Its offer was the most expensive;*

10.1.4 The Evaluation Committee requested further quotes from the bidders after the closing date for the submission of tenders;

10.1.5 Imvume was placed third in terms of its quote and the tender was awarded to Leokoane Oil Industries on 4 January 2002, subject to a positive due diligence report and the submission of a $1 million performance bond;

10.1.6 Leokoane failed to comply with the said conditions and was disqualified;

10.1.7 The tender was subsequently jointly awarded to World Wide Africa and Imvume, but World Wide withdrew;

10.1.8 On 23 January 2002, Imvume's attorneys furnished the SFF with a letter from a bank in London which undertook to issue the required performance bond;" **[pp169-170]**

[70] In paras 10.1.9 and 10.1.10 he deals with Dr Mokate's alleged disruptive role as already mentioned herein. He then proceeds from 10.1.11 as follows:

"*10.1.11 It appears from 'a partial draft' of a due diligence report that Imvume had certain shortcomings;*

10.1.12 *The contract between Imvume and the SFF was signed on 6 March 2003; and*

10.1.13 *Dr Mokate was later dismissed on charges of dereliction of duty and financial management involving a loss to the State of R70-million. (These charges did not relate to the matters discussed in this report.)*"

In 10.2, the respondent has his "*response by the Central Energy Fund*". He states that the Chief Executive 0fficer of CEF responded to his request and quotes from that response. The CEO states that CEF is "*a statutory company established to acquire, exploit, generate, manufacture, market and distribute any energy form and conduct research relating to the energy sector. The SFF's specific mandate is to procure and store crude oil as well as manage the strategic crude oil stocks for South Africa.*" - the SFF being a subsidiary of CEF. He points out that, in 1999, the South African Government took a strategic decision to relocate its strategic stocks from 0gies to Saldanha and gives the reasoning behind that. Ultimately, it was to "*ensure that the country had in storage crude oil stocks that are appropriate to its needs and are of known quality*".

[71] Having decided to sell and having sold the oil stocks from 0gies, it became necessary for the Government to replace such oil at Saldanha. A sub-committee

was established for that purpose and its tasks included deciding on the best method of purchasing strategic stock where identified, open tender being one of such methods. Part of the tasks of such committee was to "*undertake an analysis of what the appropriate crude oil types to keep as strategic stocks are*". The sub-committee "*concluded and recommended to the Board that the Nigerian Bonny Light and the Iraqi Basrah Light were the two suitable types based on two considerations*" which are mentioned in the Report. The sub-committee was also to "*design a comprehensive and fair tender process, including the appropriate process*".

[72] Having invited companies with an interest in supplying crude oil to submit their profiles for inclusion in its database of suppliers, SFF issued a tender, on 5 December 2001, calling for proposals for the supply of Iraqi Basrah Light crude oil "*chosen for its quality and price*". With the anticipated delivery date being in January of February 2002, the closing date for tenders was 14 December 2001, a period which, as the applicants point out, was remarkably but I suppose unavoidably short. A special sub-committee which had been mandated to evaluate and rate the tender proposals on predetermined criteria - which included the price, BEE composition and capacity to deliver the service effectively - produced a short-list of bidders, Imvume coming out as only the third, as has previously been mentioned. As the respondent puts it, "*However, the other two parties failed to comply with the conditions of the tender and it was ultimately awarded to Imvume*". The applicants are highly suspicious of the two companies

especially the Worldwide Africa Investment Holdings ("WAIH"), which had jointly been awarded the tender with Imvume. In para 101 of their founding affidavit, p39, the applicants said the following in that regard:

> "*101. For reasons unknown, but apparently after an interaction with Jawoodeen, WAIH withdrew its bid and Imvume, in the end, supplied all four million barrels of Basrah Light to the SFF.*"

[73] The respondent, correctly in my view, points out that the applicants' averment or allegation in this regard is not based on facts. In other words, the applicants have not produced any evidence on the basis whereof the Court can infer that Mr Jawoodeen interacted in the manner suggested. That did not, however, in my view, exonerate the respondent from conducting a full investigation, which took into account, *inter alia,* the allegations contained in "**SB11**". Mr Jawoodeen's position in SFF is common cause. That he went to Iraq in the company of, amongst others, Mr Majali, is also not in dispute. In the context of such serious allegations about the purpose for which Imvume, of which Mr Majali was in charge, was founded, viz to siphon funds from PetroSA to the ANC, it was imperative that Mr Jawoodeen be interviewed by the respondent. For that matter, all others mentioned in the IIC reports and the *Mail & Guardian* annexures to the applicants' affidavits, should similarly have been interviewed. That includes those who allegedly went to Iraq with Mr Majali, those who attended meetings with him in South Africa and those who were allegedly present at any of the

places mentioned in the annexures when he either declared himself a representative of both the ANC and the Government or simply of the ANC.

[74] It will be remembered that, according to the IIC Report on Programme Manipulation:

> *"In September 2001, as Chairperson of both the SAIFA [the South African-Iraq Friendship Association] and the South African Business Council for Economic Transformation ('SABCETT'), Mr Majali* ***led a South African delegation to Baghdad****, which included officials from the South African Strategic Fuel Fund Association and South African Department of Minerals and Energy. The delegation was involved in discussions on strengthening ties between the ANC and the Iraq Friendship Association and Arab Ba'ath Socialist Party ... as well as building better oil trade relationships* ***between the two countries****. Mr Majali undertook the trip* ***as a recognised representative of the ANC****. In a letter to Iraq Friendship Association, Mr Motlanthe stated that Mr Majali's position as Chairperson of SAIFA had the ANC's 'full approval and blessing'. He also confirmed the ANC's approval of Mr Majali 'as a designated person to lead the implementation processes arising out of our economic development programmes.'"* **[p347(f)]**

Mr Aziz Pahad, the then Deputy Foreign Minister, who, according to the IIC Report, *"led a delegation of 30 South African companies with interests in oil,*

electricity, and other sectors to Iraq", should also have been interviewed. From the South African Government Information, "*The Official Visit To South Africa By The Deputy Prime Minister Of Iraq*", cited in footnote 199 of the ICC Report at p347(a), one purpose of the visit was "*to expose South African businesses with already established interests in the so-called 'oil-for-food' programme with Iraq to the processes involved in winning such UN-approved contracts*".

