

**REPORT OF THE JUDICIAL COMMISSION OF INQUIRY
INTO ALLEGATIONS OF IMPROPRIETY AT THE
PUBLIC INVESTMENT CORPORATION**

SUBMITTED TO

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

**HIS EXCELLENCY PRESIDENT MATAMELA CYRIL
RAMAPHOSA**



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EXECUTIVE SUMMARY

INTRODUCTION

- 1 On 4 October 2018 the President of the Republic of South Africa, President Cyril Ramaphosa (the President), acting in terms of section 84(2)(f) of the Constitution of the Republic of South Africa, appointed a Commission of Inquiry (the Commission) into allegations of impropriety regarding the Public Investment Corporation (the PIC/ the Corporation). The appointment of the Commission was published in the *Government Gazette*, No. 41979 of 17 October 2018, under Proclamation No. 30 of 2018.
- 2 The PIC is a Financial Services Provider (FSP) in terms of the Financial Advisory and Intermediary Services Act, No 37 of 2002 (the FAIS Act)¹.
- 3 The PIC is an asset management company that manages assets for clients for a fee. As a company, it is subject to the provisions of the Companies Act 71 of 2008 (Companies Act) and it, being a state-owned company, is also subject to the provisions of the Public Finance Management Act, No 1 of 1999 (PFMA).
- 4 The assets managed by the PIC on behalf of its clients amounted to R2.08 trillion as of March 2018. Its mandate is to generate returns and to contribute to the developmental goals of South Africa.

¹ Section 4 of the FAIS Act provides that the main object of the Corporation is to be a financial services provider in terms of the FAIS Act.

- 5 In order for it to qualify as an FSP in terms of the FAIS Act, the PIC has to satisfy the Registrar of Financial Services Providers that it complies with the requirements for 'fit and proper financial services providers' in respect of:
- 5.1 personal character qualities of honesty and integrity;
 - 5.2 its competence and operational ability to fulfil the responsibilities imposed by the FAIS Act; and
 - 5.3 its financial soundness.
- 6 In addition, as a FSP, the PIC would have to satisfy the registrar that any 'key individual' in respect of it (PIC) complies with the requirements of honesty and integrity, as well as competence and operational ability, to the extent required, in order to fulfil the responsibilities imposed on key individuals by the FAIS Act.²

THE TERMS OF REFERENCE

- 7 The Commission's Terms of Reference (ToR), which are set out in the schedule to the Proclamation, and which, on 19 March 2019 was amended to include ToR 1.17, read as follows:

'1. The Commission must enquire into, make findings, report on and make recommendations on the following:

1.1 Whether any alleged impropriety regarding investment decisions by the PIC in media reports in 2017 and 2018 contravened any legislation, PIC policy or contractual obligations and resulted in any undue benefit for

² See section 8(1) of the FAIS Act. A 'key individual' is defined, in relation to an authorised financial services provider (licenced in terms of section 7 of the FAIS Act), or a representative, carrying on business as a corporate body, as 'any natural person responsible for managing or overseeing, either alone or together with other so responsible persons, the activities of the corporate body relating to the rendering of any financial service.'

any PIC director, or employee or any associate or family member of any PIC director or employee at the time;

1.2 *Whether any findings of impropriety following the investigation in terms of paragraph 1.1 resulted from ineffective governance and /or functioning by the PIC Board;*

1.3 *Whether any PIC director or employee used his or her position or privileges or confidential information for personal gain or to improperly benefit another person;*

1.4 *Whether any legislation or PIC policies concerning the reporting of alleged corrupt activities and the protection of whistle-blowers were not complied with in respect of any alleged impropriety referred to in paragraph 1.1;*

1.5 *Whether the approved minutes of the PIC Board regarding discussions of any alleged impropriety referred to in paragraph 1.1 are an accurate reflection of the discussions and the Board's resolution regarding the matters and whether the minutes were altered to unduly protect persons implicated and, if so, to make a finding on the person/s responsible for the alterations;*

1.6 *Whether the investigations into the leakage of information and the source of emails containing allegations against senior executives of the PIC in media reports in 2017 and 2018, while not thoroughly investigating the substance of these allegations, were justified;*

1.7 *Whether any employees of the PIC obtained access to emails and other information of the PIC, contrary to the internal policies of the PIC or legislation;*

1.8 *Whether any confidential information of the PIC was disclosed to third parties without the requisite authority or in accordance with the Protected Disclosures Act, 2000, and, if so, to advise whether such disclosure impacted negatively on the integrity and effective functioning of the PIC;*

1.9 *Whether the PIC has adequate measures in place to ensure that confidential information is not disclosed and, if not, to advise on measures that should be introduced;*

1.10 *Whether measures that the PIC has in place are adequate to ensure that investments do not unduly favour or discriminate against -*

1.10.1 *a domestic prominent influential person (as defined in section 1 of the Financial Intelligence Centre Act, 2001);*

1.10.2 *an immediate family member (as contemplated in section 21H(2) of the Financial Intelligence Centre Act, 2001) of a domestic prominent influential person; and*

1.10.3 *known close associates of a domestic prominent influential person;*

1.11 *Whether there are discriminatory practices with regard to remuneration and performance awards of PIC employee;*

1.12 *Whether any senior executive of the PIC victimised any PIC employees;*

1.13 *Whether mutual separation agreements concluded in 2017 and 2018 with senior executives of the PIC complied with internal policies of the PIC and whether pay-outs made for this purpose were prudent;*

1.14 *Whether the PIC followed due and proper process in 2017 and 2018 in the appointment of senior executive heads, and senior managers, whether on permanent or fixed- term contracts;*

1.15 *Whether the current governance and operating model of the PIC, including the composition of the Board, is the most effective and efficient model and, if not, to make recommendations on the most suitable governance and operational model for the PIC for the future;*

1.16 *Whether, considering its findings, it is necessary to make changes to the PIC Act, the PIC Memorandum of Incorporation in terms of the Companies Act, 2008 and the investment decision – making framework of the PIC, as well as the delegation of authority for the framework (if any) and, if so, to advise on the possible changes.'*

1.17 *Whether the PIC has given effect to its clients' mandates as required by the Financial Advisory and Intermediary Services Act, 2002 (Act no. 37 of 2002) and any applicable legislation.'*

8 The ToR further provide as follows in relation to the temporal scope of the enquiry:

' 2. The Commission must, in its enquiry for the purpose of its findings, report and recommendations, consider the period 1 January 2015 to 31 August 2018.

3. The commission must submit -

3.1. an interim report to the President by not later than 15 February 2019; and

3.2. a final report by not later than 15 April 2019.

4. *The commission may, if necessary, investigate and make findings and recommendations on, any other matter regarding the PIC, regardless of when it is alleged to have occurred, on condition that such other investigations, findings and recommendations do not cause any delay in the submission of the reports on the applicable dates referred to in paragraph 3.'*

9 To empower the Commission in its fact-finding function, the TOR further provided that:

'5. The Commission may request the advice or views of any organ of state or any other person or organisation that the Commission is of the opinion may be able assist.

6. *In order to -*

6.1 enable the Commission to conduct its work meaningfully and effectively; and

6.2 facilitate the gathering of evidence, by conferring on the Commission such powers as are necessary to secure the attendance of witnesses and to compel the production of documents and any other required information, including the power to enter and search premises, regulations must be made under the Commissions Act, 1947, which will apply to the Commission.'

THE PROCESS FOLLOWED BY THE COMMISSION

10 The hearings were held over a period of 63 days, from 21 January 2019 until 14 August 2019.

- 11 The Commission's hearings were widely publicised, which, together with the testimonies of particular witnesses given in public, we believe, encouraged a number of people, particularly employees of the PIC, to come forward to testify.
- 12 Where the legal team intended to present a witness to the Commission whose evidence would, or might, implicate another person, it was required in terms of Rule 3.3, through the Secretary of the Commission, to notify that person in writing within a reasonable time before the witness gave evidence. The legal team by and large complied with the provisions of this rule, but where a person was implicated whilst not having been notified beforehand, they would be informed after the fact and advised to lodge a statement or an affidavit in response should they so wish, or apply, in terms of regulation 9(3) of the Regulations or rule 3.3.6 of the Commission Rules, to cross-examine the witness concerned and to give evidence. Two witnesses who testified before the Commission were cross-examined under these provisions; leave having been obtained from the Commissioner.
- 13 77 (seventy-seven) witnesses gave oral testimony before the Commission over the 63 (sixty-three) days of hearings. The names of the persons who testified before the Commission are set out in an annexure to the Report.

THE STRUCTURE AND FUNCTIONING OF THE PIC

- 14 The structure and functioning of the PIC is set out here so that the Commission would be in a position to assess and explain whether any findings of impropriety could be located in structural deficits or organizational pathologies impeding the proper functioning of the PIC. As the testimony and explanation of the structure indicates, sound structures and operating procedures were in place but these cannot act as a complete check on the malfeasance of public officials.

- 15 In terms of section 8 of the PIC Act, the business of the PIC is controlled by a Board of directors (the Board) which, in terms of section 6, must be determined and appointed by the Minister, in consultation with Cabinet. The Minister is enjoined to appoint the members of the Board 'on the grounds of their knowledge and experience, with due regard to the FAIS Act, which, when considered collectively, should enable the Board to attain the objects of the corporation'³.

The Memorandum of Incorporation

- 16 There was some confusion during the testimony of Dr Matjila relating to the Memorandum of Incorporation (MOI) under which the PIC is currently operating. The Commissioners had been provided with a copy of a MOI that had been signed by the then Minister of Finance, Mr Pravin Gordhan (Mr Gordhan), on 26 April 2013 (2013 MOI). Clause 7.1.11 of that MOI provided that the Board '*shall, with prior approval of the Minister, appoint the nominees for chief investment officer (CIO), chief financial officer (CFO) and chief operations officer (COO) to those positions as employees, in accordance with applicable labour legislation*'. It was common cause that the PIC has been operating without a CIO and COO. Dr Matjila was appointed to the position of CEO in December 2014.
- 17 The evidence has revealed that on 24 March 2017, Minister Gordhan wrote to his deputy, Mr Mcebisi Jonas (Mr Jonas), in his capacity as chairman of the Board, advising that he (Minister Gordhan) had identified three sub-clauses in the 2013 MOI which needed to be amended, namely, sub-clauses 7.1.12, 7.3.1 and 7.3.6.
- 18 One of the proposed amendments (sub-clause 7.1.12) would make provision for the CEO and CFO becoming ex-officio directors of the Corporation. Minister Gordhan also requested that the PIC call a shareholders' meeting within two days

³ Section 6(3) of the FAIS Act.

of the date of his letter.⁴ However, on 29 March 2017, the Board, in addition to approving the Minister's proposed amendments, resolved to approve further amendments, including the deletion of sub-clause 7.1.11.⁵ The effect of the deletion would be the elimination of the positions of CIO⁶ and COO in the PIC.

- 19 At the shareholders meeting held on 29 March 2017, a special resolution was passed in terms of which '*the existing Memorandum of Incorporation of the Public Investment Corporation . . . is hereby amended*'. All the proposed amendments were accordingly approved and Minister Gordhan signed the amended version of the MOI on 30 March 2017 (amended MOI).⁷ The amended MOI was accepted and filed by the Commissioner of the Companies and Intellectual Property Commission (CIPC) on or about 19 April 2017.⁸
- 20 We are satisfied that the statutory procedures to amend the PIC's 2013 MOI were followed and that the amendments were, consequently, valid. It is, however, common cause that subsequent to Mr Gigaba succeeding Minister Gordhan as Minister of Finance in March 2017, he requested the Board, in a letter dated 19 April 2017, to not implement the amended MOI and that the 2013 MOI remain in existence until he had familiarised himself with the PIC. The attempted substitution of the amended MOI was not in accordance with statutory requirements and, on this basis, it was concluded that the PIC's current MOI is the amended MOI, which was signed by former Minister Gordhan on 30 March 2017 and accepted by CIPC on 19 April 2017.

⁴ A copy of the letter is annexure 'DD 30' of Dr Matjila's statement.

⁵ Extract from approved minutes of Board meeting held on 29 March 2017 attached as 'Appendix 3'.

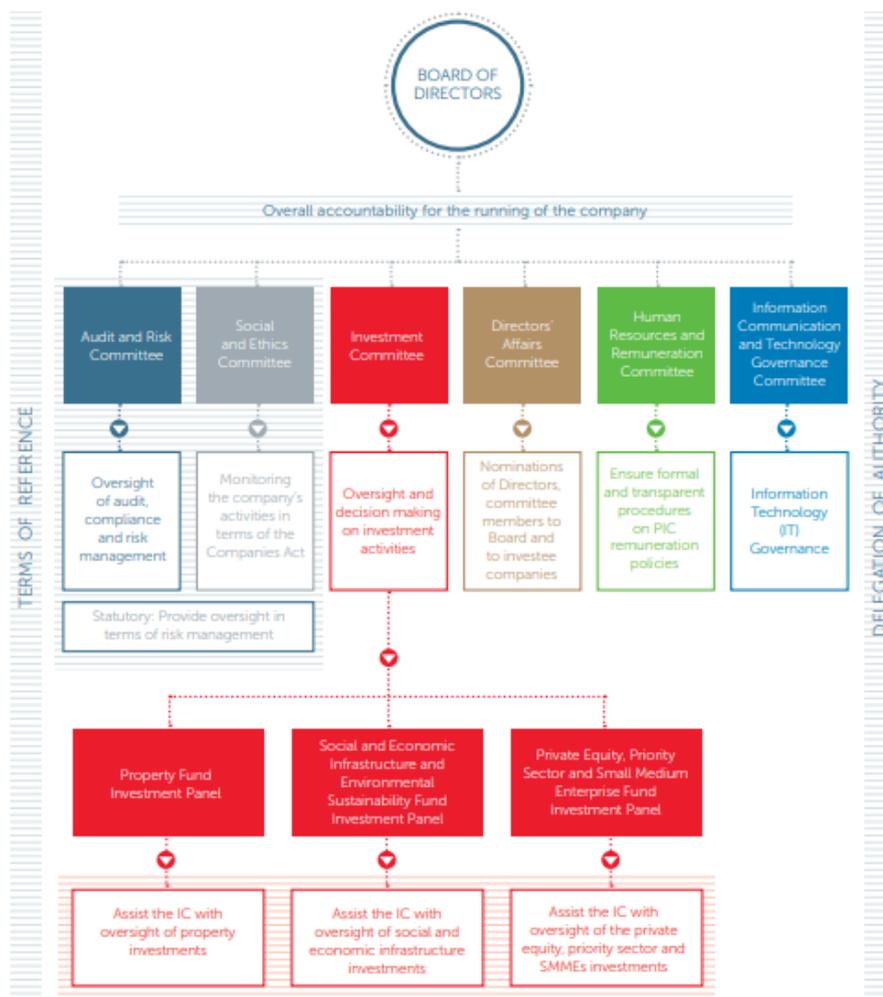
⁶ The ditching of the position of CIO was in line with an organisational restructuring that took place, according to Dr Matjila's testimony (para 102 of his statement) in 2014 and 2015, resulting in the CIO position being split into four Executive Heads of investments, namely of Listed Investments, Private Equity & Structured Investments, Developmental Investments, and Properties.

⁷ Copies of the resolution passed at a shareholders meeting on 29 March 2017 and of the amended MOI are attached as 'Appendix 4' and 'Appendix 5' respectively.

⁸ A copy of letter dated 19 April 2017 attached as 'Appendix 6'.

The Composition of the Board

- 21 Clause 7.1.1 of the Corporation’s MOI provides that the Board ‘shall comprise of no less than 10 and no more than 15 directors . . .’. The shareholder, defined in the MOI as the State acting through the Minister, is required, in terms of clause 7.1.2.1 to ensure that the Board consists of executive and non-executive directors.
- 22 The Board committees which have been established can be seen in the diagram below:



23 The individuals who serve on these Board committees are all members of the Board as envisaged in section 7(1) of the PIC Act.

24 The Board has issued DoAs in respect of the following:

24.1 Corporate Governance/Affairs;

24.2 Unlisted Investments;

24.3 Listed Investments; and

24.4 Property Investments.

25 The powers of the Board and management committees are set out in the Delegations of Authority (DoA). In addition, policies and procedures have been developed, which are designed to influence, determine and guide all major investment decisions and actions.

The Executive Committee

26 The responsibility of the day to day management of the PIC rests with the CEO in line with the approved DoA framework and the strategic direction set by the Board. The CEO is assisted in the discharge of further responsibilities by an Executive Committee (EXCO), comprising the CEO as Chairman, the Chief Financial Officer (CFO) and the Executive Heads of the ten (10) PIC divisions, namely:

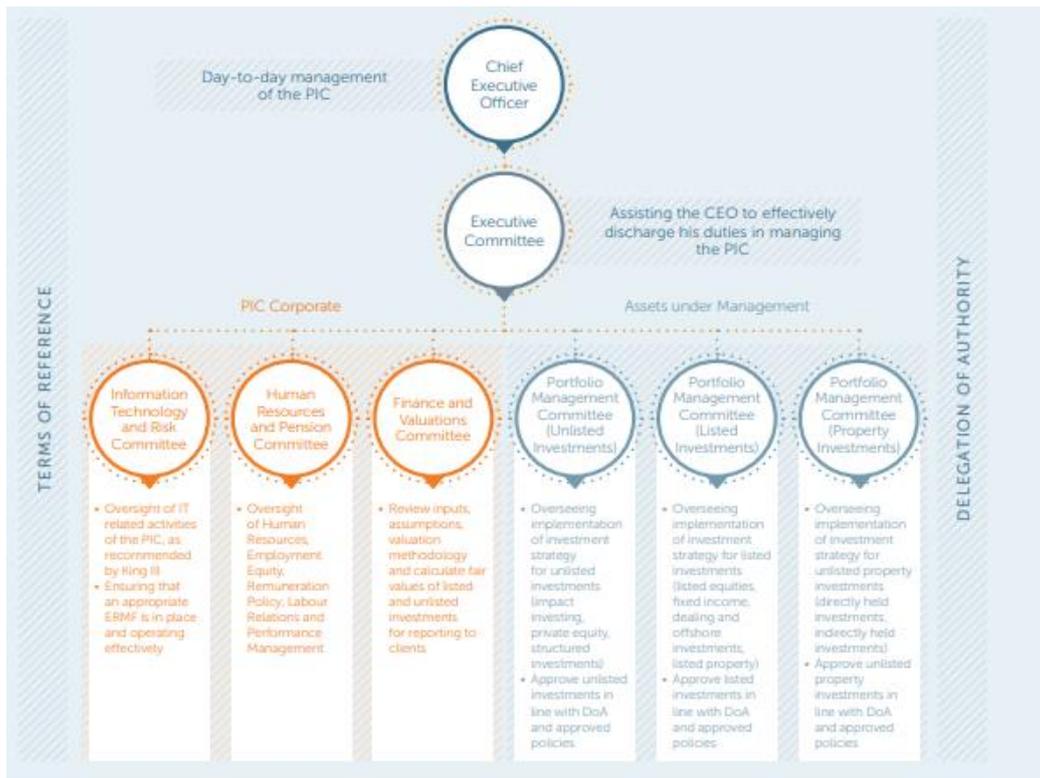
26.1 Research and Project Development;

26.2 Impact investing;

26.3 Private Equity and Structured Investment Products (SIPS);

- 26.4 Property Investments;
- 26.5 Listed Investments;
- 26.6 Investment Management;
- 26.7 Human Resources;
- 26.8 Risk;
- 26.9 Legal Counsel, Governance and Compliance; and, lastly
- 26.10 Information Technology.

27 The EXCO has established six (6) sub-committees, three (3) of which relate to corporate affairs and the other three (3) to assets under management. These sub-committees are in line with the PIC investment strategy to instil a culture of compliance and good governance, so as to ensure that the Corporation's governance processes and affairs are conducted in a transparent, fair and prudent manner and that accountability becomes a certainty. The Executive Committee and its Sub-committee structures are depicted below:



Client mandates

- 28 The PIC's clients have provided the PIC with investment mandates, which set out, among others, their investment objectives, risk appetite, investment parameters as well as the asset class allocations. In order to ensure compliance with client mandates, the PIC utilises a special system, which enables it to capture the mandates for monitoring purposes. According to Ms W Louw, the PIC reports to clients on a monthly and quarterly basis, detailing, among other things, portfolio performance. Clients are thus able to engage with the PIC during these presentations and to seek clarity, if they so wish.

DEVELOPMENTS AT THE PIC SINCE THE JAMES NOGU/NOKO/LEIHLOLA EMAILS

- 1 The James Nogu emails led to an atmosphere that was not conducive to good, healthy and effective working relations between members of the Board and between the Board and certain senior executives, particularly the CEO and CFO. These emails were sent on 31 August 2017, 5 September 2017, 13 September 2017, 28 January 2019 and 30 January 2019 (For convenience, we shall refer to the emails collectively as the 'James Nogu emails'.)
- 2 An extraordinary general meeting was convened by Minister Nene on 25 July 2018, where the Board was instructed to conduct a forensic investigation on the Nogu/MST allegations and to develop a plan of action by 17 August 2018. Subsequently, after some consultation with counsel, the Board appointed Advocate Budlender SC to conduct the above investigation.
- 3 Advocate Budlender SC found that there was no evidence of a romantic relationship between Dr Matjila and Ms Pretty Louw (Ms P Louw) and that no impropriety could be found in the MST transaction.
- 4 Dr Matjila was aggrieved by the action of the chairman of the Board, deputy Minister Gungubele (the Chairman), of failing to oppose the UDM application that was brought in the Pretoria High Court to have him suspended for the very allegations in respect of which he had been cleared. He met the chairman at his office in Cape Town and advised him that he (Dr Matjila) had decided to exit the PIC in due course, but only once the Budlender SC report had been released. Apparently, the chairman had not at that point shared the report with the other non-executive directors.
- 5 The Board then put together a task team consisting of Dr Xolani Mkhwanazi (Deputy Chairman of the Board), Ms Toyi and Dr Goba to negotiate the CEO's

exit. When Dr Matjila subsequently met the task team, Dr Mkhwanazi was not in attendance, apparently because he wanted the CEO to first present a letter of resignation. Dr Matjila reluctantly delivered a letter on 7 November 2018 in which he made certain exit proposals to the Board.

- 6 On 23 November 2018, Dr Matjila was called to a Board meeting. His letter was tabled at this meeting for the first time, although already in public circulation. At this meeting, the Chairman informed him that the Board had accepted his resignation with immediate effect. His protestations that he had not resigned, but had merely given an exit proposal containing, amongst others, an intention to give notice to resign in keeping with his contract, fell on deaf ears. The Chairman's response was that his employment contract had been terminated.
- 7 A little over two months thereafter, at a Board meeting on 1 February 2019, the Chairman, having taken a call from the current Minister of Finance, Mr Mboweni, informed the rest of the members of the Board that the Minister wanted the whole Board to resign immediately, failing which they would be dismissed by Monday, 4 February 2019. Ms Hlatshwayo said the mood became one of indignation and the Board members decided to resign *en masse*. A letter to that effect was dispatched to Minister Mboweni. However, they continued with their function until the interim Board was appointed.
- 8 The James Nogu emails and media reports about the PIC not only affected the Board but also senior employees of the PIC. On 5 December 2017, Ms Vuyokazi Menye (Ms Menye), who was the Executive Head: Information Technology, and Mr Simphiwe Mayisela (Mr Mayisela), who was the Senior Manager: Information Security, were charged with 'accessing unauthorised documentation during an investigation commissioned to unearth the penetration of the PICs mailing list' and intercepting emails of Executive Directors without obtaining the necessary approval. They were also alleged, *inter alia*, to have withheld information in a case opened against the CEO under the pretext that it was erroneously done and

Mr Mayisela for obtaining confidential information without prior approval, for the sole purpose of advancing their case, while purporting to be assisting the investigation regarding the identity of James Nogu. Ms Menye left the PIC, having reluctantly accepted a settlement figure of approximately R7.5 million on 11 April 2018.

- 9 Mr Mayisela was dismissed following a full disciplinary process. Ms Bongani Mathebula, the Company Secretary, who was placed on suspension on 11 April 2018, was charged with, *inter alia*, breaching her duty of good faith and confidentiality as an employee in her position as Company Secretary, in that she caused the distribution and/or copying of confidential PIC information. The chairman of the disciplinary committee found her guilty and recommended that she be dismissed with immediate effect. However, having been recommended for a dismissal, Ms Mathebula returned to occupy her position of Company Secretary on 27 March 2019.
- 10 Ms More, the CFO, and Mr Madavo: Executive Head: Listed Investments are currently under suspension and face disciplinary charges relating to their conduct in handling a particular transaction, namely AYO, which will be discussed below. Mr Victor Seanie, the Assistant Portfolio Manager: Non-Consumer Industrials, faced disciplinary charges over the same transaction. His disciplinary hearing was concluded, finding him guilty, and he was dismissed on 22 October 2019 with one month's pay in lieu of notice.

EVIDENCE, FINDINGS AND RECOMMENDATIONS PER TERMS OF REFERENCE

TERM OF REFERENCE 1.1

1. In 2018 the media reported on certain political parties that had called for transparency in the PIC. Mention was made of particular transactions.

2. The transactions that formed the subject of media reports during this period are discussed below. It should be noted, however, that these transactions and/or case studies do not constitute a comprehensive list of improprieties identified by the Commission.
3. The case studies prepared by the Commission appear in this ToR, with the exception of the VBS and Harith case studies, which are contained in ToR 1.3, below.

CASE STUDY: Matome Maponya Investment Holdings (MMI)

4. The Isibaya Fund's investment in MMI is an example of multiple investments with a single counterparty.
5. While prior exposure to any single counterparty would be raised as part of deliberations at approval committees, there was previously no firm counterparty limit. However, recently counterparty limits have been established, and they are contained in the Private Placement Memorandums (PPMs).
6. The Commission found that the total PIC exposure to Mr Matome Maponya (Mr Maponya) amounted to R1.85 billion. The exposure to Mr Maponya in the investments of Magae Makhaya and Daybreak alone amounted to R1.023b. Therefore, one could say the PIC was overexposed.
7. The Commission finds that the PIC's decision to make cumulative investments in various transactions with a single individual has resulted in significant exposure to reputational risk and financial losses.
8. The MMI investments call into question the PIC's thoroughness in conducting its due diligence as well as its assessment of cumulative and reputational risks.

9. In order to ensure that PIC funds are available to as many South Africans as possible and to not be exposed to risks associated with any single party, single counterparty limits should be determined and adhered to by the PIC.
10. The PIC must also restrict funding from the Isibaya Fund to counterparties or unlisted investments to a maximum of two projects (businesses) but only until capacity and servicing of loans has been established. It should also limit the cumulative monetary amount of exposure to a single counterparty or unlisted investment.

SA Home Loans (SAHL) Investment

11. Regarding the investment in SAHL, Dr Matjila confirmed the statement by Mr Kevin Penwarden of SAHL that a combination of SAHL and JP Morgan were the first to present the equity opportunity and a proposal for housing finance for GEPF members to the PIC. Consequently, Dr Matjila's statement that, *'I was under the impression that this R9bn funding application was a joint plan of the SAHL and MMI partnership'*⁹ is extremely concerning. The question must be asked how thorough the processes were before a transaction of R9 billion was approved that the CIO/CEO did not know, or did not endeavour to find out, what the actual situation was.
12. Furthermore, Mr Kevin Penwarden, CEO of SAHL, stated that Mr Wellington Masekesa (Mr Masekesa), Executive Assistant to Dr Matjila and PIC non-executive director on the board of SAHL, and Mr Maponya had approached a colleague, Mr Dlamini, and said that SAHL should 'regularise' what were called 'arranging fees' of R95 million.¹⁰

⁹ Para 520 of Dr Matjila's statement signed on 17 July 2019.

¹⁰ Para 59-70 of Mr Penwarden's statement signed on 28 May 2019.

13. The Commission recommends that the Board should develop clear policies to guide the involvement of PIC employees and non-executive directors in investee companies. Appointment of PIC employees and/or non-executive directors of the PIC to serve on the boards of investee companies must be reconsidered.
14. The role played by Mr Masekesa in respect of the SAHL Investment, as indicated in paragraph 12 above, is found to be an irregularity as envisaged in Section 45 of the Auditing Profession Act, being, in the SAHL auditors' (Deloitte) opinion, a *prima facie* contravention of Section 3 of the Prevention and Combatting of Corrupt Activities Act (soliciting a bribe to obtain a contract).
15. The Board should ensure that there is a full inquiry into the role played by Mr Masekesa in the SAHL matter and engage with the GEPPF to ensure that there has been no undue influence exerted by any party on the SAHL application for R10 billion further funding.

Conclusion

16. In relation to a number of the transactions considered above, there were contraventions of PIC Policy, processes were not followed, necessary disclosures were not made to the Board and on certain occasions the Board was misled. Furthermore, in certain transactions, the Commission found that the Standard Operating Procedure was not followed.
17. The Commission found that a number of individuals unduly benefited from the improprieties identified. The role of Dr Matjila is concerning in terms of his one-on-one meetings with individuals who stood to be vastly enriched, undercutting the objectives of the Isibaya Fund and in contravention of the PIC's mandate from its clients. In addition, the Commission found that Dr Matjila's role in pressurising Mr Mulaudzi was improper and posed a reputational risk for the PIC.

18. The PIC's decision to make cumulative transactions with a single individual is of concern to the Commission and recommendations in this regard are made.
19. Finally, governance, at a variety of levels, was undermined by the conduct of several individuals in relation to the transactions discussed above and in the conduct addressed in the ToRs which follow.

CASE STUDY: SEKUNJALO GROUP

20. The following companies, within the Sekunjalo Group, are dealt with below:
21. Sekunjalo Independent Media (Pty) Ltd (SIM) and Independent News and Media South Africa (Pty) Ltd (INMSA), which was later renamed Independent Media (Pty) Ltd (IM).
22. Sagarmatha Technologies Limited (Sagarmatha).
23. Premier Food & Fishing Limited, later renamed Premier Fishing and Brands Limited (Premier Fishing).
24. Ayo Technology Solutions Limited (Ayo).

SIM AND INMSA

25. During 2013, the PIC advanced a number of loans to SIM and INMSA. The PIC also bought a 25% equity stake in INMSA. The loans were for a period of five years and, together with interest thereon, were repayable in August 2018.
26. The GEPP did not support the deal and expressed the view that it was an investment in a sector that 'had a bleak future'. However, their view was that the PIC should make the decision provided that the exposure did not exceed R2 billion.

27. In 2017, it became clear that INMSA and SIM would not be able to repay the loans as they became due. Sekunjalo Investment Holdings (Pty) Ltd (SIH), the holding company of both INMSA and SIM, made an offer to the PIC in a letter dated 14 September 2017 proposing that the PIC exit its investment in INMSA and SIM. In terms of the offer, SIH and/or its nominee would acquire the PIC's shares in and loan claim(s) against INMSA as well as its loan claim(s) against SIM.
28. The letter stated that SIH intended to list one of its subsidiaries (Sagarmatha) with a primary listing on the JSE, with secondary listings on the New York and Hong Kong Stock Exchanges. It further stated that SIH would not make any cash payment for its acquisition of PIC's shares and loan claims and that the payment would be settled through the issue of shares in Sagarmatha to the PIC.
29. In terms of the letter, a similar offer had been extended to the PIC's co-shareholders in INMSA and Dr Matjila was requested to countersign the letter, if it was acceptable to the PIC, resulting in the conclusion of a binding agreement between the PIC and SIH.
30. In a credit risk report signed on 9 and 10 November 2017, the risk team assessed the risks relating to the proposed transaction as 'HIGH'.
31. The Private Equity, Priority Sector and Small Medium Enterprise Fund Investment Panel (PEPPS FIP) approved the offer subject to certain conditions. It is apparent from these conditions that the PEPPS FIP required SIH to make a cash payment for the proposed acquisition of the PIC's shares and loan claims and that there would be no link to the proposed listing of Safarmatha. This is important to note because agreeing to the proposal would have meant that the exit of the PIC from IM would have been funded by the PIC itself. It is clear from the conditions that were imposed that the resolution was in the best interests of the PIC.

32. Despite the resolution taken by the PEPPS FIP, on 13 December 2017 Dr Matjila signed what appears to be a sale of shares and claims agreement between the GEPF represented by the PIC and Sagarmatha. The agreement was signed on behalf of Sagarmatha a day later.
33. In terms of clause 5 of the agreement, the debt of approximately R1.5 billion due to the PIC would be discharged through the issuing of shares to the PIC in Sagarmatha. The agreement stated that the price per share was R39.62.
34. Dr Matjila signed/approved the appraisal report on 15 November 2017, approximately one month prior to signing the share swap agreement. That report was for the attention of the PEPPS FIP and made it clear that its purpose was to request approval from PEPPS FIP for the PIC to accept the offer from SIM to acquire all the shares and loan claims that the PIC has in and against INMSA and SIM, (the 'Offer'), thereby exiting its investment in INMSA.
35. As someone who knew the operations of the PIC, Dr Matjila was aware, or ought to have been aware, that the risk, legal and ESG teams would also have to submit their reports for consideration by the PEPPS FIP.
36. When questioned about the share swap agreement and when informed that the terms thereof violated the PIC resolution, Dr Matjila claimed to have not been aware of the resolution. Even if he had not seen the PEPPS FIP resolution, one would have expected him to enquire what resolution had been taken before signing the share swap agreement.
37. Dr Matjila was also aware, or ought to have been aware, that the Listed Investments team had not yet done a valuation of Sagarmatha when he signed the share swap agreement.
38. If the Sagarmatha listing had proceeded (it did not because the JSE did not approve the listing) and the share swap agreement signed by Dr Matjila

executed, the PIC would have invested in Sagarmatha at a price of R39.62 and not the R7.06 valuation of the PIC team. Moreover, PIC funds would have been used to settle INMSA debt to the PIC, with the full knowledge by Dr Matjila that this was effectively what was going to happen.

SAGARMATHA (TO BE READ WITH THE INMSA SECTION ABOVE)

39. In late 2017, Sagarmatha offered the PIC to subscribe for shares worth between R3 billion and R7.5 billion. The price for the shares was R39.62 per share.
40. The deal team valued the shares at R7.06 per share. It is clear from the evidence of the members of that team that they did not support the transaction. The transaction was eventually abandoned after the JSE disapproved Sagarmatha's listing.
41. Dr Matjila, who was not a member of the deal team, was actively involved in the transaction. He wanted PIC to subscribe for Sagarmatha shares at R39.62 per share or at another price higher than that recommended by the deal team. Dr Matjila had already signed the share swap agreement and irrevocably bound the PIC to a share price of R39.62 prior to Sagarmatha being valued by the deal team.
42. The deal team members, in particular Mr Molebatsi and Mr Seanie, made it clear that they were opposed to the PIC investing in Sagarmatha. Notwithstanding this, not only did Dr Matjila negotiate the share price without the knowledge of the deal team, but he also requested Ms Mathebula to arrange a telephone conference and a meeting between members of the IC and Sagarmatha officials shortly before the IC was to consider the transaction. Dr Matjila's support of the transaction went to the extent of asking Ms Mathebula to forward documents in support of the transaction from various trade unions and other organisations –

which were going to be part of the BEE component of the deal - to members of the IC. This was improper conduct and went against standard practice.

43. It is difficult to understand why Dr Matjila sought to invest in a company at a price significantly higher than that recommended by the very experts he claimed throughout his testimony to rely on, and ignoring the fact that the company already had liquidity problems and was not servicing debt due to the PIC.
44. The conduct of the IC in referring the transaction back to the PMC despite serious concerns raised by some of its members, calls into question its professionalism and whether, at all times, it was acting in the best interests of the PIC.

PREMIER FISHING

NOTE: This transaction is merely included for the sake of completeness of the transactions that the PIC undertook within the Sekunjalo Group

45. PMC Listed ratified a maximum amount of R339.3 million at R4.50 per share in a private placement for a 29% shareholding in Premier Fishing, ahead of its listing on the JSE on 2 March 2017. Premier Fishing was a subsidiary of African Empowerment Equity Investment (AEEI).
46. The deal team was interested in this opportunity. However, the PIC ESG team had identified that there were governance issues around the fact that the chairman and majority of directors of Premier Fishing were also AEEI directors and therefore were not independent. The ESG team had identified, in their due diligence (DD) report, that Mr Arthur William Johnson (Mr Johnson) from 3 Laws Capital, a related party company to the Sekunjalo Group, was listed as an independent non-executive director and a member of the Premier Fishing audit committee. Mr Johnson was appointed as a director of 3 Laws Capital in April 2008 which makes him a non-independent non-executive director of Premier Fishing. Ms Rosemary Mosia had also been identified as an independent non-

executive director on the audit committee. Subsequently, on 10 October 2017, Ms Mosia was appointed as a non-executive director to the Sagarmatha Board and on 22 August 2018 she was appointed to the Ayo Board.

47. She resigned from the Sagarmatha Board on 26 September 2019, and on 30 August 2019, her daughter, Ms Moleboheng Gabriella Mosia, was appointed as a non-executive director on the AEEI Limited Board.
48. Other issues identified by ESG were around the need for a remuneration policy aligned to the business strategy and performance indicators linked to both short- and long-term incentives. The company also did not provide details on its health and safety programmes, labour practices or working conditions.
49. The PIC's Risk Due Diligence report had foreign exchange risk as its only high risk, but overall did not raise any objection to continuing with the transaction. The PMC Listed also requested that at least two board seats be allocated to the PIC, one being that of the lead independent director, or that they have the opportunity to participate in the appointment of the lead independent director.

AYO

50. In this transaction, the PIC subscribed for 99.8 million shares at a total price of R4.3 billion, being R43.00 per share.
51. The opportunity to invest in Ayo was presented to Dr Matjila in or around October 2017 by Dr Survé, the chairman of the Sekunjalo Group of companies. Dr Matjila testified that, because he did not get involved with the analysis of investment potential of opportunities presented to the PIC and the processing thereof, he requested the Executive Head of Listed Investments, Mr Fidelis Madavo (Mr Madavo), to look into the opportunity and assess its investment potential.

52. On 16 November 2017, Mr Madavo instructed Mr Seanie, the Assistant Portfolio Manager for Non-Consumer Industrials, and Equity Analyst at the PIC, to attend a meeting with Ayo representatives. Mr Seanie learnt at the meeting that Ayo's intended listing on the JSE was scheduled for 15 December 2017.
53. Due to the time pressure, and before scheduling a PMC1 meeting, on 27 and 30 November 2017, Mr Seanie requested ESG, Risk and Legal teams to allocate team members to assist in the Ayo initial public offering and to conduct a due diligence which, in terms of the PIC's processes, would be done once PMC1 had approved a due diligence exercise. However, meetings of PMC1 failed to materialize and the due diligence was never authorized.
54. Due to the looming placement date, namely 15 December 2017, and since the PMC1 meeting did not materialize, Dr Matjila told Mr Molebatsi that it was impossible to organize another meeting of the PMC at such short notice. He therefore suggested to Mr Molebatsi that they both sign an irrevocable share subscription form, subject to the understanding that he would request PMC to regularize the transaction at the first available opportunity. The subscription form was signed on 14 December 2017 by Dr Matjila and Mr Molebatsi who irrevocably committed the PIC to participating in the listing of Ayo.
55. The transaction was approved at a hastily scheduled PMC2 meeting held on 20 December 2017, chaired by the CFO, Ms More. Dr Matjila, Ms More (who had signed the disbursement memo the day before) and Mr Seanie attended the meeting, but none of them informed those present at the meeting that an irrevocable subscription form had already been signed, as had the disbursement memo, and that PMC2 should ratify the actions of Dr Matjila and Mr Molebatsi of prematurely signing the irrevocable subscription form instead of approving the transaction.

56. Further evidence came to light that Dr Matjila had, in fact, signed an irrevocable commitment to purchase 92% of Ayo – the full issue – at a price of R43 per share, on 4 December 2017, ten days prior to the signing referred to above. This, too, was not revealed to the PMC2 meeting of 20 December 2017.
57. Emails provided to the Commission also indicate that PSG Capital, the transactional advisor and sponsor for the listing, received a “generous” bonus in the region of R4 million from Dr Survé for successfully listing Ayo.
58. Dr Survé and Dr Matjila had both indicated at the Commission that the monies received from the PIC are still in Ayo’s bank accounts. This is partly correct, due to the fact that the results are published at a point in time and indicate that the monies were transferred back to Ayo just before the interim and year end cut-off periods (28 February and 31 August respectively). The evidence gleaned from various bank statements show that there has been significant movement of the funds between different related parties. This created the impression of funds in bank accounts but, in reality, this was only the case at specific moments in time.
59. The Commission has also noted that Grant Thornton signed off on a limited assurance report on forecasted financial information contained in Ayo’s PLS. BDO and Grant Thornton merged in July 2018. BDO Cape Incorporated has been the auditor of Ayo for 21 years. This indicates a long-standing relationship between the audit firm and Ayo and brings into question its independence.

Findings

60. It is found by the Commission that the failure of the PIC to obtain approval from PMC1 to proceed to the due diligence and the signing of the irrevocable subscription form without first obtaining the approval to invest from PMC2 amounted, in each case, to improper conduct since the actions were not in accordance with the PIC’s investment procedures.

61. By instructing ESG, Risk and Legal to proceed with the due diligence without the approval of PMC1, Mr Seanie acted improperly and thereby contravened the PIC's policy on Standard Operating Procedure.
62. In failing to disclose to PMC2 that an irrevocable share subscription form had already been signed, Dr Matjila and Mr Seanie acted improperly and were dishonest. (Mr Molebatsi did not attend the PMC2 meeting.)
63. As a key individual in terms of the FAIS Act, Dr Matjila failed to comply with the fit and proper requirements in terms of section 8A(a) of the FAIS Act in that he acted dishonestly and without integrity, thereby contravening the provisions of section 8A(a).
64. There is no evidence that the impropriety or contravention resulted in any undue benefit for any PIC director, or employee or any associate or family member of any PIC director or employee at the time.

Recommendations

65. The Commission recommends that stringent measures be taken to ensure that there is adherence to, and compliance with, the procedures which are designed to serve the interests of both the asset manager and the investee company.
66. Both Dr Matjila and Mr Seanie are no longer employees of the PIC, Mr Seanie having been charged and dismissed following disciplinary proceedings arising from his actions or inaction relating to the Ayo transaction. With regard to Dr Matjila, the PIC must consider reporting the contravention of the provisions of the FAIS Act to the relevant authorities.

OVERALL FINDINGS AND RECOMMENDATIONS IN RELATION TO THE SEKUNJALO GROUP INVESTMENTS

67. The Sekunjalo Group investments showed a marked disregard for PIC policy and standard operating procedures.
68. Proper governance was absent or poor, and risk identification processes were downplayed by looking for risk mitigants to make sure the deals were approved.
69. Due diligence reports highlighting issues around independence of Board members, policies to be implemented etc. were not followed up by the PIC to ensure implementation post the deal being approved and monies having flowed.
70. The “close relationship” between Dr Matjila and Dr Survé created top down pressures that the deal teams experienced to get the requisite approvals.
71. Board members within the Sekunjalo Group of companies are not independent. Some board members are related to Dr Survé, are long-serving employees, long-time friends or are non-executive directors on other Sekunjalo Group company boards and dominate the board seats in those companies. Independent non-executive directors are in the minority on the boards of AEEI and Ayo.
72. In the light of the above, the Commission recommends that the PIC must conduct a forensic review of all the processes involved in all transactions entered into with the Sekunjalo Group and ensure that the PIC obtains company registration numbers of every entity in the Sekunjalo Group to be able to conduct a forensic investigation as to the flow of monies out of and into the Group.
73. It is further recommended that the PIC must ensure that all pre- and post-conditions for all investments made, not just those in the Sekunjalo Group, have

been fully met and implemented, and that effective processes and systems are in place to properly monitor investments post disbursement.

74. Steps must be taken to recover all monies with interest due to the PIC, especially where personal or other sureties was a precondition to approval of the investment.
75. The PIC must also determine the future role, if any, of the PIC in all of the transactions with the Sekunjalo Group, to protect the interests of the PIC and its client; and review all aspects of the transactions entered into with the Sekunjalo Group to determine whether any laws or regulations have been broken.
76. It is also recommended that the PIC reviews its internal processes, including its standard operating procedures, together with the DoA, to determine responsibility and culpability, and to consider whether there are grounds for disciplinary, criminal and/or civil legal action against any PIC employees or Board members, current or previous.
77. The Commission recommends that the Regulatory and Other Authorities should consider whether any laws and/or regulations have been broken by either the PIC and/or the Sekunjalo Group; determine what legal steps, if any, should be taken to address any such violations; and assess whether the movement of funds between accounts, as indicated above, was intended to mislead/defraud investors and/or regulators.

Case Study: S & S REFINERY

78. S&S Refinery (S&S) is a palm oil refinery and saponification plant based in Nacala, Nampula Province, Mozambique. The PIC decided, in October 2014, to invest in S&S. The legal agreements relating to the investment decision were concluded on 14 November 2014.

79. Although the investment decision was made in 2014 and therefore falls outside the period 1 January 2015 and 31 August 2018, the transaction is among those mentioned in media reports in 2017 and /or 2018 as per ToR 1.1.
80. The allegations in the media reports were that Dr Matjila had authorised an investment to the tune of nearly R1 billion in a dilapidated Mozambican palm oil refinery plant (S&S) that was not operational. It was also alleged that, apart from injecting US\$ 63 million (approximately R812 million) for a 50% stake in S&S, the PIC also paid millions in facilitation fees to a company named Indiafrec Trade & Investment (Pty) Ltd.
81. A reading of the evidence of the four witnesses who testified before the Commission on the S&S transaction shows that there was no substance in the media reports that the PIC invested in a dilapidated refinery and does not show any impropriety in the investment decision. However, given the evidence presented before the Commission and the fact that a further investment was made by the PIC in the same project, the information, in particular matters presented in the Risk report, will be considered.
82. In or about August 2014, the PEPSSME Fund Investment Panel approved the total investment of US\$ 62.5 million in S&S. On 21 January 2016, the PIC, through the PEPSS Fund Investment Panel, resolved to increase its investment in S&S from 45% to 70% by acquiring a further 25% shareholding for a consideration of US\$ 10 million.¹¹ In the result, as a number of Mozambican banks also invested in the project, the PIC's total exposure in S&S stood at US\$ 63 million.

¹¹ The PEPSSME FIP of 20 October 2014 reflects a reduced investment from the original US\$ 62,5 million to US\$

Findings

83. It is found that the Risk assessment and investment decisions relating to the S&S investment did not take sufficient account of the following issues
- 83.1. The fact that raw materials essential for the business were imported and paid for in US dollars, while earnings were in the local currency, namely the Mozambican metical;
 - 83.2. The purchase by the PIC of its equity shares in S&S was in US dollars, while repayment would be in meticals;
 - 83.3. The reliability and sustainability of supplies of the imported raw material, as well as the transport costs thereof, would also have to be paid for in US dollars;
 - 83.4. The economic outlook in Mozambique, where deteriorating economic conditions affected the financial viability of the enterprise, and interest rates on local borrowing escalated rapidly;
 - 83.5. The dependency on imported raw materials; and
 - 83.6. The assumptions used for the assessment of risks were not rigorous enough.

Recommendations

84. Accordingly, it is recommended that greater focus and interrogation must be given post an investment decision to the management and the performance of existing investments, prior to such investments becoming distressed.

85. The IT infrastructure for unlisted investments must be addressed as a priority, as at the time of giving evidence, there were no automated portfolio management systems in place. This would make the process of monitoring compliance more efficient and effective.
86. Furthermore, a separate workout and restructuring department that focusses on resolving and reconfiguring distressed assets should be established as well as a stand-alone division within the PIC that looks at investment proposals to be made outside South Africa.
87. It is also recommended that the role of risk, in investment decisions, needs to be strengthened.
88. It should also be noted that the conditions precedent which applied to the transaction were not implemented. This failure is a serious management oversight and those responsible should be held to account.
89. When investing abroad, a careful analysis of local partners, who should be established corporates and not individuals or family run businesses, must be undertaken.
90. The documentation submitted to the various committees for decisions must be reviewed to ensure authenticity and any changes to investment amounts and that shareholding reflects both names and percentages, and dates.

Case Study: Lancaster Steinhoff

Project Sierra

91. The investment proposal was prepared by Symphony Capital on behalf of the Lancaster Group for the acquisition of 2.75% of the shares in Steinhoff International Holdings N.V. (SNH) amounting to R9.35 billion. Symphony Capital

was paid R76.95m for this work, and an amount of R22,85m was paid to Lancaster Group, and to L101, a subsidiary of the Lancaster Group.

92. Paragraph 20 of the 20 July 2016 appraisal report of the PIC states that Mr Jayendra Naidoo (Mr Naidoo) has a long and established relationship with major shareholders of SNH, particularly Mr Christo Wiese. This was confirmed by Mr Naidoo.¹²
93. Steinhoff had a voting pool arrangement in place, which pool controlled 33% of the company and exercised significant influence over all matters that required shareholder approval. Through this transaction, Mr Naidoo, being the sole Shareholder of Lancaster Group, had been invited to join the voting pool. The PIC at the time owned 9% of Steinhoff. At no point was the PIC going to get a seat on the Board, and Mr Naidoo in testimony before the Commission stated that the shares were ordinary shares and did not have any special voting rights, as claimed by Dr Matjila.¹³
94. The proposal further provided for the PIC to acquire a 50% equity stake in L101 for R50 million.
95. The total funding provided by the PIC amounted to R9,4 billion (loan + equity). This was reduced from the initial request for R10,4bn, according to Dr Matjila, so that the investment decision would fall within his delegated authority and would not have to be referred to a higher committee or the Board for consideration.¹⁴
96. An equity derivative backed financing structure was put in place by L101(ratio collar structure), with the PIC's capital guaranteed by an international bank (Citibank) through a primary cession and pledge of L101's put option proceeds

¹² At page 14 of the Transcript for day 63 of the hearings held on 14 August 2019.

¹³ Ibid. page 23.

¹⁴ At page 98 of the Transcript for day 55 of the hearings held on 16 July 2019.

as security for its loan obligations. However, the security arrangements were altered with 100% of the primary cession being granted to Citibank for it to provide R6,5bn to fund the transaction as part of a second phase of the transaction, known as Project Blue Buck (L102).

Findings and Recommendations

97. The PIC could have purchased any quantum of Steinhoff shares outright in the market instead of entering into a transaction to do so through Mr Naidoo. The 'joining' of the "voting pool" by Mr Naidoo did not materialise.
98. The Investment Committee (IC) of the PIC approved the transaction. The chair of the IC was Mr Roshan Morar, a PIC non-executive director, who signed off on the IC resolution for this investment. At the same meeting, he was also appointed as a board member to L101 representing PIC's interests which clearly indicates a conflict of interest. He continues to be a director of the Lancaster Foundation which is a non-profit company.
99. As at the end of February 2019, the amount outstanding on this loan was approximately R11.6 billion with interest accrued. The loan has not been serviced by L101 to date.
100. On 26 September 2016, a SENS announcement was put out by Steinhoff stating that a 2.5% underwriting commission was paid to the Lancaster Group (this was not reflected in L101's financials) when the shares were subscribed for in Steinhoff – R114 million was paid to the Lancaster Group, and not to L101.
101. The Commission finds that it would not have been possible for these shares to have been subscribed for by L101 had it not been for the funding advanced by the PIC. Yet the underwriting commission was paid to the Lancaster Group.

102. It is questionable whether the Lancaster Group or L101 should have received an underwriting commission at all, and whether this should have gone to the PIC itself.
103. Based on the evidence of Mr Naidoo, it also appears that no discussion took place in relation to whether the commission should have been paid to L101, instead of the Lancaster Group.
104. The Commission recommends that the PIC must obtain a legal opinion as to whether the R114 million underwriting commission that was paid to the Lancaster Group should have been paid to L101, or if it was in fact due to the PIC, and if the latter is shown to be the case, appropriate steps should be taken to recover the money.
105. It should further be noted that a total of R100 million in equity contributions were made by both the PIC and Mr Naidoo which Mr Naidoo has failed to prove is still in the relevant bank account.
106. The Commission has noted that the PIC did not use any transaction advisors, notwithstanding the complexity of the proposed structure and deal. The PIC team indicated that the Lancaster Group then dictated the terms through their advisors. This is found to have placed the PIC team at a significant disadvantage.
107. The Commission finds that the conduct of Dr Matjila in reducing the amount so that it falls within his DoA was wholly improper. This might be taken to indicate collusion between Dr Matjila and Lancaster.
108. The Commission recommends that the PIC's MOI and DoAs regarding the PIC's investment decision making framework be amended to require the Board to approve any amendments to proposals which require the Board's approval when they are submitted to the PIC.

Project Blue Buck

109. L101 was to subscribe for shares in STAR for R6.2 billion (5.9%). This was to be funded by raising new bank finance against the put option proceeds under the ratio collar. The amount raised was R6.5 billion.
110. The PIC loan and security package was re-negotiated in favour of L101 and essentially was diluted with an addition in security over the shares that L101 would acquire in STAR through a primary cession and pledge over these shares.
111. Steinhoff agreed to match the R6.2 billion of funding in order to ultimately buy additional shares in STAR, after the acquisition of Shoprite held by Thibault. Due to free float issues, the funding was later reduced to R4 billion. Steinhoff committed to provide the additional R2.2 billion to L101 for future investments, which did not materialise.

Findings

112. A significant amount of money had already been loaned to Mr Naidoo, amounting to R9.4 billion for Project Sierra. Yet the PIC was ready to entertain a second transaction, notwithstanding that the terms of their loan and security package were diluted in favour of L101.
113. The reasons provided by Dr Matjila for his decision to invest in Steinhoff through Mr Naidoo reflect a disregard for the interests of the clients of the PIC in pursuit of an ostensible ability to secure influence over a JSE listed company. Given that Mr Naidoo is also a PEP, the PIC was obliged to ensure a thorough due diligence was undertaken. Yet the PIC IC, and Dr Matjila, approved a transaction that would significantly enrich a single individual, and at the same time took decisions that removed the safeguards that were in place to protect the interests of the PIC.

114. The PIC renegotiated the terms of its loan and security and in the process diluted its security. The proceeds from the ratio collar put option proceeds of L101 were then ceded in favour of an international bank, which would then fund the R6.2 billion acquisition of STAR shares by L101. PIC agreed to a reversionary cession and pledge on these proceeds (their loan capital no longer guaranteed) whereas previously it had a primary cession and pledge over these proceeds (their loan capital was guaranteed.)
115. The only security the PIC has that has any value is the primary cession and pledge over the STAR shares which could be sold and set-off the debt owed under Project Sierra, but this would realise a significant loss.
116. It is concerning that the PIC approved the first and second transactions and transferred the funds, notwithstanding that the Lancaster Group had not established the B-BBEE Trust. This constituted an inexplicable waiver of the PIC's right to defer the transaction as a result of the Lancaster Group's failure to adhere to the conditions upon which its proposal to the PIC was approved. Those responsible for this very material oversight must be the subject of disciplinary action within the PIC.
117. It would have also been appropriate for the PIC to ensure that conditions precedent were expressly agreed to as part of the approval of the transaction, particularly with regard to the date for the establishment of the Trust, prior to any transfer of funds. This would have enabled the PIC to monitor and enforce such conditions and to cancel the transaction if such conditions were not adhered to.
118. It should also be noted that, although the initial approval by the PIC was for the establishment of a Trust; there was a subsequent request for the Trust to be converted into a non-profit company, which the PIC approved. The non-profit company was only established in 2017, a year after the transaction was finalised.

119. The PIC agreed to a second transaction with the same individual, ignoring both cumulative and counterparty risk, at great cost to the PIC/GEPF.
120. The PIC did not adhere to its criteria for funding B-BBEE as these two transactions had the same single individual as a counterpart. The transaction also enabled significant enrichment to accrue to a single individual.
121. A B-BBEE transaction with one individual cannot be construed as a broad-based empowerment transaction and does not comply with the Structured Investment Products mandate to facilitate B-BBEE given by the GEPF. The PIC essentially imposed the creation of an empowerment trust on the Lancaster Group, but provided the funding without it being in place.

CASE STUDY: ERIN ENERGY

122. ERIN, previously Camac, sought, in February 2014, a secondary listing on the JSE. Dr Matjila signed a letter in which the PIC confirmed that on the day of the secondary listing of Camac, an injection of USD135 million would be made by the PIC and a further amount of USD135 million would be paid 90 days thereafter.
123. In 2013, Camac declared that it was technically bankrupt. This fact was not disclosed to the JSE in the PLS. By virtue of the cash injections (totaling USD 270million) made by it, the PIC acquired a 30% shareholding in ERIN15.
124. During May 2016, ERIN approached the PIC for a guarantee in the amount of USD100 million to cover loan funding it had requested from the Mauritius Commercial Bank. The IC considered ERIN's request and resolved to approve

¹⁵ Ibid, para 2.

it. ERIN then obtained a loan facility for the amount of the guarantee from the Mauritius Commercial Bank (“MCB”).

125. There is no evidence before the Commission to support a finding of impropriety in the PIC’s decision to approve the provision of a guarantee in favour of MCB. However, it is necessary, to make the following observations:
126. In their report, the risk team, consisting of Mr Tshifhango Ndadza and Mr Paul Magula, recommended that the approval of the guarantee be subject to a number of conditions. In its wisdom, the IC did not include this recommendation as a condition precedent to the approval coming into effect.
127. It is understood, from certain media reports in Nigeria, that in 2019 the Nigerian government revoked ERIN’s oil mining licence/lease (OML) 120 and 121.
128. ERIN had drawn down on the MCB loan facility amounts totaling approximately USD67 million, which the PIC has had to pay as guarantor.

Findings

129. In approving the transaction to provide a guarantee of USD100 million, while disregarding the recommendation of the risk team to approve the transaction subject to certain conditions precedent, the Investment Committee acted improperly.
130. In addition, no thorough due diligence and legal risk assessment was done to enable the IC to give proper consideration to Erin’s application for funding and for the provision of the guarantee referred to above.
131. This impropriety is in contravention of the investment policy of the PIC relating to investment processes.

132. However, there is no evidence that the impropriety or contravention resulted in any undue benefit for any PIC director, or employee or any associate or family member of any PIC director or employee at the time.

Recommendations

133. The Commission is of the view that, if due diligence and legal risk assessments had been given proper attention, the difficulties encountered by ERIN would probably have been highlighted. Their respective roles therefore need to be strengthened so as to ensure that no investment decisions are made without following due process.

134. The PIC should investigate what measures can be taken to retrieve any tangible assets of ERIN to reduce losses and engage with the Nigerian government in this regard if deemed appropriate.

CASE STUDY: ASCENDIS HEALTH TRANSACTION

135. The PIC concluded two transactions that involved the same BEE company and Mr Lawrence Mulaudzi from Kilimanjaro Capital (KiliCap), namely Tosaco and Ascendis, in terms of which an investment was to be made into Ascendis Health and Bounty Brands. Kefolile Health Investments (Pty) Ltd (KHIH) was the investment vehicle.

136. During the review of the deal, the Commission found that R100 million which was approved by the PIC for the purchase of shares in Ascendis, was not used for that purpose. Rather, it seemed that the R100 million had been added to the transaction fees and paid to two entities of Mr Mulaudzi.

137. It was also established that the transaction in question was not initially approved but, according to Dr Matjila, as chairman of the Social and Economic

Infrastructure and Environmental Sustainability Fund Investment Panel, Ms Zulu, albeit after this transaction, whose personal relationship with Mr Mualudzi was confirmed during his testimony, signed the resolution in terms of which it was resolved that the PIC would provide the funding to KHIH.

138. It should be noted that, during his testimony, Mr Mulaudzi also stated that:

*'I ... received a call from Dr Matjila, requesting my urgent assistance. He advised that the same lady [Ms Pretty Louw]... was in financial trouble ... He asked me to urgently come to her rescue by settling her debts...'*¹⁶

Findings

139. The Ascendis transaction was presented to the PIC at virtually the same time as the Tosaco transaction, yet the two appear to have been considered by the relevant PIC approval committee as two discrete investments.

140. The PIC approval conditions, in this instance how the funding was to be utilised, were very specific. Yet again, the Ascendis investment shows the PIC's weakness, indeed failure to monitor the implementation of the decision and ensure that the funds provided were used as approved. Transaction costs were determined as R19m, yet there is a payment to Mr Mulaudzi of R79,8 million from KHIH.

141. Dr Matjila states that 'we had to buy some time to assess the performance of Kisaco in the Tosaco transaction before we commit to another entity led by Mr Mulaudzi'.¹⁷ It is highly questionable that the approach to be taken is one of

¹⁶ Paras 52-58 of Mr Mulaudzi's statement signed on 26 March 2019.

¹⁷ Para 360 of Dr Matjila's statement signed on 17 July 2019.

buying time to assess the previous transaction. This borders on reckless investing, and timelines should not drive deal decisions.

142. Ms Zulu requested that the Ascendis transaction be brought back for consideration by a committee that she chaired. Mr Mulaudzi asserts that he has 'not attempted to influence her professional views in any way...'.¹⁸ Yet the sequence of events and the eventual outcomes raise significant concerns as to the role of non-executive directors in investment decision making, as well as undue and inappropriate influence from the Board. This is a critical matter.
143. Dr Matjila's repeated efforts to have Mr Mulaudzi provide financial assistance to Ms Pretty Louw reflects the abuse of his office and influence over investee companies. The investigative work into tracing the money also raises concerns as to how influence and advisor fees were utilised behind closed doors, and that fees may have been paid out of client funds, regardless of value received.

Recommendations

144. The PIC must undertake a forensic audit of the utilisation of the funds provided to Ascendis to ensure they were utilised as approved, and legal avenues be pursued to recover any money not utilised in accordance with the PIC approval stipulations.
145. Parallel investments in different transactions with a common counterparty should be limited by the PIC both in number and value.
146. Coordination within the PIC between the different approval structures and processes must be addressed to ensure that investments and exposures to an

¹⁸ Para 69 of Mr Mulaudzi's statement signed on 26 March 2019.

entity or counterparty are clearly understood, and that cumulative financial and reputational risk is integral to risk assessment.

147. The role of non-executive Board members in investment decisions must be reviewed and the relevant PIC legislation and DoAs reconsidered. The matters of governance and oversight must be given a higher priority and role. Such a review should be completed by no later than June 2020.
148. Controls must be put in place to ensure investment decisions as approved in the governance process are implemented in the actual transaction prior to funds being dispersed.
149. The PIC should reconsider the use of SPVs and layered legal entities within investment structures or ensure there are appropriate mechanisms to enforce its rights.

CASE STUDY: KARAN BEEF

150. Allegations of impropriety in the Karan Beef transaction came by way of the email of 30 January 2019, referred to in Chapter I of the report, from a sender with the name or pseudonym 'James Noko'. It was alleged in the email that a non-executive director of the PIC, Ms Dudu Hlatshwayo (Ms Hlatshwayo), as Chairperson of the Fund Investment Panel, approved the Karan Beef transaction, in which a high ranking politician, Mr Paul Mashatile, Treasurer-General of the ANC, has a financial interest, held through another individual. It was also alleged that the construction of the deal was simply to inflate the selling price by R1 billion, and to pay the amount to Mr Mashatile.
151. Despite numerous invitations issued by the Evidence Leader and announced by the Commissioner during the hearings, for those with information relevant to the Commission's Terms of Reference to come forward, no one came forward to substantiate the allegations made in the email referred to above. The only person

who submitted a comprehensive statement to the Commission was Mr Sello Adson Motau (Mr Motau).

152. Mr Motau sets out, in his statement, the route the transaction proposal took to the PIC investment process. It went through PMC1, PMC2 and ultimately the Investment Committee, which approved the transaction on certain conditions. The conditions were met. However, since the resignation of the whole Board of the PIC on 1 February 2019, the transaction has stalled – the executive, according to Mr Motau, decided that the deal should be referred back to PMC2.¹⁹
153. The Commission finds that the allegations in the James Noko email of corruption and impropriety in the Karan Beef transaction have not been substantiated. There is therefore no substance in them. Consequently, no finding of impropriety in the investment decision in the Karan Beef transaction can be made.

CASE STUDY: Mobile Satellite Technologies (MST)

154. In the James Nogu email of 5 September 2017, it was alleged that Dr Matjila had funded Ms P Louw in the amount of R21 million through her company, Maison Holdings, co-owned by Ms Annette Dlamini (Ms Dlamini). It was further alleged that Ms P Louw was Dr Matjila's girlfriend. Dr Matjila denied these allegations.
155. There was no other evidence placed before the Commission (nor in fact before the Budlender Inquiry) on this issue.
156. Dr Matjila conceded that he was introduced to Ms Dlamini and Ms P Louw by then Minister of Intelligence, Mr David Mahlobo at OR Tambo International Airport. Dr Matjila then introduced Ms P Louw and Ms Dlamini to Mr Lawrence Mulaudzi.²⁰ At a later date, upon Dr Matjila's request, Mr Mulaudzi made a

¹⁹ Paras 28 – 41 of Mr Motau's statement signed on 21 May 2019.

²⁰ At page 27-28 of the Transcript for day 55 of the hearings held on 16 July 2019.

donation, in his personal capacity of R300 000.00 to Ms P Louw to assist Maison Holdings with the financial difficulties it was facing.²¹

157. As to the PIC's funding of MST, Mr Rajdhar testified that MST applied to the PIC in June 2015 for a loan of R45 million to procure buses.²² After completion of the due diligence, PMC 2 approved the transaction for a term loan of R50 million plus 25% equity at a nominal amount of R25. However, MST was not willing to offer equity to the PIC unless the company value was increased. After some negotiation, PMC-UI granted approval of a revised proposal in the form of a debt facility of R21 million plus a 5% profit share.²³ The loan facility was to be disbursed upon fulfillment of conditions precedent set by PMC-UI. Thereafter, term loan agreements were signed and the funds disbursed on 6 July 2017. However, the conditions precedent was not fulfilled in more than one respect.

158. Although it has been found that there is no substance to the allegation that Dr Matjila directly funded Ms P Louw to the tune of R21 million, which in fact, is the funding that was provided by the PIC to MST; it appears that there were certain MST proposals to the PIC, in which Ms P Louw was involved.²⁴ Mr Rajdhar also testified that Ms P Louw initiated a number of CSI proposals that were not approved.

159. On 1 April 2017 MST paid an amount of R438 000 plus VAT to Maison Holdings for 'work done to date'. It was found in the Budlender report that the money was paid as a reward for Ms P Louw's efforts and to encourage her to continue therewith.

²¹ Ibid. page 33.

²² At page 8 of the Transcript for day 20 of the hearings held on 26 March 2019.

²³ A copy of the revised proposal is attached as annexure 'D' to Mr Royith Rajdhar' statement of 18 March 2019. See para 10.4.

²⁴ Para 35 of the Budlender Report.

Findings

160. No finding of impropriety can be made on the established facts regarding the investment decision of the PIC in the MST transaction. What is of concern is the failure, on the part of the PIC, to demand from MST its 30 July 2016 audited financial statements prior to disbursing the funds.
161. The Commission finds that Dr Matjila acted improperly in pressuring Mr Mulaudzi, as the owner of an investee company of the PIC, to assist Ms P Louw and Maison Holdings. This conduct constitutes an abuse of Dr Matjila's position as CEO and is a reputational risk to the PIC.
162. MST did not adhere to the conditions precedent for the loan of R21 million, which were very specific, namely, that the borrower (MST) would apply all the funds for the purpose of designing, constructing, assembling, operating and leasing of bus units; and that MST would submit to the PIC its Audited Financial Statements by no later than a period of 90 days after its financial year end. In addition, the funds were not used by MST for the agreed purposes set out above. Indeed, a number of busses were not purchased and monies were used to settle the debts of MST.
163. The R5 million CSI donation made directly to MST, of which approximately half a million went to Ms Louw's company, reflects a misuse of what the funds were intended for.
164. The Commission recommends that the R500 000 paid to Ms Louw from the PIC CSI donation must be repaid by MST to the PIC.

CASE STUDY: TOSACO (PTY) LTD

165. During 2015, TOSACO announced its intention to sell 91.8% of its shares to qualifying buyers.

166. Three companies, namely, Kilimanjaro Capital (Pty) Ltd (Kilicap), Sakhumnotho (Pty) Ltd (Sakhumnotho) and Lereko (Pty) Ltd, separately approached the PIC for funding to purchase the shares. The PIC's Investment Committee (IC) approved funding to the Kilimanjaro Sakhumnotho Consortium (Pty) Ltd, a consortium comprising of KiliCap and Sakhumnotho, in the amount of R1.8 billion to acquire the shares. However, the Consortium acquired the shares for R1.7 billion. The additional R100 million was allegedly funding for transaction fees, but this was not brought to the attention of the PIC's relevant committees for approval.
167. Certain concerns were raised in relation to the circumstances surrounding the merging of the two companies. Dr Matjila denied the allegation that he imposed the merger on the two companies however, evidence to the contrary was put before the Commission.²⁵
168. On the issue of whether due diligence was conducted by the PIC on Sakhumnotho before the merger, it was conceded that this had not been done. However, it is clear from the evidence of Mr Mongalo that a thorough due diligence should have been done as it is a critical part of the PIC's decision-making processes.

Findings

169. The Commission is of the view that there is no merit to the claims that –
- 169.1. the merger between KiliCap and Sakhumnotho was voluntary.
- 169.2. there was no need to do a detailed due diligence on Sakhumnotho as it was already an existing client of the PIC;

²⁵ At page 70 of the Transcript for day 53 of the hearings held on 11 July 2019.

169.3. Dr Matjila only became aware of the transaction fees through media reports.

170. There was also no justification for the various PIC committees not to be informed of the transaction fee.

171. While advice offered to the two entities, KiliCap and Sakhumnotho, to merge for purposes of improving their chances to win the bid, would probably not be improper, Dr Matjila should not have, imposed the merger on KiliCap. Notwithstanding this, the Commission is unable to point to any policy of the PIC, legislation or contractual obligation that may have been contravened in this regard.

172. The failure to do due diligence on Sakhumnotho or the new entity, KISACO, after the merger amounted to a disregard of the PIC's investment policy.

173. In giving the instruction that the transaction amount be increased from R1.7 billion to R1.8 billion and thereafter failing to ensure that the alteration is disclosed to the approving committee, Mr Rapudi acted improperly. As a FAIS representative in terms of section 7(1)(b), read with section 13 of the FAIS Act, he failed to comply with the requirements of 'fit and proper' relating to personal character qualities of honesty and integrity, thereby contravening the provisions of section 8A(a).²⁶

174. There is no evidence that the contravention resulted in any undue benefit for any PIC director or employee or any associate or family member of any PIC director or employee at the time.

²⁶ The Fit and Proper requirements are addressed in detail in Chapter V of the report.

Recommendations

175. The Board should interrogate the approval process and authorisation of the payment of the R100 million transaction fee and determine whether the R50 million paid to both KiliCap and Sakhumnotho was due, and in fact paid to the advisors.
176. If the money was not due, then the PIC should institute legal proceedings with regard to recovering the R100 million.
177. The Board should review the structure of the PIC to ensure that there are no parallel processes and teams working with different potential investees on the same transaction, unbeknown to each other.
178. The signing-off approval and disbursement processes require greater legal oversight to ensure that the proposals, approvals and final disbursements are not manipulated or changed from the original decision.
179. The role of the PIC in proposing advisors to investees for potential transactions needs to be reconsidered as it can inappropriately create a system of patronage and enrichment.
180. The PIC should consider whether or not appropriate action must be taken against Mr Tshepo Rapudi as a FAIS representative in terms of section 7, read with section 13, of the FAIS Act, for issuing the instruction to increase the amount of the transaction from R1.7 billion to R1.8 billion, and determine on whose authority he issued the instruction.

TERM OF REFERENCE 1.2

'Whether any findings of impropriety following the investigation in terms of paragraph 1.1 resulted from ineffective governance and/or functioning of the PIC Board.'

1. When considering the above Term of Reference, it is necessary to take account of a number of factors, including current best practice and codes for the effective functioning and accountability of boards, the legislation applicable to the PIC (and GEPF), and the practice and role of the Board of the PIC. This, together with further issues regarding governance, has been addressed in ToR 1.15 below.
2. ToR 1.1 refers to 'any alleged impropriety regarding investment decisions by the PIC ...' Consequently, as illustrative examples, reference will be made to the following ten transactions, all of which have been dealt with in different chapters of this report, as set out below:
 - 2.1. The Sekunjalo Group of companies, namely:
 - 2.1.1. Ayo Technology Solutions (Ayo);
 - 2.1.2. Independent News and Media South Africa (Pty) Ltd (INMSA); and
 - 2.1.3. Sagarmatha;
 - 2.2. Steinhoff/Lancaster Transaction
 - 2.3. TOSACO
 - 2.4. Ascendis

2.5. S&S Refineries

2.6. VBS Mutual Bank

2.7. Erin Energy

2.8. MST²⁷

3. The approach taken has been to consider whether there was impropriety in the above transactions, and if so, was this the result of a failure of governance and/or ineffective functioning of the Board. The details of each transaction will not be covered and can be found in the case studies in ToR 1.1, above.

Ayo Technology Solutions (Ayo)

4. The Commission has found that there was impropriety in the Ayo transaction in two respects, viz:

4.1. Mr Seanie giving instructions to ESG, Risk and Legal to proceed with due diligence approval from PMC1, thereby contravening the policy on Standard Operating Procedure; and

4.2. Failure by both Dr Matjila and Mr Seanie to disclose to PMC2 that an irrevocable subscription form had already been signed by Dr Matjila when PMC2 considered approval of the transaction.

5. The Commission concludes that these improprieties resulted from ineffective governance.

²⁷ Reference is made to these case studies throughout the report however detailed reference is made to each transaction as a case study, in Term of Reference 1.1 and elsewhere in the report.

6. This is found in the decision-making process, the material non-disclosures, as well as a lack of interrogation of essential information – such as the determination of the valuation – and the parallel processes that took place to give effect to the transaction.
7. There was no proper valuation to back the investment that was done, and therefore the question remains as to whether the PIC subscribed for the shares at a fair and reasonable value. At the listing date, the shares were R43 per share, while as at 23 October 2019 the share price was R5.60 per share, a decrease in value per share of 87%.

Recommendation:

8. It is recommended that the PIC should introduce stringent measures to ensure that each step in the investment procedure is followed before the transaction is allowed to proceed to the next step. In this regard, a committee should satisfy itself before dealing with a matter that there was compliance with the processes leading up to its consideration of the transaction.

CASE STUDY: Independent News and Media South Africa (Pty) Ltd (INMSA) and Sagarmatha.

9. The Commission did not consider the initial investment in INMSA, and therefore cannot make any findings in that regard. However the Commission finds that in the subsequent INMSA and Sagarmatha proposed transactions, there was impropriety that occurred as a result of ineffective governance.
10. The impropriety lies in Dr Matjila signing the share swap agreement with Sagarmatha, claiming that he did not know of the resolution by the approving committee, (the PEPPS-FIP), in terms of which the transaction had been approved with conditions diametrically opposed to the share swap agreement

that he signed. This evidences a complete disregard of the PIC's investment processes by Dr Matjila.

11. Further indicators of ineffective governance relating to these transactions are:
 - 11.1. The PIC appraisal documents did not assess the implications of cumulative group exposure in any of the applications to invest. Moreover, even when the investment proposals were tabled at the required approving structures, the question of overall exposure to a group seemed to not be an issue, nor was the fact that INMSA was not servicing their loan.
 - 11.2. The Sekunjalo investments showed a marked disregard for PIC policy and standard operating procedures.
 - 11.3. Proper governance was absent or poor, and risk identification processes were downplayed by looking for risk mitigants to make sure the deals were approved.
 - 11.4. Due diligence reports highlighting issues around the independence of Board members and policies to be implemented were not followed up by the PIC to ensure implementation post the deal approval and monies having flowed.
 - 11.5. The proposed Sagarmatha transaction, including the suspected share price manipulation and essentially attempting to use the PIC's own investment to pay the debt INMSA owed to the PIC, demonstrates a lack of ethics, lack of compliance with laws and regulation, and a disregard for the best interests of the PIC and its clients.
12. The recommendation proposed in Ayo above, applies equally in respect of this INMSA/Sagarmatha transaction.

CASE STUDY: Steinhoff/Lancaster Transaction

13. The Commission finds that there was impropriety in the decision to invest in both the Steinhoff and Lancaster transactions. This was due to ineffective governance and the poor functioning of the PIC Board.
14. This is evidenced in the approach taken by Dr Matjila to essentially 'buy' influence and a Steinhoff Board seat, the change from the original proposal from Mr J Naidoo for an investment of R10,4 billion, reduced by the PIC to R9,35 billion to enable the transaction to fall within the mandate limit of the Investment Committee and the further decision to invest in Lancaster for the STAR transaction.
15. The statement by Dr Matjila exemplifies this ineffective governance: 'we could have gone to the Board but it was more convenient for the IC to deal with the matter at that level' adding that the Board has never rejected an Investment Committee decision.

CASE STUDY: TOSACO

16. The Commission has found that there was impropriety in the process that led to the approval of the transaction. The merger imposed by Dr Matjila, the failure to do due diligence on Sakhumnotho and the inclusion in the capital amount of transaction fees that were not requested by KISACO, nor recommended or approved by the committees, reflects this.
17. In giving the instruction that the transaction amount be increased from R1.7 billion to R1.8 billion and thereafter failing to ensure that the alteration was disclosed to the approving committee, Mr Tshepo Rapudi acted improperly. As a

FAIS representative in terms of section 7(1)(b), read with section 13 of the FAIS Act, he failed to comply with the requirements of 'fit and proper' relating to personal character qualities of honesty and integrity, thereby contravening the provisions of section 8A(a).

18. The Commission finds that there was impropriety that resulted from ineffective governance in the TOSACO Transaction

CASE STUDY: Ascendis

19. The Ascendis transaction was presented to the PIC at virtually the same time as the TOSACO transaction, yet the two appear to have been considered by the relevant PIC approval committee as two discrete investments, notwithstanding the comment below.
20. Ms Zulu, a non-executive Board member, requested Mr Rajdhar (Head: Impacting Investing at the PIC) to bring the Ascendis transaction back for consideration by a committee that she chaired. Mr Mualudzi asserts that he has 'not attempted to influence her (Ms Zulu's) professional views in any way and have never expected any undue influence from her through the positions she holds, including at the PIC'.²⁸ Yet the sequence of events and the eventual outcomes raise significant concerns as to the role of non-executive directors in investment decision making, as well as undue and inappropriate influence from the Board. This is a critical matter. Clearly, as chair of the relevant committee, Ms Zulu played a significant role, not only in getting the deal back onto the table but also in the recommendations to make the investment.
21. It is of concern that Mr Mualudzi admitted in his testimony before the Commission that he had known Ms Zulu from around 2016, but they only began a personal

²⁸ Para 69 of Mr Mualudzi's statement signed on 26 March 2019.

intimate relationship in 2018. He confirmed that at the time of appearing before the Commission he was in an intimate relationship with Ms Zulu.

22. The Commission finds that there was impropriety in the Ascendis transaction due to both ineffective governance at executive level and in the functioning of the PIC Board, in that Ms Zulu participated in the PIC consideration of a transaction in which Mr Mulaudzi had an interest. This is particularly important given the roles that non-executive directors play in the PIC's transaction decision making, and the responsibilities exercised in that regard. This issue is addressed in the section on 'Lifestyle Audits' in Chapter V.

CASE STUDY: S&S Refineries

23. The Commission found that there was no impropriety regarding the decision taken to invest in S&S Refineries.
24. The Commission finds that failure to ensure that the decision taken to invest was based on a rigorous and thorough analysis of the relevant information points to ineffective governance, which is also evidenced by the fact that the conditions precedent which applied to the transaction were not implemented.

CASE STUDY: VBS Mutual Bank

25. The Commission found that there was no impropriety on the part of the Board of the PIC in the decision to invest in the VBS transaction.
26. The Commission is of the view, however, that there is clear evidence of ineffective governance in the PIC in that two of its executive directors, Mr Nesane and Mr Magula, egregiously violated their fiduciary duties towards both VBS and the PIC.

27. They acted in collusion, such that the PIC was not aware of critical information relating to, among other things, shareholding in VBS, notwithstanding that the information that they were privy to was critical to any investor/shareholder. They hid behind the excuse that they could not share such information as they had fiduciary responsibilities to the VBS Board. Nor did they act responsibly as non-executive directors on the Board of VBS as they did not insist that the information be made available to all shareholders and investors.
28. Both men used their positions of trust and responsibility to unduly enrich themselves at the expense of the depositors, clients and investors of VBS, including the PIC.

CASE STUDY: Erin Energy

29. The Commission found that there was impropriety in the decision to approve the Erin transaction. This came about, in the Commission's view, as a result of ineffective governance. This investment (provision of a guarantee) was made notwithstanding Erin being technically insolvent and against the advice of the PIC's own energy experts and internal team that had identified the problem as being one of insolvency and not that of liquidity. Dr Matjila himself conceded that the legal risk assessment was not properly done. Given the fact that this transaction was to be performed outside the South African borders, and particularly that the first transaction was to facilitate the purchase, by the investee, of oil leases/licenses, it was imperative that legal risk established that the purchase did occur, yet legal risk did not establish this fact. In addition, conditions precedent proposed by credit and risk analysts of the PIC were disregarded. These factors point to a serious lack of effective governance.
30. The question has to be asked as to how appropriate it is for an asset manager of a pension fund to invest in oil exploration, which is a high risk endeavor.

CASE STUDY: MST

31. The Commission found that there was no impropriety in the decision to invest in MST. However, the circumstances that led the PIC to consider the investment in the first place are indicative of a serious lack of appropriate governance.
32. During the presentation by MST for loan funding in November 2015, Dr Matjila requested Corporate Affairs (PIC) to consider CIS funding for the MST project. After a number of unsuccessful attempts to obtain funding, as the request did not find favour with the Executive Committee, R5 million was approved in February 2017, with payment authorised by Dr Matjila on 20 March 2017. On 1 April 2017 MST paid R438 plus VAT (R500 000) to Maison Holdings, Ms Louw's company, 'for work done to date'.
33. The link to Ms Louw arose from the former Minister of Intelligence, Mr Mahlobo, calling Dr Matjila to a meeting at OR Tambo airport without any indication of the purpose of the meeting or who would be present. Moreover, Dr Matjila said he saw no problem with this conduct. In this instance, he was asked, as the PIC, to help Ms Pretty Louw.
34. There was ineffective governance in the provision of R5 million as a CSI contribution to MST, of which Ms Louw received R500 000.

TERM OF REFERENCE 1.3

‘Whether any PIC director or employee used his or her position or privileges, or confidential information for personal gain or to improperly benefit another person.’

1. This Term of Reference will be answered by way of illustration using the case study of Harith, Venda Building Society Mutual Bank (VBS) and the Edcon Mandate letter.

Harith

2. From the evidence and testimony before the Commission, the PIC created two funds – PAIDF I and PAIDF II – and appointed a senior employee, Mr Tshepo Mahloele (Mr Mahloele), to establish the funds and who, in due course, became the CEO of Harith in its various forms.
3. Harith was a company established precisely to manage the two Funds, and at significantly high fees. The Deputy Minister and Chair of the PIC, Mr Moleketi, was appointed chairman of Harith. Through various processes, two employee bodies were created, the HSIST and Harith Holdings, which was held 100% by an employees’ equity trust of the same type as the HSIST, in which its skilled employees participated.
4. The GEPPF, the most significant investor in the Funds, initiated a legal process to enforce its rights to both dividends and share ownership.
5. The earnings and incentive schemes provided rich rewards for those selected by the PIC to fulfil these roles, confirming that PIC directors and employees used their positions for personal gain and/or to benefit another person.

6. Legal structures can be engineered such that they obfuscate substance for form. In other words, the substance may still be legal. The 'arm's length' loan, based on the minutes of the PIC, clearly shows that this was not done at an arms' length. It is the Commission's view that there is no question that the approach taken provided easy access to PIC funds and influence including an enhanced ability to secure additional investment, including from the GEPF.
7. Harith's conduct was driven by financial reward to its employees and management, and not by returns to the GEPF. In essence, the PIC initiative, created in keeping with government vision and PIC funding was 'privatised' such that those PIC employees and office bearers originally appointed to establish the various Funds and companies reaped rich rewards.
8. The Commission recommends that the GEPF and the PIC should jointly appoint an independent investigator as soon as possible after receiving this report. The mandate must be to examine the entire PAIDF initiative to determine that all monies due to both parties have been paid and properly accounted for; to determine whether any monies due to overcharging or any other malpractice should be recovered, and to provide the results of such investigation within six months to the Boards of both the GEPF and the PIC.
9. The Board of the PIC should examine whether the role played by either Mr Moleketi and Mr Mahloele breached their fiduciary duties or the fit and proper test required of a director in terms of the Companies Act.
10. The Board of the PIC should develop appropriate policies and guidelines for the secondment/transfer/appointment of employees to external entities such that the interests of the PIC and its clients are duly protected.

The VBS Mutual Bank

11. The PIC saw VBS as a strategic asset with the potential to grow into a regional bank. According to Dr Matjila, the PIC supported the conversion of VBS from a building society into a mutual bank as a vehicle to assist in the development of a black-owned and black managed player in the banking sector.²⁹
12. On 29 March 2012, Dr Matjila proposed that the Directors' Affairs Committee (DAC) of the PIC appoint two of its senior executives to the VBS Board, namely Mr Ernest Nesane (Mr Nesane) and Mr Paul Magula (Mr Magula). Their appointment was approved. The resolution does not reflect any concern by the DAC that both men were responsible for signing off on PIC legal and risk approvals for the investment, and were now being appointed to the board of VBS, which would be a conflict of interest.
13. In her evidence, Ms Brendah Mdluli (Ms Mdluli), stated that the VBS request for a revolving credit facility (RCF) from the PIC was introduced by Mr Magula and was approved by the relevant committee.³⁰
14. Giving testimony before the Commission, South African Reserve Bank Deputy Governor, Mr Kuben Naidoo (Mr Naidoo) covered the investigation into VBS, the evidence of Mr Magula and Mr Nesane and the confidentiality of their evidence given to the Motau investigation.
15. Mr Naidoo testified that,

'(Mr Nesane) eventually confessed after putting up strenuous denials that he had received unlawful payments made to a nominee

²⁹ Para 499 of Dr Matjila's statement signed on 17 July 2019.

³⁰ Page 69 of the Transcript for day 20 of the hearings held on 26 March 2019.

*company*³¹... in a total amount in excess of R7,2 million in order to buy his silence. Mr Nesane resigned from his post at the PIC two days after testifying ...³²

16. In relation to Mr Magula, it is stated at paragraph 21.4 of Motau's report that:

'...[he] eventually confessed, after putting up strenuous denials, that he had received unlawful payments, made to two companies which acted as his nominees, in a total amount in excess of R7.6 million in order to buy his silence.'

17. Motau's report further states at paragraph 39.3 that:

'The monthly payments of R300 000 all took place on the same date each month that Vele made a distribution of monies to a variety of related parties, including Magula's front companies, Nesane's front company, Makhavhu, who is the advisor to the Venda king.'

18. In Para 52.4, it is stated that Mr Nesane testified that he 'did not properly comply with his fiduciary duties as a director of VBS.'

19. The Motau report, in paragraph 237, deals with the extent of the looting, indicating that R1 894 923 674 was gratuitously received from VBS by 53 individuals for the period 1 March 2015 to 17 June 2018. These recipients included Vele and Associates (R936 699 111) and the two PIC senior executives who were appointed to the Board as non-executive directors to exercise their fiduciary duties to ensure PIC investments were not wasted. It was found by Adv Motau SC that, in total, Mr Nesane received R16 646 086

³¹ At page 6 of the Transcript for day 23 of the hearings held on 2 April 2019.

³² Para 21.5 of the Motau report.

and Mr Magula, R14 818 098. They seem to have been handsomely rewarded for turning a blind eye.

20. The Commission finds that Mr Nesane and Mr Magula egregiously violated their fiduciary duties towards both VBS and the PIC. They acted in collusion, such that the PIC was not aware of critical information relating to, among other things, shareholding in VBS, notwithstanding that the information that they were privy to was critical to any investor/shareholder. They hid behind the excuse that they could not share such information as they had fiduciary responsibilities to the VBS Board. Nor did they act responsibly as non-executive directors on the Board of VBS as they did not insist that the information be made available to all shareholders and investors.
21. Both men used their positions of trust and responsibility to steal and unduly enrich themselves at the expense of the depositors, clients and investors of VBS.
22. The Commission recommends that the Board of the PIC must ensure due legal process is pursued to recoup investment funds lost in so far as this is possible. This is dealt with in more detail in Chapter V Next Steps: Investment Risks and Losses.
23. The Board of the PIC must institute due legal process to recover the ill-gotten gains from both Mr Nesane and Mr Magula, who were in their employ at the time of the theft.
24. The PIC should explore recovering any bonus or enhanced payments made to both men during the period that they served on the VBS board, whether related to the VBS matter or their regular duties.

25. The actions of both Mr Nesane and Mr Magula should be referred to the relevant regulatory and professional bodies to consider what action they should take, should this not have been done already.
26. It is further recommended that the criminal conduct of Mr Nesane and Mr Magula should be referred to the National Prosecuting Authority.

The Edcon Mandate Letter

27. Kleoss Capital, in a letter to the PIC's Mr M Muller dated 8 August 2017, and signed by Mr Andile Keta, sets out the terms of their appointment as joint financial advisors to the PIC in relation to a potential investment by the PIC and/or funds managed by it into Edcon Holdings Ltd. The second adviser is Mr Keketso Mabe of Keletso M Squared (Pty) Ltd). He is a former PIC employee who, at the time of his employment, was Executive Head, Private Equity and SIPS (structured investment products). He left the PIC at the beginning of February 2017.
28. The fees and expenses to be paid to the joint financial advisors, were "a success fee in the amount of 1,5% of the total capital raised from the PIC, including any potential co-investors, payable upon closing of the transaction once all the conditions precedent have been fulfilled".
29. The relevant part of this agreement is contained in Paragraph 4.2, which states that:

"It is confirmed that, unless otherwise agreed by both parties on termination of this Appointment Letter, or unless this Appointment Letter shall have been terminated as a result of a breach by the Joint Financial Advisers of their obligations in terms of this Appointment Letter, should the Transaction be completed within a period of 2 years from termination of this Appointment Letter, the Joint Financial Advisers full fee in respect

of the Transaction shall remain payable upon completion thereof, regardless of such termination, and regardless of the fact that the PIC may have completed the Transaction with the assistance of no advisers or advisers other than the Joint Financial Advisers”.

30. Confirming this agreement, the “PIC hereby agrees to the terms and conditions of the appointment of the Joint Financial Advisers as recorded above.
31. The above agreement is signed by Ms More on behalf of Dr Matjila on 17 August 2017.
32. On 11 October 2019, Kleoss Capital, on behalf of the joint advisors, presented an invoice to the PIC claiming R44 661 975 as payment from the PIC for the services rendered as per the Appointment Letter.
33. The terms of the above agreement significantly disadvantage the PIC, to put it mildly
34. The open-ended commitment in the agreement raises a number of questions:
 - 34.1. Is this the only contract with such a clause, and if so, what were the special circumstances that gave rise to it?
 - 34.2. Was this contract signed off and approved by the PIC legal team?
 - 34.3. Was any work as set out in the appointment letter performed by the advisors, and if so was any assessment of their contribution made to the conclusion of the Edcon deal undertaken?

Recommendations:

35. The PIC Board of Directors institute a review of all contracts signed with advisors over the past five years to see if any contain similar or the same agreements.
36. The PIC review the Edcon transaction and determine whether the joint advisors executed the mandate they were engaged to fulfil, or were utilised in any way.
37. The PIC consider the legal options available to it regarding recouping any payments made to the advisors.
38. Ms More be asked to explain her approval of the flawed agreement.

TERM OF REFERENCE 1.4

‘Whether any legislation or PIC policies concerning the reporting of alleged corrupt activities and the protection of whistle-blowers were not complied with in respect of any alleged impropriety referred to in paragraph 1.1.’

1. On the evidence before the Commission, the Commission finds that the PIC failed to implement a Fraud Prevention Plan in terms of the Protected Disclosure Act, 26 of 2000 (PDA).
2. The Commission further finds that Dr Matjila failed to initiate training programmes to create awareness of the PIC whistle-blower policy and the Board in situ at the time also failed to exercise its oversight function in this regard.
3. Dr Matjila also acted in breach of the PIC’s whistle-blowing Policy by demanding the passwords from the IT Department, insisting that all whistle-blower reports be handed to him and taking charge of a forensic investigation in which he and his fellow executive director, Ms More (CFO), were directly implicated.
4. The Commission is of the view that the content and tone of the Noku/Nogu emails indicate that the intention of the originator was not to blow the whistle on corruption but to cause maximum reputational damage to the PIC and its directors/top management. Investigations conducted by the forensic team of the Commission, assisted by the FIC, could not establish the veracity of the allegations contained in the emails, except for the R 300 000 paid to Ms Pretty Louw (discussed in the MST transaction) by Mr Mulaudzi at the request of Dr Matjila.

5. Noku/Nogu cannot seek protection as a whistle-blower in terms of the PDA as his/her emails cannot be classified as *bona fide* as they contain false information in general except for elements of the 'Pretty Louw' matter. The probabilities are that Nogu/Noku is a person within the PIC with access to information not readily available to PIC employees, such as Board/Exco minutes.
6. The Commission cannot, on the evidence before it, comment on the disciplinary enquiries of Mr Mayisela and Ms Mathebula as the enquiries were conducted in terms of the PIC disciplinary policy and the hearings were chaired by independent chairpersons. It must be recorded that Ms Mathebula was suspended and resumed her duties after the departure of the former CEO, following a decision by the Board not to implement the sanction of dismissal as recommended by the Chairperson of her disciplinary hearing.
7. It is important to note that the practice of issuing anonymous emails has continued at the PIC, with the latest being in or about October 2019. With regard to the latest email, it is clear that the contents were obtained from a specific PIC email address, probably by hacking emails of certain employees of the PIC and distributing them in various forums. It appears that information within the PIC's information system platforms of communication continues to be accessed without permission and leakages continue unabated, including records of meetings of various forums within the PIC, such as the Exco, Board and Board subcommittees.
8. The Commission recommends that the Board of the PIC must, as a matter of priority, develop a comprehensive policy to give effect to the PDA and institute a programme to ensure that there is information and training available to implement the amended policy. The implementation and effectiveness of such a programme must be regularly reviewed and measured by the Board.
9. A complete review of the whistle-blowing policy and how it has been implemented is essential.

10. The Commission further recommends that the PIC IT systems need to be adequately and appropriately secured and the document management policy should be reviewed to reflect levels of confidentiality, access, processes and versions that can be tracked appropriately.

11. The continued use of anonymous emails, the leaking of confidential documents and abuse of social media reflects a serious breakdown of trust and confidence within the PIC. The Board and Executive need to address this as a matter of urgency through, among other things, reviewing existing policies on ethics and values; examining and addressing the behaviour of leadership, including that of the Board and Executive, to ensure they practice, and are seen to live up to, the values and ethics the PIC espouses. This will ensure transparency and fairness throughout the organisation.

TERM OF REFERENCE 1.5

‘Whether the approved minutes of the PIC Board regarding the discussions of any alleged impropriety referred to in Clause 1.1 are an accurate reflection of the discussions and the Board’s resolution regarding the matters, and whether the minutes were altered to unduly protect persons implicated and, if so, to make a finding on the person/s responsible for the alterations’

1. In order to answer the question *‘whether the approved minutes of the PIC Board regarding the discussions of any alleged impropriety referred to in Clause 1.1 are an accurate reflection of the discussions and the Board’s resolution regarding the matters, and whether the minutes were altered to unduly protect persons implicated and, if so, to make a finding on the person/s responsible for the alterations’* it is necessary to consider the following two aspects:
 - 1.1. Firstly, in relation to whether the approved minutes accurately reflect the discussions of the Board and the resolutions taken, it is clear that the Board was concerned about recording the discussions. The instruction to Ms Mathebula not to record the meeting, and the subsequent redaction of the minutes to exclude references to the discussions, reflect the concerns, and perhaps fears and tensions within the Board, of individual comments and opinions being recorded. The concern about leakages also informed this approach.
 - 1.2. Secondly, it is not possible to determine the accuracy of the minutes as only resolutions were in the minutes of the Board meeting of 29 September 2017. The above minutes were signed by the Chairman of the Board. These are therefore the final minutes and evidence of the proceedings of the

meeting. Furthermore, the only changes to the minutes were those that occurred in the normal course of Board members commenting on or changing draft minutes, and the final minutes presented to the Board took such changes into account, and were then signed by the Chairman on 29 September 2019.

2. The evidence presented to the Commission consistently indicates that there was a decision not to record the Board meetings dealing with the anonymous email allegations, as there were concerns about such minutes being leaked and becoming public.
3. Furthermore, the content containing discussions that took place in the meeting was deliberately removed from the draft minutes, but there was no apparent difference of view between Board members as to the accuracy thereof.
4. It would be impossible for the Commission, given the time and resources available, to properly examine all the minutes of all the investment decisions. Nothing was brought to the attention of the Commission regarding alteration of minutes of investment decisions.
5. In relation to the Board meeting of 29 September 2017, it is reasonable to conclude that there was no intention to change the record of the discussions or purposefully alter the outcome and decisions. It is reasonable to recognise this as an honest error of judgement taken at a time of great tension and fragility in the PIC and significant distrust among members of the Board itself.
6. Therefore, the Commission recommends that the Company Secretary must in future ensure that the Board minutes document the discussions that lead to decisions, including the issues raised and the reasons for the decision.
7. All Board meetings, whether ad hoc, in camera or regular meetings, as well as those of Board sub-committees established for any special purpose, should have

an experienced minute-taker and an audio recording for ease of reference. Audio recordings must be kept for at least 30 days after the formal minutes have been adopted.

8. Where appropriate, resolutions should indicate whether the decisions taken were unanimous or record the vote and any dissenting views, including, if requested, the director/s name.

TERM OF REFERENCE 1.6

‘Whether the investigations into the leakage of information and the source of emails containing allegations against senior executives of the PIC in media reports in 2017 and 2018, while not thoroughly investigating the substance of these allegations, were justified;’

1. At the Board meeting of 15 September 2017, besides finding no wrongdoing by the CEO as alleged in the contents of the Nogu email, the Board authorised Dr Matjila to investigate the leakage of information himself.
2. The Commission finds that the investigations into the leakage of information and the source of emails containing allegations against senior executives of the PIC in media reports in 2017 and 2018 were justified.
3. The Commission finds that the Board abdicated its responsibilities by failing to take charge of all aspects of the investigations. It was the responsibility of the Board to manage the process, to ensure that the IT systems of the PIC were protected and that due and fair process was followed throughout the investigations.
4. The PIC suffered considerable reputational damage as a consequence of the leakages and the internal turmoil that resulted.
5. The role of the Board is to ensure due process and proper governance at all times. In the matter of the anonymous email allegations, the Board did not respond adequately. It should have obtained specialist legal advice on the matter.
6. The Commission recommends that conflicts of interest need to be thoroughly evaluated and properly managed and the policies of the PIC should be reviewed to ensure that provision is made for appropriate guidance in the circumstances

such as those under consideration. Such policies must be known to all and adherence thereto must be enforced.

7. The Board must also ensure that investigative processes are fair, transparent and thorough in the interests of affected parties, the PIC and its employees.

TERM OF REFERENCE 1.7

‘Whether any employees of the PIC obtained access to emails and other information of the PIC, contrary to the internal policies of the PIC or legislation?’

1. In June 2018, the PIC commissioned a legal opinion from the law firm ENS Africa (opinion) in response to the actions of Mr Simphiwe Mayisela (Mr Mayisela) with regard to him accessing or attempting to access the PIC’s confidential information without authorisation. Human Resources head, Mr Christopher Pholwane (Mr Pholwane), attached the Opinion as an annexure to his statement³³ which he confirmed under oath at a hearing on 27 May 2019.
2. The background to the Opinion was that Mr Mayisela had allegedly informed Mr Lufuno Nemagovhani (Mr Nemagovhani), the Head of Internal Audit, that he was in possession of an electronic password protected copy of the internal audit report on the investment by the PIC in Ayo Technology Solutions. He requested Mr Nemagovhani to provide him with the password for the report, but Mr Nemagovhani declined the request.
3. The Opinion concluded that Mr Mayisela could have contravened, among others, section 86(1) of the Electronic Communications and Transactions Act, 25 of 2002 (ECTA), which reads:

‘Subject to the Interception and Monitoring Prohibition Act, 27 of 1992, a person who intentionally accesses or intercepts any data without authority or permission to do so is guilty of an offence.’

³³ A copy of the legal opinion is annexure ‘CP15’ to Mr Christopher Pholwane’s statement.

4. The Commission agrees. The Commission is of the view that, since Mr Nemagovhani refused to provide Mr Mayisela with the password and the latter could therefore not gain access to the report, he could also have been guilty of a contravention of section 88(1) of ECTA, in that he had attempted to commit an offence referred to in section 86. Section 88(1) provides that:

'[a] person who attempts to commit any of the offences referred to in sections 86 and 87 is guilty of an offence and is liable on conviction to the penalties set out in section 89(1) or (2), as the case may be'.

5. It should also be noted that, over the past few years, especially in 2017 and 2018, confidential information belonging to the PIC has found its way to external parties, including the media and retired General Bantubonke Holomisa (General Holomisa).
6. An important point to note is that a number of employees went through disciplinary processes (which are dealt with below) presided over by independent Senior Counsel, where they were represented by experienced lawyers during hearings that often lasted many days. The Commission will not interfere with the findings and recommendations or conclusions of these hearings. It has no review or appeal jurisdiction.

Past disciplinary processes

7. Mr Mayisela faced a number of charges, including being found guilty of being in possession of a document – Loan Market Association (LMA) Risk Participation - that related to a transaction between Deutsche Bank, the Government Employees Pension Fund (GEPF) and the PIC. According to the decision of the chairman of the disciplinary committee, he also 'accessed and retained the letter of appointment of Naledi Advisory Services to investigate the circumstances relating to the opening of the corruption case against the CEO'. This document

related to an investigation conducted into Mr Mayisela himself. The disciplinary committee held that there was no justifiable reason or reasonable explanation for accessing and retaining these documents. This amounted to misconduct on his part and a dismissal was recommended by the Chairperson (Advocate N.A. Cassim SC), which recommendation was carried out by the PIC.

8. Ms Matshepo More (Ms More) testified that Mr Mayisela utilised the access privileges to monitor email communications of employees, including hers. Ms More said granting of super-administration rights to Mr Mayisela without following procedures exposed the PIC to major risks.³⁴
9. The Commission finds that Ms Menye did not follow the process laid out by the PIC to grant the access rights to Mr Mayisela, and Mr Mayisela utilised this to obtain wide ranging information not related to the police investigation into Dr Matjila's alleged acts of corruption. In any event, he was not supposed to irregularly access this information.
10. Ms Mathebula, the Company Secretary, went through a full and, in our view, independent, disciplinary process where she was charged with enabling Mr Mayisela to have access to confidential minutes of the Board, which were then found to be in the public domain.
11. Ms Mathebula was found guilty in March 2019 of breaching PIC policies and a dismissal was recommended by the Chairperson, Adv W Hutchinson SC.
12. Although Ms Mathebula denied, before the Commission, that she caused the distribution of confidential PIC information in the form of minutes of the Board, the Commission accepts the findings of the disciplinary committee until they are successfully challenged. After Ms Mathebula had been found guilty of a dismissible offence, the Board of the PIC opted to give her a final written warning.

³⁴ At page 104 of the Transcript on day 45 of the hearings held on 24 June 2019.

However, it was never suggested that Ms Mathebula was irregularly in possession of the minutes at the time that she would have breached PIC policies, or at any other time. She can therefore not be said to have ‘obtained access to emails and information of the PIC contrary to the internal policies of the PIC or legislation’.

13. There may well be more PIC employees involved in irregularly obtaining and disseminating information of the PIC. In fact, Mr Mayisela testified that he was still receiving documents leaked from the PIC, which he passed on to a member of the South African Police Service.³⁵ This was after he had been dismissed from the PIC. Despite the Commission having appointed, through the investigation team, experts in the field of IT, the person/s behind the pseudonyms James Nogu, James Noko and Leihlola could not be identified.
14. The question whether any employees of the PIC obtained access to emails and other information of the PIC, contrary to the internal policies of the PIC or legislation, is answered in the affirmative. There is sufficient evidence for the Commission to conclude that Mr Mayisela obtained access to emails and other information of the PIC contrary to the internal policies of the PIC or legislation (at least section 86(1) of the Electronic Communications and Transactions Act, 25 of 2002).

RECOMMENDATIONS

15. The PIC has thorough policies and procedures in relation to safeguarding its information and employees are obliged to familiarise themselves therewith. It is accordingly recommended that the PIC should regularly review and enhance its policies on protection of its information, particularly given the pace of change taking place in the IT environment.

³⁵ Page 10 of Mr Mayisela’s statement signed on 27 February 2019.

16. Leakage of information and similar transgressions of policies and ethics have a great deal to do with the culture of the organisation. The PIC should therefore continue to inculcate values of integrity, honesty and transparency.
17. The Board of the PIC must determine what legal recourse it intends taking with regard to the deliberate actions by Mr Mayisela to obtain privileged information and pass such information on to third parties, with severe consequences for the PIC. As indicated above, Mr Mayisela could have contravened, among others, section 86(1) of the Electronic Communications and Transactions Act, 25 of 2002 (ECTA), which reads:

‘Subject to the Interception and Monitoring Prohibition Act, 27 of 1992, a person who intentionally accesses or intercepts any data without authority or permission to do so is guilty of an offence.’

18. Furthermore, Mr Mayisela may well have contravened section 88(1) of ECTA, in that he had attempted to commit an offence referred to in section 86. Section 88(1) provides that:

‘[a] person who attempts to commit any of the offences referred to in sections 86 and 87 is guilty of an offence and is liable on conviction to the penalties set out in section 89(1) or (2), as the case may be’.

19. It should also be noted that, Dr Matjila alleged that the first Nogu email appears to have emerged, in some ways, through the electronic platforms of Dr Mkhwanazi and that his personal assistant might also have played a role here, which allegation Dr Mkhwanazi denied. Though not related to this ToR, but treated here, it should also be noted that Dr Matjila accused Dr Mkhwanazi of being involved in political interference at the PIC. Dr Mkhwanazi has yet to answer to these allegations. It is recommended that the Minister and/or Chairperson of the PIC investigate these concerns and bring them to finality.

TERM OF REFERENCE 1.8

‘Whether any confidential information of the PIC was disclosed to third parties without the requisite authority or in accordance with the Protected Disclosures Act, 2000, and, if so, to advise whether such disclosure impacted negatively on the integrity and effective functioning of the PIC;’

1. From the second half of 2017 to the present, the PIC has received negative media and other coverage. Confidential information found its way into the hands of a variety of third parties, including print, radio, television and social media. These platforms have disseminated material that contained confidential information on PIC transactions, internal treatment of staff and PIC Board deliberations.
2. It has been determined that highly confidential documents, including Board papers, transaction reports and correspondence were leaked to the media and other external parties (Statement of Ms Sandra Beswick, non-executive director, paragraph 3.3.4), irregularly and without the requisite authority of the PIC (also see ToR 1.7).³⁶ Even prior to the James Nogu emails, confidential PIC information could already be found in the public domain. This distribution of information was in violation of PIC protocols on handling of information and was thus done irregularly.
3. Certain of the witnesses who testified before the Commission emphasised that information that was released was in keeping with the PIC’s Whistle-Blowing Policy (WBP), which policy is based on the PDA. However, there was no evidence that anyone followed the protocols contained in the WBP and PDA, including Nogu / Leihlola; nor were these protocols taken into account,

³⁶ Para 3.3.4 of Ms Sandra Beswick’s statement signed on 27 February 2019.

notwithstanding the damage that would be inflicted on the reputation and functionality of the PIC. The leakage of information through the Nogu emails was not in keeping with the processes as determined by the WBP. The confidential information disclosed to the SAPS by Mr Mayisela was done without authority nor in accordance with the PDA.

4. As outlined above, negative media coverage escalated over the past few years. External parties have had access to confidential information and placed it in the public domain. General Holomisa was also provided with much of the information, which was integral to his allegations against the PIC. Certain parties that appeared before the Commission were critical of the PIC and how it had handled the leakage of its information. Among these, the Association for Monitoring and Advocacy of Government Pensions (AMAGP) and Congress of South African Trade Unions (COSATU), organisations that have a direct interest in the funds managed by the PIC, expressed unhappiness with losses that the PIC had allegedly incurred, as per evidence placed before the Commission.
5. AMAGP's key complaints against the PIC related to the various transactions that had attracted controversy such as VBS losses, the R5 billion loan to Eskom and the Harith/Lebashe transactions. They accused the PIC of lack of accountability and transparency.
6. COSATU accused the PIC of looting pensioners' funds and claimed that they had lost faith in the PIC and demanded that labour federations have representation on the Board of the PIC.
7. Inevitably, the information leaks have fueled negative public and stakeholder perceptions about the PIC, which has in turn impacted negatively on the integrity of the PIC, denting the confidence in it by key stakeholders and clients.
8. The extent to which the PIC's Board of Director's Code of Conduct and Code of Ethics Policy have been breached, as per the testimonies presented to the

Commission, and the widespread concerns raised by the general public and stakeholders with regard to the functioning of the PIC – at both Board and Executive level – makes it is clear that confidence in, and the integrity of, the PIC have been impacted negatively.

9. From evidence presented before the Commission, there is no doubt that the effective functioning of the PIC, at all levels, has been negatively affected by the events of the past two to three years. From receipt of the first James Nogu email on 5 September 2017, the PIC has been severely affected. This is reflected in the resignation letter of Dr Manning to the then Minister of Finance Nene, dated 22 July 2018, wherein she states: *'I would urge you, as the shareholder representative of the PIC, to act swiftly to introduce stability and restore public confidence in the PIC ...'*³⁷
10. In the aftermath of the Nogu emails, the representative of the shareholder of the PIC, the Minister of Finance, Minister Mboweni, was called upon to intervene. This resulted in the Finance Minister commissioning the Budlender report.
11. The Board experienced deep divisions on how to deal with the issue of the CEO, Dr Matjila, in relation to the allegations contained in the emails and what action should be taken.
12. The functioning of the Board was significantly affected, particularly in 2018 when General Holomisa launched litigation to have Dr Matjila suspended.
13. Individual members of the Board resigned at various times. The Board, as a whole, offered to resign and the Minister of Finance, Mr Mboweni, 'advised' the members of the Board, through its Chairperson, Deputy Minister Gungubele, to resign.

³⁷ At page 46 of the Transcript for day 5 of the hearings held on 29 January 2019.

14. Ultimately, the Board resigned on 1 February 2019 and a new interim Board was appointed to serve from 12 July 2019. Investigations, including various disciplinary charges, were instituted that resulted in a number of senior executives of the PIC losing their jobs.
15. At present, the PIC has a substantial number of executive heads in acting positions, including acting positions for the CEO, CFO, heads of legal, risk and others. The staff at the PIC operated under extremely difficult circumstances during these times, but they have largely continued to execute their duties in a professional manner.
16. The Commission finds that confidential information was disclosed to third parties without the requisite authority. This was neither in accordance with the PDA of 2000 nor in keeping with the PIC's own whistle-blowing policy.
17. This unauthorised disclosure of the PIC's confidential information impacted negatively on the integrity and functioning of the PIC. Major reputational damage has been done to the PIC. It is apparent that while codes and policies to address ethics and values were developed and put in place, they were not respected in many of the practices followed at the PIC.

RECOMMENDATIONS

18. The Commission recommends that the Board must review the codes and policies that address ethics, values and whistle-blowing, examine why they have not been effective and put in place appropriate measures to enhance the value system adhered to by all employees, including management, the executive and directors of the PIC.
19. The PIC should take measures to ensure that directors, management and employees at all levels know, espouse and live the values and policies of the PIC.

20. Initiatives and induction for all new employees and/or Board members should be reviewed and strengthened so as to embed the values and ethics of the PIC into the culture of the organisation. This should include the protection of information and the imperative to always carry out duties and responsibilities with integrity.
21. The Board will need to take appropriate measures to rebuild trust, confidence and integrity both internally and with clients and stakeholders, as well as with the business sector and the general public.

TERM OF REFERENCE 1.9

‘Whether the PIC has adequate measures in place to ensure that confidential information is not disclosed and, if not, to advise on measures that should be introduced;’

1. As indicated in ToR 1.7 above, the PIC has implemented various measures to safeguard its confidential information. These measures are embedded in the Corporate Affairs Department, employee contracts, Information Technology (IT) policies and procedures and also include reference and adherence to relevant legislation. The PIC requires physical space to secure information in its physical form, such as printed documents, as well as the ability to ensure the physical security of its hardware and IT systems; in other words, essentially all elements of IT security. There is no suggestion that physical space for these purposes is inadequate.
2. IT security is found in the following policies of the PIC.
 - 2.1. Acceptable Use Policy;
 - 2.2. IT Disposal Policy; and
 - 2.3. Third Party Management.
3. In relation to whether any of the abovementioned measures were breached, it should be noted that from August/September 2017 the PIC experienced unprecedented instances of leaked information. The first occurred on 5 September 2017, namely, the Mobile Satellite Technologies (MST) investment

and allegations regarding Dr Matjila's romantic involvement with Ms P Louw. For purposes of this ToR, it is important to trace the events relating to this leak:

- 3.1. The message emerged from an external email address in the name of 'James Nogu' (Nogu).
- 3.2. The message was sent to a number of people, including Board members of the PIC and National Treasury officials.
- 3.3. It is not clear how the sender –
 - 3.3.1. obtained the email addresses of the people to whom the message was sent;
 - 3.3.2. obtained the information contained in the body of the email; or
 - 3.3.3. obtained access to the document attached to the email, which was about the Pan African Infrastructure Development Fund (PAIDF, but referred to as PADF).
- 3.4. It appears that the anonymous sender obtained access to internal information of the PIC and sent it to the parties he/she desired. There are, seemingly, three possible means by which 'Nogu' could gain access to the information:
 - 3.4.1. Irregularly breaching the IT systems of the PIC by exploiting the vulnerabilities therein, essentially hacking into the systems; or
 - 3.4.2. Internal parties at the PIC with access to the information providing that information to 'Nogu'; or

- 3.4.3. Being provided with illegal access to the IT system by unknown internal parties such that the information could be directly accessed by 'Nogu'.
4. Ms Menye testified that there was no hacking of the IT systems during the time of the leak. In her statement, she said the following:

*'24. He then enquired whether there was anyone who would like to say something. Mr Deon Botha raised his hand and he said that he does not believe that we were hacked, Mr Botha indicated that whoever has been sending those emails has that information. I also raised my hand to clarify that what was contained in the email, which I had seen is far from hacking. I then explained what hacking is. I also indicated that the information that was contained in the email by the looks of things appeared to come from someone who has been "drinking coffee from the same cup and eating from the same plate with Dr Dan". I also clarified that the systems of PIC do not store such personal information.'*³⁸ (Emphasis added).

5. It is difficult to ensure protection against this form of breach since the means to enable a contravention have, in all likelihood, been provided by internal parties.
6. The PIC's IT team responded as follows to the breach:
- 6.1. Further dissemination via the PIC IT system was blocked.
- 6.2. Steps were taken to investigate employees of the PIC who had access to and/handled the information that was leaked and whether they may have sent or delivered it to external parties.

³⁸ Para 24 of Ms Menye's statement signed on 6 March 2019.

- 6.3. Steps were taken to identify the domain source of the emails and to establish 'Nogu's' identity so as to halt further leaks.
- 6.4. The contents of the email were investigated to establish whether policies of the PIC were flouted and any legislation contravened. The Board mandated the Internal Audit Department to investigate the matter and later appointed an external and independent Counsel, Advocate G. Budlender SC, to investigate the veracity of the allegations contained in the email.
7. From the above, it appears that the PIC had put in place a reasonable level of protection for its information. Notwithstanding such policies, collusion between internal parties in breach of policies, practices and laws, or collusion between internal and external parties, is very difficult to prevent.
8. Securing information is clearly a multi-dimensional undertaking and since the leaks the PIC has moved to strengthen its protection measures in the following way:
 - 8.1. It took action immediately after the leaks. The then CEO, Dr Matjila, indicated at the hearings that the PIC had commissioned an investigation into options to strengthen the IT protective environment. He stated that the action and future plans, recommended in the resulting report, are being implemented.
 - 8.2. There is an on-going effort to finalise a comprehensive classification of the PIC's information so that various levels of access can be designated, accordingly.
9. The current and planned measures for the protection of the PIC's information are wide ranging and among best-in-class levels. The successful implementation, monitoring and regular review of the measures are essential steps to ensure ongoing effective protection that is able to adapt to the rapidly changing world of

IT systems. This must include vulnerability awareness programmes for all employees at all levels, an improved overall control environment and ensuring that a suitable IT system is put in place for unlisted investments.

10. The PIC is intent on strengthening the protection of its information and aspires to have a high-level state of security in the next few years. Security remains a moving target. The PIC has taken significant steps to address the vulnerabilities identified and to create a greater awareness among all employees. It has committed to assigning responsibilities for information security, enhancing the capacity of the IT teams and implementing a security strategy that focuses on key areas the Board and Executive have identified.
11. The Commission finds that the PIC had reasonably good information protection policies in place prior to the leaks, which policies did not allow the type of action taken by those parties who deliberately chose to leak information and documents. Policies that were in place include the Acceptable Use policy, the IT Disposal Policy and the Third Party Management Policy that covered key aspects of the PIC's IT resources.
12. The parties who participated in the leaks appear to have simply taken the information to which they had access and provided it to third parties.
13. Besides admitting that he stole and was given PIC information, Mr Mayisela misused the super-administrator rights enabling him full access to the whole of the PIC's IT systems. He did not need to and did not, in fact, hack the system.
14. The PIC is instituting comprehensive measures to protect its information from current and possible future threats.

RECOMMENDATIONS

15. Clearly defined and enforced classification of information will enhance the security of sensitive information.
16. The Commission recommends that the PIC should continue to strengthen its information protection measures. Appropriate measures on how to classify and declassify information should assist with security of information and enable the detection of leaks with more certainty. The IT systems should be state of the art and regularly updated in keeping with changes in technology, including the capacity to deal with cybercrime.
17. The Commission further recommends that the PIC manual systems that are still in use must be automated as a priority. The PIC should develop an ethical, transparent and value-driven culture and ensure that employee disputes are fairly and quickly addressed.
18. Investments in IT security systems and human resources should continue to be made and the PIC should live its values of integrity, empathy, accountability and respect to ensure a workforce that pulls together.

TERM OF REFERENCE 1.10

‘Whether measures that the PIC has in place are adequate to ensure that investments do not unduly favour or discriminate against –

- 1.10.1 *a domestic prominent influential person (as defined in section 1 of Financial Intelligence Centre Act, 2001 [“FICA”]);***

1.10.2 an immediate family member (as contemplated in section 21H(2) of [FICA]) of a domestic prominent influential person; and

1.10.3 known close associates of a domestic prominent influential person.'

1. The term 'domestic prominent influential person', as referred to in ToR 1.10 is more self-descriptive and unambiguous than PEPs (but will be used interchangeably with the latter term), is defined in section 1 of the Financial Intelligence Centre Act, 38 of 2001 (FICA), as a person referred to in Schedule 3A of the FICA.
2. Schedule 3A of the FICA, in turn, defines such persons, through a comprehensive list, as individuals who hold 'a prominent public function', 'including in an acting position for a period exceeding six months, or has held at any time in the preceding 12 months, in the Republic': in national, provincial and local government, political leaders, traditional leaders, army generals, certain diplomatic officials, judges, as well as accounting officers, CEOs, CFOs and CIOs of entities listed in Schedules 2 and 3 of the Public Management Finance Act, 1999 and those appointed in term of section 54A of the Local Government: Municipal Systems Act, 2000, or in terms of section 80(2) of the Municipal Finance Management Act, 2003.
3. This fairly comprehensive list further includes executives, board chairs and audit committee chairs of companies that provide goods or services to a State organ worth a certain threshold fixed by the Minister of Finance; and head or executive of an international organisation based in the Republic.
4. In respect of the term 'immediate family member', section 21H(2) of the FICA provides, in relevant part, that it –

'includes-

the spouse, civil partner or life partner;

the previous spouse, civil partner or life partner, if applicable;
children and stepchildren and their spouse, civil partner or life partner;
parents; and
sibling and step siblings and their spouse, civil partner or life partner.'

5. Whilst the list in Schedule 3A of FICA (relating to the term “domestic prominent influential person”) is fairly exhaustive, section 21H(2) (in relation to the term “immediate family member”) is not, because of the use of the word “includes” in the latter provision, which implies that the ensuing list is not exhaustive.
6. The self-contained test for the adequacy of the measures, discernible from ToR 1.10, is that such measures: ‘ensure that investments’ neither ‘unduly favour’ nor ‘discriminate against’ the class of persons in question.
7. As one of the largest asset managing companies in the country, wholly owned by the State (represented by the Minister of Finance), that manages a diversified investment portfolio comprised of multiple asset classes spanning all sectors of the South African economy, the PIC is vulnerable to the challenges concerning Politically Exposed Persons (PEPs). Dr Matjila in his evidence stated that ‘*[w]ith funds exceeding R2 trillion the PIC is a very tempting piggybank for many.*’³⁹ He referred to the adverse influence of politics on the PIC, stating that the PIC received a barrage of funding proposals from politically connected people across political formations.
8. However, despite the barrage of proposals that the PIC receives from politically connected persons, and because of the ‘*PIC’s stringent compliance practices,*’ Dr Matjila testified that many of such proposals ‘have not been fruitful.’⁴⁰ The ‘stringent compliance practices’ referred to by Dr Matjila include the PIC policies

³⁹ At pages 4-5 of the Transcript for day 53 of the hearing held on 11 July 2019.

⁴⁰ Ibid at page 72.

relating to PEPs, which, *inter alia*, stipulate that once PEPs are identified, an enhanced due diligence be conducted in transactions involving them.

9. Dr Matjila confirmed that whilst there are proper measures in place as part of the internal PIC 'process', that 'access' pressures is something that still has to be dealt with. Such 'pressures' are ascribable to the reality of the PIC's unique position as a state-owned asset manager.
10. The Commission also heard evidence that the PIC has a plethora of policies that form part of the regulatory framework within which it operates. Ms Wilna Louw (Ms Louw), the PIC's Acting Company Secretary, in her capacity as custodian of the PIC's policies and records, stated that the PIC's policies and procedures are designed to influence, determine and guide all major decisions and actions.⁴¹
11. When Mr Roy Rajdhar (Mr Rajdhar), the Executive Head for Impact Investing, who heads the Private Equity, Impact Investing and Unlisted Properties subdivisions, gave evidence before this Commission on, *inter alia*, the investment process, function and operation of his division, the two main points that emerged from his evidence were that the PIC PEPs policy is continually being improved to respond to the needs of the PIC and that the PIC adopts a broader understanding of PEPs to include people who are known to be 'politically aligned' from reports in the public domain. This encompasses more than 'known close associates' and it thus provides for a more effective policy framework governing the risks associated with PEPs.
12. The PIC's PEPs policy is titled the 'Unlisted Investment Isibaya Fund: Policy on Treatment of Politically Exposed Persons' (the PEPs Policy) and is dated May 2014 and was reviewed by the Investment Committee in December 2014.

⁴¹ At page 26 of the Transcript for day 1 of the hearings held on 21 January 2019.

13. Dr Matjila stated the following in relation to the underpinnings and purpose of the PEPs Policy:

'... The politically exposed persons policy, it's actually derived from the law, this law that deals with politically exposed person, I think it's under FIC. So we have taken that and crafted a politically exposed persons policy that allows us to do deeper due diligence on the parties spends in any transaction, if there are politicians, we need to understand their sources or finance, delve deep into . . . the relationships that they have . . . so that we ensure that the political reputational risk exposure on the PIC's side resulting in this transaction is minimised if not eliminated.'(sic)⁴²

14. These are some the main features of the PEPs Policy:

14.1. The PEPs Policy defines PEPs as *'Natural persons who are or have been entrusted with prominent public functions by a domestic or foreign country, their family member, relatives, persons known to be close associates of such persons, or trusts and other juristic persons over which they practice control.'*⁴³

14.2. The definition list setting out who is regarded as PEPs by the PIC, casts the net wider than Schedule 3A of FICA. By way of illustration, it is not only confined to leaders of political parties, but to members of parliament and of provincial legislatures, senior government officials, including local government officials. In relation to the judiciary, it extends its reach beyond just high court judges, to include Magistrates and even State prosecutors. It further includes labour group officials (i.e. trade union officials) and executives of State-Owned Enterprises.⁴⁴

⁴² At page 105 of the Transcript for day 51 of the hearings held on 9 July 2019.

⁴³ See 'Definitions' at page 7 of the PEPs Policy.

⁴⁴ Ibid. See definition of 'domestic PEPs' at pages 7-8.

- 14.3. The PEPs Policy further adopts, as wide as possible, definitions in respect of family members and associates of PEPs. This widening of the definitions, however, is at best precautionary as the aim of the policy is not to exclude, but to invoke enhanced due diligence investigations into PEPs, their family members and associates.
- 14.4. In defining the mischief to which it is directed, namely risk, the PEPs Policy provides that *'[r]elationships with PEPs can culminate in increased risks for the PIC due to the possibility that individuals holding such political positions may misuse their power and influence for personal gain or advantage of family and/or close associates.'*⁴⁵ It further sets out the reasons why PEPs are screened. Its focus is on the PIC's business relationships where PEPs are counterparties.⁴⁶
- 14.5. It defines the purpose of the policy as the regulation of all investment activities of the Isibaya Fund and ensuring that they comply with acceptable ethical norms and standards. *'It seeks to manage the resultant reputational and related risks that the PIC and its clients may become exposed to, by virtue of such relationships.'*⁴⁷
- 14.6. The objectives of the policy are to combat corruption, ensure that the PIC adheres to statutory requirements and best practice. The further objectives are to bring about consistency in the treatment of PEPs and to ensure equity, fairness and transparency whilst also mitigating the risk for the PIC.⁴⁸

⁴⁵ At 15 of the PEPs policy.

⁴⁶ See the 'Scope' of the policy at 5.

⁴⁷ See 'Purpose of the policy' at 5.

⁴⁸ See 'Objectives' of the policy at 5.

- 14.7. Although the primary responsibility for the PEPs Policy is that of the CEO, it is also the joint responsibility of all PIC employees and directors without exception, and a breach of the policy constitutes misconduct.⁴⁹
- 14.8. The PEPs Policy has features similar to an operations manual that sets out what “markers” to look for in client due diligences to identify PEPs. It, *inter alia*, sets out what an enhanced due diligence is and when to do it and provides for enhanced on-going monitoring of PEPs related transactions and the keeping of a PEPs database.
- 14.9. The PEPs Policy sets out ten policy principles on which it is based, such as that ‘Senior management shall decide on the circumstances under which PIC may reject establishing a business relationship with a PEP’: under which principle, it is provided that the intention is not to give reasons for declining transactions involving PEPs, but to ensure that preventive measures are adopted.
15. During Dr Matjila’s testimony, the Commission heard evidence affirming that there is no blanket exclusion of PEPs in transactions at the PIC. He confirmed that, in fact, the PEPs Policy prohibits discriminating against PEPs. In part, this accordingly meets the test under ToR 1.10 for the adequacy of PIC measures, in that the PEPs Policy does not discriminate against PEPs in investments.
16. Dr Matjila also testified that one of the important purposes of the PEPs Policy is the scrutiny and transparency it brings concerning the transactions involving PEPs.⁵⁰ The Commission further heard evidence on how the pragmatic and combined use of the PEPs Policy, in tandem with the deal screening committee and appeals made to the Chairman of the PIC board, Deputy Finance Minister, Mr Mcebisi Jonas, during meetings, were used to manage some of the pressures from and interferences of politicians. Dr Matjila testified, in another context,

⁴⁹ See application of the policy and exclusions at 5-6.

⁵⁰ At page 201 of the Transcript for day 61 of the hearings held on 12 August 2019.

about how he raised the PEPs Policy with the then Chairman of the Board, Deputy Finance Minister Gungubele, when the latter castigated him about a certain deal.

17. It should be noted that PEPs were directly involved in a number of the transactions that came under scrutiny before this Commission.
18. The Commission finds that, as a measure directed at addressing the risks associated with PEPs, weaknesses in the PEPs Policy creates the opportunity for abuse and poses a real and on-going risk for the PIC that needs to be addressed.
19. Moreover, the practice, or implementation, of the PEPs Policy as reflected in the actions of Dr Matjila, shows a total disregard for the policy on PEPS. These are dealt with in the section addressing ToR 1.1 contained in Chapter III.

RECOMMENDATIONS

20. The Board should review, in its entirety, the PEPs policies, taking into account the information presented to the Commission on the weaknesses in practice when implementing the PEPS policy.
21. The Commission recommends that the Board, through the proposed Risk Committee, should ensure oversight and evaluation of the effective implementation of a revised PEPs Policy on a regular basis.
22. The Lancaster/Steinhoff transaction, the Harith/PAIDF investment, the Sakumnotho/Kilicap Tosaco and Ascendis transactions are illustrations of the weaknesses of the PEPs policies in practice.

TERM OF REFERENCE 1.11

‘Whether there are discriminatory practices with regard to remuneration and performance awards of PIC employees.’

‘Whether there are discriminatory practices with regard to remuneration and performance awards of PIC employees.’

1. Consideration of discriminatory remuneration and performance practices in the PIC needs also to take account of allegations of victimisation, as victimisation also manifests itself in remuneration practices, bonus payments, balanced scorecard assessments, bias in promotions and opportunities for advancement as well as exposure to opportunities that enhance experience and expertise. Therefore, this term of reference needs to be read in conjunction with ToR 1.12, below, which addresses the question of victimisation.
2. The evidence given to the Commission was from a range of very senior PIC employees, many of them having attained positions of leadership, including being Executive Heads of functions and departments. The issues raised, including the level of non-participation in the climate survey, reflects deep-seated discontent, mistrust, a strong sense of grievance and being treated unfairly.
3. The lack of transparency in the process followed by the moderation committee, poor communication to employees and the exclusion of executive management from the various decision-making and evaluation processes has led to a breakdown of trust between employees and management, as well as between executive management, the executive directors and the Board.

4. The responses of those in positions of responsibility for the HR function, both Mr Pholwane and Ms More, were defensive and dismissive.
5. The actions of Minister Mboweni and National Treasury created confusion and uncertainty among employees and appear to violate the remuneration policy of the PIC and its contract with PIC employees.
6. The Commission finds that there are discriminatory practices with regard to the remuneration and performance awards of PIC employees.

RECOMMENDATIONS

7. In the light of the above and in view of the shareholder instruction to retrospectively cancel bonuses, it is recommended that Shareholder proposals should be prospective, not retrospective, and the Shareholder Compact should be agreed on for a defined period, for example three years, and then reviewed to reflect proposed changes.
8. Furthermore, Shareholder intervention should be fair, taking account of the agreed policies and agreements that the PIC has in place with its employees. Dates for payment of bonuses, short term investments and long term investments should be communicated at the start of each year to provide the necessary certainty to all employees.
9. The Commission further recommends that the Board of the PIC should ensure greater transparency, fairness and inclusiveness with regard to salaries, grading, performance criteria and balanced score card assessments.

10. Performance balanced score cards should be relevant to the work performed and the incentive policies and should not be used as a tool or implicit threat to ensure a compliant or subservient employee.
11. The Board should take steps to rebuild staff morale through fairness in performance assessments, remuneration and certainty regarding the bonus policy.
12. The moderating process needs to be transparent, the principles applied clearly set out, and the outcome, including any changes, whether positive or negative, timeously discussed with each employee individually. Similarly, the remuneration and incentive policies of the PIC should be transparent, clearly communicated and adhered to.
13. The Board of the PIC should institute a new climate survey to be conducted within a month of the appointment of the new PIC CEO in order to form a base line from which to measure progress in the organisation.
14. An independent professional body should be commissioned to review the re-grading process and its outcomes. It should be appointed by the Board and finalise its report by the end of April 2020. The Board also needs to urgently address the level of misinformation and distrust that prevails in the PIC.
15. Mr Pholwane should be the subject of disciplinary action for his alleged improper conduct in falsifying the results of the second climate survey, thereby misleading his senior management, as well as the Board. If the above allegations are true, his conduct was dishonest, misleading and seriously undermined the functioning of the PIC.
16. It is clear that on Ms More's watch many of the critical areas so vital to the functioning of the PIC have developed very serious problems. These include:

- 16.1. Remuneration;
- 16.2. Grading;
- 16.3. Performance evaluation and incentives; and
- 16.4. Work culture experienced by the employees.

TERM OF REFERENCE 1.12:

'Whether any senior executive of the PIC victimised any PIC employee.'

1. The evidence before the Commission presented by employees and previous employees was very clear in that employees alleged victimisation by senior executives of the PIC, in particular the former CEO, Dr Matjila, the CFO, Matshepo More and to a lesser extent the Executive Head: Human Resources, Chris Pholwane.
2. The former CEO, Ms More and Mr Pholwane all denied these allegations in their testimony before the Commission.
3. The fact that there existed a culture of fear and victimisation within the organisation even before 2015, has been established independently and objectively by external service providers in what is called a 'climate survey'.
4. Some of the pertinent findings of the climate survey presented to the PIC Board were as follows:
 - 4.1. Fear culture and not unified;
 - 4.2. Lack of strategic direction;
 - 4.3. Management by fear and poor people management;
 - 4.4. Management does not have employees' best interest at heart;
 - 4.5. Blame shifting and poor decision-making abilities;
 - 4.6. Do not address problems; and
 - 4.7. Moving goal post.⁵¹ (sic)

⁵¹ Paras 24-25 of Mr Vuyo Jack's statement signed on 4 March 2019.

5. Various senior employees testified to being victimised by Dr Matjila, Ms More and Mr Pholwane.
6. The modus operandi allegedly followed by the perpetrators, in most cases, was to make use of a so-called whistleblower report accusing the employee of some or other impropriety. This would inevitably be followed by a disciplinary hearing and eventual dismissal. The exception was Ms Menye, who was initially charged with leaking information to third parties that resulted in the infamous James Nogu emails accusing the former CEO and CFO of impropriety. Ms Menye was eventually, before the start of the disciplinary hearing, offered a severance package which she signed under duress.
7. The alleged victimisation was direct and/or indirect. The 'victim would be told to his/her face that he/she is not wanted in the organisation' or indirectly by excluding him/her from meetings or by way of manipulation of remuneration and/or exclusion from eligibility for short and/or long-term incentives. The other method used was to promote a more junior employee over the head of his/her senior, to whom he/she was reporting. This promotion method was used in the risk and legal department with devastating effect on the morale in the two departments.
8. A serious concern is that a number of the Executive and Board members who testified before the Commission appeared to be totally unaware of the culture of fear and victimisation in the organisation. The culture of an organisation is set from the top, yet a number of the Board and executive directors (the CEO and the CFO) appeared to be totally out of touch with the prevailing climate of fear and the culture of victimisation in the organisation. The CEO conceded, however, at least in respect of the CFO, that she was the main role player accused of victimisation; that he realised this and made an attempt to 'coach'

her. It was for this very reason that an employees' union was established at the PIC and as at September 2019, the union represented more than 60% of the workforce at the PIC. In the Commission's view, the probabilities are overwhelmingly in favour of the employees' version that there was a culture of fear and victimisation in the PIC.

9. The Commission finds that senior executives at the PIC abused their positions of trust and responsibility and victimised employees, contributing to a culture of fear that existed, and to some extent still exists, at the PIC.

RECOMMENDATIONS

10. The Commission recommends that the new Board should address the matter urgently and take corrective measures to rebuild confidence and trust in the PIC executive, Board and processes. Such measures should include the following:
 - 10.1. Open discussions on the results of a new climate survey that should be conducted within three months of the appointment of the new PIC CEO;
 - 10.2. An internal communication programme ensuring awareness among all staff of signs of bullying, abuse of office and misuse of promotions/incentives/salary increases or performance assessments to intimidate employees;
 - 10.3. Providing a safe platform for employees at all levels to raise their concerns.
 - 10.4. A leadership and management programme for all incumbents who hold managerial positions to strengthen their skills.

- 10.5. Implementing a mentorship programme, using both internal and external mentors, to strengthen leadership throughout the organisation.
- 10.6. Ensuring an appropriate coaching programme is in place, and both mentorship and coaching must be compulsory for all executives and senior management.
- 10.7. Putting in place programmes and activities that will build a core leadership team effective across the different levels of management.

TERM OF REFERENCE 1.13

‘Whether mutual separation agreements concluded in 2017 and 2018 with senior executives of the PIC complied with internal policies of the PIC and whether pay-outs made for this purpose were prudent.’

1. Two cases were specifically dealt with affecting two senior executives, who are both Executive Heads of the Information Technology (IT) department of the PIC, namely, Ms Vuyokazi Charity Menye (Ms Menye); and Mr Luyanda Ntuane (Mr Ntuane).
2. Witnesses alleged that Ms Menye knew, but did not inform the PIC, that Dr Matjila was under investigation by the police for corruption and also that she gave super-administration rights –which was in breach of PIC IT policies and access rights policies - to Mr Mayisela who went on to use them for unauthorised purposes. As such, Ms Menye was due to face disciplinary action and possible dismissal.

3. Given that the ToR specifically mentions the years 2017 and 2018, the Commission shall inquire into, and make findings and recommendations only in relation to Ms Menye; and utilize the matter of Mr Ntuane for comparison purposes.
4. From the inquiry and discussions set out in the Report, it is found that, by entering into the Mutual Separation Agreement (MSA) with Ms Menye, the PIC did not comply with its internal policies because there was no written DoA for Mr Pholwane to sign the MSA and verbal authority was not appropriate. Mr Pholwane should not have signed the MSA as only the CEO is authorised to do so.
5. This deviation by management did not receive any ratification from higher bodies of the PIC, in particular the Information, Communications and Technology Governance Committee (ICTGC) and Audit and Risk Committee (ARC). Though the MSA was reported to the Board, it did not specifically seek ratification as per the minutes of the joint-committee meeting that was held a week following the conclusion of the MSA between Ms Menye and the PIC. Instead, it was presented to the Board meeting for information purposes only.
6. In terms of the 29 month guaranteed salary paid to Ms Menye, the amount was not in accordance with PIC practice as it is significantly above previous amounts paid. On his own version, Mr Pholwane indicated that the amount was excessive and out of the ordinary and no evidence to the contrary was offered by others, including Dr Matjila.
7. Typically, and as confirmed by Mr Pholwane, MSAs signed by corporations usually do not exceed 6 months' salary. As such, the MSA between Ms Menye and the PIC was '*precedent setting*' and could not be justified.

8. The MSA is found to be invalid. It should not have been concluded and accordingly, Ms Menye was still supposed to be an employee of the PIC.
9. Dr Matjila breached PIC policies by authorising Mr Pholwane to sign Ms Menye's MSA and Mr Pholwane should not have acted on his instructions as they were not in writing – contrary to the PIC's policies
10. It should be noted that, subsequent to the Commission's hearings, and after seeking legal advice, the (previous) Board decided to reinstate Ms Menye. However, the Board's proposal was not accepted by Ms Menye.
11. However, the PIC has alleged that Ms Menye knew, but did not inform the PIC, that Dr Matjila was under investigation by the police for corruption and that she gave super administration rights, especially without limitations on scope and duration – not in keeping with the PIC IT policies and access rights policies - to Mr Mayisela who went on to use them for unauthorised purposes.
12. The extensive use of disciplinary hearings is disturbing and should be cause for concern to the Board and the HRRC, particularly given the number of very senior employees that have been 'disciplined', suspended and/or dismissed.
13. It is therefore recommended that the PIC should have a policy on MSAs, which sets out the process to be followed during the negotiation of an MSA and provide guidelines for settlements in terms of pay-outs to be made.
14. The PIC must also ensure that when an authority to execute a decision is delegated, such instruction must be in writing and appropriate to the level of decision-making required. A verbal instruction on significant matters is not acceptable practice.

15. DoAs should be respected and adhered to. If, for any reason, they are not appropriate, inadequate or in conflict with practice, amendments should be considered.
16. Due to the fact that the MSA of Ms Menye was invalid, the monies paid to Ms Menye in terms of the MSA must be returned to the PIC within a month of the publication of this Report.
17. The PIC is to investigate the conduct of Ms Menye in terms of the improper granting of super-administration rights to Mr Mayisela. The same applies to Mr Pholwane in relation to his alleged improper conduct in signing Ms Menye's MSA without the requisite authority.
18. Mr Pholwane's conduct and role as EH:HR in relation to the allegations of victimisation against him must be reviewed and concluded within three months of the publication of this Report.
19. The Board, through its HRRC, must undertake a comprehensive review of the use of disciplinary processes in the organisation.

TERM OF REFERENCE 1.14

‘Whether the PIC followed due and proper process in 2017 and 2018 in the appointment of senior executive heads, and senior managers, whether on permanent or fixed-term contracts’

1. The key allegations centred on issues affecting two executives, namely Ms Rubeena Solomon (Ms Solomon), who was appointed Executive Head (EH) of Investment Management from 1 September 2017, and is a senior executive head; and Mr Adrian Lackay (Mr Lackay), who was appointed to the position of investor relations from 2 April 2018 and is a senior manager.
2. The statement of Executive Head of Risk, Mr Paul Magula, states:

‘58. Appointment of certain staff members done without following a transparent recruitment process.

58.1. Ms. Rubeena Solomon was appointed as an Executive Head: Investments Support, without approval of organizational structure changes, advert and interview process. PIC did not have staff promotion policy unless if I did not know or was established after I was dismissed.

58.2. Mr. Adriaan Lackay was appointed in the Department of Communications without an advert and interview process.’⁵²(sic)

3. The history of Ms Solomon’s appointment as executive head goes back to 2015 when the PIC engaged in a restructuring process. The 2015 restructuring

⁵² Paras 58.1-58.3 of Mr Paul Magula’s statement signed on 11 March 2019.

process created major changes in the functioning of the PIC, including changes to executive and other staff positions. From the documentation provided by Mr Pholwane, the restructuring process was approved by the relevant authorities, including the Human Resources and Remuneration Committee (HRRC), the Board and the Minister of Finance as the shareholder representative. Thus, the assertion by Mr Magula that there was no approval of the restructuring is not correct.

4. A further review of the structure took place in 2017 and was approved by the Board and the Shareholder as per the documents provided by Mr Pholwane during his testimony. This also affected Ms Solomon's position as Mr Pholwane indicated:

*'...the position of General Manager: Investment Management was reviewed and enhanced to Executive Head: Investment Management. This then meant that the position of GM: Investment Management was redundant. The incumbent for the GM: Investment Management position was then absorbed [in]to the position of Executive Head: Investment Management.'*⁵³

5. However, according to PIC policy, positions for new appointments have to be advertised to afford suitable candidates an opportunity to apply. Mr Pholwane said that the PIC does at times opt to give internal candidates a chance to fill positions before seeking external candidates.
6. Typically, the position is advertised, and the subsequent recruitment process follows as per steps 1-5 of the recruitment and selection process. It entails shortlisting, interviewing and selection of candidates. Mr Pholwane said Ms

⁵³ Para 2.2.2. of Mr Christopher Pholwane's statement signed on 22 January 2019; for additional detail, see also ToR 1.13.

Solomons was absorbed into the position on a permanent basis, and did not present any evidence of an advertising process.

7. The issues of company restructuring and redundancies of positions are regulated by section 189 of the Labour Relations Act, 66 of 1995, where it is suggested, in subsection (3)(b), that before proposing dismissals on the basis of operational requirements, an employer must consider alternatives, which would include an attempt to employ redundant employees in alternative positions.
8. Section 16 of the Recruitment and Selection policy lays out the process for creating career development and progression for employees. Given that Ms Solomon appeared to be suitably qualified for the position, this could be interpreted as a promotion, but without following the agreed processes, the approach taken is open to interpretations of favouritism and exclusion of an opportunity for other internal candidates to apply for the position. This is all the more so given the significant salary increase that accompanied the new position.
9. The increase in remuneration of Ms Solomon of the order of R953 304.21 was the increase from her previous position to the new one, and as such, reflected the salary level that any incumbent in that position would have been paid.
10. Ms Petje herself was negatively affected by the restructuring as her position was rendered redundant. She was offered a position as an Environment, Social and Governance (ESG) analyst and from evidence presented to the Commission there is no indication that her managers offered her the position by following PIC processes of advertising and engaging in a competitive process, either internal or external.
11. In relation to Mr Lackay, he was appointed on a permanent basis in 2018 in a position of Investor Relations in the Corporate Affairs Department. According to the evidence of Ms Petje, Mr Magula and Mr Pholwane.

12. Ms Petje indicated that, before being appointed permanently in March 2018, Mr Lackay had been serving on a fixed term contract for 18 months at the PIC, effectively as a contractor. Section 13.6 of the Recruitment and Selection policy says these contracts '*should follow the normal recruitment process*'.
13. Regarding Mr Lackay's permanent appointment, Mr Pholwane stated that PIC policies and processes were followed: the position was created by the restructuring and human resources processes; an internal advertisement process was complied with; there was a shortlist and in terms of the scoring process Mr Lackay was the best candidate on the list of three.
14. In terms of the increased remuneration for Mr Lackay, in the order of R331 200.00, the approvals from various bodies incorporated changes in remuneration for new positions that had been created. Various employees, including Mr Lackay, were awarded substantial increases in remuneration that accompanied their new positions and roles. Thus, this was within the PIC policy and process.
15. The Commission finds that the appointment of Ms Solomon as Executive Head: Investments Support appears not to have followed PIC policies and processes. She was 'absorbed' into the position. The position was not advertised, either internally or externally, and a competitive process was not conducted. Thus the Board should investigate if Dr Matjila, Ms More and Mr Pholwane breached PIC policies in approving her appointment.
16. The approach followed allowed for an interpretation of special treatment of some employees and unfair treatment or limiting opportunities for others, particularly given the substantial remuneration increases that accompanied such appointments.

17. The first appointment of Mr Lackay on a fixed term contract did not follow PIC processes. Thus Dr Matjila, Ms More and Mr Pholwane breached PIC policies in approving the appointment. However, the second appointment of Mr Lackay on a permanent basis followed PIC processes and all the prescribed procedures were followed.

RECOMMENDATIONS

18. The PIC has human resources policies and processes in place, and the Commission recommends that senior executives should follow these policies at all times.
19. It is further recommended that employees need to be, and be seen to be, treated fairly and equally. The inconsistent application of the policies has the potential for employees to feel their careers are limited due to favouritism.
20. Transparency, openness and visible fair employment and promotion processes and procedures are essential to ensure an environment of trust.
21. PIC HR policies should be reviewed by the Board HRRC on a regular basis and the Board HRRC should regularly evaluate senior promotions and appointments to ensure that they comply with policies, procedures and fair practices.
22. In respect of the potential irregular appointment of Ms Solomon and the first appointment of Mr Lackay, referred to above, it is recommended that Ms More and Mr Pholwane, who remain in the employment of the PIC, should be further investigated and, if appropriate, subject to disciplinary charges.

TERM OF REFERENCE 1.15

‘Whether the current governance and operating model of the PIC, including the composition of the Board, is the most effective and efficient model and if not, to make recommendations of the most suitable governance and operating model for the PIC for the future.’

GOVERNANCE

1. Following the PIC investment in Afrisam (where the total investment by the PIC was R12,6bn in what, in essence, is a non-performing asset) and the restructuring that took place in 2013, the GEPP responded to the Afrisam crisis by *‘imposing a cap of R2bn on the amounts that the PIC could invest in a single asset in the future. Also, that any investments above that figure had to be approved by the GEPP⁵⁴’*.
2. Mr Sithole specifically stated that, with regard to the Ayo transaction (dealt with above), and notwithstanding the limitations imposed on the PIC by the GEPP, the PIC did not involve or inform the GEPP when it considered and made the investment in Ayo, nor did it highlight the investment in its subsequent reporting to the GEPP, but only responded when the GEPP began asking questions. The PIC contended that they considered the Ayo investment fell under the listed investment DoA, a view that Mr Sithole strongly disagreed with and said that, while he could not pronounce on the legality of the action, it was certainly a breach of faith and trust.
3. Both Dr Matjila and Ms More confirmed that, notwithstanding the DOA requirement that, in many instances, agreement between them was to be

⁵⁴ Para 80 of Dr Matjila’s statement signed on 15 July 2019.

obtained prior to a decision being made, they did not do so. They stated that this requirement was, however, met through various committee meetings. When asked about not contacting Ms More as required prior to the Ayo transaction approval, Dr Matjila said: '*Ms More is in a similar situation as I am because we rely on advice from the technical people as they are the ones who do the work and make recommendations, so it was not necessary to ask her ...*'⁵⁵ However, he acknowledged that the DOA was not changed to reflect this practice.

4. Dr Matjila's justification for investing in Ayo is moreover a *post facto* tailoring of facts and a dishonest one. He vacillated in relation to what authority he had been acting on when he signed the Ayo irrevocable subscription form. And there is no record of any other IPOs subscribed for in the manner he opted for in respect of the Ayo transaction, ie, without prior PMC approval.
5. Dr Matjila, when asked how he had dealt with the matters raised by the Investment Committee (IC) regarding the timing of Ayo and whether (the deal) was in line with the DOA ... he replied: '*I cannot remember ... but I remember quite a number of them were dealt with by the team*'.⁵⁶
6. Yet there is a conspicuous material non-disclosure in all reporting memoranda given throughout to the Board, GEPF and SCOPA regarding the process followed to approve the deal, in respect of his signing the irrevocable subscription form before PMC approval. Even after 'ratification', Dr Matjila failed to give full and frank disclosures on the process followed to approve the deal.
7. In the Steinhoff/Lancaster investment, the original proposal from Mr Naidoo was for an investment of R10,4bn, but this was reduced by the PIC to R9,35bn. When asked about the reasons for this reduction, Mr Vusi Raseroka, the PIC official dealing with Lancaster/ Steinhoff Project Sierra, responded: '*I can only speculate*

⁵⁵ At page 86 of the Transcript for day 59 of the hearings held on 24 July 2019.

⁵⁶ Ibid. page 68.

*that the reduction was to enable the transaction to fall within the mandate limit of the IC ... which if exceeded would have resulted in the transaction going to the full PIC Board for approval.*⁵⁷

8. With regard to the Steinhoff/Lancaster transaction (dealt with in 1.1), Dr Matjila confirmed that they had reduced the amount from R10,4bn to R9,4bn *'to be in line with the Investment Committee mandate, so that they were able to approve it...'*⁵⁸

9. A significant number of witnesses raised their concerns about time pressures to meet deadlines that compromised processes, valuations and the quality of due diligences being conducted. This is all the more concerning given that the PIC is the funder and the entity approached to consider whether to invest or not. The evidence indicated considerable irregularity, overruling of processes and improper sequencing of decisions including, by way of illustration, signing the irrevocable subscription prior to due process being followed in respect of the Ayo transaction⁵⁹, in the name of making a quick decision. There can never be a justification for time constraints overruling the merits of investment decision-making being thoroughly interrogated.

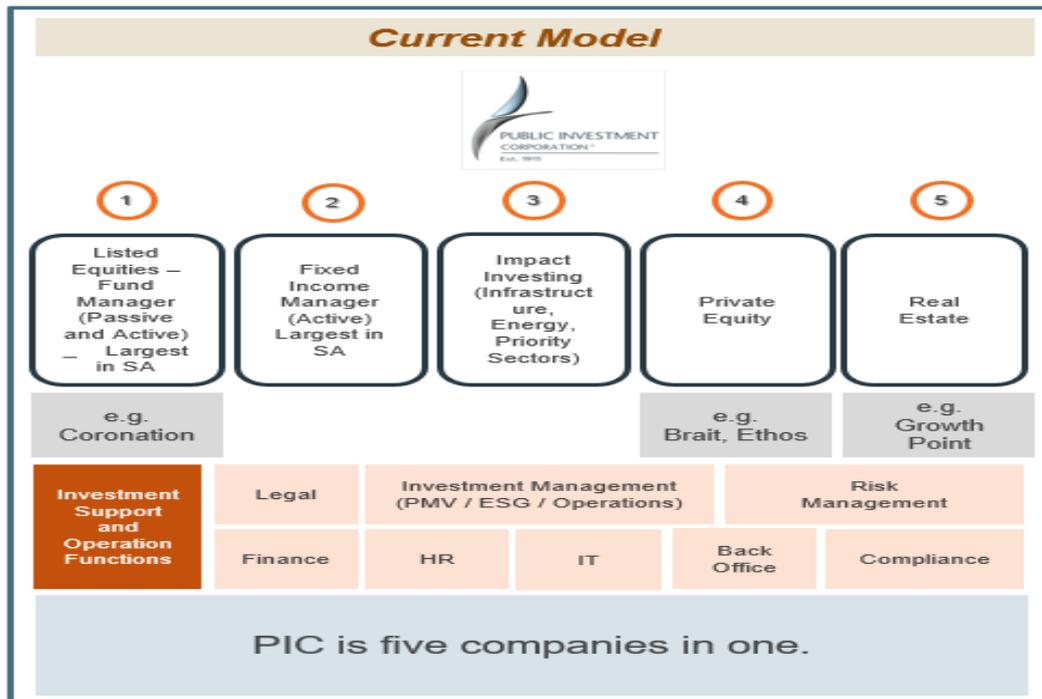
OPERATING MODEL

10. The current operating model, depicted in the diagram below, which was adopted in 2015 after Dr Matjila became CEO, can best be described as a centralised operating model:

⁵⁷ At page 73 of the Transcript for day 26 of the hearings held on 9 April 2019.

⁵⁸ At pages 103-105 of the Transcript for day 55 of the hearings held on 16 July 2019.

⁵⁹ For details see the Sekunjalo Case Study in Chapter III of the report.



11. As depicted in the diagram above:

11.1. The PIC is a massive and complex organisation with more than R2 trillion in managed assets.

11.2. The scale of the operations of the PIC are akin to managing five large investment management businesses including equities, fixed income and private equity. On a standalone basis these would be some of the largest companies in their field.

11.3. The businesses are aided by departments that support investments such as Risk, Investment Management and Legal.

11.4. Departments such as finance, Human Resources (HR) and Information Technology (IT) complete the picture.

12. Thus, the PIC is an organisation with enormous operations under one roof and it is highly concentrated at the top (with the CFO and the CEO, who has the final say on investment related decisions).
13. In relation to governance, the Commission finds that confusion as to the role, functioning and responsibilities of the Board prevails. Non-executive board members have responsibilities and functions that blur the distinction between the role of a board and that of management.
14. Non-executive Board members fulfil decision-making functions by serving on, and chairing committees that make investment decisions.
15. Non-executive board members also serve on the boards of investee companies, as do executive members, impacting on fiduciary duties, conflicts of interest and where accountability lies.
16. In a number of instances, non-executives (and executives), who have been key figures in making an investment, then serve on that investee company board.
17. The dependency of the earnings of some non-executive board members from serving not only on the PIC Board and the required sub-committees, but also on various other boards and executive committees of the PIC, calls into question their status as 'independent'.
18. There is ineffective oversight of decision-making and processes by the Board as they are an integral part of the decisions taken. It is not possible or appropriate to be part of overseeing decisions and processes that you have been part of.
19. The Board conducts inadequate risk oversight and assessment and approves inappropriate investee board representatives.

20. The frequent changes to the Finance Minister, who represents the shareholder with regard to the PIC, and role of the Chairperson of the PIC, being the Deputy Minister of Finance, appears to have significantly contributed to ineffective governance and the deficient functioning of the Board. Moreover, their appointment to such positions in the PIC was by virtue of the office they held, whether or not they had the appropriate skills, experience or expertise with regard to chairing and appreciating the functioning and business of such a critical organisation.
21. The reliance on Round Robin Resolutions to take major decisions is inappropriate. This approach completely disregards the benefits derived from engagement about decisions to be taken, processes to be followed and the rigour required to thoroughly interrogate investment proposals.
22. The violation of the MOI, with respect to the restructuring in 2015, was deliberately condoned by the Board, notwithstanding the impact it had on the composition of the Board and the significant enhancement of the power and influence of the two non-executive directors.
23. Minutes of formal meetings are kept. However, records of meetings and interactions of management at various levels are deliberately not kept. The evidence before the Commission showed repeatedly how who was being met, by whom and for what purpose was not recorded. This made who met, when and where, what was discussed and whether any promises or undertakings were made, impossible to validate.

FINDINGS AND RECOMMENDATIONS IN RELATION TO THE OPERATING MODEL AND GOVERNANCE

24. In relation to the operating model, the Commission finds that the PIC is a large and complex organisation that needs to evolve and, in a way, be “broken up” or restructured to further enhance efficiency and accountability.
25. The PIC is like running 5 large businesses in one and these need to be delineated properly and managed for efficiency and effectiveness.
26. The decision-making processes are highly centralised and go all the way to the top with all the key decisions ultimately residing with the CEO. This clogs the system and needs to change.
27. The new operating model should consider decentralised decision-making, changing the structure and having focused management. It should consider the creation of three large specialist investment business units. This will hopefully result in better investment performance.
28. Decentralisation does have some drawbacks in terms of duplication and extra costs, but this can deftly be managed.
29. The investment decision frameworks will have to change, but the PMCs should stay.
30. It is important to note that the new model is likely to be more costly, thus the PIC will have to fund this through better investment performance, resulting in increased revenues over time to recoup the costs.
31. The areas of Risk, Legal and IT; Paper-based and spread-sheet based systems in PMV, Investment Operations and Unlisted Investments were identified as weaknesses at the PIC.

32. It has also been noted that the PIC outsources a lot of key capabilities and this might need to be brought in-house. This includes non-complex issues in the Legal department and also derivatives structuring in the SIPS department.
33. The Commission also finds that the old operating model served the PIC well in the past, but it appears to have run its course now that the PIC manages approximately R2 trillion in assets.
34. The PIC has been exploring a new model which seems to accord with good local and international models. It is recommended that the PIC implements a model in keeping with its future strategies and culture.
35. The new model could involve major restructuring and the creation of units that in time could be managed on an autonomous basis with different sub-cultures and shared services, within a broader HoldCo. It needs to be emphasized that specialist asset classes will be separated and this is where investment decisions will be made and concluded.
36. The Commission further recommends that the PIC needs to overhaul the way it deals with directors that serve on the boards of investee companies and ensure proper oversight and management of conflicts of interest. The process of appointment, skills needed and the fees paid need to be examined to safeguard the interests of the PIC.
37. It is also recommended that round-robin resolutions should be undertaken in rare circumstances, especially for major decisions.
38. There should also be a limit, on a cumulative basis, on how much funds a sponsor can access from the PIC, especially when the sponsor's companies are underperforming.

39. There should be more meaningful engagement between the PIC and its clients such as the GEPF.
40. The PIC should ensure that it effectively manages any subsidiaries and associate companies, should they be created.
41. Transactions undertaken and fees paid to advisors should be transparent and made public.
42. The PIC should attend to areas of Risk, Legal and IT, among other functions; it should also consider establishing a Legal Counsel office, distinct from the legal department, that advises the Board and Exco.
43. Paper-based processes in Unlisted Investments, PMV and Investment Operations should also be attended to.
44. The Commission has noted the lack of collaboration with stakeholders and a need to achieve more in ESG. This needs to be addressed.
45. There are also HR problems, such as acting positions, vacancies and issues with performance management, bonuses and salary adjustments. In this regard, the Commission recommends that the Shareholder Compact, signed on 7 July 2017, should be reviewed. The clause that requires the Minister of Finance to sign off on the awarding of incentives to all staff has contributed to the uncertainty around the bonus pool, the timing of bonus payments and the quantum thereof.
46. Furthermore, at present, the Shareholder Compact is an annual agreement signed between the PIC and the Minister of Finance representing the shareholder. It is recommended that the Shareholder Compact should be reviewed every three years, not annually. This would also align the Compact with the three-year horizon of the Corporate Plan. The role, expectations and responsibilities of both parties need to be clearly defined in such a compact.

47. The PIC should in-source key and basic skills, particularly in legal and derivatives restructuring, and outsource only complex matters where specialist skills are desired.
48. A cooling off period should be determined for former directors and staff that prohibits them from conducting business with the PIC or an entity established by it for a period of time, possibly 12 months.