[75] Against this, it will be recalled that it is alleged, in the Report on Programme Manipulation, that:

> "*During [Mr Aziz, the Iraqi Prime Minister's] July 2002 official visit ... to South Africa, Mr Aziz attended a farewell dinner* ***hosted by the ANC*** *with members of South Africa-Iraq Friendship Association ... and the business community at the Cabanga Conference Center,* ***which was funded by Imvume****, which ... had been purchasing oil from Iraq under the Programme.*"

[76] In the respondent's answering affidavit, dealing with "***THE ALLEGED IMPROPER INVOLVEMENT OF SENIOR OFFICIALS OF THE DEPARTMENT OF MINERALS AND ENERGY IN THE ADVANCEMENT OF BUSINESS RELATIONS BETWEEN IMVUME AND THE IRAQI GOVERNMENT***", he writes, in para 9.3, as though the only information he has by way of response was that which he obtained after the Director General of the

Department of Minerals and Energy, Adv S Nogxina, was interviewed. The paragraph reads as follows:

> "***9.3 The response by the Director General of Minerals and Energy.***
>
> *During the investigation, the Director General of the Department of Minerals and Energy, Adv S Nogxina, was provided with an opportunity to respond to the allegations referred to in this paragraph. From his reply it appeared that ...*"

and then he proceeds to state his summary of what he understands from the investigation. There is no suggestion there that he or his representative spoke to any other person concerning this complaint.

[77] According to Mr Nogxina, this was a perfectly normal official visit by the Minister of Minerals and Energy (subsequently to become the Deputy President) to Iraq, from 7 to 10 April 2001. He writes thus in that regard:

> "*During the bilateral discussions with senior Government officials emphasis was placed on the need to enhance the economic relations between South Africa and Iraq. In this context detailed deliberations were held between representatives of Eskom and the Iraq Electricity Commission on the basis of the Minute of Understanding concluded in September 2000 in Pretoria. Discussions were also held on ways and means to improve the cooperation between South Africa and Iraq in the oil industry.*

There was agreement that our private sectors and parastatals are not exploiting the tremendous potential that exists to develop our bilateral economic relations.

The two sides welcomed the intended ***humanitarian flight*** *from South Africa to Iraq to deliver* ***humanitarian assistance*** *arranged by the civil society organiser under the umbrella of the Iraq Action Committee. It was agreed that the humanitarian flight to Iraq would take place in the middle of May 2001.*

The other important issue discussed by the two sides was the question of the suffering and damage to Iraq caused by international sanctions against Iraq. They deplored the deepening humanitarian crises resulting from these sanctions. Both sides agreed on the imperative of lifting of the sanctions to halt further destruction of the fabric of Iraq society. They called for the normalisation of the Middle East region and the resolution of all the problems associated with the Middle East."

In para 9.3.2 the following is stated by the respondent:

"*9.3.2 The 'humanitarian flight' referred to in the said media statement included a number of BEE companies that were approved by the United Nations (UN) in terms of its 'Iraq Oil for Food Programme';"*

[78] There is reference, in paras 9.3.3 and 9.3.4 to the former Minister of Public Enterprises, Mr J Radebe, leading a –

> *"follow-up humanitarian flight to Iraq, accompanied by the Deputy Minister of Foreign Affairs, government officials and a business delegation. The purpose of this visit was to provide assistance to the people of Iraq in the light of the catastrophic humanitarian situation that prevailed as a result of the imposition of sanctions and to explore trade relations under the UN Iraq Oil for Food Programme;"*

[79] I find the contents of para 9.3.4 of the Report somewhat confusing. The paragraph reads:

> *"9.3.4 It was against the background as set out above that he [Mr J Radebe] approached the Minister of Minerals and Energy to approve a visit to Iraq by himself, Mr A Nkuhlu (Director: Ministerial Services), and Mr T Mafoko (of the International Liaison section) for the period 10 to 14 September 2001. A copy of the memorandum submitted to the Minister [presumably of Minerals and Energy] on 7 September 2001 was provided with the Director General's* ***response to the said allegations.***" (Emphasis added.)

[80] It is not clear what "*allegations*" would have been in existence on 7 September 2001. The following sentence of that paragraph reads: "*From this document it appears that the request for the approval of the visit to Iraq was motivated as follows:*" What follows in the quotation from the "*document*" is a picture of a normal and innocent relationship between two countries. Included therein is reference to Eskom being involved in negotiations with the Iraq Electricity Commission "*over the rehabilitation and construction of a power station to the tune of US$ 500 million over two years*". Then the following is stated:

> "*There is room for expansion for more trade by South Africa* ***under the '0il for Food (UN) programme ... It is recommended that the right political atmosphere between Iraq and South Africa be created in order to win more business.***"

[81] In 9.3.5 to 9.3.10 the following is stated:

> "*9.3.5 One of the aims of the visit to Iraq was to explore the possibility of a government-to-government oil supply deal for South Africa's strategic oil stocks;*
>
> *9.3.6 The delegation included a representative of the SFF, the state institution charged with managing strategic oil stocks on behalf of the South African Government;*

9.3.7 Shortly before their departure, Mr Majali contacted his [presumably the Director-General's] office and indicated that he had learned from the Iraqi Embassy of the intended visit. Mr Majali explained that he represented a BEE and requested to join the delegation as he held the view that it would be helpful if the delegation could explain the South African Government's BEE policy to the Iraqi Government. He also indicated that he has had previous dealings with the Iraqi's.

9.3.8 As a result of the tense situation immediately following the 11 September 2001 terrorist attack in the United States of America, the South African delegation found it difficult to meet with Iraqi officials. However, Mr Majali managed to secure a meeting for the delegation with the Deputy Minister for Oil through the so-called South African Friendship Association;

9.3.9 The intended meetings with the Electricity Commission to pursue the negotiations initiated by Eskom did not take place due to the aftermath of the events of 11 September 2001; and

9.3.10 It is normal practice for government officials undertaking official visits abroad to be accompanied by a business delegation to assist in the facilitation of trade negotiations."

[82] It appears that the respondent accepts all the explanations given, as quoted above. Of course, if that explanation is correct, it depicts an innocent visit by Mr Majali to Iraq in the company of the departmental officials. That view, however, stands in stark contrast to the negative image of South Africa, with regard to its relationship with Iraq in the light of the Oil-for-Food Programme, as contained in the IIC reports and the article by the Al-Mada ("**SB17**"). I have already stated that there is no indication that the respondent was aware of the IIC reports at the time of his investigation. He similarly may not have been aware of the Al-Mada article. He was, however, aware of all this information as at the time of his filing his opposing papers in the application. As already mentioned in this judgment, it is strange that, in spite of such knowledge, he continued to oppose the application. The respondent need not have disbelieved Mr Nogxina's account for him to seek more information from other sources, in the light of the IIC reports and the Al-Mada article.

[83] Apart from the information contained in the IIC reports and the "**SB17**", information in the respondent's possession, from the list of articles written by the applicants, as at the time of his investigations, was, in my view, enough to have caused him to make more investigations and not to simply accept innocent explanations such as that I have just referred to, concerning the "***alleged improper involvement of senior officials of the Department of Minerals and Energy in the***

advancement of business relations between Imvume and the Iraqi Government". He had read, or should have read, *inter alia*, the following:

1. In "**SB5**", of 20-26 May 2005 the following is stated:

   "***Mail & Guardian*** *investigation into covert party funding has revealed how R11-million of public money was diverted to African National Congress coffers ahead of the 2004 elections.*"

2. Reporting on the payment of R11-million by PetroSA to Imvume, in "**SB6**", dated 3-9 June 2005 the following is stated:

   (a) "*... the African National Congress has maintained that R11-million it received before last year's elections was an ordinary donation from a private company. But Imvume Management was no ordinary private company, judging by its chief executive's CV.*

   Documentation produced by another Imvume group company describes its boss, Sandi Majali, not only as the ANC secretary-general's 'economic advisor', but also places him close to party committees involved in fundraising and economic policymaking."

   (b) It is stated that Mr Majali's lawyer said the following about him:

"As a party member and from time to time ... he has provided advice to various structures within the ANC, including to the secretary general."

(c) *"In one of the ANC's first responses, the party's national spokesperson, Smuts Ngonyama, was quoted in the* ***Cape Times*** *as saying: 'It really has very little to do with the ANC because it's a business transaction between a company and PetroSA – that's all ...*

'The ANC only features in that a donation was given to the ANC – it's an issue that we believe is a pure business transaction.'"

He is reported to have gone on to say the following, in the **Business Day**:

"'We do not ask donors where their money comes from ... The business relationship between Imvume and PetroSA and other parties is their business, not ours.'"

If Mr Ngonyama said that, indeed, it would be a strange statement, bearing in mind that the ANC was the governing party. It could not be indifferent as to where its funds emanate from. He may, of course, have been inaccurately quoted or, if correctly quoted, had

been expressing a personal view. The respondent could not, on his part, been that indifferent and ought to have questioned even Mr Ngonyama himself about the PetroSA payment, in my view.

3. In "**SB7**" of 10-16 June 2005, the following is said of payments in relation to the Deputy President's brother and Dr Zola Skweyiya's wife's residence:

> "*The [two] ministers – Phumzile Mlambo-Ngcuka of Minerals and Energy and Zola Skweyiya of Social Development – regulate fields in which Majali's companies operated.*
>
> ...
>
> *Mlambo-Nguka's ministry is responsible for PetroSA, which awarded Imvume the condensate contract in October 2002 and made the controversial advance payment on that contract in December 2003.*"

It is common cause and it also emerges, though somewhat inelegantly, from "**SB7**", that Dr Zola Skweyiya's Social Development Department is involved with, *inter alia*, pension grants, nationally. According to "**SB7**", Mr Majali's business(es) was/were a significant beneficiary/beneficiaries from social grants. From the long excerpt that follows, there are suggestions of improper relationship between Dr Zola Skweyiya and Majali. The following appears in "**SB7**" in that regard:

*"Skweyiya this week contacted the **M&G** from France to answer questions about Imvume's R65 000 payment towards renovating his Waterkloof Ridge home.*

*He denied knowing of the payment and referred the **M&G** to his wife, Mazibuko-Skweyiya.*

Mazibuko-Skweyiya confirmed the payment by Majali, but said the money was a loan that was repaid last year. She said she and her husband had taken out a R800 000 bond to pay for the renovations. Majali had been in France at the time and had offered to help after overhearing her say she had problems paying the builder.

Skweyiya said he was aware that Majali 'was trying to recruit my wife' to work for Imvume once her ambassadorial term ended. But he denied that his wife's employment by Imvume would have constituted a knowing conflict of interest, as he was unaware at the time that Majalie's companies were involved in social grants distribution.

Mazibuko-Skweyiya confirmed that Majali offered her a job, but said: 'When I told Zola, he said you can't work with Sandi. That's why I turned it down.'

She was unclear why her husband disapproved of her working with Majali. Asked whether it was because Skweyiya knew Majali was

active in the field he regulated, she said she could not remember, or had not asked her husband for a reason.

Skweyiya also argued that there was no conflict of interest because social grants distribution was a provincial competency at the time, and contracts were not issued by his national department.

Skweyiya said it would be 'unfair reasoning' to suggest that Majali was trying to buy influence 'for the future'.

Serge Belamant, the chief executive of NetI UEPS Technologies, the holding company of Cash Paymaster Services (CPS), confirmed this week that Majali's companies, principally the Permit group, had partnered his firm.

CPS is the country's premier grants distribution group, with contracts from five provincial governments.

Belamant said that in several provinces, Majali's companies were contracted to 'distribute our message on the ground' to stakeholders from pensioners' committees to church groups and local politicians. That contract, worth up to R700 000 a month, was terminated last year.

*The **M&G** has seen documentary evidence that in late 2003 Majali was not only an agent for CPS, but was working on grandiose plans to build a financial services group under the Permit banner. Imvume, NetI 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 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.

Belamant remarked: 'We don't get a R1,7-billion contract without being pretty close to the minister nationally as well as to the [provincial ministers].'"

4. "**SB9**", dated 24-30 June 2005 says "***Mlambo-Ngcuka 'interfered' at PetroSA.***" I have already referred to it extensively earlier in the judgment.

5. I have similarly quoted from "**SB10**".

6. "**SB11**", dated 22-28 July 2005, was, in all likelihood not seen by the respondent at the time of his investigations. Judging from the extent to which he has made no reference to the annexures that he acknowledges having seen and, quite obviously, read, there is no reason to believe that he would have reacted differently from the contents of "**SB11**".

[84] The significance of these "**SB**" annexures is the fact that the allegations contained therein tally remarkably with the allegations contained in the IIC reports and the Al-Mada article. I have repeatedly referred to the respondent's failure to interview people mentioned in these articles. By way of example, I consider the contents of "**SB7**", which I find particularly damaging to Dr Zola Skweyiya's reputation and dignity, to have called for an interview with him. Quite apart from the damage that the allegations do to the country and its government, Dr Skweyiya, I would imagine, would be happy to have his name properly cleared, by allowing him to repeat these statements, even under oath if need be, before the respondent. I would think that Ms Skweyiya would equally well-come an interview, to enable her to state her version in her own words.

[85] In my view, regardless of the truth or otherwise of the contents of the IIC reports and the Al-Mada article, the contents of the "**SB**" articles lend credence to the negative version of the country and its government as allegedly held by the UN, concerning the alleged manipulation of the Oil-for-Food Programme by various countries, including South Africa. The fact that the respondent's Report was endorsed by the legislature, in the manner already described, does not, in my view, really remove the suspicion and stigma attached to South Africa. I have no knowledge of the circumstances under which the approval came about and the extent to which those concerned were aware of the details as set out in this judgment, most of which were before the respondent at the time of his investigation.

Complaints with regard to Dr Skweyiya concerning alleged improper relationship between him and Imvume

[86] I have already stated, in this judgment, that I am of the view that, regardless of the adequacy or otherwise of his investigation, the Public Protector did investigate this complaint. The only question remaining, therefore, is whether or not the investigation was adequate. From what I have said, with reference to the contents of, in particular, "**SB7**", it is clear that I am of the view that the investigation in this regard was inadequate. I need to point out that, in para 5.5.7.2 of his Report, the respondent says the following:

> "*5.5.7.2* *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.***"

[87] Relying on the judgment already referred to, in ***South African Association of Personal Injury Lawyers v Heath and Others***, the respondent repeated that the

money used by Imvume for payment to Hartcon Construction was not "*public money*". Consequently, he concluded that "*The suggestion of corruption therefore also falls outside of the jurisdiction of the Public Protector to investigate.*" [para 5.5.7.5, p145].