Board Composition and Functioning

49. The legislative and regulatory framework governing the PIC should be amended to implement and/ or achieve the following:
 - 49.1. Define the nature and responsibilities of the Board as being one of oversight, in keeping with best practice.
 - 49.2. Ensure the appropriate Board committees are established with clear terms of reference and accountability.
 - 49.3. Separate the Audit and Risk Committees, establishing a specific Board risk committee with clearly defined terms of reference and accountability.
 - 49.4. Formalise requirements for technical skills, personal experience, knowledge and expertise as well as conflicts of interest.
 - 49.5. Term of office of Board members should be a maximum of 3 terms of three years each.
50. It is further recommended that the PIC should develop and put in place appropriate policies for Board and management, regularly monitored and updated, as they relate to:

- 50.1. Compliance, including whistleblowing and procedures for raising concerns;
 - 50.2. Anti-corruption, including policies on political engagement; payments or assistance to public officials and gifts and entertainment guidelines;
 - 50.3. Intermediaries, including a review of the PEP policy and third-party due diligence requirements;
 - 50.4. Political or other pressure;
 - 50.5. Conflicts of interest;
 - 50.6. Assessing and monitoring culture to ensure it is aligned with the company's purpose, values and strategy;
 - 50.7. Effective engagement with, and encourage participation from, employees; and
 - 50.8. Overarching governance and board fees
51. In relation to the Chairperson of the Board, the Commission recommends that the 'role profile', expertise and personal qualities required of a Chairperson need to be formalised. In addition, the Chairperson needs to be independent and non-executive and he/she needs to have experience and expertise in Pension Funds, finance, markets as well as governance. It is also recommended that the term of office of the Chairperson is to be the same as those of other non-executive board members and the Deputy Minister of Finance should not be the PIC Chairperson.
52. With respect to Board appointees, the Commission recommends that they should go through an induction process dealing with clarity of fiduciary duties and role played if they sit on boards of investee companies. There should be a Service Level Agreement with investee companies as to the role of board members,

independence vis-à-vis who is paying board members, clarity of policies and expectations.

53. The Board should also have the skills that are applicable to the PIC's corporate governance, strategic and operational requirements.

Board selection process

54. The Commission recommends that the process of appointing the Board should reside with the PIC and the Directors Affairs Committee (DAC), and Board members should then be approved by the Minister, together with Cabinet.
55. The PIC, not National Treasury, should source new directors through various means including recruitment agencies and placing adverts in media platforms.
56. The PIC should follow a robust process in selecting Board members and should ensure that the individuals recruited possess the skills needed. Thereafter, this process and its outcomes, without impinging on confidentiality of individuals, should be made public.
57. Thus, the selection of the Board should not follow a full public process in parliament and the appointment of 'political appointees' should be avoided.
58. In the event that a full Board, as opposed to rotating members, has to be appointed, the Minister shall be required to utilise the CEO of the PIC to take the role of the Directors' Affairs Committee and the CEO and the Minister shall follow the process outlined above.
59. Once the Board has been selected, the Board and not the Minister, should choose its own Chairperson.

60. The appointment of the CEO should also follow the current process whereby the Board leads the process and offers the selected name to the Minister to approve. If the Minister rejects the Board's selection, the Minister should show good cause for that rejection.
61. The removal of directors of the PIC should not be at the whim of the Minister. The MOI says the Minister should offer reasons for removal to the Cabinet. This is not sufficient for the security of tenure of directors and these reasons should be immediately made public by the Minister. In the event that the entire Board is removed, the question of institutional memory arises and needs to be taken account of.
62. In terms of the Board subcommittees, given the complexity of the PIC, it is recommended that the Risk and Audit Committees should be separated and each stand alone.
63. The Information Communication and Technology Governance Committee (ICTGC) should be given greater weight in deliberations, ensure manual systems are replaced and keep modernising the technology environment of the PIC. It should also deal with digital transformation.
64. Given the changes proposed in the operating model, the IC will be the most affected of the sub-committees as it will have to concentrate on an oversight role as opposed to participating in investment decisions. Investment operations would likely be moved to specialist business units.
65. The PIC Board should concentrate on playing a strong oversight role and extricate itself from operations. The Board should thus strengthen rules on oversight – it should be a governance and not a management board.

TERM OF REFERENCE 1.16

‘Whether, considering its findings, it is necessary to make changes to the PIC Act, the PIC Memorandum of Incorporation and the investment decision-making framework of the PIC, as well as the delegation of authority for the framework (if any) and, if so, to advise.’

Shareholders compact

1. It appears that the annual engagement on the Shareholder Compact is onerous to the PIC and thus it is proposed that it be undertaken every three years. This will also create greater certainty, enable envisaged changes to be forward looking and lessen the burden on the PIC.
2. The Commission recommends that the Shareholder Compact needs to be reviewed to ensure certainty and clarity of roles, responsibilities and accountability.

Memorandum of Incorporation (Mol)

3. The Commission recommends that the PIC’s Mol should be evaluated afresh in keeping with GEPF requirements and the roles of CIO and COO should be reinstated. It is also recommended that the CEO, CFO and CIO should be ex officio board members.
4. Consideration should be given to both Risk and IT having executive roles at the same level.

Mandate

5. Clarity on the primary mandate needs to be obtained – ensuring adequate funds through investment and contributions to meet both short- and long-term liabilities in a sustainable manner. This requires that the GEPF thoroughly review its financial position and the financial progress of the Fund to evaluate the appropriateness of the investment strategy currently in place, taking account of the nature and extent of liabilities.
6. There needs to be agreement between the shareholder, the GEPF and the PIC on what the benchmark return should be to maintain the Fund at a level agreed between the three parties. This should also help determine the investment strategy.
7. The secondary mandate – which includes promoting economic development – should be determined between the shareholder and the GEPF such that the PIC’s implementation thereof, including through a clearly defined developmental investment strategy, also meets the requirements of the primary mandate.
8. Effective monitoring and evaluation of investments should include a clear definition of what success is from the outset.

Delegation of Authority (DoA)

9. The DoA needs to be revised to ensure appropriate oversight and escalation.
10. The reserved powers of the Board, in its totality, need to be reviewed
11. The unintended consequences of the DoA need to be considered.
12. The Board, given changes to governance and the operating model, will have to revise the Reserved Matters and align them to the new reality.

13. The DOAs will also change extensively in so far as they cover various actions and approvals by parties within the PIC.

The Recommendations on the Amendment of Legislation

14. It is the view of the Commission that there needs to be an urgent redrafting of legislation relating to the PIC. The current PIC Act should remain in force until new legislation is promulgated.
15. The drafting of such legislation must take account of the PIC Amendment Bill that has been passed by Parliament, as well as the findings and recommendations contained in the report of this Commission. Such a process must ensure wide stakeholder engagement and consultation and should be a priority to be completed as soon as possible.
16. The Board should not have, as a legal requirement, to include representatives of labour and depositors such as the GEPF. Every Board member owes a fiduciary duty to the PIC and does not represent their own interests on the Board. Thus, proposals in the PIC Amendment Bill on this issue may need reconsideration.
17. To the extent that the Minister might include the above, the representatives of Labour and/or depositors should be appointed as individuals and contribute their experience and expertise in keeping with the needs of the PIC Board.
18. The proposal to have PIC clients, such as the GEPF, on its Board will create conflicts of interest as the GEPF must hold the PIC accountable regarding the implementation of its mandate and investments the PIC makes.
19. Consideration could be given to a director being appointed from National Treasury, as this could assist the Board's understanding of the Government's priorities relevant to the PIC. Should such an appointment be made, it should

not serve as a substitute for formal meetings between the PIC and the shareholder. There would also need to be clarity as to where fiduciary duties lie.

20. In terms of Directives issued by the Minister, they could be tabled in Parliament for debate. Needless to say, the decisions should be rational.
21. In redrafting legislation, the terms of the PIC Amendment Bill should require the National Assembly to play a stronger role, particularly with regard to reporting requirements and public accountability. To ensure greater transparency, the PIC should provide more information to the relevant parliamentary committee and, where appropriate, the National Assembly, including with regard to strategy, mandate implementation, and performance on both listed and unlisted investments.
22. The PIC should ensure that the actuarial valuation report is presented to the appropriate committee within three months of its conclusion.
23. The PIC Amendment Bill expands and makes explicit the investments the PIC must make such as in manufacturing and local investments. Though well-intentioned, this is not appropriate and, if need be, broad parameters could be included in the GEPIF Law or its mandate to the PIC.
24. The re-drafted PIC Act should consider what must be mandatory for the Minister to table in Parliament, for instance draft regulations, and must take into account comments arising from members of Parliament.
25. In terms of the FAIS Act, the PIC is required to meet its obligations in terms of this Act and the mandates it gets from clients.

General Recommendations

26. The Commission recommends that a Legal Counsel office needs to be established, which will be responsible to the Executive and the Board, and separate from the legal department, to ensure that the Board and executive operate within the law and best practice at all times.
27. Keeping records of meetings, including participants in such meetings, decisions taken and relevant, material matters should be standard practice and maintained for both formal and informal meetings.
28. Ensure segregation of roles between Board and management to avoid interference in operational matters
29. Independence of non-executive directors needs to be ensured and it must be considered what percentage of their income is earned from Board fees, and whether their independence could be compromised by a need to remain in the CEO's/CFO's 'good books' to ensure continued board and committee appointment.
30. Shareholder proposals regarding bonus pools or other HR matters, if not contained in the Shareholder Compact, should only be prospective, and not applied retrospectively, to ensure that contractual agreements with staff are not disregarded.
31. The PIC needs to be made future-proof to ensure that it can deliver on its mandate without undue interference, pressure or attempts at manipulation.
32. It is global best practice that with large asset managers, the CEO does not get involved in investment decisions. The CEO will then be in a position to hold investment professionals accountable for investment performance.

TERM OF REFERENCE 1.17

‘Whether the PIC has given effect to its clients’ mandates as required by the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002) and any applicable legislation.’

1. In considering whether the PIC has given effect to its clients’ mandates, the focus will only be on the GEPF given that it comprises 87% of the assets under management by the PIC and it is the client that has appeared before the Commission.
2. The GEPF approved an investment policy in 2007 and the GEPF Board of Trustees (BoT) approved an expanded developmental investment strategy in 2010⁶⁰. This recognised that the GEPF had a tremendous opportunity to make investments with positive economic and social benefits that had not been leveraged to the extent possible.

The Legal Relationship between the GEPF and the PIC

3. In a memorandum prepared by law firms Cliffe Dekker Hofmeyr and Adonisi Malapane Moletsane & Molo Inc (AMMM) for consideration by the GEPF⁶¹ (the Memorandum), the following points are made:
 - 3.1. The GEPF entered into an Investment Management Agreement (IMA) in June 2007 with the PIC, in terms of which the PIC was appointed as an investment

⁶⁰ A copy of the investment strategy is attached as annexure ‘A2’ to Mr Abel Sithole’s statement.

⁶¹ A copy of the memorandum is attached as annexure ‘B4’ to Mr Abel Sithole’s statement.

manager of the GEPF and is required to act within the investment policy of the GEPF.

- 3.2. The actions of the PIC are explicitly limited to the parameters of the GEPF investment policy.
- 3.3. The PIC must 'manage the investment portfolio as a fiduciary in the utmost good faith, and with the due care, diligence and skill which is to be expected of any expert investment manager, and generally to act in accordance with the terms of the IMA at all times'.
- 3.4. The IMA also sets out the common law duties of the PIC, which includes the duty to keep the BoT informed of all material matters concerning the investment portfolio. The PIC is required to disclose information to the BoT and not conceal any material information⁶² relating to the investment portfolio.
- 3.5. The PIC is liable to the BoT for breach or damages that arise from non-compliance with the mandate.
- 3.6. Where the PIC has acted beyond its mandate, the GEPF is entitled to ratify such action and where this is not done, the PIC would be liable for the loss or damages incurred as a result of such action.
4. The FAIS Act states that where a provider is a corporate, that provider must at all times be satisfied that every director, member, trustee or partner complies with the requirements in respect of personal character qualities of honesty and integrity.⁶³

⁶² It should be noted that the standard of materiality, especially from an auditing point of view, comprises of issues that are material by amount and material by nature. Often the latter is not intrinsically considered by people when assessing 'materiality'. For example, the information about activities within the DoA but not within reasonable fiduciary duty is equally material to amounts over R2 billion or R10 billion. Thus, information about material activities known by the PIC but not disclosed to the GEPF would fall foul of this element.

⁶³ Section 8(10)(a)

5. The Commission finds that Dr Matjila did not meet the fit and proper qualities of honesty and integrity with regard to providing accurate information to the GEPP, with particular reference to the Ayo Technology transaction.
6. It is unclear whether the register of representatives has been regularly updated and if those currently listed (at the time of looking at the website) are all still in the employ of the PIC.
7. The imperative as set out in the IMA to make 'prudent' investments appears to have been largely disregarded. Too many examples, set out in 1.1 of this report, reflect this lack of prudence.
8. The attitude of Dr Matjila to investment performance demonstrates an insufficient commitment to the prudence requirement. An example of this is noted when during his testimony, he stated:

'The Commission is dealing with almost 2% of the portfolio (in unlisted investments) ... If you add up all the problem transactions you are not going to exceed R30bn at best ... the total figure could be R40bn'.⁶⁴

9. At this point, when evaluating materiality and prudence, it is important to note that the use of percentages obfuscates the numerical size of the funds in question. R40 billion exceeds a full year's state contribution by National Treasury to the pension fund which has averaged R37,7 billion a year and comes in at around 64% of total contributions. All of this makes the ability to absorb write offs and losses precarious which, by definition, is the opposite of prudence. Any 2% capital loss, when the fund is potentially not fully solvent (in terms of the actuarial valuation reflecting the funding level of long-term liabilities), is a significant loss to what should be capital reserves or a buffer.

⁶⁴ At pages 78 and 80 of the Transcript for day 58 of the hearings held on 23 July 2019.

10. Moreover, given that the losses primarily occurred in the investments made through the Isibaya Fund, the R40bn should be measured against the R123 billion that the PIC has invested through the Isibaya Fund, 41% of which is at risk, on watch, under-performing or non-performing.
11. Using percentages masks the size of the monies involved. While it is recognised that even with the best processes and due diligence, losses and bad investments will occur, the issue at stake here is the failure to follow due process and making investments without the required rigour and authorisation.
12. Improving investment returns is critical to ensure that there is no future requirement to increase government contributions, especially as the government is borrowing to fund total expenditure, including that contributed to the GEPF.
13. The repeat investments that have been made with particular individuals or companies – single name risk - indicates a tolerance of cumulative risk that raises the question as to whether the PIC has deliberately structured the internal risk management function and process to be ineffective. At present, each deal is considered in isolation, irrespective of how many other deals have been applied for by the same individual or entity, approved/not approved or how they are performing, so that there is little assessment or consideration given to the total risk profile or exposure on a cumulative basis. This ‘deliberate structuring’ approach also enabled the favouring and repeated enriching of or providing opportunities to, the same people via different investments and also often ignored the imperative for ‘broad based’ investments, contained in the GEPF mandate.
14. The review of the IMA by an independent consulting firm, expected to be completed in two years, reflects a lack of urgency on the part of the GEPF to ensure the PIC/GEPF agreement takes account of the changing economic and asset management environment or the challenges of governance that the GEPF

and the PIC are facing. Such a review should produce an interim report by no later than end June 2020, following which the next steps should be determined.

15. The principal terms regarding investment limits of the Private Placement Memorandums (PPMs) which were approved in 2016, that there should be a maximum of 30% of aggregate Capital Commitments (for each sub-fund) in any single investment, bears deep consideration for future detailed review. A statistically anecdotal review (i.e. the transactions that have been reviewed by the Commission) shows multiple breaches of this resolution of a maximum capital commitment as defined as the sum of debt and equity. Further work should be undertaken to ascertain whether there was intentional subversion of this requirement.
16. Should the stakeholders in this complex relationship between GEPF and PIC wish to consider a change in approach, whereby the GEPF is called on to take direct responsibility and accountability for activities within the PIC, then a new conversation should be started to evaluate if the GEPF should have a material shareholding in the PIC.
17. The Commission recommends that the PIC Board and the GEPF BoT need to jointly determine their purpose, role, relationships, nature and frequency of meetings to rebuild trust and confidence, and then ensure that appropriate interaction at the required level actually takes place. As an example, this could be achieved via a neutral third party facilitation process whereby each side's requirements and expectations are gathered and consolidated. Then a collaborative session should be held to formalise roles and responsibilities ("the what") as well as defining new ways of work ("the how"). The facilitator would combine the outcome for final approval on both sides that would then become a foundational operating model between asset managers and clients. It is recommended that this be initiated as soon as possible.

18. It is further recommended that the IMA between the GEPF and the PIC of 2007, as well as the Addendums of 2013 and 2016, should be reviewed in their entirety with a focus on returns expected, management and governance. Particular attention should be paid to the effectiveness or otherwise of the GEPF Investment Committee's functioning as the Advisory Board of the various sub-funds and its primary function of reviewing the PIC's compliance to investment objectives and mandate as well as to monitor and review performance. This should inform the mandate given to the independent consulting firm currently undertaking a review, and the timeline for completion should be significantly shortened without compromising quality.
19. The GEPF should ensure it has the required skills, resources and expertise to check and challenge the PIC. The ability of the GEPF to deeply understand the various portfolios will ensure that they have the capacity to fully challenge and review investments, including losses incurred.
20. Consideration should be given by the PIC to removing 'annual total value of approved transactions' as a balanced-scorecard key performance indicator (KPI) as it prioritises deal flow over risk/returns.
21. The Commission recommends that the PIC should establish a compliance coordinator and develop a compliance charter by no later than June 2020. There needs to be demonstrable consequences for individuals and teams, and steps taken if there is a lack or breach of compliance. The specifying of the role requirements and creation of this function within the PIC second line of defense should be completed within 6 months of the publication of this report.
22. There is a need to better understand the interplay between investment returns, net contributions or withdrawals and, crucially, consideration of the cost to the country of on-going and historic funding for the clients out of debt, not savings.

23. Adequate benchmark and returns hurdles set by the GEPF (and other clients) for the PIC must take into account the actuarial net present liability. Benchmarks should be set at a level to ensure actuarial solvency and aim to not have to increase government/employer annual contributions. This approach is important so as to remove any non-balance sheet liabilities in the national accounts which are, in reality, a tax on future generations.
24. The setting of investment hurdles must robustly take into account risk appetite, loss capital buffers and the ability to absorb major capital losses, net contributions and actuarial liabilities.
25. The BoT resolution of October 2017 which requires the PIC to seek approval from the GEPF's Investment Committee for any single investment above the R2 billion for unlisted and property investments should be reviewed to take account of cumulative investments that are made. Such investments may in total exceed the R2 billion cut off, but individually fall within the limit set.
26. The Commission recommends that the role of advisors and the approach to financial engagement thereof must be reviewed and strict commercial boundaries must be codified. This is an essential and immediate requirement. The new approach must be transparent; competitive; have mechanisms for public check and challenge; limit fees paid to value received and, most importantly, must recognise that the PIC, as the largest role-player in the private sector capital markets, should take advantage, in the right way, of its sectoral importance to drive value creation from its advisors for its clients.
27. In addition to the above recommendations, consideration should also be given to—
 - 27.1. developing formalised sub-strategies, for example, an Offshore Strategy and a B-BBEE Strategy.

- 27.2. conducting a review of the overall scope of all investment strategies and limits that could unlock value by setting boundaries and narrowing focus. The current wide-ranging objectives allow for different investment cases to underpin investments which reduces comparability and the connection to strategy.
- 27.3. There should be a strict discipline to put in place formal house views that are tracked with a matrix of measures for objectives.
- 27.4. using a separate entity/dedicated fund involved with B-BBEE and a transformation mandate.
- 27.5. The use of a separate entity/dedicated fund involved with B-BBEE and transformation mandate.
- 27.6. including a service level agreement in the Shareholder Compact that sets timelines within which the Minister of Finance is required to deal with matters as they affect the PIC, for instance the asset and liability management assessment finalisation.
- 27.7. putting formal arrangements in place to regularise meetings between the three key role players, namely the Minister of Finance as Shareholder Representative, the GEPF and the PIC.
- 27.8. having transparency within the PIC, which would eliminate room for impropriety by removing the GEPF's and the PIC's ability to be less than forthcoming with investment decisions and losses. On the other side of the ledger, it would make plain any market outperformance and that should enable solid fund management returns to be rewarded at a level comparable to the private sector.
- 27.9. daily publishing of the market value of the listed portfolio at that day's close of business. This should be broken down per each investment. Unlisted

investments should be valued regularly, and the valuation updated online approximately every six months, three months in arrears. The timelines need to ensure that publishing such information does not create investor panic in the investee which is imperative in an unlisted investment. The full suite of internal daily risk reporting could be published.

27.10. full disclosure of the ultimate beneficial owners of investments in which the PIC participates. The ultimate beneficial owner would in every instance need to be a natural person or listed entity. This would make any potential financial crime significantly more difficult and would ensure transparent exposure of which individuals are benefiting from PIC support; and

27.11. improving discipline in respect of always creating clarity about the true participants in any investment or activity. Specifically, clarity of the role/s of the clients, for example the GEPF and the PIC legal entity. Much of the time, the specific legal entities are not clear in both documentation and discussion, leading to potential confusion as to what the PIC means.

CHAPTER IV RESPONSIBILITY AND ACCOUNTABILITY

RESPONSIBILITY AND ACCOUNTABILITY – DR DAN MATJILA

1. The transactions relating to Ayo and Sagarmatha, amongst other things, have been relied on in reaching the findings set out below.
2. Dr Matjila stated the following in relation to the AYO transaction:

‘In my position as the CEO I was not involved with the analysis of the investment potential of opportunities presented to the PIC. I therefore requested Executive Head: Listed Investments, Mr Madavo, to look into

*the opportunity ... He led the Ayo investment process from the PIC side ... My understanding was that the draft PLS was shared with the PIC even before it was finalised to allow the PIC to begin its internal investment processes. The postponement of the PMC meetings scheduled for 6 and 13 December 2017 added to the pressure of meeting the deadline for the subscription which was by 17h00 on 15 December 2017.'*⁶⁵

3. In his testimony before the Commission, Dr Matjila stated that by 14 and 15 December 2017 all due diligence processes and reports had been prepared and submitted as per the appraisal report and annexures.
4. He stated that the subscription form was already signed by Mr Molebatsi for 20% (twenty percent) of the shares, and that he decided that this should be changed to 29% (twenty-nine percent), taking up the full share offer. The subscription form they signed on 14 December 2017 reflected the price of R43.00 (forty-three Rand) per share for 29% (twenty-nine percent) of Ayo. The impact of this is to immediately discredit Dr Matjila's assertion that Mr Madavo *'led the Ayo investment process from the PIC side'*.⁶⁶
5. Dr Matjila stated that the final Pre-Listing Statement (PLS) did not contain any differences from the draft PLS and therefore the information upon which the share purchase was made did not differ from the information contained in the final PLS.
6. The final PLS was received by the PIC at 14:42 on 14 December 2017, after the irrevocable subscription form was signed earlier the same day. The final PLS was received 10 days after the irrevocable letter of undertaking had been provided to the Board of Directors of AEEI. Throughout his testimony, Dr Matjila referred to the signing of the irrevocable subscription form on 14 December 2017, and stated that he had made his decision based on the final PLS. There are no

⁶⁵ Paras 416-417 of Dr Matjila's statement.

⁶⁶ Ibid.

indications that a reconciliation was considered on the draft versus the final PLS, although it was repeatedly stated that there was no material difference between the two.

Concerns related to circumvention of the required investment process

7. Neither the CEO nor CFO advised the PMC meeting that the irrevocable subscription form had been signed prior to approval.
8. The information that has come to light during the Commission hearings indicates that an improper process, outside of legal mandate, was followed by Dr Matjila in respect of this transaction.
9. It has now emerged that the evidence and testimony submitted by Dr Matjila regarding the Ayo investment is untrue. This finding is based on the letter dated 4 December 2017 to the Board of Directors of AEEI, headed IRREVOCABLE LETTER OF UNDERTAKING, which Dr Matjila signed as CEO on behalf of the PIC.
10. By signing the above letter to the Board of Directors of AEEI on 4 December 2017, prior to a PMC meeting to approve the transaction, Dr Matjila acted improperly and in breach of the PIC's processes for transactions under listed investments. In approving this transaction, Dr Matjila also acted beyond the scope of his Delegation of Authority which does not provide for CEO discretion for a R4,3 billion 'investment'.
11. This letter was not provided to the Commission by Dr Matjila or his legal team, nor was any reference made to its existence. This is evidence of his broader unreliability as a witness whose failure to mention crucial points fundamentally changes the narrative. Throughout his testimony, Dr Matjila stated that he relied on the PIC deal team to do the work and is guided by their expertise and

recommendations, yet he decided to make a significant investment prior to team input or the completion of PIC processes.

12. It is our view further, regarding whether the PMC meeting of 20 December 2017 was to ratify or approve the Ayo transaction, that Dr Matjila's response was disingenuous. When asked by the Commission why '*there should have been an attempted ratification if ratification and approval mean the same thing*', Dr Matjila replied: '*I mean the effect is the same*'.⁶⁷ While Dr Matjila stated that the 20 December 2017 meeting was to ratify a decision that had already been taken – a meeting at which he was present and was chaired by Ms More – the meeting in fact approved the transaction. In his written submission, Dr Matjila states that '*the intention of the meeting of 20 December was always to approve ...*'.⁶⁸ yet when asked why he did not clarify to the meeting that the deal had already been done and it was not approval post event, but ratification, Dr Matjila said '*I did not see any need at the time ...*'.
13. The evidence placed before the Commission supports the finding that the meeting of 20 December 2017 could only have been to ratify a decision already taken, that decision being the approval of the transaction. Such conduct is not in accordance with the PIC's processes with respect to transactions under listed investments.
14. The information that has come to light during the Commission hearings indicates that due process was not followed. Firstly, by sending the letter of 4 December 2017 to the Board of Directors of AEEI undertaking that the PIC would subscribe for 29% (twenty nine percent) of the share capital of AYO and confirming the price that would be paid per share, prior to PMC2 approving the transaction, Dr Matjila circumvented the prescribed process for authorising a listed transaction.

⁶⁷At page 37 of the Transcript for day 60 of the hearings held on 25 July 2019.

⁶⁸ Para 484 of Dr Matjila's written statement signed on 17 July 2019.

15. Secondly, although Dr Matjila undermines the importance of this step in his testimony, the reports compiled by ESG, Risk and Legal were not finalised when Dr Matjila signed the irrevocable subscription form on 14 December 2017, let alone when he signed the 4 December 2017 letter. As such, a substantial component of the necessary due diligence was overlooked. Moreover, whatever Dr Matjila's actual regard for the importance or otherwise of specific elements of the process like ESG, Risk and Legal, the process is clearly set out and obligatory, and he did not have the authority to override, bypass or ignore the process. In bypassing processes secretly, he acted improperly.
16. Furthermore, as Dr Matjila dealt with this transaction as 'listed', and therefore did not obtain GEPF approval in keeping with the R2 billion limit (discussed in further detail in ToR 1.17), the forecasts contained in the draft PLS were subject to Limited Assurance, which was only provided in the final PLS. As there was no reconciliation between the draft PLS and the final PLS, no reliance could be placed on the assurance work performed. It was also too late as the share purchase commitment made by Dr Matjila, ten days earlier, was irrevocable.
17. With regard to the Sagarmatha transaction, which was running parallel with the Ayo investment decision-making process in the PIC, Dr Matjila said that '*one of the suspensive conditions of the agreement was the successful listing of Sagarmatha which ultimately never happened and therefore the agreement never became operational and lapsed*'.⁶⁹
18. The listing price of Sagarmatha was set at R39,62 (thirty-nine Rand and sixty-two cents) per share, though the PIC internal valuation was R7,06 (seven Rand and six cents) per share. This valuation discrepancy is of great concern.
19. The differentiated pricing proposed at the listing of Sagarmatha is clearly market manipulation and would not have been tolerated by the Johannesburg Stock

⁶⁹ Para 407 of Dr Matjila's statement.

Exchange (JSE) if they were aware that this was happening. When questioned during his testimony, Dr Matjila clearly recognised this was not acceptable behaviour.

20. In this regard, Mr Molebatsi said: *'The CEO wanted this transaction [Sagarmatha] to be presented to PMC...and so in that...particular situation it was an instruction.'*⁷⁰
21. This is another example that contradicts Dr Matjila's evidence that he relied on the PIC deal team when making investment decisions. Mr Molebatsi's statement indicates that the deal team itself had the view that Dr Matjila negotiated parallel to their work, dealing directly with Sekunjalo Chairperson, Dr Iqbal Survé (Dr Survé).
22. Mr Tatenda Makuti stated that when he had finished his draft legal report he was informed that a share purchase agreement between Dr Matjila and Sagarmatha had already been concluded in December 2017. Furthermore, he established that the firm of attorneys whose name appeared on the agreement actually acted for Sagarmatha and not the PIC and testified that, *'We still do not know if the document was reviewed by external legal counsel as is normally the process before an agreement was signed'*.⁷¹

Dr Matjila's disregard for established PIC approval, decision-making and other internal processes

23. Dr Matjila's testimony, in respect of the Tosaco Energy transaction, illustrates a complete disregard for transparency, formal process and proper governance. It also illustrates the implicit understanding of Dr Matjila that his influence, status and power enable him to direct activity without having to detail specifics. It is not

⁷⁰ At page 24 of the Transcript for day 14 of the hearings held on 12 March 2019.

⁷¹ Para 33 of Mr Makuti's statement signed on 18 March 2019.

reasonable or acceptable business behaviour for a CEO to leave a meeting and be followed by the participant in that meeting into the next meeting without some implicit or unspoken understanding. Dr Matjila also testified that he was thinking that the two (Mr Mseleku and Mr Mulaudzi) should combine forces even if he did not say so, and it is incredulous that his thinking can manifest into reality by accident, 'and within a brief moment of time'. Simply put, real decision making was effected outside of the PIC governance processes despite a surfeit of those processes bordering on democracy.

24. Dr Matjila was aware that the Investment Committee always led the Board's investment decision-making process. He was also aware of the role he played in the Investment Committee. It is difficult to believe that the CEO who is also CIO and one of only two executive directors is just a voice at the table. As leader of the organisation, Dr Matjila was clearly the source of authority in the PIC. He was not simply '*just a member of the Investment Committee*'. Dr Matjila underplayed his true role in his evidence to the Commission.
25. Linked to this observation, is a consistent pattern in Dr Matjila's testimony where he takes no individual accountability for material errors, mistakes or failures.

Dr Matjila highlighting political pressure as a serious concern and his misconduct in relation thereto

26. When asked whether it was improper or unethical for a Minister of State, in particular the Minister of Intelligence, Minister Mahlobo, to call the CEO of the PIC to a meeting at an airport without any indication of the purpose of the meeting or who would be present, Dr Matjila said he saw no problem with this conduct.⁷²
27. His response is disingenuous at best. The issue at hand is not a meeting with a cabinet minister per se, but the circumstances, demands, discussions, records

⁷² At page 29 of the Transcript for day 55 of the hearings held on 16 July 2019.

and outcomes of such meetings as they relate to the responsibilities of the PIC and any impropriety or undue pressure that might have occurred.

28. Dr Matjila appeared oblivious of the ramifications regarding reputational risk for himself and the PIC, notwithstanding the damage the allegations in the anonymous emails did to him personally and to the PIC as a whole.
29. This is further illustrated by Dr Matjila forwarding requests for financial assistance to, inter alia, recipients of PIC investments to consider.
30. A reasonable person would not give any credence to the assertion that the CEO of the PIC, who enables funding and fee payments in the ordinary course of running a +R2 trillion asset manager, is merely sharing the information of the ruling party and its tripartite partner looking for funding. This logic is borne out in that Mr Mseleku made a R1 000 000. 00 (one million Rand) contribution shortly thereafter. The “quid pro quo” in action shows that the implicit message was both clear and understood. Similarly, with the R300 000.00 (three hundred thousand Rand) donated by Mr Muluadzi to a beneficiary, unknown to him.
31. Those who gave evidence before the Commission stated that they advised Dr Matjila of donations made or assistance provided, in particular both Mr Mseleku and Mr Mulaudzi. Furthermore, Dr Matjila did not simply pass on requests from political parties and other influential entities for funding, he actually followed up on such requests.
32. The CEO of any organisation should never excuse behaviour – mistaken, unintentional or intentional – on the basis of whether there is a policy in place or not. It is also the responsibility of both the CEO and the Board to ensure that appropriate policies are in place. Furthermore, if the CEO does not take ownership and responsibility for judgement calls and defers to compliance, then that CEO is setting a tone that says anything is allowed if it is not expressly illegal or barred via policy.

33. In these particular instances, the question that arises is, why would anyone follow up on a 'relayed request' if it was just a process of information sharing? The act of "following up" strongly implies that there is an expectation that the request would be complied with and that Dr Matjila would want to know that this was the case.

Whistle Blower Concerns

34. Several testimonies from staff alluded to the deep perception that the whistleblowing process was not to be trusted. With some staff taking issues directly to the Police and other insiders using the James Nogu email route, it seems clear that there was no faith in this mandatory process.

FINDINGS

35. The following findings are made:

- 35.1. Evasiveness as a witness;
- 35.2. A selective view of accountability, a disregard for the legislative and regulatory framework which the PIC is required to operate within, including the Companies Act 71 of 2008 (Companies Act), the PIC's Memorandum of Incorporation (MOI) and the GEPF mandate;
- 35.3. A tendency to ride roughshod over the established approval and decision-making processes;
- 35.4. Perceived breach of the Protected Disclosures Act 26 of 2000;
- 35.5. Doing repeat deals with individuals and/or their entities, even where no value has been proven from the first deals.

- 35.6. A disregard for established rather than hypothetical enhanced value. An apparent insensitivity to the risk profile required to build/maintain actuarial solvency of the GEPF where shortfalls must eventually be financed by the taxpayer.
- 35.7. A consistent behaviour, when interacting with potential investees, or meeting without anyone else present, of not keeping records or minutes or any written audit trail of such interactions. This constitutes a breach of Dr Matjila's fiduciary duties in that he failed to do the following while adopting a consistent practice of accepting and hosting meetings without anyone else from the PIC being present:
- 35.8. keep records or minutes of material conversations and decisions; and
- 35.9. as CEO and Executive Director, ensure that the appropriate control environment for record keeping is maintained throughout the organisation when interacting with potential investees.
- 35.10. Highlighting political pressure as a serious concern but defending his practice of meeting such parties without anyone else from the PIC in attendance, keeping no record of these meetings, and holding such meetings outside of the PIC premises. This is further compounded by the finding that Dr Matjila directly solicited donations for COSATU and the ANC from individuals whose companies the PIC has invested in.
- 35.11. Distancing himself from significant fee payments to financial service advisors, notwithstanding the need for both actual and optical propriety in both substance and form. He also claimed no knowledge of fees paid to such parties. However, in reality the benefit was for a few people only, but those who were 'chosen often reaped significant financial rewards. In building this

transformed professional cohort, there is no indication of a structural evaluation metric that was put in place to pre-determine what a measure of success would look like. This gives rise to the perception (and reality) of access to the PIC and significant fee income for privileged insiders, who were, in a number of instances, previous employees of the PIC.

- 35.12. Taking a decision to keep a transaction below the level that would require reference to a higher decision-making body. This constitutes a subversion of governance.
- 35.13. Disregarding the advice of experts when such advice did not align with his desired outcome.
- 35.14. Failure to adequately exercise his CEO responsibilities with regard to the organisational, legal, regulatory, human resource and operational frameworks relevant to good governance and client mandates.
- 35.15. Failure to ensure that risk was managed at an appropriate level, raising the question of whether this was the result of a deliberate structural and capacity weakness by design, while maintaining the perception of an operational risk management system (when in fact it was unfit for purpose).

Recommendations

- 36. The Commission recommends that, in relation to the conduct set out above, the GEPF/PIC/Government as shareholder should institute an appropriate investigation as to whether Dr Matjila violated the FAIS Act requirements of honesty and integrity as well as of “fit and proper” given that he was a Key Individual in the PIC.

37. In ToR 1.1, the Commission made findings regarding whether Dr Matjila violated any other legislation applicable to the PIC, including the PFMA, any rules, listing procedures or other requirements of the JSE. The Commission recommends that the PIC gives effect to its findings in this regard.
38. The Commission further recommends that the PIC must give consideration to whether any personal liability is attached to the conduct of Dr Matjila, including with regard to any fruitless and wasteful expenditure which, if found to be the case, would make Dr Matjila liable for the loss to the PIC.
39. Where money has been lost or investments made where the funds provided have not been used for the intended purpose, this must be identified, quantified and recovered.
40. Demonstrating a lack of due diligence and care, Dr Matjila breached his fiduciary duties when approving investments into insolvent and technically insolvent companies, for example Erin. Consequently, the appropriate steps need to be taken.
41. The Commission further recommends that the Independent Regulatory Board for Auditors (IRBA) should open an investigation into the Limited Assurance work performed on the Ayo Prelisting Statement given that the extreme revenue forecasts were clearly very aggressive. For example, the 2018 actual comprehensive income achieved R148 million compared to what was forecast (R764 million), which reflects a significant under performance.
42. Responsibility and Accountability of Mr Rajdhar: the Commission has noted with concern the financial losses and breach of processes that have emanated from the unlisted investments arena, including in the Developmental Investments. Numerous investments that resulted in undue losses for the PIC occurred during the time when Mr Rajdhar was the EH: Developmental Investments. As the head, Mr Rajdhar needs to be held responsible and

accountable for this problematic division - not only Dr Matjila. Thus, it is recommended that the PIC Board should thoroughly investigate Mr Rajdhar for any impropriety and negligence arising from the transactions dealt with at the Commission that did not follow processes and/or resulted in financial loss.

CHAPTER V – RECOMMENDATIONS AND REMEDIES

Recommendations For Next Steps Regarding Investment Losses And Those At Risk

1. 41% of the R123 billion of Unlisted Investments are on watch, under-performing or not servicing loans (non-performing loans). Elsewhere in the portfolio, there are assets where there is scope for enhancing value as well as capital sitting in insolvent entities. For the purposes of this report, these investments will be called Investment Capital at Risk (ICAR). From a Finance lens, much of this ICAR would be termed “Distressed Assets”.
2. The total ICAR is a significant portion of the portfolio, both in quantum and relative to the AuM. This observation is important because Dr Matjila repeatedly stated that the losses and write-downs are not significant relative to the fund size. Additionally, it is important to note that on-going employer annual contributions are financed not by a profit source, but rather from the fiscus.
3. An element of the current model is that investments are grouped and managed in various portfolios. A recommendation for a more efficient model for the PIC in the future is to create a bifurcated fund to house the Investment Capital at Risk and manage this portfolio to achieve the best financial outcome for the PIC’s clients.
4. A current model for this is the “good bank/bad bank” or “Non-Core Operations Model”. What takes place is that the asset manager looks at the funds being managed and divides the assets into two categories. Into the “bad” column go the investments at risk, the investments on the watch list and all troubled

assets as well as illiquid investments where an exit strategy is regarded as challenged. The remaining assets are the “good” assets which represent the on-going investment profile at the core of the fund, optimised for solvency regarding the pension obligations.

5. In the course of the Commission’s investigative work, multiple individual transactions, loans and investments were noted where there were apparent signs of financial stress leading to the various clients having to absorb capital losses.
6. It is proposed that the Board and the Exco determine a set of conditions that defines non-core investments. Then, an exercise should be conducted to scrutinise the entire portfolio of assets against this set of conditions. All assets that are found to be “non-core” should be identified as potential ‘non-core’. Given the subjective nature of the exercise and fluid circumstance specific to each asset, it would be ideal for the PIC Board and the Exco to work through this list to agree on assets that are on the margins of the set criteria to be either excluded or included. These assets should be proposed to be ring-fenced as non-core and managed separately.
7. Management and the Board should agree a high-level approach to be taken to realise optimal value through time and should also define up-front what time horizon the non-core portfolio has before it is liquidated. This step is essential so that timeline and end for the working out of non-core investments should be stipulated. Reasonable performance that clearly determines what success looks like should also be defined.
8. Given that the purpose of the “bad bank” is to focus on optimal ways to de-risk and free up time and energy for the sustainable future-focussed funds, it is essential to ensure the non-core portfolio work out is time-limited. It is

suggested that the categorisation and approach be aligned to the perspectives of the clients.

9. At this point, the non-core investments should be hived off to the managers of non-core. This team should be dedicated to the work-down of this fund and should report separately to the governance and executive structures with a direct line to the Board.
10. Given the history, the high-visibility and sensitivity of some of these investments there should also be specific scrutiny on material divestments/exit strategies to ensure the interests of the clients are held paramount and other impacts are managed delicately and thoughtfully.
11. Part of the solution looking to the future is to reconsider the existing organisational approach so that it will now take into account the historic vested interests and ensure the funds' members' needs are held paramount. It is essential, in the process of realising maximum value of the "non-core" assets, that focus for the ICAR is placed on, but not limited to, the following:
 - 11.1 Stabilising and strengthening of balance sheets.
 - 11.2 Installing appropriate skilled and incentivised management.
 - 11.3 Enshrining transparency and dedication to good conduct at all times.
 - 11.4 Fostering a culture of constant and consistent reputational risk management.
 - 11.5 Ensuring that value is restored where possible to maximise returns when exiting the investment is imperative.

- 11.6 Focusing on appropriate due diligence for partners and acquirers to guard against any accusations of preferential treatment for connected parties.
12. It is also essential that all of these actions remain transparent in the public sphere to ensure past mistakes are not repeated.
13. Many investments are not performing at their maximum valuation due to insufficient active management, operational involvement and oversight. Thus, the teams in the non-core fund would need to have the appropriate resources to realise optimal value. The information provided to the Commission has shown a pattern for assets to underperform, and sub-optimal management approaches that are not ideal to turn around the investment with the end result of the investee requiring some form of bail-out, often via an additional capital injection.
14. There needs to be a detailed analysis comparing investment returns with the actual losses written-off, impaired or potentially impaired. This analysis should also take into account the inherent riskiness of the original investment to consider what legal implications there are relative to considerations such as fiduciary duty to pensioners/taxpayers.
15. A comprehensive review of the PIC approach to Risk Measurement and Management as an Investment Manager is urgent and imperative. This needs to consider, at the least, risk measurement pre-deal and portfolio; Model Risk; Credit Risk; Country Risk; Currency Risk if applicable to the investment; Concentration Risk and Client Risk Appetite setting; Risk Reporting for PIC itself e.g. Regulatory and Operational Risk; Breaches, Condonation and Pre-approved Deviations (waivers); Reputational Risk as well as the management of short term volatility versus a 10-year investment approach.
16. As an advance-funded scheme, the GEPF should hold sufficient assets to cover the estimated liabilities it will have to meet future and current retirees,

estimates being actuarially calculated based on various assumptions. When comparing previous actuarial reports with the most recent one, the funded position of the GEPF has deteriorated in recent years, primarily because of the growth of benefits and lower than expected investment returns.

17. In terms of the GEPF mandate, employer contributions should be sufficient to ensure that the Fund is able to meet its obligations at all times, subject to a minimum funding level of 90%. The pre-funding level of the Fund remains well above the critical minimum funding level of 90%. The Funding Policy of the Fund also stipulates that the Board of Trustees should strive to maintain the long-term funding level at or above 100%. The long-term funding level equalled 75,5%.

NEXT STEPS: FIT AND PROPER / VIOLATIONS OF FAIS

18. Due to the fact that this section is dealt with in Chapter II of the Report, we have not summarised these findings here.

THE PIC AND TRANSACTION ADVISORS

19. On 6 December 2018, the Standing Committee on Public Accounts met with the Deputy Minister of Finance, Mr Mondli Gungubele, in his role as Chairperson of the PIC, as well as a number of the Directors and Executive team of the PIC. Mr David Maynier, a DA Member of Parliament, asked at the Standing Committee on Public Accounts about Mr Nana Sao's advisory fees. Mr Maynier asked specifically about the transaction costs in the Vodacom transaction, arguing that the fees the advisors received didn't equate to the work they undertook and, at the same time, questioned the PIC's selection process and transparency thereof.
20. The Commission undertook an investigation into the matter.

Mr Nana Sao

21. Mr Sao was paid directly by the PIC for three transactions where his fees averaged 1.10%, which is an industry norm.
22. In 2015, the South African government sold 13.91% of its stake in Vodacom to the PIC and in 2016, Mr Sao approached Dr Matjila with a suggestion to purchase Vodacom shares. Dr Matjila responded by advising him of a consortium called Inkanyezi that was interested in buying shares on behalf of the GEPPF. Mr Sao was asked by Mr Koketso Mabe, an employee of the PIC, to work with Inkanyezi given his experience in deal structuring and raising capital. He agreed and led the execution of the deal on behalf of Inkanyezi.
23. After the selection process, Mr Sao heard rumours that people connected to the Inkanyezi Consortium were fronts for politicians. This prompted the commission of an external company to perform a Due Diligence on Inkanyezi.
24. The Control Risk report flowing from the Due Diligence revealed that politically connected people were behind the deal, but there was no conclusive link between them and members of the consortium. The Control Risk report was sent to Mr Koketso and Dr Matjila, and all agreed that the transaction should be cancelled.

Findings

25. The Commission finds there is no evidence that the PIC's process of appointing professional advisors was followed in respect of the appointment of Mr Sao.
26. Furthermore, outsourcing the running of an RFP process is questionable and this should be done directly by the PIC.

27. Sao Capital was apparently not paid for their work, despite incurring over R5 million in costs associated with the transaction. They had expected to be paid once the deal was concluded.

Recommendations

28. In respect of the findings relating to Mr Sao, the Commission recommends that the DoA should ensure that the PIC CEO is not authorised to simply appoint an advisor.
29. Policy and approved due process must be clear and followed at all times to ensure a fair selection process of an advisor in a transaction.
30. The allegations and findings in the Control Risk Report must be further investigated by the PIC.
31. If there are substantive allegations of corruption involving an investee company, the PIC should immediately investigate and, where applicable, take legal action.
32. The PIC should ensure that funds allocated are used for their agreed purpose, in this instance payment of transaction fees that were provided for in the agreement.

Sakhumnotho

33. Around mid-2015, Mr Sao was approached by Mr Sipho Mseleku, the CEO of Sakhumnotho. Sao Capital was appointed by Sakhumnotho to prepare an independent valuation report in relation to a potential transaction where

Sakhumnotho, as one of the bidders, was contemplating acquiring shares in Total South Africa Consortium (Pty) Ltd (Tosaco).⁷³

34. Even though Sakhumnotho did not sign an advisory mandate, it was verbally agreed that Sao Capital would be paid a transaction fee equal to 1% of the gross value of all shares or other similar securities acquired pursuant to the transaction. The other competing bidder for the aforementioned 91.8% stake in Tosaco was an entity called Kilimanjaro Capital (Pty) Ltd (KiliCap).
35. In August 2015, Mr Mseleku informed Mr Sao that Sakhumnotho was merging its bid with that of KiliCap, creating a new consortium called Kilimanjaro Sakhumnotho Consortium (Kisaco). Once Kisaco was selected as the preferred bidder, Sao Capital was side-lined and had no further involvement. Mr Mseleku told Mr Sao that Sakhumnotho no longer had funds to pay for the advisory services Sao Capital rendered, and reneged on the verbally agreed upon 1% of the transaction value.
36. In October 2015, Sao Capital became aware that the PIC had made available R100 million for the purpose of settling transaction costs relating to the Tosaco transaction. Sakhumnotho received R50 million (half) of the amount paid by the PIC. However, Sao Capital was only paid R5 million by Sakhumnotho.

Findings

37. The Commission finds that the role of advisors in determining the valuation of the transaction has a direct bearing on the fee they ultimately earn. The PIC therefore needs to ensure there is a thorough and appropriately skilled process, followed with absolute integrity, in the valuation process to ensure it does not overpay.

⁷³ See the TOSACO case study in Chapter III.

38. Sao Capital settled for R5 million even after learning that the PIC had paid Sakhumnotho R50 million to cover their alleged transaction fee.
39. The PIC funds, allocated ostensibly to cover transaction costs, appear to have not been used for the stipulated purpose.
40. There was no signed contract between Sakhumnotho and Sao Capital,
41. There was no evidence presented to the Commission of an invoice from Sakhumnotho to the PIC setting out all transaction costs, as should normally be provided prior to any payment of such costs.

Recommendations

42. In relation to Sakhumnotho, the Commission recommends that the PIC must ensure that greater attention is paid to the valuation of an entity and that such a determination is made with the essential skills, independence and thoroughness.
43. Valuation determinations must be a key feature of all approval processes and thoroughly interrogated.
44. Proper, detailed documentation on transaction costs incurred must be presented to the relevant authority in the PIC, and be validated prior to any payment of such claims.
45. Given the information provided by Mr Sao, appropriate legal steps must be taken by the PIC to recover the monies paid in transaction fees that were not used for the intended and approved process.

Mr Dan Mahlangu (Mr Mahlangu)

46. Mr Mahlangu is the CEO of BNP Capital (Pty) Ltd, which changed its name to Pholisani Mahlangu.
47. Mr Mahlangu was appointed by KiliCap as its financial advisor after BNP Capital was specifically nominated by the PIC. Mr Mahlangu is a former employee of the PIC.
48. The mandate letter BNP signed with KiliCap required BNP to run with the entire management of the share purchase for a fee of 2%, excluding VAT, of the capital raised, i.e. R1,7 billion. In turn, BNP engaged other service providers to assist with both legal and financial due diligences.
49. In his affidavit, Mr Mahlangu states that ‘the introduction of the new consortium [Kilicap] and advisor meant that BNP Capital fees were reduced...’.⁷⁴ After the successful fund raising, Mr Mulaudzi advised BNP to send an invoice for R1 million, VAT inclusive, to a company named AVACAP.
50. BNP has since been unsuccessful in its efforts to get the balance of the fees owed, being paid only around 6% of the expected fee as per the mandate letter.⁷⁵

Nedbank

51. Nedbank was the transaction advisor for the Tosaco transaction as Calulo, the main shareholder of Tosaco¹, appointed Nedbank Capital to act as its exclusive investment bank and corporate advisor.

⁷⁴ Para 4.1.11 – 4.1.12 of Mr Mahlangu’s statement signed on 1 October 2019.

⁷⁵ Ibid. para 4.1.18.

52. The Commission issued a subpoena to Nedbank after receiving unsolicited WhatsApp messages between Mr Tapiwa Shamu, a Nedbank employee responsible for the Tosaco transaction, and Mr Lawrence Mulaudzi. In the messages, Mr Shamu requests a R400 000 loan from Mr Mulaudzi. There is also evidence of Mr Shamu passing on various other transactions that were presented for consideration to Nedbank to Mr Mulaudzi, and that the R400 000 was transferred from Mr Mulaudzi's account to Mr Shamu's wife.
53. This appears to be a highly irregular relationship given that KiliCap was a bidder for the purchase of the shares in Tosaco.
54. Circumstantial evidence shows that Mr Shamu played a significant role in ensuring that Mr Mulaudzi and the KiliCap/Sakhumnotho Consortium won the Tosaco bid. He had a personal and professional relationship with Mr Mulaudzi, Mr Mseleku and others. Mr Shamu also participated in the bidding process as a member of the selection team and would have been in a position to influence the decisions taken by the team.

Kingdom Mugadza

55. Kingdom Mugadza's started Tirisano in 2011.
56. Tirisano was in discussion with the PIC about a supply chain empowerment fund and was well placed to facilitate the acquisition of Distell shares from AB Inbev by the PIC, where it originated, structured and executed the sale of Distell to the PIC in a closed bidding process.
57. Before the Distell deal went public, Mr Mulaudzi requested an urgent meeting with Mr Mugadzi. Mr Mulaudzi wanted information regarding the Distell deal, the situation deteriorated, Mr Sello Motau became involved and Mr Mugadzi felt his life was in danger.

58. One of the conditions set by the Competition Commission before its approval of the acquisition of Distell was that the PIC would sell at least 10% of its acquired Distell shares to a BEE entity. Tirisano, however, recommended that the PIC delay the said BEE deal.
59. At the beginning of September 2015, Mr Sello Motau, an Executive Director of Theko Capital, discussed with Dr Matjila a possible investment in the Export Trading Group (ETG).
60. The local ETG team requested that Mr Motau provide them with a letter of support for the funding proposal from the PIC. Mr Motau advised the Commission that, in the second half of 2015 he was considering an equity investment in Profert Holdings⁷⁶, and that ETG was also interested in an investment in Profert.
61. Mr Motau submitted a proposal to Dr Matjila on 7 September 2015 regarding ETG. On 10 September 2015, Mr Motau received a non-binding Expression of Interest signed by Dr Matjila. The potential investment in ETG was presented to the Portfolio Management Committee (PMC1) for approval to commence with the due diligence review processes.
62. In October 2015, the PIC deal team introduced Theko Capital to Tirisano Partners as a transaction advisor to work with the teams from the PIC in order to coordinate the investment process on behalf of all parties. On 19 October 2015 they received an Engagement Letter from the PIC.
63. According to Tirisano, they are not on the PIC database, and no transactional advisor internal process as per the PIC policy was followed.

⁷⁶ Para 50 of Mr Motau's statement signed on 21 May 2019.

64. Mr Motau states that, *'the PIC team stopped responding to Theko's correspondence[I was told] that the deal had been approved ...with the condition from PMC2 to remove Theko from the deal...'.⁷⁷*
65. Mr Motau concludes that *'It is concerning that the PIC can express an interest in a transaction, go as far as conducting FICA processes and getting the necessary internal approvals, and then at a later stage at their own discretion decide to remove a sponsor to include their preferred sponsor ... this opens the door to favouritism and gate keeping'.⁷⁸*
66. However, there were conflicting reports of what actually took place.

Findings

67. The Commission finds that the PIC processes to appoint advisors were not followed in respect of Kingdom Mugadza.
68. The PIC reportedly introduced a specific transaction advisor, namely Tirisano Partners, to the parties involved.
69. Conflicting accounts of events and commitments prevail, without a clear record of meetings held and decisions taken.
70. There is a consistent pattern of a lack of clarity of the terms of engagement and non-compliance with PIC procurement processes.
71. Imposing/recommending specific advisors for potential investees to use is highly questionable and inappropriate.

⁷⁷ At pages 101-102 of the Transcript for day 38 held on 21 May 2019.

⁷⁸ Para 118 of Mr Motau's statement signed on 21 May 2019.

72. The PIC recommending and/or appointing certain advisors for multiple transactions is improper and inappropriate.

Recommendations

73. The Commission recommends that a detailed investigation should be initiated by PIC management (potentially with the support of appropriate governmental prosecuting bodies) to create an exhaustive list of all fees paid over R5 million since 2014. This list must then be interrogated to aggressively initiate legal processes of recovery where appropriate.
74. The PIC Board must ensure transparent processes are in place that prevent arbitrary changes and decisions that can lead to perceptions, real or otherwise, of abuse, gate keeping and favouritism.
75. The Board must ensure that there is a comprehensive, inclusive and fair process to appoint advisors for different transactions according to their relevant skills and expertise.
76. The Board must ensure that an effective monitoring and reporting system is in place with regard to the appointment, role, fees and accountability of advisors.
77. Where advisors are appointed or recommended by the PIC, an appropriate assessment should be made of the work performed prior to any subsequent/repeat appointment.

Dividend Policy

78. In the 2018 financial year, the PIC paid R80 million to government in the form of dividends. The Government Employees Pension Fund (the GEPEF / the Fund) Statutory Actuarial Valuation, conducted by Alexander Forbes, as at 31

March 2018, shows that the minimum funding level and the long-term funding level declined.

79. The primary funding objective of the GEPF is to ensure that employer contributions should be sufficient to ensure that the Fund is able to meet its obligations at all times, subject to a minimum funding level of 90%, at which point government would be obliged to increase its contributions to the Fund. At present, this is well funded and the minimum funding level stands at 108,3%. However, the Funding Policy of the GEPF also stipulates that the Board of Trustees should strive to maintain the long-term funding level at or above 100%. Thus, standing as it does at present at 75,5% means that the GEPF does not meet its long-term funding objective as at the valuation date of 31 March 2018.
80. Paragraph 5 of the Dividend Policy considers the Companies Act and sets out the process required for payment of a dividend and for the requirements of the Companies Act to be met. In essence, the PIC "...must pass the Solvency and Liquidity test, as set out in section 4 of the Companies Act, before a dividend can be declared."
81. The Board of the PIC proceeded to pay dividends to the Shareholder in keeping with the Dividend Policy (other relevant provisions of the Dividend Policy can be seen in the Main Report) and as approved on an annual basis by resolution of the Board. In May 2017, the Board Resolution of 29 May 2017 confirms that the PIC paid an interim dividend of R20 million for the financial year ended 31 March 2017, and declared a final dividend of R60 million to the Shareholder for the financial year 2016/17. The resolution authorising the payment of a R20 million interim dividend was approved at a shareholder meeting on 10 March 2017, in terms of Section 60 of the Companies Act, and signed by the Shareholder representative, Minister of Finance, Mr Pravin Gordhan.

82. The final dividend of R60 million was approved by the Board of Directors, at a meeting held on 29 May 2017, and signed by Deputy Minister Sifiso Buthelezi as Chairman of the Board of Directors.
83. The Commission finds that the PIC has a Dividend Policy in place and has paid dividends in keeping with the requirements of the Companies Act. However, noting the continued decline in the short term funding level, and taking account of the Funding Policy of GEPP, which also stipulates that the Board of Trustees should strive to maintain the long term funding level at or above 100%, and that this currently stands at 75,5% which means that this does not meet its long term funding objective of the PIC as at the valuation date.
84. In view of the above, the quantum of dividend payments in March 2017 and May 2017 by the PIC to the Shareholder is questionable.
85. The mandate of the PIC is to act in the best interests of its clients; it is not to maximise profits. Essentially, by paying dividends from management fees charged to the GEPP and other clients, an indirect tax is imposed on the PIC's clients.
86. The payment of a dividend raises the question as to whether this is being done to convey to the Shareholder that the PIC is in fact functioning extremely well and is thus able to afford to pay a dividend?
87. The Commission therefore recommends that the Board of Directors of the PIC should review the Dividend Policy, which has not been reviewed since it was adopted in 2016.
88. The Board of Directors of the PIC should also review the budget, including the required capital expenditure and the staff complement and remuneration, to ensure the funding requirements are adequate.

89. The Commission further recommends that the Board of Directors should discuss an appropriate policy to comply with Section 46 of the Companies Act with the Shareholder, taking into account that the PIC mandate is not driven by profitability as an objective, but the imperative to maintain funding levels of the GEPF and other Funds under management of the PIC.

90. If the fees charged to PIC clients, particularly the GEPF which has the responsibility of managing civil service pension funds, result in profits such that a dividend can be paid to the Shareholder, then the Commission recommends that the budget of the PIC is reviewed to see that the PIC is functioning optimally with adequate funding. Alternatively, the management fees charged to clients should be the subject of assessment and review.

LIFESTYLE AUDITS

91. As a result of the allegations of corrupt activities made in the James Nogu emails, the Commission engaged PwC to conduct lifestyle audits and background checks on the following Directors of the PIC:

- | | | |
|------|---------------------|-----------------------------|
| 91.1 | Mr Mondli Gungubele | Non-executive and Chairman; |
| 91.2 | Ms Sibusisiwe Zulu | Non-executive; |
| 91.3 | Ms Dudu Hlatshwayo | Non-executive; |
| 91.4 | Dr Dan Matjila | Executive; and |
| 91.5 | Ms Matshepo More | Executive. |

92. The findings and conclusions of the lifestyle audits are contained in the individual reports on the five Directors, which are annexed to the affidavit of Mr Lionel van Tonder, a director of PwC.

93. The Evidence Leader, Adv. Jannie Lubbe SC, placed the following on record in relation to the findings of the lifestyle audit:

'In general Mr Commissioner and members the finding was that there was no indication of any criminal conduct regarding any of these individuals and he [Mr van Tonder] couldn't find any substance and you will recall that one of the main reasons for... requesting these lifestyle audits was the allegations contained in the Nogu emails implicating some of these people [as] receiving exorbitant amounts of money from transactions within the PIC. So what he can state and what I can place on record is there is no evidence

*of any criminal conduct and there's no evidence of any substantiating the implications in the emails by Nogu.*⁷⁹

94. Although the Commissioners had sight of the contents of the reports of the lifestyle audits, the reports remain confidential. The reports, therefore, do not form part of the Commission's final report.
95. With regard to the report on Ms Zulu, PwC noted what appears to the Commission to be some serious discrepancies, particularly relating to the purchase of certain fixed property. After she had testified before the Commission, Ms Zulu was invited to the Commissioners' chambers where she was requested to explain the discrepancies. She undertook to provide the Commission with a written explanation but failed to submit the explanation. The legal team, according to a verbal report to the Commissioner, subsequently invited her on more than one occasion to provide the Commission with the explanation, but she still failed to do so.
96. In this respect, it also needs to be placed on record that R100 000 was paid by Mr Mulaudzi into the account of Ms Zulu on a monthly basis between 30 August and 5 December 2018. This emerged as a result of subsequent investigations by the Commission.
97. In view of the serious nature of the discrepancies alluded to above, coupled with the results of further investigations conducted by the Commission's legal team, the Commission feels obliged to recommend that the discrepancies indicated in Ms Zulu's lifestyle audit be further investigated.

⁷⁹ At page 5 of the Transcript for day 62 of the hearings held on 13 August 2019.

CONCLUSION

1. The government, as the guarantor of last resort for the obligations to the GEPF, recognises that a failure of the PIC or any significant investments for the GEPF exposes it to substantial financial vulnerability.
2. The Commission has concluded that, among other things, there has been substantial impropriety at the PIC, poor and ineffective governance, inadequate oversight, confusion regarding the role and function of the Board and its various sub-committees, victimisation of employees and a disregard for due process..
3. The report outlines the above through the 17 terms of reference addressed in this report as well as specific illustrative case studies. The findings show that:
4. While the PIC has, in many instances, sound policies, processes and frameworks, in many instances these were not adhered to, deliberately by-passed and/or manipulated to achieve certain outcomes. There is a need to review existing policies.
5. Legislation, mandates and standard operating procedures were repeatedly violated.
6. The GEPF mandate relating to addressing economic developmental goals was not always adhered to. There must be a clear definition of what success looks like when investing in unlisted entities.
7. The Board was found to be divided and conflicted. The involvement of non-executive directors in transaction/investment decision making structures of the PIC rendered their oversight responsibilities ineffective, if not absent. Their independence is questionable.

8. The Commission found that there was both impropriety and ineffective governance in a number of investments.
9. The lack of diligence to ensure that conditions precedent (and post) were enforced or adhered to has resulted in considerable losses for the PIC.
10. There are clear instances where the Commission found that directors and/or employees benefited unduly from the positions of trust that they held.
11. Repeat investments with a small number of entities, frequently represented by a single individual, (for instance the Lancaster/Steinhoff transactions), reflects poor risk assessments, particularly with regard to cumulative exposure, and the repeat opportunity for enrichment of single individuals.
12. Fees reportedly paid to advisors, who, in a number of instances were recommended to investee companies by the PIC, were on a number of instances found to be well above the industry norm.
13. There were discrepancies in a number of instances where committed investment amounts were increased during the approval process, and where conditions for the investment were altered to weaken or subordinate the interests of the PIC.
14. The lifestyle audits conducted by PWC at the request of the Commission found, in the instance of Ms Zulu, questionable behaviour and a significant flow of funds to her account. This should be the subject of further investigation.
15. Dr Matjila's requests to provide financial assistance or make contributions to individuals, organisations and political parties reflects his abuse of office and the ability to exert undue influence over investee companies.

16. The role of the Shareholder, coupled with the frequent changes to the Minister, Deputy Minister and consequently the Chairperson of the PIC, created instability and a vacuum of leadership at the helm of the PIC.
17. The Commission found that the CFO and the Executive Head: HR used various means to give effect to victimisation of staff, many of whom were in very senior positions
18. Of critical importance for remedial action is the urgent requirement to ensure that the IT systems covering all unlisted investments are automated.
19. The Commission expresses its sincere appreciation to the Evidence Leader, Advocate Jannie Lubbe (SA), for his sterling work in enabling the Commission conduct its investigations fairly in a particularly challenging environment. We extend our thanks to the investigators, legal team and support staff for their tireless efforts, professionalism and diligence. Special mention must be made of two members of staff, namely Ms Lizzy Sibi and Ms Gcobisa Mdlatu, A big thank you goes to Mr Daniel Buntman, who was released by Absa at no cost to the Commission, for his sterling work and contribution in the preparation of this report.
20. We also extend our appreciation to all those who bore witness and gave testimony at the hearings of the Commission.
21. We also express our appreciation to the management of Armscor and to the Tshwane Metropolitan Municipality. Our appreciation also goes to the media houses who ensured that their journalists attended the hearings of the Commission and thereby keeping the nation informed about the process.
22. It is with all humility that we present this Report, and trust that the work we have done will contribute to resolution of what has been an extremely difficult

period not only for PIC staff, but also for the members and pensioners of the GEPF and other clients of the PIC, whose assets they manage.

CHAPTER I – INTRODUCTORY REMARKS

INTRODUCTION

1. On 4 October 2018 the President of the Republic of South Africa, President Cyril Ramaphosa (the President), acting in terms of section 84(2)(f) of the Constitution of the Republic of South Africa, appointed a Commission of Inquiry into allegations of impropriety regarding the Public Investment Corporation (the PIC/ the Corporation), a State-owned company established in terms of section 2 of the Public Investment Corporation Act 23 of 2004 (the PIC Act). The appointment of the Commission of Inquiry (the Commission) was published in the Government Gazette, No. 41979 of 17 October 2018, under Proclamation No. 30 of 2018 (“the Proclamation”).
2. This report covers numerous extremely complex areas, which areas include governance issues, investment transactions, information technology, human resources and a range of other niche areas. In view of the above, the Commission had to rely on a range of experts with experience and expertise pertaining to these complex matters.
3. In so doing, the work of the Commission was divided into certain areas. This is reflected in the various sections and chapters of the report, some of which were drawn from a range of contributions from experts.
4. In compiling the report, the Commission has attempted to establish uniformity in the sections and chapters. Where this has not been possible, we request the President’s indulgence.
5. While there are areas of repetition in the report in certain chapters, such repetition is necessary as the topics and terms of reference (ToR) overlap

considerably. Use is made of cross referencing to minimise this as far as possible.

6. This report is voluminous, but necessarily so, if the Commission is to comprehensively address the task that was set by the President.
7. It should be noted that due to the extensive ToRs, as well as the deep complexity of certain of the transactions and governance processes at the PIC, as well as the time pressures stipulated for delivery of this report, this report was compiled under significant constraints.

THE PUBLIC INVESTMENT CORPORATION

8. The PIC is a financial services provider (FSP) in terms of the Financial Advisory and Intermediary Services Act, No 37 of 2002 (the FAIS Act)⁸⁰, which is defined as any person, natural or juristic, who, as a regular feature of the business of such person, furnishes advice and/or an intermediary service. An 'intermediary service' is defined as *'any act other than the furnishing of advice, performed by a person for and on behalf of a client or product supplier' – in the case of the PIC – 'with a view to buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis), managing, administering, keeping in safe custody, etc. a financial product purchased by a client from a product supplier or in which the client has invested'*.
9. The PIC is thus an asset management company that manages assets for clients for a fee, its business address being: Menlyn Maine Central Square, Corner Aramist and Corobay Avenues, Waterkloof Glen Extension 2, Pretoria, Republic of South Africa, 0181. As a company, it is subject to the provisions of the Companies Act, No. 71 of 2008 (Companies Act) and, it being a State

⁸⁰ Section 4 of the Public Investment Corporation Act provides that the main object of the Corporation is to be a financial services provider in terms of the FAIS Act.

Owned company, it is also subject to the provisions of the Public Finance Management Act, No. 1 of 1999 (PFMA).

10. The PIC's main clients are:

10.1 The Government Employees Pension Fund (GEPF), whose contribution, according to the PIC's 2018 Integrated Annual Report, makes up 87.12% of the funds managed by the Corporation;

10.2 The Unemployment Insurance Fund (UIF);

10.3 The Compensation Commissioner Fund;

10.4 The Compensation Commissioner Pension Fund;

10.5 The Skills Fund

10.6 The Department of Justice Guardian Fund; and

10.7 Various other public sector clients with smaller portfolios.

11. The assets managed by the PIC on behalf of its clients amounted to R2.08 trillion as of March 2018. In his contribution to the 2018 Integrated Annual Report, the then Chief Executive Officer (CEO) of the PIC, Dr Daniel Matjila (Dr Matjila), recorded that despite a challenging investment environment, assets under the management of the PIC grew from R1.928 trillion in 2017 to R2.08 trillion in 2018.⁸¹ Its mandate is to generate returns and to contribute to the developmental goals of South Africa.

⁸¹ At page 15, PIC Integrated Annual Report, 2018.

12. In order for it to qualify as a FSP in terms of the FAIS Act, the PIC has to satisfy the registrar of financial services providers that it complies with the requirements for 'fit and proper financial services providers' in respect of:
- 12.1 personal character qualities of honesty and integrity;
 - 12.2 its competence and operational ability to fulfil the responsibilities imposed by the FAIS Act and
 - 12.3 its financial soundness.
13. In addition, as a FSP, the PIC would have to satisfy the registrar that any 'key individual' in respect of it (PIC) complied with the requirements of personal character qualities of honesty and integrity, as well as competence and operational ability, to the extent required, in order to fulfill the responsibilities imposed on key individuals by the FAIS Act.⁸² We were informed at the Commission hearings during January 2019 that the PIC had 69 investment professionals or key individuals registered with the Financial Service Conduct Authority (FSCA) that had been approved to make recommendations or take decisions in respect of investments in various asset classes on behalf of clients.

BACKGROUND TO THE APPOINTMENT OF THE COMMISSION

14. It is stated in what may be referred to as the 'preamble' to the Commission's ToRs, inter alia, that 'there are persistent and continued negative reports about alleged improprieties regarding investments by the PIC and the conduct of certain former and current office bearers and employees of the PIC, as well

⁸² See section 6A of the FAIS Act. A 'key individual' is defined, in relation to an authorised financial services provider (licenced in terms of section 7 of the FAIS Act), or a representative, carrying on business as a corporate body, as 'any natural person responsible for managing or overseeing, either alone or together with other so responsible persons, the activities of the corporate body relating to the rendering of any financial service.'

as about the effective functioning of its Board which have given rise to negative perceptions of the PIC'. In this regard, the Commission elaborated as follows in paragraphs 10, 11, 12 and 14 of its Interim Report⁸³:

[10] The allegations of impropriety regarding the PIC first surfaced through an email dated 5 September 2017, from a person with the pseudonym 'James Nogu'. The email was distributed to several staff members, as well as to members of the Board of Directors of the PIC. The subject of the email was 'PIC CEO funds girlfriend'. It was alleged in the email that a corrupt relationship had been uncovered between the CEO, Dr Matjila, 'and his girlfriend, Ms Pretty Louw'; that Dr Matjila funded Ms Louw to the tune of R21 million and that in doing so he failed to follow the PIC's policy and procedures. The funding was allegedly done through Ms Louw's company, Maisons Holdings. Furthermore, it was alleged that Dr Matjila had instructed a director of a company that had been funded by the PIC to assist in settling Ms Louw's financial obligations when her business was facing closure and the assets about to be attached. Following the surfacing of the 'James Nogu' email, it appears, from documentation made available to us, that Dr Matjila had instructed one of the employees of the PIC, Mr Simphiwe Mayisela, who was the Senior Manager: Information Security, to investigate and establish the source of the email and the identity of its author. Mr Mayisela's efforts were unsuccessful and the identity of 'James Nogu' is yet to be established.

[11] During August 2018 the Board, on the recommendation of the then Minister of Finance, Mr N Nene, commissioned a forensic investigation into the allegations levelled against Dr Matjila in the email, including the alleged relationship between him and Ms Louw. The Board

⁸³ Submitted to the President on 15 February 2019.

appointed Adv. Budlender (SC) to lead the investigation. In his conclusion on the alleged relationship between Dr Matjila and Ms Louw, Adv. Budlender (SC) found, on the basis of their denial and the absence of evidence to the contrary, that Dr Matjila and Ms Louw 'did not and do not have a romantic relationship'.

[12] With regard to the allegation that Dr Matjila funded Ms Louw to the tune of R21 million, Adv. Budlender (SC) found that the PIC had advanced a loan to an entity, Mobile Satellite Technologies (MST), in that amount. MST, which operates, staffs and maintains mobile units used to provide medical and educational services in rural areas, had sought and obtained the loan as an investment in its business. It had also sought and obtained a Corporate Social Investment contribution from the PIC. Adv. Budlender (SC) did not find any impropriety in the R21 million loan made by PIC to MST.

[14] Also forming part of the documentation made available to the Commissioners to prepare for the work of the Commission, were application papers in a matter between the United Democratic Movement (UDM) (as applicant) and Dr Matjila, the PIC, the Minister of Finance and the Chairperson of the Board as first, second, third and fourth respondents, respectively. The UDM sought, inter alia, an order compelling the Board to suspend Dr Matjila pending the finalisation of an independent investigation into allegations of gross misconduct levelled against him. Paragraph 7.3 of the founding affidavit, deposed to by Mr Bantubonke Harrington Holomisa, reads:

'As a matter of fact, the CEO has instigated suspensions of several employees whom he suspects of being involved in leaking information and co-operating with the police. One of these employees has been dismissed in a dismissal which...is unfair

and will be challenged through the appropriate labour structures. Another employee accepted a generous financial settlement.'

The two employees referred to in the excerpt above are Mr Mayisela, who was charged and dismissed for failing to disclose that a criminal case of corruption had been opened against Dr Matjila by the South African Police Service, based on the contents of the 'James Nogu' email and Ms V Menye, who was Mr Mayisela's immediate superior and who faced a similar charge. Mr Mayisela indicated to the Evidence Leader of the Commission that he wanted to testify before the Commission. The disciplinary inquiry against Ms Menye was withdrawn when she accepted payment of a substantial amount in settlement of the dispute.'

15. Mr Mayisela, Ms Menye and Dr Matjila testified before the Commission and reference will be made to their evidence later in this report.
16. The 'James Nogu' email of 5 September 2017, referred to above, was preceded by one dated 31 August 2017 from a person with the same name (James Nogu) and addressed to Mr Roy Rajdhar (Mr Rajdhar), a senior PIC employee. The following questions were posed to Mr Rajdhar in the email:

- '1. What was the motivation for loaning a privately run, profit making company money through the CSI [Corporate Social Investment] fun Day? (sic)*
- 2. Are you aware that Pretty Louw who is a beneficiary of the project you approved is the girlfriend of the CEO?*
- 3. What is your relationship with Ranjay Harripersad the director of PAISA Capital?*
- 4. Are you a silent partner or associated with PAISA?*

5. *Have you ever instructed any person/company funded through the PIC to warehouse commission/facilitation for yourself through? (sic)*
6. *Have you ever received or invited PAISA to pay any of your financial demands?*
7. *Did you solicit an amount of R20m from any of the client[s] who was funded by the PIC?’⁸⁴*

17. A third email dated 13 September 2017, from one Leihlola Leihlola - presumably a pseudonym - was addressed to members of the Board and National Treasury officials and copied to certain senior officials in the employ of the Corporation. The third paragraph of the email reads:

‘There are matters that we would like to formally bring to your attention as the Board members of the PIC. The reason we are writing is because we believe PIC is a reputable company however it has been trusted to be administered by corrupt leaders i.e. PIC CEO (Dr. Daniel Matjila) and CFO (Ms. Matshepo More).’⁸⁵

18. The author/s of the email raised the following matters of concern within the PIC:

18.1 Remunerations and Bonus Incentives

It was alleged, among other things, that for the past three years salary adjustments have been processed without proper governance approval structures (i.e. Human Resources and Remuneration Committee) having been followed and that these adjustments evidently favour those who are in the good books of the CFO and CEO.

⁸⁴ A typed copy is annexure ‘DD 36’ to Dr Matjila’s statement.

⁸⁵ A typed copy is annexure ‘DD 39’ to Dr Matjila’s statement.

18.2 Corrupt Deals/ Investments

In addition to the allegation of a corrupt relationship between the CEO and his alleged girlfriend, referred to above, it was alleged that further deals had been awarded to companies founded by former employees of the PIC, who are closely linked to the CEO. Most of the alleged corrupt deals *'are pushed through the Isibaya Fund'*.

18.3 Victimization and ill-treatment of staff

It was alleged that the CFO makes the PIC work environment very difficult and ill-treats all employees that are not favoured by her. Among other things, she has killed staff morale and *'manages by fear and intimidation'*. Names of certain former employees are mentioned who left the PIC, allegedly as a result of ill-treatment, insults and intimidation.

18.4 Nepotism

The author/s asked the question whether the Board was aware that the CEO's son, (Mr Katleho Lebata) was employed by the PIC.

The author/s depict a PIC that *'is not run by the CEO'*, but by *'the mean and vindictive CFO'* for at least the past three years.⁸⁶

19. A fourth email surfaced on 28 January 2019 from one 'James Noko' addressed to the current Minister of Finance (Minister), Minister Tito Mboweni, with the subject: *'Another PIC scandal'*. The third and fourth paragraphs read:

'PIC board member Sibusisiwe Zulu who is a niece of ex ANC TG politician Minister Zweli Mkhize, and acting Judge in KZN High Court, has approved transactions for her live in partner Mr Lawrence Mulaudzi to the tune of R6 billion. These include the controversial TOTAL deal where Mr Lawrence

⁸⁶ A copy of the email is attached as annexure 'DD 39' to Dr Matjila's statement.

Mulaudzi was paid R100m for facilitation of which R40m was paid to Sibusisiwe and her uncle, former TG Zweli Mkhize. Mr Mulaudzi is the well-known PIC benefactor who was used by Dr Dan Matjila to pay R300k to the ex CEO's girlfriend.

...

The proceed of this deal was the start of Ms Zulu[s] lavish lifestyle where she splurge[d] her ill-gotten PIC money on a multi-million rand mansion in the coastal Umhlanga Ridge suburb in Durban, including luxury vehicles.' (sic)

20. There were other serious allegations made in the email against Ms Zulu, a member of the PIC Board of Directors and the Chairman, former Deputy Minister Mondli Gungubele, which allegations will be referred to later in this report, if necessary.
21. A fifth email, sent this time by 'James Noko' dated 30 January 2019, was addressed to Minister Mboweni. The contents of the email indicate that it had probably been authored by someone who had communicated with the PIC during 2018 about corruption in which a non-executive Board member, Ms Dudu Hlatshwayo (Ms Hlatshwayo), had allegedly been involved. It was alleged, *inter alia*, that Ms Hlatshwayo, as chairman of the Fund Investment Panel, '*approved Karan Beef*', a transaction in which a high-ranking politician and Treasurer-General of the African National Congress (ANC), Mr Paul Mashatile (Mr Mashatile), has a financial interest which he holds through another individual. The Karan Beef transaction will be discussed in Chapter III: ToR 1.1, below.
22. These allegations, albeit anonymous, brought into question the reputation of the PIC and were considered to be sufficiently serious to warrant investigation.

TERMS OF REFERENCE

The Initial Terms of Reference

23. The Commission's initial terms of reference, which are set out in the schedule to the Proclamation, read as follows:

'1. The Commission must enquire into, make findings, report on and make recommendations on the following:

1.1 Whether any alleged impropriety regarding investment decisions by the PIC in media reports in 2017 and 2018 contravened any legislation, PIC policy or contractual obligations and resulted in any undue benefit for any PIC director, or employee or any associate or family member of any PIC director or employee at the time;

1.2 Whether any findings of impropriety following the investigation in terms of paragraph 1.1 resulted from ineffective governance and /or functioning by the PIC Board;

1.3 Whether any PIC director or employee used his or her position or privileges or confidential information for personal gain or to improperly benefit another person;

1.4 Whether any legislation or PIC policies concerning the reporting of alleged corrupt activities and the protection of whistle-blowers were not complied with in respect of any alleged impropriety referred to in paragraph 1.1;

- 1.5 *Whether the approved minutes of the PIC Board regarding discussions of any alleged impropriety referred to in paragraph 1.1 are an accurate reflection of the discussions and the Board's resolution regarding the matters and whether the minutes were altered to unduly protect persons implicated and, if so, to make a finding on the person/s responsible for the alterations;*
- 1.6 *Whether the investigations into the leakage of information and the source of emails containing allegations against senior executives of the PIC in media reports in 2017 and 2018, while not thoroughly investigating the substance of these allegations, were justified;*
- 1.7 *Whether any employees of the PIC obtained access to emails and other information of the PIC, contrary to the internal policies of the PIC or legislation;*
- 1.8 *Whether any confidential information of the PIC was disclosed to third parties without the requisite authority or in accordance with the Protected Disclosures Act, 2000, and, if so, to advise whether such disclosure impacted negatively on the integrity and effective functioning of the PIC;*
- 1.9 *Whether the PIC has adequate measures in place to ensure that confidential information is not disclosed and, if not, to advise on measures that should be introduced;*
- 1.10 *Whether measures that the PIC has in place are adequate to ensure that investments do not unduly favour or discriminate against -*

- 1.10.1 *a domestic prominent influential person (as defined in section 1 of the Financial Intelligence Centre Act, 2001);*
- 1.10.2 *an immediate family member (as contemplated in section 21H(2) of the Financial Intelligence Centre Act, 2001) of a domestic prominent influential person; and*
- 1.10.3 *known close associates of a domestic prominent influential person;*
- 1.11 *Whether there are discriminatory practices with regard to remuneration and performance awards of PIC employee;*
- 1.12 *Whether any senior executive of the PIC victimised any PIC employees;*
- 1.13 *Whether mutual separation agreements concluded in 2017 and 2018 with senior executives of the PIC complied with internal policies of the PIC and whether pay-outs made for this purpose were prudent;*
- 1.14 *Whether the PIC followed due and proper process in 2017 and 2018 in the appointment of senior executive heads, and senior managers, whether on permanent or fixed- term contracts;*
- 1.15 *Whether the current governance and operating model of the PIC, including the composition of the Board, is the most effective and efficient model and, if not, to make recommendations on the most suitable governance and operational model for the PIC for the future;*

1.16 *Whether, considering its findings, it is necessary to make changes to the PIC Act, the PIC Memorandum of Incorporation in terms of the Companies Act, 2008 and the investment decision – making framework of the PIC, as well as the delegation of authority for the framework (if any) and, if so, to advise on the possible changes.'*

24. The ToRs provide as follows in relation to the temporal scope of the enquiry:

'2. The Commission must, in its enquiry for the purpose of its findings, report and recommendations, consider the period 1 January 2015 to 31 August 2018.

3. The commission must submit -

3.1. an interim report to the President by not later than 15 February 2019; and

3.2. a final report by not later than 15 April 2019.

4. The commission may, if necessary, investigate and make findings and recommendations on, any other matter regarding the PIC, regardless of when it is alleged to have occurred, on condition that such other investigations, findings and recommendations do not cause any delay in the submission of the reports on the applicable dates referred to in paragraph 3.'

25. To empower the Commission in its fact-finding function, the ToRs further provided that:

'5. The Commission may request the advice or views of any organ of State or any other person or organisation that the Commission is of the opinion may be able assist.

6. *In order to -*

6.1 *enable the Commission to conduct its work meaningfully and effectively; and*

6.2 *facilitate the gathering of evidence, by conferring on the Commission such powers as are necessary to secure the attendance of witnesses and to compel the production of documents and any other required information, including the power to enter and search premises, regulations must be made under the Commissions Act, 1947, which will apply to the Commission.'*

Amendment to the Terms of Reference

26. As was required in terms of paragraph 3.1 of the ToRs, the Commission submitted its interim report to the President on 15 February 2019. On 19 March 2019 and at the request of the Commission, the date of submission of the final report to the President, namely 15 April 2019, was extended by the President to 31 July 2019, by Proclamation No. 21 of 2019.⁸⁷ The ToRs were also amended, under the same Proclamation, by the insertion of ToR 1.17, which reads:

'1.17 Whether the PIC has given effect to its clients' mandates as required by the Financial and Intermediary Services Act, 2002 (Act no. 37 of 2002) and any applicable legislation.'

⁸⁷ Published in Government Gazette No. 42384 of 4 April 2019.

27. The insertion came about as a result of allegations made before the Commission that the PIC, in certain instances, might not have acted in accordance with clients' mandates.
28. On 18 July 2019, again at the request of the Commission, and by Proclamation No. 47 of 2019, the date of submission of the final report to the President, namely 31 July 2019, was extended by the President to 31 October 2019⁸⁸ and thereafter to 15 December 2019.
29. The Regulations envisaged in paragraph 6 of the ToRs were made by the President under Proclamation 33 of 2018 (Proclamation 33)⁸⁹ and signed by him on 28 November 2018 (the Regulations). The Regulations are contained in a schedule to Proclamation 33. In terms of regulation 14(1), the Commissioner was directed 'to determine the seat of the Commission by Notice in the Gazette'. In accordance with the regulation the seat of the Commission was determined to be: Armscor, Corner Delmas Drive and Nossob Street, Erasmuskloof Extension 4, Pretoria 0001.90 Regulation 17 provides that the Commission 'may, by means of rules determine its own procedures'. The Commission accordingly issued the 'Rules Governing Proceedings of the Judicial Commission of Inquiry into Allegations of Impropriety Regarding the Public Investment Corporation (PIC)' (Commission's Rules).⁹¹

Interpretation of the Terms of Reference

30. It is important to declare how the Commission interpreted its ToRs:

⁸⁸ Published in Government Gazette No. 42596 of 26 July 2019.

⁸⁹ Published in Government Gazette No. 42076 of 3 December 2018.

⁹⁰ Published under 'General Notices' as Notice No 849 in Government Gazette No 42506 of 4 June 2019.

⁹¹ Published under 'General Notices' in Government Gazette No. 42157 of 15 January 2019.

31. The issue to be addressed in ToR 1.1. is -

‘Whether any alleged impropriety regarding investment decisions by the PIC in media reports in 2017 and 2018 contravened any legislation, PIC policy or contractual obligations and resulted in any undue benefits for any PIC director, or employee or any associate or family member of any PIC director or employees at the time.’

32. In 2018 the media reported that certain political parties had called for transparency in the PIC regarding investments in its ‘unlisted portfolio’. It was also reported that calls had been made for the PIC to provide detailed information about R70 billion worth of investments made by it in its unlisted investment portfolio in 2017/2018. Mention was made of particular transactions, of which some were also in the listed investment portfolio. The transactions that formed the subject of media reports included Ayo Technology Solutions, Independent News and Media South Africa (Pty) Ltd (INMSA), which was concluded on 16 August 2013, as well as those pertaining to Sagarmatha, Tosaco, Steinhoff, Lancaster, VBS Mutual Bank, Erin Energy, S & S Refinery, Ascendis, Mobile Satellite Technologies and Karan Beef.

33. Paragraph 1.1 of the ToRs appears to have limited the scope of investigations or inquiry into allegations of impropriety regarding investment decisions by the PIC to transactions that featured in media reports during 2017 and 2018. In terms of paragraph 4, however, the scope of the Commission’s inquiry seems, at first glance, to have been enlarged to the extent that the Commission is authorised, where necessary, to investigate and make findings and recommendations ‘in any other matter regarding the PIC regardless of when it is alleged to have occurred’. The only condition in this regard is that other investigations, findings and recommendations do not cause any delay in meeting the dates by which reports (interim and final) should be submitted to

the President. The question, therefore, is whether the expression ‘any other matter’ includes investment decisions that fall outside the period mentioned in ToR 1.1. This question requires to be answered before the Commission embarks on a discussion of the individual transactions.

34. The Commission expresses its appreciation to the Evidence Leader, Adv. J Lubbe SC, for providing it with an opinion on the proper interpretation of paragraph 4 of the ToRs.

35. Paragraph 4 reads:

‘The Commission may, if necessary, investigate and make findings and recommendations on any other matter regarding the PIC, regardless of when it is alleged to have occurred, on condition that such other investigations, findings and recommendations do not cause any delay in the submission of the reports on the applicable dates referred to in paragraph 3.’ (Emphasis added.)

36. Paragraph 2 provides thus:

‘The Commission must, in its inquiry for the purposes of its findings, report and recommendations, consider the period 1 January 2015 to 31 August 2018’. (Emphasis added.)

37. The present state of the law relating to the interpretation of a document has been expressed as follows in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances

attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.

Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’⁹²

38. To interpret the provisions of the Proclamation properly one should first have regard to the time frames given in the relevant paragraphs quoted above. Paragraph 2 makes it clear that the period 1 January 2015 to 31 August 2018 must be considered (compulsory) but that the Commission may (discretionary) look at any other matter also outside the period, on certain conditions. The investment decisions that should be considered, under ToR 1.1, are those reported in the media during 2017 and 2018. This must and can only be interpreted to refer to investments or transactions reported in the media and not necessarily all investment decisions made during 2017/2018.

⁹² 2012 (4) SA 593 (SCA) para 18.

39. The Commission must, therefore, consider the period 1 January 2015 to August 2018. During that period the Commission must look at investments reported in the media during 2017 and 2018, but the Commission may also look at any other matter on condition that there is no delay in the time frames stated in section 3 of the Proclamation.
40. A question that further arises is whether the expression ‘*any other matter*’ includes or excludes ‘*investment decisions*’ referred to in paragraph 1.1 of the ToR. The maxim *generalalia specialibus non derogant* comes into play. The matter is put thus in *R v Gwantshu*:

*‘When the Legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. This case is a peculiarly strong one for the application of the general maxim’ (per Lord Hobhouse delivering the judgment of the Privy Council in *Barker v Edger* ([1898] A.C. at p. 754). ‘Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly . . . altered . . . merely by force of such general words, without any indication of a particular intention to do so.’⁹³*

41. Having already given its attention to the particular subject and provided for it, the Legislature is reasonably presumed not to alter that special provision by a

⁹³ 1931 EDL 29 at 31.

subsequent general enactment unless that be manifested in explicit language.⁹⁴

42. The maxim is part of South African Law and has been referred to with approval by the Constitutional Court in *Ruta v Minister of Home Affairs*.⁹⁵ In *Consolidated Employers' Medical Aid Society & others v Leveton*,⁹⁶ Schutz JA, writing for a unanimous court, agreed with the views expressed by the learned author Christie in *Christie the Law of Contract in SA*,⁹⁷ that 'there is no reason why the maxim should not be used in interpreting contracts'. There can certainly be no reason for it not to be used in interpreting a Presidential Proclamation.
43. Applying the maxim to the Proclamation, it is clear, in the Commission's view, that 'any other matter' does not refer to 'investment decisions' as contemplated in paragraph 1.1 of the ToR. If the President or drafter of the ToRs had intended the expression 'any other matter' to include 'investment decisions' they could easily have done so by substituting 'investment decisions' for the word 'matter', or by adding the words 'or investment decision' after the word 'matter'. 'Any other matter', in the Commission's view, refers to any matter, bar investment decisions, that may have been of concern in the operations of the PIC.

⁹⁴ Maxwell, *Interpretation of Statutes*, 7ed at 153.

⁹⁵ 2019 (2) SA 329 (CC) para 42.

⁹⁶ 1999 (2) SA 32 (SCA) 1998 at 41B-C.

⁹⁷ 3ed at 345.

THE PROCESS FOLLOWED BY THE COMMISSION

Administrative and logistical challenges

44. The Commissioner was formally advised of his appointment by way of a telephone call received by him a few days prior to 19 October 2018, the date upon which he received an email from Adv Jacob Skosana (Adv Skosana), Deputy–Director General: Court Services, Department of Justice & Constitutional Development (DOJCD), confirming the appointment. Adv Skosana proposed, in the email, that a meeting be held on 2 November 2018. On Friday, 26 October 2018, Adv Skosana delivered to the Commissioner, in Pretoria, a file containing several documents, amongst which was a copy of the Proclamation establishing the Commission, together with the Commission’s ToRs, set out in a schedule to the Proclamation, and draft regulations.
45. Given that the Commission had no office from which to operate, the meeting proposed in Adv Skosana’s email of 19 October 2018 was held at the Southern Sun International Hotel, OR Tambo International Airport, Johannesburg, on 2 November 2018. In addition to the Commissioner and his two Assistants, Ms Gill Marcus (Ms Marcus) and Mr Emmanuel Lediga (Mr Lediga), the following Departments were represented: the DOJCD, Department of Public Works (DPW), National Treasury and the Office of the President. At the meeting, a file containing media reports and related documents concerning the Commission’s ToRs was handed to both Assistants to the Commissioner (the Commissioner and Assistants will henceforth collectively be referred to as ‘the Commissioners’).
46. The following recommendations were made at the meeting:

- 46.1 that the investigative team should be identified urgently by the Commissioners to enable them to commence with the perusal of documentation that would be made available to them;
- 46.2 that the Commission would need the services of persons who were well-versed in financial matters; with knowledge of how investment deals are structured and how proposals are evaluated and assessed; and
- 46.3 that it would be important for the Commission to tap into the experiences of similar investigations, conducted internationally, in respect of entities such as the Oil Fund, which is the sovereign wealth fund of Norway, the Ontario Teachers' Pension Plan Board and the California Public Employees' Retirement System (CalPERS).
47. The Commissioners were also informed at the meeting that no budget had been allocated for the Commission because the Commission was established after the adjustment estimates of the National Expenditure submissions to National Treasury. This meant that for the 2018/19 financial year, the DOJCD would cover the Commission's expenditure. A budget for the Commission would be submitted to National Treasury once key appointments had been made. In the meantime, the Department would provide administrative personnel to deal with procurement and logistical arrangements to support the Commission.
48. The absence of a budget for the Commission contributed substantially to the slow pace at which the Commission commenced its work. For example, laptops and data cards were to be provided to the Commissioners during the week of 17 – 21 December 2018. However, laptops were made available, without data cards, in the last week of January 2019. As reported to the Commission, this was because procurement officials had to comply with departmental prescripts. The legal team received their laptops from the

Department during the week 21-25 January 2019, but the Commission still had no office. Delays in procurement, often in matters considered by the Commission to be urgent, including unacceptably long delays in payment of remuneration to certain staff members, plagued the Commission for the better part of its life. Moreover, bureaucratic processes and red tape, coupled with a seeming lack of urgency, severely impacted on the efficient and effective working of the Commission. It is strongly recommended that an appropriate governance and operational framework be created to enable entities such as Commissions of Inquiry to operate efficiently, independently and without undue interference.

Appointing the Team and commencing work

49. The work of the Commission could commence in earnest only after the Evidence Leader, Adv Jannie Lubbe SC (Evidence Leader/ Adv Lubbe SC), had been contracted by the State Attorney on 12 November 2018. As was mentioned in the Commission's Interim Report,⁹⁸ the Evidence Leader has vast experience in the practice of law, which includes 18 years of forensic investigation. He commenced with investigations immediately after he was engaged by the State Attorney. The Secretary of the Commission, Adv Phuti Setati (Adv Setati), was appointed or designated, in terms of regulation 4 of the Commission's regulations, on 3 December 2018 and the rest of the staff were appointed, in terms of regulation 5(2), on 28 December 2018. The Evidence Leader was assisted by three junior advocates, contracted by the State Attorney on 29 November 2018, namely Adv N Khooe, Adv I Monnahela and Adv S Mohapi. The Evidence Leader and his assistants were further assisted by a forensic investigation team, consisting of leading forensic investigator, Mr M Rheeder and Ms H Mukomana, a qualified attorney. They were appointed on 1 January 2019 and 14 January 2019, respectively. Ms N

⁹⁸ At para 9.

Ford-Hoon, a financial specialist and Chartered Accountant, who was appointed on 1 January 2019, also assisted the forensic investigation team. A fourth member, Ms Heleen Scorrano, also a financial specialist and forensic Chartered Accountant, joined the team on 20 May 2019.

50. Ms Thabi Leoka, an economist, who later also assisted the forensic investigation team, and Ms Bomikazi Molapo occupied the positions of spokesperson for the Commission and communications manager respectively. Mr Victor Radebe held the position of Stakeholder and Information Senior Manager. In addition, 14 other individuals, holding various junior positions, formed part of the administrative and documentation staff of the Commission. Thus, in total, the Commission employed eight legal/forensic experts, two communications professionals and 16 administrative/documentation/IT personnel. Further support was obtained from a number of experts relating to specific areas of expertise on a pro bono basis, all of whom signed a confidentiality agreement. In accordance with regulation 12(1) of the Regulations, all persons who assisted the Commission took an oath, administered by the Commissioner, to preserve secrecy '*with regard to any matter or information that may come to [his/her] knowledge in the performance of [his/her] duties relating to the functions of the Commission*'.
51. From January 2019, the investigation teams (legal and forensic) enjoyed unimpeded access to the facilities and staff of the PIC. This was after the Evidence Leader had obtained the assurance from the Chairperson of the Board of the PIC, Deputy Minister Mondli Gungubele that the PIC would co-operate fully with the Commission in its investigations. The PIC made available to the legal team, at the latter's request, a list of the names of former employees of the PIC, who had either resigned or had been dismissed during the period January 2015 to September 2018. The legal team also prepared a written invitation to all the employees of the PIC to come forward voluntarily to

assist the Commission in its investigations, which was distributed by the acting company secretary, Ms Wilhelmina Louw (Ms W Louw).

52. A website, <http://www.justice.gov.za/commissions/pic/>, was created where information relating to the Commission could be accessed by members of the public. Invitations calling on all persons who might have information relevant to the Commission's Terms of Reference to come forward were posted onto the website. Announcements were also made on certain radio stations, extending the same invitation. Another invitation was extended to a variety of other stakeholders, including political parties represented in Parliament.

The Hearings

53. At its meeting held on 4 December 2018, the Commission resolved that hearings would commence on 21 January 2019. This resolution was taken due to pressure on the Commission having to submit its interim report to the President on 15 February 2019 as was required in terms of paragraph 3.1 of the ToR. Nevertheless, the target date was met and, indeed, the hearings commenced on 21 January 2019. The Evidence Leader and his team are to be commended for ensuring, under extreme pressure of time, that the hearings commenced as scheduled.
54. The hearings were held in the Council Chamber at Sammy Marks Building in Central Pretoria, over a period of 63 days, from 21 January 2019 until 14 August 2019. It had been anticipated that the hearings would be finalised by end July 2019, but due to unforeseen circumstances, such as strike action by the Tshwane municipal workers, approximately five days of hearing time was lost.
55. The Commission's hearings were widely publicised through both print and electronic media, which, together with the testimonies of particular witnesses

given in public, we believe, encouraged a number of people, particularly employees of the PIC, to come forward to testify. Rule 2.1 of the Commission's Rules provides that the Commission 'must regularly inform the public of the matters to be covered at its hearings by publishing relevant information on its website'. For the first two weeks of the hearings, statements of witnesses scheduled to testify were published on the Commission's website a day before such witnesses' testimonies were to be given. But, following reports of alleged threats made against the lives of certain potential witnesses, which the Commission considered to be serious and thus not to be ignored, the posting of statements on the website the day before a witness was due to testify was abandoned at the direction of the Commissioner. Statements of witnesses were from then on posted on the website during the morning of the day on which they were scheduled to testify.

56. Rule 3.1 of the Commission's Rules provides that '[s]ubject to anything to the contrary contained in these Rules or to the Chairperson's directions in regard to any specific witness, the Commission's Legal Team bears the overall responsibility to present the evidence of witnesses to the Commission'. In this regard the process adopted by the Commission was the following: The legal team obtained, from a potential witness, a statement which, if relevant to the Commission's Terms of Reference, would be repeated at the hearing under oath or affirmation, administered by the Commissioner in accordance with regulation 8 of the Regulations.

57. Rule 3.2 of the Commission's Rules reads:

'A member of the Commission's Legal Team may put questions to a witness whose evidence is presented to the Commission by the Commission's Legal Team, including questions aimed at assisting the Commission in assessing the truthfulness of the evidence of the witness'

58. The legal team were afforded an opportunity to question every witness who gave evidence before the Commission, in compliance with this rule.
59. Where the legal team intended to present a witness to the Commission whose evidence would, or might, implicate another person, it was required in terms of Rule 3.3, through the Secretary of the Commission, to notify that person in writing within a reasonable time before the witness gave evidence. The legal team by and large complied with the provisions of this rule, but where a person was implicated whilst not having been notified beforehand, they would be informed after the fact and advised to lodge a statement or an affidavit in response should they so wish, or apply, in terms of regulation 9(3) of the Regulations or rule 3.3.6 of the Commission Rules, to cross-examine the witness concerned and to give evidence.
60. Two witnesses who testified before the Commission were cross-examined under these provisions; leave having been obtained from the Commissioner. Two instances require to be mentioned in this regard.
61. During August 2019, the former Minister of Finance, Mr Malusi Gigaba (former Minister Gigaba), indicated, through his legal representatives, that he intended to apply for leave to cross-examine Dr Matjila. Following some discussion and an indication from the Commissioner that in his view, prima facie, it was not necessary to cross-examine Dr Matjila due to the nature of the evidence, former Minister Gigaba's legal representatives indicated by email, on 22 August 2019, that the former Minister would not be proceeding with his application for leave to cross-examine Dr Matjila.
62. The next matter to deal with, briefly, was raised by Mr Kholofelo Maponya (Mr Maponya), who describes himself as an adult businessman and director of companies, with a controlling interest in Matome Maponya Investment Holdings (MMI). On 14 August 2019, which was the last day of the hearings,

Mr Maponya issued a media statement in which he maintained that the Evidence Leader had neglected ‘the basic rules of natural justice’, presumably by not calling him to testify before the Commission. He stated that his name had been mentioned several times during the hearings and, in many cases, in a manner that has the potential to irreparably damage his reputation and business interests. Mr Maponya had apparently deposed to an affidavit on 8 July 2019 and subsequently delivered it, or caused it to be delivered, together with a number of annexures, to the Secretary of the Commission.

63. Mr Maponya claimed in his affidavit that his company, MMI, was owed an amount of R45 million by the PIC. The amount allegedly due, relates to fees for facilitating a transaction concluded between the PIC and SA Home Loans (SAHL), an entity set up to provide affordable housing to members of the GEPPF.
64. It is clear that the issues raised by Mr Maponya in his affidavit have no relevance whatsoever to the Commission’s terms of reference. The Commission has no authority to decide on whether or not Mr Maponya or MMI is, or is not, owed any money by the PIC. In any event, Mr Maponya avers in his affidavit that on 11 April 2019 a summons was issued by his attorneys out of the Gauteng Division of the High Court, claiming payment of the amount allegedly due to MMI. The defendants cited in the summons are the PIC, GEPPF and SAHL. The matter is being defended. Clearly, therefore, Mr Maponya’s claim is not covered by the Commission’s terms of reference and the Commission is not empowered to consider it.⁹⁹

⁹⁹ Matome Maponya Investment Holdings is addressed in a case study in Chapter III: ToR 1.1 of the report, to the extent that the transactions discussed are relevant to the Commission’s terms of reference.

65. 77 witnesses gave oral testimony before the Commission over the 63 days of hearings. At the end of the hearings on 14 August 2019, the Commission issued a statement in which, amongst others, the following was clearly stated:

'Today marks the end of the scheduled public hearings on allegations of impropriety as it is outlined in the terms of reference that guide the work of the Commission. It is now our task to review, assess, make findings, propose recommendations and prepare our final report in keeping with these terms of reference. In addition to the investigations and testimonies that have been presented to the Commission over the past eight months, further possible questionable transactions have come to the attention of the investigation team. The team will continue with their investigations and, if deemed appropriate, further limited public hearings may be held.'

Furthermore, anyone with evidence, or who has been mentioned in evidence to date and wishes to place their version of events on record, are welcome to submit their testimony to the Commission by way of sworn affidavits. All such submissions will form part of the testimonies that will be considered when writing our report.'

In the period between now and 30 September 2019, Advocate Lubbe SC and his team remain available as the point of contact with the Commission. Our communications team will alert the media if or when any new documents are posted on the website.'

66. In addition to the statement, the Commission directed the Evidence Leader to invite, in writing, certain individuals who had been mentioned during the testimonies of one or more witnesses, to respond to allegations made against them by way of affidavit, should they wish to do so.

Evaluation of the evidence

67. It has been said that the proper function of a commission of inquiry is -

‘ . . . to find the answers to certain questions put by the President in the terms of reference. A commission is itself responsible for the collection of evidence, for taking statements from witnesses and for testing the accuracy of such evidence by inquisitorial examination – inquisitorial in the Canonical, not the Spanish sense.’¹⁰⁰

68. In *Bell v Van Rensburg N.O.* it was held that a commission of inquiry is not a court of record (oorkondegof), nor is it analogous to it.¹⁰¹ A court of law ‘is bound by the rules of evidence and the pleadings, but a Commission is not. It may inform itself of facts in any way it pleases – by hearsay evidence and from newspaper reports or even through submissions or representations on submissions without sworn evidence’.¹⁰² In *Bongoza v Minister of Correctional Services & others*, Jafta AJP said that the commission of inquiry in that case

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‘ . . . was not bound by the rules regulating the admission of evidence or evidentiary material in a court of law. Its regulations indicated that it would be improper for it to act as if it was a court of law when it was not. For example, cross-examination was subject to its chairperson’s permission, which could be granted only if he was convinced that such cross-examination would be in the interests of its functions.’¹⁰³

¹⁰⁰ Van den Heever JA: U G 36 – 49: Report of the Commission of Inquiry into Riots in Durban, quoted in the Report of the Marikana Inquiry at page 22, para 1.2.

¹⁰¹ 1971 (3) SA 693 (C) at 719.

¹⁰² *S v Sparks & others* 1980 (3) SA 952 (T) at 961B-C.

¹⁰³ 2002 (6) SA 330 (TkH), para 25.

69. There has been some dispute of fact on certain issues dealt with in the evidence placed before the Commission. It is the Commission's task to make findings on the matters that are in dispute.
70. In a civil trial the approach of our courts when dealing with disputes of fact was set out as follows by the Supreme Court of Appeal (per Nienaber JA, writing for a unanimous Court):

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of

*the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.*¹⁰⁴

71. But the Commission is not dealing with a civil trial where there is normally a *lis* between the parties and thus an onus resting on one or the other. Considering the evidence that the Commission could admit, which could include hearsay, documentary and on affidavit without the deponent testifying, we think the proper approach is to evaluate all the evidence and come to a view based on the probabilities. No onus can be said to lie on any of the parties to prove or disprove any allegations made by or against them. But those implicated in alleged wrongdoing had an obligation to place all relevant information before the Commission.

THE STRUCTURE AND FUNCTIONING OF THE PIC

72. The structure and functioning of the PIC is set out in considerable detail so that the Commission would be in a position to assess and explain whether any findings of impropriety could be located in structural deficits or organisational pathologies impeding the proper functioning of the PIC. As the testimony and explanation of the structure indicates, sound structures and operating procedures were largely in place but these cannot act as a complete check on the malfeasance of public officials.
73. A comprehensive description of the structure and functioning of the PIC was given by Ms W Louw, the acting Company Secretary at the time of her testimony, before the Commission on 23 January 2019. She joined the PIC on 1 September 1996 as a Personal Assistant to the then Chief Director Mr

¹⁰⁴ Stellenbosch Farmers' Winery Group Ltd v Martell et Cie 2003 (1) SA 11 (SCA) para 5.

Badenhorst, and has since served in several positions at the PIC. She, therefore, has an intimate knowledge of the structure and functioning of the PIC.

74. In terms of section 8 of the PIC Act, the business of the PIC is controlled by a Board of directors (the Board) which, in terms of section 6, must be determined and appointed by the Minister, in consultation with Cabinet. The Minister is enjoined to appoint the members of the Board *'on the grounds of their knowledge and experience, with due regard to the FAIS Act, which, when considered collectively, should enable the Board to attain the objects of the corporation'*¹⁰⁵, the main object being that of a financial services provider in terms of the FAIS Act.

The Memorandum of Incorporation

75. There was some confusion during the testimony of Dr Matjila relating to the memorandum of incorporation (MOI) under which the PIC is currently operating. The Commissioners had been provided with a copy of a MOI that had been signed by the then Minister of Finance, Mr Pravin Gordhan (Minister Gordhan), on 26 April 2013 (2013 MOI). Clause 7.1.11 of that MOI provided that the Board *'shall, with prior approval of the Minister, appoint the nominees for chief investment officer (CIO), chief financial officer (CFO) and chief operations officer (COO) to those positions as employees, in accordance with applicable labour legislation'*. It was common cause that the PIC has been operating without a CIO and COO. Dr Matjila was appointed to the position of CEO in December 2014.
76. It appears that the vacancy in the position of CIO, a position Dr Matjila had held before his appointment as CEO, was never filled. Similarly, the position of COO was never filled after Ms Petronella Dekker (Ms Dekker), who had

¹⁰⁵ Section 6(3) of the PIC Act.

held that position from 2012 until 2015, vacated the position when she was appointed Executive Head: Corporate Services. The evidence has revealed that on 24 March 2017, Minister Gordhan wrote to his deputy, Mr Mcebisi Jonas (Mr Jonas), in his capacity as chairman of the Board, advising that he (Minister Gordhan) had identified three sub-clauses in the 2013 MOI which needed to be amended, namely, sub-clauses 7.1.12, 7.3.1 and 7.3.6.

77. One of the proposed amendments (sub-clause 7.1.12) would make provision for the CEO and CFO becoming ex-officio directors of the Corporation. Minister Gordhan also requested that the PIC call a shareholders' meeting within two days of the date of his letter.¹⁰⁶ However, on 29 March 2017 the Board, in addition to approving the Minister's proposed amendments, resolved to approve further amendments, including the deletion of sub-clause 7.1.11. The effect of the deletion would be the elimination of the positions of CIO¹⁰⁷ and COO in the PIC. Section 16(1) of the Companies Act provides:

'A company's Memorandum of Incorporation may be amended-

(a) . . . ;

(b) . . . ; or

(c) at any other time if a special resolution to amend it-

is proposed by-

(aa) the board of the company; or

¹⁰⁶ A copy of the letter is annexure 'DD 30' of Dr Matjila's statement.

¹⁰⁷ The abolition of the position of CIO was in line with an organisational restructuring that took place, according to Dr Matjila's testimony (para 102 of his statement signed on 17 July 2019) in 2014 and 2015, resulting in the CIO position being split into four Executive Heads of investments, namely of Listed Investments, Private Equity & Structured Investments, Developmental Investments, and Properties.

(bb) shareholders entitled to exercise at least 10% of the voting rights that may be exercised on such a resolution; and

is adopted at a shareholders meeting, or in accordance with section 60, subject to subsection (3).'

78. At a shareholders meeting held on 29 March 2017 a special resolution was passed in terms of which *'the existing Memorandum of Incorporation of the Public Investment Corporation . . . is hereby amended'*. All the proposed amendments were accordingly approved and Minister Gordhan signed the amended version of the MOI on 30 March 2017 (amended MOI/MOI).¹⁰⁸ The amended MOI was accepted and filed by the Commissioner of the Companies and Intellectual Property Commission (CIPC) on or about 19 April 2017.¹⁰⁹
79. We are therefore satisfied that the statutory procedures to amend the PIC's 2013 MOI were followed and that the amendments were, consequently, valid. It is, however, common cause that subsequent to Mr Gigaba succeeding Minister Gordhan as Minister of Finance in March 2017 he requested the Board, in a letter dated 19 April 2017, to not implement the amended MOI and that the 2013 MOI remain in existence until he had familiarised himself with the PIC. Although the CIPC accepted Minister Gigaba's request on 15 May 2017, it needs no emphasising that the attempted substitution of the amended MOI was not in accordance with statutory requirements. Section 16(5) of the Companies Act states:

'(5) An amendment contemplated in subsection (1)(c) may take the form of-

¹⁰⁸ Copies of the resolution passed at a shareholders meeting on 29 March 2017 and of the amended MOI are attached as 'Appendix 4' and 'Appendix 5' respectively.

¹⁰⁹ A copy of letter dated 19 April 2017 attached as 'Appendix 6'.

(a) a new Memorandum of Incorporation in substitution for the existing Memorandum; or

(b) one or more alterations to the existing Memorandum of Incorporation by-

(i) . . .;

(ii) deleting, altering or replacing any of its provisions;

(iii) inserting any new provisions into the Memorandum of Incorporation;
or

(iv) making any combination of alterations contemplated in this paragraph.’

80. A valid substitution of the 2013 MOI for the amended MOI required a special resolution to do so, proposed by the Board or the shareholders, through Minister Gigaba. There was no evidence before the Commission of any such resolution.

81. In an affidavit deposed to on 24 July 2019 in support of an application for leave to cross-examine Dr Matjila, former Minister Gigaba states that as far as he was aware, at the time that he requested that the 2013 MOI be reinstated, the amended MOI ‘*was not yet operational at the PIC*’¹¹⁰. That may well be so. But what matters, in our view, is the date upon which the Notice of Amendment was filed with the CIPC. Section 16(9)(b) of the Companies Act decrees that in a case other than where an amendment to a company’s MOI changes the name of the company, the amendment takes effect on the later of ‘(i) the date on, and time at, which the Notice of Amendment is filed; or (ii) the date, if any, set out in the Notice of Amendment’. According to Ms Mathebula, the company

¹¹⁰ Para 41 of Mr Gigaba’s statement signed on 24 July 2019.

secretary at the relevant time, the 2013 MOI, 'was refiled with CIPC thereby withdrawing the new MOI [amended version]. The 2013 MOI was accepted by CIPC on 15 May 2017'.¹¹¹ By that time the amended MOI had already been accepted and filed, at the latest, on 19 April 2017.

82. Dr Matjila stated the following during his testimony:

*'The MOI [amended version] was amended and the notice of amendment filed with CIPC on 30 March 2017.'*¹¹²

83. This evidence was not contradicted. In any event, it is not in dispute that the actual amended MOI was filed on 30 March 2017. It therefore came into effect on 30 March 2017 or at the latest on 19 April 2017 (s 16(5) of the Companies Act). In the absence of any evidence to the contrary, we conclude that the PIC's current MOI is the amended MOI, which was signed by former Minister Gordhan on 30 March 2017 and accepted by CIPC on 19 April 2017, on which date a 'Certificate of Confirmation' was issued.

The Composition of the Board

84. Clause 7.1.1 of the Corporation's MOI provides that the Board '*shall comprise of no less than 10 and no more than 15 directors . . .*'. The shareholder, defined in the MOI as the State acting through the Minister, is required, in terms of clause 7.1.2.1 to ensure that the Board consists of executive and non-executive directors. Thus, at the time of appointment of the Commission, the following individuals served as members of the Board:

Non-Executive Directors:

¹¹¹ Para 176 of Ms Mathebula's statement signed on 24 April 2019.

¹¹² Para 199 of Dr Matjila's statement signed on 17 July 2019.

1. Deputy Minister Mondli Gungubele - Chairperson
2. Dr Xolani Mkhwanazi - Deputy Chairperson
3. Ms Sandra Beswick
4. Mr Trueman Goba
5. Ms Dudu Hlatshwayo
6. Mr Pitsi Moloto
7. Ms Mathukana Mokoko
8. Ms Lindiwe Toyi
9. Ms Sibusisiwe Zulu

Executive Directors

1. Dr Daniel Matjila - Chief Executive Officer
2. Ms Matshepo More - Chief Financial Officer

85. Two former non-executive directors, Dr Claudia Manning (Dr Manning), who testified before the Commission and Ms Tantaswa Fubu (Ms Fubu) had resigned from the Board on 22 July 2018 and 31 July 2018, respectively.
86. Ms Sandra Beswick (Ms Beswick), former non-executive Board member, gave evidence on 27 February 2019. In paragraph 9 of her statement, dealing with the resignation of the Board, she states that the Board was informed by the Chairperson, Mr Gungubele, that he had received a call from the Minister of Finance, Mr Tito Mboweni (Minister Mboweni). They were told that Minister

Mboweni said, *'the Board should consider resigning immediately, failing which, he will fire us and appoint an interim Board within the next week.'* Her statement continues, stating that, *'This demand was highly irregular because the repercussions could be disastrous for the PIC as it could lose its FAIS licence and was in contravention of the Companies Act. All nine members of the Board agreed to resign'* and issued a letter to the Minister of Finance.

87. They advised the Minister, in their letter of resignation, that they were prepared to continue as Board members until an interim Board had been appointed.¹¹³ The Minister accepted the Board members' resignation on 15 February 2019 and an interim Board was later appointed to serve for the period 12 July 2019 to 31 July 2020, consisting of the following non-executive directors (NEDs):

1. Dr Reuel Khoza - Chairman
2. Dr Xolani Mkhwanazi - re-appointed: Deputy Chairman
3. Ms Sindi Mabaso-Koyana
4. Ms Irene Charnley
5. Ms Tshepiso Moahloli
6. Ms Maria Ramos
7. Ms Barbara Watson
8. Mr Ivan Fredericks

¹¹³ Para 9 of the statement of Ms Sandra Beswick signed on 27 February 2019 and para 24 of the statement of Ms Dudu Hlatshwayo signed on 26 February 2019.

9. Mr Zola Saphetha
10. Mr Bhekithemba Gamedze
11. Dr Angelo De Bruin
12. Professor Bonke Dumisa
13. Advocate Makhubalo Ndaba
14. Mr Pitsi Moloto (re-appointed) and
15. Mr Mugwena Maluleke.

88. It should be noted that the current MOI makes provision for a Board of ten and no more than fifteen people. Appointing fifteen NEDs plus the CEO and the CFO as ex officio members means that the Board is operating in breach of its MOI with seventeen directors.

89. According to Ms W Louw, the Board retains control over the operations of the PIC through well-developed structures such as various Board committees and comprehensive delegations of authority (DoA), in terms of which responsibilities for different kinds of transactions are delegated to a variety of role players in the PIC investment divisions. The following Board committees have been established:

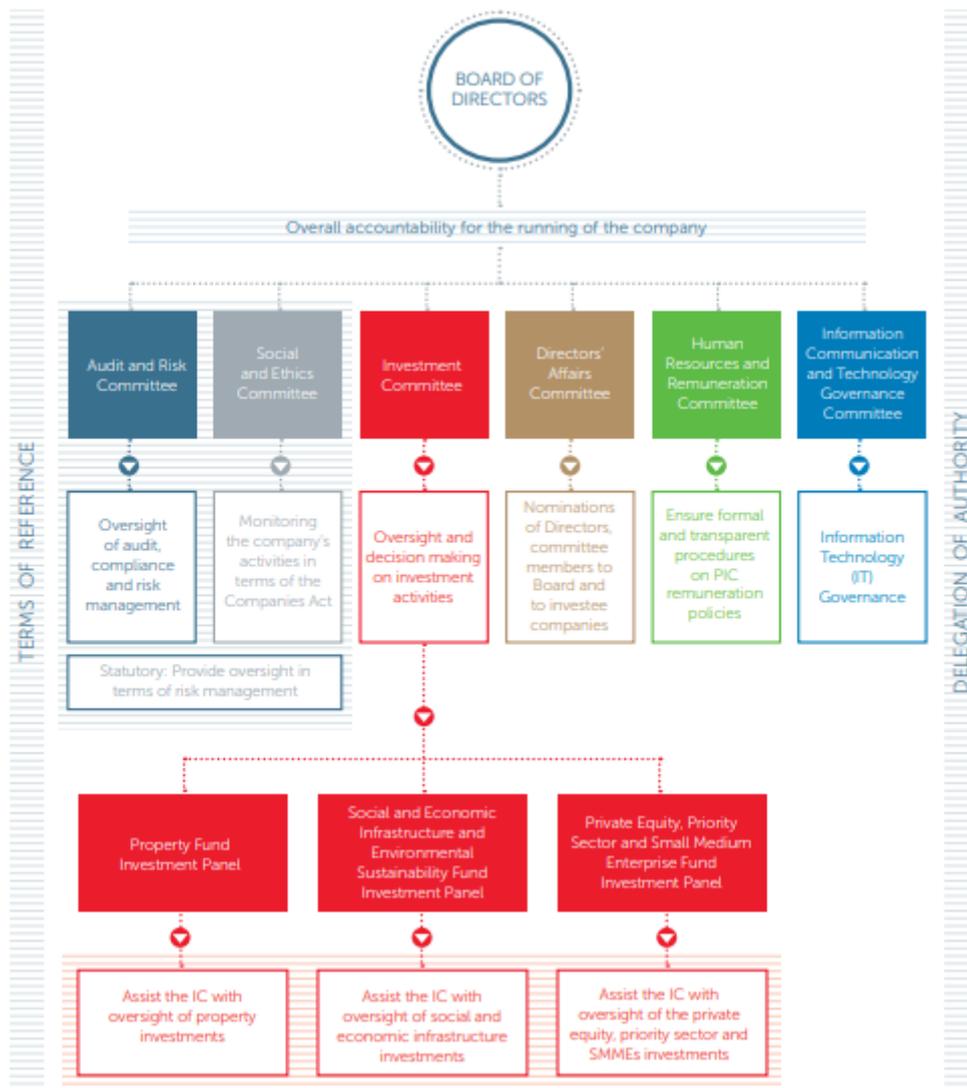
1. *Audit and Risk Committee (ARC)*, a statutory committee in terms of section 94 of the Companies Act, which provides oversight in respect of audit, compliance and risk management.

2. *Social and Ethics Committee (SEC)*, established in terms of regulation 43 of the Regulations promulgated under the Companies Act. (All State – owned entities are required to have a SEC in place).
 3. *Directors Affairs Committee (DAC)*, which serves as a nomination committee focusing on evaluations and nominations for appointments of persons to the Board of PIC investing companies.
 4. *Human Resources and Remuneration Committee (HRRC)*, which ensures that formal and transparent procedures are followed in respect of remuneration policy and labour relations matters.
 5. *Information, Communications and Technology Governance Committee (ICTGC)*, constituted in terms of Principle 12 of the King IV Report focussing on, amongst others, information and technology governance and cyber security. According to Principle 12 of King IV, the purpose of IT governance is to support the organisation to set and achieve its objectives.
 6. *Investment Committee (IC)*, provides oversight and decision making on investment activities.
90. Three Fund Investment Panels (FIPs) have been established as sub-committees of the Investment Committee (IC). These FIPs have been authorised to deliberate and make investment decisions on unlisted investments, including properties in accordance with the relevant DoAs. The sub-committees are:
1. *Property Fund Investment Panel (Prop FIP)*, which assists the IC with oversight in respect of direct and indirect property investments;

2. *Social and Economic Infrastructure and Environmental Sustainability Fund Investment Panel* (SEIES FIP), which assists the IC with oversight in respect of unlisted social and economic infrastructure investments.
3. *Private Equity, Priority Sector and Small Medium Enterprise Fund Investment Panel* (PEPSS FIP), which assists the IC with oversight of private equity, Priority Sector and Small Medium Enterprise Investments.

91. The structure described above is contained in the following diagram¹¹⁴:

¹¹⁴ At page 26 of Ms Wilhelmina Louw's statement signed on 16 January 2019.



The individuals who serve on these Board committees are all members of the Board as envisaged in section 7(1) of the PIC Act.

11 The Board has issued DoAs in respect of the following:

1. Corporate Governance/Affairs;
2. Unlisted Investments;
3. Listed Investments; and

4. Property Investments.

92. The powers of the Board and management committees are set out in the DoAs. In addition, policies and procedures have been developed, which are designed to influence, determine and guide all major investment decisions and actions.

The Executive Committee

93. The responsibility of the day to day management of the PIC rests with the CEO in line with the approved DoA framework and the strategic direction set by the Board. The CEO is assisted in the discharge of further responsibilities by an Executive Committee (EXCO), comprising the CEO as Chairman, the Chief Financial Officer (CFO) and the Executive Heads of the ten PIC divisions, namely:

1. Research and Project Development;
2. Impact investing;
3. Private Equity and Structured Investment Products (SIPS);
4. Property Investments;
5. Listed Investments;
6. Investments Management;
7. Human Resources;
8. Risk;

9. Legal Counsel, Governance and Compliance; and, lastly

10. Information Technology.

94. The heads of internal audit and corporate affairs, the general manager of finance, executive assistant to the CEO and the Company Secretary are permanent invitees to the EXCO meetings.

95. The EXCO has established six sub-committees, three of which relate to corporate affairs and the other three to assets under management. These sub-committees are in line with the PIC investment strategy to instil a culture of compliance and good governance, so as to ensure that the Corporation's governance processes and affairs are conducted in a transparent, fair and prudent manner and that accountability becomes a certainty. The sub-committees are:

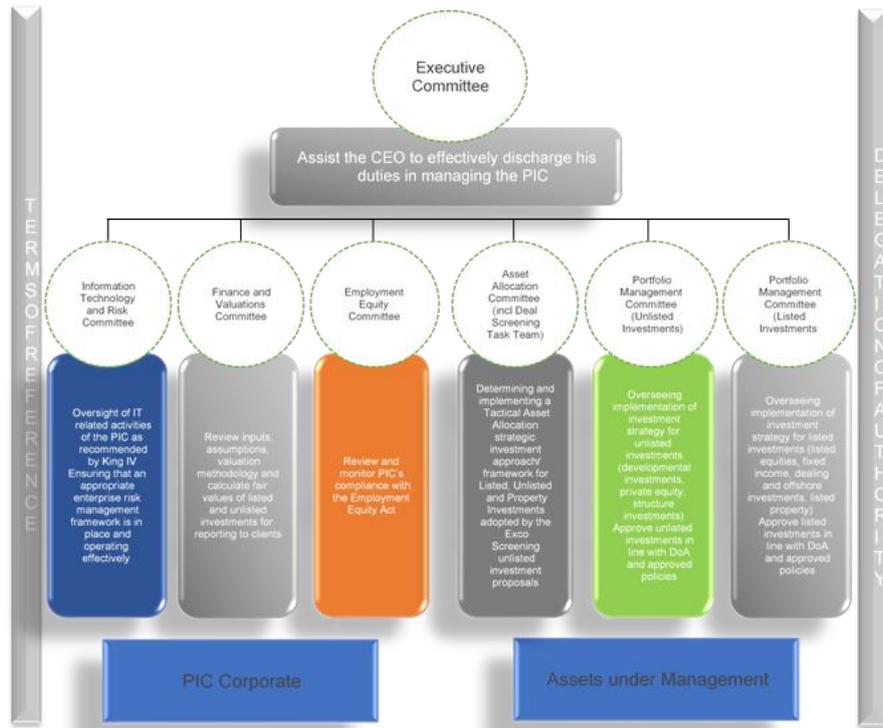
1. *Information Technology and Risk Committee*, which provides oversight of IT related activities within the PIC and ensures that an appropriate Enterprise Risk Management Framework is in place and operates effectively.
2. *Finance and Valuations Committee*, which reviews inputs, assumptions, valuations and methodology and calculations, fair values of listed and unlisted investments for reporting to clients;
3. *Employer Equity Committee*, which is responsible for ensuring compliance in the workplace with all the requirements of the Employment Equity Act;
4. *Portfolio Management Committee (Unlisted investments) (PMC-UI)*, which is responsible for oversight of implementation of the PIC's investment strategy in respect of unlisted investments and for the

approval or otherwise of unlisted investments, including property investments, in line with the relevant DoAs and approved policies.

5. *Portfolio Management Committee (Listed Investment)* (PMC-LI), which is responsible for oversight of implementation of the Corporations investment strategy for listed investments and approval of listed investment transactions in line with the relevant DoA and approved policies.

6. *Asset Allocation Committee (AAC)*, established in 2012 and whose responsibility includes the screening of unlisted investment proposals received by the PIC through a deal screening task team before they are submitted to the PMC-UI for considering whether or not the proposal should proceed to the next stage, namely, Due Diligence (DD).

The Executive Committee and its Sub-committee structures are depicted below¹¹⁵:



Client mandates

96. The PIC's clients have provided the PIC with investment mandates, which set out, among others, their investment objectives, risk appetite, investment parameters as well as the asset class allocations. In order to ensure compliance with client mandates, the PIC utilises a special system, which enables it to capture the mandates for monitoring purposes. According to Ms W Louw, the PIC reports to clients on a monthly and quarterly basis, detailing, among other things, portfolio performance. Clients are thus able to engage with the PIC during these presentations and to seek clarity, if they so wish. For illustrative purposes we refer to the GEPF's mandate, as the Corporation's largest client.

¹¹⁵ At page 29 of Ms Wilhelmina Louw's statement signed on 16 January 2019.

97. The relationship between the PIC and the GEPF is governed by an Investment Management Agreement (IMA) concluded on 12 June 2007.¹¹⁶ In terms of the IMA, the GEPF granted the PIC a power of attorney and appointed it as an investment manager with the authority to act as its agent *'in managing and administering the portfolio within the constraints specified in the IMA . . . and subject to any policies of the GEPF which are appended to the IMA'*.¹¹⁷ Annexure 'A' to the statement of Mr Abel Sithole (Mr Sithole), the principal executive officer of the GEPF, is a policy document that sets out the strategic asset allocation percentages and the strategic limits to be applied in a diversified portfolio. It should be noted that in a letter addressed to the former CEO of the PIC, Dr Matjila, dated 26 October 2017, the principal executive officer of the GEPF stated that the Fund had resolved that the PIC *'is required to seek approval from the GEPF for any single investment above R2 billion for unlisted and property investments'*.
98. This will be dealt with in more detail in the section addressing ToR 1.17, below.

Investment process

99. In the main, two senior officials of the PIC gave uncontested testimony on the investment processes followed when dealing with a proposed transaction, namely, Mr Fidelis Madavo (Mr Madavo), Executive Head of Listed Investments and Mr Roy Rajdhar, Executive Head of Impact Investing, which lies under the unlisted investments division. Both report directly to the CEO. We deal with the listed and unlisted divisions separately.

¹¹⁶ A copy of the agreement is annexed to the statement of Mr Abel Sithole, signed on 15 July 2019, the principal executive officer of the GEPF. The document appears in the confidential section of the annexures to that statement, marked as 'Bundle B' and thus does not form part of the record.

¹¹⁷ Para 7.4.3 of Mr Sithole's statement signed on 15 July 2019.

Listed Investments

100. The Listed Investments division covers listed equities, listed property, listed fixed income securities, cash and money markets portion of the client mandate. Transactions concluded by the Listed Investments division are dealt with through three governance committees, in line with the PIC's DoA, namely, the Portfolio Management Committee: Listed Investments (PMC-LI), the Investment Committee and, where appropriate, the PIC Board.

101. The members of the PMC - LI are:

1. *The CEO (Chairman)*
2. *The CFO*
3. *Executive Head: Listed Investments*
4. *Executive Head: Risk*
5. *Executive Head: Legal Counsel, Governance and Compliance*
Executive Head: Research and Project Development
6. *Executive Head: Investment Management*
7. *General Manager: Listed Equities*
8. *General Manager: Fixed Income and*
9. *General Manager: Externally Managed Funds.*

102. Transactions under the Listed Investments division go through the following process:

The Public Investment Corporation (PIC) receives applications for funding through unsolicited applications from clients or advisors, referrals by other funding institutions or strategic partners, Initial Public Offerings and Book Builds and Rights Issues



Upon receipt of an application, the Investment Team prepares a scoping report requesting approval for the application to be referred for due diligence. Scoping Report contains in effect the initial Due Dilligence of the Transaction Team



The scoping report is submitted to the Executive Head for review and approval to be submitted, via the Company Secretary, to the Portfolio Management Committee of Listed Investments (PMC1)



PMC1 will either approve or decline the request for the referral of the inestement opportunity for due diligence



If PMC1 approves the request, the Investment Team will request the Executive Heads of Risk, Legal and Environmental, Social and Governance (ESG) divisions for resources to perform their own due diligence for the proposed transaction



Each team prepares independent reports focused on their area of expertise. The reports broadly cover commercial, financial, technical and operational, legal and regulatory, and ESG areas

Investment Team also prepares an appraisal report recommending either an approval or rejection of the investment. The report is prepared while/concurrently with ESG, Risk and Legal are preparing their reports.



The appraisal report is reviewed and signed off by the Executive Head: Listed Investments before it is submitted to the Portfolio Management Committee (PMC2)



The appraisal report will be accompanied by independent reports from ESG and Risk and Legal (signed off by their Executive Heads) and incorporate the due diligence findings and the controls to be implemented to mitigate any risk identified during the due diligence.



PMC2 will consider the four reports and deliberate on the matter. PMC will either approve or decline it or refer it back to be reworked



If the proposed transaction does not fall within PMC2's Delegation of Authority, it will be approved for onward transmission to a higher Committee (either the Investment Committee or the Board)

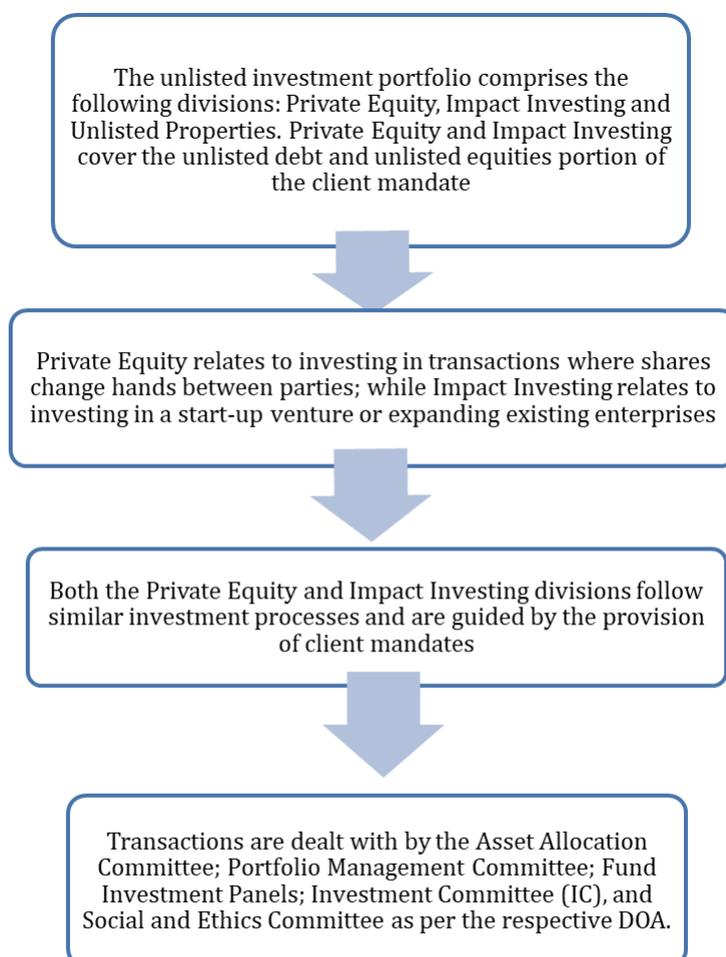


If the transaction is approved, the Company Secretariat will prepare a resolution to be signed off by the Chairperson, who will be the CEO or another designated person. The contracting phase will then begin. This phase varies depending on the nature of the investment.

103. There are differences in the processes followed for Book Builds and Rights Issues due to the real time nature of listed market events. Because of the type of transactions that will be discussed below, which do not include Book Builds or Rights Issues, nothing more will be said about these two types of investments.

Unlisted Investments

104. The process of transactions under the unlisted investments division:



The PIC receives funding applications by various means which could include the following: Unsolicited applications from clients or their advisors; Deal origination by PIC investment professionals; Referrals by other funding institutions; From strategic partners; Delisting from PIC listed investment portfolio.



Upon receiving an application, a letter of acknowledgment will be prepared and sent to the potential client. An initial desktop review of the application will be conducted by the investment team to ascertain whether it complies with PIC investment mandate requirements, particularly in relation to meeting financial return requirements and the level of developmental impact and nature of the project.



If the application, based on desktop evaluation, meets the mandate requirements, the investment team will prepare a deal screening report for submission to the Executive Head for review and approval for onward submission to the Deal Screening Task Team ("DSTT"), a structure within the Asset Allocation Committee



The investment team will make a presentation to DSTT requesting approval to submit the scoping report to the Portfolio Management Committee: Unlisted Investments ("PMC-UI"). The purpose of this Scoping Report is to obtain approval to proceed to due diligence and, where necessary, incur costs in appointing consultants to assist in certain parts due diligence.

In preparing the scoping report, inputs will be obtained from the Portfolio Management and Valuation, Environmental, Social and Governance, Legal and Risk divisions. The scoping report, once complete and signed by the Executive Head will be submitted to PMC. The scoping report will be to request the PMC for approval to go to due diligence.



Having considered the submissions, PMC-UI will either approve, decline or refer the submission back to the investment team for further work to be done



Upon receiving approval from PMC:UI, the investment team will request from the various EH's from Risk, Legal and ESG divisions for resources to assist on the due diligence on the proposed transaction. The investment team will prepare the engagement letter and indicative term sheet which is reviewed by Legal before forwarding it to the potential client for review and sign-off in line with the DOA.



The due diligence can be conducted using internal or external resources depending on a number of factors including but not limited to complexity of the transaction and availability of internal capacity. Appointment of external resources will be done in line with the unlisted procurement policy.



Once the due diligence is completed, the investment team will prepare an Appraisal Report for submission to PMC:UI. The appraisal document will be reviewed and signed off by the EH of the relevant division prior to submission to PMC:UI. The appraisal report will be accompanied by independent reports from ESG, Risk, and Legal divisions and these reports will incorporate the due diligence findings and the controls to be implemented to mitigate any risks identified during the respective due diligence investigations.



PMC:UI will consider the submissions and either approve or decline same or refer the submission back to the investment team for rework. If the submission is declined by the PMC:UI, the investment team will prepare a decline letter to be signed in line with the DOA. If it does not fall within the PMC:UI DOA, the transaction will be referred for onward submission to a different committee for consideration. The relevant committee would typically be the Board, IC or its sub-committees.



If the proposed transaction falls within PMC:UI DOA, the PMC:UI will approve the transaction and the investment team will accordingly prepare an approval letter which will be signed in line with the DOA. This letter will be submitted to the potential client. The Company Secretary will prepare a resolution which is signed by the approving committee chairperson. If referred back for rework, the investment team will rework and resubmit to PMC:UI.

DEVELOPMENTS AT THE PIC SINCE THE JAMES NOGU/NOKO/LEIHLOLA EMAILS

105. The James Nogu/Noko and Leihlola emails led to an atmosphere that was not conducive to good, healthy and effective working relations between members of the Board and between the Board and certain senior executives, particularly the CEO and CFO. (For convenience we shall refer to the emails collectively as the 'James Nogu emails'.)¹¹⁸ Six witnesses testified before the Commission in this regard, namely Dr Manning, Ms Hlatshwayo, Mr Gungubele, Ms Beswick, Ms Zulu (all non-executive directors) and Dr Matjila. Although the names of the non-executive directors have been mentioned in the sequence in which they testified, we will not necessarily refer to their evidence in the same sequence.
106. Ms Hlatshwayo was appointed as non-executive director of the PIC Board on 1 December 2013. She is a member of the Institute of Business Advisors of Southern Africa and has held, among others, positions of General Manager at the Absa Retail Bank and Group Executive at Transnet (SOC) Ltd. She presented evidence on the period before the James Nogu anonymous emails of August 2017 and the period thereafter. She depicted the PIC as stable, peaceful and productive, where Board members could debate, argue and disagree with each other professionally. There had never been any resignations from the Board before terms had ended. In essence, the Board was uni-directional and focused on carrying out its fiduciary duties, meetings were scheduled and not cancelled at short notice, and Board packs properly prepared.
107. After the emergence of the emails, the PIC environment became fearful, stressful, suspicious, disgruntled and very unproductive. Low staff morale and

¹¹⁸ The dates of the emails are: 31 August 2017, 5 September 2017, 13 September 2017, 28 January 2019 and 30 January 2019.

lower levels of productivity could be felt throughout the organisation. Board meetings were fractious and focused on the allegations and how to deal with the emails.

108. The situation deteriorated significantly with Minister Gigaba and Deputy Minister Buthelezi becoming shareholder representative and chairman of the PIC respectively, after their appointment on 30 March 2017. With regard to an urgent Board meeting held on 26 September 2017, at the instance of Minister Gigaba, Ms Hlatshwayo testified that the meeting was tense, aggressive and unpleasant, with the Minister demanding answers from the Board on '*why the media had dragged his name into the PIC issues and wanted to know what the PIC Board was going to do to cleanse his name*'¹¹⁹ He allowed only certain Board members to speak, but later relented and allowed others to express their views. Once all had spoken, including Dr Matjila, Minister Gigaba's tone changed and he became reconciliatory and indicated his support and confidence in the Board and Dr Matjila. After the Minister had issued a media statement on 9 October 2017, the Board sought an engagement with him, but no meetings materialised.

109. Minister Gigaba and Deputy Minister Buthelezi were replaced by Minister Nhlanhla Nene as Minister of Finance, with Mr Gungubele his deputy. On 14 May 2018, Minister Nene requested the Board to report on the James Nogu email allegations against the CEO and CFO. He proposed a meeting with the Board that did not materialise. However, as chairman, Deputy Minister Gungubele convened an urgent Board meeting on 18 May 2018, which was confrontational and accusatory, in tone and content. He accused the Board of not having followed due process, and having exonerated the CEO based on incomplete evidence. Ms Hlatshwayo's observation was that Deputy Minister Gungubele, as Chairman of the Board, did not have an enquiring approach

¹¹⁹ Para 14.2.1.2 of Ms Hlatshwayo's statement signed on 26 February 2019.

and already had strong views on the events that had occurred. The meeting did not reach any conclusion on the way forward. Board members found the engagement belittling and felt ambushed and attacked by his allegations. Board members also found Deputy Minister Gungubele's approach to the UDM application¹²⁰, brought in the Pretoria High Court, unacceptable. He had participated in a meeting at which the Board resolved, with his support, to oppose the UDM application, yet, contrary to that resolution, he deposed to an affidavit, in his personal capacity, in which he made it known that he was not opposing the application. There had been no consultation with the Board regarding this approach and members wanted to resign due to this untenable situation. Both Dr Manning and Ms Fubu tendered their resignation, reflecting the increasing divisions in the Board. On the other hand Minister Nene filed an affidavit opposing the application.

110. An extraordinary general meeting was convened by Minister Nene on 25 July 2018, where the Board was instructed to conduct a forensic investigation on the Nogu/MST allegations and to develop a plan of action by 17 August 2018. Subsequently, after some consultation with counsel, the Board appointed Advocate Geoff Budlender SC (Adv Budlender SC) to conduct the investigation.
111. The evidence of Ms Hlatshwayo on these developments, including the disunity within the Board is, to a large extent supported by that of Dr Matjila, among others. His evidence is to the effect that after the Board had investigated the allegations made in the James Nogu emails concerning him, the Board cleared him at its meeting held on 29 September 2017, with one non-executive director dissenting. Despite Dr Matjila's name having been cleared, negative media reports about the PIC continued, hence Minister Nene's instruction to the Board that an independent forensic investigation be conducted into the

¹²⁰ United Democratic Movement v Dr Dan Matjila and others, case no: 41772/18.

James Nogu allegations. In his report¹²¹, Advocate Budlender SC found that there was no evidence of a romantic relationship between Dr Matjila and Ms Pretty Louw (Ms P Louw) and that no impropriety could be found in the MST transaction.

112. Dr Matjila was aggrieved by the action of the chairman of the Board, Deputy Minister Gungubele, of failing to oppose the UDM application to have him suspended for the very allegations of which he had been cleared. Dr Matjila met the chairman at his office in Cape Town at the former's instance and advised him that he had decided to exit the PIC in due course, but only once the Budlender Report had been released. Apparently, the chairman had not, as yet, shared the report with the other non-executive directors.
113. The Board then put together a task team consisting of Dr Mkhwanazi, Ms Toyi and Dr Goba to negotiate the CEO's exit. When Dr Matjila subsequently met the task team, Dr Mkhwanazi was not in attendance, apparently because he wanted the CEO to first present a letter of resignation. Dr Matjila reluctantly delivered a letter on 7 November 2018 in which he made certain exit proposals to the Board.
114. On 23 November 2018, Dr Matjila was called to a Board meeting at 18:00. His letter was tabled at this meeting for the first time, although already in public circulation. At this meeting, the chairman informed him that the Board had accepted his resignation with immediate effect. His protestations that he had not resigned but had merely given an exit proposal containing, amongst others, an intention to give notice to resign in keeping with his contract, fell on deaf ears. The chairman's response was that his employment contract had been terminated.

¹²¹ The Budlender Report, Appendix Three to the report.

115. According to Ms Hlatshwayo, it appeared to her that there were members of the Board who went to the meeting already knowing what was going to happen. It was at that meeting where the CFO, Ms Matshepo More (Ms More), was appointed as acting CEO, '*with [the chairman] using his casting vote . . . to secure this as the Board was split down the middle*'. A little over two months thereafter, at a Board meeting on 1 February 2019, the Chairman, having taken a call from the current Minister of Finance, Minister Mboweni, informed the rest of the members of the Board that the Minister wanted the whole Board to resign immediately, failing which they would be dismissed by Monday, 4 February 2019. Ms Hlatshwayo said the mood became one of indignation and the Board members decided to resign *en masse*. A letter to that effect was dispatched to Minister Mboweni. However, they continued with their function until the interim Board was appointed as mentioned above.
116. Dr Manning, who was appointed to the Board on 1 December 2015 and served on the IC, the DAC, the ICTGC and the SEC, confirmed that the period between September and December 2017 '*can best be described as a tumultuous one, characterised by fierce divisions in the Board creating a tense and polarised environment*'.¹²² Both Board and management, she said, were devoting considerable time to managing the crisis, rather than the core business of the PIC. The Board remained divided on the need for an independent investigation, particularly given the urgent application launched by the UDM in June 2018, seeking an order directing the Minister to suspend the CEO and to conduct an independent inquiry into the MST transaction and the allegations of a corrupt relationship between the CEO and a woman alleged to be his girlfriend.
117. Deputy Minister Gungubele was appointed as Chairman of the Board of the PIC in May 2018. He confirmed that the Board '*found itself divided on issues*

¹²² At page 18 of the Transcript for day 5 of the hearings held on 29 January 2019.

*relating to the former CEO, Dr Matjila*¹²³ and that when the Board members disagreed *'there would [be] so much tension'*¹²⁴. He also confirmed taking a stance in the UDM application that was contrary to that of the Board, which he had earlier supported. He did this to indicate that the Board *'was not fulfilling its fiduciary duties'*.

118. Ms Beswick was appointed as non-executive director of the PIC in 2015 and served on several Board committees. Her evidence corroborates the versions of Ms Hlatshwayo and Dr Manning in all material respects. She added, however, that when Minister Gigaba suspended the Board and committee meetings, crisis management became the order of the day with innumerable special meetings called to deal mainly with media statements and anonymous emails. Highly confidential documents, including Board papers, transaction reports and correspondence were leaked to the media and other external parties. Board meetings became highly contentious resulting in strong divisions and mistrust between Board members. Ms Beswick's view was that Deputy Minister Gungubele's action of not opposing the UDM application amounted to 'undermining his own Board in public which further fuelled the divisions among Board members, leading to the resignation of Dr Manning and Ms Tantaswa Fubu', which weakened the Board.

119. Ms Zulu became a member of the Board of the PIC in October 2015 and served as such until the Board was replaced with the Interim Board on 12 July 2019. She served on various Board committees, including the IC. Ms Zulu did not dispute the allegations about a divided Board, but stated that the division was caused by two issues: firstly, the Board's handling of the allegations against Dr Matjila and exonerating him without allowing for an independent process of investigation. The second issue was whether disciplinary actions taken against certain employees based on the James Nogu emails were

¹²³ Para 4 of Deputy Minister Mondli Gungubele's statement signed on 25 February 2019.

¹²⁴ Ibid.

reasonable, justified, fair and independent. Ms Zulu maintained, though, that the differing views and positions taken on matters were ‘a clear illustration of independence and activeness of directors ... [acting] without any fear or favour’.¹²⁵

120. With regard to Ms Beswick’s evidence that she wrote letters of suspension in respect of Messrs Madavo and Seanie, Ms Zulu, disputing the allegations, said it is in her nature to make her own notes on deliberations at Board meetings, which she will read out when it is her turn to take the floor to make a contribution. At the special Board meeting convened on 21 January 2019, which ran from 4pm to 2am, Ms Zulu said the company secretary took her notes and typed the letters of suspension. Ms Zulu also denied the allegation that when the Board was dealing with the CEO’s letter, expressing his intention to resign, she appeared to have been fully prepared and to have read documents of which no other member had had sight. She asserted that she only expressed her views that the letter contained a resignation, with the only issue being the date on which it would come into effect.

121. The James Nogu emails and media reports about the PIC not only affected the Board but also senior employees of the PIC. On 5 December 2017, Ms Vuyokazi Menye (Ms Menye), who was the Executive Head: Information Technology, and Mr Simphiwe Mayisela (Mr Mayisela), who was the Senior Manager: Information Security were charged with ‘accessing unauthorised documentation during an investigation commissioned to unearth the penetration of the PICs mailing list’ and intercepting emails of Executive Directors without obtaining the necessary approval. They were also alleged, inter alia, to have withheld information in a case opened against the CEO under the pretext that it was erroneously done and for obtaining draft Board minutes without prior approval, for the sole purpose of advancing their case,

¹²⁵ At page 18 of the Transcript for day 62 of the hearings held on 13 August 2019.

while purporting to be assisting the investigation regarding the identity of James Nogu. Ms Menye left the PIC, having reluctantly accepted a settlement figure of approximately R7.5 million on 11 April 2018. This is dealt with in detail in Chapter III: ToR 1.13.

122. Mr Mayisela was dismissed following a full disciplinary process. Both cases will be dealt with more fully below during discussions on allegations of victimisation (ToR 1.12) and mutual separation agreements under ToR 1.13.
123. Ms Bongani Mathebula (Ms Mathebula), the Company Secretary, who was placed on suspension on 11 April 2018, was charged with, inter alia, breaching her duty of good faith and confidentiality as an employee in her position as Company Secretary, in that she caused the distribution and/or copying of confidential PIC information. The chairman of the disciplinary committee found her guilty and recommended that she be dismissed with immediate effect. However, having been recommended for dismissal, Ms Mathebula returned to occupy her position of Company Secretary on 27 March 2019 after the Board resolved to not implement the recommended sanction of dismissal.
124. Ms More, and Mr Fidelis Madavo (Mr Madavo): Executive Head: Listed Investments are currently under suspension and face disciplinary charges relating to their conduct in handling a particular transaction, namely AYO, which will be discussed in ToR 1.1 below. Mr Victor Seanie (Mr Seanie), the Assistant Portfolio Manager: Non-Consumer Industrials, faced disciplinary charges over the same transaction. His disciplinary hearing was concluded, finding him guilty and he was dismissed on 22 October 2019 with one month's pay in lieu of notice.
125. A further indication of how the turmoil affected the PIC is the fact that of the 12-person executive, plus Cosec, at least eight have faced dismissal/disciplinary charges or resigned.

CHAPTER II – LEGISLATIVE AND REGULATORY FRAMEWORK

THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 of 2002 (FAIS Act)

1. Section 6A(1) states as follows:

'The registrar, for purposes of this Act, by notice in the Gazette –

(a) must-

- (i) classify financial services providers into different categories;*
- (ii) determine fit and proper requirements for each category of providers;
and*
- (iii) in each category of providers determine fit and proper requirements
for –*
 - (aa) key individuals or providers;*
 - (bb) representatives of providers;*
 - (cc) key individuals of representatives of providers; and*
 - (dd) compliance officers; and*

(aA) may classify representatives into different categories; and

*(b) may determine fit and proper requirements for providers, key individuals,
representatives, key individuals of representatives and compliance officers
in general.'*

2. Section 7(1) states that:

'With effect from a date determined by the Minister by notice in the Gazette, a person may not act or offer to act as a-

(a) financial services provider, unless such person has been issued with a licence under section 8; or

(b) a representative, unless such person has been appointed as a representative of an authorised financial services provider under section 13.'

3. Section 8 of the FAIS Act details the process of application for authorisation as a FSP:

'Application for authorisation

(1) An application for an authorisation referred to in section 7(1), including an application by an applicant not domiciled in the Republic, must be submitted to the Authority in the form and manner determined by the Authority by notice on the Authority's web site, and be accompanied by information to satisfy the Authority that the applicant complies with the fit and proper requirements.

(1A) If the applicant is a partnership, trust or corporate or unincorporated body, the application must be accompanied by additional information to satisfy the Authority that every person who acts as a key individual of the applicant complies with the fit and proper requirements for key individuals in the category of financial services providers applied for to the extent required in order for such key individual to fulfill the responsibilities imposed by this Act.

(2) The registrar may -

(a) require an applicant to furnish such additional information, or require such information to be verified, as the registrar may deem necessary; and

(b) take into consideration any other information regarding the applicant or proposed key individual of the applicant, derived from

whatever source, including the Ombud and any other regulatory or supervisory authority, if such information is disclosed to the applicant and the latter is given a reasonable opportunity to respond thereto.

(3) The registrar must after consideration of an application -

(a) grant the application if the registrar-

(i) is satisfied that the applicant and its key individual or key individuals comply with the requirements of this Act; and

(ii) approves the key individual or key individuals of the applicant, in the case of a partnership, trust or corporate or unincorporated body; or

(b) refuse the application if the registrar-

(i) is not satisfied that the applicant and its key individual or key individuals comply with the requirements of this Act; or

(ii) does not approve the key individual or key individuals of the applicant in the case of a partnership, trust or corporate or unincorporated body.

(4)

(a) Where an application is granted, the registrar may impose such conditions and restrictions on the exercise of the authority granted by the licence, and to be included in the licence, as are necessary, having regard to -

(i) all facts and information available to the registrar pertaining to the applicant and any key individual of the applicant;

(ii) the category of financial services which the applicant could appropriately render or wishes to render;

(iii) the category of financial services providers in which the applicant is classified for the purposes of this Act; and

(iv) the category or subcategory of financial products in respect of which the applicant could appropriately render or wishes to render financial services.

(b) Conditions and restrictions contemplated in paragraph (a), may include a condition that where after the date of granting of the licence

-

- (i) any key individual in respect of the licensee's business is replaced by a new key individual; or*
- (ii) any new key individual is appointed or assumes office; or*
- (iii) any change occurs in the personal circumstances of a key individual which renders or may render such person to be no longer compliant with the fit and proper requirements for key individuals, no such person may be permitted to take part in the conduct, management or oversight of the licensee's business in relation to the rendering of financial services, unless such person has on application been approved by the registrar as compliant with the fit and proper requirements for key individuals, in the manner and in accordance with a procedure determined by the registrar by notice on the official web site.*

(5)

(a) Where an application for authorisation is granted, the registrar must issue to the applicant-

- (i) a licence authorising the applicant to act as a financial services provider, in the form determined by the registrar by notice in the Gazette; and*
- (ii) such number of certified copies of the licence as may be requested by the applicant.*

(b) The registrar may at any time after the issue of a licence -

- (i) on application by the licensee or on own initiative withdraw or amend any condition or restriction in respect of the licence, after having given the licensee a reasonable opportunity to make submissions on the proposed withdrawal or amendment and having considered those submissions, if the registrar is*

satisfied that any such withdrawal or amendment is justified and will not prejudice the interests of clients of the licensee; or

(ii) pursuant to an evaluation of a new key individual, or a change in the personal circumstances of a key individual, referred to in subsection (4)(b), impose new conditions on the licensee after having given the licensee a reasonable opportunity to be heard and having furnished the licensee with reasons, and must in every such case issue an appropriately amended licence to the licensee, and such number of certified copies of the amended licence as may be requested by the licensee.

(6) Where an application referred to in subsection (1) is refused, the registrar must-

- (a) notify the applicant thereof; and*
- (b) furnish reasons for the refusal.*

(7)

(a) Despite any other provision of this section, a person granted accreditation under section 65(3) of the Medical Schemes Act, 1998 (Act No. 131 of 1998), must, subject to this subsection, be granted authority to render as a financial services provider the specific financial service for which the person was accredited, and must be issued with a licence in terms of subsection (5).

(b) The registrar must be satisfied that a person to be granted authority under paragraph (a), and any key individual of such person, comply with the fit and proper requirements.

(c) A person granted authority and licensed as contemplated in paragraph (a), together with any key individual, are thereafter subject to the provisions of this Act.

(d) If a licence -

- (i) is refused in terms of this section;*

(ii) is suspended in terms of section 9;
(iii) is withdrawn in terms of section 10; or
(iv) lapses in terms of section 11, the accreditation referred to in paragraph (a) is deemed to have lapsed in terms of the Medical Schemes Act, 1998, or to have been suspended or withdrawn, as the case may be.

(e) If an accreditation referred to in paragraph (a) is suspended or withdrawn or lapses in terms of the Medical Schemes Act, 1998, the licence issued in terms of that paragraph is deemed to have been suspended or withdrawn or to have lapsed in terms of sections 9, 10 and 11, respectively, of this Act.

(8) A licensee must -

(a) display a certified copy of the licence in a prominent and durable manner within every business premises of the licensee;

(b) ensure that a reference to the fact that such a licence is held is contained in all business documentation, advertisements and other promotional material; and

(c) ensure that the licence is at all times immediately or within a reasonable time available for production to any person requesting proof of licensed status under authority of a law or for the purpose of entering into a business relationship with the licensee.

(9) No person may-

(a) in any manner make use of any licence or copy thereof for business purposes where the licence has lapsed, has been withdrawn or provisionally withdrawn or during any time when the licensee is under provisional or final suspension;

(b) perform any act which indicates that the person renders or is authorised to render financial services or is appointed as a representative to render financial services, unless the person is so authorised or appointed; and

(c) perform any act, make or publish any statement, advertisement, brochure or similar communication which-

(i) relates to the rendering of a financial service, the business of a provider or a financial product; and

(ii) the person knows, or ought reasonably to know, is misleading, false, deceptive, contrary to the public interest or contains an incorrect statement of fact.

(10)

(a) Where a provider is a corporate or unincorporated body, a trust or a partnership, the provider must-

(i) at all times be satisfied that every director, member, trustee or partner of the provider, who is not a key individual in the provider's business, complies with the requirements in respect of personal character qualities of honesty and integrity as contemplated in paragraph (a) of subsection (1A); and

(ii) within 15 days of the appointment of a new director, member, trustee or partner, inform the registrar of the appointment and furnish the registrar with such information on the matter as the registrar may reasonably require.

(b) If the registrar is satisfied that a director, member, trustee or partner does not comply with the requirements as contemplated in

paragraph (a) of subsection (1A), the registrar may suspend or withdraw the licence of the provider as contemplated in section 9.

4. Section 8A of the FAIS Act governs compliance with the fit and proper requirement after authorisation and states as follows:

'An authorised financial services provider, key individual, representative of the provider and key individual of the representative must-

(a) continue to comply with the fit and proper requirements; and

(b) comply with the fit and proper requirements relating to continuous professional development'

5. Section 9 of the FAIS Act governs the suspension and withdrawal of authorisation. Section 9(2) states that:

'(a) Before suspending or withdrawing any licence, the registrar-

(i) may consult any regulatory authority; and

(ii) must inform the licensee of the intention to suspend or withdraw and the grounds therefor and must give the licensee a reasonable opportunity to make a submission in response thereto.

(b) Where the registrar contemplates the suspension or withdrawal of any licence, the registrar must also inform the licensee of-

(i) the intended period of the suspension; and

(ii) any terms to be attached to the suspension or withdrawal, including-

(aa) a prohibition on concluding any new business by the licensee as from the effective date of the suspension or withdrawal and, in relation to uncompleted business, such measures as the registrar may determine for the protection of the interests of clients of the licensee; and

(bb) terms designed to facilitate the lifting of the suspension.

(c) The registrar must consider any response received, and may thereafter decide to suspend or withdraw, or not to suspend or withdraw, the licence, and must notify the licensee of the decision.

(d) Where the licence is suspended or withdrawn, the registrar must make known the reasons for the suspension or withdrawal and any terms attached thereto by notice on the official web site and may make known such information by means of any other appropriate public media.'

6. Section 14 of the FAIS Act governs the debarment of representatives if he or she no longer meets the fit and proper requirements or has failed to comply with any provision of the FAIS Act. It states as follows:

'(1)

(a) An authorised financial services provider must debar a person from rendering financial services who is or was, as the case may be-

(i) a representative of the financial services provider; or

(ii) a key individual of such representative,

if the financial services provider is satisfied on the basis of available facts and information that the person-

(iii) does not meet, or no longer complies with, the requirements referred to in section 13(2)(a); or

(iv) has contravened or failed to comply with any provision of this Act in a material manner;

(b) The reasons for a debarment in terms of paragraph (a) must have occurred and become known to the financial services provider while the person was a representative of the provider.

(2)

(a) Before effecting a debarment in terms of subsection (1), the provider must ensure that the debarment process is lawful, reasonable and procedurally fair.

(b) If a provider is unable to locate a person in order to deliver a document or information under subsection (3), after taking all reasonable steps to do so, including dissemination through electronic means where possible, delivering the document or information to the person's last known e-mail or physical business or residential address will be sufficient.

(3) A financial services provider must-

(a) before debarring a person-

(i) give adequate notice in writing to the person stating its intention to debar the person, the grounds and reasons for the debarment, and any terms attached to the debarment, including, in relation to unconcluded business, any measures stipulated for the protection of the interests of clients;

(ii) provide the person with a copy of the financial services provider's written policy and procedure governing the debarment process; and

(iii) give the person a reasonable opportunity to make a submission in response;

(b) consider any response provided in terms of paragraph (a)(iii), and then take a decision in terms of subsection (1); and

(c) immediately notify the person in writing of-

(i) the financial services provider's decision;

(ii) the persons' rights in terms of Chapter 15 of the Financial Sector Regulation Act; and

(iii) any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal.

(4) Where the debarment has been effected as contemplated in subsection (1), the financial services provider must-

(a) immediately withdraw any authority which may still exist for the person to act on behalf of the financial services provider;

(b) where applicable, remove the name of the debarred person from the register referred to in section 13(3);

(c) immediately take steps to ensure that the debarment does not prejudice the interest of clients of the debarred person, and that any unconcluded business of the debarred person is properly attended to;

(d) in the form and manner determined by the Authority, notify the Authority within five days of the debarment; and

(e) provide the Authority with the grounds and reasons for the debarment in the format that the Authority may require within 15 days of the debarment.