[88] In the light of, *inter alia*, the damning evidence I have alluded to in "**SB7**", I find it difficult to understand why the respondent says the following, in para 5.5.7.6:

> "*5.5.7.6 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 is clearly speculates in respect of future events that might or might not occur, which obviously cannot be investigated.*" (Emphasis – except underlining by the respondent - is added.)

It is not clear to me why in spite of the serious allegations contained in, *inter alia*, "**SB7**", the Minister had to be performing an "*official action or omission*" before the respondent could investigate the matter much more than he did. How could he arrive at the conclusion that the "*suggested corrupt intent*" is clearly speculative without deeper investigation?

[89] I agree with the submissions made on the applicants' behalf that the only way in which the respondent could be certain as to whether or not the allegations made, in this respect and in other respects, were valid was for him to investigate much

more deeply than he did. After all, the Public Protector has power, in terms of s.7(1)(a) of the PPA, "*on his or her own initiative ... to conduct a criminal investigation*", in terms of s.(4)(a) of the PPA, of, *inter alia*, "*any alleged abuse of power or other improper conduct by a person performing a public function*". Once there were allegations of the nature made against Dr Skweyiya, it was incumbent, upon the respondent, in terms of the provisions of the PPA, to, on his own initiative, conduct an investigation in respect of the allegations, even if the "*suggested corrupt intent purely speculate(d) in respect of future events that might or might not occur*", the respondent was, in my view, obliged to investigate now that the matter was before him.

The Law

[90] Although I have arrived at the conclusion that the respondent ought to have investigated the complaints that he did not investigate and to have investigated more fully the ones he did investigate, that does not automatically render his Report liable to be set aside. The Court may not set aside the respondent's decisions simply because it thinks they ought to have been otherwise. It can do so only if it, in law, has the power to do so. Both counsel addressed the Court comprehensively and ably on a number of applicable legal principles relevant in a matter of this nature. In the nature and the obvious length of this judgment, I cannot do more justice to counsel than to ensure them that I thoroughly considered their respective submissions. These are on matters such as the question whether or not the respondent's conduct is an administrative action, the

question of the applicability or otherwise of the provisions of PAJA, the question as to whether the respondent was under an obligation to treat the applicants fairly, the question of reasonableness when an official such as the respondent conducts an investigation and the role played by the principle of legality in such matters. For reasons that will be apparent later, I do not propose discussing all this aspects, I shall deal, primarily, with the principle of legality and, incidentally, reasonableness.

Principle of legality

[91] In para 19.1 of their founding affidavit the applicants make the following allegation:

> "*19.1 The respondent* ***misconstrued the nature of his powers*** *under the Public Protector Act read with the Constitution. This amounts to a material error of law under PAJA and breaches the constitutional principle of legality.*" **[p10]**

Quite clearly the applicants, in that paragraph, linked the principle of legality to PAJA. Although, in para 214 of the founding affidavit, the applicants, discussing the respondent's attack on the applicants' credibility, do not in so many words refer to the principle of legality, they allege that the respondent is "*endowed ... with wide powers to statutorily compel the disclosure of information*". In the applicants' heads of argument, Mr Budlender, directly or indirectly, repeatedly refers to the principle of legality. Referring to the respondent's conclusion that

the money paid by Imvume to the ANC, out of the R15 million received from PetroSA, were no longer public money at the time of such payment by Imvume, the applicants submit, in para 107 of the founding affidavit, that "*the respondent erred in this regard, and that he was in fact empowered to investigate the ANC Payment Complaint.*" The question is then raised as to whether, if it is assumed that the Imvume was, in fact, an ANC front company, the Public Protector would not have had jurisdiction to enquire into the matter, which question is answered on the basis that "*it will be indisputable*" that he would have such jurisdiction in terms of s.6(4)(a)(iv) and s.6(5)(a) and (c) of the PPA (paras 109-110, pp41-42). Then, in para 111, the following is stated:

> "*111. Of course, the question is whether those were the facts. The only way to determine that is to enquire into them. However, the Public Protector disabled himself from exercising his functions, by refusing to investigate the matter. His very starting-point – that this was not 'public money' – was a conclusion he could only have reached after investigating the facts.*"

[92] The respondent's submissions with regard to the principle of legality, as contained in his first answering affidavit, is somewhat contradictory in my view. In para 8 (p721-722) the respondent states the following in this regard:

> "*8. I have been advised that although the respondent exercises public power which is subject to control by this Court, the findings, conclusions and points of view described in the report* ***may only be***

> ***reviewed*** *if it is shown that they constitute* ***'administrative action'*** *which materially and adversely affect the rights and legitimate expectations of the applicants, and do so* ***in a manner which is not procedurally fair.***" (Emphasis added.)

This submission seems to be repeated in paras 112-113 of the respondent's heads of argument (pp60-61), which read:

> "*We do not accept that the applicants are entitled to rely on the principle of legality, in support of the other ground of review, pleaded by them, with reference to the principle of legality. We draw attention, in this regard, to the following passages of the judgment of Moseneke DCJ, in the* ***Masethla judgment [Billy Lesedi Masethla v President of the Republic of South Africa & Another*** *not yet reported case CCT 01/07 of 3 October 2007 (CC), since reported under 2008(1) SA 566 (CC)] –*
>
> > *'It is clear that the Constitution and the legislative scheme give the President a special power to appoint and that it will be only reviewable on narrow grounds and constitutes executive action and not administrative action ... It would not [be] appropriate to constrain the executive power to requirement of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred especially upon the President for the effective business of government, and in this particular case, for the effective pursuit of*

national security. In ***Premier, Mpumalanga****, this Court had occasion to express itself on whether to impose a requirement of procedural fairness, in the following terms-*

"In determining what constitutes procedural fairness in a given case, a Court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.'"

113. Whilst it is so that the Constitutional Court, in the ***Masethla case****, was concerned with the exercise of* ***executive power****, which did not constitute administrative action, we submit that the principles captured in the above quoted passage applies, with equal force, to the exercise of other constitutional power which does not constitute executive power. That principle will apply therefore to the exercise of the powers vested upon the respondent, in terms of section 182 of the Constitution."*

[93] What the respondent submits in paras 112 and 113 is not clear to me. Section 182 of the Constitution is the enabling section from which the Public Protector draws

his/her powers of investigation and receives duties in that regard. In subsection (2), the Constitution provides that the Public Protector "*has the additional powers and functions prescribed by national legislation,*" in this case the PPA that was subsequently enacted. Nothing in s.182 of the Constitution has a bearing on the *dictum* by MOSENEKE, DCJ in *Masethla*, in my view.

[94] In para 20.1 of his answering affidavit, the respondent's understanding of what he was required to investigate is clearly set out. He responds, in that paragraph, to the applicants' allegations in para 12. In that paragraph the applicants state:

> "*12. The Report arose from a number of articles published in the* ***Mail & Guardian*** *relating to what has become known as 'Oilgate'. Broadly speaking, these articles raised allegations regarding*"

to a number of issues outlined in the remaining portion of the section. Those were the matters that were supposed to be investigated and reported on by the respondent. The respondent makes it clear that he did not consider himself obliged or even entitled to investigate the issues raised in the *Mail & Guardian* articles. As already stated, earlier in this judgment, the respondent made it clear, in paras 20.1 to 20.4, that he confined his investigation to what is contained in the complaints by Messrs Spies and Leon, annexures "AA5" and "AA6", respectively. He says, in 20.3 and 20.4:

> *20.3 ... The report resulted from the investigation into complaints referred to in annexures 'AA5' and 'AA6'.*

> *20.4* ***The respondent was not required*** *and did not therefore investigate the widespread allegations of impropriety contained in the articles published by the first applicant, in* ***[sic]*** *which they attribute to functionaries of a foreign state, and private commercial entities and persons."* (Emphasis added.)

[95] Evidently, the respondent regarded himself as being required to merely react to that which is pertinently raised by the applicants in annexures "AA5" and "AA6", the complaints by Messrs Spies and Leon, respectively. However, those complaints were said to be based on articles written in the *Mail & Guardian* which, as I have already stated earlier in the judgment, the respondent did read. It seems, however, that the respondent did not consider it his business to investigate issues arising from these annexures – including, for instance, the damaging contents of "**SB7**" – as long as they did not appear to him to be pertinently part of annexures "AA5" and "AA6". That is notwithstanding the respondent's acknowledgement of the fact that he is entitled, in law, to initiate investigations. In this regard, it should be borne in mind that s.182(1)(a) authorises the Public Protector "*(a) to investigate any conduct in the 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*" (emphasis added). The significance of the word "*suspected*" lies, in my view, in the fact that the Public Protector does not have to rely on actual facts proven and that he may make an investigation based on mere suspicion, whether his own or that of

another. The articles that were before him – certainly before he filed his answering affidavit(s) - contained, in my view, enough to have caused him to be at least suspicious that there was conduct of a nature that called for investigation, where he had conducted none or much deeper investigation, where he did conduct an investigation. After all, the PPA empowered him to institute an investigation out of his own initiative. As I have already stated the Public Protector is not expected to confine himself to the proverbial four letters of the complaint or complaints placed before him or her.

[96] The respondent evidently changed his stance in paras 107-109 of his heads of argument. Before reading those, however, I should allude to what precedes them. In para 287 of their founding affidavit, the applicants state the basis on which the Report may be set aside. In subparas 2.7.1 – 2.7.4 the grounds are related to PAJA. Subpara 287.5 reads:

> "*the Report contravenes section 182(1)(a) [of the Constitution], which requires a proper investigation by the respondent;*"

Subpara 287.6 reads:

> "*287.6 it contravenes the constitutional principle of legality embodied in the rule of law in section 1(c) of the Constitution in that it is irrational.*"

The respondent clearly adopts the view that the first five grounds, in subparas 287.1-287.5, are different from the ground in subpara 287.6. He is not sure whether the latter is part of the first five or an alternative ground thereto.

[97] In paras 107-109 (pp58-59), the following is stated:

> "*107. Whatever the precise status of the allegation made in paragraph 287.6 of the founding affidavit may be, it is clear that it constitutes a conclusion made in support of a specific ground of review, pleaded by the respondent, namely that* ***there was no proper investigation done by the respondent.***
>
> *108. In the first answering affidavit, the respondent accepts that the exercise of public power by him is subject to control by this Court,* ***even if it did not constitute an administrative action.*** *[From what has already been stated earlier,, it is evident that the respondent is making a mistake by relying on para 8 of his answering affidavit as supporting this submission.] We submit that* ***the principle of legality*** *is one of the means by which this Court will be entitled to exercise control on the exercise of public power by the respondent. This is the scheme of control by Courts on the exercise of public power,* ***which does not amount to administrative action.*** *[Reliance for this submission is on* ***President of the Republic of***

South Africa & 0thers v South African Rugby Football Union & 0thers 2000 1 SA 1 (C).]

109. The judgments of the Constitutional Court have now established that public powers conferred upon public functionaries must be exercised lawfully, rationally and in a manner consistent with the Constitution. [Reference is to the ***Masethla*** *judgment, para [78].]* ***We accept, in these proceedings, that the principle of legality will apply to the question whether the respondent properly construed the powers vested upon him when he decided not to investigate aspects of the complaints that were submitted to him****. In other words,* ***if he was mistaken in the construction of his statutory mandate, by excluding from investigation****, aspects of the complaints submitted to him,* ***that in itself would be sufficient to justify the setting aside of his decision*** *not to investigate the aspects of the complaints concerned, based on the principle of legality."* (Emphasis added.)

[98] That change of stance by the respondent was confirmed during submissions by Mr Maleka. 0n p323 (vol 4) the following submission was made by Mr Maleka:

"*MR MALEKA: Now the point we are making on page 34 up to 48 is quite a simple point and that is (1) the public protector measured* ***his own understanding of his powers*** *and then (2) concluded that he did not have*

jurisdiction to investigate 3 complaints. He may be wrong or right. ***If he is wrong*** *all that it means is that* ***his decision ought to be reviewed and it must be set aside*** *on the basis that* ***he misunderstood the nature of the mandate vested upon him.*** *We agree with our learned friends that for you to set aside that decisions* ***[sic] does not depend upon whether the public protector carried out an administrative action*** *on their [sic] part. You have the power to set aside even if his decision does not constitute power simply because [on] the principle of legality which we all agree,* ***that will be the basis upon which you set aside the decision.***

So we accept that if the respondent misconstrued the nature of his power(s) you have every right to set aside his decision."

[99] My decision not to discuss the question of the application of PAJA and all that go with it, in this judgment, is based, primarily, on the concession made by and on behalf of the respondent, in the manner demonstrated, with regard to the principle of legality – a concern well made, in my view. Both parties rely on **Masethla** with Mr Maleka, probably before he applied his mind to the need to concede, submitting that it is not authority in support of the principle of legality on the facts of this case. Although he did not say so in so many words, it is evident that Mr Maleka now concedes that **Masethla** supports the applicants' submission with regard to the principle of legality. As the respondent himself has conceded, all that the applicants require this Court to do is to find that the respondent

misconstrued his powers and duties and that, consequently, he constrained himself unduly and did not investigate where he should have done so or under-investigated what he did investigate.