(5) A debarment in terms of subsection (1) that is undertaken in respect of a person who no longer is a representative of the financial services provider must be commenced not longer than six months from the date that the person ceased to be a representative of the financial services provider.

(6) For the purposes of debarring a person as contemplated in subsection (1), the financial services provider must have regard to information regarding the conduct of the person that is furnished by the Authority, the Ombud or any other interested person.

(7) The Authority may, for the purposes of record keeping, require any information, including the information referred to in subsection (4)(d) and (e), to

enable the Authority to maintain and continuously update a central register of all persons debarred in terms of subsection (1), and that register must be published on the web site of the Authority, or by means of any other appropriate public media.

(8) A debarment effected in terms of this section must be dealt with by the Authority as contemplated by this section.

(9) A person debarred in terms of subsection (1) may not render financial services or act as a representative or key individual of a representative of any financial services provider, unless the person has complied with the requirements referred to in section 13(1)(b)(ii) for the reappointment of a debarred person as a representative or key individual of a representative.'

7. Section 17 of the FAIS Act governs compliance officers and compliance arrangements. Section 17(1) and (3) state as follows:

'(1)

(a) Any authorised financial services provider with more than one key individual or one or more representatives must, subject to section 35(1) (c) and subsections (1) (b) and (2)(a)(i), appoint one or more compliance officers to oversee the provider's compliance function and to monitor compliance with this Act by the provider and such representative or representatives, particularly in accordance with the procedures contemplated in subsection (3), and to take responsibility for liaison with the registrar.

(b) Such person must comply with the fit and proper requirements.

(bA) The provisions of section 8A apply with the necessary changes to a compliance officer.

(c) The provisions of section 19(4), (5) and (6), relating to an auditor of an authorised financial services provider, apply with the necessary changes to a compliance officer.'

8. Section 19 of the FAIS Act imposes accounting and audit requirements. Subsections (1) and (2) state as follows:

‘(1) Except to the extent exempted by the registrar, an authorised financial services provider must, in respect of the business carried on by the provider as authorised under the provider’s licence –

(a) maintain full and proper accounting records on a continual basis, brought up to date monthly; and

(b) annually prepare, in respect of the relevant financial year of the provider, financial statements reflecting –

(i) the financial position of the entity at its financial year end;

(ii) the results of operations, the receipt and payment of cash and cash equivalent balances;

(iii) all changes in equity for the period then ended, and any additional components required in terms of South African Generally Accepted Accounting Practices issued by the Accounting Practices Board or International Financial Reporting Standards issued by the International Accounting Standards Board or a successor body; and

(iv) a summary of significant accounting policies and explanatory notes on the matters referred to in paragraphs (i) to (iii)

(2)

(a) An authorised financial services provider must cause the statements referred to in subsection (1)(b) to be audited and reported

on in accordance with auditing pronouncements as defined in section 1 of the Auditing Professions Act, 2005 (Act No. 26 of 2005) by an external auditor approved by the registrar.

(b) The financial statements must-

(i) fairly represent the state of affairs of the provider's business;

(ii) refer to any material matter which has affected or is likely to affect the financial affairs of the provider; and

(iii) be submitted by the authorised financial services provider to the registrar not later than four months after the end of the provider's financial year or such longer period as may be allowed by the registrar.'

9. Section 44(1) and (2) of the FAIS Act state as follows:

'(1) The registrar may on or after the commencement of this Act, but prior to the date determined by the Minister in terms of section 7(1), exempt any person or category of persons from the provisions of that section if the registrar is satisfied that –

(a) the rendering of any financial service by the applicant is already partially or wholly regulated by any other law; or

(b) the application of the said section to the applicant will cause the applicant or clients of the applicant financial or other hardship or prejudice; and

(c) the granting of the exemption will not –

(i) conflict with the public interest;

(ii) prejudice the interests of clients; and

(iii) frustrate the achievement of the objects of this Act.

(2) The registrar –

(a) having regard to the factors mentioned in subsection (1), may attach to any exemption so granted reasonable requirements or impose reasonable conditions with which the applicant must comply either before or after the effective date of the exemption in the manner and during the period specified by the registrar; and

(b) must determine the period for which the exemption will be valid.’

FAIS Act: Codes of Conduct for Administrative and Discretionary FSPs, BN 79 of 8 August 2003

10. Paragraph 5 of the Code of Conduct states as follows:

‘5. Dealing with clients—

‘(1) An administrative FSP must obtain a signed mandate from a client, before rendering any intermediary service to that client: Provided that the parties may agree to complete an electronic mandate in respect of which appropriate controls and personal identification procedures have been put in place that ensures security of information.

(2) The mandate must comply with the following minimum requirements:

(a) State whether the client will deal with the administrative FSP through another person or in a personal capacity;

- (b) *if the client will deal with the administrative FSP through another person —*
- (i) *state the name of the person;*
 - (ii) *state whether that person is an authorised FSP;*
 - (iii) *state whether that FSP is appointed with full or limited discretion and where the discretion is limited, indicate those limits;*
 - (iv) *authorise the administrative FSP to accept from that FSP instructions given on behalf of the client;*
- (c) *record the names, telephone and fax numbers, and postal and e-mail addresses of the client and the other FSP;*
- (d) *indicate that the financial products will be registered in the name of the independent nominee of the administrative FSP;*
- (e) *provide in bold font an indication of the time period involved with regard to the following administrative processes:*
- (i) *The cut-off times within which an instruction must be received by the administrative FSP to enable it to render an intermediary service on that particular day;*
 - (ii) *once an instruction has been received, the maximum number of working days it will take to render that intermediary service and an indication of the day that will determine the price that the client eventually receives;*

(iii) maximum number of working days that it will take to process a switch or withdrawal instruction and an indication of the day that will determine the price that the client eventually receives;

(f) stipulate separately in respect of the administrative FSP and the other FSP (if any), the total fees and benefits to be received by each in respect of a client's financial products, whether by way of a deduction from the financial product or not, including—

(i) the initial fees or costs;

(ii) ongoing fees or costs;

(iii) any other benefit, fees or costs, whether in cash or kind;

(iv) costs (if any) to have the financial products registered in the name of the client or in the name of the nominee company of another administrative FSP at the request of the client or at termination;

(v) any fees or costs that will be levied on additional investment in or purchase of the same financial product; and

(g) the signatures of the client, as well as the other FSP, where applicable.

(3) Further to paragraph 5.2 above, an administrative FSP may, subject to the approval of the registrar, provide the said information either in the mandate or in a combination of the mandate and the administrative FSP's written terms or guides of business.

(4) The registrar must initially approve a specimen of the mandate and where relevant, the administrative FSP's terms of business, and may grant approval subject to the conditions that the registrar may determine. The registrar may

subsequent to approval require that any other information that is deemed necessary, be disclosed in the interest of the client. An administrative FSP may not substantially amend the documents approved by the registrar, without the prior written approval of the registrar.

(5) The administrative FSP must ensure that it has, in relation to the financial products offered by it, appropriate forms available to enable the client or the other FSP to conduct business with it. These forms include application, instruction, transfer, switch, withdrawal or additional investment forms.

(6) An administrative FSP must—

(a) within 14 days of receipt of a notice from a product supplier of an increase in costs, notify the client or the other FSP (if any) in writing of such increase, who in turn must inform the client in writing within 14 days;

(b) if it wishes to increase costs unrelated to the costs referred to above, give the client or such other FSP three months prior written notice thereof, who in turn must notify the clients of the other FSP in writing within 14 days, provided that the cost of the increase may not become effective during the notice period.

(7) If a client notifies an administrative FSP in writing that the client has terminated the client's relationship with a particular FSP and wishes to continue with the relationship with an administrative FSP through another FSP, such notification must be sent by the administrative FSP to the terminating FSP.

(8) An administrative FSP may accept telephonic or electronic instructions without written confirmation, provided that appropriate controls and personal identification procedures have been put in place to ensure security of

information and transactions, and that records of such telephonic or electronic instructions must be made and stored for a period of five years from the date when the instruction was received.

(9) Where another FSP intends to provide, through an administrative FSP, a client with its own personalised range of financial products, such other FSP and the administrative FSP must first enter into a written agreement which must provide for termination of the agreement by either party on written notice of not less than 30 days.

(10) An administrative FSP must enter into an appropriate written agreement with each product supplier from or to whom it buys or sells financial products on behalf of clients, which agreement records their particular arrangements and makes provision for termination of the agreement by either party on written notice of not less than 30 days.

(11) In relation to new investments placed with an administrative FSP, no interest shall be payable to a client until the expiry of the first completed day after receipt of the funds. After the expiry of the first completed day, interest earned shall be payable to the client.

(12) No interest shall be payable to clients in relation to funds held in bulk during the execution of a switching instruction, provided that the administrative FSP adheres to the time standards which are stipulated as part of the service levels to clients. In the event of non-adherence, the client shall be entitled to interest for the period in excess of the stipulated time period.

(13) If an administrative FSP has made a mistake in executing an instruction or allocating client funds in such a manner that a client is entitled, in law, to be placed in the position that the client would have been in had the administrative FSP not made the mistake, the client shall only be entitled to compensation to

the extent that the client is placed in said position. The administrative FSP shall not be required to pay interest to the client in addition to restoration.

(14) Where an administrative FSP effects payment of an investment to a client, whether in whole or in part, no interest shall be payable to that client on funds that are paid within the first complete day after the receipt of the funds from the liquidation of the underlying investment by the administrative FSP: Provided that should the administrative FSP issue a cheque for the amount received within the abovementioned time period, the issuing of the cheque shall be deemed to be payment and no interest liability shall accrue to the administrative FSP in respect of the time period between the issuing of the cheque and the actual payment of the cheque by the drawee bank.'

THE COMPANIES ACT 71 of 2008

11. The relevant subsections of section 16 of the Companies Act state as follows:

'(1) A company's Memorandum of Incorporation may be amended-

(a) . . . ;

(b) . . . ; or

(c) at any other time if a special resolution to amend it-

(i) is proposed by-

(aa) the board of the company; or

(bb) shareholders entitled to exercise at least 10% of the voting rights that may be exercised on such a resolution;

(ii) and is adopted at a shareholders meeting, or in accordance with section 60, subject to subsection (3).

(5) An amendment contemplated in subsection (1)(c) may take the form of-

(a) a new Memorandum of Incorporation in substitution for the existing Memorandum; or

(b) one or more alterations to the existing Memorandum of Incorporation by-

(i) ...;

(ii) deleting, altering or replacing any of its provisions;

(iii) inserting any new provisions into the Memorandum of Incorporation; or

(iv) making any combination of alterations contemplated in this paragraph.

(9) An amendment to a Company's Memorandum of Incorporation takes effect –

(a) ...

(b) in any other case, on the later of –

(i) the date on, and time at, which the Notice of Amendment is filed; or

(ii) the date, if any, set out in the Notice of Amendment.'

12. Section 60 of the Companies Act states that:

'(1) A resolution that could be voted on at a shareholders meeting may instead be—

(a) submitted for consideration to the shareholders entitled to exercise voting rights in relation to the resolution; and

(b) voted on in writing by shareholders entitled to exercise voting rights in relation to the resolution within 20 business days after the resolution was submitted to them.

(2) A resolution contemplated in subsection (1)—

(a) will have been adopted if it is supported by persons entitled to exercise sufficient voting rights for it to have been adopted as an ordinary or special resolution, as the case may be, at a properly constituted shareholders meeting; and

(b) if adopted, has the same effect as if it had been approved by voting at a meeting.

(3) An election of a director that could be conducted at a shareholders meeting may instead be conducted by written polling of all of the shareholders entitled to exercise voting rights in relation to the election of that director.

(4) Within 10 business days after adopting a resolution, or conducting an election of directors, in terms of this section, the company must deliver a statement describing the results of the vote, consent process, or election to every shareholder who was entitled to vote on or consent to the resolution, or vote in the election of the director, as the case may be.

(5) For greater certainty, any business of a company that is required by this Act or the company's Memorandum of Incorporation to be conducted at an annual

general meeting of the company, may not be conducted in the manner contemplated in this section.'

13. Section 76 of the Companies Act states as follows:

'(1) In this section, "director" includes an alternate director, and —

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the company's board.

(2) A director of a company must —

(a) not use the position of director, or any information obtained while acting in the capacity of a director—

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company; and

(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director —

(i) reasonably believes that the information is —

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director

—

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person —

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company

—

(a) will have satisfied the obligations of subsection (3) (b) and (c) if —

(i) the director has taken reasonably diligent steps to become informed about the matter;

(ii) either —

(aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or

(bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and

(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and

(b) is entitled to rely on —

(i) the performance by any of the persons —

(aa) referred to in subsection (5); or

(bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

(ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

(5) To the extent contemplated in subsection (4) (b), a director is entitled to rely on —

(a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;

(b) legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters —

*(i) within the particular person's professional or expert competence;
or*

(ii) as to which the particular person merits confidence; or

(c) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.'

14. Section 77 of the Companies Act imposes liability on directors and states that:

'(1) In this section, "director" includes an alternate director, and —

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the company's board.

(2) A director of a company may be held liable —

(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76 (2) or 76 (3) (a) or (b); or

(b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of —

(i) a duty contemplated in section 76 (3) (c);

(ii) any provision of this Act not otherwise mentioned in this section; or

(iii) any provision of the company's Memorandum of Incorporation.

(3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having —

(a) acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;

(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22 (1);

(c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;

(d) signed, consented to, or authorised, the publication of —

(i) any financial statements that were false or misleading in a material respect; or

(ii) a prospectus, or a written statement contemplated in section 101, that contained —

(aa) an “untrue statement” as defined and described in section 95; or

(bb) a statement to the effect that a person had consented to be a director of the company, when no such consent had been given,

despite knowing that the statement was false, misleading or untrue, as the case may be, but the provisions of section 104 (3), read with the changes required by the context, apply to limit the liability of a director in terms of this paragraph; or

(e) been present at a meeting, or participated in the making of a decision in terms of section 74, and failed to vote against —

(i) the issuing of any unauthorised shares, despite knowing that those shares had not been authorised in accordance with section 36;

(ii) the issuing of any authorised securities, despite knowing that the issue of those securities was inconsistent with section 41;

(iii) the granting of options to any person contemplated in section 42 (4), despite knowing that any shares —

(aa) for which the options could be exercised; or

(bb) into which any securities could be converted,

had not been authorised in terms of section 36;

- (iv) the provision of financial assistance to any person contemplated in section 44 for the acquisition of securities of the company, despite knowing that the provision of financial assistance was inconsistent with section 44 or the company's Memorandum of Incorporation;*
- (v) the provision of financial assistance to a director for a purpose contemplated in section 45, despite knowing that the provision of financial assistance was inconsistent with that section or the company's Memorandum of Incorporation;*
- (vi) a resolution approving a distribution, despite knowing that the distribution was contrary to section 46, subject to subsection (4);*
- (vii) the acquisition by the company of any of its shares, or the shares of its holding company, despite knowing that the acquisition was contrary to section 46 or 48; or*
- (viii) an allotment by the company, despite knowing that the allotment was contrary to any provision of Chapter 4.*

(4) The liability of a director in terms of subsection (3) (e) (vi) as a consequence of the director having failed to vote against a distribution in contravention of section 46 —

(a) arises only if —

- (i) *immediately after making all of the distribution contemplated in a resolution in terms of section 46, the company does not satisfy the solvency and liquidity test; and*
- (ii) *it was unreasonable at the time of the decision to conclude that the company would satisfy the solvency and liquidity test after making the relevant distribution; and*

(b) does not exceed, in aggregate, the difference between —

- (i) *the amount by which the value of the distribution exceeded the amount that could have been distributed without causing the company to fail to satisfy the solvency and liquidity test; and*
- (ii) *the amount, if any, recovered by the company from persons to whom the distribution was made.*

(5) If the board of a company has made a decision in a manner that contravened this Act, as contemplated in subsection (3) (e)—

(a) the company, or any director who has been or may be held liable in terms of subsection (3) (e), may apply to a court for an order setting aside the decision of the board; and

(b) the court may make—

- (i) *an order setting aside the decision in whole or in part, absolutely or conditionally; and*
- (ii) *any further order that is just and equitable in the circumstances, including an order —*

(aa) to rectify the decision, reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the decision of the board; and

(bb) requiring the company to indemnify any director who has been or may be held liable in terms of this section, including indemnification for the costs of the proceedings under this subsection.

(6) The liability of a person in terms of this section is joint and several with any other person who is or may be held liable for the same act.

(7) Proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that gave rise to that liability.

(8) In addition to the liability set out elsewhere in this section, any person who would be so liable is jointly and severally liable with all other such persons —

(a) to pay the costs of all parties in the court in a proceeding contemplated in this section unless the proceedings are abandoned, or exculpate that person; and

(b) to restore to the company any amount improperly paid by the company as a consequence of the impugned act, and not recoverable in terms of this Act.

(9) In any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may relieve the director, either wholly or partly, from any liability set out in this section, on any terms the court considers just if it appears to the court that —

*(a) the director is or may be liable, but has acted honestly and reasonably;
or*

(b) having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director.

(10) A director who has reason to apprehend that a claim may be made alleging that the director is liable, other than for wilful misconduct or wilful breach of trust, may apply to a court for relief, and the court may grant relief to the director on the same grounds as if the matter had come before the court in terms of subsection (9).'

15. Section 94 of the Companies Act regulates the appointment of audit committees, section 94(1) and (2) state the following:

'(1) This section —

(a) applies concurrently with section 64 of the Banks Act, to any company that is subject to that section of that Act, but subsections (2), (3) and (4) of this section do not apply to the appointment of an audit committee by any such company; and

(b) does not apply to a company that has been granted an exemption in terms of section 64 (4) of the Banks Act.

(2) At each annual general meeting, a public company, state-owned company or other company that is required only by its Memorandum of Incorporation to have an audit committee as contemplated in sections 34 (2) and 84 (1) (c) (ii), must elect an audit committee comprising at least three members, unless —

(a) the company is a subsidiary of another company that has an audit committee; and

(b) the audit committee of that other company will perform the functions required under this section on behalf of that subsidiary company.'

THE GOVERNMENT EMPLOYEE PENSION LAW, 1996 (GEP Law)

16. Section 6(7) of the GEP Law states that:

'6 Management of Fund by Board of Trustees

...

(7) The Board, acting in consultation with the Minister, shall determine the investment policy of the Fund.'

17. Rule 4.1.19 of the Rules of the Government Employees Pension Fund, Schedule I to the GEP Law states that:

'4. Management of the Fund

4.1.19 Each trustee or a substitute referred to in rule 4.1.6 shall, notwithstanding the duties as may be determined by the Board –

(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the Fund and the provisions of the Law are protected at all times, especially in the event of an amalgamation or splitting of the Fund, termination or reduction of contributions by the employer, increase of contributions by members and withdrawal of an employer;

- (b) *act at all times with due care and diligence and in good faith;*
- (c) *avoid conflicts of interest;*
- (d) *act with impartiality in respect of all members and beneficiaries;*
- (e) *ensure that proper registers, books and records are kept, inclusive of proper minutes of all resolutions passed by the Board;*
- (f) *ensure that proper control systems are employed by or on behalf of the Board;*
- (g) *take all reasonable steps to ensure that the rules of the Fund comply with the Law, and all other applicable laws;*
- (h) *ensure that adequate and appropriate information is communicated to the members informing them of their rights, benefits and duties in terms of the rules of the Fund;*
- (i) *take all reasonable steps to ensure that contributions are paid timeously to the Fund in accordance with the provisions of the Law;*
- (j) *obtain expert advice on matters where Board members may lack expertise;*
- (k) *ensure that the operation and administration of the Fund comply with the Law, and all other applicable laws; and*
- (l) *adhere to the principles of privileged information and confidentiality.'*

THE PROTECTED DISCLOSURES ACT 26 of 2000 (PDA)

18. Employee is defined in section 1 of the PDA as follows:

‘Employee means –

(a) any person, excluding an independent contractor, who works or worked for another person or for the State, and who receives or received, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer;’

19. Section 9B of the PDA, inserted by the Amendment Act, 2017, states the following:

‘Disclosure of false information

9B. (1) An employee or worker who intentionally discloses false Information -

(a) knowing that information to be false or who ought reasonably to have known that the information is false; and

(b) with the intention to cause harm to the affected party and where the affected party has suffered harm as a result of such disclosure,

is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

(2)

(a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the Director of Public Prosecutions.

(b) The Director of Public Prosecutions concerned may delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.'

THE FINANCIAL INTELLIGENCE CENTRE ACT, 38 of 2001 (FICA)

20. Section 1 of FICA defines 'domestic prominent influential person' as a person 'referred to in Schedule 3A'.

21. Schedule 3A states the following:

'A domestic prominent influential person is an individual who holds, including in an acting position for a period exceeding six months, or has held at any time in the preceding 12 months, in the Republic —

(a) a prominent public function including that of —

(i) the President or Deputy President;

(ii) a government minister or deputy minister;

(iii) the Premier of a province;

(iv) a member of the Executive Council of a province;

(v) an executive mayor of a municipality elected in terms of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);

(vi) a leader of a political party registered in terms of the Electoral Commission Act, 1996 (Act No. 51 of 1996);

(vii) a member of a royal family or senior traditional leader as defined in the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003);

(viii) the head, accounting officer or chief financial officer of a national or provincial department or government component, as defined in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994);

(ix) the municipal manager of a municipality appointed in terms of section 54A of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), or a chief financial officer designated in terms of section 80 (2) of the Municipal Finance Management Act, 2003 (Act No. 56 of 2003);

(x) the chairperson of the controlling body, the chief executive officer, or a natural person who is the accounting authority, the chief financial officer or the chief investment officer of a public entity listed in Schedule 2 or 3 to the Public Finance Management Act, 1999 (Act No. 1 of 1999);

(xi) the chairperson of the controlling body, chief executive officer, chief financial officer or chief investment officer of a municipal entity as defined in section 1 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);

(xii) a constitutional court judge or any other judge as defined in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001);

*(xiii) an ambassador or high commissioner or other senior representative of a foreign government based in the Republic;
or*

(xiv) an officer of the South African National Defence Force above the rank of major-general;

(b) the position of —

(i) chairperson of the board of directors;

(ii) chairperson of the audit committee;

(iii) executive officer; or

(iv) chief financial officer,

of a company, as defined in the Companies Act, 2008 (Act No. 71 of 2008), if the company provides goods or services to an organ of state and the annual transactional value of the goods or services or both exceeds an amount determined by the Minister by notice in the Gazette; or

(c) the position of head, or other executive directly accountable to that head, of an international organisation based in the Republic.'

22. Section 21H(2) of the FICA defines 'immediate family member' as follows:

'immediate family member includes –

- (a) the spouse, civil partner or life partner;*
- (b) the previous spouse, civil partner or life partner, if applicable;*
- (c) children and stepchildren and their spouse, civil partner or life partner;*
- (d) parents; and*
- (e) sibling and step siblings and their spouse, civil partner or life partner.'*

THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT, 25 of 2002

23. Section 81 of ECTA defines the powers of cyber inspectors. Section 81(1) states that:

'(1) A cyber inspector may

- (a) monitor and inspect any web site or activity on an information system in the public domain and report any unlawful activity to the appropriate authority;*
- (b) in respect of a cryptography service provider –*
 - (i) investigate the activities of a cryptography service provider in relation to its compliance or non-compliance with the provisions of this Act; and*
 - (ii) issue an order in writing to a cryptography service provider to comply with the provisions of this Act;*

(c) in respect of an authentication service provider –

- (i) investigate the activities of an authentication service provider in relation to its compliance or non-compliance with the provisions of this Act;*
- (ii) investigate the activities of an authentication service provider falsely holding itself, its products or services out as having been accredited by the Authority or recognised by the Minister as provided for in Chapter VI;*
- (iii) issue an order in writing to an authentication service provider to comply with the provisions of this Act; and*

(d) in respect of a critical database administrator, perform an audit as provided for in section 57.'

24. Section 86(1) of the ECTA states as follows:

'Subject to the Interception and Monitoring Prohibition Act, 27 of 1992, a person who intentionally accesses or intercepts any data without authority or permission to do so is guilty of an offence.'

25. Section 88(1) provides that:

'A person who attempts to commit any of the offences referred to in sections 86 and 87 is guilty of an offence and is liable on conviction to the penalties set out in section 89(1) or (2), as the case may be'.

THE PUBLIC FINANCE MANAGEMENT ACT 1 of 1999 (PFMA)

26. Section 49 of the PFMA states that:

‘Accounting authorities—

‘(1) Every public entity must have an authority which must be accountable for the purposes of this Act.

(2) If the public entity—

(a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or

(b) does not have a controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority.

(3) The relevant treasury, in exceptional circumstances, may approve or instruct that another functionary of a public entity must be the accounting authority for that public entity.

(4) The relevant treasury may at any time withdraw an approval or instruction in terms of subsection (3).

(5) A public entity must inform the Auditor-General promptly and in writing of any approval or instruction in terms of subsection (3) and any withdrawal of an approval or instruction in terms of subsection (4).’

27. Section 50 of the PFMA sets out the Fiduciary Duties of the Accounting Authority as follows:

‘(1) The accounting authority for a public entity must —

- (a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;*
 - (b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;*
 - (c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and*
 - (d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.*
- (2) A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not —*
- (a) act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or*
 - (b) use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.*
- (3) A member of an accounting authority must —*
- (a) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and*

(b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant.'

THE PUBLIC INVESTMENT CORPORATION ACT 23 of 2004 (PIC Act)

28. Section 2 of the PIC Act establishes the Corporation:

'Establishment of corporation—

'(1) There is hereby established a juristic person, an institution outside the public service, to be known as the Public Investment Corporation Limited.

(2) The Registrar of Companies must enter the name of the corporation in the register kept in terms of the Companies Act and must issue to the corporation a certificate to that effect.

(3) Despite the Companies Act, the Minister, on behalf of the State, must sign the memorandum of association and the articles of association of the corporation.

(4) On signature of the memorandum of association and the articles of association in terms of subsection (3), such memorandum and articles must be regarded as complying with the requirements of the Companies Act for registration in terms of the said Act.

(5) On receipt of the signed memorandum and articles, the Registrar of Companies must register the said memorandum and articles as contemplated in section 63 of the Companies Act and endorse thereon a certificate to the effect that the corporation is incorporated.

(6) No fees are payable in terms of the Companies Act in respect of the checking of documents, the reservation of name, the registration of the said memorandum and articles and the issue of a certificate to commence business.

(7) Sections 32, 54 (2), 66, 92, 190 and 344 (d) of the Companies Act do not apply to the corporation.'

29. Section 4 contains the Object of the PIC:

'The main object of the corporation is to be a financial services provider in terms of the FAIS Act.'

30. Section 6 of the PIC Act provides for the appointment of the board of directors:

'(1) The Minister must, in consultation with Cabinet, determine and appoint the members of the board.

(2) The Minister must, when appointing the board, have due regard to the nominations submitted to him or her by the depositors.

(3) The members of the board must be appointed on the grounds of their knowledge and experience, with due regard to the FAIS Act, which, when considered collectively, should enable the board to attain the objects of the corporation.

(4) The Minister may issue directives to the board regarding the management of the corporation if —

(a) it is in the public interest; or

(b) it is reasonably necessary to do so.'

31. Section 8 of the PIC Act states that the Management of the corporation is:

‘Subject to the provisions of this Act, the board must control the business of the corporation, direct the operations of the corporation and exercise all such powers of the corporation that are not required to be exercised by the shareholders of the corporation.’

32. Section 9 of the PIC Act states that:

‘Authorisation as financial services provider —

(1) The corporation must, in terms of the FAIS Act, obtain authorisation from the Registrar as a financial services provider.

(2) Neither the registrar nor the corporation may terminate the authorisation referred to in subsection (1) without the consent of the Minister.’

CHAPTER III – EVIDENCE, FINDINGS AND RECOMMENDATIONS PER TERM OF REFERENCE

TERM OF REFERENCE 1.1

1. In 2018 the media reported on certain political parties that had called for transparency in the PIC regarding investments in its 'unlisted portfolio'. It was also reported that calls had been made for the PIC to provide detailed information of approximately R70 billion worth of investments made by it in its unlisted investment portfolio in 2017/2018. Mention was also made of particular transactions, of which some were in the listed investment portfolio. The scope of this ToR is interpreted and laid out in Chapter I: Terms of Reference.
2. The transactions that formed the subject of media reports during this period included the following:
 - 2.1 Ascendis;
 - 2.2 Ayo Technology Solutions (part of the Sekunjalo Group);
 - 2.3 Erin Energy;
 - 2.4 Harith and Lebashe;
 - 2.5 Independent News and Media South Africa (Pty) Ltd (INMSA) (which was concluded on 16 August 2013) (part of the Sekunjalo Group);
 - 2.6 Lancaster Steinhoff;
 - 2.7 Matome Maponya Investments (MMI);

- 2.8 Mobile Satellite Technologies.
 - 2.9 S & S Refinery;
 - 2.10 Sagarmatha (part of the Sekunjalo Group);
 - 2.11 TOSACO;
 - 2.12 Venda Building Society Mutual Bank (VBS);
3. In order to address this ToR comprehensively, case studies of the transactions cited in paragraph 2 above, are relied on.
 4. The transactions which were considered in the form of case studies were those highlighted in the media for the period under consideration and are for illustrative purposes. These transactions and/or case studies do not constitute a comprehensive list of improprieties identified by the Commission.
 5. During the course of the Commission's investigations, a substantial number of additional transactions and allegations of impropriety were brought to the attention of the Commission. However, due to time constraints, further investigation could not be carried out.
 6. A list of all the additional transactions which warrant further investigation will be conveyed to the PIC for that purpose.
 7. The case studies prepared by the Commission appear in this ToR, with the exception of the VBS and Harith case studies, which are contained in ToR 1.3, below.

Case Study: Maponya Matome Investment Holdings (MMI)

Background to the Isibaya Fund

8. The Isibaya Fund started in the mid-1990s when the PIC allocated 3.5% of total assets under management towards investment in Black Economic Empowerment (BEE) transactions. This amount was later increased to 5% of assets under management and, in terms of the existing GEPF mandate, it currently stands at 10%, split equally between Private Equity and Impact Investing (formerly Developmental Investments).
9. The Isibaya Fund's mandate, as executed by the PIC, focuses its investments on B-BBEE initiatives, investors and entrepreneurs – there has been no Isibaya Fund investment outside of this framework.
10. Over the years, many significant B-BBEE transactions have been concluded resulting in several large investments being made, notably Afrisam, where the PIC's exposure was approximately R12 billion.
11. The Isibaya Fund's investment in MMI is an example of multiple investments with a single counterparty.
12. While prior exposure to any single counterparty would be raised as part of deliberations at approval committees, there was previously no firm counterparty limit. In other words, there was neither a limit to the cumulative monetary amount of exposure to a single counterparty nor a limit to the number of distinct investments made with the same counterparty. However, recently counterparty limits have been established, and they are contained in the Private Placement Memorandums (PPMs). The total Funds equate to R70 billion, which is broken down as follows:
 - 12.1. Economic Infrastructure Fund II – R4 billion

- 12.2. Environmental Infrastructure Fund I – R2 billion
- 12.3. Energy Infrastructure Fund I – R23 billion
- 12.4. Social Infrastructure Fund I – R10 billion
- 12.5. Africa Developmental Investments Fund I – R10 billion
- 12.6. Private Equity Africa Fund I – R5 billion
- 12.7. Private Equity (Domestic) Fund II – R10 billion
- 12.8. SME Fund I – R2 billion
- 12.9. Priority Sectors Fund II – R4 billion
13. In each of the above nine Funds, no single counterparty may receive more than 30% of the Fund size. By way of example, in the case of Priority Sectors Fund II, the maximum limit that may be received by a single counterparty would be R1.2 billion. However, nothing prevents a counterparty from obtaining funding of up to 30% in other Funds. Theoretically, funding for a single counterparty could be R21 billion (being 30% of R70 billion).

Exposure to a Single Counterparty (MMI/Maponya)

14. Mr Roy Rajdhar (Mr Rajdhar), Executive Head, Impact Investing, testified that Mr Maponya had received funding from the PIC that included:
 - 14.1. R648 million of a R1,2 billion commitment, (plus R200 million thereafter) for Daybreak;

- 14.2. R367 million for a stake in AFGRI;¹²⁶
- 14.3. R480 million for the SA Home Loans transaction;¹²⁷
- 14.4. R79 million that had been drawn down of a R275 million facility that had been granted by the PIC for affordable housing developments; and
- 14.5. Magae Makhaya (Proprietary) Limited. The facility with Magae Makhaya was cancelled because of default.¹²⁸

15. These investments are summarised in the table below:

| Investment Name | Total Project Amount (R) | Maonya's Exposure (R) |
|-----------------|--------------------------|-----------------------|
| Afgri | 880m | 360m |
| Daybreak | 1.127b | 648m |
| SA Home Loans | 9.37b | 468m |
| Magae Makhaya | 11.00b | 375m |
| Total | R22.377b | R1.851b |

16. Save for establishing counterparty limits, as indicated above, the PIC has, to date, had no formal policy dealing with single obligor/counterparty limits.
17. The total PIC exposure to Mr Maonya amounted to R1.85 billion and with accrued interest to R2.2 billion. The exposure to Mr Maonya in the investments of Magae Makhaya and Daybreak alone amounted to R1.023 billion. Therefore, one could say the PIC was overexposed.

¹²⁶ At page 38 of the Transcript for day 36 of the hearings held on 15 May 2019 and para 55 of Mr Roy Rajdhar's statement signed on 15 April 2019.

¹²⁷ Para 55 of Mr Roy Rajdhar's statement signed on 15 April 2019.

¹²⁸ Ibid.

18. Should a counterparty default and the PIC is over-exposed to that party, it can severely impact the PIC's portfolio. In the case of actively managed companies, the counterparty risk may be significant if the investee company has to manage more than one investment.

SA Home Loans (SAHL) Investment

19. With regard to the investment in SAHL, Dr Matjila confirmed the statement by Mr Kevin Penwarden (Mr Penwarden) of SAHL, made to the Commission, that a combination of SAHL and JP Morgan were the first to present the equity opportunity and a proposal for housing finance for GEPF members to the PIC. SAHL approached the PIC for a credit line of R9 billion for end user finance for GEPF members, affordable housing and the development of housing stock. Consequently, Dr Matjila's statement that, *'I was under the impression that this R9bn funding application was a joint plan of the SAHL and MMI partnership'*¹²⁹, is extremely concerning. The question must be asked how thorough the processes were before a transaction of R9 billion was approved that the CIO/CEO did not know, or did not endeavour to find out, what the actual situation was.
20. Mr Wellington Masekesa, Executive Assistant to the former CEO Dr Matjila and reporting directly to him¹³⁰, was appointed by the PIC to represent it as a non-executive director on the board of SAHL, together with Mr Rajdhar.¹³¹ Following allegations contained in the statement made by Mr Penwarden, CEO of SAHL, that Mr Masekesa and Mr Maponya had approached a colleague, Mr Dlamini, and said that SAHL should 'regularise' what were called 'arranging fees' of R95 million, Mr Masekesa confirmed the substance

¹²⁹ Para 520 of Dr Matjila's statement signed on 17 July 2019.

¹³⁰ Para 2 of Mr Masekesa's statement signed on 11 March 2019.

¹³¹ Para 13.2 of Mr Sinton's statement signed on 21 May 2019.

of the above to Mr Penwarden.¹³² The PIC has since instituted an investigation into the aforementioned allegations.

Findings

21. The PIC's decision to make cumulative investments in various transactions with a single individual has resulted in significant exposure to reputational risk and financial losses. For instance, as at the time of the hearings, the Daybreak investment had not been serviced, although proactive measures had been taken by the PIC and it was recovering well.
22. The MMI investments call into question the PIC's thoroughness in conducting its due diligence as well as its assessment of cumulative and reputational risks. It should also be noted that, at the time of the hearings, the PIC was in litigation with Mr Maponya.
23. With regard to the SAHL investment, the evidence before the Commission revealed a difference of understanding of the investment and obligations that arose between the PIC team members involved.
24. The different positions taken by Dr Matjila, reflected in his statement and correspondence, as set out in paragraph 12 above, are of grave concern and are indicative of decision-making without adequate information or legal considerations.
25. The role played by Mr Masekesa, as indicated in paragraph 20 above, is found to be an irregularity as envisaged in Section 45 of the Auditing Profession Act, being, in the SAHL auditors' (Deloitte) opinion, a *prima facie* contravention of Section 3 of the Prevention and Combatting of Corrupt Activities.

¹³² Para 59-70 of Mr Penwarden's statement signed on 28 May 2019.

Recommendations

26. The Commission recommends that the Board should develop clear policies to guide the involvement of PIC employees and non-executive directors in investee companies.
27. The appointment of PIC employees and/or non-executive directors of the PIC to serve on the boards of investee companies must be reconsidered given the potential for conflict of interest, breach of fiduciary duties, and over-reliance on such a person protecting the PIC's interests by virtue of them being on the investee company's board. The practice of appointing a person to the board where that person has had a role or been responsible for approval of the investment is highly questionable.
28. The Board should ensure that there is a full inquiry into the role played by Mr Masekesa in the SAHL matter.
29. The Board should engage with the GEPF to ensure that there has been no undue influence exerted by any party on the SAHL application for R10 billion further funding.
30. In order to ensure that PIC funds are available to as many South Africans as possible, and to not be exposed to risks associated with any single party, single counterparty limits should be determined and adhered to by the PIC.
31. The PIC must also restrict funding to operational B-BBEE partners or unlisted investments to a maximum of two projects (businesses) but only until capacity and servicing of loans has been established, and limit the cumulative monetary amount of exposure to a single B-BBEE party or unlisted investment.

32. It is further recommended that the PIC must strengthen the capacity and role of post investment monitoring and evaluation.

Case Study: Sekunjalo Group

High Level Overview of the Transactions that were considered by the PIC Relating to Companies that form part of the Sekunjalo Group

33. The following companies, within the Sekunjalo Group, were part of the evidence brought before the Commission and are dealt with below:

33.1. Sekunjalo Independent Media (Pty) Ltd (SIM) and Independent News and Media South Africa (Pty) Ltd (INMSA) which was later renamed Independent Media (Pty) Ltd (IM);

33.2. Premier Food & Fishing Limited, later renamed Premier Fishing and Brands Limited (Premier Fishing).

33.3. Ayo Technology Solutions Limited (Ayo), and

33.4. Sagarmatha Technologies Limited (Sagarmatha).

34. These are the companies in the Sekunjalo Group that featured at various PIC governance committee meetings, where investment proposals were tabled. Premier Fishing and Ayo were listed on the Johannesburg Stock Exchange (JSE) in 2017 and the investment in IM was an unlisted investment that took place in 2013. While the PIC had signed an irrevocable undertaking and committed to the transaction, the investment into Sagarmatha did not take place because the JSE did not approve their listing.

Case Study: Independent News and Media South Africa (Pty) Ltd

35. During 2013, the PIC advanced a number of loans to SIM and INMSA. The PIC also bought a 25% equity stake in INMSA. The loans were for a period of five years and, together with interest thereon, were repayable in August 2018.
36. The deal was structured as follows:
 - 36.1. The PIC Board meeting of 11 March 2013, resolved to participate in the 100% acquisition of INMSA to the maximum amount of R1,44 billion split up as follows:
 - 36.1.1. A direct equity payment of R167 million for a minimum of 25% equity stake in INMSA;
 - 36.1.2. A Shareholder loan of R773 million at an Internal Rate of Return (IRR) of 15% on INMSA's balance sheet;
 - 36.1.3. An Equity loan to the Sekunjalo Consortium of R500 million to purchase 75% equity in INMSA.
 - 36.2. These were, *inter alia*, to be secured by a R150 million corporate guarantee by Sekunjalo Investment Holdings (Pty) Ltd.
 - 36.3. Repayments totaling R325.75 million were received the same day as a result of the equity restructuring and the Interacom Investment Holdings (a Chinese investment company) purchase of 20% equity.
37. However, in 2017 it became clear that INMSA and SIM would not be able to repay the loans when they fell due. Sekunjalo Investment Holdings (Pty) Ltd (SIH), the holding company of both INMSA and SIM, made an offer to the PIC in a letter dated 14 September 2017 proposing that the PIC exit its investment

in INMSA and SIM. SIH and/or its nominee would acquire PIC's shares in and loan claim(s) against INMSA as well as its loan claim(s) against SIM. The letter stated that SIH intended to list one of its subsidiaries, namely Sagarmatha, with a primary listing on the JSE and secondary listings on the New York and Hong Kong Stock Exchanges.

38. The letter further stated that SIH would not make any cash payment for its acquisition of PIC's shares and loan claims, and that *'all of the above equity will be settled by the issue of shares [to PIC] in Sagarmatha prior to its listing on the [JSE]'*. The price for the Sagarmatha shares would be *'the price per share as per the final prelisting statement of Sagarmatha, approved by the JSE'* (emphasis added).
39. The letter, from Dr Survé and addressed to Dr Matjila, claimed that a similar offer had been extended to the PIC's co-shareholders in INMSA. Dr Matjila was requested to countersign the offer, if it was acceptable to the PIC, resulting in the conclusion of a binding agreement between the PIC and SIH.
40. The PIC teams (deal, risk, legal and ESG) prepared reports for submission to the relevant authorising committees that would consider the proposal. Paragraph 2 of the appraisal report, prepared by the deal team and dated 14 November 2017, stated that:

'In terms of section 15.6 of the Delegation of Authority for Unlisted Investments, the first approval committee for the Proposed Transaction is the Portfolio Management Committee and the final approving committee for the Proposed Transaction is the PEPPS FIP.'

41. Dr Matjila signed/approved the appraisal report on 15 November 2017. In their credit risk report signed on 9 and 10 November 2017, the risk team assessed the risks relating to the proposed transaction as *'HIGH'*. Some of the issues of

concern were the non-valuation of Sagarmatha by PIC's Listed Equities team at the relevant time – the exit opportunity had to be considered in conjunction with the valuation of Sagarmatha – and inter-related party transactions.

42. The Private Equity, Priority Sector and Small Medium Enterprise Fund Investment Panel (PEPPS FIP) considered SIH's offer at its meeting of 6 December 2017. It resolved to approve the offer subject to conditions different from those proposed by SIH, two of which are relevant for the purpose of this submission: namely that:

'[t]he offer to exit INMSA and SIM investment should be separate from the offer to acquire a stake in Sagarmatha;

the PIC' exit from INMSA should not be conditional upon the PIC's participation in the listing of Sagarmatha; and

PIC should be provided with the information pertaining to how SIM would fund the proposed offer prior to accepting same.'

43. It is apparent from these conditions that the PEPPS FIP required SIH to make cash payment for the proposed acquisition of the PIC's shares and loan claims. It appears, from the evidence placed before the Commission, that the PEPPS FIP, which was the final approving committee in connection with this transaction, never changed its resolution. This is important to note because agreeing to the proposal would essentially have meant that the exit of the PIC from IM would have been funded by the PIC itself. No evidence was placed before the Commission that shows any impropriety in the resolution by the PEPPS FIP. It is clear from the conditions that were imposed that the resolution was in the best interests of the PIC.
44. Despite the resolution taken by the PEPPS FIP, on 13 December 2017, Dr Matjila signed what appears to be a sale of shares and claims agreement

between the GEPPF represented by the PIC and Sagarmatha. The agreement was signed on behalf of Sagarmatha a day later. In terms of clause 5 of the agreement, the debt of approximately R1.5 billion due to the PIC would be discharged through the issuing of shares to the PIC in Sagarmatha. The agreement stated that the price per share was R39.62.

45. Testifying before the Commission, when questioned by the evidence leader, Adv Jannie Lubbe (SC), Dr Matjila confirmed that he had signed the 'share swap agreement' on 13 December 2017, but said that he had signed it on the 'recommendation' of Mr Mervin Muller (Mr Muller). However, Dr Matjila eventually conceded that there was no resolution that authorised him to sign what was an irrevocable commitment, claiming instead that '*there was an agreement within the PIC*' that swapping INMSA and SIM's debt to PIC for shares in Sagarmatha was '*something that [could] be done ...*'.¹³³
46. However, Mr Lebogang Molebatsi (Mr Molebatsi) testified that Dr Matjila wanted the Sagarmatha deal to go to the PMC and be approved, irrespective of the facts, stating that it was an instruction that the transaction be presented to the PMC.
47. In her evidence relating to the transaction, Ms Mathebula, the company secretary, stated that she had sent the PEPPS FIP's resolution to management, including Dr Matjila. When questioned why he had signed the share swap agreement which clearly violated the resolution, Dr Matjila claimed that he had not seen, nor was he aware of, the resolution.
48. Dr Matjila signed/approved the appraisal report on 15 November 2017, approximately one month prior to signing the share swap agreement. That report was for the attention of the PEPPS FIP and made it clear that its purpose was '*to request approval from PEPPS FIP for the PIC to accept the*

¹³³ At page 10 of the Transcript for day 59 of the hearings held on 24 July 2019.

offer from SIM to acquire all the shares and loan claims that the PIC has in and against INMSA and SIM, (the 'Offer'), thereby exiting its investment in INMSA'. As someone who knew the operations of the PIC, Dr Matjila was aware, or ought to have been aware, that the risk, legal and ESG teams would also have to submit their reports for consideration by the PEPPS FIP. He could not have expected a resolution to be taken on the basis of one report. The minutes of the meeting of 6 December 2017 recorded an apology from Dr Matjila stating that he would not be able to attend the meeting. It is highly unlikely that he would have sent the apology if he did not know that the meeting would be held. It is also unlikely that he could not have been aware of the agenda of the meeting and that the offer would be considered by the PEPPS FIP, at the meeting.

49. Moreover, even if he had not seen the resolution, one would have expected him to enquire what resolution had been taken before signing the share swap agreement. He claimed that he *'needed to be at the forefront so as to influence decisions which will be in the best interest[s] of the PIC'*¹³⁴ and that not doing so would have been reckless. It is difficult to understand how he could have been in the forefront to protect the interests of the PIC but at the same time claim he did not find out what the resolution taken by the PEPPS FIP was.
50. SIH's offer letter, dated 14 September 2017, stated that the price for the Sagarmatha shares would be the price in the approved PLS. Since the letter was addressed to him, Dr Matjila must have been aware of the contents thereof, including the pricing. The evidence before the Commission showed that the PLS was approved months after Dr Matjila signed the share swap agreement. He was aware, or ought to have been aware, that the Listed Investments team had not yet done a valuation of Sagarmatha when he signed

¹³⁴ At page 26 of the Transcript for day 59 of the hearings held on 24 July 2019.

that agreement. In any event, the PIC team valued Sagarmatha at R7.06 per share, not at the R39.62 per share as per the PLS.

51. Dr Matjila's conduct in relation to SIH's offer must be considered together with his conduct in respect of other transactions relating to the Sekunjalo Group of companies. He signed the irrevocable subscription offer/form/agreement (ISF) relating to the Ayo transaction before the relevant committee(s) had made a decision on the transaction. He wanted the Sagarmatha transaction to proceed despite the deal team's apparent opposition thereto. He sought to influence the decision of the IC when he reportedly asked Ms Mathebula to arrange a meeting between Sagarmatha officials and members of the IC, and to forward letters/emails from political organisations to members of the IC on the eve of its meeting to consider the transaction. According to the testimony of Mr Molebatsi, Dr Matjila went to the extent of directly negotiating the proposal he referred to in an email of 10 April 2018, namely that Sagarmatha would issue additional shares to the PIC to bring the average share price paid by the PIC down to R8.50. He did this without the knowledge of the deal team, and notwithstanding that this undisclosed side agreement would have resulted in the PIC paying R8.50 per share while any other investor would pay the R39.62 on the same day, a highly questionable proposal for the PIC to even consider.

52. In his statement, Dr Matjila referred to the resolution by the PEPPS FIP and some of the conditions imposed therein, saying that he had reduced it to an '*agreement*'.¹³⁵ He did not claim lack of knowledge of the existence of the resolution. When questioned about the share swap agreement and that the terms thereof violated the PIC resolution, he claimed to have not been aware of the resolution. Prior to this, Dr Matjila had made no mention of the share swap agreement in his statement or evidence at all.

¹³⁵ A copy of the agreement is attached as annexure 'DD60' to Dr Matjila's statement.

53. Dr Matjila claimed that by signing the 'agreement', he was giving effect to the resolution. This was disingenuous, at best. The PEPPS FIP made it clear that SIH should provide the PIC with information on how it would 'fund the proposed offer' before it could be accepted. Since the PEPPS FIP is the final approving committee, the information sought should have been submitted to it. There is no evidence that such information was ever provided or that the PEPPS FIP finally approved the offer before the 'agreement' was signed.
54. Essentially, if the Sagarmatha listing had proceeded and the share swap agreement signed by Dr Matjila executed, the PIC would have invested in Sagarmatha at a price of R39.62 and not the R7.06 valuation of the PIC team. Moreover, PIC funds would have been used to settle INMSA debt to the PIC, with the full knowledge by Dr Matjila that this was effectively what was going to happen.

Case Study: Premier Fishing

Note: Premier Fishing was not one of the listed transactions that needed to be investigated, however for the sake of completeness of the transactions that the PIC undertook within the Sekunjalo Group, the facts concerning this transaction are relevant.

55. PMC: LI ratified a maximum amount of R339.3 million at R4.50 per share in a private placement for a 29% shareholding in Premier Fishing, ahead of its listing on the JSE on 2 March 2017. Premier Fishing was a subsidiary of African Empowerment Equity Investment (AEEI).
56. The deal team was interested in this opportunity as it was a black owned and managed fishing company that could easily obtain and renew fishing rights. Its growth potential was high due to the demand for abalone farming which

produces 70% gross profit margins and 30% net profit margins. China is a huge market and they had 100 tonnes pre-ordered from South Africa.

57. The ESG team had identified that there were governance issues around the fact that the chairman and majority of directors of Premier Fishing were also AEEI directors and therefore were not independent. The PIC ESG team had identified, in their due diligence report, that Mr Arthur William Johnson (Mr Johnson) from 3 Laws Capital, a related party company to the Sekunjalo Group, was listed as an independent non-executive director and a member of the Premier Fishing audit committee. Mr Johnson was appointed as a director of 3 Laws Capital in April 2008 which makes him a non-independent non-executive director of Premier Fishing. Ms Rosemary Mosia (Ms Mosia) had also been identified as an independent non-executive director on the audit committee. Subsequently, on the 10 October 2017, Ms Mosia was appointed as a non-executive director to the Sagarmatha Board and on 22 August 2018 she was appointed to the Ayo Board. She resigned from the Sagarmatha Board on 26 September 2019.
58. On 30 August 2019, her daughter, Ms Moleboheng Gabriella Mosia, was appointed as a non-executive director on the AEEI Board.
59. Other issues identified by ESG were around the need for a remuneration policy aligned to the business strategy and performance indicators linked to both short and long term incentives. The company also did not provide details on its health and safety programmes, labour practices or working conditions. There was no disclosure on effluent discharge, total energy and water consumed or their reduction targets.
60. The PIC's Risk due diligence report had foreign exchange risk as its only high risk, but overall did not raise any objection to continuing with the transaction. The PMC:LI also requested that at least two board seats be allocated to the

PIC, one being that of the lead independent director, or that they have the opportunity to participate in the appointment of the lead independent director.

Case Study: Sagarmatha (to be read with the INMSA Section above)

61. Sagarmatha, which is a subsidiary of SIH, intended to have a primary listing on the JSE and secondary listings on the New York and Hong Kong Stock Exchanges. In late 2017, Sagarmatha approached PIC with an offer for PIC to subscribe for shares worth between R3 billion and R7.5 billion. The price for the shares was R39.62 per share.
62. The transaction was considered internally by the relevant teams who raised certain concerns regarding the transaction. The deal team valued the shares at R7.06 per share. It is clear from the evidence of the members of that team that they did not support the transaction, with Mr Seanie testifying that he thought Sagarmatha would abandon its listing based on their valuation. The transaction was eventually abandoned after the JSE cancelled the listing due to Sagarmatha's alleged failure to file its financial statements with the CIPC. Although the PIC ultimately did not invest in the transaction, there are serious concerns that arise from what transpired.
63. Dr Matjila, who was not a member of the deal team, was actively involved in the transaction. He wanted PIC to subscribe for Sagarmatha shares at R39.62 per share or at another price higher than that recommended by the deal team. Dr Matjila had already signed the share swap agreement and irrevocably bound the PIC to a share price of R39.62 prior to Sagarmatha being valued by the deal team. Email correspondence placed before the Commission showed that Dr Matjila held negotiations with Dr Survé such that the PIC would pay R8.50 per share – essentially the PIC would subscribe for shares at

R39.62 and be issued additional shares at R1.00 per share to bring the average price per share down to R8.50.

64. It appears from the evidence of Mr Molebatsi that these negotiations were held without the knowledge of the members of the deal team. The deal team members, in particular Mr Molebatsi and Mr Seanie, made it clear that they were opposed to the PIC investing in Sagarmatha. When Dr Matjila sent Mr Molebatsi the email outlining the R8.50 per share proposal, the deal team had already made a submission to the IC. This is clear from an email Dr Manning sent to Dr Matjila at 17h03 on 10 April 2018, in which she stated that the deal team had advised that subscribing at R7.06 per share would be a good deal for the PIC's clients. Importantly, it appears from Dr Manning's email, that the submission to the IC was made on the same day (10 April 2018).

65. Dr Matjila did not only negotiate the share price without the knowledge of the deal team, but also requested Ms Mathebula to arrange a telephone conference and a meeting between members of the IC and Sagarmatha officials shortly before the IC was to consider the transaction. This was an improper proposal made by the CEO, going against standard practice whereby presentations by potential investee companies should be made to the due diligence teams, and not to PIC committees. The due diligence teams are then meant to advise the committees on whether a transaction should be approved or not. Dr Matjila's support of the transaction went to the extent of asking Ms Mathebula to forward letters or emails in support of the transaction from various trade unions and other organisations – which were going to be part of the B-BBEE component of the deal - to members of the IC. Dr Matjila, in his evidence before the Commission, raised the challenges he faced due to political pressures, yet he aided such interference in support of the Sagarmatha transaction by distributing the correspondence addressed to him, thereby enabling political interference.

66. When considering the best interests of the PIC, it is difficult to understand why Dr Matjila thought investing at a price significantly higher than that recommended by the very experts he claimed throughout his testimony to rely on, and ignoring the fact that the company already had liquidity problems and was part of a group that was not servicing debt due to the PIC, was in the best interests of the PIC.
67. The conduct of the IC, in referring the transaction back to the PMC despite serious concerns raised by some of its members, calls into question its professionalism and whether, at all times, it was acting in the best interests of the PIC.

Case Study: AYO

68. Established in 1996 and alleged to have clients both in the private and public sector within South Africa and abroad, Ayo's 'big' selling points for listing were, firstly, its strategic relationship with BTSA (British Telecom - South Africa) and, secondly, its B-BBEE credentials which supposedly positioned it optimally to capture part of the growing expenditure on information and communications technology (ICT) in the South African market.
69. Given its empowerment credentials and strategic alliance with BT, Ayo allegedly identified an opportunity to aggressively grow its business and approached the PIC to participate in a private placement in which it initially indicated that it planned to raise R5.7 billion.
70. When it officially approached the PIC on 16 November 2017, Ayo planned to list on the JSE on 15 December 2017. It requested the PIC to invest R4.3 billion through subscribing for 104.7 million shares offered at R43.00 per share. This had initially been proposed to be 78% of the total Initial Public Offering (IPO) which constituted 134 million shares for a total capital raise of

R5.7 billion (and a 30,2% stake in Ayo). However, when Dr Matjila signed the ISF on 14 December 2017, Ayo's final PLS significantly changed in that the total shares on offer became the 99.8 million shares which the PIC subscribed for entirely, giving it 29% ownership of Ayo.

71. The proceeds of the capital raised in the IPO were proposed to be used for:

71.1. acquiring a 30% stake in BTSA for approximately R1 billion;

71.2. funding the rollout of the BTSA strategic relationship; and

71.3. funding Ayo's acquisitions pipeline.

72. The ostensible purpose for the capital raise sought through Ayo's listing (IPO) was stated in Ayo's pre-listing statement (PLS) as:

the rationale for the listing is to:

- *raise capital in order to fund the rollout of the BTSA strategic relationship;*
- *raise capital in order to fund the BTSA Subscription;*
- *raise capital in order to fund AYO Technology's acquisition pipeline;*
- *allow AYO Technology to use listed scrip to fund future acquisitions;*
- *provide AYO Technology's management and employees an opportunity to acquire an equity stake in AYO Technology post the listing through the AYO Technology Incentive Scheme, which will also serve as a valuable retention and incentivisation tool;*

- *provide Invited Investors with an opportunity to participate in the Private Placement; and*
- *provide Shareholders with a liquid, tradable asset within a regulated environment and with a market-determined share price.'*

73. The PLS further stated that:

'The net proceeds of the Private Placement received by AYO Technology (after deducting the expenses of the Private Placement, which are expected to amount to approximately R77.3 million) will be employed, inter alia, to:

- *provide the Company with the capital to fund the rollout of the BTSA strategic relationship;*
- *provide the Company with the capital to fund organic growth;*
- *provide the Company with the capital to fund the BTSA Subscription; and*
- *provide the Company with capital in order to fund AYO Technology's acquisition pipeline.'*

74. Ayo would be buying the 30% stake in BTSA from a related company within the Sekunjalo Group, Kilomix (Pty) Ltd, though there was no justification of how the value of R1 billion was arrived at, nor did the CFO, Ms More, query the number.

75. AEEI is 61.17% owned by SIH. Post the listing, AEEI's shareholding in Ayo diluted from 80.03% to 49%.

76. AEEI also undertook a B-BBEE consortium share issue to ensure that Ayo's ownership remained above 51% black owned and 30% black female owned post the listing. Shares were issued to the B-BBEE Consortium¹³⁶ at a significant discount of R1.50 per share.
77. A circular to shareholders was issued on 27 November 2017, prior to the Ayo proposed listing date of 21 December 2017. The circular indicated that pricing was based on precedent pricing set by Ayo's most recent corporate actions (those concluded within the past 12 months).
78. The valuation of Ayo was based on a forward price earnings multiple (PE) of 16 times based on Ayo's estimated normalised earnings. The premium paid by PIC represents the additional value in the listed space and was based on the present value of future cash flows based on growth opportunities identified.
79. There was an amount paid to AEEI Corporate Finance (related party) as corporate advisor and book runner of R57.7 million and not R78.8 million, which was the total expense for the listing.
80. An amount of R16 million in total was also paid to PSG Capital as transaction advisor and sponsor. Mention is made by the PIC that normal market placement fees are between 1-2% of total equity raised. R73.7/R4300 = 1.71%. These expenses are also listed in the PLS.
81. This transaction drew most of Dr Matjila's attention in his statement before the Commission, and it also took the greatest number of days during which Dr Matjila was questioned on the transaction.

¹³⁶ The B-BBEE Consortium was made up of: Police and Prisons Civil Rights Union (POPCRU), South African Clothing and Textile Workers Union (SACTWU), the Black Business Council, Federation of Unions of South Africa (FEDUSA) nominess, the National Education, Health and Allied Workers' Union (NEHAWU) and the Social Entrepreneurship Foundation (Dr Survé's foundation).

82. The outright manipulation by Dr Survé of the valuation numbers to increase the Ayo valuation from its own initial staff assessment (by former CIO, Mr Malick Salie) of R2.3 billion to range between R10 billion and R15 billion, ultimately determining a value of R13 billion, which translated to the R43 per share or R4.3 billion paid by the PIC for its 29% investment in Ayo, was defended by Dr Matjila, who acknowledged that the value of the Ayo assets were estimated at R292 million at the time. He stated that the value was based on future deals that could be expected so *‘I was satisfied that this valuation was reasonable’*.

Areas of Concern Arising from the Above Transactions

General concerns pertaining to the deals

83. The PIC appraisal documents never assessed cumulative group exposure in any of the applications to invest. Moreover, even when these proposals were tabled at the required approving structures, the question of overall exposure to a group seemed to not be an issue, nor was the fact that IM was not servicing their loan. Dr Matjila, in his appearance before the Commission, justified the PIC’s failure to take steps to ensure the loan was serviced, stating that:

*‘the asset has performed very poorly in terms of financial returns in line with other print media companies ... I strongly believe that the investment facilitated transformation and is contributing to democracy by keeping the citizenry informed ... INMSA has not been able to meet its obligations due to a tough operating environment (and) SIH has funded most of the working capital so far’.*¹³⁷

¹³⁷ At page 121 of the Transcript for day 58 of the hearings held on 23 July 2019.

84. Regardless of this non-servicing of the debt, which amounts to around R1.5 billion, the PIC continued to invest in Premier Fishing, Ayo and almost in Sagarmatha.
85. The Sekunjalo investments showed a marked disregard for PIC policy and standard operating procedures.
86. Proper governance was absent or poor, and risk identification processes were downplayed by looking for risk mitigants to make sure the deals were approved.
87. DD reports highlighting issues around independence of Board members, policies to be implemented etcetera, were not followed up by the PIC to ensure implementation post the deal approval and monies having flowed.
88. The close relationship between Dr Matjila and Dr Survé created top down pressures that the deal teams experienced to get the requisite approvals.
89. In addition to the concerns raised above, pertaining to the IM and Sagarmatha deals, the following concerns need to be raised:
90. The IC meeting of 6 February 2013 raised concerns that the IM business was overvalued – the income statement and profitability trends were declining. They approved the transaction on condition, inter alia, that personal surety needed to be provided by the 40% lead consortium member (Sekunjalo) for the PIC's loans. The Commission has established that this precondition was never met.¹³⁸
91. As at 30 June 2016, the directors of IM were Dr Survé, Trueman Goba, Koketso Mabe, Salim Young, Takudzwa Hove, Lu Zhengyi, David Liang,

¹³⁸ Email to Gill Marcus from Ford-Hoon Naidene dated 03 December 2019

Saarah Survé (daughter of Dr Survé), Aziza Begum Amod (sister of Dr Survé), Fatima Survé (sister of Dr Survé), Ismet Amod (brother-in-law of Dr Survé), and Cherie Hendricks. Only Dr Survé is listed as a Director of SIM.

Ayo

92. In Dr Matjila's statement he indicated that the opportunity to invest in Ayo was introduced to him by Dr Survé around October 2017. He stated that he '*saw the deal as very strategic for the PIC as it gave the PIC exposure to the growing ICT, information, communication and technology sectors which is part of the developmental investments.*'¹³⁹ What this shows is that the transaction had Dr Matjila's stamp of approval even before it was officially proposed to or evaluated by the PIC. This lends credence to the top-down pressures that the deal team said they were exposed to.
93. The ISF was signed on 14 December 2017, before any PMC meeting to approve the transaction. In fact, subsequent evidence that surfaced indicated that Dr Matjila signed an irrevocable letter of undertaking to AEEI on 4 December 2019. This clearly demonstrates that the transaction had Dr Matjila's approval prior to even the ISF being signed and indicates that it was already a *fait accompli* by the time Dr Matjila and Mr Molebatsi (Acting Executive Head: Listed Investments) signed the ISF on 14 December 2017.
94. No proper valuation to back the investment was done, and therefore the question remains as to whether the PIC subscribed for the shares at a fair and reasonable value. At the listing date, the shares were R43 per share, while as at 23 October 2019 the share price was R5.60 per share, a decrease in value per share of 87%.

¹³⁹ At page 53 of the Transcript for day 59 of the hearings held on 24 July 2019.

95. The PIC relied on a draft Ayo PLS and should have used the final PLS to ensure the accuracy and adequacy of information in its analysis of the company. Key to its evaluation of Ayo was the BTSA historical annual financial statements which the PIC did not have in its possession, nor was it included in the draft or final PLS. Furthermore, a letter from BTSA to Mr Kevin Hardy (Mr Hardy), former CEO of Ayo, dated 23 August 2018 and tabled at the Commission, clearly showed that BTSA did not agree with the assumptions made in the PLS about BTSA. Paragraph 6 of the letter states:

'Not only was the information relating to BTSA's existing customers, its revenues and the anticipated transition of BTSA's existing customers to Ayo not provided to Ayo, such information and disclosures are not factually correct. BTSA's consent was never sought nor obtained for any such disclosures'.

96. In Paragraph 7 the letter states that:

'It is undeniable that the PLS creates a distinct impression that its relationship with BTSA is closer than actually contemplated and agreed in the Alliance Agreement. This is not only misleading but damaging to BTSA's reputation ... at no time did BTSA together with Ayo identify target companies to increase Ayo's offering'.

97. But BTSA formed a critical part of the valuation of Ayo as it was considered a key strategic relationship that would aggressively grow its business. Revenue was projected to increase by 825% premised on the assumptions that existing BTSA customers would transition across to Ayo and Ayo would be targeting an increase in market share between 1-2% for the periods forecasted owing to its superior B-BBEE credentials. It was also envisaged that the existing Ayo subsidiaries would achieve organic growth due to working capital funding which Ayo would provide.

98. An 825% increase in revenue in one year (from 2017 to 2018) based on assumptions should call into question whether this significant percentage increase was actually achievable, reasonable and realistic. The PIC relied on the fact that the forecast was signed off by Grant Thornton, Mr Imtiaaz Hassim was the partner, who provided a limited assurance report on the forecast information for the purpose of complying with JSE listing requirements.
99. The PIC was pressed to evaluate the transaction and perform DDs in a short space of time to meet the JSE listing date of 21 December 2017. The PIC deal team were only introduced to the prospect of investing in Ayo on 16 November 2017, nearly a month after Dr Survé had introduced the Ayo deal to Dr Matjila and, furthermore, after both Ayo and Sagarmatha had been pitched to Mr Madavo in Cape Town. This fact was excluded from Mr Madavo's evidence at the Commission.
100. Ayo/Sekunjalo was essentially driving the timelines for PIC approval, and not the PIC. Many PIC executives were already on leave and had staff acting in their positions, including Mr Madavo, EH: LI.
101. The PIC had insufficient liquidity to fund the subscription of Ayo, such that a letter was sent to the JSE, signed by Dr Matjila, indicating that payment for the shares would be made in two tranches. The PIC had to liquidate certain assets in order to make funds available.
102. The PIC was the only subscriber to the private placement and took up the entire subscription, although Dr Survé tried to create the impression that there was an over subscription for the shares (which turned out later to be related parties to Dr Survé/Sekunjalo).
103. The GEPI had imposed a limit, in October 2017, such that any single investment above R2 billion on the unlisted and property investment portfolios required its prior approval. In his evidence, GEPI's Principal Executive

Officer, Dr Abel Sithole, found the explanatory letter of 16 April 2018 sent by the PIC about the Ayo transaction to be a material misrepresentation and said that there should be legal consequences.

104. The PIC's investment process in relation to IPOs as set out in the Standard Operating Procedures: Listed Investments (SOPs) was flouted - there was no PMC 1 process to assess the mandate fit of the prospective investment as well as to approve proceeding with detailed due diligence investigations. Secondly, there was no PMC 2 approval before subscribing for the shares in the Ayo IPO.
105. Post Dr Matjila signing the ISF on 14 December 2017, which then committed the PIC to the R4.3 billion Ayo share subscription, the next PMC meeting needed to ratify the transaction, in order to regularise the decision taken by Dr Matjila. This was not done. The due diligence reports from Legal, ESG and Risk had not been finalised until after the ISF had been signed, even though Dr Matjila, in his statement, indicated that he had received verbal feedback from the Heads or Acting Heads of those departments at the time, prior to signing the ISF. No evidence could be provided on this.
106. There is concentration risk in one group, the Sekunjalo Group, and one man, Dr Survé, with no evaluation of group exposure in any scoping or appraisal document pertaining to the above four transactions, having taken place.
107. In relation to governance matters - board members within the boards of the Sekunjalo Group of companies are not independent. It was a PIC requirement that the Ayo board be strengthened with independent non-executive directors. The following tables explain how board members are related to Dr Survé, are long-serving employees, long-time friends or are non-executive directors on other Sekunjalo Group company boards and dominate the board seats in those companies. Independent non-executive directors are in the minority on

the boards and this point is illustrated using two examples, namely on the AEEI and Ayo boards.

AEEI Board (as provided by Mr Salie, ex-employee of AEEI who also appeared at the Commission)

| Name | Role | Qualification | Relationship with Dr Iqbal Survé | Other Boards in the SIH Group |
|-------------------|------------------------|----------------------|--|---|
| Khalid Abdulla | Executive CEO | MBA, B Com Hons | Brother in-law of Dr Survé | Numerous boards of AEEI and major shareholder Including Deputy Chair of Premier Fishing Ltd |
| Chantelle Ah Sign | Executive FD | CA (SA) | Long serving employee since 2007 | Numerous boards of AEEI |
| Ismet Amod | Non-Executive Director | None | Brother-in-law of Dr Survé, married to Aziza below | Numerous boards of SIH, Independent Media and AEEI Including Premier and AYO Ltd |

| | | | | |
|--|------------------------|------------|--|---|
| Aziza Begum Amod | Non-Executive Director | None | Eldest sister of Dr Survé | Numerous boards of SIH, Independent Media, AEEI and 3 laws Capital Including Premier Fishing and AYO Ltd |
| Advocate Ngoako Abel Ramathodi | Non-Executive Director | | Long standing relationship with Dr Survé | Numerous boards of AEEI Including Premier Fishing Ltd and AYO Ltd |
| Gaamiem Colbie | Non-Executive | None | Bookkeeper of SIH | Numerous boards |
| Moleboheng Gabriella Mosia (Rosemary Mosia's daughter) | Non-Executive | Law degree | Her mother is on the Premier Fishing and Ayo Boards – Rosemary Mosia | Unknown |

| | | | | |
|-----------------|---------------|--------|---------|---------|
| | | | | |
| Jowayne van Wyk | Non-Executive | CA(SA) | Unknown | Unknown |

Ayo Board

| Name | Role | Qualification | Relationship with Dr Iqbal Survé | Other Boards in the SIH Group |
|------------------|-----------------------------------|--|--|-------------------------------|
| Howard Plaatjies | Executive CEO | B Com | Ex Independent Media Executive director | AYO and subsidiary boards |
| Tatenda Bundo | Executive FD | CA (SA) | Long serving employee | AYO and subsidiary boards |
| Vanessa Govender | Non-Executive | Unknown | Long serving employee previously worked for IM | AYO subsidiary boards |
| Wallace Mqoqi | Chairman – Non Executive Director | B.A Soc. Science, LLB, degrees, Post-graduate qualifications from Harvard University, USA, and the Development Lawyers Course at the | Long standing relationship with Dr Survé | AYO |

| | | | | |
|--------------------------------|------------------------|--|--|---|
| | | International Development Law Institute in Rome, Italy | | |
| Ismet Amod | Non-Executive Director | None | Brother in-law to Dr Survé, married to Aziza below | Numerous boards of SIH, Independent Media and AEEI Including Premier and AYO Ltd |
| Aziza Begum Amod | Non-Executive Director | None | Eldest sister of Dr Survé | Numerous boards of SIH, Independent Media, AEEI and 3 laws Capital Including Premier and AYO Ltd |
| Advocate Ngoako Abel Ramathodi | Non-Executive Director | | Long standing relationship with Dr Survé | Numerous boards of AEEI Including Premier Fishing Ltd and AYO Ltd |

| | | | | |
|--|---------------|-----------------------|---|--|
| Takudzwa Hove (Resigned 19 August 2019) | Non-Executive | None | CEO/FD Independent Media | Numerous boards of SIH, Independent Media, AEEI and 3 laws Capital |
| Rosemary Mosia | Non-Executive | B Com Hons | Long standing relationship with Dr Survé | Numerous boards of AEEI Including Premier Fishing Ltd and AYO Ltd |
| Dennis George | Non-Executive | Phd | Shareholder linked to controversial B-BBEE consortium shares on AYO listing | AYO |
| Sello Rasateba | Non-Executive | BA Degree and Masters | Black Business Council Chair, organisation with long history and transactions with Dr Survé | AYO |

PSG Capital received a bonus from Dr Survé post the successful listing of Ayo

108. Emails provided to the Commission indicated that PSG Capital received a bonus from Dr Survé for successfully listing Ayo. PSG Capital was the transaction advisor and sponsor for the listing. An email from Mr David Tosi (Mr Tosi) thanked Khalid Abdulla for the '*generous bonus*'.
109. The invoice from PSG Capital to AEEI was R20.6 million excluding VAT. Their fee specified in the PLS was R14.5 million as transaction advisor and R1.5m as sponsor, which totals R16 million. The '*bonus*' was therefore in the region of R4 million. When the question was posed in an email sent by the Commission to Mr Tosi of PSG Capital, as to what services were rendered for the placement fee of R16 million, as the PIC was the only company taking up the private placement of shares, his response was:

'As is normal for transactions of this nature, our mandate comprised of a fixed and variable portion. Without the variable portion, our fixed fee would have been much higher (clients generally prefer a lower fixed fee with a higher success based variable fee). The variable portion was based on a percentage of the capital raised and was effectively dependent on a successful transaction (if capital was not raised then it would not have been due and payable). The variable portion is in line with what we have charged in other non-related transactions.'

110. An analysis of the following bank accounts has been conducted:

- 110.1. 3 Laws Capital (Period: January 2017 to June 2019, current account with Nedbank).

- 110.2. Ayo (Period: December 2017 to July 2019 (May 2019 missing), current account with Absa)
- 110.3. African News Agency (Pty) Ltd (ANA) (Period: March 2015 to June 2019, current account with Nedbank)
111. The analysis illustrates and gives examples of transactions that seem strange for that particular company's business and also indicates that monies are transferred to fund other group companies and then transferred back when it is time to reflect that company's interim or year-end results. This occurs particularly in the case of Ayo, as it is listed on the JSE and its results are available publicly.
112. Dr Survé and Dr Matjila had both indicated to the Commission that the monies received from the PIC are still in Ayo's bank accounts. This is partly correct due to the fact that the results are published at a point in time, and the monies are transferred back to Ayo just before the interim and year end cut-off periods i.e. 28 February and 31 August, respectively.
113. See the below table for the analysis of 3 Laws Capital Nedbank current account indicating the movement of monies between Ayo, Sekunjalo Capital and 3 Laws Capital:

3 Laws Capital 10888 03911 Nedbank current account

| Date | Amount | Comment |
|------------------------|---|---|
| 04/06/2019 | R26 700 515.92 | Inflow from AYO which is then transferred to the 3 Laws Capital call account |
| 18/3/2019 | R20 561 536 | Payment to Ayo |
| 15/3/2019 | R23 000 000 | Transfer to 3 Laws Capital from SBG (R23m inflow and on 18/3/2019 and amount of R20 561 536 was paid to Ayo) |
| 22/2/2019 22/2/2019 | R400 000 000 R70 000 000 | 3 Laws Capital then transfers R470m back to Ayo on 22/2/2019 just before their financial year end 28/2/2019 |
| 22/2/2019 | R370 000 000 R35 000 000 R35 000 000 R30 000 000 | R370m transferred out of call account to current account. Two additional transfers into 3 Laws Capital current account (one of the R35m transfers comes from ANA (validated by their bank statement)) R30m from SBG Securities Total of R470m received on 22/2/2019 |
| 11/12/2018 | R50 000 000 | R50m transferred from 3 Laws Capital call account to SBG Securities on 12/12/2018 |
| 29/11/2018 | R400 000 000 | AYO investment again in 3 Laws Capital post the financial year end date 31/8/2018 and |

| | | |
|-----------|-----------------------------|--|
| | | R300m transferred to the call account on 30/11/2018 and a further R100m on the 4/12/2018 |
| | | No large transfers back to 3 Laws Capital between April 2018 and October 2018 from any Sekunjalo Group company in this account. <i>The assumption then is that another group company transferred the R400m back to Ayo on 20/8/2018 even though in the Ayo bank statement it says 3 Laws Capital. There is not a similar entry in 3 Laws Capital's bank account on the same day</i> |
| 9/4/2018 | R50 000 000 | R50m is transferred from 3 Laws Capital call account and then transferred to Sekunjalo Capital (another company in the Sekunjalo Group) - |
| 29/3/2018 | R160 000 000 R50 000 000 | R210m is transferred out of the 3 Laws Capital call account and transferred on 29/3/2018 to Sekunjalo Capital |
| 27/3/2018 | R160 000 000 | 3 Laws Capital takes R160m out of call account and on 28/3/2018 transfers R160m to |

| | | |
|-----------|--------------|---|
| | | Sekunjalo Capital. Total transferred R160m + R210m + R50m = R420m. |
| 5/3/2018 | R400 000 000 | AYO investment into 3 Laws Capital just post the half year end 28/2/2018 and it is transferred to 3 Laws Capital call account |
| 10/3/2017 | R25 000 000 | R25m is transferred out of 3 Laws Capital call account and then transferred to Independent Newspapers Holding on 14/3/2017 |

AYO Bank account 407 232 1896 Absa current account

| Date | Amount | Comment |
|-----------|----------------|--|
| 6/6/2019 | R600 000 | Payment made to Dr VI Ramlakan (Reverend) |
| 4/6/2019 | R26 700 515.92 | Payment to 3 Laws Capital (validated by 3 Laws Capital Nedbank current account) |
| 29/4/2019 | R98 477 892.80 | Not sure what this is but it is a large payment. Both Naahied Gamielien and Malick Salie do not know |
| 26/3/2019 | R15 000 000 | Payment to Loot Online (Pty) Ltd (subsidiary of Sagarmatha) |
| 26/3/2019 | R15 000 000 | Transfer from Ayo money market to current account |

| | | |
|-----------|-----------------------------|---|
| 22/3/2019 | R100 000 000 | Payment to Tamlalor (Pty) Ltd. Per Malick Salie this was a Fintech Fund set up to acquire IT assets. He is not sure of the status of it now. Per CIPC records, the directors of this company are Khalid Abdulla, Neil Mark Anderson and Ethan Dube (both are Vunani Corporate Finance directors). There was a press article that was found on this JV between Vunani Corporate Finance (Vunani) and Ayo |
| 22/3/2019 | R106 000 000 | Transfer from Ayo money market to current account |
| 20/3/2019 | R26 000 000 | Transfer from Ayo money market to current account |
| 18/3/2019 | R20 561 536 | Deposit from 3 Laws Capital (validated by 3 Laws Capital Nedbank current account) |
| 6/3/2019 | R32 000 000 | Transfer from Ayo money market to current account |
| 26/2/2019 | R465 000 000 | Transfer to Ayo money market account |
| 22/2/2019 | R400 000 000 R70 000 000 | Deposits from 3 Laws Capital (validated by 3 Laws Capital Nedbank current account) |
| 20/2/2019 | R25 000 000 | Payment to Abrahams Kiewitz Attorneys (Dr Survé's personal |

| | | |
|------------|------------------------------|--|
| | | lawyer per Naahied Gamieldien) |
| 25/1/2019 | R18 000 000 (R12 305 000) | Transfer from Ayo money market to current account and then an amount of R12.305m was paid to ANA. The integrated reporting function was to be under ANA, yet they had no experience. When the ANA people met with Naahied Gamieldien the original quote was R36m excl. VAT |
| 21/12/2018 | R300 000 000 R100 000 000 | Payments made to Oasis Asset Managers (Oasis) |
| 21/12/2018 | R420 000 000 | Transfer from Ayo money market to current account to facilitate investment in Oasis |
| 18/12/2018 | R3 896 220.17 | Amount paid to Vunani for Sizwe deal per Naahied Gamieldien |
| 18/12/2018 | R20 000 000 | Transfer from Ayo money market to current account |
| 03/12/2018 | R84 360 639.90 | Ayo dividend paid to shareholders |
| 30/11/2018 | R64 000 000 | Transfer from Ayo money market to current account |
| 29/11/2018 | R400 000 000 | Transfer to 3 Laws Capital (Validated by 3 Laws Capital Nedbank current account bank statement) |

| | | |
|------------|--------------------------------|--|
| 29/11/2018 | R400 000 000 | Transfer from Ayo money market to current account |
| 28/9/2018 | R153 000 000 (R145 000 000) | Transfer from Ayo money market to current account and then, on the same day, there was a transfer made to Investec Employee Benefits for R145m. Speaking to Naahied Gamieldien and Malick Salie, they recall this being a term loan from Ayo to Vunani in order to settle their debt with Investec. In exchange, Ayo would acquire 32% of Vunani. In addition, the R100m fintech fund was set up and is a JV between Ayo and Vunani. See above 22/3/2019 |
| 14/9/2019 | R35 000 000 | Transfer from Ayo money market to current account |
| 31/8/2018 | R93 967.50 | Payment made to Dr MI Survé for travel allowance for him, W Mgoqi and Z Qwebu. They were going to the UK to visit BT |
| 29/8/2018 | R13 463 | Payment made to Wallace Mgoqi |
| 24/8/2018 | R380 000 000 | Transfer made to Ayo money market |
| 20/8/2018 | R400 000 000 | 3 Laws Capital returning the funds to Ayo but no entry in |

| | | |
|------------|--------------|--|
| | | <p>their Nedbank bank statement on this date. In Ayo's bank statement it says 3 Laws Capital. Naahied Gamielien checked 3 Laws Capital Standard Bank account and there was no such transfer on this date.</p> <p><i>The assumption is then that it came from elsewhere in the Sekunjalo Group.</i></p> |
| 10/8/2018 | R29 000 000 | Transfer from Ayo money market to current account |
| 5/3/2018 | R400 000 000 | Transferred to 3 Laws Capital (Validated by 3 Laws Capital Nedbank account) |
| 28/2/2018 | R400 000 000 | Transferred out of Ayo money market to Ayo current account |
| 18/1/2018 | R70 000 000 | Transferred out of Ayo money market and on same day R64.578m was transferred to AEEI |
| 22/12/2017 | R35 000 000 | Transferred to Sekunjalo Capital |
| 22/12/2017 | R3.7 billion | Transferred to Ayo money market account |
| 22/12/2017 | R35 000 000 | Transferred to 3 Laws Capital. This was received in a Standard Bank account for 3 Laws Capital 072092335(the |

| | | |
|------------|---------------|--|
| | | Commission has not had sight of the bank statements for this account). Naahied Gamiendien confirmed that she did the transfer into this account. |
| 22/12/2017 | R3.79 billion | Received from the PIC |
| 21/12/2017 | R499 999 958 | Received from the PIC |

African News Agency 1096 778 106 Nedbank current account

| Date | Amount | Comment |
|-------------------------|----------------------|---|
| 22/2/2019 | R35 000 000 | Transfer to 3 Laws Capital (validated by their bank statement) |
| 25/1/2019 | R12 305 000 | Funds received from AYO for marketing services etc. ANA has no experience in doing any of the services offered and no comparative quote or references were received by AYO for this work per Naahied Gamiendien |
| 31/8/2018 | R41 340 000 | ANA paid Premier Fishing. (Premier Fishing bank statements reflect this payment as an AEEI deposit) |
| 23/7/2018 22/11/2018 | R166 667 R100 000 | Payment to R Mosia – AYO Director appointed in August 2018, also a director on Sagarmatha board (resigned 26 September 2019). She remains a director of |

| | | |
|------------------------|----------------------------|---|
| | | Premier Fishing and Ayo. Yet Dr Survé said she was independent at the Commission. She is not a director of ANA but receives monies from ANA |
| 16/8/2016 18/8/2016 | R25 000 000 R25 000 000 | Transfer from ANA call account to current account Transfer out to Dr Survé |
| 27/5/2015 | R357 000 000 | Received funds from the China-Africa Development Fund (CADFUND) for an investment into ANA and monies transferred same day into the call account. |

114. Family members such as Dr Survé's sister, Ms Aziza Amod (Ms Amod), transact in the ANA Nedbank accounts under his instruction. Ms Amod and Dr Survé are directors of ANA. Both the Nedbank call and current accounts of ANA have 3 authorised signatories:

114.1. Cherie Felicity Hendricks

114.2. Dr Survé; and

114.3. Ms Amod

115. According to Mr Grant Fredericks (Mr Fredricks) and Ms Lisa-Marie de Villiers (Ms de Villiers), the previous CFO and Financial Manager of ANA, executive management does not have access to these bank accounts. According to

them, copies of bank statements are requested from Ms Amod on a monthly basis and then captured into ANA's accounting records.

116. A Standard Bank current account for ANA was opened in September 2016. Ms de Villiers and two others were made authorised signatories of this account. She explained that the way it worked was that a detailed cost schedule was prepared on a monthly basis and sent to Ms Amod and she would then transfer the amount required into the account. This account effectively paid for all operating expenses of ANA. Strict control over the funds in this account is maintained by Ms Amod.
117. Ms Amod was a director of 3 Laws Capital, but the latest publicly available information indicates that Dr Survé and Mr Arthur Johnson are the only two directors. The Commission had asked Dr Survé to provide a list of his directorships that are active and inactive. He disclosed that he was an active director of ANA but did not disclose that he was an active director of 3 Laws Capital. He listed that he had resigned from Sagarmatha and Ayo.

Increased dividend flows to AEEI and ultimately the Haraas Trust

118. The Haraas Trust owns 100% of SIH, which owns 61.17% of AEEI. Ayo is 49.39% owned by AEEI. The Haraas Trust trustee is Dr Survé and the beneficiaries of the trust are his two children Rayhaan Survé and Saarah Survé.
119. The table below was prepared by Mr Malick Salie. What it illustrates is the increase in dividend flow to AEEI post the listings of Premier Fishing and Ayo. The dividend numbers could not be validated by the forensic team as the AEEI website was not available.

| | | Dividends | | | |
|--|-------------|--------------------|-------------|------------|----------------------------|
| AEEI Ltd | Year | Executive Director | Shareholder | % Increase | |
| | | R'000 | R'000 | | |
| | 1996 - 2013 | 0 | 0 | | |
| Maiden Dividend declaration took place at the time Dr Surve decided to move from being an executive to a Shareholder | 2014 | 9 827 | 0 | | |
| | 2015 | 0 | 12 283 | 25% | |
| | 2016 | 0 | 16 203 | 32% | |
| The operational cashflows did not justify this increase and interest from AYO used fund Div | 2017 | 0 | 25 804 | 59% | Listing of Premier and AYO |
| | 2018 | 0 | 43 238 | 68% | |

Dividends

| Year | Executive Director (R'000) | Shareholder (R'000) | % Increase |
|------|----------------------------|---------------------|------------|
| 1 | 0 | 0 | |
| 2 | 9 827 | 0 | |
| 3 | 0 | 12 283 | 25% |
| 4 | 0 | 16 203 | 32% |
| 5 | 0 | 25 804 | 59% |
| 6 | 0 | 43 238 | 68% |

120. As stated above, Grant Thornton Cape Incorporated signed off on the limited assurance report on forecast financial information contained in the PLS. BDO and Grant Thornton merged July 2018. BDO Cape Incorporated has been the auditor of Ayo for 21 years, as reflected in the annual financial statements of AYO 2018 (independent auditor's report page 8). This indicates a long-standing relationship between the audit firm and Ayo and brings into question its independence.

Concluding remarks

121. From the outset it appears that the PIC's interactions with and investments in the Sekunjalo Group were questionable. The different investment proposals emanated from direct discussions between Dr Survé and Dr Matjila.

122. The PIC presented the original INMSA proposal to the GEPF, which expressed its discomfort with the exposure even though it was within the limits prescribed by the PIC. The GEPF did not support the deal and expressed the view that this was an investment in a sector that ‘had a bleak future’. However, their view was that the PIC should make the decision provided that the exposure did not exceed R 2 billion.
123. The Board of the PIC met in 2013 to consider the recommendation of the IC. The Board did not support the investment proposal and decided that the transaction team should pursue a revised proposal. It finally agreed to an investment of R1.44 billion in INMSA with a number of preconditions, including that the 40% lead consortium member, Sekunjalo, provide personal surety of R500 million.
124. At the time of finalising this report, the outstanding balance owed to the PIC is R1.5 billion. The Commission has established that the surety of R500 million was never registered.¹⁴⁰ However, it should be noted that the PIC has recently taken steps to recover the full amount owed, including applying for the liquidation of Sekunjalo Independent Media (SIM).
125. Dr Matjila, notwithstanding all the information that was disclosed at the Commission, not only continued to try to defend the decisions taken at the time, but made a concerted effort to justify his actions. With regard to INMSA, Dr Matjila stated that ‘*the asset has performed very poorly ... in line with other print media*’¹⁴¹, going on to give performance figures of other media houses. He further stated that the investment was contributing to democracy. However, he was not able to show a broad media investment strategy to address the need for transformation and a contribution to democracy. He went further to say that ‘*I understand that Sekunjalo Investment Holdings has funded most of*

¹⁴⁰ Email to Gill Marcus from Ford-Hoon Naidene dated 03 December 2019

¹⁴¹ At page 121 of the Transcript for day 58 of the hearings held on 23 July 2019.

the working capital so far'.¹⁴² At no point in his testimony did he indicate that it was his concern, let alone a priority, that the outstanding debt to the PIC owed by INMSA, be serviced, particularly given the further investments that had been made.

126. The proposed Sagarmatha transaction epitomises the lengths to which Dr Matjila and Dr Survé were willing to go to get the deal done. In considering the transaction, the Commission was informed of the processes and proposals, and the decisions taken by Dr Matjila and the PIC. That the transaction did not go ahead was a result of the action taken by the JSE, and notwithstanding protestations by Dr Matjila that he had decided against the investment around the same time that the JSE withdrew the listing, if it had been left to the PIC, the transaction would in all likelihood, have proceeded. Dr Matjila did not, or was unable to, provide any evidence that he communicated in writing to Dr Survé, on behalf of the PIC, that it had decided not to proceed with the transaction.

127. The Ayo transaction demonstrates the malfeasance of the Sekunjalo Group, the impropriety of the process and practice of the PIC as well as the gross negligence of both the CEO and CFO. By both omission and commission, the two most senior executive directors of the PIC demonstrated not only their lack of credibility as witnesses, but their readiness to distance themselves from decisions taken and blame others, including the most junior staff members involved in the transaction. At no point did either acknowledge deficiencies in the process or accept either responsibility or accountability for the investment.

128. Dr Matjila stated that *'I have not put any pressure on anyone to make specific recommendations, including the valuations, to ensure that the deal worked'*.¹⁴³

¹⁴² At page 121 of the Transcript for day 58 of the hearings held on 23 July 2019.

¹⁴³ At page 81 of the Transcript for day 59 of the hearings held on 24 July 2019.

However, there was no valuation done at all this time. The valuation was only done in May 2018, when the IC started asking questions about the Ayo transaction after extensive media comments. Dr Matjila's deliberate misleading, inaccurate disclosure and material non-disclosure in his testimony to the Commission was most evident in his evidence around the signing of the ISF to invest in Ayo.

129. In his statement, Dr Matjila asserted that the PIC funds invested in Ayo (R4.3 billion) was in the bank. However, as the evidence gleaned from various bank statements show, there has been significant movement of the funds between different related parties. This created the impression of funds in bank accounts but, in reality, this was only the case at specific moments in time.

Recommendations

130. The PIC Board should:

- 130.1. Conduct a forensic review of all the processes involved in all transactions entered into with the Sekunjalo Group;
- 130.2. Ensure that the PIC obtains all company registration numbers of every entity in the Sekunjalo Group to be able to conduct a forensic investigation as to the flow of monies out of and into the Group;
- 130.3. Ensure that all pre- and post-conditions for all investments made, not just those in the Sekunjalo Group, have been fully met and implemented, and that effective processes and systems are in place to properly monitor the investment post disbursement;
- 130.4. Take the necessary steps to recover all monies with interest due to the PIC, especially where personal or other surety was a precondition to approval of the investment;

- 130.5. Take appropriate action to recover the funds, with interest, invested in Ayo, taking into account the precondition set as to what the PIC funds could be spent on and the money movements between the Sekunjalo related companies;
- 130.6. Determine the future role, if any, of the PIC in all of the transactions done with the Sekunjalo Group, to protect the interests of the PIC and its clients;
- 130.7. Review all aspects of the transactions entered into with the Sekunjalo Group to determine whether any laws or regulations have been broken;
- 130.8. Review the internal processes including standard operating procedures followed by the PIC, together with the delegation of authority, to determine responsibility and culpability, and to consider whether there are grounds for disciplinary, criminal and/or civil legal action against any PIC employees or Board members, current or previous.

131. The Regulatory and other authorities should:

- 131.1. Consider whether any laws and/or regulations have been broken by either the PIC and/or the Sekunjalo Group;
- 131.2. Determine what legal steps, if any, should be taken to address any such violations; and
- 131.3. Assess whether the movement of funds between accounts, as indicated above, was intended to mislead/defraud investors and/or regulators.

CASE STUDY: S & S REFINERY

132. S&S Refinery (S&S) is a palm oil refinery and saponification plant based in Nacala, Nampula Province, Mozambique. The PIC decided, in October 2014, to invest in S&S. The legal agreements relating to the investment decision were concluded on 14 November 2014.
133. Although the investment decision was made in 2014 and therefore falls outside the period 1 January 2015 and 31 August 2018, as stipulated in paragraph 2 of the ToRs, which states that '*the Commission must, in its enquiry for the purpose of its findings, report and recommendations, consider the period 1 January 2015 to 31 August 2018*', the transaction is among those mentioned in media reports in 2017 and /or 2018 as per ToR 1.1.
134. The allegations in the media reports were that Dr Matjila had authorised an investment to the tune of nearly R1 billion in a dilapidated Mozambican palm oil refinery plant (S&S) that was not operational, 'years after a massive cash injection'. It was also alleged that, apart from injecting US\$ 63 million (approximately R812 million) for a 50% stake in S&S, the PIC also paid millions in facilitation fees to a company named Indiafrec Trade & Investment (Pty) Ltd, whose directors were listed as Indian-born Mr Ameer Mirza (Mr Mirza) and Mr Siyabonga Nene (Mr S Nene) whose father, Mr Nhlanhla Nene (Mr Nene/Deputy Minister Nene), was allegedly the Finance Minister at the time of the investment.¹⁴⁴
135. A reading of the evidence of the four witnesses who testified before the Commission on the S&S transaction, namely, Dr Matjila, Messrs Rajdhar and Wellington Masekesa (Mr Masekesa) and Ms Constance Sharon Madzikanda (Ms Madzikanda), does not show any impropriety in the investment decision. However, given the evidence presented before the Commission and the fact

¹⁴⁴ <https://mg.co.za/article/2018-10-12-00-dangerous-liaisons-pic-rassul-and-the-port-of-nacala>

that a further investment was made by the PIC in the same project, the information, in particular matters presented in the Risk report, will be considered.

136. The S&S deal was introduced to the PIC by Mr S Nene and Mr Mirza, through Dr Matjila who was the CIO at the time. Dr Matjila testified that Mr S Nene had previously been introduced to him by his father, Deputy Minister Nene, who was the Deputy Minister of Finance at the time and who, by virtue of that position, was also chairman of the PIC. Dr Matjila further testified that Deputy Minister Nene requested him 'to coach' his son,¹⁴⁵ which he agreed to do, claiming that this practice was very common in the private sector. Dr Matjila confirmed that he had assisted Mr S Nene and his partner, Mr Mirza, with '*advice on the small business they had in cement*' and in resolving their business issues with Afrisam.¹⁴⁶ He said that, in February 2014, he passed on the proposed S&S deal to Mr Rajdhar, who subsequently oversaw the process of it going through the various stages of the PIC's investment procedures, until disbursement.¹⁴⁷

137. The proposal put to the PIC by Messrs Mirza and S Nene was that their company, Indiafrec, jointly participate with the PIC in acquiring 50% of the ownership in S&S and that the PIC fund Indiafrec's portion of the acquisition. At the end of the first meeting, Mr Rajdhar and his team agreed to undertake a site visit at S&S in Mozambique. According to Mr Rajdhar, the site visit was undertaken in February or March 2014, the visiting team consisting of himself, Mr Paul Magula (Mr Magula) and Mr Masekesa, accompanied by Messrs Mirza and S Nene.¹⁴⁸

¹⁴⁵ At page 56 of the Transcript for day 55 of the hearings held on 16 July 2019.

¹⁴⁶ At page 56 of the Transcript for day 55 of the hearings held on 16 July 2019.

¹⁴⁷ Para 10 of Mr Rajdhar's statement signed on 25 March 2019.

¹⁴⁸ Paras 14-15 of Mr Rajdhar's statement signed on 25 March 2019

138. Contrary to the media reports referred to above, Mr Masekesa testified that he was impressed by the plant, which he said was well built with the equipment used in the plant being of high quality, sourced from a reputable supplier in Belgium.¹⁴⁹ The plant was at that stage, about 80% to 90% complete. Mr Masekesa said they were met at S&S by a team of enthusiastic experts and specialist engineers from India. He said the project promoter was a Mr Momade Rassul Rahim (Mr Rassul).¹⁵⁰
139. Back in South Africa, a transaction team was assembled and instructed to look deeper into the proposed transaction. Mr Masekesa, who worked in the office of the CIO where his role was to assist in the development of the Africa strategy, was invited by Mr Rajdhar to be part of the team considering the proposed transaction.
140. After PMC1 had approved the referral of the proposal for due diligence, a second site visit was undertaken by a larger team which, among other things, also visited the surrounding areas to assess potential demand and supply of cooking oil.¹⁵¹ Subsequent to the due diligence, the proposed transaction was tabled before PMC2 on 7 August 2014 for recommendation to the PEPSSME FIP. The PEPSSME FIP subsequently approved the total investment of US\$ 62.5 million, made up of US\$ 44 million of senior debt (loan) and US\$ 18.5 million equity funding, plus an additional US\$ 5 million being working capital.¹⁵²
141. At PMC1, the issue of the relationship between Mr S Nene and his father, Deputy Minister Nene, and the former's participation in the transaction was raised and discussed. The PMC ordered that the matter be investigated. The

¹⁴⁹ At page 93 of the Transcript for day 17 of the hearings held on 19 March 2019.

¹⁵⁰ Ibid. pages 88-89.

¹⁵¹ At page 98 of the Transcript for day 17 of the hearings held on 19 March 2019.

¹⁵² Ibid. page 99.

deal team's report at the next PMC was that nothing prevented the PIC from funding related parties. There was no policy in terms of which the funding of politically exposed persons (PEPs) was prohibited. A policy relating to PEPs was approved only in December 2014.¹⁵³

142. It appears that at some stage during the process of considering the transaction proposal, Indiafrec fell by the wayside and so did Mr S Nene. Mr Rassul, as the sponsor, dealt only with Mr Mirza as the deal initiator.¹⁵⁴ When the referral fee of US\$ 1.725 million was paid on 8 September 2014, it was paid, upon the instruction of Mr Mirza, into the account of a company named Zaid International, domiciled in Dubai. Mr Rajdhar said that the PIC only became aware of Zaid International at the time of payment of referral fees.¹⁵⁵ It cannot be established, on the evidence, that Mr S Nene received part of the referral fee paid to Mr Mirza, but Mr Masekesa stated that Mr S Nene was not paid any fee by the PIC.¹⁵⁶ However, in his testimony Dr Matjila stated that *'what the PIC did was to pay Mr Nene (junior) and his partner a facilitation fee (US\$1,7 million) which is common and standard practice to do in the investment industry upon the successful conclusion of the deal'*.¹⁵⁷

143. On 21 January 2016, the PIC, through the PEPSS Fund Investment Panel, resolved to increase its investment in S&S from 45% to 70% by acquiring a further 25% shareholding for a consideration of US\$10 million.¹⁵⁸ The motivation for the resolution reads:

'WHEREAS the PIC (company) has received an opportunity to increase its shareholding in S & S Refinery LDA (S & S Refineries)

¹⁵³ Paras 20-21 of Mr Rajdhar's statement, 25 March 2019.

¹⁵⁴ Ibid. Para 36.

¹⁵⁵ Paras 44-45 of Mr Rajdhar's statement, 25 March 2019.

¹⁵⁶ Para 31.5.5 of Mr Masekesa's statement, 13 March 2019.

¹⁵⁷ Para 367 of Dr Matjila's statement signed on 17 July 2019.

¹⁵⁸ The PEPSSME FIP of 20 October 2014 reflects a reduced investment from the original US\$ 62,5 million to US\$ 53 million because of the participation of Mozambican banks.

from 45% to 70% by acquiring an additional 25% equity from Mr Momade Rassul for an amount of US\$10 000 000 (ten million dollars). The rationale for this proposal is for the PIC to warehouse the additional equity for strategic partners who will be appointed as the management company (ManCo) during the operationalization of the plant.

AND WHEREAS S & S Refinery is a palm oil refinery and saponification plant in Nacala, Nampula Province in Mozambique. The plant will refine and saponify crude oil to produce 252 tons of refined palm oil, 80 tons of soap and 48 tons stearin annually (the Project).¹⁵⁹

144. The above resolution of the PEPSSME FIP further indicates that the PIC would exit from S&S within a period of ten years.

145. In the result, the PIC's total exposure in S&S stood at US\$ 63 million, made up of US\$28 million equity and US\$35 million of senior debt. The senior debt was reduced as a result of certain Mozambican banks having decided to participate in the project. At this stage, the plant was operational, allegedly producing more than two million litres of palm oil and 30 000 kilograms of laundry soap from 3000 tons of crude oil. The downside was that there was no local supplier and the crude oil was sourced from places such as Indonesia and Malaysia at high cost. With the aim of increasing production volumes, the PIC facilitated a US\$10 million facility for S&S from Ecobank, secured by assets in Ecobank, Nigeria.

146. Ms Madzikanda, the PIC's portfolio manager in the Portfolio Management and Valuation Department, whose department's responsibility is to monitor investments for compliance with legal agreements and financial performance,

¹⁵⁹ A copy of the resolution, signed by the CFO, Ms More, is annexure 'F' to Mr Rajdhar's statement on S & S Refinery.

painted a bleak picture about the performance of S&S. She took over the monitoring from another portfolio manager in 2016.

147. Ms Madzikanda received management accounts in respect of the refinery in October 2016. They reflected operating losses and showed that more than two-thirds of what had been invoiced by S&S to the off-taker, S&N Trading, between April and June 2016 was outstanding. S&N Trading is a business undertaking owned by Mr Rassul and his family.¹⁶⁰
148. Between July and September 2016, production was suspended due to working capital challenges which affected procurement of production inputs, but were not due to any technical issues with the plant.¹⁶¹
149. Ms Madzikanda said, on one of a number of visits to the refinery by herself and her team, they were informed that all salaries and wages and other operating costs were being paid by Mr Rassul from his trading business.¹⁶² From February 2017 until the date upon which she gave evidence before the Commission on 25 March 2019, Ms Madzikanda and her team had not received management accounts from S&S despite having requested for them and visiting the plant. She sums up the position as follows:

*'Due to the client's lack of cooperation with information undertakings the PMV's role in assessing this company was greatly constrained and this was reported to all committee meetings relevant.'*¹⁶³ (sic)

150. Mr Rajdhar testified that, as at the date of his testimony, the debt was not being serviced, nor was the amount for the working capital.¹⁶⁴ There are other

¹⁶⁰ At pages 62-63 of the Transcript for day 19 of the hearings held on 25 March 2019.

¹⁶¹ Ibid.

¹⁶² At page 64 of the Transcript for day 19 of the hearings held on 25 March 2019.

¹⁶³ Page 79 of the Transcript for day 19 of the hearings held on 25 March 2019.

¹⁶⁴ Ibid. Page 48.

developments that took place, such as the PIC being drawn into a dispute between Messrs Mirza and Rassul, etcetera which are, in the view of the Commission, not relevant for purposes of this ToR.

1. *According to Dr Matjila, poor governance, exacerbated by a collapse of the Mozambican currency (Metical) against the US dollar, caused great harm to this investment, mainly because the cost of raw materials more than doubled in a short space of time resulting in the refinery's inability to purchase sufficient stock. He believed, however, that the plant is a world class facility. Dr Matjila testified that a strategic partner has been roped in to operate the facility which will lead to production being restored and profitability realised.*¹⁶⁵

2. *It is worth mentioning, in particular since Dr Matjila cited poor governance and the collapse of the Mozambican currency as having caused 'great harm' to the investment, that Mr Magula's risk report dealt with these issues. The transaction was recommended subject to the following conditions precedent:*
 - 2.1. *The establishment of proper governance structures, which entails a Board of Directors, with (i) an audit and risk sub-committee and (ii) a human resource and remuneration sub-committee; etc, and*

 - 2.2. *The establishment of an Executive Management Committee and that a CEO and CFO be seconded by the PIC to S&S for a period of three years, with a mandate to establish proper controls, systems, policies and processes.*

¹⁶⁵ At page 57 of the Transcript for day 55 of the hearings held on 16 July 2019.

3. *Mr Magula's risk report also suggested the PIC consider putting a hedging strategy in place. All these recommendations seem to have been ignored or overlooked. This gives credence to the evidence of Mr Seanie, the Assistant Portfolio Manager: Non-Consumer Industrials, who testified that sound investment recommendations by investment professionals were often ignored at the PIC and that management would proceed with investments despite incomplete processes and notwithstanding concerns and risk factors raised. He said that he observed at least one instance of a deal being pushed through, that fulfilled neither of the PIC's dual mandate, namely, to generate returns on behalf of clients and to contribute to the developmental goals of South Africa.*

4. *Mr Masekesa also testified that the risks that were identified in respect of this transaction were not heeded when the investment decision was made. He stated that, 'the above challenges... were considered during due diligence and at the time of concluding the transaction, however, our assumption did not factor in the effects of such steep interest rates and sudden changes in the economy growth factors and significant currency devaluations'.¹⁶⁶*

5. *In his testimony, Mr Rajdhar averred that the present status (as at March 2019) of the S&S Refinery investment was the following:*
 - 5.1. *instructions had been given to lawyers to initiate a process for the PIC to exercise its rights as pledge creditor in respect of pledged shares;*

¹⁶⁶ At page 129 of the Transcript for day 17 of the hearings held on 19 March 2019.

5.2. *discussions would be opened between the PIC, Vamara and the Mozambican banks on the aspect of Vamara moving from being only an operator to a strategic equity partner and operator; and*

5.3. *the capital structure will have to be restructured concurrently.*¹⁶⁷

Findings

151. Clearly, there was no substance in the media reports that the PIC invested in a dilapidated refinery that was not operational.

152. No finding can be made, on the available evidence, of impropriety in the investment transaction when either the first or the second investment for US\$10 million was made.

153. Notwithstanding the above, it is found that the Risk assessment and investment decisions relating to the S&S investment did not take sufficient account of, the following issues:

153.1. the fact that raw materials essential for the business were imported and paid for in US dollars, while earnings were in the local currency, namely the Mozambican metical;

153.2. the purchase by the PIC of its equity shares in S&S was in US dollars, while repayment would be in meticals;

153.3. the reliability and sustainability of supplies of the imported raw material, as well as the transport costs thereof, would also have to be paid for in US dollars;

¹⁶⁷ At page 47 of the Transcript for day 19 of the hearings held on 25 March 2019.

- 153.4. the economic outlook in Mozambique, where deteriorating economic conditions affected the financial viability of the enterprise, and interest rates on local borrowing escalated rapidly;
- 153.5. the dependency on imported raw materials; and
- 153.6. the assumptions used for the assessment of risks were not rigorous enough.

Recommendations

- 154. In the light of the above findings, it is recommended that greater focus and interrogation must be given post an investment decision to the management and the performance of existing investments, prior to such investments becoming distressed.
- 155. The IT infrastructure for unlisted investments must be addressed as a priority, as at the time of giving evidence, there were no automated portfolio management systems in place. This would make the process of monitoring compliance more efficient and effective.
- 156. A separate workout and restructuring department that would focus on resolving and reconfiguring distressed assets should be established.
- 157. Consideration should be given to the establishment of a stand-alone division within the PIC that looks at investment proposals to be made outside South Africa.
- 158. The role of risk in investment decisions needs to be strengthened, ensuring greater rigour, realistic assumptions and thorough scenario alternatives be examined so as to take more informed decisions fully understanding the downside risks and worst case scenarios.

159. The conditions precedent which applied to the transaction were not implemented. The failure to implement the conditions precedent set out above is a serious management oversight and those responsible should be held to account.
160. When investing abroad, a careful analysis of local partners, who should be established corporates and not individuals or family run businesses, must be undertaken.
161. The documentation submitted to the various committees for decisions must reflect the original amount of funding requested and indicate any changes to such investment amounts, and ensure that shareholding reflects names, ownership percentages, and dates.

Case Study: Lancaster Steinhoff

The Lancaster Steinhoff case study is separated into two parts, namely Project Sierra and Project Blue Buck.

Brief Background to the transaction (Project Sierra)

162. Dr Matjila, in his statement submitted to the Commission, dated 17 July 2019, stated that the reason for making an additional investment in Steinhoff International was a strategic one, driven by *'our desire to influence better governance at Steinhoff ... When Mr Jayendra Naidoo approached us with an opportunity to buy up to 3,5% of shares in Steinhoff that carried special voting rights and a seat on the Board, we thought we had found a solution ...'*¹⁶⁸
163. The investment proposal was prepared by Symphony Capital on behalf of the Lancaster Group, whose sole shareholder is Mr Jayendra Naidoo (Mr Naidoo),

¹⁶⁸ Paras 373 -374 of Dr Matjila's statement signed on 17 July 2019.

for the acquisition of 2.75% of the shares in Steinhoff International Holdings N.V. (SNH) amounting to R9.35 billion. Symphony Capital was paid R76.95 million for this work, and an amount of R22.85 million was paid to Lancaster Group, and to Project Sierra, also known as L101, a subsidiary of the Lancaster Group for other costs incurred.

164. Paragraph 20 of the PIC's appraisal report dated 20 July 2016, states that Mr Naidoo has a long and established relationship with major shareholders of SNH, particularly Mr Christo Wiese. This was confirmed by Mr Naidoo in his testimony before the Commission.

165. Steinhoff had a voting pool arrangement in place, which pool controlled 33% of the company and as a result exercised significant influence over all matters that required shareholder approval. Through this transaction, Mr Naidoo, being the sole Shareholder of Lancaster Group, had been invited to join the voting pool, and Dr Matjila claimed that the Lancaster Group would therefore be able to influence the strategic direction of the business of Steinhoff. The PIC at the time owned 9% of Steinhoff. At no point was the PIC going to get a seat on the Board, and Mr Naidoo in testimony before the Commission stated that the shares were ordinary shares and did not have any special voting rights.¹⁶⁹

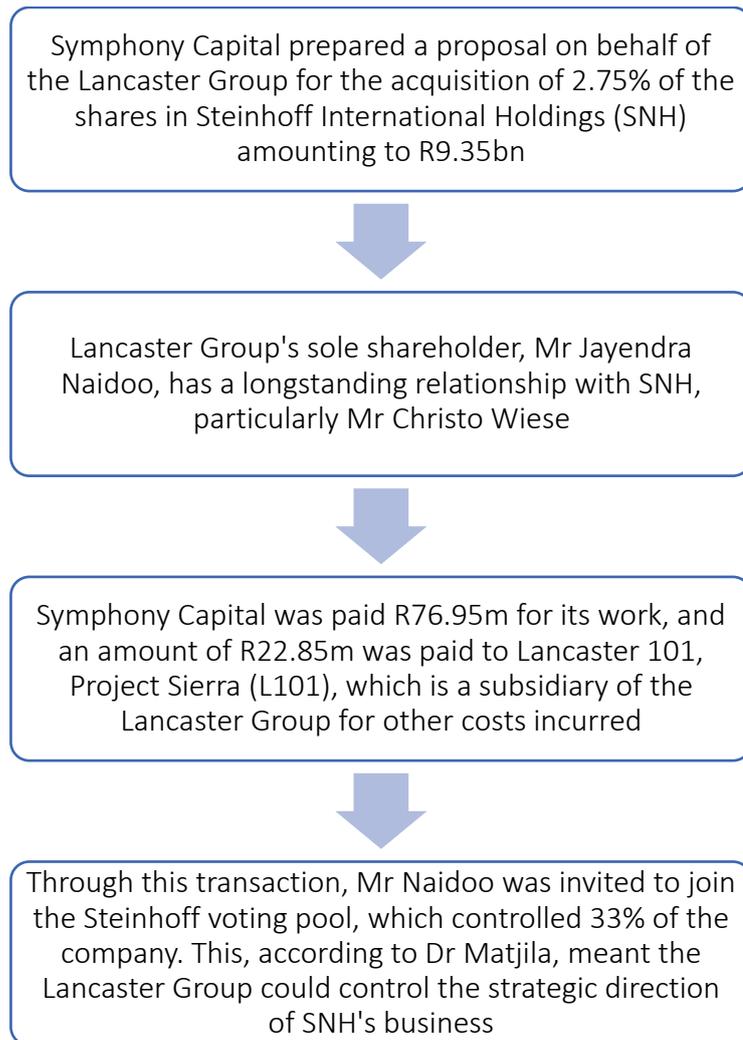
166. The proposal further provided for the PIC to acquire a 50% equity stake in L101 for R50 million, while the Lancaster Group and a still to be established B-BBEE Trust (the Trust) was to own the balance of 50% (25% for each entity) for R50 million. The Trust was later converted to a non-profit company which was approved by the PIC.

167. The total funding provided by the PIC amounted to R9.4 billion (loan + equity). This was reduced from the initial request for R10.4 billion, according to Dr

¹⁶⁹At page 23 of the Transcript for day 63 of the hearings held on 14 August 2019.

Matjila, so that the investment decision would fall within his delegated authority and would not have to be referred to a higher committee or the Board for consideration.

168. An equity derivative backed financing structure was put in place by L101 (ratio collar structure), with the PIC's capital guaranteed by an international bank (Citibank) through a primary cession and pledge of L101's put option proceeds as security for its loan obligations. The security package initially put in place by the PIC ensured that it would not lose its capital. However, the security arrangements were altered with 100% of the primary cession being granted to Citibank for it to provide R6.5 billion to fund the transaction as part of a second phase of the transaction, known as Project Blue Buck (L102), which is dealt with in further detail below. The re-ranking of the security package was a condition by Citibank for making the loan to L102 for it to purchase a 5,9% equity interest in Steinhoff's JSE-listed subsidiary, Steinhoff African Retail Limited (Star).
169. The diagram below summarises the transaction that took place in respect of Project Sierra:



Findings and Recommendations

170. The PIC could have purchased any quantum of Steinhoff shares outright in the market instead of entering into a transaction to do so through Mr Naidoo, the sole owner of the Lancaster Group. The 'joining' of the 'voting pool' by Mr Naidoo did not materialise and later became what was then known as a 'Retail Forum', which, according to Mr Naidoo, is less formal than a voting pool.

171. The IC of the PIC approved the transaction on 5 August 2016, consisting of a term loan to and equity subscription in L101 of R9.4 billion. The chair of the IC was Mr Roshan Morar (Mr Morar), a PIC non-executive director, who signed off on the IC resolution for this investment. At the same meeting, he was also appointed as a board member to L101 representing PIC's interests which clearly indicates a conflict of interest. He continues to be a director of the Lancaster Foundation which is a non-profit company.
172. As at the end of February 2019, the amount outstanding on this loan was approximately R11.6 billion with interest accrued. The loan has not been serviced by L101 to date. The dividends from the non-delta shares (shares not used for the ratio collar) would be used to service the loan and any accrued interest not serviced would be capitalised to the loan.
173. On 26 September 2016, a Stock Exchanged News Service (SENS) was put out by Steinhoff stating that a 2.5% underwriting commission was paid to the Lancaster Group (this was not reflected in L101's financials) when the shares were subscribed for in Steinhoff – 303 million (60 million shares at share price € 5.055) per the SENS x 2.5% = € 7.58 million x 15.03 (€/ZAR FX rate in SENS) = R114 million was paid to the Lancaster Group, and not to L101.
174. The Commission finds that it would not have been possible for these shares to have been subscribed for by L101 had it not been for the funding advanced by the PIC. Yet the underwriting commission was paid to the Lancaster Group, whose sole shareholder is Mr Naidoo. When queried about this during his evidence before the Commission, Mr Naidoo said that he had informed the PIC of this payment, confirming that he had mentioned this to Dr Matjila. The deal team had been notified, and they had not raised any concerns about it.¹⁷⁰ This has not been substantiated in the correspondence and the emails provided to the Commission. These show that Dr Matjila was copied in on Mr

¹⁷⁰ At page 36 of the Transcript for day 63 of the hearings held on 14 August 2019.

Naidoo's correspondence with Mr Deon Botha (Mr Botha) from the PIC concerning the wording of the SENS release as mentioned above, but there is no written response from him. No deal team member was copied in as per the emails provided to the Commission.

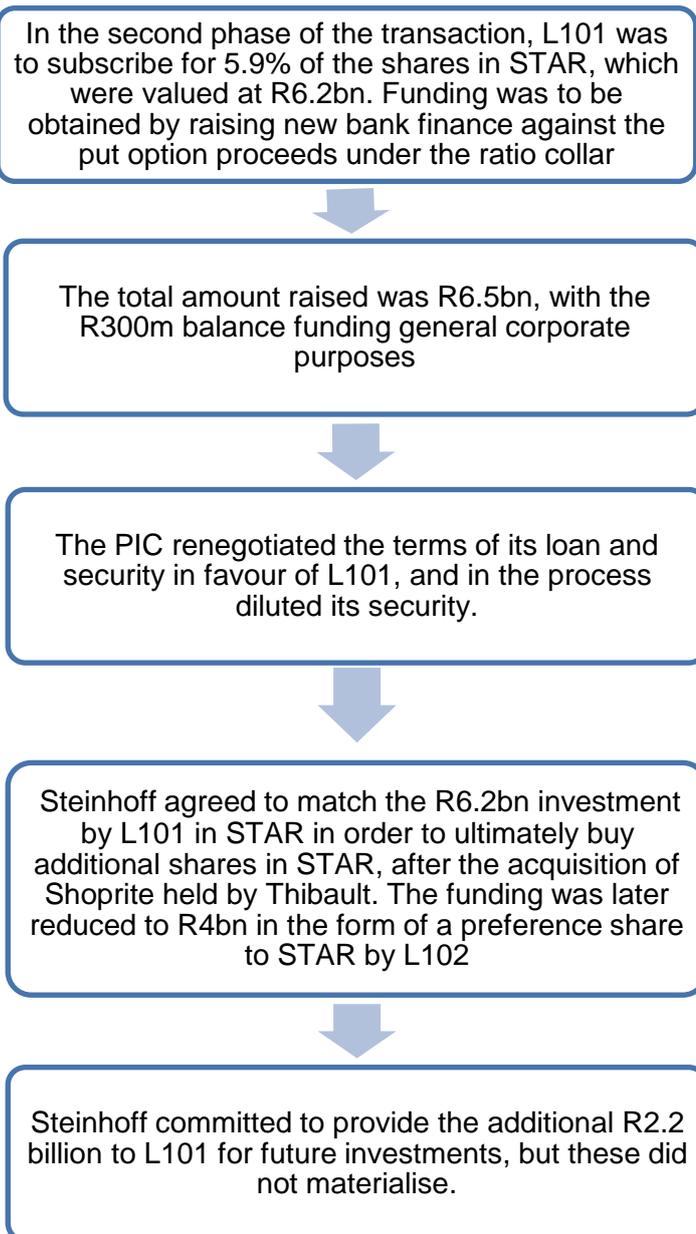
175. It is questionable whether the Lancaster Group or L101 should have received an underwriting commission at all, and whether this should have gone to the PIC itself. In his testimony, Mr Naidoo said this was never discussed. When Dr Matjila was questioned by the Commission about whether he was aware of the underwriting commission earned by the Lancaster Group, he denied knowing anything about it.
176. Therefore, Dr Matjila denied knowing about the underwriting commission, despite Mr Naidoo stating that he had informed Dr Matjila about it and there is no evidence indicating that the deal team was notified about the payment of the underwriting commission to the Lancaster Group. Based on the evidence of Mr Naidoo, it also appears that no discussion took place in relation to whether the commission should have been paid to L101, instead of the Lancaster Group.
177. The Commission recommends that the PIC must obtain a legal opinion as to whether the R114 million underwriting commission that was paid to the Lancaster Group, should have been paid to L101, or if it was in fact due to the PIC, and if the latter is shown to be the case, appropriate steps should be taken to recover the money.
178. It should further be noted that a total of R100 million in equity contributions were made by both the PIC and Mr Naidoo, which funds were to be used for working capital purposes. Mr Naidoo has yet to provide the December 2016 signed annual financial statements to prove that these monies were still in the bank account. He provided signed December 2017 annual financial

statements, but these included the Blue Buck transaction, therefore the cash amount reflected would be skewed. Mr Naidoo in his statement claimed that the cash is all there, but in different bank accounts.

179. The Commission has noted that the PIC did not use any transaction advisors, notwithstanding the complexity of the proposed structure and deal. The PIC team indicated that the Lancaster Group then dictated the terms through their advisors, Symphony Capital, essentially setting out the approach, complexity of instruments, the derivative modelling calculations and scenario payoffs. This is found to have placed the PIC team at a significant disadvantage.
180. As indicated in paragraph 167 above, the Commission has also noted that the original proposal to the PIC was for an amount of R10.4 billion, which was subsequently reduced down to R9.4 billion to fall within Dr Matjila's delegated authority of R10 billion so that the Board's approval would not be required.
181. The Commission finds that the conduct of Dr Matjila was wholly improper in that he admitted to the investment amount being reduced in order to enable the decision to fall within his delegated authority. This might be taken to indicate collusion between Dr Matjila and Lancaster, given that the value of the investment amount was reduced in order to secure Dr Matjila's approval, which was granted. Due process would have required the proposal to be referred for Board approval since, in its original form, it did not fall within the CEO's delegated authority.
182. The Commission recommends that the PIC's MOI and all DoAs regarding the PIC's investment decision making framework be amended to require the Board to approve any amendments to proposals which require the Board's approval when they are submitted to the PIC.

Brief background to the L102 transaction (Project Blue Buck)

183. L101 was to subscribe for shares in STAR for R6.2 billion (5.9%). This was to be funded from raising new bank finance against the put option proceeds under the ratio collar (this was PIC's guarantee of its capital for the term loan to L101 - Project Sierra). The amount raised in total was R6.5 billion with the balance of R300 million funding general corporate purposes, value enhancing strategies and transaction costs.
184. The PIC loan and security package was re-negotiated in favour of L101 and essentially was diluted with an addition in security over the shares that L101 would acquire in STAR through a primary cession and pledge over these shares.
185. Steinhoff agreed to match the R6.2 billion of funding being invested by L101 in STAR in order to ultimately buy additional shares in STAR, after the acquisition of Shoprite held by Thibault. Due to free float issues, the funding was later reduced to R4 billion in the form of a preference share to STAR by L102 (100% subsidiary of L101). Steinhoff committed to provide the additional R2.2 billion to L101 for future investments, which did not materialise.
186. The diagram below summarises the transaction that took place in respect of Project Blue Buck:



Findings

187. A significant amount of money had already been loaned to one individual, Mr Naidoo was ready to entertain a second transaction, notwithstanding that the terms of their loan and security package were diluted in favour of L101.

188. The reasons provided by Dr Matjila for his decision to invest in Steinhoff through Mr Naidoo reflect a disregard for the interests of the clients of the PIC in pursuit of an ostensible ability to secure influence over a JSE listed company. Given that Mr Naidoo is also a PEP, the PIC was obliged to ensure a thorough due diligence was undertaken. Yet the PIC IC, and Dr Matjila, approved a transaction that would significantly enrich a single individual, and at the same time took decisions that removed the safeguards that were in place to protect the interests of the PIC.
189. The PIC renegotiated the terms of its loan and security and in the process diluted its security as the loan capital was no longer guaranteed. The proceeds from the ratio collar put option proceeds of L101 were then ceded in favour of an international bank, which would then fund the R6.2 billion acquisition of STAR shares by L101. PIC agreed to a reversionary cession and pledge on these proceeds (their loan capital no longer guaranteed) whereas previously it had a primary cession and pledge over these proceeds (their loan capital was guaranteed).
190. As at 30 September 2019, the loan amount outstanding on Project Sierra, plus accrued interest, was R11.9 billion. The dividends from the non-delta shares (shares not used for the ratio collar) had not been sufficient to service the loan and accrued interest had been capitalised to the loan.
191. The only security the PIC has that has any value today, is the primary cession and pledge over the STAR shares (known as Pepkor today) which could be sold in order to set-off the debt owed under Project Sierra. As at 28 October 2019, Pepkor was trading at R16.84 a share. If the PIC was to insist on such a sale, the proceeds would be R5.1 billion (302 439 024 shares x R16.84), which would be offset against the total amount owed to the PIC of R11.9 billion, realising a loss of R 6.8 billion.

192. It is concerning that the PIC approved the first and second transactions and transferred the funds, notwithstanding that the Lancaster Group had not established the B-BBEE Trust, which the PIC had insisted that L101 create and was part of the proposal submitted to, and approved by, the PIC, and which was to own 25% of L101 (with the PIC owning 50% and the Lancaster Group, i.e. Mr Naidoo as the sole owner of Lancaster Group, owning 25%). The PIC's decision to proceed with the transaction despite the Lancaster Group not having complied with the terms of the proposal, specifically the establishment of the Trust that was to own a 25% stake in L101, was an inexplicable waiver of the PIC's right to defer the transaction as a result of the Lancaster Group's failure to adhere to the conditions upon which its proposal to the PIC was approved. Those responsible for this very material oversight must be the subject of disciplinary action within the PIC.
193. It would have also been appropriate for the PIC to ensure that conditions precedent were expressly agreed to as part of the approval of the transaction, particularly with regard to the date for the establishment of the Trust, prior to any transfer of funds. This would have enabled the PIC to monitor and enforce such conditions and to cancel the transaction if such conditions precedent were not adhered to by the Lancaster Group.
194. It should also be noted that, although the initial approval by the PIC was for the establishment of a Trust; there was a subsequent request for the Trust to be converted into a non-profit company, which the PIC approved. The non-profit company was only established in 2017, a year after the transaction was finalised.
195. The PIC agreed to a second transaction with the same individual, Mr Naidoo, ignoring both cumulative and counterparty risk, at great cost to the PIC/GEPF.

196. A B-BBEE transaction with one individual cannot be construed as a broad-based empowerment transaction and does not comply with the Structured Investment Products mandate to facilitate B-BBEE given by the GEPF. The PIC essentially imposed the creation of an empowerment trust on the Lancaster Group, but provided the funding without it being in place.
197. The PIC did not adhere to its criteria for funding B-BBEE as these two transactions had a single individual as a counterpart. The transaction also enabled significant enrichment to accrue to a single individual.
198. Refer to the findings and recommendations made in the Matome Maponya Investment case study in Chapter III, for a detailed review of single counterparty limits.
199. Reference must also be made to the findings contained in Chapter IV: Responsibility and Accountability.

Case Study: Erin Energy Limited

200. Erin Energy Corporation (Erin), previously known as Camac Energy Incorporated (Camac), is an oil and gas exploration company that sought, in February 2014, a secondary listing on the Johannesburg Stock Exchange (JSE). Camac was a company based in the United States of America, with primary listing on the New York Stock Exchange (NYSE). It operated in certain African countries, including Nigeria, Kenya and the Gambia. Although the Commission was advised by the Evidence Leader that the PIC had no documentation or minutes of the investment, it seems common cause that in 2014 it (PIC) acquired an equity interest in Erin. Mr Andries Francois Visser (Mr Visser), General Manager for Issue Regulation at the JSE, testified about a letter from the PIC addressed to the JSE, dated 21 February 2014 and signed by Mr Leon Smit, General Manager for Fixed Income division and Dr

Matjila, when still the CIO, in which the PIC confirmed that on the day of the secondary listing of Camac an injection of USD135 million would be made. A further amount of USD135 million would be paid 90 days thereafter.¹⁷¹ Ultimately, the PIC's total exposure in Camac stood at USD270 million.

201. The listing on the JSE was granted with effect from 24 February 2014 after certain conditions precedent were fulfilled, one of which being that an injection of an amount of USD135 million be made by the date of listing. It is not in dispute that in 2013 Camac (which shall henceforth be referred to as 'ERIN') declared that it was technically bankrupt. This fact was not disclosed to the JSE in the pre-listing statement. It appears that the capital injection from the PIC addressed the liquidity problem.
202. ERIN's assets comprised two oil mining leases (OML 120 and 121), located next to each other in the Oyo Field, which is in turn located in deep water off the coast of Southern Nigeria and certain blocks located in the Gambia and Kenya. Drilling for oil reserves was expected to commence in September 2013 with the Oyo 7 well.¹⁷² By virtue of the cash injections (totaling USD 270million) made by it, the PIC acquired 30% shareholding in ERIN¹⁷³.
203. During May 2016, ERIN approached the PIC for a guarantee in the amount of USD100 million to cover loan funding it had requested from the Mauritius Commercial Bank. The loan funding was intended to enable ERIN to increase its production and to support its operations, including the drilling of new wells. The PIC teams prepared the necessary reports in which they recommended the approval of the transaction to the Investment Committee . The Investment Committee considered ERIN's request at its meeting held on 3 June 2016 and resolved to approve it. ERIN then obtained a loan facility for the amount of the

¹⁷¹ At pages 39-40 of the Transcript for day 40 of the hearings held on 27 May 2019.

¹⁷² See para 29 of memorandum dated 16 September 2013 (annexure '3' in the ERIN file) and referred to by Dr Matjila at page 28 of the Transcript for day 57 of the hearings held on 22 July 2019.

¹⁷³ Ibid, para 2.

guarantee from the Mauritius Commercial Bank (MCB). There is no evidence before the Commission to support a finding of impropriety in the PIC's decision to approve the provision of a guarantee in favour of the lender, Mauritius Commercial Bank. It is necessary, however, to make the following observations.

204. In their report the risk team of Mr Tshifhango Ndadza (Mr Ndadza), a market and credit risk analyst, as compiler, and Mr Paul Magula (Mr Magula), as reviewer, had recommended that the approval of the guarantee be subject to a number of conditions. One of those conditions was a requirement that ERIN's management 'successfully' reach agreement with its creditors that they would not enforce their right to place the company under receivership. In its wisdom, the Investment Committee did not include the recommendation as a condition precedent to the approval coming into effect. It is interesting to note that the committee that made the 2013 decision to invest in ERIN had done likewise: it failed to include, as a condition precedent, a recommendation that the second tranche of the funds invested should only be released upon completion of a certain oil well, which must be able to produce 8 000 (eight thousand) barrels of oil per day. That production rate was never attained.

205. In a document dated 11 May 2018, headed '*INVESTMENT COMMITTEE – UPDATE MEMO: ERIN ENERGY CORPORATION*' it is recorded (at para 19) that –

'[o]n 25 April 2018, it came to the attention of the PIC that Erin filed for bankruptcy under Chapter 11 in the United States'

206. And (at para 29):

*'The bankruptcy proceedings remain ongoing and the PIC shall monitor the development therein.'*¹⁷⁴

207. It is understood, from certain media reports in Nigeria, that in 2019 the Nigerian government revoked ERIN's oil mining licence/lease (OML) 120 and 121. The reason for the revocation was stated as ERIN's 'legacy debt'. ERIN had not paid taxes and royalties that became due to the government.

208. Erin had drawn down on the MCB loan facility amounts totaling approximately USD67 million, which the PIC has had to pay as guarantor. On 8 May 2018 the IC of the PIC passed a resolution authorizing the PIC *'to step in and take MBC's position as a lender to Erin Energy on the facility of USD100 million, and settle the outstanding facility capital and interest amount to MBC and make every effort to have this facility repaid.'*

209. A disturbing feature about the decision to provide the guarantee is that it seems that no proper due diligence was done before the decision was made. Indeed, Mr Ndadza testified that he did not go on the due diligence exercise because Mr Magula was uncomfortable with the transaction.¹⁷⁵ Mr Jeff Tshikhudo (Mr Tshikhudo) said that oil is a very specialized field and that the PIC needed highly qualified people to do the due diligence.¹⁷⁶ Dr Matjila also weighed in, saying that legal risk had not been done properly and that deeper legal assessment should have been undertaken.¹⁷⁷

210. Mr Tshikhudo also testified that he was sent to attend a workshop at Erin's headquarters in Houston, Texas in March 2017 and thereafter to review the investment thesis and the probability of the PIC earning a return from the

¹⁷⁴ Annexure '2' in the Erin file referred to in footnote 1.

¹⁷⁵ At page 57 of the Transcript for day 37 of the hearings held on 20 May 2019.

¹⁷⁶ Ibid. page 82.

¹⁷⁷ At page 90 of the Transcript for day 57 of the hearings held on 22 July 2019.

investment, and to advise on the next step the PIC should take.¹⁷⁸ It is reasonable to infer from this exercise that the PIC was not convinced about the investment and still needed to know more about the entity and its operations. Mr Tshikhudo did conduct a review of the investment case in April 2017 and prior to the drilling of Oyo 9 and 10 wells, he said, and submitted a report to the PIC in which he stated that Erin was insolvent and required capital injections to remain a going concern.

211. According to Dr Matjila, the reason why Erin did not survive was a dramatic drop in the oil price and a dispute surrounding what was believed to be its assets, namely, ownership of the oil mining leases or licenses (OML 120 and 121).¹⁷⁹ At the time of the initial investment Erin was not a 100% owner of the interest in the oil mining leases. As Camac, it only owned 12.5 %, with the hope of acquiring the other 87.5% interest from the entity that owned it. Litigation between this entity and a third party culminated in the third party closing off Erin's operations. Dr Matjila testified that the ownership dispute was not known to the PIC and had not featured in Erin's prelisting statement.¹⁸⁰

212. The other contributing factor to Erin's failure to survive was the oil rig that was used on site which developed mechanical problems and had to be removed, with the result that production was interrupted. By the time another rig was secured the oil price had dropped dramatically. Dr Matjila conceded that the Erin transaction was a 'very poor' investment and that the PIC has lost the money it invested in Erin.¹⁸¹ In the Commission's view, there was substance in the media reports in 2017/18 that the PIC stood to lose its R4 billion

¹⁷⁸ At page 87 of the Transcript for day 37 of the hearings held on 20 May 2019.

¹⁷⁹ At pages 79-80 of the Transcript for day 57 of the hearings held on 22 July 2019.

¹⁸⁰ Ibid. page 48.

¹⁸¹ Ibid. page 57.

investment in the Houston-based oil company, Camac Energy, as it files for bankruptcy.

Findings:

213. In approving the transaction to provide a guarantee of USD100 million while disregarding the recommendation of the market and credit risk analyst, Mr Ndadza, and the reviewer, Mr Magula, to approve the transaction subject to certain conditions precedent, the Investment Committee acted improperly.
214. In addition, no thorough due diligence and legal risk assessment was done to enable the Investment Committee of the PIC to give proper consideration to Erin's application for funding and for the provision of the guarantee referred to in (a) above. Mr Ndadza said he did not go to due diligence because Mr Magula was uncomfortable with the transaction.
215. The impropriety is in contravention of the investment policy of the PIC relating to investment processes.
216. This investment has resulted in significant losses for the PIC – the original investment of \$270 million and a further \$67 million that Erin had already used of the MCB loan when it filed for bankruptcy. There is no evidence that the impropriety or contravention resulted in any undue benefit for any PIC director, or employee or any associate or family member of any PIC director or employee at the time.

Recommendations

217. The Commission is of the view that if due diligence and legal risk assessment had been given proper attention by the relevant teams, the difficulties encountered by the investee company, Erin, would probably have been

highlighted. Their respective roles therefore need to be strengthened so as to ensure that no investment decisions are made without full and proper due diligence and risk assessments having been undertaken.

218. The PIC should investigate what measures can be taken to retrieve any tangible assets of Erin to reduce losses, and engage with the Nigerian government in this regard if deemed appropriate

Case Study: Ascendis Health Transaction

219. The PIC concluded two transactions that involved the same B-BEEE company and Mr Lawrence Mulaudzi (Mr Mulaudzi) from Kilimanjaro Capital (KiliCap), namely Tosaco and Ascendis.¹⁸²

220. Dr Matjila, in his testimony before the Commission, confirmed Mr Maluadzi's testimony that he received the Ascendis proposal from him a few days after receiving the TOSACO proposal.¹⁸³ In this instance, Shkhara Health, a recently incorporated company, was to be the investment vehicle. Shkhara requested the PIC to provide R1.25 billion to purchase R1 billion worth of shares in Ascendis Health and R250 million worth of shares in Bounty Brands.

221. Dr Matjila stated that the '*shareholding of Shkhara was very much similar to KiliCap but with extra PEPs. The team requested them to clean up the structure and broaden the shareholder base*'.¹⁸⁴

¹⁸² See the TOSACO case study below and other references to the Ascendis transaction in the report.

¹⁸³ Paras 359-360 of Dr Matjila's statement signed on 17 July 2019.

¹⁸⁴ Ibid. para 60.

222. A new entity, Kefolile Health Investments (Pty) Ltd (KHIH) was formed, and replaced Shkhara. At this stage, the requested investment increased by R500 million to R1.775 billion, without any reason being provided.
223. Addressing the Ascendis Health Transaction (Ascendis), Mr Mulaudzi stated that *'In April 2015, KiliCap was introduced to a company called Coast2Coast Capital (C2C), by their then mandated advisors, Avior Capital Markets. Our understanding was that Avior was mandated by C2C to find suitable investors to support the growth strategy and increase B-BBEE participation in Ascendis. C2C were the founding shareholders in Ascendis and remained the largest shareholder after their listing on the JSE in 2013'*.¹⁸⁵
224. The outcome of their discussions was the creation of a special purpose vehicle (SPV) being a new company called Shkhara Health (Shkhara). The proposed transaction that was taken to the PIC included a direct investment in Ascendis through the issue of new shares that would result in a 10%-15% shareholding, as well as an investment in Bounty Brands, another C2C company, as indicated in paragraph 220 above.
225. In his statement¹⁸⁶, Mr Mulaudzi stated that once the PIC had approved that due diligence could go ahead, BNP Capital was engaged as their independent transaction advisors on the advice of the PIC.¹⁸⁷ An engagement letter was also signed with the PIC. During this period, Shkhara's exclusivity with C2C expired. C2C indicated that to take the transaction forward, Shkhara's B-BBEE had to be more diversified and not mainly limited to directors of KiliCap. Consequently, KiliCap established a broader B-BBEE consortium – Kefolile Health Investment Holding (Kefolile).

¹⁸⁵ Paragraph 34 of Mr Mulaudzi's statement signed on 26 March 2019.

¹⁸⁶ Para 43 of of Mr Mulaudzi's statement signed on 26 March 2019.

¹⁸⁷ Para 346 of Dr Matjila's statement signed on 17 July 2019 and para 4 of Mr Pholisani Daniel Mahlangu's statement signed on 1 October 2019.

226. The transaction that was then submitted to the PIC for approval included an investment in Ascendis of R1.369 billion and an investment in Bounty Brands of R406 million, an increase of R275 million for the same transaction originally submitted.¹⁸⁸ This transaction was approved by the PIC at the end of June 2016.

227. According to the PIC transaction documentation, the funding was to be utilised as follows:

227.1. R600 million - direct equity into Ascendis

227.2. R100 million - Ascendis Pharma Med (Pty) Ltd

227.3. R650 million - convertible debenture instrument into Coast2Coast

227.4. R19 million – transaction cost

228. During the review of the deal and the legal documentation, the Commission found that R500 million was used to buy Ascendis shares, and not the R600 million to purchase direct equity as approved by the PIC. The difference of R100 million seems to have been added to the transaction costs/fees paid to related parties of Kefolile Health Investments.

229. As indicated in the financial statements of Kefolile Health Investments for the year ended 30 June 2018, and the Portfolio Monitoring and Valuations (PMV) report of PIC dated March 2019, transaction fees were paid to the following related parties:

¹⁸⁸ Para 48 of Mr Mulaudzi's statement signed on 26 March 2019.

229.1. Blackgold Oil and Gas (Pty) Ltd – R80 million (an entity of Mr Mulaudzi)AVACAP (Pty) Ltd – R39 million (an entity of Mr Mulaudzi).

230. The Commission reviewed bank account statements of Blackgold Oil and Gas (Pty) Ltd and found that an amount of R79.8 million was received on 19 August 2016, with reference ‘Kefolile Health Investments’.

231. The investment was not initially approved but, according to Dr Matjila *‘[a]t some point Ms Sibusisiwe Zulu [non-executive Board member] asked Mr Rajdhar to bring back the transaction for consideration by the Social and Economic Infrastructure and Environmental Sustainability FIP (SEIES -FIP) which is chaired by Ms Zulu and which is a sub-committee of the Investment Committee.’*¹⁸⁹ In June 2016, as chairman of the SEIES FIP, Ms Zulu signed the resolution passed at the meeting held on 28 June 2016, where it was resolved by the SEIES FIP that the PIC provide the funding on behalf of the UIF to Kefolile.

232. In his statement, Mr Mulaudzi states that:

‘A few months after we concluded the Ascendis transaction, I received a call from Dr Dan Matjila who wanted to introduce me to a lady by the name of Pretty Louw. He informed me that she was involved in the beauty sector (she owned a beauty salon and spa) and requested that I source business opportunities and/or participation for her in Ascendis as part of the company’s enterprise development... I informed Dr Matjila that I was not aware of any such opportunities available in the business but would check ... A few months had passed... I then received a call from Dr Matjila, requesting my urgent assistance. He advised that the same lady ... was in financial trouble ... He asked me to urgently come to her rescue by settling her debts

¹⁸⁹ Para 361 of Dr Matjila’s statement signed on 17 July 2019.

*... I made an EFT payment of R150 000.00 to the lawyers account. Ms Louw then contacted me the following day [saying] that the lawyers required the balance of the arrears before allowing them to go back to their business. She told me that Dr Matjila had also informed them that I would settle the debt in full ... I made the second payment to the same lawyers account of R150 000.00 and sent proof of payment thereof to Ms [W] Louw [of the PIC]. I also confirmed telephonically with Dr Matjila that I had done the payments as per his request.'*¹⁹⁰

233. The Commission's investigators reviewed the bank statements of Maison Holdings (the entity of Ms P Louw), that reflected an amount paid into Maison Holding's bank account on 6 September 2016 amounting to R40 000 with reference Blackgold (Blackgold is one of Mr Mulaudzi's entities). This date is only a few days after Blackgold received the R79.8 million from Kefolile. This seems to be a further payment made to Ms P Louw, but which was not mentioned by Mr Mulaudzi in his testimony.

234. Mr Mulaudzi concluded that *'at no point did I regard this as a loan. This was based on the request made by Dr Matjila ... there is no way I would have said no to the CEO of the PIC ... as a businessman, you never wanted to be ostracised by Dr Matjila. It is known in the investment space that his influence was significant ...'*¹⁹¹

235. Mr Mulaudzi, in his testimony before the Commission, confirmed his personal relationship with Ms Zulu, but stated that Ms Zulu had no influence over any of his investments funded by the PIC. He stated that *'I can confirm that I have a love relationship with Ms Zulu. This is, from my perspective, a serious and committed relationship and I consider Ms Zulu as my partner ... I connected*

¹⁹⁰ Paras 52-58 of Mr Mulaudzi's statement signed on 26 March 2019.

¹⁹¹ Paras 59-61 of Mr Mulaudzi's statement signed on 26 March 2019.

with Ms Zulu in November 2017 ... (and) we solidified our relationship later in 2018 ... I have not attempted to influence her professional views in any way and have never expected any undue influence from her through the positions she holds, including at the PIC.¹⁹²

236. Responding to the allegations made in the Nogu emails, Mr Mulaudzi said *'the allegation by the unknown source that I gave her R40 million from the R100 million fees KISACO received in the Total deal is false ... Having dealt with the PIC, it is my understanding that it is the deal team that must find an investment proposal commercially viable in order for it to go through the approval processes. I therefore find it difficult why anyone would think a non-executive director could have ... influenced such a process...'*¹⁹³

237. The share price of Ascendis Health was around R20 per share at the time the PIC made the investment, but at the time of the hearings stood at R4,69. A delay in releasing its annual results in 2019 saw the share price fall to R3.85 on 2 October 2019. Mr Mulaudzi stated that, at the time of the hearings, the interest received from the investment due to the PIC was being paid.

Findings

238. The Ascendis transaction was presented to the PIC at virtually the same time as the TOSACO transaction, yet the two appear to have been considered by the relevant PIC approval committee as two discrete investments, notwithstanding the comment below.

239. The PIC approval conditions, in this instance how the funding was to be utilised, were very specific. Yet again the Ascendis investment shows that the PIC's weakness, indeed failure, to monitor the implementation of the decision,

¹⁹² Paras 65 to 69 of Mr Mulaudzi's statement signed on 26 March 2019.

¹⁹³ Paras 70 – 71 of Mr Mulaudzi's statement signed on 26 March 2019.

and ensure that the funds provided were used as approved, is evident. Transaction costs were determined as R19 million, yet there is a payment to Mr Mulaudzi of R79.8 million from Kefolile.

240. Dr Matjila states that *'we had to buy some time to assess the performance of Kisaco in the Tosaco transaction before we commit to another entity led by Mr Mulaudzi'*.¹⁹⁴ It is highly questionable that the approach to be taken is one of buying time to assess the previous transaction. This borders on reckless investing, and timelines should not drive deal decisions.
241. Ms Zulu requested Mr Rajdhar to bring the Ascendis transaction back for consideration by a committee that she chaired. Mr Mulaudzi asserts that he has *'not attempted to influence her professional views in any way and have never expected any undue influence from her through the positions she holds, including at the PIC'*.¹⁹⁵ Yet, the sequence of events and the eventual outcomes raise significant concerns as to the role of non-executive directors in investment decision making, as well as undue and inappropriate influence from the Board. This is a critical matter. Clearly, as chair of the relevant committee Ms Zulu played a significant role, not only in getting the deal back onto the table but in the recommendations to make the investment.
242. Dr Matjila's repeated efforts to have Mr Mulaudzi provide financial assistance to Ms P Louw reflects the abuse of his office and influence over investee companies. The investigative work into tracing the money also raises concerns as to how influence and advisor fees were utilised behind closed doors, and that fees may have been paid out of client funds, regardless of value received.

¹⁹⁴ Para 360 of Dr Matjila's statement signed on 17 July 2019.

¹⁹⁵ Para 69 of Mr Mulaudzi's statement signed on 26 March 2019.

Recommendations

243. The PIC must undertake a forensic audit of the utilisation of the funds provided to Ascendis to ensure they were utilised as approved, and legal avenues be pursued to recover any money not utilised in accordance with the PIC approval stipulations.
244. Parallel investments in different transactions with a common counterparty should be limited by the PIC both in number and value.
245. Coordination within the PIC between the different approval structures and processes must be addressed to ensure that investments and exposures to an entity or counterparty are clearly understood, and that cumulative financial and reputational risk is integral to risk assessment.
246. The role of non-executive Board members in investment decisions must be reviewed and the relevant PIC legislation and DoAs reconsidered. The matters of governance and oversight must be given a higher priority and role. Such a review should be completed by no later than June 2020.
247. Controls must be put in place to ensure investment decisions as approved in the governance process are implemented in the actual transaction prior to funds being dispersed.
248. The PIC should reconsider the use of SPVs and layered legal entities within investment structures, or ensure there are appropriate mechanisms to enforce its rights.

Case Study: KARAN BEEF

249. The media report relating to the Karan Beef transaction did not contain any allegations of impropriety in the investment decision, but rather reported on

Karan Beef's intended merger with another entity and the involvement of the Competition Commission regarding the merger. Allegations of impropriety came by way of the email of 30 January 2019, referred to in Chapter I of the report, from a sender with the name or pseudonym 'James Noko'. It was alleged in the email that a non-executive director of the PIC, Ms Hlatshwayo, as chairman of the IC, approved the Karan Beef transaction, in which a high ranking politician, Mr Paul Mashatile, Treasurer-General of the ANC, has a financial interest, held through another individual. It was also alleged that the construction of the deal was simply to inflate the selling price by R1 billion, and to pay the amount to Mr Mashatile.

250. In the first paragraph on page 2 of the email, the following is stated:

'when we queried why the valuation in Karan Beef was inflated by R1bn to make it R6bn whereas we had on earlier application from a different group with the same transaction at R4.5bn, we were told by Dr Dan [Matjila] not to ask questions as this transaction was urgent and it was for the T.G. [Treasurer-General].'

251. Despite numerous invitations issued by the Evidence Leader and announced by the Commissioner during hearings, for those with information relevant to the Commission's Terms of Reference to come forward, no one came forward to substantiate the allegations made in the email referred to above. The only person who submitted a comprehensive statement to the Commission, signed on 29 May 2019, was Mr Sello Adson Motau (Mr Motau), who was alleged in the email to be the boyfriend of Ms Hlatshwayo. Mr Motau denied the allegations made against him and specifically the allegation that he was intimately involved with Ms Hlatshwayo.¹⁹⁶

¹⁹⁶ Para 13 of Mr Motau's statement signed on 21 May 2019.

252. Mr Motau was involved in the Karan Beef transaction as the transaction advisor and claimed to have 'in depth' knowledge of the transaction. Mr Motau is a director of Theko Capital (Pty) Ltd (Theko), which provides corporate advisory services in various sectors. He averred in his statement that his involvement with the PIC in the Karan Beef transaction was purely advisory. Mr Motau stated that to the best of his knowledge the selling price of Karan Beef was not inflated and that an independent and detailed valuation was done by one of the leading investment banks in the country, namely, Rand Merchant Bank, which provided a valuation range to the B-BBEE consortium (Pelo Agricultural Ventures (Pty) Ltd), that sought PIC funding to acquire a stake in Karan Beef.¹⁹⁷

253. Mr Motau sets out, in his statement, the route the transaction proposal took through the PIC investment process, going through PMC1, PMC2 and ultimately the Investment Committee, which approved the transaction on 14 August 2018, on certain conditions. One of the conditions was that the selling price be capped at R5.2 billion, while the sellers' valuation was R6 billion. That condition was met together with the others. However, since the resignation of the whole Board of the PIC on 1 February 2019, the transaction has stalled – the executive, according to Mr Motau, decided that the deal should be referred back to PMC2.¹⁹⁸

Finding

254. The allegations in the James Noko email of corruption and impropriety in the Karan Beef transaction have not been substantiated. There is therefore no substance in them. Consequently, no finding of impropriety in the investment decision in the Karan Beef transaction can be made.

¹⁹⁷ Para 13.4 of Mr Motau's statement signed on 21 May 2019.

¹⁹⁸ Paras 28 – 41 of Mr Motau's statement signed on 21 May 2019.

Mobile Satellite Technologies

255. In its interim report, the Commission mentioned, that it was unable to make findings in relation to the allegations leveled against Dr Matjila in the James Nogu email of 5 September 2017, since it had not heard any evidence on the matter.¹⁹⁹ The Commission was provided with the report compiled by Advocate Geoff Budlender SC (the Budlender report), who had dealt with the matter.²⁰⁰ As a Commission document, the Budlender report consequently became public. With regard to the allegations that Dr Matjila had funded Ms P Louw and that she was his girlfriend, Dr Matjila denied that there was ever a romantic relationship between them and that he funded her in the amount of R21 million through her company, Maisons Holdings, a health spa co-owned by Ms P Louw and Ms Annette Dlamini (Ms Dlamini).
256. Dr Matjila conceded, however, that he met the two women for the first time at the OR Tambo International Airport where they were introduced to him by then Minister of Intelligence, Mr David Mahlobo.²⁰¹ He had been invited by the former Minister to meet him at the airport. He obliged even though he did not know what would be discussed between them, nor did he enquire as to the purpose of the meeting. It turned out that it was to request the PIC to help Ms Louw and Ms Dlamini with their investment proposal. Dr Matjila said the PIC could not fund their business, Maisons Holdings, which was in financial difficulty, and referred them to other funders.²⁰²
257. Dr Matjila also introduced them to Kefolile Health Investment Holdings (Kefolile) through Mr Lawrence Mulaudzi (Mr Mulaudzi), the lead promoter. The PIC had previously funded three entities in which Mr Mulaudzi has an

¹⁹⁹ Para 12 of the Commission's Interim Report dated 15 February 2019.

²⁰⁰ A copy of the Budlender report was handed in and forms part of the record, attached hereto as Appendix Three.

²⁰¹ At pages 27-28 of the Transcript for day 55 of the hearing held on 16 July 2019.

²⁰² At page 28 of the Transcript for day 55 of the hearing held on 16 July 2019.

interest, namely, Kefolile, TOSACO and Ascendis. When Maison Holdings experienced financial difficulties and the sheriff was about to attach their business, they again approached Dr Matjila for assistance. He then contacted Mr Mulaudzi and asked him to help save a women-led, 'black business' from collapse. Mr Mulaudzi agreed to do so in his personal capacity which he did by donating a sum of R300 000.

258. Throughout these meetings and interactions Dr Matjila kept no record of any meetings, discussions, agreements or requests that he made to third parties. Dr Matjila, in his testimony, repeatedly highlighted that one of the challenges he faced was political pressure and pressure from Politically Exposed Persons (PEP). To not take basic measures such as notes of a meeting with a Minister, so that there is some record of the interaction, flouts standard practice and flies in the face of appropriate behavior. As is evident in the TOSACO case²⁰³, to cite one example, this consistent lack of keeping a record of meetings held has resulted in disputed versions of what occurred or what was agreed to.

259. In his testimony, Mr Mulaudzi confirmed these facts as they related to him and said because the PIC had funded an entity in which he is a shareholder, Kilimanjaro Capital Investment Holdings Company (KiliCap), and that the request came from Dr Matjila, he felt obliged to assist Ms P Louw and Ms Dlamini. Dr Matjila denied the allegation that he funded Ms P Louw or that he and Ms P Louw were romantically involved. There was no other evidence placed before the Commission (nor in fact before the Budlender Inquiry) on this issue, despite repeated invitations to the public at large to come forward with information relevant to the Commission's ToRs. There is thus no reason to reject Dr Matjila's denial.

260. The Commission accordingly finds that there was no substance in the allegations contained in the James Nogu email that Dr Matjila funded Ms P

²⁰³ Refer to the case study below.

Louw through Maison Holdings in the amount of R21 million and that there existed an intimate relationship between him and Ms P Louw. However, the Commission finds that Dr Matjila acted inappropriately in pressuring Mr Mulaudzi, as the owner of an investee company, to assist Ms Louw and Maison Holdings.

261. As to the PIC's funding of MST, Mr Rajdhar testified that MST applied to the PIC in June 2015 for a loan of R45 million to procure buses for use to provide mobile health care and educational services for school children in certain areas in the Western Cape Province and nationally. MST manufactures and 'kits out' buses from corporate social responsibility funds or funds made available by government departments and public entities to be used to offer social benefits to society. The application was referred to the division now known as Impact Investing. A scoping report was done and tabled on 16 July 2015, for consideration by the PMC-UI for approval to proceed to DD. The approval was granted. After completion of DD, PMC 2 approved the transaction on 23 November 2015 for a term loan of R50 million plus 25% equity at a nominal amount of R25. However, MST was not willing to offer equity to the PIC unless the company value was increased, which meant that the PIC was to pay for the value created.

262. After further negotiations between the parties had taken place, PMC-UI granted approval of a revised proposal on 8 June 2016 in the form of a debt facility of R21 million plus a 5% profit share.²⁰⁴ The amount of R21 million was for financing seven buses which were to be manufactured at an estimated price of R3 million each.²⁰⁵ MST had an existing agreement with Mercedes Benz in terms of which it purchased bus chassis from them and then, with materials procured from other suppliers, assembled the buses. The PIC

²⁰⁴ A copy of the revised proposal is attached as annexure 'D' to Mr Royith Rajdhar' statement of 18 March 2019. See para 10.4.

²⁰⁵ Para 10.3. of Mr Royith Rajdhar' statement of 18 March 2019.

funding would enable it to explore other chassis suppliers and not be limited to Mercedes Benz. The PIC would become the title holder of the new vehicles.²⁰⁶ The loan facility was to be disbursed upon fulfillment of conditions precedent set by PMC-UI. Following the fulfillment of the conditions precedent, so said Mr Rajdhar, legal agreements (term loan agreements) were signed and the funds disbursed on 6 July 2017.

263. The conditions precedent included, among others, the following:

263.1. That as security for the funding, the PIC would register a Special Notarial Bond over the bus-units and a General Notarial Bond over moveable assets acquired from the proceeds of the funding;

263.2. That the borrower (MST) would apply all the funds for the purpose of designing, constructing, assembling, operating and leasing of bus units; and

263.3. That MST would submit to the PIC its Audited Financial Statements by no later than a period of 90 days after its financial year end.

264. Mr Rajdhar asserted in his statement that the conditions precedent '*were fulfilled prior to disbursement taking place*'.²⁰⁷ It had been impossible, however, to register a special notarial bond over the units (buses) because the process required specific identifiable information about the units, which was not forthcoming from MST. Mr Rajdhar also stated that the PIC provided audited financial statements as at 30 June 2015, but should have demanded delivery of the 30 June 2016 audited financial statements prior to disbursement of the funds.²⁰⁸ He said that in the absence of that set of audited

²⁰⁶ Ibid.

²⁰⁷ Para 22 of Mr Royith Rajdhar's statement signed on 23 March 2019.

²⁰⁸ At page 11 of the Transcript for day 20 of the hearings held on 26 March 2019.

financial statements the team had obtained management accounts and interrogated the numbers, but there were no audited financial statements as at 30 June 2016. *'Technically the provision of 30th June 2015 audited financial statements would discharge the condition of providing annual financial statements'*.²⁰⁹ He confirmed that the PIC had experienced difficulties in obtaining further audited financial statements, and those that had been provided in January 2017 were independently reviewed, not audited.

265. Ms Constance Sharon Madzikanda (Ms Madzikanda), is a Portfolio Manager in the PMV Department of the PIC. It is a support structure of the Impact Investment team and is responsible for post-investment monitoring, which entails monitoring compliance with legal instruments (agreements) and the financial performance of investee entities. Ms Madzikanda testified that when PMV requested an update from MST on the number of buses that had been manufactured and delivered the latter responded, on 7 September 2017, that six of the seven buses had been delivered and that the 7th would be delivered in the following week.²¹⁰ On 24 October 2017, PMV asked for particulars of the buses for purposes of having them registered under a Special Notarial Bond as per one of the conditions of the loan. In response, a list of Vehicle Identification Numbers (VINs) in respect of seven buses was sent to the PIC on 30 October 2017. A later list of VINs sent to PMV differed from the first, when the numbers were compared.

266. After some correspondence had passed between the parties the PIC discovered, from a submission by MST, that only two chassis had been purchased from the funds advanced by the PIC, while the balance was used for internal fittings for seven buses.

²⁰⁹ At page 12 of the Transcript for day 20 of the hearings held on 26 March 2019.

²¹⁰ A copy of the response is annexure '4' to Ms Madzikanda's statement, signed on 26 March 2019.

267. The testimony of Ms Madzikanda reveals that after a number of emails were exchanged between the parties, several meetings held and site visits conducted, it became clear that not all of the funds advanced to MST by the PIC were used for the purpose for which they were sought.²¹¹ Ms Madzikanda also testified that their attempt to assess the financial position of the MST were impeded by the latter's failure to submit its audited financial statements.²¹²
268. Leave was granted to MST to cross-examine Mr Rajdhar and Ms Madzikanda. In the end, only Mr Rajdhar was cross-examined, although his cross-examination was incomplete. It was agreed, at the end of his cross-examination, on 3 July 2019, that counsel for MST, Adv. Oldwadge KC, and the Evidence Leader, Adv. Lubbe SC, would arrange a suitable date for the continuation of the cross-examination. That did not materialise. The Commissioners were made to understand that the parties were working on settling their differences. During cross-examination of Mr Rajdhar, counsel for MST acknowledged that MST was in default in that it was not servicing the loan and that MST used part of the funds to pay creditors stating that it had to continue with its operations. In essence, funds provided for a specific purpose and intended for capital expenditure were used to finance operational costs. This was in violation of the condition precedent that *'the borrower (MST) would apply all the funds for the purpose of designing, constructing, assembling, operating and leasing of bus units'*, as stipulated in paragraph 263.2.
269. The cross-examination centered around whether or not the loan had been secured in terms of the conditions precedent and whether Mr Rajdhar was correct in testifying that the funds were advanced for the purpose of acquiring new buses. As to the question of security, Mr Rajdhar conceded that there was some security, but said that the Special Notarial Bond has yet to be registered since MST had not provided the necessary information in respect

²¹¹ At page 30 of the Transcript for day 20 of the hearings held on 26 March 2019.

²¹² At page 37 *ibid.*

of the buses. As to the second issue, it is clear from the evidence of both Ms Madzikanda and Mr Rajdhar that, at least, on the side of the PIC there is no confusion that the funding was meant for the acquisition of new buses. Paragraph 10.3 of the Extract from the minutes of a meeting of the PMC- UI, held on 8 June 2016, reads as follows:

*'Upon approval of the transaction the PIC will finance 7 buses which will be manufactured at an estimated price of R3 million each. The PIC will become the title holder of the new vehicles.'*²¹³ (Emphasis added)

270. And although the Term Loan Agreement does not speak of 'new' bus units, it does say the borrower *'shall apply all amounts borrowed . . . for purposes of designing, constructing, assembling, operating and leasing of BUS units'*.

271. It is not necessary to say more on this issue. What requires emphasis is that the legal department, which is responsible for drawing up the agreement following approval of a transaction, should ensure that the intention of the approving committee is correctly and properly captured in such agreement.