[100] Since INNES, ACJ's decision in **Shidiack v Union Government (Minister of the Interior) 1912 AD 642**, at 651 it had been accepted law that:

> "*where a matter is left to the discretion or the determination of a public officer, and where his discretion has been* ***bona fide*** *exercised or his judgment* ***bona fide*** *expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own.*"

In **Pharmaceutical Manufacturers Association of SA & Another: In re: Ex parte President of the Republic of South Africa and 0thers 2000(2) SA 674 (CC)** at paras [83] to [86], CHASKALSON, P, as he then was, dealt at length with this topic as follows:

> "*[83] To the extent that* ***Shidiack*** *requires public officials to exercise their powers in good faith and in accordance with the other requirements mentioned by Innes ACJ, it is consistent with the foundational principle of the rule of law enshrined in our*

Constitution. The Constitution, however, requires more; it places further significant constraints upon the exercise of public power through the Bill of Rights and the founding principle enshrining the rule of law.

[84] In ***S v Makwanyane*** *[1995 (3) SA 391 (CC)] Ackermann J characterised the new constitutional order in the following terms:*

'We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.'

Similarly, in ***Prinsloo v Van der Linde and Another [1997(3) SA 1012 (CC)]*** *this Court held that when Parliament enacts legislation that differentiates between groups or individuals it is required to act in a rational manner:*

'In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" ***that serve no legitimate governmental purpose****, for that would be inconsistent*

with the rule of law and the fundamental premises of the constitutional State.'

[85] It is a requirement of the rule of law that ***the exercise of public power*** *by the Executive* ***and other functionaries*** *should not be arbitrary. Decisions must* ***be rationally related to the purpose for which the power was given****, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and* ***other functionaries*** *must, at least, comply with this requirement. If it does not, if falls short of the standards demanded by our Constitution for such action.*

[86] The question whether a decision is ***rationally related to the purpose for which the power was given*** *calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took* ***it mistakenly and in good faith*** *believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."* (Emphasis added.)

Both counsel before me cited **Pharmaceutical Manufacturers** as authority for the principle of legality and agreed on its interpretation as outlined above.

[101] All this does not mean that the principle of judicial deference is abandoned. In other words, Courts may not usurp the function of the legislature or the executive. In **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd 2003(6) SA 407 (SCA)** the following is stated [at 409J-410A]:

> "*Judicial deference was particularly appropriate where the subject-matter of an administrative action was very technical or of a kind in which a Court had no particular proficiency.*"

In my view, those remarks should apply also in a case where one is not dealing with administrative action but simply the exercise of a power by a public functionary such as the respondent in the present case. A combination of the principle of legality and judicial deference ensures that a Court can, without usurping the powers or functions of a public official, determine whether or not the conduct of such public official is rational in accordance with the powers and duties conferred upon him or her by statute. Bearing these two principles in mind – the principle of legality and judicial deference – I have come to the conclusion that the respondent acted irrationally in respect of (a) complaints that he did not investigate because he considered them to be beyond his jurisdiction and (b) complaints which he investigated with the aid of inadequate evidence, i.e., without obtaining further relevant evidence in the respects I have discussed in this judgment.

[102] In summary, on the question of the respondent's omissions, I refer to the applicants' list of such omissions, which reads thus:

"*The respondent:*

210.1 did not direct any person to submit an affidavit or affirmed declaration,

210.2 did not summon any person to produce documents;

210.3 did not summon any person to give evidence;

210.4 did not seize any documents;

210.5 ***did not make any enquiry of the*** **Mail & Guardian,** ***which had published the reports which gave rise to the complaints;***

210.6 did not make any enquiry of Imvume;

210.7 did not make any enquiry of [Mr] Majali;

210.8 did not make any enquiry of any representative of the ANC;

210.9 did not make any enquiry of [Dr] Mokate, the former CEO of the SFF, who had refused to award the tender to Imvume;

210.10 did not make any enquiry of any staff of the CEF, including those identified in the documents as having had a role in the matter;

210.11 did not make any enquiry of any staff of the DME, including those identified in the documents as having had a role in the matter;

210.12 did not make any enquiry of any staff of PetroSA, including those identified in the documents as having had a role in the matter;

210.13 did not make any enquiry of [Dr] Skweyiya;

210.14 did not make any enquiry of Hartkon;

210.15 did not make any enquiry of Uluntu;

210.16 did not make any enquiry of [Deputy President] Mlambo;

210.17 did not make any enquiry of the persons who were publicly reported as stating that Imvume was not a joint venture partner of Uluntu in the St Lucia project;

210.18 ***did not investigate PetroSA's use of [Mr] Mkhabela, who represented Imvume at the time of the advance, to pursue the recovery of the advance from Imvume;*** " (Emphasis added.)

[103] Whilst I agree with the applicants' list of the respondent's omissions, I should point out that, in respect of item 210.5, the applicants are bitterly aggrieved by what they consider to be "*defamatory and highly damaging [criticism and] findings against the* ***Mail & Guardian*** *newspaper, and by necessary implication, its publisher (the first applicant), its editor (the second applicant), and the two journalists who were in the main responsible for the reporting on the Oilgate saga (the third and fourth applicants)*". [Para 72 of the applicants' heads of argument, read with paras 201-206 of their founding affidavit.] In para 205 of the founding affidavit, the applicants state the following:

"*205.* ***The damning nub of the respondent's findings*** *in relation to the* ***Mail & Guardian*** *were reiterated and emphasised in the media statement of the respondent on the release of the Report (annexure* ***'SB60'****),* ..." (Emphasis added.)

[104] As pointed out, earlier in the judgment, the applicants have since abandoned the alleged defamatory aspect of the criticism, correctly so in my view. Consequently, I do not share the view expressed by the applicants in item 210.5 above. I also do not think that it would have been appropriate for the respondent to investigate the item in 210.18. It seems to me a matter more appropriately left to the Law Society of South Africa, as it relates more to the conduct of an attorney than that of the respondent. Ideally, it would have been better if the respondent had used the services of another firm of attorneys rather than one already used by Imvume. The applicants' submissions in paras 208 to 210 of their founding affidavit are, however, correct, in my view. They read:

> "*208. It is inconceivable that the respondent was able to make findings relating to the veracity of the factual allegations contained in the articles, given the fact that the respondent did not investigate the payments made by Imvume to the ANC, Uluntu and Hartkon and that he did not investigate the relationship between Imvume and the ANC as well as the involvement of the ANC in Majali's business negotiations with the Government of Iraq ...*
>
> *209. Without investigating these aspects, it is impossible to assess the veracity of the central allegations made in the articles. ...*
>
> *210. Furthermore, the respondent was not justified in finding that much of what was stated in the Articles was factually incorrect in*

circumstances in which the Report does not identify a single instance of a factual error in the Articles."

[105] In agreeing with the applicants' criticism of the Report, I need to emphasise that I make no finding as to the correctness of the articles as well as the contents of the UN's IIC's reports and the Al-Mada article. I have no basis for making such a finding neither have I been asked to do so. It is conceivable that the interventions by Cabinet Ministers and others were genuine innocent interventions by the SA President, Government Departments and Cabinet Ministers involved with Iraq. They could yet be part of the alleged manipulation of the OFF for reasons other than an honest endeavour to assist Iraqi citizens who were unintended victims of the international sanctions, whatever justification there was for the sanctions. Al-Mada, the Security Council and the applicants are of the view that these were mischievous interventions. Clearly the respondent could have helped unravel this situation and rescue Mr Mbeki, the Cabinet Ministers involved and, therefore, the country, if their involvement was innocent. The ANC would certainly benefit as the ruling party, if the trips concerned were innocent. Similarly, the respondent had no basis, in my view, for making credibility findings in respect of the contents of the articles.

[106] Whilst on this aspect, I should mention that I find it odd that the respondent, when dealing with "**THE ALLEGED IMPROPER INVOLVEMENT OF SENIOR OFFICIALS OF THE DEPARTMENT OF MINERALS AND ENERGY IN**

THE ADVANCEMENT OF BUSINESS RELATIONS BETWEEN IMVUME AND THE IRAQI GOVERNMENT", chose to rely on the "*South Africa Yearbook*" and "*Harmony and Discord in South African Foreign Policy*", by Tim Hughes, *et al*, instead of obtaining evidence from relevant individuals, including officials of the Department. The allegation that South Africa is part of a group of dishonourable countries that are involved in the manipulation of the Oil-for-Food Programme, with the use of improper stratagems, is damning to the otherwise high esteem with which South Africa is generally known to be held in the world. The respondent, as the Public Protector, is duty-bound to protect the country's image, including its Government, Cabinet Ministers and senior officials of the various departments implicated. To the extent that the ANC is a party from which almost all the Cabinet Ministers originated, including the then Minister of Minerals & Energy (Mrs Mlambo-Ngcuka) and the Minister of Social Development (Dr Skweyiya), makes it essential, in my view, in the public interest, for the respondent to clear its name, if it is improperly accused of underhand practices. I would be most surprised if the ANC thought otherwise in this regard.

[107] The respondent's omissions notwithstanding, I am unable to make a finding, as is contended by the applicants, that the respondent's inadequacy of investigation is due to the fact that he deliberately wanted to shield the ANC. In the absence of direct evidence to that effect, I am constrained to approach the respondent's conduct when dealing with the complaints on the basis of the integrity that he and

his office possess, in the manner I have already alluded to. In any event, it is not necessary for the Court to determine that aspect in order for it to determine whether or not the respondent's findings and conclusions, as set out in his Report, should be set aside. It should always be borne in mind that the Report was prepared by Mr Fourie, the deponent to the respondent's affidavits, as lawfully instructed by the respondent to conduct the investigation on behalf of the Office of the Public Protector. A finding that the respondent is a crony of the ANC would, in my view, entail a necessary finding that Mr Fourie is also a crony of the ANC or the respondent's puppet. Neither the applicants nor Mr Budlender submitted that Mr Fourie is a crony of the ANC or the respondent's puppet. In saying that the investigation was conducted by Mr Fourie, I am not unmindful of the fact that, according to him as deponent, the respondent was constantly in touch with him during the course of the investigation and that he read the Report and endorsed its accuracy.

[108] I must emphasise that, to arrive at my decision, I considered the applicants' reliance on the constitutional principle of legality. In other words, I have not determined the question whether or not the applicants are entitled to bring the application on the basis of the provisions of the Promotion of Administrative Justice Act ("PAJA"). I have not decided the question whether or not the respondent's conduct, in investigating the complaints and making his Report, amounts to an administrative action as defined in PAJA. I have reached the decision on the basis that the respondent's conduct does not pass the test of the

constitutional principle of legality. (*New National Party of South Africa v Government of the Republic of South Africa* 1999 3 SA 191 (CC), at para [106].) I have also taken into account the following *dictum* by CHASKALSON, P (as he then was) in *Ferreira v Levin NO & Others 1996 1 SA 984 (CC)* at para [165], which reads:

> "*... I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather* ***adopt a broad approach to standing****. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.*"

[108(a)] In doing so, however, I am conscious that such "broad approach" cannot and does not, in my view, amount to a *carte blanche* approach to the question of standing in which a party need not give a basis for bringing an application, i.e., establish its standing. As I have stated, I considered the fact that the applicants were unhappy with the manner in which the respondent dealt with their complaints, which, it is common cause, they were entitled to place before the respondent.

[108(b)] Having arrived at the conclusion that the applicants have standing to bring this application in their own interest, I found it unnecessary to determine whether or not they also have standing to bring it in public interest, although I am inclined to

think that they were entitled to bring the application on that basis as well. What is important, however, in my view, is that, once the applicants are entitled to bring this application in their own interest, as I have found, the Court is entitled and duty-bound to consider the public interest when dealing with the facts of the case, as I have done when I pointed out the various public groups that have an interest in a proper investigation of the complaints.

[109] As already pointed out earlier in the judgment, the respondent's appreciation of "*the ambit of the statutory complaints*" was that "*he was not required to investigate widespread allegations of impropriety that were contained in all of the articles published by the first applicant, on the so-called Oilgate scandal*" (para 20 of the respondent's heads of argument, read with paras 20.4-20.5 of his answering affidavit.) That, in my view, has to be the basis on which his conduct during the investigation should be understood, even in instances where his attitude borders, in my view, on naivety. He also believed that those aspects that he regarded as being "*beyond his competence [ought to] be investigated by the commission of enquiry appointed by the president*" (the Donen Commission), whose "*terms of reference*" are contained in annexure "AA7".

The Donen Commission

[110] It is quite evident that the then President of the Republic of South Africa, Mr Mbeki, was disturbed by the allegations that the Republic of South Africa was involved in the manipulation of the Oil-for-Food Programme, in the manner

alleged in, *inter alia*, the IIC reports, which, it must safely be assumed, he was aware of. It is for that reason, in my view, that he appointed the Donen Commission.

[110(a)] The Donen Commission was established on 17 February 2006, almost seven months after the respondent had finalised and published his Report. That may be an indication that President Mbeki was not at ease to rely on the respondent's Report in defence of his and the country's image. I found both counsel's knowledge of the background for the creation of that Commission and what its real role was inadequate. Its terms of reference read as follows:

> "*The President has, in terms of section 84(2)(f) of the Constitution of the Republic of South Africa of 1996, appointed a Commission of Inquiry to conduct an investigation into the alleged illicit activities of certain South African companies or individuals relating to the United Nations Oil-For-Food Programme in Iraq, with the terms of reference set out in the Schedule, and appoint Adv Michael Donen, S.C., as Chairperson, and Adv Khehla Chauke (of the Specialised Commercial Crime Unit of the National Prosecuting Authority) and Senior Superintendent Lucy Moleko (of the Serious Economic Crime Unit of the Commercial Crime Unit of the South African Police Services) as additional members of the said Commission.*"

[110(b)] If, as I find must be assumed, the President was aware of the adverse allegations

against the country, in the manner I have described in the background to this judgment – an assumption that is borne out by the terms of reference, to "*the United Nations Oil-For-Food Programme in Iraq*" – then the President must have realised that the respondent's Report did not cast any light on the alleged manipulation of the Programme.