272. We return to Ms P Louw. Although it has been found above that there is no substance in the allegation that Dr Matjila directly funded Ms P Louw to the tune of R21 million, which in fact, is the funding that was provided by the PIC to MST. The initial funding request for MST, introduced by Ms More, was not supported for various reasons. It is clear that Ms Louw's request was considered by the PIC because it had come through Dr Matjila, and that such an introduction arose out of a meeting with a Minister.

273. It was held in the Budlender report that Ms P Louw did have a commercial relationship with MST, from which she derived financial benefit. The facts set

²¹³ A copy of the minutes is annexure "D" to Mr Royith Rajdhar's statement.

out in the Budlender report are these: On 22 July 2016, Maison Holdings and MST concluded a Joint Venture Agreement in terms of which the former would act as the latter's agent in seeking partnerships with State entities or businesses.²¹⁴ It appears that there were certain MST proposals in which she was involved, although the extent of her involvement is not clear.

274. During the presentation of the MST application for loan funding, on 23 November 2015, Dr Matjila requested Corporate Affairs (PIC) to consider the MST project offering for a CSI investment – CSI falls under Corporate Affairs. The request did not find favour with the Executive Committee. After several further unsuccessful attempts, a project proposal submitted by a Mr Mzonyana of MST for CSI funding of R5 million, was approved and the amount was allocated on 20 February 2017. Payment of the amount was authorised by Dr Matjila on 20 March 2017.

275. Mr Rajdhar testified that Ms Louw initiated a number of CSI proposals of between R23 million and R37 million, that were not approved. *'[R]ound about in January or February the following year' the PIC executive decided to commit R5 million 'in anticipation of the 31 March year end ...and the PIC having to contribute to CSI.'* Mr Rajdhar confirmed that he had received a message from Dr Matjila asking him to assist with the R5 million and said, *'...that R5 million [CSI donation] was dealt with directly with MST ... media articles were coming out and we were getting queries [as to whether] Maison received any fee...'*²¹⁵ Mr Rajdhar was advised by Mr Fernanco of MST that they had paid Ms Louw R438 000. He said, *'if you add VAT to it you'll see that the amount is going to come to exactly R500 000 ... 10% of R5 million'*.²¹⁶ It needs to be

²¹⁴ Para 35 of the Budlender Report.

²¹⁵ At page 58 of the Transcript for day 20 of the hearings held on 26 March 2019.

²¹⁶ At page 59 of the Transcript for day 20 of the hearings held on 26 March 2019.

borne in mind that Dr Matjila's first contact with Ms Louw was in April 2016, and at that stage had no connection with MST.

276. On 1 April 2017 MST paid an amount of R438 000 plus VAT to Maison Holdings for 'work done to date'. It was found in the Budlender report that the money was paid to Maison Holdings as a reward for Ms P Louw's efforts and to encourage her to continue therewith.

Findings

277. In the Commission's view, no finding of impropriety can be made on the established facts regarding the investment decision of the PIC in the MST transaction. What is of concern is the failure, on the part of the PIC, to demand from MST its 30 July 2016 audited financial statements prior to disbursing the funds.

278. The R5 million CSI donation made directly to MST, of which approximately half a million went to Ms P Louw's company, Maison Holdings, an entity introduced to the PIC/Dr Matjila by Minister Mahlobo, reflects a misuse of what the funds were intended for. It brings into question what services were rendered by Maison Holdings to the value of half a million rand, when the CSI donation was made directly to MST.

279. MST did not adhere to the conditions precedent for the loan of R21m, which were very specific, namely:

279.1. That the borrower (MST) would apply all the funds for the purpose of designing, constructing, assembling, operating and leasing of bus units; and

279.2. That MST would submit to the PIC its Audited Financial Statements by no later than a period of 90 days after its financial year end.

280. It is questionable whether proper due diligence, including viability and risk assessment, could have been meaningfully conducted without up to date audited financial statement from MST.
281. Mr Rajdhar, in his evidence before the Commission, stated that MST was in default in terms of its financial obligations or servicing of the loan.²¹⁷
282. Moreover, the question arises as to whether there was impropriety in the conduct of Dr Matjila that arose from his meeting with Minister Mahlobo and thereafter facilitating access to funding through other PIC investee companies (Mr Mulaudzi) and the PIC itself.
283. Dr Matjila's pressurising of Mr Mulaudzi, resulting in him donating R300 000 to Ms P Louw, was wholly improper, an abuse of his position as CEO and a reputational risk to the PIC.
284. Ms P Louw in fact received R800 000 from her introduction by former Minister Mahlobo to Dr Matjila. The R500 000 paid to Ms P Louw from the PIC CSI donation must be repaid by MST to the PIC.
285. The PIC must significantly enhance its capacity to monitor effective implementation of conditions precedent and the performance of the entity invested in.

Case Study: Tosaco (Pty) Ltd

Introduction

286. Total South Africa Consortium (Pty) Ltd ('TOSACO) is a B-BBEE entity which holds a 25% equity interest in Total South Africa (Pty) Ltd (Total). TOSACO is

²¹⁷ Para 24 of Mr Rajdhar's statement signed on 18 March 2019.

the holding company, with TOSACO Retail (Pty) Ltd (TOSACO Retail) operating filling stations branded by Total. During 2015 TOSACO announced its intention to sell 91.8% of its shares to qualifying buyers. The remaining 8.2% belonged to the 'TOSACO Staff Trust' and the owners of those shares had no intention of disposing of them.

287. In his evidence to the Commission, Mr Mulaudzi said that in 2015 his investment company, which had been established in January of the same year, Kilimanjaro Capital Pty Ltd (KiliCap), became aware of a transaction titled 'Project Atlas'.²¹⁸ A B-BBEE shareholder (TOSACO) in Total, wanted to dispose of their investment that had reached maturity.

288. During February 2015, Calulu Investments (Pty) Ltd (Calulo) engaged Nedbank Capital, a division of Nedbank, to act as their corporate advisor in the proposed sale, by tender, of their equity stake in TOSACO. Nedbank was to assist Calulo in considering proposals, to make recommendations as required and provide strategic corporate finance advice to the company with regard to the transaction. Mr Tapiwa Shamu (Mr Shamu), a Nedbank Corporate Advisor, and Ms Aamena Patel (Ms Patel), his supervisor, were appointed by Nedbank to conduct the tender sale.

289. Three companies, namely, KiliCap, Sakhumnotho (Pty) Ltd (Sakhumnotho) and Lereko (Pty) Ltd ('Lereko'), separately approached the PIC for funding to purchase the shares. The PIC's Investment Committee (IC) approved funding to the Kilimanjaro Sakhumnotho Consortium (Pty) Ltd, a consortium comprising of KiliCap and Sakhumnotho, in the amount of R1.8 billion to acquire the shares and R300 million for the expansion of TOSACO Retail, a total of R2.1 billion. However, the Consortium acquired the shares for R1.7 billion, not the R1.8 billion approved by the IC. The additional R100 million

²¹⁸ At page 5 of the Transcript for day 21 of the hearings held on 27 March 2019.

was allegedly funding for transaction fees, but this was not brought to the attention of the PIC's relevant committees for approval.

290. The PIC disbursed R1.8 billion, but not the R300 million because the transaction relating thereto was abandoned due to the expiry of the period within which legal agreements should have been concluded. Mr Mulaudzi's original proposal included a development facility of R300 million for Tosaco Retail, intended for the development of 20 service stations, which would in turn be franchised to young black entrepreneurs. However, the Tosaco Retail investment component of the deal had not materialised at the time of Mr Mulaudzi's testimony before the Commission.

291. There is a significant difference between the versions of the parties regarding the circumstances that led to the merger between KiliCap and Sakhumnotho. Mr Mulaudzi, a director of KiliCap and its representative in its dealings with the PIC, testified that the decision to merge was imposed on KiliCap by Dr Matjila, the CEO of the PIC at the time. On the other hand, Dr Matjila and Mr Siphon Mseleku (Mr Mseleku), the chairman of Sakhumnotho, denied the allegation by Mr Mulaudzi and alleged that the merger was voluntary.

292. KiliCap submitted its application for funding to acquire the TOSACO shares in May 2015. Mr Mulaudzi testified that they had become aware of TOSACO's intention to dispose of the shares through a director of KiliCap who was a minority shareholder in TOSACO. On 1 June 2015, Mr Mulaudzi sent an email to Mr Masekesa, Dr Matjila's Executive Assistant, in which he asked Mr Masekesa to liaise with Dr Matjila regarding the provision of a non-binding letter of support in favour of KiliCap. He stated that they were under pressure to submit an indicative offer as soon as possible.²¹⁹ Mr Masekesa forwarded the email to Dr Matjila, who responded to Mr Masekesa that there was another B-BBEE entity that was interested in the transaction and that they might have

²¹⁹ Page 5-7 of the Transcript for day 21 of the hearings held on 27 March 2019.

'to persuade them to work together'. The reference to 'them' could only have been a reference to KiliCap and the B-BBEE entity referred to in the email, namely, Sakhumnotho. This notwithstanding, Dr Matjila issued a 'non-binding expression of interest and funding support' letter dated 2 June 2015, in favour of KiliCap.²²⁰

293. KiliCap made an unsolicited offer to TOSACO for 100% of its equity and requested a meeting with Dr Matjila, which took place at the PIC offices. Mr Mulaudzi stated that:

*'...this was my very first interaction and meeting with Dr Matjila. We had never met [prior] to this'*²²¹

294. KiliCap submitted an investment proposal to Dr Matjila on 22 May 2015, which covered the acquisition of the empowerment shareholding in Total as well as a facility for the development of a network of retail service stations. Similar funding applications were also submitted to both Standard Bank and Nedbank.

295. On 19 April 2015 Mr Shamu scheduled a meeting with Mr Mulaudzi and on 5 May 2015, it appears that Mr Shamu had a meeting with, among others, Mr Mulaudzi and Mr Kinesh Pather (Mr Pather).

296. During June 2015, Nedbank concluded an agreement with the minority shareholders of TOSACO, along similar lines as their agreement with Calulo, to dispose of their shares in TOSACO simultaneously with those of Calulo. Mr Shamu signed the agreement as the Nedbank Principal: Corporate Finance. One of the minority shareholders was Amafutha International Company. Mr

²²⁰ A copy of this letter is attached as Annexure 'B' of Mr Tshepo Rapudi's statement.

²²¹ At page 6 of the Transcript for day 21 of the hearings held on 27 March 2019.

Pather, one of the Directors of Amafuthu, signed the agreement in that capacity.

297. KiliCap received an indicative non-binding funding support letter from both Nedbank and the PIC. This was followed by KiliCap interacting with the PIC deal team and KiliCap was advised that on 29 June 2015, the relevant PMC considered the scoping report presented by Mr Tshepo Rapudi's (Mr Rapudi) team. The PMC gave approval to proceed to DD. Nedbank Corporate Finance Division, the bank dealing with the TOSACO transaction, on behalf of Total had commenced with a competitive bidding process and KiliCap was invited by Nedbank Corporate Finance, on 19 June 2015, to participate in 'Project Atlas II', which it did, submitting a funding support letter from the PIC.

298. In his testimony, Mr Mulaudzi stated that:

*'During our engagements with the PIC ... it was decided that KiliCap will appoint a transaction advisor nominated by the PIC as this would allow for better understanding of the PIC funding application process. BNP Capital was nominated by the PIC and formally engaged by KiliCap on 24th June 2015.'*²²²

299. KiliCap worked with a PIC official, namely, Mr Rapudi, an Associate Fund Principal. According to Mr Rapudi, he was first introduced to the TOSACO deal when Mr Rajdhar assigned the case to him around 29 May 2015. He stated that he was the team leader and had received emails on the same day from Mr Mulaudzi regarding their bid.²²³

²²² At page 7 of the Transcript for day 21 of the hearings held on 27 March 2019.

²²³ At page 86 of the Transcript for day 26 of the hearings held on 9 April 2019.

300. The structure of the deal was for the PIC to fund KiliCap to acquire 25% shareholding in Total, held at the time by TOSACO.
301. KiliCap was required to submit a binding offer on 31 July 2015, so the PIC funding sought, had to be unconditional. In a meeting with Nedbank, they discovered that the PIC had issued funding support to other bidders who were also part of the Project Atlas II process.
302. On 19 June 2015, Nedbank by email, invited Sakhumnotho to submit an indicative non-binding offer by 12h00 on Friday, 26 June 2015. Mr Mseleku forwarded the email to Mr Madavo of the PIC on 22 June 2015 requesting him to advise whether the PIC could 'do' the transaction and, if so, to assist Sakhumnotho. The PIC then issued a non-binding letter of support dated 30 June 2015 in favour of Sakhumnotho, emailed by Mr Nesane, PIC Head: Legal, to Mr Mseleku and Mr Benedict Mongalo (Mr Mongalo) on the same day.
303. Lereko, the third interested party, submitted its application for funding to the PIC, which issued a non-binding letter of support, dated 30 June 2015, in favour of Lereko – the third such letter. No information was placed before the Commission to show that anything was done on the Lereko transaction beyond the issuing of the letter of support.

The parallel PIC processes

304. The KiliCap and Sakhumnotho transactions were allocated to different teams within the PIC, one for the KiliCap transaction, led by Mr Rapudi and another for the Sakhumnotho transaction, led by Mr Mongalo.
305. As explained in paragraph 297 above, the team dealing with the KiliCap transaction had prepared a scoping report and presented it to PMC1 on 29

June 2015, which authorised the transaction to proceed to DD.²²⁴ On 30 June 2015 the PIC and KiliCap signed an engagement letter, setting out the terms of engagement by the PIC as potential investor in the transaction.²²⁵

306. The internal teams (deal, legal and risk) performed a due diligence on the KiliCap transaction, as authorised by PMC1 and presented to PMC2 at its meeting held on 24 July 2015. PMC2 approved the transaction for onward submission to the PEPSSME-FIP.

307. According to Mr Rapudi, the transaction was then placed on the agenda of a meeting the PEPSSME-FIP scheduled for 31 July 2015. However, on 28 July 2015 Dr Matjila and Mr Nesane instructed him to remove the transaction from the agenda, which Mr Rapudi did. The reason given was that other bidders who had also been shortlisted for phase 2 of the bidding process had approached the PIC for funding. Dr Matjila confirmed giving Mr Rapudi the instruction.²²⁶ Mr Rapudi further stated that on 29 July 2015 he had received copies of the letters of support issued in favour of Sakhumnotho and Lereko from Mr Mongalo. While Mr Rapudi and his team were working on the KiliCap transaction, Mr Mongalo was working on the Sakhumnotho transaction.²²⁷

308. On 1 July 2015, Nedbank emailed a letter to Sakhumnotho informing them that they had been shortlisted for the second phase of the bidding process and that binding offers should be submitted by 12h00 on Friday, 31 July 2015. On 2 July 2015, Mr Mseleku forwarded the Nedbank correspondence to Mr Nesane, and copied Dr Matjila. He stated that the shortlisting of Sakhumnotho would require a due diligence to be conducted. Mr Nesane forwarded the email to Mr Mongalo. On 3 July 2015 Mr Mseleku sent Mr Nesane an email

²²⁴ A copy of an extract from the minutes of the PMC1 meeting is attached as Annexure 'D' to Mr Rapudi's statement.

²²⁵ A copy of the engagement letter is attached as Annexure 'E' to Mr Rapudi's statement.

²²⁶ Para 18 of Mr Rapudi's statement signed on 8 April 2019.

²²⁷ Ibid para 19.

stating that '*[w]e believe PIC will undertake its own DD [due diligence] ...*'²²⁸

He also stated that they (as Sakhumnotho) fully appreciated the conditions of the letter of support and that there was another bidder. Mr Nesane confirmed that '*[t]he PIC will carry [out] its own due diligence*'.²²⁹

309. On 24 July 2015, Sao Capital (Pty) Ltd, which was the lead transaction advisor to Sakhumnotho, emailed their valuation report on the TOSACO/Total deal to Mr Mseleku, who forwarded it to Dr Matjila and copied Mr Nesane and Mr Mongalo.

310. On the same day, Nedbank sent letters to KiliCap and Sakhumnotho, among others, changing the date for the submission of binding offers to Friday, 7 August 2015. Mr Mulaudzi testified that in a meeting he had with Dr Matjila, the latter stated that in order for him to proceed with issuing a final approval he (Mr Mulaudzi) needed to urgently meet with Mr Mseleku of Sakhumnotho as the other interested party. Dr Matjila also told him that Mr Mseleku's company must merge with theirs to form one consortium, and that they had to give Mr Mseleku 50% of the transaction and the fees that they would ultimately receive.²³⁰

311. The transaction fees came to a staggering R100 million, being R50 million each for the two companies. Mr Mulaudzi stated that '*...the transaction fees are unfortunately a direct consequence of the merger between KiliCap and Sakhumnotho*'.²³¹

312. Agreement was reached and KiliCap changed its company name to 'KISACO' (KiliCap Sakhumnotho Consortium). On 30 July 2015, KiliCap and

²²⁸ A copy of this email was obtained by the Commission.

²²⁹ A copy of this email was obtained by the Commission.

²³⁰ At page 8 of the Transcript for day 21 of the Hearings held on 27 March 2019.

²³¹ At page 25-26 of the Transcript for day 21 of the Hearings held on 27 March 2019.

Sakhumnotho informed Nedbank and the PIC, through letters of the same date that they had agreed to merge the two companies into one consortium for the purpose of acquiring the TOSACO shares. The new consortium would be called Kilimanjaro Sakhumnotho Consortium (Pty) Ltd ('KISACO'), which was only registered in August 2015. The letters stated that the consortium would be owned equally (50/50) by KiliCap and Sakhumnotho and that Mr Mulaudzi and Mr Mseleku would be its joint chairmen. The letters stated further that KiliCap and Sakhumnotho would 'henceforth' make 'joint and unified submissions' for the transaction.²³²

313. Mr Mulaudzi stated that he asked Dr Matjila whether Sakhumnotho had undergone a due diligence process. The basis for this question was that KiliCap had concluded its due diligence process and '*been informed that [the] transaction had been approved by the management committee to go to the board approval committee*'.²³³ According to Mr Rapudi, PMC2 had recommended the transaction for approval by the PEPSSME-FIP (a sub-committee of the Investment Committee) on 24 July 2015.²³⁴

314. Mr Mongalo, Fund Principal, Impact Investing at the PIC, stated in his testimony to the Commission that on or about 3 July 2015, he had been assigned by Mr Ernest Nesane, Head of Legal, to work with Sakhumontho in their bid to secure a stake in TOSACO. He also stated that because Sakhumontho was not a preferred bidder, he had not participated in the due diligence that was being conducted by Sao Capital on behalf of Sakhumontho. He further stated that the PMC1 had not granted approval for Sakhumnotho to participate in the due diligence process.²³⁵ Mr Mongalo claimed that he was advised by Mr Nesane on 30 July 2015 that Sakhumontho and KiliCap had

²³² Copies of the letters to Nedbank and the PIC are attached as annexures 'I' to Mr Rapudi's statement.

²³³ At page 8 of the Transcript for day 21 of the Hearings held on 27 March 2019.

²³⁴ Para 16 of Mr Rapudi's statement signed on 8 April 2019.

²³⁵ At pages 55-56 of the Transcript for day 21 of the hearing held on 27 March 2019.

joined to become a consortium. On 3 August 2015, the PIC held a meeting with representatives of the consortium, KISACO.

The formation of KISACO

315. According to Mr Mulaudzi, he did not know Mr Mseleku. The latter's contact details were provided to him by Dr Matjila. He then 'briefed' his 'partners' (fellow directors) who were devastated by the 'directive' from Dr Matjila. Mr Mulaudzi said they realised that 50% of the transaction was better than the whole transaction being taken away from them and made the difficult decision for the two companies to merge.²³⁶ Mr Mulaudzi's fellow directors mandated him to meet with Mr Mseleku.

316. Dr Matjila testified that on 30 July 2015 Mr Mseleku and Mr Mulaudzi separately visited the PIC offices to see him.²³⁷ He largely confirmed Mr Mseleku's version regarding what allegedly happened on that date.

317. Dr Matjila denied the allegation that he imposed the merger on the two companies. He claimed that the merger was a voluntary exercise, but conceded that the issue of a merger had been on his mind.²³⁸ He accepted that he had sent an email to Mr Masekesa stating that they might have to persuade KiliCap and the other B-BBEE entity to work together, and that it was for the benefit of KiliCap and Sakhumnotho should they merge to form a bigger entity. Dr Matjila stated during questioning by the Evidence Leader that he was not privy to information relating to the bidding process as it was conducted by Nedbank.

²³⁶ At page 8 of the Transcript for day 21 of the Hearings held on 27 March 2019.

²³⁷ At page 62 of the Transcript for day 53 of the hearings held on 11 July 2019.

²³⁸ At page 70 of the Transcript for day 53 of the hearings held on 11 July 2019.

318. In his statement Mr Rapudi stated the following:

'On the 6 August 2015 PIC sent a funding undertaking letter of support addressed to Nedbank . . . Paragraph 6 of the letter stated that "We confirm that should the Consortium [KISACO] be selected a winning bidder, the PIC hereby confirms its interest and commitment to provide, in aggregate, up to R1.7 billion in funding to the Consortium to satisfy the total purchase consideration for the proposed transaction".²³⁹ (sic)

319. However, an email dated 7 August 2015 from Mr Rapudi to Mr James Mchenga reads:

'Attached is the final letter of support. Please make approval amount of R1.8 billion'.

There is no explanation provided.

320. In his statement, Mr Rapudi states further that the transaction costs were 'the loan of R2.1 billion was approved, comprising R1.7 billion relating to the acquisition of shares, the R300 million relating to the roll-out of 20 retail service station sites and R100 million to fund the consortiums transaction related costs.'²⁴⁰ The IC minutes of 14 August 2015, reflect that the project was approved with KISACO receiving a loan facility of R1.8 billion and approval of a senior debt facility on behalf of the UIF for R300 million.²⁴¹

321. The resolution of the IC was signed by Dr Matjila as CEO on 17 August 2015. There is no disclosure anywhere in the document containing the resolution

²³⁹ Para 23 of Mr Rapudi's statement signed on 8 April 2019.

²⁴⁰ Para 31-32 of Mr Rapudi's statement signed on 8 April 2019.

²⁴¹ A copy of the IC minutes are attached as annexure 'L' to Mr Rapudi's statement.

that the price paid for the stake was in fact R1.7 billion, and that the R100 million reflected capitalised 'fees'.

322. This is in contrast to the undated letter from the PIC to Nedbank Capital, signed by Dr Matjila, which states that:

*'6. We write to confirm that should the Consortium be selected as the winning bidder, the PIC hereby confirms its approval to provide, in aggregate, up to R1,7 billion (one billion seven hundred million rand) in funding to the Consortium to satisfy the total purchase consideration for the Proposed Transaction.'*²⁴²

323. On the issue of whether due diligence was conducted by the PIC on Sakhumnotho before the merger, Mr Rapudi and Mr Mongalo conceded that this had not been done. Mr Mongalo stated that they *'had never gone to the stage where we would approach PMC1 to obtain approval to go to due diligence'*.²⁴³ Mr Rapudi testified that he obtained certain information, for FICA purposes, from Sakhumnotho to update the appraisal report they had prepared on KiliCap.²⁴⁴ There is email correspondence that shows that the PIC was provided with a profile of Sakhumnotho and other documents for due diligence purposes.

324. In his evidence Mr Mseleku claimed that there was no need for the PIC to do a detailed due diligence on Sakhumnotho as it was already an existing client of the PIC and thorough due diligence had been done in the past.²⁴⁵ In his statement Mr Mseleku states that *'[o]nly a confirmatory Due Diligence was conducted in relation to the TOSACO transaction with the request for update*

²⁴² Para 6 of the letter - a copy of which is attached as annexure 'SM 8' to Mr Siphon Mseleku's statement signed on 16 April 2019.

²⁴³ At page 60 of the Transcript for day 21 of the hearings held on 27 March 2019.

²⁴⁴ At page 92 of the Transcript for day 26 of the hearings held on 9 April 2019.

²⁴⁵ Para 11.3-11.4 of Mr Siphon Mseleku's statement signed on 16 April 2019.

*on FICA Documents, B-BBEE Verification Certificates, Directors and Shareholder information.*²⁴⁶

325. When testifying on 11 July 2019, Dr Matjila stated that the PIC had to do a due diligence on KiliCap, Sakhumnotho and the target asset 'in full'. When asked about Mr Mseleku's statement that this was not necessary, as Sakhumnotho was an existing client of the PIC, Dr Matjila said that he would '*check with the team*' but stated that he '*would expect them to have done a due diligence.*'²⁴⁷ However, on 15 July 2019, he contradicted himself and claimed that there was no need to have done a due diligence on Sakhumnotho '*which has an exposure to the PIC it gets reported on a quarterly basis...*' and the PIC has '*information around Sakhumnotho...*'²⁴⁸

326. On 3 August 2015, a meeting was held between representatives of KISACO and representatives of the PIC at the PIC's offices. Two days later, 5 August 2015, Mr Mseleku emailed a draft letter of support in favour of KISACO to Mr Nesane, copying both Mr Rapudi and Mr Mongalo, who acknowledged receipt thereof. The next day, 6 August 2015, Mr Rapudi sent an email to Mr Mseleku and Mr Mulaudzi (as KISACO's joint chairmen) asking them to provide the PIC with the 'final price' (that is, the bid amount) to which KISACO had agreed. Mr Mseleku stated that they had agreed on R1.7 billion. Dr Matjila then issued a letter of support dated 6 August 2015 in favour of KISACO, confirming the PIC's commitment to provide funding in the amount of R1.7 billion if KISACO was selected as the winning bidder. The commitment was also conditional upon '*the PIC's final approval committee approving the funding to the Bidder [KISACO]*'.

²⁴⁶ Para 11.3 of Mr Siphon Mseleku's statement signed on 16 April 2019.

²⁴⁷ At page 68 of the Transcript for day 53 of the hearings held on 11 July 2019.

²⁴⁸ At page 154 of the Transcript for day 54 of the hearings held on 15 July 2019.

327. However, on 7 August 2015, Mr Rapudi forwarded the letter of support in an email to Mr James Mchenga (Mr Mchenga) and Ms Bridgette Layloo (Ms Layloo), employees of the PIC who had been assisting him on the KiliCap transaction and requested them to '*make approval amount of R1,8billion*'.²⁴⁹ (sic).
328. KISACO was selected by Nedbank as the preferred bidder to purchase the TOSACO shares for R1.7 billion. The transaction reached financial close on or about 9 December 2015. The total amount of R1.8 billion was disbursed by the PIC. The amount was disbursed as follows: R1.7 billion was paid to Main Street 87 (Pty) Ltd (Main Street) for the shares and R100 million, which was allegedly for transaction fees, was paid directly to KISACO. In his evidence Dr Matjila alleged that there was no reference to transaction fees in the transaction documents. He stated that even if the transaction fees are capitalised the committees should be informed of those fees. He claimed that he only became aware of the fees through media reports at a later stage.²⁵⁰
329. Mr Sello Nkoane (Mr Nkoane) made a note on the disbursement memorandum raising a concern regarding the payment of the amount of R1.8 billion into two different accounts. He seems to have been under the impression that the entire amount should be paid to Main Street.
330. In an effort to determine whether the PIC funding of the Tosaco transaction was used for the purposes as per the transaction approval, bank statements obtained by the Commission were examined. The following has been established: An entity named Blackgold is registered to Mr Mulaudzi of KiliCap and Kilimanjaro Sakhumontho. Hekima Capital (Pty) Ltd and Investar Connect are companies registered to a Mr Lot Magosha. In the VBS Report titled 'VBS Mutual Bank: The Great Bank Heist', Advocate Motau SC found that Hekima

²⁴⁹ A copy of the letter is attached as annexure 'J' to Mr Rapudi's statement signed on 8 April 2019.

²⁵⁰ At page 127 of the Transcript for day 54 of the hearings held on 15 July 2019.

Capital and Investar were front companies for Mr Paul Magula. At paragraph 49.1 of the Motau Report, it is stated that

'Hekima Capital (Pty) Ltd and Investar Connect Holdings (Pty) Ltd were front companies which were his [Mr Magula's] vehicles for receiving payments from Vele and Vele Petroport amounting to in excess of R7.6 million.'

331. An estimated R400,000 was transferred to Mr Shamu of Nedbank from Mr Mulaudzi.

The contracting of advisors

332. Given the serious concerns about the R100 million (R50 million each) paid to KiliCap and Sakhumnotho ostensibly for transaction costs, including that of advisors, and how the amount was determined, an affidavit was obtained by the Commission from Mr Pholisani Daniel Mahlangu (Mr Mahlangu), extracts of which are quoted below. Mr Mahlangu is the CEO of BNP Capital (Pty) Ltd, (BNP) which was nominated as the transaction advisor by the PIC.

333. Mr Mahlangu was Head of Funds for the PIC (private equity funds Advisory Boards). He stated that the purpose of making the statement is to *'set the record straight about our involvement in the Total B-BBEE transaction and the total fees paid to us for work done'*.²⁵¹ He was introduced to Mr Mulaudzi by Mr Rajdhar, who indicated that KiliCap *'would need to get someone to assist them package the transaction.'* (para 4.1.2).²⁵²

334. The mandate letter BNP signed with KiliCap required BNP to run with the entire management of the share purchase, and would be compensated with a

²⁵¹ Para 2.4.1 of Mr Mahlangu's statement signed on 1 October 2019.

²⁵² Para 4.1.2 of Mr Mahlangu's statement signed on 1 October 2019.

fee of 2%, excluding VAT, of the capital raised, i.e. R1.7 billion. In turn, BNP engaged other service providers to assist with both legal and financial due diligence, to be paid on the same terms as BNP. The Sakhumnotho consortium engaged Sao Capital, led by Mr Nana Sao.

335. Mr Mahlangu states further in his statement that:

*'[t]he introduction of the new consortium and advisor meant that BNP fees were reduced to R17 million from the initial R34 million as per the signed mandate letter. Both KiliCap and Sakhumnotho...[to] pay their respective advisors.'*²⁵³

336. After the successful fund raising, Mr Mulaudzi advised BNP to send an invoice for R1 million, VAT inclusive, to a company named AVACAP.

337. BNP enquired about the balance of its fees, but was only told that some of the money was going to be paid later. KiliCap also indicated to BNP that they would pay the two service providers that provided legal and financial due diligence directly.

338. BNP has since been unsuccessful in its efforts to get the balance of the fees owed being paid only around 6% of the expected fee as per the mandate letter.

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339. The Commission is of the view that there is no merit in the claims that:

²⁵³ Para 4.1.11-4.1.12 of Mr Mahlangu's statement signed on 1 October 2019.

²⁵⁴ Para 4.1.15-4.1.18 of Mr Mahlangu's statement signed on 1 October 2019.

- 339.1. the merger between KiliCap and Sakhumnotho was voluntary. If the merger was voluntary, there would have been no reason for KiliCap's directors to feel aggrieved and compelled to merge.
- 339.2. there was no need to do a detailed due diligence on Sakhumnotho as it was already an existing client of the PIC;
- 339.3. Dr Matjila gave Mr Rapudi the instruction to remove the transaction from the agenda of a meeting where it was tabled for consideration in order to give the other bidders a fair chance to participate in the transaction.
- 339.4. Dr Matjila only became aware of the transaction fees through media reports. There was also no justification for the various PIC committees not to be informed of the transaction fee.
340. On the issue of a due diligence on Sakhumnotho, it is clear from the evidence of Mr Mongalo that due diligence should have been done. Mr Nesane had informed Mr Mseleku that the PIC would do its own due diligence. Dr Matjila gave contradictory evidence in this regard. A thorough due diligence prior to any decision to make an investment is a critical part of the PIC's decision-making processes, and is intended to ensure that clients' interests are protected and funds are invested after due process and careful consideration.
341. As regards the transaction fees, it was disingenuous of Dr Matjila, to claim that he only became aware thereof as a result of media reports. Dr Matjila had stated in the letter of support in favour of KISACO that the PIC was committed to provide funding of up to R1.7 billion to KISACO to acquire the TOSACO shares while the Resolution of the Investment Committee, passed at a meeting held on 14 August 2015, reflected a total funding of R1.8 billion. He did not question what the additional R100 million was for, when he signed the resolution on 17 August 2015.

342. KiliCap, Sakhumnotho and KISACO, after the merger, did not make a formal application for transaction fees. Dr Matjila conceded that even if transaction fees are capitalised, as they allegedly were in this transaction, the PIC approving committees must be informed thereof. In this transaction the PEPSSME-FIP and the IC were never informed of the fees and appear to have been misled into believing that the entire R1.8 billion was for the acquisition of the shares. Fees of R100 million amounted to 5,8% of the value of the transaction. The question arises as to whether payment was approved with full information provided to the relevant committees. The Commission's view is that the answer to the question is 'no'.

Findings

343. While advice offered to the two entities, KiliCap and Sakhumnotho, to merge for purposes of improving their chances to win the bid, would probably not be improper, in imposing the merger on KiliCap, Dr Matjila should not have done so. The Commission is unable to point to any policy of the PIC, legislation or contractual obligation that may have been contravened in this regard.

344. The failure to do due diligence on Sakhumnotho or the new entity, KISACO, after the merger amounted to a disregard of the PIC's investment policy, in that a critical stage in the investment process, namely due diligence, was not undertaken, in contravention of the PIC's investment policy.

345. In giving the instruction that the transaction amount be increased from R1.7 billion to R1.8 billion and thereafter failing to ensure that the alteration is disclosed to the approving committee, Mr Tshepo Rapudi acted improperly. As a FAIS representative in terms of section 7(1)(b), read with section 13 of the FAIS Act, he failed to comply with the requirements of 'fit and proper'

relating to personal character qualities of honesty and integrity, thereby contravening the provisions of section 8A(a).²⁵⁵

346. There is no evidence that the contravention resulted in any undue benefit for any PIC director or employee or any associate or family member of any PIC director or employee at the time.
347. Findings in relation to the contracting of advisors are addressed in detail in Chapter V: The Role of Transaction Advisors.

Recommendations

348. The Board should interrogate the approval process and authorisation of payment of the R100 million transaction fee and determine whether the R50 million paid to both KiliCap and Sakhumnotho was due, and in fact paid to the advisors.
349. If the money was not due, the PIC should institute legal proceedings with regard to recovering the balance of the R100 million.
350. The Board should review the structure of the PIC to ensure that there are not parallel processes and teams working with different potential investees on the same transaction, unbeknown to each other.
351. The signing-off approval and disbursement processes require greater legal oversight to ensure that the proposals, approvals and final disbursements are not manipulated or changed from the original decision.

²⁵⁵ The Fit and Proper requirements are addressed in detail in Chapter V of the report.

352. The role of the PIC in proposing advisors to investees for potential transactions needs to be reconsidered as it can inappropriately create a system of patronage and enrichment.
353. The PIC should consider whether or not appropriate action must be taken against Mr Tshepo Rapudi as a FAIS representative in terms of section 7, read with section 13, of the FAIS Act, for issuing the instruction to increase the amount of the transaction from R1.7 billion to R1.8 billion, and to determine on whose authority he issued the instruction.

Conclusion

354. In relation to a number of the transactions considered above, there were contraventions of PIC Policy, processes were not followed, necessary disclosures were not made to the Board and on certain occasions, the Board was misled. Furthermore, in certain transactions, the Commission found that the Standard Operating Procedure was not followed.
355. The Commission found that a number of individuals unduly benefited from the improprieties identified. The role of Dr Matjila is concerning in terms of his one-on-one meetings with individuals who stood to be vastly enriched, undercutting the objectives of the Isibaya Fund and in contravention of the PIC's mandate from its clients. In addition, the Commission found that Dr Matjila's role in pressurising Mr Mulaudzi was improper and posed a reputational risk for the PIC.
356. The PIC's decision to make cumulative transactions with a single individual is of concern to the Commission and recommendations in this regard are made.
357. Finally, governance, at a variety of levels, was undermined by the conduct of several individuals in relation to the transactions discussed above and in the conduct addressed in the ToRs which follow.

TERM OF REFERENCE 1.2

'Whether any findings of impropriety following the investigation in terms of paragraph 1.1 resulted from ineffective governance and/or functioning of the PIC Board.'

1. When considering the above Term of Reference, it is necessary to take account of a number of factors, including current best practice and codes for the effective functioning and accountability of boards, the legislation applicable to the PIC (and GEPP), and the practice and role of the Board of the PIC. This, together with further issues regarding governance, has been addressed in ToR 1.15 below.
2. ToR 1.1 refers to *'any alleged impropriety regarding investment decisions by the PIC ...'* Consequently, as illustrative examples, reference will be made to the following ten transactions, all of which have been dealt with in different chapters of this report, as set out below:
 - 2.1. The Sekunjalo Group of companies, namely:
 - 2.2. Ayo Technology Solutions (Ayo);
 - 2.3. Independent News and Media South Africa (Pty) Ltd (INMSA); and
 - 2.4. Sagarmatha;
 - 2.5. Steinhoff/Lancaster Transaction
 - 2.6. TOSACO
 - 2.7. Ascendis

2.8. S&S Refineries

2.9. VBS Mutual Bank

2.10. Erin Energy

2.11. MST²⁵⁶

3. The approach taken has been to consider whether there was impropriety in the above transactions, and if so, was this the result of a failure of governance and/or ineffective functioning of the Board. The details of each transaction will not be covered and can be found in the case studies in ToR 1.1, above.

Ayo Technology Solutions (Ayo)

4. The Commission has found that there was impropriety in the Ayo transaction in two respects, viz:

4.1. Mr Seanie giving instructions to ESG, Risk and Legal to proceed with due diligence approval from PMC1, thereby contravening the policy on Standard Operating Procedure; and

4.2. Failure by both Dr Matjila and Mr Seanie to disclose to PMC2 that an irrevocable subscription form had already been signed by Dr Matjila when PMC2 considered approval of the transaction.

5. The Commission concludes that these improprieties resulted from ineffective governance.

²⁵⁶ Reference is made to these case studies throughout the report however detailed reference is made to each transaction as a case study, in Term of Reference 1.1 and elsewhere in the report.

6. This is found in the decision-making process, the material non-disclosures, as well as a lack of interrogation of essential information – such as the determination of the valuation – and the parallel processes that took place to give effect to the transaction.
7. There was no proper valuation to back the investment that was done, and therefore the question remains as to whether the PIC subscribed for the shares at a fair and reasonable value. At the listing date, the shares were R43 per share, while as at 23 October 2019 the share price was R5.60 per share, a decrease in value per share of 87%.

Recommendation:

8. It is recommended that the PIC should introduce stringent measures to ensure that each step in the investment procedure is followed before the transaction is allowed to proceed to the next step. In this regard, a committee should satisfy itself before dealing with a matter that there was compliance with the processes leading up to its consideration of the transaction.

Independent News and Media South Africa (Pty) Ltd (INMSA) and Sagarmatha

9. The Commission did not consider the initial investment in INMSA, and therefore cannot make any findings in that regard. However the Commission finds that in the subsequent INMSA and Sagarmatha proposed transactions, there was impropriety that occurred as a result of ineffective governance.
10. The impropriety lies in Dr Matjila signing the share swap agreement with Sagarmatha, claiming that he did not know of the resolution by the approving committee, (the PEPPS-FIP), in terms of which the transaction had been approved with conditions diametrically opposed to the share swap agreement

that he signed. This evidences a complete disregard of the PIC's investment processes by Dr Matjila.

11. Further indicators of ineffective governance relating to these transactions are:

11.1. The PIC appraisal documents did not assess the implications of cumulative group exposure in any of the applications to invest. Moreover, even when the investment proposals were tabled at the required approving structures, the question of overall exposure to a group seemed to not be an issue, nor was the fact that INMSA was not servicing their loan.

11.2. The Sekunjalo investments showed a marked disregard for PIC policy and standard operating procedures.

11.3. Proper governance was absent or poor, and risk identification processes were downplayed by looking for risk mitigants to make sure the deals were approved.

11.4. Due diligence reports highlighting issues around the independence of Board members and policies to be implemented were not followed up by the PIC to ensure implementation post the deal approval and monies having flowed.

11.5. The proposed Sagarmatha transaction, including the suspected share price manipulation and essentially attempting to use the PIC's own investment to pay the debt INMSA owed to the PIC, demonstrates a lack of ethics, lack of compliance with laws and regulation, and a disregard for the best interests of the PIC and its clients.

4 The recommendation proposed in Ayo above, applies equally in respect of this INMSA/Sagarmatha transaction.

Steinhoff/Lancaster Transaction

12. The Commission finds that there was impropriety in the decision to invest in both the Steinhoff and Lancaster transactions. This was due to ineffective governance and the poor functioning of the PIC Board.
13. This is evidenced in the approach taken by Dr Matjila to essentially 'buy' influence and a Steinhoff Board seat, the change from the original proposal from Mr J Naidoo for an investment of R10,4 billion, reduced by the PIC to R9,35 billion to enable the transaction to fall within the mandate limit of the Investment Committee and the further decision to invest in Lancaster for the STAR transaction.
14. The statement by Dr Matjila exemplifies this ineffective governance: 'we could have gone to the Board but it was more convenient for the IC to deal with the matter at that level' adding that the Board has never rejected an Investment Committee decision.

TOSACO

15. The Commission has found that there was impropriety in the process that led to the approval of the transaction. The merger imposed by Dr Matjila, the failure to do due diligence on Sakhumnotho and the inclusion in the capital amount of transaction fees that were not requested by KISACO, nor recommended or approved by the committees, reflects this.
16. In giving the instruction that the transaction amount be increased from R1.7 billion to R1.8 billion and thereafter failing to ensure that the alteration was disclosed to the approving committee, Mr Tshepo Rapudi acted improperly. As a FAIS representative in terms of section 7(1)(b), read with section 13 of the FAIS Act, he failed to comply with the requirements of 'fit and proper'

relating to personal character qualities of honesty and integrity, thereby contravening the provisions of section 8A(a).

17. The Commission finds that there was impropriety that resulted from ineffective governance in the TOSACO Transaction

Ascendis

18. The Ascendis transaction was presented to the PIC at virtually the same time as the TOSACO transaction, yet the two appear to have been considered by the relevant PIC approval committee as two discrete investments, notwithstanding the comment below.
19. Ms Zulu, a non-executive Board member, requested Mr Rajdhar (Head: Impacting Investing at the PIC) to bring the Ascendis transaction back for consideration by a committee that she chaired. Mr Malaudzi asserts that he has *'not attempted to influence her (Ms Zulu's) professional views in any way and have never expected any undue influence from her through the positions she holds, including at the PIC'*.²⁵⁷ Yet the sequence of events and the eventual outcomes raise significant concerns as to the role of non-executive directors in investment decision making, as well as undue and inappropriate influence from the Board. This is a critical matter. Clearly, as chair of the relevant committee, Ms Zulu played a significant role, not only in getting the deal back onto the table but also in the recommendations to make the investment.
20. It is of concern that Mr Mulaudzi admitted in his testimony before the Commission that he had known Ms Zulu from around 2016, but they only began a personal intimate relationship in 2018. He confirmed that at the time

²⁵⁷ Para 69 of Mr Mulaudzi's statement signed on 26 March 2019.

of appearing before the Commission he was in an intimate relationship with Ms Zulu.

21. The Commission finds that there was impropriety in the Ascendis transaction due to both ineffective governance at executive level and in the functioning of the PIC Board, in that Ms Zulu participated in the PIC consideration of a transaction in which Mr Mulaudzi had an interest. This is particularly important given the roles that non-executive directors play in the PIC's transaction decision making, and the responsibilities exercised in that regard. This issue is addressed in the section on 'Lifestyle Audits' in Chapter V.

S&S Refineries

22. The Commission found that there was no impropriety regarding the decision taken to invest in S&S Refineries.
23. The Commission finds that failure to ensure that the decision taken to invest was based on a rigorous and thorough analysis of the relevant information points to ineffective governance, which is also evidenced by the fact that the conditions precedent which applied to the transaction were not implemented.

VBS Mutual Bank

24. The Commission found that there was no impropriety on the part of the Board of the PIC in the decision to invest in the VBS transaction.
25. The Commission is of the view, however, that there is clear evidence of ineffective governance in the PIC in that two of its executive directors, Mr Nesane and Mr Magula, egregiously violated their fiduciary duties towards both VBS and the PIC.

26. They acted in collusion, such that the PIC was not aware of critical information relating to, among other things, shareholding in VBS, notwithstanding that the information that they were privy to was critical to any investor/shareholder. They hid behind the excuse that they could not share such information as they had fiduciary responsibilities to the VBS Board. Nor did they act responsibly as non-executive directors on the Board of VBS as they did not insist that the information be made available to all shareholders and investors.
27. Both men used their positions of trust and responsibility to unduly enrich themselves at the expense of the depositors, clients and investors of VBS, including the PIC.

Erin Energy

28. The Commission found that there was impropriety in the decision to approve the Erin transaction. This came about, in the Commission's view, as a result of ineffective governance. This investment (provision of a guarantee) was made notwithstanding Erin being technically insolvent and against the advice of the PIC's own energy experts and internal team that had identified the problem as being one of insolvency and not that of liquidity. Dr Matjila himself conceded that the legal risk assessment was not properly done. Given the fact that this transaction was to be performed outside the South African borders, and particularly that the first transaction was to facilitate the purchase, by the investee, of oil leases/licenses, it was imperative that legal and risk established that the purchase did occur, yet neither established this fact. In addition, conditions precedent proposed by credit and risk analysts of the PIC were disregarded. These factors point to a serious lack of effective governance.
29. The question has to be asked as to how appropriate it is for an asset manager of a pension fund to invest in oil exploration, which is a high risk endeavor.

MST

30. The Commission found that there was no impropriety in the decision to invest in MST. However, the circumstances that led the PIC to consider the investment in the first place are indicative of a serious lack of appropriate governance.
31. During the presentation by MST for loan funding in November 2015, Dr Matjila requested Corporate Affairs (PIC) to consider CIS funding for the MST project. After a number of unsuccessful attempts to obtain funding, as the request did not find favour with the Executive Committee, R5 million was approved in February 2017, with payment authorised by Dr Matjila on 20 March 2017. On 1 April 2017 MST paid R438 plus VAT (R500 000) to Maison Holdings, Ms Louw's company, 'for work done to date'.
32. The link to Ms Louw arose from the former Minister of Intelligence, Mr Mahlobo, calling Dr Matjila to a meeting at OR Tambo airport without any indication of the purpose of the meeting or who would be present. Moreover, Dr Matjila said he saw no problem with this conduct. In this instance, he was asked, as the PIC, to help Ms Pretty Louw.
33. There was ineffective governance in the provision of R5 million as a CSI contribution to MST, of which Ms Louw received R500 000.

TERM OF REFERENCE 1.3

‘Whether any PIC director or employee used his or her position or privileges, or confidential information for personal gain or to improperly benefit another person.’

1. This Term of Reference will be answered by way of illustration using the case study of Harith, which exemplifies using a position of trust for personal enrichment, the case study of the Venda Building Society Mutual Bank (VBS) and the Edcon Mandate letter.

Harith

2. General Holomisa said the following in his testimony before the Commission:

*‘One of the most difficult tasks regarding dealing with the type of corruption that is alleged to have happened at the PIC is the sophisticated nature of the transactions. Corruption can come in two forms, legal and illegal corruption. Legal corruption occurs when the elite build a legal framework that protects corruption or manipulate existing legal framework without necessarily breaking the law.’²⁵⁸*Hon. B Holomisa, 2019-04-10, testimony on day 27 of the Commission of Inquiry.

3. When going through the story of Harith, these words resonate. The layering of legal entities (state owned corporations, pension funds, banks, companies and trusts and partnerships etc), when applied by financiers and corporate structure experts, can make finding the substance, and not form, of a transaction or series of transactions complex and quite perplexing. These layers also give the players in such a formation the ability to use ‘plausible

²⁵⁸ At page 32 of the Transcript for day 27 of the hearings held on 10 April 2019.

deniability' most effectively, as looking through all the conduits is challenging and time consuming.

4. Presidential vision and ambition to catalyse an African Renaissance led to the idea of creating an Africa Fund. In a PIC board meeting on June 6, 2005 it is noted that President Mbeki mandated the then CEO, Brian Molefe, to initiate the creation of an Africa Fund as a core investment. This new fund's creation would require the GEPF to change the PIC's investment mandate to include non-South African investments. It would, as a starting point, also need the GEPF to express a desire and approval for such an investment, as neither the President nor his government had a mandate to direct or commit GEPF investment.
5. The PIC initiated a multi-year process to establish a pan-African investment fund which materialised as the Pan African Infrastructure Development Fund (PAIDF). The object of the PAIDF was to primarily invest in private equity interests in infrastructure development projects in sectors such as power and energy, telecommunications, transportation, as well as water and sanitation sectors in the African continent. The goal of the PAIDF managers was to secure funding of at least US\$1 billion. PAIDF, a 15-year Fund, was set up as a vesting Trust and commenced operations on 14 September 2007 with commitments totalling US\$625 million from nine investors, including US\$250 million from the GEPF. Only the Social Security and National Insurance Trust (SSNIT) of Ghana and the African Development Bank (AfDB) were non-South African investors.
6. In his testimony before the Commission, Dr Matjila stated that:

*'The formation of PAIDF led to the establishment of Harith Fund Managers ... Harith was set up in 2006 (sic) by the PIC to manage PAIDF.'*²⁵⁹

The PIC provided around R22m as seed capital from its own funds, and obtained all the statutory approvals, he said. This seed money was repaid in full in due course. Dr Matjila said that, *'Mr Tshepo Mahloele resigned from the PIC but was persuaded by the PIC to become the CEO of Harith Fund Managers.'*²⁶⁰

7. This statement is incorrect as Mr Tshepo Mahloele (Mr Mahloele) was employed by the PIC as Head of Corporate Finance and of the Isibaya Fund. Without any due selection process or consideration of other candidates, he was appointed by the PIC to lead the PAIDF Secretariat which was to coordinate the processes to bring PAIDF to fruition. Harith Fund Managers (HFM), initially a shelf company secured by Mahloele in his personal capacity, was then transferred to the PIC *'as a matter of convenience and as the nominal shareholder'*, according to Mr Mahloele.

8. In Mr Mahloele's statement it is stated that:

*'The PIC's Management Executive Committee identified me (I believe) as the best candidate for the job of establishing the PAIDF ... With effect from 31 March 2006, I resigned from the PIC with the specific task of establishing the PAIDF, outside of the PIC...'*²⁶¹

²⁵⁹ At page 76 of the Transcript for day 50 of the hearings held on 8 July 2019.

²⁶⁰ Para 45 of Dr Matjila's statement signed on 17 July 2019.

²⁶¹ Para 7 of Mr Tshepo Mahloele's statement signed on 15 April 2019.

9. He was employed as the CEO of HFM with effect from 1 September 2007, for a period of seven years, after his service agreement with the PAIDF Facilitation Trust, established to create PAIDF, ended.
10. Mr Mahloele noted in his testimony that he was hired by HFM. What that obfuscates is that HFM was 100% owned by the PIC. Therefore, he was put in place by the PIC. This could also be seen as an 'internal transfer'.
11. Prior to his appointment to head up HFM Mr Mahloele was the author of a memo wherein the PIC, in November 2005, requested a mandate from the GEPP to invest US\$250 million (R1,65 billion) in the PAIDF.
12. Mr Jabu Moleketi served as Deputy Minister of Finance and Chairperson of the PIC from 2004 to 2008. In his statement Mr Moleketi said that,

*'...by virtue of my chairmanship of the PIC I, together with two other non-executive directors of the PIC, was appointed as the PIC's nominee to the Board as a non-executive director of HFM. In that capacity, I was then elected as the Chairman of the Board of HFM ... As I have already mentioned, in September 2008, I resigned as Deputy Minister of Finance and accordingly as ... Chairman of the PIC. However, at the request of the shareholders of HFM, who obviously had the necessary confidence in me and who were probably motivated by considerations of continuity and stability, I remained on as the Chairman of HFM, and from then onwards received a modest emolument.'*²⁶²

13. He continues,

²⁶² Para 35-44 of Mr Phillip Jabulani Moleketi's statement signed on 23 April 2019.

*'I became a non-executive director, and the Chairman, of HGP [Harith General Partners].'*²⁶³

14. At this point the PIC was the sole shareholder that owned 100% of HFM, therefore Mr Moleketi was appointed by the PIC.
15. Harith General Partners' shareholders are Harith Holdings (Pty) Ltd at 70% and the PIC at 30%. Harith Holdings is held 100% by an employees' equity trust of the same type as the Harith Share Incentive Scheme Trust (HSIST), in which its skilled employees participate. Mr Moleketi stated that he has never had any interest in the shareholding of HGP and was not a beneficiary of the Trust.
16. In March 2007 Mr Mahloele proposed that the PIC retain 70% of Harith Fund Managers (HFM) and management obtain 30% for R5 million, which was approved by the PIC Board. Among the reasons given for the establishment of Harith Fund Managers was to diversify the PIC's revenue.
17. In his testimony, Mr Mahloele said he was a director of Harith Fund Managers (HFM), HGP of which he is the CEO, and is the chairman of Lebashe Investment Group, an unlisted investment holding company. He refers to both HGP and HFM as Harith.
18. Mr Mahloele testified that the PIC intended to remain the sole shareholder of the management company, a position that was opposed by the GEPI and other investors. In this regard, he stated that,

²⁶³ Para 48 of Mr Phillip Jabulani Moleketi's statement signed on 23 April 2019.

*'A compromise was reached and Harith Fund Managers shareholding was restructured with the approval of then Minister of Finance Mr Pravin Gordhan and the PIC board...'*²⁶⁴

19. The restructuring resulted in the PIC owning 46%, while the HSIST held a 30% stake and two other investors, ABSA and Old Mutual Life Assurance each held 12%. The HSIST permits employees of HFM, including Mr Mahloele, to participate in an equity share in PAIDF as a form of incentive over and above their salaries.
20. HFM, and later HGP, earned an annual management fee averaging out at 1,75% of the total value of the funds. In addition, they earned a 'carry', which is determined as a percentage of the value of the funds under administration beyond a certain threshold.
21. HFM was intended to only manage PAIDF. Consequently, when the Fund was closed it was anticipated that it would be necessary to incorporate a multi-fund entity to manage further funds. Harith General Partners (HGP) was established for this purpose and with effect from 1 April 2012 HFM, under the chairmanship of Mr Moleketi and with Mr Mahloele as the CEO, resolved to subcontract to HGP its management agreement with the PAIDF. As a result, all employees were transferred to HGP, but HFM remained with a board of directors constituted of investee representatives whose task was to oversee the execution of the management agreement by HGP.
22. On 23 April 2012, the PIC wrote to Minister Gordhan to request authorisation for the PIC to acquire a 30% shareholding in the issued share capital of Harith General Partners (for R30), which Harith management incorporated and was

²⁶⁴ At page 25 of the Transcript for day 29 of the hearings held on 16 April 2019.

intended to manage PAIDF II funds as well as those of other funds. This was approved by the Minister.

23. HGP became active in October 2012 with the following shareholders:

Harith Holdings (Pty) Ltd with 70% and the PIC with 30%.

24. The establishment of HGP led to the creation of PAIDF II, which was closed in June 2014 with total capital commitments of US\$435 million, of which US\$350 million came from the GEPF. Thus, the GEPF invested a total of US\$600 million in the PAIDF initiative.

25. According to Mr Mahloele,

*'The Fund was never intended to be a public sector led initiative. On the contrary, the investors agreed to invest in the PAIDF expressly on the basis that they would not be subject to a fund, governed by the structures of the PAIDF...'*²⁶⁵

26. Simply put: The PIC, with government support and using its influence and the provision of R22 million seed funding as a loan created for PAIDF I, drew in other South African investors, particularly the GEPF and two other investors. This loan was repaid via the 'establishment fee' of 1% on the US\$625 million raised, of which US\$250 million was government employee savings through the GEPF. When PAIDF II was established, the establishment fee was dropped to 0.25%, 75% lower than that charged in PAIDF I.
27. The fees charged by HFM appear punitive: management fees, advisory fees, transaction fees, costs of covering HFM operating expenses, incentive fees from 2015 on returns in excess of 8% per annum and a poison pill termination

²⁶⁵ At page 13 of the Transcript for day 29 of the hearings held on 16 April 2019.

clause. On termination HFM is to be paid 12 months management fee (2% of investments) and 13% of the market value of all investments. To illustrate, assuming assets had not grown and stayed at US\$625 million, they would be paid 13% of that amount. This is certainly not a standard management agreement.

28. HFM was permitted to use US\$6,25 million of the original US\$625 million raised to establish itself. It would appear that the US\$6,25 million was used from the funds raised for investment into the PAIDF to establish HFM. This meant that the PIC essentially funded an entity in which the person seconded from the PIC and later appointed as CEO, who had part of a 30% stake in the company, benefitted without incurring any financial cost.
29. An estimate of management fees between 1 April 2009 and 31 December 2014 was US\$72,45 million, while the estimate of management fees paid between May 2014 and the end of March 2019 stood at US\$37,4 million or R542 million, 70% of which would have gone to Harith.
30. This can be illustrated quoting from the PIC Annual Integrated Report (AIR) of 2009, which shows HFM generated revenue of R93 million, with costs of R57 and a net profit of R36. The revenue shown is partly a drawdown on the establishment fees that are part of the management agreement. In the PIC AIR of 2008, this is reflected as:

'Harith's turnover amounted to R83m, consisting of an organisational fee of R40m and a management fee of R43m. The fees are calculated based on the management agreement between HFM and PAIDF.'

31. In the 2010 report the following is stated:

'On 30 June 2009 the PIC disposed of 54% of its controlling stake in HFM ... the cash profit on the sale of 54% of Harith is R57m'.

32. Moreover, there were concerns about Harith such that the GEPF, in 2009, obtained a legal opinion from TWB and Partners as to who actually owned the shares.²⁶⁶ An extract from the opinion states that the,

'GEPF's contention is that:

- 1. PIC set up the PAIDF and Harith entirely in the course of its activities as GEPF's asset manager;*
- 2. GEPF is the single largest investor in PAIDF – in fact GEPF's capital commitment to PAIDF amounts to 40% of the aggregate of all the capital commitments made by all the investors;*
- 3. PIC accordingly set up PAIDF and Harith with GEPF's money; and*
- 4. In the circumstances GEPF is entitled to both (1) the dividend which will be declared at the end of March 2009, and (2) PIC's remaining shares in Harith.'*

33. The legal opinion concluded that *'there is virtually no doubt that GEPF is entitled both to the dividend which Harith will declare and to PIC's shares in Harith ... (and) in the circumstances PIC is not entitled, without GEPF's written consent, to realise a profit ...'*

34. The GEPF was advised that, to enforce the above, it should write a letter of demand to the PIC in which it claims immediate transfer of the shares. This matter remained unresolved as at the last evidence presented to the Commission.

²⁶⁶ The opinion is signed by Mr Ludwig Smith of Tugendhaft Wapnick Banchetti and Partners.

The VBS Mutual Bank case study

35. The 'Great Bank Heist' report of Advocate Motau SC (Motau report) is publicly available and provides a full report on the VBS saga. For the purposes of addressing this ToR, the focus will be on the PIC's actions and involvement.
36. The GEPF inherited the Venda Building Society (VBS) as part of the amalgamation of the civil servants' pension funds of the former independent bantustans. At the time exposure to VBS was around R10 million, which was invested in a Perpetual Bond or Indefinite Period Shares (IPS), which gave it a 34% shareholding. The PIC saw this as a strategic asset with the potential to grow into a regional bank, servicing the largely rural population of Limpopo. According to Dr Matjila in his testimony before the Commission, the PIC supported the conversion of VBS from a building society into a mutual bank as a vehicle to assist in the development of a black-owned and black managed player in the banking sector with the aspiration that VBS would grow into a fully-fledged bank in the future.²⁶⁷
37. In 2011, VBS decided to convert the IPS to Permanent Interest Bearing Shares (PIBS) to ensure the bank had primary capital adequacy in place. The PIC approved this change subject to board representation with an alternate and being provided with a strategy to ensure sustainability and stability within three months.
38. On 29 March 2012, Dr Matjila proposed that the Director's Affairs Committee (DAC) of the PIC appoint two of its senior executives to the VBS Board, namely Mr Ernest Nesane (Mr Nesane), Executive Head: Legal and Mr Paul Magula (Mr Magula) as his alternate (who later became a full director), who

²⁶⁷ Para 499 of Dr Matjila's statement signed on 17 July 2019.

was Executive Head: Risk. In his evidence, Dr Matjila stated that they had deployed these two executives as they both had roots in Venda.²⁶⁸ Their appointment was approved by the DAC at a meeting held on 9 May 2012. The resolution does not reflect any concern by the DAC that both men were responsible for signing off on PIC legal and risk approvals for the investment, and were now being appointed to the board of VBS, which would be a conflict of interest.

39. In her evidence Ms Brendah Mdluli (Ms Mdluli), Associate Principal for Impact Investing, stated that the VBS request for a revolving credit facility (RCF) from the PIC for R350 million was introduced by Mr Magula, who was at the time an alternate VBS Board member, and he subsequently compiled the required appraisal report for the PMC – Unlisted Investment meeting. The RCF was finally approved by the relevant committee, the Priority Sectors, Small and Medium Enterprises Fund Investment Panel (PSSME FIP) on 24 June 2014. The facility was approved on a ring-fenced basis.
40. Ms Mdluli says in her statement that the facility agreed to by the committees did not include the following amended conditions (underlined below) which were included in the Facility Agreement post approval, both of which seriously disadvantage the rights of the PIC:

‘a. Clause 3.5 which now reads as follows: *“The facility shall be ring fenced for its purpose as defined in this Agreement as such shall be subordinated as against other Borrower creditors”*; and

b. Clause 3.6, which now reads as follows: *“The facility outstanding amount or any portion thereof may be converted into equity, at the*

²⁶⁸ Para 498 of Dr Matjila’s statement signed on 17 July 2019.

discretion of the Lender, at any time before the Final Repayment Date”.²⁶⁹

41. Ms Mercy Boitumelo Leroke (Ms Leroke), Legal Advisor at the PIC, stated in her evidence that she was included in email correspondence of 23 April 2015 in which Mr Nesane responded to the investment team and advised that he had incorporated their final comments. In this regard, she testified that:

‘...at all material times the draft of the revolving credit facility agreement of which I was asked to review did not have clauses 3.5 and 3.6 ... it is unclear to me when the clauses were inserted in the agreement.’²⁷⁰

42. Notwithstanding all of the above, the version of the Revolving Credit Facility Agreement (RCFA) ultimately signed off by Dr Matjila and witnessed by Ms Leroke included the changed clauses.

43. Giving testimony before the Commission, South African Reserve Bank Deputy Governor, Mr Kuben Naidoo (Mr Naidoo) covered the investigation into VBS, the evidence of Mr Magula and Mr Nesane and the confidentiality of their evidence given to the Motau investigation.

44. Mr Naidoo testified that,

‘(Mr Nesane) eventually confessed after putting up strenuous denials that he had received unlawful payments made to a nominee company²⁷¹... in a total amount in excess of R7,2 million in order to buy

²⁶⁹ Para 18 of Ms Brendah Mdluli’s statement signed on 26 March 2019.

²⁷⁰ At page 84 of the Transcript for day 22 of the hearings held on 1 April 2019.

²⁷¹ At page 6 of the Transcript for day 23 of the hearings held on 2 April 2019.

*his silence. Mr Nesane resigned from his post at the PIC two days after testifying ...*²⁷²

45. In relation to Mr Magula, it is stated at paragraph 21.4 of Motau's report that:

'...[he] eventually confessed, after putting up strenuous denials, that he had received unlawful payments, made to two companies which acted as his nominees, in a total amount in excess of R7.6 million in order to buy his silence.'

46. Motau's report further states at paragraph 39.3 that:

'The monthly payments of R300 000 all took place on the same date each month that Vele made a distribution of monies to a variety of related parties, including Magula's front companies, Nesane's front company, Makhavhu, who is the advisor to the Venda king.'

47. In Para 52.4 it is stated that Mr Nesane testified that he *'did not properly comply with his fiduciary duties as a director of VBS.'*

48. The Motau report, in paragraph 237, deals with the extent of the looting, indicating that R1 894 923 674 was gratuitously received from VBS by 53 individuals for the period 1 March 2015 to 17 June 2018. These recipients included Vele and Associates (R936 699 111) and the two PIC senior executives who were appointed to the Board as non-executive directors to exercise their fiduciary duties so as to ensure PIC investments were not wasted. It was found by Adv Motau SC that, in total, Mr Nesane received R16 646 086 and Mr Magula, R14 818 098. They seem to have been handsomely rewarded for turning a blind eye.

²⁷² Para 21.5 of the Motau report.

The Edcon Mandate Letter

49. Kleoss Capital, in a letter to the PIC's Mr M Muller dated 8 August 2017, and signed by Mr Andile Keta, sets out the terms of their appointment as joint financial advisors to the PIC in relation to a potential investment by the PIC and/or funds managed by it into Edcon Holdings Ltd. The second adviser is Mr Koketso Mabe (Mr Mabe) of Keletso M Squared (Pty) Ltd). He is a former PIC employee who, at the time of his employment, was Executive Head, Private Equity and SIPS (structured investment products). He left the PIC at the beginning of February 2017.
50. The fees and expenses are to be paid to the joint financial advisors, being 'a success fee in the amount of 1,5% of the total capital raised from the PIC, including any potential co-investors, payable upon closing of the transaction once all the conditions precedent have been fulfilled'.
51. The relevant part of this agreement is contained in Paragraph 4.2, which states that:
52. 'It is confirmed that, unless otherwise agreed by both parties on termination of this Appointment Letter, or unless this Appointment Letter shall have been terminated as a result of a breach by the Joint Financial Advisers of their obligations in terms of this Appointment Letter, should the Transaction be completed within a period of 2 years from termination of this Appointment Letter, the Joint Financial Advisers full fee in respect of the Transaction shall remain payable upon completion thereof, regardless of such termination, and regardless of the fact that the PIC may have completed the Transaction with the assistance of no advisers or advisers other than the Joint Financial Advisers.'

53. Confirming this agreement, the 'PIC hereby agrees to the terms and conditions of the appointment of the Joint Financial Advisers as recorded above. For and on behalf of the PIC'.
54. This is 'PP' signed by Ms More on behalf of Dr Matjila on 17 August 2017.
55. On 11 October 2019, Kleoss Capital, on behalf of the joint advisors, presented an invoice to the PIC claiming R44 661 975, as payment from the PIC for the services rendered as per the Appointment Letter.
56. This open-ended commitment raises a number of questions:
 - 56.1. Is this the only contract with such a clause, and if so, what were the special circumstances that gave rise to it?
 - 56.2. Was this contract signed off and approved by the PIC legal team?
 - 56.3. Was any work as set out in the appointment letter performed by the advisors, and if so, was any assessment of the contribution made to the conclusion of the Edcon deal done?

Findings

Findings in relation to Harith

57. From the evidence and testimony before the Commission, the PIC created two funds – PAIDF I and PAIDF II – and appointed a senior employee, Mr Mahloele, to establish the funds and who, in due course, became the CEO of Harith in its various forms.
58. Harith was a company established precisely to manage the two Funds, and at significantly high fees. The Deputy Minister and Chair of the PIC, Mr Moleketi,

was appointed chairman of Harith. Through various processes, two employee bodies were created, the HSIST and Harith Holdings, which was held 100% by an employees' equity trust of the same type as the HSIST, in which its skilled employees participated.

59. The GEPF, the most significant investor in the Funds, initiated a legal process to enforce its rights to both dividends and share ownership.
60. The earnings and incentive schemes provided rich rewards for those selected by the PIC to fulfil these roles, confirming that PIC directors and employees used their positions for personal gain and/or to benefit another person.
61. Legal structures can be engineered such that they obfuscate substance for form. In other words, the substance may still be legal. The 'arm's length' loan, based on the minutes of the PIC, clearly shows that this was not done at an arms' length. This leaves the Commission with several unanswered questions: was any other fund manager considered? Was a competitive process run? If it was intended to be independent of government, why was Harith so PIC-employee heavy and had the former Chairman of the PIC as its chairman? It is the Commission's view that there is no question that the approach taken provided easy access to PIC funds, influence and including an enhanced ability to secure additional investment, including from the GEPF.
62. Harith's conduct was driven by financial reward to its employees and management, and not by returns to the GEPF. In essence, the PIC initiative, created in keeping with government vision and PIC funding was 'privatised' such that those PIC employees and office bearers originally appointed to establish the various Funds and companies reaped rich rewards.

Findings specifically related to ToR 1.3 in respect of the VBS case study (and not to the whole VBS matter)

63. The two executive directors of the PIC, Mr Nesane and Mr Magula, egregiously violated their fiduciary duties towards both VBS and the PIC.
64. They acted in collusion, such that the PIC was not aware of critical information relating to, among other things, shareholding in VBS, notwithstanding that the information that they were privy to was critical to any investor/shareholder. They hid behind the excuse that they could not share such information as they had fiduciary responsibilities to the VBS Board. Nor did they act responsibly as non-executive directors on the Board of VBS as they did not insist that the information be made available to all shareholders and investors.
65. Both men used their positions of trust and responsibility to steal and unduly enrich themselves at the expense of the depositors, clients and investors of VBS.

Recommendations

Recommendations in relation to Harith

66. The GEPF and the PIC should jointly appoint an independent investigator as soon as possible after receiving this report. The mandate must be to examine the entire PAIDF initiative to determine that all monies due to both parties have been paid and properly accounted for; to determine whether any monies due to overcharging or any other malpractice should be recovered, and to provide the results of such investigation within six months to the Boards of both the GEPF and the PIC.

67. The Board of the PIC should examine whether the role played by either Mr Moleketi and Mr Mahloele breached their fiduciary duties or the fit and proper test required of a director in terms of the Companies Act.
68. The Board of the PIC should develop appropriate policies and guidelines for the secondment/transfer/appointment of employees to external entities such that the interests of the PIC and its clients are duly protected.

Recommendations in relation to the Edcon Mandate Letter

69. The PIC Board of Directors institute a review of all contracts signed with advisors over the past five years to see if any contain similar or the same agreements.
70. The PIC review the Edcon transaction and determine whether the joint advisors executed the mandate they were engaged to fulfill, or were utilised in any way.
71. The PIC to consider legal options available to it regarding the claim for payment.
72. Ms More be asked to explain her approval, as CFO, of clause 4.2 above.

Recommendations in relation to the whole of ToR 1.3

73. The Board of the PIC must ensure due legal process is pursued to recoup investment funds lost in so far as this is possible. This is dealt with in more detail in Chapter V: Next Steps: Investment Risks and Losses.
74. The PIC, going forward, should not be seen to be rewarding work performed in one area of responsibility, when fulfilling other responsibilities, the same person is being significantly enriched and/or involved in the theft of monies

and not complying with their fiduciary duties – at great cost to the PIC and investors.

75. The Board of the PIC must institute due legal process to recover the ill-gotten gains from both Mr Nesane and Mr Magula, who were in their employ at the time of the theft.
76. The PIC should explore recovering any bonus or enhanced payments made to both men during the period that they served on the VBS board, whether related to the VBS matter or their regular duties.
77. The actions of both Mr Nesane and Mr Magula should be referred to the relevant regulatory and professional bodies to consider what action they should take, should this not have been done already.
78. The criminal conduct of Mr Nesane and Mr Magula should be referred to the National Prosecuting Authority.

TERM OF REFERENCE 1.4

‘Whether any legislation or PIC policies concerning the reporting of alleged corrupt activities and the protection of whistle-blowers were not complied with in respect of any alleged impropriety referred to in paragraph 1.1.’

Statutory Framework

1. The legislation applicable is the Protected Disclosures Act, 26 of 2000 (PDA). The provisions of the Act protect an employee or *‘any other person who in any manner assists in carrying on or contributing to the business of an employer’*.²⁷³ To qualify for protection, therefore, the person must be covered by the definition of *‘employee’* contained in section 1 of the PDA.
2. The PDA provides protection to whistleblowers in the private and public sectors who disclose information regarding unlawful or irregular conduct by their employers or fellow employees. The Amendment Act of 2017, according to an article by Zaakir Mohamed, *What does the Protected Disclosures Amendment Act mean for whistleblowers and employers alike?* Cliffe Dekker Hofmeyr, 16 August 2017, broadens the ambit of the PDA and introduces several new provisions which place further obligations on whistleblowers and employers alike.
3. Mohamed explains that,

‘the Amendment Act amends some of the definitions in the PDA and also introduces new definitions. The definition of ‘occupational detriment’ has

²⁷³ Section 1 of the Protected Disclosures Act 26 of 2000, the definition of ‘employee’.

been extended to include being subjected to a civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of a criminal offence or information which shows or tends to show that a substantial contravention or failure to comply with the law has occurred, is occurring or is likely to occur.

The Amendment Act introduces definitions for ‘temporary employment service’ as well as ‘worker’. The definition of ‘worker’ includes individuals currently or previously employed by the state as well as independent contractors, consultants, agents and those rendering services to a client whilst being employed by a ‘temporary employment service’ (i.e. a labour broker).

The Amendment Act substitutes section 6 of the principal Act with an amended section 6, that imposes a new obligation on employers, who are now required to:

- authorise appropriate internal procedures for receiving and dealing with information about improprieties; and*
- take reasonable steps to bring the internal procedures to the attention of every employee and worker.*

Therefore, employers need to ensure that they have measures in place to deal with employee disclosures. These procedures should be set out in a company policy which is made available to all of its employees. The aim of any whistle-blowing policy is ultimately to create a culture of openness and accountability without fear of reprisals or occupational detriment to ensure that employees report knowledge of any irregularities so that management can take the necessary steps to investigate and/or deal with those irregularities identified. ‘

A whistleblowing policy should include information regarding matters which are to be disclosed in terms of the policy as well as the procedures that need to be followed when making such disclosures. The policy should also provide guidance on the amount of information that should be provided when making any disclosures (for example, the type of conduct which constitutes the alleged irregularity, the names of the individuals involved in the alleged conduct, dates and places of occurrence as well as how the information had come into the relevant employee's knowledge). In addition to making the policy available to all of their employees, employers should ensure that they provide training to their employees on the policy.'

Ultimately, a whistleblowing policy should form part of a company's suite of anti-fraud and corruption policies, all of which should be aimed at creating a culture within the company of zero tolerance to irregular and/or unethical conduct, as well as a culture of reporting knowledge of such conduct so that appropriate steps may be taken.

Another new provision introduced into the PDA is the duty to inform an employee or worker of the steps taken once a disclosure has been made. In this respect, employers are required to, as soon as reasonably possible, but within a period of 21 days after receiving the protected disclosure, decide whether to investigate the matter or refer the disclosure to another person or body (if that disclosure could be investigated or dealt with more appropriately by that other person or body). The employer is also required to acknowledge receipt of the disclosure in writing by informing the employee or worker of its decision to investigate the matter or to refer it to another person or body. Should an employer be unable to make a decision within this time period, the employer will be required to inform the employee or worker, in writing, that it is unable to do so and, thereafter, advise the employee or worker

on a regular basis (at intervals of not more than two months at a time) that the decision is still pending. In such instance, the employer is required to advise the employee or worker of its decision on whether to investigate the matter as soon as reasonably possible but within a period of six months after the protected disclosure has been made.

An employer need not comply with the duty to advise an employee or worker of its decision on whether or not to investigate the relevant matter if 'it is necessary to avoid prejudice to the prevention, detection or investigation of a criminal offence. An employer will also be required to inform the employee or worker of the outcome of any investigation undertaken at the conclusion of the investigation.

Employees who make disclosures in terms of the PDA are required to do so in good faith. In this respect, the Amendment Act introduces a new provision in the PDA in terms of which an employee or worker who intentionally discloses false information knowing that the information is false with the intention to cause harm to the affected party and the affected party suffered harm as a result of such disclosure is guilty of an offence. This conduct would constitute an offence even if an employee or worker 'ought reasonably to have known' that the information being disclosed is false. If an employee or worker is found guilty of this offence, he or she would be liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment. The relevant section reads as follows:

'Disclosure of false information

9B. (1) An employee or worker who intentionally discloses false

Information -

(a) knowing that information to be false or who ought reasonably to have known that the information is false; and

(b) with the intention to cause harm to the affected party and where the affected party has suffered harm as a result of such disclosure,

is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

(2) *(a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the Director of Public Prosecutions.*

(b) The Director of Public Prosecutions concerned may delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.'

The introduction of this new provision is to be welcomed as it is likely to serve as a deterrent to employees leveling false allegations against their employers or fellow employees. It further strengthens the principle that disclosures should be made in good faith. There should be a basis on which the relevant disclosure is made and disclosures should not stem from mere speculation without any substance. This is because allegations received by a company have serious consequences for the company and any employee implicated in the allegations. This includes the cost and time spent on investigating the relevant allegations as well as the potential reputational harm that the company or relevant

*employee against whom the allegations are leveled may suffer as a result of any pursuant investigation.*²⁷⁴

General disclosure in terms of the guidelines issued by the Department of Justice in terms of the Act:

4. The employee must act in good faith when making a disclosure to any other person. In making the disclosure the employee must reasonably believe that the information is true.
5. One or more of the following must apply:
 - 5.1. the employee must believe that he or she will be subjected to an occupational detriment if the disclosure is made to the employer; or
 - 5.2. the employee must believe that the employer will conceal or destroy evidence relating to the criminal offence or malpractice if the disclosure is made to the employer; or
 - 5.3. no action was taken in respect of a previous disclosure to the employer; or
 - 5.4. the criminal offence or malpractice is of an exceptionally serious nature.
6. Lastly, according to the CDH article, *‘the Amendment Act introduces a provision whereby an employee or worker will not be liable to any civil, criminal or disciplinary proceedings for making a disclosure which is ‘prohibited by any other law, oath, contract, practice or agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with*

²⁷⁴ Article by Zaakir Mohamed.

*respect to a matter*²⁷⁵. This provision applies to the disclosure of information that a criminal offence has been committed, is being committed or is likely to be committed or which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur. This exclusion of liability does not extend to the civil or criminal liability of the employee or worker for his or her participation in the disclosed impropriety.²⁷⁶

The PIC's Whistleblower Policy

7. The PIC has a policy dealing with whistleblowing. It is posted on the intranet of the PIC and consists of 25 pages. In terms of paragraph 3.4 of the policy, it was to come into effect immediately on approval by the Board of Directors, which occurred on 27 November 2015.
8. The policy opens with a Policy Statement setting out the importance of awareness of fraud/corruption and nepotism. In paragraph 1.4 the following is stated:

'The PIC recognises that the continuous success of this policy depends upon the effectiveness of the awareness of the Board of Directors and employees at all levels and programmed training.'

9. However, there is no evidence that the Board approved an awareness programme, nor did any programme training take place.
10. In paragraph 8 of the document, 'ENVIRONMENT AND CULTURE', the following is stated:

²⁷⁵ Section 9A(1)(b) inserted by the Amendment Act, 2017.

²⁷⁶ Article by Zaakir Mohamed.

‘8.1 The Board and management must create an environment and culture in which employees are reassured that dishonest acts shall be detected and investigated by ensuring that –

8.1.1 Employees participate in in-house training programmes covering fraud, corruption and nepotism, and the detection and prevention thereof.’

11. In terms of paragraph 9.2 of the policy, the overall responsibility for the response and investigations into corruption/fraud and nepotism rests with the CEO. Notwithstanding the policies and obligations, there was no roll out of in-house training programmes, nor does it appear that such programmes were even developed. Furthermore, the Board never reviewed, considered or received a report from the CEO on an anti-corruption programme.
12. The Commission has been informed by the PIC that the law firm ENSAfrica is in the process of reviewing the current policy and drafting a policy specifically to address whistleblowing.
13. In the Budlender report (Appendix Three) the following is stated:

‘The somewhat perfunctory investigation of the allegations in the emails contrasts sharply with the investigation which was undertaken in an attempt to find out who had sent the emails, and who had “leaked” PIC documents (in particular, the MST transaction documents and the draft minutes). Three IT companies were involved in this investigation, which was intensive and extensive. (I note that the IT companies were ultimately reporting to Dr Matjila, which appears inappropriate in light of the fact that the allegations were made about him.)’²⁷⁷ (Sic.)

²⁷⁷ Para 145 of the Budlender report.

14. The transactions covered by the Commission's terms of reference are the following as per ToR 1.1:

14.1. INSMA

14.2. MST

14.3. Erin Energy

14.4. Karan Beef

14.5. Ayo

14.6. Sagarmatha

14.7. S&S Refinery

14.8. Lancaster & Steinhoff

14.9. Tosaco

14.10. Ascendis

15. The only transactions referred to in the section addressing ToR 1.1 that featured in the Noko/Nogu emails are MST and Karan Beef. The Commission is of the view that the content and tone of the Noko/Nogu emails indicate that the intention of the originator was not to blow the whistle on corruption but to cause maximum reputational damage to the PIC and its directors/top management. Investigations conducted by the forensic team of the Commission, assisted by FIC, could not establish the veracity of the allegations contained in the emails, except for the R300 000 paid to Ms Pretty

Louw (discussed in the MST transaction) by Mr Mulaudzi at the request of Dr Matjila.

16. The Karan Beef allegations were found to be without any substance. On the facts before the Commission it is clear that the content of the Nogu/Noko emails cannot be classified as *bona fide*. On the contrary, they are clearly *mala fide* and the anonymous author/s cannot rely on any statutory protection.
17. Mr Simphiwe Mayisela (Mr Mayisela) is the only former employee who could possibly claim to be described as a whistleblower. However, on the facts and on his own evidence he is not a whistleblower. Mr Mayisela, in his evidence before the Commission, clearly stated that he had deliberately used his super-administrator rights to access and steal documents and claimed that he received various documents from other employees, including documents dealing with transactions. He confirmed that he had knowingly and deliberately handed such documents over to a member of the South African Police Service, who readily received them.²⁷⁸
18. Mr Mayisela was charged with misconduct, a hearing was conducted, chaired by an independent chairperson in terms of the PIC policies and procedures, was found to be guilty and dismissed. There is no suggestion that the hearing was unfair or that the findings were wrong. The same with regard to Ms Bongani Mathebula (Ms Mathebula) who was charged with leaking Board minutes to third parties. Ms Mathebula was charged in terms of PIC policies and procedures, a hearing chaired by an independent chairperson found her guilty and recommended her dismissal.

²⁷⁸ Pages 39-106 of the Transcript for day 11 of the hearings held on 5 March 2019.

19. The former CEO ordered all passwords from the IT Department as well as whistleblower reports to be given to him according to the evidence before the Commission.²⁷⁹ This is in clear breach of the PIC whistleblowers policy.
20. All indications are that the Nogu/Noko emails have their origin in the PIC and were probably from a senior employee with access to Board minutes and the email server. Ms Menye probably is correct in her evidence where she stated that the emails come from someone '*...who has been "drinking coffee from the same cup and eating from the same plate with Dr Dan".*'(sic)²⁸⁰ The Commission has on many occasions publicly issued an invitation to Noko/Nogu to come forward with proof of the allegations, without a response. The Commission also requested Crime Intelligence and the Hawks to assist with establishing the identity of Noko/Nogu without any success.

Findings

On the evidence before the Commission:

21. The PIC failed to implement a Fraud Prevention Plan in terms of the PDA.
22. Dr Matjila failed to initiate training and information programmes to create awareness of the PIC whistleblower policy and the Board in situ at the time failed to exercise its oversight function in this regard
23. Dr Matjila acted in breach of the PIC's whistleblowing Policy by demanding the passwords from the IT Department, insisting that all whistleblower reports be handed to him and taking charge of a forensic investigation in which he and his fellow executive director, Ms More (CFO), were directly implicated.

²⁷⁹ Paras 550 and 594 of Dr Matjila's statement signed on 17 July 2019.

²⁸⁰ Para 24 of Ms Menye's statement signed on 6 March 2019.

24. Noku/Nogu cannot seek protection as a whistleblower in terms of the PDA as his/her emails cannot be classified as bona fide as they contain false information in general except for elements of the 'Pretty Louw' matter. The probabilities are that Nogu/Noku is a person within the PIC with access to information not readily available to most PIC employees, for example Board/Exco minutes.
25. The Commission cannot, on the evidence before it, comment on the disciplinary enquiries of Mr Mayisela and Ms Mathebula as the enquiries were conducted in terms of the PIC disciplinary policy and the hearings were chaired by independent chairpersons. Ms Mathebula was suspended and resumed her duties after the departure of the former CEO, following a decision by the Board not to implement the sanction recommended by the Chairperson.
26. It is important to note that the practice of issuing anonymous emails has continued at the PIC, with the latest being in or about October 2019. With regard to the latest email, it is clear that the contents were obtained from a specific PIC email address, possibly by hacking emails of certain employees of the PIC and distributing them in various forums. It appears that information within the PIC's information system platforms of communication continues to be accessed without permission and leakages continue unabated, including records of meetings of various forums within the PIC, such as the Exco, Board and Board subcommittees.

Recommendations

27. The Board of the PIC must, as a matter of priority, develop a comprehensive policy to give effect to the PDA.
28. A programme ensuring that information and training to implement the amended policy must be instituted. The implementation and effectiveness of

such a programme must be regularly reviewed and measured by the Board, which must also undergo such training.

29. A complete review of the whistle blowing policy and how it has been implemented is essential.
30. The PIC IT systems need to be adequately and appropriately secured.
31. The document management policy should be reviewed to reflect levels of confidentiality, access, processes and versions that can be tracked appropriately.
32. The continued use of anonymous emails, the leaking of confidential documents and abuse of social media reflects a serious breakdown of trust and confidence within the PIC.
33. The Board and Executive need to address this as a matter of urgency through, among other things:
 - 33.1. reviewing existing policies on ethics and values;
 - 33.2. examining and addressing the behaviour of leadership, including that of the Board and Executive, to ensure they practice, and are seen to live up to, the values and ethics the PIC espouses; and
 - 33.3. ensuring transparency and fairness throughout the organisation.

TERM OF REFERENCE 1.5

‘Whether the approved minutes of the PIC Board regarding discussions of any alleged impropriety referred to in paragraph 1.1 are an accurate reflection of the discussions and the Board’s resolution regarding the matters, and whether the minutes were altered to unduly protect persons implicated and, if so, to make a finding on the person/s responsible for the alterations’

1. Mr Chris Pholwane, Executive Head of Human Resources, outlined the disciplinary procedures followed by the PIC in his testimony before the Commission. He specifically referred to the disciplinary hearing conducted with regard to then Company Secretary Ms Bongani Mathebula, citing for background:

‘The Board minutes, accuracy or alteration thereof are best dealt with by the author of the minutes and the Board members present at the said meetings; and

In general it is common cause that the officially signed minutes are accepted as the accurate reflection of the minutes of the meeting and in this instance the same would apply to the said minutes of the Board for the period under consideration ...’

2. In her testimony before the Commission, the Company Secretary, Ms Bongani Mathebula, stated that *‘I was suspended by the PIC on allegations that I caused the distribution and/or copying of confidential information to unauthorised persons. The allegations against me were that I had leaked draft Board minutes which related to the allegations of impropriety against the former CEO, Dr Matjila ... I will deal with how that particular aspect of the*

minutes were substantially deleted (sanitised) from the original draft of the minutes ...'

3. The matter arose from the Board approach to dealing with the email containing allegations of corruption by the PIC CEO. (Note: the anonymous emails are dealt with in Chapter I of this Report).
4. Ms Mathebula states²⁸¹ : *'The whistle-blower allegations were tabled in a Board meeting held on 15 September 2017. As Company Secretary, I was in the in-camera meeting and was responsible for taking the minutes in that meeting. At the start of the meeting, I was instructed to switch off the tape recording. The Board was adamant that it did not want the in-camera meeting to have a voice recording. I then decided to take notes of all discussions in order to enable me to prepare minutes which would be presented to the Board for approval. It must be noted that all meetings that relate to the allegations against the CEO and CFO were not recorded at the behest of the Board. The Board proceeded with the meeting although it was highlighted from the onset that a letter requesting cancellation of the meeting was received from Fedusa. Such a letter was never made available at the meeting as part of the official record'*.
5. Ms Mathebula expands on the divisions in the Board about how to deal with the e-mail allegations, the mandating of Internal Audit to conduct an internal review notwithstanding their indication that they lacked the forensic expertise to do so, the Board's reversal of its original resolution to conduct an independent investigation into the allegations, noting that *'the about-turn came at the instance of the individuals against whom allegations had been made and in the face of IA's stated lack of forensic capacity to properly pursue the investigation'*.

²⁸¹ At page 11 of the Transcript for day 32 of the hearings held on 24 April 2019.

6. The Internal Audit Report on the allegations regarding the loan by PIC to MST was presented to a Board meeting on 29 September 2017. No board pack was presented. Ms Mathebula testified that:

*'I was in attendance at that meeting, taking minutes, so it was prudent for me to capture the true proceedings of the discussion at the meeting. I also did not want to second-guess the discussion of the Board and confine the minutes to only the resolutions taken at the meeting ...'*²⁸²

*On 6 October 2017 the Board held an urgent special Board meeting ... I was in attendance and taking minutes. Again, I was instructed not to record the discussions. The Board took a resolution not to pursue any further investigations of the allegations of 13 September 2017 ... the reason given by the Board to stop all further investigations was to restore stability at the PIC and focus on the implementation of the mandate of the PIC ...'*²⁸³

7. Ms Mathebula lists the draft Board minutes that she emailed to the Board on 12 October 2017, namely those of 28 July, 4 August, 15 September, 29 September and 6 October 2017 and said that the only Board member who indicated her comfort with the minutes was Ms Lindiwe Toyi, except for a few grammatical errors.
8. At a Board meeting of 17 November 2017, the minutes of 15/9, 29/9, 6, 16 and 19 October were tabled for adoption by the Board. In her testimony Ms Mathebula states that:

²⁸² At pages 44-45 of the Transcript for day 32 of the hearings held on 24 April 2019.

²⁸³ At page 49 of the Transcript for day 32 of the hearings held on 24 April 2019.

'The minutes were never considered but subsequently submitted to the Board meeting of 24 November. Instead the Board requested that the minutes be revised and be confined to matters under discussion and the end-point resolution only'.

*'I held a different view in that all minutes of the Board should bear a true reflection of the discussions of the meeting ... How does one prove that the Board discharged its fiduciary duties if minutes just capture the resolutions only?'*²⁸⁴

9. At the Board meeting of 24 November 2017, the minutes as originally drafted were submitted to the Board, which made changes to the minutes. Ms Mathebula testified that: *'A considerable number of deletions were made to the minutes of 29 September during the meeting as the Board felt that the minutes portrayed a negative picture ... Some Board members were giving instructions on how portions of the minutes should be deleted. There was one Board member who felt that discussions held during the meeting be retained ... The Board decided that the minutes of 15 September, 29 September and 16 October 2017 be adopted via Round Robin Resolution (RRR). This was unorthodox as normally the Board would correct the minutes. If there are substantial corrections, the Board would still adopt the minutes but request that the final minutes be circulated for the Board to note that all the corrections have been taken into account before the Chairman signs the final minutes....'*²⁸⁵
10. The RRR was prepared and circulated to the Board on 28 November 2017 and the minutes were eventually approved by RRR which itself was confirmed at a meeting of 2 February 2018.

²⁸⁴ Ibid. pages 65 and 66.

²⁸⁵ At pages 72 and 73 of the Transcript for day 32 of the hearings held on 24 April 2019

11. Ms Mathebula stated that it was out of the ordinary to correct the minutes by deleting the critical discussions held during the meeting and that *'one of the effects of this editing of the minutes down to the resolutions taken was that criticism by the Board of the CEO's involvement in securing funding for Ms Pretty Louw's company was effectively excised from the record, thereby sanitising the minutes. At no point did the Board highlight that the minutes did not capture the true nature of the discussions held'*.²⁸⁶
12. However, she further stated with regard to the allegations of doctoring of minutes that while discussions were deleted from the minutes, the resolutions were not changed. She was aware of a number of joint committee meetings that had taken place, but no secretarial support was asked for and therefore no minutes were taken of these meetings. She stated that the minutes that were leaked were in fact still draft minutes, which were, in keeping with standard practice, circulated for comment and amendments prior to the final minutes being tabled for approval.
13. Ms Mathebula stated that while she was told not to record meetings electronically, she took copious notes during meetings that she could refer to afterwards when drafting the minutes.
14. Ms Wilhelmina Louw, Acting Company Secretary, provided an overview of the functioning and structure of the PIC to the Commission. She stated that *'Since December 2017 all discussions at Board and Board Committee meetings are recorded, including in-camera discussions'*.²⁸⁷

²⁸⁶ Ibid. page 74.

²⁸⁷ At page 41 of the Transcript for day 1 of the hearings held on 21 January 2019.

15. Responding to questions regarding the minutes of 29 September 2017, Ms W Louw, Acting Company Secretary of the PIC at the time and current Board Secretary, testified:

'The Board Secretary and the Company Secretary attend Board meetings. The Minutes of the Board are then drafted by the Board secretary. The Board Secretary is most of the time recused from in-camera discussions.

The Company Secretary attended the in-camera Board meeting of Friday, 29 September 2017, after which she gave her notes to the Assistant Company Secretary for typing as the Board Secretary was not available to attend to the typing of the notes. The draft minutes were then refined by the Company Secretary. Directors also have a chance to provide input into the draft Minutes. There are usually a number of draft minutes before the final minutes are approved by the Board. In this specific case, the minutes that served before the Board were amended by the directors and the Company Secretary was requested to indicate the changes when circulating the final Minutes for adoption.

The changes to the minutes were to summarise the discussions of the Board. The concern raised by the Commission that the Minutes have been shortened from 10 to 6 pages, should take into account that the draft minutes contain the changes (original text) as well as the final text.

Minutes of the Board are usually kept confidential²⁸⁸(sic)

²⁸⁸ Written submission by Ms Louw, not dated, in response to questions raised at the Commission on 21 January 2019 regarding the minutes of 29 September 2017.

16. Ms Louw stated that she did not believe that the minutes were altered so as to not reflect the discussions and decisions of the Board. She said that the minutes of the Board meeting of 29 September 2017, signed by the chairman of the Board, are therefore the final minutes and evidence of the proceedings of that meeting. Furthermore, the only changes to the minutes were those that occurred in the normal course of Board members commenting on or changing draft minutes, and the final minutes presented to the Board took such changes into account and were then signed by the Chairman.
17. PIC Chairperson, Mr Gungubele, Deputy Minister of Finance, stated that '*the Board found itself divided on issues relating to the former CEO Dr Matjila ... where we disagreed there was so much tension*'.²⁸⁹ Among other points he made were that there was no tampering with the minutes of Board meetings and that systems need overhauling to deal with leakages from meetings'.
18. Non-Executive Director Ms Sandra Beswick, testified that '*highly confidential documents, including board papers, transaction reports and correspondence were leaked...*'²⁹⁰ and that Board meetings became highly contentious with strong divisions and mistrust between Board members.
19. Ms Sibuswe Zulu, former non-executive director of the PIC, gave evidence before the Commission, on whether Board minutes were tampered with. Ms Zulu said that meetings dealing with the Nogu emails during 2017 were not recorded. This was a decision of the Board as they were concerned about leakage of information. She said in retrospect this was an incorrect decision as what was discussed was now not available to be replayed. Minutes were circulated, comments made and ultimately when presented to the Board it was felt there was too much detail and content. The Board decided that much of the content and issues covered should be removed and the minutes should

²⁸⁹ Page 6 of Mr Gungubele's statement signed on 25 February 2019.

²⁹⁰ At page 7 of the Transcript for day 9 of the hearings held on 27 February 2019

only focus on the resolutions taken. Ms Zulu confirmed that the sanitised version was adopted adding that there was no dishonest or fraudulent intent at the time, and the minutes were not altered, but with hindsight the content is missing.²⁹¹

20. Ms Zulu reiterated that there were many examples of a culture of fear. There was the understanding that you must comply and cannot question and that there was an unhealthy environment for employees who were unable to freely voice their opinions. When asked about who she thinks sets the culture in an organisation, she responded that it was the responsibility of the Board.²⁹²
21. Bongani Mathebula was the only witness who testified that Board minutes were tampered with. She was also adamant in her testimony that Nogu was a whistle-blower and probably an employee of the PIC with intimate knowledge of the PIC. She was highly critical of the manner in which the Board dealt with the allegations against the CEO and giving the CEO a mandate to establish the identity of Nogu rather than protecting the whistle-blower and establish an independent forensic inquiry into the veracity of the allegations.²⁹³
22. It is therefore a matter of great concern that soon after she was suspended, there was an application by the UDM relying *inter alia* on doctored Board minutes which were found on her computer during her disciplinary hearing, where she was found guilty by an independent chair. A perusal of the record of the disciplinary proceedings does not reveal any glaring irregularity or bias at the hearing. In an about-turn, the PIC Board subsequently reinstated her on the basis that she was a victim of the actions taken by the former CEO.

²⁹¹ At pages 43-44 of the Transcript for day 62 of the hearings held on 13 August 2019.

²⁹² Ibid. page 20.

²⁹³ Pages 2-170 of the Transcript for day 32 of the hearings held on 24 April 2019.

23. In attempting to answer the question ‘whether the approved minutes of the PIC Board regarding the discussions of any alleged impropriety referred to in Clause 1.1 are an accurate reflection of the discussions and the Board’s resolution regarding the matters, and whether the minutes were altered to unduly protect persons implicated and, if so, to make a finding on the person/s responsible for the alterations’ it is necessary to consider two different aspects of the above.
24. Firstly, on whether the approved minutes accurately reflect the discussions of the Board and the resolutions taken, it is clear the Board was concerned about recording the discussions. The instruction to Ms Mathebula not to record the meeting, and the subsequent redaction of the minutes to exclude references to the discussions, reflect the concerns, and perhaps fears and tensions within the Board, of individual comments and opinions being recorded. The concern about leakages also informed this approach.
25. Secondly, it is not possible to determine the accuracy of the minutes as only resolutions were detailed in the minutes of the Board meeting of 29 September 2017, the above minutes were signed by the chairman of the Board. These are therefore the final minutes and evidence of the proceedings of the meeting. Furthermore, the only changes to the minutes were those that occurred in the normal course of Board members commenting on or changing draft minutes, and the final minutes presented to the Board took such changes into account and were then signed by the Chairman on 29 September 2019.
26. The evidence presented was consistent in that:
- 26.1. there was a decision not to record the Board meetings dealing with the anonymous email allegations
- 26.2. there was a concern about such minutes being leaked and becoming public

- 26.3. the content containing discussions that took place in the meeting was removed as a deliberate decision from the draft minutes, but there was no apparent difference of view between Board members as to the accuracy thereof
- 26.4. the minutes containing the resolutions were adopted by the Board and signed off by the chairperson.

Findings

27. ToR 1.1 refers to 'any alleged impropriety regarding investment decisions ...' This ToR refers the Commission back to alleged impropriety referred to in ToR1.1. However, the allegations of tampering with the minutes arose from the evidence given by Ms Mathebula, and related to Board discussions that were centred on how to deal with the anonymous emails. The Commission therefore dealt with this matter. It should be recognised that it would be impossible for the Commission, given the time and resources available, to properly examine all the minutes of all the investment decisions. The altering of an investment decision can be found in the VBS case study, referred to in more detail in the section addressing ToR 1.3, situated in Chapter III of this report. Nothing else was brought to the attention of the Commission regarding alteration of the minutes of investment decisions.
28. From the statements before the Commission it would appear that the actual content of the Board minutes was not questioned. Due to the concern that the detail of the Board discussions would be leaked, only the resolutions were recorded. There was no evidence that they were altered in any way.
29. It is reasonable to conclude that there was no intention to change the record of the discussions or purposefully alter the outcome and decisions

30. It is reasonable to recognise this as an honest error of judgement taken at a time of great tension and fragility in the PIC and significant distrust among members of the Board itself.

Recommendations

31. The Company Secretary must ensure the Board minutes document the discussion that led to the decision, including the issues raised and the reasons for the decision.
32. All Board meetings, whether ad hoc, in camera or regular meeting, as well as those of Board sub-committees established for any special purpose, should have an experienced minute-taker and an audio recording for ease of reference.
33. Audio recordings must be kept for at least 30 days after the formal minutes have been adopted.
34. Where appropriate, resolutions should indicate whether the decisions taken were unanimous or record the vote and any dissenting views, including, if requested, the director/s name.

TERM OF REFERENCE 1.6

‘Whether the investigations into the leakage of information and the source of emails containing allegations against senior executives of the PIC in media reports in 2017 and 2018, while not thoroughly investigating the substance of these allegations, were justified;’

1. This term of reference (ToR) deals with investigations that arose after the leakage of information and the submission of anonymous emails from September 2017. The key issues to be considered include the following:
 - 1.1. The events leading to the investigations.
 - 1.2. The authorisation of the investigations.
 - 1.3. The number of investigations conducted.
 - 1.4. What was investigated and was the substance of the allegations made sufficiently investigated?
 - 1.5. Were the investigations undertaken to:
 - 1.5.1. investigate the leakage of information, or
 - 1.5.2. identify the source of the emails containing the allegations or
 - 1.5.3. consider the substance of the allegations?
 - 1.6. Given the above, were the investigations justified?

Events Leading to the Investigations

2. The former chief executive officer (CEO), Dr Daniel Matjila (Dr Matjila), in his testimony said that by August 2017 journalists were calling him about allegations of impropriety at the PIC, clearly having had access to confidential, but leaked, PIC information. The key early leakage of information that led to the investigations being undertaken happened on Tuesday, 5 September 2017 and Wednesday, 13 September 2017.
3. On 5 September 2017, an email from someone with the name 'James Nogu' (Nogu) was sent to a number of people, including PIC board members and staff at National Treasury. The email, with the subject '*PIC CEO FUNDS GIRLFRIEND*', contained allegations against the CEO that he funded his alleged girlfriend with PIC money. This issue has also been covered in Chapter I of this Report.
4. The PIC management became aware of this email while they were holding an off-site strategy session. The Head of IT, Ms Vuyokazi Menye (Ms Menye), was instructed to block further distribution of the emails. In her statement Ms Menye stated that:

*'...the CFO and EH: HR advised me that they have an urgent and highly confidential request for me. They instructed me to immediately block and not release all the emails that were being received by some employees in the organisation and they indicated that the emails were about the CEO.'*²⁹⁴

5. On 6 September 2017, the Deputy Chairperson, Dr Xolani Mkhwanazi (Dr Mkhwanazi), with the Board's approval, met Dr Matjila to formally inform him

²⁹⁴ Para 11 of Ms Vuyokazi Menye's statement signed on 6 March 2019.

of the serious allegations contained in the anonymous email. He told Dr Matjila to provide a response to the Board by 15 September 2017.

6. A second email from someone whose name was reflected as Leihlola Leihlola (Leihlola) surfaced on 13 September 2017. This email extended the allegations made against Dr Matjila and also included allegations against the Chief Financial Officer (CFO), Ms Matshepo More, accusing her of victimising staff at the PIC.
7. On 15 September 2017 a special Board meeting was held to consider the allegations contained in the emails. The following occurred at the meeting:
 - 7.1. The Board decided to appoint an external party to investigate the allegations.
 - 7.2. Dr Matjila requested the Board to afford him an opportunity to respond to the emails as had been agreed with Dr Mkhwanazi. He was granted the opportunity. The Board was satisfied with Dr Matjila's response to the allegations, with Ms More concurring.
 - 7.3. The Board accordingly rescinded their decision to appoint an external investigator. Instead, the Internal Audit Department (IAD) was tasked with verifying the responses given by Dr Matjila and report to the Board on 29 September 2017. This was notwithstanding the Head of Internal Audit advising the Board that the IAD did not have the capacity to conduct a forensic investigation.
8. The Board thereafter issued a media statement affirming its confidence in the CEO. It expressed its concern, however, that given the extent of state capture, certain forces might be intent on removing the CEO from the PIC.

9. Former board member, Ms Sandra Beswick (Ms Beswick), had this to say on the issue at hand:

‘As far as I am aware there was no leakage of information during this period [when Mr Mcebisi Jonas was chairperson of the PIC]

...

The firing of Finance Minister Mr. Pravin Gordhan and Deputy Finance Minister Mr. Jonas at the end of March 2017 was a cause of great concern for me because the perceived risk of potential “State Capture” of the PIC increased significantly’.²⁹⁵

10. During the next Board meeting, held on 29 September 2017, the IAD presented the results of its investigations, which corroborated Dr Matjila’s statement. The Board accepted the findings that there was no impropriety on the part of the implicated parties and cleared them of any wrongdoing.
11. The Board meeting of 6 October 2017 decided to spend no more time on investigating what some Board members felt were malicious allegations against the CEO and CFO. Thus, no further investigations were undertaken on the contents of the emails, to which answers had been provided by Dr Matjila.

Approval of the Investigations

12. At the Board meeting of 15 September 2017, besides finding no wrongdoing by the CEO as alleged in the contents of the Nogu email, the Board authorised

²⁹⁵ Para 2.4-2.5 of Ms Sandra Beswick’s statement signed on 27 February 2019.

Dr Matjila to investigate the leakage of information himself. In this regard, Dr Claudia Manning, now a former Board member, stated that:

*'At the same [Board] meeting management was also instructed to investigate the IT systems of the organi[s]ation which had been breached, resulting in confidential transaction documents being distributed in public. The concern was that this would continue and put the work of the PIC at risk. The Board appeared unanimous in its view that the security breaches were a serious risk to the PIC and that they needed to be investigated and resolved as a matter of urgency.'*²⁹⁶ (Emphasis added.)

13. Thus, it is clear that the investigations were approved by the Board and the CEO was tasked with investigating the leakage of information.

Number of Investigations

14. Following the leaks on 5 and 13 September 2017, investigations were launched at the PIC by different entities, including:

- 14.1. The IAD investigation – this was undertaken to verify the responses provided by Dr Matjila, as instructed by the Board, and to investigate senior management (i.e. Dr Matjila and Ms More) on the allegations relating to the leaked information.

- 14.2. The BCX/Telkom investigation - this was initiated by senior management, the purpose of which was to investigate the leaks and the source of the emails. BCX outsourced this to Naledi Advisory Services (Naledi) and Sensepost. Naledi conducted a forensic investigation into the leaks and Sensepost undertook an external security assessment of the PIC IT

²⁹⁶ Paragraph 4, page 2, of Dr Claudia Manning's statement signed on 28 January 2019.

systems for potential hacking and other issues. Subsequently, Naledi was also asked to investigate the circumstances of the opening of the corruption case against the CEO.

- 14.3. The Sizwe Ntsaluba Gobodo (SNG) investigation – this was initiated by senior management to conduct a digital forensic investigation of the leaks. This investigation emerged during the testimony of Ms Bongani Mathebula (Ms Mathebula), the PIC’s Company Secretary, regarding the SNG investigation into her for allegedly leaking some minutes of the Board.
- 14.4. The Budlender Report – this relates to the external investigation initiated by the Ministry of Finance against the CEO. It investigated the content of the Nogu email of 5 September 2017 and held that there was no evidence of wrongdoing by the CEO.
15. Thus, two investigations, namely the IAD’s and Budlender SC’s, probed senior management (mainly Dr Matjila and Ms More), while three investigations, namely the Naledi, Sensepost and SNG, were ordered by the senior management to investigate parties suspected of leaking information.
16. The investigations were commissioned as a result of the allegations in the anonymous emails and the leakage of confidential information. Naledi was briefed on the scope of the investigation on 18 September 2017, while Sensepost’s brief was signed on 21 September 2017.

The Content of the Investigations

17. The content of these investigations is dealt with below.
18. First, it is important to sketch how the leakage of information arose:

- 18.1. Confidential PIC information was obtained, most probably from parties internal to the PIC and found its way to various parties, including PIC non-executive directors, National Treasury officials, retired general Bantubonke Holomisa (Gen Holomisa) and the media.
- 18.2. James Nogu disseminated the information to different parties, utilising an external email address that has proved difficult to trace.
19. The three different routes that investigations took are outlined below.

19.1. **Investigating the actual information leaks**

Since it appeared that the leaked information came from internal parties it was important to determine who could have supplied the information to external parties. The focus was on the potential 'suspects', namely those who had access to the relevant information. This was also prioritised to endeavour to avoid further outflow of confidential information. Many employees were cleared in the process, but a few were investigated further.

It was appropriate to take this approach in the investigation so as to better secure the IT systems.

19.2. **Investigating the source of the emails**

To try to ensure that leakage of damaging emails would not occur again, the PIC wanted to find and isolate the source of these emails. If a PIC employee/s were leaking information, this would have been in breach of policies and the ethical standards of the organisation.

- 19.3. There were two schools of thought presented during the Commission's hearings:

- 19.3.1. The sender inappropriately obtained and circulated information. Initially, there was uncertainty as to whether or not Nogu had hacked into the PIC IT systems, resulting in an investigation to try to identify the sender. There was a view that the sender was not a whistle-blower and thus not entitled to the legal protection afforded to whistle-blowers. Moreover, hacking into IT systems would be a breach of the Electronic Communications and Transactions Act 25 of 2002 (ECTA).
- 19.3.2. Others held the view that the sender was a whistle-blower and thus taking steps to identify Nogu would contravene the Protected Disclosures Act 26 of 2000 (PDA). A number of board members and several senior managers emphasised that Nogu and other senders of information did not follow the whistle-blowing policy of the PIC and therefore could not claim protection under the PDA. It is also not clear how the PDA would protect an unknown person or entity.

The decision to investigate and the subsequent investigations into the leakage of confidential information were necessary to enable the PIC to protect the integrity of its transactions, its processes and the IT system itself. It should also be noted that the provider of the information and the sender of the emails may not necessarily have been the same person. The steps taken by the PIC would therefore appear to have been appropriate, given the circumstances.

19.4. **Investigating the substance of the allegations**

Besides the Naledi, Sensepost and SNG investigations into the leaking of documents, the IAD and Budlender SC investigations looked into the substance of the allegations contained in the emails. The IAD

investigation has been dealt with above, while Adv. Budlender SC, who was tasked with investigating the allegations, did not find any wrongdoing on the part of Dr Matjila. Notwithstanding the measures taken as indicated above, anonymous emails have continued to surface, making various allegations against members of the PIC Board and the Executive.

The Commission is of the view that once the leakages emerged, the PIC had to act urgently and institute investigations without delay so as to protect client information, transactions under consideration and information relating to its assets under management. The question, however, is whether the CEO and CFO, as implicated parties, should have been mandated to undertake some of the investigations. Concerns were raised about the investigations being a witch hunt and about some investigations being handled by management instead of external parties. Independent counsel that presided over the disciplinary hearings of implicated employees also raised this issue as a concern. The leakage of confidential documentation, coupled with the allegations made in the anonymous emails, resulted in tensions, conflict and mistrust among Board members, as well as between the Board and the executive.

Findings

The following findings are made:

20. The investigations into the leakage of information and the source of emails containing allegations against senior executives of the PIC in media reports in 2017 and 2018 were justified.
21. The Commission finds that the Board abdicated its responsibilities by failing to take charge of all aspects of the investigations. It was the responsibility of

the Board to manage the process, to ensure that the IT systems of the PIC were protected and that due and fair process was followed throughout the investigations.

22. The PIC suffered considerable reputational damage as a consequence of the leakages and the internal turmoil that resulted.

Recommendations

23. The role of the Board is to ensure due process and proper governance at all times. In the matter of the anonymous email allegations the Board did not respond adequately. It should have obtained specialist legal advice on the matter.
24. Conflicts of interest need to be thoroughly evaluated and properly managed.
25. The policies of the PIC should be reviewed to ensure that provision is made for appropriate guidance in circumstances such as those under consideration. Such policies must be known to all and adherence thereto must be enforced.
26. The Board must ensure that investigative processes are fair, transparent and thorough in the interests of affected parties, the PIC and its employees.

TERM OF REFERENCE 1.7

‘Whether any employees of the PIC obtained access to emails and other information of the PIC, contrary to the internal policies of the PIC or legislation?’

1. To address this term of reference (ToR) the following aspects will be considered:
 - 1.1 The PIC policies regarding the safeguarding and release of information belonging to the company.
 - 1.2 Legislation relating to the handling of information.
 - 1.3 The nature of the information obtained irregularly.

PIC Policies on Information

2. As an asset manager that manages more than R2 trillion, the PIC has a wealth of information across its many departments. Various policies are in place as well as designated entities within the PIC that manage the flow of information. Certain of these policies, relevant to this term of reference, are briefly elaborated on below.

The Corporate Affairs Department and the News and Social Media Policy

3. This department is tasked with managing communications at the PIC and the flow of information from both an internal and external perspective. Amongst others, it regulates the manner in which information should be released to

external parties and broader stakeholders and how to deal specifically with the media and the use of social media by employees. Strict guidelines have been issued relating to the dissemination of sensitive information pertaining to transactions, the PIC's business partners and issues such as proxy voting. All these are covered in the News and Social Media Policy within the Corporate Affairs Department. The rationale, it appears, is that the PIC's information cannot be obtained and released without codified procedures being followed.

Confidentiality clauses in employment agreements

4. The PIC (the Employer) specifically includes its policies on information in the employment contracts it enters into with its employees. Embedding the PIC's policy on information in the contractual relationship between the parties has a binding effect. The objective is to ensure that employees do not have access to information they should not possess. There are numerous clauses in these contracts that are intended to ensure the safeguarding of the PIC's information, examples of which were provided to the Commission during its hearings. The employment contracts of Ms Nomzamo Petje (Ms Petje), a current employee and Mr Paul Magula (Mr Magula), a former employee, were included as part of their submissions to the Commission.
5. In terms of these contracts employees are required to -
 - 5.1. comply with the rules, policies, procedures and regulations of the PIC and legislation applicable to the PIC and to familiarize themselves with such policies, procedures, regulations and legislation; and
 - 5.2. at all times use their best endeavours to further the interests and objectives of the PIC and not place themselves in situations where there would be a conflict between personal interests and the interests of the PIC.

6. On confidentiality and disclosure of information, clause 21 of Mr Magula's employment contract – it is assumed that other PIC employees' contracts contain a similar provision – stipulates that the employee '*shall not . . . except in the proper course of his duties . . . divulge to any person . . . any information of a confidential nature acquired by him during the course of his employment with the Employer*'. Confidential information is said to include, among others, all information and data concerning operations, dealings, transactions and finances. In addition, an employee who wishes to make a public statement regarding the PIC or its business is required to obtain prior permission to do so from the Employer.

Information Technology Use Policy (IT Use Policy)

7. Information is now stored mainly in electronic devices and not in physical form and locations as in the past. It is thus important that users of the information technology (IT) systems of the PIC conduct themselves appropriately and as per the Acceptable Use Policy of the PIC to avoid creating risks that could harm the systems. Section 5 of the IT Use Policy gives general guidelines on the use of IT resources and prohibits employees from -
 - 7.1. accessing data and information without authorization, especially information they do not need for their day to day duties;
 - 7.2. obtaining, viewing, storing and distributing information in contravention of PIC policies and any applicable laws; and
 - 7.3. accessing, using or distributing inappropriate material that harms, or could harm, the reputation of the PIC.
8. Section 10 of the IT Use Policy deals with the monitoring and interception of issues within the PIC's IT resources and indicates the following:

- 8.1. the CEO can authorise persons within the PIC to intercept any communications and monitor every user's use of IT resources as a matter of routine or when it has launched an investigation.
- 8.2. importantly, users of the IT system may not intercept and monitor any information or communication of the PIC without authorisation.
9. Besides the IT Use Policy mentioned above, the PIC has created a higher level governing body, being a sub-committee of the Board, namely, the Information and Communication Technology Governance Committee (ICTGC), which has oversight of the PIC IT resources and the IT department. Its duties are, among others, to ensure that the IT department properly assists the PIC in the execution of its corporate strategy; that it has appropriate policies and that it monitors compliance thereof. It must also approve the IT strategy prepared by management and IT investments to be made.

Legislation

10. In addition to the policies outlined above, there is legislation applicable and relevant to this term of reference, that legislation prohibits obtaining information without authorisation. Even though this particular issue was not traversed during the hearings, the PIC examined this prior to the appointment of the Commission. In June 2018, the PIC commissioned a legal opinion from law firm ENSAFrica (the Opinion) in response to the actions of Mr Simphiwe Mayisela (Mr Mayisela) with regard to him accessing or attempting to access the PIC's confidential information without authorisation. Human Resources head, Mr Christopher Pholwane (Mr Pholwane), attached the Opinion as an annexure to his statement²⁹⁷, which he confirmed under oath at a hearing on 27 May 2019. The background to the legal opinion was that Mr Mayisela had allegedly informed Mr Lufuno Nemagovhani (Mr Nemagovhani), the Head of

²⁹⁷ A copy of the legal opinion is annexure 'CP15' to Mr Christopher Pholwane's statement.

Internal Audit, that he was in possession of an electronic password protected copy of the internal audit report on the investment by the PIC in Ayo Technology Solutions. He requested Mr Nemagovhani to provide him with the password for the report, but Mr Nemagovhani declined the request.

11. In the Opinion, ENSAfrica concluded that Mr Mayisela could have contravened, among others, section 86(1) of the Electronic Communications and Transactions Act, 25 of 2002 (ECTA), which reads:

‘Subject to the Interception and Monitoring Prohibition Act, 27 of 1992, a person who intentionally accesses or intercepts any data without authority or permission to do so is guilty of an offence.’

12. The Commission agrees. Furthermore, the Commission is of the view that, since Mr Nemagovhani refused to provide Mr Mayisela with the password and the latter could therefore not gain access to the report, he could also have been guilty of a contravention of section 88(1) of ECTA, in that he had attempted to commit an offence referred to in section 86. Section 88(1) provides that:

‘[a] person who attempts to commit any of the offences referred to in sections 86 and 87 is guilty of an offence and is liable on conviction to the penalties set out in section 89(1) or (2), as the case may be’.

What Other PIC-Held Information was Obtained?

13. Over the past few years, especially in 2017 and 2018, confidential information belonging to the PIC has found its way to external parties, including the media and retired General Bantubonke Holomisa. This information relates to various aspects of the PIC, including the following:

- 13.1. Transactions undertaken or concluded by the PIC, including Mobile Satellite Technologies, Ayo Technologies and Tosaco Energy.
- 13.2. Remuneration and incentive structures of the PIC.
- 13.3. Alleged victimisation of employees who were trying to expose alleged irregular and corrupt practices at the PIC.
- 13.4. Alleged political interference in the investment and other decisions at the PIC.
- 13.5. Leaking of documents relating to the deliberations of the Board of Directors and Board committees.

Employees that Obtained Information Without Authorisation

14. As to which employees obtained the PIC's information contrary to internal policies and legislation, certain individuals and their conduct will be examined, including members of the Board of the PIC. The key individuals who are alleged to have obtained and leaked the PIC's confidential information and those who might have assisted in this process are discussed below.

Past disciplinary processes

15. An important point to note is that a number of employees went through disciplinary processes presided over by independent Senior Counsel, where they were represented by experienced lawyers during hearings that often lasted many days. The Commission will not interfere with the findings and recommendations or conclusions in these hearings. It has no review or appeal jurisdiction.

Mr Mayisela

16. Mr Mayisela is the former senior manager Information Security, Risk and Governance at the PIC. He was involved in a disciplinary process during December 2017 and May 2018. He faced a number of charges, but for purposes of this ToR he was charged with, and found guilty of, being irregularly in possession of a document – Loan Market Association (LMA) Risk Participation - that related to a transaction between Deutsche Bank, the Government Employees Pension Fund (GEPF) and the PIC. According to the decision of the chairman of the disciplinary committee he also irregularly '*accessed and retained the letter of appointment of Naledi Advisory Services to investigate the circumstances relating to the opening of the corruption case against the CEO*'. This document related to an investigation conducted into Mr Mayisela himself. The disciplinary committee held that there was no justifiable reason or reasonable explanation for accessing and retaining these documents. This amounted to misconduct on his part and a dismissal was recommended by the Chairperson (Advocate N.A. Cassim SC), which recommendation was carried out by the PIC.
17. It may be mentioned, in addition, that Ms Matshepo More (Ms More) testified that Mr Mayisela utilised the access privileges to monitor email communications of employees, including hers.
18. Whilst Ms Menye has not been brought before a disciplinary committee, her conduct has been called into question in testimonies of Mr Pholwane, Chief Financial Officer Ms Matshepo More (Ms More) and former chief executive officer (CEO) Dr Daniel Matjila (Dr Matjila).
19. Whilst Mr Mayisela's former manager, Ms Vuyokazi Menye did not obtain unauthorised information herself her actions might have contributed to Mr Mayisela irregularly obtaining information. Evidence was led by Ms More

indicating that Ms Menye gave super-administrator rights to Mr Mayisela. These rights entitle the holder to literally have access to the entire IT system of the PIC.

20. Ms More said granting of super administrator rights to Mr Mayisela without following procedures exposed the PIC to major risks. Mr Mayisela said he accessed information to assist the police in their corruption investigation against Dr Matjila, while Ms Menye said she gave the rights to enable Mr Mayisela to carry out his daily duties in accordance with his responsibilities.
21. As the statement from Ms More indicates below, it appears Ms Menye did not follow the process laid out by the PIC to grant the rights and Mr Mayisela utilised this to obtain wide ranging information not related to the police investigation. In any event, he was not supposed to irregularly access any information. Thus, it is likely that Ms Menye aided Mr Mayisela in obtaining the information.

'For the PIC IT team to have access to Mimecast it has to be duly enabled to access Mimecast. In this regard there are controls that have been put in place from both the PIC and Mimecast perspectives in order to ensure that such access is not abused. The internal controls referred to above are in addition to the required compliance with the applicable legislation including, among others, RICA and POPI.

Within the PIC, super administrator privileges to access employee emails are only granted in the following instances:

when specific information is needed internally from a former employee's email inbox; and

during forensic investigations where the investigators require access to certain employees' emails as part of the investigation.

The process at the PIC with regards to granting super administrator access to staff emails is that a request is sent by the business or applicable person to the CEO with a memo motivating why access to employees' email is requested.

Once the CEO has considered and granted the request, she/he would send a letter to Mimecast requesting that they grant super administrator privileges i.e. access to staff emails.

The letter addressed to Mimecast will clearly identify the purpose, nature and extent of the activity for which access is required. The IT team within the PIC would then facilitate the implementation of the access granted. I attach hereto, for demonstration purposes, a copy of a letter requesting super administrator privileges to the forensic investigation company in relation to the VBS investigation marked Annexure "MM13".

From the perspective of Mimecast, access is granted only when it has been duly authorised by certain senior officials within the PIC. I attach hereto a letter from Mimecast dated 4 May 2018 addressed to the PIC confirming measures in place to grant super administrator privileges marked Annexure "MM14". It is to be noted that the letter states that "requests must be made by a customer employee with the title of Director or higher". Placing the approval responsibility at a senior level is in recognition of the high risk that the granting of such privileges exposes the business to. (risks).

It therefore follows that granting such privileges on a permanent basis and without checks and balances is not in keeping with PIC policy or

*good corporate governance and in fact borders on irresponsibility and/or recklessness.*²⁹⁸

22. On his own version Mr Mayisela obtained access to PIC documents which he passed on to the South African Police Service (SAPS) contrary to internal policies of the PIC²⁹⁹.

Ms Vuyokazi Menye

23. Whilst the disciplinary action against Ms Menye, Executive Head of the Information Technology division, ultimately did not proceed because of the conclusion of a separation agreement discussed under ToR 1.13 below, her conduct has been called into question during the testimonies of Mr Pholwane, Ms More and Dr Matjila. It is common cause that Ms Menye gave super administrator rights without the usual limitations to Mr Mayisela. These rights entitle the holder to have unlimited access to the entire IT system of the PIC. According to Ms More, Ms Menye did not follow the process prescribed by the PIC when she granted the super administrator rights to Mr Mayisela and this exposed the PIC to major risks. Indeed, Mr Mayisela utilised this access to obtain wide-ranging information not related to the SAPS investigation. He justified his actions, saying he accessed confidential information in order to assist the SAPS in their corruption investigation against Dr Matjila.
24. Ms More testified that within the PIC, super administrator privileges to access employee emails are only granted where specific information is needed internally from a former employee's email inbox and during forensic investigations where the investigators require access to certain employees' emails as part of the investigations. She sets out in her statement the process

²⁹⁸ Para 4.3.4-4.3.10 of Ms More's statement signed on 21 June 2019.

²⁹⁹ Page 10 of Mr Mayisela's statement signed on 27 February 2019.

to be followed when applying for super administrator privileges, which Ms Menye did not follow.³⁰⁰

25. There is no evidence that Ms Menye obtained unauthorised access to information at any stage, but her actions contributed to Mr Mayisela irregularly obtaining information. It could be argued that she aided Mr Mayisela to obtain information without the necessary authorisation. However, the question is whether she knew that Mr Mayisela would use the super administrator privileges to obtain access to information for purposes other than those intended. We think not.
26. Ms More stated³⁰¹ that the granting of super administrator privileges on a permanent basis '*without checks and balances*' is not in line with good corporate governance and in fact borders on irresponsibility and/or recklessness. Granting super administrator rights without limitations was not appropriate on the part of Ms Menye however on the evidence traversed she cannot be held to have aided the obtaining or herself obtained confidential information.
27. Though not directly related to this ToR, the Board of the PIC should examine the role played by Ms Menye in the leaks, especially putting no limitations on the granting of super administrator rights to Mr Mayisela, who went on to abuse the rights by 'spying' on PIC employees. Allied to this the Board should investigate the role played by Ms Menye in not letting the PIC know that the CEO (Dr Matjila) was under investigation for corruption charges. This aspect is also covered in TOR1.13.

³⁰⁰ Paras 4.3.6-4.3.10 of Ms More's statement signed on 21 June 2019.

³⁰¹ Para 4.3.10 of Ms More's statement signed on 21 June 2019.

Ms Bongani Mathebula (Ms Mathebula)

28. Ms Mathebula, the Company Secretary, went through a full and in our view, independent, disciplinary process where she was charged with enabling Mr Mayisela to have access to confidential minutes of the Board, which were then found to be in the public domain. The charge against her is couched as follows in the decision of the disciplinary committee provided to the Commission by Mr Pholwane during his testimony:

*'It is alleged that you breached your duty of good faith and confidentiality as an Employee and in your position as Company Secretary of the Public Investment Corporation (SOC) Limited ("the PIC") in that you caused the distribution and/or copying of confidential PIC information.'*³⁰² (Emphasis added)

29. She was found guilty in March 2019 of breaching PIC policies and a dismissal was recommended by the Chairperson, Adv W Hutchinson SC.

30. Although Ms Mathebula denied, before the Commission, that she caused the distribution of confidential PIC information in the form of minutes of the Board, the Commission accepts the findings of the disciplinary committee until they are successfully challenged. After Ms Mathebula had been found guilty of a dismissible offence, the Board of the PIC opted to give her a final written warning. However, it was never suggested that Ms Mathebula was irregularly in possession of the minutes at the time that she would have breached PIC policies, or at any other time. Thus, strictly speaking she can therefore not be said to have 'obtained access to emails and information of the PIC contrary to the internal policies of the PIC or legislation'.

³⁰² A copy of Ms Mathebula's charge sheet is attached as annexure 'P' to Mr Pholwane's first statement, para 5.1.1.1, signed on 22 January 2019.

31. Whilst not directly related to this ToR, the role that Ms Mathebula played in the leakage of information and Board issues need to be dealt with here. As a Company Secretary (Secretary) Ms Mathebula's role is to assist and guide the Board on its duties and as perform the duties of the Secretary, which include administrative activities. During the hearings she has been found to hold strong views on Board deliberations and appeared to take sides among Board members. She should have assisted the Board to be well-functioning. She might not have breached any policies or legislation, but it is recommended that she be apprised of this by the Board. Finally, a major concern is that Ms Mathebula underwent a full disciplinary process, for leaking minutes of the Board, which disciplinary process recommended her dismissal and yet the Board, let by Mr Gungubele, chose not to dismiss her. This might make a mockery of the PIC's disciplinary processes.
32. We recommend that the Board examines the issue of Ms Mathebula's resintatement and satisfies itself on whether this was correct or not.

Dr Xolani Mkhwanazi

33. Dr Matjila had a lot to say about the behaviour of Dr Mkhwanazi in terms of the leakage of information and that the first Nogu email appears to have emerged, in some ways, through the electronic platforms of Dr Mkhwanazi and that his personal assistant might also have played a role here. When asked about this, Dr Mkhwanazi denied any part in the leakage of information and offered to answer these at a later date. Though not related to this ToR, but treated here, Dr Matjila accused Dr Mkhwanazi of being involved in political interference at the PIC. Dr Matjila said that when the National Empowerment Fund (NEF) was applying for funding at the PIC in one instance, Dr Mkhwanazi was in the company of the then Chairperson of the PIC and Deputy Minister of Finance, Mr Buthelezi, and pressurised Dr Matjila to approve funding for the NEF. It should be noted that Mr Buthelezi is the

brother of the Chief Executive of the NEF, Ms Philisiwe Mthethwa. Dr Mkhwanazi has yet to answer to these allegations. It is recommended that the Minister and/or Chairperson of the PIC investigate these concerns and bring them to finality.

‘James Nogu’

34. There may well be more PIC employees involved in irregularly obtaining and disseminating information of the PIC. In fact, Mr Mayisela testified that he was still receiving documents leaked from the PIC, which he passed on to a member(s) of the SAPS. This was after he had been dismissed from the PIC. Despite the Commission having appointed, through the investigation team, what was considered to be experts in the field of IT, the person/s behind the pseudonyms James Nogu, James Noko and Leihlola Leihlola could not be identified.

Findings

35. The question posed in this term of reference, namely, whether any employees of the PIC obtained access to emails and other information of the PIC, contrary to the internal policies of the PIC or legislation, is answered in the affirmative.
36. There is sufficient evidence for the Commission to conclude that one of the employees of the PIC who obtained access to emails and other information of the PIC contrary to the internal policies of the PIC or legislation (at least section 86(1) of the Electronic Communications and Transactions Act, 25 of 2002) was Mr Simphiwe Mayisela.

Recommendations

37. The PIC has good policies and procedures on safeguarding its information and employees are obliged to familiarise themselves therewith. It is accordingly recommended that-

37.1. The PIC should regularly review and enhance its policies on safeguarding its information, particularly given the pace of change taking place in the IT environment.

37.2. Leakage of information and similar transgressions of policies and ethics have a great deal to do with the culture of the organisation. The PIC should therefore continue to inculcate values of integrity, honesty and transparency in its environment.

37.3. The Board of the PIC must determine what legal recourse it intends taking with regard to the deliberate actions by Mr Mayisela to obtain privileged information and pass such information on to third parties, with severe consequences for the PIC. As indicated above, Mr Mayisela could have contravened, among others, section 86(1) of the Electronic Communications and Transactions Act, 25 of 2002 (ECTA), which reads:

'Subject to the Interception and Monitoring Prohibition Act, 27 of 1992, a person who intentionally accesses or intercepts any data without authority or permission to do so is guilty of an offence.'

37.4. Furthermore, Mr Mayisela may well have contravened section 88(1) of ECTA, in that he had attempted to commit an offence referred to in section 86. Section 88(1) provides that:

'[a] person who attempts to commit any of the offences referred to in sections 86 and 87 is guilty of an offence and is liable on conviction to the penalties set out in section 89(1) or (2), as the case may be'.

TERM OF REFERENCE 1.8

‘Whether any confidential information of the PIC was disclosed to third parties without the requisite authority or in accordance with the Protected Disclosures Act, 2000, and, if so, to advise whether such disclosure impacted negatively on the integrity and effective functioning of the PIC;’

1. This Term of Reference (ToR) addresses the alleged leaking of the PIC’s confidential information to third parties and whether, if this indeed occurred, it affected the integrity and functioning of the PIC. It also deals with whether or not such information was released irregularly.
2. From the second half of 2017 to the present, the PIC has received negative media and other coverage. Confidential information found its way into the hands of a variety of third parties, including print, radio, television and social media. These platforms have disseminated, among others, material that contained confidential information on PIC transactions, internal treatment of staff and PIC Board deliberations. This is also covered elsewhere in this Report in the sections addressing terms of reference 1.1, 1.5, 1.6 and 1.7.

Information disclosed without authority

3. It has been determined that highly confidential documents, including Board papers, transaction reports and correspondence were leaked to the media and other external parties, irregularly and without the requisite authority of the PIC (see also ToR 1.7).³⁰³ Even prior to the anonymous emails of James Nogu/Noko (Nogu) and Leihlola Leihlola (Leihlola), confidential PIC information could already be found in the public domain. Nogu and Leihlola

³⁰³ Para 3.3.4 of Ms Sandra Beswick’s statement signed on 27 February 2019.

raised the stakes by making wide-ranging allegations about the CEO and operations inside the PIC. This distribution of information was in violation of PIC protocols on handling of information, and was thus done irregularly.

Information disclosed without following the Protection of Disclosure Act, No 26 of 2000 (PDA)

4. Certain of the witnesses who testified before the Commission emphasised that information that was released was in keeping with the PIC's Whistle-Blowing Policy (WBP), which policy is based on the PDA. However, there was no evidence that anyone followed the protocols contained in the WBP and the provisions of the PDA, including Nogu and Leihlola; nor were these protocols taken into account, notwithstanding the damage that would be inflicted on the reputation and functionality of the PIC. The leakage of information through the Nogu/Noku and Leihlola emails was not in keeping with the processes as determined by the WBP. The confidential information disclosed to the SAPS by Mr Mayisela was done without authority and not in accordance with the PDA, as explained in the section addressing Term of Reference 1.4 above.

Did disclosure of confidential information negatively impact on the *integrity* of the PIC?

5. As outlined above, negative media coverage abounded over the past few years. External parties have had access to confidential information and placed it in the public domain. Retired General Bantubonke Holomisa (General Holomisa) was also provided with much of the information, which was integral to his allegations against the PIC. Certain parties that appeared before the Commission were critical of the PIC especially after the leakage of its information. Among these, the Association for Monitoring and Advocacy of Government Pensions (AMAGP) and Congress of South African Trade Unions (COSATU), organisations that have a direct interest in the funds managed by

the PIC, expressed unhappiness with losses the PIC had allegedly incurred, as per evidence placed before the Commission.

6. AMAGP's key complaints against the PIC related to the various transactions that had attracted controversy such as VBS losses, a R5 billion loan to Eskom and the Harith/Lebashe transactions. They accused the PIC of lack of accountability and transparency.
7. COSATU accused the PIC of looting pensioners' funds and claimed that they had lost faith in the PIC and demanded that labour federations have representation on the Board of the PIC.
8. Inevitably, the information leaks have fueled negative public and stakeholder perceptions about the PIC, which has in turn impacted negatively on the integrity of the PIC, denting the confidence of key stakeholders and clients in the PIC.
9. It is unfortunate that the integrity of the PIC has been called into question by the practices it followed that have come to light during the hearings of the Commission. The PIC has ethical codes and policies in place that seek to entrench its integrity. One of its core values states as follows:

'We believe that everything we do is glued together by integrity; without integrity our relationship with our stakeholders can never stand.'

10. There are two key policies that outline the ethical conduct expected from all PIC employees with regard to integrity, honesty and transparency:
 - 10.1. The Board of Directors Code of Conduct – this is applicable to all executive and non-executive directors of the PIC. The Code of Conduct requires:-

- 10.1.1. That directors diligently carry out their fiduciary duties.
- 10.1.2. Honest and ethical conduct of directors.
- 10.1.3. Good governance, risk and compliance management.
- 10.1.4. Avoidance and management of conflicts of interest.
- 10.1.5. Failure to adhere to the Code could result in a director being removed from the Board.
- 10.2. Code of Ethics Policy – this is applicable to all directors and employees at all levels of the PIC. It also emphasizes ethical conduct in all dealings at the PIC. The Policy:
 - 10.2.1. Lays out ethical principles to live by, including protecting the reputation and confidential information of the PIC.
 - 10.2.2. Expects all employees, at all times, to behave in a way that respects the laws, delegations of authority, policies, procedures and values that govern or are applicable to the PIC.
 - 10.2.3. Encourages directors and employees to report breaches of the code of ethics and espoused values.
- 11. The extent to which these codes and policies have been breached, as per the testimonies presented to the Commission, and the widespread concerns raised by the general public and stakeholders with regard to the functioning of the PIC – at both Board and Executive level – makes it clear that confidence in, and the integrity of, the PIC have been impacted negatively.

Did disclosure have a negative impact on the functioning of the PIC?

12. From the documentation provided to the Commission, and from testimony presented, the PIC's functioning can be broken down into the following levels:
 - 12.1. The interaction between the PIC and the Minister of Finance as shareholder representative, primarily through the Annual General Meeting (AGM) and the Shareholder Compact.
 - 12.2. The activities of the Board of Directors and the Board sub-committees, including the Investment Committee, Audit and Risk Committee and those of IT and Human Resources.
 - 12.3. The activities of executive management, the executive committee, and various management committees, including the Portfolio Management Committees (PMCs).
 - 12.4. The managers and general staff from senior, middle to lower ranks that carry out the PIC operations on a daily basis.
13. From evidence presented before the Commission, there is no doubt that the effective functioning of the PIC, at all levels, has been negatively affected by the events of the past two to three years. From receipt of the first James Nogu email on 5 September 2017, the PIC has been severely affected. This is reflected in the resignation letter of Dr Manning to then Minister of Finance Nene, dated 22 July 2018, where she states that '*I would urge, as the shareholder representative of the PIC, to act swiftly to introduce stability and restore public confidence in the PIC ...*'.³⁰⁴

³⁰⁴ At page 46 of the Transcript for day 5 of the hearings held on 29 January 2019.

14. In the aftermath of the Nogu/Noko/Leihlola emails the following developments impacting on the functioning of the PIC unfolded:
 - 14.1. The representative of the shareholder of the PIC, the Minister of Finance, was called upon to intervene. This resulted in the Finance Minister commissioning the Budlender report.
 - 14.2. The Board experienced deep divisions on how to deal with the issue of the CEO, Dr Matjila, in relation to the allegations contained in the emails and what action should be taken.
 - 14.3. The functioning of Board was significantly affected, particularly in 2018 when General Holomisa launched litigation to have Dr Matjila suspended.
 - 14.4. Individual members of the Board resigned at various times. The Board, as a whole, offered to resign and the Minister of Finance, Mr Mboweni, 'advised' the members of the Board, through its Chairperson, Deputy Minister Gungubele, to resign.
 - 14.5. Ultimately, the Board resigned in 2019 and an interim Board has been appointed.
 - 14.6. Investigations, including various disciplinary charges, were instituted that resulted in a number of senior executives of the PIC losing their jobs.
 - 14.7. At present, the PIC has a substantial number of executive heads in acting positions, including acting positions for the CEO, CFO, heads of legal, risk and others.
 - 14.8. The staff at the PIC operated under extremely difficult circumstances during these times, but they have largely continued to execute their duties in a professional manner.

- 14.9. Some of the key issues reflected above have resulted in the President of the Republic of South Africa instituting the PIC Commission of Inquiry. This, in itself, has resulted in intense public scrutiny.

Findings

15. Confidential information was disclosed to third parties without the requisite authority.
16. This was done neither in accordance with the PDA, nor in keeping with the PIC's own whistle-blowing policy.
17. This unauthorised disclosure of the PIC's confidential information impacted negatively on the integrity and functioning of the PIC. However, the disclosures also reflect the climate of fear and victimisation that prevailed at the PIC.
18. Major reputational damage has been done to the PIC.
19. It is apparent that while codes and policies to address ethics and values were developed and put in place, they were not respected in many of the practices followed at the PIC.

Recommendations

20. The Board must review the codes and policies that address ethics, values and whistle blowing, examine why they have not been effective and put in place appropriate measures to enhance the value system adhered to by all employees, including management, the executive and directors of the PIC.

21. The PIC should take measures to ensure that directors, management and employees at all levels know, espouse and live the values and policies of the PIC.
22. Initiatives and induction for all new employees and/or Board members should be reviewed and strengthened so as to embed the values and ethics of the PIC into the culture of the organisation. This should include the protection of information and the imperative to always carry out duties and responsibilities with integrity.
23. The PIC has suffered major reputational damage. The Board will need to take appropriate measures to rebuild trust, confidence and integrity both internally and with clients and stakeholders, as well as the business sector and the general public.

TERM OF REFERENCE 1.9

‘Whether the PIC has adequate measures in place to ensure that confidential information is not disclosed and, if not, to advise on measures that should be introduced;’

1. In considering this ToR, the Commission will deal with the following issues:
 - 1.1 What are the current measures in place to protect the PIC’s confidential information?
 - 1.2 Whether these measures were breached during the outflow of information from the PIC, mainly from quarter four of 2017 to quarter one of 2019 and, if so, how did the breach occur?
 - 1.3 Possible measures to ensure that the confidential information of the PIC is adequately protected.

Current Measures in Place

2. As indicated in ToR 1.7 above, the PIC has implemented various measures to safeguard its confidential information. These measures are embedded in the Corporate Affairs Department, employee contracts, Information Technology (IT) policies and procedures and also include reference and adherence to relevant legislation. The PIC requires physical space to secure information in its physical form, such as printed documents, as well as the ability to ensure the physical security of its hardware and IT systems; in other words, essentially all elements of IT security. There is no suggestion that physical space for these purposes is inadequate.

3. IT security is found in the following policies of the PIC.

3.1 Acceptable Use Policy;

3.2 IT Disposal Policy; and

3.3 Third Party Management.

Acceptable Use Policy: IT Security sections

4. The Acceptable Use Policy deals with all manner of IT issues, with the focus on IT security. There are procedures and guidelines on how users should utilize the PIC's IT resources, covering a wide area of the IT systems. Some of the procedures are:

4.1 Confidential information must be stored in the right places on the network drive.

4.2 Users must protect their passwords to prevent unauthorised access to their information.

4.3 Users must not access, especially classified information, on the network without authorisation.

4.4 Unauthorised distribution of information, usernames and email addresses of users to third parties is prohibited.

4.5 Users must exercise caution in opening email attachments from unknown senders as these might contain viruses.

- 4.6 The placing of the PIC's material – such as internal memos, policies and presentations - on any publicly accessible internet computers is not permitted.
- 4.7 All users of mobile devices of the PIC must follow the same procedures as they do in respect of desktops in the office, including ensuring that they have password protection enabled and that users should not fall behind by more than two weeks without updating their mobile operating systems such as iOS.
- 4.8 Users are not permitted to store or copy information to any external media unless this has been approved by their line manager.
- 4.9 The CEO may authorise persons within the PIC to intercept any communications and may monitor user's use of IT resources either as a matter of routine or when undertaking an investigation.
- 4.10 Users are not permitted to intercept messages or files in transit on the network without prior written permission of the CEO.
5. The PIC ensures that all the users of IT resources sign a user agreement. Breach of this IT user agreement may result in disciplinary action against the user and may constitute a criminal offence in certain instances.

Disposal Policy

6. This policy essentially addresses the proper disposal of the PIC's IT equipment (or IT assets) in an environmentally responsible way. This equipment, such as hard drives, USB drivers, servers, personal computers and laptops can store sensitive data and their disposal must take this into account and be treated with care. IT security is important in such disposals. When IT assets have reached the end of their useful lives they are disposed

of, but all data and software stored in the equipment such as hard drives must be erased beforehand.

Third Party Management

7. For various reasons the PIC outsources parts of its IT Services to external suppliers or third parties. This could pose risks with regard to information security at the PIC and one mitigation measure is to sign rigorous supplier agreements with such external parties.
8. These supplier agreements include the following:
 - 8.1 Agreed security controls;
 - 8.2 Confidentiality and non-disclosure agreements to safeguard information;
 - 8.3 Protection of the intellectual property of the PIC; and
 - 8.4 The need for suppliers to comply with relevant legislation and regulations.
9. In terms of risk management there is regular monitoring of the performance of the suppliers and also protocols on how suppliers can gain privileged access to the PIC's IT resources related to the services provided.

Were These Measures Breached?

10. From August/September 2017 the PIC experienced unprecedented instances of leaked information. The first occurred on 5 September 2017, namely, the Mobile Satellite Technologies (MST) investment and allegations regarding Dr Matjila's romantic involvement with Ms P Louw. For purposes of this ToR it is important to trace the events relating to this leak:

- 10.1 The message emerged from an external email address in the name of 'James Nogu' (Nogu).
- 10.2 The message was sent to a number of people, including Board members of the PIC and National Treasury officials.
- 10.3 It is not clear how the sender –
 - 10.3.1 obtained the email addresses of the people to whom the message was sent;
 - 10.3.2 obtained the information contained in the body of the email;
 - 10.3.3 obtained access to the document attached to the email, which was about the Pan African Infrastructure Development Fund (PAIDF).
11. It appears that the anonymous sender obtained access to internal information of the PIC and sent it to the parties he/she desired. There are, seemingly, three possible means by which 'Nogu' could gain access to the information:
 - 11.1 Irregularly breaching the IT systems of the PIC by exploiting the vulnerabilities therein, essentially hacking into the systems; or
 - 11.2 Internal parties at the PIC with access to the information providing that information to 'Nogu'; or
 - 11.3 Being provided with irregular/illegal access to the IT system by unknown internal parties such that the information could be directly accessed by 'Nogu'.
12. Ms Menye testified that there was no hacking of the IT systems during the time of the leak. In her statement she said the following:

'24. He (Dr Matjila) then enquired whether there was anyone who would like to say something. Mr Deon Botha raised his hand and he said that he does not believe that we were hacked, Mr Botha indicated that whoever has been sending those emails has that information. I also raised my hand to clarify that what was contained in the email, which I had seen is far from hacking. I then explained what hacking is. I also indicated that the information that was contained in the email by the looks of things appeared to come from someone who has been "drinking coffee from the same cup and eating from the same plate with Dr Dan". I also clarified that the systems of PIC do not store such personal information.'³⁰⁵ (Emphasis added).

13. When asked about what hacking is, the following exchange took place with Ms Menye:

'ADV SECHABA MOHAPI: *Just for the benefit of the Commission Ms Menye can you give that explanation of what hacking is versus the James Nogu e-mail distribution?*

MS VUYOKAZI MENYE: *...So basically hacking is to use a technical measure to penetrate ... a system for the intention of getting . . . information for malicious use.'*³⁰⁶

14. Though initially it was not clear if hacking was involved or not, it later became clear that the leaks most likely came from internal parties. Thus 11.2 and 11.3 was applicable and it is difficult to ensure protection against this form of breach since the means to enable a contravention have, in all likelihood, been provided by internal parties.

³⁰⁵ Para 24 of Ms Menye's statement signed on 6 March 2019.

³⁰⁶ At page 15 of the Transcript for day 12 of the hearing held on 6 March 2019.

15. The PIC's IT team responded as follows to the breach:
 - 15.1. Further dissemination via the PIC IT system was blocked.
 - 15.2. Steps were taken to investigate employees of the PIC who had access to and/handled the information that was leaked and whether they may have sent or delivered it to external parties.
 - 15.3. Steps were taken to identify the domain source of the emails and to establish 'Nogu's' identity so as to halt further leaks.
 - 15.4. The actual contents of the email were investigated to establish whether policies of the PIC were flouted and any legislation contravened. The Board mandated the Internal Audit Department to investigate the matter and later the Minister appointed an external and independent Counsel, Advocate G. Budlender SC, to investigate the veracity of the allegations contained in the email.
16. From the above sections, it appears that the PIC had put in place a reasonable level of protection for its information. Notwithstanding such policies, it is clear that collusion between internal parties in breach of policies, practices and laws, or collusion between internal and external parties, is very difficult to prevent.

Further Protective Measures to be Considered

People and technology

17. Protection of information and IT security is not only a process of policies, procedures and controls, but, critically, one dependent on the behaviour of the employees and the culture of the organisation. Ethical and value-driven

employees and an ethical and transparent culture from top to bottom can assist in curbing incidents such as information leaks.

18. When asked at the hearings how the PIC could further protect its information Ms Menye had this to say about IT security:

‘MR EMMANUEL LEDIGA: ... part of our terms of reference is to find out how the leaks happened and why they happened and finding out about James Nogu not really dealing with the whistle-blowers.... Can you . . . give us some ideas about that?

MS VUYOKAZI MENYE: Thank you Sir. I will not know how the leaks have happened and I don't know who James Nogu is . . . there's a lot of processes that needs to be considered in terms of avoiding information leaks in the organisation.

I always say to my colleagues in the industry that there are four key things . . . when you're running an IT organisation to enable an organisation to achieve its strategic and operational objectives to be considered.

[Y]ou can buy expensive technologies and implement them and put in place but if you do not educate your people on how to manage the information and how to take care of the information that investment will be worthless And also if you do not have the right processes in place to ensure that all this information that you're using in the organisation . . . flows effectively and be stored in this technology and disseminated correctly and classified . . . correctly then all of those things they go together.

So there's a lot of things to be considered in terms of you know avoiding . . . information leaks in any organisation or in any industry

but the four key things are people, process, technology and information and education about how to handle information is critical in any organisation or in any entity.

. . . I don't know who James Nogu is and I do not know . . . how this information could have leaked, it could have been through hardcopy documents, emails, taking pictures or maybe a person just looking at information...there's a number of e-mails that were circulated that we saw, so really I don't have an idea.³⁰⁷ (Emphasis added).

19. Mr Simphiwe Mayisela (Mr Mayisela), had this to say on IT security:

MR EMMANUEL LEDIGA: *And is there some way in which the systems can be strengthened orthe leaks stopped?*

MR SIMPHIWE MAYISELA: *So in the realm of IT, IT is composed of people, processes and technology. When you strengthen the systems you are only addressing the technology component you cannot address the people, there's nothing stopping people from walking away with confidential documents no matter how robust your technology may be and there's nothing stopping people from stealing with their eyes....³⁰⁸ (Emphasis added)*

Further protection measures

20. Securing information is clearly a multi-dimensional undertaking and since the leaks the PIC has moved to strengthen its protection measures in the following way:

³⁰⁷ At pages 60-61 of the Transcript for day 12 of the hearing held on 6 March 2019.

³⁰⁸ At page 102 of the Transcript for day 11 of the hearing held on 5 March 2019.

- 20.1. It took action immediately after the leaks. The then CEO, Dr Matjila, indicated at the hearings that the PIC commissioned an investigation into options to strengthen the IT environment. He stated that the action and future plans, recommended in the resulting report, are being implemented.
- 20.2. There is an on-going effort to finalise a comprehensive classification of the PIC's information so that various levels of access to information can be designated accordingly.
21. The current and planned measures for the protection of the PIC's information are wide ranging and the approach among best-in-class levels. The successful implementation, monitoring and regular review of the measures are essential steps to ensure on-going effective protection that is able to adapt to the rapidly changing world of IT systems. This will include vulnerability awareness programmes for all employees at all levels, an improved overall control environment and ensuring that a suitable IT system is put in place for unlisted investments.
22. The PIC is intent on strengthening the protection of its information and aspires to have a high-level state of IT security in the next few years. Security, however, remains a moving target. The PIC has taken significant steps to address the vulnerabilities identified and to create a greater awareness among all employees. It has committed to assigning responsibilities for information security, enhancing the capacity of the IT teams and implementing a security strategy that focuses on key areas the Board and Executive have identified.

Findings

23. The following findings are made:
 - 23.1. The PIC had reasonably good information protection policies in place prior to the leaks, which policies might have mitigated risks on actions taken by

those parties who deliberately chose to leak information and documents. Policies that were in place include the Acceptable Use Policy, the IT Disposal Policy and the Third Party Management Policy that covered key aspects of the PIC's IT resources.

- 23.2. The parties who participated in the leaks appear to have simply taken the information to which they had access and provided it to third parties.
- 23.3. Besides admitting that he both stole and was given PIC information, Mr Mayisela misused the super administrator rights enabling him full access to the whole of the PIC's IT systems. He did not need to, and did not in all likelihood, hack the system.
- 23.4. The PIC is instituting comprehensive measures to protect its information from current and possible future threats.
- 23.5. Clearly defined and enforced classification of information will enhance the security of sensitive information.

Recommendations

24. The recommendations that follow from the findings are:
 - 24.1. The PIC should continue to strengthen its information protection measures. Appropriate measures on how to classify and declassify information should assist with security of information and enable the detection of leaks with more certainty.
 - 24.2. The IT systems should be state of the art and be regularly updated in keeping with changes in technology, including the capacity to deal with cybercrime.

- 24.3. The PIC manual systems that are still in use must be automated as a priority.
- 24.4. The PIC should develop an ethical, transparent and values-driven culture and ensure that employee disputes are fairly and quickly addressed.
- 24.5. Investments in IT security systems and human resources should continue to be made.
- 24.6. The PIC should live its stated values of integrity, empathy, accountability and respect to ensure a workforce that pulls together.

TERM OF REFERENCE 1.10

‘Whether measures that the PIC has in place are adequate to ensure that investments do not unduly favour or discriminate against –

1.10.1 a domestic prominent influential person (as defined in section 1 of the Financial Intelligence Centre Act, 2001 [“FICA”]);

1.10.2 an immediate family member (as contemplated in section 21H(2) of the Financial Intelligence Centre Act, 2001 of a domestic prominent influential person; and

1.10.3 known close associates of a domestic prominent influential person.’

Scope of the Enquiry of ToR 1.10

1. Term of Reference (ToR) 1.10, mandates the Commission to enquire, make findings, report on and make recommendations into the *adequacy* of PIC *measures* relating to ‘domestic prominent influential persons’³⁰⁹, better known as politically exposed persons (PEPs): that investments do not unduly favour or discriminate against them, their immediate family members and known close associates. The operative words in ToR 1.10 being: “*adequacy*” and “*measures.*”
2. The term ‘*domestic prominent influential person*’, which is more self-descriptive and unambiguous than PEPs (but which will be used

³⁰⁹ Cf. “*foreign prominent public officials*” who have been defined in FICA as persons referred to in Schedule 3B of FICA.

interchangeable with the latter term), is defined in section 1 of the Financial Intelligence Centre Act, 38 of 2001 (FICA), as a person referred to in Schedule 3A of the FICA.

3. Schedule 3A of the FICA, in turn, defines such persons, through a comprehensive list, as individuals who hold ‘a prominent public function’, ‘including in an acting position for a period exceeding six months, or has held at any time in the preceding 12 months, in the Republic’: in national, provincial and local government, political leaders, traditional leaders, army generals, certain diplomatic officials, judges, as well as accounting officers, CEOs, CFOs and CIOs of entities listed in Schedules 2 and 3 of the Public Management Finance Act, 1999 and those appointed in term of section 54A of the Local Government: Municipal Systems Act, 2000, or in terms of section 80(2) of the Municipal Finance Management Act, 2003.
4. This fairly comprehensive list further includes – executives, board chairs and audit committee chairs of companies that provide goods or services to a State organ worth a certain threshold fixed by the Minister of Finance; and head or executive of an international organisation based in the Republic.
5. In respect of the term ‘*immediate family member*’, section 21H(2) of the FICA provides, in relevant part, that it

‘includes-

the spouse, civil partner or life partner;

the previous spouse, civil partner or life partner, if applicable;

children and stepchildren and their spouse, civil partner or life partner;

parents; and

sibling and step siblings and their spouse, civil partner or life partner.'

6. Whilst the list in Schedule 3A of FICA (relating to the term “**domestic prominent influential person**”) is fairly exhaustive, section 21H(2) (in relation to the term “**immediate family member**”) is not, because of the use of the word “includes” in the latter provision, which implies that the ensuing list is not exhaustive.
7. The self-contained test for the adequacy of the measures, discernible from ToR 1.10, is that such measures: ‘*ensure that investments*’ neither ‘*unduly favour*’ nor ‘*discriminate against*’ the class of persons in question.

Background to the PEPs Concept

8. The idea of persons who occupy (or who previously occupied) prominent public office being more pre-disposed to corruption and money-laundering and thus drawing more risk to financial transactions than the average person has a proven history and underpinning.
9. At the end of the 1990s, Nigerian army general and dictator, Sani Abacha, who had taken power in Nigeria through a military coup in November 1993, is said to have looted over US\$4 billion in public funds for his personal gain, comprised, in part, of development aid. He did this with the help of his family members and close associates. He allegedly siphoned and hid the looted funds in bank accounts in Europe, mostly in the UK and Switzerland.³¹⁰

³¹⁰ Bosse and Benisty “Politically exposed persons vs. Local corruption” *Europe, Global Financial Crime Review* 20 March 2018 (see www.acamstoday.org). See also, Enrico Monfrini “The Abacha Case” in M Pieth (ed) *Recovering Stolen Assets* (2008) pp 41-61.

10. After a new government was subsequently installed in Nigeria, it commissioned an international judicial inquiry on the recovery of the looted funds from several European countries. That led to a feat that remains praised to this day involving a combination of anti-dissipation relief sought through mutual assistance arrangements and the launching of criminal proceedings for money-laundering where Abacha had held bank accounts. Funds of up to US\$2 billion in ten jurisdictions were consequently frozen, of which US\$1,2 billion is reported to have since been recovered.³¹¹

11. It is from this background, which is reported to have involved more than 60 financial institutions, that the concept of politically exposed persons (**PEPs**) is said to have been conceived and developed.

International legislative origin

12. PEPs became the subject of a landmark, international anti-corruption treaty that was adopted by the UN General Assembly in October 2003, namely the United Nations Convention against Corruption, 2003 (treaty).³¹² The treaty, for the first time, brought into sharp focus the role of public officials in financial transactions. It insisted that care be taken when dealing with public officials as individuals who are more prone to be linked to corruption than the average customer. The treaty listed nearly every possible characteristic that would later define PEPs and would be integrated in the Financial Action Task Force (FATF) Recommendations³¹³ and the subsequent EU directives.³¹⁴

³¹¹ See *Abacha v Secretary of State of the Home Department* [2001] EWHC Admin 787 para 1.

³¹² The treaty was adopted on 31 October 2003 and came into force on 14 December 2005. See 43 (2004) *ILM* 37.

³¹³ FATF Recommendations, 2012 were adopted on 16 February 2012 and have been updated regularly since. See FATF (2012-2019), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, www.fatf-gafi.org/recommendations.html.

³¹⁴ Bosse and Benisty "Politically exposed persons vs. Local corruption" *Europe, Global Financial Crime Review* 20 March 2018 (see www.acamstoday.org).

13. The treaty represents a remarkable global achievement in response to a global problem. With 186 State Parties, including the Republic of South Africa,³¹⁵ bound by it, the treaty recognises the importance of both preventive and punitive measures. It addresses the cross-border nature of corruption with provisions on international cooperation and on the return of the proceeds of corruption. It obliges State Parties to, *inter alia*, cooperate in the prevention and combating of corruption through technical assistance (defined broadly as including financial and human resources, training, and research).³¹⁶

The PEPs concept closer to home

14. Closer to home, the concept of PEPs recently received judicial consideration by the Gauteng Local Division in *Kassel v Thompson Reuters (Markets) SA 2019 (1) SA 251 (GJ)*, where Unterhalter J, held as follows:

'[1] This case concerns a particular class of persons: politically exposed persons (PEPs). There is no universal definition of PEPs. The Financial Action Task Force (FATF), an international body of which South Africa is a member, defines domestic and foreign PEPs. In essence, PEPs enjoy or have enjoyed high office within the State and its institutions from which office PEPs discharge prominent public functions. There is no closed list of these offices. They include heads of State or government, senior government, judicial and military officials; and, importantly for this case, senior executives of State-owned corporations.

[2] The designation of this class of persons is intended to facilitate enhanced due diligence by financial institutions when a customer or

³¹⁵ South Africa signed the treaty on 9 December 2003 and ratified it on 22 November 2004.

³¹⁶ United Nations Convention against Corruption, 2003. Adopted by the UN General Assembly on 31 October 2003, by resolution 58/4 and entered into force on 14 December 2005, in accordance with article 68(1).

prospective customer is a PEP. And it is common ground that this enhanced scrutiny is part of a worldwide effort to exercise greater vigilance in the global financial system so as to detect and deter money-laundering and the financing of terrorism. Many countries, South Africa included, have passed legislation that requires enhanced due diligence of PEPs.'

15. The legislation that has been passed in South Africa for the purposes mentioned in *Kassel*, is FICA, which came into effect on 1 February 2002.

The PIC's Unique Position

16. As one of the largest asset managing companies in the country, wholly owned by the State (represented by the Minister of Finance), that manages a diversified investment portfolio comprised of multiple asset classes spanning all sectors of the South African economy, the PIC is vulnerable to the challenges concerning PEPs. Dr Matjila in his evidence stated that '*[w]ith funds exceeding R2 trillion the PIC is a very tempting piggybank for many.*'³¹⁷ He referred to the adverse influence of politics on the PIC, stating that the PIC received a barrage of funding proposals from politically connected people across political formations. He testified thus:

'DR DANIEL MATJILA: . . . The biggest challenge that I and my management colleagues faced during these trying times was handling deals that originated from powerful people and influential people including the office of the [PIC] chairman at that time. As the CEO responsible for most of significant asset manager on the African continent, I have on countless occasions been approached by many people of influence, bankers, financials, business people and

³¹⁷ At pages 4-5 of the Transcript for day 53 of the hearing held on 11 July 2019.

politicians not just of the ruling party I must add, but by all political parties with requests to invest in various companies.... (sic)

MR EMMANUEL LEDIGA: *...to follow up there on these political parties just give us an example of a typical transaction they would pitch ...?*

DR DANIEL MATJILA: *...it's a lot, they really come in many forms . . . some coming in e-mail format, some verbally...followed by e-mail, some followed by actual information memorandum already ...*

MR EMMANUEL LEDIGA: *But can't you give me just one example just to get a sense...?*

DR DANIEL MATJILA: *I think the closest one would be [a] request to provide R3 billion to the National Empowerment Fund ...*

ACSA, Adcock Ingram, Sasol Petroleum, Ascendis itself, Tosaco..., Erin Energy will fall into that category...

MR EMMANUEL LEDIGA: *And across from ANC, DA, EFF and the others...?*

...

DR DANIEL MATJILA: *Not the political party but individuals that are connected.'*³¹⁸

17. However, despite the barrage of proposals that the PIC receives from politically connected persons, and because of 'PIC's stringent compliance

³¹⁸ Pages 72-73 of the Transcript for day 52 of the hearings held on 10 July 2019.

practices,’ Dr Matjila testified that many of such proposals ‘*have not been fruitful.*’³¹⁹ The ‘stringent compliance practices’ referred to by Dr Matjila include the PIC policies relating to PEPs, which, *inter alia*, stipulate that once PEPs are identified, an enhanced due diligence be conducted in transactions involving them.

18. Dr Matjila was asked whether the PIC had effective internal processes that appropriately assessed investment proposals of PEPs:

‘MS GILL MARCUS: (Referring to) ...[paragraph] 272... that says *the fact that they were not fruitful is a consequence of the process within the PIC but it is not a mechanism to deal with the pressures or the access [by PEPs] and therefore this is an area that would need much closer scrutiny by the Commission.* Does that cover what we have discussed earlier?

DR DANIEL MATJILA: Yes Commissioner.’³²⁰ (Emphasis added.)

19. Accordingly, Dr Matjila confirmed that whilst there are proper measures in place as part of the internal PIC ‘process’, that ‘access’ *pressures* is something that would still have to be dealt with. Such ‘pressures’ are ascribable to the reality of the PIC’s unique position as a State-owned asset manager.

20. Dr Matjila’s responses to this matter, when asked what measures he put in place to manage such political and PEP pressures, are dealt with in greater detail in Chapter IV under the heading ‘Responsibilities and Accountability’.

³¹⁹ Ibid. page 72.

³²⁰ Ibid. page 74.

Evidence Heard by the Commission

21. The Commission heard evidence that the PIC has a plethora of policies that form part of the regulatory framework within which it operates. Ms Wilna Louw (Ms Louw), the PIC's Acting Company Secretary, in her capacity as custodian of the PIC's policies and records, stated the following:

'MS WILNA LOUW: . . . *PIC is also adhering to a number of policies. PIC's policies and procedures are designed to influence, determine and guide all major decisions and actions.*³²¹

PEPs regulation part of broader policy framework

22. In further evidence Ms Louw mentioned a number of indirectly important policies for the purposes of ToR 1.10:

'MS WILNA LOUW: [In] *The Records Management Department, we have the Records Management Policy and the Records Retention Schedule for PIC. In our Compliance Department we have got an Anti-money laundering Policy, Client Complaints Resolution Policy, the Compliance Charter, Compliance Framework and Manual Conflict of Interest Management Policy, Debarment Policy, Personal Account and Inside[r] Trading Policy, Risk Management and compliance programme and treating customers fairly policy with the ...[intervenes]*

COMMISSIONER: *Mr Lubbe I suspect that virtually all these would be relevant, is it not?*

ADV JANNIE LUBBE SC: *It is absolutely correct Mr Commissioner yes.*

³²¹ At page 26 of the Transcript for day 1 of the hearings held on 21 January 2019.

...

MS WILNA LOUW: . . . then for listed investments they are responsible for the Dealing Policies Procedures, Fixed Income Policies and Procedures, listed equity straight allocation policy and they have also got a standard operating procedure for listed investments. Investment management is the Asset Apportionment Policy, Asset Disposal Guidelines, Triple B-BBEE Policy for Listed Investments. Triple B-BBEE Guidelines for the Isibaya Investments, Delisted Investment Policy, ESG Guidelines for External Managers and ESG Policy for Fixed Income, ESG Policy for Listed Equities, ESG Policy for Public Entities and ESG Policy for Unlisted Investments, Governance Policy and a Politically Exposed Persons Policy.

ADV J LUBBE SC: Again, if I may interrupt Mr Commissioner, highly relevant, you will notice in the terms of reference that specific reference is made to politically exposed persons for this Commission's investigations.'³²² (Emphasis added.)

23. The PIC PEPs policy³²³ is accordingly designated to the unlisted division given that in respect of transactions in the listed division, the PIC's counterparty is a JSE-listed company subject to legal, regulatory and oversight measures.

³²² At pages 28-29 of the Transcript for day 1 of the hearings held on 21 January 2019.

³²³ The full citation of this policy is the: Unlisted Investment Isibaya Fund: Policy on Treatment of Politically Exposed Person

Development and continued improvements on the PIC PEPs policy

24. When Mr Roy Rajdhar (Mr Rajdhar), the Executive Head for Impact Investing, who heads the Private Equity, Impact Investing and Unlisted Properties subdivisions, gave evidence before this Commission on, *inter alia*, the investment process, function and operation of his division, he affirmed as follows:

***MR ROY RAJDHAR:** ...in terms of politically exposed persons, we have also improved in terms of the policy in that regard... following the establishment of the Social and Ethics Committee,... [it] can be approached for guidance to the Committee to which the [PEP'S] project is serving, notwithstanding that at Committees we have declaration of interest register signed. Later on we decided let us bring a process of declaration [of interests] much earlier in the process... We are incorporating ESG issues in the investment process as well...going forward, there may be areas where we find that we can improve and that is what we continually strive to do...*

***ADV JANNIE LUBBE SC:** What is your understanding of a politically exposed person?*

***MR RAJDHAR:** Well my understanding of a politically exposed person is any person who has been employed in any sphere of Government, including public entities. Then it is people related to those persons, ... and then it is also people who is known to be politically aligned, I mean based on reports that you see in the public [domain]. So we would also consider them to be politically exposed persons.’³²⁴*

³²⁴ At pages 80-81 of the Transcript for day 1 of the hearings held on 21 January 2019.

25. The two main points that emerge from Mr Rajdhar's evidence are: firstly, that the PIC PEPs policy is continually being improved to respond to the needs of the PIC. Secondly, the PIC adopts a broader understanding of PEPs to include people who are known to be 'politically aligned' from reports in the public domain. This encompasses more than 'known close associates' and it thus provides for a more effective policy framework governing the risks associated with PEPs.

The PIC Policy on the Treatment of PEPs

26. The PIC's PEPs policy is titled the '*Unlisted Investment Isibaya Fund: Policy on Treatment of Politically Exposed Persons*' (the PEPs Policy) and is dated May 2014 but was reviewed by the Investment Committee in December 2014.
27. Dr Matjila testified on the underpinnings and purpose of the PEPs Policy:

'DR DANIEL MATJILA: The politically exposed persons policy, it's actually derived from the law, this law that deals with politically exposed person, I think it's under FIC. So we have taken that and crafted a politically exposed persons policy that allows us to do deeper due diligence on the parties spends in any transaction, if there are politicians, we need to understand their sources or finance, delve deep into . . . the relationships that they have . . . so that we ensure that the political reputational risk exposure on the PIC's side resulting in this transaction is minimised if not eliminated.'(sic)³²⁵

28. These are some the main features of the PEPs Policy:
- 28.1. The PEPs Policy defines PEPs as '*Natural persons who are or have been entrusted with prominent public functions by a domestic or foreign country,*

³²⁵ At page 105 of the Transcript for day 51 of the hearings held on 9 July 2019.

*their family member, relatives, persons known to be close associates of such persons, or trusts and other juristic persons over which they practice control.*³²⁶

- 28.2. The definition list setting out who is regarded as PEPs by the PIC, casts the net wider than Schedule 3A of FICA. By way of illustration, it is not only confined to leaders of political parties, but to members of parliament and of provincial legislatures, senior government officials, including local government officials. In relation to the judiciary, it extends its reach beyond just high court judges, to include Magistrates and even State prosecutors. It further includes labour group officials (i.e. trade union officials) and executives of State-owned Enterprises.³²⁷
- 28.3. The PEPs Policy further adopts, as wide as possible, definitions in respect of family members and associates of PEPs. This widening of the definitions, however, is at best precautionary as the aim of the policy is not to exclude, but to invoke enhanced due diligence investigations into PEPs, their family members and associates.
- 28.4. In defining the mischief to which it is directed, namely risk, the PEPs Policy provides that '*[r]elationships with PEPs can culminate in increased risks for the PIC due to the possibility that individuals holding such political positions may misuse their power and influence for personal gain or advantage of family and/or close associates.*'³²⁸ It further sets out the reasons why PEPs are screened. Its focus is on the PIC's business relationships where PEPs are counterparties.³²⁹

³²⁶ See 'Definitions' at page 7 of the PEPs Policy.

³²⁷ Ibid, see definition of 'domestic PEPs' at pages 7-8.

³²⁸ At 15 of the PEPs policy.

³²⁹ See the 'Scope' of the policy at 5.

- 28.5. It defines the purpose of the policy as the regulation of all investment activities of the Isibaya Fund and ensuring that they comply with acceptable ethical norms and standards. *'It seeks to manage the resultant reputational and related risks that the PIC and its clients may become exposed to, by virtue of such relationships.'*³³⁰
- 28.6. The objectives of the policy are to combat corruption, ensure that the PIC adheres to statutory requirements and best practice. The further objectives are to bring about consistency in the treatment of PEPs and to ensure equity, fairness and transparency whilst also mitigating the risk for the PIC.³³¹
- 28.7. Although the primary responsibility for the PEPs Policy is that of the CEO, it is also the joint responsibility of all PIC employees and directors without exception, and a breach of the policy constitutes misconduct.³³²
- 28.8. The PEPs Policy has features similar to an operations manual that sets out what markers to look for in client due diligences to identify PEPs. It, *inter alia*, sets out what an enhanced due diligence is and when to do it and provides for enhanced on-going monitoring of PEPs related transactions and the keeping of a PEPs database.
- 28.9. The PEPs Policy sets out ten policy principles on which it is based, such as that *'Senior management shall decide on the circumstances under which PIC may reject establishing a business relationship with a PEP'*: under which principle, it is provided that the intention is not to give reasons for

³³⁰ See 'Purpose of the policy' at 5.

³³¹ See 'Objectives' of the policy at 5.

³³² See application of the policy and exclusions at 5-6.

declining transactions involving PEPs, but to ensure that preventive measures are adopted.

Application of the PEPs Policy

29. Dr Matjila testified as follows on the application of the PEPs Policy:

***ADV ALEXANDER ROELOFSE:** Then I just want to deal quickly with this issue of PEPs. Who is responsible really for implementing the policy regarding PEPs and for screening deals for PEPs and that sort of thing?*

***DR DANIEL MATJILA:** This is the deal team with – the deal team comprises of both the investment team, legal, risk and environmental and social and governance teams. All of them will have to identify potential PEPs, mainly the ESG team is the one that identifies those characters in any transaction and they will be the one that proposes the way forward.*

If they can't resolve the matter on their own or the extent of the PEP or the risk is regarded as high, that PEP is then referred to the social and ethics committee, which is a sub-committee of the [B]oard, for review and guidance.

***ADV ALEXANDER ROELOFSE:** But we know certainly in respect of the Ascendis deal the issue of PEPs was indeed at the forefront or one of the items at the forefront of the FIP's concerns.*

***DR DANIEL MATJILA:** Yes*

***ADV ALEXANDER ROELOFSE:** Because when the deal initially goes before the FIP on the 20 January 2016, the Chairman suggests*

that due to the presence of politically connected people in the transaction that the deal team review the whole transaction before it was resubmitted for approval?

DR DANIEL MATJILA: *That's true.*

ADV ALEXANDER ROELOFSE: *So that policy was being applied?*

DR DANIEL MATJILA: *[It] was being applied.*

ADV ALEXANDER ROELOFSE: *At the time of this transaction.*

DR DANIEL MATJILA: *That's correct.'*³³³

30. The Commission had earlier heard evidence affirming that there is no blanket exclusion of PEPs in transactions at the PIC. This was during Dr Matjila's evidence. He confirmed that, in fact, the PEPs Policy prohibits discriminating against PEPs. In part, this accordingly, meets the test under ToR 1.10 for the adequacy of PIC measures, in that the PEPs Policy does not discriminate against PEPs in investments. Dr Matjila testified thus:

'MR EMMANUEL LEDIGA: *... And then final thing is about the PEPs ... So you say that in the Shkhara transaction there were two PEPs which [were] removed ... my issue is that are you saying that PEPs cannot do business with the PIC? I'm just worried that much as we say PEPs can exert pressure, are they excluded from the opportunities in the country?*

DR DANIEL MATJILA: *Not necessarily.*

³³³ At pages 52-53 of the Transcript for day 55 of the hearings held on 16 July 2019.

...

As we said, if they are there then there's a process of enhanced due diligence, a thorough process around enhanced due diligence that takes place as part of the transaction and we've done so, there are other PEPs where the transaction had been approved ... and enhanced due diligence done on them

... as part of the processing.

MR EMMANUEL LEDIGA: *And so there could be times where you are not happy with the PEPs and you tell them that after the enhanced D[D] [that you] were not happy to...(inaudible – speaking simultaneously)*

DR DANIEL MATJILA: *Yes, is that - if the results are negative, we wouldn't ... [intervenes]*

MR EMMANUEL LEDIGA: *Ja, okay. So, there's no blanket ban about PEPs?*

DR DANIEL MATJILA: *No, there is not.*

*... In fact, the policy of the PIC was saying we don't discriminate. If there are issues, they need to be dealt with, conflicts and those kind of politically exposed persons which is now even law to some extent needs to be complied with in terms of FICA.'*³³⁴

31. The Commission also heard evidence that one of the important purposes of the PEPs Policy is the scrutiny and transparency it brings about to the

³³⁴ At pages 45-46 of the Transcript for day 55 of the hearings held on 16 July 2019.

transactions involving PEPs.³³⁵ The Commission further heard evidence on how the pragmatic and combined use of the PEPs Policy, in tandem with the deal screening committee and appeals made to the Chairman of the PIC Board, Deputy Finance Minister, Mr Mcebisi Jonas, during meetings, were used to manage some of the pressures from and interferences of politicians. Dr Matjila gave the following evidence:

***‘ADV ALEXANDER ROELOFSE:** . . . Dr Matjila, in [paragraph] 144 you talk about the fact that people had gone effectively behind the back of yourself and others to deal directly with senior managers bypassing PIC executives to exert influence over deals at that level and then you then say that you established a deal screening committee to deal with that. Can you just briefly explain to us what was that deal screening committee?*

***DR DANIEL MATJILA:** Commissioner, thanks a lot , we had challenges with deals that were brought about by politically connected people and most of them we were able to reject upfront, especially when they don't fit the portfolio and for some reason in some instances they found a way of getting into lower management to try and get their deals considered at that level, so we established a deal screening committee that will then give us capability of seeing – have sight on all the deals that are coming to the PIC so that we are able to identify those that have high political risk and subject them to the policy that we have put together, the politically exposed person policy that we had, the board had adopted within the PIC as part of that process of managing politically exposed persons.*

Insofar as the meetings are concerned, I have used the politician within the PIC to deal with political matters and this has happened

³³⁵ At page 201 of the Transcript for day 61 of the hearings held on 12 August 2019.

quite a lot in the time of Mr Mcebisi Jonas and we agreed that . . . any political matters he will have to handle as a politician with his colleagues or . . . comrades for that matter and applying PIC processes to deals so that we take the best deals and we do all the analysis including enhanced due diligence that is required if we see a politically exposed person involved in the transaction.’³³⁶

32. Dr Matjila testified, in another context, about how he raised the PEPs Policy with the then Chairman of the Board, Deputy Finance Minister Gungubele, when the latter castigated him about a certain deal. He testified that:

‘DR DANIEL MATJILA:[Reading from para 239 of his Statement] “. . . I arranged a meeting with the chairman to brief him on PIC matters before I flew overseas. He suggested that we meet at O.R. Tambo International.

When I entered the protocol lounge where the meeting was due to take place, I was surprised to see the deputy chairman accompanying the chairman. The chairman was Mr Buthelezi at that time

...However, during that meeting, the chairman also [castigated] me for... raising in the PIC’s then consideration of the National Empowerment Fund’s application for R3 billion funding from the PIC, the issue of the relationship between his sister, who was the CEO of the NEF, Ms Buthelezi, and her husband who was the Minister of Arts and Culture.

He was visibl[y] angry and told me at some [point] in time that: “We must leave politics to politicians.”

³³⁶ At pages 103-105 of the Transcript for day 51 of the hearings held on 9 July 2019.

I explained to him that I had not raised this issue but rather the PIC Investment Team that was considering the deal and it had nothing to do with politics at all, but it was simpl[y] a standard procedure at the PIC, when a politically exposed person was involved in the potential PIC transaction.

An enhanced level due diligence had to be performed by the PIC as part of the ESG process'.³³⁷ (Sic)

33. PEPs were directly involved in at least two of the transactions that came under scrutiny before this Commission, namely, the Ascendis transaction (Ascendis) and the Tosaco transaction (TOSACO).
34. Dr Matjila gave the following evidence on Tosaco in relation to PEPs:

***DR DANIEL MATJILA:** . . . sometime after Kisaco's successful bid, I became formally aware of the involvement of Mr Shezi who was at the time a chairman and trustee respectively in two of former President Zuma's trust[s].*

***CHAIRPERSON:** There's probably many Shezi's so it's Tshwane Sizwe Shezi.*

***DR DANIEL MATJILA:** Yes.*

***CHAIRPERSON:** According to the statement.*

***DR DANIEL MATJILA:** Sizwe Shezi, that's correct. So he was the shareholder in now KiliCap and Kisaco. He was so angry – I think Mr Mulaudzi in his testimony to this Commission said that Mr Shezi bled*

³³⁷ At pages 31 – 32 of the Transcript for day 52 of the hearings held on 10 July 2019.

for two hours. He was angry with my initial refusal to issue KiliCap with a binding letter of support to a point where he started putting pressure on the Minister at the time, Mr Nhlanhla and Deputy Minister to fire me. I was later informed of this by the Deputy Minister at that time Mr Mcebisi Jonas himself.

*... As per the statement of Mr Mseleku to the Commission, the involvement of Mr Shezi in the transaction [caused] a big uproar in the public space. This came as a surprise to the PIC as well because his name only came up after the merger of the two companies. I must emphasise that the deal followed PIC processes and it's performing well. The PIC has since revised its delegation of [f] authority to ensure that the issuing of letters of expression of interest is properly managed.'*³³⁸ (Sic)

35. In response to the above testimony from Dr Matjila, Mr Shezi, on 18 July 2019, wrote to the Commission, saying:

'I watched with shock as Dr Matjila related his concerns regarding my involvement in Kilimanjaro Capital Propriety Limited ("KiliCap") and by virtue of the imposed merger, KISACO, as a shareholder. My shock and surprise stems from the fact that at the very onset of the TOSACO Transaction, I personally met with Dr Matjila to introduce Mr Mulaudzi and the TOSACO Transaction to the PIC. This meeting took place at the PIC head office in Garsfontein on 21 May 2015. Dr Matjila therefore knew of my involvement and interest even before the TOSACO Transaction started being processed by the PIC.

None of the PIC transaction team members, nor Dr Matjila himself, raised any concerns regarding my shareholding in KiliCap or indirectly

³³⁸ At pages 127-128 of the Transcript for day 54 of the hearings held on 15 July 2019.

in KISACO at any point before the TOSACO Transaction reached financial close.

It is indeed true that I personally felt very aggrieved regarding the imposition of a merger with another company. And I conveyed this to Dr Matjila himself. Dr Matjila's testimony that I was angry because he would not issue a binding letter of support is not true.

*It is a blatant lie that I approached the then Minister of Finance, Mr. Nhlanhla Nene, and Deputy Finance Minister Mr. Mcebisi Jonas to have Dr Matjila fired ... Dr Matjila has unfairly and dishonestly created the impression that I am a politically exposed person, when the same has no basis.'*³³⁹

36. The Commission heard evidence that owing to subsequent improvements of the internal controls, now, before the PIC issues binding expressions of interest, these types of transactions are first referred to the deal screening committee.
37. On Ascendis, Dr Matjila testified as follows:

'DR DANIEL MATJILA: ...As [per] Mr Lawrence Mulaudzi's statement to this Commission, I received the Ascendis proposal from him a few days after Tosaco proposal. This time...Shkhara Health a recently incorporated company was used as a vehicle to make this investment...Shkhara was requesting the PIC to provide funding approximately R1.25 billion to purchase one billion worth of shares in Ascendis Health a listed company and R250 million worth of shares

³³⁹ Extract from paras 1-7 of a letter submitted to the Commission by Mr Sizwe Shezi signed on 18 July 2019.

in Bounty Brands. I passed this proposal to the executive heads for consideration and guidance.

I was extremely concerned with this new application just being a few days after Tosaco. However, the transaction team commenced with their process. The role played by politically exposed person in this transaction was a big worry for me especially now that Mr Sizwe Shezi had now revealed his interest in the business affairs of KiliCap and subsequently Kisaco. The shareholding of Shkhara was very much similar to KiliCap but with more PEPs in it.’³⁴⁰

38. Dr Matjila testified that he told the deal team to ensure that there were no politically exposed persons included in the deal, and if there were to ensure that there was appropriate due diligence conducted on those individuals as part of the transaction process. He also said the structure should be ‘cleaned up and broadened’, which resulted in only Mr Shezi remaining in the transaction.³⁴¹

Findings

39. As a measure directed at addressing the risks associated with PEPs, weaknesses in the PEPs Policy create the opportunity for abuse and pose a real and on-going risk for the PIC that needs to be addressed.
40. Moreover, the practice, or implementation, of the PEPs Policy as reflected in the actions of Dr Matjila, shows a total disregard for the policy on PEPS. These are dealt with in the section addressing ToR 1.1 contained in Chapter III.

³⁴⁰ At pages 2-3 of the Transcript for day 55 of the hearings held on 16 July 2019.

³⁴¹ Ibid. page 5.

Recommendations

41. The Board, through the proposed Risk Committee, should ensure oversight and evaluation of the effective implementation of a revised PEPs Policy on a regular basis.
42. The Board should review, in its entirety, the PEPs policies, taking into account the information presented to the Commission of the weaknesses in practice when implementing the PEPS policy.
43. The Lancaster/Steinhoff transaction, the Harith/PAIDF investment, the Sakumnotho/Kilicap Tosaco and Ascendis transactions are illustrations of the weaknesses of the PEPs policies in practice.

TERM OF REFERENCE 1.11

‘Whether there are discriminatory practices with regard to remuneration and performance awards of PIC employees.’

Introduction

1. Consideration of discriminatory remuneration and performance practices in the PIC needs also to take account of allegations of victimisation, as victimisation also manifests itself in remuneration practices, bonus payments, balanced scorecard assessments, bias in promotions and opportunities for advancement as well as exposure to opportunities that enhance experience and expertise. Therefore, this term of reference needs to be read in conjunction with ToR 1.12, below, which addresses the question of victimisation.

Climate Survey

2. Remuneration and performance should also be considered taking account of the levels of staff dissatisfaction. In his testimony before the Commission, Mr Ramabu Diamond Motimele (Mr Motimele), senior HR Business Partner at the PIC, said that the PIC conducted employee engagement surveys, through an independent service provider, between October 2016 and May 2017. The first survey had such a low participation rate (36% of staff at the PIC participated in it) that it had to be redone. Staff reasons for their unwillingness to participate included concerns of being identified in the survey, and that possible means of identifying who said what – race, gender and occupation level – were to be excluded. Even though all of these requests were met, only 51% of staff at the

PIC participated in the second survey. Mr Motimele said this was a clear indication of the environment that prevailed at the PIC.³⁴²

3. The overall results of the survey were negative, with the key issues identified as follows: dissatisfaction with leadership, issues relating to performance management and incentives. The report proposed that the PIC Executive should undergo coaching on the PIC's values. The survey reflected employees' unhappiness about the environment, deeming it bureaucratic, political, unfair and frustrating.
4. Mr Motimele testified that his line manager, Executive Head: HR, Mr Pholwane, who reported directly to the CFO, Ms More, was not happy with the results of the survey. He proposed adding the neutral scores (18.1%) to the positive scores (51%) and other changes. The service provider explained that this could not be done, and expressed surprise when the final score for the PIC was reflected as 74,8% and not the 51% which was the true result. Mr Motimele regarded this as misleading, and as a consequence of expressing these views found that he was side-lined, the working relationship with Mr Pholwane deteriorated and his work was frustrated.³⁴³

Remuneration and Incentives

Evidence of Mr Mervyn Muller (Mr Muller)

5. Mr Muller was the Executive Head: Private Equity and Structured Investment Products (SIPS), until his resignation from the PIC on 14 March 2019. Mr Muller testified extensively about his experience regarding both Short Term

³⁴² At page 22 of the Transcript for day 48 of the hearings held on 2 July 2019.

³⁴³ At pages 43-50 of the Transcript for day 48 of the hearings held on 2 July 2019.

(STI) and Long Term Incentives (LTI), and the issues as they impacted on PIC employees. Reading from his statement, he testified that,

‘... the lack of transparency internally at the PIC as well as the retrospective interference by the shareholder in the incentives of PIC staff creates a risk for the most important resource of the PIC, its staff.

...’³⁴⁴

6. Mr Muller addressed the question of the introduction, by the Minister of Finance Mr Nhlanhla Nene in 2016/17, of caps to the bonuses of staff and the executive, and applicable to all staff. The cap on the executive was set at 80% of their annual guaranteed package. It was applied retrospectively to the incentives of the previous year. This was unprecedented and was not possible if the remuneration policy of the PIC was adhered to. This situation was exacerbated when, for the 2017/18 financial year, in August 2018, the PIC Board submitted an incentive proposal to the Minister of Finance in which a cap of 50% was to be applied to the executive. No reply was received from the Minister and, given the level of staff unhappiness, a decision was taken that all staff, excluding the executive, be paid their STI bonuses, effective 30 September 2018. This payment was in accordance with the remuneration policy and the Board’s recommendations to the Minister. The pool used to pay the staff was as per the agreement in the Shareholder Compact that had been signed in July 2017 between the PIC and the Shareholder. It is this Shareholder Compact that introduced a new clause whereby the Minister must approve the incentives awarded.³⁴⁵
7. Exco STI bonuses were paid on 14 December 2018, with the amounts significantly reduced by the Minister who had introduced a new method of calculating the bonuses paid to Exco, changing the past PIC practices. Mr

³⁴⁴ At page 48 of the Transcript for day 17 of the hearings held on 18 March 2019.

³⁴⁵ At pages 49-52 of the Transcript for day 17 of the hearings held on 18 March 2019.

Muller testified that, *'[t]his new method of calculation is now in direct contravention to the Shareholder Compact ...'*³⁴⁶

8. He went on to say that the PIC (Board) did not engage the Minister/Shareholder on the breach of the compact and the unfair discrepancies that resulted, for instance, some Exco members found that a number of their direct reports, who had lower performance scores than they did, were being paid more than the Exco member. He was also concerned that this had been applied retrospectively, without consultation. Furthermore, employees affected by the shareholder intervention were unaware of the basis on which their STIs were calculated, were reduced or the reasons why LTIs were deferred. In his own circumstances, Mr Muller's STI as reported in the Annual Financial Statements was R1,85 million. There was no clarity over the following five months when the STI would be paid.³⁴⁷

9. When ultimately paid on 14 December 2018, Mr Muller found that the amounts paid were halved. A letter from Minister Mboweni that outlined his approach *'was only shared with me [Mr Muller] when requested by my lawyer [during a grievance procedure he instituted to try to receive payment prior to emigrating] and had not been shared with other Exco members...'*³⁴⁸

10. Mr Muller also testified that PIC staff was issued with letters regarding significant increases to their annual salaries, including back payments effective 1 April 2017, but that Exco were not involved in the process and had no sight of the calculations that resulted in the increases. The staff was generally very unhappy as, when they compared their salaries among peers, they could not understand the differentials. He said that there were some peers who had differences in salaries of up to R1 million between each other.

³⁴⁶ Ibid. page 52.

³⁴⁷ Ibid. pages 54-61.

³⁴⁸ At page 62 of the Transcript for day 17 of the hearings held on 18 March 2019.

The lack of transparency created a perception that favouritism was rife in the application of the principles.³⁴⁹

11. Mr Muller stated that *'in my department it created massive gaps between peers and I was not in a position as head of department, to explain the reasons for this'*.³⁵⁰ When he asked why he should not be involved in analysing his own staff and their performance prior to approval of the new grades, which resulted in the increases, he was told it was a matter of confidentiality. His perception was that only Mr Pholwane and Ms More were involved in the determination of staff grading. Mr Muller refused to sign off on the letters to staff in his department, and ultimately Mr Pholwane did so himself.

12. However, shortly after the re-grading payments of staff, *'we [the staff] were told that all appointments of new staff members would now be frozen as the re-grading has now resulted in a shortfall in budget that would first need to be sorted out.'*³⁵¹ [our insertion] According to Mr Muller, the freeze was lifted in March 2018, but salaries were again adjusted, without discussion, in August 2018, without the involvement of Exco. Nor were the principles that were applied, disclosed. In December 2018 further new principles were introduced by Ms More, with new criteria. Exco members advised the Head of HR, Mr Pholwane, that they were uncomfortable with the processes followed. Mr Muller concluded that staff salaries and the HR processes followed remain a massive bone of contention at the PIC, with suspicions of unfairness and favouritism.³⁵²

³⁴⁹ Ibid. page 65.

³⁵⁰ Ibid.

³⁵¹ Ibid page 66.

³⁵² At page 71 of the Transcript for day 17 of the hearings held on 18 March 2019.

Evidence of Ms Candace Abrahams (Ms Abrahams)

13. The core of the evidence given by Ms Abrahams, acting Executive Head of Risk and Compliance, related to HR and remuneration matters. She said that:

*'... there is no clear and transparent approach in the manner in which remuneration is calculated and determined for staff ... I am not privy to nor am I consulted or given an opportunity to input into the actual calculations and determination for staff that report in to the Executive Head for the Risk and Compliance function.'*³⁵³

14. Echoing the testimony of Mr Muller, Ms Abrahams testified that:

*'Whilst I am required by the Human Resources Department to sign off remuneration letters for staff as the Executive Head for the department, this remuneration is already predetermined. The letters addressed to each staff member outlining their remuneration are compiled and printed by the Human Resources department and then are sent for my signature. The timing of signing these letters itself would render me unable to give input therein as the letters are in my experience circulated for signature a day or two before actual payment into staff bank accounts is made. This therefore would infer... that the payroll process would have already been concluded.'*³⁵⁴

15. Ms Abrahams said that remuneration was a major bone of contention among staff, adding that while HR states that salary adjustments are made to ensure staff are remunerated at the midpoint of their grade, staff had determined that

³⁵³ At page 92 of the Transcript for day 14 of the hearings held on 12 March 2019.

³⁵⁴ At page 93-94 of the Transcript for day 14 of the hearings held on 12 March 2019.

this was not the case and that they are remunerated below the midpoint of the pay scale.³⁵⁵

16. Confirming Mr Muller's testimony, Ms Abrahams said she was excluded from the last Exco that addressed remuneration of staff, with Mr Pholwane stating that 'actors' were conflicted.³⁵⁶ Ms Abrahams also dealt with the question of capacity and vacancies in the Risk Department. The total number of positions as per the approved structure of the Risk Department is 51, but the actual head count was 22 with 29 vacant positions, which are budgeted for but the approval required from the CEO to fill the vacancies was not forthcoming.³⁵⁷

Evidence of Ms Petro Dekker (Ms Dekker)

17. A number of other senior PIC employees testified as to their concerns about the remuneration policy, incentive schemes, manipulation of the balanced score card, pay and reward differentials, grading of positions as well as the restructuring process and outcomes that favoured some people: for instance, Mr Manuka, a general manager in the Finance department, received an increase of R1 957 975 while disadvantaging and demoting others. Ms Nomzamo Petje, a communications manager who was demoted to an ESG analyst said in her statement that:

'... my demotion and transfer was utterly baseless and unlawful. [I]t was nothing but a show of arrogance and power by management...At no stage did I receive a complaint from my employer regarding my performance. To the contrary, I was rewarded for my performance [and] I received both STI and long term incentive LTI bonuses ...

³⁵⁵ Ibid. page 94.

³⁵⁶ Ibid.

³⁵⁷ Ibid. page 97.

*Being moved to grade C5 meant that I no longer qualified for the LTI bonus.*³⁵⁸

18. A case in point is that of Ms Dekker who joined the PIC in 2004, and by 2012, had been appointed the PIC COO. The PIC restructuring process resulted in her being appointed to the role of Executive Head (EH): Corporate Services. In her evidence Ms Dekker said that during the restructuring process in 2014/15, Ms More informed her that the position of EH: Corporate Services would no longer form part of Exco and the grade of the position would be adjusted to Level E. However, when the restructuring was finalised and formally communicated, the position remained as part of Exco and graded at Level F.³⁵⁹
19. Ms Dekker testified that *'since 2014 I found the working environment at the PIC to be hostile and inefficient*³⁶⁰, with meeting agendas amended at the start of a meeting, documents requiring approval standing over for consecutive meetings and agenda items being added without due documentation or process. The Exco appointed PWC (Remchannel) to assist with organisational development, including assisting line managers with job descriptions, job grading and benchmarking of positions. However, according to Ms Dekker, the CIO at the time, Dr Matjila, and the CFO, Ms More, were not comfortable with the grades determined through the process and decided that Exco was in a better position to do this work themselves. Thereafter the grading of positions was done based on discussions in Exco, and not through the Remchannel system, with PWC being removed from the project.³⁶¹ Ms Dekker ultimately chose to leave the PIC, forfeiting her Long Term Incentive of about

³⁵⁸ At pages 8-11 of the Transcript for day 17 of the hearings held on 19 March 2019.

³⁵⁹ Para 5 of Ms Petronella Dekker's statement signed on 26 February 2019.

³⁶⁰ At page 85 of the Transcript for day 8 of the hearings held on 26 February 2019.

³⁶¹ At pages 88-89 of the Transcript for day 8 of the hearings held on 26 February 2019.

R2 million and did not claim any remuneration or settlement package from the PIC.³⁶²

Evidence of Ms Nozamo Petje (Ms Petje)

20. Ms Petje made assertions, comparing her position with that of the two executives and commented on their remuneration. On Ms Solomon she said:

30. ... I am aware of at least one employee whose position was rendered redundant and she was appointed to a higher position. Her salary was adjusted to a higher grade. The employee I am referring to is Ms Rubeena Solomon. She was occupying the position of General Manager: Investment Management. That position was inexplicably rendered redundant and she was appointed Executive Head: Investment Management. As a result of the promotion, Ms Solomon's salary was increased by a whopping R953 304.21...

30. If Ms Solomon could be promoted and her salary be automatically adjusted to a higher grade, nothing prevented the same being done in my favour. In my view, it is irrelevant that Ms Solomon's promotion and salary adjustment occurred approximately two years after my demotion. The treatment accorded to Ms Solomon and the one accorded to me shows that employees are not treated equally within the PIC.³⁶³

Evidence of Mr Luyanda Ntuane (Mr Ntuane)

21. Mr Ntuane, Executive Head: IT and Chief Technology Officer, testified that following the restructuring he was appointed EH: IT without any change to his

³⁶² Ibid. page 94.

³⁶³ Paras 30-31 of Ms Nomzamo Petje's statement signed on 19 March 2019.

responsibilities but was to report to the CFO and no longer the CEO. He stated that his working life started to take strain due to unresolved conflict between the CFO and himself, face to face meetings did not take place, communication was via email, and he could not get the IT structure finalised or approved without any explanation. At the same time the CFO consistently made disparaging comments about IT – inside and outside of meetings.³⁶⁴

22. Mr Ntuane found that his recommendations for system upgrades and integration were deflected without explanation. In a deteriorating situation, blame was often laid at the door of IT and ultimately a whistle blower allegation of favouritism was made against him.³⁶⁵ Investigations were conducted between 29 March 2016 and 20 May 2016, informal overtures were made to see what he would accept as a settlement and Mr Ntuane was told by Dr Matjila that *'the PIC needed some way to justify the separation agreement.'*³⁶⁶ Dr Matjila wrote to him on 30 March 2016, stating, *'the allegations levelled against you include, inter alia, allegations of conflicts of interest, in appropriate conduct and favouritism...and (the PIC) has suspended you pending an investigation.'* In his statement, Mr Ntuane said, *'he attended a meeting with Mr Matjila, wherein he indicated that the investigation was complete but he would rather not proceed with a disciplinary process. I stated that I had no fear of any disciplinary process, but the main issue was that he and the CFO do not want me at the PIC any more'*³⁶⁷ which is why they accused him of *'being found to have been in possession of confidential proprietary information on [his] work laptop without authorisation'*.³⁶⁸

³⁶⁴ At pages 11-12 of the Transcript for day 11 of the hearings held on 5 March 2019.

³⁶⁵ Ibid. page 23.

³⁶⁶ Para 9.3.9.3 of Mr Ntuane's statement signed on 5 March 2019.

³⁶⁷ Para 9.3.8 of Mr Ntuane's statement signed on 5 March 2019.

³⁶⁸ Para 9.3.9.2 of Mr Ntuane's statement signed on 5 March 2019.

23. Mr Ntuane said this attitude of the CFO extended to the inconsistent BSC process and bonus allocation. He stated:

'8.5.1... I witnessed a number of incidents where salaries were adjusted for a "select group of individuals", based on what the CFO had to say ... through collusive behaviour with some of the Executive Heads.

*8.5.2 I witnessed the CFO passing judgement about performance of staff members, without even knowing their day-to-day operational responsibilities. This judgement was either negative or positive, based on whether the CFO liked the employee(s) concerned.'*³⁶⁹

24. However, at no stage throughout his suspension related to the above investigation was there any interaction with his line manager, Ms More. Mr Ntuane said that her bad behaviour in meetings meant that he did not know what he would be dealing with at any time. He stated that:

'at no point was there an indication, neither was I ever found guilty of sexual harassment or procurement irregularities

*... the factors leading to my suspension and separation from the PIC ... She [Ms More: CFO] led a culture that was highly divisive. [and] [t]he rampant unfairness in salary reviews, adjustments and bonus allocations were all orchestrated by the CFO'*³⁷⁰

25. Mr Ntuane raised his concern that salaries and bonuses were not fair, consistent or objective and that an asset manager the size of the PIC was calculating bonuses and salaries on spread sheets that were being sent

³⁶⁹ Ibid. Paras 8.5.1 - 8.5.2.

³⁷⁰ At pages 27-29 of the Transcript for day 11 of the hearings held on 5 March 2019 and paras 9.4-10.3 of Mr Ntuane's statement signed on 5 March 2019.

around by email. As head of IT, he found it very strange that this system was not upgraded.³⁷¹ In this regard he also raised his concern that there was no asset management system of the Isibaya fund, which was operated on spread sheets making it also susceptible to manipulation and the compromising of data integrity, given that only the latest version of a spread sheet is able to be audited.

26. In a subsequent submission, following the testimony of Mr Pholwane, Mr Ntuane claimed that Mr Pholwane had misled and lied to the Commission about him, and that if the audited reports were examined they would show that there *'were no material audit findings for the whole entity (IT), and the Audit and Risk Committee minutes show a positive outlook to the IT control environment'*. Mr Chris Pholwane, EH: Human Resources gave voluminous testimony that was endorsed by both Ms More and Dr Matjila.

Evidence of Mr Christopher Pholwane (Mr Pholwane)

27. With regard to salaries and bonuses, Mr Pholwane referred to a letter from the Minister of Finance (2014) which instructed that the PIC must obtain shareholder approval for any salary adjustment above CPI and the awarding of any incentives – performance or retention bonuses – for executive directors and senior management. In 2017, the National Treasury said the PIC must include the bonus pool in the Corporate Plan and Shareholder's Compact. This created a concern for the Board and employees about a continuously reducing bonus pool. This was further aggravated by a National Treasury instruction in 2018 that 20% of total personnel expenditure will be the amount of the pool, which resulted in a further reduction of the funds available.³⁷²

³⁷¹ At page 38 of the Transcript for day 11 of the hearings held on 5 March 2019.

³⁷² At page 53-75 of the Transcript for day 2 of the hearings held on 22 January 2019.

28. The difference between what the PIC's remuneration policy provided for and what the National Treasury's instructions resulted in, was significant. The PIC's provisions for 2015/16 was R116 436 429, while the shareholder approved R96 369 127; for 2017/18 the PIC's policy provided for R239 920 660 and that approved by the shareholder was R123 398 800 – nearly half the amount as per the PIC remuneration policy. Such a severe reduction had a significant impact on staff morale.
29. Mr Pholwane also testified in relation to the allegations of victimisation in the PIC, a topic dealt with in ToR 1.12, below. He said that the people who complained about victimisation, demotion or removal from their positions had been affected by the restructuring process. He conceded that there was a level of mistrust and fear prevalent in the PIC at the time of the climate survey, adding that the survey was conducted shortly after the restructuring process and there were 'residual ill feelings' among employees at the time.³⁷³ Mr Pholwane submitted a statement to the Commission in response to allegations made in the testimony of Mr Motimele and the PIC Union. In the statement, he referred to the Molefi Climate Survey that was commissioned after the restructuring process. Mr Pholwane states in his statement that, '*the survey plainly cannot be used as an objective basis to come to a conclusion that there was a culture of discrimination, unfair treatment, harassment and/or victimisation at the PIC...*'³⁷⁴
30. Mr Pholwane's testimony covered PIC policies on recruitment and remuneration and how these were to be applied.

³⁷³ At page 6 of the Transcript for day 41 of the hearings held on 28 May 2019.

³⁷⁴ Para 2.8.4 of Mr Christopher Pholwane's statement signed on 2 August 2019.

Evidence of Ms Matshepo More (Ms More)

31. In her testimony, Ms More responded to a number of the issues raised. Distancing herself from any responsibility, notwithstanding that HR reported directly to her as the CFO. Ms More stated that the HR model did not reside in her office, and it was the EH: HR, Mr Pholwane, who permitted those who needed to know, access to the information. Ms More stated that she '*can't refuse a model that does not reside within my team ...*'³⁷⁵ Ms More also said that her role, in relation to HR reporting directly to her, was for administrative purposes only.³⁷⁶
32. On Mr Ntuane's assertions that there was a reduction in the results of his BSC, and that this was done while he was on leave and without discussion with him, Ms More responded by talking about a 'negative rating' that was introduced into his assessment which resulted in a reduction in his BSC. Ms More said she could not remember whether this was discussed with him or not.³⁷⁷ When asked about keeping records of her discussions as a CFO and line manager with her direct report, EH of IT, Ms More said there were no minutes or records because, '*there will never be a decision that's made, it is in the form of guidance ... I don't have a single decision that I could say single-handedly...*'³⁷⁸
33. Ms More provided information on how Mr Brian Manuka (Mr Manuka), a general manager in the Finance department reporting to the CFO, was awarded a gross salary increase of almost R1 957 975. The allegations were that this adjustment was made without any rationale as to why or how it was determined, and that Mr Manuka and Ms More worked together when they

³⁷⁵ At page 9 of the Transcript for day 46 of the hearings held on 25 June 2019.

³⁷⁶ At page 47 of the Transcript for day 46 of the hearings held on 24 June 2019.

³⁷⁷ Ibid. page 121.

³⁷⁸ At pages 116-117 of the Transcript for day 45 of the hearings held on 24 June 2019.

were both employed at Deloitte. In her response Ms More stated that the increase did not only apply to Mr Manuka and was given as a result of the re-grading process, which was based on principles and was effected across the board. She reiterated that there were no issues regarding the increases because they were awarded as part of the remuneration policy.³⁷⁹

34. With regard to assessing performance, Ms More said that there was a moderating committee that she was part of that deliberated on performance. It would, as part of the process, question line managers on performance and motivation as this pertains to the BSC rating proposed.³⁸⁰ She saw accountability as being in place and effective because *'it is sitting in their balance score card inside their KPI in terms of performance'*³⁸¹, reflecting how important the BSC was to employees and their remuneration. Clearly for Ms More, accountability was limited to performance indicators.
35. Addressing the question of the incentive schemes at the PIC, Ms More said that this was a big issue in the PIC and a serious bone of contention, acknowledging that *'the manner that we implement the remuneration policy incentive has actually caused unhappiness in the PIC'*.³⁸² She further admitted that the issues raised by Mr Muller regarding the LTI that he was due, but not paid, was correct, and that the unhappiness with the processes had resulted in the establishment of a union at the PIC.³⁸³
36. On the matter of a freeze on new appointments, Ms More stated that this was done to get everyone to reorganise their priorities, and *'for every executive head to go back and review and identify the critical positions so that it's not*

³⁷⁹ At page 125 of the Transcript for day 45 of the hearings held on 24 June 2019.

³⁸⁰ At pages 124-125 of the Transcript for day 45 of the hearings held on 24 June 2019.

³⁸¹ At page 57 of the Transcript for day 45 of the hearings held on 24 June 2019.

³⁸² At page 6 of the Transcript for day 46 of the hearings held on 25 June 2019.

³⁸³ Ibid.

*just filling up vacancies...’ but ‘the freeze was not due to budget constraints’.*³⁸⁴

Evidence of the National Union of Public Service and Allied Workers Union (NUPSAW)

37. The National Union of Public Service and Allied Workers Union (NUPSAW) appeared before the Commission. It is a registered trade union under the umbrella of the SA Federation of Trade Unions (SAFTU), with a branch established in the PIC in 2018. In their evidence they stated that:

*‘The idea of organising workers within the PIC came about by the need to change the culture of fear and victimisation... prevalent within the company. There is also a lack of transparency and ... unfair labour practices when it comes to remuneration and performance, incentive calculations...’*³⁸⁵

38. On remuneration and performance issues, NUPSAW stated that staff members wrote to the Chairperson of the Board, Deputy Minister Gungubele, expressing their concerns about the delay in payment of the STI. In the meeting between the two parties, their evidence stated that *‘at a meeting with staff held on 21 September 2018, Mr Gungubele revealed that the STI for staff members is authorised by the PIC’s Board upon recommendation of the HRRC, and not the Minister of Finance’*. This would be in line with the PIC’s remuneration policy. The level of NUPSAW’s distrust of the PIC’s management is evident in their statement that *‘management had presented a narrative that suggested the payment of the staff STI was delayed by the Minister of Finance (Mr Mboweni) who was unwilling to sign off on staff bonuses.’* The union stated that, *‘To this day, staff still do not understand the*

³⁸⁴ At page 8 of the Transcript for day 46 of the hearings held on 25 June 2019.

³⁸⁵ At page 66 of the Transcript for day 48 of the hearings held on 2 July 2019.

*shareholder's involvement in the determination of staff bonuses and require clarity on the role of National Treasury in this matter.*³⁸⁶

39. With regard to the Long-Term Incentive (LTI), a staff retention scheme for senior employees only, NUPSAW stated as follows:

'the LTI process is unclear and dissatisfactory, as staff members who are conditionally allotted this performance reward to not receive letters confirming such allotment. This leaves the process open to undue meddling with the reward amounts to be paid at the time of vesting. In some cases the policy has been changed and retrospectively applied to the detriment of those who previously qualified ...'

40. With regard to the re-grading process, NUPSAW said the *'process undertaken was unclear to staff who felt that there were many inconsistencies and a lack of transparency, with vast discrepancies between employees in similar roles and grade bands. Many employees were also dissatisfied as their executive heads could not explain or justify their re-grading. This created much distrust with the process and Exco . . .'*

Findings

41. The evidence given to the Commission was from a range of very senior PIC employees, many of them having attained positions of leadership, including being Executive Heads of functions and departments. The issues raised, including the level of non-participation in the climate survey, reflects deep-seated discontent, mistrust, a strong sense of grievance and being treated unfairly.

³⁸⁶ At page 2 of the NUPSAW statement dated 2 July 2019.

42. The lack of transparency in the process followed by the moderation committee, poor communication to employees and the exclusion of executive management from the various decision-making and evaluation processes has led to a breakdown of trust between employees and management, as well as between executive management, the executive directors and the Board.
43. The responses of those in positions of responsibility for the HR function, both Mr Pholwane and Ms More, were defensive and dismissive.
44. The actions of the Minister of Finance and National Treasury created confusion and uncertainty among employees and appear to violate the remuneration policy of the PIC and its contract with PIC employees.
45. From all of the testimony quoted above and elsewhere in this report, the Commission finds that there are discriminatory practices with regard to remuneration and performance awards of PIC employees.

Recommendations

46. Shareholder proposals should be prospective, not retrospective, and the Shareholder Compact should be agreed on for a defined period, for example three years, and then reviewed to reflect proposed changes.
47. Shareholder intervention should be fair, taking account of the agreed policies and agreements that the PIC has in place with its employees.
48. Dates for payment of bonuses, STIs and LTIs should be communicated at the start of each year to provide the necessary certainty to all employees.
49. The Board of the PIC should ensure greater transparency, fairness and inclusiveness with regard to salaries, grading, performance criteria and balanced score card assessments.

50. Performance balanced score cards should be relevant to the work performed and the incentive policies and should not be used as a tool or implicit threat to ensure a compliant or subservient employee.
51. The Board should take steps to rebuild staff morale through fairness in performance assessments, remuneration and certainty regarding the bonus policy.
52. The moderating process needs to be transparent, the principles applied clearly set out, and the outcome, including any changes, whether positive or negative, timeously discussed with each employee individually.
53. The remuneration and incentive policies of the PIC should be transparent, clearly communicated and adhered to.
54. The Board of the PIC should institute a new climate survey to be conducted within a month of the appointment of the new PIC CEO in order to form a base line from which to measure progress in the organisation.
55. An independent professional body should be commissioned to review the re-grading process and its outcomes, to be appointed by the Board and to finalise its report by end April 2020.
56. The Board needs to urgently address the level of misinformation and distrust that prevails in the PIC.
57. Mr Pholwane should be the subject of disciplinary action for his alleged improper conduct in falsifying the results of the second climate survey, thereby misleading his senior management, as well as the Board. If the above allegations are true, his conduct was dishonest, misleading and seriously undermined the functioning of the PCI.

58. It is clear that on Ms More's watch many of the critical areas so vital to the functioning of the PIC developed very serious problems. This includes:

58.1. Remuneration;

58.2. Grading;

58.3. Performance evaluation and incentives;

58.4. Work culture experienced by the employees

TERM OF REFERENCE 1.12:

‘Whether any senior executive of the PIC victimised any PIC employee.’

1. The evidence before the Commission presented by employees and previous employees was very clear that employees alleged victimisation by senior executives of the PIC, in particular the former CEO, Dr Matjila, the CFO, Matshepo More and, to a lesser extent, the Executive Head: Human Resources, Chris Polwane.
2. The former CEO, Ms More and Mr Pholwane all denied these allegations in their testimony before the Commission.
3. The fact that there existed a culture of fear and victimisation within the organisation even before 2015, has been established independently and objectively by external service providers in what is called a ‘climate survey’. It was also confirmed in evidence by Mr Vuyo Jack, former PIC Board member, who initiated an in-depth investigation on behalf of the PIC Board during 2013/2014. In his statement he refers to the survey conducted by Deloitte as follows:

‘24. Deloitte was commissioned in August 2013 to conduct a survey of the working conditions at the PIC through staff interviews, 134 staff members were interviewed. The reason the board commissioned the survey was because the[re] was mounting tension in various sub-committees and EXCO.

25. Some of the pertinent findings of the climate survey presented to the PIC Board were as follows:

- *Fear culture and not unified;*
- *Lack of strategic direction;*
- *Management by fear and poor people management;*
- *Management does not have employees' best interest at heart;*
- *Blame shifting and poor decision-making abilities;*
- *Do not address problems; and*
- *Moving goal post.³⁸⁷ (sic)*

4. Mr Diamond Motimele in his evidence referred to the climate survey conducted in 2017 as follows:

'21. An independent service provider was sourced to undertake this project. The climate survey was conducted between October 2016 and May 2017. The survey was rolled out in two phases. The first survey attempt could not attract employees. The participation rate was very low such that the survey had to be retaken.

22. Despite the assurances with regard to anonymity and confidentiality of participants, employees were uncomfortable to participate, citing that they would be tracked through the system and harsh consequences would follow. It was clear that employees were not interested in participating and this confirms the prevalence of fear within the organisation.

³⁸⁷ Paras 24-25 of Mr Vuyo Jack's statement signed on 4 March 2019.

23. *The second phase (re-take) was conducted both manually and electronically between December 2016 and January 2017. Like the initial survey, the uptake was also very slow. Employees were concerned that their identity will be exposed and insisted that the survey questionnaire exclude demographics i.e. (race, gender, occupational level, tenure etc.). Once more, the above issues highlighted the exten[t] of fear prevalent within the PIC.*

24. *On several occasions, as the project was unfolding, I suggested to my line manager that we needed to engage with CEO with regards to the observations relating to employees' poor participation and perceptions of fear as well as possible victimisation. I sensed a strong reluctance by my line manager to meet with the CEO which was surprising considering that issues of organisational culture are within his purview. For this reason, the CEO needed to be kept abreast of the developments in this regard and be sensitised of the potential outcome of the survey and the impact thereof.*

25. *During various interactions with my line manager regarding work and related activities, it was my observation that he wanted to instil fear on me to ensure that his views and opinions around all areas of work in HR are accepted without question, even though at times they tended to be contrary to critical corporate governance values and best practices.³⁸⁸ (sic)*

5. Various senior employees have testified to being victimised by Dr Matjila, Ms More and Mr Pholwane. These include:

5.1 Mr Ntuane the former head of IT;

³⁸⁸ Para 21-25 of Mr Ramabu Diamond Motimele's statement signed on 2 July 2019.

- 5.2 Ms Menye, the Executive Head of IT;
- 5.3 Ms Mathebula the present Company Secretary;
- 5.4 Mr Paul Magula, the former Executive Head of Risk;
- 5.5 Ms Pamela Phala, former Head of Legal; and
- 5.6 Mr Diamond Motimele from Human Resources;

to name but a few. What is strikingly obvious is that the individuals listed above are all senior employees.

- 6. The *modus operandi* followed by the alleged perpetrators, in most cases, was to make use of a so-called whistleblower report accusing the employee of some or other impropriety. This would inevitably be followed by a disciplinary hearing and eventual dismissal. The exception was Ms Menye, who was charged with leaking information to third parties that resulted in the infamous Nogu/Noku emails accusing the former CEO and CFO of impropriety.
- 7. The victimisation was direct and/or indirect. The '*victim would be told to his/her face that he/she is not wanted in the organisation*' or indirectly by excluding him/her from meetings or by way of manipulation of remuneration and/or exclusion from eligibility for short and/or long-term incentives. The other method used was to promote a more junior employee over the head of his/her senior, to whom he/she was reporting. This promotion method was used in the risk and legal department with devastating effect on the morale in the two departments.
- 8. In her evidence, Ms Pamela Phala (Ms Phala) stated that she was Executive Head: Legal Counsel Governance and Compliance, and that due to her refusal to accept inappropriate instructions, she was undermined and demoted. Ms

Phala's statement reflects her refusal to include a particular firm of attorneys on a short list to be appointed to a panel that the then CIO (Dr Matjila) insisted on; and her disagreement with him in signing off on an investment in Mozambique notwithstanding that the PIC mandate did not permit investing offshore at the time.³⁸⁹

9. Furthermore, Ms Phala states that in late 2015 at a staff meeting where they were informed of a restructuring that would take place, she was surprised that Dr Matjila introduced Mr Ernest Nesane (Mr Nesane) as Acting Executive Head; Legal. Mr Nesane had been appointed by Ms Phala as a junior lawyer. *'I continued to manage a corporate legal department under the leadership of Nesane ... who side-lined me, preferring to go directly to my subordinates'*.³⁹⁰
10. A serious concern is that a number of the Executive and Board members who testified before the Commission appeared to be totally unaware of the culture of fear and victimisation in the organisation. The culture of an organisation is set from the top, yet a number of the Board and executive directors (the CEO and the CFO) appeared to be totally out of touch with the prevailing climate of fear and the culture of victimisation in the organisation. The CEO conceded, however, at least in respect of the CFO, that she was the main role player accused of victimisation; that he realised this and made an attempt to 'coach' her. It is for this very reason that an employees' union was established at the PIC and as at September 2019 the union represented more than 60% of the workforce at the PIC. In the Commission's view, the probabilities are overwhelmingly in favour of the employees' version that there was a culture of fear and victimisation in the PIC.

³⁸⁹ Para 7.5.1-7.5.2 of Ms Pamela Phala's statement signed on 28 March 2019.

³⁹⁰ Para 7.7.3 – 7.7.5 of Ms Pamela Phala's statement signed on 28 March 2019.

Finding

Senior executives at the PIC abused their positions of trust and responsibility and victimised employees, contributing to a culture of fear that existed, and to some extent still exists, at the PIC.

Recommendation

11. The new Board should address the matter urgently and take corrective measures to rebuild confidence and trust in the PIC executive, Board and processes.
12. Such measures should include:
 - 12.1. Open discussions on the results of a new climate survey that should be conducted within three months of the appointment of the new PIC CEO;
 - 12.2. An internal communication programme ensuring awareness among all staff of signs of bullying, abuse of office and misuse of promotions/incentives/salary increases or performance assessments to intimidate employees;
 - 12.3. Providing a safe platform for employees at all levels to raise their concerns.
 - 12.4. A leadership and management programme for all incumbents who hold managerial positions to strengthen their skills.
 - 12.5. Implementing a mentorship programme, using both internal and external mentors, to strengthen leadership throughout the organisation.

- 12.6. Ensuring an appropriate coaching programme is in place, and both mentorship and coaching must be compulsory for all executives and senior management.
- 12.7. Putting in place programmes and activities that will build a core leadership team effective across the different levels of management.

TERM OF REFERENCE 1.13

‘Whether mutual separation agreements concluded in 2017 and 2018 with senior executives of the PIC complied with internal policies of the PIC and whether pay-outs made for this purpose were prudent.’

Introduction

1. The above Term of Reference (ToR) was considered during the Commission’s hearings and through further supplementary documents that were supplied to the Commission by relevant parties. Two cases were specifically dealt with affecting two senior executives, who, at various times, occupied the position of Executive Head of the Information Technology (IT) department of the Public Investment Corporation (PIC), namely:
 - 1.1. Ms Menye; and
 - 1.2. Mr Luyanda Ntuane (Mr Ntuane)
2. Given that the ToR specifically mentions the years 2017 and 2018, the Commission shall inquire into, and make findings and recommendations only in relation to Ms Menye; and utilise the matter of Mr Ntuane for comparison purposes. Mr Ntuane left the PIC in May 2016.
3. Before embarking on the details of Ms Menye’s Mutual Separation Agreement (MSA) with the PIC, various high-level matters regarding human resources at the PIC have to be dealt with.

PIC Policies

4. In order to determine if the MSA between Ms Menye and the PIC complied with internal policies of the PIC and whether pay-outs made for this purpose were prudent, various high-level policies and procedures have to be examined.
5. Issues of human resources at the PIC are managed at high levels. They are handled by the suspended Chief Financial Officer (CFO), Ms More and the Executive Head of Human Resources (EH:HR), who is currently Mr Pholwane who reports directly to Ms More. The CEO of the PIC also has a say on HR matters.
6. The Board's role with regard to HR is delegated to the Human Resources and Remuneration Committee (HRRC) board subcommittee. Its terms of reference include attending to:
 - 6.1. the PIC's remuneration issues, including remuneration policies affecting senior management and other employees;
 - 6.2. the approval of the human resources strategy crafted by management; and
 - 6.3. not undertaking any management duties, but acting in an oversight role, including dealing with the exit of employees.³⁹¹
7. The next level of HR governance is found in the Delegations of Authority document within the PIC (DOA). The key delegations in the DOA are in the domain of the Chief Executive Officer (CEO) and the EH:HR, where much of the authority is vested.

³⁹¹ Section 5 of the Terms of Reference for Human Resources and Remuneration Committee, July 2018

8. Clause 8 of the DOA covers HR issues and deals variously with matters that include changes to the organisational structure, recruitment, remuneration and employee relations. In particular, sub-clause 8.6 deals with termination of service (TOS) for employees and sub-clause 8.6.1 indicates that any TOS must have the final approval of the CEO and be agreed to by the EH:HR.
9. Then the HR department follows. It is the key department responsible for human resources, including implementing the relevant policies in recruitment, remuneration, performance management and disciplinary procedures. It also assists line managers in other departments of the PIC with human capital matters, which are carried out by HR partners specifically allocated to various departments.

Matters Relating to Ms Menye

10. Having set out the background, the issue of the MSA between Ms Menye and the PIC is addressed below.
11. During the hearings, the MSA (which relates to the separation of the Executive Head: Information Technology, Ms Menye, from the PIC) came into focus.
12. Ms Menye was employed by the PIC on 16 November 2016 and was suspended on 20 November 2017. The MSA between Ms Menye and the PIC is dated 11 April 2018.
13. The issue of Ms Menye's MSA was surrounded by controversy – it was also covered in the media - and was first dealt with by Mr Pholwane in his statement to the Commission dated 21 January 2019 and during his testimony. Mr Pholwane stated the following:
 - 13.1. Following the suspension and disciplinary hearing of Ms Menye, and from the last quarter of 2017 until April 2018, there were attempts to enter into

an MSA between Ms Menye and the PIC. This was encouraged by the Chairperson of the disciplinary hearing, Adv. Nazeer Cassim SC.

- 13.2. During the disciplinary hearing, the legal representatives of Ms Menye and the PIC engaged in negotiations and it was finally agreed that an MSA would be entered into.
- 13.3. Mr Pholwane said he was in touch with the CEO, Dr Daniel Matjila (Dr Matjila) during the negotiation process and that Dr Matjila authorised him to engage the parties on the terms of the MSA. Mr Pholwane confirmed that he signed the MSA. However, it has been disputed whether he was authorised to sign it as this was the province of the CEO. As indicated in paragraph 8 above, clause 8.6.1 of the DOA clearly indicates that only the CEO can approve a TOS, with the agreement of the EH:HR.³⁹²
- 13.4. In her testimony former board member Ms Zulu said she found it strange that the settlement with Ms Menye was signed by the Executive Head: HR, Mr Pholwane instead of the CEO and that according to the DoAs, Mr Pholwane did not have the authority to sign such an agreement. In paragraph 15 of her testimony, Ms Zulu testified that *'We (the Board) resolved that Ms Menye and Ms Mathebula must be reinstated ...'*

14. This ToR is thus centred on two issues, namely:

- 14.1. if the MSA complied with internal policies of the PIC; and
- 14.2. whether the pay-out made for this purpose was prudent.

³⁹² At page 87 of the Transcript for day 2 of the hearings held on 22 January 2019.

15. To address how the MSA came about and who initiated it, below are exchanges between Mr Pholwane and members of the Commission as per the transcript.

'ADV JANNIE LUBBE SC: Thank you, Mr Commissioner. The next issue is whether mutual separation agreements concluded in 2017 and 2018 with senior executives of the PIC, complied with internal policies of the PIC, and whether pay-outs made for this purpose were prudent.

MR CHRIS PHOLWANE: Commissioner, if I can just maybe deal with that.....The mutual agreement generally become an outcome of a disciplinary hearing, and I think its common cause that in any disciplinary or a dispute, you might seek for a resolution of that dispute. So in most cases it will either be advanced by a disputing party, or it could be initiated by the Chairperson of the hearing....

So the chairperson of the hearing indicated whether the parties are amenable to resolving the dispute at that point in time...

... I was the employer representative in that case in point, delegated by the CEO at the time. I then informed and engaged with the CEO and said CEO – there's a matter before us before we can continue with the disciplinary hearing that are we amenable to a mutual separation discussion, as it were.

Then he indicated, Chris, there's no harm in exploring that alternative. Let's see how it goes. And from that basis, you know, it was made in good faith, and both parties participated and voluntarily so, and had

legal representation and then the mutual agreement was concluded.'

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16. As to whether Mr Pholwane was authorised to sign the MSA, the exchange below refers:

'ADV JANNIE LUBBE SC: Who signed the separation agreement on behalf of the PIC?

MR CHRIS PHOLWANE: So I was the employer representative, so I did sign on that behalf. So I was delegated at the time by the CEO to the affairs of representing the PIC so I signed it.

ADV JANNIE LUBBE SC: Now can I ask you, Mr Pholwane, since date of signature of this separation agreement till last night did anybody at the PIC ask you about your views on the merits of this agreement?' ³⁹⁴

17. Mr Pholwane was also engaged on whether he thought the amount paid was prudent. He indicated that the MSA was precedent setting, as per the exchange below.

'MS GILL MARCUS: ... this dissatisfaction about this particular mutual separation agreement. Were there other separation agreements that had been signed before and what is the issue in this one that has caused such repercussions with Board and shareholder... surely the most important question is the terms because you set precedent with terms.

³⁹³ At pages 77-78 of the Transcript for day 2 of the hearings held on 22 January 2019.

³⁹⁴ At page 87 of the Transcript for day 2 of the hearings held on 22 January 2019.

MR CHRIS PHOLWANE: So definitely it was (a) precedent settlement which dealt with the value of 29 months of the guaranteed pay of the affected individual

MS GILL MARCUS: So they were paid for more than two and half years?

MR CHRIS PHOLWANE: Yes, that is correct, yes. So I would imagine from a precedent point of view, so that would be the issue ...

The settlement on its own, it's an outcome of a negotiation between the two parties where there would be a position expressed and in this respect there were issues that were tabulated to the employer. Amongst them was the potential loss of incentives, both short term and long term, if the employee was to exit the organisation and then they would also look at the potential to be able to be employed within a specific period of time, as we all have an appreciation of the unemployment rate in South Africa and opportunities in respect of certain skills.' ³⁹⁵[our emphasis]

18. Mr Pholwane was further engaged on whether the payments were undertaken in accordance with PIC policies. However, he indicated that there was no policy on MSAs. He went on to address the issue of prudence of the MSA pay-out and admitted that it was excessive and had never been done before.

'CHAIRPERSON: Just to be clear, so according to you, including all the calculations you mentioned, was this done within the PIC policies?

MR CHRIS PHOLWANE: Ja, within the policies - as I referred to, you know, from a policy point of view it's an outcome of a disciplinary

³⁹⁵ At pages 87-88 of the Transcript for day 2 of the hearings held on 22 January 2019.

hearing and then you may want to settle. We - you don't (have) policy or have something that says that you will have mutual settlement, you know, as a form of a policy so there's a decision and a sanction or you arrive at a certain decision in disciplinary hearings and then you'll deal with that.

What probably the Commissioner may want to direct the question is to (whether this) was prudent?Do I, as the head of HR, think that it's excessive? Yes I do. As I indicated it was a precedent settlement, we've never had anything like that. We've had settlements before and none exceeding 12 months, if I'm not mistaken so we had one for about 12 months or so – I mean, for about ten months and six months, those that I can recall. In some instances less than that period but none (were) exceeding 24 months. So this would have been the first, so it is precedent setting.' ³⁹⁶ [our emphasis]

19. Ms Menye submitted a statement to the Commission dated March 2019. In paragraph 163 of her statement, she said the following:

'The total final settlement amount was R7 250 000.00. This settlement amount included R1 500 000.00 performance bonus. The performance bonus was paid without any performance evaluation and adherence to PIC policies.' ³⁹⁷

20. During her testimony, she expanded on the above issues as follows:

'I told my legal team to discuss with the PIC legal team. When they came back to me they said PIC is proposing that they pay me a settlement of 24 months salary which is equivalent to, I can't recall

³⁹⁶ Ibid. pages 89-90.

³⁹⁷ Para 163 of Ms Menye's statement signed on 6 March 2019.

equivalent to what the 24 months' salary and then on top of that they pay me a performance bonus of five months. So the total amount that I was paid by PIC is R7.250 million for the duration of 29 months and that was divided into 24 months of the settlement and the five months of the performance bonus. [our emphasis]

MR EMMANUEL LEDIGA: You say in (paragraphs) 163 and 164 that your settlement was carried out not in keeping with the PIC policies - is that correct?

MS VUYOKAZI MENYE: Yes and the reason why I am saying this was due to the evidence that was given in this Commission of Inquiry by the Executive Head of HR.

MR EMMANUEL LEDIGA: Yes.

MS VUYOKAZI MENYE: When you asked him whether was this in line with PIC policies and he said there is no policy that is...(in) support of that and I was actually shocked as I was listening to that and why because he is the same person who signed the settlement agreement and which policy mandated him to sign the settlement agreement.

MR EMMANUEL LEDIGA: So it did flout the policies then?

MS VUYOKAZI MENYE: Yes, yes there was no governance process whatsoever that was followed in terms of this.' ³⁹⁸ [our emphasis]

21. Mr Pholwane indicated that he was delegated by the then CEO, Dr Matjila, to negotiate the MSA and he also went on to sign the MSA. This is not in keeping

³⁹⁸ At pages 51-52 of the Transcript for day 12 of the hearings held on 6 March 2019.

with the policies of the PIC as he only got a verbal delegation/instruction from Dr Matjila and not a written one. The exchange below refers:

‘MR CHRISTOPHER PHOLWANE : ‘The Chief Executive Officer was required in writing to delegate to the Executive Head of Human Resources, Public Investment Corporation, Chris Pholwane, the authority to sign the settlement agreement with Menye.’ The legal opinion further goes into other components in terms of what is at issue. I ’m not sure whether I should look at that.

MS GILL MARCUS: I think an important question in the letter or the document you’re referring to is 19.4 as head of HR... you received only verbal instruction or authority to sign the settlement agreement from Dr Matjila, is that correct?

MR CHRISTOPHER PHOLWANE: That is correct.

MS GILL MARCUS: Would you normally do such a thing without a written instruction?

*MR CHRISTOPHER PHOLWANE: There are instances where – I think in this one, the values are way too high and I would I agree that a written instruction would have been required at that time.’ ³⁹⁹
(Emphasis added)*

22. Ms Menye went on to say that she should be re-instated as the process followed in finalising the MSA was not in keeping with PIC policies, as per the testimony below:

³⁹⁹ At pages 96 the Transcript for day 40 of the hearings held on 27 May 2019.

*'The R7.2 million that they gave me it's a salary that I could have earned within a period of two years, hence I am saying that the Commission must make a determination about this and one of the things that I'd like the Commission to make a determination about is to ensure that I am reinstated in my position of an Executive Head of PIC ... taking into consideration the fact that PIC Executive Head of HR signed... a settlement agreement without any authority or following any governance processes that are supporting the settlement agreement that was given to me and actually this settlement agreement was used as another weapon of victimising one of the young black females in the country outside of PIC...'⁴⁰⁰
(Emphasis added)*

23. The testimony of Mr Simphiwe Mayisela is also relevant. He was Senior Manager: Information Security, Risk and Governance at the PIC and was undergoing a disciplinary process. He stated the following about Ms Menye's MSA:

'The PIC paid the Executive Head of IT a settlement of approximately R7.25 million, which is equivalent to 29 months' salary despite her being with PIC for a period of 18 months. This amount is irregular and is tantamount to bribery.'⁴⁰¹(Emphasis added)

24. It should also be noted that, although in paragraphs 579, 580, 198 and 208 of Dr Matjila's statement, he deals with issues relating to Ms Menye, he does not address the issue of the MSA. Similarly, in her statement, Ms Menye submitted that she should be re-instated as the process followed in finalising the separation agreement was not in keeping with PIC policies.

⁴⁰⁰ At page 53 of the Transcript for day 12 of the hearings held on 6 March 2019.

⁴⁰¹ At page 95 of the Transcript for day 11 of the hearings held on 5 March 2019.

Matters Relating to Mr Ntuane

25. As discussed above, the aim is not to delve into matters relating to Mr Ntuane, but to make a comparison between the way in which the case of Ms Menye and that of Mr Ntuane were dealt with.
26. Mr Ntuane worked at the PIC from December 2012 until his MSA was signed in May 2016.
27. During his testimony at the Commission, Mr Ntuane made allegations of victimisation against mainly Ms More.⁴⁰² Mr Ntuane stated that *'when my reporting lines changed to reporting to the CFO, my work life started to take strain due to ongoing and unresolved conflict between the CFO and myself.'*⁴⁰³ During her testimony, and later through an affidavit, Ms More indicated that Dr Matjila concluded a settlement agreement with Mr Ntuane even after he was found to have contravened a number of PIC policies, something that should ordinarily have led to a dismissal.
28. In this instance, the Commission learnt that Mr Ntuane was paid 10 months of his guaranteed salary; and his agreement was signed by the CEO.

Did the Board Know of the MSA and was it Ratified?

29. Mr Pholwane told the Commission that a joint meeting of the Information and Communications Technology Governance Committee (ICTGC) and the Audit and Risk Committee (ARC) (both Board sub-committees) was informed of the MSA about a week after its conclusion. The memorandum presented to the Board, written by Dr Matjila, does not request ratification of the MSA and it

⁴⁰² At pages 34-36 of the Transcript for day 11 of the hearings held on 5 March 2019.

⁴⁰³ Para 8 of Mr Luyanda Ntuan'e statement signed on 5 March 2019.

appears that it was submitted for information purposes only as the MSA had already been approved and ratified by Dr Matjila. The testimony below refers:

‘MR CHRISTOPHER PHOLWANE: ... The terms and conditions of the agreement were subsequently approved and ratified in writing by Dr Dan Matjila. In this regard I refer to the submission that was made to the board in an employee relations report on the 18th April 2018 containing a summary of such terms and conditions attached hereto marked annexure CP4.⁴⁰⁴

MR CHRISTOPHER PHOLWANE: ... I also followed up in terms of my submissions of the update to the Board. I think that’s where Dr Dan has also signed. In other words, one can make inference that that was therefore a ratification of the agreement itself because the terms and conditions and the final amount – I mean, the final were indicated in that report. So that’s the report I referred to that was from the 18 April ...⁴⁰⁵

MS GILL MARCUS: What was the timeline between the approval of the settlement and tabling to the Board?

MR CHRISTOPHER PHOLWANE: So the settlement was signed on the 11 April. I tabled the report on the 18 April [2018].’⁴⁰⁶ (Emphasis added)

⁴⁰⁴ At page 79 of the Transcript for day 40 of the hearings held on 27 May 2019.

⁴⁰⁵ At page 96 of the Transcript for day 40 of the hearings held on 27 May 2019.

⁴⁰⁶ Ibid. page 98.

Legal Opinion on the MSA

30. Almost a year after the signature of the agreement in April 2018, the Board of the PIC resolved, in March 2019, to seek legal advice on the MSA. The legal opinion provided stated that:
- 30.1. Mr Pholwane was not authorised to sign the MSA; and
- 30.2. Based on Mr Pholwane's own version, the payment made to Ms Menye in terms of the MSA was extraordinary.
31. During his testimony, Mr Pholwane stated the following in relation to the abovementioned legal opinion:

'MR CHRISTOPHER PHOLWANE: And thirdly, is the Board, I think had taken exception particularly to the values. You will recall that a report to the Board was made in and around the 18 April (2018) earlier on. So a year later the question surfaced with regards to the settlement discussion.

When I then gave my reasons they indicated that it is best for the Board to get a legal opinion on the validity of the settlement agreement itself. The legal opinion was obtained from Cliffe Dekker, CDH....' ⁴⁰⁷

⁴⁰⁷ At page 94 of the Transcript for day 40 of the hearings held on 27 May 2019.

Findings

32. From the inquiry and discussions above, it is found that, by entering into the MSA with Ms Menye, the PIC did not comply with its internal policies for the following reasons:
 - 32.1. There was no written delegation of authority for Mr Pholwane to sign the MSA and a verbal one was not appropriate.
 - 32.2. Mr Pholwane should not have signed the MSA as only the CEO is authorised to do so.
 - 32.3. This deviation by management did not receive any ratification from higher bodies of the PIC, in particular the ICTGC and ARC. Though the MSA was reported to the Board, it did not specifically seek ratification as per the minutes of the joint-committee meeting that was held a week following the conclusion of the MSA between Ms Pholwane and the PIC. Instead it was presented to the Board meeting for information purposes only.
33. In terms of the 29 month guaranteed salary paid to Ms Menye, the amount was not in accordance with PIC practice as it is significantly above previous amounts paid.
34. On his own version, Mr Pholwane indicated that the amount was excessive and out of the ordinary and no evidence to the contrary was offered by others, including Dr Matjila.
35. Typically, and as confirmed by Mr Pholwane, MSAs signed by corporations usually would be 6 months' salary or thereabouts. As such, the MSA between Ms Menye and the PIC was '*precedent setting*' and could not be justified.

36. The CDH opinion confirms the invalidity of the settlement, and the MSA is found to be invalid. It should not have been concluded and accordingly, Ms Menye was still supposed to be an employee of the PIC.
37. Dr Matjila breached PIC policies by authorising Mr Pholwane to sign Ms Menye's MSA and Mr Pholwane should not have acted on his instructions as they were not in writing – contrary to the PIC's policies
38. It should be noted that, subsequent to the Commission's hearings, and after seeking legal advice, the (previous) Board decided to reinstate Ms Menye, but this was not effected as she did not accept the Board's proposal.
39. However, the PIC has alleged that Ms Menye knew, but did not inform the PIC, that Dr Matjila was under investigation by the police for corruption and that she gave super administration rights, especially without limitations on scope and duration – not in keeping with the PIC IT policies and access rights policies - to Mr Mayisela who went on to use them for unauthorised purposes. As such, Dr Matjila said Ms Menye was due to face disciplinary action.
40. The extensive use of disciplinary hearings is disturbing and should be cause for concern to the Board and the HRRC, particularly given the number of very senior employees that have been 'disciplined', suspended and/or dismissed.

Recommendations

41. It is recommended that the PIC should have a policy on MSAs, which sets out the process to be followed during the negotiation of an MSA and provide guidelines for settlements in terms of pay-outs to be made.
42. The PIC must also ensure that when an authority to execute a decision is delegated, such instruction must be in writing and appropriate to the level of

decision-making required. A verbal instruction on significant matters is not acceptable practice.

43. Delegations of Authority should be respected and adhered to. If, for any reason, they are not appropriate, inadequate or in conflict with practice, amendments should be carefully considered.
44. Due to the fact that the MSA of Ms Menye was invalid, the monies paid to Ms Menye in terms of the MSA must be returned to the PIC within a month of the publication of this Report and Ms Menye should be paid her normal remuneration and benefits from the time she left to the time she resumes employment at the PIC, should she decide to accept reinstatement.
45. The PIC is to investigate the conduct of Ms Menye in terms of the improper granting of super-administration rights to Mr Mayisela.
46. The same applies to Mr Pholwane in relation to his alleged improper conduct in signing Ms Menye's MSA without the requisite authority.
47. Mr Pholwane's conduct and role as EH:HR in relation to the allegations of victimisation against him must be reviewed and concluded within three months of the publication of this Report.
48. The Board, through its HRRC, must undertake a comprehensive review of the use of disciplinary processes in the organisation.

TERM OF REFERENCE 1.14

‘Whether the PIC followed due and proper process in 2017 and 2018 in the appointment of senior executive heads, and senior managers, whether on permanent or fixed-term contracts’

Introduction

1. This Term of Reference (ToR) was dealt with during the hearings and arose from allegations that some PIC executive appointments were not in compliance with PIC processes. The key allegations centred on issues affecting two executives:
 - 1.1. Ms Rubeena Solomon (Ms Solomon), who was appointed Executive Head (EH) of Investment Management from 1 September 2017, and is a senior executive head; and
 - 1.2. Mr Adrian Lackay (Mr Lackay), who was appointed to the position of investor relations from 2 April 2018 and is a senior manager.
2. The key allegations were made by two individuals, namely:
 - 2.1. Mr Paul Magula (Mr Magula), who requested the Commission of Inquiry (Commission) to examine how the two executives were appointed to their new roles. Mr Magula was the Executive Head of Risk at the PIC until termination of his employment in April 2018.
 - 2.2. Ms Nomzamo Colleen Petje (Ms Petje), who, in her complaint regarding victimisation by the PIC, compared her situation with how Ms Solomon and Mr Lackay were treated.

3. Mr Christopher Pholwane, the Executive Head: Human Resources, offered responses to the allegations during his testimony.

The allegations

4. In his statement Mr Magula states that:

'58. Appointment of certain staff members done without following a transparent recruitment process.

58.1. Ms. Rubeena Solomon was appointed as an Executive Head: Investments Support, without approval of organizational structure changes, advert and interview process. PIC did not have staff promotion policy unless if I did not know or was established after I was dismissed.

58.2. Mr. Adriaan Lackay was appointed in the Department of Communications without an advert and interview process.⁴⁰⁸(sic)

5. Ms Petje made similar assertions, comparing her position with that of the two executives and also commented on their remuneration (paragraph 30-32 Page 11-12 of her statement). On Ms Solomon she said:

30....I am aware of at least one employee whose position was rendered redundant and she was appointed to a higher position. Her salary was adjusted to a higher grade. The employee I am referring to is Ms Rubeena Solomon. She was occupying the position of General Manager: Investment Management. That position was inexplicably rendered redundant and she was appointed Executive

⁴⁰⁸ Paras 58.1-58.3 of Mr Paul Magula's statement signed on 11 March 2019.

Head: Investment Management. As a result of the promotion, Ms Solomon's salary was increased by a whopping R953 304.21

31. If Ms Solomon could be promoted and her salary be automatically adjusted to a higher grade, nothing prevented the same being done in my favour. In my view, it is irrelevant that Ms Solomon's promotion and salary adjustment occurred approximately two years after my demotion. The treatment accorded to Ms Solomon and the one accorded to me shows that employees are not treated equally within the PIC.⁴⁰⁹

6. And on Mr Lackay she said:

'33. The Investor Relations position, which was left vacant during the restructuring process, was later filled by Mr Adrian Lackay. According to the documents that were placed before this Commission by Mr Pholwane, Mr Lackay was initially appointed on an 18-month contract. Some of us were not even aware that Mr Lackay had been appointed to the position until Mr Pholwane testified as to the best of my recollection that there was no advert to this effect. We merely saw Mr Lackay on a daily basis at the PIC. He attended staff meetings. We wondered why someone who was not an employee of the PIC attended those meetings. The position was subsequently advertised on a permanent basis and Mr Lackay was appointed to it. Surprisingly, Mr Lackay was appointed directly to grade E3. Mr Lackay's appointment to grade E3 resulted in his salary on that grade exceeding the salary he was earning on a fixed-term contract by R331 200.00.⁴¹⁰

⁴⁰⁹ Paras 30-31 of Ms Nomzamo Petje's statement signed on 19 March 2019.

⁴¹⁰ Para 32 of Ms Nomzamo Petje's statement signed on 19 March 2019.

7. To understand the processes that were followed, the relevant human resources policies of the PIC, set out in Mr Pholwane's statement, are reproduced below:

'2.3 Recruitment

2.3.1 Governance

2.3.1.1. The PIC follows the recruitment policy and processes when sourcing, and appointing employees. Refer to Annexure I for the Recruitment and Selection Policy.

2.3.1.2. Section 8.2 of the Delegation of Authority governs the approval process with regards to recruitment remuneration. Refer to Annexure A for a copy of the Delegation of Authority.

2.3.1.3. The recruitment and selection policy details the following as it relates to recruitment:

- All the processes that need to be complied with when recruiting for a vacant position;*
- All the processes that need to be complied with when recruiting an employee who is required to be FAIS Representative*
- All the processes that need to be complied with when recruiting an employee on a temporary basis and fixed term*
- All the processes that need to be complied with when recruiting a foreign national*

- *All the processes that need to be complied with when seconding an employee*
- *All the processes that need to be complied with regards to promotions.*

2.3.1.4. Sections 5 to 9 of the recruitment and selection policy detail the steps that need to be followed leading to the interview process. The following steps need to take place:

Step 1: Vacancy request (refer to section 5 of policy)

Step 2: Advertising the position (refer to section 6 of policy)

Step 3: Shortlisting and screening (refer to section 7 of policy)

Step 4: Psychometric and competency based assessment when applicable (refer to section 8 of policy)

Step 5: Interview (refer to section 9 of policy).'⁴¹¹

Process followed in respect of Ms Solomon

8. The history of Ms Solomon's appointment as Executive Head goes back to 2015 when the PIC engaged in a restructuring process. The 2015 restructuring process created major changes in the functioning of the PIC, including changes to executive and other staff positions. From the documentation provided by Mr Pholwane, the restructuring process was approved by the relevant authorities, including the Human Resources and Remuneration Committee (HRRC), the Board and the Minister of Finance as the shareholder

⁴¹¹ Para 2.3.1 of Mr Christopher Pholwane's statement signed on 22 January 2019; for additional detail, see also ToR 1.13.

representative. Thus, the assertion by Mr Magula that there was no approval of the restructuring is incorrect.

9. A further review of the structure took place in 2017 and was approved by the Board and the Shareholder as per the documents provided by Mr Pholwane during his testimony. This also affected Ms Solomon's position as Mr Pholwane indicated:

*'... the position of General Manager: Investment Management was reviewed and enhanced to Executive Head: Investment Management. This then meant that the position of GM: Investment Management was redundant. The incumbent for the GM: Investment Management position was then absorbed [in]to the position of Executive Head: Investment Management.'*⁴¹²

10. Approval of this position was addressed in a memorandum by Mr Pholwane to the Chief Executive Officer, Dr Matjila (Dr Matjila) and Chief Financial Officer, Ms Matshepo More (Ms More) on 17 August 2017.

11. However, three critical issues emerge from this appointment.

- 11.1. According to PIC policy, positions for new appointments have to be advertised to afford suitable candidates an opportunity to apply. Mr Pholwane said that the PIC does at times opt to give internal candidates a chance to fill positions before seeking external candidates.

- 11.2. Typically, the position is advertised, and the subsequent recruitment process follows as per steps 1-5 of the recruitment and selection process above. It entails short listing, interviewing and selection of candidates. Mr Pholwane said Ms Solomons was absorbed into the position on a

⁴¹² Para 2.2.2. of Mr Christopher Pholwane's statement signed on 22 January 2019; for additional detail, see also ToR 1.13.

permanent basis and did not present any evidence of an advertising process.

- 11.3. The issues of company restructuring and redundancies of positions are regulated by section 189 of the Labour Relations Act, 66 of 1995, where it seems to be suggested, in subsection (3)(b), that before proposing dismissals on the basis of operational requirements, an employer must consider alternatives, which would include an attempt to employ redundant employees in alternative positions.
- 11.4. Section 16 of the Recruitment and Selection policy lays out the process for creating a career development and progression for employees. Given that Ms Solomon appeared to be suitably qualified for the position, this could be interpreted as a promotion as per section 16. But without following the agreed processes, the approach taken is open to interpretations of favouritism and exclusion of an opportunity for other internal candidates to apply for the position. This is all the more so given the significant salary increase that accompanied the new position.
- 11.5. The process of appointing executive heads was also addressed by Senior Manager: Corporate Legal, Ms Pamela Phala (Ms Phala) in her testimony:

'Shortly thereafter, sometime late in 2015, Dr Dan called a staff meeting ... He indicated that there will be a restructuring within the company. The positions of Executive Heads were introduced and Acting Executive Heads were introduced at the meeting. The people who were heads of departments automatically became acting Executive Heads. Dr Dan introduced Ernest Nesane as acting Executive Head Legal ... When they advertised for the position, I did

*not apply having sensed that Dr Dan and Matshepo clearly did not want me at the institution. (Emphasis added)*⁴¹³

12. The increase in remuneration of Ms Solomon of the order of R953 304.21 was the increase from her previous position to the new one, and as such reflected the salary level that any incumbent in that position would have been paid.
13. Ms Petje herself was negatively affected by the restructuring as her position was rendered redundant. She was offered a position as an Environment, Social and Governance (ESG) analyst and from evidence presented to the Commission, there could well be, but there is no indication that her managers offered her the position by following PIC processes of advertising and engaging in a competitive process, either internal or external.

Process followed for Mr Lackay

14. Mr Lackay was appointed on a permanent basis in 2018 in a position of Investor Relations in the Corporate Affairs Department. According to the evidence of Ms Petje, Mr Magula and Mr Pholwane, the association of Mr Lackay with the PIC commenced and progressed as follows:
 - 14.1. Ms Petje indicated that before being appointed permanently in March 2018, Mr Lackay had been serving on a fixed term contract for 18 months at the PIC, effectively as a contractor. Section 13.6 of the Recruitment and Selection policy says these contracts '*should follow the normal recruitment process*', of creating a vacancy, advertising, short listing, interviewing and finally appointing the successful candidate. Ms Petje queried why this position was not permanently filled immediately after the 2015 restructuring.

⁴¹³ Para 7.7.3 of Ms Pamela Phala's statement signed on 28 March 2019. Note: Ms Phala was the Head of the Legal Department then.

- 14.2. Regarding Mr Lackay's permanent appointment, Mr Pholwane stated that policies and processes were followed: the position was created by the restructuring and human resources processes; an internal advertisement process was complied with; there was a shortlist and in terms of the scoring process Mr Lackay was the best candidate on the list of three.
- 14.3. In terms of the increased remuneration for Mr Lackay, in the order of R331 200.00, the approvals from various bodies incorporated changes in remuneration for new positions that had been created. Various employees, including Mr Lackay, were awarded substantial increases in remuneration that accompanied their new positions and roles. Thus, this appears to have been within the policy and process.

Findings

15. In relation to the appointment of Ms Solomon as Executive Head Investment Management, Mr Pholwane indicated that the PIC could absorb employees without advertising and indeed it has happened with numerous employees. It would appear from the testimony of Ms Phala above that Mr Solomons could have been appointed in an active capacity and the position thereafter advertised as it happened with other EHs. The issue of absorbing employees appears not to be part of policy and yet there is policy on filling positions which in this instance appears not to have been followed. Thus, subject to the Board examining this issue of absorption, we hold that the appointment of Ms Solomons appears not have followed PIC policies and processes. She was 'absorbed' into the position. With no evidence presented to the contrary it is clear that the position was not advertised, either internally or externally, and a competitive process was not conducted. The Board should investigate if Dr Matjila, Ms More and Mr Pholwane breached PIC policies in approving the appointment of Ms Solomon if the Board concludes it was done irregularly.

16. The approach followed allowed for an interpretation of special treatment of some employees and unfair treatment or limiting opportunities for others, particularly given the substantial remuneration increases that accompanied such appointments.
17. In relation to Mr Lackay's appointment, Mr Pholwane has supplied certain evidence to show that proper processes were followed in creating and getting approvals for the position (fixed term contract) in which Mr Lackay was appointed, however no evidence of advertising the position and the interviewing process was provided. According to PIC policy even such contracts must go through the full recruitment process as provided for in Clause 13.6 of the Recruitment and Selection Policy which states "The appointment of Fixed Term Contractors will follow the normal recruitment process". We conclude that the first appointment of Mr Lackay on a fixed term contract did not follow PIC processes. It would then appear that the senior managers who appointed him breached PIC policies.
18. However, the second appointment of Mr Lackay on a permanent basis followed PIC processes and all the prescribed procedures were followed.

Recommendations

19. The following recommendations are made:
 - 19.1. The PIC has reasonable human resources policies and processes in place, and senior executives should follow these policies at all times.
 - 19.2. Employees need to be, and be seen to be, treated fairly and equally. The inconsistent application of the policies has the potential for employees to feel their careers are limited due to favouritism practised at the PIC.

- 19.3. Transparency, openness and visible fair employment and promotion processes and procedures are essential to ensure an environment of trust.
- 19.4. PIC HR policies should be reviewed by the Board HRRC on a regular basis.
- 19.5. The Board's HRRC should regularly evaluate senior promotions and appointments to ensure that they comply with policies, procedures and fair practices.
- 19.6. In respect of the potentially irregular appointment of Ms Solomon and the irregular first appointment of Mr Lackay, referred to above, Ms More and Mr Pholwane, who remain in the employment of the PIC, should be further investigated and, if appropriate, subject to disciplinary charges

TERM OF REFERENCE 1.15

‘Whether the current governance and operating model of the PIC, including the composition of the Board, is the most effective and efficient model and if not, to make recommendations of the most suitable governance and operating model for the PIC for the future.’

1. In order to answer this term of reference, the following must be addressed:
 - 1.1. What the most effective and efficient governance and operating model looks like.
 - 1.2. What the PIC’s current governance and operating model is.
 - 1.3. Whether the PIC’s current governance and operating model is consistent with the most effective and efficient governance and operating model.
2. This term of reference is core to enabling lessons on past missteps to be learnt. It is also key in providing the foundation for a best-in-class future for fund beneficiaries, stakeholders, government and taxpayers. Why is governance important? The United Nations in the paper *What is Good Governance*, helps explain:

‘The concept of "governance" is not new. It is as old as human civilisation. Simply put "governance" means: the process of decision-making and the process by which decisions are implemented (or not implemented). Governance can be used in several contexts such as

corporate governance, international governance, national governance and local governance.’⁴¹⁴

3. The paper goes on to explain that there are eight main characteristics of *Good Governance*. Good governance is:
 - 3.1. participatory,
 - 3.2. consensus oriented,
 - 3.3. accountable,
 - 3.4. transparent,
 - 3.5. responsive,
 - 3.6. effective and efficient,
 - 3.7. equitable and
 - 3.8. inclusive and follows the rule of law.

GOVERNANCE

Board’s effective functioning guidelines

4. The 2018 revised ‘Guidance on Board Effectiveness’ published by the Financial Reporting Council (FRC) with the UK Corporate Governance Code, emphasises the importance of ‘*the way we do things around here*’ as being a

⁴¹⁴ [“What is Good Governance”](#). UNESCAP, 2009

key factor and introduces the requirement for boards to report on purpose, culture and workforce engagement in their annual report. The Guidance emphasises that the Board should:

- 4.1. Establish the company's purpose, values and strategy.
 - 4.2. Assess and monitor culture to ensure it is aligned with the company's purpose, values and strategy.
 - 4.3. Ensure effective engagement with, and encourage participation from, employees.
5. While employees should be able to raise any matter of concern, companies need to relook at their whistleblowing policies and procedures.
6. Given the challenges the PIC Board has, and is facing the FRC Guidelines section on decision-making is worth elaborating on. It states that:
- 6.1. Well-informed and high-quality decision making does not happen by accident. Boards can minimise the risk of poor decisions by investing time in the design of their decision-making policies and processes, including the contribution of committees and obtaining input from key stakeholders and expert opinions when necessary.
 - 6.2. Meeting regularly is essential for the board to discharge its duties effectively and to allow adequate time for consideration of all the issues falling within its remit. Ensuring there is a formal schedule of matters reserved for its decision will assist the board's planning and provide clarity to all over where responsibility for decision-making lies.
 - 6.3. Complex decisions depend on judgement, but the decisions of well-intentioned and experienced leaders can, in certain circumstances, be

distorted. Factors known to distort judgement are conflicts of interest, emotional attachments, unconscious bias and inappropriate reliance on previous experience and decisions.

6.4. There are ways boards can create conditions that support sound decision-making, for instance separate discussions for important decisions that cover steps like concept, proposal for discussion and proposal for decision.

7. The section also identified risk factors that can result in poor decision-making, including:

7.1. A dominant personality or group of directors on the board, inhibiting contribution from others.

7.2. Insufficient diversity of perspective on the board which can contribute to 'group think'.

7.3. Insufficient attention to risk or excess focus on risk mitigation.

7.4. A compliance mindset and failure to treat risk as part of the decision-making process.

7.5. Insufficient knowledge and ability to test underlying assumptions.

7.6. Failure to listen and to act upon concerns that are raised.

7.7. Inability to challenge effectively, inadequate information or analysis, and

7.8. Lack of time for debate and truncated debate.

8. South Africa's King IV Code was updated in 2016. While it builds on the previous positioning of sound corporate governance, it also simplifies the principles and reiterates that good governance is not a tick-box or compliance exercise but to be the catalyst for 'a shift from a compliance-based mind set to one that sees corporate governance as a lever for value creation.' The new or enhanced features relate to, amongst other matters:
 - 8.1. Fair, responsible and transparent organisation-wide remuneration
 - 8.2. Responsible and transparent tax strategy and policy
 - 8.3. Balanced composition of governing bodies and the independence of members of the governing body
 - 8.4. Delegation to management and committees
 - 8.5. Performance evaluation of the governing body as well as of key management individuals and committees
 - 8.6. Risk governance
 - 8.7. Audit committee disclosures
 - 8.8. Technology and information
 - 8.9. Following a combined assurance model
9. King IV also considers the matter of independent non-executive directors and defines such independence as, among other things, stating that:

- 9.1. Involvement in the day-to-day management of the company (or its subsidiary) defines the director as executive, while not being involved in management defines the non-executive director
- 9.2. Non-executive directors are independent of management on all issues, including strategy, performance, sustainability, resources, transformation, diversity, employment equity, standards of conduct and evaluation of performance.
10. It also states that an independent director should be independent in character and judgement and there should be no relationship or circumstances which would affect or appear to affect this independence. Independence is the absence of undue influence and bias. It recommends that every board should consider its size, diversity and demographics to make it effective. Diversity applies to academic qualifications, technical expertise, relevant industry knowledge, experience, nationality, age, race and gender. Furthermore, directors should be individuals of courage, and have the relevant knowledge, skills and experience to bring judgement to bear on the business of the company, all of which should be assessed prior to any appointment being made. It recommends that prior to their appointment the directors' backgrounds should be investigated, with the nominations committee playing a role in this process.
11. King IV elaborates on the roles and functions of the various chairs, committees, reporting and evaluation as well as the establishment of key committees such as Audit, Social and Ethics, the establishment of committees responsible for risk governance and remuneration as well as a nominations committee.
12. Deloitte, in a document entitled Duties of Directors, makes the following points (also see Legal section below):

- 12.1. The Companies Act 71 of 2008 codifies the standard of directors' conduct in Section 76, and sets a very high bar including personal liability where the company suffers loss or damage as a result of directors' conduct not meeting the prescribed standard. The Act makes no specific distinction between the responsibilities of executive, non-executive or independent non-executive directors, and the codified standard applies to all directors. Court cases confirm that a director stands in a fiduciary relationship to the company even if a non-executive director.
- 12.2. In terms of this standard a director must exercise powers and perform functions:
- 12.2.1. In good faith and for a proper purpose
- 12.2.2. In the best interests of the company
- 12.2.3. With the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions and having the general knowledge, skill and experience of that particular director.
- 12.3. In essence, the Act combines the common law fiduciary duty and the duty of care and skill. The codified standard applies in addition to, and not in substitution of, the common law duties of a director. All directors are bound by their fiduciary duty and the duty of care and skill.

Board Oversight Responsibilities

13. Deloitte, in its document entitled 'Developing an effective governance operating model,'⁴¹⁵ states that the board is accountable for oversight of the governance process, while management is responsible for implementing the

⁴¹⁵ 2013.

policies and procedures through which governance occurs within the organisation. Three drivers and expectations that have intensified the need for improved governance are identified, namely the growth imperative, organisational size and complexity, and regulatory changes. The board's governance role includes responsibility for reviewing corporate strategies, shaping the culture, setting the tone at the top and promulgating the organisation's vision, values and core beliefs. It is expected to oversee senior management's collective ownership and individual accountability for regulatory compliance and risk management. The board is accountable for all aspects of governance, including decision making authority that codifies who is responsible for making key decisions; organisational structures that define and clarify responsibilities for operational, control and reporting processes; and organisational design that is understood by managers, employees and external stakeholders. Technology and risk oversight policies are also included in infrastructure oversight responsibilities.

14. A recent article published by Business Law Today, titled Board Oversight and Governance: From Tone at the Top to Substantive Checks and Balances⁴¹⁶, states that post the control breakdowns of various companies there seems to be a change in thinking, evolving from an approach of focusing primarily on 'tone at the top' to one of instituting substantive checks and balances and considering broader aspects of ethics, values and corporate culture, where boards may in fact take direct responsibility for the checks and balances related to the CEO and other members of senior management. A substantive checks and balances approach addresses the role, responsibilities and relationships among the key elements and players in an organisation's governance, controls and oversight system and recognises 'that a leader's role is one of service rather than entitlement ... Experience has shown that

⁴¹⁶ H Grace Jr., S Prendergast and S Koski -Gafer, *Board Oversight and Governance: From Tone at the Top to Substantive Checks and Balances*, Business Law Today, 14 February 2019. Available at: <https://businesslawtoday.org/2019/02/board-oversight-governance-tone-top-substantive-checks-balances/>

governing structures which consolidate power and authority into fewer and fewer hands ... often fail to meet conceptual ideals if individuals in power come to feel entitled to do as they please. Without effective oversight and a system of checks and balances, conditions are ripe for misconduct'⁴¹⁷

15. It is against this development of best practice, globally and domestically, that the functioning of the Board of the PIC should be measured.

Global Best Practice on Governance

16. The PIC has previously undertaken a global benchmarking exercise - this was also presented to the Commission, by former PIC board member Mr Vuyo Jack (Mr Jack).
17. At the PIC Governance Workshop held in May 2019, convened by the PIC Commission (the PIC Governance Workshop) Mr Jack presented a global benchmarking exercise previously undertaken by the PIC which can be summarised as follows⁴¹⁸:

| | PIC | NORWAY GPF | CALPERS | CPPIB | OTTP |
|-------------------------|-----------------------------------|-----------------------|-----------------|-----------------|----------------|
| Assets under Management | US\$144 billion (R2,083 trillion) | US\$1 trillion | US\$354 billion | US\$295 billion | C\$193 billion |
| Date founded | 1911 | 1990 | 1931 | 1966 | 1990 |
| Employees | 372 | 400 | 2800 | 1661 | 1200 |
| Type of entity | Asset manager | Sovereign Wealth Fund | Pension Fund | Asset Manager | Pension Fund |

⁴¹⁷ Ibid.

⁴¹⁸ Table 12, of the presentation, 'International Benchmarks of Pension Funds' of Mr Vuyo Jack's presentation at the PIC Commission of Inquiry Workshop.

| | | | | | |
|--|----------------------------------|-------------------------------|--|---|--|
| Proportion of assets managed in-house vs. externally | 70% in-house 30% external | 95% in-house 5% external | Approx. 65% managed in-house; Private Equity managed externally | Largely manage assets in-house | Approx. 80% in-house; Outsource where it is not efficient or practical to maintain equivalent skills in-house |
| Management fees | Estimated 3 - 5 cents per R100 | 5 - 6 cents per \$100 | 61.2 cents per \$100 | 32.8 cents per \$100 | 67 cents per \$100 |
| Asset allocation In-country-Global split | 90% in-country; 10 global | 0% in-country; 100% global | 55% in-country; 45% global | 15.5% in-country; 84.5% global | 44% in-country; 56% global |
| Size of Board | 10-15 | 8 | 13 | 12 | 11 |
| Board Chair | Deputy Minister of Finance | Governor of Central Bank | Elected annually by Board members | Appointed by Minister after consultation with Board | Board selects chair |
| IC process (Board involvement) Y/N | Y | N | Y in line with pension fund governance model | N | Y in line with pension fund governance model |
| Management incentives | Base pay; Pay for performance | N/A | Base pay; Pay for performance; Special day | N/A | Base pay; Annual incentive plan; Long-term incentive plan |

18. Some observations from the comparison contained in the table above are that:

18.1. The board size is generally below 15.

- 18.2. In large asset managers, as opposed to pension funds, the board is not directly involved in the investment process.
- 18.3. The chairperson of the board is generally not from the government, to avoid potential political interference.

Legislative and Regulatory Framework Specific to Governance

19. The legislative and regulatory framework governing the PIC in general is addressed in Chapter II of this report. As such, only those legislative and regulatory provisions specific to governance will be cited in this section and reference will be made, where necessary, to relevant provisions contained in other parts of this report.

The Public Investment Corporation Act 23 of 2004 (PIC Act)

20. The key parts of the PIC Act that address the governance of the PIC are contained in the following sections:
 - 20.1. Section 2 of the PIC Act establishes the PIC as a juristic person. In terms of the main object contained in section 2(4), the PIC is to be a Financial Service Provider (FSP) in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act).
 - 20.2. Section 6 of the Act which deals with the appointment of the board of directors;
 - 20.3. Section 7 of the Act authorises the board to form committees, as is necessary, and determine their functioning and provides in subsection 3 that 'any person with expert knowledge of a function of a committee may be co-opted by such committee on such terms as the board may determine'.

- 20.4. Section 8 deals with the management of the corporation and indicates that ‘subject to the provisions of this Act, the board must control the business of the corporation, direct the operations of the corporation and exercise all such powers of the corporation that are not required to be exercised by the shareholders *of the corporation.*’

The PIC Act Amendment Bill, 2017 (Amendment Bill)

21. The Amendment Bill, published in 15 June 2018⁴¹⁹, was approved by the National Assembly (NA) but is yet to be signed into law. It makes some pertinent changes to the PIC Act, including:
- 21.1. Providing for a stronger role for the NA in the affairs of the PIC in terms of oversight and accountability.
 - 21.2. Having a board of 13 (thirteen) members made up of 10 (ten) non-executive and 3 (three) executive directors, as opposed to the current 15 (fifteen).
 - 21.3. The 10 non-executive directors must not include more than 1 (one) representative of the National Treasury.
 - 21.4. The Deputy Minister of Finance is to be the Chairperson of the PIC, or alternatively a Deputy Minister in the economic cluster.
 - 21.5. PIC clients, such as the GEPF and other large clients with more than 10% of assets managed by the PIC, are to be represented on the PIC board.

⁴¹⁹ Published in Gazette No 41704 of 15 June 2019.

- 21.6. Representation of 3 (three) members from trade unions. Thus, out of the 10 (ten) non-executive directors at least 7 (seven) are proposed to come from government, PIC clients and trade unions.
- 21.7. Ministerial directives, in terms of Section 4, should be tabled before the NA and depositors first before they become effective.
- 21.8. The investment strategy has been expanded with much more focus on areas such as job creation, industrialisation, economic transformation and bias for local investments.
- 21.9. There are also transparency requirements in terms of the PIC publishing details of transactions it undertakes.
- 21.10. The Minister is also now required to table any proposed Regulations at the NA and to take into account comments arising therefrom.

The Companies Act 71 of 2008

22. The relevant sections covering the PIC in terms of the Companies Act and relevant to the Commission are covered in Chapter II of this Report and discussed in further detail in Chapter V: Next Steps: Fit and Proper/Violations of FAIS.

The Financial Advisory and Intermediary Services Act (FAIS Act) and Regulations

23. The PIC is governed by the FAIS Act which essentially regulates the behaviour of Financial Service Providers (FSPs, as defined in the Act) towards their clients in order to promote consumer protection. The FAIS Act, insofar as it

pertains to the PIC, is also discussed in detail in Chapter V in the section Next Steps: Fit and Proper/Violations of FAIS.

24. The obligations imposed by the FAIS Act are critical for governance. In particular, key individuals (as defined in the FAIS Act) are required to possess the personal character qualities of honesty and integrity, and competence and operational ability, as defined in the fit and proper requirements – at least to the extent required of them to fulfil the responsibilities imposed on them by the FAIS Act.

The Public Finance Management Act 1 of 1999 (PFMA)

25. The relevant sections covering the PIC in terms of the PFMA and relevant to the Commission are covered in the legislation section of this Report. The key issue here is that in terms of section 49 of the PFMA, the Board of the PIC is the Accounting Authority. The general responsibilities of the accounting authority are set out in section 51 of the PFMA.

The Memorandum of Incorporation (MOI) of the PIC

26. The MOI is a key document that establishes the governance framework at the PIC and aspects of its contents shall be highlighted in this section.

26.1. Applicable MOI

- 26.1.1. The evidence presented to the Commission regarding the MOI was confusing and contradictory, with the PIC itself not able to state which MOI was in fact approved by the Companies and Intellectual Properties Commission (CIPC) and in place. In essence, the confusion is about whether the MOI of 2017 as opposed to the MOI of 2013, should be taken as the MOI that is in force.

26.1.2. As discussed in Chapter I of this report, the Commission is of the view that the 2017 MOI is the MOI that is in force and applicable. Thus, this issue will not be examined again here.

26.2. Clauses of the MOI applicable to this ToR

26.2.1. Clause 7 of the MOI sets out the composition of the Board:

26.2.2. Clause 7.1.1 states that 'The Board shall comprise of no less than 10 and no more than 15 directors, who are to be appointed by the Minister in consultation with Cabinet.'

26.2.3. Clause 7.1.2.1 states that 'The board shall ...comprise executive and non-executive directors.' and clause 7.1.2.3 states that the board 'comprises of directors who are appointed from various disciplines to encompass, amongst others, the financial investment, financial advice and pension fund sectors.'

26.2.4. Clause 7.1.3 states that 'the Board shall, with the approval of the Minister, appoint a suitably skilled and qualified person as the chief executive officer of the Company.'

26.2.5. Clause 7.1.10 states that 'The chief executive officer shall make recommendations to the Board with regard to the appointment of the Executives of the Company.'

26.2.6. Clause 7.1.11 states that 'The chief executive officer and the chief financial officer of the Company shall be appointed as ex officio executive directors of the Company.'

- 26.2.7. Clause 7.1.12 states that the ‘chief executive officer shall, in consultation with the Board, appoint the other Executives in accordance with applicable labour legislation.’
- 26.2.8. Clause 7.5.1, dealing with the authority of the Board, states that ‘The management and control of the Company shall be vested in the Board which shall exercise all of the powers and perform any of the functions of the Company and manage and direct the business and affairs of the Company, save as restricted or varied by this MOI, the PIC Act or the PFMA.’
- 26.2.9. Clause 7.7 governs the removal of directors and Clause 7.7.1 states that ‘The Shareholder shall furnish Cabinet with reasons for the proposed removal of any director in terms of section 71(1) of the Act [Companies Act].’
- 26.2.10. Clause 13.1 states that the ‘Board may establish any number of Board committees *and delegate to such committees any authority of the Board*’, and specifically sets out the approach to establishing an Audit and a Social and Ethics Committee.

26.3. **Delegations of Authority (DOA)**

- 26.3.1. The DOA in place was approved by the PIC Board on 29 May 2015 and delegates extensive powers to ‘persons or bodies.’ It sets out the ‘extent and nature of such delegations, including limitations attending to those delegated powers.’ It covers Board Reserved Matters, the Powers of the CEO and General Principles that apply.
- 26.3.2. The Board exercises control over the operations of the PIC through a combination of committees and through the four DOA documents that are in place.

26.3.3. The four DOAs which have accordingly been put in place at the PIC are the:

26.3.3.1. Delegation of authority dated April 2015, which was referred to in testimony as the Corporate DOA.

26.3.3.2. Delegation of authority for Property Investments dated July 2015 (DOA:PI);

26.3.3.3. Delegation of authority for Listed Investment (Listed Equities, Fixed Income & Dealing) dated July 2015 (DOA:LI); and

26.3.3.4. Delegation of authority for Unlisted Investments dated July 2015 (DOA:UI).

26.4. **Corporate DOA**

26.4.1. By way of an outline, the Corporate DOA provides the following - which seems to suggest a unitary DOA that must be read and understood as such, and that seems to have been divided into sections A to E for practical reasons:

‘3.3 This delegation supersedes any prior delegations of authority and takes effect immediately upon the date of approval by the Board and the Exco, as applicable;

3.4 The specific delegations pertaining to the PIC are attached as follows to this Delegation of Authority:

- *Corporate Delegation of Authority – attached as Section A;*
- *Property Investments – attached as Section B;*

- *Listed Investments – attached as Section C;*
- *Unlisted Investments – attached as Section D;*
 - *Authorities required for payment processing – attached as Section E.’*

26.4.2. In clause 4 of the Corporate DOA, the following is provided:

‘4. BOARD RESERVED MATTERS

4.1 To the extent that any of the following actions are not within the powers and authority delegated to the CEO in terms of clause 5 and the EXCO in terms of its Terms of Reference, none of the following actions shall be taken by or in respect of the company unless the action in question is authorised by the Board. The powers of the Board set out herein also include those powers and duties set out in the Terms of Reference of the Board’s various committees. In addition, the powers of the EXCO set out herein include those set out in the Terms of Reference of the EXCO;

4.2 Any determination of, or amendment to, the management structure or Board authorities, provided that such approval may not be unreasonably withheld;

4.3 Approval or amendment by the PIC of the PIC’s strategic objectives or (to the extent legally permissible) the strategic objectives of any subsidiary or business division of the PIC;

4.4 Formation of any committee of, or the delegation of any authority to such committee by the Board, other than as expressly set out in the MOI;

4.5 *Establishment by the PIC of any subsidiary of the PIC;*

4.6 *Recommend to the shareholder(s) for the approval of a dividend policy and/or the declaration / distribution of any dividends by the PIC;*

4.7 *Any material change in the business of the PIC or of any subsidiary of the PIC;*

4.8 *Executive and non-executive directors shall be selected, appointed or removed by the Minister of Finance in consultation with Cabinet based on recommendations from the Board; and*

4.9 *The Board only reserves the authority to appoint the PIC's auditors who are registered in terms of Section 15 of the Public Accountants' and Auditors Act, 1991 (Act No 80 of 1991). The Board may only make such appointment if the financials are not audited by the Auditor General. Furthermore, the appointment of the abovementioned auditors is to be in consultation with the AG.'*

26.4.3. Under clause 5 of the Corporate DOA, the general powers of the CEO are defined. They include that he or she has the day to day responsibility of managing the business activities pertaining to third party funds.⁴²⁰ That must, however, be read in the context of the entire DOA which confine the CEO's '*Delegated authority to, and direct members of, PIC's management as set out in Sections A-E with respect to any matters that are within the authority of the CEO.*'⁴²¹ Clause 5, accordingly, confines

⁴²⁰ Clause 5.1.7 of the Corporate DOA.

⁴²¹ Clause 5.1.8 of the Corporate DOA.

the CEO's powers only to that which has been delegated to him or her in the unitary DOA (sections A-E).

- 26.4.4. Clause 6 of the Corporate DOA provides general principles. In clause 6.1 it provides that *'All approvals as per the detailed delegation (Section A-E) are subject to those expenses/capital expenditure being in line with the various approved budgets'* and that *'It is the authoriser's responsibility to ensure the adherence to the budget.'* Importantly, in clause 6.7.1 and 6.7.2 it provides respectively that:

'All agreements and contractual arrangements must be reviewed by the Legal Counsel, Governance and Compliance department prior to entering into such agreements and/or arrangements, and instructions to attorneys on the panel will only be through the legal department of the PIC.'

and

'All Investment related agreements/transactions/contractual arrangements shall be signed in terms of a resolution passed by the delegated committee nominating any PIC representative to sign the relative agreements/transactions/contractual arrangements on behalf of the Company, as well as all such other documents as may be required to give effect to the finalisation of the agreement/ transaction/contractual arrangements. Failing which all agreements /transactions/contractual arrangements can be signed by the relevant EH GM [sic] and any Category A signatory (as per Section E).'

- 26.4.5. The Corporate DOA is clearly an overarching instrument that makes provision for governance structures of the PIC. In the delegations section, the Corporate DOA provides, in the first place, that only the

Board can finally approve the DOA.⁴²² In line with the Board's prerogative to control the strategic direction of the PIC, the Corporate DOA provides for the final approval by the Board of the long-term strategy of the PIC⁴²³ and vision, mission and values.⁴²⁴

- 26.4.6. Matters concerning the corporate plan have all been reserved for the Board, subject to submissions made to the shareholder (i.e. Minister of Finance).⁴²⁵ Under 'Financial Plan (Budgets)', only the Board can finally approve annual budgets of the PIC, but approvals for more than 2% of the total expenditure overrun or more than 50% on a specific budget item must be approved by the ARC.⁴²⁶ The lower budget reallocations have been delegated to the CEO and General Manager of Finance.⁴²⁷
- 26.4.7. Under '*Governance Structures and terms of reference*', which relates to the establishment of Board committees and those constituted by Exco, provision is made for the Board's final approval of board constituted committees save for the ARC, which requires the shareholder's approval.⁴²⁸
- 26.4.8. The rest of the Corporate DOA makes delegations in respect of statutory requirements such as the approval of annual financial statements, the approval of dividend declarations, all of which have been reserved for the shareholder. In addition, the approval of the dividend policy, the approval of PIC lease terms, the appointment of service providers for the supply of contracts greater than R10 million per transaction, all PIC

⁴²² Section 1.1 of the Corporate DOA.

⁴²³ Section 2.2 of the Corporate DOA.

⁴²⁴ Section 2.1 of the Corporate DOA.

⁴²⁵ Section 2.3 of the Corporate DOA.

⁴²⁶ Section 2.4.2 of the Corporate DOA.

⁴²⁷ Sections 2.4.3 and 2.4.4 of the Corporate DOA respectively.

⁴²⁸ Section 3.1.1 and 3.1.2 of the Corporate DOA.

litigation, changes in the organisational structure, the appointment of first tier executive directors have all been reserved for the Board's approval.

26.4.9. The Corporate DOA presents a fairly good mix of reservation of issues subject to board approval and delegations of authority to Board constituted committees, Exco, the CEO and Exco constituted committees to manage the strategic affairs of the PIC.

26.5. **Delegation of Authority for Property Investments (DOA: PI)**

26.5.1. Save for the approval of financial year end valuations which must be co-approved by the client, the GEPF, in respect of property investments, the approval of other annual valuations, domestic acquisitions and disposals above R7 billion,⁴²⁹ Africa acquisitions and disposals exceeding US\$ 16,5 million, and budget overruns in respect of the approved capital expenditure budget exceeding 5% or R500 million, must be approved by the IC. Beyond the approvals cited hereinabove, much of the delegations under the DOA: PI are entrusted to PIC executive management either in respective individual capacities or through Exco constituted committees, predominately to PMC: Properties.

26.6. **Delegation of authority for Listed Investment (Listed Equities, Fixed Income & Dealing):**

26.6.1. The relevant clauses of this DOA are as follows:

⁴²⁹ All acquisitions and disposals above R7 billion but below R12 billion by IC and all acquisitions and disposals above R12 billion by the board.

4.1.1 Fixed income derivative deals (OTC and listed) for nominal amounts exceeding R10bn (once off), the MPC Listed has final approval and the CEO must agree beforehand

4.2.1 Money and Capital Markets: Dealings for nominal amounts exceeding R5bn (once off), final approval rests with the CEO but the Executive Head, LI must agree beforehand

5.1 All structured investment products exceeding R10bn – final approval lies with the Investment Committee

5.2 All structured investment products of nominal amounts greater than R3bn but less than R10bn, final approval rests with PMC Listed.

6.1 South Africa, Africa and offshore strategic investments, (listed) amounts greater than R10bn, final approval rests with the Investment Committee

6.2 Strategic investments (listed) for amounts greater than R3bn but less than R10bn, final approval rests with the PMC Listed and the CEO, CFO and Executive Head of Risk must agree beforehand

6.10 Deal execution for all listed markets/exchanges outside South Africa, final approval rests with the PMC Listed and the CEO, while the CFO must agree beforehand

8.1.1 Purchases or disposals of amounts exceeding 5% of the value of the equity portfolio, final approval rests with PMC Listed while the CEO has to agree beforehand

8.1.2 *Purchases or disposals greater than 3% but not exceeding 5% of the value of the portfolio, final approval rests with the CEO while both the CFO and Executive Head, Risk must agree beforehand*

10.1 *Acquisition of 20% and more in JSE top 100 companies, final approval rests with PMC Listed, with the CEO, CFO and Executive Head: Risk required to agree beforehand.'*

26.7. Delegations of authority for Unlisted Investments (DOA: UI)

26.7.1. In terms of clauses 1.3, 1.4 and 1.7, the CEO has final approval for deal pipelines to be included in PPMs to clients, those to be considered by the PIC and the signing of letters of proposals declined at PMC and FIP.

26.7.2. The relevant extracts of clause 5 are as follows:

'5.15 Investments greater than R5bn per deal for structured investment products (SIPS) or mixed assets requires final approval from the Board

5.18 Final approval from the Board is required for investments greater than US\$500m per deal (SIPS)

5.21 Investments in Unlisted Fixed Income or Debt papers: private placement from an issuer greater than R10bn also requires board approval.'

26.8. In effect, the Board does not appear to have any reserved authority regarding listed investments and has minimal reserved authority regarding unlisted investments.

27. The PIC's Operating Mandate

27.1. There are four aspects to the mandate agreed with the PIC that need to be considered:

27.1.1. Firstly, the mandate that the clients of the PIC have agreed upon, including the GEPF (which accounts for 87% of the assets under management), the Unemployment Insurance Fund (UIF), and the Workmen's Compensation Fund (WCC) being the primary funds, and which govern the investment framework within which the PIC operates.

27.1.2. Secondly, the mandate to ensure the generation of financial returns that ensures the sustainability of the pension funds and limits the potential obligation of the state to make good any shortfall, given that the fund is a defined benefit fund.

27.1.3. Thirdly, particularly through the Isibaya Fund which was established in 1999, to provide 'finance for projects that generate financial returns while also supporting positive, long-term economic, social and environmental outcomes for South Africa'. In practice the Isibaya Fund focuses extensively on black economic empowerment, which it funds through private equity and developmental investments and applies this mandate through a set of earmarked funds for infrastructure, environmental sustainability, priority sectors that drive job creation, skills and alleviate poverty – in essence impact investment strategies and not just ESG.

27.1.4. Fourthly, any mandate that the shareholder, represented by the Minister of Finance, determines and agrees with the PIC.

27.2. The PIC's mandate from its clients is discussed in more detail in the section addressing ToR 1.17, in Chapter III of this report.

28. The Board of the PIC

28.1. As discussed above, the Board of the PIC is appointed in line with the PIC Act and the MOI. It should be noted that these documents do not set out the appointment process of the Board and it is the prerogative of shareholder/s in South Africa.

28.2. Appointment of the Board

28.2.1. At the PIC Governance Workshop, the Head of Asset and Liability Management (ALM), a division of National Treasury, Mr Anthony Julies (Mr Julies), explained the process thus:

28.2.1.1. The Minister engages with the Chairperson of the Board and receives nominations of new candidates to serve on the PIC Board for his consideration. This is done in order to promote transparency as well as Board participation in the process.

28.2.1.2. Once the nominations are received from the Chairperson of the Board, the ALM reviews the submitted names having due regard to requirements such as the mix of executive and non-executive directors as well as the skills, expertise and experience required at that point in time (taking the Corporate Plan into account).

28.2.1.3. If the ALM division is not in support of the recommended candidates, it would then identify candidates from the NT database taking into account the skills gaps (incorporating, *inter alia*, skills, experience, competencies, and a mix of gender and race). In this regard, there is an annual advertisement issued seeking applications to serve on boards of companies controlled by National Treasury.

- 28.2.1.4. The ALM division will also vet prospective board members, including their qualifications, references, criminal and credit checks.
- 28.2.1.5. An internal memorandum and a Cabinet Memorandum will then be prepared for the Minister's consideration recommending suitable candidates.
- 28.2.1.6. If the Minister is in support of the recommendation, he/she will approve and submit the Cabinet Memorandum to Cabinet for approval.
- 28.2.2. In this respect, it should be noted that it is not often that a whole board is appointed at once. Concern has been raised about the above described process. In particular, the fact that the process is not sufficiently independent and is susceptible to influence by the nominating bodies. In this regard, former CEO, Dr Matjila, alleged that Dr Xolani Mkhwanazi, a current board member, was appointed with ulterior motives by the Ministry of Finance. This is addressed in the findings and recommendations.

28.3. Dismissal of the Board of Directors

- 28.3.1. The Minister is empowered to dismiss members of the Board. A similar concern to that raised in respect of the appointment of the Board arose in relation to the dismissal of Board members.
- 28.3.2. This issue was raised with the PIC and it was stated that the Minister should at least show cause before replacing a well-functioning board. During his testimony, former Chairperson of the PIC, Mr Mondli Gungubele (Mr Gungubele), alluded to this issue and stated that there must be a specialised process in place governing the removal of a full

board. One clause in the MOI governs the removal of directors which should address this issue:

‘7.7.1 The Shareholder shall furnish Cabinet with reasons for the proposed removal of any director in terms of section 71(1) of the (Companies) Act.’

28.4. Appointment of the Chairperson

- 28.4.1. The choice of the Chairperson is provided for in the Act, the MOI or in corporate governance guidelines of the PIC. The Chairperson has traditionally been the Deputy Minister (DM) of Finance. It is noteworthy that the PIC Act Amendment Bill codifies this tradition.
- 28.4.2. Throughout the hearings, the majority of the views were against this practice. Typically, in the corporate sector, the Chairperson is chosen by fellow directors.
- 28.4.3. At the hearings, former directors and senior executives of the PIC were not in favour of appointing the DM, whereas the Congress of South African Trade Unions (COSATU), in particular, was in favour. Abrupt changes of Chairperson, as a consequence of for example, a Cabinet reshuffle, has the tendency to destabilize the PIC.
- 28.4.4. A suggested solution is that the ‘role profile’ and requisite qualities of a Chairperson be formalised. Core competencies should include strong experience and expertise in corporate governance, strategic leadership, asset management, investments and government policies.

28.5. **Appointment of the Chief Executive Officer (CEO)**

28.5.1. The MOI has numerous clauses dealing with the appointment of the CEO. Clause 7.1.4, says '*The Board shall conduct the recruitment and selection process of the chief executive officer, in accordance with the guidelines issued by the Minister....*' (Emphasis added).

28.5.2. The deliberations at the PIC Workshop indicated that the appointment of the CEO is coordinated between the Board and National Treasury.

28.5.3. The following process is followed:

28.5.3.1. The Board decides on appointing a CEO.

28.5.3.2. An advert is placed in the media and candidates are invited to apply.

28.5.3.3. A shortlist is created and final interviews undertaken.

28.5.3.4. The Board sends their proposal for the preferred candidate to the Minister for a decision.

28.6. At the PIC Workshop and during the testimonies, the general position was that the Board should manage the process and present to the Minister a final candidate for ministerial approval. The Minister should show cause if he/she does not accept the recommendation of the Board.

28.7. **Appointment of other senior executives**

28.7.1. Some of the key appointments in the executive committee of the PIC are provided for in the MOI. The key clauses are:

Clause 7.1.10: *'The chief executive officer shall make recommendations to the Board with regard to the appointment of the Executives of the Company.'*

Clause 7.1.11: *'The chief executive officer and the chief financial officer of the Company shall be appointed as ex officio executive directors of the Company.'*

Clause 7.1.12: *'The chief executive officer shall, in consultation with the Board, appoint the other Executives in accordance with applicable labour legislation.'*

28.7.2. The MOI that is in place does not make provision for executive posts that were provided for in the MOI of 2013, such as:

28.7.2.1. Chief Investment Officer (CIO)

28.7.2.2. Chief Operating Officer (COO)

28.7.2.3. Chief Risk Officer (CRO)

28.7.3. The Board approved these changes resulting in a material breach of the MOI, which breach was only rectified in 2017. It was alleged in testimonies heard by the Commission, that Dr Matjila did away with these positions to concentrate power in the position of CEO, something he has denied.

28.8. **The Board Sub-Committees**

28.8.1. As explained in Chapter I of this Report, the Board currently has six sub-committees that execute certain specialist tasks that are core to the business of the PIC. These sub-committees have delegated authority

and operate in terms of well-developed terms of reference and procedures.

28.8.2. The key views expressed during the hearings, as they relate to the Board sub-committees and their functions, are as follows:

28.8.2.1. The most visible sub-committee at the PIC is the Investment Committee (IC), which handles investments within its purview. The IC has both an oversight and an investment role.

28.8.2.2. The PIC has a combined Audit and Risk Committee (ARC).

28.8.2.3. The Director Affairs Committee (DAC) - National Treasury, as a Shareholder, appoints the Board.

28.9. Powers of the Board

28.9.1. As outlined above, the Board of the PIC has been granted extensive powers arising from the PIC Act and the MOI, in addition to those matters reserved for the Board in terms of corporate governance.

28.9.2. In the light of the evidence heard by the Commission, the question arises as to whether the PIC has a governing (i.e. oversight) or a management (i.e. active) Board. During the hearings, the view was expressed that the Board encroaches on the domain of management. For example, it has been noted that former Board member, Ms S Zulu, initiated various documents in a Board meeting that were supposed to be drafted by Management. This results in potentially conflicting decisions being taken by the Board. A further example is that of the IC, where non-executive directors participate directly in decisions on investments. How does the Board then exercise oversight of the appropriateness of such decisions by their own members?

29. Shareholder's Compact and Corporate Plan⁴³⁰

29.1. Shareholder's Compact⁴³¹

29.1.1. The PIC is also governed by means of a Shareholder's Compact (Compact) between the Corporation and the Government as the Shareholder, represented by the Minister of Finance.

29.1.2. The Compact, which is a requirement in terms of Regulation 29.2 of the Treasury Regulations⁴³², is designed to give the Government/ Shareholder oversight of the PIC. It serves as an annual contract and represents a legally binding performance agreement between the Minister and the PIC's Board.

29.1.3. In terms of Treasury Regulation 29.2.2, the Compact must document the mandated key performance measures and indicators to be attained by the public entity, in this case the PIC. The Compact between the PIC and the Government outlines strategic objectives, the roles and responsibilities of the Board, including those of the Shareholder and reporting requirements. A new clause was introduced into the Compact which stipulates that the Minister should approve incentives paid to staff members of the PIC.

⁴³⁰ This whole section is taken from a presentation made by the head of ALM at the National Treasury, Mr Julies, at the PIC Workshop.

⁴³¹ Mr A Julies' presentation at the PIC Governance Workshop.

⁴³² National Treasury Regulations, April 2001.

29.2. Corporate Plan (CP)

29.2.1. The CP is a requirement in terms of Section 52 of the PFMA and Treasury Regulation 29. The CP is a strategic and operating plan that the PIC presents to the National Treasury for approval.

29.2.2. The CP must cover a period of 3 (three) years and must outline the following, amongst others:

29.2.2.1. Strategic objectives and outcomes agreed to in the SC;

29.2.2.2. Risk management plan;

29.2.2.3. Fraud prevention plan; and

29.2.2.4. Financial plan – addressing projections of revenue, expenditure, borrowing and dividend policy etc.

29.2.3. The National Treasury will review the CP to determine the following:

29.2.3.1. Consistency between the PIC's strategies and financial plans;

29.2.3.2. Alignment of the PIC's strategy to its mandate and government's developmental objectives; and

29.2.3.3. Risks in the implementation of the strategy and risk-mitigation strategies for the identified risks.

30. The AGM

30.1. The PIC AGM is conducted in terms of Clause 6.8 of the MOI, read with Section 61(7)(b) of the Companies Act, which requires the PIC to convene

an AGM once every calendar year (and no more than 15 (fifteen) months after the date of the previous AGM).

30.2. In line with Clause 6.8.5 of the MOI, the agenda items, amongst others, are:

30.2.1. A Presentation of the Directors' Report and the Financial Statements;
and

30.2.2. Resolutions to be effected, i.e. Appointment of External Auditors; Appointment of Audit Committee; Approval of the Non-Executive Directors' fees and noting different Reports, which includes the Social and Ethics Committee Report.

30.3. The AGM further provides the Minister with an opportunity to engage with the Board on matters relating to the performance of the PIC as a whole, as well as to provide strategic direction in terms of the expectations of the Minister going forward.

EVIDENCE CONSIDERED BY THE COMMISSION

Evidence in respect of the DOAs and MoA (Memorandum of Agreement)

31. A few examples provided below illustrate the attitude of the PIC to compliance with the DOA and PIC internal processes, as well as the GEPI's MoA.

32. Following the PIC investment in Afrisam (where the total investment by the PIC was R12,6bn in what in essence is a non-performing asset) and the restructuring that took place in 2013, the GEPI responded to the Afrisam crisis by *'imposing a cap of R2bn on the amounts that the PIC could invest in a single asset in the future. Also, that any investments above that figure had to*

*be approved by the GEPF*⁴³³. In essence, the GEPF reduced the MoA discretion limits.

33. There do not appear to be DOAs approved by the Board prior to the current ones – Unlisted Investments (October 2015) and Listed Investments (May 2015).; This was compounded by, as Dr Matjila mentioned during his testimony, that ‘at the time’ there had been a ‘loose [client] mandate’ (sic). This seems to be supported by Mr Sithole’s testimony regarding the few addenda to the GEPF-PIC Investment Management Agreement (IMA) first entered into in 2007. But these do not detract from the proposition regarding the PIC’s attitude towards the GEPF as a client and the AuM. The GEPF client mandate agreement is made up of ad hoc addenda refined over time. The PIC took advantage of the loopholes inherent in a ‘loose mandate’ that had to be tightened piecemeal over time (a better improvement of the mandate might be served by revisions contained in a single agreement as is the case with the UIF), compounded by Dr Matjila’s fast and loose interpretation of the MoA as exemplified in Ayo.
34. On 26 October 2017, the GEPF wrote to the PIC setting out the Board of Trustees resolution that the PIC’s investment limit in unlisted investments required GEPF approval for any single investment above R2bn for unlisted and property investments, and any amounts above that must be submitted to the GEPF Board via its investment committee for approval.
35. Mr Sithole specifically stated that, with regard to the Ayo transaction and notwithstanding the above limitations, the PIC did not involve or inform the GEPF when it considered and made the investment in Ayo (discussed in further detail in the case study in Chapter III). Nor did it highlight the investment in its subsequent reporting to the GEPF but only responded when the GEPF began asking questions, including about valuation. The PIC contended that

⁴³³ Para 80 of Dr Matjila’s statement signed on 15 July 2019.

they considered the Ayo investment fell under the listed investment delegation of authority, a view that Mr Sithole strongly disagreed with and said that while he could not pronounce on the legality of the action, it was certainly a breach of faith and trust.

36. With regard to Sekunjalo and the investment in Independent Media (discussed in further detail in the case study in Chapter III:ToR 1.1), Mr Sithole said the GEPF was consulted and both the Board and the GEPF's Investment Committee expressed their discomfort, but as the PIC was acting within their mandate they did not interfere with the decision. However, they did advise the PIC of their discomfort with the investment. Moreover, Mr Sithole regarded the PIC letter of 16 April 2018 as a material misrepresentation to the GEPF, and said there should be legal consequences. He concluded that this reflected a clear indication that the PIC reporting to the GEPF does not accurately reflect what actually happened.
37. Both Dr Matjila and Ms More confirmed that, notwithstanding the DOA requirement that, in many instances, agreement between them was to be obtained prior to a decision being made, they did not do so but said that meeting in the various committees, such as PMC, met this requirement. When asked about not contacting Ms More as required prior to the Ayo transaction approval, Dr Matjila said: 'Ms More is in a similar situation as I am because we rely on advice from the technical people as they are the ones who do the work and make recommendations, so it was not necessary to ask her ...' However, he acknowledged that the DOA was not changed to reflect practice.
38. Dr Matjila's justification for investing in Ayo is moreover a post facto tailoring of facts and a dishonest one. He vacillated in relation to what authority he had been acting on when he signed the Ayo irrevocable subscription form. And there is no record of any other IPOs subscribed for in the manner he opted to do in Ayo, ie, without prior PMC approval (PMC2).

39. In the Steinhoff/Lancaster investment, the original proposal from Mr J Naidoo was for an investment of R10,4bn, but this was reduced by the PIC to R9,35bn. When asked the reasons for this reduction, Mr Vusi Raseroka, the PIC official dealing with Lancaster/Project Sierra, responded: *'I can only speculate that the reduction was to enable the transaction to fall within the mandate limit of the IC ... which if exceeded would have resulted in the transaction going to the full PIC Board for approval'*. In his testimony Mr J Naidoo, replying to a question as whether he was aware that the investment needed to be below R10bn to proceed without further approvals in the PIC process as determined by the DOA, said: *'I took it that the representative of the counterparty was saying that in order for them to approve the approach, these were the parameters they could live with (or) they might have to take it to another level ... I was aware that this was as far as they could go.'*
40. With regard to the Steinhoff/Lancaster transaction, Dr Matjila confirmed that they had reduced the amount from R10,4bn to R9,4bn *'to be in line with the Investment Committee mandate, so that they were able to approve it ... we could have gone to the Board but it was more convenient for the IC to deal with the matter at that level'* adding that the Board has never rejected an Investment Committee decision.
41. Dr Matjila, when asked how he had dealt with the matters raised by the IC regarding the timing of Ayo and whether (the deal) was in line with the DOA he replied: *'I cannot remember ... but I remember quite a number of them were dealt with by the team'*.
42. Yet there is a conspicuous material non-disclosure in all reporting memoranda given throughout from the Board, GEPF and SCOPA regarding the process followed to approve the deal, about his signing the irrevocable subscription form before PMC approval. Even after 'ratification' Dr Matjila failed to give full and frank disclosures on the process followed to approve the deal.

43. A significant number of witnesses raised their concern about time pressures to meet deadlines that compromised processes, valuations and quality of due diligences being conducted. This is all the more concerning given that the PIC is the funder and the entity approached to consider whether to invest or not. The evidence indicated considerable irregularity, overruling of processes and improper sequencing of decisions including, by way of illustration, signing the irrevocable subscription prior to any process in the Ayo transaction⁴³⁴, in the name of making a quick decision. There can never be a justification for time constraints overruling the merits of investment decision-making being thoroughly interrogated.

Evidence on Ineffective Governance and/or functioning of the PIC Board

44. Testimony was presented by a number of non-executive members of the Board in relation to the functioning of the PIC Board. This testimony is set out in Chapter I of the report and will not be repeated here. The evidence presented. reflects a wide range of difficulties experienced by the Board.

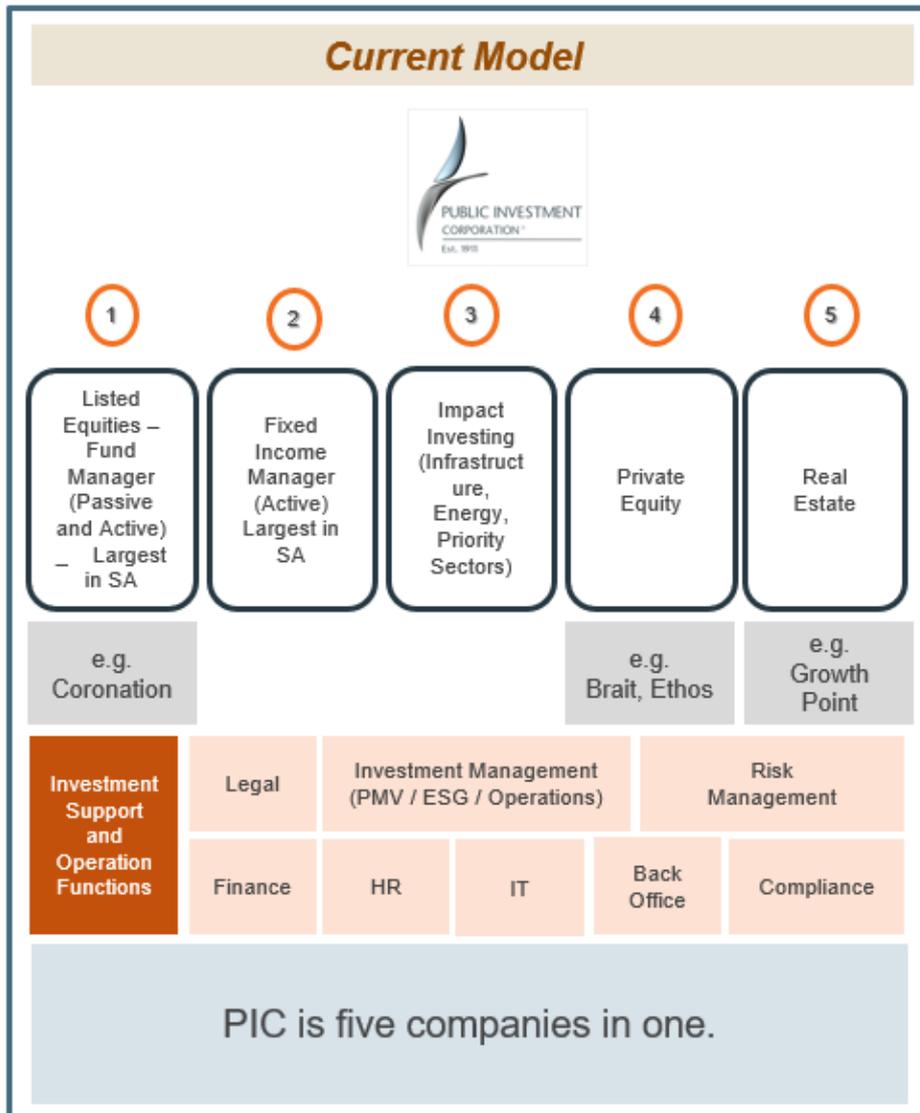
45. Operating Model

45.1. An operating model can mean many things but according to various definitions it essentially represents how an organisation delivers value to its

⁴³⁴ For details see the Sekunjalo Case Study in Chapter III of the report.

customers or beneficiaries as well as how an organisation actually runs itself.

45.2. The current operating model, depicted in the diagram below, which was adopted in 2015 after Dr Matjila became CEO, can best be described as a centralised operating model:



45.3. As depicted in the diagram above:

45.3.1. The PIC is a massive and complex organisation with more than R2 trillion in managed assets.

45.3.2. The scale of the operations of the PIC is akin to managing five large investment management businesses including equities, fixed income and private equity. On a standalone basis these would be some of the largest companies in their field.

45.3.3. The businesses are aided by departments that support investments such Risk, Investment Management and Legal.

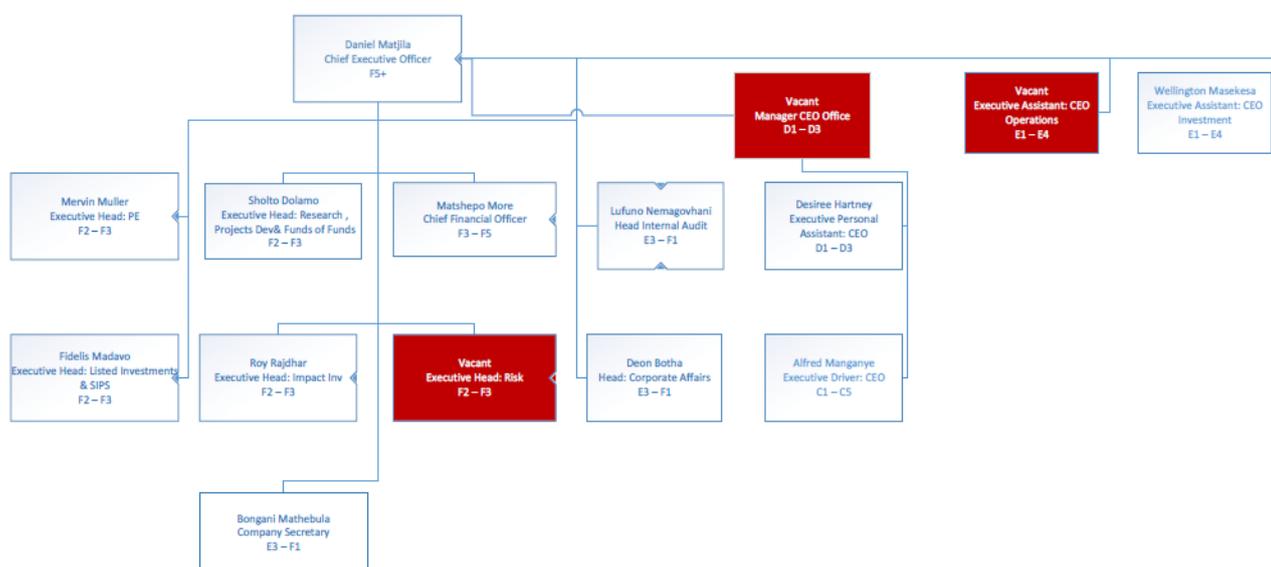
45.3.4. Then departments such as finance, human resources (HR), Information Technology (IT) complete the picture

45.4. Thus, the PIC is an organisation with enormous operations under one roof and highly concentrated at the top.

46. **The current departmental structure of PIC**

46.1. The current departmental structure is captured in the diagram⁴³⁵ below:

⁴³⁵ Source: the PIC



Findings Regarding the Structure:

47. There appears to be a concentration of power at the level of the CEO and CFO who oversee all decisions. Most of the non-investment departments report to the CFO given that the COO department was abolished. Thus, enormous authority, responsibility and power resides with the CFO.
48. In terms of investments, there are Executive Heads, including the powerful head of listed investments, where close to 90% of the approximately R2 trillion is managed. This department was managed by Mr Fidelis Madavo who has since been suspended.
49. Even with investment heads in place the CEO has essentially incorporated the role of the CIO into that of the CEO and he has the final say on investments. Previously a CIO would have fulfilled this role, providing the opportunity for an

element of checks and balances, but the CIO position was done away with in the restructuring of 2015.

50. The PIC also has enormous operations in unlisted investments such as impact investing, private equity and real estate, totaling more than R200 billion.

51. **A centralised operating model**

51.1. As can be seen from above, the decision-making structures of the PIC are highly centralised with all the key decisions ultimately residing with the CEO. In terms of best practice and for a company of the PIC's size, this model is unusual.

51.2. This centralisation would have slowed decision making and the speed at which the organisation could react to events. The PIC itself has recognised the need to evolve as it has grown bigger and expanded its unlisted investments. It has thus been exploring a new operating model.

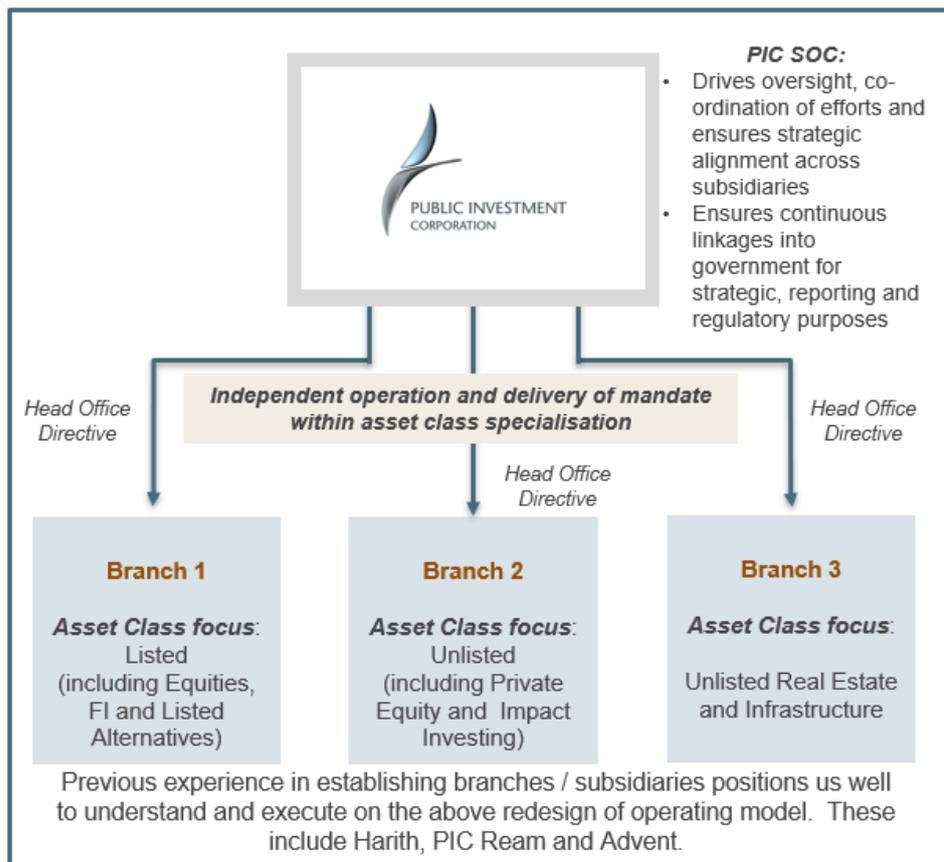
52. **A new operating model**

52.1. The PIC needs to evolve to the next stage of its development as such, the PIC has been exploring various operating models and the one(s) below appear to address some of the key weaknesses of the current operating model. From the diagram below, the following can be discerned:

52.1.1. The PIC will be a holding company (Hold Co) managing the specialist business units/branches/clusters.

52.1.2. At the holding company there will then be key positions including CIO, who set overall investment philosophy and strategy and monitors investment heads at specialist levels.

- 52.1.3. The COO will likewise be at HoldCo and manage all the services that can be shared with specialist business units, so will be the CFO. COO activities will include corporate functions such IT and HR.
- 52.1.4. Risk and investment support will mainly be based at specialist unit level to support these differentiated asset classes, though a Chief Risk Officer (CRO) will be appointed at HoldCo to have overall oversight of risk and compliance across the investment units.
- 52.1.5. The issue of the executive committee will have to be reassessed and see how it fits into the new structure.
- 52.1.6. As noted above it needs to be emphasized that specialist asset classes are separated and this is where investment decisions are made and concluded. The CIO will have overall accountability for this and also hold investment heads accountable.
- 52.2. In other words, the PIC should determine the best configuration within this possible new model as to which areas stay within specialist asset classes and which ones are at shared services level. There must optimal configuration along vertical and horizontal lines.



52.3. The next diagram, inserted below, (sourced from the PIC) deals with governance aspects of the new operating model as opposed to investments and operations. The key issues are:

52.3.1. There will still be a HoldCo board with various sub-committees.

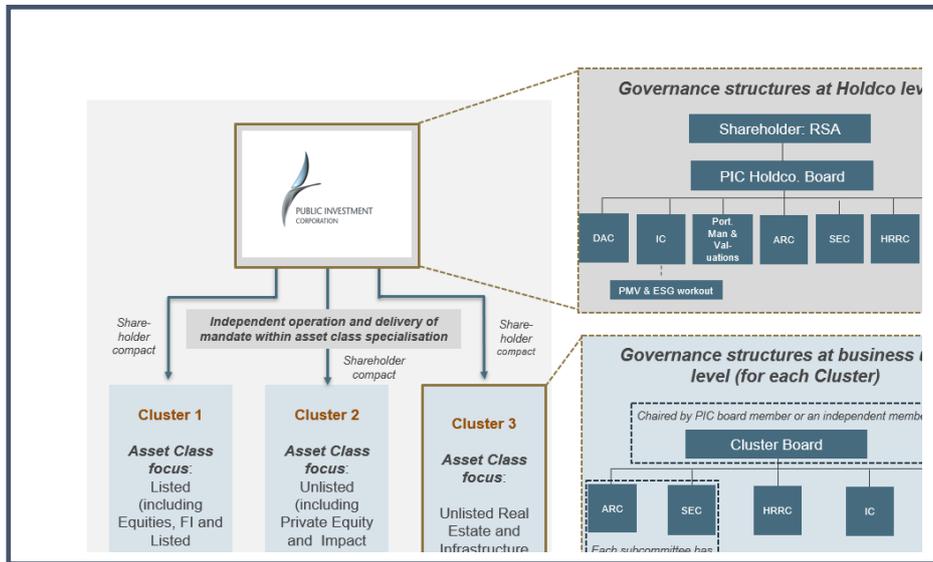
52.3.2. It is to be noted that the Investment Committee will be mandated differently as it will not actively take investment decisions but have oversight on overall investment policy, strategy and investment performance.

52.3.3. As to governance structures at business unit levels, the structures need not be statutory in the sense of being subsidiaries. The “internal boards” can be chaired by a PIC board member and even non-PIC and

independent board members can be appointed, especially in areas where investments are dealt with.

52.4. As to which governance structures to choose here the PIC will have to determine which ones will be optimal, including costs and regulatory issues involved.

52.5. The structures should also enable the PIC to make decisions more quickly but still within robust risk management processes. Days of the PIC taking more than six months to make investment decisions should be consigned to history.



Source: PIC

53. In summary: The new operating model could be a mixture of separating the investment units to take autonomous decisions, having optimal configuration of corporate functions to support these and having an optimal governance structure at Hold Co and business unit/cluster levels.

54. On decentralisation, it must be noted that that the new possible operating model substantially decentralises the operations of the PIC but there could be disadvantages that will have to be considered and managed.
55. **Decentralised Model: Advantages and Disadvantages**⁴³⁶

| Advantages | Disadvantages |
|---|--|
| <ul style="list-style-type: none"> ▪ Strategic direction vests at HO ▪ Instills entrepreneurial mindset across business units ▪ Accountability by business units ▪ Competition for capital requires all business units to contribute to profitability ▪ Performance and incentives aligned with asset class characteristics of each business unit ▪ Allows for specialization and dedicated expertise and knowledge | <ul style="list-style-type: none"> ▪ Additional governance layers and possible duplication of administrative functions ▪ Decentralized decision-making can result in silo thinking at expense of a collaborative strategy ▪ Risk to license if compliance not adhered to and managed with required oversight within business unit |

⁴³⁶ PIC Presentation on Future Operating Model, PIC Commission of Inquiry Workshop.

- | | |
|--|--|
| ▪ Clarified relationship between Management, Board and Shareholder | |
|--|--|

56. Finally, to illustrate how this operating model works at large asset managers a case study of Sanlam Investments is provided. This was dealt with at the PIC Commission Workshop.

57. **Case Study: A Decentralised Operating Model – Sanlam Investments**

57.1. Sanlam is a 101-year-old business operating in 44 countries across the globe. Sanlam group runs a decentralised operating model, comprising five businesses, including the investment cluster. Each business has a clear mandate to profitably deliver value to its clients.

57.2. The strategy of the investment business is built around growing clients' wealth and therefore contributing to the economic development and transformation of the country.

57.3. There is clear delineation of asset management activities to allow for the smooth running of the business. The CEO of Sanlam Investments (SI) is responsible for the overall investment business.

57.4. The sub-committees of the Board consist of the Credit Committee, Risk Committees and relevant Asset Management Investment Committees. It is the prerogative of the business and the Board to determine the investment philosophy which spans across Passive management, Active management, Multi-Manager and Alternative Investment Solutions. However, all four investment teams operate independently. There is no involvement from the business (Board and/or Management) in the formulation of investment process or in investment decision-making.

57.5. The role of the business is to hire the right investment team, hold them accountable, and to replace as needed where such teams do not exemplify the firm's values or significantly underperform. The investment business does not have one 'super' CIO and the Chairs of the different Investment Committees effectively play that role. The risk and compliance function is completely removed from the investment process.

57.6. From an operational point of view, the four investment areas are supported by a shared services infrastructure consisting of Client Services, Trading, Reporting, Compliance, Legal, Performance, Risk, Finance, IT and Human Resources. There is a central COO who oversees the digital strategy, systems, and the different investment platforms. The shared services model is cost effective and essential to competing effectively in the market.

58. Investment decision framework that follows

58.1. The investment decision framework is contained in the diagrams that set out the process followed for listed and unlisted investments, covered elsewhere in the Report, especially related to transactions, so it will be examined briefly here.

58.2. From the above discussion and arguments it follows that the PICs investment decision framework will need to be reassessed. The process is currently as follows:

58.2.1. The investment decisions flow from the Board and then the investment committee (IC) depending on the size of the investments.

58.2.2. Then the Fund Investment Panels (FIPs) augment the work of the IC in specialist roles.

- 58.2.3. And then the various portfolio management committees 1 and 2 (PMC 1&2) run by management engage in detailed processes of investment from deal origination, due dilligence, deal appraisal, investment and post investment processes.
- 58.2.4. There was an issue about PIC board members serving on the boards of investee companies and how the process of appointments was carried out and also the managing the conflicts of interests.
- 58.2.5. There was also a problem about taking major decisions, including major investments decisions, through round robin resolutions, thus resulting in no good management engagement on such decisions.
- 58.2.6. Investments were viewed on a stand-alone basis and the cumulative investments offered to, say, one party were not limited, even in the face of the party underperforming such as in Sekunjalo group companies.
- 58.2.7. In terms of investments there was thinking that a closer relationship needed to be built between the PIC and GEPF and indeed other clients of the PIC.
- 58.2.8. The PIC should take an active interest in companies where it holds more than 50% shareholding (subsidiaries) and large shareholding (associates) and ensure the companies are well managed.

59. Given the proposed changes the following outcome is possible:

- 59.1. The FIPs will be subsumed into the specialist business units.
- 59.2. The PMCs could be kept as the process is, in principle, robust.

59.3. The restructuring and decentralization could result in the PIC executing transactions at faster speeds.

60. **Operational issues that arose at the Commission**

60.1. Various employees of the PIC gave views on the operational shortcomings, namely:

60.1.1. Risk – Ms Candace Abrahams: identified the key issue as the lack of a strong risk department with the necessary resources to carry out duties optimally and changes at the top of the department when EH Mr Paul Magula was dismissed.

60.1.2. Legal – Ms Pamela Phala/Macheka and Ms Lindiwe Dlamini: identified the main issue as the instability of the department and quality control in the department in terms of agreements. It's EH Mr Nesane resigned after his statement in the VBS investigation.

60.1.3. PMV, ESG and Operations – including Ms Solomons and others: There were issues about paper-based systems in PMV and limited traction in getting ESG adopted broadly in the country.

60.1.4. HR – Vacancies: Mr Pholwane dealt with this. There are wide-spread vacancies at the PIC and a large number of senior positions are occupied on an Acting basis, including the CEO and CFO.

60.1.5. Attraction of top talent and proper incentives – Mr Pholwane dealt with this, the issue of incentives and salary adjustments have become a bone of contention and this might deprive the PIC of top talent going forward.

- 60.1.6. IT issues and the safety of the PIC systems – Ms Menye and Mr Mayisela, the IT systems have come under scrutiny due to the leakage of confidential information. The PIC is consequently taken measures to strengthen the systems.
- 60.1.7. The issue of paper-based processes, particularly in the unlisted division, was raised as a critical issue that needed to be attended to.

61. Other Operational Issues

- 61.1. Cooling off period: for both Board members and staff, upon leaving the PIC, should be subject to a 'cooling off period', of a reasonable length of time, whereby they cannot access funding from the PIC and/or do business with the PIC.
- 61.2. The transactions undertaken and fees paid by the PIC should be transparent and made public.

62. Global best practices in operating models

The Commission has interacted with global asset managers on operating models and other issues and their models are similar to the ones observed with leading local asset managers including Sanlam Investments discussed above. Thus the same principles shall apply and there is no need to undertake an exposition. Some of key global best practices are covered in the Appendix 1, containing the Governance Workshop Report.

FINDINGS IN RELATION TO GOVERNANCE

63. Confusion as to the role, functioning and responsibilities of the Board prevails. Non-executive board members have responsibilities and functions that blur the distinction between the role of a board and that of management.

64. Non-executive Board members fulfil decision-making functions by serving on, and chairing, committees that make investment decisions.
65. Non-executive board members serve on the boards of investee companies, as do executive members, impacting on fiduciary duties, conflicts of interest and where accountability lies.
66. In a number of instances non-executives (and executives) who have been key figures in making an investment then serve on that investee company board (for instance Mr R Morar was Deputy Chairperson of the PIC Board, Chaired the Investment Committee that considered (and he signed) the resolution approving the Lancaster/Steinhoff investment, became the PIC representative on the Lancaster Board and then served on the Board of its Foundation when it was established).
67. The dependency of the earnings of some non-executive board members from serving not only on the PIC Board and the required sub-committees, but also on various other boards and executive committees of the PIC, calls into question their status as 'independent'.
68. There is ineffective oversight of decision making and processes by the Board as they are an integral part of the decisions taken. It is not possible or appropriate to be part of overseeing decisions and processes that you have been part of.
69. The Board's inadequate risk oversight and assessment, as well as approval of inappropriate investee board representatives, is cause for concern. An example of this is VBS bank, where the Executive Head: Risk, Mr Magula and the Executive Head: Legal, Mr Nesane, both of whom assessed and recommended the investment, then being appointed to serve on the VBS Bank Board with the disastrous consequences that resulted in the collapse of bank and the loss of the PIC's investment. Furthermore, their self-confessed

'turning a blind eye to what was happening' in return for being paid millions of rand is a material indictment of and reputational risk for the PIC.

70. The frequent changes to the Finance Minister, who represents the shareholder with regard to the PIC, and role of the Chairperson of the PIC, being the Deputy Minister of Finance, appears to have significantly contributed to ineffective governance and the deficient functioning of the Board. Moreover, their appointment to such positions in the PIC was by virtue of the office they held, whether or not they had the appropriate skills, experience or expertise with regard to chairing and appreciating the functioning and business of such a critical organisation.
71. The Shareholder Compact, signed on 7 July 2017, should be reviewed. At present, it is an annual agreement signed between the PIC and the Minister of Finance representing the shareholder. The introduction of a clause that requires the Minister of Finance to sign off on the awarding of incentives to all staff has contributed to the uncertainty around the bonus pool, the timing of bonus payments and the quantum thereof. Furthermore, this should be an agreement that is required to be reviewed every three years, not annually. This would also align the Compact with the three-year horizon of the Corporate Plan. The role, expectations and responsibilities of both parties need to be clearly defined in such a compact.
72. The reliance on Round Robin Resolutions to take major decisions. When asked whether this was common practice, Dr Matjila replied: 'we've done many RRRs ... the information that is there is enough to make a decision ... where people have issues they could send an email' and confirmed that in some instances he would sign a RRR before other required signatories, but denied that this could be seen as a signal of approval for the transaction. This approach completely disregards the benefits derived from engagement about

decisions to be taken, processes followed or the rigour required to interrogate thoroughly investment proposals.

73. The violation of the MOI was deliberately condoned by the Board, notwithstanding the impact it had on the composition of the Board and the significant enhancement of the power and influence of the two non-executive directors.
74. Minutes, meetings and record keeping of formal meetings are kept, and are addressed in ToR 1.5. However, records of meetings and interactions by the management at various levels are deliberately not kept. The evidence before the Commission showed repeatedly how who was being met, by whom and for what purpose was not recorded. This made reference to who was met when and where, what was discussed and whether any promises or undertakings were made, impossible to validate.

FINDINGS IN RELATION TO OPERATING MODEL

75. Given the discussion above, various findings can be made on all the sections on the operating model.
 - 75.1. The PIC is a large and complex that needs to evolve and in a way to be “broken up” or restructured and also enhance accountability.
 - 75.2. The PIC is like running five large businesses in one and these need to be delineated properly and managed for efficiency and effectiveness.
 - 75.3. The decision making processes are highly centralised and go all the way to the top and this clogs the system and needs to change.
 - 75.4. The new operating model should consider decentralised decision making, changing the structure and having focused management. It should consider

the creation of three large specialist investment business units. This will hopefully result in better investment performance.

- 75.5. Governance structures at HoldCo and specialist levels will have to be adjusted to accommodate the new operating model.
- 75.6. Decentralisation does have some drawback in terms of duplication and extra costs, but this can deftly be managed.
- 75.7. The investment decision frameworks will have to change somewhat but the PMCs should probably stay.
- 75.8. It is important to note that the new model is likely to be more costly, thus the PIC will have to fund this through better investment performance, resulting in increased revenues over time to recoup the costs.
- 75.9. The following areas were seen as weaknesses at the PIC: Risk, legal and IT; Paper-based and spread-sheet based systems in PMV, Investment Operations and Unlisted Investments. In Human Resources, the level of vacancies, issues with bonuses and acting positions is cause for concern.
- 75.10. It has also been noted that the PIC outsources a lot of key capabilities and this might need to be brought in-house. This includes non-complex issues in the Legal department and also derivatives structuring in the SIPS department.

RECOMMENDATIONS

RECOMMENDATIONS ON THE OPERATING MODEL

- 76. As can be realised above from the findings on the operating model the following key recommendations are made:

- 76.1. The old operating model served the PIC well in the past, but it appears to have run its course as the PIC manages R2 trillion in assets.
- 76.2. The PIC has been exploring a new model which seems to accord with good local and international models. The PIC will need to implement a model in keeping with its future strategies and culture.
- 76.3. The new model could involve major restructuring and the creation of units that in time could be managed on an autonomous basis with different sub-cultures, within a broader HoldCo and some shared services.
- 76.4. In terms of investments and the discussion above the following recommendations are made:
 - 76.4.1. The PIC needs to overhaul the way it deals with directors that serve on investee companies and ensure proper oversight and management of conflicts of interest. The process of appointment, skills needed and the fees paid need to be examined to safeguard the interests of the PIC.
 - 76.4.2. Round-robin resolutions should be the exception and undertaken only in rare circumstances, especially for major decisions.
 - 76.4.3. There should be a limit, on a cumulative basis, to how much funds a sponsor can access from the PIC, especially when the sponsor's companies are underperforming.
 - 76.4.4. There should be more meaningful engagement between the PIC and its clients such as the GEPF.
 - 76.4.5. The PIC should ensure that it effectively manages any subsidiaries and associate companies, should they be created.

- 76.4.6. Transactions undertaken and fees paid to advisors should be transparent and made public.
- 76.5. The PIC should move to address the following key weaknesses:
- 76.5.1. Deal with key areas of Risk, Legal and IT, among other functions, and make them top of the class.
- 76.5.2. An office of the Legal Counsel, as distinct from the functioning of the legal department, and that advises the Board and Exco, should be considered.
- 76.5.3. It is urgent and important to address the paper-based processes in Unlisted Investments, PMV and Investment Operations.
- 76.5.4. Seek more collaboration with stakeholders and achieve more in ESG.
- 76.5.5. Resolve major HR problems such as acting positions, vacancies and issues with performance management, bonuses and salary adjustments.
- 76.5.6. PIC should in-source key and basic skills, particularly in legal and derivatives structuring, and outsource only complex matters where specialist skills are desired.
- 76.5.7. A cooling off period should be determined, possibly for a 12 month period, for former directors and staff that prohibits conducting business with the PIC or an entity established by it.

RECOMMENDATIONS ON GOVERNANCE

77. Board Composition and Functioning:

77.1. The legislative and regulatory framework governing the PIC should be amended to implement and/ or achieve the following:

77.1.1. Define nature and responsibilities of the Board as one of oversight and not executive, in keeping with best practice as outlined in ToR 1.15 above.

77.1.2. Ensure the appropriate Board committees are established with clear terms of reference and accountability.

77.1.3. Separate the Audit and Risk Committees, establishing a specific Board Risk committee with clearly defined terms of reference and accountability to ensure better oversight and understanding of both critical functions

77.1.4. Formalise requirements for:

77.1.4.1. Technical skills

77.1.4.2. Personal experience, knowledge and expertise

77.1.4.3. Conflicts of interest

77.1.5. Term of office: maximum of 3 terms of three years each, for a maximum total of 9 years

77.1.6. Develop and put in place appropriate policies for Board and management, regularly monitored and updated, as they relate to:

- 77.1.6.1. Compliance, including whistleblowing policy and raising concerns procedures
- 77.1.6.2. Anti-corruption, including policies on political engagement policy; payments or assistance to public officials policy and procedure and gifts and entertainment guidelines
- 77.1.6.3. Intermediaries, to include a review of the PEP policy and third party due diligence requirements
- 77.1.6.4. Political or other pressure, in order to ensure ethical and accountable interaction with all parties, with detailed records of all interactions being kept.
- 77.1.6.5. Conflicts of interest
- 77.1.6.6. Assessing and monitoring culture to ensure it is aligned with the company's purpose, values and strategy
- 77.1.6.7. Effective engagement with, and participation from, employees
- 77.1.6.8. The development of an overarching governance policy framework
- 77.1.6.9. Board fees and that such fees form part of the governance policy

77.2. Role of Chairperson:

- 77.2.1. Formalise 'role profile', expertise and personal qualities required
 - 77.2.1.1. Independent and non-executive

- 77.2.1.2. Core: Experience and expertise in Pension Funds, finance, markets as well as governance
- 77.2.1.3. Term of Office to be the same as that of other non-executive board members
- 77.2.2. The Deputy Minister of Finance should not be the PIC Chairperson. This has caused considerable instability. Skills needed to chair the Board may well be different from those that the Deputy Minister of Finance brings. The role of the Chairperson should be defined and the skills and personal qualities needed, codified in the MOI.
- 77.2.3. Induction of Board appointees, including clarity of fiduciary duties and determination of role if sitting on boards of investee companies. There should be an SLA with investee companies as to the role of Board members, independence vis-à-vis who is paying Board members, clarity of policies and expectations
- 77.2.4. The Board should have the skills that are applicable to PIC's corporate governance, strategic and operational requirements. Adding to the list above, the following have been identified as skills and expertise needed by the Board and its committees:
- 77.2.4.1. Corporate governance
- 77.2.4.2. Corporate strategy and strategic leadership
- 77.2.4.3. Investment management, also called asset management – these include areas such as listed investments, private equity, infrastructure funding, property, actuarial and valuation skills
- 77.2.4.4. Risk management – investments and corporate

- 77.2.4.5. Human Resources
- 77.2.4.6. Accounting, financial and audit and forensic skills
- 77.2.4.7. Legal and regulatory skills and perhaps taxation
- 77.2.4.8. Information technology and its governance and digital transformation
- 77.2.4.9. Environmental and Public safety
- 77.2.4.10. Economic and Social Transformation
- 77.2.4.11. Economics and economic policy
- 77.2.4.12. International and Africa skills

77.3. Board selection process:

- 77.3.1. The process of appointing the Board should reside with the PIC, the Directors Affairs Committee (DAC), and Board members should then be approved by the Minister, together with Cabinet. The Board is well placed to offer the Minister potential Board members with the required skills.
- 77.3.2. The PIC, not the National Treasury, should source new directors through recruitment agencies and placing adverts in media platforms.
- 77.3.3. The PIC should follow a robust process in selecting Board members in terms of skills needed and tightly matching these to the individuals recruited. Thereafter, this process and its outcomes, without impinging on confidentiality of individuals, should be made public by the Minister

and/or the PIC. This is the same process followed for the appointment of the South Africa Revenue Services Commissioner.

- 77.3.4. Thus, the selection of the Board should not follow a full public process in parliament such as that followed by the South African Broadcasting Corporation (SABC). This is not preferred as it tends to discourage capable directors who do not want this public exposure or be subject to political party agendas. .
- 77.3.5. The appointment of ‘political appointees’ should be avoided as this might cause political interference at the PIC.
- 77.3.6. In the event that a full Board, as opposed to rotating members, has to be appointed, the Minister shall be required to utilise the CEO of the PIC to take the role of the DAC and the CEO and Minister shall follow the process outlined above.
- 77.3.7. Once the Board has been selected, the Board and not the Minister, should choose its own Chairperson.
- 77.3.8. The PIC is a long-term investor and it is proposed that the term for rotation be increased to three years with a maximum of three terms each.
- 77.3.9. The choice of the CEO should also follow the current process of the Board leading the process and offering the selected name to the Minister to approve. If the Minister rejects the Board’s selection, the Minister should show good cause for that rejection. The responsibility of selection must still remain with the Board. The CEO should never feel indebted to the government of the day or the Minister.

- 77.3.10. The removal of directors of the PIC should not be at the whim of the Minister. Directors should not be apprehensive of or feel indebted to the Minister. The MOI says the Minister should offer reasons of removal to the Cabinet. This is not sufficient for the security of tenure of directors and these reasons should be immediately made public by the Minister. In the event that the entire Board is removed, the question of institutional memory arises and needs to be taken account of..
- 77.3.11. In terms of the Board subcommittees, the finding is that, given the complexity of the PIC, the Risk and Audit Committees should be separated and each stand alone.
- 77.3.12. The Information Communication and Technology Governance Committee (ICTGC) should be given greater weight in deliberations, ensure manual systems are replaced and keep modernising the technology environment of the PIC. It should also deal with digital transformation.
- 77.3.13. Given the changes proposed in the operating model, the Investment Committee will be the most affected of the sub-committees as it will have to concentrate on an oversight role as opposed to participating in investment decisions. Investment operations would likely be moved to specialist business units.
- 77.4. As indicated above, the powers of the Board to control the operations of the PIC will have to be revisited should the PIC moves from a management to a governance Board. The PIC legislation would require the appropriate amendments, and an extensive framework of governance will have to be in place to enable this.
78. The PIC Board should concentrate on playing a strong oversight role and extricate itself from operations, including making investment decisions at the

Investment Committee. The Board should thus strengthen rules on oversight and should be a governance not a management board.

TERM OF REFERENCE 1.16

‘Whether, considering its findings, it is necessary to make changes to the PIC Act, the PIC Memorandum of Incorporation and the investment decision-making framework of the PIC, as well as the delegation of authority for the framework (if any) and, if so, to advise.’

1. Considering the findings in ToR 1.15 above, the following recommendations are made:

Shareholders compact:

2. The Minister has an arsenal of mechanisms to control and guide the activities of the PIC in the form of:
 - 2.1. The Shareholder Compact (SC)
 - 2.2. The Corporate Plan (CP)
 - 2.3. The Annual General Meetings (AGM)
3. As a sole shareholder the Minister can influence the PIC by engaging the Board on topics desired by the Minister and the AGM is the correct setting for such dialogue and resolution of any issue. It appears that the annual engagement on the SC is onerous to the PIC and thus it is proposed that it be undertaken through a medium-term process of a rolling three-year period in the same way it is done with the national budget. This would also align the time horizon with the Corporate Plan.

4. Review the Shareholders Compact to ensure certainty, clarity of roles and responsibilities and accountability, as well as the time frame within which it operates.
5. The Shareholder Compact should be engaged with on a 3-year medium-term basis, rather than on an annual basis, to create greater certainty, enable envisaged changes to be forward looking, and to lessen the burden on the PIC.

Memorandum of Incorporation (Moi)

6. It has been stated in Chapter I of this report that the MOI of 2017 shall be taken as the one that is in force and applicable, thus everything shall follow from that understanding.
7. The Moi should be evaluated afresh, must be in keeping with GEPF requirements and the CIO and COO roles should be reinstated
8. Consideration should be given to executive roles at the same level for both Risk and IT
9. As will be made clearer in the operating model section, the PIC should bring back the positions of CIO, COO and CRO and this needs to be codified in the MOI as before. In addition, the CEO, the CFO and CIO should be ex officio board members as their roles are critical, but the CFO and CIO will still report to the CEO. The COO's work could be reported on by the CEO to the Board.

Mandate

10. Clarity on the primary mandate – ensuring adequate funds through investment and contributions to meet both short and long term liabilities in a sustainable manner – is well defined. This requires that the GEPF thoroughly review its

financial position and the financial progress of the Fund to evaluate the appropriateness of the investment strategy currently in place, taking account of the nature and extent of liabilities.

11. There needs to be agreement between the shareholder, the GEPF and the PIC on what the benchmark return should be to maintain the Fund at a level agreed between the three parties. This should also help determine the investment strategy.
12. The secondary mandate – which includes promoting economic development – should be determined between the shareholder and the GEPF such that the PIC’s implementation thereof, including through a clearly defined developmental investment strategy, also meets the requirements of the primary mandate.
13. Effective monitoring and evaluation of investments should include a clear definition of what success is at the outset.

Delegation of Authority

14. Revise the DoA to ensure appropriate oversight and escalation
15. Review the reserved powers of the Board in its totality
16. Consider unintended consequences for the Delegations of Authority:
 - 16.1. Did it facilitate Board abdication of responsibility where deference to DoA took precedence over misgivings?
17. The Board, given changes to governance and the operating model, will have to revise the Reserved Matters and align them to the new reality.

18. The DOAs will also change extensively in so far as they cover various actions and approvals by parties within the PIC

The Recommendations on the Amendment of Legislation

19. There needs to be an urgent redrafting of legislation relating to the PIC. The current PIC Act – The Public Investment Corporation Act, No 23 of 2004 – should remain in force until new legislation is promulgated.
20. The drafting of such legislation must take account of the PIC Amendment Bill that has been passed by Parliament, as well as the findings and recommendations contained in the report of this Commission.
21. Such a process must ensure wide stakeholder engagement and consultation, and should be a priority to be completed as soon as possible.
22. The Board of the PIC should not have, as a legal requirement, to include representatives of labour and depositors such as the GEPF. Every Board member owes a fiduciary duty to the PIC and does not represent their own interests on the Board. Thus, proposals in the PIC Amendment Bill on this issue may need reconsideration.
23. To the extent that the Minister might include the above, the representatives of Labour and/or depositors should be appointed as individuals and contribute their experience and expertise in keeping with the needs of the PIC Board.
24. Consideration could be given to a director being appointed from the National Treasury, as this could assist the Board's understanding of the Government's priorities relevant to the PIC. Should such an appointment be made, it should not serve as a substitute for formal meetings between the PIC and the shareholder. There would also need to be clarity as to where fiduciary duties lie.

25. In terms of Directives issued by the Minister, they could be tabled in Parliament for debate, and the Minister take matters raised into consideration. Needless to say, the decisions should be rational. For example, the directive to retrospectively reduce pay incentives (bonuses) at the PIC, though well-intentioned, was detrimental to staff morale at the PIC.
26. In redrafting legislation, the terms of the PIC Amendment Bill should require the National Assembly to play a stronger role, particularly with regard to reporting requirements and public accountability. To ensure greater transparency the PIC should provide more information to the relevant parliamentary committee and, where appropriate, the National Assembly, including with regard to strategy, mandate implementation, and performance on both listed and onunlisted investments. The PIC should ensure that the actuarial valuation report is presented to the appropriate committee within three months of its conclusion.
27. The proposal to have PIC clients, such as the GEPF, on its Board will create conflicts of interest as the GEPF must hold the PIC accountable regarding the implementation of its mandate and investments the PIC makes.
28. The PIC Amendment Bill expands and makes explicit the investments the PIC must make such as in manufacturing and local investments. Though well-intentioned this is not appropriate and, if need be, broad parameters could be included in the GEPF Law or its mandate to the PIC. For instance, the lack of more foreign investments by the PIC will harm the portfolio in the long term and overly expose it to South African country risk – this point has been corroborated by the GEPF actuary. It needs to be emphasised that as a pension fund the role of the GEPF, through the PIC, is to generate sustainable returns to meet the liabilities of the pension fund.

29. The redrafted PIC Act should consider what must be mandatory for the Minister to table in Parliament, for instance draft regulations, and must take into account comments arising from members of Parliament.
30. In terms of the FAIS Act, the PIC is required to meet its obligations in terms of this Act and the mandates it gets from clients. This is fleshed out in ToR 1.17.

General Recommendations

31. Create the office of Legal Counsel, responsible to the Executive and the Board, and separate from the legal department, to ensure that the board and executive operate within the law and best practice at all times
32. Records of meetings, including participants in such meetings, decisions taken and relevant, material matters should be standard practice and maintained for both formal and informal meetings
33. Ensure segregation of roles between Board and management to avoid interference in operational matters (e.g. Ms Zulu's role and allegations of favouritism)
34. Ensure independence of non-executive directors and consider what the percentage of their income is earned from Board fees, and whether their independence could be compromised by a need to remain in CEO/CFO 'good books' to ensure continued board and committee appointment.
35. Shareholder proposals regarding bonus pools or other HR matters, if not contained in the Shareholder Compact, should only be prospective, not applied retrospectively, so as to ensure that contractual agreements with staff are not disregarded.

36. The PIC needs to be made future-proof to ensure that it can deliver on its mandate without undue interference, pressure or attempts at manipulation.
37. It is global best practice that with large asset managers, the CEO does not get involved in investments decisions. The CEO is thus in a position to hold investment professionals accountable for investment performance.

TERM OF REFERENCE 1.17

'Whether the PIC has given effect to its clients' mandates as required by the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002) and any applicable legislation.'

Consideration of the Term of Reference

1. In considering this Term of Reference (ToR), the following obligations contained in the legislative and regulatory framework, set out in chapter III, above, should be borne in mind. In addition, reference is made to the general application of the FAIS Act, to the PIC section, in Chapter V, Remedies and Recommendations, below.
2. As an authorised category I and II FSP, the PIC is subject to, *inter alia*, the general Code of Conduct for authorised FSPs and representatives as well as the Code of Conduct for Discretionary FSPs.
3. Paragraph 5 of the Code of Conduct for Administrative and Discretionary FSPs, published in 2003, requires the PIC to have signed a mandate with each client which must contain certain specified provisions with regard to the rendering of discretionary intermediary services.
4. In terms of compliance by the PIC with relevant provisions of the FAIS Act and the Codes of Conduct, as set out in chapter II above, the following appears to be in place:
 - 4.1. The PIC has a signed mandate with each client that contains certain specified provisions. The PIC's specimen mandate was approved by the Registrar at the licencing stage and affords the PIC full discretion

regarding the investment decision and choice of financial products in relation to clients' investments. The records of the Financial Sector Conduct Authority (FSCA) indicate that the PIC has entered into full discretionary mandates with 22 clients. The key clients (depositors) of the PIC are the GEPF, the Department of Labour Funds, the Workman's Compensation Funds, the Unemployment Insurance Fund (UIF), the Skills Fund, the Department of Justice Guardian Fund and other public sector funds.

- 4.2. The PIC has appointed two approved compliance officers, Mr D M Makonko and Mr N B Nsibande, to comply with the requirement to establish an independent compliance function. The PIC compliance officers must comply with the fit and proper requirements.
- 4.3. In terms of Section 19 of the FAIS Act, the PIC is required to maintain full and proper accounting records, audited by an external auditor approved by the FSCA and prepare annual financial statements.
- 4.4. The PIC has a list of key individuals responsible for managing or overseeing the activities of the PIC. This should be urgently reviewed and updated as a number of the individuals so identified are no longer in the employ of the PIC.
- 4.5. Key individuals identified are required to possess the personal character qualities of honesty and integrity, as well as competence and operational ability, as defined in the fit and proper requirements, in order to fulfil their responsibilities in keeping with the FAIS Act.

The PIC giving effect to its client's mandates

5. In considering whether the PIC has given effect to its clients' mandates, the focus will only be on the GEPF given that it comprises 87% of the assets under

management by the PIC and it is the client that has appeared before the Commission.

6. In 2007 the GEPF approved an investment policy, stating that:

'The strategic asset allocation percentages set out below, the solvency reserve and contribution rate, established through modelling the financial position of the fund under different scenarios over a 10-year period, balance the maintenance of a long-term funding level of 100% and minimise fluctuations in the employer contribution rate. Within these strategic limits, a diversified Portfolio shall be established'.

The Strategic Asset Allocation Percentages contained in the 2007 GEPF approved investment policy are as follows:

| | Proposed lower limit | Proposed strategic | Proposed upper limit |
|--|----------------------|--------------------|----------------------|
| Equities | 40% | 51% | 55% |
| Domestic listed | | | |
| Private equity aimed at infrastructure, social desirable investment and B-BBEE financing (Isibaya Fund, Pan African Infrastructure Development Fund, etc.) | 3% | 6% ⁴³⁷ | 9% |
| Bonds | 25% | 31% | 45% |
| Property | 0% | 5% | 7% |
| Cash/money market instruments | 0% | 5% | 10% |

⁴³⁷ In terms of the Financial Sector Charter, 5% should be invested in local targeted investment,

| | | | |
|--------------------------------|----|--------|----|
| Structured investment products | 0% | 2% | 3% |
| Total | | 100.0% | |

7. The investment policy continues to state:

‘Secondary investment objectives shall include the financing of emerging sectors of the South African economy and of promoting economic well-being in Africa generally.

A third objective shall be the development of the capacity and intellectual capital of the investment management industry in South Africa by subcontracting portions of the Portfolio for management by licensed investment managers owned and operated by Black People or B-BBEE Companies.

In seeking to achieve the aforementioned objectives, the investment policy shall be directed in a manner that does not cause undue market impact either on registered exchanges or at a macro-economic level.’

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8. The GEPF Board of Trustees (BoT) approved an expanded developmental investment strategy in 2010⁴³⁹. This recognised that the GEPF had a tremendous opportunity to make investments with positive economic and social benefits that had not been leveraged to the extent possible. As fiduciaries of the GEPF, the BoT set out the parameters for this initiative, including that:

⁴³⁸ A copy of the investment policy is attached as annexure ‘A1’ to Mr Abel Sithole’s statement.

⁴³⁹ A copy of the investment strategy is attached as annexure ‘A2’ to Mr Abel Sithole’s statement.

- 8.1. The interests of members and pensioners must always come first;
- 8.2. The existing frameworks remained valid;
- 8.3. Returns are important and all investments, whether developmental or related to the economic crisis, or strategic, should at least maintain solvency of the GEPF. The strategy states that, 'all investments must, together, achieve a required real return ...';⁴⁴⁰
- 8.4. The GEPF is not a bail-out fund and it is not the role of the GEPF to take on the burden of ailing industries;
- 8.5. The BoT is willing to consider investments that seek to boost economic development of the country as well as those which help to deal with social backlogs; and
- 8.6. The BoT is happy, in principle, to hold strategic assets, but the investments cannot be strategic only for the State but must also be strategic for the GEPF.
- 8.7. The BoT also adopted a four-pillar approach to developmental investing, namely:
 - 8.7.1. Pillar 1: economic infrastructure;
 - 8.7.2. Pillar 2: social infrastructure;
 - 8.7.3. Pillar 3: environmental investment; and

⁴⁴⁰ Para 2.4.3 of GEPF Memo, Developmental Investment Strategy, dated 24 February 2010.

- 8.7.4. Pillar 4: Enterprise development, black economic empowerment and job creation.

The Legal Relationship between the GEPF and the PIC

9. In a memorandum prepared by law firms Cliffe Dekker Hofmeyr and Adonisi Malapane Moletsane & Moloji Inc (AMMM) for consideration by the GEPF⁴⁴¹ (the Memorandum), the following points are made:

- 9.1. The GEPF entered into an Investment Management Agreement (IMA) in June 2007 with the PIC, in terms of which the PIC was appointed as an investment manager of the GEPF and is required to act within the investment policy of the GEPF. The IMA regulates the relationship between the two. The IMA and the contents thereof are subject to legislation and neither the GEPF nor the PIC are entitled to agree to any terms which are contrary or inconsistent with applicable legislation.
- 9.2. The IMA stipulates that the PIC acts as an agent for the GEPF and, in fulfilling its mandate, the actions of the PIC are explicitly limited to the parameters of the GEPF investment policy, which is outlined in paragraphs 8 and 8.7 above.
- 9.3. Clause 3.2 of the IMA states that the PIC, as investment manager, must 'manage the investment portfolio as a fiduciary in the utmost good faith, and with the due care, diligence and skill which is to be expected of any expert investment manager, and generally to act in accordance with the terms of the IMA at all times'.
- 9.4. The IMA also sets out the common law duties of an agent that the PIC has to the GEPF, including to do as instructed, exercise care and

⁴⁴¹ A copy of the memorandum is attached as annexure 'B4' to Mr Abel Sithole's statement.

diligence and must impart information. This duty requires the PIC to keep the BoT of the GEPF informed of all material matters concerning the investment portfolio. The PIC is required to disclose information to the BoT and not conceal any material information⁴⁴² relating to the investment portfolio. A failure to disclose material information will constitute a breach of the common law duty of an agent to give information.

- 9.5. An agent is required to act in good faith, which required the PIC to manage the investment portfolio of the GEPF in line with the interests of the GEPF, including the duty not to make secret profits but also to avoid conflicts of interest. Finally, as an agent the PIC has the duty to account to the GEPF.
- 9.6. The PIC, in performing its duties as an investment manager, is liable to the BoT for breach or damages that arise from the non-compliance with the mandate. The BoT owes their duties directly to the members of the GEPF, such duties being set out in rule 4.1.19 of Schedule I to the Government Employees Pension Law, 1996 (GEP Law)⁴⁴³, including the duties 'to ensure that the interests of the members [of the GEPF]... are protected', that each trustee 'avoid conflicts of interest' and the duty 'to act at all times with due care and diligence and in good faith'.
- 9.7. Setting out consequences of a breach of mandate, the Memorandum states that where the PIC has acted beyond its mandate, the GEPF is

⁴⁴² It should be noted that the standard of materiality, especially from an auditing point of view, comprises of issues that are material by amount and material by nature. Often the latter is not intrinsically considered by people when assessing 'materiality'. For example, the information about activities within the DoA but not within reasonable fiduciary duty is equally material to amounts over R2 billion or R10 billion. Thus, information about material activities known by the PIC but not disclosed to the GEPF would fall foul of this element.

⁴⁴³ Proclamation no. 21 of 1996.

entitled to ratify such action or where this is not done the PIC would be liable for the loss or damages incurred as a result of such action.

- 9.8. Section 6(7) of the GEP Law, enables the BoT to amend the Investment Policy in consultation with the Minister of Finance. Any changes must be approved by the Minister of Finance, and neither party is able to unilaterally change the investment policy.

EVIDENCE

Exchange of Emails and Correspondence

10. The GEPF sent the then CEO, Mr Elias Masilela (Mr Masilela), copying the then CIO Dr Matjila, an amendment to the IMA as it related to unlisted investments, signed by the Acting Principal Officer, Mr Oliphant on 3 November 2011. It states that the GEPF had reviewed its investment strategy to introduce new asset classes and markets in an effort to further diversify the portfolio and pursue opportunities in new markets. The GEPF would also make a greater allocation towards unlisted investments. Given this, the BoT of the GEPF felt a need to enhance the investment processes, particularly around unlisted investments.
11. The letter stated that:

“Going forward the fund would prefer to make an allocation to specific unlisted investment strategies under the PIC on specific motivation for the strategy and on a commitment basis. This approach will lead to a multiple closed fund approach as opposed to the current open mandate...this approach will require more governance structures”.⁴⁴⁴

⁴⁴⁴ At page 2, Letter to Mr E Masilela, 3 November 2011.

12. It states further that:

“... greater reliance will be placed on the PIC as the strategic partner to bring forward proposals on different strategies and funds, of which the GEPF would consider and commit on a commercial basis ... The GEPF Board has agreed to pursue and propose to the PIC the above approach in an effort to deal with the current weaknesses, and has further agreed to pay market related fees so that the appropriate governance structures can be put in place and that there be greater alignment of interest between the fund manager and the GEPF ... the GEPF Investment Committee under this model would play the role of an advisory board for all the Funds with a mandate to review conflicts, performance and valuations.”⁴⁴⁵

13. The letter concludes:

*“All unlisted investments greater than R200 million should be submitted to the GEPF for approval, as the GEPF board would like to manage its investment risks towards large investments better. This limit applies to all unlisted investments including property”.*⁴⁴⁶

14. A series of emails that express the GEPF’s concerns regarding certain PIC investments and requesting further information and explanation appear to indicate a lack of confidence and deficit in consultation and flow of information between the PIC and the relevant GEPF committee. Some of the correspondence to this effect is cited in the paragraphs that follow.

⁴⁴⁵ Ibid. pages 3 - 4.

⁴⁴⁶ Ibid. page 5.

15. The Principal Executive Officer, Mr Abel Sithole (Mr Sithole), in a letter to Dr Matjila dated 26 October 2017, reads:

'The Board of Trustees (the Board) of the Government Employees Pension Fund (GEPF) resolved the following on 20 October 2017 with regards to the PIC's investment limits in Unlisted Investments:

- 1. The PIC is required to seek approval from the GEPF for any single investment above the R2 billion for unlisted and property investments. Investments above the R2bn limit must be submitted to the GEPF Board via the GEPF's Investment Committee for approval.*
- 2. The following principal terms regarding investment limits of the Private Placement Memorandums (PPMs) which were approved in 2016 are still applicable:*
 - a. A maximum 30% of aggregate Capital Commitments (for each sub-fund) in any single investment;*
 - b. Single Obligor: maximum 30% of aggregate Capital Commitments (for each sub-fund) in any single counterparty, sponsor or obligor.*

Notwithstanding these terms, any single investment above the R2 billion is subject to the approval by the GEPF.

*This resolution revokes any previous investment limits set by the GEPF Board of Trustees for the PIC with regards to investments in the GEPF's unlisted and property investment portfolios.'*⁴⁴⁷

16. An email from Mr Deon Botha, dated 19 March 2018, sent to Mr Madavo and others, copied to Dr Matjila, reads:

*"I had a call from GEPF just now, they want a detailed report on the Ayo transaction please. The report should also indicate how this transaction relates to the previous transactions with Sekunjalo especially the INMSA transaction."*⁴⁴⁸

17. On 19 March 2018, Ms Linda Mateza (Ms Mateza), Head of Investments and Actuarial Services at the GEPF, sent an email to Dr Matjila, copying Mr Sithole and Dr Renosi Mokate (GEPF Chairperson), with the subject line 'Ayo Technology Solutions, Sekunjalo, AEEI', that reads:

'I'm sure you have seen the media reports relating to the PIC's R4.3 billion [investment] into Ayo Technology Solutions and the relationships between various entities including Sekunjalo and AEEI. Please provide an explanatory memo to the GEPF, outlining the details relating to these transactions.

There are also questions of governance, if the media reports are to be believed, as it appears that the proper due diligence and approvals processes were not followed.

In the same publication, there was an article about Project Sierra and Project Blue Buck. We are concerned, in particular, about the

⁴⁴⁷ A copy of the letter is attached as annexure 'A3' to Mr Abel Sithole's statement.

⁴⁴⁸ A copy of the email is attached as annexure 'A4' to Mr Abel Sithole's statement.

suggestion that the PIC ignored a recommendation from its own Risk department and went ahead with the transaction.

*We would like clarification on both matters.*⁴⁴⁹

18. An email dated 16 April 2018, from Ms Mateza to Dr Matjila, reads:

'In addition to our previous enquiry (below), we have read a number of articles in the press regarding Sagarmatha Technologies and the funding thereof.

*We'd like the PIC to clarify and provide comprehensive information to the GEPF regarding all GEPF investments in companies linked to Sekunjalo Investment Holdings. This request is urgent.'*⁴⁵⁰

19. On 23 January 2019, Dr Mokate, Chairperson of the BoT, wrote to Mr Gungubele as follows:

'The Government Employees Pension Fund (GEPF) is extremely perturbed by the recent announcement by the PIC that it has suspended its Executive Head of Listed Investments, Mr Fidelis Madavo and the Assistant Portfolio Manager, Mr Victor Seanie, following a preliminary investigation report that reflects the flouting of governance and approval processes with respect to the Ayo Technology Solutions transaction.

The PIC Executive team had assured the GEPF on numerous occasions and in correspondence that correct governance processes

⁴⁴⁹ A copy of the email is attached as annexure 'A5' to Mr Abel Sithole's statement.

⁴⁵⁰ A copy of the email is attached as Annexure 'A6' to Mr Abel Sithole's statement.

were followed with respect to the Ayo Technology Solutions transaction. The GEPF views this as a serious breach of trust.

The breach of the trust relationship between the GEPF and PIC will be discussed at a GEPF Board meeting shortly. The GEPF will communicate the outcome of the aforementioned discussion and possible actions required to rebuild the trust relationship with the PIC.⁴⁵¹

20. Subsequent developments with regard to the Ayo transaction were communicated to the GEPF in June 2019, indicating that the PIC had issued a summons, dated 29 May 2019, against Ayo in the Cape Town High Court with the PIC claiming to recover the invested funds in the amount of R4,3 billion. The PIC's claim is premised on two principles: misrepresentation on the part of Ayo when the transaction was concluded and legality, on the basis that the PIC's internal processes were not properly followed and/or complied with, which should nullify and invalidate the transaction.

Testimony of Mr Sithole, Principal Executive Officer of the GEPF

21. In his testimony before the Commission on 15 July 2019, Mr Sithole said that the GEP Law states that the primary role is to protect the benefits of its members and pensioners by safeguarding their retirement benefits through proper administration and prudent investment. Moreover, benefits are guaranteed by the State. The Law prescribes that the BoT must consult the Minister of Finance on any changes to the investment policy, which he must approve.
22. The GEPF is managed by a BoT of 16 (sixteen) members, each with an alternate, 8 (eight) appointed by the Government and 8 (eight) represent

⁴⁵¹ A copy of this letter is attached as Annexure 'A10' to Mr Abel Sithole's statement.

pensioners and members. The investment strategy uses a liability-driven approach that takes into consideration expected future benefit payment, the actuarial position and other long-term objectives as well as the risk to the overall solvency of the GEPF. It understands that success cannot be isolated from the development of South Africa as any constraints on economic growth will have an impact on the GEPF.

23. The GEPF has a developmental investment policy statement that refers to investments that deliver both financial and social returns, allocating 5% of the total portfolio of R1,8 trillion for developmental investments, such that socially responsible development is possible but not at the expense of returns, believing that both can be achieved.
24. The most recent asset and liability management assessment was done in 2016, generating an optimal strategic asset allocation that is still awaiting the Minister of Finance's recommendations. Mr Sithole advised that the IMA is under review, led by an independent consulting firm with completion expected in about two years.
25. Mr Sithole specifically dealt with the Ayo Technology investment, stating that:
 - 25.1. The PIC did not involve or inform the GEPF when it considered and made the investment;
 - 25.2. It did not highlight this investment in its subsequent reporting to the GEPF;
 - 25.3. The PIC only began responding when the GEPF raised questions, including about the valuation of the investment; and

25.4. The PIC stated that they considered that the Ayo investment fell under the Listed Investment mandate and therefore did not require to be reported on.⁴⁵²

26. Mr Sithole stated in his testimony that:

*“I do not agree with this ... It is my respectful submission that if on the effective date and during the interim period before listing the funding arrangements are legally classified as unlisted or accounted for as such, it is not clear why the funding arrangement will be considered to be listed. In my opinion it should have fallen under unlisted investments and therefore [at R4,3bn] be above the R2 billion limit of unlisted investments beyond which the PIC needs to involve the GEPF.”*⁴⁵³

27. Mr Sithole said he could not pronounce on the legality of the action taken by the PIC, but it was certainly a breach of faith and trust and ‘the PIC’s position that the investment did not need the GEPF’s approval is incorrect’.⁴⁵⁴ Referring to the letter quoted in paragraph 19 above from Dr Mokate to the PIC of 23 January 2019, he said the GEPF gave instructions to senior counsel to understand what its rights were with regard to the events surrounding this investment. On 3 June 2019, the PIC sent a further memorandum to the GEPF stating that it has proceeded to issue summons against Ayo. However, Mr Sithole raised the concern that the PIC apparently issued the summons on behalf of both the PIC and GEPF, stating that ‘to the best of my knowledge no one at the GEPF with the requisite authority authorised the joining of the GEPF as a plaintiff’.⁴⁵⁵

⁴⁵² At page 75 of the Transcript for day 54 of the hearings held on 15 July 2019.

⁴⁵³ Ibid. pages 77 – 78.

⁴⁵⁴ Ibid. pages 79 – 80.

⁴⁵⁵ Ibid page 86.

28. Mr Sithole confirmed that there had been difficulties holding various essential meetings, including with the Minister of Finance and the PIC Board, particularly given the number of times the Minister of Finance had changed over recent years.⁴⁵⁶ This has resulted in difficulties in getting the required approvals finalised. He stated that the GEPF, if necessary, can take action as there is no obligation to only work through the PIC. Furthermore, more could be done with regard to monitoring and giving effect to scheduled meeting arrangements.
29. A number of additional points made by Mr Sithole include:
- 29.1. The GEPF had not been party to nor had sight of the fees paid by the PIC to various parties such as advisors, and is reviewing the fee structure issue as it relates to Unlisted Investments.
- 29.2. The GEPF should be able to match the limits applicable to private pension funds, citing the example of the investment limits of 30% offshore and the 10% unlisted/private equity provision.
30. Addressing the Sekunjalo investments, including that made in INMSA, he confirmed that the GEPF was consulted and both the Board and the investment committee expressed their discomfort and advised the PIC accordingly. However, as the PIC was acting within their mandate the GEPF did not interfere with the decision.
31. Regarding the Ayo investment, Mr Sithole referred to the PIC letter of 16th April 2018, referred to in paragraph 18 above, as a material misrepresentation to the GEPF and that there should be legal consequences. He stated that this

⁴⁵⁶ At page 26 of the Transcript for day 54 of the hearings held on 15 July 2019.

also reflects a clear indication that the PIC reporting to the GEPF does not accurately reflect what actually took place.

32. Mr Sithole stated that he was unaware that the PIC was not operating in keeping with its MOI. In this regard, the following exchange took place:

'ADV JANNIE LUBBE SC: Mr Commissioner, I have a couple of brief questions and I will make an agreement with Mr Sithole that we can deal with it in five minutes. I will be brief in my questions and I have agreed with him that he will be very brief in his response. Mr Sithole, my first question is, were you aware that the PIC may have been acting for many years not within the Memorandum of [Incorporation] of the company?'

*MR ABEL SITHOLE: No, counsellor. We were not.'*⁴⁵⁷

33. On 2 December 2019 Mr Sithole, on behalf of the GEPF, provided a supplementary statement to the Commission. In it he re-emphasised that both the GEPF and PIC are separate legal entities, with the PIC 'an independent corporation with its own governance and a shareholder.' He drew attention to the view that 'there is very limited scope for a client to inform/dictate the governance structures and processes with the corporation and the relationship between the corporation and its shareholder[s].' He underlined that the GEPF has worked hard to ensure alignment for the best interests of its members. He concluded with the view that if the situation were to change whereby the GEPF would be called on to foster change in the PIC, then "the GEPF would have to be a shareholder to engender [such] change".

⁴⁵⁷ At page 120 of the Transcript for day 54 of the hearings held on 15 July 2019.

Findings

34. The FAIS Act, Section 8(10)(a) states that where a provider is a corporate ... that provider must at all times be satisfied that every director, member, trustee or partner ... complies with the requirements in respect of personal character qualities of honesty and integrity as set out in the fit and proper requirements. From the evidence of Mr Sithole the conclusion can be drawn that Dr Matjila did not meet the fit and proper qualities of honesty and integrity with regard to providing accurate information to the GEPF, with particular reference to the Ayo Technology transaction.
35. There is a section of this report that specifically addresses findings on Dr Matjila, particularly related to perceptions of his honesty and integrity. Drawing out one example is germane here. Dr Matjila ran a parallel investment process for Ayo, which was probably kept secret from his colleagues (based on for example, testimony of Ms More). Dr Matjila personally provided an irrevocable undertaking to purchase 29% of Ayo for R4.3 billion in this parallel process. There is scope to question his integrity when he stood by as two colleagues in his reporting line (Executive Head of Listed Investments, Mr Fidelis Madavo and the Assistant Portfolio Manager, Mr Victor Seanie) were found to have flouted governance and approval processes with respect to the Ayo Technology Solutions transaction (see para 51), while he knew of the 4 December 2017 letter.
36. It is unclear whether the register of representatives has been regularly updated and if those currently listed (at the time of looking at the website) are all still in the employ of the PIC.
37. The imperative as set out in the IMA to make 'prudent' investments appears to have been largely disregarded. Too many examples seen so far reflect this lack of prudence, including but not limited to investments in:

38. Erin: investing hundreds of millions of US dollars into oil exploration on the African continent where, according to testimony, in general there is only a 20% success rate.⁴⁵⁸ Additionally, agreeing to a further guarantee against the advice of the PIC internal expert and notwithstanding the fact that the investee company was technically insolvent and did not own the oil leases/licences in the first place. The PIC lost all investments made, around US\$330 million.
39. Ecobank: the GEPF owns 13% of the shares with a current market value of R1,78 billion. Since this is a dollar investment the basis of consideration should be dollar returns so as to remove the impact of rand fluctuations. The latter is important since investment risk taken here is international equity risk not currency risk, which could be hedged out and exists independent of the equity investment risk. The returns on investment in US dollars were negative over all periods since investment in 2012 to March 31, 2019, with a negative yield overall of -6,48%.
40. In terms of achieving the GEPF investment policy objectives, explained in paragraph 6 above, Ayo and the potential Sagarmatha investments breach this requirement since they could be seen to have caused 'undue market impact'. The Ayo transaction is an instructive example: where incredible revenue growth forecasts were the background for a share that had a tangible net asset value of 11.1 cents and a listing price of 4300 (R43). Reasonable review, in all circumstances would question that as an almost insurmountable obstacle for investment at that price.
41. Notwithstanding paragraph 8 above, the PIC was often used as a bailout fund for connected insiders and also a bailout fund for bad investments made by the PIC, for example, the investments in SacOil, Erin and possibly others. It is

⁴⁵⁸ At page 85 of the Transcript for day 37 of the hearings held on 20 May 2019.

important to note that the Commission has not done an exhaustive review of all transactions.

42. The investment in Steinhoff through a single individual of an amount that at February 2019 stood at R11.6 billion, and not able to be serviced, in order to obtain a board seat and influence (indirectly) governance, according to Dr Matjila, is a further example of a disastrous investment that ultimately was only going to vastly enrich one individual. The details of this transaction are expanded on in Chapter III: ToR 1.1.
43. That fact is that in the period December 2017 to December 2018, 41%⁴⁵⁹ of the total Unlisted Investments (worth approximately R123 billion), are on watch, under-performing or in distress and not servicing their loans. Those in distress and not servicing their loans make up 29% of the 41%, cited above. This does not reflect the GEPF mandate which requires that *'Returns are important...all investments, whether developmental or related to the economic crisis, or strategic, should at least maintain solvency of the Fund ... "all investments must, together, achieve a required real return"'*⁴⁶⁰
44. Included in the distressed entities are INMSA, Sakhumnoto, S&S both loan and equity and SSIH (Ascendis).
45. The cavalier attitude of Dr Matjila to the above investment performance demonstrates an insufficient commitment to the prudence requirement. An example of this is noted when during his testimony, he stated:

⁴⁵⁹ PMV Deal Performance Classification, attached as an annexure to Ms Rubeena Solomon's statement.

⁴⁶⁰ Para 2.4.3 of GEPF Memo, Developmental Investment Strategy, dated 24 February 2010.

'The Commission is here dealing with almost 2% of the portfolio (in unlisted investments) ... You can add them all... you are not going to exceed probably R30bn at best ... the total figure could be R40bn'.⁴⁶¹

46. At this point, when evaluating materiality and prudence, it is important to note that the use of percentages obfuscates the numerical size of the funds in question. R40 billion exceeds a full year's state contribution by National Treasury to the pension fund which has averaged R37.7 billion a year and comes in around 64% of total contributions. All of this makes the ability to absorb write offs and losses precarious which, by definition, is the opposite of prudence. Any 2% capital loss, when the fund is potentially not fully solvent (in terms of the actuarial valuation reflecting the funding level of long-term liabilities), is a significant loss to what should be capital reserves or a buffer.
47. The repeat investments that have been made with particular individuals or companies – single name risk - indicates a tolerance of cumulative risk that raises the question as to whether the PIC has deliberately structured the internal risk management function and process to be ineffective. At present, each deal is considered in isolation, irrespective of how many other deals have been applied for by the same individual or entity, approved/not approved or how they are performing, so that there is little assessment or consideration given to the total risk profile or exposure on a cumulative basis. This 'deliberate structuring' approach also enabled the favouring and repeated enriching of or providing opportunities for the same people via different investments and also often ignored the imperative for 'broad based' investments, contained in the GEPF mandate.
48. The review of the IMA by an independent consulting firm, expected to be completed in two years according to Mr Sithole, reflects a lack of urgency on the part of the GEPF to ensure the PIC/GEPF agreement takes account of the

⁴⁶¹ At pages 78 and 80 of the Transcript for day 58 of the hearings held on 23 July 2019.

changing economic and asset management environment or the challenges of governance that the GEPF/PIC are facing. Such a review should produce an interim report by no later than end June 2020, following which the next steps should be determined.

49. The principal terms regarding investment limits of the Private Placement Memorandums (PPMs) which were approved in 2016, that a maximum 30% of aggregate Capital Commitments (for each sub-fund) in any single investment, bears deep consideration for future detailed review. A statistically anecdotal review (i.e. the transactions that have been reviewed by the Commission) shows multiple breaches of this resolution of a maximum capital commitment as defined as the sum of debt and equity. Examples include Sacoil with an 86% stake and Daybreak being wholly owned. Further work should be undertaken to ascertain whether there was intentional subversion of this requirement. For example, the Erin equity investment stood at 30% but then a guarantee was used to enable Erin to obtain loan financing from a corporate bank. One way to read this, in substance (while not legal form) since Erin was technically insolvent, was that the PIC made a direct capital injection taking its capital contribution, independent of legal form, above the 30% mark. What was the extent, if any, of deliberately using loan funding, guarantees and derivatives to optically circumvent this requirement?
50. Should the stakeholders in this complex relationship between GEPF and PIC wish to consider a change in approach, whereby the GEPF is called on to take direct responsibility and accountability for activities within the PIC, then a new conversation should be started to evaluate if the GEPF should have a material shareholding in the PIC would be of benefit.

Recommendations

It is recommended that:

51. The PIC Board and the GEPF BoT need to jointly determine their purpose, role, relationships, nature and frequency of meetings to rebuild trust and confidence, and then ensure that appropriate interaction at the required level actually takes place. As an example, this could be achieved via a neutral party facilitation process whereby each side's requirements and expectations are gathered and consolidated. Then a collaborative session should be held to formalise roles and responsibilities ("the what") as well as defining new ways of work ("the how"). The facilitator would combine the outcome for final approval on both sides that would then become a foundational operating model between asset managers and clients. It is recommended that this be initiated as soon as possible. This must be given highest priority and be concluded within three months of the appointment of the new PIC CEO.

52. The IMA between the GEPF and the PIC of 2007, as well as the Addendums of 2013 and 2016, should be reviewed in their entirety with a focus on returns expected, management and governance. Particular attention should be paid to the effectiveness or otherwise of the GEPF Investment Committee's functioning as the Advisory Board of the various sub-funds and its primary function of reviewing the PIC's compliance to investment objectives and mandate as well as to monitor and review performance. This should inform the mandate given to the independent consulting firm currently undertaking a review, and the timeline for completion should be significantly shortened without compromising quality.

53. The GEPF should ensure it has the required skills, resources and expertise to check and challenge the PIC. The ability of the GEPF to deeply understand the various portfolios will ensure that they have the capacity to fully challenge and review investments, including losses incurred.

54. Consideration should be given to removing 'annual total value of approved transactions' as a balanced-scorecard key performance indicator (KPI) as it prioritises deal flow over risk/returns.
55. The PIC should establish a compliance coordinator and develop a compliance charter by no later than June 2020. There needs to be demonstrable consequences for individuals and teams, and steps taken if there is a lack or breach of compliance. The specifying of the role requirements and creation of this area within the PIC second line of defence should be completed within 6 months of the publication of this report.
56. There is the need to better understand the interplay between investment returns, net contributions or withdrawals and, crucially, consideration of the cost to the country of on-going and historic funding for the clients out of debt, not savings.
57. Adequate benchmark and returns hurdles set by the GEPF (and other clients) for the PIC must take into account the actuarial net present liability. Benchmarks should be set at a level to ensure actuarial solvency and aim to prevent any need for an increase in government/employer annual contributions. This approach is important so as to remove any non-balance sheet liabilities in the national accounts which are, in reality, a tax on future generations.
58. The setting of investment hurdles must robustly take into account risk appetite, loss capital buffers and the ability to absorb major capital losses, net contributions and actuarial liabilities.
59. The BoT resolution of October 2017 with regards to the PIC's investment limits in Unlisted Investments, which requires the PIC to seek approval from the GEPF's Investment Committee for any single investment above the R2 billion for unlisted and property investments should be reviewed to take account of

cumulative investments that are made. Such investments may in total exceed the R2 billion cut off, but individually fall within the limit set.

60. The role of advisors and the approach to financial engagement thereof must be reviewed and strict commercial boundaries must be codified. This is an essential and immediate requirement. The new approach must be transparent; competitive; have mechanisms for public check and challenge; limit fees paid to value received and most importantly must recognise that the PIC, as the largest role-player in the private sector capital markets, should take advantage, in the right way, of its sectoral importance to drive value creation from its advisors for its clients.
61. In addition to the above recommendations, consideration should also be given to:
62. Developing formalised sub-strategies for example an Offshore Strategy and a Broad -Based Black Economic Empowerment (B-BBEE) Strategy.
63. A review of the overall scope of all investment strategies and limits that could unlock value by setting boundaries and narrowing focus. The current wide-ranging objectives allow for different investment cases to underpin investments, which reduces comparability and the connection to strategy.
64. There should be a strict discipline to put in place formal house views that are tracked with a matrix of measures for objectives.
65. The use of a separate entity/dedicated fund involved with B-BBEE and a transformation mandate.
66. The Shareholder Compact should contain a service level agreement that sets timelines within which the Minister of Finance is required to deal with matters

as they affect the PIC, for instance the asset and liability management assessment finalisation.

67. Formal arrangements should be in place to regularise meetings between the three key role players, namely the Minister of Finance as Shareholder Representative, the GEPF and the PIC.
68. Transparency within the PIC which would eliminate room for impropriety by removing the GEPF's and the PIC's ability to be less than forthcoming with investment decisions and losses.
69. On the other side of the ledger, it would make plain any market outperformance and that should enable solid fund management returns to be rewarded at a level comparable to the private sector.
70. In the form of, for example, a daily publishing of the market value of the listed portfolio at that day's close of business. This should be broken down per each investment. Unlisted investments should be valued regularly and the valuation updated online approximately every six months, three months in arrears. The timelines need to ensure that publishing such information does not create investor panic in the investee which is imperative in an unlisted investment.
71. The full suite of internal daily risk reporting could be published.
72. Full disclosure on the ultimate beneficial owners of investments in which the PIC participates. The ultimate beneficial owner would in every instance need to be a natural person or listed entity. This would make any potential financial crime significantly more difficult and would ensure transparent exposure of which individuals are benefiting from PIC support.
73. Improving discipline in respect of always creating clarity about the true participants in any investment or activity. Specifically, clarity of the role/s of

the clients, for example the GEPF and the PIC legal entity. Much of the time, the specific legal entities are not clear in both documentation and discussion, leading to potential confusion as to what PIC means. For example, does it mean the PIC as asset manager or the PIC as agent for GEPF or the PIC itself (i.e. when PIC takes a position alongside the client in the hypothetical situation of the PIC owning 20% and taking the remaining 80% as asset manager for the GEPF, while the PIC also runs “x” day-to-day as a representative for all shareholders).

CHAPTER IV RESPONSIBILITY AND ACCOUNTABILITY

DR DAN MATJILA, CEO

1. Dr Matjila submitted a 225 (two hundred and twenty-five) page testimony to the Commission. He testified for numerous days and the transcript runs to hundreds of pages, covering questions and responses.
2. It should be noted that the evidence discussed below is not intended to be comprehensive, but rather to highlight certain conduct of Dr Matjila in relation to the Ayo transaction and other matters related thereto. This Report should be read holistically and thus reference must be made to the other transactions and findings discussed throughout this Report.

Dr Matjila's credibility as a witness

3. The transactions relating to Ayo and Sagarmatha (see case studies) have been relied on, amongst other things, in reaching the findings which will be set out further below.
4. Dr Matjila stated the following in relation to the AYO transaction:

'In my position as the CEO I was not involved with the analysis of the investment potential of opportunities presented to the PIC. I therefore requested Executive Head: Listed Investments, Mr Madavo to look into the opportunity ... He led the Ayo investment process from the PIC side ... My understanding was that the draft PLS was shared with the PIC even before it was finalised to allow the PIC to begin its internal investment processes. The postponement of the PMC meetings scheduled for 6 and 13 December 2017 added to the

pressure of meeting the deadline for the subscription which was by 17h00 on 15 December 2017.’⁴⁶²

5. In the Ayo transaction the dates and sequence of events are important.
6. In his testimony before the Commission, Dr Matjila stated that by 14 and 15 December 2017 all due diligence processes and reports had been prepared and submitted as per the appraisal report and annexures. He said:

‘On 14th December 2017 Mr Molebatsi approached me with the Ayo subscription form in hand, and asked me what we should do as the deadline was the next day. It was then impossible to organise another meeting of the PMC at such short notice ... I had to make a judgement call on whether the PIC should conclude the Ayo transaction or not ... I suggested to Mr Molebatsi that he sign and I co-sign the subscription form but subject to the understanding that I would request the PMC to regularise the transaction at the first available opportunity. Molebatsi and I then signed the subscription form. In signing, I acted as the CEO of the PIC and a key individual, while Mr Molebatsi was Acting Executive Head of Listed Investments, also with full authority to sign’.⁴⁶³

7. Dr Matjila stated that the subscription form was already signed by Mr Molebatsi for 20% (twenty percent) of the shares, and that he decided that this should be changed to 29% (twenty-nine percent), taking up the full share offer. The subscription form they signed on 14 December 2017 reflected the price of R43.00 (forty-three Rand) per share for 29% (twenty-nine percent) of Ayo.

⁴⁶² Paras 416-417 of Dr Matjila’s statement signed on 17 July 2019.

⁴⁶³ Ibid. paras 440 - 441.

The impact of this is to immediately discredit Dr Matjila's assertion that Mr Madavo '*led the Ayo investment process from the PIC side*'.

8. Dr Matjila stated that the final Pre-Listing Statement (PLS) did not contain any differences from the draft PLS and therefore the information upon which the share purchase was made did not differ from the information contained in the final PLS. (Note the draft PLS would not have had the Limited Assurance work signed off by the auditors.)
9. When asked by his advocate, Adv Alexander Roelofse (Adv Roelofse), whether he was involved in the financial information provided regarding the investment to be made in Ayo, Dr Matjila said he was not, and confirmed that the price of R43.00 per share was what was recommended to the Portfolio Management Committee (PMC), and was the information placed before him at the PMC meeting of 20 December 2017.
10. When asked by Adv Roelofse if he was saying that all these numbers were derived from the final PLS and not the draft PLS, and if he had all the financial information required to make the decision before signing the irrevocable subscription form on 14 December 2017, Dr Matjila confirmed that they were derived from the draft PLS, and that only the Environmental, Social and Governance (ESG), Legal and Risk reports were being finalised. He further stated that there '*are no material issues, as in an IPO the biggest component of the work is around valuation which the team had concluded and were happy with*'.⁴⁶⁴ He further confirmed that the due diligence was performed on the draft PLS.
11. Contradicting Dr Matjila's testimony, Non-Consumer Industrials: Assistance Portfolio Manager, Mr Victor Seanie (Mr Seanie) stated that '*there was no valuation done on Ayo prior to 2018, let alone a sensitivity analysis, which was*

⁴⁶⁴ At page 95 of the Transcript for day 59 of the hearings held on 24 July 2019.

engineered around beginning May 2018 when the Investment Committee requested information about the Ayo investment.

12. The final PLS was received by the PIC at 14:42 on 14 December 2017, after the irrevocable subscription form was signed earlier the same day. The final PLS was received 10 days after the IRREVOCABLE LETTER OF UNDERTAKING had been provided to the Board of Directors of AEEI. Throughout his testimony, Dr Matjila referred to the signing of the irrevocable subscription form on 14 December 2017, and stated that he had made his decision based on the final PLS. There are no indications that a reconciliation was considered on the draft versus the final PLS, although it was repeatedly stated that there was no material difference between the two.

Concerns related to circumvention of the required investment process

13. Dr Matjila spent a number of days testifying on the various Sekunjalo Group investments before the Commission. A considerable amount of evidence was led, including through Dr Matjila's own advocate, Adv Roelofse, on the specifics as they related to the Ayo transaction. Discussions centred on the signing of the irrevocable subscription form on 14 December 2017, who played what role in the decision to invest, and who in the specially convened PMC meeting that was to approve/ratify the decision knew, or was assumed to know, that the irrevocable subscription form had been signed on 14 December 2017.
14. Evidence in this regard was heard from former Chief Financial Officer, Ms Matshepo More (Ms More), who chaired that particular meeting, at which Dr Matjila was present. Neither of them, though the CEO and CFO, advised the meeting that the irrevocable subscription form had been signed prior to approval. Ms More's testimony to the Commission was that she did not know

at the time that an irrevocable subscription form had been signed by Dr Matjila, but she goes on to accuse Mr Seanie of fraudulent behaviour for deliberately not disclosing that information, notwithstanding that the most senior person in the PIC, Dr Matjila, was also present and said nothing. It is unclear if she was aware of the 4 December letter of irrevocable undertaking, covered below.

15. The information that has come to light during the Commission hearings indicates that an improper process, outside of legal mandate, was followed by Dr Matjila in respect of this transaction.
16. It has now emerged that the evidence and testimony submitted by Dr Matjila regarding the Ayo investment is untrue. This finding is based on the following:
 - 16.1. In the letter dated 4 December 2017 to the Board of Directors of AEEI, headed IRREVOCABLE LETTER OF UNDERTAKING which he signed as CEO on behalf of the PIC, Dr Matjila, *inter alia*, states:

'4. The PIC confirms its irrevocable commitment and undertaking to subscribe for 99,782,655 (ninety nine million seven hundred eighty two thousand six hundred fifty five) ordinary shares at R43.00 per share at a total value of R4 290 654 165 (four billion two hundred ninety million six hundred fifty four thousand one hundred sixty five) which is equal to 29% of the issued shares in Ayo as set out in the Pre-Listing Statement to be issued by Ayo pursuant to the Listing.

5. The irrevocable undertaking and commitment to subscribe for the shares set out herein will lapse and be of no further force and effect if the Listing does not occur by no later than 01 May 2018.

8. This irrevocable undertaking contains all the provisions agreed to by us with regard to the subject matter of this irrevocable undertaking

and we waive the right to rely on any alleged provision not contained in this irrevocable undertaking.’(sic)

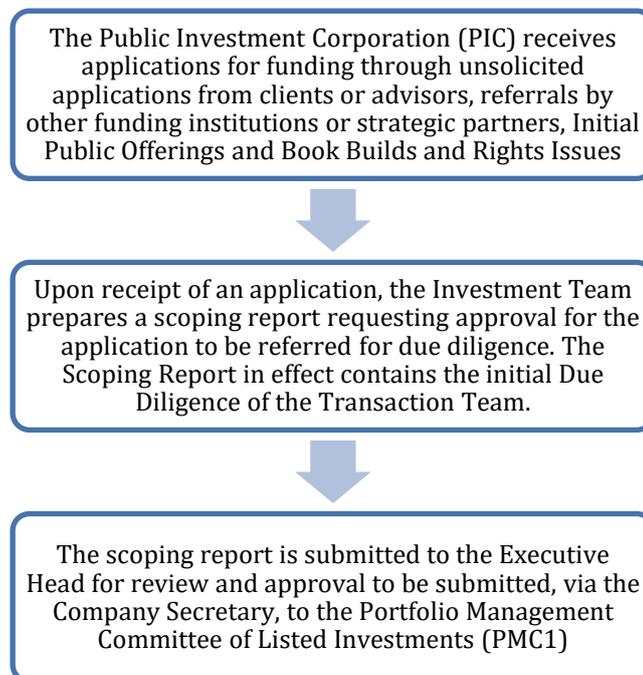
17. By signing the above letter to the Board of Directors of AEEI on 4 December 2017, prior to a PMC meeting to approve the transaction, Dr Matjila acted improperly and in breach of the PIC’s processes for transactions under listed investments. In approving this transaction, Dr Matjila also acted beyond the scope of his Delegation of Authority which does not provide for CEO discretion for a R4,3 billion ‘investment’.
18. This letter was not provided to the Commission by Dr Matjila or his legal team, nor was any reference made to its existence. This is evidence of his broader unreliability as a witness whose failure to mention crucial points fundamentally changes the narrative. Throughout his testimony, Dr Matjila stated that he relied on the PIC deal team to do the work and is guided by their expertise and recommendations, yet he decided to make a significant investment prior to team input, for instance on valuation or results of due diligence, or the completion of PIC processes and not disclosing this letter to the deal team.
19. It is our view further, regarding whether the PMC meeting of 20 December 2017 was to ratify or approve the Ayo transaction, that Dr Matjila’s response was disingenuous. When asked by the Commission why ‘*there should have been an attempted ratification if ratification and approval mean the same thing*’, Dr Matjila replied: ‘*I mean the effect is the same*’.⁴⁶⁵ While Dr Matjila stated that the 20 December 2017 meeting was to ratify a decision that had already been taken – a meeting at which he was present and was chaired by Ms More – the meeting in fact approved the transaction. In his written submission Dr Matjila states that ‘*the intention of the meeting of 20 December was always to approve ...*’⁴⁶⁶, yet when asked why he did not clarify to the

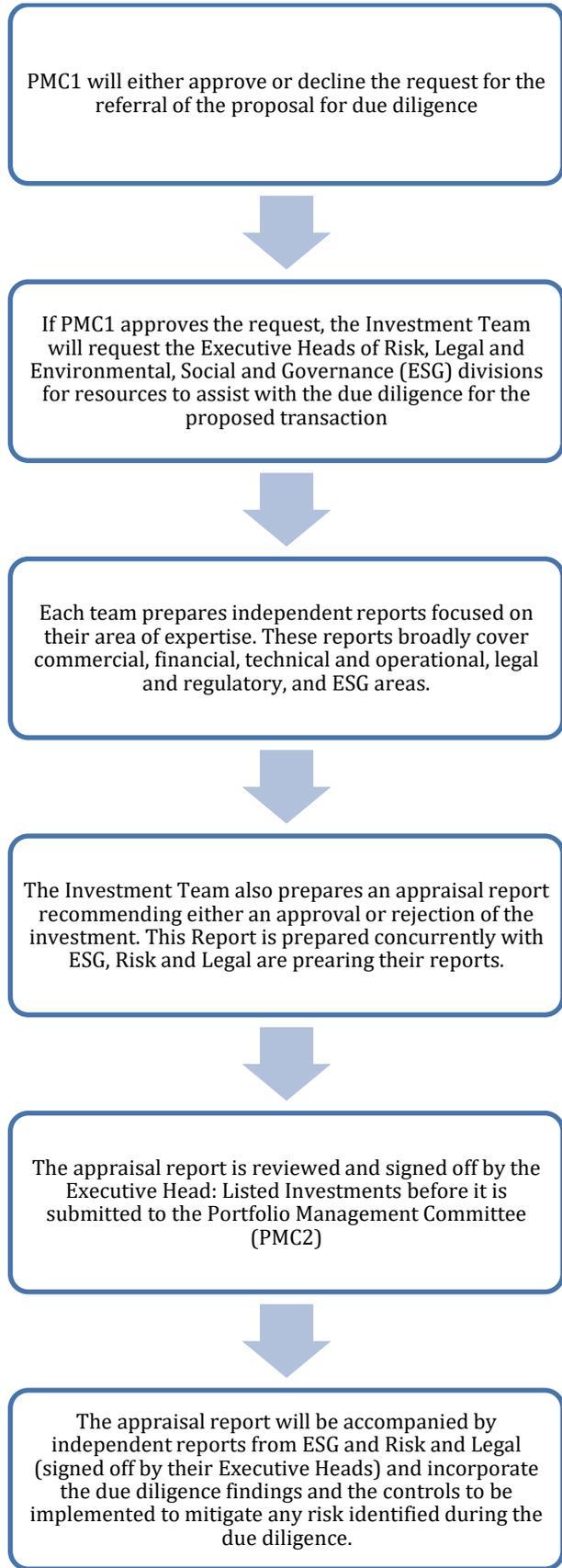
⁴⁶⁵At page 37 of the Transcript for day 60 of the hearings held on 25 July 2019.

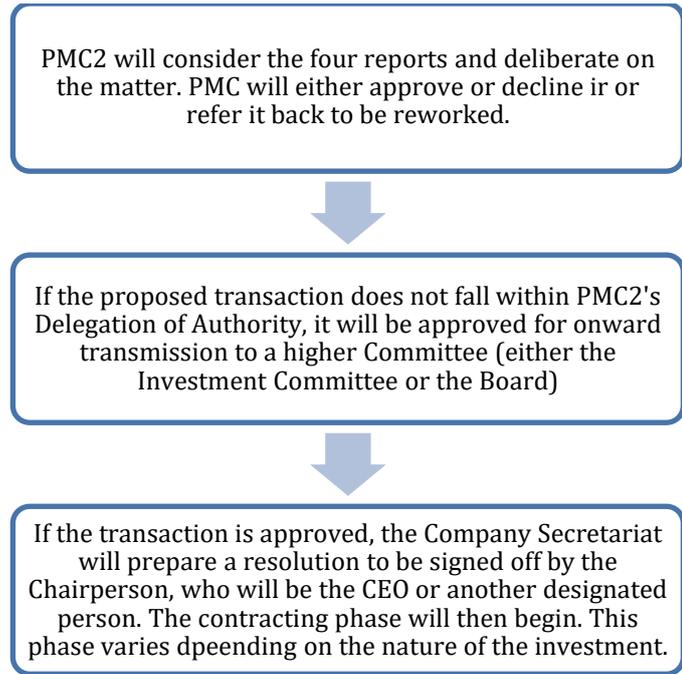
⁴⁶⁶ Para 484 of Dr Matjila’s statement signed on 17 July 2019.

meeting that the deal had already been done and it was not approval post event, but ratification, Dr Matjila said '*I did not see any need at the time ...*'.

20. The evidence placed before the Commission supports the finding that the meeting of 20 December 2017 could only have been to ratify a decision already taken, that decision being the approval of the transaction. Such conduct is not in accordance with the PIC's processes with respect to transactions under listed investments.
21. The process that ought to have been followed when dealing with a proposed transaction under a listed investment is as follows:







22. The information that has come to light during the Commission hearings, when compared to the above process, indicates that due process was not followed. Firstly, by sending the letter of 4 December 2017 to the Board of Directors of AEEI undertaking that the PIC would subscribe for 29% (twenty nine percent) of the share capital of AYO and confirming the price that would be paid per share, prior to PMC2 approving the transaction, Dr Matjila circumvented the prescribed process for authorising a listed transaction.
23. Secondly, although Dr Matjila undermined the importance of this step in his testimony, the reports compiled by ESG, Risk and Legal were not finalised when Dr Matjila signed the irrevocable subscription form on 14 December 2017, let alone when he signed the 4 December 2017 letter. As such, a substantial component of the necessary due diligence was overlooked. Moreover, whatever Dr Matjila's actual regard for the importance or otherwise of specific elements of the process like ESG, Risk and Legal, the process is clearly set out and obligatory, and he did not have the authority to override, bypass or ignore the process.

24. Moreover, as Dr Matjila stated above, *'in an IPO the biggest component of the work is around valuation which the team had concluded and were happy with'*.⁴⁶⁷ Yet Dr Matjila, by his own admission above, did not interrogate the valuation. In secretly making an irrevocable commitment in his letter of 4 December, that included that the price would be R43 per share, he acted in such a manner that in bypassing processes secretly, he acted improperly.
25. Thirdly, the PMC Listed Investments and PMC2 were not given the required information or reports to consider (the scoring report and the appraisal report accompanied by the relevant supporting documents, respectively) prior to a decision being taken in relation to the Ayo transaction i.e. the PIC was already bound by an irrevocable subscription undertaking as early as 4 December 2017.
26. It is of further concern, although not explicitly provided for in the process outlined above, that the approval was granted based on a draft PLS and that when this matter did come before the PMC, they were not made aware of the fact that this transaction was already approved, and only ratification was being sought. Furthermore, as Dr Matjila dealt with this transaction as 'listed', and therefore did not obtain GEPF approval in keeping with the R2 billion limit (discussed in further detail in ToR 1.17), the forecasts contained in the draft were subject to Limited Assurance, which was only provided on the final PLS. As there was no reconciliation between the draft PLS and the final PLS (see para 10 above), no reliance could be placed on the assurance work performed. It was also too late as the share purchase commitment made by Dr Matjila, ten days earlier, was irrevocable.
27. The problematic nature of this transaction is compounded by information that has recently come to light regarding Ayo, which includes the pre-determined share price at the time of listing, the decline of the share price to just above

⁴⁶⁷ At page 95 of the Transcript for day 59 of the hearings held on 24 July 2019.

the downside protection level for the short period that it was in place, and the current share price; the recent withdrawal of the auditors from four companies in the Sekunjalo Group – African Equity Empowerment Investments Limited (AEEI), Ayo, Independent News and Media South Africa (Pty) Ltd (INMSA) and Premier Fishing;

28. With regard to the Sagarmatha transaction, which was running parallel with the Ayo investment decision-making process in the PIC, it is noted that Dr Matjila stated that Sekunjalo approached the PIC in September 2017 with a proposal to restructure the loans (relating to INMSA) due and payable to the PIC and thereby provide the PIC with an exit from INMSA through an investment in Sagarmatha, and dependent on a listing of Sagarmatha with a significant investment from the PIC. This was agreed to by the PMC listed investments, but with the proviso that the exit from INMSA was not linked to the listing of Sagarmatha and that the PIC Investment Committee confirmed it had an appetite for the transaction.
29. Dr Matjila said that *'one of the suspensive conditions of the agreement was the successful listing of Sagarmatha which ultimately never happened and therefore the agreement never became operational and lapsed'*.⁴⁶⁸ The listing price was set at R39,62 (thirty-nine Rand and sixty-two cents) per share, though the PIC internal valuation was R7,06 (seven Rand and six cents) per share. Again, this valuation discrepancy is of great concern. Even though the members of the GEPF appear to be the intended victims, the real victim is the South African taxpayer: all member benefits are guaranteed by government and are thus protected and thus if there was to be underfunding, there would have to be a transfer of funds from the fiscus to the fund at some point to make up the shortfall.

⁴⁶⁸ Para 407 of Dr Matjila's statement signed on 17 July 2019.

30. Mr Molebatsi's statement was that '*...in our submission to PMC we had highlighted that our fair value was much lower at R7,06 compared to Sagarmatha's IPO asking price of R39,62. In addition we outlined that part of the capital raised from the IPO would be used by Sagarmatha to buy PIC's shares in and loan claims against Independent Media and Sekunjalo Independent Media...*'⁴⁶⁹ – in essence the PIC using new GEPF funds firstly to finance its own exit from the failing INMSA and secondly to effect a cover up of the extent of the losses attributable to INSMA (even as more funds were being proposed for investment in the same group of companies).
31. Mr Molebatsi stated that, in his view, Dr Matjila had continued negotiations with Sekunjalo without the knowledge of the team, and had proposed that:

*'...we submit a new PMC document, the salient features of the deal that was reached being that the PIC would subscribe at Sagarmatha's originally requested listing price of R39,62 for R3bn worth of shares. In addition, Sagarmatha would issue PIC a Call Option of R1 on enough shares so as to give us an average price of R8.50 per share. In effect the PIC would be receiving exposure to Sagarmatha at a lower price (R8.50) than the IPO price on the same day that other subscribers would be paying the full price (R39.90).'*⁴⁷⁰

32. In his response to the above, Dr Matjila said: '*this is just one of the proposals that I put forward to the PIC which I communicated directly to the team so that they could consider if it was DoAble ...*'.⁴⁷¹
33. The differentiated pricing proposed at the listing of Sagarmatha is clearly market manipulation and would not have been tolerated by the Johannesburg

⁴⁶⁹ Para 60 of Mr Molebatsi's statement signed on 11 March 2019.

⁴⁷⁰ Ibid. Para 69

⁴⁷¹ At page 29 of the Transcript for day 59 of the hearings held on 24 July 2019.

Stock Exchange (JSE) if they were aware that this was happening. When questioned during his testimony, Dr Matjila clearly recognised this was not acceptable behaviour.

34. In this regard, Mr Molebatsi said: *'The CEO wanted this transaction [Sagarmatha] to be presented to PMC...and so in that...particular situation it was an instruction.'*⁴⁷²
35. This is yet another example that contradicts Dr Matjila's evidence that he relied on the PIC deal team when making investment decisions. Mr Molebatsi's statement indicates that the deal team itself had the view that Dr Matjila negotiated parallel to their work, dealing directly with Sekunjalo Chairperson, Dr Iqbal Survé (Dr Survé).
36. Mr Tatenda Makuti (Mr Makuti), the PIC Legal Advisor for Listed Investments, testified that, *'there was a potential breach of regulations under the FSB/FSCA specifically Section 4(2)(f) of the [Financial Markets Act, 19 of 2012] (FMA) by Sagarmatha in that they acted as if shares were already listed at the time when the draft PLS was forwarded to the PIC'*.⁴⁷³ According to the PLS, Sagarmatha was 'conditionally listed by the JSE', but it was not listed.⁴⁷⁴
37. Mr Makuti stated that when he had finished his draft legal report he was informed that a share purchase agreement between Dr Matjila and Sagarmatha had already been concluded in December 2017. Furthermore, he established that the firm of attorneys whose name appeared on the agreement actually acted for Sagarmatha and not the PIC and testified that, *'We still do*

⁴⁷² At page 24 of the Transcript for day 14 of the hearings held on 12 March 2019.

⁴⁷³ Para 25 of Mr Makuti's statement signed on 18 March 2019.

⁴⁷⁴ Ibid. Paras 27 -28.

not know if the document was reviewed by external legal counsel as is normally the process before an agreement was signed'.⁴⁷⁵

38. It should be noted that paragraph 16 of the DOA states that *'All agreements and contractual arrangements must be reviewed by the Legal Counsel, Governance and Compliance department prior to entering into such agreements and/or arrangements.'*
39. The JSE cancelled the IPO on 12 April 2018. Dr Matjila said: *'The PIC would have taken the decision not to go ahead on the same day or the day before that'. The due listing date was 13 April 2018. Despite the Commission requesting sight of documentation of the PIC making the decision not to proceed with the transaction, and the communication to Sekunjalo/Dr Survé that the PIC was not going to proceed with the investment into Sagarmatha, nothing has been provided.*

Dr Matjila's disregard for established PIC approval, decision-making and other internal processes

40. The following extract of the Transcript for Day 54, relating to the Tosaco Energy transaction was relied on in reaching our findings:

'ADV JANNIE LUBBE SC: On the other hand you have the evidence of Mr Mseleku that it was an accidental meeting because he followed you into a boardroom where Mr Mulaudzi was present.

DR DANIEL MATJILA: With Mr Mseleku, that's true. He didn't know that Mr Mulaudzi will be at the PIC until I told him that Mr Mulaudzi is here to also ask for a binding letter of expression of interest.

⁴⁷⁵ Ibid. Para 33.

ADV JANNIE LUBBE SC: My recollection of your evidence Dr Matjila, is that I think you said to Mr Mseleku or Mr Mulaudzi, just correct me, but one of the two you said to I cannot give you a letter on your own. Was that your evidence?

DR DANIEL MATJILA: No, I said I will never give them a letter of expression of interest, binding letter of expression.

ADV JANNIE LUBBE SC: On their own.

DR DANIEL MATJILA: No. Not on their own a letter of expression of interest, binding letter of expression of interest.

ADV JANNIE LUBBE SC: Was it never mentioned and I'll have to check the recording that to one of them you said, you cannot have this letter on your own.

DR DANIEL MATJILA: No, I don't remember saying, on their own because they were there for a letter of expression of interest and I indicated to them that I cannot issue a letter of expression of interest, binding letter of expression of interest to any of them at that time in the process.

ADV JANNIE LUBBE SC: And if I remember correctly, you did not invite Mr Mseleku to walk with you to where Mr Mulaudzi was waiting for you?

DR DANIEL MATJILA: After telling Mr Mseleku that I'm going to meet now Mr Mulaudzi he said to me he wanted to also hear that I'm going to deliver the same message to Mr Mulaudzi. That's why he then followed me.

ADV JANNIE LUBBE SC: What did you respond to that?

DR DANIEL MATJILA: I didn't respond.

ADV JANNIE LUBBE SC: Did you invite him to come with you?

DR DANIEL MATJILA: I didn't invite him to come to me, I mean to follow me, he just followed that's all.

ADV JANNIE LUBBE SC: So the meeting between the two was quite accidental?

DR DANIEL MATJILA: You can argue that it was accidental. They were there at the same time so I mean I used the opportunity to make them meet.

ADV JANNIE LUBBE SC: And within a brief moment of time they shook hands and said we'll go into this together?

DR DANIEL MATJILA: I can't recall what happened but it would have been moments later that they wrote to us that they've agreed to meet if not several hours I can't remember exactly when they formally wrote to us to say they've agreed to merge. I think it was a letter that they formally wrote to us.⁴⁷⁶

41. This testimony illustrates a complete disregard for transparency, formal process and proper governance. It also illustrates the implicit understanding of Dr Matjila that his influence, status and power enable him to direct activity without having to detail specifics. It is not reasonable or acceptable business behaviour for a CEO to leave a meeting and be followed by the participant in

⁴⁷⁶ At pages 130-132 of the Transcript for day 54 of the hearings held on 15 July 2019.

that meeting into the next meeting without some implicit or unspoken understanding. Dr Matjila also testified that he was thinking that the two (Mr Mseleku and Mr Mulaudzi) should combine forces even if he did not say so, and it is incredulous that his thinking can manifest into reality through accident, *'and within a brief moment of time'*. Simply put, the testimony is not credible. And at the same time, it shows how real decision making was effected, and that it was effected outside of the PIC governance processes despite a surfeit of those processes bordering on bureaucracy.

42. Dr Matjila denied being a 'powerful man' yet by engineering the combination of the CIO and CEO roles and with only the CEO and CFO as executive directors, he had the position, authority and influence to make his role significantly more powerful than any other.
43. Dr Matjila was aware that the Investment Committee always led the Board's investment decision-making process.

'MS GILL MARCUS: ...I'd just like to follow up that last question. Because I would have thought in governance terms it would be [of] concern that as you have said earlier Dr Matjila unless I misunderstood you that the original amount of R10.4 [billion] was reduced by to R9.4 [billion] precisely to ensure that it was within the investment committee mandate. And therefore the question that you then followed it up with was that, well it wouldn't matter really if it went to the board because the board responds to the investment committee recommendation. Are you saying the board's oversight of these investments which is a key function of that board as it's currently structured, is a rubber stamp?

DR DANIEL MATJILA: No, not necessarily Commissioner.

MS GILL MARCUS: But it would be if you as you have just said that it would make no difference because the board - it would have been the same thing because the board would listen to the investment committee's recommendations. So there's no interrogation of it. No, there is a lot of interrogation Commissioner ... (intervenes)

MS GILL MARCUS: Then why would you avoid the board interrogation?

DR DANIEL MATJILA: I mean the Commissioners mustn't get me wrong. There is interrogation but there's never been a moment where the investment committee recommends something to the board and it doesn't happen. I can't remember you know that those things they exist. Not that the board doesn't apply its mind Commissioner.

MS GILL MARCUS: And Dr Matjila, you say you don't have power.

DR DANIEL MATJILA: Sorry. I say Commissioner, I beg you.

MS GILL MARCUS: Dr Matjila and you say you don't have power, that a board has never rejected an investment committee decision.

*DR DANIEL MATJILA: But I'm not the investment committee, Commissioner. I'm just a member of the Investment Committee.'*⁴⁷⁷

44. It is beyond stretching credulity to believe that the CEO who is CIO and one of only two executive directors is just a voice at the table. As leader of the organisation, the CEO is from where all employees take actual and implied

⁴⁷⁷ At pages 104-105 of the Transcript for Day 55 of the hearings held on 19 July 2019

direction. He is not simply 'just a member of the Investment Committee'. Dr Matjila underplays his true role.

45. Linked to this observation, is a consistent pattern in Dr Matjila's testimony where he takes no individual accountability for material errors, mistakes or failures. As CEO/CIO and an ED he has no place to claim successes only and not missteps.

Dr Matjila highlighting political pressure as a serious concern and his misconduct in relation thereto

46. Dr Matjila stated that in his time as CIO he experienced a great deal of pressure from senior politicians of most political parties, influential people in various fields, and business people who felt that their business ventures deserved to be financed by the PIC. When asked what steps he took to manage the problem, his response was that '*the biggest protection for [the organisation] has been process*'.⁴⁷⁸ He confirmed that, notwithstanding the pressure, he would meet people – including Ministers and other politically exposed persons (PEPS) – on his own, did not keep a record of who he met nor a note or minute of such meetings, nor did he advise anyone else in the PIC regarding what was discussed, requested, offered, proposed or committed to. Moreover, even in retrospect, he did not think a more formal process or arrangement was necessary or appropriate, even when in the fullness of time it became clear that the 'PIC processes' were not sufficient to protect the organisation.
47. When asked whether it was improper or unethical for a Minister of State, in particular the former Minister of Intelligence, to call the CEO of the PIC to a meeting at an airport without any indication of the purpose of the meeting or

⁴⁷⁸ At page 79 of the Transcript for day 51 of the hearings held on 9 July 2019 and paras 88, 89, 104, 143 and 144 of Dr Matjila's statement signed on 17 July 2019.

who would be present, Dr Matjila said he saw no problem with this conduct. When, in this instance, he was asked as the PIC to help a Ms Pretty Louw (Ms P Louw) and a second woman (unnamed in his testimony) – Ms P Louw subsequently being part of the allegations made in anonymous emails – Dr Matjila replied: *'I've met ministers not only at the airport, some at their places for convenience. I don't see anything unethical about meeting a cabinet minister'*.⁴⁷⁹

48. The above response is disingenuous at best. The issue at hand is not a meeting with a cabinet minister per se, but the circumstances, demands, discussions, records and outcomes of such meetings as they relate to the responsibilities of the PIC and any impropriety or undue pressure that might have occurred. Further, he confirmed that he would attend such meetings on his own, and that there would be no record or note of the meeting as they were *'just preliminary discussions'*, but he and the counterpart would be the only ones who would know the meeting took place, what was said or promised, and what follow up was to take place. Moreover, as Dr Matjila indicated above that he would not know what the meeting was about, how would he know they would be *'preliminary discussions'*, or if such *'preliminary discussions'* could place him in a compromising or invidious position.
49. Dr Matjila appeared oblivious of the ramifications regarding reputational risk for himself and the PIC, notwithstanding the damage the allegations in the anonymous emails did to him personally and to the PIC as a whole.
50. This is further illustrated by Dr Matjila forwarding requests for financial assistance by Congress of South African Trade Unions (COSATU) and the ANC to recipients of PIC investments – Mr Mulaudzi and Mr Mseleku in this instance (See the Tosaco transaction as it affects Kilicap and Sakumnotho) –

⁴⁷⁹ At page 29 of the Transcript for day 55 of the hearings held on 16 July 2019.

to consider. Dr Matjila confirmed that Mr Mseleku advised him that he had donated R1m as a result of the request, saying:

'I mean we didn't have a policy that says I can't relay requests of certain individuals to people who are able to assist them or organisations that are able to assist them ... they could have said no'.⁴⁸⁰

51. The following is an extract from the Transcript for Day 55 that followed questions regarding the solicitation of donations for the ANC and Cosatu. A reasonable person would not give any credence to the assertion that the CEO of the PIC, who enables funding and fee payments in the ordinary course of running a +R2 trillion asset manager, is merely sharing the information of the ruling party and its tripartite partner looking for funding. This logic is borne out in that Mr Mseleku made a R1 000 000 contribution shortly thereafter. The 'quid pro quo' in action shows that the implicit message was both clear and understood. Similarly, with the R300 000 donated by Mr Muluadzi to a beneficiary, unknown to him.

'ADV JANNIE LUBBE SC: I'm not trying to criticise you Dr Matjila, I know it's a hot seat that you occupy. But don't you think it's improper for the CEO of the PIC to send out such request to business people in this country?

DR DANIEL MATJILA: Commissioner, I was just responding to a request and I was not for enforcing them you know I was just responding. To me I mean we didn't have a policy that says I can't relay request of certain individuals to people who are able to assist them or organisations that are able to assist them.

⁴⁸⁰ At page 33 of the Transcript for day 55 of the hearings held on 16 July 2019.

ADV JANNIE LUBBE SC: You see the perception out there in the real world is that the PIC just assisted Mulaudzi and Mseleku with funding the entities and now shortly thereafter Mulaudzi pays 300 000 rand from his own pocket on your request to assist. And Mseleku makes a million rand contribution to the ANC based on a request from or a message from the CEO of the PIC.

DR DANIEL MATJILA: They could have said no, they had a choice it was not an instruction, Commissioner.

ADV JANNIE LUBBE SC: Thank you.⁴⁸¹

52. And responding to the comment: ‘*So the perception of Mr Mulaudzi, as per his evidence, that a request from Dr Dan is like an order*’, Dr Matjila said he did not agree with that. Yet those who gave evidence before the Commission stated that they advised Dr Matjila of donations made or assistance provided, in particular both Mr Mseleku and Mr Mulaudzi. Furthermore, Dr Matjila did not simply pass on requests from political parties and other influential entities for funding, but actually followed up on such requests, as is evident from email exchanges between him and certain individuals to whom the requests had been relayed. (Copies of such emails are available.)
53. The CEO of any organisation should never excuse behaviour – mistaken, unintentional or intentional – on the basis of whether there is a policy in place or not. It is also the responsibility of both the CEO and the Board to ensure that appropriate policies are in place. Furthermore, if the CEO does not take ownership and responsibility for judgement calls and defers to compliance, then that CEO is setting a tone that says anything is allowed if it is not expressly illegal or barred via policy.

⁴⁸¹ At page 33 of the transcript of day 55 of the hearings held on 16 July 2019.

54. In these particular instances, the question that arises is, why would anyone follow up on a 'relayed request' if it was just a process of information sharing? The act of "following up" strongly implies that there is an expectation that the request would be complied with and that Dr Matjila would want to know that this was the case.

Whistle Blower Concerns

55. Several testimonies from staff alluded to the deep perception that the Whistleblowing process was not to be trusted. With some staff taking issues directly to the Police and other insiders using the James Noku email route, it seems clear that there was no faith in this mandatory process. The Protected Disclosure Act protects employees and workers who blow the whistle; and requires management to foster a culture facilitating the disclosure of information by employees and workers relating to criminal and other irregular conduct in the workplace in a responsible manner.
56. The following testimony is significant:

'MS GILL MARCUS: Then just one other question. Would be, in terms of the whistle blower reports Mr Magula said you'd asked for all reports to be sent to you irrespective – including the ones that involved yourself, that internal audit should provide all of those reports to you, is that correct?

DR DANIEL MATJILA: I've asked for all the reports and the reason why I've asked for all the reports is because I was concerned that there are certain matters that are not brought to my attention and some of the issues were raised in this Commission, you know, which were not brought into my attention and it was just to satisfy myself that

all matters have been reported or all matters that have been reported by the whistle blower are being attended to.

*MS GILL MARCUS: Thank you.*⁴⁸²

57. In a separate dialogue the following is noted

CHAIRPERSON: This... You know, these terms of reference that we have. There is one relating to – I think it is either the very first one or the next one – that relates to the question. Where the PIC instead of investigating what was revealed by the Whistle-blower, it rather investigated who is the person who gave that information, relating to you and what you would allegedly have done. What do you say to that, if anything?

DR DANIEL MATJILA: I think, Commissioner. It really depends how you see this person. You know. If you see them as a Whistle -blower, then probably the PIC should have investigated these issues that the Whistle-blower is raising. But in any case, those have been investigated by senior counsel. And subjected to the investigations. But we also argued that we do not believe this is a Whistle -blower, because they are very malicious. They can say anything. And you can see some of the allegations and it is... Ja.

From where I sit, I could not believe they can be called Whistle-blowers. They can be given the status of a Whistle -blower. In my view. You know. It is just something that someone that is just being malicious and really throwing as much mud as possible and hoping that something will stick in the process. That is how I see it. Because the Whistle-blowing process within the PIC, is properly defined and I

⁴⁸² At page 43 of the Transcript for day 58 of the hearings held on 23 July 2019.

am sure the employees know about it. There is a hotline. There is the board. There is even Treasury. If you want to work outside the PIC through shareholders. So there are all kinds of ways of reporting the issues in a more, I would say, dignified way, than just splashing out emails in the manner that we have seen. And using the media to support this. You know.

CHAIRPERSON: And in your endeavours to secure the IT system and the information of the PIC, did that entail checking or inverted commas, the people are saying you were spying on them. Sort of checking on people, rather than looking at ways of securing the IT system. That is what the spying allegation comes from.⁴⁸³

58. In the circumstances, it would appear that there was an excessive focus on tracing the source of the e-mail.

Dr Matjila's cavalier and dismissive approach to the scale of loss or assets at risk

59. Dr Matjila stated repeatedly that the main function of the PIC is to deliver asset management services to its clients, manage their portfolios and generate returns. During his testimony, he stated the following:

'In a big portfolio of about R2 trillion, when you deliver outperformance for a client of 252 basis points on a five year rolling number you are the best. The Commission is dealing with almost 2% of the portfolio. 98% of the portfolio is doing exceptionally well. If you add up all the

⁴⁸³ At pages 147-148 of the Transcript for day 57 of the hearings held on 22 July 2019

*problem transactions you are not going to exceed R30bn at best ...
the figure could be R40bn divided by R2 trillion ...*⁴⁸⁴

60. In essence, his response was dismissive of concerns raised and the fact that the R40bn is roughly equivalent to the amount government contributes annually to the GEPF. Moreover, given that the losses primarily occurred in the investments made through the Isibaya Fund, the R40bn should be measured against the R123 billion that the PIC has invested through the Isibaya Fund, 41% of which is at risk, on watch, under-performing or non-performing.
61. Using percentages masks the size of the monies involved. While it is recognised that even with the best processes and due diligence, losses and bad investments will occur, the issue at stake here is the failure to follow due process, making investments without the required rigour and authorisation, not always ensuring that conditions precedent are met and inadequate post investment monitoring.
62. The mandate of the PIC from the GEPF, when approving a developmental investment strategy in 2010, states that the interests of members and pensioners must always come first and that '*all investments must, together, achieve a required rate of return ...*'.⁴⁸⁵
63. The GEPF Statutory Actuarial Valuation as at 31 March 2018, conducted by Alexander Forbes, estimated that the present value of future liabilities are covered by the assets on a range from 108,3% (well above the critical minimum funding level of 90% at which point government would be obliged to increase its contribution to the Fund, but showing a deterioration in recent years) to 75,5% being the 'stricter liability measure'. On the stricter measure,

⁴⁸⁴ At page 77-80 of the Transcript for day 58 of the hearings held on 23 July 2019.

⁴⁸⁵ Para 2.4.3 of GEPF Memo, Developmental Investment Strategy, dated 24 February 2010.

the Fund is about R583 billion short of its liabilities. In the 2017/18 financial year, the employer contribution to the GEPF was R45.3 billion, employee contribution was R25,1 billion and investment income was R72 billion, giving a total income of R142,4 billion.

64. Thus, improving investment returns is critical to ensure that there is no future requirement to increase government contributions, especially as the government is borrowing to fund total expenditure, including that contributed to the GEPF.
65. Mr Sithole, recognising all of the above, nonetheless stated that, '*The fund's assets grew by 8.3% during the 2017/18 financial year, going from R1,7 billion to R1,8 billion. This growth is a vote of confidence in how the pension fund is managed and how the funds are invested.*'⁴⁸⁶ Mr Sithole, in para 23.3, states further that 'although large in rand terms, and every rand counts, the unlisted portfolio comprises less than 5% of the GEPF's assets managed by the PIC. A significant part of the unlisted portfolio is performing well ...'

Findings

66. Throughout the testimony, Dr Matjila displayed the following characteristics:
- 66.1. Evasiveness: Dr Matjila has been repeatedly economical with the truth, not disclosing material information, relationships or interactions with counterparties which were relevant to the decisions taken, and justifying his actions even when the outcomes thereof were questionable.
- 66.2. A selective view of accountability: In retrospect the restructure appears engineered to concentrate power into the hands of the CEO and CFO while simultaneously merging the role of CIO into CEO. The consequence of this

⁴⁸⁶ Para 23.2 of Mr Sithole's statement signed on 15 July 2019.

concentration of organisational power left the two executive directors in de facto control of the organisation. Dr Matjila failed to take accountability when the outcome was bad and did not hesitate to take the credit when the outcome was good. The lack of accountability and responsibility for decisions taken, and their negative outcome, also displayed itself in Dr Matjila's tendency to use committee decisions in a way that disguises his role (as CIO and CEO)

- 66.3. A disregard for the legislative and regulatory framework which the PIC is required to operate within, including the Companies Act 71 of 2008 (Companies Act), the PIC's Memorandum of Incorporation (MOI) and the GEPF mandate.
- 66.4. A tendency to ride roughshod over the established approval and decision-making processes, using a combination of process, influence, fear and dictatorial fiat.
- 66.5. Perceived breach of the Protected Disclosures Act 26 of 2000
- 66.6. Doing repeat deals with individuals and/or their entities, even where no value has been proven from the first deals. Examples of this include the transactions concluded with Mr Jayendra Naidoo in Steinhoff and Lancaster, MMI, Ascendis, INMSA and various other entities owned and/or controlled by Dr Iqbal Survé. These actions of the CEO carry great financial risk for the PIC.
- 66.7. A disregard for established rather than hypothetical enhanced value. An apparent insensitivity to the risk profile required to build/maintain actuarial solvency of the GEPF where shortfalls must eventually be financed by the taxpayer.

- 66.8. A consistent behaviour, when interacting with potential investees, or meeting without anyone else present, of not keeping records or minutes or any written audit trail of such interactions. This constitutes a breach of Dr Matjila's fiduciary duties in that he failed to do the following while adopting a consistent practice of accepting and hosting meetings without anyone else from the PIC being present:
- 66.8.1. keep records or minutes of material conversations and decisions; and
 - 66.8.2. as CEO and Executive Director, ensure that the appropriate control environment for record keeping is maintained throughout the organisation when interacting with potential investees.
- 66.9. Highlighting political pressure as a serious concern but defending his practice of meeting such parties without anyone else from the PIC in attendance, keeping no record of these meetings, and holding such meetings outside of the PIC premises. This is further compounded by the finding that Dr Matjila directly solicited donations for COSATU and the ANC from individuals whose companies the PIC has invested in.
- 66.10. Distancing himself from significant fee payments to financial service advisors, and hiding behind the corporate veil, notwithstanding the need for both actual and optical propriety in both substance and form. He also claimed no knowledge of fees paid to such parties, while recognising that the building of professional black asset managers and intermediaries formed part of what he saw as a success. However, in reality the benefit was for a few people only, but those who were 'chosen often reaped significant financial rewards. In building this transformed professional cohort, there is no indication of a structural evaluation metric that was put in place to pre-determine what a measure of success would look like. This gives rise to the perception (and reality) of access to the PIC and significant

fee income for privileged insiders, who were, in a number of instances, previous employees of the PIC.

- 66.11. Taking a deliberate decision to keep transactions below the level that would require reference to a higher decision-making body, for instance the investment in Steinhoff/Lancaster (referred to above) whether the IC or the Board. This constitutes a subversion of governance.
- 66.12. Disregarding the advice of experts when such advice did not align with his desired outcome such as in the Sagarmatha and Erin transactions. This is dealt with in detail in the case studies in Chapter III.
- 66.13. Failure to adequately exercise his CEO responsibilities with regard to the organisational, legal, regulatory, human resource and operational frameworks relevant to good governance and client mandates. This is reflected in the various terms of reference and case studies presented.
- 66.14. Failure to ensure that risk was managed at an appropriate level, raising the question of whether this was the result of a deliberate structural and capacity weakness by design, while maintaining the perception of an operational risk management system (when in fact it was unfit for purpose).

RECOMMENDATIONS

67. In relation to the misconduct set out above, the GEPF/PIC/Government as shareholder should institute an appropriate investigation as to whether Dr Matjila violated the FAIS Act requirements of honesty and integrity as well as of “fit and proper” given that he was a Key Individual in the PIC.
68. The Commission, in ToR 1.1, considered and made findings that need to be given effect to regarding whether Dr Matjila:

- 68.1. Violated any other legislation applicable to the PIC, including the PFMA;
- 68.2. violated any rules, listing procedures or other requirements of the JSE;
and/or
- 68.3. breached the Protected Disclosures Act in his endeavours to find out who the whistle-blower/author/s of the anonymous emails were.
69. The PIC to give consideration to whether any personal liability is attached to the conduct of Dr Matjila, including with regard to any fruitless and wasteful expenditure which, if found to be the case, would make Dr Matjila liable to make the loss to the PIC whole.
70. Where money has been lost or investments made where the funds provided have not been used for the intended purpose, this must be identified, quantified and recovered.
71. Demonstrating a lack of due diligence and care, Dr Matjila breached his fiduciary duties when approving investments into insolvent and technically insolvent companies, for example Erin. Consequently, the appropriate steps need to be taken.
72. The Independent Regulatory Board for Auditors (IRBA) to open an investigation into the Limited Assurance work performed on the Ayo Prelisting Statement given that the extreme revenue forecasts were clearly very aggressive. For example, the 2018 actual comprehensive income achieved R148 million compared to what was forecast (R764 million) reflects a significant under performance.
73. Responsibility and Accountability of Mr Rajdhar: the Commission has noted with concern the financial losses and breach of processes that have emanated from the unlisted investments arena, including in the Developmental

Investments. Numerous investments that resulted in undue losses for the PIC occurred during the time when Mr Rajdhar was the EH: Developmental Investments. As the the head, Mr Rajdhar needs to be held responsible and accountable for this problematic division - not only Dr Matjila. Thus, it is recommended that the PIC Board should thoroughly investigate Mr Rajdhar for any impropriety and negligence arising from the transactions dealt with at the Commisison that did not follow processes and/or resulted in financial loss.

CHAPTER V – RECOMMENDATIONS AND REMEDIES

RECOMMENDATIONS FOR NEXT STEPS REGARDING INVESTMENT LOSSES AND THOSE AT RISK

1. Term 1.15 in the Commission’s Terms of Reference asks whether ‘the current governance and operating model of the PIC, including the composition of the Board, is the most effective and efficient model and, if not, to make recommendations on the most suitable governance and operational model for the PIC for the future.’
2. In addressing ToR 1.17 it is noted that 41% of the R123 billion of Unlisted Investments are on watch, under-performing or not servicing loans (non-performing loans). Elsewhere in the portfolio, there are assets where there is scope for enhancing value as well as capital sitting in insolvent entities. For the purposes of this report these investments will be called Investment Capital at Risk (ICAR). From a Finance lens, much of this ICAR would be termed “Distressed Assets”.
3. The total ICAR is a significant portion of the portfolio, both in quantum and relative to the AuM. This observation is important because Dr Matjila repeatedly stated that the losses and write-downs are not significant relative to the fund size.
4. An element of the current model is that investments are grouped and managed in various portfolios, such as “Listed Investments” or “Property” or “Unlisted Investments” to name just three. A possibility when consideration is given to a more efficient model for the PIC in the future is to create a bifurcated fund to house the Investment Capital at Risk and manage this portfolio to achieve the best financial outcome for the PIC’s clients, based not on the initial business or investment case, but rather on the best future-looking approach.

5. A current model for this is the “good bank/bad bank” or “Non-Core Operations Model”. For the purposes of this report the usage of bank will be substituted by asset management, with reference to the PIC, specifically. What takes place is that the asset manager looks at the funds being managed and divides the assets into two categories. Into the “bad” column go the investments at risk, the investments on the watch list and all troubled assets, such as non-performing loans as well as illiquid investments where an exit strategy is regarded as challenged. It is possible that even non-strategic investments that have been marked for exit could also be allocated into this category. The remaining assets are the “good” assets which represent the on-going investment profile at the core of the fund, optimised for solvency regarding the pension obligations. Hence another way of referring to this approach is “core” and “non-core”.
6. The Bank for International Settlements paper, (BIS Policy Paper, No. 6 – August 1999), “Bank restructuring in practice” provides an instructive summary in this circumstance. The Paper starts with an overview by John Hawkins and Philip Turner. The germane points from that paper are summarised as follows. While the Paper is focussed on Banks, the same principles can apply to the Asset Manager (PIC). The summary has been flexed to apply those principles overlaid onto the situation of the PIC.
7. A structural choice available for remediation of the current situation is to consider the separation of ICAR from the unimpaired assets of the existing AuM. Compared to outright liquidation, the case for leaving the assets with the originating manager is that the PIC knows the borrower and investees. Additionally, it gives space and resources for the optimal realisation of these assets rather than write downs and unnecessary loss-making divestment. Where there is a credit relationship it may allow for this to be rehabilitated when the loan is eventually repaid.

8. The argument for ‘carving out’ the ICAR is that the managers who originated the deals may be less objective than new managers who would consider the investment afresh and would be differently-incentivised. Given that there have been many examples of continuing to lend to delinquent borrowers, and sometimes blindly investing new funds to keep “zombie” investments alive, the non-core operation is expected to be dispassionately objective in the approach it takes and in the options it considers.
9. Furthermore, an Asset Manager preoccupied with managing legacy investments may become very risk-averse, with less time or inclination for new investing as it works out the ICAR. Specifically, were the core and non-core to remain in the same portfolios, the PIC may also find itself constrained by constant consideration of political imperatives over investment imperatives for the troubled assets. It is easier to give separate transparent goals if different people are charged with the on-going asset management operations and the resolution of ICAR.
10. The BIS authors note that there is also a case for not moving all ICAR away from the bank (asset manager). The logic, applicable to the PIC as well, is that it is desirable for the PIC to maintain and enhance experience with work-out procedures and expertise on how to engage with watch-list investments. The non-core unit need not be separate from the performing investments in that they would still be part of each of the Client portfolios as before. Also, the non-core management team should be part of the new Exco. This level of integration will mean that the skills acquired and developed would remain with the PIC and would support knowledge and skill sharing, independent of the carved-out portfolio.
11. The BIS highlights that:

'...particularly when cronyism and corruption have been significant causes of the problems in banks, it is important that the [non-core unit] operates in a very transparent and objective manner. While some staff will come from banks to bring their experience of loan problems, many will come from outside the domestic banking system. They may be organised into project groups managing a specific cluster of connected assets.

*The [non-core unit] should be structured with appropriate incentives so that management and staff seek a fairly quick resolution rather than unnecessarily prolonging the life of the [non-core unit] to protect their own jobs. A further category of incentive may be needed to induce key staff to stay when the [non-core unit] is nearing the end of its operations.'*⁴⁸⁷

12. In addition to segregating the ICAR within the parent funds' balance sheets, a 'non-core' structure permits specialised management with sole focus on optimal management of these non-core assets. The approach allows the core portfolios that are performing to expectations to concentrate on their core investment approaches, while the "non-core" entity can be dedicated to the maximisation of value from the high-risk assets.
13. In the course of the Commission's investigative work and the public hearings, multiple individual transactions, loans and investments were noted where there were apparent signs of financial stress leading to the various clients, particularly the GEPF and the UIF, of the PIC having to absorb capital losses.
14. It is proposed that the Board and the Exco determine a set of conditions that defines non-core investments. Then, an exercise should be conducted to scrutinise the entire portfolio of assets against this set of conditions. All assets

⁴⁸⁷ At Page 70 of the BIS.

that are found to be “non-core” using the pre-agreed definition should be identified as potential ‘non-core’. Given the subjective nature of the exercise and fluid circumstance specific to each asset, it would be ideal for the PIC Board and the Exco to work through this list to agree on assets that are on the margins of the set criteria to be either excluded if felt to be core or included if felt to be non-core, yet not completely matching the pre-determined conditions. These assets should be proposed to be ring-fenced as non-core and managed separately.

15. Management and the Board should agree a high-level approach to be taken to realise optimal value through time, and should also define up-front what time horizon the non-core portfolio has before it is liquidated. This step is essential so that timeline and end for the working out of non-core investments should be stipulated. This date must be mutually agreed on per asset at the outset. Reasonable performance that clearly determines what success looks like should also be defined *ab initio*, in order to create clarity on what would be regarded as success so as to frame the activities for the managers of the non-core portfolio.
16. Given that the purpose of the “bad bank” is to focus on optimal ways to de-risk and free up time and energy for the sustainable future-focussed funds, it is essential to ensure the non-core portfolio work out is time-limited. It is suggested that the categorisation and approach be aligned to the perspectives of the clients.
17. At this point the non-core investments should be hived off to the managers of non-core. This team should be dedicated to the work-down of this fund and should report separately to the governance and executive structures with a direct line to the Board.

18. Given the history, the high-visibility and sensitivity of some of these investments there should also be specific scrutiny on material divestments/exit strategies to ensure the interests of the clients are held paramount and other impacts are managed delicately and thoughtfully.
19. A primary concern is that investments are not optimised or exited in a way that benefits a select few on the basis of influence and not profit/optimal financial returns or best solution for resolution of the problems besetting that asset. For example, fixing the balance sheet and installing appropriate management seems to have turned Daybreak Farms around. It would be most unfortunate if, for example, investments that can be turned around or salvaged are sold for less than they are worth, possibly to connected insiders or simply allowed to fail. Similarly, it should be avoided where the required management action is not executed effectively and a sub-optimal price is realised due to lack of appropriate effort by the “non-core” management team.
20. It is imperative that this team’s areas of focus should include, but not be limited to, the following:
 - 20.1 Fixing balance sheets;
 - 20.2 installing appropriate management;
 - 20.3 ensuring sufficient transparency and governance;
 - 20.4 ensuring that value is restored where possible to maximise returns when exiting the investment.
21. These areas of focus will help avoid a situation where sub-optimal prices are realised, and they will support monitoring of the performance and appropriate actions/efforts of “bad bank” managers.

22. Concerted management action and attention can often enable turn-arounds to be effected. This requires the right investment of all forms of capital (especially entrepreneurship, funding and labour).
23. Part of the solution looking to the future is to reconsider the existing organisational approach so that it will now take into account the historic vested interests and ensure the funds' members' needs are held paramount. It is essential, in the process of realising maximum value of the "non-core" assets, that focus for the ICAR is placed on, but not limited to, the following:
 - 23.1 Stabilising and strengthening of balance sheets.
 - 23.2 Installing appropriate skilled and incentivised management.
 - 23.3 Enshrining transparency and dedication to good conduct at all times.
 - 23.4 Fostering a culture of constant and consistent reputational risk management.
 - 23.5 Ensuring that value is restored where possible to maximise returns when exiting the investment is imperative.
 - 23.6 Focusing on appropriate due diligence for partners and acquirers to guard against any accusations of preferential treatment for connected parties.
24. It is also essential that all of these actions remain transparent in the public sphere to ensure past mistakes are not repeated. Several times in testimony before the Commission, reference was made to "School Fees" (Dr Matjila Day 55,19-07-2019), meaning that in investing not all investments are going to make a profit and the combined expertise within the asset manager improves by learning from mistakes. The corollary maxim should be that "School Fees are only paid once". These actions and considerations will help avoid a

situation where sub-optimal prices or returns are realised, as well as effectively monitoring the performance and appropriate actions/efforts of “bad bank” managers.

25. Many investments are not performing at their maximum valuation due to insufficient active management, operational involvement and oversight. Thus, the teams in the non-core fund would need to have the appropriate resources to realise optimal value. For example, there must be the authority and resources provided to hire specialist management or consultants, as well as the commitment for additional capital that is clearly targeted for turnaround operations to enhance investment profits or reduce losses. The information provided to the Commission, including from its own team’s investigations, have shown a pattern for assets to underperform, then sub-optimal management approaches that are not ideal to turn around the investment with the end result of the investee requiring some form of bail-out, often via an additional capital injection.
26. This behaviour cannot continue and, at the same, there must be caution to not make choices that reject the favourable along with the unfavourable by ceasing to inject capital that would turn around a good underlying business.
27. Specific examples have arisen during the Commission’s investigations including that of Erin Energy.⁴⁸⁸ In this instance the view of the Commission is that it is essential for the PIC to actively take steps to maximise return on whatever remaining capital value still exists, such as the oil rigs. In addition, the economic interests of the facility extended to Erin by Mauritius Commercial Bank and guaranteed by the PIC (on behalf of the GEPF) were taken over directly by the PIC, and any rights thereunder should be actively sought out.

⁴⁸⁸ See the Erin Energy case study in Chapter III.

28. There needs to be a detailed analysis comparing investment returns with the actual losses written-off, impaired or potentially impaired. This analysis should also take into account the inherent riskiness of the original investment to consider what legal implications there are relative to considerations such as fiduciary duty to pensioners/taxpayers.
29. A comprehensive review of the PIC approach to Risk Measurement and Management as an Investment Manager is urgent and imperative. This needs to consider, at the least, risk measurement pre-deal and portfolio; Model Risk; Credit Risk; Country Risk; Currency Risk if applicable to the investment; Concentration Risk and Client Risk Appetite setting; Risk Reporting for PIC itself e.g. Regulatory and Operational Risk; Breaches, Condonation and Pre-approved Deviations (waivers); Reputational Risk as well as the management of short term volatility versus a 10-year investment approach.
30. As an advance-funded scheme, the GEPF should hold sufficient assets to cover the estimated liabilities it will have to meet future and current retirees, estimates being actuarially calculated based on various assumptions. The estimated present value of future liabilities are covered by the assets on a range from 108,3% to 75,5% - the range being "best estimate basis" through to the "stricter liability measure". On the stricter measure the Fund is about R583bn short of its liabilities. In the 2017/18 financial year, the employer contribution to the GEPF was R45,3bn, employee contributions R25,1bn and investment income was R72 billion giving a total income of R142.4 billion, against an outflow of benefits paid of R94.9 billion (National Treasury Budget Review 2019). When comparing previous actuarial reports with the most recent one, the funded position of the GEPF has deteriorated in recent years, primarily because of the growth of benefits and lower than expected investment returns.

31. The Alexander Forbes GEPF Statutory Actuarial Valuation as at 31 March 2018 shows that the minimum funding level declined from 115.8% (2016) to 108.3% (2018) while the long term funding level declined from 79.3% (2016) to 75.5% (2018). Thus the pre-funding level of the Fund remains well above the critical minimum funding level of 90%, at which point government would be obliged to increase its contributions to the Fund. In terms of the GEPF mandate, the Fund's rules state that employer contributions should be sufficient to ensure that the Fund is able to meet its obligations at all times, subject to a minimum funding level of 90%. This can therefore be viewed as the primary funding objective of the Fund. The Funding Policy of the Fund also stipulates that the Board of Trustees should strive to maintain the long-term funding level at or above 100%. The long term funding level equalled 75,5%, and therefore it does not meet its long term funding objective at the valuation date.

NEXT STEPS: FIT AND PROPER / VIOLATIONS OF FAIS

“AB Asset Management is a specialist active investment manager that provides an extensive range of South African and international investment products and services to institutions, advisory clients and individuals. Our clients include pension funds, central banks, sovereign wealth funds, insurers, foundations, financial advisers and individual investors, and the strategies and funds offer exposure to major asset classes, across a wide range of sectors and regions.

The mission of AB is to understand the expectations of their clients and exceed their expectations and investment returns that they require over the long term.”

This is an extract from the mission statement of an asset manager listed on the JSE, which illustrates the business of an asset manager.

Introduction

32. As set out earlier in this Report, the Commission has had extensive hearings and received a plethora of evidence. Following these hearings, the Commission has made a number of findings of fact which appear in Chapter III of this Report.
33. It is not the responsibility of the Commission to engage in a detailed analysis of the legal consequences of any wrongdoing by particular persons, as evidenced in the findings of fact. In addition, the absence of adequate resources and the limited life span of the Commission preclude it from undertaking that hugely complex and time-consuming task. Accordingly, that would, in the case of criminal conduct, be the function of the relevant law enforcement agencies of the State. In the case of recoveries arising from losses or damages sustained by the PIC it, as appropriately advised, would be required to institute the necessary remedial actions.
34. It is, however, required of the Commission to provide context, on the basis of its factual findings, to categories of wrongdoing that necessitate the institution of criminal prosecution and / or civil action.
35. For the purposes of providing such context and guidance, the Commission must of necessity:-
 - 35.1 analyse the purpose and role of the PIC;
 - 35.2 identify the duties and responsibilities of those who direct and manage the business and affairs of the PIC; and
 - 35.3 identify certain of the duties and responsibilities of third parties who deal with the PIC as represented by its directors, managers or employees.

The Statutory Nature of the PIC and its Business

36. The founding statute of the PIC is the Public Investment Corporation Act No 23 of 2004 (the PIC Act).
37. In terms of section 2 of the PIC Act the PIC is established as a juristic person and the Registrar of Companies is directed to register the Memorandum of Incorporation and Articles of Association of the PIC in terms of the Companies Act. Accordingly, the provisions of the Companies Act, 71 of 2008 (the Companies Act), apply to the PIC.
38. It is important to observe that, in terms of section 2(4) of the PIC Act, the main object of the PIC is to be a financial services provider in terms of the Financial Advisory and Intermediary Services Act No 37 of 2002 (the FAIS Act).
39. It is further of great importance that, in terms of section 6 of the PIC Act :-
 - 39.1 the Minister of Finance must, in consultation with Cabinet, determine and appoint the members of the board; and
 - 39.2 the members of the board must be appointed on the grounds of their knowledge and experience, with due regard to the FAIS Act, which, when considered collectively, should enable the board to attain the objects of the PIC.
40. In terms of section 8 of the PIC Act, the board must control the business of the PIC, direct the operations of the PIC and exercise all such powers of the PIC that are not required to be exercised by the shareholders of the PIC.
41. Very importantly, in terms of section 9 of the PIC Act, the PIC must, in terms of the FAIS Act, obtain authorisation from the Registrar referred to in section 2 of the FAIS Act, as a financial services provider.

42. Again, by way of background, the PIC Act also makes provision for the investment strategy to be adopted by the board of the PIC.

Regulation of the PIC under the FAIS Act and the duties and responsibilities of the directors and officers of the PIC in terms of the FAIS Act

43. As set out above :-

43.1 the PIC is registered as a Financial Services Provider (FSP) with the Financial Sector Conduct Authority (FSCA), with FSP number 19777;

43.2 the PIC has listed a certain number of persons as representatives on its FSP licence and has appointed certain key individuals. Further, the PIC has appointed two compliance officers to ensure that the PIC and its representatives and key individuals comply with the FAIS Act and the fit and proper requirements in terms of the FAIS Act;

43.3 as a juristic entity, the manner in which the PIC's compliance with the fit and proper requirements will be measured, will be through the personal behaviour or conduct of its directors, members, trustees, partners or key individuals. If the Registrar is satisfied that a director, member, trustee or partner of the PIC does not comply with the fit and proper requirements in respect of personal character qualities of honesty and integrity, the Registrar may suspend or withdraw the PIC's FSP licence.

General Application of the FAIS Act

44. The FAIS Act came into full effect on 30 September 2004. The purpose of the FAIS Act is to promote consumer protection through the regulation of advisory

and intermediary services in respect of financial products (collectively, 'financial services') by FSPs⁴⁸⁹.

45. Section 7(1) of the FAIS Act prohibits any person⁴⁹⁰ from providing advice or rendering intermediary services unless that person is registered as an authorised FSP, or listed as a representative of an authorised FSP on the licence of that FSP. A person who is furnishing advice or rendering intermediary services must therefore make an application for authorisation as an FSP. If successful, the person will be issued a licence under section 8 of the FAIS Act, subject to the requirements imposed by the Registrar with which that person and its key individuals and representatives must comply.
46. To meet the consumer-protection imperative, the FAIS Act imposes requirements on FSPs to ensure, among other things, that consumers receive proper financial advice, that they are provided with sufficient information to make informed investment decisions and that they are dealing with fit and proper advisors and intermediaries. These requirements are termed the determination of Fit and Proper Requirements for financial services providers and their representatives (the fit and proper requirements).
47. The fit and proper requirements for each of the categories of FSPs, key individuals and representatives are –

47.1 personal character qualities of honesty and integrity;

47.2 good standing;

⁴⁸⁹ Van Wyk., K., Botha, Z., and Goodspeed, I Understanding south African Financial Markets (2012) 4 ed page 73

⁴⁹⁰ "Person" means any natural person, partnership or trust, and includes –

(a) Any organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996);

(b) Any company incorporated or registered as such under any law; and

(c) Any body of persons corporate or unincorporated."

- 47.3 competence;
- 47.4 continuous professional development;
- 47.5 operational ability; and
- 47.6 financial soundness.
48. Section 8(10)(a) of the FAIS Act states that where a provider is a corporate or unincorporated body, a trust or a partnership, that provider must at all times be satisfied that every director, member, trustee or partners, who is not a key individual in the provider's business, complies with the requirements in respect of personal character and qualities of honesty and integrity, as set out in the fit and proper requirements.
49. If the Registrar is satisfied that a director, member, trustee or partner does not comply with the fit and proper requirements in respect of personal character qualities of honesty and integrity, the Registrar may suspend or withdraw the licence of the provider (section 10(b) of the FAIS Act).
50. Section 9(2) of the fit and proper requirements further stipulates that compliance with section 8(1) of the fit and proper requirements (honesty, integrity and good standing) by a person that is not a natural person must be demonstrated through its corporate behaviour or conduct and through the personal behaviour or conduct of the persons who control or govern that first mentioned person or who is a member of a body or group of persons which control or govern that person, including directors, members, trustees, partners or key individuals of that person.
51. Before an applicant applies for authorisation as an FSP (referred to in paragraph 45 above), it must ascertain whether it needs to appoint and

nominate a key individual(s) and a compliance officer (appointment of key individuals and compliance officers will be dealt with below).

52. If the applicant FSP is a partnership, trust or corporate or unincorporated body, the application for registration must be accompanied by additional information to satisfy the Registrar that every person who acts as a key individual of the applicant FSP complies with the fit and proper requirements for key individuals in the category of FSPs applied for to the extent required in order for such key individual(s) to fulfil the responsibilities imposed by the FAIS Act.⁴⁹¹
53. Once an application for authorisation (to act as an FSP) has been approved, section 8A of the FAIS Act obliges an FSP, key individual(s) representative(s) and key individuals of the representative(s) to continue to comply with the fit and proper requirements.

Application of the FAIS Act to the PIC

54. The FAIS Act, as with most consumer protection legislation, adopts a functional approach to regulation. As such, if the PIC is giving 'advice' (as that term is defined in the FAIS Act) and/or rendering 'intermediary services' (as that term is defined in the FAIS Act), then the PIC would be required to be registered as an authorised FSP.
55. In addition, section 4 of the PIC Act lists the main object of the PIC as being an FSP in terms of the FAIS Act. In order to achieve its objective (as set out in section 4), the PIC must ensure that it is registered as an FSP under the FAIS Act.

⁴⁹¹ In terms of section 6A(1) of the FAIS Act, the Registrar must determine the requirements that financial service providers, key individuals and representatives of the FSP must comply with. These requirements are termed the Determination of Fit and Proper Requirements for financial service providers and their representatives. The requirements set the honesty and integrity, competency and operational ability requirements for all FSPs, key individuals and representatives.

56. The PIC must furthermore comply with the fit and proper requirements.
57. On 6 December 2005, the PIC was approved by the Registrar as a Category I and II FSP.
58. A category I FSP is an FSP which offers advice and renders intermediary services, but without discretion (i.e. the client must instruct the FSP to make the investment). As a category I FSP, the PIC may be requested to provide input into the clients' mandates in relation to asset class allocations, with a view to assist the client in achieving its investment objectives, but the ultimate decision to invest is that of the client.
59. A category II FSP is an FSP which renders intermediary services of a discretionary nature regarding the choice of a particular financial product. As a category II FSP, the PIC is authorised to make investment decisions (buy or sell asset classes) on behalf of clients.
60. The authorisation of the PIC, as stipulated in paragraph 58, allows it to render financial advisory, intermediary and discretionary intermediary services to clients in respect of the financial products listed below :
 - 60.1 Category I FSP :
 - 60.1.1 participatory interest in a hedge fund;
 - 60.1.2 shares;
 - 60.1.3 money market instruments;
 - 60.1.4 debentures and securitised debt;
 - 60.1.5 warrants, certificates and other instruments;

- 60.1.6 bonds
- 60.1.7 derivative instruments;
- 60.1.8 participatory interests in a collective investment scheme;
- 60.1.9 long-term deposits; and
- 60.1.10 short-term deposits.

- 60.2 Category II FSP – Discretionary FSP:
 - 60.2.1 participatory interest in a hedge fund;
 - 60.2.2 shares;
 - 60.2.3 money market instruments;
 - 60.2.4 debentures and securitised debt;
 - 60.2.5 warrants, certificates and other instruments;
 - 60.2.6 bonds
 - 60.2.7 derivative instruments;
 - 60.2.8 participatory interests in one or more collective investment schemes;
 - 60.2.9 long-term deposits; and
 - 60.2.10 short-term deposits.

61. As an authorised FSP, the PIC is subject to, *inter alia*, the general Code of Conduct for authorised FSPs and representatives as well as the Code of Conduct for Discretionary FSPs.
62. Paragraph 5 of the Code of Conduct for Discretionary FSPs requires the PIC to have signed a mandate with each client which must contain certain specified provisions with regard to the rendering of discretionary intermediary services. The PIC's specimen mandate was approved by the Registrar at licensing state and affords the PIC full discretion regarding the investment decision, and choice of financial products in relation to clients' investments. The records of the FSCA indicate that the PIC has entered into full discretionary mandates with 22 clients.

Compliance Officers

63. The PIC has the responsibility of ensuring compliance with the FAIS Act and the fit and proper requirements. As such, the PIC must ensure that an independent compliance function exists or is established (as part of its obligation to manage the risks of its business) and establish and maintain procedures to be followed by the PIC or any representatives concerned.
64. In compliance with section 17 of the FAIS Act (Compliance officers and compliance arrangements) the PIC has appointed two approved compliance officers, namely Mr D M Makonko and Mr N B Nsibande, who are responsible for–
 - 64.1 oversight of the PIC's compliance function;
 - 64.2 monitoring compliance with the FAIS Act by the PIC and its representative(s); and
 - 64.3 liaison with the Registrar.

65. The PIC's compliance officers must comply with the fit and proper requirements, however, there seems to be no reference in the fit and proper requirements to compliance officers. Instead, the qualifications and experience of compliance officers in respect of financial services business had been determined under BN 51 in GG 40785 of 13 April 2017.

Audit and accounting requirements

66. In terms of section 19 of the FAIS Act, the PIC is required to maintain full and proper accounting records (brought up to date monthly), prepare annual financial statements and cause such statements to be audited by an external auditor approved by the FSCA.

Key Individuals

67. As the PIC is an incorporated body, it must have a key individual(s). The requirement also applies to the PIC's representatives insofar as such representatives are incorporated bodies.

68. Key individuals include natural persons, responsible for managing or overseeing, either alone or together with other such responsible persons, the activities of the PIC, or of a representative of the PIC. The PIC has appointed the following key individuals ⁴⁹²:-

68.1 Ms Melissa Breda (class of business – investments);

68.2 Mr Sholto Dolamo (class of business – not shown on FSCA website);

68.3 Mr Fidelis Madavo (class of business – investments);

⁴⁹² A copy of the list of key individuals as shown on the FSCA website.

- 68.4 Dr Daniel Mmushi Matjila (class of business – short-term and long-term deposits, structured deposits and investments);
- 68.5 Mr Lebogang Molebatsi (class of business – short-term and long-term deposits and investments); and
- 68.6 Mr Leonardus Smit (class of business – short-term and long-term insurance and investments).
69. Key individuals are required to possess the personal character qualities of honesty and integrity, and competence and operational ability, as defined in the fit and proper requirements – at least to the extent required of them to fulfil the responsibilities imposed on them by the FAIS Act.

Representatives

70. The PIC must maintain a register of representatives (and key individuals of such representatives, where applicable), which must be regularly updated and be available to the Registrar for reference or inspection purposes. The PIC must also ensure that its representatives are listed as such on its FSP licence.
71. The FSCA records indicate that the PIC has a total of 85 representatives.⁴⁹³ The PIC is responsible for the actions of its representatives and must ensure that each of its representatives meets the relevant fit and proper requirements (unless exempted in terms of the FAIS Act). We set out a summary of the relevant provisions in the fit and proper requirements insofar as they relate to all representatives in Schedule 2 of the FAIS Act.

⁴⁹³ The list of representatives according to the FSCA records is available on the FSCA website.

Debarment and suspension and withdrawal of licence

72. In terms of section 14 of the FAIS Act, if the PIC is satisfied that a key individual or representative of the PIC no longer meets the fit and proper requirements, or has failed to comply with any provision of the FAIS Act in a material manner, the PIC must debar the key individual or representative from rendering financial services.
73. In addition, since the PIC is a corporate, the failure by the PIC and its key individuals to meet, or continue to meet the fit and proper requirements (as applicable to the PIC and its key individuals) could also lead to the suspension or withdrawal of the PIC's licence by the Registrar (see section 9 of the FAIS Act).

Exemptions under the FAIS Act

74. The Registrar has the power to exempt any person or category of persons, including key individuals and representatives, from any applicable provision of the Act (which includes the regulations, rules or codes of conduct, any notices given, and any determinations made by the Registrar) either on the Registrar's own initiative or on application by an FSP (section 44 of the FAIS Act).
75. The FAIS Act however, unlike similar legislation in other jurisdictions, does not have a sophisticated investor exemption. While specific exemptions exist in respect of certain categories of clients, pension funds are specifically excluded from the exemptions.
76. As such, there are no specific exemptions applicable to the PIC.

Regulation of the PIC in terms of the Public Finance Management Act, no 1 of 1999 (PFMA) and the duties and responsibilities of the directors of the PIC in terms of the PFMA

77. The PIC is an institution to which Schedule 3(2) of the PFMA is applicable.
78. In terms of section 49 of the PFMA, the board of the PIC is its accounting authority.
79. In terms of the PFMA, very onerous duties are imposed on the board of the PIC as its accounting authority. In this regard section 50 of the PFMA reads as follows –

'50. Fiduciary duties of accounting authorities –

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

- (a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity.*
- (b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;*
- (c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and*

- (d) *Seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state*
- (2) *A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not –*
- (a) *act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or*
 - (b) *use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.*
- (3) *A member of an accounting authority must –*
- (a) *disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and*
 - (b) *withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant.'*

80. Section 51 of the PFMA provides as follows :-

'51. General responsibilities of accounting authorities

(1) An accounting authority for a public entity –

(a) must ensure that that public entity has and maintains –

- (i) effective, efficient and transparent systems of financial and risk management and internal control;*
- (ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and*
- (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;*
- (iv) a system for properly evaluating all major capital projects prior to a final decision on the project;*

(b) must take effective and appropriate steps to –

- (i) collect all revenue due to the public entity concerned; and*
- (ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and*
- (iii) manage available working capital efficiently and economically;*

- (c) is responsible for the management, including the safeguarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;*
- (d) must comply with any tax, levy, duty, pension and audit commitments as required by legislation;*
- (e) must take effective and appropriate disciplinary steps against any employee of the public entity who –*
- (i) contravenes or fails to comply with a provision of this Act;*
 - (ii) commits an act which undermines the financial management and internal control system of the public entity; or*
 - (iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure;*
- (f) is responsible for the submission by the public entity of all reports, returns, notices and other information to Parliament or the relevant provincial legislature and to the relevant executive authority or treasury, as may be required by this Act;*
- (g) must promptly inform the National treasury on any new entity which that public entity intends to establish or in the establishment of which it takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal establishment; and*

(h) must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity.

If an accounting authority is unable to comply with any of the responsibilities determined for an accounting authority in this Part, the accounting authority must promptly report the inability, together with reasons, to the relevant executive authority and treasury.'

The Duties and Responsibilities of the Directors of the PIC in terms of the Companies Act

81. Since the PIC is a company governed by the Companies Act, its directors and managers have all the duties and responsibilities applicable in terms of the Companies Act, to the extent applicable to State owned companies, and the common law to directors of a for profit company.
82. The duties of the directors of companies derives for the most part from sections 76 and 77 of the Companies Act and the common law. The provisions of sections 76 and 77 of the Companies Act are essentially a precis of the common law.
83. These duties are traditionally grouped into two categories –
 - 83.1 fiduciary duties; and
 - 83.2 the duty of care, skill and diligence.
84. Insofar as concerns the fiduciary duties of directors the following are included–
 - 84.1 the duty to act honestly and in good faith;

- 84.2 in the best interests of the company;
- 84.3 to avoid conflicts;
- 84.4 to avoid usurping corporate opportunities;
- 84.5 not to use fiduciary information for the directors' own benefit;
- 84.6 to act with an independent judgement;
- 84.7 to act within their powers; and
- 84.8 to act for a proper purpose.
85. The duties of care, skill and diligence which is set out in section 76(3)(c) is to exercise their powers and perform their functions –
- 'with the degree of care, skill and diligence that may reasonably be expected of a person –*
- (i) carrying out the same functions in relation to the company as those carried out by that director; and*
- (ii) having the general knowledge, skill and experience of that director.*
86. The foregoing is subject to the business judgement test.
87. An examination of the case law indicates the true nature of the character of fiduciary responsibilities. In *Canadian Aero Service Limited v O'Malley* (1974) 40 DLR (3d) 371 (SCC) Laskin J held :-

‘An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law.’

88. In a recent judgement of the Federal Court of Australia in the case of *Australian Securities and Investments Commission v Healey*⁴⁹⁴ the role, and responsibilities, of directors was thoroughly evaluated. The following passages from the judgement are particularly instructive :-

‘A director is an essential component of corporate governance. Each director is placed at the apex of the structure of direction and management of a company. The higher the office that is held by a person, the greater the responsibility that falls upon him or her. The role of a director is significant as their actions may have a profound effect on the community, and not just shareholders, employees and creditors.’; and

‘The case law indicates that there is a core, irreducible requirement of directors to be involved in the management of the company and to take all reasonable steps to be in a position to guide and monitor.’

89. It is important to observe that in the case of the PIC the directors have all the duties that directors of, for example, a trading or industrial company, would have. However, in the case of directors of the PIC, being an asset manager which, by virtue of the provisions of the FAIS Act, is itself subject to extremely onerous fiduciary and other duties, the directors of the PIC have the consequence that the proper discharge by them of their duties imposed in terms of the Companies Act obliges them to ensure that the PIC complies with its onerous fiduciary duties imposed in terms of the FAIS Act.

⁴⁹⁴ [2011] FCA 717.

90. An important question relates to the determination of the duties and responsibilities of management and officers of a company as opposed to directors. In this regard in Gower's Principles of Modern Company Law, Sixth Edition, it is stated as follows:

*'Thirdly, these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officers of the company who are authorised to act on its behalf and in particular to those acting in a managerial capacity.'*⁴⁹⁵

91. In an earlier edition, the learned author states that the foregoing sentence was approved by the Canadian Supreme Court in *Canadian Aero Services Ltd v O'Malley* (1973) 40 D.L.R.

92. However, the learned author in the Ninth Edition of Gower's Principles of Modern Company Law re-examines this same question. In this regard it is stated as follows: –

'However, it can be asked whether the fiduciary duties apply as a matter of common law to the senior managers of the company who are not directors. In Canadian Aero Services Ltd v O'Malley the Canadian Supreme Court approved a statement from an earlier edition of this book that directors' duties apply to those "officials of the company who are authorised to act on its behalf and in particular to those acting in a senior management capacity". That view has not been adopted expressly in any English court. Moreover, it is clear that, in principle, the employment relationship is not a fiduciary relationship, so that it would be inappropriate to apply the full range of directors' duties even to senior employees. However, this proposition

⁴⁹⁵ At page 600.

*is subject to a number of qualifications. First, a senior employee who does in fact discharge the duties of a director may be classed as a de facto director, under the principles discussed above. Secondly, the courts have held that, as a result of the specific terms of an employee's contract and of the particular duties undertaken by him or her, a fiduciary relationship may arise between employee and employer, even in the case of employees who are not part of senior management, though the fiduciary duty may be restricted to some part of their overall duties. The view of the Canadian Supreme Court is not inconsistent with these developments, since it too was derived from an analysis of the functions of the employees in question as senior management employees, though there will be scope for argument on the facts of each case about how extensive the fiduciary aspects of the employee's duties are. It goes without saying that, should a senior manager place him – or herself in an agency relationship with the company, then the normal fiduciary incidents of that relationship would arise. Thirdly, the implied and mutual duty of trust and confidence which is imported into all contracts of employment can in some cases operate in the same way as directors' fiduciary duties. This is particularly the case in relation to competitive activities on the part of an employee or the non-disclosure by senior managers of the wrongdoing of fellow employees and in some cases their own wrongdoing.'*⁴⁹⁶

93. It follows, that for all intents and purposes, senior managers and officers of companies are effectively bound by the same duties and responsibilities as are applicable to directors.

⁴⁹⁶ At page 515.

Application of Various Other Statutes

94. The conduct revealed in the findings of fact may give rise to a violation of a number of other statutes including :-

94.1 Financial Intelligence Centre Act 2001;

94.2 Broad-Based Black Economic Empowerment Act 2003 (particularly fronting);

94.3 Prevention and Combatting of Corrupt Activities Act 2004;

94.4 Prevention of Organised Crime Act 1998; and

94.5 Preferential Procurement Policy Framework Act 2000.

Governance

95. The findings of fact set out in earlier Chapters of this Report manifest a significant breach of governance in the management of the affairs of the PIC. The implications of mismanagement of the PIC from a governance point of view are dealt with in Chapter III, under terms of reference 1.2 and 1.15, relating to governance. In particular, it is important to take steps relating to the governance of the PIC so as to ensure that there will not be a recurrence of the manifest failures of governance which have been described in earlier Chapters of this Report.

Application of the Legal Principles to the findings of fact

96. It is necessary to apply the legal principles set out in paragraphs 0, 0 , 0 and 0 above, to the findings of fact, for the purposes of determining persons, or

categories of persons, that have committed wrongdoing which gives rise to criminal or civil consequences.

97. Before applying the legal principles to the findings of fact, it is appropriate to provide some context. As appears from the findings of fact, there was a significant failure of governance and a pervasive disregard for compliance with the relevant legal duties and responsibilities of the directors and managers. It is always lamentable when this occurs in the case of any company, but even more so when the company concerned is an asset manager of the scale and significance of the PIC. It is self-evident that the PIC is an institution of fundamental importance. This arises from a number of factors including :-
- 97.1 the PIC is the repository of a significant part of the nation's savings. Its beneficiaries, being State employees and their dependants, look to the PIC for their financial security; and
- 97.2 the PIC is a significant investor and provides funding for new and established ventures and assists in underpinning the stability of the JSE.
98. It follows, that in implementing the recommendations set out hereunder the observations set out in paragraph 97 above must feature prominently.
99. Insofar as it concerns criminal consequences it will be necessary for the State law enforcement officials to consider the findings of fact in the light of the relevant legal principles identified in this Chapter to determine whether it would be appropriate to prosecute individuals who have been involved in acts which may give rise to criminal wrongdoing.
100. Insofar as it concerns wrongdoing which has caused loss or damage to the PIC it will be necessary for the PIC to evaluate the wrongdoing arising from the findings of fact and to institute appropriate actions to recover any such loss or damages.

Recommendations

101. It is accordingly recommended that this Report should be forwarded to –

101.1 the relevant State law enforcement officials to consider the findings of fact in the light of the relevant legal principles identified in this Chapter to determine whether it would be appropriate to prosecute individuals who have been involved in acts which may give rise to criminal wrongdoing; and

101.2 the PIC to evaluate the wrongdoing arising from the findings of fact and to institute appropriate actions to recover any loss or damages that may have been incurred.

102. Although it does not appear to the Commission that there is any deficiency in the laws regulating the business of the PIC and, in particular, the conduct of its directors and officers, it is appropriate for this Report to be submitted to the FSCA to consider the adequacy of the laws regulating the PIC, its directors and officers.

103. The measures required to address the failures in governance are contained in the sections relating to Governance, specifically ToRs 1.15 and 1.16.

104. Consideration should also be given to the institution of actions for the recovery of benefits received by third parties who were complicit in the wrongdoing of directors or managers of the PIC in the breach of their duties to the PIC.

THE PIC AND TRANSACTION ADVISORS

PIC and Transaction Fee Framework⁴⁹⁷

105. On 6 December 2018, the Standing Committee on Public Accounts met with the Deputy Minister of Finance, Mr Mondli Gungubele, in his role as Chairperson of the PIC, as well as a number of the Directors and Executive team of the PIC. Mr David Maynier, a DA Member of Parliament, asked at the Standing Committee on Public Accounts about Mr Nana Sao's advisory fees. Mr Maynier asked specifically about the transaction costs in the Vodacom transaction, arguing that the fees the advisors received didn't equate to the work they undertook and, at the same time, questioned the PIC's selection process and transparency thereof.
106. In a PIC document entitled Framework: costs relating to Unlisted Investments, Para 5.6 states that 'these payment of fees and receipt of restructuring fees has, since 2018, become a bone of contention amongst various stakeholders, notably PIC Clients, PIC's recently appointed Board and the Minister of Finance' Mr Tito Mboweni.
107. The document sets out the PIC's policy framework in dealing with advisors, including in 7.1 (a) Advisory Fees: This fee may be payable by the PIC or sometimes may be shared with other parties in relation to a particular loan or equity deal. It is intended to cover due diligence costs, legal costs, fund raising costs of a debt arranger, amongst others.
108. Covering broad guiding fee principles in paragraph 6, it states that:

⁴⁹⁷ FRAMEWORK: COSTS RELATING TO UNLISTED INVESTMENTS. PIC document of 1 December 2019 submitted to the Commission

6.1 *PIC must in all instances act in the best interest of its clients, in good faith and fully disclose all material facts in relation to transaction costs, expenses and fees incurred to its clients and any fees received by itself resulting from a transaction funded by its clients.*

6.2 *The Treating Clients Fairly principle is paramount as it relates to Transaction Costs.*

6.3 *Except Asset Management Fees, Facility Agent's Fees, Property Development Fees and Monitoring Fees, all other fees received by PIC shall be for the benefit of the PIC Client.*

6.4 *Treatment of costs and fee income shall in all instances comply with and be governed by provisions of the PIC's Client mandates and where this guideline is in conflict with the PIC Client mandates, the mandates shall prevail.*

6.5 *PIC must clearly distinguish between costs and fee income for its own account and those for its client's account.*

6.6 *Cost management and value for money principles must always be applied and adhered to where transaction costs, expenses and fees are involved and such paid must be commensurate to the services provided;*

6.7 *As far as possible PIC shall attempt to recoup costs from investee companies or borrowers or from other parties to the extent such parties benefit from work undertaken by PIC.*

6.8 *In the absence of a compelling case, whenever there are two options available to delivering a product or service on behalf of the Client the least cost alternative will be chosen.*

6.9 Whenever costs are incurred in relation to a transaction in the Unlisted Investments space it will either be for the account of PIC or PIC's Client or the borrower or investee. To the extent possible, these costs should be passed on the borrower or investee or recouped from them. In certain cases Advisory Fees and Due Diligence Costs may be capitalized to the funding instruments or written-off or recovered directly from the investee.'

109. The Commission, in considering its terms of reference and the role played by various advisors, as well as the significant fees incurred in the transactions that involved the PIC, undertook an investigation into the matter and interviewed a number of advisors who had been involved in transactions either on behalf of the PIC and/or investee companies. A limited number of advisors were spoken to directly. There is reference in the different case studies to the role and fees of other transaction advisors, for instance the Steinhoff/Lancaster deal.

110. The transaction advisors spoken to were Mr Nana Sao, Mr Dan Mahlangu, Mr Kingdom Mugadzi and Ms Anushka Bogdanov, while there was some interaction on the matter with both Deutsche Bank and Nedbank. This section will cover two examples, and the four advisors interviewed each provided a written statement to the Commission.

Mr Nana Sao

111. Mr Sao's involvement with the PIC was through deals involving MTN Nigeria, Kenyan Electricity Generating Company Limited (KenGen), an Angolan government bond, Vodacom and Sakhomnotho. He was paid directly by the PIC for three of the transactions namely MTN Nigeria, KenGen and the Angolan government bond, where Sao Capital's fees averaged 1.10%, which

is an industry norm. Cumulatively, he earned R50.34 million from all three PIC deals.

112. In 2015, the South African government sold 13.91% of its stake in Vodacom to the PIC to help fund its R23 billion allocation to Eskom.
113. Mr Sao approached Dr Matjila in 2016 with a suggestion to purchase Vodacom shares. Dr Matjila responded by advising him of a consortium called Inkanyezi, a B-BBEE group that was interested in buying shares on behalf of the GEPF. Inkanyezi was led by Romeo Khumalo who was Vodacom Tanzania's COO. Mr Sao was asked by Mr Koketso Mabe, an employee of the PIC at the time, to work with Inkanyezi given his experience in deal structuring and raising capital. He agreed and led the execution of the deal on behalf of Inkanyezi.
114. After the selection process, Mr Sao heard rumours that people connected to the Inkanyezi Consortium were fronts for politicians. This prompted the commission of an external company, Control Risk, by Sao Capital and Barclays Africa, who were both working on the transaction, to perform a due diligence on Inkanyezi.
115. The Control Risk report revealed that politically connected people were behind the deal, but there was no conclusive link between them and members of the consortium. The Control Risk report was sent to Mr Koketso and Dr Matjila, and all agreed that the transaction should be cancelled.

Findings

116. There is no evidence that the PIC's process of appointing professional advisors was followed. Mr Sao approached Dr Matjila with a proposal to purchase Vodacom shares. Dr Matjila connected him with the consortium, Inkanyezi. According to the PIC's DoA, if the transaction exceeds R30 million, three general managers and an executive head should be the first to approve

the transaction. Thereafter, approval is sought from the CEO and CFO and then the final decision is made by the Investment Committee. At least three advisors should be recommended. In this case there was only one advisor, Sao Capital, and no process followed in making their appointment.

117. Outsourcing the running of an RFP process is questionable and this should be done directly by the PIC.
118. Sao Capital was apparently not paid for their work, despite incurring over R5 million in costs associated with the transaction. They had expected to be paid once the deal was concluded.

Recommendations

119. The DoA should ensure that the PIC CEO should not be authorised to simply appoint an advisor.
120. Policy and approved due process must be clear and followed at all times to ensure a fair selection process of an advisor in a transaction.
121. The allegations and findings in the Control Risk Report (above para XX) must be further investigated by the PIC.
122. If there are substantive allegations of corruption involving an investee company, the PIC should immediately investigate and, where applicable, take legal action.
123. The PIC should ensure that funds allocated are used for their agreed purpose, in this instance payment of transaction fees that were provided for in the agreement.

Sakhumnotho

124. Around mid-2015, Mr Sao was approached by Mr Sipho Mseleku, the CEO of Sakhumnotho, who he had first encountered when he was employed by Goldman Sachs. Sakhumnotho is a 50% shareholder in Tosaco ²¹. Sao Capital was appointed by Sakhumnotho Goup Holdings (Pty) Ltd in 2015 to prepare an independent valuation report in relation to a potential transaction where Sakhumnotho, as one of the bidders, was contemplating acquiring 91.8% of the shares in Total South Africa Consortium (Pty) Ltd (Tosaco).⁴⁹⁸
125. Even though Sakhumnotho did not sign the original advisory mandate the mandate stipulated that Sao Capital would be paid a transaction fee equal to 1% of the gross value of all shares or other similar securities acquired pursuant to the transaction. This amounted to about R17 000 000 (Seventeen Million Rand). The 1% was a verbal agreement between Sakhumnotho represented by its CEO, Mr Sipho Mseleku and Mr Nana Sao. The other competing bidder for the aforementioned 91.8% stake in Tosaco was an entity called Kilimanjaro Capital (Pty) Ltd (KiliCap).
126. In August 2015, Mr Mseleku informed Mr Sao that Sakhumnotho was merging its bid with that of KiliCap, creating a new consortium called Kilimanjaro Sakhumnotho Consortium (Kisaco). Once the joint KiliCap/Sakhumnotho Consortium was selected as the preferred bidder, Sao Capital was side-lined and had no further involvement. Mr Mseleku told Mr Sao that Sakhumnotho no longer had funds to pay for the advisory services Sao Capital rendered, and reneged on the verbally agreed upon 1% of the transaction value (R17 million). According to Mr Mseleku, the inability to pay was due to a lack of availability of funds from the PIC for transaction costs. Mr Mseleku requested

⁴⁹⁸ See the TOSACO case study in Chapter III.

Sao Capital to agree to a reduced fee of R5 million, about 30% of the R17 million previously (verbally) agreed upon.

127. In October 2015, Sao Capital became aware that the PIC had fully funded the new consortium and had made available R100 million for the purpose of settling transaction costs relating to the Tosaco transaction. Sakhumnoto received R50 million (half) of the amount paid by the PIC, with KiliCap receiving the other half. However, Sao Capital was only paid R5 million by Sakhumnontho.

Findings

128. The role of advisors in determining the valuation of the transaction has a direct bearing on the fee they ultimately earn. The PIC therefore needs to ensure there is a thorough and appropriately skilled process, followed with absolute integrity, in the valuation process to ensure it does not overpay.

129. Sao Capital settled for R5 million even after learning that the PIC had paid Sakhumnotho R50 million to cover their alleged transaction fee.

130. The PIC funds, allocated ostensibly to cover transaction costs, appear to have not been used for the stipulated purpose.

131. There was no signed contract between Sakhumnotho and Sao Capital.

132. There was no evidence presented to the Commission of an invoice from Sakhumnoto to the PIC setting out all transaction costs, as should normally be provided prior to any payment of such costs.

Recommendations

133. The PIC must ensure that greater attention is paid to the valuation of an entity and that such a determination is made with the essential skills, independence and thoroughness required.
134. Valuation determinations must be a key feature of all approval processes and thoroughly interrogated.
135. Proper, detailed documentation on transaction costs incurred must be presented to the relevant authority in the PIC, and be validated prior to any payment of such claims.
136. Given the information provided by Mr Sao, appropriate legal steps must be taken by the PIC to recover the monies paid in transaction fees that were not used for the intended and approved process.

Mr Dan Mahlangu (Mr Mahlangu)

137. Mr Mahlangu is the CEO of BNP Capital (Pty) Ltd, which changed its name to Pholisani Mahlangu. He said the name of the company was changed because his business partner, Ms Mathebula, left the company in 2017. However, the fact is that the Financial Services Board (FSB) had suspended BNP Capital's company licence.
138. Mr Mahlangu was appointed by KiliCap as its financial advisor after BNP Capital was specifically nominated by the PIC to KiliCap. Mr Mahlangu had been exposed to the PIC in various roles. In 2006, he worked for the PIC in the private equity team, looking after their funds of funds. He also sat on the board of the Royal Bafokeng Holdings as a representative of the PIC. In 2010, he left the PIC to form BNP Capital.

139. Mr Mahlangu said he was introduced to Mr Mulaudzi (KiliCap) by Mr Rajdhar, who indicated that KiliCap ‘would need to get someone to assist them package the transaction’.⁴⁹⁹
140. The mandate letter BNP signed with KiliCap required BNP to run with the entire management of the share purchase, and BNP would earn a fee of 2%, excluding VAT, of the capital raised, i.e. R1,7 billion. In turn BNP engaged other service providers to assist with both legal and financial due diligences, to be paid on the same terms as BNP. The Sakhumnotho consortium engaged Sao Capital, led by Mr Nana Sao, for the same purpose.
141. In his affidavit, Mr Mahlangu states that ‘the introduction of the new consortium and advisor meant that BNP Capital fees were reduced to R17 million, from the initial R34 million as [per] the signed mandate letter. Both KiliCap and Sakhumnotho ... [were to] pay their respective advisors’.⁵⁰⁰ After the successful fund raising, Mr Mulaudzi advised BNP to send an invoice for R1 million, VAT inclusive, to a company named AVACAP.
142. BNP enquired about the balance of its fees, but was only told that some of the money was going to be paid later. KiliCap also indicated to BNP that they would pay the two service providers that provided legal and financial due diligence directly.
143. BNP has since been unsuccessful in its efforts to get the balance of the fees owed, being paid only around 6% of the expected fee as per the mandate letter.⁵⁰¹

⁴⁹⁹ Para 4.1.2 of Mr Mahlangu’s statement signed on 1 October 2019.

⁵⁰⁰ Ibid. para 4.1.11 – 4.1.12.

⁵⁰¹ Ibid. para 4.1.18.

Nedbank

144. Nedbank was the transaction advisor for the Tosaco transaction as Calulo, the main shareholder of Tosaco 1, appointed Nedbank Capital to act as its exclusive investment bank and corporate advisor.
145. The Commission issued a subpoena to Nedbank on 18 July after receiving unsolicited WhatsApp messages between Mr Tapiwa Shamu, a Nedbank employee responsible for the Tosaco transaction on behalf of Total SA, and Mr Lawrence Mulaudzi. In the messages Mr Shamu requests a R400 000 loan from Mr Mulaudzi (IP364791MULAUDZI 400,000.00 22DEC16). There is also evidence of Mr Shamu passing on various other transactions that were presented for consideration to Nedbank to Mr Mulaudzi, and that the R400 000 that was transferred from Mr Mulaudzi's account to went to Ms Sandra Shamu, Tapiwa Shamu's wife.
146. This appears to be a highly irregular relationship given that Mr Mulaudzi, through KiliCap, was a bidder for the purchase of the shares in Tosaco and Mr Shamu was the advisor to Tosaco.
147. Circumstantial evidence shows that Mr Shamu played a significant role in ensuring that Mr Mulaudzi and the KiliCap/Sakhumnotho Consortium won the Tosaco bid. He had a personal and professional relationship with Mr Mulaudzi, Mr Mseleku and others. Mr Shamu also participated in the bidding process as a member of the selection team and would have been in a position to influence the decisions taken by the Total team.
148. After this irregular relationship and payment (as above) was brought to the attention of the relevant Nedbank officials, Nedbank suspended Mr Shamu, who resigned shortly thereafter.

Kingdom Mugadza

149. Kingdom Mugadza's name appears in the many text messages that circulated in WhatsApp groups. In these messages, Mr Mugadza is said to be 'a transactional advisor who is used by the Leaders and ANC Ministers...' He was an employee of Old Mutual, which was one of the first major financial institutions to get involved in the renewable energy REIPPP programme. At the time, the PIC was not involved in renewable energy and, as an expert, Mr Mugadza requested Old Mutual to enable him to work with the PIC to help it establish their renewable energy fund.⁵⁰²
150. There was no contract between Old Mutual and the PIC, even though Mr Mugadza was provided with a work station at the PIC. After a presentation to the PIC's Mr Radjah and Dr Matjila, Dr Matjila asked why he didn't start his own firm with the backing of the PIC. Mr Mugadza subsequently resigned from Old Mutual and started an Energy Fund. The former CFO of the PIC, Ms Albertinah Kekana, left the PIC to join him. However, the fund was shut down due to contractual issues with the PIC. Ms Kekana moved on to work at the Royal Bafokeng Holdings, while Mr Mugadzi started Tirisano in 2011.
151. Tirisano was involved in selling SAB Miller shares to the PIC, facilitating workshops between the PIC and AB InBev. It also was in discussion with the PIC about a supply chain empowerment fund and was well placed to facilitate the acquisition of Distell shares from AB Inbev by the PIC, where it originated, structured and executed the sale of Distell to the PIC by AB InBev in a closed bidding process.
152. Before the Distell deal went public, Mr Mulaudzi requested an urgent meeting with Mr Mugadzi. Mr Mulaudzi wanted information regarding the Distell deal,

⁵⁰² Para 3.1 – 3.3 of Mr Mugadzi's statement.

the situation deteriorated, Mr Sello Motau became involved and Mr Mugadzi felt his life was in danger.

153. One of the conditions set by the Competition Commission before its approval of the acquisition of Distell was that the PIC would sell at least 10% of its acquired Distell shares to a B-BBEE entity. As the shares had just been purchased and since Tirisano believed that they had not yet made sufficient returns, it recommended that the PIC delay the said B-BBEE deal.
154. At the beginning of September 2015, Mr Sello Motau, an Executive Director of Theko Capital which he founded in 2009, discussed with Dr Matjila a possible investment in the Export Trading Group (ETG). This links back to Mr Mahlangu (above) who said he had done some due diligence work together with Deloitte on ETG (Export Trading Group). He advised Dr Matjila that ETG could be a strategic fit for the PIC's pan-African investment strategy and could be used as a platform for PIC investments in the rest of the continent since ETG operated in 26 other African countries.
155. The local ETG team requested that Mr Motau and his team provide them with a letter of support for the funding proposal from the PIC. Mr Motau advised the Commission that in the second half of 2015 he was considering an equity investment in Profert Holdings, which was one of the leading suppliers of agricultural inputs in the Southern African Development Community (SADC)⁵⁰³, and that ETG was also interested in an investment in Profert.
156. In his evidence before the Commission Mr Motau stated that his 'involvement with the PIC in so far as it relates to the Karan Beef transaction is in an

⁵⁰³ Para 50 of Mr Motau's statement signed on 21 May 2019.

advisory capacity rather than on an equity participation as alleged in the said 'James Noko' email'.⁵⁰⁴ (Sic.)

157. Mr Motau's investment idea relating to ETG was well received by Dr Matjila and Mr Motau submitted a proposal to Dr Matjila on 7 September 2015. On 10 September 2015, Wellington Masekesa, Dr Matjila's Head of Office who was responsible for driving the African investment strategy, gave Mr Motau a letter signed by Dr Matjila for a non-binding Expression of Interest. The potential investment in ETG was presented to the Portfolio Management Committee (PMC1) for approval to commence with the due diligence review processes. Deloitte and Norton Rose Fulbright were approved as service providers by the PIC to perform financial/tax and legal due diligence reviews, respectively.

158. In October 2015, the PIC deal team introduced Theko Capital to Tirisano Partners as a transaction advisor to work with the teams from the PIC - Theko Capital, Deloitte and Norton Rose - in order to coordinate the investment process on behalf of all parties. Tirisano was represented by Mr Mugadza, Lauren Rawlings, Lilian Oyando and Tafadzwa Mhlanga in all aspects of the proposed transaction.⁵⁰⁵ On 19 October 2015 they received an Engagement Letter from the PIC that set out the funding arrangements. Theko was to be responsible for the payment of any fees and expenses, capped at R10 million, which could be capitalised. The original engagement letter from the PIC had proposed transaction costs be capped at US\$5 million.

159. According to Tirisano, they are not on the PIC database, and no transactional advisor internal process as per the PIC policy was followed.

160. Mr Motau states that, '[a]fter the submissions to PMC2 were updated, the PIC team stopped responding to Theko's correspondence ... After numerous

⁵⁰⁴ At page 48 of the Transcript for day 38 of the hearings held on 21 May 2019.

⁵⁰⁵ Ibid. page 96.

attempts I met with the PIC ...[and was told] that the deal had been approved by PMC2 for presentation at the next IC meeting with the condition from PMC2 to remove Theko from the deal since we have no agricultural experience ... [and] they will run a process to bring another consortium or partner to take the ten percent (10%) previously agreed to be allocated to Theko. I was very shocked to learn about this proposed approach'.⁵⁰⁶

161. However, there were conflicting reports of what actually took place.
162. According Mr Mugadza's statement, on 16 February 2016, Mr Motau was invited to a meeting by Tirisano Partners, for what they termed 'ETG check out brief'.⁵⁰⁷ In the meeting Mr Mugadza informed Mr Motau that the PIC has decided to proceed with the transaction without Theko.
163. After on-going interaction with the PIC to try to resolve the matter, Mr Motau (para 105 of his statement) said that 'after submission of information a meeting was arranged by Dr Matjila's assistant (presumably Mr Masekesa) between Theko and Tirisano Partners (who were the PIC's transaction advisor) for 6 March 2018. In that meeting Tirisano Partners, represented by Mr Mugadza, informed us that the shareholding structure for the implementation of the transaction had changed (and) Theko will now be allocated 1,0% shareholding, and that 9,0% of ETG equity stake shall be allocated to a new B-BBEE consortium which Tirisano was currently working on formalising. This was unacceptable to Theko.
164. Mr Motau concludes that 'It is concerning that the PIC can express an interest in a transaction, go as far as conducting FICA processes and getting the necessary internal approvals, and then at a later stage at their own discretion

⁵⁰⁶ At pages 101-102 of the Transcript for day 38 held on 21 May 2019.

⁵⁰⁷ Ibid. Page 102.

decide to remove a sponsor to include their preferred sponsor ... this opens the door to favouritism *and gate keeping*'.⁵⁰⁸

Findings

165. PIC processes to appoint advisors were not followed.
166. The PIC reportedly introduced a specific transaction advisor, namely Tirisano Partners, to the parties involved.
167. Conflicting accounts of events and commitments prevail, without a clear record of meetings held and decisions taken.
168. There is a consistent pattern of a lack of clarity of the terms of engagement and non-compliance with PIC procurement processes.
169. The imposing/recommending specific advisors for potential investees to use is highly questionable and inappropriate.
170. That the PIC recommends and/or appoints certain advisors for multiple transactions is improper and inappropriate.

Recommendations

171. A detailed investigation should be initiated by PIC management (potentially with the support of appropriate governmental prosecuting bodies) to create an exhaustive list of all fees paid over R5 million since 2014. This list must then be interrogated to aggressively initiate legal processes of recovery where appropriate.

⁵⁰⁸ Para 118 of Mr Motau's statement signed on 21 May 2019.

172. The PIC Board must ensure transparent processes are in place that prevent arbitrary changes and decisions that can lead to perceptions, real or otherwise, of abuse, gate keeping and favouritism.
173. The Board must ensure that there is a comprehensive, inclusive and fair process to appoint advisors for different transactions according to their relevant skills and expertise.
174. The Board must ensure that an effective monitoring and reporting system is in place with regard to the appointment, role, fees and accountability of advisors.
175. Where advisors are appointed or recommended by the PIC, an appropriate assessment should be made of the work performed prior to any subsequent/repeat appointment.

RECOMMENDATIONS ON DIVIDEND POLICY

1. In the 2018 financial year, the PIC paid R80 million to government in the form of dividends. The Government Employees Pension Fund (the GEPF / the Fund) Statutory Actuarial Valuation, conducted by Alexander Forbes, as at 31 March 2018, shows that the minimum funding level declined from 115.8% (2016) to 108.3% (2018), while the long-term funding level declined from 79.3% (2016) to 75.5% (2018).
2. The primary funding objective of the GEPF is to ensure that employer contributions should be sufficient to ensure that the Fund is able to meet its obligations at all times, subject to a minimum funding level of 90%, at which point government would be obliged to increase its contributions to the Fund. At present, this is well funded and the minimum funding level stands at 108.3%. However, the Funding Policy of the GEPF also stipulates that the Board of Trustees should strive to maintain the long-term funding level at or above 100%. Thus, standing as it does at present at 75.5% means that the GEPF does not meet its long-term funding objective as at the valuation date of 31 March 2018.
3. The Dividend Policy of the PIC (October 2016) states that:

'2.1 The shareholder expects an appropriate return on the equity invested in its business enterprises. However, unlike publicly listed companies, ownership rights in Government Business Enterprises are not ready (sic) tradable.

2.2 This necessitates a policy mechanism to secure the interests of the government as a shareholder and to provide a strong incentive for the Board and Management to focus on enhancing the value of the PIC.

2.3 *The objective of the dividend policy is to:*

Enhance the transparency of, and accountability for, financial performance of the PIC; and

Recognise the opportunity costs associate[d] with Government's equity' [as the PIC is 100% State Owned]

4. Paragraph 4 of the Dividend Policy covers the Legislative Framework:

'4.1 The legal framework governing the Dividend Policy is based on the following prescripts and guidelines:

The PIC Act, No 23 of 2004

Companies Act 71 of 2008

PIC Memorandum of Incorporation

The PIC approved Delegation of Authority'

5. Paragraph 5 of the Dividend Policy considers the Companies Act 71 of 2008 (Companies Act), and sets out the process required for payment of a dividend and for the requirements of the Companies Act to be met. In essence, the PIC "...must pass the Solvency and Liquidity test, as set out in section 4 of the Companies Act, before a dividend can be declared.

6. Paragraph 6 of the Dividend Policy sets out the general principles, including that dividends are to be declared at the Annual General Meeting (AGM) of the PIC, based on the approval of a dividend resolution by the PIC Board; and that the Board will approve that dividends be declared if the Companies Act

conditions and all of the PIC dividend declaration requirements have been met.

7. The PIC dividend requirements are broken down into two sections: PIC Sustainability Ratio Targets and Client Sustainability Ratio Targets.
8. The first part of the policy requires the PIC Sustainability requirements to be met, which are:
 - 8.1. Net income must be more than R0
 - 8.2. Net income over revenue must be more than 10%
 - 8.3. Management fees over cost to company must be more than three times
 - 8.4. Management fees over other costs must be more than four times
 - 8.5. Management fees over all liabilities must be more than two times; and
 - 8.6. Cash reserves over other costs must be more than two times.
9. Once all the above requirements have been met then the PIC Sustainability requirements have been met.
10. The second part of the requirements that need to be met are:
 - 10.1. Fund ratios for a three-year rolling period must be more than 100%
 - 10.2. Preferred returns, the hurdle rate for a five-year rolling period must be more than 0%; and
 - 10.3. The fund must generate alpha.

11. Once all the above requirements have been met, then the Client Sustainability requirements have been met.
12. Paragraph 7 of the Dividend Policy sets out the amount to be excluded from dividends, with the PIC applying a 'Residual Dividend Policy', as it relies on internally generated income to finance new projects. As a result, the declared dividend amount must come out of the residual, or leftover, profits, after excluding all projected capital requirements and unrealised profits in the year, in which dividends are declared.
13. Paragraph 7.2 of the Dividend Policy states that 'The PIC shall make a transfer of profits to the Non-Distributable Reserve (NDR) on an annual basis regardless of the conditions of a dividend being met or not met'. In paragraphs 7.3 and 7.4 the following is stated:

'7.3 The PIC will transfer to the NDR the sum of:

One year budgeted capital expenditure; and

Unrealised profits and losses.

7.4 The Non-Distributable Reserves are not available to be declared as a dividend to the Shareholder. The directors may use the funds to fund future capital expenditure of the PIC, therefore ensuring the financial sustainability of the Company.'

14. The Dividend Policy further outlines the application of the dividend policy, the calculation of dividends, and deviation from the dividend policy.
15. The Board of the PIC proceeded to pay dividends to the Shareholder in keeping with the Dividend Policy and as approved on an annual basis by resolution of the Board. In May 2017, the Board Resolution of 29 May 2017

confirms that the PIC paid an interim dividend of R20 million for the financial year ended 31 March 2017, and declared a final dividend of R60 million to the Shareholder for the financial year 2016/17. The resolution authorising the payment of a R20 million interim dividend was approved at a shareholder meeting on 10 March 2017, in terms of Section 60 of the Companies Act, and signed by the Shareholder representative, Minister of Finance, Mr Pravin Gordhan. The final dividend of R60 million was approved by the Board of Directors, at a meeting held on 29 May 2017, and signed by Deputy Minister Sfiso Buthelezi as Chairman of the Board of Directors.

16. In his testimony, Dr Matjila said that:

*“The PIC has been trying to revise the dividend policy to ensure that the PIC does not pay dividends directly from management fees, but pays dividends on value adds such as outperformance and other corporate initiatives. Discussions with National Treasury have not yielded any results because this issue was not a priority for National Treasury”.*⁵⁰⁹

Findings

17. The PIC has a Dividend Policy in place and has paid dividends in keeping with the requirements of the Companies Act. However, noting the continued decline in the short term funding level, and taking account of the Funding Policy of GEPF, which also stipulates that the Board of Trustees should strive to maintain the long term funding level at or above 100%, and that this currently stands at 75,5% which means that this does not meet its long term funding objective as at the valuation date. In view of the above, the quantum

⁵⁰⁹ Para 164 of Dr Matjila’s statement signed on 17 July 2019.

of dividend payments in March 2017 and May 2017 by the PIC to the Shareholder is questionable.

18. The mandate of the PIC is to act in the best interests of its clients; it is not to maximise profits. Essentially, by paying dividends from management fees charged to the GEPF and other clients, an indirect tax is imposed on PIC's clients.
19. The payment of a dividend raises the question as to whether this is being done to convey to the Shareholder that the PIC is in fact functioning extremely well and is thus able to afford to pay a dividend?

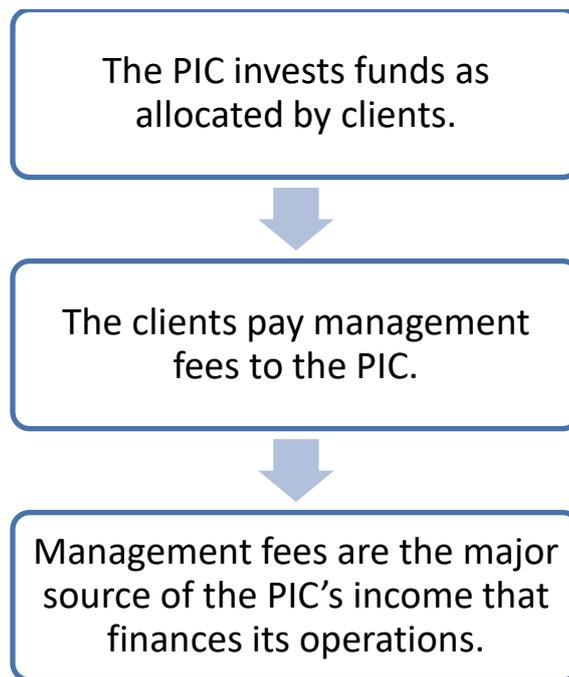
Recommendations

20. The Board of Directors of the PIC should review the Dividend Policy, which has not been reviewed since it was adopted in 2016.
21. The Board of Directors of the PIC should review the budget, including required capital expenditure and the staff complement and remuneration, to ensure the funding requirements are adequate.
22. The Board of Directors should discuss an appropriate policy to comply with Section 46 of the Companies Act with the Shareholder, taking into account that the PIC mandate is not driven by profitability as an objective, and the imperative to maintain funding levels of the GEPF and other Funds under management of the PIC.
23. If the fees charged to PIC clients, particularly the GEPF which has the responsibility of managing civil service pension funds, result in profits such that a dividend can be paid to the Shareholder, then the budget of the PIC needs to be reviewed to see that the PIC is functioning optimally with adequate

funding. Alternatively, the management fees charged to clients should be the subject of assessment and review.

Note for information

24. The PIC business model can be summarised as follows:



25. The PIC's main source of income is management fees, charged on the market value of AuM. PIC charges fees below market rates at an average of approximately 3 to 5 basis points. Although the below-average market fees reflect the captive client base, the PIC continues to deliver investment performance which compares well with that of active asset managers in the private sector. Other sources of income include board fees, where employees are nominated as directors on investee companies, and investment income which the PIC receives from surplus corporate operations funds that have been invested.

LIFESTYLE AUDITS

26. As a result of the allegations of corrupt activities made in the Nogu/Noko/Leihlola emails, the Commission engaged the auditors PricewaterhouseCoopers Advisory Services (Pty) Ltd, Johannesburg to conduct lifestyle audits and background checks on the following directors of the PIC:

- | | | |
|-------|---------------------|-----------------------------|
| 26.1. | Mr Mondli Gungubele | Non-executive and Chairman; |
| 26.2. | Ms Sibusisiwe Zulu | Non-executive; |
| 26.3. | Ms Dudu Hlatshwayo | Non-executive; |
| 26.4. | Dr Dan Matjila | Executive; and |
| 26.5. | Ms Matshepo More | Executive. |

27. In undertaking this task, PwC performed certain procedures. The procedures are set out in the affidavit of Mr Lionel van Tonder, a director of PwC:

'Procedure performed

The following procedures were performed with regard to lifestyle audit conducted:

- i. Reviewed documentation provided by the individuals;*
- ii. Using Global Intelligence tools conducted detailed searches on the individuals;*
- iii. Liaised with financial institutions in South Africa;*

- iv. *Requested additional bank statements identified (if any);*
- v. *Performed analysis on the bank statements received; and*
- vi. *Consulted with the individuals.'*

28. The findings and conclusions of the lifestyle audits are contained in the individual reports on the five directors, which are annexed to Mr van Tonder's affidavit.

29. The Evidence Leader, Adv. Jannie Lubbe SC, placed the following on record relating to the findings of the lifestyle audit:

*'In general Mr Commissioner and members the finding was that there was no indication of any criminal conduct regarding any of these individuals and he [Mr van Tonder] couldn't find any substance and you will recall that one of the main reasons for... requesting these lifestyle audits was the allegations contained in the Nogu emails implicating some of these people [as] receiving exorbitant amounts of money from transactions within the PIC. So what he can state and what I can place on record is there is no evidence of any criminal conduct and there's no evidence of any substantiating the implications in the emails by Nogu.'*⁵¹⁰ (Sic).

30. Although the Commissioners had sight of the contents of the report of the lifestyle audits, the reports remain confidential. They were intended only for the use of the Commission and National Treasury. The reports, therefore, do not form part of the Commission's final report.

⁵¹⁰ At page 5 of the Transcript for day 62 of the hearings held on 13 August 2019.

31. With regard to the report on Ms Zulu, PwC noted what appears to the Commission to be some serious discrepancies, particularly relating to the purchase of certain fixed property at Umhlanga Rocks, KwaZulu/Natal in 2016. The property was purchased through a Trust which was set up by Ms Zulu, for a consideration of R6 700 000. At issue is the source of the moneys used to pay the purchase price. After she had testified before the Commission, Ms Zulu was invited to the Commissioners' chambers where she was requested to explain the discrepancies. She undertook to provide the Commission with a written explanation but failed to do so. The legal team, according to a verbal report to the Commissioner, subsequently invited her on more than one occasion to provide the Commission with the explanation, but she still failed to do so.
32. Given the allegation in the 'James Noko' email of 28 January 2019, it was, in the Commission's view, imperative for Ms Zulu to provide the explanation or clarity requested by the Commission. Subsequent investigations conducted by the Commission's legal team (Evidence Leaders) have established that the information relating to the source for the purchase price of the property as given to PwC by Ms Zulu might not be true.
33. In Addition, it is noted in the report that Ms Zulu received seven (7) payments of R100 000 each during the period 30 August 2018 to 5 December 2018 from her 'romantic partner, Mr Mulaudzi'. She is reported as having stated that the payments 'were for various things', which she proceeded to mention. Mr Mulaudzi was a leading figure in both the Ascendis and TOSACO transactions discussed elsewhere in this report.⁵¹¹

⁵¹¹ See the Case Studies in ToR 1.1.

Recommendation

34. In view of the serious nature of the discrepancies alluded to above, coupled with the results of further investigations conducted by the Commission's legal team, the Commission feels obliged to recommend that the discrepancies indicated in Ms Zulu's lifestyle audit be further investigated.

CONCLUSION

1. The government, as the guarantor of last resort for the obligations to the GEPF, recognises that a failure of the PIC or any significant investments for the GEPF exposes it to substantial financial vulnerability, as is stated in Proclamation 30 of 2018, through which the President established the Commission.
2. The Commission, through public hearings and the consideration of written testimony from a broad range of witnesses, has concluded that, among other things, there has been substantial impropriety at the PIC, poor and ineffective governance, inadequate oversight, confusion regarding the role and function of the Board and its various sub-committees, victimisation of employees and a disregard for due process.
3. The report outlines the above through the 17 terms of reference addressed in this report as well as specific illustrative case studies. The findings show that:
4. While the PIC has, in many instances, sound policies, processes and frameworks, in many instances these were not adhered to, deliberately by-passed and/or manipulated to achieve certain outcomes. However, there are definite gaps and shortcomings in existing policies. There is a need to review existing policies and ensure that a comprehensive policy framework is put in place that includes, but is not limited to, policies as they relate to PEPS, intermediaries, whistle blowing, compliance, IT security, record and document keeping.
5. Legislation, mandates and standard operating procedures were repeatedly violated, including the requirements for directors, both executive and non-executive, to be 'fit and proper' and to conduct themselves, at all times, with

honesty, integrity and in the best interests of their clients. The Commission recommends that legislation governing the PIC be reviewed and drafted afresh. This must take account of the Amendment Bill currently before the President for his consideration, as well as the existing PIC, PFMA and FAIS legislation as well as the findings and recommendations of this Report.

6. The dual mandate of both the PIC and the GEPF to ensure the short and long term funding levels match the long term liabilities was considered. The GEPF mandate relating to addressing economic developmental goals was not always adhered to. There must be a clear definition of what success looks like when investing in unlisted entities.
7. The Board was found to be divided and conflicted. The involvement of non-executive directors in transaction/investment decision making structures of the PIC rendered their oversight responsibilities ineffective, if not absent. Their independence is questionable, particularly as, together with executive and senior staff members, NEDS are also appointed to serve on the boards of investee companies.
8. The Board essentially was a rubber stamp for the decisions driven by Dr Matjila. It repeatedly abdicated its responsibilities in deference to delegations of authority, even in instances when it expressed concern about a particular investment.
9. The Commission found that there was both impropriety and ineffective governance in a number of investments. This was compounded by the dishonesty of and material non-disclosure by Dr Matjila, both during his evidence at the Commission and in decision-making processes regarding various transactions.

10. The lack of diligence to ensure that conditions precedent (and post) were enforced or adhered to, particularly prior to the transfer of funds, has resulted in considerable losses for the PIC with debts not being serviced.
11. There are clear instances where the Commission found that directors and/or employees benefited unduly from the positions of trust that they held.
12. Repeat investments with a small number of entities, frequently represented by a single individual, (for instance the Lancaster/Steinhoff transactions), reflects poor risk assessments, particularly with regard to cumulative exposure, and the repeat opportunity for enrichment of single individuals. This does not reflect the mandate of the GEPF or the objectives of the PIC to invest in broad-based black economic empowerment.
13. Fees reportedly paid to advisors, who, in a number of instances were recommended to investee companies by the PIC, were on a number of instances found to be well above the industry norm. Moreover, payment was made without detailed invoices as to costs incurred, for instance legal advisors contracted to work on a transaction, and were not necessarily actually paid to the advisors.
14. There were discrepancies in a number of instances where committed investment amounts were increased during the approval process, and where conditions for the investment were altered to weaken or subordinate the interests of the PIC.
15. The lifestyle audits conducted by PWC at the request of the Commission found, in the instance of Ms Zulu, questionable behaviour and a significant flow of funds to her account. This should be the subject of further investigation.

16. Dr Matjila's requests to provide financial assistance or make contributions to individuals, organisations and political parties reflects his abuse of office and the ability to exert undue influence over investee companies.
17. The role of the Shareholder, coupled with the frequent changes to the Minister, Deputy Minister and consequently the Chairperson of the PIC, created instability and a vacuum of leadership at the helm of the PIC. Moreover, the retrospective instructions given to the PIC regarding remuneration and bonus pool caps created uncertainty among staff, confusion about what policies applied, and undermined the contractual obligations that the PIC had with staff.
18. The Commission found that the CFO and the Executive Head: HR used various means to give effect to victimisation of staff, many of whom were in very senior positions. Allegations by a number of staff of trumped up charges against them so as to enable disciplinary processes to take place were credible. Promotions, lack of assignments or tasks, assessments of the balanced score card and salary scales all formed part of a systematic pattern of control, intimidation and victimisation.
19. IT systems, including controls around security, were the subject of considerable evidence in the light of the allegations contained in the various anonymous emails. Of critical importance for remedial action is the urgent requirement to ensure that the IT systems covering all unlisted investments are automated. The fact that these investments are managed by a manual system using spread sheets, which means that only the latest entries can be audited, is cause for grave concern given how open this is to manipulation of data and records. There is an imperative to ensure sufficient funding is available to upgrade systems and maintain the highest standard of security of access to data and the data itself.

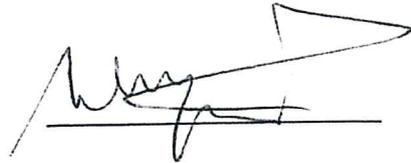
20. The Commission expresses its sincere appreciation to the Evidence Leader, Advocate Jannie Lubbe (SA), for his sterling work in enabling the Commission conduct its investigations fairly in a particularly challenging environment. We extend our thanks to the investigators, legal team and support staff for their tireless efforts, professionalism and diligence. Special mention must be made of two members of staff, namely Ms Lizzy Sibi, for taking on the huge responsibility of making travel and accommodation arrangements for the Commissioners and making their lives and work easier by organising their documentation in appropriate files; and Ms Gcobisa Mdlatu, who ably took on the task of organising and keeping the record, statements and annexures available for easy access to the Commissioners. A big thank you goes to Mr Daniel Buntman, who was released by Absa at no cost to the Commission, for his sterling work and contribution in the preparation of this report.
21. We also extend our appreciation to all those who bore witness and gave testimony at the hearings of the Commission. We know this took personal courage and determination to not only stand for what is right, but to stand against what is wrong. Many of you testified at great personal cost - emotionally, physically and with the real risk of victimisation and loss of employment. Others faced threats to the lives of their families as well as their own.
22. We also express our appreciation to the management of Armscor for providing spacious office accommodation from which the Commission directed its operations; and to the Tshwane Metropolitan Municipality for providing their Council chambers for the Commission's hearings. Our appreciation also goes to the media houses who ensured that their journalists attended the hearings of the Commission and thereby keeping the nation informed about the process.

23. It is with all humility that we present this Report, and trust that the work we have done will contribute to resolution of what has been an extremely difficult period not only for PIC staff, but also for the members and pensioners of the GEPF and other clients of the PIC, whose assets they manage.

Report of the Judicial Commission of Inquiry into Allegations of Impropriety at the Public Investment Corporation

Submitted by Justice Lex Mpati, the Commissioner, and his assistant Commissioners, Ms Gill Marcus and Mr Emmanuel Lediga

Signed at Johannesburg on this 13th day of December 2019

A handwritten signature in black ink, appearing to read 'Lex Mpati', is written over a horizontal line. The signature is stylized and somewhat cursive.

Justice Lex Mpati

GLOSSARY

| | |
|-----------------------|--|
| 2013 MOI | The Memorandum of Incorporation of the Public Investment Corporation signed on 26 April 2013 |
| 3 Laws Capital | 3 Laws Capital South Africa (Pty) Ltd |
| AAC | Asset allocation Committee |
| AEEI | African Equity Empowerment Investments Limited |
| AfDB | African Development Bank |
| AGM | Annual General Meeting |
| AIR | Annual Integrated Report |
| ALM | Asset and Liability Management |
| AMAGP | Association for Monitoring and Advocacy of Government Pensions |
| Amended MOI | The Memorandum of Incorporation of the Public Investment Corporation signed on 30 March 2017 |
| Amendment Bill | The PIC Act Amendment Bill, 2017 |
| ANA | African News Agency (Pty) Ltd |
| ANC | African National Congress |
| ARC | Audit and Risk Committee established in terms of section 94 of the Companies Act |

| | |
|---------------------------|---|
| AuM | Assets Under Management |
| Ayo | Ayo Technology Solutions Limited |
| B-BBEE | Broad-Based Black Economic Empowerment (B-BBEE) |
| BBC | Black Business Council |
| Board | Board of Directors of the Public Investment Corporation |
| BoT | Board of Trustees |
| BSC | Balance score card |
| BTSA | British Telecom-South Africa |
| C2C | Coast2Coast Capital |
| CaIPERS | California Public Employees' Retirement System |
| Calulo | Calulo Investments (Pty) Ltd |
| CEO | Chief Executive Officer |
| CFO | Chief Financial Officer |
| CIO | Chief Information Officer |
| CIPC | Companies and Intellectual Property Commission |
| Commission | Commission of Inquiry into allegations of impropriety regarding the Public Investment Corporation |
| Commission's Rules | Commission's Rules of Procedure |

| | |
|----------------------|---|
| Commissioners | The Commissioner, Judge Mpati and his assistants, Ms Gill Marcus and Mr Emmanuel Lediga |
| Compact | Shareholder's Compact (Compact) |
| Companies Act | Companies Act 71 of 2008, as amended from time to time |
| COO | Chief Operating Officer |
| COSATU | Congress of South African Trade Unions |
| CP | Corporate Plan |
| CRO | Chief Risk Officer |
| CSI | Corporate Social Investment |
| DAC | Directors Affairs Committee |
| DD | Due Diligence |
| DM | Deputy Minister |
| DOA: PI | Delegations of authority for Property Investments |
| DOA:LI | Delegations of authority for Listed Investments |
| DOA:UI | Delegations of authority for Unlisted Investments |
| DoAs | Delegations of authority |
| DOJCD | Department of Justice & Constitutional Development |
| DPW | The Department of Public Works |

| | |
|------------------------|---|
| DSTT | Deal Screening Task Team |
| ECTA | Electronic Communications and Transactions Act, 25 of 2002 |
| EDCON | Edcon Holdings Ltd |
| EH | Executive head at the PIC |
| Erin | Erin Energy Limited |
| ESG | Environmental, Social and Governance |
| ETG | Export Trading Group |
| Evidence Leader | Adv Jannie Lubbe SC |
| EXCO | Executive Committee |
| FAIS Act | Financial Advisory and Intermediary Services Act 37 of 2002 |
| FATF | Financial Action Task Force |
| FAWE | Fruitless and wasteful expenditure |
| FEDUSA | Federation of Unions of South Africa |
| FICA | Financial Intelligence Centre Act 39 of 2001 |
| FIPss | Fund Investment Panels |

| | |
|----------------|---|
| FMA | Financial Markets Act, 19 of 2012 |
| FRC | Financial Reporting Council |
| FSCA | Financial Services Conduct Authority |
| FSP | Financial Services Provider |
| GEP Law | Government Employees Pension Law, 1996 |
| GEPF | Government Employees Pension Fund |
| HFM | Harith Fund Managers |
| HGP | Harith General Partners |
| Hold Co | Holding Company |
| HR | Human Resource |
| HRRC | Human Resources and Remuneration Committee (a PIC Board subcommittee) |
| HSIST | Harith Share Incentive Scheme Trust |
| IAD | Internal audit department |
| IC | Investment Committee |
| ICT | Information and Communications Technology |
| ICTGC | Information and Communication Technology Governance Committee |
| IMA | Investment Management Agreement |

| | |
|----------------------|---|
| INMSA | Independent News and Media South Africa (Pty) Ltd |
| INMSA | Independent News and Media South Africa (Pty) Ltd |
| IPO | Initial Public Offering |
| IPS | Indefinite Period Shares |
| IRR | Internal Rate of Return |
| ISF | Irrevocable Subscription Form |
| IT | Information Technology |
| IT Use Policy | Information Technology Use Policy |
| JSE | Johannesburg Stock Exchange |
| JVH | Jurgens van Huyssteen |
| KiliCap | Kilimanjaro Capital (Pty) Ltd |
| KISACO | Kilimanjaro Sakhumnotho Consortium (Pty) Ltd |
| KPI | Key performance indicator |
| Lereko | Lereko (Pty) Ltd |
| LMA | Loan Market Association |
| LTI | Long term incentives |
| MCB | Mauritius Commercial Bank |
| Minister | Minister of Finance, at various times |

| | |
|-------------------|--|
| MMI | Matome Maponya Investment Holdings |
| MOI | The Memorandum of Incorporation of the Public Investment Corporation |
| MSA | Mutual separation agreement |
| MST | Mobile Satellite Technologies (Pty) Ltd |
| NA | National Assembly |
| NDR | Non-Distributable Reserve |
| NEDs | Non-executive directors |
| NEHAWU | National Education, Health and Allied Workers' Union |
| NT | National Treasury |
| NUPSAW | National Union of Public Service & Allied Workers |
| OML | Oil Mining License |
| PAIDF/PADF | Pan African Infrastructure Development Fund |
| PDA | The Protected Disclosures Act 26 of 2000 |
| PE | Price Earnings Multiple |
| PEPS | Politically Exposed Persons |
| PEPSS FIP | Private Equity, Priority Sector, Small Medium Enterprise Fund Investment Panel |
| PFMA | Public Finance Management Act 1 of 1999 |

| | |
|----------------------------------|--|
| PIBS | Permanent Interest Bearing Shares |
| PIC | Public Investment Corporation |
| PIC Act | Public Investment Corporation Act 23 of 2004 |
| PIC IT | To be defined |
| PLS | Pre-listing statement |
| PMC | Portfolio Management Committee |
| PMC-LI | Portfolio Management Committee (Listed investments) |
| PMC-UI | Portfolio Management Committee (Unlisted investments) |
| PMV | Portfolio Management and Valuation Department |
| PMV | Portfolio Monitoring and Valuations |
| POPCRU | Police and Prisons Civil Rights Union |
| PPM | Private Placement Memorandum |
| Premier Fishing | Premier Food & Fishing Limited, renamed later renamed Premier Fishing and Brands Limited, part of the Sekunjalo group of companies |
| Proclamation 33 | Proclamation 33 of 2018 |
| Prop FIP | Property Fund Investment Panel |
| Protected Disclosures Act | Protected Disclosures Act 26 of 2000, as amended from time to time, see also PDA |

| | |
|------------------------------------|--|
| PSSME - FIP | Priority Sectors, Small and Medium Enterprises Fund Investment Panel |
| RCF | Revolving credit facility |
| RCFA | Revolving Credit Facility Agreement |
| Regulations | Published in Government Gazette No. 42076 of 3 December 2018 |
| RRR | Round Robin Resolution |
| Rules | Published under 'General Notices' in Government Gazette No. 42157 of 15 January 2019 |
| SACTWU | South African Clothing and Textile Workers Union |
| SAFTU | South African Federation of Trade Unions |
| Sagarmatha | Sagarmatha Technologies Limited, part of the Sekunjalo group of companies |
| Sakhumnotho | Sakhumnotho (Pty) Ltd |
| SAPS | South African Police Service |
| SEC | Social & Ethics Committee established in terms of regulation 43 of the Regulations promulgated under the Companies Act |
| Secretary of the Commission | Adv Phuti Setati |
| SEIES FIP | Social and Economic Infrastructure and Environmental Sustainability Fund Investment Panel |
| SENS | Stock Exchange News Service |

| | |
|----------------------|---|
| SI | Sanlam Investments |
| SIH | Sekunjalo Investment Holdings (Pty) Ltd |
| SIM | Sekunjalo Independent Media |
| SIP | Structured investment product |
| SIPS | Private Equity and Structured Investment Products |
| SNG | Sizwe Ntsaluba Gobodo |
| SNH | Steinhoff International Holdings |
| SPV | Special purpose vehicle |
| SSNIT | Social Security and National Insurance Trust of Ghana |
| STAR | Steinhoff African Retail Limited |
| STI | Short Term Incentives |
| ToR | Terms of Reference |
| TOS | Terms of Separation |
| TOSACO | Total South Africa Consortium (Pty) Ltd |
| TOSACO Retail | TOSACO Retail (Pty) Ltd |
| Total | Total South Africa (Pty) Ltd |
| UDM | United Democratic Movement |
| UIF | The Unemployment Insurance Fund |

| | |
|-------------|------------------------------------|
| VBS | Venda Building Society Mutual Bank |
| VINs | Vehicle Identification Numbers |
| WBP | PIC Whistle-Blowing Policy |
| WCC | Workmen's Compensation Fund |

REPORT ON PROCEEDINGS
OF THE PIC INQUIRY
WORKSHOP

17th – 19th May 2019

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INTRODUCTION

Sources and Scope

This report has been prepared by Muitheri Wahome at the request of the PIC Commission of Inquiry. The report synthesizes the discussions and presentations given at the PIC Inquiry Workshop held on 17th – 19th May, 2019 at Irene Country Lodge (see Annexure A for Programme of the PIC Commission of Inquiry Workshop). I would like to thank Messrs. Tshepo Pule and Mark Davids of Peo Risk Management and others who assisted me in the preparation of this report.

The report follows the key Terms of Reference of the PIC Commission of Inquiry, namely:

1. PIC's clients and investment mandates
2. PIC's investments and investment processes
3. PIC's strategy and operating model
4. Governance processes at PIC

Accordingly, Chapter 1 briefly sets the PIC in context both in terms of its role and importance in South Africa and globally. Chapter 2 addresses the role of asset owners in the investment mandate setting process and the nature of pension fund as a legal entity separate from the employer, members and dependents. Chapter 3 examines the PIC's investment processes across listed and unlisted investments. Chapter 4 covers operating models and lessons to be learnt from South Africa and from the world's biggest sovereign wealth fund. Chapter 5 concludes with the lessons learnt coming out of the Workshop with a focus on governance practices.

Limitations of the report

In preparing this report, I have relied solely on the discussions and presentations given at the PIC Inquiry Workshop. Therefore, I have neither sought to, nor been obliged to verify their accuracy. While the information is believed to be reliable, I make no representations or warranty as to the accuracy of the information and accept no responsibility or liability for any error, omission, or inaccuracy of such information.

The report summarizes the major points that emerged from the presentations and is not intended to be a detailed review or official record of all potentially relevant mandate, governance, strategic, operating model and investment issues from the PIC Inquiry Workshop.

Muitheri Wahome
June 2019

CHAPTER 1: PIC LIMITED IN CONTEXT

1.1 The Public Investment Corporation Limited (“PIC”) has a demonstrated track record of over 100 years, a feat matched by very few asset managers globally. The predecessor to the PIC, the Public Debt Commissioners, began its work in 1911 and was incorporated in 2004¹ becoming the Public Investment Corporation Limited, with the South African government as its sole Shareholder. Since its inception, 108 years ago, the organization’s mandate and approach to investing has evolved (see **Table 1**) to include local and offshore, public and private markets. The move to corporatize the organization was deemed a critical step towards bolstering its investment skills and agility and to strengthening the PIC’s ability to execute its mandate.

Table 1: Evolution of the PIC Mandate

| Political era | Roles | Asset classes |
|---------------------------------------|--|---|
| 1910-1961 Union of South Africa | <ul style="list-style-type: none"> ▪ Public Debt Commissioners established 1911 ▪ Manages surplus and trust funds ▪ Debt management | Fixed income |
| 1961-1994 Republic of South Africa | <ul style="list-style-type: none"> ▪ Assets under management: R1.6bn, 1961 ▪ Public sector pension fund management ▪ Budget deficit funding ▪ Renamed Public Investment Commissioners in 1984 | Fixed income Money market |
| 1995- Democratic era | <ul style="list-style-type: none"> ▪ Becomes Public Investment Corporation Limited in 2004 ▪ Economic growth, development and transformation goals ▪ Reshaping the asset management industry by supporting black-owned investment firms ▪ Funding black economic empowerment ▪ ‘Lender of last resort’ to troubled SOEs | Equity, Inflation-linked bonds, Offshore, Africa, Developmental, Infrastructure |

1.2 The PIC Board represents the interest of the Shareholder and is currently chaired by the Deputy Minister of Finance. The PIC has access to regulators, legislators and political heads of the country. As a state-owned corporation, it is audited by the Auditor General and is required to report to Parliament per the terms of the Public Finance Management Act of 1999. The PIC is registered with the Financial Sector Conduct Authority (FSCA) as a financial services provider and is regulated under the Financial Advisory and Intermediary Services Act of 2002. In addition to its fiduciary duty to its clients, the PIC has an additional mandate from its Shareholder

¹ PIC Act of 2004 replaced the PIC Act of 1984

to contribute to the economic development of South Africa² and therefore open to be influenced by political considerations.

- 1.3 The PIC is the largest domestic asset manager in South Africa with ZAR2.083 trillion (US\$144 billion) in assets under management (AUM) as at 31st March 2018, which represents 42% of South Africa’s GDP. It has a diverse client base with 23 institutional public sector clients, each with different obligations and stakeholders that represent divergent interests and focus. The Corporation is profitable and pays dividends to its Shareholder.
- 1.4 The PIC has tremendous financial clout in South Africa given it manages the investments of the largest pension fund in the country, the Government Employees Pension Fund (GEPF), which ranks in the top 20 pension funds in the world on the basis of AUM³. The PIC is therefore integral to the financial well-being of millions of South Africans, and a significant driver of the overall economic prospects of the nation. How then the PIC manages public trust is fundamental.
- 1.5 Since 1995 to 2018, the PIC’s AUM has grown by a multiple 22 times, or a compound annual growth rate (CAGR) of approximately 14%, driven mainly by the performance of the local equity and bond markets during that period.
- 1.6 The PIC matches up well with both the life insurance sector and the collective investments schemes (unit trusts) in terms of aggregate AUM and far exceeds private pension market by AUM (see **Table 2**).

Table 2: PIC in context

| | 1995 | | 2018 |
|--|----------|----------|----------|
| | ZAR (bn) | | ZAR (bn) |
| PIC AUM* | 94.2 | 22 times | 2,083 |
| AUM (% of GDP) | 12.3% | | 42.7% |
| INSTITUTIONAL INVESTORS AUM (sector totals) | | | |
| Life insurance | 408 | | 2,816 |
| Private pensions | 112 | | 1,224 |
| Unit trusts | 34 | | 2,195 |

Source: PIC, ASISA, SARB *AUM - Assets under Management

- 1.7 The Corporation is significantly larger than its leading private sector peers by AUM and is more than three times the size of the biggest local asset manager, the Old Mutual Investment Group South Africa (OMIGSA). **Table 3** shows the Top 20 South

² PIC Integrated Report 2011, p.4

³ Pensions & Investments/ Willis Towers Watson 300 Analysis Year September 2017, p.39

African private sector asset management firms as ranked in the Alexander Forbes *Annual Retirement Fund Survey* for comparison.

Table 3: Top 20 Private Sector Asset Managers ranked by Total AUM as at 30 June 2018

| 2017 Rank | 2018 Rank | | Asset Manager | Total AUM (R m)* | Total SA Assets |
|-----------|-----------|----|------------------------------------|------------------|-----------------|
| 1 | 1 | - | Old Mutual Investment Group | 644721 | 492589 |
| 2 | 2 | - | Coronation Fund Managers | 531918 | 422247 |
| 3 | 3 | - | Investec Asset Management | 527429 | 318178 |
| 4 | 4 | - | Allan Gray Limited | 522334 | 342276 |
| 5 | 5 | - | STANLIB Asset Management | 483360 | 480064 |
| 6 | 6 | - | Sanlam Investment Management | 477767 | 379998 |
| 7 | 7 | - | Alexander Forbes Investments | 311937 | 244317 |
| - | 8 | NA | Nedgroup Investments | 249805 | 196629 |
| 9 | 9 | - | Sanlam Multi-Manager International | 208519 | 165593 |
| 8 | 10 | ▼ | Prudential Portfolio Managers | 207307 | 183341 |
| 10 | 11 | ▼ | Futuregrowth Asset Management | 177756 | 177755 |
| 13 | 12 | ▲ | Momentum Asset Managers | 139501 | 115349 |
| 14 | 13 | ▲ | Taquanta Asset Managers | 138409 | 134404 |
| 11 | 14 | ▼ | Foord Asset Management | 136094 | 101541 |
| 16 | 15 | ▲ | Absa Asset Management | 131027 | 105478 |
| 17 | 16 | ▲ | Old Mutual Multi Managers | 101252 | 75770 |
| 15 | 17 | ▼ | Momentum Manager of Managers | 98588 | 79881 |
| 19 | 18 | ▲ | Prescient Investment Management | 86381 | 84612 |
| 20 | 19 | ▲ | Abax Investments | 76366 | 69301 |
| 21 | 20 | ▲ | STANLIB Multi Managers | 75803 | 45570 |

Source: Alexander Forbes Annual Retirement Fund Survey. Figures in Rand millions.

*AUM as reported in the Alexander Forbes AUM survey June 2018 – Ranking are based on the Total AUM figures. Please note that due to standardization methodology, numbers may be overstated.

- 1.8 The PIC in aggregate owns almost one-third of South African government bonds, more than half of government issued inflation-linked bonds, and more than 10% of the publicly traded equities by value on the JSE Securities Exchange. Further, the PIC is critical to South Africa's economic development and transformation goals given it is one of the biggest investors in economic and social infrastructure and black economic empowerment funding through the Isibaya fund. A key component of the organization's vision is to be a leader in impact investments targeting both a financial and social return.
- 1.9 Today, the PIC is a hybrid entity: it is effectively both an asset manager and a manager-of-managers (multi-manager). It is the largest passive (index tracking) asset manager in the country and plays an influential role in financial markets as well as capital allocation in the asset management industry through its asset manager selection role, where it allocates assets to black-owned investment firms and others. Given this transformative role, there is a further compelling and legitimate public interest in the way the PIC is managed.

CHAPTER 2: PIC CLIENT INVESTMENT MANDATES

No. 41979 GOVERNMENT GAZETTE, 17 OCTOBER 2018

The Commission must enquire into, make finding, report on and make recommendations on the following:

1.17 Whether the PIC has given effect to its clients' mandates as required by the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002) and any applicable legislation.

Overview

2.1 The PIC manages assets exclusively for the public sector and has a diverse range of clients including pension and provident funds, social security and guardian funds. The GEPF accounts for almost 90% of the assets managed by the PIC (see **Table 4** below for the composition of the PIC client base). The PIC levies a management fee to its clients which is a fixed percentage of the assets under management. The PIC does not earn performance fees.

Table 4: Composition of PIC Client Base

| Client | Allocation (%) |
|--|----------------|
| Government Employees Pension Fund (GEPF) | 87.12% |
| Unemployment Insurance Fund (UIF) | 7.53% |
| Compensation Commissioner (CC) | 2.02% |
| Compensation Commissioner Pension Fund (CP) | 1.12% |
| Association Institutions Pension Fund (AIPF) | 0.77% |
| Other* | 1.44% |
| Total | 100.00% |

Source: PIC

2.2 The Compensation Commissioner Pension Fund⁴ was the only PIC client that presented at the Inquiry Workshop, although the Unemployment Insurance Fund (UIF) submitted a presentation as part of the record (see **Appendix A**). The GEPF is expected to present in due course at the Commission on its mandate to the PIC and on the role of the Trustee Board in the client mandating process. The following section is therefore based on the discussions at the PIC Inquiry Workshop following

⁴ The Compensation Fund Investment Portfolio Performance, 17 May 2019

presentations by the Compensation Fund, the PIC⁵ and an independent legal expert⁶, without access to the terms of the GEPF's mandate.

The Client Mandating Process

- 2.3 It is a client's responsibility to determine their fund's objectives, its investment philosophy and other elements of its investment strategies, and to decide the strategic or long-term asset allocation, which is the most important determinant of investment performance. The investment policy statement documents the approach to investments. This is codified in the investment mandate agreed with the fund manager.
- 2.4 Typically, the investment mandate documents the client's risk preference, performance objectives including benchmark and return targets, and investment time horizon. It also specifies among other things, the manager strategy, the extent of manager discretion allowed, when special approvals are required from the client, any restrictions, the investment universe, reporting frequency, proxy voting policy, responsible investment policy, conflict of interest policy, hedging policy, brokerage commission policy, the fee structure *etc.*
- 2.5 In the event of a breach of its investment mandate, the PIC is expected to send a letter to its clients detailing the breach and the reasons for it.

The consequences of a breach for a typical asset manager can range from an interdiction against the manager on the basis of improper conduct, a cancellation of the asset management agreement, or a claim for damages and a clawback of fees paid to the asset manager. Transactions concluded by an asset manager in breach of its duties may be void or voidable and the asset manager's FAIS license may be withdrawn. (This does not apply to the PIC).

The asset manager and or its senior employees may also be found guilty of criminal offences if they violated section 2 of the Financial Institutions (Protection of Funds) Act of 2001.⁷

The Nature of Pension Funds

- 2.6 Pension funds are special purpose legal entities through which people make provisions for retirement. Most pension funds in South Africa are regulated under the Pension Fund Act of 1956. A few are exempt: these include the GEPF, the Post

⁵ PIC: A look at the investments and their processes, 17 May 2019

⁶ Legal framework within which the PIC is required to exercise investment powers on behalf of the GEPF Memo by Rosemary Hunter, 17 May 2019

⁷ Pension Fund Investments: Legal Framework by Rosemary Hunter

Office Retirement Fund, the Telkom Pension Fund, and the Transnet Pension, all of which are legal entities established by their own particular statutes, and to which the State has, or has had, substantial direct and contingent financial exposure.

- 2.7 Pension funds are important vehicles for the provision of social security. They form a critical part of the way in which the state fulfils its constitutional obligation to provide social security benefits. This can be through an occupational fund where employees together with employers contribute to savings by allocating a portion of their remuneration to the pension fund.
- 2.8 To encourage South Africans to save for retirement, the government provides tax incentives on the contributions to pension funds, which has boosted the level of participation in occupational funds in South Africa relative to the rest of the world. In 2017, over 3.17 million people received tax deductions on contributions at a cost of R73 billion or approximately R21,500⁸ per taxpayer to the fiscus.
- 2.9 Pension funds have their own interests which can be entirely separate from the interests of their members, the employer, and the dependents of members. The board of a fund must exercise the powers which belong to the fund to deliver the pension benefits in the very long-term. How the assets are invested to meet future liabilities is therefore an important consideration.

Government Employees Pension Fund (GEPF)

- 2.10 The GEPF is a defined benefit, balance of cost, pension fund to which the components of the national and provincial governments, in their capacities as employers of its in-service members, are required to contribute at rates determined from time to time with due regard to the results of triennial valuations of the fund. The Fund collects contributions and pays benefits when they fall due, thereby fulfilling the purpose of the pension fund to its members and beneficiaries. As the largest client to the PIC and by virtue of its sheer size, a failure of the PIC, or by extension, a failure of any significant investments made on behalf of the GEPF would expose the South African government to material financial vulnerability.
- 2.11 The GEPF Board is required to determine its investment policy(ies) in consultation with the Minister of Finance and may not make any changes to that policy without the Minister's approval. The Minister, who has the right to appoint half of the GEPF Board members, also has a veto right over changes to the GEPF's investment policy that may negatively impact the Government's financial obligations towards the Fund as the guarantor of the defined benefit fund. The GEPF Board is not expected to have expert knowledge on all aspects of the pension fund and may take on and

⁸ Legal framework within which the PIC is required to exercise investment powers on behalf of the GEPF Memo by Rosemary Hunter, p.7

rely on expert advice as needed. It can also delegate the management of the investments to professionals. The Fund's long-term objectives published on its website are: (1) To provide members and their dependents with the benefits promised in the Rules. (2) To target the granting of full inflationary increases to pensions, subject to affordability. (3) To keep the employer contribution rate as stable as possible, with any changes to the employer contribution rate being introduced gradually. The GEPF Board has appointed the PIC to manage the assets of the Fund.

- 2.12 As a registered Financial Services Provider (FSP), the PIC is governed by the Financial Advisory and Intermediary Services Act of 2002 (FAIS) which is designed to protect consumers of financial products and services. FAIS also applies to the FSP's representatives, or any person who gives financial advice or who provides an intermediary service (*e.g.*, the collection of premiums). The FAIS General Code of Conduct for FSPs requires them to render financial services honestly, fairly, with due skill, care and diligence in the interests of clients and the integrity of the financial services industry and to avoid conflicts between interests and duties. Similarly, the Financial Institutions (Protection of Funds) Act of 2001 requires financial institutions to act with utmost good faith and exercise proper care and diligence in the affairs of their clients.
- 2.13 The GEPF Board is responsible for ensuring the pension assets are invested in accordance with the investment mandate, which is jointly agreed with the PIC. The investment mandate which formalizes the relationship and expectations of both parties therefore becomes the reference point for ongoing performance monitoring and evaluation.
- 2.14 The GEPF aims to ensure financial sustainability into the future while having a large exposure to the South African economy. The GEPF's long-term asset allocation requires 90% invested in South Africa across equities, bonds, property, with the majority of assets invested on the JSE Securities Exchange. The balance of 10% is split equally between offshore investments and in the rest of Africa ex-South Africa. This allocation is modest in comparison to other FSCA regulated funds that can invest up to 30% outside of South Africa.
- 2.15 Part of the PIC mandate from its clients is to invest in private equity, infrastructure, direct property, and impact investments to varying allocations based on the client mandate. The GEPF has publicly stated its intention to increase its allocation to developmental investments in due course. These investments aim to stimulate economic growth and transformation. This is in recognition that without adequate infrastructure, a fundamental requirement of a growing economy, the Fund's investments in the other parts of the economy could be compromised *e.g.*, if goods cannot make it to the ports, or there is insufficient electricity to power the economy, this hampers growth. The GEPF Board therefore has the right to preview unlisted

transactions above certain thresholds so that its Board or investment committee, in the context of its investment framework can consider and approve such transactions. Currently, transactions above R2 billion⁹ are required to be submitted for final approval. The PIC's investment activity must therefore be aligned with client mandates, relevant regulations and risk objectives.

- 2.16 Importantly, developmental investment is not philanthropy or grant funding: it must generate a financial return.

The Compensation Fund and the Compensation Commissioners Portfolio

- 2.17 The Compensation Fund shared insights into their investment strategy and policy that forms the basis of the investment mandate as well as the performance of their two funds. The Compensation Fund is a Schedule 3A public entity of the Department of Labour, established under the terms of Section 15 of the Compensation for Occupational Injuries and Diseases Act as amended. The main objective of the Act is to provide compensation for disabilities caused by occupational injuries or diseases sustained or contracted by employees or for death resulting from such injuries or diseases and provide for matters connected therewith.

- 2.18 The Compensation Fund has appointed the PIC as its sole asset manager to manage and administer investment portfolios on behalf of the Compensation Fund. The Compensation fund sets out the responsibilities of the PIC which include:

- Implementing the investment strategy as mandated by the Fund
- Providing reports for monitoring purposes and preparation of the management accounts by the Fund

- 2.19 The Compensation Fund collects premiums from employers and invests them with the PIC according to its investment policy, as approved by the Director General of the Department of Labour. The investment objectives that have been agreed between the PIC and the Compensation Fund as part of the investment mandate as follows:

- Primary objective – to ensure capital preservation of all assets
- Secondary objective – to ensure that after providing for the liabilities of the Fund, that the investment growth is sufficient to cover the future benefit improvements.
- The investment return objective is to achieve returns in excess of headline inflation plus 3.5% over a rolling two-year period.

- 2.20 The Compensation Fund has two investment portfolios managed by the Public Investment Corporation (PIC) which are:

⁹ PIC Commission of Inquiry Workshop 2019 Legal Framework, Presentation by Lindiwe Dhlamini, p.17

1) The Compensation Commissioner's (CC) portfolio

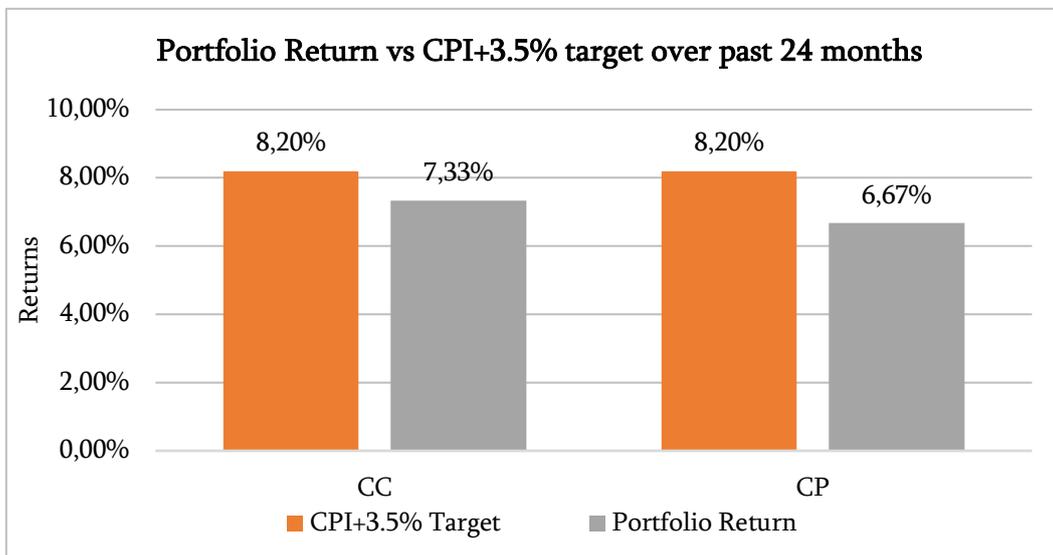
The purpose of the CC portfolio is to provide for all benefits and expenses yet to be paid in respect of accidents that happened before the valuation date of the reserve fund.

2) The Compensation Pension portfolio (CP).

CP portfolio's purpose is to provide for future pensions and Constant Attendance Allowance (CAA) payments that had been granted before.

Figure 1 shows portfolio returns on the two portfolios versus the investment target of inflation plus 3.5% over the past 24 months.

Figure 1: Portfolio Returns versus CPI+3.5% target over the past 24 months



Source: Compensation Fund

Note: Past performance is not an indicator of future performance

Table 5 shows the asset class ranges and limits per asset class as set out in the investment strategy. The PIC can take short-term tactical asset allocation decisions within the minimum and maximum asset allocation ranges, which the investment team reviews quarterly.

Table 5: Compensation Fund Investment Strategy

| Asset Classes | Min. Range | SAA | Max. Range | Benchmark ¹⁰ |
|--|------------|-------|------------|-------------------------|
| Bonds (Nominal and Inflation Linked Bonds) | 55% | 59.5% | 62% | 50% ALBI/ 50% CILI |
| Equities | 20% | 23% | 27% | FTSE/JSE SWIX |
| Developmental Investments | 5% | 10% | 10% | Case by case basis |
| Unlisted Property | 2.5% | 2.5% | 5% | IPD Index |
| Cash & Money Market | 3% | 5% | 10% | STEFI Composite |
| Total | | 100% | | |

Source: Compensation Fund

2.21 To determine if assets are being managed in compliance with policies and procedures and if the PIC is in compliance with the mandate requires clear reporting so that a client can understand the investment performance. Without detailed attribution of asset class performance, it is not possible to identify which investments had added or detracted value overall and effectively monitor compliance with investment policies. The Compensation Fund highlighted internal data challenges in reconciling, assessing and compiling long-term investment performance due to internal staff changes.

2.22 An analysis of the actual asset allocation and the strategic (long-term) asset allocation shown in **Table 10**, for example, shows that the asset mix is not in line with the Strategic targets, with allocations to cash, unlisted property and developmental assets outside of the determined ranges. The majority of assets are invested in government bonds and money market instruments, and the investment mandate has credit risk limits as set out in the Public Finance Management Act Treasury Regulation 31.3.2 (see **Appendix B**).

Table 6: Compensation Fund: Actual Asset Allocation compared to Strategic Target

| Asset Classes | Actual | Strategic Target | Range |
|--|--------|------------------|-----------|
| Bonds (Nominal and Inflation Linked Bonds) | 60% | 59.5% | 55% - 62% |
| Equities | 21% | 23% | 20% - 27% |
| Developmental Investments | 3% | 10% | 5% - 10% |
| Unlisted Property | 0% | 2.5% | 2.5% - 5% |
| Cash & Money Market | 16% | 5% | 3% - 10% |
| Total | 100% | 100% | |

Source: Compensation Fund

¹⁰ ALBI: All Bond Index;
 CILI: Composite Inflation Linked Index;
 SWIX: Shareholder Weighted Index;
 IPD: Investment Property Databank Index;
 STEFI: Short-Term Fixed-Interest Composite Index

Developmental Investments

2.23 When appraising developmental assets, the Compensation Fund looks at financial performance against expectations as well as social impact. In 2019, of the 17 developmental investments made on behalf of the Fund, 8 were performing in line with expectations, 6 were distressed with low prospects of recoverability of the Fund's investment and 3 were underperforming with significant variance to budgeted revenue, governance failure and breach of contract. The high number of distressed and potentially unrecoverable assets are a red flag and suggest that a careful review of the investment processes undertaken by the PIC may be required to determine if there has been either misconduct or non-compliance with the client mandate and guidelines.

CHAPTER 3: INVESTMENTS AND INVESTMENT PROCESSES

No. 41979 GOVERNMENT GAZETTE, 17 OCTOBER 2018

The Commission must enquire into, make finding, report on and make recommendations on the following:

1.1 Whether any alleged impropriety regarding investment decisions by the PIC in media reports in 2017 and 2018 contravened any legislation, PIC policy or contractual obligations and resulted in any undue benefit for any PIC director, or employee or any associate or family member of any PIC director or employee at the time.

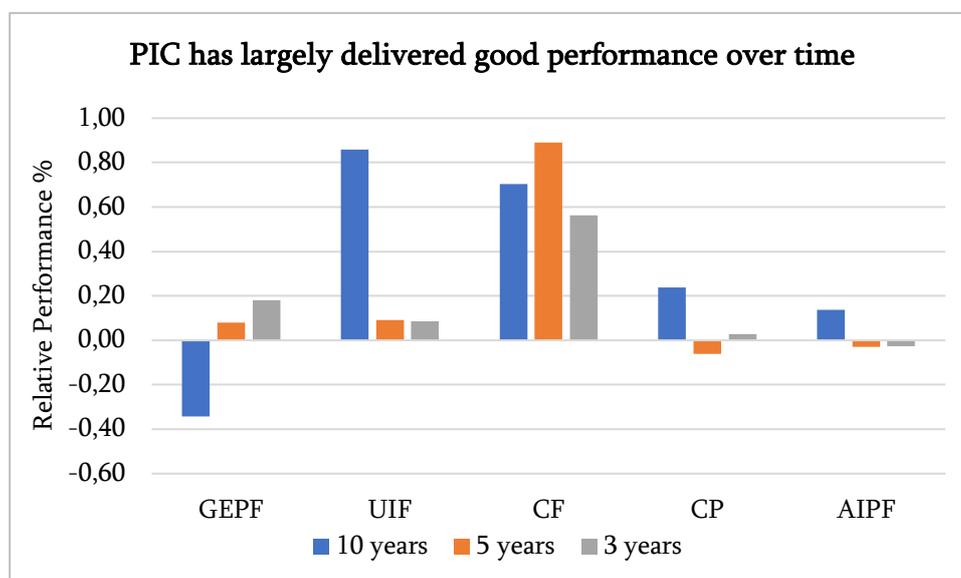
3.1 The PIC presented its investment process and performance at the PIC Inquiry Workshop¹¹. This section summarizes the different processes used to manage the PIC's assets. It is important to note that the GEPF mandate was not available to participants at the Inquiry Workshop. As such, participants could therefore not comment on the question of whether any of the PIC's investment decisions under consideration by the Commission were made in breach of any of its investment mandates. This is an issue into which the Commission itself will have to separately address.

¹¹ PIC Investment Framework Strategy Process & Performance across all asset classes, May 2018

Performance Overview

3.2 The PIC is focused on delivering attractive risk-adjusted returns in order for its clients to meet their obligations. The institution has produced results broadly in-line with or above the relevant benchmarks for its clients over the past 10 years. **Figure 1** shows PIC investment performance for its respective clients relative to benchmarks over different periods ending 31st March, 2018.

Figure 2: PIC Performance over 1, 5 and 10 Years across Clients as at 31 March 2018



Source: PIC

Note: Past performance is not an indicator of future performance

Relative performance: Returns above benchmark

Investment Philosophy

- 3.3 The PIC investment philosophy is underpinned by two broad objectives: namely generating financial returns and sustainable Environmental & Social Governance (ESG) impact. This approach is supported by a risk management framework that is embedded in its organizational and decision-making structures. The PIC believes that a focus on the following six principles contributes to value-added performance.
- a. **Risk management.** The efficient use of risk budget by avoiding risks that do not provide commensurate returns and targeting a low volatility portfolio
 - b. **Diversification.** Well diversified portfolios to produce a stable distribution of returns
 - c. **Time horizon.** Investment strategies will generally be long-term in nature and will avoid *ad hoc* decision-making based on short-term factors
 - d. **Market efficiency.** Markets differ in degree of efficiency at macro, sector and asset level. Investment strategies will reflect a mix of active and passive investments, with passive investments being overweight in more efficient markets
 - e. **Valuation & analysis.** Valuation and analysis based on fundamentals generally produce superior return/risk results. Investment strategies will focus on fundamentally based processes.
 - f. **Cost.** Cost management adds significant value to production of excess return. Investment strategies will actively seek to minimize overall transaction costs.

(Source: PIC Integrated Report 2018)

Role of the Investment Committee in Investment Process

- 3.4 The PIC Board has established various committees to assist it in discharging its duties and responsibilities. The Investment Committee (IC) was established to provide oversight and decision-making in respect of all investment activities. The primary purpose of the IC is to assist the Board in discharging its statutory duties and oversight responsibilities in relation to listed and unlisted (including direct property) investment activities.
- 3.5 The IC is comprised of a majority of Independent, Non-Executive Board Directors. Detailed information of the responsibilities and duties of the IC are found in **Appendix C**. Additionally, the team structure and the role of the IC from Old Mutual Investment Group (OMIG) in South Africa can be found in **Appendix D** for comparison.
- 3.6 By contrast, industry practice shared at the Inquiry Workshop demonstrated a far more flexible and decentralized approach to investment decision-making at large asset management firms. At OMIG and Sanlam Investments, for example, the

Boards have overall responsibility over governance, policies and oversight but no direct role in investment decision-making which is decentralized to respective investment committees. Both aim to create environments that encourage risk-taking and do not only evaluate performance, particularly in the case of evaluating a negative outcome but also carefully weigh the processes undertaken to get to a particular outcome.

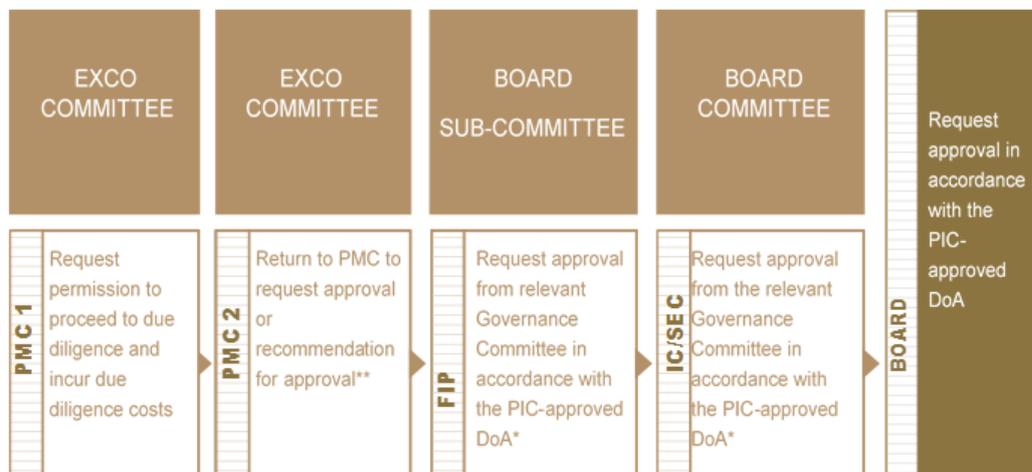
- 3.7 Unlike the PIC, both had more than one Investment Committee (IC) as different skill sets are required for listed, unlisted, and multi-manager investments. There was a CIO or other officer with visibility across the different ICs to ensure a consistent approach was taken, and to avoid layering on risks. In addition, this ensured that there was enough capacity to review the volume of transactions. Capacity constraints within the PIC were identified as an area of weakness, which led on occasion to governance processes being compromised. Capacity constraints, made worse by recent staff turnover across the investment team, was raised as a matter that needs urgent attention.

Investment Policies and Framework

- 3.8 All investment transactions at the PIC are subject to various policies, as well as appropriate ESG frameworks, all of which are based on international best practice and are aligned with applicable legislation and regulations.
- 3.9 The PIC has an approved Delegation of Authority (DOA) framework in place, delegating responsibilities for different transactions to a variety of role-players in the investment divisions (*i.e.*, Listed, Unlisted, and Property Investments), as well as to employees in Risk Management, Legal, Compliance, Corporate Affairs, and Investment Management. The DOA also outlines the powers of the Board, its committees, and those of the Executive Directors.
- 3.10 The designated process includes rigorous interventions at various stages of the investment process include independent investment reviews and reports, which are considered alongside the investment appraisal report from Risk, Legal and ESG teams. Recent media coverage suggests that investment allocation and approval processes have not always been followed as prescribed.
- 3.11 The Investment Committee has a number of sub-committees that deal specifically with specialist investments. **Figure 3** shows the composition of the Investment appraisal committees in more detail. The PIC approval committees that preside over investment considerations comprise of the Portfolio Management Committee (PMC), the Fund Investment Panels (FIP) which cover direct property, private equity, priority sectors and small medium enterprises and social and economic infrastructure and environment sustainability, the Investment Committee and the

Board. Depending on the size of the transaction, the investment proposal can go to the PMC, FIP or to the client for approval.

Figure 3: Delegation of Authority Framework

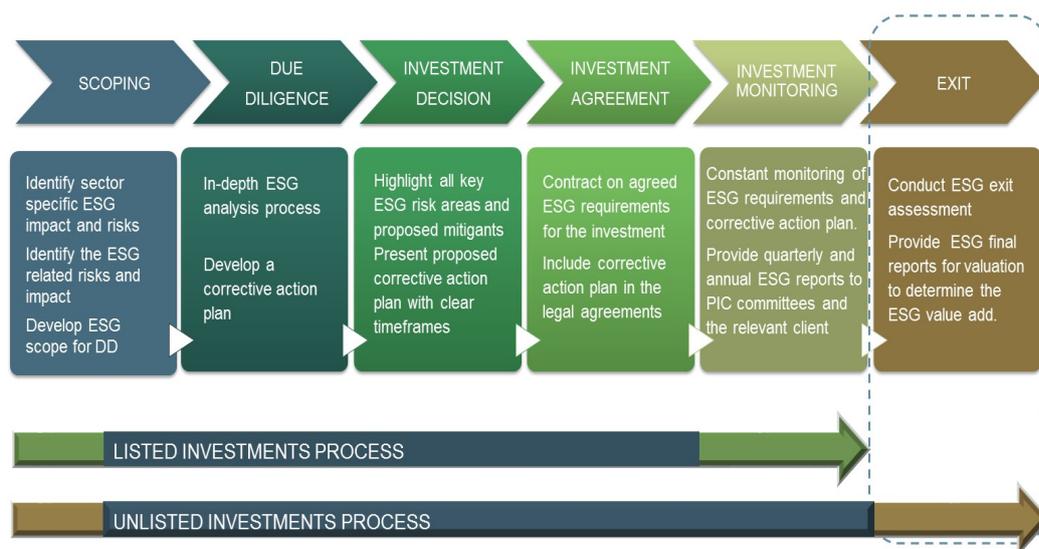


Source: PIC

Integration of ESG in the Investment Process

3.12 The PIC is a signatory to the UN Principles of Responsible Investments (UN PRI) and the Code for Responsible Investing in South Africa (CRISA). It believes that a strong commitment to the highest standards of business ethics and sound corporate governance is essential to creating long-term value for clients. The PIC ESG investment practices are guided by policies specific to the different asset classes including listed equities, fixed income, public entities/SOEs, and unlisted investments. **Figure 4** illustrates how ESG is integrated in the investment process.

Figure 4: PIC Integration of ESG in Investment Process



Source: PIC

3.13 The PIC's responsible investing activities, which have been integrated with its investment process include:

- Conducting ESG quality reviews
- Exercising voting rights (proxy voting)
- Liaising with investee companies
- Influencing the ESG landscape through shareholder activism

3.14 As the largest single investor in the public markets, the PIC policies around corporate governance and shareholder engagement, gives the corporation significant influence and import in the South African market.

3.15 Best practice recommendations shared at the Inquiry Workshop that can promote sustainability practices are shown in **Figure 5**.

Figure 5: Summary Recommendations for ESG Integration

| Key measures for ESG Integration | Benefits | Challenges |
|---|---|--|
| Build internal capacity and conviction | Informed on ESG relevance within companies and investments Clear investment guidelines Clarity for companies / external manager | Building knowledge Application and integration Vision |
| Alignment of ESG investment guidelines with internal and external portfolio management > Allocate to ESG > Report on portfolio ESG profile and performance | Holistic ESG approach in portfolios Steer companies based on you investment Ability to reconcile portfolios on ESG and basis for engagement | Applying vision and conviction in investment processes Reporting metrics and data |
| Partner and collaborate | Work based on global best practices Gain broader expertise and adoption | Selecting frameworks Selecting partners |

| Three concrete steps | Benefits | Challenges |
|---|---|--|
| 1. Defining vision and philosophy: set priorities | Select internationally accepted codes and specific sustainability topics / outcomes | Selection and relevance Making it specific and Monitoring |
| 2. Implementing > Considering overlays > Integrating ESG in portfolios > Manager selection and monitoring | Voting and Engagement • Less changes in portfolio Existing portfolios can adopt ESG view Aligned external portfolios | Alignment with ESG view Changing investment process New basis for selection and metrics for monitoring |
| 3. Integrating and evaluating | Start structured ESG process: clear objectives | Setting objectives and ambition |

Source: Robeco Institutional Asset Management N.V.

Deconstructing the PIC Assets under Management

3.16 As at 31st March, 2018, the PIC assets under management were ZAR 2,083 trillion. The PIC had a staff complement of 372, of whom 188 (50.5%) are investment professionals. Although not directly comparable, Old Mutual Investment Group (OMIG) in South Africa has a staff complement of 112 just in its unlisted investments team, of whom 72 (65.2%) are investment professionals.

3.17 The following tables and charts provide insight into how assets at the PIC are split at different levels including by asset class, internally vs. externally managed, and by geography.

Table 7: PIC Split of Total Assets by Asset Class

| LISTED | | | UNLISTED | | |
|-------------------------|--------------|---------------|------------------|------------|--------------|
| | ZAR bn | % | | ZAR bn | % |
| Equities (Internal) | 832* | 39.94% | Private equity | 21 | 1.02% |
| Bonds (Internal) | 692 | 33.20% | Impact investing | 49 | 2.35% |
| Listed Funds (External) | 194 | 9.32% | Property | 47 | 2.26% |
| Cash | 112 | 5.38% | Africa unlisted | 6 | 0.30% |
| Global Equities | 91 | 4.38% | | | |
| Global Bonds | 21 | 0.99% | | | |
| Africa ex. ZA | 18 | 0.86% | | | |
| | 1,959 | 94.07% | | 123 | 5.93% |

Source: PIC Integrated Report 2018

*Includes Listed Properties

Figure 6: Split of Assets Between Internally Managed and Externally Managed Assets

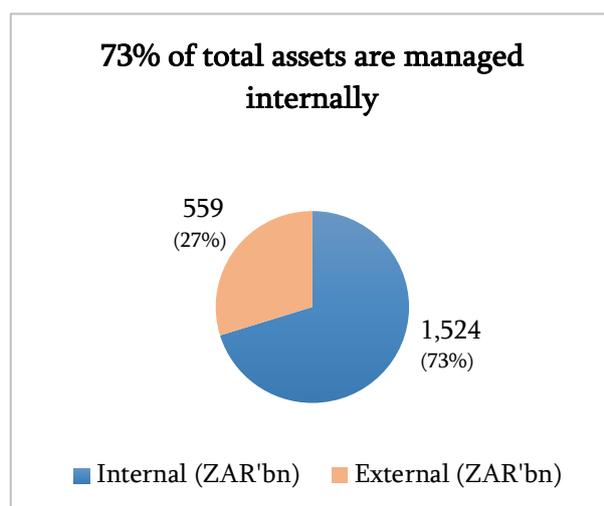
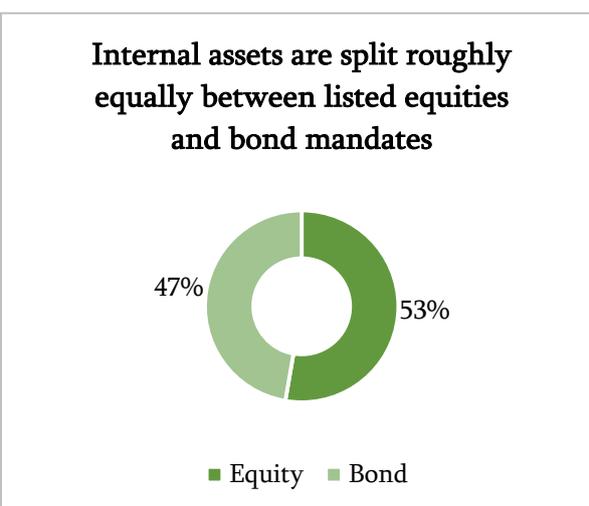


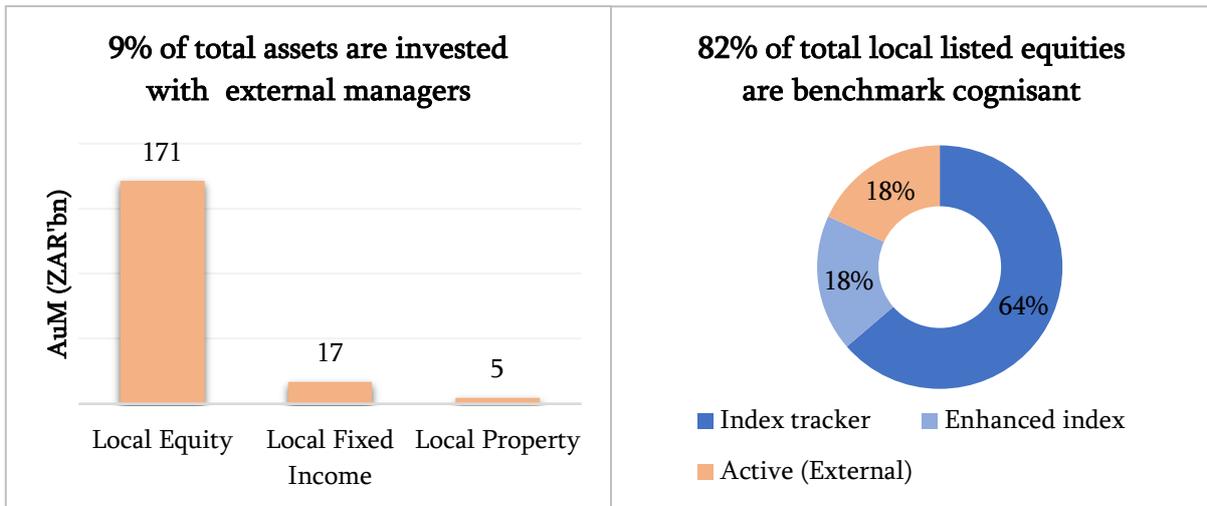
Figure 7: Split of Assets Between Internally Managed Equity and Bond funds



Source: PIC Integrated Report 2018

Figure 8: Split of Externally Managed Assets by Asset Class

Figure 9: Split of Local Listed Equities by Strategy



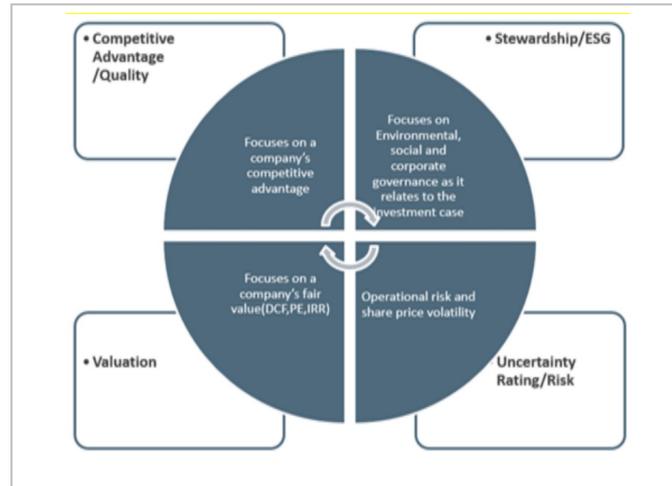
Source: PIC Integrated Report 2018

Listed Investments

Internally managed listed investments

- 3.18 A larger portion (53%) of the internally managed listed equity assets are managed passively through (1) tracker fund and (2) enhanced index strategies. A tracker fund is an index fund that tracks a broad market index or a segment thereof. These funds seek to replicate the holdings and performance of a designated index. Tracker funds are designed to offer investors cost efficient exposure to an entire index.
- 3.19 The PIC uses an index tracking strategy to replicate the holdings and performance of the Shareholder Weighted Index (SWIX) at a maximum tracking error of 0.5%. Passive investments account for 64% of the total local listed equity mandates at the PIC (see **Figure 9**). Strong equity markets have resulted in good investment returns for the passive investment strategy.
- 3.20 This type of investing is widely employed by some of the largest asset managers across the globe. For example, BlackRock, which is the largest money manager in the world, makes use of index tracking as part of their core offering. Other examples include the likes of Satrix in South Africa and the Norwegian Sovereign Wealth Fund who use index tracking to gain exposure to the broader market at a low cost.
- 3.21 On the other hand, an enhanced index fund follows a strategy that seeks to enhance the returns of an index by using active management of the weightings of holdings for additional return. The PIC uses an enhanced index strategy on 18% of the total local listed equity assets at a maximum tracking error of 1.5%.
- 3.22 This portion of the portfolio is managed in recognition that financial markets can be inefficient due to behavioral biases that can cause divergences between a company's fundamental value and its market price. **Figure 10** illustrates the 4-Factor investment process used to identify stock opportunities for the enhanced index fund. The 4 factors include competitive advantage and quality, stewardship and ESG, uncertainty and risk, and valuation.
- 3.23 The remaining 18% of the local listed equity mandates is managed on an active basis and is discussed in the next section. Almost half of the internally managed assets (47%) are allocated to bonds. These assets are also managed passively to track the holdings and performance of the All Bond Index (ALBI) and the Composite Inflation Linked Index (CILI). Both these strategies employed for equities and bonds have historically been successfully managed and have achieved their long-term objectives.

Figure 10: 4-Factor Investment Process for Enhanced Index Fund

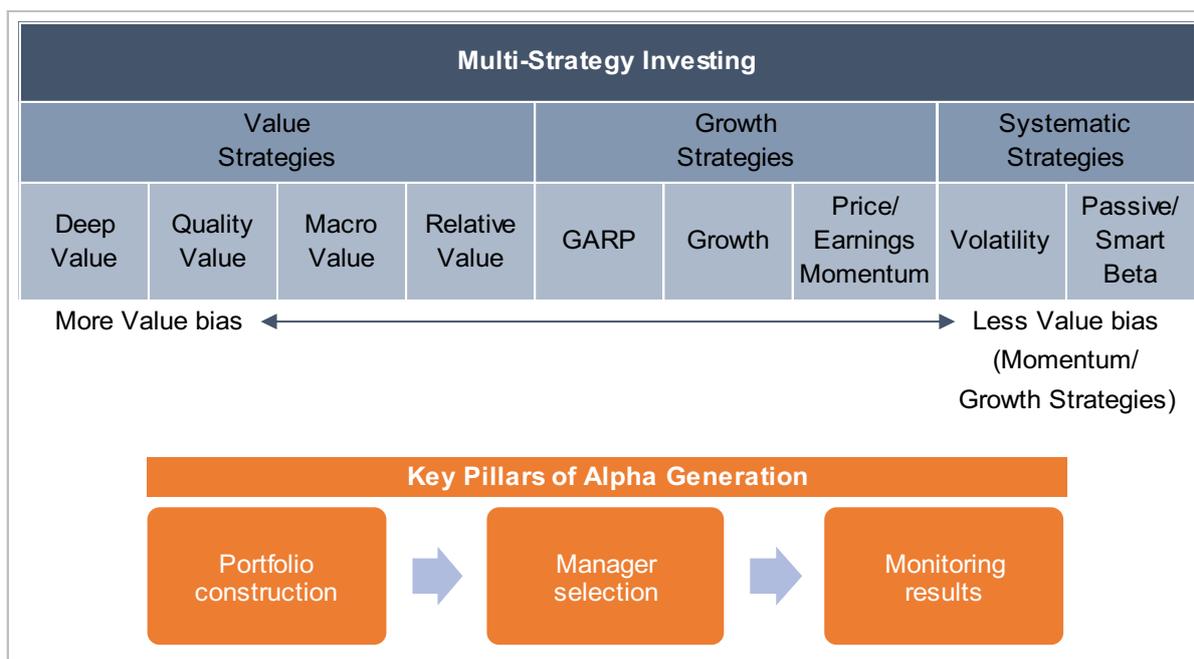


Source: PIC

Externally managed listed investments

- 3.24 The PIC outsources the investment management of 22% of its total listed assets across various asset classes. This includes local equities, local fixed income, local properties, offshore equities, and offshore bonds.
- 3.25 The team uses a specialist multi-managed approach to manage all external local assets (see **Figure 8**), which is higher maintenance to build and design than a fully passive approach. Clear processes are required for manager research and selection, portfolio construction, and monitoring and review.
- 3.26 The aim is to create robust solutions by adhering to portfolio construction principles of diversification and risk management. The stringent selection and monitoring processes employed by the team ensures that the portfolio meets the criteria of a well-constructed solution.
- 3.27 The PIC combines qualitative factors, including diversity of styles and philosophy with quantitative risk factors. **Figure 11** shows the Multi-manager investment approach including the types of strategies used as well as the key pillars of alpha generation. Allocating resources in the right asset classes, and portfolio rebalancing are additional crucial factors required to generate sustainable value-added returns.

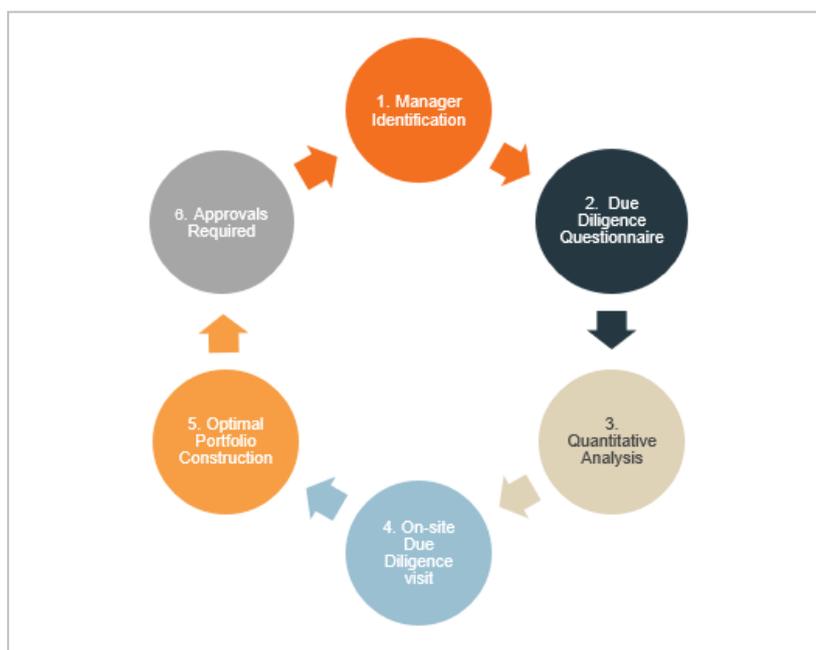
Figure 11: Multi-manager Investment Approach and Key Pillars of Alpha Generation



Source: PIC

3.28 The due diligence process incorporates Environmental Social and Governance (ESG), risk, and legal assessments. The managers are appointed through a request for proposal (RFP) process. The PIC then selects managers and creates a reserve list of managers that is researched and monitored regularly. This enables the PIC to act quickly should the need for a manager change arise. **Figure 12** demonstrates the PIC manager selection process.

Figure 12: PIC Manager Selection Process



Source: PIC

- 3.29 The selected managers manage their respective portfolios on an active basis relying on analytical research, forecasts, and their individual judgment and experience in making their investment decisions. This type of investing has a specific goal of outperforming a designated benchmark index or target return and therefore comes at a higher cost. External listed equity asset managers manage assets on an active basis with a maximum tracking error of 8%.
- 3.30 The offshore equities are currently managed passively although the GEPF mandate allows the PIC to invest in different investment strategies. The global portfolio has an 80% allocation to developed markets and 20% to emerging markets. The offshore bonds have a 70% allocation that is passively managed with 30% allocated to actively managed strategies.
- 3.31 The PIC as it is currently structured, does not have the necessary in-house skills and resources to manage offshore assets; it therefore makes sense to appoint global managers to invest its clients' offshore assets.

Unlisted Investments

- 3.32 Unlisted investments as at 31 March 2018 were ZAR 123 billion or 6% of the PIC assets under management. The charts and tables in this section demonstrate the breakdown of the unlisted assets at the PIC.
- 3.33 The PIC has significant influence in the private equity, infrastructure, and impact investment arenas in South Africa by virtue of being an important source of risk capital given its scale. Indeed, the PIC is frequently the first investor to fund new investment arenas *e.g.*, the Renewable Energy IPP program (REIPP), where the PIC's early efforts were important in catalysing significant local and international investor participation in the renewable energy sector.
- 3.34 Unlisted investments are investments into shares of companies or assets that are not traded on the open market, which makes them harder to sell than publicly listed investments. One of the capital pools available is private equity sourced from individual investors and institutional funds.
- 3.35 The rationale for investing in unlisted assets makes sense for several reasons:
- a. For diversification benefits and improving client risk-adjusted returns;
 - b. Opportunities to invest in economic sectors not accessible through listed investments;
 - c. Listed investment activities comprise the exchange secondary paper only as opposed to the creation of new assets;
 - d. Active investor by targeting sectors and opportunities that contribute and stimulate economic growth;
 - e. Overall portfolio diversification given lower correlation with public market returns reduces portfolio volatility; and
 - f. Affords crowding-in ahead of and alongside other investors to support development investment opportunities that would otherwise not attract public market funding.

The Isibaya Fund

- 3.36 The Isibaya Fund accounts for over 60% of the PIC's unlisted investments (see **Table 8**). Impact investing accounts for the largest allocation at 40%, followed by private equity at 17% and Africa 5%.
- 3.37 Impact investing strategies have gained significant support as a viable means for generating positive financial returns while addressing pressing social and environmental challenges. In 2018, the size of global impact investing capital was estimated at US\$502 billion, accounting for less than 1% of more than US\$80 trillion

invested in the global equity markets. In contrast, total assets available locally for impact investing are estimated at 2.6% of the total financial assets in South Africa¹².

Table 8: Composition of the PIC Unlisted Investment Portfolio

| Portfolio | Sub-portfolio | ZAR bn | % |
|-------------------|------------------|--------|------|
| Isibaya | Private equity | 21 | 17% |
| | Impact investing | 49 | 40% |
| | Africa ex. ZA | 6 | 5% |
| Unlisted Property | Property | 47 | 38% |
| Totals | | 123 | 100% |

Source: PIC Integrated Report 2018

Figure 14: Comparison of Listed Assets against Unlisted

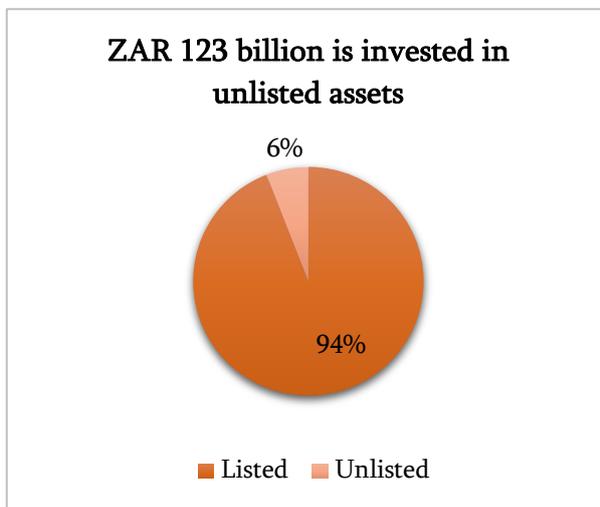
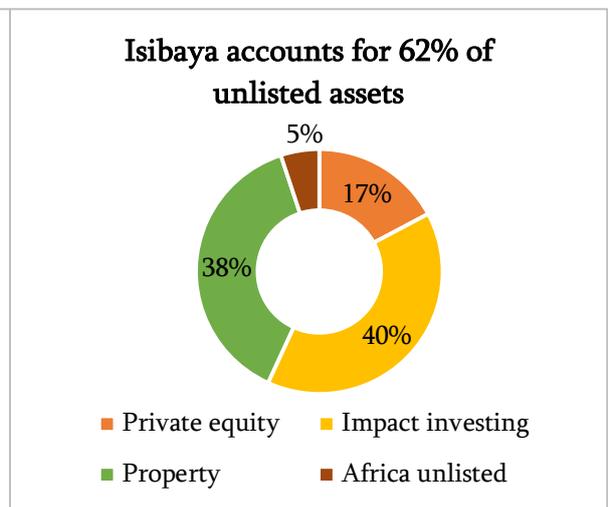


Figure 13: Composition of the PIC Unlisted Portfolio



Source: PIC Integrated Report 2018

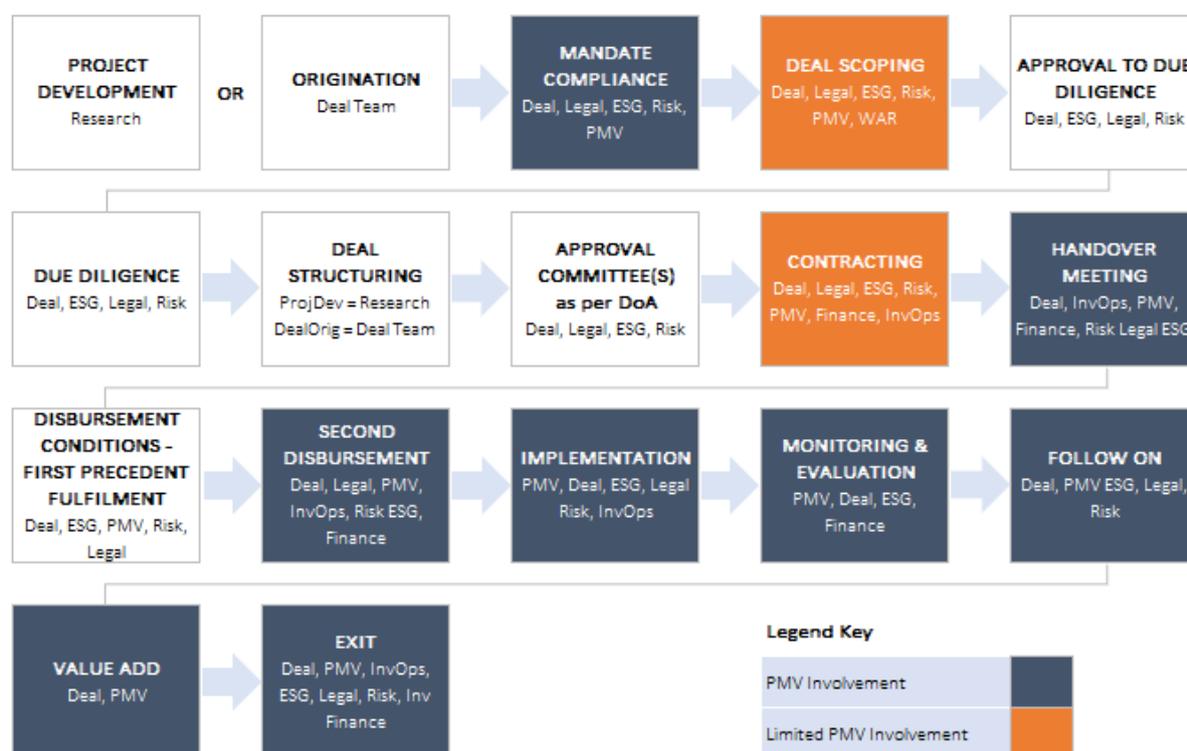
¹² Impact Investing: Global trends and the South African Experience Presentation by IDC May 2019

- 3.38 Private equity in the Rest of Africa requires a high level of active management with continuous investor contact and engagement required. To harness the African growth opportunity, a localized approach and perspective in key focus countries is crucial as the best quality deal flow often requires local relationships in the respective markets. The PIC looks to collaborate and partner with other investors in this regard. See **Appendix E** for best practice in African private equity investments.

Unlisted investments process

- 3.39 The following principles anchor the decision-making process for unlisted investments:
- Investment strategies are based on detailed, well researched, in-house analysis – linking top-down macro-economics, global, structural, and thematic investment trends to attractive opportunities in local sectors;
 - Targeted investment returns and social returns are not mutually exclusive. However, no compromise is made for social return over an economic return;
 - ESG principles must be incorporated in the investment decision-making process;
 - Central to the PIC investment philosophy is the requirement to invest in a manner that is additional *i.e.*, catalyzes economic growth, with the intention of directing other investor funds towards impact investing;
 - The PIC invests directly in new and existing enterprises as well as through the use of intermediaries such as external fund managers and retail intermediaries;
 - B-BBEE principles must be applied in all investments, including operational involvement of BEE-funded parties;
 - The PIC must be represented on Boards of companies in which it has significant shareholding to ensure stringent governance principles are applied as well as alignment of strategic objectives with the principle objective of transformation at shareholder level;
 - Investments may comprise of a combination of senior loans, mezzanine funding and equity instruments.
- 3.40 Once the deal is complete, the investment is taken over by the Portfolio Monitoring and Valuation (PMV) team. The PMV team is the biggest team in the business and it is responsible for on-going monitoring of the investments in the portfolio. By contrast, at Old Mutual Alternative Investments, the team that originates the deal, executes the deal and is accountable for the performance of the investment until its eventual exit from the portfolio. There is a high level of deferred compensation and gains are booked over time ensuring that there is an alignment of those individuals to the outcomes that they are expected to deliver. **Figure 15** in the following page shows the PIC investment and decision-making process.

Figure 15: Isibaya Investment and Decision-Making Process



Source: PIC

3.41 The unlisted portfolio represents continual investment of capital into the South African economy to stimulate growth. **Table 9** shows a summary of assets still to be injected into the economy from approved projects as at 31st March, 2018.

Table 9: Assets still to be injected into the economy from approved projects

| % of Total assets | AUM (ZAR bn) | % of unlisted AUM | Committed investments (ZAR bn) | Invested investments (ZAR bn) | Undrawn commitment (ZAR bn) |
|-------------------|--------------|-------------------|--------------------------------|-------------------------------|-----------------------------|
| 5.93% | 123.5 | 100% | 153.9 | 126.9 | 27 |

Source: PIC Unlisted Investments Schedule

Direct Property

3.42 The PIC invests in unlisted property as the asset class provides diversification and has qualities that can enhance the returns of a diversified portfolio. It also delivers social impact as it (1) promotes enterprise development, (2) supports targeted, preferential procurement, and (3) creates employment. See **Appendix F** for best practice in unlisted property investments from a large asset manager in South Africa. **Table 10** outlines the minimum criteria for investments into unlisted properties at PIC.

Table 10: Minimum Criteria for Investments into Unlisted Properties

| | |
|------------------------|---|
| Retail centres | <ul style="list-style-type: none"> ▪ Assets measuring minimum 10,000m² ▪ At least 70% national tenants' representation ▪ Preference given to townships and other under-developed areas |
| Office buildings | <ul style="list-style-type: none"> ▪ Assets measuring 5,000m² and more ▪ Avoid multi-tenanted buildings unless it is government department or agencies ▪ Preference given to government and SOCs ▪ 60% pre-let |
| Industrial buildings | <ul style="list-style-type: none"> ▪ Assets measuring at least 3,000m² or more in developing nodes and/or industrial parks ▪ Avoid multi-tenanted buildings ▪ 100% pre-let |
| Specialised buildings | <ul style="list-style-type: none"> ▪ Minimum investment size of approximately R 100 million ▪ Direct investment or into a fund |
| Portfolio of buildings | <ul style="list-style-type: none"> ▪ Thorough due diligence conducted to avoid unsustainable buildings, short-term leases or unfavorable expiry profile |

Source: PIC

3.43 Risk management in choosing investments in unlisted property is part of investment process and is accompanied by independent reports from Risk, ESG, and Legal teams. The approach follows a customary 5-step approvals process which can get up to 7-steps depending on the size and nature of the transaction.

- (1) Deal origination
- (2) Initial analysis & deal screening
- (3) First Portfolio Management Committee (PMC) properties – due diligence
- (4) Detailed due diligence process
- (5) Final PMC properties – Approval/recommendation (less than ZAR 250 million)
- (6) Properties Fund Investment Panel (FIP) approval/recommendation (greater than ZAR 250 million, less than ZAR 7 billion)
- (7) Investment Committee (IC) approval/recommendation & Board approval (greater than ZAR 7 billion)

Private Equity

3.44 The PIC makes direct and fund-of-fund private equity investments in South Africa and the rest of Africa. The corporation has a long history of investing in fund-of-funds, a strategy that invests money in portfolios of individual private equity fund managers, having made 18 different investments totaling ZAR 5 billion over 13 years, without any loss of capital. The principal investment rationales are access to a deeper pool of investing talent (without the strictures around compensation and retention if in-house), and access to certain investment strategies/vehicles/mandates that are easier to effect in a smaller, focused asset manager, and transformation of the private equity arena. The key internal focus is then how best to strengthen internal oversight role, evaluate options and the manager selection process.

- 3.45 The PIC's ability to make direct private equity transactions in South Africa and the rest of Africa has come into public scrutiny following a number of contentious transactions recently brought to light at the PIC Commission Inquiry Workshop. In particular, internal governance and investment decision-making structures that have enabled financing of non-commercial deals, as well as the corporation's internal structure and limited or stretched capacity to evaluate, make and monitor direct unlisted investments have raised concerns. The process of deal origination and review were identified at the Inquiry Workshop as an area of concern.
- 3.46 Various presenters at the Inquiry Workshop shared Best Practice in unlisted investments – private equity, direct property, black economic empowerment funding and investing in Africa.
- 3.47 A few points of note highlighted include:
- All potential transactions need to be evaluated on their own merits and only undertaken when the underlying economics and other key, consistently applied deal criteria make sense;
 - Deal origination, deal review and deal proposals should be undertaken by the investment team and the Board/Business should not interfere with the process. It is important to have the top structuring teams and investment professionals who can originate, evaluate and structure transactions;
 - To succeed in direct unlisted investing, there has to be clear alignment of interests whereby investment professionals are invested in the funds that they make decisions on. Investment professionals must be there for the long-term, and measured by the returns they deliver at exit. To earn performance fees, the funds have to make an appropriate return in excess of the targeted hurdle rates;

CHAPTER 4: PIC OPERATING MODEL

No. 41979 GOVERNMENT GAZETTE, 17 OCTOBER 2018

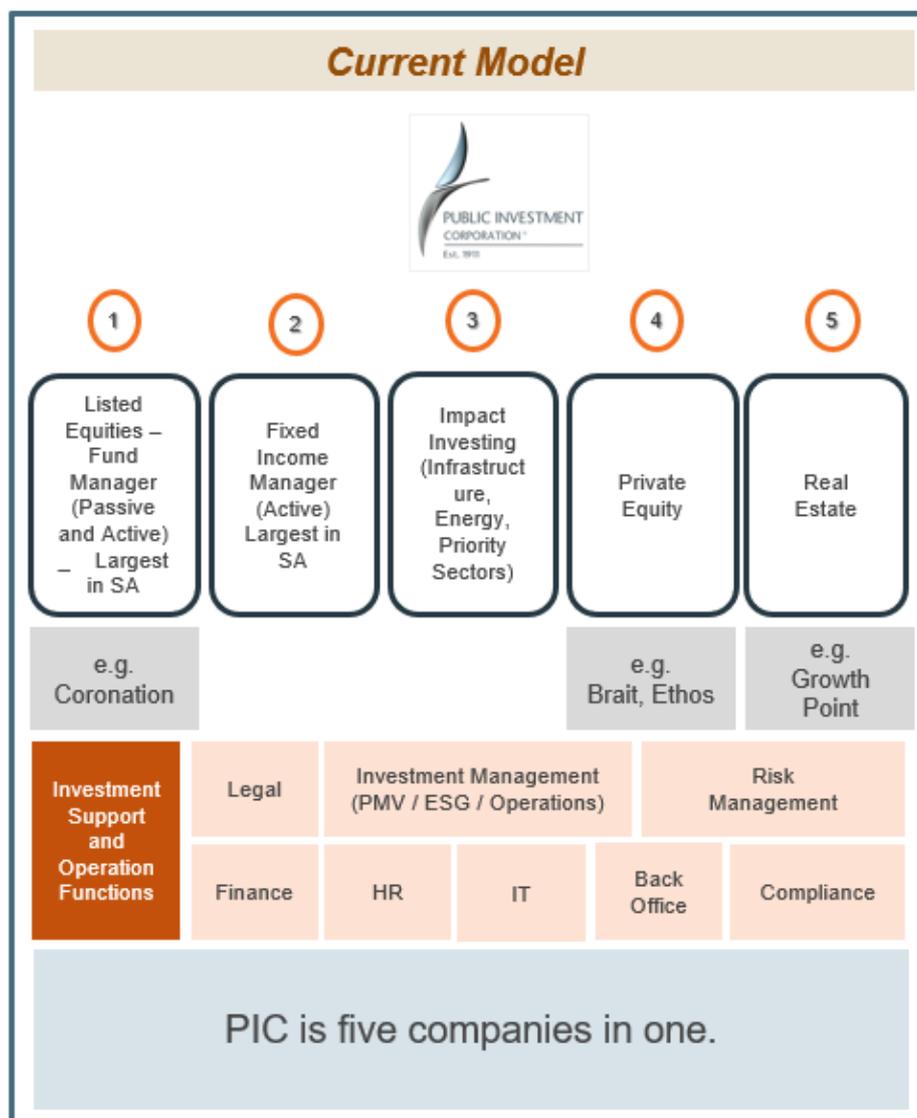
The Commission must enquire into, make finding, report on and make recommendations on the following:

1.15 Whether the current governance and operating model of the PIC, including the composition of the Board, is the most effective and efficient model and, if not, to make recommendations on the most suitable governance and operational model for the PIC for the future.

PIC Current Operating Model

- 4.1 There are many proven global and local business models for large, publicly-owned or oriented investors like the PIC. Any model must be relevant for the organization's size, current and future needs, complexity of its mandates, and for the South African context. The PIC should be at the forefront of investment ideas and thought, good practice and generated returns in South Africa and beyond. Irrespective of the business model, the key success factors are, among other things, good quality leadership, the right leadership and governance structure, a clearly articulated and consistently applied strategic framework and investment processes, and a culture that underpins the various mandates of the organization and embodies its public-facing responsibilities.
- 4.2 The PIC is in the process of reviewing its operating structure and internal discussions are underway to determine what operating model to adopt. Currently under consideration is a business unit structure versus a holding company/subsidiary company structure. The current model is shown in **Figure 16** in the following page.

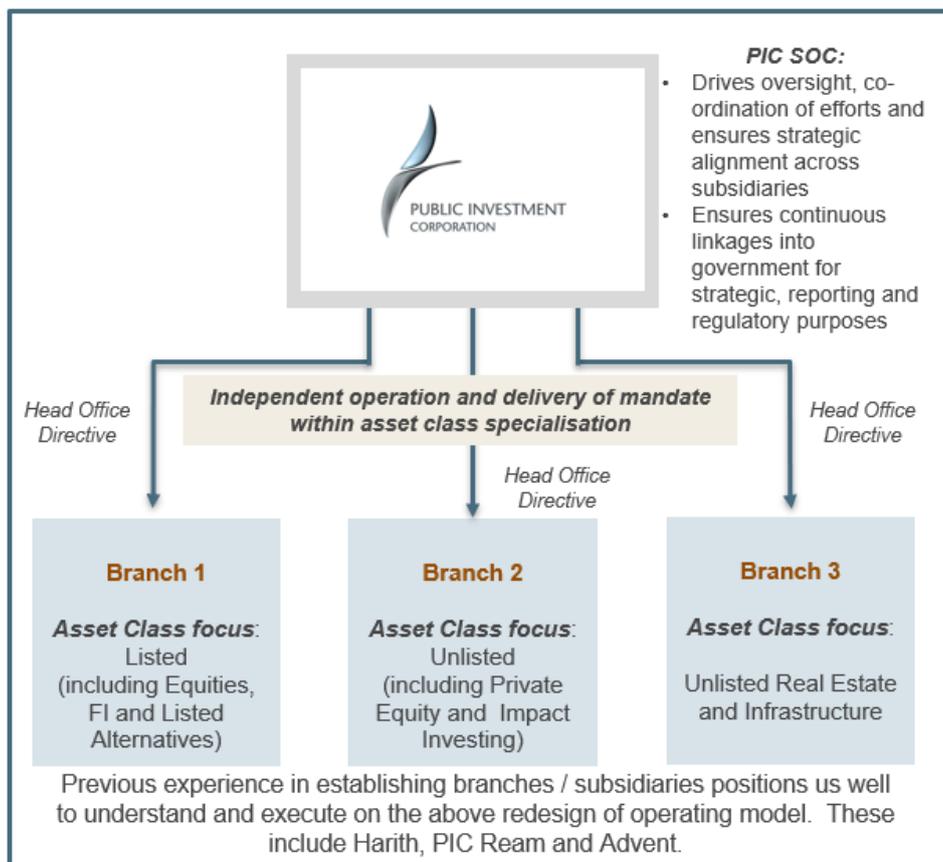
Figure 16: PIC Current Operating Model



Source: PIC

- 4.3 The PIC is in the process of reviewing its operating structure and internal discussions are underway to determine what operating model to adopt. Currently under consideration is a business unit structure versus a holding company/subsidiary company structure.
- 4.4 The business unit structure envisages an organization with a clear separation of business units. This operating model is deemed more cost effective than the holding company or subsidiary company structure as the corporation would maintain a single Board structure that the business unit heads would report to rather than each unit having its own board of directors. **Figure 17** in the following page shows the decentralized business unit structure that is currently favored and under discussion.

Figure 17: Proposed Model: A Decentralised Model across Asset Classes Specialisation



Source: PIC

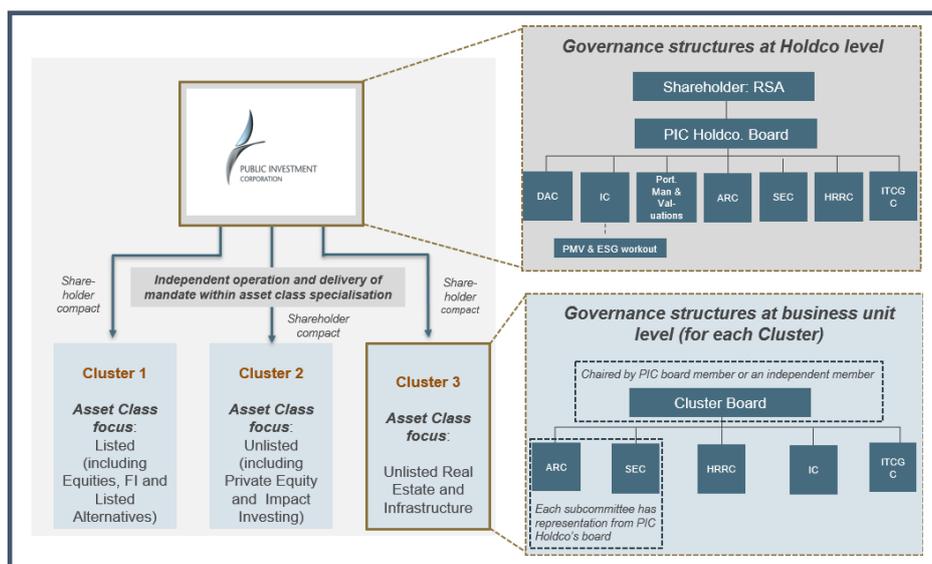
4.5 **Table 11** summarizes the advantages and disadvantages of the decentralized model.

Table 11: Decentralised Model: Advantages and Disadvantages

| Advantages | Disadvantages |
|--|--|
| <ul style="list-style-type: none"> ▪ Strategic direction vests at HO ▪ Instils entrepreneurial mindset across business units ▪ Accountability by business units ▪ Competition for capital requires all business units to contribute to profitability ▪ Performance and incentives aligned with asset class characteristics of each business unit ▪ Allows for specialization and dedicated expertise and knowledge ▪ Clarified relationship between Management, Board and Shareholder | <ul style="list-style-type: none"> ▪ Additional governance layers and possible duplication of administrative functions ▪ Business units might have overlapping mandates resulting in duplication ▪ Decentralized decision-making can result in silo thinking at expense of a collaborative strategy ▪ Risk to license if compliance not adhered to and managed with required oversight |

Source: PIC Presentation on Future Operating Model, PIC Commission Inquiry Workshop

Figure 18: Proposed Model: Maintains Independence of Subsidiaries with Holdco oversight



Source: PIC

4.6 The case studies below summarise key lessons on operating and governance models and investment decision-making structure drawn from a sophisticated local investor and shared at the Workshop.

Case Study 1: A Decentralised Operating Model

4.7 Sanlam is a 101-year-old business operating in 44 countries across the globe. Sanlam group runs a decentralized operating model, comprising five businesses, including the investment cluster. Each business has a clear mandate to profitably deliver value to its clients.

4.8 The strategy of the investment business is built around growing clients' wealth and therefore contributing to the economic development and transformation of the country.

4.9 There is clear delineation of asset management activities to allow for the smooth running of the business. The CEO of Sanlam Investments (SI) is responsible for the overall investment business.

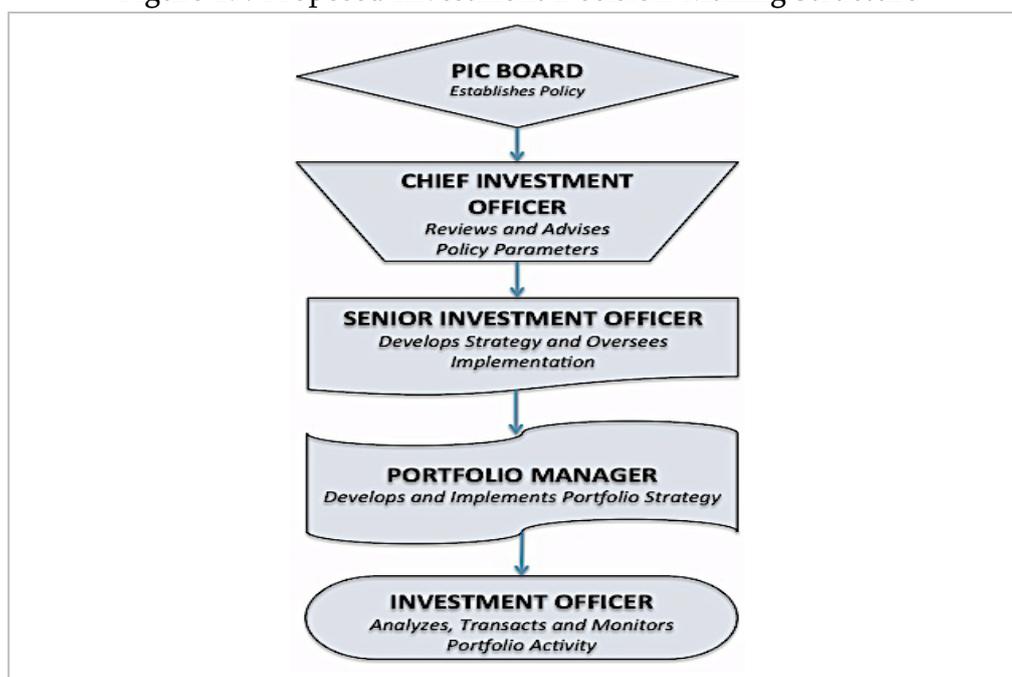
4.10 The sub-committees of the Board consist of the Credit Committee, Risk Committees and relevant Asset Management Investment Committees. It is the prerogative of the business and the Board to determine the investment philosophy which spans across Passive management, Active management, Multi-Manager and Alternative Investment Solutions. However, all four investment teams operate independently. There is no involvement from the business (Board and/or Management) in the formulation of investment process or in investment decision-making.

- 4.11 The role of the business is to hire the right investment team, hold them accountable, and to replace as needed where such teams do not exemplify the firm's values or significantly underperform. The investment business does not have one 'super' CIO and the Chairs of the different Investment Committees effectively play that role. Risk and compliance function is completely removed from the investment process.
- 4.12 From an operational point of view, the four investment areas are supported by a shared services infrastructure consisting of Client Services, Trading, Reporting, Compliance, Legal, Performance, Risk, Finance, IT and Human Resources. There is a central COO who oversees the digital strategy, systems, and the different investment platforms. The shared services model is cost effective and essential to competing effectively in the market.
- 4.13 Key lessons from sophisticated local and global investors:
- The CEO role is responsible for the overall management of the business. Supportive organizational and decision-making structures allow the executive space to exercise judgement and objectivity, which is necessary to run a successful business;
 - Teamwork and collaboration within businesses is what gives a business the competitive edge;
 - Structure is important but it is not the panacea. The organization must have the right people and be managed properly;
 - Remuneration is critical and it must be competitive to attract and retain top talent;
 - Independent ICs can focus purely on what is the best risk-adjusted outcome for the client. Visibility into each sector area allows for more transparency around investment outcomes, and for course-correction if needed;
 - A strong corporate culture is central to the long-term success of an asset manager.

Case Study 2: Investment decision-making structure

- 4.14 A key principle of investing is to define a framework which defines and allocates responsibilities to the right levels and groups and identifies how much and which risks to take. **Figure 19** below shows a proposed investment decision-making structure.

Figure 19: Proposed Investment Decision-Making Structure



Source: International Benchmarks of Pension Funds, presented by Vuyo Jack. PIC Commission of Inquiry

CHAPTER 5: GOVERNANCE PROCESSES AT THE PIC

No. 41979 GOVERNMENT GAZETTE, 17 OCTOBER 2018

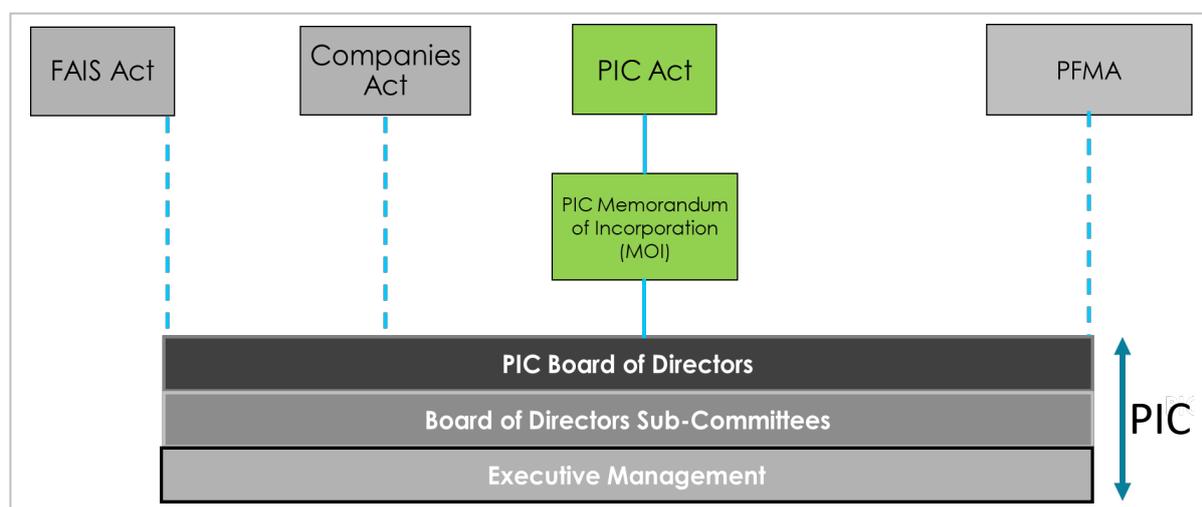
The Commission must enquire into, make finding, report on and make recommendations on the following:

1.16 Whether, considering its findings, it is necessary to make changes to the PIC Act, the PIC Memorandum of Incorporation in terms of the Companies Act, 2008, and the investment decision-making framework of the PIC, as well as the delegation of authority for the framework (if any) and, if so, to advise on the possible changes.

Legal Framework

5.1 The PIC is governed by the PIC Act of 2004 and its Memorandum of Incorporation (MOI). The PIC operates in a highly regulated environment and is required to comply with the Financial Advisory and Intermediary Services Act of 2002 (FAIS), the Companies Act of 2008, and the Public Finance Management Act of 1999 (PFMA). **Figure 20** shows the corporation's overarching regulatory framework.

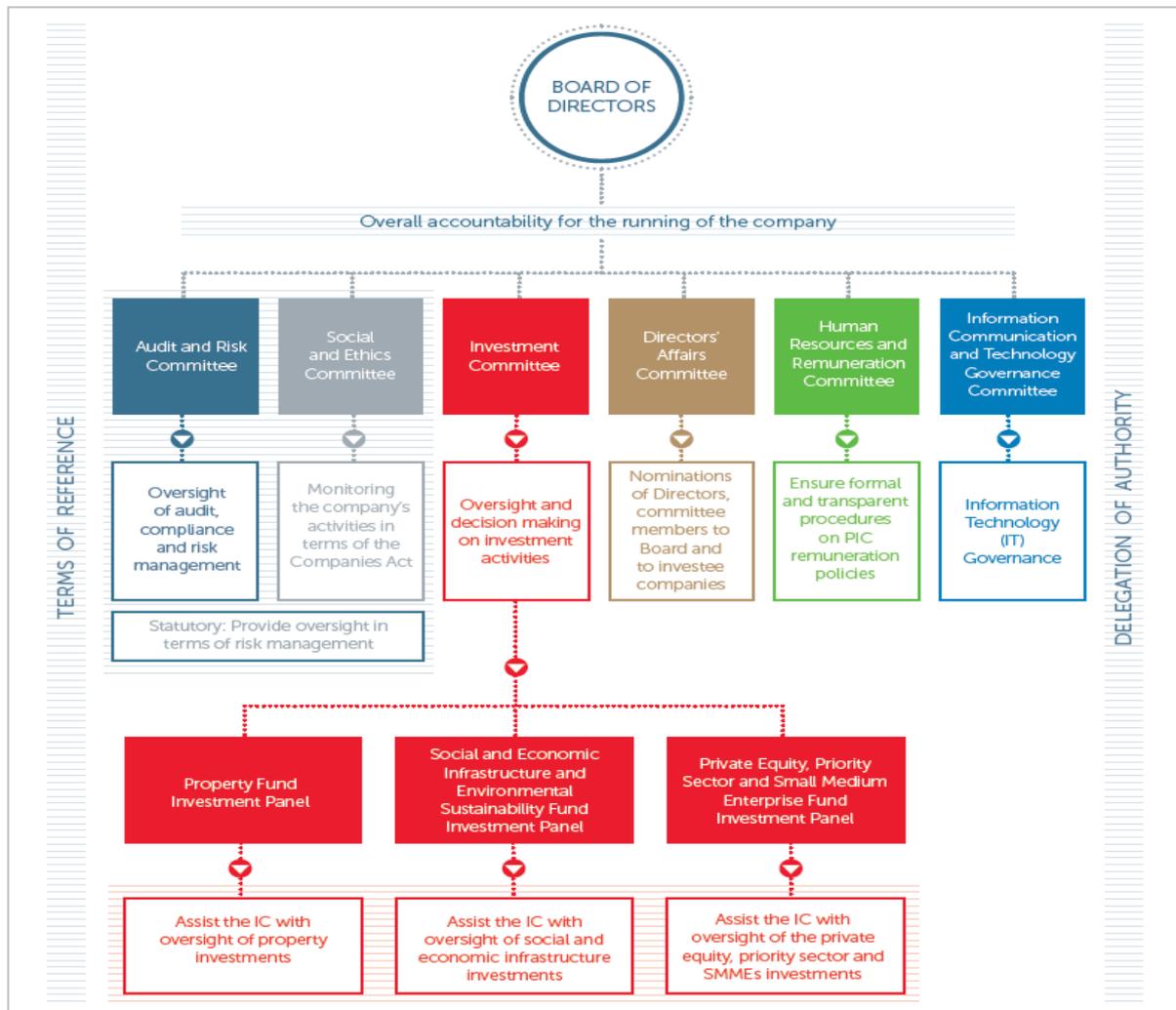
Figure 20: PIC Overarching Regulatory Framework



Source: PIC Legal Framework PIC Commission of Inquiry Workshop 2019

5.2 The PIC Act read in conjunction with the MOI provides the framework within which the PIC Board operates. The Act states that the Board may establish such committees as it deems fit, consisting of Directors as it considers necessary in order to discharge of its duties. The PIC governance structure is shown overleaf on **Figure 21** on the following page.

Figure 21: PIC Governance Structure



Source: PIC Investment Framework, Strategy, Process & Performance across all asset classes. PIC Inquiry Workshop May 2019

5.3 The PIC Board is responsible for appointing the CEO and retains more than a strategic and oversight role. For example, the PIC Board can instruct the investment committee what to invest in. Non-Executive Board members sit in the investment sub-committees, including:

- the Equity Priority Sector and the Small, Medium Enterprise Fund Investment Panel;
- the Social and Economic Infrastructure and Environmental Sustainability Fund Investment Panel;
- the Property Fund Investment Panel; and
- the Investment Committee,

where they participate in investment decision-making.

- 5.4 The PMC (unlisted investments) has the authority to approve all transactions relating to investments in the rest of Africa up to maximum threshold of ZAR 500 million¹³. This contrasts with best practice in the asset management sector where Board members are neither represented on the Investment Committee nor directly participate in the workings of the investment teams.

Current Board Nomination and Selection Process

- 5.5 The PIC currently does not have a fully constituted Board, after the Board was asked to resign by the Minister of Finance, following conflict and reported dysfunction on the Board to the detriment of the corporation. The interim arrangement is that the Board stay in place until a new Board is constituted.
- 5.6 The Minister of Finance, in consultation with Cabinet appoints the Board that comprises no less than 10 and no more than 15 directors, including the CEO who reports to the Board. Current practice is the Deputy Minister of Finance chairs the PIC Board. Section 6 (3) of the PIC Act states that members of the Board must be appointed on the grounds of their knowledge and experience with due regard to the FAIS Act¹⁴. The skill set required of the Board is therefore covered in various pieces of legislation. The GEPF has no representation on the PIC Board.
- 5.7 The Chairperson of the PIC Board (the Deputy Minister of Finance) also chairs the PIC Directors Affairs Committee, which submits nominations of candidates to National Treasury for appointment by the Minister of Finance. The nominations are then reviewed by the Asset Liability Management (ALM) division, taking into account the requirements – the mix of executive and non-executive directors, skills, expertise and experience required at that point in time. If none of the candidates are deemed eligible, the ALM division selects candidates from the National Treasury database, which the directorate maintains and updates annually from persons that have expressed an interest in becoming directors of state-owned entities in response to its annual advert. Once there is list of suitable candidates, it is given to the Minister of Finance who has the prerogative to decide who to appoint. It appears that Cabinet can also nominate a person outside of the process. It was noted that the current process of selection has inherent weaknesses and may not result in the selection of individuals with appropriate investment and commercial experience.

¹³ PIC Legal Framework by Lindiwe Dlamini. PIC Commission of Inquiry Workshop 2019, p.11

¹⁴ PIC Legal Framework by Lindiwe Dlamini. PIC Commission of Inquiry Workshop 2019, p.7

PIC Current Investment Decision Making Framework and Delegation of Authority

- 5.8 It is the responsibility of the PIC Board to ensure that the objectives of the PIC are attained.
- 5.9 The PIC has an approved delegation of authority (DOA) framework for the Board and management in accordance with relevant legislation. The current DOA delegates responsibilities for different transactions to various governance structures and outlines the powers of the Board, its committees and officials to approve transactions and related unlisted investment activities. In most instances, the DOA only provides for the CEO to sign agreements and ancillary documents.
- 5.10 The PIC currently runs a centralised operating model with significant concentration of decision-making responsibility, power and influence in the hands of the CEO and the CFO. They sit on the Board as Executive Directors, they sit in investment committees and serve on the Boards of Investee Companies. The PIC does not have a Chief Operations Officer (COO) or a dedicated Chief Investment Officer (CIO). The CEO performs the role of the CIO, although certain investment functions report to the CFO. This is in contravention of the PIC Act Memorandum of Incorporation, which prescribes roles for a CEO, Chief Investment Officer (CIO) and (COO) and is also in contrast to the approach taken by many global fund managers. The current management structure therefore lacks adequate executive support for an organisation of its size and complexity, creating undue pressure on executives required to make timely and sufficiently informed decisions

Proposed Governance Model

- 5.11 As a public institution the PIC has to manage internal and external stakeholders that want to influence, advise or put constraints on the Corporation. In theory, it is a long-term investor, in practice short-term performance matters. Strategic asset allocation has a longer-term focus, but investment opportunities can be fleeting, which calls for agility. There is no perfect structure or governance framework to navigate the different stakeholders and multiple time frames. The proposed recommendations outlined below for consideration cover areas where the current practice could be reviewed so as to ensure the success and sustainability of the PIC into the future. Of critical importance is to create an environment that gives the PIC the best possible conditions for the successful discharge of its client and Shareholder mandate.

Board Composition

- 5.12 The Board should encompass the right expertise required to play an effective oversight role including (actuarial, asset management, general business, legal, audit

and risk expertise) that can advise on investment-related issues. It should have broad competence in asset management and business. As the PIC is a global investor and asset management is a global industry, the Board should include individuals that bring global investment industry experience and perspective.

- 5.13 Further, the Board should have appropriate representation of key stakeholders, such as key clients and trade union representatives who also meet the minimum board competency requirements.

Board Selection

- 5.14 An independent PIC Board Chairman with a significant background and demonstrable track record in investments or business rather than an *Ex Officio* chairperson was proposed by the participants.
- 5.15 The appointment of Board members should in future reside with the Board Nominations Committee of the PIC. Board terms should be staggered, defined in term and duration, and key board committees and composition clearly codified.
- 5.16 In the current unique situation, it is recommended that the Chair in consultation with the new CEO and Minister of Finance work together to create the new Board.

Delegation of Authority

- 5.17 Amend the PIC Memorandum of Incorporation (MOI) to give effect to the strategic objectives of the PIC.
- 5.18 Define clear delegation of authority, with clear escalation methodology to ensure accountability of Executives. The Corporation's governance framework allows the PIC to review the policies, processes, frameworks and guidelines that govern its unlisted investment activities from time-to-time to ensure that they are relevant and take into account the operating model and mitigate existing and new operational risks.

Executive Roles

- 5.19 Separate the CEO and Chief Investment Officer (CIO) roles.
- 5.20 The CEO must administratively manage the Corporation; the CIO, however, retains direct responsibility for the investment functions. There must be a clear separation of business issues (*e.g.*, administration, operations, stakeholder engagement) from investment allocation issues. This separation must exist in theory and be rigorously and consistently applied in practice.

- 5.21 Appoint a Chief Operating Officer (COO) to free up the CEO from operational responsibilities and allow the CEO to focus on the overall strategy and external stakeholder management. The CEO and by extension, the senior management, should exemplify the PIC's values that put clients first and align the interests of the organization with the client.
- 5.22 Appoint a Chief Risk Officer (CRO) to focus on the corporation's overall risk profile, and report directly to the Risk Committee of the Board. Risk and compliance functions report to the CRO.

Remuneration

- 5.23 Implement variable remuneration that is linked to individual and team performance as well as overall contribution to achieving client and firm objectives, subject to profitability and growth.
- 5.24 Ensure alignment of incentive structures *e.g.*, appropriate key performance indicators at each level, meaningful deferred compensation as a percentage of total compensation with a long vesting period, ability to clawback compensation in the event of inappropriate behavior/gross incompetence *etc.*
- 5.25 Emphasize non-financial benefits that the organization offers (such as the ability to influence markets, broad scope of learning possibilities, and an opportunity to make a meaningful difference to South Africa) that can help attract and retain quality staff. The PIC 'halo' should be a key draw and PIC should position itself and demonstrate to potential candidates that it is the place to either have or launch a successful career in asset management in South Africa.

Investment Governance and Structure

- 5.26 The Board's role shall be restricted to an oversight role for the PIC and ensuring that the overall strategic and governance frameworks are in place. The Board is responsible for ensuring the right policies are in place and that investment processes and governance structures are respected and consistently applied.
- 5.27 The Investment Committee (IC) shall be solely responsible for approving all investment opportunities relating to client assets. All investment decisions of the Investment Committee are binding.
- 5.28 The PIC should put in place clear rules that govern the composition of the Investment Committee, its tenure, and process for onboarding new members.

- 5.29 The PIC should appoint a CIO or Head of Investments that has oversight over the different investment mandates, broader propositions and overall accountability by ensuring that the PIC delivers on its client mandates within the articulated risk parameters.
- 5.30 The PIC should appoint experienced senior investment professionals reporting to the CIO to head up the listed, unlisted, and multi-manager areas as different skillsets are required for each. Each area should have decision-making power in order to allow for timely decision-making. There should be an identifiable person(s) with whom accountability rests at each decision-making stage.
- 5.31 There should be a clear set of performance metrics for the CIO and his direct reports, with an incentive structure that aligns and underpins the key PIC objectives.

Outsourcing of Investments

- 5.32 The experience of other sophisticated global investors shows that getting access to the best people, opportunities, and ideas matters significantly more to investment performance and is more efficient than building out investment capability in all areas.

Investment Committee Composition

- 5.33 The Investment Committee (IC) must include a majority of independent, competent individuals with deep investment knowledge and, integrity that understand their fiduciary roles.
- 5.34 The IC chairperson shall be independent.
- 5.35 The IC should include a mix of asset class specialists with deep domain knowledge as well as generalists with expertise that cuts across sectors in order to evaluate opportunities and appropriate correlation of asset class returns and risks. Individuals should have at least ten years' experience in core domain expertise, and ideally with portfolio management experience across the business cycle (*i.e.*, bull/bear markets).
- 5.36 Based on global best practice, it is recommended that the IC be comprised of five to nine members. This will ensure both requisite, broad-ranging experience (investing, risk, regulatory and compliance) is present without compromising the quality and pace of decision-making.

- 5.37 Diversity of experience, opinions, and views are important to the quality of decision-making.

Transparency and Reporting

- 5.38 Transparency is important to managing and bolstering public trust and confidence. Public funds have to be well governed because they have the potential to strengthen or destroy public trust in important public institutions. This is established foremost by an active, public reporting stance.
- 5.39 The PIC should consider providing greater disclosure of investments, without jeopardizing deals, on a public register to promote transparency and build trust.
- 5.40 The CIO shall provide a quarterly Investor Letter to the Board (and potentially other key stakeholder representatives *e.g.*, Minister of Finance, National Treasury, members of the public) that will enumerate key holdings/rationales, absolute and relative performance, investment outlook and any material changes to the PIC or its mandates. This can have a valuable stakeholder education role and help build trust.
- 5.41 The PIC shall provide clients reporting in accordance with the investment mandate requirements that specifies risk-taking strategy, performance objectives, evaluation horizon and reporting frequency *etc.*

Case Study 2: Global Benchmarking

Table 12: Comparison of Key Parameters against Peers

| | PIC | NORWAY GPF | CALPERS | CPPIB | OTTP |
|--|-----------------------------------|-------------------------------|--|---|--|
| Assets under Management | US\$144 billion (R2,083 trillion) | US\$1 trillion | US\$354 billion | US\$295 billion | C\$193 billion |
| Date founded | 1911 | 1990 | 1931 | 1966 | 1990 |
| Employees | 372 | 400 | 2800 | 1661 | 1200 |
| Type of entity | Asset manager | Sovereign Wealth Fund | Pension Fund | Asset Manager | Pension Fund |
| Proportion of assets managed in-house vs. externally | 70% in-house 30% external | 95% in-house 5% external | Approx. 65% managed in-house; Private Equity managed externally | Largely manage assets in-house | Approx. 80% in-house; Outsource where it is not efficient or practical to maintain equivalent skills in-house |
| Management fees | Estimated 3 - 5 cents per R100 | 5 - 6 cents per \$100 | 61.2 cents per \$100 | 32.8 cents per \$100 | 67 cents per \$100 |
| Asset allocation In-country-Global split | 90% in-country; 10 global | 0% in country; 100% global | 55% in-country; 45% global | 15.5% in-country; 84.5% global | 44% in-country; 56% global |
| Size of Board | 10-15 | 8 | 13 | 12 | 11 |
| Board Chair | Deputy Minister of Finance | Governor of Central Bank | Elected annually by Board members | Appointed by Minister after consultation with Board | Board selects chair |
| IC process (Board involvement) Y/N | Y | N | Y in line with pension fund governance model | N | Y in line with pension fund governance model |
| Management incentives | Base pay; Pay for performance | N/A | Base pay; Pay for performance; Special day | N/A | Base pay; Annual incentive plan; Long-term incentive plan |

Source: "International Benchmarks of Pension Funds" presented by Vuyo Jack. PIC Commission of Inquiry Workshop. N/A – Not available.

For deeper understanding of the different international peers, refer to Appendices I and K.

APPENDICES

Appendix A: Unemployment Insurance Fund (UIF)

1. The Unemployment Insurance Fund did not attend the PIC Inquiry Workshop although they did submit a presentation as part of the record.
2. The Unemployment Insurance Fund (UIF) was established in terms of Section 4(1) of the Unemployment Insurance Act, 2001 (Act 63 of 2001), as amended; the act empowers the UIF to register all employers and employees in South Africa. The Unemployment Contributions Act, 2002 (act 4 of 2002) empowers the SARS Commissioner to collect monthly contributions from both employers and employees. The UIF is financed by a dedicated tax on the wage bill.
3. The PIC manages approximately R154 billion in assets under management for the UIF (US\$10 billion) as at 31st March 2018, which represents about 7.2% of the PIC assets under management.
4. The purpose of this act is to provide for the payment of contributions to the benefit of the UIF and to provide for the procedures for the collection of contributions. The UIF contributes to the alleviation of poverty in South Africa by providing short-term unemployment insurance to all workers who qualify for unemployment related benefits.
5. The UIF must be used for the payment of benefit in terms of the act and the reimbursement of excess contributions to employers. In addition, the UIF is used for the payment of remuneration & allowances to members of the UI Board and its committees and any other expenditure reasonably incurred and relating to the application of this act
6. The UIF has appointed the PIC as its asset manager to manage and administer investment portfolios on its behalf. The UIF with the assistance of its externally appointed actuarial consultant and externally appointed investment advisor sets out the responsibilities of its asset manager, the PIC.
7. The process the UIF follow in the formulation of the investment mandate is as follows
 - Role of the UIF externally appointed actuary
 - Actuary performs an asset and liability modelling exercise annually - as at 31 March
 - Actuary performs, from a solvency and assessment management (SAM) perspective, an assessment of the Reserves and Capital of the UIF.
 - Actuary performs a Free Capital study

8. Role of the PIC and UIF externally appointed investment advisor

- The above three reports are supplied to the PIC and the externally appointed investment advisor. The PIC and the externally appointed investment advisor interpret the results of the reports with the aim of reviewing the efficiency of the UIF's current investment mandate versus the results of the above reports.
- If there is a requirement for any changes to the mandate by the PIC and/or the externally appointed investment advisor, a proposal will be provided to the UIF.
- Any new proposal or proposals for changes to the mandate from the PIC and/or the externally appointed investment advisor, will be compared and if there are any inconsistencies, these will be workshopped by the parties.
- Any amendments to the mandate, if required, will be presented to the UIF's governance structures for approval
- The mandate is submitted to the PIC for implementation

9. **Table 5A** shows the asset class ranges and limits per asset class as set out in the investment strategy.

Table 13A: UIF Investment Strategy as at 31 March 2019

| Asset Class | Min. Range | SAA | Max. Range | SAA - 2018 | SAA - 2017 | Benchmark ¹⁵ |
|------------------------------------|--------------|---------------|---------------|---------------|---------------|-------------------------|
| Nominal Bonds | 13.0% | 23.0% | 33.0% | 26.5% | 27.5% | ALBI |
| Equity | 20.0% | 28.0% | 30.0% | 24.0% | 24.0% | CSWIX (ex SAPY) |
| Inflation Linked Bonds | 16.0% | 26.0% | 36.0% | 28.0% | 30.0% | CILI |
| Cash & Money Market | 1.0% | 5.0% | 15.0% | 10.0% | 5.0% | STeFI |
| Listed Property | 1.0% | 2.0% | 5.0% | 2.5% | 2.5% | SAPY |
| Unlisted Property | 1.0% | 6.0% | 8.0% | 5.0% | 5.0% | IPD (Customised) |
| African Investments | 0.0% | 0.0% | 2.0% | 0.0% | 2.0% | MSCI Africa (ex ZA) |
| Foreign Equity - Emerging Markets | 2.0% | 2.0% | 5.0% | 4.0% | 4.0% | MSCI EM (ex ZA) |
| Foreign Equity - Developed Markets | 0.0% | 8.0% | 10.0% | | | MSCI ACWI (ex ZA) |
| Total | 54.0% | 100.0% | 144.0% | 100.0% | 100.0% | |

Source: UIF

¹⁵ ALBI: All Bond Index

CAPPED SWIX: Capped Shareholder Weighted Index

CILI: Composite Inflation Linked Index

STeFI: Short-term Fixed Interest Composite

SAPY: SA Listed Property Index

IPD: Investment Property Databank Index (PIC Customised/CPI+5%)

MSCI EM: MSCI Emerging Market Index

MSCI ACWI: MSCI All Country World Index

Table 14A: UIF Investment Strategy for Unlisted Assets as at 31 March 2019

| Asset Class | Min. Range | SAA - 2019 | Max. Range | SAA - 2018 | SAA - 2017 | Benchmark |
|--|------------|------------|------------|------------|------------|--|
| Unlisted Property | 1.0% | 6.0% | 8.0% | 5.0% | - | IPD (Customised) |
| High Social Impact Funds | 0.0% | 2.0% | 4.0% | - | - | >15% social Return |
| Socially Responsible Investments | 15.0% | 20.0% | 25.0% | 20.0% | 20.0% | CPI+3.5% |
| Project Development Partnership Fund (PDP) | 0.0% | 2.0% | 3.0% | - | - | To be agreed on a project by project basis |
| Total | 16.0% | 30.0% | 40.0% | 25.0% | 20.0% | |

Source: UIF

10. An analysis of the actual asset allocation and the strategic (long-term) asset allocation in the years 2017 and 2018 are shown in shown in **Tables 7A**. The majority of assets are invested in government bonds and money market instruments, and the investment mandate has credit risk limits as set out in the Public Finance Management Act Treasury Regulation 31.3.2 (see Appendix A).

11. During the year 2018, the range of allocation to most asset classes were significantly reduced. For Equity and Bonds from a range of 20% down to a range of only 4%; this would force a much closer and active management of the asset classes to avoid breaches of limits.

Table 15A: UIF Actual Asset Allocation compared to Strategic Target as at 31 March 2017

| Asset Classes | Actual | Strategic Target | Range | Benchmark |
|------------------------|--------|------------------|-----------|-----------------------|
| Nominal Bonds | 27.5% | 27.5% | 20% - 40% | ALBI |
| Equity | 21% | 24.0% | 10% - 30% | Capped SWIX (Ex SAPY) |
| Inflation Linked Bonds | 28.0% | 30.0% | 20% - 40% | CILI |
| Cash & Money Market | 10% | 5.0% | 1% - 10% | STeFI |
| Listed Property | 4% | 2.5% | 0% - 5% | SAPY |
| Unlisted Property | 0% | 5.0% | 1% - 7% | IPD (Customised) |
| African Investments | 0% | 2.0% | 0% - 5% | MSCI Africa (ex ZA) |
| Foreign Equity | 3% | 4.0% | 0% - 10% | MSCI EM Index (ex ZA) |
| Total | | 100.0% | | |

Source: UIF

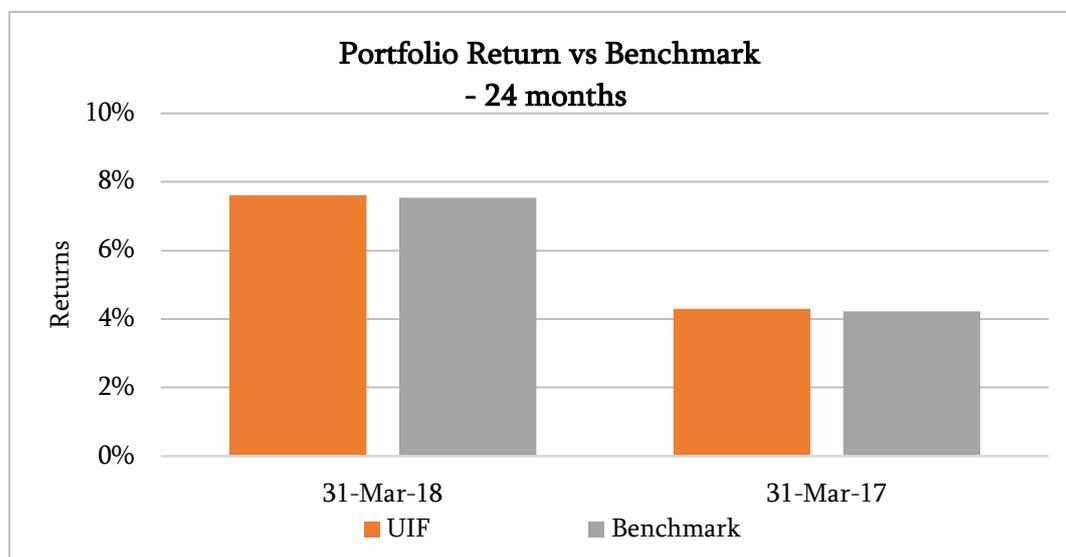
Table 16A: UIF Actual Asset Allocation compared to Strategic Target as at 31 March 2018

| Asset Classes | Actual | Strategic Target | Range | Benchmark |
|------------------------|--------|------------------|-------------|-----------------------------------|
| Nominal Bonds | 25% | 26.5% | 24% - 28% | ALBI |
| Equity | 19% | 24.0% | 22% - 26% | Capped SWIX (ex SAPY) |
| Inflation Linked Bonds | 28.5% | 28.0% | 26% - 30% | CILI |
| Cash & Money Market | 9% | 10.0% | 8% - 12% | STeFI |
| Listed Property | 3% | 2.5% | 1.5% - 3.5% | SAPY |
| Unlisted Property | 0% | 5.0% | 1% - 7% | IPD index (PIC Customised/CPI+5%) |
| African Investments | 0% | 0% | 0% - 0% | MSCI Africa (ex ZA) |
| Foreign Equity | 3% | 4.0% | 2% - 6% | MSCI EM Index (ex ZA) |
| Total | | 100.0% | | |

Source: UIF

12. **Figure 20A** shows portfolio returns on the UIF versus the Funds internal benchmark over the past 24 months to 31 March 2018 and 31 March 2017.

Figure 20A: Performance of UIF Fund against the Fund benchmark



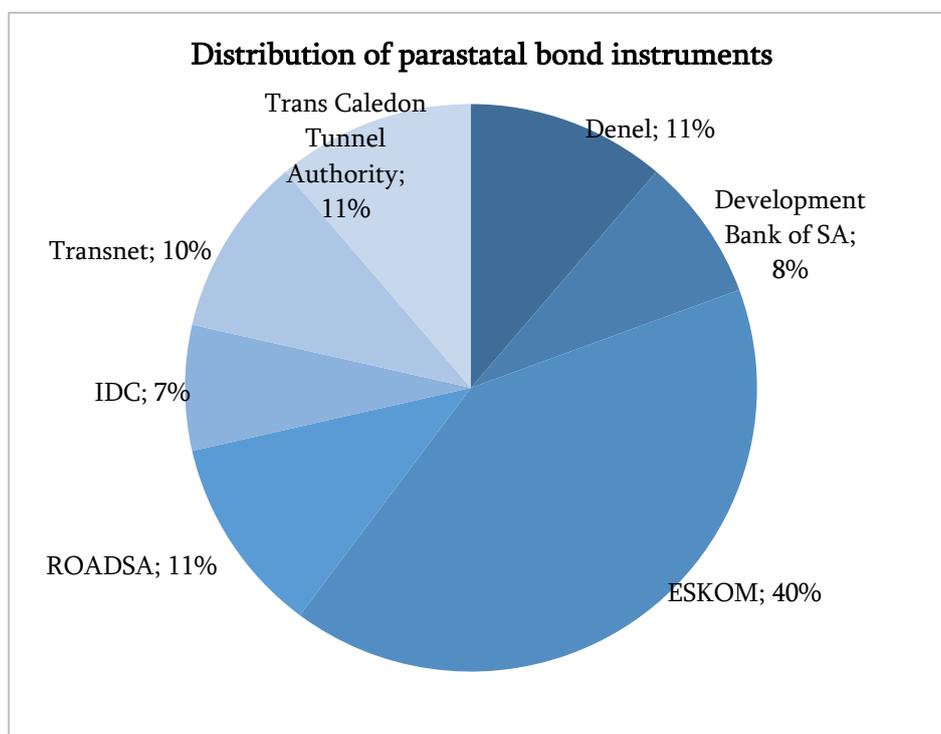
Source: UIF

Note: Past performance is not an indicator of future performance

Table 17A: A Breakdown of the UIF Assets Under Management by Asset Class (R'bn)

| Asset Class | 31-Mar-17 | 31-Mar-18 |
|--|--------------------|--------------------|
| Government Bonds | 61,074,066 | 74,096,806 |
| Parastatal Bonds | 13,297,800 | 13,695,882 |
| Other Bonds | 2,256,889 | 514,985 |
| Money Market and Cash Instruments | 13,817,397 | 15,118,587 |
| Domestic Equity Instruments | 35,244,034 | 36,613,362 |
| Foreign Equity Instruments | 4,658,660 | 4,784,929 |
| Unlisted Social Investment Instruments | 6,446,480 | 9,721,377 |
| Total | 136,795,326 | 154,545,928 |

Figure 21A: Breakdown of the UIF Parastatal Bond Instruments



Source: UIF

Developmental Investments

13. The UIF has included in its mandate to the PIC a strategic allocation of 30% to unlisted investments. This allocation has evolved since 2017 when the allocation was 20% and was referred to as Socially responsible investments. It was changed to Unlisted Investments in 2019 and its strategic allocation was increased to 30%. The Socially Responsible Investment component is still included at 20%, however, it now also includes an allocation of Unlisted Property (6%), a High Social Impact Fund (2%) and a Project Development Partnership Fund (PDP) (2%).
14. The Project Development Partnership Fund (PDP) was established by the PIC and the UIF to fund early stage, investable projects, opportunities or innovations in key and targeted economic sectors. These include, Agribusiness and Bioscience, Mining and Beneficiation, Energy and Related sectors, Manufacturing, Information Communication Technologies, Social Infrastructure, Water and Waste, and Financial and Related services. A strong focus of the fund will be to drive woman and youth-led entrepreneurs. The PDP Fund seeks to invest directly into the economy to contribute to South Africa's socio-economic objectives, such as job creation, inclusive growth and transformation; whilst generating financial returns.
15. As at the 31 March 2018, the SRI initiatives of the UIF have facilitated a total of 23 442 permanent and temporary jobs in the South African economy in the following sectors:

Table 10A: Job creation

| Sector | Number |
|---------------|---------------|
| Agriculture | 5 572 |
| Economics | 12 266 |
| Environmental | 293 |
| Social | 5 311 |
| Total | 23 442 |

Appendix B: Compensation Fund Credit Risk Management

Credit Risk – as per PFMA Treasury Regulation 31.3.2

Table 18B: Bonds in Aggregate: Investment Mandate Limits in Bond Instruments

| Instrument | Max. limit per issuer |
|---|-----------------------|
| Government Bonds (RSA Bonds and/or Government Guaranteed, etc.) | 70% to 100% |
| Other Bonds (Corporate, Parastatals, Securitisation, etc.) | 0% to 30% |

Source: Compensation Fund

Table 19B: Counter Parties: Mandates Limits in terms of Bond Credit Risk Rating

| Subject to the following restrictions based on the total value of the portfolio | Lower Bound | Upper Bound | SAA Limit |
|---|-------------|-------------|-------------|
| Sovereign obligations of the Republic of South Africa | 70% | 100% | 100% |
| AAA - rated bonds with South African Government guarantee | 0% | 50% | 40% |
| AAA- rated bonds without South African Government guarantee | 0% | 25% | Unallocated |
| AA - Rated Bonds | 0% | 25% | 20% |
| A- Rated Bonds | 0% | 15% | 10% |
| BBB – Rated Bonds | 0% | 5% | 2.5% |

Source: Compensation Fund

Table 20B: Money Market: Mandate Limits

| Bank | Recommended Range (%) |
|---------------|-----------------------|
| ABSA | 0% - 40% |
| Firststrand | 0% - 40% |
| Investec | 0% - 20% |
| Nedbank | 0% - 40% |
| Standard Bank | 0% - 40% |
| Other | 0% - 20% |

Source: Compensation Fund

Table 21B: Counter Parties: Mandate Limits in terms of Credit Risk Rating

| Subject of the following restrictions based on the total value of the portfolio | Lower Bound | Upper Bound |
|---|-------------|-------------|
| Republic of South Africa | 70% | 100% |
| AAA – rated issuer with SA Government guarantee | 0% | 30% |
| AAA – rated issuer without SA Government guarantee | 0% | 10% |
| AA – Rated issuer | 0% | 10% |
| A – Rated issuer | 0% | 5% |

Source: Compensation Fund

Appendix C: Duties of the Investment Committee at PIC

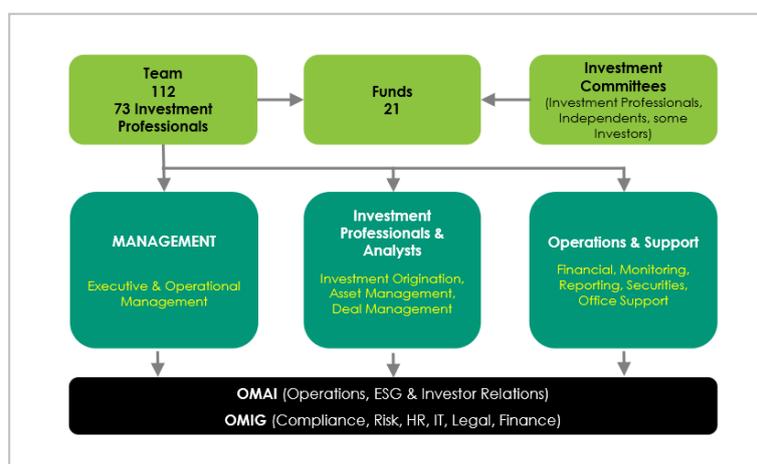
1. The IC operates in line with approved Terms of Reference (TOR), DOA Framework and policies which are reviewed on an annual basis. The responsibilities and duties of the IC are to:
 - 1.1 Ensure that investments, disposals and acquisitions (listed, unlisted and properties) are in line with the PIC's overall investment strategy;
 - 1.2 Ensure that appropriate due diligence procedures are followed when acquiring or disposing of investments;
 - 1.3 Ensure that investments/divestments are in the best interest of clients, increase shareholder value and meet the PIC's financial and ESG criteria;
 - 1.4 Make recommendations to the Board concerning further action about investment/divestment opportunities;
 - 1.5 Give due consideration to the relevant provisions of the Companies Act, read in conjunction with the Companies Act Regulations, the PIC Act, the approved DOA Framework, King IV, competition laws and any other legislation and regulations;
 - 1.6 Monitor performance of the investments, at least on a quarterly basis;
 - 1.7 Review and evaluate policies and procedures that PIC Management has implemented to monitor compliance with client mandates;
 - 1.8 Oversee the implementation of client mandates by reviewing PIC Management's quarterly reports, including but not limited to, the regulatory requirements under the FAIS Act, the PFMA and the Financial Markets Act, 2012 (Act 19 of 2012);
 - 1.9 Report quarterly to the Board on issues relating to the investment of funds under management;
 - 1.10 Consider and approve investments, acquisitions and divestments in line with the approved DOA Framework;
 - 1.11 Review the deal approval process, policies and criteria on an annual basis;

- 1.12 Ensure that risk management is incorporated in all investment recommendations and decisions;
- 1.13 Approve the criteria and process for the selection of external investment managers and notify the Board of approvals;
- 1.14 Approve the process for establishing the mandates of external investment managers;
- 1.15 Approve the process for monitoring external investment managers;
- 1.16 Evaluate performance of external investment managers;
- 1.17 Make recommendations to the Board, which it deems appropriate, on any area within its authority where action or improvement is needed; and
- 1.18 Perform such other investment-related functions as may be determined by the Board from time to time.

Appendix D: Best Practice in Unlisted Investments

1. Old Mutual Alternative Investments (OMAI) is an investment firm that specializes in investing in private equity, infrastructure and impact investments, collectively described as alternatives. They have AUM of R58 billion across 21 funds with over 188 underlying portfolio companies. The unit has a team of 112 employees of which 73 (65%) are investment professionals. The decentralised organizational structure at OMAI is as follows:

Figure 22D: The Decentralised Organisational Structure



Source: OMAI

2. The type of investments that they undertake in the alternatives space include:
 - (1) **Infrastructure:** transport, renewable energy, power generation, communication infrastructure development
 - (2) **Private equity:** direct and fund of funds approaches
 - (3) **Impact funds:** government-supported and private sector projects for social development *e.g.*, schooling and housing
3. In acknowledgement of the broader African growth opportunity, Old Mutual has offices in several locations across the continent in recognition that the best quality deal flow often requires local relationships in the respective markets.

Example 1: SA Infrastructure Fund (IDEAS FUND)

5. There is segregation between the professional team that originates the potential transactions and the investment committee that approves the deals. In a team of 57, there are nine investment professionals on the SA Infrastructure fund (three Investment Directors, five Investment Principals and one Associate) with the rest serving in operating and other support capacities.

6. Composition of the investment committee: Comprised of the Chair who is independent with over 30 years' investment management experience, three senior individuals from the investment team with 10-20 years' experience and three members representing investors (professional investment managers) with 10-20 years' experience.

Example 2: Impact Fund (EDUCATION TEAM)

7. There is segregation between the professional team that originates the potential transactions and the investment committee that approves the deals. In a team of 34, there are four investment professionals (one Investment Principal, two Senior Investment Professionals and one Analyst).
8. Composition of the investment committee: Independent chair with over 20 years' investment and credit experience, three members representing investors with 10-20 years investment management experience, and one independent member who is an Actuary with over 15 years' experience.

Key lessons:

16. Decentralized decision-making: The 21 funds are not managed by one team, and therefore there are several different investment-making structures in place.
17. OMAI has clearly defined levels of responsibility and accountability across the investments business. Levels of investment professionals include Analysts, Associates, Principals and Investment Directors. They are supported by Administration, Finance, Legal, Risk, Compliance, Human Resources, Investment Technology *etc.*
18. Deal origination, deal review and deal proposals are done by the investment team.
19. There is more than one Investment Committee (IC) so that there is enough capacity to review the volume of transactions. In addition, the skills needed to review private equity, infrastructure and impact investing are different. All transactions are approved at the ICs.
20. This means that the way the ICs are constructed is very important. Each IC must have enough independence, skills, and the voice of the investment team who proposes the deals and is held accountable for the investment outcome. The Chair of the IC and the majority of the board is independent with deep investment and commercial experience.
21. Investment decisions are made by unanimous consensus.

22. Old Mutual aims to create an environment that encourages risk-taking and does not only evaluate outcomes but also carefully weighs the process undertaken to get to a particular negative outcome.
23. Hiring top talent gives the firm a competitive edge.
24. Business (Board/senior management) does not get involved in investment decision-making rather has a broader oversight role.
25. The Chief Risk Officer is responsible for compliance and risk functions. This team sits outside of the investment function.
26. At Old Mutual Investment Group (OMIG), the Board has overall responsibility over governance, policies and oversight but no direct role in investment decision-making which is decentralized to respective investment committees.
27. Investment Committee (IC) membership demonstrates a combination of independence, skill and expertise in infrastructure investments. IC members earn a flat fee for being part of the committee.
28. There is clear alignment of interests whereby investment professionals are invested in the funds that they make decisions on. The CEO/MD is not involved in any of the investment making platforms; their main responsibility is to run the business.

Presentation by:

Khaya Gobodo, Old Mutual Investment Group

Appendix E: Best Practice in Private Equity and Private Markets in ROA¹⁶

1. Strategy, selection of markets, defensible sectors, deal size, deal stage, equity size (sweet spot):
 - Proven businesses, with adequate scale, EBITDA profitability, revenues of USD 10m+
 - Early stage businesses/ venture, post revenue, pre-EBITDA with clear path to profitability
 - Ability to absorb follow-on funding rounds with exit visibility
2. Value creation/ portfolio management:
 - Identification of consistent institutionalising activities (operations/ management information systems/ governance)
 - Articulation of key strategic & commercial value drivers which can unlock growth & profitability through responsible investments
3. Deal selection, strategy led, relationship based (proprietary/ intermediated):
 - Knowledge of the management team, understand their strengths, weaknesses, personal and professional drivers and working style
 - Viability of the market & consumer growth (B2B/ B2C): Burrow beneath the business models and understand the business
4. Local and Regional Presence/ Oversight:
 - 54 Countries > 5 regions > Pan-Regional, selection based on common language, ease of cross border business engagement, similar drivers of growth
 - Fast growing cities, well connected regions
5. Trusted Partners/ Ensure alignment of interest:
 - Access to transactions through co-investment rights of funds
 - Own staff housed with partner funds
 - Referral compensation for deal origination/ management
 - Own diverse staff in-house and on-plane
6. Appropriate Team Composition – building the next generation with experienced proven teams with market experience/ networks/ reputations with the right standards and culture:
 - Investment skills
 - Operational skills
 - Industry/ thematic skills

¹⁶ Rest of Africa

7. Investing in the Entrepreneur, growing the Management:
 - Identify what the true management requirements are for the stages of the business, hire well and incentivise based on the strategic plan

8. Structuring well:
 - Mix of internal gearing and equity, aligned with the capital needs of the business
 - Allows for better downside protection, get cash out early and hedges against currency volatility without needing a significant equity exit
 - Ensure strong minority rights, remaining an active investor on all key decisions (M&A/ key staff decisions/ large capex spend), anti-dilution and influencing exit negotiations

9. Currency management:
 - Seek to naturally hedge with dollar-based sales
 - Actively monitor currency assumptions during portfolio management
 - Understand price elasticity to balance market share and profitability

Presented by:

Geetha Tharmaratnam, The Botswana Public Officers Pension Fund (BPOPF)

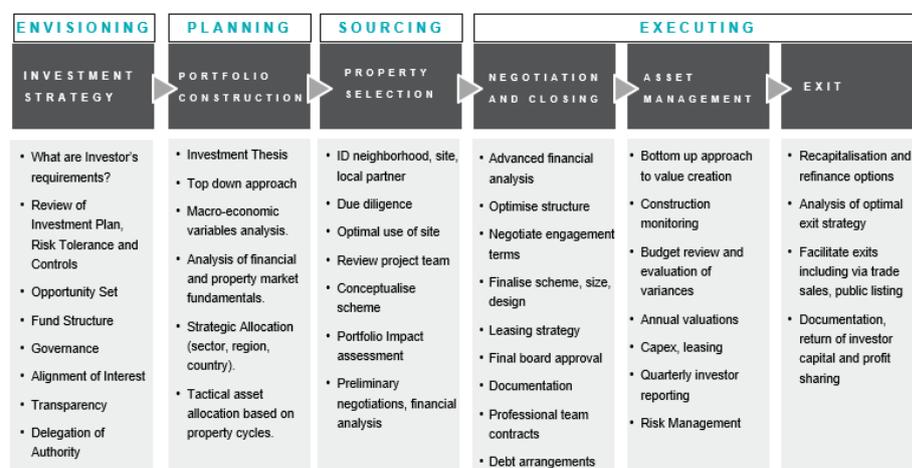
Appendix F: Best Practice in Unlisted Property in ROA

1. African property markets are not homogenous. The African direct property market offers investors an opportunity for higher return at higher risk and it important to understand the different market dynamics. The direct property market is highly illiquid. Low secondary trading means there is poor price discovery. In addition, a significant amount of work is therefore required to establish ownership and title.
 - I. To mitigate the risks, an experienced team and a presence on the ground is required.
 - II. Investors need to determine the right investment approach in each market and buy carefully. It is important to tailor the approach to the type and size of project and have the requisite property development, property management and fund management skills, which can be in-house or outsourced.
 - III. At conceptualization, it is important to identify the region, or country, type of property, the risk and returns of the different market segments (industrial, office, hotels) and selecting the property in the fund within a set framework.
2. Direct property capabilities

| Asset Management | Property Management | Project Development |
|---|---|---|
| <ul style="list-style-type: none"> ▪ Capital raising ▪ Investment allocations ▪ Acquisitions and disposals ▪ Maximising net income ▪ Maximising capital values | <ul style="list-style-type: none"> ▪ Lease management ▪ Accounting and reporting ▪ Operations, risk management ▪ Property marketing ▪ Utility management | <ul style="list-style-type: none"> ▪ Opportunity identification – what to build, where? ▪ Concept design – how to build it? ▪ Construction – the build |

Source: STANLIB

Figure 23F: STANLIB Unlisted Property Investment Process



Source: STANLIB

3. Alignment of interest between Manager and Investor

Manager commitment: Regulation of successor and predecessor funds and time spent on each

Term of Fund: Time for capital raising versus management, divestment, extensions, approval mechanisms

Management fee: Reasonableness of fee versus cost, wage structure. Regulations to establish calculation basis

Carried interest: Manager's economic rights to share in profits, order to pay out, communication of accrual

Reinvestments: Recommended conditions (time and quantity) under which Manager makes investments

Investment related fees: Clarity on nature and origin of fees paid directly or indirectly to Manager/ related entities

Set up and operating expenses: Regulations to clearly specify what quantities. Fund placement fees are always excluded

Co-investments: Transparency regarding the criteria by which the opportunity is offered, and any additional fees

Reporting: Frequent, timely reporting is essential for transparency and control over Manager's activity

4. Fund governance

Board practices: Separate roles of CEO and board chairman, experienced directors, diversity of backgrounds

Advisory/ supervisory committee: Conflict of interest resolution, setting valuation methodology

Manager removal: Investors maintain right to remove manager for cause, with no fees paid beyond removal

Key man clause: Consequences of departing key staff, replacement, notifying investors

Investment policy: Clearly defined investment strategy, sector/ geographical/ sponsor limits, prohibited transactions

Financing polity: Policy on the use of credit facilities, reasons, restrictions, and impact of fund IRR

Modification of fund terms: Flexibility to adapt to changing circumstances, with material modifications subject to approval

Investment committee: Investments and divestments decided by IC, comprising of key staff
ESG policy: ESG factors considered and recorded at every stage of the investment process

Presented by:

Patrick Mamathuba, STANLIB Asset Management

Appendix G: Best Practice in Listed Equities in Rest of Africa

1. Investec have been investing listed asset classes in the rest of Africa since 2004
2. Alpha generation
 - Managing a substantial team, combined with generalist and specialist including financials, resources, economist and credit specialist
3. Including boots on the ground where analysts are regularly flying into countries
4. Philosophy
 - Only invest in companies that are profitable already, as opposed to promise of profit in the future
 - Avoid being contrarian on the continent, this is a hard lesson that has to be learned
5. Have to have people on the ground, this is a non-negotiable

Key lessons

6. Blue sky story spun by charismatic CEOs is not worth it. Invest in profitable companies now
7. Management that are strong operationally and embrace innovation
8. Must understand the macroeconomic risks
9. Spend time in the country
10. Be patient

Presented by:

Thabo Khojane, Investec Asset Management

Appendix H: BEE Deal Structuring

Key lessons

1. All potential transactions need to be evaluated on their own merits and only undertaken when the underlying economics and other key, consistently applied deal criteria make sense.
2. Lending banks assess the risk on BEE deals with reference to the risk of the underlying company as this is the source of all potential repayment proceeds. Size and stability of cashflows from the underlying business as well as the quality of the management and asset base or security are important considerations.

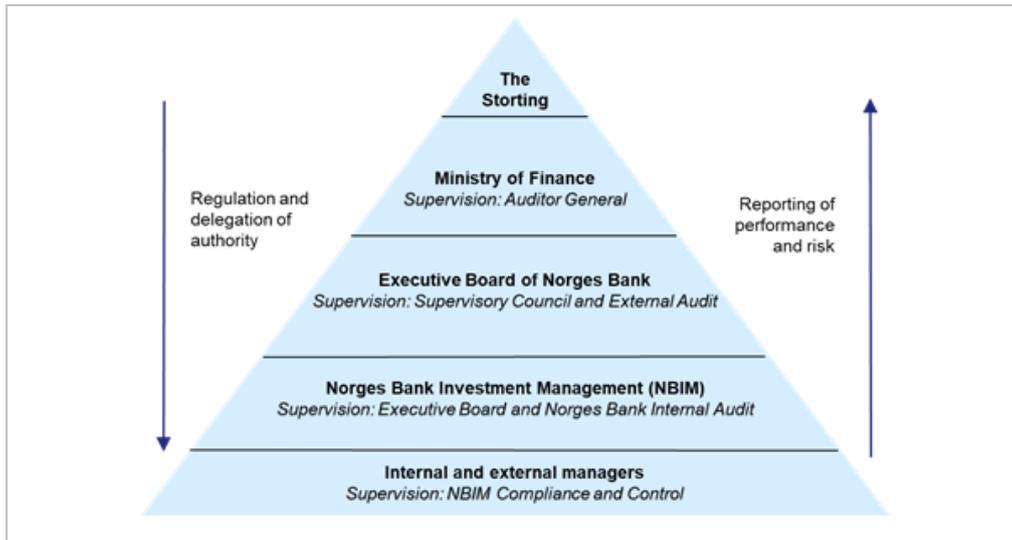
Appendix I: Building Public Trust

Overview of the Norwegian Government Pension Fund Global (GPFG)

1. The Norwegian Government Pension Fund Global (GPFG) is the largest sovereign wealth fund in the world with assets under management of \$1 trillion. The GPFG is managed by NBIM, a special division of the Norwegian Central Bank. The fund invests the country's oil income into listed markets with the aim of achieving the highest possible long-term financial return within an acceptable level of risk. Oil and gas were discovered Norwegian continental shelf in 1969 with production starting in 1971. For the first 25 years, all the revenue generated from the oil and gas sector was simply spent and in some years, more was spent than earned. In time, the need to manage and save petroleum income to transform the finite natural resource into a permanent source of financial wealth for future generations, led to the creation of the Government Petroleum Fund in 1990, with the first net transfer to the Fund occurring in 1996. In 2006, a strategic political decision was made to rename the fund the Government Pensions Fund Global to encourage a stronger sense of ownership and awareness from the population of the country.
2. The fund invests all of its assets outside of Norway. Ninety-nine percent of the assets are managed passively in indices worldwide, largely in-house by a comparatively small investment team of 400. There is very little room for discretionary decisions, but specialist consultants are brought in when their expert knowledge is required. Approximately 70% of the assets are invested in equities and 30% are invested in bonds. The Fund displays its full assets under management in real time on its website including all investments with current market values, which is possible as the Fund invests mainly in listed markets. Any changes to the GPFG's mandated strategy go through a well-defined process to ensure that they are anchored in line with broader societal considerations as follows:
 1. Appointment of national and international experts to assess and make recommendations on the proposed change
 2. Report is made public via a public hearing system
 3. Based on the hearings and on the recommendations, Minister of Finance makes a recommendation to Parliament
 4. Parliament then has another hearing
 5. Based on this hearing and the recommendation from the experts, a decision is made and executed.
3. At present, the most important decision facing the government is where the GPFG should be based inside the central bank or in a separate independent organisation with its own dedicated board given the complexities of running such a fund¹⁷. **Figure 24I** in the following page illustrates the GPFG governance model.

¹⁷ "Norway wealth fund's former chief hits out at governance," by Richard Milne, *Financial Times* May 27, 2019

Figure 24I: GPFG Governance Model



Source: Presentation made on behalf of the Norwegian Ministry of Finance

Key lessons

4. Transparency is important to managing and bolstering public trust and confidence. Public funds have to be well governed because they have the potential to strengthen or destroy public trust in important public institutions. This is established foremost by an active, public reporting stance.
5. No changes are made to the strategic asset allocation changes to the Fund without expert advice.

Presentation by:

Paal Bjornestad - Norwegian Embassy, Pretoria

Appendix J: Other Lessons

1. A key principle of investing is to define a framework which defines and allocates responsibilities to the right levels and groups and identifies how much and which risks to take.
2. In theory, the natural timeframe for many institutional investors is long-term but in practice, short-term performance often matters, and not only in terms of actual results but in a grounding in the process that resulted in the particular results.

Presentation by:

Stephan Meschenmoser, BlackRock

Appendix K: Global Benchmarking

1. California Public Employees' Retirement System (CalPERS) is the largest pensions fund in the United States of America, with over 2,800 employees, US \$354 billion in assets, and is a defined benefit fund. Board members are elected by members or *Ex officio* members or appointed by the State of California. *Ex Officio* members are political appointees and only entitled to sit on the Board because of their office, hence the clear political involvement in the fund.
2. In 2014, CalPERS went through a huge scandal on its governance, when the CEO was involved in racketeering and since then the Fund has taken several steps to fix the issues, with a major focus on transparency.
3. The PIC can learn from their mistakes by strengthening transparency, and internal controls through governance and investment process improvements.
4. Two other Canadian based funds are the Ontario Teachers' Pension Plan (OTPP) which looks after the pension funds for teachers and has about C\$193 billion in assets, and the Canadian Pension Plan Investment Board (CPPIB) which manages about US \$295 billion, with a mandate to provide a universal foundation for all Canadian workers in retirement. Both are governed by strong legislation which insulates them from political interference.

Overview of CalPERS (California Public Employees' Retirement System)

5. CalPERS was established by State legislation in 1931 and its governance code vests significant authority in the CalPERS Board, including the management and control of the particular retirement systems, programs and plans. These are governed and overseen by a 13-member Board of Administration. The Board President and Vice President are elected annually by members of the Board in an open session at the first meeting of the Board for the term of one calendar year. CalPERS Board of Administration consists of 13 members who are elected, appointed, or hold office ex officio. Six are elected from CalPERS members. Three appointed members - two members are appointed by the Governor of the State of California and one public representative appointed by the Speaker of Assembly and the Senate Rules Committee. Four ex Officio members, State Treasurer, State Controller, Director of California Department of Human Resources and a representative from State Personnel Board. CalPERS board subcommittees include:
 - Board Governance Committee;
 - Finance and Administration Committee;
 - Investment Committee;
 - Pension and Health Benefits Committee;
 - Performance and Compensation Committee; and,

- Risk and Audit Committee
6. In terms of transparency, when CalPERS meetings take place, they are governed by California's Bagley-Keene Open Meeting Act. All meetings of the Board and its committees are open to the public with only certain few exceptions. Among other things, the Act requires that CalPERS provide members of the public with an opportunity to address the Board before or during the discussion of each agenda item (three minutes per speaker). Strategic investment decisions are held behind closed doors but the minutes of the meeting are made available once the investment has been made.
 7. CalPERS investment committee is made up of all the members of the board and reviews investment transactions and investment performance and also establishes investment policy and strategy. More than 65% of the CalPERS investments are outsourced to external asset managers. Calpers is the only investor in this case study that has a developmental imperative to develop and invest with emerging asset managers, defined as newly established or relatively small sized firms in terms of assets under management. This is a political imperative and there seems to be a will to do so. The CalPERS Board has delegated significant authority regarding investments to the professional staff of the CalPERS investment office. That office and its staff are led by the CalPERS Chief Investment Officer ("CIO"). The role of the CIO is very well defined in the CalPERS governance manual as well as the delegation of authority given to the CIO. In addition, any role that is given a delegation of authority has to sign for that authority and is obliged to escalate any instance where they are hampered in the execution of that authority. Each investment division is led by a Senior Investment Officer ("SIO") who reports to the CIO.

Overview of the OTPP (Ontario Teachers' Pension Plan)

8. OTPP was founded in 1990 and has 1,200 employees in Toronto, London and in Hong Kong, and invests its assets globally and across a spectrum of sectors. It is a defined benefit pension plan which covers almost all certified teachers employed in education in Ontario. It is governed by the Teachers' Pension Act and Ontario Pension Benefits Act, the Federal Income Tax Act, and laws in the various jurisdictions in which it invests and operates. Ontario Teachers' Federation (OTF) representing teachers and the Ontario government representing the employer are the plan's joint sponsors and re equally responsible for ensuring the pension plan has enough money to meet its long-term obligations. In addition, they appoint experienced, professional experts to the pension plan's board. Through a six-member Partners' Committee, the sponsors jointly, set benefit levels, establish the contribution rate paid by working teachers (which is matched by the Ontario government and other designated employers), decide how to address funding shortfalls or use surplus funds when they arise. Members of the Partners' Committee do not sit on the plan's independent Board.

9. OTTP has an eleven-member board, appointed by the Ontario Teachers' Federation and the Ontario government with the mandate to oversee the management of the pension plan. Each of the Ontario government and the OTF appoint five Board members and, together, they select the chair. The board is independent and oversees management of the pension fund and administration of the pension plan. Board members are professionals with financial and governance expertise and are typically drawn from the fields of accounting, actuarial science, banking, business, economics, education, information technology and investment management.

The OTTP board subcommittees include:

- Investment Committee,
- Audit & Actuarial Committee
- Governance Committee
- Human Resources & Compensation Committee
- Succession Committee
- Operational Risk Committee
- Benefits Adjudication Committee.

10. The OTTP Investment Committee includes all the board members. The Investment Committee of the board reviews and approves the risk budget annually, monitors overall investment risk exposure, and reviews and approves risk management policies that affect the total portfolio, as well as new investments that result in significant risk exposure. The Plan uses risk budgeting to allocate active risk across the investment asset classes. The active risk budget is presented to the Board annually for review and approval. Each investment department is responsible for managing the investment risks associated with the investments they manage within the active risk budget allocated to them. The OTTP report publicly on their investment performance on an annual basis following the end of each calendar year.

Overview of the CPPIB (Canadian Pension Plan Investment Board)

11. "Aligned with our independence from any government, the Act sets no expectations or directions on economic development, social objectives or politically based directives. As a result, we are able to invest with an unambiguous focus solely on the interests of CPP contributors and beneficiaries." - CPPIB-Annual report 2019
12. The Canadian Pension Plan was created in 1966; however, its successor vehicle, the CPPIB was created in 1997 by an act of parliament (the CPPIB Act) to manage and invest the Canadian Pension Plan assets. The CPPIB has assets of US\$295 Bn, 1,661 employees based in Toronto, London, Hong Kong, New York, Sao Paulo, Mumbai, Sydney and Luxembourg. The CPPIB currently invests more than 80% of its assets outside of Canada (vs. only 35% in 2006), and anticipates its assets to grow to US\$600 billion by 2030.

13. The CPPIB Act has safeguards against any political interference. CPPIB operates at arm's length from federal and provincial governments under the oversight of an independent, highly qualified professional Board of Directors. CPPIB management reports not to governments, but to the CPPIB Board of Directors. Amendments to the legislation that governs CPPIB, require agreement by the federal government plus two-thirds of the provinces representing two-thirds of the population. The CPPIB Act holds the Board of Directors and management accountable for their performance under a rigorous public accountability regime which includes accountability to the federal and provincial Finance Ministers who serve as the stewards of the Canadian Pension Plan.
14. The CPPIB Board is comprised of 12 directors, including the Chairperson. The Governor in Council shall, on the recommendation of the Minister, made after the Minister has consulted with the board of directors and the appropriate provincial Ministers of the participating provinces, designate one of the directors as Chairperson. Directors are appointed by the federal Finance Minister in consultation with the participating provinces, and with the assistance of a nominating committee. The nomination process is designed to ensure that only those with expertise in investment, business and finance are appointed to the Board.
- CPPIB board subcommittees include:
- Governance Committee
 - Investment Committee;
 - Audit Committee
 - Risk Committee (Established in 2018)
 - Human Resources and Compensation Committee
15. Risk and audit committees were split in 2018. The Board holds a public meeting once every two years in each participating province to discuss the Board's most recent annual report and to give interested persons an opportunity to comment on it.
16. The CPPIB manage most of their assets in-house. The investing function within CPPIB is structured via the following investment departments:
- Total Portfolio Management (TPM)
 - Capital Markets and Factor Investing (CMF)
 - Active Equities (AE)
 - Credit Investments (CI)
 - Private Equity (PE)
 - Real Assets (RA)

Presentation by:

Vuyo Jack, Empowerdex

GLOSSARY OF TERMS

Active Management

Refers to a portfolio management strategy where the manager makes specific investments with the goal of outperforming an investment benchmark index or target return

Assets

means the investments comprising or constituting a portfolio of a collective investment scheme and includes any income accruals derived or resulting from the investments in the portfolio which are held for or are due to the investors in that portfolio

Authorised financial services provider or provider

means a person who has been granted an authorisation as a financial services provider by the issue to that person of a licence under the Financial Advisory and Intermediary Services Act

Benchmarks

means a standard point or reference against which things maybe compared or assessed

Beneficiaries

means people who gains benefit from something, especially a trust or will or in the case of retirement funds a widow's or orphan's benefit from the deceased member's Fund or those who were usually dependant on the deceased member for maintenance before he/she died

Board

in relation to a pension fund, means the board of the fund referred to in the Act

Board member

means any member of a board of management of a fund

Breach

means an act of breaking a Law, agreement, or code of conduct

Chairperson

means a person in charge of a meeting, company or other organization

Collective investment scheme

means a scheme, in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio

Conflicts of Interest

occur when a party which is in a position to make decisions which affect other stakeholders, has other vested interests which conflicts with the interests of the stakeholders, and is therefore unable to take effective decisions in the best interests of the other stakeholders

Contributions

The amounts paid or payable by a member and/or his or her employer to the fund, in terms of the rules of the retirement fund.

Defined benefit fund

A fund, which is not a defined contribution fund, in which the rules specify the benefits to be paid, usually based on years of service, membership and on final salary or final average salary and where the employer ordinarily undertakes to finance the balance of the cost, after allowing for member contributions, if any.

Defined contribution fund

A fund where the rates of contributions of both the member and employer are specified in the rules and where benefits relate directly to contributions received, together with interest or bonuses arising from the investment performance of the fund.

Expert advisors

means a person who is very knowledgeable about or skillful in a particular area

Fund return

in relation to the assets of a fund, means any income (received or accrued) and capital gains and losses (realised or unrealised) earned on the assets of the fund, net of expenses and tax charges, associated with the acquisition, holding or disposal of assets; or

Index

means a weighted average of securities listed on an exchange or a number of exchanges, with full membership of the World Federation of Exchanges, and published by such exchange or exchanges representing a statistical indicator providing a representation of the value of the securities which constitute such index: Provided that the composition of such an index meets the same level of diversification as contemplated in the Notice

Investment

means money put into financial schemes, shares, or property with the expectation of achieving a profit or preserving the real value

Listed securities

means securities included in the list of securities kept by an exchange

Minister

means the Cabinet member responsible for finance in the context of the Pension Funds Act and other legislation supervised by the Financial Sector Conduct Authority, the Minister of Finance in the context of the Pension Funds Act

Passive Management

is an investing strategy that tracks a market-weighted index or portfolio.

Pension fund

A funding arrangement as defined in the Pension Funds Act, to provide pension and/or other benefits for members on retiring and, after a member's death, for his or her dependants or nominees. At least two-thirds of the benefits due at retirement are to be taken as a pension in terms of the Income Tax Act, 1962.

Performance

means the accomplishment of a given task measured against preset known standards of accuracy, completeness, cost, and speed

PFA

Pension Funds Act, 1956

Portfolio

means a group of assets including any amount of cash in which members of the public are invited or permitted by a manager to acquire, pursuant to a collective investment scheme, a participatory interest or a participatory interest of a specific class which as a result of its specific characteristics differs from another class of participatory interests

Private Equity

Shares that are not traded on a public market or, more broadly, investments for which there is no readily liquid market on which the investor can exit at an objectively determined price.

Provident fund

any fund (other than a pension fund, benefit fund or retirement annuity fund) that is approved by the Commissioner of Inland Revenue and is registered under the provisions of the Act. The total benefit at retirement may be taken as a cash lump sum, subject to income tax

Regulatory authority

an entity established in terms of national legislation responsible for regulating activities of an industry, or sector of an industry

Risk management

involves assessing and quantifying business risks, then taking measures to control or reduce them

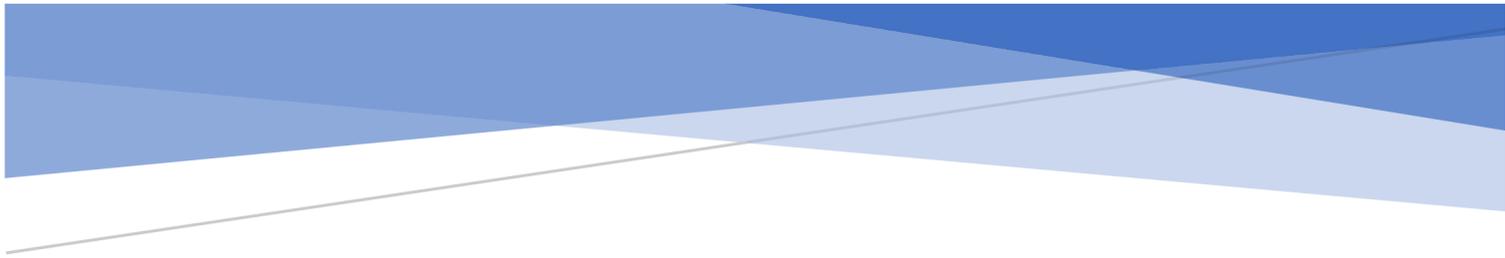
Terms of reference

describes the purpose and structure of a project, committee, meeting, negotiation, or any similar collection of people who have agreed to

Tracking error

is a measure of how closely a portfolio follows the index to which it is benchmarked. An index tracking fund is expected to have zero or very low tracking error relative to the index being tracked

Source: <https://www.trusteetoolkit.co.za/> and other



APPENDICES

REPORT ON PROCEEDINGS OF THE
PIC INQUIRY WORKSHOP

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Appendix A: Compensation Fund Credit Risk Management

Credit Risk – as per PFMA Treasury Regulation 31.3.2

Table 1A: Bonds in Aggregate: Investment Mandate Limits in Bond Instruments

| Instrument | Max. limit per issuer |
|---|-----------------------|
| Government Bonds (RSA Bonds and/or Government Guaranteed, etc.) | 70% to 100% |
| Other Bonds (Corporate, Parastatals, Securitisation, etc.) | 0% to 30% |

Source: Compensation Fund

Table 2A: Counter Parties: Mandates Limits in terms of Bond Credit Risk Rating

| Subject to the following restrictions based on the total value of the portfolio | Lower Bound | Upper Bound | SAA Limit |
|---|-------------|-------------|-------------|
| Sovereign obligations of the Republic of South Africa | 70% | 100% | 100% |
| AAA - rated bonds with South African Government guarantee | 0% | 50% | 40% |
| AAA- rated bonds without South African Government guarantee | 0% | 25% | Unallocated |
| AA - Rated Bonds | 0% | 25% | 20% |
| A- Rated Bonds | 0% | 15% | 10% |
| BBB – Rated Bonds | 0% | 5% | 2.5% |

Source: Compensation Fund

Table 3A: Money Market: Mandate Limits

| Bank | Recommended Range (%) |
|---------------|-----------------------|
| ABSA | 0% - 40% |
| Firststrand | 0% - 40% |
| Investec | 0% - 20% |
| Nedbank | 0% - 40% |
| Standard Bank | 0% - 40% |
| Other | 0% - 20% |

Source: Compensation Fund

Table 4A: Counter Parties: Mandate Limits in terms of Credit Risk Rating

| Subject of the following restrictions based on the total value of the portfolio | Lower Bound | Upper Bound |
|---|-------------|-------------|
| Republic of South Africa | 70% | 100% |
| AAA – rated issuer with SA Government guarantee | 0% | 30% |
| AAA – rated issuer without SA Government guarantee | 0% | 10% |
| AA – Rated issuer | 0% | 10% |
| A – Rated issuer | 0% | 5% |

Source: Compensation Fund

Appendix B: Duties of the Investment Committee at PIC

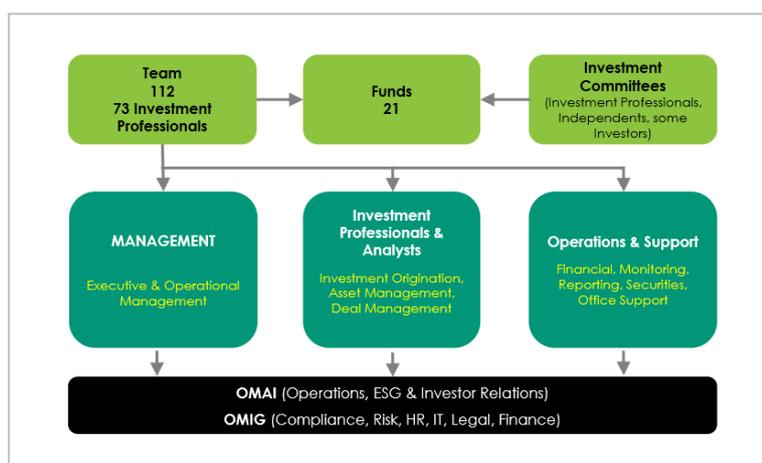
The IC operates in line with approved Terms of Reference (ToR), DoA Framework and policies which are reviewed on an annual basis. The responsibilities and duties of the IC are to:

- a. Ensure that investments, disposals and acquisitions (listed, unlisted and properties) are in line with the PIC's overall investment strategy;
- b. Ensure that appropriate due diligence procedures are followed when acquiring or disposing of investments;
- c. Ensure that investments/divestments are in the best interest of clients, increase Shareholder value and meet the PIC's financial and ESG criteria;
- d. Make recommendations to the Board concerning further action about investment/divestment opportunities;
- e. Give due consideration to the relevant provisions of the Companies Act, read in conjunction with the Companies Act Regulations, the PIC Act, the approved DoA Framework, King IV, competition laws and any other legislation and regulations;
- f. Monitor performance of the investments, at least on a quarterly basis;
- g. Review and evaluate policies and procedures that PIC Management has implemented to monitor compliance with client mandates;
- h. Oversee the implementation of client mandates by reviewing PIC Management's quarterly reports, including but not limited to, the regulatory requirements under the FAIS Act, the PFMA and the Financial Markets Act, 2012 (Act 19 of 2012);
- i. Report quarterly to the Board on issues relating to the investment of funds under management;
- j. Consider and approve investments, acquisitions and divestments in line with the approved DoA Framework;
- k. Review the deal approval process, policies and criteria on an annual basis;
- l. Ensure that risk management is incorporated in all investment recommendations and decisions;
- m. Approve the criteria and process for the selection of external investment managers and notify the Board of approvals;
- n. Approve the process for establishing the mandates of external investment managers;
- o. Approve the process for monitoring external investment managers;
- p. Evaluate performance of external investment managers;
- q. Make recommendations to the Board, which it deems appropriate, on any area within its authority where action or improvement is needed; and
- r. Perform such other investment-related functions as may be determined by the Board from time to time.

Appendix C: Best Practice in Unlisted Investments

Old Mutual Alternative Investments (OMAI) is an investment firm that specializes in investing in private equity, infrastructure and impact investments, collectively described as alternatives. They have AUM of R58 billion across 21 funds with over 188 underlying portfolio companies. The unit has a team of 112 employees of which 73 (65%) are investment professionals. The decentralised organizational structure at OMAI is as follows:

Figure 1C: The Decentralised Organisational Structure



Source: OMAI

The type of investments that they undertake in the alternatives space include:

- (1) **Infrastructure:** transport, renewable energy, power generation, communication infrastructure development
- (2) **Private equity:** direct and fund of funds approaches
- (3) **Impact funds:** government-supported and private sector projects for social development *e.g.*, schooling and housing

In acknowledgement of the broader African growth opportunity, Old Mutual has offices in several locations across the continent in recognition that the best quality deal flow often requires local relationships in the respective markets.

Example 1: SA Infrastructure Fund (IDEAS FUND)

- There is segregation between the professional team that originates the potential transactions and the investment committee that approves the deals. In a team of 57, there are nine investment professionals on the SA Infrastructure fund (three Investment Directors, five Investment Principals and one Associate) with the rest serving in operating and other support capacities.
- Composition of the investment committee: Comprised of the Chair who is independent with over 30 years' investment management experience, three senior individuals from

the investment team with 10-20 years' experience and three members representing investors (professional investment managers) with 10-20 years' experience.

Example 2: Impact Fund (EDUCATION TEAM)

- There is segregation between the professional team that originates the potential transactions and the investment committee that approves the deals. In a team of 34, there are four investment professionals (one Investment Principal, two Senior Investment Professionals and one Analyst).
- Composition of the investment committee: Independent chair with over 20 years' investment and credit experience, three members representing investors with 10-20 years investment management experience, and one independent member who is an Actuary with over 15 years' experience.

Key lessons:

- Decentralized decision-making: The 21 funds are not managed by one team, and therefore there are several different investment-making structures in place.
- OMAI has clearly defined levels of responsibility and accountability across the investments business. Levels of investment professionals include Analysts, Associates, Principals and Investment Directors. They are supported by Administration, Finance, Legal, Risk, Compliance, Human Resources, Investment Technology *etc.*
- Deal origination, deal review and deal proposals are done by the investment team.
- There is more than one Investment Committee (IC) so that there is enough capacity to review the volume of transactions. In addition, the skills needed to review private equity, infrastructure and impact investing are different. All transactions are approved at the ICs.
- This means that the way the ICs are constructed is very important. Each IC must have enough independence, skills, and the voice of the investment team who proposes the deals and is held accountable for the investment outcome. The Chair of the IC and the majority of the board is independent with deep investment and commercial experience.
- Investment decisions are made by unanimous consensus.
- Old Mutual aims to create an environment that encourages risk-taking and does not only evaluate outcomes but also carefully weighs the process undertaken to get to a particular negative outcome.
- Hiring top talent gives the firm a competitive edge.
- Business (Board/senior management) does not get involved in investment decision-making rather has a broader oversight role.
- The Chief Risk Officer is responsible for compliance and risk functions. This team sits outside of the investment function.
- At Old Mutual Investment Group (OMIG), the Board has overall responsibility over governance, policies and oversight but no direct role in investment decision-making which is decentralized to respective investment committees.

- Investment Committee (IC) membership demonstrates a combination of independence, skill and expertise in infrastructure investments. IC members earn a flat fee for being part of the committee.
- There is clear alignment of interests whereby investment professionals are invested in the funds that they make decisions on. The CEO/MD is not involved in any of the investment making platforms; their main responsibility is to run the business.

Appendix D: Best Practice in Private Equity and Private Markets in ROA¹

1. Strategy, selection of markets, defensible sectors, deal size, deal stage, equity size (sweet spot):
 - Proven businesses, with adequate scale, EBITDA profitability, revenues of USD 10m+
 - Early stage businesses/ venture, post revenue, pre-EBITDA with clear path to profitability
 - Ability to absorb follow-on funding rounds with exit visibility
2. Value creation/ portfolio management:
 - Identification of consistent institutionalising activities (operations/ management information systems/ governance)
 - Articulation of key strategic & commercial value drivers which can unlock growth & profitability through responsible investments
3. Deal selection, strategy led, relationship based (proprietary/ intermediated):
 - Knowledge of the management team, understand their strengths, weaknesses, personal and professional drivers and working style
 - Viability of the market & consumer growth (B2B/ B2C): Burrow beneath the business models and understand the business
4. Local and Regional Presence/ Oversight:
 - 54 Countries > 5 regions > Pan-Regional, selection based on common language, ease of cross border business engagement, similar drivers of growth
 - Fast growing cities, well connected regions
5. Trusted Partners/ Ensure alignment of interest:
 - Access to transactions through co-investment rights of funds
 - Own staff housed with partner funds
 - Referral compensation for deal origination/ management
 - Own diverse staff in-house and on-plane
6. Appropriate Team Composition – building the next generation with experienced proven teams with market experience/ networks/ reputations with the right standards and culture:
 - Investment skills
 - Operational skills
 - Industry/ thematic skills

¹ Rest of Africa

7. Investing in the Entrepreneur, growing the Management:
 - Identify what the true management requirements are for the stages of the business, hire well and incentivise based on the strategic plan

8. Structuring well:
 - Mix of internal gearing and equity, aligned with the capital needs of the business
 - Allows for better downside protection, get cash out early and hedges against currency volatility without needing a significant equity exit
 - Ensure strong minority rights, remaining an active investor on all key decisions (M&A/ key staff decisions/ large capex spend), anti-dilution and influencing exit negotiations

9. Currency management:
 - Seek to naturally hedge with dollar-based sales
 - Actively monitor currency assumptions during portfolio management
 - Understand price elasticity to balance market share and profitability

Presented by:

Geetha Tharmaratnam, The Botswana Public Officers Pension Fund (BPOPF)

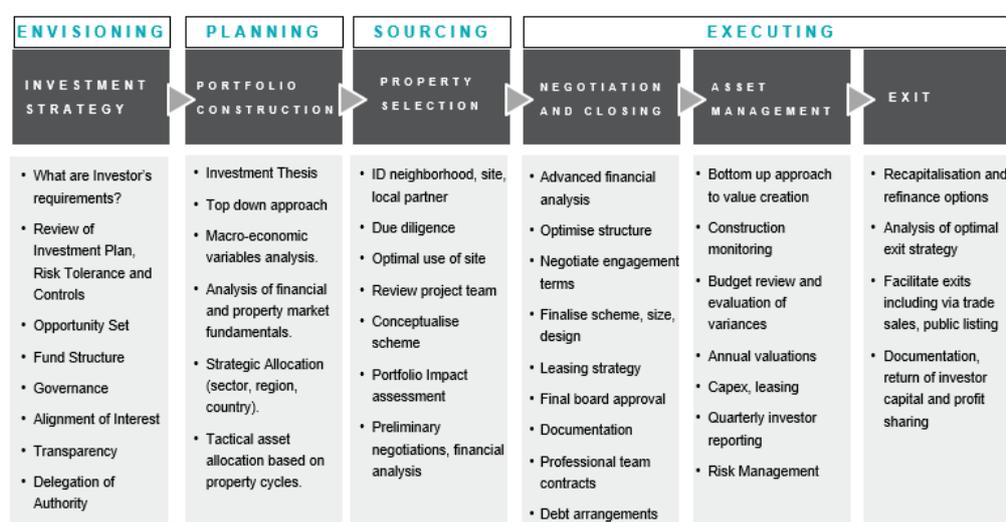
Appendix E: Best Practice in Unlisted Property in ROA

1. Direct property capabilities

| Asset Management | Property Management | Project Development |
|---|---|---|
| <ul style="list-style-type: none"> Capital raising Investment allocations Acquisitions and disposals Maximising net income Maximising capital values | <ul style="list-style-type: none"> Lease management Accounting and reporting Operations, risk management Property marketing Utility management | <ul style="list-style-type: none"> Opportunity identification – what to build, where? Concept design – how to build it? Construction – the build |

Source: STANLIB

2. Investment process



Source: STANLIB

3. Alignment of interest between Manager and Investor

Manager commitment: Regulation of successor and predecessor funds and time spent on each

Term of Fund: Time for capital raising versus management, divestment, extensions, approval mechanisms

Management fee: Reasonableness of fee versus cost, wage structure. Regulations to establish calculation basis

Carried interest: Manager's economic rights to share in profits, order to pay out, communication of accrual

Reinvestments: Recommended conditions (time and quantity) under which Manager makes investments

Investment related fees: Clarity on nature and origin of fees paid directly or indirectly to Manager/ related entities

Set up and operating expenses: Regulations to clearly specify what quantities. Fund placement fees are always excluded

Co-investments: Transparency regarding the criteria by which the opportunity is offered, and any additional fees

Reporting: Frequent, timely reporting is essential for transparency and control over Manager's activity

4. Fund governance

Board practices: Separate roles of CEO and board chairman, experienced directors, diversity of backgrounds

Advisory/ supervisory committee: Conflict of interest resolution, setting valuation methodology

Manager removal: Investors maintain right to remove manager for cause, with no fees paid beyond removal

Key man clause: Consequences of departing key staff, replacement, notifying investors

Investment policy: Clearly defined investment strategy, sector/ geographical/ sponsor limits, prohibited transactions

Financing policy: Policy on the use of credit facilities, reasons, restrictions, and impact of fund IRR

Modification of fund terms: Flexibility to adapt to changing circumstances, with material modifications subject to approval

Investment committee: Investments and divestments decided by IC, comprising of key staff
ESG policy: ESG factors considered and recorded at every stage of the investment process

Presented by:

Patrick Mamathuba, STANLIB Asset Management

Appendix F: Best Practice in Listed Equities in ROA

Investec have been investing listed asset classes in the rest of Africa since 2004

- Approach to investment decisions
- Examples of opportunities and of failures across Africa

Alpha generation

- Managing a substantial team, combined with generalist and specialist including financials, resources, economist and credit specialist
- Including boots on the ground where analysts are regularly flying into countries

Philosophy

- Only invest in companies that are profitable already, as opposed to promise of profit in the future
- Avoid being contrarian on the continent, this is a hard lesson that has to be learned
- Have to have people on the ground, this is a non-negotiable

Key lessons

- Blue sky storey spun by charismatic CEOs is not worth it. Invest in profitable companies now
- Management that are strong operationally an embrace innovation
- Must understand the macroeconomic risks
- Spend time in the country
- Be patient

Presented by:

Thabo Khojane, Investec Asset Management

Appendix G: BEE Deal Structuring

Key lessons:

- All potential transactions need to be evaluated on their own merits and only undertaken when the underlying economics and other key, consistently applied deal criteria make sense.
- Lending banks assess the risk on BEE deals with reference to the risk of the underlying company as this is the source of all potential repayment proceeds. Size and stability of cashflows from the underlying business as well as the quality of the management and asset base or security are important considerations.

Appendix H: Building Public Trust

The Norwegian Government Pension Fund Global (GPF) is the largest sovereign wealth fund in the world with assets under management of \$1 trillion. The GPF is managed by NBIM, a special division of the Norwegian Central Bank. The fund invests the country's oil income into listed markets with the aim of achieving the highest possible long-term financial return within an acceptable level of risk. Oil and gas were discovered on the Norwegian continental shelf in 1969 with production starting in 1971. For the first 25 years, all the revenue generated from the oil and gas sector was simply spent and, in some years, more was spent than earned. In time, the need to manage and save petroleum income to transform the finite natural resource into a permanent source of financial wealth for future generations, led to the creation of the Government Petroleum Fund in 1990, with the first net transfer to the Fund occurs in 1996. In 2006, a strategic political decision was made to rename the fund the Government Pensions Fund Global to encourage a stronger sense of ownership and awareness from the population of the country.

The fund invests 100% outside of Norway. Ninety-nine percent of the assets are managed passively in indices worldwide, largely in-house by a comparatively small team of 400. There is very little room for discretionary decisions, but specialist consultants are brought in when their expert knowledge is required. Approximately 70% of the assets are invested in equities and 30% are invested in bonds. The Fund displays its full assets under management in real time on its website including all investments with current values, which is possible as the Fund invests mainly in listed markets. Any changes to the Fund's mandated strategy go through a well-defined process to ensure that they are anchored in line with broader societal considerations as follows:

1. Appointment of national and international experts to assess and make recommendations on the proposed change
2. Report is made public via a public hearing system
3. Based on the hearings and on the recommendations, Minister of Finance makes a recommendation to Parliament
4. Parliament then has another hearing
5. Based on this hearing and the recommendation from the experts, a decision is made and executed.

At present, the most important decision facing the government is where the Fund should be based: inside the central bank or in a separate independent organisation with its own dedicated board given the complexities of running such a fund².

Key lessons:

² "Norway wealth fund's former chief hits out at governance," by Richard Milne, *Financial Times* May 27, 2019

- Transparency is important to managing and bolstering public trust and confidence. Public funds have to be well governed because they have the potential to strengthen or destroy public trust in important public institutions. This is established foremost by an active, public reporting stance.
- No changes are made to the strategic asset allocation changes to the Fund without expert advice.

Appendix I: Other Lessons

- A key principle of investing is to define a framework which defines and allocates responsibilities to the right levels and groups and identifies how much and which risks to take.
- In theory, the natural timeframe for many institutional investors is long-term but in practice, short-term performance often matters, and not only in terms of actual results but in a grounding in the process that resulted in the particular results.



PIC Commission Report

REPORT BY
 Meltwater

Gold, spot - 1.276,820 - 23:00:00 13 giu (CEST)
Gold, spot (Bid), 1 minute, # 159 / 300, Logarithmic, Heikin A

| Volume | High |
|--------|----------|
| 1079.8 | 16787.89 |
| 1089.8 | 16402.11 |
| 1139.8 | 16444.57 |
| 1157.8 | 16121.84 |
| 1189.8 | 7678.5 |
| 1239.8 | 4555.86 |
| 125.8 | 8958.55 |
| | 11134.3 |
| | 414.86 |
| | 1387.282 |
| | 818.74 |
| | 745.516 |
| | 487.226 |



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27. Word Cloud (PIC Transactions | Glob...



EXECUTIVE SUMMARY

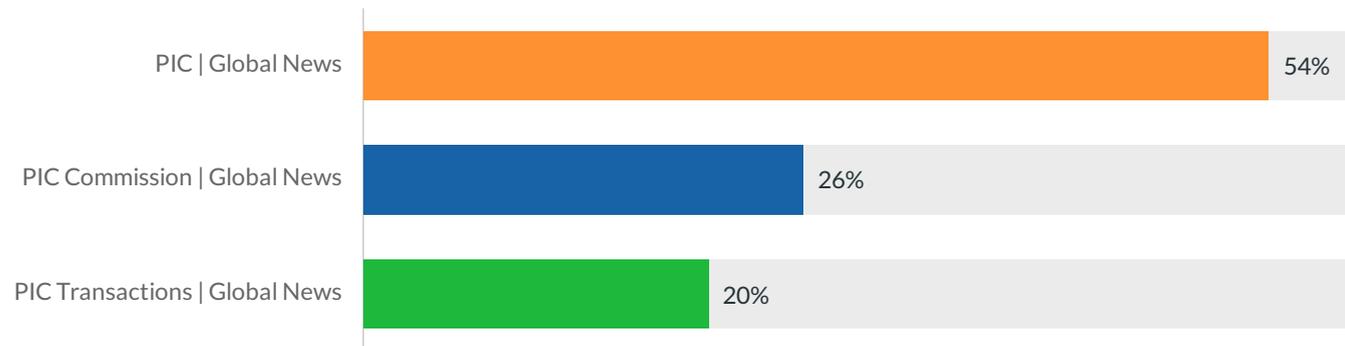
HIGHLIGHTS

- The total number of editorial mentions for the group were 12.5k, with an overall potential reach of 46B views
- The group's sentiment was overall negative



Global News's reach share covered 54%

SHARE OF VOICE BY REACH - Jan 1, 2019 - Sep 30, 2019



GROUP SUMMARY

≡ Editorial Mentions | 12.5k

The number of appearances in articles

↗ Potential Reach | 46B

Approximate number of article views you appeared in

🗨️ Net Tonality Score | -9

The net change (up or down) in sentiment over the time period

GROUP TONALITY

Positive 2%

Negative 10%

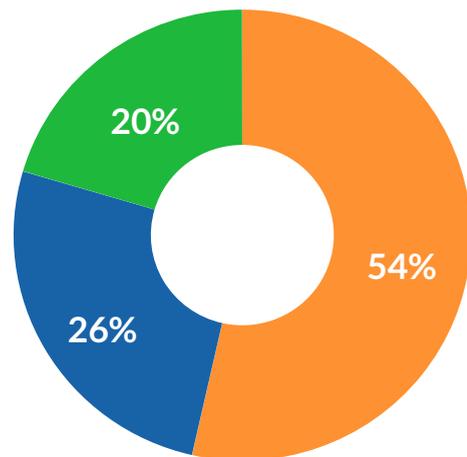
Neutral 88%

SHARE OF VOICE BY REACH

HIGHLIGHTS

PIC | Global News had the largest reach share with 54%

Share of Voice by Reach - Jan 1, 2019 - Sep 30, 2019



| | |
|---|-------|
| ● PIC Global News | 24.6B |
| ● PIC Commission Global N... | 12B |
| ● PIC Transactions Global... | 9.4B |

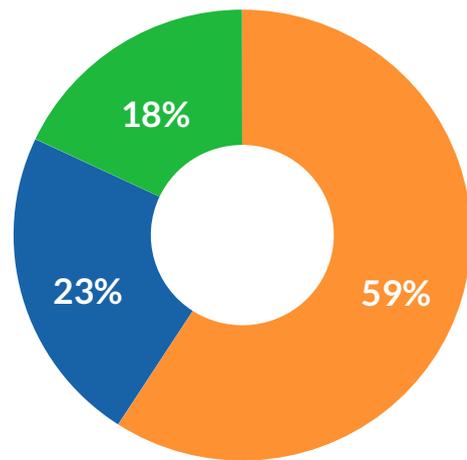


SHARE OF VOICE BY VOLUME

HIGHLIGHTS

PIC | Global News had the largest volume share with 59%

Share of Voice by Volume - Jan 1, 2019 - Sep 30, 2019



| | |
|---|------|
| ● PIC Global News | 7.4k |
| ● PIC Commission Global N... | 2.9k |
| ● PIC Transactions Global... | 2.3k |



TOP ARTICLES

HIGHLIGHTS

- The top 25 articles combined for a total reach of 3B
- The sentiment was predominantly negative in the top articles with high reach
- PIC Commission



MSN South Africa had the largest reach of 109M

Top Articles - Jan 1, 2019 - Sep 30, 2019

MSN South Africa | May 1

Discredited Sunday Times journalists find new home at Iqbal Survé's media empire

Editor's note: The opinions in this article are the author's, as published by our content partner, and do not represent the views of MSN or ...

Reach 109M ● Neutral

MSN South Africa | May 7

Western Cape ANC to return Iqbal Survé's R1m election donation

CAPE TOWN - The African National Congress (ANC) in the Western Cape has decided to return a donation from Cape Town businessman Iqbal Survé...

Reach 109M ● Neutral

MSN South Africa | May 8

Swerve on Survé: R1m donation falls foul of ANC factional strife

Editor's note: The opinions in this article are the author's, as published by our content partner, and do not necessarily represent the view...

Reach 109M ● Neutral

MSN South Africa | May 15

Former Ayo board member implicates Iqbal Survé directly in bogus valuation of company

Editor's note: The opinions in this article are the author's, as published by our content partner, and do not represent the views of MSN or ...

Reach 109M ● Neutral

TOP ARTICLES

HIGHLIGHTS

- The top 25 articles combined for a total reach of 3B
- The sentiment was predominantly negative in the top articles with high reach
- PIC



搜狐新闻-搜狐 had the largest reach of 129M

Top Articles - Jan 1, 2019 - Sep 30, 2019

搜狐新闻-搜狐 | Aug 15

腾讯背后的神秘金主，1000亿美元资本大收割

原标题：腾讯背后的神秘金主，1000亿美元资本大收割 2001年是腾讯生死存亡的一年，资金几乎耗尽，在用户数迅速增加的同时，盈利却遥遥无期。当时腾讯的两个大股东-IDG资本和小超人李泽楷急了，觉得这笔投资很亏...

Reach 129M ● Neutral

MSN South Africa | May 1

Discredited Sunday Times journalists find new home at Iqbal Survé's media empire

Editor's note: The opinions in this article are the author's, as published by our content partner, and do not represent the views of MSN or ...

Reach 109M ● Neutral

搜狐新闻-搜狐 | Aug 15

腾讯背后的神秘金主，1000亿美元资本大收割

原标题：腾讯背后的神秘金主，1000亿美元资本大收割 欢迎关注“创事记”微信订阅号：sinachuangshiji 文/挖数 来源：挖数 (ID:washu66) 2001年是腾讯生死存亡的一年，资金几乎耗尽，...

Reach 129M ● Neutral

MSN South Africa | May 2

New HoldCo acquisition of Edgars should go ahead – commission

DURBAN – Struggling Edcon on Tuesday received a major lease of life after the Competition Commission recommended that the Competition Tribun...

Reach 109M ● Neutral

TOP ARTICLES

HIGHLIGHTS

- The top 25 articles combined for a total reach of 3B
- The sentiment was predominantly negative in the top articles with high reach
- PIC Transactions



MSN South Africa had the largest reach of 109M

Top Articles - Jan 1, 2019 - Sep 30, 2019

MSN South Africa | May 1

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Reach 109M ● Neutral

MSN South Africa | May 7

Western Cape ANC to return Iqbal Survé's R1m election donation

CAPE TOWN – The African National Congress (ANC) in the Western Cape has decided to return a donation from Cape Town businessman Iqbal Survé...

Reach 109M ● Neutral

MSN South Africa | May 8

Swerve on Survé: R1m donation falls foul of ANC factional strife

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Reach 109M ● Neutral

MSN South Africa | May 6

WhatsApps expose Floyd Shivambu and the 'red boys'

A series of cryptic messages add further weight to claims that the EFF deputy president used his political profile for financial gain. Floy...

Reach 109M ● Neutral

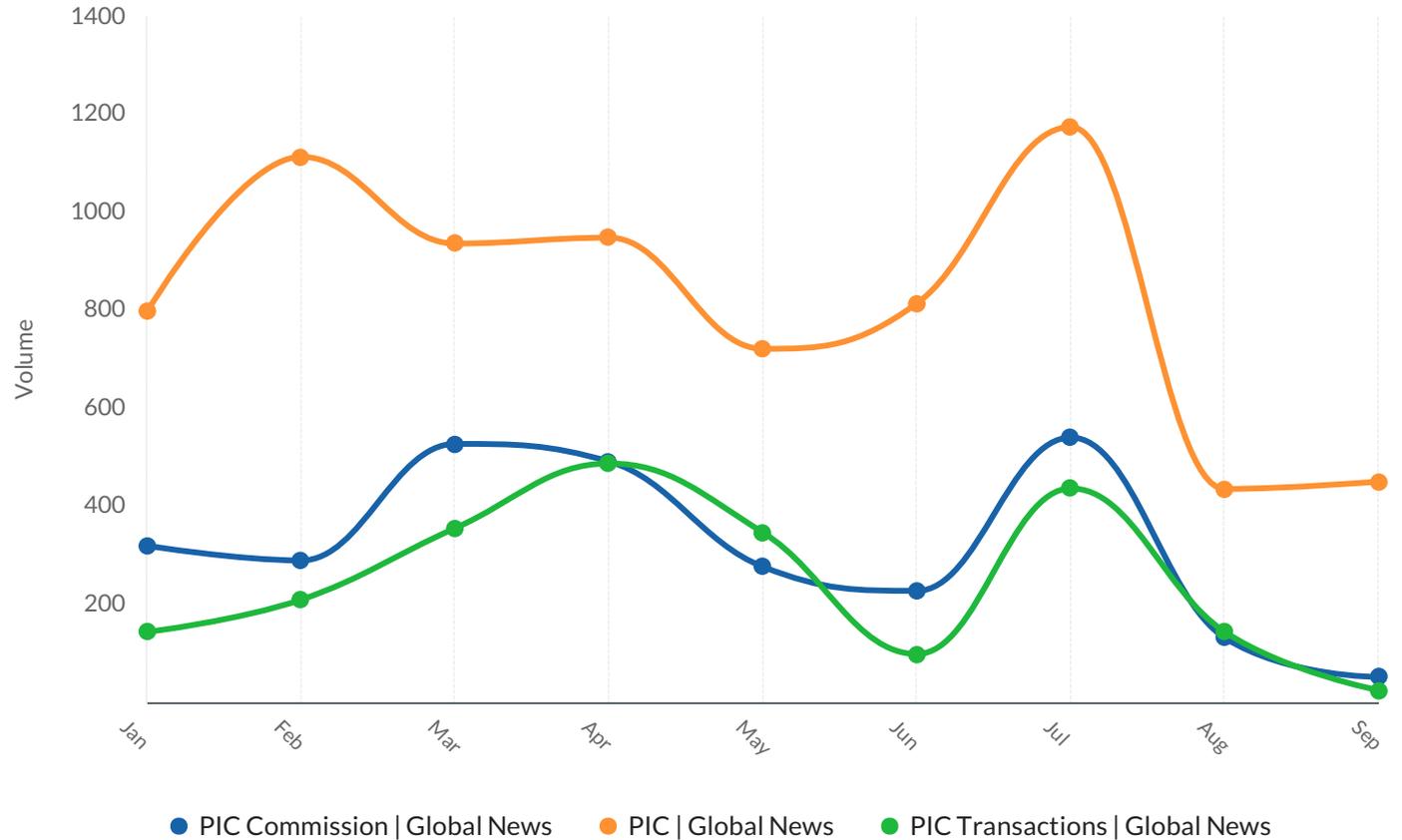
COMPETITIVE MEDIA EXPOSURE

HIGHLIGHTS



PIC | Global News's exposure peaked in July at 1.2k

Competitive Media Exposure - Jan 1, 2019 - Sep 30, 2019



mSCORE

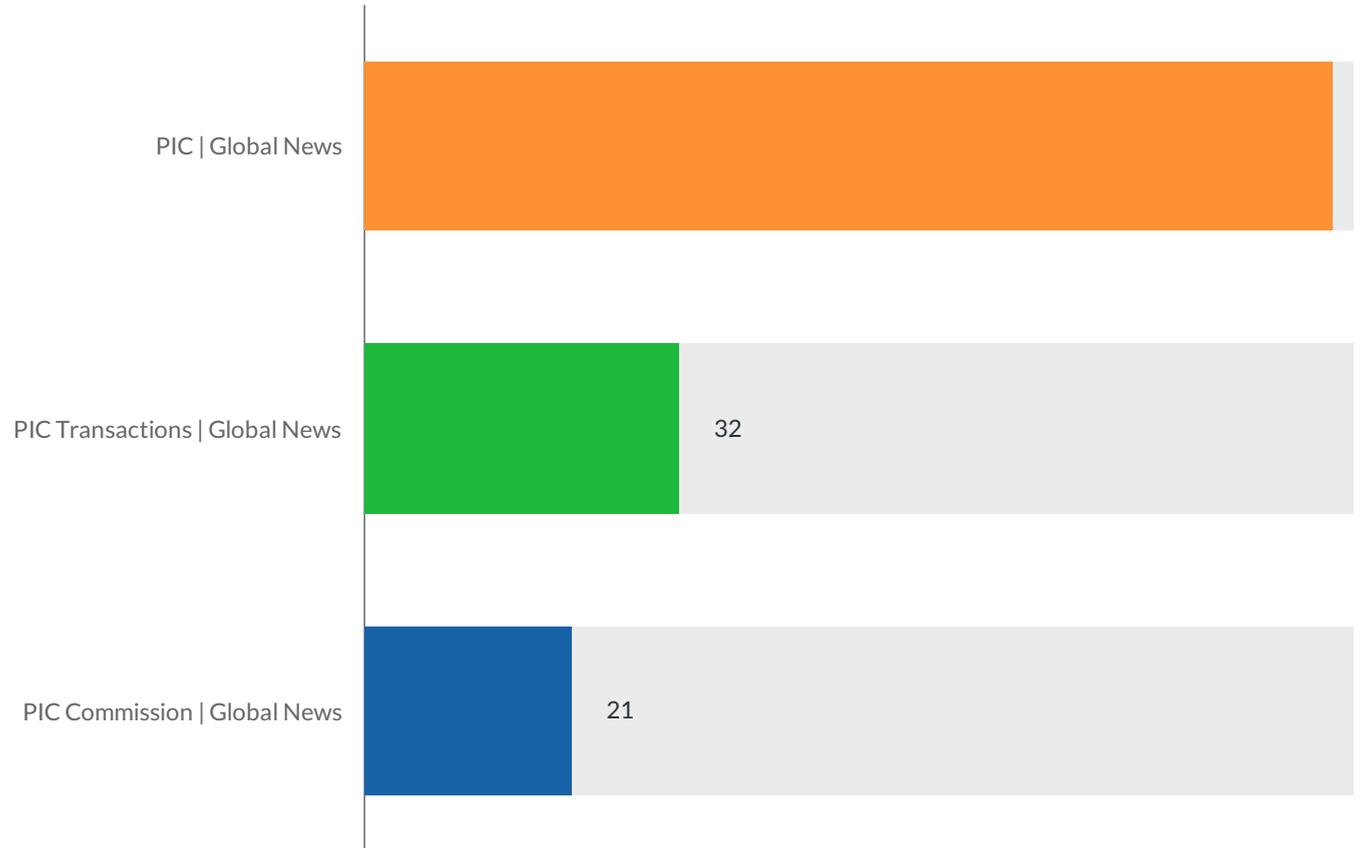
Your mScore is based on a combination of Editorial Mentions, Reach, and Tonality

HIGHLIGHTS



PIC | Global News scored the highest at 98

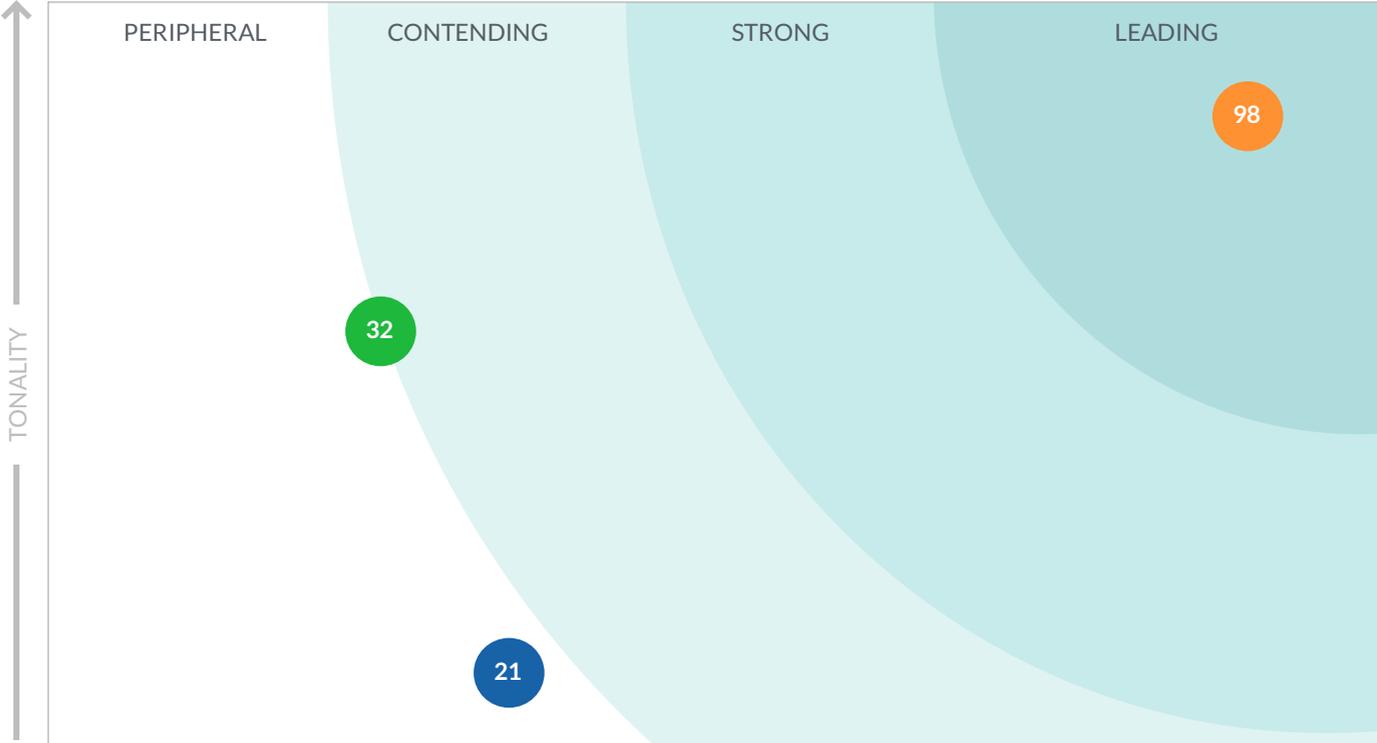
mSCORE - Jan 1, 2019 - Sep 30, 2019



mSCORE POSITION

PIC | Global News scored the highest

mScore Position - Jan 1, 2019 - Sep 30, 2019



● 21 - PIC Commission | Global News ● 98 - PIC | Global News ● 32 - PIC Transactions | Global News



MEDIA EXPOSURE

PIC Commission | Global News

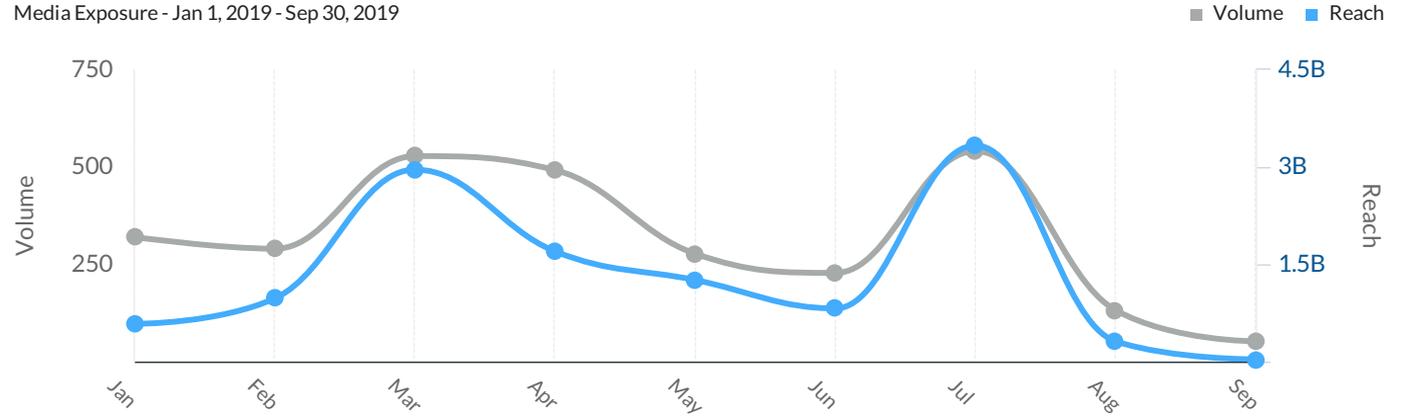
HIGHLIGHTS

- July had the highest volume of editorial mentions with 541
- IOL mentioned PIC Commission | Global News the most at 313

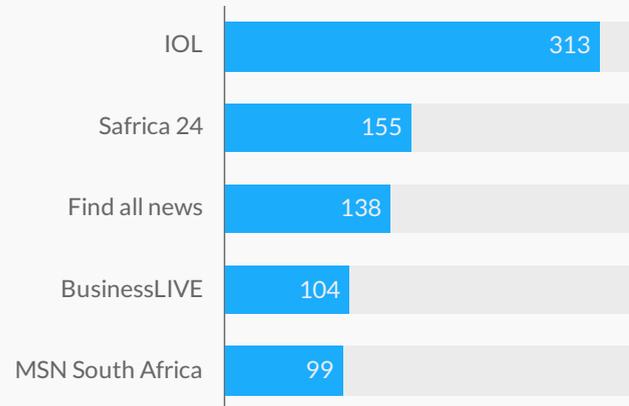


PIC Commission | Global News's exposure was highest in July

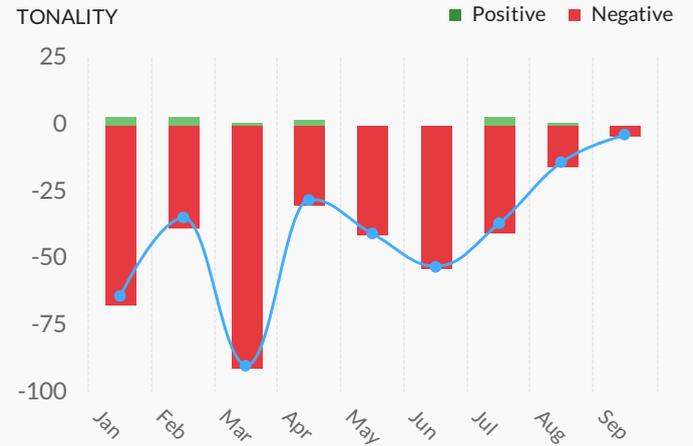
Media Exposure - Jan 1, 2019 - Sep 30, 2019



TOP PUBLICATIONS



TONALITY



MEDIA EXPOSURE

PIC | Global News

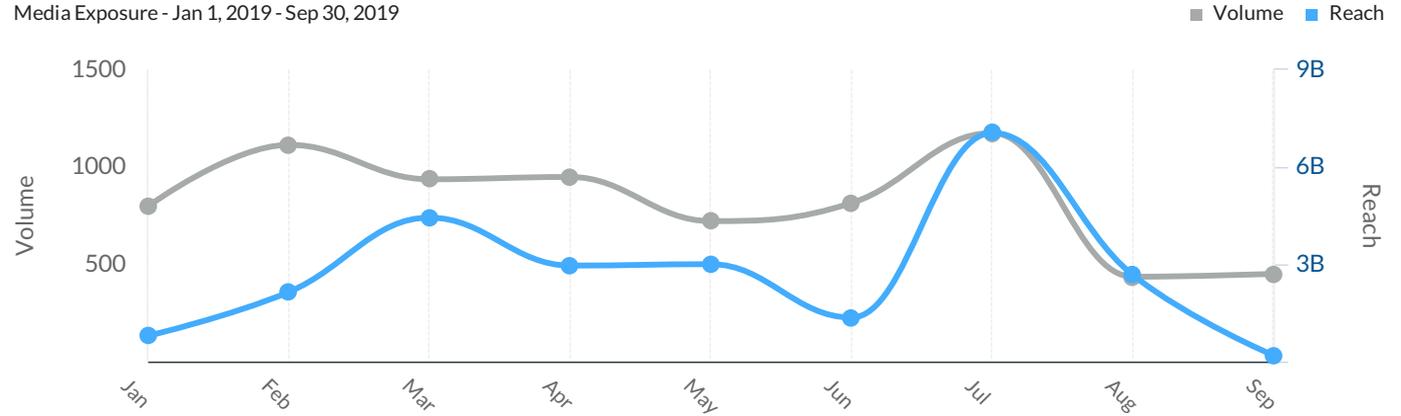
HIGHLIGHTS

- July had the highest volume of editorial mentions with 1.2k
- IOL mentioned PIC | Global News the most at 405

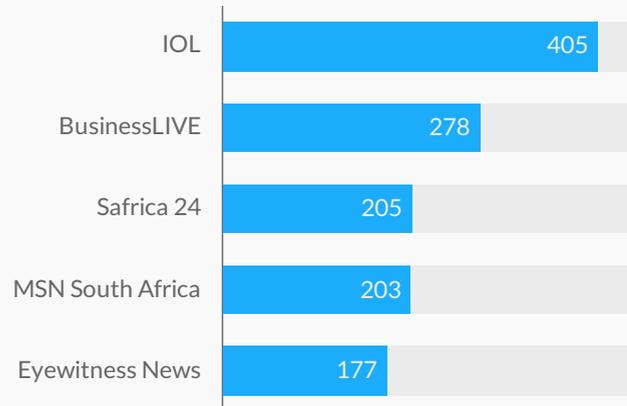


PIC | Global News's exposure was highest in July

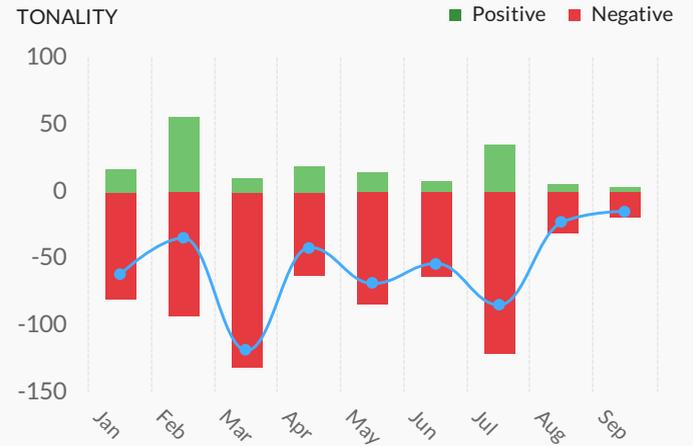
Media Exposure - Jan 1, 2019 - Sep 30, 2019



TOP PUBLICATIONS



TONALITY



MEDIA EXPOSURE

PIC Transactions | Global News

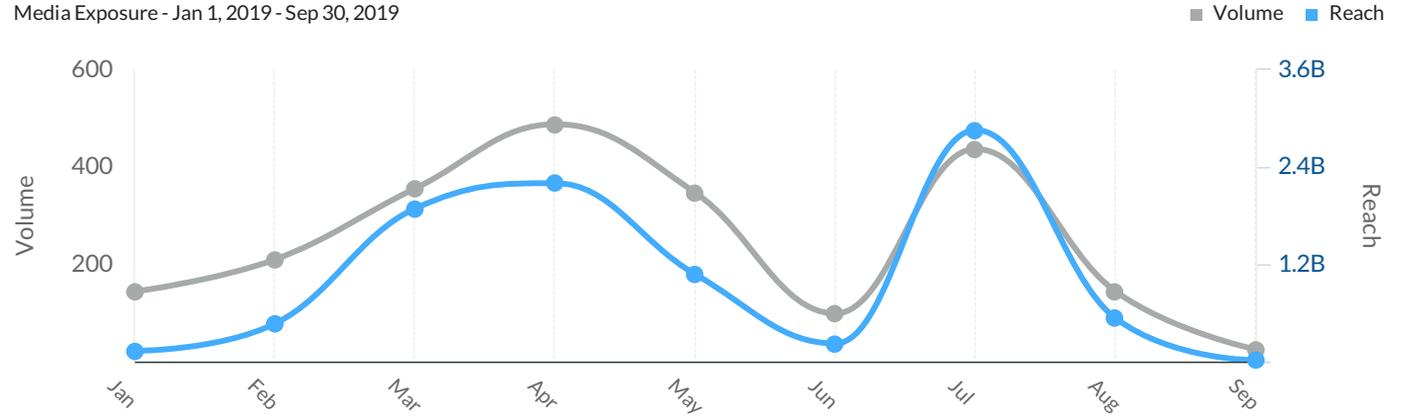
HIGHLIGHTS

- April had the highest volume of editorial mentions with 488
- IOL mentioned PIC Transactions | Global News the most at 236

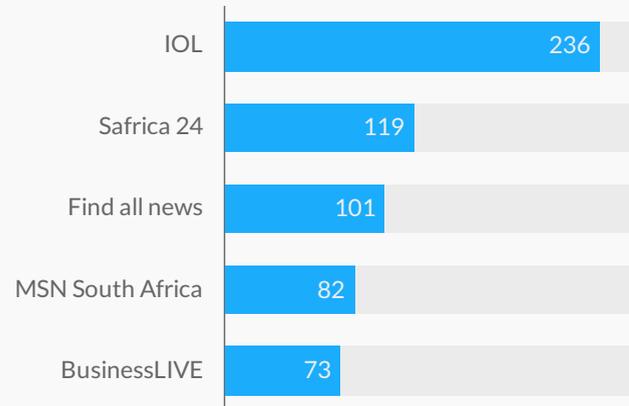


PIC Transactions | Global News's exposure was highest in Apr...

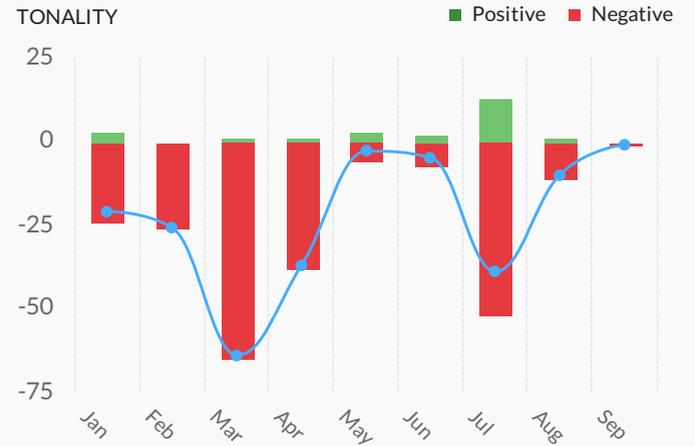
Media Exposure - Jan 1, 2019 - Sep 30, 2019



TOP PUBLICATIONS



TONALITY



TONALITY

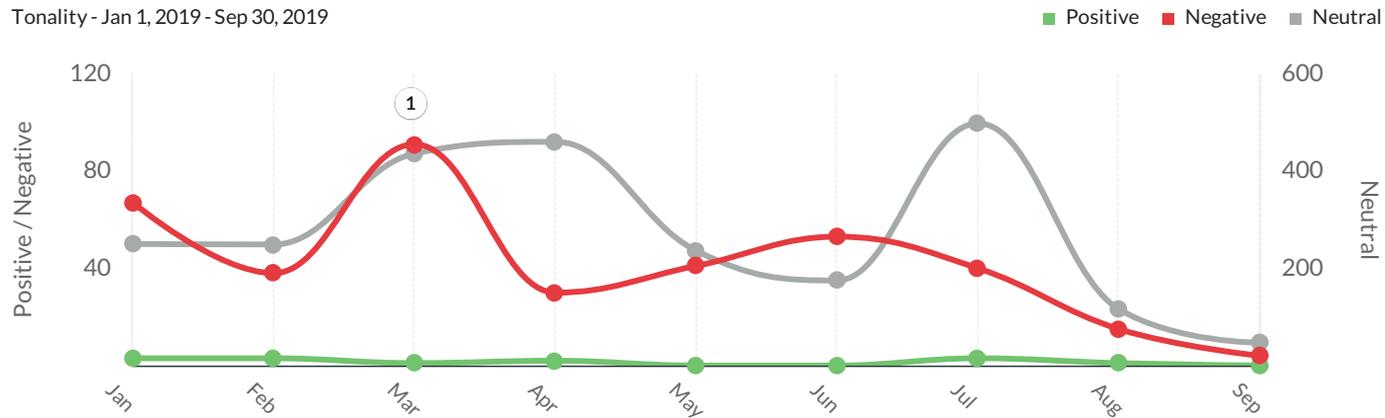
PIC Commission | Global News

HIGHLIGHTS

- 1 March had the highest volume of 91 negative articles, rising 139%
- "MSN South Africa", with 108M reach, drove negative sentiment in an article titled "[Suspended PIC accuses inquiry of evidence tampering](#)"

PIC Commission | Global News's net tonality was overall nega...

Tonality - Jan 1, 2019 - Sep 30, 2019



ARTICLES WITH MOST IMPACT

MSN South Africa | Jun 25

Suspended PIC accuses inquiry of evidence tampering

JOHANNESBURG - A serious accusation has been made against the PIC inquiry. The suspended PIC Chief Investment Officer suggested the commission's legal team could have tried to tamper with evidence.

...

Reach 108M ● Negative



TONALITY

PIC | Global News

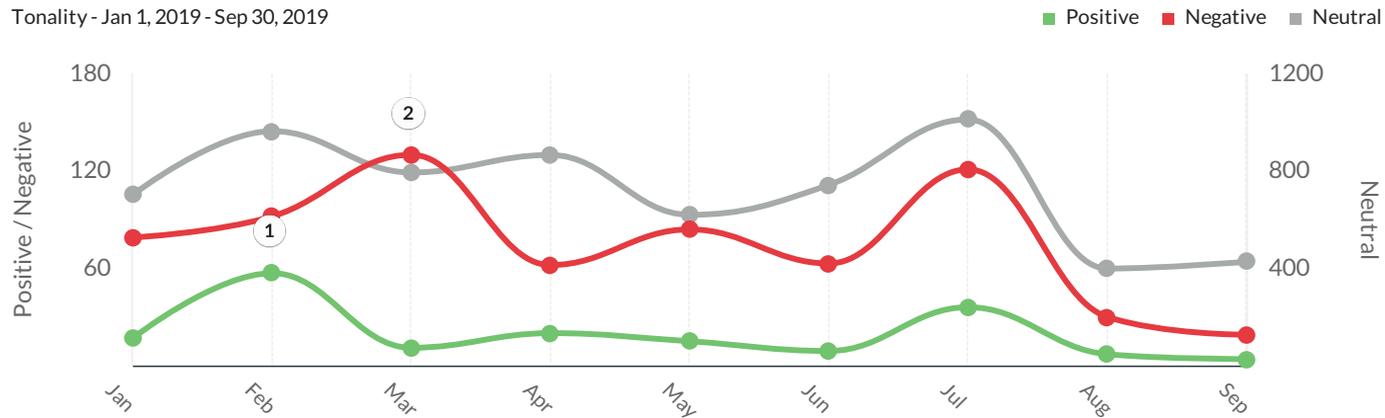
HIGHLIGHTS

- 1 February had the highest volume of 57 positive articles, rising 235%
- 2 March had the highest volume of 130 negative articles, rising 41%
- "MSN South Africa", with 109M reach, drove negative sentiment in an article titled "[Blade Nzimande calls on workers to give ANC decisive poll victory](#)"



PIC | Global News's net tonality was overall negative

Tonality - Jan 1, 2019 - Sep 30, 2019



ARTICLES WITH MOST IMPACT

MSN South Africa | May 2

Blade Nzimande calls on workers to give ANC decisive poll victory

DURBAN - South African Communist Party (SACP) general secretary Blade Nzimande has called on workers to give the African National Congress (ANC) a decisive victory in May elections but warned President...

Reach 109M ● Negative

TONALITY

PIC Transactions | Global News

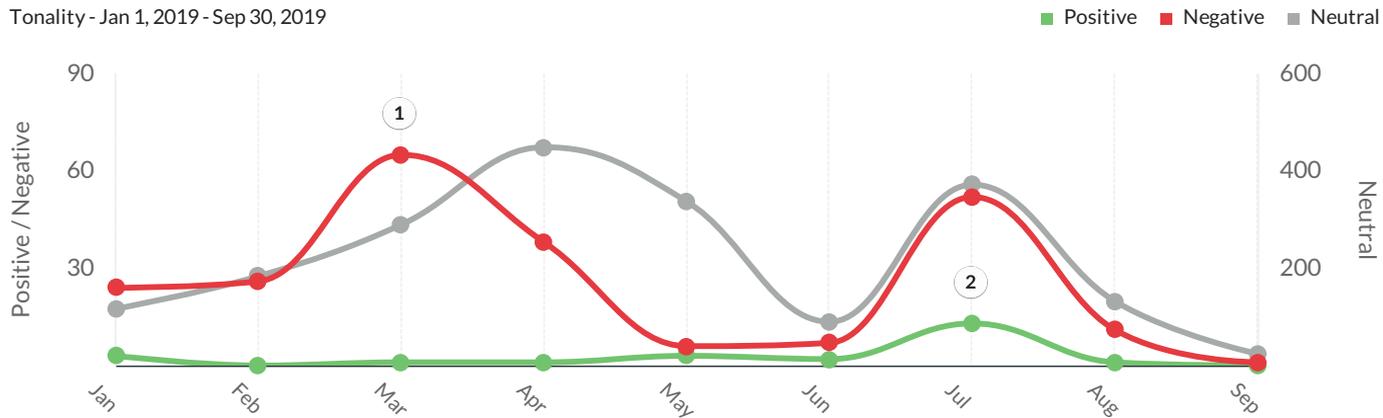
HIGHLIGHTS

- 1 March had the highest volume of 65 negative articles, rising 150%
- 2 July had the highest volume of 13 positive articles, rising 550%
- "MSN South Africa", with 108M reach, drove negative sentiment in an article titled "[PIC commission can't ignore racism claims against evidence leader - analysts](#)"



PIC Transactions | Global News's net tonality was overall ne...

Tonality - Jan 1, 2019 - Sep 30, 2019



ARTICLES WITH MOST IMPACT

MSN South Africa | Jul 1

[PIC commission can't ignore racism claims against evidence leader - analysts](#)

JOHANNESBURG - Analysts say the PIC Commission cannot ignore allegations of racism and interference against its evidence leader. Advocate Jannie Lubbe has been making headlines for the wrong reasons ...

Reach 108M ● Negative

TOP PUBLICATIONS

PIC Commission | Global News

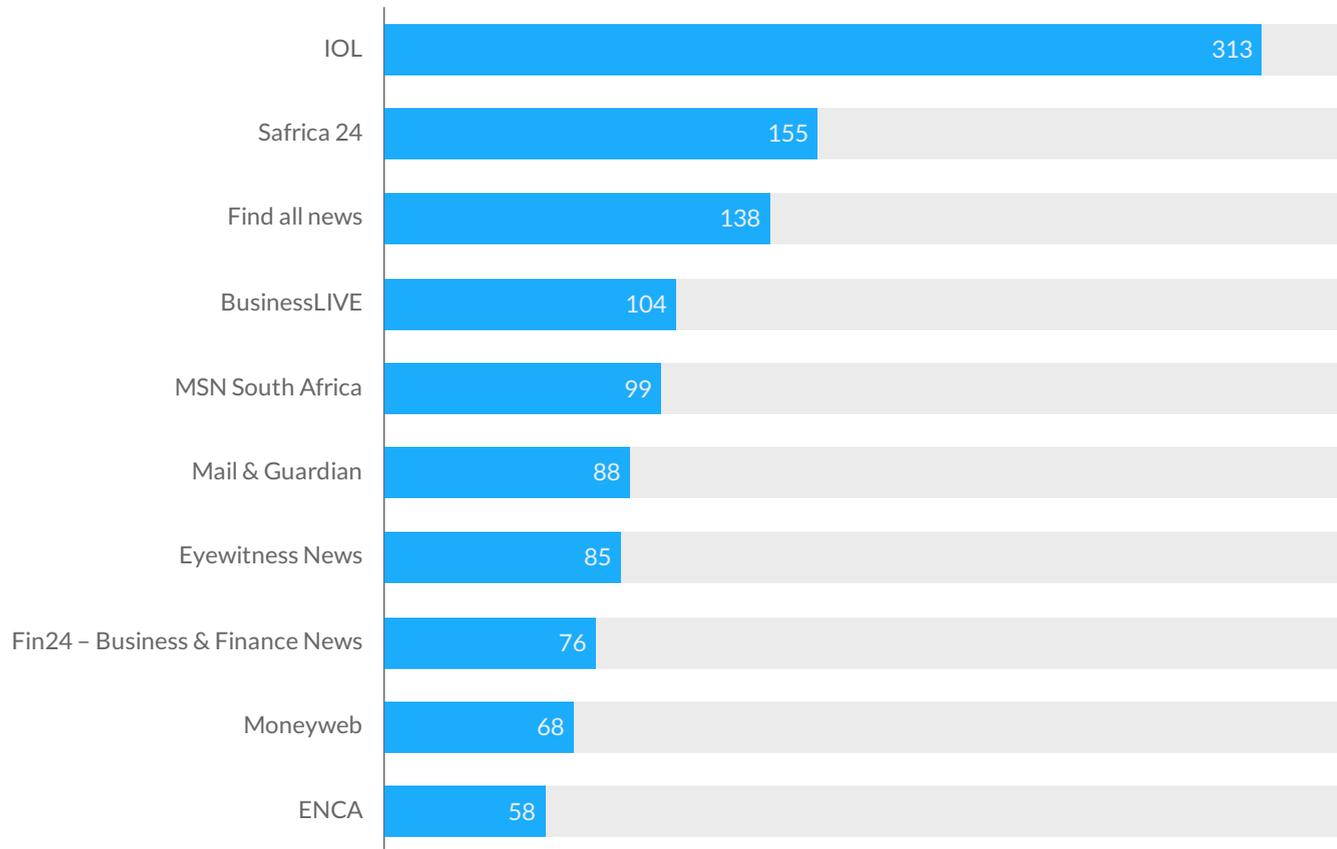
HIGHLIGHTS

- "IOL", "Safrica 24", and "Find all news" accounted for 34% of the volume share among the 25 highest publications



IOL mentioned PIC Commission | Global News the most

Top Publications by Volume - Jan 1, 2019 - Sep 30, 2019



TOP PUBLICATIONS

PIC | Global News

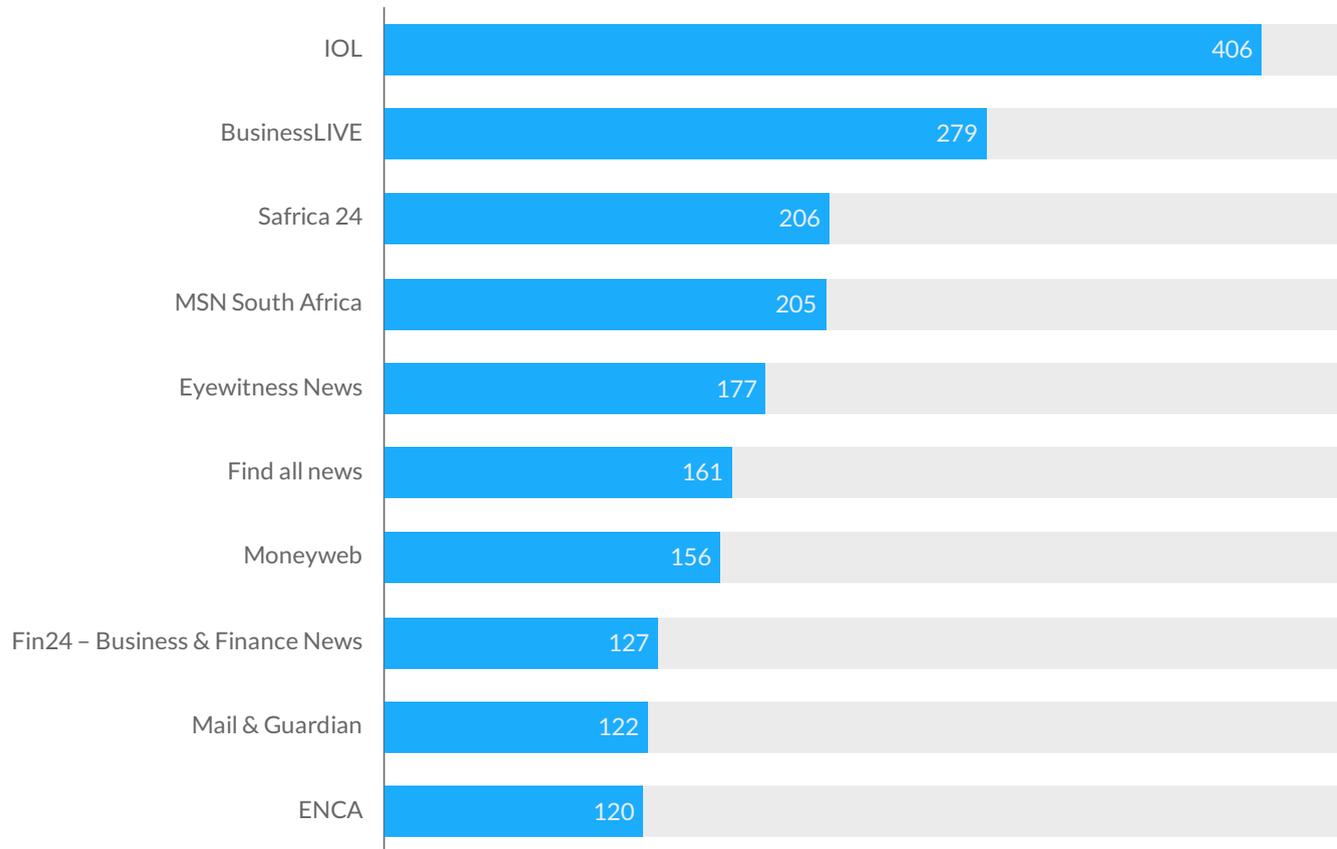
HIGHLIGHTS

- "IOL", "BusinessLIVE", and "Safrika 24" accounted for 27% of the volume share among the 25 highest publications



IOL mentioned PIC | Global News the most

Top Publications by Volume - Jan 1, 2019 - Sep 30, 2019



TOP PUBLICATIONS

PIC Transactions | Global News

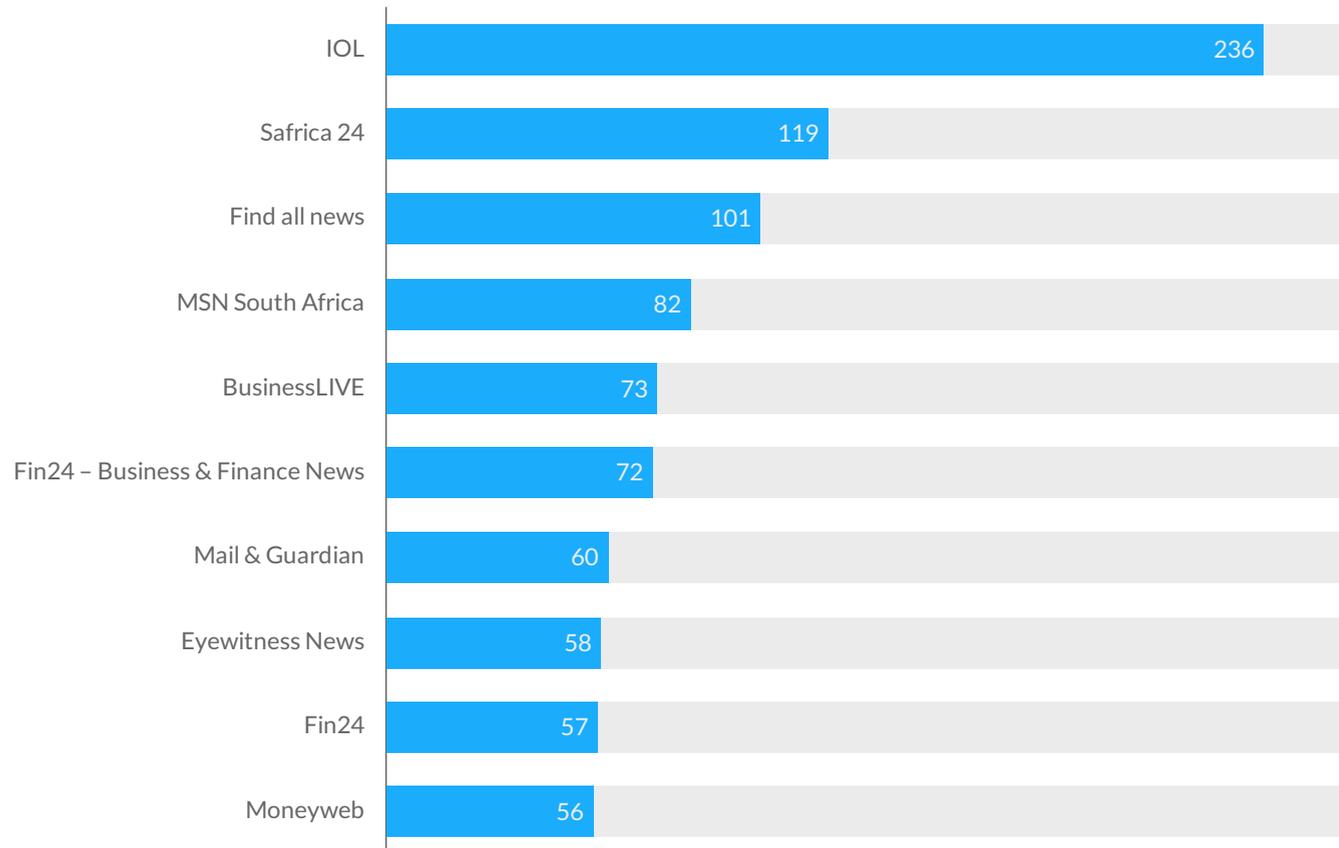
HIGHLIGHTS

- "IOL", "Safrika 24", and "Find all news" accounted for 32% of the volume share among the 25 highest publications



IOL mentioned PIC Transactions | Global News the most

Top Publications by Volume - Jan 1, 2019 - Sep 30, 2019



GEO PRESENCE

PIC Commission | Global News

HIGHLIGHTS

- PIC Commission | Global News was mentioned in 38 total countries in this time period
- The regions Southern Africa, North America, and South Asia combined to cover 85% of the total volume in this time period

South Africa and United States had the most global coverage



TOP COUNTRIES

| | | | |
|---|-----|---|----|
|  South Africa | 75% |  Nigeria | 2% |
|  United States | 5% |  Russia | 1% |
|  India | 3% |  Bahrain | 1% |
|  Australia | 3% |  Philippines | 1% |
|  Ireland | 2% |  Canada | 1% |



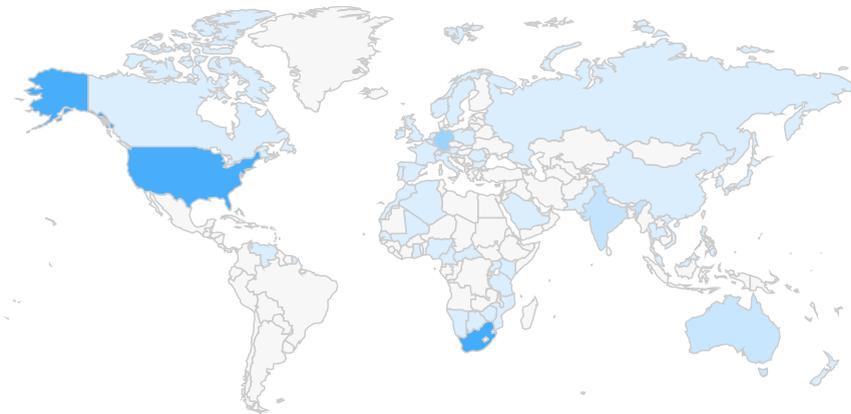
GEO PRESENCE

PIC | Global News

HIGHLIGHTS

- PIC | Global News was mentioned in 59 total countries in this time period
- The regions Southern Africa, North America, and Western Europe combined to cover 86% of the total volume in this time period

South Africa and United States had the most global coverage



TOP COUNTRIES

| | | | |
|---|-----|---|----|
|  South Africa | 59% |  United Kingdom | 2% |
|  United States | 20% |  Nigeria | 2% |
|  Germany | 3% |  Russia | 1% |
|  India | 2% |  Canada | 1% |
|  Australia | 2% |  Hong Kong (China) | 1% |



GEO PRESENCE

PIC Transactions | Global News

HIGHLIGHTS

- PIC Transactions | Global News was mentioned in 36 total countries in this time period
- The regions Southern Africa, North America, and Pacific combined to cover 86% of the total volume in this time period

South Africa and United States had the most global coverage



TOP COUNTRIES

| | | | |
|---|-----|---|----|
|  South Africa | 73% |  Bahrain | 1% |
|  United States | 9% |  Ireland | 1% |
|  Australia | 3% |  Philippines | 1% |
|  Nigeria | 2% |  Thailand | 1% |
|  India | 2% |  Venezuela | 1% |



SOCIAL ECHO

HIGHLIGHTS

- News24 had the most popular article on social media with 9.8k shares
- PIC Commission



1000 articles were shared 137.6k times on social media

Social Echo - Jan 1, 2019 - Sep 30, 2019



News24 | May 6

WhatsApps expose Floyd and the 'Red Boys'

A series of cryptic messages suggest that EFF deputy president Floyd Shivambu used his political profile for financial gain.

Reach 6M ● Neutral

🐦 821 📘 9k



The Citizen | Mar 8

ANC's plans 'could collapse pension funds, with pensioners dying poor'

The party's manifesto hints at targeting pensions through prescribed investments, 'which will see half the population's money used to bail o...

Reach 2M ● Negative

🐦 47 📘 4.8k



Eyewitness News | Feb 1

All PIC board members resign amid inquiry

Their resignations come in the middle of a commission of inquiry into the PIC which is investigating allegations of impropriety and dubious ...

Reach 2M ● Negative

🐦 123 📘 4.3k

BusinessLIVE | May 27

The PIC has nothing to show for \$270m investment into oil exploration company

The PIC inquiry has been trying in vain to get documents relating to its 2014 investment in Camac Energy, whose founder has links to Zuma

Reach 619k ● Neutral

🐦 756 📘 2.9k

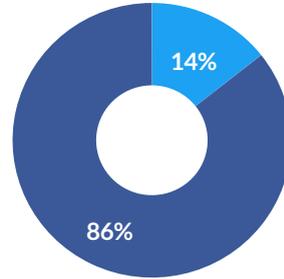
SOCIAL ECHO

HIGHLIGHTS

- News24 had the most popular article on social media with 9.8k shares
- PIC

1000 articles were shared 347.4k times on social media

Social Echo - Jan 1, 2019 - Sep 30, 2019



 Twitter 49.9k
 Facebook 297.5k

MOST SHARED ARTICLES



News24 | May 6

WhatsApps expose Floyd and the 'Red Boys'

A series of cryptic messages suggest that EFF deputy president Floyd Shivambu used his political profile for financial gain.

Reach 6M ● Neutral

 821  9k



City Press | Jun 3

R500m taken from the poorest

Documents show how money belonging to dependants of deceased miners was splurged by executive on costly mansion A pension fund boss entrusted...

Reach 704k ● Neutral

 142  7.2k



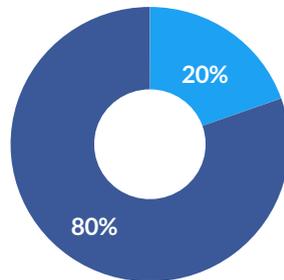
SOCIAL ECHO

HIGHLIGHTS

- News24 had the most popular article on social media with 9.8k shares
- PIC transactions

1000 articles were shared 135.3k times on social media

Social Echo - Jan 1, 2019 - Sep 30, 2019



 Twitter 26.5k
 Facebook 108.8k

MOST SHARED ARTICLES



News24 | May 6

WhatsApps expose Floyd and the 'Red Boys'

A series of cryptic messages suggest that EFF deputy president Floyd Shivambu used his political profile for financial gain.

Reach 6M ● Neutral

 821  9k



City Press | Jun 3

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Documents show how money belonging to dependants of deceased miners was splurged by executive on costly mansion A pension fund boss entrusted...

Reach 704k ● Neutral

 142  7.2k



WORD CLOUD

HIGHLIGHTS

- "Public Investment Corporation" (1.4k)
"commission" (1.4k)
"inquiry" (1.2k)
- The above 3 keywords covered 40% of the mentions across the top 20
- PIC Commission

Global News's most popular keyphrase was "Public Investment...

Word Cloud - Jan 1, 2019 - Sep 30, 2019



WORD CLOUD

HIGHLIGHTS

- "Public Investment Corporation" (3.7k)
"South Africa" (1.9k)
"company" (1.8k)
- The above 3 keywords covered 34% of the mentions across the top 23
- PIC

Global News's most popular keyphrase was "Public Investment..."

Word Cloud - Jan 1, 2019 - Sep 30, 2019



WORD CLOUD

HIGHLIGHTS

- "Public Investment Corporation" (1.3k)
"company" (954)
"inquiry" (746)
- The above 3 keywords covered 36% of the mentions across the top 22
- PIC Transactions

Global News's most popular keyphrase was "Public Investment..."

Word Cloud - Jan 1, 2019 - Sep 30, 2019



**REPORT TO
THE BOARD OF THE PUBLIC INVESTMENT CORPORATION**

on

**ALLEGATIONS CONTAINED IN ANONYMOUS EMAILS
DISTRIBUTED TO THE PIC EMAIL ADDRESS LIST
IN SEPTEMBER 2017**

GEOFF BUDLENDER SC

12 October 2018

Instructed by Ms D Tshepe

Cheadle Thompson & Haysom

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CHAPTER 1

INTRODUCTION

1. From 5 September 2017, a number of e-mails were widely distributed to the staff of the Public Investment Corporation, and to members of its Board. The e-mails purported to have been sent by, amongst others, “*James Nogu*” and “*leihlola Leihlola*”. No such persons are known to the PIC. I therefore refer to them as the anonymous emails. The e-mails made serious allegations of misconduct against the PIC, and in particular the Chief Executive Officer, Dr Daniel Matjila, and to a lesser extent, the Chief Financial Officer, Ms Matshepo More.
2. The Board and management investigated this matter. I refer below to the steps which the Board and management took in this regard.
3. On 29 September 2017, a media release was issued on behalf of the Board, stating:

“On the 29th September 2017, the Board of the Public Investment Corporation (PIC) met to receive feedback from Internal Audit division with regard to the allegations against the CEO, Dr Daniel Matjila. The Board fully applied its mind to the report presented by

Internal Audit and confirms its satisfaction with the report. The Board has concluded that the allegations were baseless and that Dr Matjila is cleared of any wrongdoing”.

4. This did not however put an end to the controversy, which continued.
5. Ultimately, after having a meeting with the Board, the Minister of Finance (Mr Nhlanhla Nene) wrote on 25 July 2018 to the Chairperson of the PIC as follows:

“I would like to thank members of the board for the constructive discussion and their recommitment to ensuring that we do restore public confidence in the Public Investment Corporation (PIC), that the institution is stabilised and that staff morale is returned.

As indicated at the meeting I hereby, in terms of section 6(4)(a) and (b) of the PIC Act,¹ request the board to commission a forensic investigation into allegations that have been made against the Chief Executive Office(r) and Chief Financial Officer of the PIC in e-mails sent to the PIC e-mail address list from an unknown source. I want to appeal that this be initiated as a matter of urgency and that the

¹ Section 6 of the PIC Act provides as follows:

(4) The Minister may issue directives to the board regarding the management of the corporation if-

- (a) it is in the public interest; or
- (b) it is reasonably necessary to do so.

final report of the investigation be submitted to me by 31 September 2018.

I am convinced that the report that will be prepared will assist us in dealing with the challenges at the PIC in a decisive manner”.

6. On 6 August 2018, the Board resolved to appoint me as the lead for the forensic investigation required by the Minister. I accepted the appointment, after which the terms of reference for the investigation were settled, and attorney Doris Tshepe of attorneys Cheadle Thompson and Haysom was appointed as my instructing attorney.
7. The steps which Ms Tshepe and I took in order to conduct the investigation included the following:
 - 7.1 We arranged for the establishment of a secure e-mail address for the investigation, to which only she and I would have access.
 - 7.2 We sent an e-mail to the entire PIC e-mail address list, informing recipients that we had been appointed. We set out the enquiry’s terms of reference, and stated that all communications with us would be treated as confidential. We provided the secure e-mail address, and invited people with relevant information to come forward with it, by providing documents and/or attending an interview. We stated that all interviews would be conducted at an off-site venue.

- 7.3 We also sent the email to the email addresses of the “senders” on the emails which had been sent to the PIC mailing list during September.
- 7.4 Subsequently, we sent a further e-mail to all persons on the PIC e-mail address list stating that we were continuing to receive and would welcome further information, and also advising that if there were any persons who preferred to be interviewed after normal working hours, we would accommodate that request.
- 7.5 We appointed an IT specialist to assist us with the analysis of electronic information.
- 7.6 We appointed a financial analyst to assist us with analysis of the financial information which we expected to receive, and did receive.
8. We conducted face-to-face or telephonic interviews with twenty-two people (a number of them on more than one occasion). We examined a large volume of documents provided to us by the PIC, and by people who appeared before us for an interview.
9. The IT analyst conducted an analysis of the company laptop, company mobile phone, company mobile device, company file share folder and personal Gmail account of the CEO, Dr Matjila, who co-operated in making them available for this purpose.

10. As a result of this investigation, I now make this report. I wish to express my great appreciation for the considerable assistance which Ms Tshepe gave me. This report is the product of the work which both of us undertook. However, as I was the person appointed as the lead investigator, the report is in my name.

Terms of reference

11. At the outset it is necessary to clarify my terms of reference, as there may be some confusion in that regard. My brief was limited in its scope. I was not appointed to investigate all of the allegations that have been made about the PIC in the recent past.
12. The letter from the Minister of Finance to the Board of the PIC set out matters which the Minister required to be investigated. They are the allegations that were made against the Chief Executive Officer and Chief Financial Officer of the PIC in e-mails sent to the PIC e-mail address list from an unknown source (the anonymous emails).
13. My terms of reference are set out in Annexure A to this report.
14. In recent times a number of allegations have been raised in the media about investments which the PIC has made. Issues have been raised with regard to investments in or loans to companies such as Ayo, VBS, Sagamartha, Steinhoff, S&S Refinery, and Tosaco Energy. The question

which has been raised is whether those investments or loans were prudent, and whether they were influenced by political considerations, pressure or favouritism. These matters do not fall within my terms of reference.

15. The President has announced that he will appoint a commission of inquiry to look into a wide range of matters concerning the structure and functioning of the PIC. Public commentators have suggested that matters such as those to which I have just referred will be included within the mandate of that commission.
16. Consistent with the mandate given to me by the Board (which flowed from the mandate of the Minister), I have not investigated this broader range of issues relating to the PIC's investment decisions, as it was not within my authority to do so.
17. During my investigation I have however received information containing allegations of improper or inappropriate or politically influenced investment. Most of this material is already in the public domain. If and when the contemplated commission or another enquiry is appointed, I shall make that information available to it.
18. In this Report, I deal with the following matters:

- 18.1 Allegations of favourable treatment of the company Mobile Satellite Technology (Pty) Ltd as a result of an alleged romantic relationship between Dr Matjila and Ms Pretty Louw.
 - 18.2 The role of then Minister Mr David Mahlobo.
 - 18.3 Allegations that Dr Matjila instructed or induced a beneficiary of a PIC investment, Mr Lawrence Mulaudzi, to make a payment to Ms Louw.
 - 18.4 The Board's investigation of and response to these matters.
 - 18.5 A number of the other allegations which were made in the emails.
 - 18.6 Conclusions and recommendations.
19. I note at the outset that the allegations in the emails were wide-ranging and disparate. Some of them were very generalised. A substantial number related to employee grievances, and would require a much more extensive investigation than was possible in the limited time available to me for this purpose.²

² The original mandate from the PIC Board, reflecting the request by the Minister, was that the investigation should be concluded by the end of September 2018. In the event, at my request this was extended to 12 October 2018.

CHAPTER 2

THE PIC, MST AND MS PRETTY LOUW

20. MST operates, staffs and maintains “Mobile units” (adapted buses) which are used to provide medical and educational services in rural areas.
21. During 2016 and 2017, the PIC made funds available to MST through two mechanisms:
 - 21.1 MST sought and ultimately obtained a loan from the PIC as an investment in its business; and
 - 21.2 MST sought and ultimately obtained a Corporate Social Investment (CSI) contribution from the PIC towards its work in providing services in rural areas.³
22. I describe each of these transactions below.
23. At the heart of the allegations in the anonymous emails was the question of the relationship between Dr Matjila and Ms Pretty Louw, who had a business relationship with MST.

³ The proposed CSI funding is sometimes described as the lease of a bus or buses. In substance, however, it was a grant to MST in support of its work. PIC did not take possession of the bus for which it provided funding to enable the provision of educational services in rural areas.

The alleged relationship between Dr Matjila and Ms Louw

24. The anonymous e-mails alleged that MST received the loan and CSI contribution from the PIC because Ms Pretty Louw is the girlfriend of the CEO, Dr Matjila, and has a corrupt relationship with him. It was alleged that Dr Matjila *“funded his girlfriend an amount of R21 million through Maison Holdings”*, Ms Louw’s company.
25. The first question which arises is whether Ms Louw is or was the girlfriend of Dr Matjila, as alleged. Both of them deny the allegation. The investigations which have been conducted have not provided any support for the allegation. They suggest that the allegation is not true.
26. In the *“James Nogu”* e-mail of 19 September 2017, the author said the following:
- “Does Dr Daniel Matjila have a love relationship with Ms Pretty Louw? The answer is yes. As a whistle blower I have tangible evidence that proves this assumption and given an independent opportunity under oath I can provide this evidence. I have pictures of the two, SMS between Dr Daniel Matjila and Ms Pretty Louw, including WhatsApp messages”.*
27. No such evidence has been produced. As I have noted, I sent two e-mails to the entire PIC mailing list, inviting people with evidence and information

to come forward. I also sent the email to the “senders” of the anonymous emails. Only one of those emails bounced back.

28. In those emails, I undertook to deal with information on a confidential basis. I provided a secure e-mail address to which information could be sent. I undertook and arranged that the interviews would be off-site (in other words, not at the PIC), and offered to hold interviews after working hours if those with information would prefer this.
29. It is clear from the content of the e-mails that “*James Nogu*” is either employed at the PIC, or has contacts and sources of information within the PIC. The email was sent to the “*authors*” of the anonymous emails. The fact of this enquiry has been reported in the media. It is reasonable to assume that the true author or authors of the anonymous e-mails became aware of the enquiry. They have not come forward.
30. In particular, I have not been provided with the alleged photographs, SMS and WhatsApp messages, which were said to be evidence of the alleged relationship.
31. Under the circumstances, the most reasonable conclusion is that this evidence does not exist. The author or authors undertook to provide it to an independent enquiry, but did not do so when such an enquiry was established.

32. I therefore conclude that there is no evidence that Ms Louw is Dr Matjila's girlfriend. In the light of their denial that this is the case, and the absence of any evidence which contradicts their denial, I must conclude that on the evidence before me, Ms Louw is not and was not Dr Matjila's girlfriend.

The relationship between MST and Ms Louw

33. Ms Louw is not a shareholder or director or employee of MST.
34. Ms Louw did have a commercial and financial relationship with MST, from which she has derived financial benefit. She and Ms Annette Dlamini run a company Maisan Holdings (Pty) Ltd, which is the vehicle for a number of current or intended businesses. Maisan Holdings entered into a Joint Venture agreement with MST, in terms of which it would act as MST's agent in seeking partnerships with state entities or businesses. This came about as follow:
- 34.1 Maisan Holdings was introduced to MST by Mr Wiseman Khumalo, when it was seeking a partner for submitting a tender to the KwaZulu-Natal education department
- 34.2 On about 22 April 2016 Ms Louw and Ms Dlamini had a meeting with MST about the KZN tender. During the course of that meeting, they learnt of MST's work in providing mobile health and education facilities. They expressed interest in working with MST on these

projects. It was agreed that Maisan would act as MST's agent in sourcing state entities and corporations to fund these activities. Ms Louw expressed the view that an approach should be made to the PIC, which might be willing to approach its investee companies.

34.3 Thereafter, MST and Maisan co-operated in the submission of proposals to a number of corporations, including the PIC.

35. Subsequently, on 22 July 2016, MST and Maisan entered into a formal Joint Venture agreement. which was termed a "*consultancy and joint venture agreement*". It provides, *inter alia*, as follows:

35.1 MST is the owner of mobile units which it seeks to supply to various Government Departments in South Africa.

35.2 MST was approached by Maisan with a proposal of sourcing clients on behalf of MST in order to supply mobile units to them.

35.3 Maisan has identified a number of potential clients to supply the mobile units.

35.4 Maisan "*has the experience and skills to facilitate a sale and supply of the mobile units to the various clients*".

- 35.5 MST has engaged the services of Maison to procure suitable clients to which the mobile units will be supplied.
- 35.6 Maison will also be responsible for *“the business development and account management of the projects brought on by them”*.
- 35.7 Maison is appointed as *“consultant and facilitator”*.
- 35.8 *“The primary objective of Maison will be to facilitate, negotiate and procure the conclusion of an agreement in terms of which the client will either purchase or rent the mobile units from MST”*.
- 35.9 Maison will be paid a *“facilitation fee”* which will be negotiated on a deal-by-deal basis.
36. On 1 April 2017, MST paid Maison Holdings R438 000 plus VAT for *“work done to date”* (the reason stated in an email from MST to the PIC). That email also stated that *“the payment was made to look at improving BEE status and motivate and stimulate our partnership to create further sales”*.
37. Ms Louw undertook to provide us a copy of her invoice in that amount. However, she did not provide this invoice, or any of the other documents which she had promised to provide.⁴

⁴ After her interview with us, she did not respond to any messages sent to her.

38. MST stated that they were not able to locate the invoice. The MST ledger reflects this as a payment for “*consulting fees*”. I discuss below what the purpose of the payment was.
39. I now deal with MST’s contacts and engagement with the PIC

The loan by PIC to MST

40. MST’s first contact with the PIC appears to have taken place in June 2015, when Ms Matshepo More, the Chief Financial Officer of the PIC, met a person connected with MST on a social occasion, and learnt of the work of MST. She said that the PIC might be interested in MST, and said that any relevant material in that regard could be submitted to the PIC through her.
41. Mr Gareth Watkins of MST thereafter sent an application for loan funding to the PIC through Ms More. She forwarded it to Mr Roy Rajdhar of the PIC.
42. MST’s application was for a loan of R45 million. It was processed in the usual manner.
43. On 23 November 2015, the PIC’s Portfolio Management Committee approved a debt facility of R30 million with 25% equity for the PIC.
44. This proposal was not acceptable to MST. Further discussions took place. Ultimately, on 8 June 2016 the PIC revised the approval of 23 November

2015, to a debt facility of R21 million, with 5% profit sharing. This was accepted by MST.

45. It took an extended period before the payment of this R21 million was made. The reasons for the extended delay have not been fully explained, but I have been informed that the reason was the delay in the signing of legal agreements and the performance of suspensive conditions.

46. On 6 July 2017, the sum of R21 million was disbursed to MST.

47. It may be said that the PIC's analysis of the financial projections of MST was unduly optimistic. However, I have not found any evidence of impropriety in the loan of R21 million made by the PIC to MST.

48. There is no evidence to support a conclusion that Ms Louw played any role in the MST's securing of loan financing of R21 million from the PIC. The PIC made its first offer to MST on 23 November 2015. As I explain below:

48.1 Ms Louw's first contact with Dr Matjila and the PIC was on 4 April 2016.

48.2 At that stage, Ms Louw had no connection with MST. Her first contact with MST was on about 22 April 2016.

48.3 The PIC's decision-making process (which included a second appraisal report on 30 May 2016⁵ because of the delay in granting the loan finance) and the PIC's flow of documentation do not support any theory that Ms Louw played a role in the PIC's approval of a revised loan facility on 8 June 2016.

Three MST proposals to the PIC for CSI funding

49. During the presentation of the MST application for loan funding to the PMC on 23 November 2015, Dr Matjila had requested that Corporate Affairs should consider the MST product offering for a CSI investment. The CSI programme falls under the Corporate Affairs section of the PCI.
50. Ultimately, three different proposals were made to the PIC for financial support which could be regarded as CSI funding. They were submitted through different routes.

The proposal facilitated by Maisan Holdings

51. On 2 May 2016, MST sent Ms Louw a draft proposal to the PIC for the lease of two buses by MST to the PIC. Ms Louw advised MST to submit the proposal to Dr Matjila and Mr Roy Rajdhar at the PIC.

⁵ The second appraisal report revised the loan to a value of R21 million with no equity, but for the most part was a cut-and-paste of the initial appraisal report for the November 2015 approval.

52. That same day, MST sent a Mobile Schools Health Vehicle Proposal to Dr Matjila. This was a proposal for CSI funding. On 9 June 2016 Dr Matjila, apparently that unaware that the proposal had also been sent to Mr Rajdhar, forwarded it to Mr Rajdhar with the comment "*Please assist*".
53. The proposal which MST submitted to the PIC contemplated the PIC leasing buses from MST over a period of three to five years. MST would then deploy the buses for health and education purposes in rural areas. The cost of the project would be between R23 million and R37 million, depending mainly on the term of the contract.
54. A meeting between MST/Maisan and the PIC took place on 30 June 2016. Ms Louw and Ms Dlamini represented Maisan/MST. The PIC was represented by Mr Rajdhar, Mr Wellington Masekesa (PIC Executive Assistant to the CEO), and Mr Paul Magula (PIC Executive Head: Risk). The meeting discussed three matters raised by Ms Louw and Ms Dlamini: a request by Maisan for funding for a manufacturing plant; a request by Maisan for funding for a chromite plant; and CSI investment in MST for the purchase of a bus.⁶
55. The MST proposal for the leasing of buses at a cost of between R23 million and R37 million received support from PIC staff, and was submitted to the

⁶ This is how the CSI proposal is referred to in a note of the meeting.

PIC Exco on 5 December 2016. Exco declined the proposal on the ground of affordability.

The Mpumalanga proposal

56. Meanwhile, the Corporate Affairs section of the PIC was independently following up the request which Dr Matjila had made on 23 November 2015 that Corporate Affairs should consider the MST product offering for a CSI investment.
57. On 12 February 2016, Xolani Matthews of Corporate Affairs wrote to Sekgoela Sekgoela. He referred to the CEO's request of 23 November 2016, and asked for a resumption of that process. He also asked for an update on the process so that this could be incorporated into the pending MST application for a loan facility.
58. Mr Kwabena Boateng of Corporate Affairs thereafter engaged with Mr Sandile Mzonyane, a director of MST, in this regard. From those discussions, a proposal emerged that the PIC provide funding for a bus to provide services to the elderly in Mpumalanga for a period of one month. The cost would be a little less than R500 000.
59. The proposal was submitted to Dr Matjila. In November 2016, acting under delegated authority to deal with funding at this level, he approved it.

60. However, when the matter was submitted to the Chief Financial Officer, Ms More, who was required to certify that funds were available for this purpose, she pointed out that another proposal from MST had recently been declined by Exco. This was the proposal which had been facilitated by Maisan. Ms More stated that the Corporate Affairs team should discuss the matter with Mr Rajdhar's team, who had put forward the Maisan-facilitated proposal.
61. The two teams discussed the matter. They concluded that by now, there were no longer funds available for the Mpumalanga project. The Mpumalanga project was therefore declined. The two teams however agreed that a new proposal should be put forward for CSI funding for a one-year education project in the new financial year.

The one-year project

62. In 2017 a one-year CSI project was accordingly proposed by MST, at a cost of R5 million. The proposal was submitted to the PIC's CSI team by Mr Mzonyane on behalf of MST. Mr Mzonyane had extensive engagement with the PIC in progressing the proposal.
63. On 20 February 2017 Exco approved an allocation of R5 million for this purpose. This was approximately 1% of the PIC's profit, which was the target for CSI spending.

64. On 28 March 2017 the CEO authorised the payment of R 5 million, which was then made.

The role of Ms Pretty Louw

65. Witnesses gave conflicting accounts of the role of Ms Louw in this process. It is necessary first to address the question of how Ms Louw came into contact with the PIC.

66. When she gave evidence, Ms Louw's account of her dealings with Dr Matjila was the following:

66.1 She and Ms Dlamini were at the OR Tambo Airport. They saw Dr Matjila, who had arrived from somewhere on a plane. They recognised him because they are in business and they had seen him on the television.

66.2 They approached Dr Matjila, introduced themselves, and asked for his business card. They told him that they had some projects that they wanted to bring to the PIC. They said that Dr Matjila was responsive to this.

66.3 Thereafter, they contacted him and set up a meeting with him at the PIC offices. They told him that they were looking for funding for spa products and a mining venture. They also introduced the subject of

MST at the meeting, and raised the question of the possible funding of buses. Dr Matjila did not mention that the PIC was already in the process of providing loan funding to MST, and that it was also already interested in possible CSI funding of MST.

67. It is common cause that Ms Louw had several meetings with Dr Matjila. Ms Louw put two requests to him for support for Maisan:

67.1 In response to a request for support for a plant for manufacturing spa products (cosmetics), Dr Matjila suggested that they approach other government funding agencies which would be more appropriate than the PIC for a proposal of this nature. He also put her in touch with Mr Lawrence Mulaudzi. He was part of a BBBEE consortium which had recently with the assistance of the PIC acquired a substantial share in Ascendis, which is involved in the pharmaceutical industry. Dr Matjila asked Mr Mulaudzi to consider providing a suitable opportunity. Nothing came of this.

67.2 In response to a request for support for a chromite mining venture, Dr Matjila put her in touch with the PIC staff who deal with mining, and asked them to deal with the matter. Thus, on 9 June 2016 Ms Louw and Ms Dlamini had a meeting with Heidi Sternberg of the PIC, who was responsible for mining beneficiation. Nothing came of this.

- 67.3 Dr Matjila also suggested alternative funding sources which Maisan might approach.
68. I asked Ms Louw how it was possible that she had such easy and extended access to the CEO of a large public entity, simply on the basis of having bumped into him at the airport and introducing herself. She insisted that this was nothing out of the ordinary, and that there was nothing surprising about it.
69. However, when she was further questioned on this, she admitted that the facts were not as she had presented them. When it was put to her that Dr Matjila had said that this has not a chance meeting, she admitted that the truth was the following:
- 69.1 She is friendly with Mr David Mahlobo, who at the time was the Minister of State Security.
- 69.2 What actually happened is that Minister Mahlobo called Dr Matjila to a meeting at the OR Tambo Airport, without disclosing the purpose of the meeting. His purpose was to introduce Dr Matjila to Ms Louw, and to ask Dr Matjila to arrange for the PIC to assist her in her venture with Ms Dlamini, which he did.
70. She could not explain why she had lied in claiming that this had been a chance encounter. When asked why Minister Mahlobo had set up this

meeting for her and Ms Dlamini with Dr Matjila, the exchange was as follows:

Question: Why did Minister Mahlobo do that for you?

Answer: Like I say, I know him from varsity.

Question: So sufficiently well that he will just phone up the head of the PIC and say come to the airport to meet some people?

Answer: Well, no, he is also a client of mine at the spa and I have known him since back in the day. And we were talking about how business is going and I said to him you know we want to do spa treatments, and in spa products and then he said Oh okay maybe try PIC.

71. Ms Louw's attempt to conceal the truth as to her first meeting with Dr Matjila clearly indicates that she recognised that this was something which she should try to hide, because it was out of the ordinary, in fact extraordinary, and called for an explanation and further enquiry. Her relationship with Minister Mahlobo was sufficiently close that he would put himself out to advance her personal business interests, and summon the head of a major public entity to the airport for this purpose – and, as I point out in the next chapter, to continue to do so after the meeting with Dr Matjila at OR Tambo.

Ms Louw's role in the CSI funding of MST

72. In considering Ms Louw's role in relation to the CSI funding of MST, it is necessary to consider each of the three proposals which emerged.
73. As I have noted, the suggestion that the PIC provide CSI funding to MST was made within the PIC when Dr Matjila requested, at the PMC meeting of 23 November 2015, that MST be considered for CSI funding. This was more than four months before Ms Louw came on the scene, when she met Dr Matjila at OR Tambo International Airport. That meeting took place on 4 April 2016.
74. Steps were taken to implement Dr Matjila's request of 23 November 2015. They culminated in the first proposal, the proposed one-month Mpumalanga project for approximately R500 000, which was ultimately not proceeded with. Ms Louw played no role in relation to this proposal.
75. The second proposal was the proposal facilitated by Maisan, for a three- to five-year project costing between R23 million and R37 million. Ms Louw played an active role in this regard. The proposal was recommended by PIC staff, but rejected by Exco.,
76. The third proposal was the one-year proposal which Mr Mzonyane submitted to the CSI team at the PIC. It was approved by Exco, and the

proposed amount of R5 million was paid to MST. Ms Louw played no role in relation to this proposal.

77. The obvious question which arises is what Ms Louw did for MST, such that they paid her R438 000, at a time when they were under some financial pressure? The various role-players gave different explanations.
78. MST stated that this was for the consultancy services which Maison Holdings had provided, particularly with regard to the PIC. They stated that during their initial meeting with Maison Holdings, Ms Louw had said that she would like to take this to various companies to obtain support for the business. She had said that she could take it to many companies, and specifically mentioned the PIC, saying that the PIC should be approached to gain access to PIC investees which need to undertake social investment. MST said that they did not have the capacity to deal with the PIC with regard to CSI, and Ms Louw had "*invigorated*" the CSI discussion with the PIC. She had worked hard in relation to other possible partners. She was "*clearly well connected*": they had been told by others that she was close to the Minister of State Security. They did not want to demotivate her. While the initial CSI proposal to the PIC (for between R23 million and R37 million) was turned down, the subsequent proposal for R5 million was approved. They appeared to attribute this, at least in part, to the work of Ms Louw. That this was their view is supported by the fact the payment of R438 000 was 10% of the PIC contribution of R5 million excluding VAT.

79. However, Mr Mzonyane said that in fact MST recognised that the R5 million project was the result of his work, and not the work of Ms Louw. He said that for this reason, the decision to pay her R438 000 initially caused some friction within MST. He said that ultimately the intention was that the payment to Ms Louw was an advance in respect of future projects to be delivered by Ms Louw.
80. Ms Louw distanced herself from any suggestion that she was responsible for the R5 million CSI contribution. She said that MST did not need her to open the door to the PIC, because that door was already open to them. She agreed with the propositions that she “*produced nothing for MST*”, and “*produced no new business for them*”. When asked why she had been paid the R438 000, She said that she had incurred expenses travelling to Cape Town to meet MST.
81. Dr Matjila confirmed that because of his original intervention in November 2015, the PIC was already considering a CSI investment in MST before Ms Louw came on the scene. He said that Ms Louw’s involvement was not necessary in order to secure the PIC investment. He was under the impression that the approved R5 million project was a revised version of the unsuccessful R23 million to R37 million proposal which had been presented by Ms Louw. It seems that he misunderstood what had happened in this regard: the R5 million project was the result of a proposal submitted by Mr Mzinyane, not the proposal submitted by Ms Louw. The Mzinyane proposal

was submitted to (and facilitated through) the CSI team, whereas the Maisan proposal was submitted to Mr Radjhar's team.

82. The absence of the key invoice (Ms Louw claimed that there were two invoices) does not assist in resolving the matter. MST stated in an e-mail to the PIC that *"the payment was made to look at improving BEE status and motivate and stimulate our partnership to create further sales"*. That appears to confirm Mr Mzinyane's explanation. However, that same email also described the payment as for *"work done to date"*.
83. As I have noted, the Joint Venture Agreement states that Maisan will be paid a *"facilitation fee"* which will be negotiated on a deal-by-deal basis, and will be attached as an Addendum. We requested copies of all such Addenda, but were informed that there were none. At our initial interview with MST, we were told that the agreement was that Maisan would be paid on a commission basis, which we understood to be a reference to a success fee. There was no such success.
84. Having regard to all of the evidence, I conclude that in substance, despite its form, the payment of R438 000 to Maisan was to reward the (unsuccessful) efforts Ms Louw had made with the PIC, and to encourage her to continue her further efforts.

CHAPTER 3

THE ROLE OF MINISTER MAHLOBO

85. When we interviewed former Minister Mahlobo, he acknowledged that he had called Dr Matjila to a meeting at the airport in order to introduce him to Ms Louw and to ask him to get the PIC to assist Ms Louw with her business interests.
86. When we asked what his relationship was with Ms Louw, Mr Mahlobo's answer was "*I don't have a relationship with her*". He said that he used to go to her Spa for treatment. He said that while they had been at university at the same time, they were not friends at university, and in fact he did not know her at university. His first contact with her was when he went to her Spa for treatment.
87. Mr Mahlobo said that when he was at the Spa, Ms Louw told him that she was experiencing "*challenges*" in dealing with the PIC, and that he then arranged the meeting with Dr Matjila. There are two difficulties with this:
- 87.1 Ms Louw did not suggest to us that she had previously approached the PIC or attempted to do so, or that she had experienced

“challenges” in this regard. Her explanation of why Mr Mahlobo approached the PIC was quite different - she said that approaching the PIC was his suggestion:

“... we were talking about how business is going and I said to him you know we want to do spa treatments, I mean spa products, and then he said oh okay, maybe try PIC.”

87.2 Dr Matjila said that when he met Minister Mahlobo and Ms Louw, neither of them said that she had previously made any attempt to approach the PIC and had experienced “challenges” in this regard.

88. Mr Mahlobo denied Dr Matjila’s evidence that when they subsequently had other meetings, he asked Dr Matjila for a follow-up on what had happened with regard to Ms Louw’s attempt to obtain assistance from the PIC. It seems to me that there are two difficulties in this regard:

88.1 It seems only natural and probable that Mr Mahlobo, having gone to the extent of setting up and attending a meeting at OR Tambo specifically to request Dr Matjila to enable Ms Louw to obtain assistance from the PIC, would at subsequent meetings have enquired what had happened in that regard.

88.2 If he did not make such follow-up enquiries, the most likely explanation would be that he had asked Ms Louw what had

happened, and that she had informed him that her attempts to raise funding through PIC for her business ventures had not been successful. However, he did not proffer this explanation.

89. When we asked Mr Mahlobo why he had called Dr Matila to a meeting at OR Tambo in order to introduce her to Dr Matijila and request his assistance, he vigorously asserted that it was commonplace for people in high positions in government to help people who were experiencing problems with other parts of government, by putting them in touch with the appropriate people. We suggested to him that this, however, was something different. It was not just that he had given Ms Louw Dr Matijila's phone number, or even that he had telephoned Dr Matijila and asked him to meet Ms Louw and assist her. In order to advance Ms Louw's personal business interests, he had gone to the extent of summoning the head of a major public entity to the airport for this purpose, had attended the meeting himself, and had asked Dr Matijila to assist her. This suggested a closer relationship than simply having attended at her Spa as a client.
90. Mr Mahlobo's response was to say that there is nothing unlawful about arranging meetings if people need help, and that there is no standard that says that it is wrong to arrange such meetings. He said there was no harm caused by arranging such meetings. We said that we were not suggesting that there was anything unlawful in what he had done, but that it seemed out of the ordinary, and that it was difficult to explain it simply on the basis

that he had attended the Spa. His response, again, was that there is no law that says you cannot arrange for people to meet.

91. We asked Mr Mahlobo whether he had ever made any similar arrangement for the benefit of any other person. His answer was that he had “*referred many people*”, and that he could not give details because he did not want to “*speculate*”.

92. In my opinion, the probabilities are the following:

92.1 It is probable that Ms Louw was telling the truth when she said that she had known him (and implicitly had been on friendly terms with him) since “*back in the day*”. If I am correct in that regard, it raises the question why Mr Mahlobo attempted to conceal the true nature of his relationship with Ms Louw.

92.2 It is probable that Ms Louw had not previously approached the PIC and experienced “*challenges*”, and that she did not say this to Mr Mahlobo.

92.3 It is overwhelmingly probable that it was out of the ordinary for Mr Mahlobo, a Cabinet Minister, to go to the extent of summoning the CEO of a major public entity to a meeting at the airport with someone with whom he did not have a personal relationship (I take it that this is what he meant when he said that he did not have a relationship

with Ms Louw), and himself attending that meeting and making the request. This cannot be explained away simply on the basis that he had been her client at her Spa. There must be more to it than that.

92.4 It is probable that when Mr Mahlobo and Dr Matjila subsequently met, Mr Mahlobo did ask Dr Matjila to inform him what had happened with regard to the attempt to obtain assistance for Ms Louw from the PIC.

93. It follows that in my opinion, the probability is that what Mr Mahlobo told us was untrue in a number of respects. The obvious questions which arise are why he would deny or understate the true nature of his relationship with Ms Louw; why he would assert that Ms Louw had said that she had previously had dealings with the PIC and had experienced "*challenges*" in that regard; and why he would deny that when he subsequently met Dr Matjila, he asked what had happened with regard to the provision of assistance to Ms Louw by the PIC. His repeated resort to the assertion that there is nothing unlawful about arranging meetings was in my opinion an attempt to avoid dealing with the obvious questions which arise from his role in this matter. His inability or unwillingness to identify any other occasion on which he had ever acted in this manner speaks for itself.

CHAPTER 4

DR MATJILA, MS LOUW AND MR LAWRENCE MULAUDZI

94. The “*James Nogu*” e-mail of 13 September 2017 to the PIC address list made the following allegations:

“... Dr Matjila had instructed one of the PIC funded companies, through its director, to assist in settling Ms Pretty Louw’s legal challenges, where her Maisan Spa in Benmore was closed and the Sheriff of the Court was about to attach her assets. Dr Matjila sent a message for the instruction to settle Ms Louw’s debt, which was paid for by the PIC funded entity”.

95. The events which gave rise to this allegation are the following.
96. When Ms Louw first approached Dr Matjila for assistance from the PIC, she told him that her business was interested in undertaking a manufacturing product in relation to cosmetics, and a mining project. At that time, the PIC had recently provided funding to a BBBEE consortium headed by Mr Lawrence Mulaudzi, in order to enable it to take a stake in Ascendis. Dr Matjila put Ms Louw in contact with Mr Mulaudzi, and asked Mr Mulaudzi whether there were opportunities in his business as far as the cosmetics

proposal was concerned, given that Ascendis is involved in pharmaceuticals. In the event, nothing came of that.

97. Part of the activities of Maisan Holdings was running a Spa in Benmore. In That business ran into financial difficulties, and they were not able to pay the rent. The landlord sued for the rent, and must have obtained a judgment for payment of the rent, because the Sheriff of the Court was going to evict Maisan. The amount owing was in excess of R300 000.
98. Ms Louw telephoned Dr Matjila and asked him for urgent assistance. She sent him, on WhatsApp, a copy of the Sheriff's writ of execution. Remarkably, Ms Louw claims not to remember whether she telephoned Dr Matjila, told him that they were in financial trouble, asked him to help them, and sent him the document from the Sheriff by WhatsApp.
99. Dr Matjila then telephoned Mr Mulaudzi. He informed Mr Mulaudzi that Ms Louw (whom he had previously referred to Mr Mulaudzi as described above) was in financial trouble. Her business had been attached by the Sheriff of the Court, as she owed money. He asked Mr Mulaudzi urgently to come to her rescue by settling her debt. He said that he would send Mr Mulaudzi the legal documents that Ms Louw had sent to him.
100. Mr Mulaudzi agreed to assist. Dr Matjila then sent him the Sheriff's documents via a WhatsApp application. Mr Mulaudzi saw that the amount

owing was some R330 000. On that same day, Ms Louw contacted him and informed him that Dr Matjila had told her that he would assist her.

101. They met the following day, at the offices of the attorneys who were involved in the matter. Mr Mulaudzi made an EFT payment of R150 000. Mr Mulaudzi's bank records show that this payment was made on 14 October 2016.
102. Ms Louw contacted him again the following day, stating that the attorneys required the balance of the arrears before Maisan would be allowed to go back to their business. She said that Dr Matjila had informed her that Mr Mulaudzi would settle the debt in full.
103. Mr Mulaudzi delayed for a few days in making this payment, as he hoped that she would obtain alternative assistance. When it became apparent that there was an expectation for him to settle the whole debt, he made a second payment of R150 000. He confirmed telephonically with Dr Matjila that he had made the payment as per his request.
104. Mr Mulaudzi says that Ms Louw thereafter asked him to make payment of the balance of approximately R30 000. He declined to do so.
105. Mr Mulaudzi and Ms Louw both state that no part of this money has ever been repaid. Both of them say that they did not have any expectation that it would be repaid. Dr Matjila says that he told Mr Mulaudzi that he should

deal with this as a loan, and that he should record the terms of the loan in an agreement. Mr Mulaudzi says that this was some time after the events.

106. Mr Mulaudzi and Dr Matjila do not have any personal relationship. Mr Mulaudzi knows Dr Matjila only in his capacity as the CEO of the PIC. He said that when Dr Matjila made this request to him,

“it was only natural for me to comply with this request as I have been funded by PIC in my business ventures. Although he did not force me to give the money to Ms Louw, there is no way I would have said no to the CEO of PIC. And it is also for this reason why I didn’t even question why he had chosen me to give money to Ms Louw.”

107. He explained it further as follows:

“... just imagine for instance, for example you receive a call from the CEO of Standard Bank and after Standard Bank has funded your transaction, I think it would be difficult to just say no because you know that if you need assistance you can still go to the very same institution. So when Dr Dan made the request I couldn’t say no to the CEO of the PIC.”

108. Mr Mulaudzi stated that the telephone call from Dr Matjila was not an instruction: it was a request. He felt however that he could not say no to

that request. He stressed that he made the payments from his personal funds, and not from the funds of any company with which he is involved.

109. If one asks why Dr Matjila responded to the telephone call from Ms Louw by requesting Mr Mulaudzi to pay her what was necessary to get her out of her financial difficulties, three possibilities arise:

109.1 First, the explanation could be that Dr Matjila and Ms Louw were involved in a romantic relationship, as alleged by "*James Nogu*". I have found no evidence of this.

109.2 Second, it could be that Dr Matjila would make such a request on behalf of any person whom he has met in the course of his work as CEO of the PIC, whose application to the PIC has been unsuccessful, and who then telephones him and says that he or she is in financial distress. This seems improbable in the extreme. As Dr Matjila acknowledged, Ms Louw was one of very many unsuccessful applicants to the PIC for funding.

109.3 Third, it could be that Dr Matjila felt under pressure in this regard, because Minister Mahlobo had called him to a meeting at the airport to introduce him to Ms Louw, and to ask him to assist Ms Louw. When we put that possible explanation to Dr Matjila, after some hesitation, he said that this was in fact the reason. What

distinguished Ms Louw from the many other disappointed PIC applicants was that she had been brought to him by a Cabinet Minister, and he felt a need to respond to that.

110. Dr Matjila said that in fact he had not met Minister Mahlobo on just one occasion, but *“probably three, four times”* to *“report back”* on *“various matters”*, including this one. He said *“I unfortunately have to respect the Ministers. When they call I come to listen you know, to what they have to say.”*
111. Dr Matjila subsequently said that he had four or five meetings with Minister Mahlobo, at the following venues: at the Minister’s home in Pretoria, at the OR Tambo international Airport, and at the Sheraton Hotel in Pretoria.
112. For present purposes, the most significant of these was the meeting on 4 April 2016 at OR Tambo International Airport.
113. In addition, a meeting was scheduled for the Minister’s home in Pretoria on 22 January 2018. The meeting did not take place. This was shortly before Minister Mahlobo ceased, on 26 February 2018, to be a member of the Cabinet.⁷

⁷ At this time, he was the Minister of Energy.

Dr Matjila's explanation to the Board

114. Dr Matjila's request to Mr Mulaudzi to make payments for the benefit of Ms Louw was discussed at the PIC Special Board Meeting on 29 September 2017. I deal with this more fully below. The Board resolved as follows:

"While the Board trusted the bona fides of the CEO in his actions with regard to helping the distressed company, such actions could be misconstrued, and the Board requested the CEO to not act on his own in taking such actions in future.

"In order to avoid a situation where management can be accused of acting improperly, it would be advisable that management do not engage with clients alone. The Board instructed the Social and Ethics Committee to look into whether a policy can be developed to guide management in this regard".

115. What is missing from this resolution, and from the discussion which preceded it, is that the CEO had been prompted or pressured into taking this action by the role played by the Minister of State Security, who had called him to a meeting and requested him to enable Ms Louw to obtain the assistance which she required, and who had thereafter pursued the matter by asking for follow-up reports. This was not disclosed to the Board, which

made no enquiry as to how Dr Matjila had come into contact with Ms Louw, and how it was that she had such ready access to him.

116. In my opinion, Dr Matjila should have disclosed this to the Board. It would have thrown the entire episode in quite a different light. The Board should have been told that its CEO had been under pressure from a Cabinet Minister to provide assistance to a person who was a friend of his. The Board was entitled to know that its CEO had been in this position, and that this was the reason why he had requested Mr Mulaudzi to assist Ms Louw.
117. One would hope that if this had been disclosed to the Board, the Board would have pursued the matter – perhaps by taking up the matter with the Minister of Finance, and requesting him to raise it in an appropriate manner and prevent a recurrence.

CHAPTER 5

THE RESPONSE OF THE PIC BOARD TO THE ALLEGATIONS

The Special Board Meeting of 15 September 2017

118. On 15 September 2017 the Board held a “*Special in camera Board meeting*”. I was informed that unlike regular Board meetings, the “*in camera*” meetings are not recorded, in order to enable a free exchange of views. While I understand the motive for this, it seems to be a doubtful practice: I would have thought that it is precisely when controversial matters are discussed, that it is necessary to have an unchallengeable record of precisely what was said – and, as I note below, what was actually decided – in order to avoid subsequent disputes in this regard.
119. The following account is drawn from what is recorded in the approved minutes and in the affidavit of Dr Matjila in answer to the UDM application to the High Court.
120. The Board noted the allegations made with respect to the loan granted to MST, and the e-mail to Board members which implicated the CEO, the CFO and other Executives. The Board:

“RESOLVED to mandate the Head of Internal Audit to conduct a review of the allegations and that for the integrity of the process, Management is prohibited from engaging with the Head of Internal Audit except for purposes of providing documents or clarity on specific questions raised by the Head of Internal Audit.”

121. The Head of Internal Audit, Mr Lufuno Nemagovhani was then called into the Board meeting for him to be briefed him on the resolution of the Board. Mr Nemagovhani expressed the view that the allegations were complex and that neither he nor his subordinates had the requisite forensic expertise to deal with the allegations as requested by the Board. He recommended that the Board appoint a company with forensic investigation expertise to conduct the investigation process. He then left the meeting.
122. Dr Matjila and Ms More were then called into the Board Meeting and advised of the Resolution. Dr Matjila expressed his dissatisfaction that the Board had failed to engage with the report which he had provided, and had not given him and the CFO an opportunity to respond to the allegations. He was then given an opportunity to address the responses raised in his report and by the Board.
123. Dr Matjila and Ms More were then excused from the meeting, and the Board reconsidered the matter. In arriving at its final Resolution, the Board considered, *inter alia*, *“the need to procure a legal opinion on a suitable way*

forward to resolve (i.e. is an external investigation required concerning the allegations implicating the CEO)”.

124. After extensive discussion, the Board resolved that the Company Secretary should draft a memo containing the Scope of Work for the review process to be conducted by the Head of Internal Audit. The review process by the Head of Internal Audit should be treated with extreme urgency and confidentiality. The Board further resolved as follows:

“With specific reference to the allegations on MST

5.13.2.4 *The Head of Internal Audit should verify the information submitted to support responses by Executive Management.*

5.13.2.5 *The verification should only⁸ entail the following:*

(a) *the validity of the documentation provided by the CEO and CFO to the Board as part of their response;*

(b) *the accuracy of the responses provided by the CEO to the PIC Board;*

(c) *whether applicable policies and procedures were complied with in approving funding to the MST;*

⁸ My emphasis.

(d) the completeness of the responses and adequacy of documentary evidence provided by the CEO in supporting those responses.

5.13.2.6 The verification process was not⁹ a forensic investigation. The verification process should be conducted internally in its entirety and therefore no external service provider should be appointed for the verification process.

5.13.2.7 The relationship between the PIC CEO and an alleged girlfriend was excluded from the scope.

5.13.2.8 The Head of Internal Audit should report to the Board at its meeting scheduled for 29 September 2017 ...

With specific reference to the email allegations received on 13 September 2017¹⁰

5.13.2.9 Responses should be provided to the Head: Internal Audit within a week, i.e. 22 September 2017.

⁹ Emphasis in original.

¹⁰ This appears to refer to the email sent by "leihlola Leihlola" to the members of the Board. It contained wide-ranging allegations of internal irregularities at the PIC. It did not include the allegation about the relationship between Dr Matjila and Ms Louw, and it also did not refer to Dr Matjila's role in arranging that Mr Mulaudzi would provide financial assistance to Ms Louw or Maisan.

5.13.2.10 The Head of Internal Audit should conduct the same review process mandated in respect of the MST allegations; and a report should be submitted to the Board within 4 weeks (22 October 2017) following receipt of responses from participating parties.”

125. I was informed that the Board was divided on this issue. The minutes record that Ms Zulu, a member of the Board, specifically requested that her dissenting views be recorded.

126. The following aspects of this are striking in the light of the present enquiry:

126.1 The Board considered the need (perhaps more correctly, whether there was a need) to procure a legal opinion on whether an external investigation was required concerning the allegations implicating the CEO. In the event, it appears that no such opinion was obtained.

126.2 The Board explicitly stated, and in fact emphasised, that the verification process was not a forensic investigation. It was, in essence, an internal review of whether the applicable policies and procedures had been complied with in approving funding to MST, and the completeness of the information provided.

126.3 The relationship between Dr Matjila and Ms Louw was explicitly excluded from the scope of the process to be undertaken by the Head of Internal Audit.

The media release of 15 September 2017

127. After the meeting of 15 September 2017, a media release was issued on behalf of the Board, headed *“PIC Board Expresses Confidence in the CEO”*.

“The Board of the Public Investment Corporation (PIC) has taken a decision to communicate the outcome of its special meeting held in Pretoria today. Ordinarily, the Board would not publicly disclose the outcomes of its deliberations. However, the Board deems it necessary to break from this tradition, given the heightened interest from the media and other stakeholders.

Following the meeting, the Board expressed its confidence in the ability and integrity of the CEO, Dr Daniel Matjila, management and staff of the PIC. The Board wishes to state that it will continue to exercise its fiduciary duties without fear or favour, including accountability to all stakeholders. The Board also noted media allegations prior to the meeting about its intention to remove the CEO. The Board wishes to reiterate that it rejects these allegations with the contempt they deserve.

The CEO made representations to the Board responding to the allegations levelled against him through the media. The CEO

provided detailed documentary evidence of the decisions made by the PIC and that the process followed was in accordance with all policies, procedures and delegation of authority of the PIC.

Following the deliberation by the Board on the allegations and representations, the Board accepted the representations of the CEO. For completeness of the process and for its final assurance, the Board mandated the Internal Audit division of the PIC to independently review the representations made by the CEO”.

128. Three observations may be made in this regard:

128.1 The Board had by this time already accepted the representations made by the CEO. The investigation by Internal Audit was merely *“for completeness of the process and for its final assurance”*.

128.2 The allegations which had received the most attention in the media, namely the alleged misuse of PIC funds and influence to favour the girlfriend of Dr Matjila, were not addressed at all.

128.3 The media release did not disclose that the allegation that Dr Matjila had used the resources and the influence of the PIC to benefit his girl-friend had not been considered by the Board, and would also not be part of the *“verification process”* to be undertaken by Internal Audit.

The Special Board meeting of 29 September 2017

129. On Friday 29 September 2017, a further special “*special in camera*” meeting of the PIC Board took place. It was not recorded.
130. The Board had before it a report prepared by the Head of Internal Audit, Mr Nemagovhani. He presented his report.
131. His report described as “*exclusions*” from his mandate, the allegation that Ms Louw was Dr Matjila’s girlfriend, and the allegation that Dr Matjila instructed an investee company to make payments to Ms Louw when she was in financial difficulty. There is some disagreement as to whether these were correctly described as “*exclusions*”. It seems to me that the description is in fact correct, having regard to the minutes of the meeting of 15 September. In any event, what is undisputed is that Mr Nemagovhani told the Board that he did not have the resources and capacity to investigate those matters, and that he was uncomfortable about carrying out an investigation into the conduct of the CEO, who was the person to whom he reported. He told the Board that he had not investigated those matters. He stated that an independent investigation would be necessary in order to deal with them.
132. Mr Nemagovhani presented the results of his enquiry, including the enquiries he had addressed to Dr Matjila. He noted that Dr Matjila had not

responded to the allegations that he had instructed the director of an investee company to pay the debt of an alleged girlfriend, and the allegation that Ms Louw was his girlfriend. Mr Nemagovhani had undertaken a verification of the information which had been provided to him. He reported that:

132.1 all of the documents submitted by the CEO and CFO as evidence of the loan to MST were valid;

132.2 the loan of R21 million was provided to MST and not Maisan Holdings;

132.3 there was an agent/principal agreement between MST and Maison, and he had not been able to obtain copy of an annexure to that contract;

132.4 the allocation of R5 million to MST as Corporate Social Investment was in line with the PIC's CSI strategy which had been approved by the Board in November 2016;

132.5 Company and Intellectual Property Commission reports confirmed that Ms Louw was not a shareholder or a director of MST.

133. Mr Nemagovhani stated that he had not engaged with Dr Matjila during the investigation process.

134. He was then excused from the meeting to allow the Board to deliberate on his report.
135. The Board was satisfied that the PIC's internal processes had been followed in respect of both the R21 million investment and the R5 million CSI transaction with MST.
136. There was extensive discussion on how the Board could verify the response by Dr Matjila as to whether he gave instructions to a director of an investee company to pay the debt of an alleged girlfriend. The Board agreed to request Internal Audit to interview both the CEO and the director of the investee company (Mr Mulaudzi).
137. Mr Namagovhani was called back into the meeting. The Board requested him to verify directly with Dr Matjila whether he had instructed a director of a PIC investee company to pay the debt of an alleged girlfriend, and also requested him to contact Mr Mulaudzi.
138. Mr Nemogovahani left the meeting at 14h00. He returned at 14h50, having made his enquiries. He reported that he had interviewed Dr Matjila in person, and that he had spoken on the telephone to Mr Mulaudzi. He reported as follows.
- 138.1 Dr Matjila told him that he was introduced to the two women. Thereafter, they submitted a cosmetic manufacturing proposal. Dr

Matjila referred them to the IDC, NEF and DTI because the proposals did not fit the mandate of the PIC. Subsequently, they presented a mining transaction to the PIC, which was not accepted because they did not have experience, the proposal was shallow, and the deadline was too short. Thereafter, the PIC concluded the Ascendis deal, in which one of the promoters was Mr Mulaudzi. Dr Matjila introduced the women to Mr Mulaudzi to see whether he could assist them through the enterprise development of Ascendis in relation to their cosmetic business. That process took too long, and their business was about to collapse. They contacted him again to assist them to save their business. He said that the PIC could not rescue them, and he asked Mr Mulaudzi to assist. This was a loan as far as Dr Matjila was concerned. He did not instruct Mr Mulaudzi to provide the assistance. He was mostly communicating with the women through telephone or cell phone messages, and had deleted most of the messages.

138.2 Mr Mulaudzi informed him that he did not know the lady in question, and had been introduced to her by Dr Matjila, who asked him to assist her with opportunities. He could not find any opportunities. Thereafter, he received a call from Dr Matjila to assist as their company was collapsing. Dr Matjila forwarded the letter of the Sheriff to him through WhatsApp. The ladies were running a Spa

shop and were locked outside. The Sheriff was waiting for payment of the outstanding amount. He paid R150 000 on the first day, and sent proof of payment to the ladies. The following day he paid R150 000. This was not a loan, he was just assisting. He could not say no, for the reason that PIC had funded two of his companies. He did not ask why he was asked to assist. This was a request, and not an instruction. He made the payments in his personal capacity. He was not expecting any payment for what he had done.

139. After further extensive discussion, the Board resolved to accept the report of Mr Nemagovhani. The Board resolved that while it trusted the *bona fides* of Dr Matjila in his actions with regard to helping the distressed company, such actions could be misconstrued, and the Board requested him not to act on his own in taking such actions in future. It resolved that in order to avoid a situation where management can be accused of acting improperly, it would be advisable that management do not engage with clients alone. The Board instructed the Social and Ethics Committee to look into whether a policy could be developed to guide management in this regard.
140. A number of members of the Board have emphasised to me that there were divisions on the Board with regard to this matter.
141. The Board also resolved that a media statement be issued stating that the Board was satisfied with the responses from the Executive Directors and

the outcome of the Internal Audit review. Later that day, a media statement was issued on behalf of the Board. I have quoted the most important part of it in Chapter 1:

“On the 29th September 2017, the Board of the Public Investment Corporation (PIC) met to receive feedback from Internal Audit division with regard to the allegations against the CEO, Dr Daniel Matjila. The Board fully applied its mind to the report presented by Internal Audit and confirms its satisfaction with the report. The Board has concluded that the allegations were baseless and that Dr Matjila is cleared of any wrongdoing”.

Assessment

142. I do not think it would be unfair to describe the Board’s investigation of the content of the emails as somewhat perfunctory. It consisted of two elements:

142.1 The major part of the investigation was an internal “*validation*” exercise undertaken by the Head of Internal Audit, to establish whether the steps taken by the PIC in making the loan and the CSI contribution were taken by the appropriate bodies, exercising authority which had been conferred upon them, and in accordance with agreed procedures and policies. The review confirmed that this

was the case. Mr Nemagovhani was not instructed to investigate the underlying allegation of undue influence in the process, and he did not do so. The enquiry was therefore very formal in its nature. Mr Nemogovahani carried out the mandate which was given to him, and did so properly and effectively. The problem lay in the mandate. He reported that he had not investigated the allegations with regard to the provision of funding to an alleged girlfriend of Dr Matjila.

142.2 The further enquiry consisted of a fairly brief interview with Dr Matjila and a telephone call to Mr Mulaudzi. The Board clearly recognised that the scope of Mr Nemagovhani's initial enquiry had not been adequate with regard to the allegations against Dr Matjila. However, its attempt to supplement that enquiry was in my opinion also inadequate. It did not involve any testing of the accuracy of the information provided by Dr Matjila or Mr Mulaudzi, or any investigation of what lay behind the events in question. The Board simply accepted the correctness of what they had said, and did not press for any further details.

143. The present enquiry demonstrates that additional highly relevant information could have been obtained through a proper enquiry.

144. The Board could not, on the information before it, have validly reached any conclusion as to whether Ms Louw was Dr Matjila's girlfriend. All it had

before it was his denial, which could not be an adequate basis for resolving the matter: it invites the famous riposte "*Well he would say that, wouldn't he?*"

145. The somewhat perfunctory investigation of the allegations in the emails contrasts sharply with the investigation which was undertaken in an attempt to find out who had sent the emails, and who had "leaked" PIC documents (in particular, the MST transaction documents and the draft minutes). Three IT companies were involved in this investigation, which was intensive and extensive. (I note that the IT companies were ultimately reporting to Dr Matjila, which appears inappropriate in light of the fact that the allegations were made about him.)
146. A further matter which calls for comment is the media statement which was issued after the Board meeting on 29 September. It consisted of a bland and unqualified endorsement of the conduct of the Executive Directors. It did not reflect the Board's discomfort or disquiet in relation to the CEO's approach to Mr Mulaudzi to provide financial support to Ms Louw. And it again did not address the aspect of the emails which had received most attention in the media, namely the allegation that Dr Matjila had used the resources and the influence of the PIC to benefit his girlfriend.
147. Under the circumstances, it is not surprising that the media statement did not lay matters to rest. The public controversy continued, and in fact

deepened. This was to the disadvantage of the PIC, which at around the same time was also coming under increased scrutiny in relation to investments which were controversial for financial or political reasons. With the benefit of hindsight, one can see that the manner in which the matter was dealt with, also did Dr Matjila no favour. In the public mind, he continued to be under suspicion of having used his position and influence as CEO of the PIC to benefit his girlfriend.

Were the Board minutes doctored or sanitised?

148. In June 2018 the United Democratic Movement instituted an application to the Pretoria High Court against Dr Matjila, the PIC, the Minister of Finance, and the Chairperson of the Board of the PIC. The UDM sought orders declaring that the Minister of Finance would be responsible for taking decisions regarding the suspension of and/or disciplinary action against Dr Matjila, directing the Minister to place Dr Matjila on suspension with immediate effect, and directing the Minister to institute disciplinary proceedings against Dr Matjila with immediate effect. The application was opposed.
149. In that application, it was alleged that the minutes of the Special Board Meeting of 29 September 2017 had been “doctored” or “sanitised”. In support of this allegation, the applicant attached draft Minutes which had been considered, revised and then approved by the Board.

150. The various respondents filed answering affidavits. None of them said that the draft minutes contained information which was not correct. It was explained that it is normal procedure for the Company Secretary to prepare a draft of the minutes, which is then circulated to the Board, revised and refined by the Board to ensure that it accurately reflects the important features of the meeting, and then approved by the Board and signed. It was denied that there had been any manipulation of the minutes, which it was said had been revised and then adopted by the Board in the ordinary course.
151. In answer to the allegation of “doctoring” or “sanitisation”, I was told that the draft minutes were revised because they went into too much detail. I was also told that there was a concern that if the minutes were too detailed and fell into the hands of third parties, this could be embarrassing to the PIC. In the event, what happened was that both the draft minutes and the approved fell into the hands of a third party, and were then made public.
152. I do not think any practical purpose would be served by a detailed analysis of the differences between the draft minutes and the minutes as approved. It is sufficient to record that the draft version was more sharply critical of Dr Matjila’s conduct than the final version – for example, the draft version stated *“The CEO’s conduct placed the reputation of the PIC at risk, as such the CEO needed to be warned”* and *“The Board could not condone the conduct of the CEO”*.

153. The obvious answer to the allegation of “doctoring” is that the final minutes were approved by the Board, and the Board can be taken to know what it decided at an earlier meeting. However, where there is a lengthy meeting and the body concerned is divided, it is possible that some members may agree to (or not explicitly oppose) something which has been proposed, and thereafter regret this and attempt to re-write the events when the minutes are to be confirmed. I am not able to say whether this happened. This does however underline the advantage of having a voice recording of the discussions and the decisions.

CHAPTER 6

OTHER ALLEGATIONS WHICH HAVE BEEN MADE

154. The e-mails (and in particular the e-mail of 13 September 2017 addressed to members of the Board) contain wide-ranging allegations of internal irregularities at the PIC:

154.1 Some of them are very generalised, and would require extensive investigation in order to be able to deal with them. I have not undertaken such investigations.

154.2 Some of the complaints are the subject of disciplinary enquiries which have either been concluded or are still in process. I have not investigated such matters. I did not understand it to be within my brief to conduct my own investigation into the disciplinary matters.

155. I have obtained some information in relation to a limited number of specific allegations which have been made. I address them briefly here.

156. These allegations are the following:

156.1 It was alleged that Dr Matjila paid money to a senior journalist of the *Sunday Times* to stop publication of allegations against the PIC or

him. No evidence was submitted in support of this allegation. Dr Matjila denied it. He informed me that he did have an interview with a journalist at the *Sunday Times*, who put to him allegations which had been made. When Dr Matjila provided his response to those allegations, the journalist did not pursue the matter further.

156.2 It was alleged that Mr Katleho Lebata, the son of the CEO, is employed by the PIC. Dr Matjila stated that while has a son named Katleho, that is not Katleho Lebata, who is employed at the PIC.

156.3 It was alleged that Dr Matjila granted a contract to a relative to run the staff canteen at the old PIC offices. Dr Matjila stated that the person who was given the contract to run the staff canteen was indeed a Mr Matjila. He stated that this person is no relative of his, and that he was not involved in the procurement process.

156.4 It was alleged that Dr Matjila had asked beneficiaries on WhatsApp to make certain payments on his behalf as a way of thanking him for approving a transaction with the PIC. No evidence was provided in support of this allegation, and Dr Matjila denied it.

156.5 It was alleged that Mr Adrian Lackay was illegally employed at the PIC on the instructions of Dr Matjila, without the proper Human Resources procedures having been followed. Mr Lackay was hired

at the PIC after his departure from the SA Revenue Service, to assist the PIC with communications. I was provided with an extensive file of documents which reflected the procedures which were followed in this regard. No-one came forward to explain or contend why the appointment was irregular. I have not investigated the matter further.

156.6 There was a series of generalised complaints against the CFO, Ms More, about the manner in which she performs her duties at the PIC. We interviewed Ms More, who denied the allegations. She said that in her capacity as CFO, she has to sign off on a wide range of procurement decisions and other decisions with financial implications. She is regularly required, she says, to refuse to approve the proposals which are submitted to her. She said that this will inevitably will make her unpopular with some people.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

157. There is no evidence that Dr Matjila and Ms Louw have or had a romantic relationship. In the light of their denial that this is the case, and the absence of any evidence which contradicts their denial, I conclude that on the evidence before me, they do not and did not have a romantic relationship.
158. I have investigated the transactions in which the PIC made a loan of R21 million to MST, and made a Corporate Social Investment contribution of R5 million to MST. I have found no irregularity or impropriety in either of those transactions.
159. The involvement of Ms Louw with the PIC was brought about by the then Minister of State Security, David Mahlobo, who called Dr Matjila to a meeting at the airport without disclosing the reason for the meeting, when in fact the reason was to introduce Dr Matjila to Ms Louw and Ms Dlamini and to request Dr Matjila to assist them to obtain funding from the PIC for their business. Ms Louw initially gave a deliberately false explanation as to how this meeting came about.

160. It is overwhelmingly probable that it was out of the ordinary for Mr Mahlobo, a Cabinet Minister, to go to the extent of summoning the CEO of a major public entity to a meeting at the airport with someone who was (on his version) a virtual stranger to him, and himself attending that meeting. There must be more to it than that, but he has not disclosed what that was. In my opinion, it is probable that Mr Mahlobo's account of what happened was untrue in a number of respects.
161. When Ms Louw's business ran into financial difficulties, she telephoned Dr Matjila and asked him for assistance. He telephoned Mr Mulaudzi, to whose consortium the PIC had recently provided substantial funding, He asked Mr Mulaudzi to assist Ms Louw. Mr Mulaudzi understood this as a request, and not an instruction, but felt that under the circumstances he had no alternative but to agree, which he did. Dr Matjila then telephoned Ms Louw and told her that Mr Mulaudzi would assist her. He did so by providing the amount of R300 000 in order to prevent the eviction of Ms Louw's business from its premises for non-payment of rent. Mr Mulaudzi paid the money personally.
162. It was inappropriate for Dr Matjila to make this request to Mr Mulaudzi. This was recognised by the Board of the PIC.
163. The reason why Dr Matjila acted as he did was that he felt under pressure as a result of the interventions by then Minister Mahlobo.

164. Dr Matjila did not disclose Minister Mahlobo's role to the PIC Board, either at the time or later when these events came to light and he was asked for an explanation of what he had done. In my opinion, he was under a duty to inform his Board that a Cabinet Minister had placed him under inappropriate pressure. He should have done so. This was particularly so when his connection with Ms Louw had become a matter of public controversy and speculation.
165. When the anonymous e-mails were sent to persons on the PIC e-mail address list making serious allegations about particularly the CEO and to a lesser extent the CFO, the PIC Board did not properly investigate the matter. After receiving a report from Dr Matjila, it pronounced itself completely satisfied with his explanation of the transactions with MST, and requested the Head of Internal Audit to carry out an internal "*verification*" process which it stated was not to be a forensic investigation. Internal Audit reported, correctly in my opinion, that the policies and procedures had been complied with, and complete information had been provided in this regard.
166. The PIC Board did not properly investigate the public allegations with regard to Dr Matjila's relationship with Ms Louw, and Dr Matjila's request to Mr Mulaudzi to provide financial assistance to Ms Louw. It contented itself with an oral report by the Head of Internal Audit on a brief interview he had with Dr Matjila, and a telephonic interview which he had with Mr Mulaudzi.

167. After its meeting on 15 September 2017, the PIC Board issued a statement in which it expressed its confidence in the ability and integrity of Dr Matjila. It did not disclose that it had at that stage made no enquiry as to his relationship with Ms Louw, and the request to Mr Mulaudzi to provide her with financial assistance.
168. After its meeting on 29 September 2017, the Board of the PIC issued a press release which stated that it had received feedback from Internal Audit with regard to the allegations against Dr Matjila, and that it had concluded that the allegations were baseless, and that Dr Matjila was cleared of any wrongdoing. The Board did not disclose the limited nature of its investigation.
169. The Board did not institute a proper investigation of this matter until after Minister Nene, on 25 July 2018, requested it to do so.
170. The Board's perfunctory or limited investigations into the truth of the allegations in the emails contrast sharply with the intensive investigations which were carried out, with the assistance of three IT companies, in an attempt to find out who were the authors of the anonymous e-mails, and who had been responsible for "*leaks*" of PIC documents.
171. The initial draft of the Minutes of the Board Meeting of 29 September 2017 differed materially from the Minutes which were ultimately approved. The

draft Minutes reflected sharper criticism of Dr Matjila's conduct than was contained in the finally approved Minutes. It is not possible for me to make any finding as to whether this was because the Board wished to "sanitise" the Minutes. This is because the discussions at the Board Meeting were held at an "in camera" session which was not recorded, unlike other meetings of the board. I recommend that the Board reconsider the practice of holding "special in camera meetings" which are not recorded. This makes it difficult to resolve disputes which may arise (particularly in relation to controversial matters) as to precisely what was said at the meeting, and what was decided.

172. The Board resolved that while it trusted the *bona fides* of Dr Matjila in his actions with regard to helping Ms Louw's company, such actions could be misconstrued, and the Board requested him not to act on his own in taking such actions in future. It resolved that in order to avoid a situation where management can be accused of acting improperly, it would be advisable that management do not do not engage with clients alone. The Board instructed the Social and Ethics Committee to look into whether a policy could be developed to guide management in this regard.

173. In my opinion, this is not an adequate response to the problem which is identified by these events. The PIC is an organ of state which manages the funds of a very large number of South Africans, in an amount of R2 trillion. It exercises considerable power through the investment decisions which it

makes. There is a risk that the PIC function may be compromised if it exercises its financial muscle in a manner which favours selected people, or which is perceived as doing so. This goes to the heart of the PIC's functions and the need to ensure its probity and integrity. I recommend that the PIC adopt clear rules which prohibit members of its staff from approaching investees or would-be investees for favours, whether for themselves or for any other person.

174. I recommend further that the PIC should develop formal supplier development criteria for investees, where this is to be a relevant criterion for investment, or where the PIC will require a company in which it has invested to undertake supplier development. This issue was raised in a number of the documents which we examined. Our recent history teaches us that so-called "*supplier development*" can be used and abused as a means of achieving patronage or corruption.

175. Finally: Members of the PIC Board have told me that in responding to the allegations about the PIC and its senior staff as they did, they were concerned to preserve the integrity and reputation of the PIC. I accept that. However, I do not think it can be disputed that subsequent events have demonstrated that the attempt to lay the matter to rest through what was in fact a perfunctory enquiry was misguided. The rumours continued to circulate, in particular the core allegation that Dr Matjila had favoured his girlfriend by assisting her and her business to obtain benefits from the PIC.

This was a serious and damaging allegation, which needed to be properly investigated and dealt with. The enquiry which I have undertaken has revealed that material facts were concealed from or at least not disclosed to the Board. A proper investigation of these serious and damaging allegations would have enabled the Board to deal with them in a manner which better promoted public accountability and confidence in the integrity of the PIC.

GEOFF BUDLENDER SC

Cape Town

12 October 2018

ANNEXURE A**PUBLIC INVESTMENT CORPORATION****TERMS OF REFERENCE FOR FORENSIC INVESTIGATION INTO
ALLEGATIONS MADE AGAINST THE CHIEF EXECUTIVE AND CHIEF
FINANCIAL OFFICER OF THE PUBLIC INVESTMENT CORPORATION**

1. On 25 July 2018 the Minister of Finance directed the Board of the PIC to commission a forensic investigation into allegations that had been made against the Chief Executive Officer and the Chief Financial Officer of the PIC in e-mails sent to the PIC e-mail address list from an unknown source. The Minister requested that this be initiated as a matter of urgency and that the final report be submitted to him by 30 September 2018.
2. The Board has appointed Adv G Budlender SC as the lead for the forensic investigation. He will be instructed by Attorney Doris Tshepe of Cheadle Thompson and Haysom. She will be responsible for the overall management of the forensic investigation.
3. Adv Budlender SC and Ms Tshepe will appoint an independent forensic investigator and any other persons whose expertise and assistance are required in order for them to be able to conduct a proper forensic investigation.

4. Adv Budlender and Ms Tshepe will conduct the investigation in a manner that will ensure that those who provide it with information are not subjected to victimisation.
5. Adv Budlender will submit a report to the Board of the PIC, which will forthwith submit it to the Minister of Finance.
6. The report or its findings and recommendations will be made public not more than thirty days after the report has been submitted to the Minister.
7. Adv Budlender will have the liberty, if he considers this desirable and in the public interest, to respond in the public domain to questions which are raised with regard to the investigation and the report.