[111] I raised the question with both counsel, during argument, as to whether the findings of the Donen Commission were not relevant to some of the aspects that I am required to make findings on in this matter. I also asked that I be informed as to, precisely, what transpired with regard to that Commission. Mr Budlender addressed me (as set out in detail on pp415-421 of the transcript of the proceedings during argument), with regard to "*the Donen Commission which engaged your lordship yesterday afternoon for some time*" (p415), *inter alia*, as follows:

> "*So M'Lord at paragraph 24 [of the applicants' heads of argument], we make the submission that it, therefore, follows that, in fact, there is no overlap at all between the activities of the Public Protector and the Donen Commission and that the Donen Commission is another red herring [which] [j]ust occupied your lordship's time unnecessarily.*"

[112] I do not know why Mr Budlender referred to "*another red herring*" in this context, bearing in mind that the issue was raised by the Court. Whatever he had in mind, this was not a red herring. From page 823 to page 827 of the papers,

being part of the mandate to the Donen Commission, in para 1 of the mandate, and pp828-829 of the papers, (which contain pp25 and 26 of the annexure attached to the terms of reference, headed "***OIL TRANSACTIONS: South African companies and individuals identified by the IIC as having participated in illicit activities relating to oil transactions***"), it is quite evident that Montega and Imvume, both of which are associated with Mr Majali, who is mentioned in respect of each of them specifically under the subheading '***Non-contractual beneficiaries (individuals)***", as "*Mr Sandi Majali*", were part of what the Commission was required to investigate. The mandate reads as follows, in para 1 (pp825-827):

> "***NOW THEREFORE,*** *in order to advise the Government of South Africa, on the appropriate action or steps to be taken relating to the alleged involvement of any South African company or individual in such alleged illicit activities and the adoption of any preventative measures to avoid any such future illicit activities:*
>
> *1. The Commission of Inquiry (hereinafter referred to as the Commission) shall conduct an investigation under the following terms of reference:*
>
> *(i) Having regard to the Constitution of the Republic of South Africa, other relevant legislation, International Law, South Africa's international law obligations deriving from UN*

Resolutions, the Commission shall investigate, report on and make recommendations regarding the following matters:

(a) Whether the alleged surcharges on oil sales or illicit payments in regard to purchases of humanitarian goods or any other illicit payments in respect of the Programme, or the offer to make such payments, referred to in the Report of the IIC and as identified and set out in the attached Annexure, were in fact paid or offered to be paid, by such identified South African companies or individuals;

(b) If so, whether any such conduct, as outlined in the Annexure, of any such South African company or person, falls within the jurisdiction of a South African court of law; and

(c) If so, whether any conduct, as outlined in the Annexure, of such company or person, amounts to the commission of-

(aa) any offence, which offence may be tried by a South African court of law and whether

there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution; or

(bb) any other illegal, illicit or irregular activity, which activity does not necessarily constitute an offence, but contravenes or violates any other South African law.

(d) In the case of the commission of any offence or illegal, illicit or irregular activity contemplated in paragraph 1(i)(c)(aa) or (bb) above, any proposed action or steps to be taken in respect of such offence, contravention or violation.

(e) Any further proposed actions or steps to be taken to prevent companies or persons falling under South African jurisdiction, from getting involved in future illegal, illicit or irregular international activities, for example, sanction-busting in respect of internationally imposed sanctions, including the enactment of legislative measures or the establishment of systems and mechanisms, to ensure

that such companies and persons do not, in future, contravene binding UN Resolutions.

(ii) As a first step in the investigation, all evidence and information obtained and assessed by the IIC, which relate to South African companies or individuals and which may assist in this investigation, must be accessed and analysed."

[113] The assumption earlier made in this judgment, that the President must have been aware of the allegations contained in the IIC reports, is, by now, confirmed as a fact. Montega and Imvume, as well as Mr Majali, are mentioned in both the IIC reports and the Al-Mada article, as well as in the articles by the *Mail & Guardian.*

[114] I do not appreciate how counsel concurred that what the Donen Commission was supposed to investigate is different from that which the respondent had earlier been requested to investigate. As I have stated, I am of the view that the President, notwithstanding the endorsement of the Report in Parliament, came to the conclusion that it did not assist in clearing the poor light in which South Africa was viewed internationally, with regard to the alleged manipulation of the Oil-for-Food Programme. Notwithstanding what the respondent says in para 25.1 of his answering affidavit, the Donen Commission was not in existence at the time of his investigation and production of the Report. The allegation in para 25.1 of the respondent's answering affidavit, which states that the aspects which "*were*

beyond [the respondent's] competence" would be investigated by the Donen Commission is made in an affidavit commissioned on 25 April 2006 and filed on the same date, more than two months after the appointment of the Commission, long after the respondent's investigation had been completed and his Report had been published. The respondent could, therefore, not have known, at the time of his dealing with the complaints, that some of the aspects in question would be dealt with by the Donen Commission.

[115] Be that as it may, the fact of the matter is that there is no indication as to what eventually happened to the Donen Commission. I must accept both counsel's report to me, after having made enquiries overnight at the Court's instance, as to the fate of the Donen Commission, that such information was not readily available, unless, of course, they both approached the inquiry on the basis that it was a red herring. Even if the Donen Commission had performed its task in terms of the mandate it got from the terms of reference, that still would not prevent the Court from making its finding as to whether or not the respondent's Report should be set aside. I have come to the conclusion that it should be set aside.

[116] The next question is with regard to the appropriate order to make. I am aware that there is authority to the effect that a Court may, in appropriate circumstances, not refer a matter back to the person or institution or body which had made the order which has been set aside, where the Court is of the view that the individual or body in question is unlikely to change his/her or its mind. I am of the view that

there is no evidence, direct or indirect, to suggest that the respondent or his successor-in-office will not do a proper investigation if the matter is remitted to his office for an appropriate investigation, taking into account the aspects mentioned in this judgment. I have considered the question as to whether Mr Mushwana would still be in office when this matter is returned to him. I do not, however, think that it makes a difference who the Public Protector is that reconsiders the complaints.

[117] In the circumstances I make the following order:

(1) The respondent's Report titled "*Report 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 allegedly related thereto*", dated 29 July 2005 ("the Report") is set aside;

(2) The respondent or his successor in title is ordered to investigate complaints that were not investigated, re-investigate all complaints that were investigated and write a report on the outcome of his/her investigation;

(3) The respondent or his successor must, when doing such investigation, take into account the findings of the Donen Commission, if any findings have been made by such Commission, and, to the extent that such findings are

consistent with his or her own findings, incorporate them into his or her own findings.

(4) The respondent is ordered to pay the applicants' costs.

J N M POSWA
JUDGE OF THE NORTH GAUTENG HIGH COURT

2263-2006

HEARD ON:
FOR THE APPLICANTS:
INSTRUCTED BY:
FOR THE RESPONDENT:
INSTRUCTED BY: