

FOREWORD

At the outset of its work the Commission gave the assurance that all interested parties would be afforded an opportunity to contribute to the public ventilation of the issues which were the subject matter of its mandate. The Commission has endeavoured to do so. The events described in this report reveal an unhappy state of affairs which, viewed separately, give rise to concern. Viewed cumulatively, they "seemed to lead into an immense heart of darkness".*

The disclosures contained herein may serve to introduce a level of cynicism about the political process in the minds of ordinary citizens. The Commission hopes, however, that comfort can be taken in the confirmation that, in a democratic society, such matters are exposed to public scrutiny and debate and do not remain cloaked in darkness, protected by denials.

During the course of the Commission's work, it was introduced to an environment in which fear and intrigue stalked the corridors of the Administration. Whilst the Commission does not make recommendations in this regard, it trusts that those in authority will have the courage, determination and vision to introduce and foster a changed culture essential to transparent and accountable governance.

*Conrad, Joseph, HeartofDarkness

PART A
INTRODUCTION

ESTABLISHMENT OF THE DESAI COMMISSION

- 1 The Desai Commission was established by way of a Proclamation in the Province of the Western Cape; Provincial Gazette No. 5848 by Proclamation 6/2002 dated 28 March 2002 by the then Premier of the Western Cape, Mr P J Marais ("Peter Marais"). He did so under the power vested in him in terms of Section 127 (2) (e) of the Constitution of the Republic of South Africa, Act 108 of 1996, read with section 37 (2) (e) of the Constitution of the Western Cape 1997 (Act 1 of 1998) and Section 1(1) (a) of the Western Cape Provincial Commissions Act, 1998 (Act 10 of 1998).
- 2 The Premier appointed the Honourable Mr Justice Siraj Desai and Mr John Ernstzen as the Commissioners, and the Honourable Mr Justice Desai as Chairperson of the Commission. For the sake of convenience the Commission is henceforth known as the Desai Commission (hereinafter referred to as "the Commission").
- 3 The events that led to the establishment of the Commission are discussed in detail in this Chapter. An overview is also provided of the legislative context, the methodology followed by the Commission and the limitations that were experienced in conducting the enquiry.

BACKGROUND

- 4 The Western Cape Province is one of the nine provinces currently recognised by the Constitution of the Republic of South Africa, No. 108 of 1996 (1996 Constitution).¹ In addition to a provincial legislature, the executive authority of a province is vested in the Premier of that province, who exercises the

¹ Section 103(1) of the 1996 Constitution

executive authority together with the other members of the executive council of the province.²

- 5 The events that led to the appointment of the Commission commenced on Tuesday, 5 March 2002. A routine security audit was being conducted at the building of the Provincial Government Western Cape, Wale Street, Cape Town at the request of Premier Peter Marais, which included sweeps for listening devices. On that day a device commonly known as a "WatchDog" was handed over to officials of the National Intelligence Agency ("NIA") by one Pierre Beneke ("Beneke"), (holding the office of Director in the office of the Director General, Western Cape Province) who then handed over same to Mr Arthur Fraser ("Fraser"), Provincial Manager, NIA Western Cape Province³. At the time this equipment was being kept in a cupboard and was not in use.
- 6 On the same day, and while Fraser was present in the building interviewing Beneke, it was noticed that two female officials of the administration were removing a number of cardboard boxes from Beneke's office on the 1st floor of the Provincial Legislative Building to a vehicle parked in the VIP parking lot. On investigation it transpired that the vehicle belonged to Beneke and that six cardboard boxes containing, *inter alia* official documentation were loaded thereon. Beneke alleged to Fraser and to the Acting Director General, Dr Gilbert Lawrence ("Lawrence"), that the contents of all the boxes were the property of Advocate Gary Oliver ("Oliver"), and that they were being removed to the latter's home. The boxes were removed from the vehicle and returned to the office of Beneke. At that stage they were not marked or coded in any way. An investigation of the contents was only conducted two days later.⁴

²Section 125(1)(2) of the 1996 Constitution

³Record, evidence of Fraser, p8 -9

⁴Record, evidence of Fraser, p11 -14

- 7 Beneke subsequently conceded that the six boxes loaded onto his motor vehicle all related to Dr. L D Barnard ("Barnard"), former Director-General of the Western Cape Provincial Administration, who held office from 1 December 1996 to 31 January 2002 when he resigned. An inventory compiled on the boxes revealed that five of these cardboard boxes (it is uncertain if those were the same boxes) contained books and objects of a personal nature belonging to Barnard, and one box contained various official documents.
- 8 Following these events and wide-spread coverage of the matter in the press through articles in the Beeld, Cape Argus and Financial Mail, the Commission was established by the aforesaid Proclamation.
- 9 At the time of the appointment of the Commission by the Premier it appeared, as it was also reported by the media, that all interested parties were of the view that an enquiry by a judicial commission was required to establish the validity of allegations and statements made regarding the WatchDog, surveillance of staff, intelligence gathering and information management.

TERMS OF REFERENCE

- 10 The original terms of reference of the Commission were as follows:

To conduct an enquiry into:

- (a) "the adherence to acceptable procedures and practices followed by the Office of the Premier and Office of the Director General from 1994 to date, including those in relation to the management and care of recorded information, regardless of the form or medium in which such information was recorded;***
- (b) the use of surveillance methods within the Provincial Administration, Western Cape;***

- (c) any malpractices and/or irregularities on the part of any person or organisation in relation to the issues mentioned in 1(a) and 1(b); and**
- (d) any other matter relevant to or connected to the issues referred to in 1(a) and 1(b) above.**

To compile a report detailing:

- (a) Any findings in respect of the above; and**
- (b) any recommendations in respect of such findings.**

- 11 On 16 April 2002, by way of Proclamation of the Provincial Gazette 5857, No. 8/2002, Proclamation 6/2002 was amended by Peter Marais, by the extension of the terms of reference of the Commission to include the following subparagraph:

"the alleged receipt of monies/benefits, in whatsoever capacity, by any of the below mentioned persons from Jürgen Harksen, Jeanette Harksen or any person or entity at their behest;

- (i) the Premier/Premiers of the Province of the Western Cape from 1994 to date or any family member of such person;***
- (ii) any person associated with the office of the Premier of the Western Cape".***

- 12 The amended terms of reference were necessitated by allegations in the media relating to the possible receipt of monies by persons from Jürgen Harksen ("Harksen") or other persons or entities associated with him, or at his behest.

REPORTS IN THE PUBLIC MEDIA

- 13 The events which were to lead to the appointment of the Commission commenced on Tuesday 5 March 2002, as will be dealt with in detail in this report, during a routine security audit conducted by the NIA, at the request of the then Premier, Peter Marais.
- 14 The matter soon came to the attention of the press, and on 13 March 2002 an article appeared in Die Burger newspaper under the headline:

"Afluister-apparaat in W-Kaapse parlement, Spioenasie-nes onthul"

with the sub-title:

"'n Nes van spioenasie en meeluistering wat herinner aan 'n James Bond rolprent is gister in the Wes-Kaapse parlamentsgebou oopgekrap nadat Die Burger inligting bekom het dat uiters gevorderde meeluister en moniteringstoerusting hier gevind is"

- 15 It was alleged that Die Burger had reliably been informed that:

"minstens drie tipes meeluistertoerusting gevind is – toerusting om op telefoon lyne in te luister, mikrosenders om in te luister op gesprekke in kantore en toerusting om van op 'n afstand op gesprekke in te skakel. Die inligting is onafhanklik by 'n nasionale regeringsbron bevestig."

“Ingeligtes na aan die ondersoek beweer dat die inligting wat met die toerusting ingesamel is, waarskynlik gebruik is om omvattende leggers oor politici en amptenare in stand te hou. Dit word glo gou in kartondose wat iewers in die wetgewergebou weggesluit is”.

- 16 Public interest was increased by further articles which appeared in the press and calls were made for a judicial commission of inquiry by Mr Ebrahim Rasool (leader of the African National Congress ("ANC") in the Western Cape) and Mr Hennie Bester ("Bester"), for the Democratic Alliance ("DA").
- 17 On **14 March 2002** The Argus ran a report under the headline ***“3 suspended in wake of 'bugging' plot – Staff worked with Barnard’***, and reported that:

“The find, which included telephone tapping equipment, micro-transmitters for bugging offices and listening devices, was the result of a routine NIA sweep of government installations.”

- 18 A report of the same date was published by Die Burger under the headline:

“Drie glo geskors in meeluisterskandaal”

“Intussen het die raaisel rondom die spioeneerdery gister verdiep te midde van bewerings dat 'n koverte spioenasie-eenheid hier deur senior amptenare van die provinsiale administrasie bedryf is ... Die eenheid, wat na bewering met staatsgeld bedryf is, is glo einde verlede jaar ontbind.”

- 19 On **18 March 2002**, after the Commission had been appointed, the Cape Times reported that:

"The provincial legislative bugging mystery has deepened, with sources close to administration confirming that the investigation has widened to include allegations that sophisticated information technology (IT) programmes were used to monitor staff computers."

- 20 This was supposedly done by monitoring the web-sites they visited, e-mails sent and received and other private documents.
- 21 The appointment of the Commission was pursuant to a consensus that a judicial commission was required to establish the truth of the allegations. This consensus included the ANC, the New National Party ("NNP"), the DA and Barnard.

CONSTITUTIONAL HISTORY AND POLITICAL BACKGROUND

- 22 The Western Cape Province is one of the nine provinces currently recognised by the Constitution of the Republic of South Africa, No. 108 of 1996 (1996 Constitution), and which together form the Republic of South Africa.⁵
- 23 The 1996 Constitution defines the Republic as one, sovereign, democratic state founded on the supremacy of the Constitution and the rule of law and that the Constitution is the supreme law of the Republic.⁶
- 24 The Constitutional model established by the 1996 Constitution recognised the concept of provinces and provincial government. In terms of section 104 of

⁵Section 103(1) of the 1996 Constitution

⁶Section 2 of the 1996 Constitution

the 1996 Constitution, the legislative authority of the Western Cape Province is vested in its provincial legislature, which has the powers set out in that section. These are limited to passing legislation for the province with regard to certain matters which are areas of concurrent national and provincial legislative competence;⁷ matters within the functional areas of exclusive provincial legislative competence;⁸ and any matter outside those functional areas and which is expressly assigned to the province by national legislation.⁹

25 In addition to a provincial legislature, the executive authority of a province is vested in the Premier of that province, who exercises the executive authority together with the other members of the executive council of the province.¹⁰

26 The 1996 Constitution also provides for provinces to adopt provincial Constitutions, provided that the Constitution is not inconsistent with the 1996 Constitution and does not purport to confer on the province any power or function that falls outside the area of provincial competence.¹¹ Any Constitution passed by a provincial legislature must submit the text of that Constitution to the Constitutional Court for certification.¹²

27 The Western Cape Province is the only one of the nine provinces which has adopted its own Constitution and which has been submitted and approved by

⁷Section 104(1)(b)(i) read with schedule 4

⁸Section 104(1)(b)(ii) read with schedule 5 of the 1996 Constitution on

⁹Section 104(1)(b)(iii) of the 1996 Constitution

¹⁰Section 125(1)(2) of the 1996 Constitution

¹¹Section 143(2) of the 1996 Constitution

¹²Section 144(1)(2) of the 1996 Constitution

the Constitutional Court after certification.¹³ This Constitution commenced on 16 January 1998. The Western Province Constitution was initially submitted for certification but was found inconsistent with national Constitution.¹⁴ It was subsequently, after amendment, certified by the Constitutional Court on 18 November 1997.¹⁵

- 28 In terms of Section 7 of the Constitution of the Western Cape, the Western Cape Government is obliged to act in accordance with the principles of co-operative government and inter governmental relations set out in the national Constitution in all its dealings with the national government, the other provincial governments and the municipalities of the Western Cape. It is also required to participate in structures and institutions to promote and facilitate inter-governmental relations, established in terms of the national Constitution, and to make use of mechanisms and procedures for the settlement of inter-governmental disputes, as established in terms of the national Constitution.
- 29 The general elections held during 1998 were fought in the Western Cape by, *inter alia*, the ANC, the NNP and the DP (the latter two parties being in an alliance known as the "Democratic Alliance"). The DA won a majority of the votes, and controlled the provincial legislature. In accordance therewith and from 1998 until his resignation on 11 November 2001, Mr Gerald Morkel ("Morkel"), occupied the office of Premier of the Western Cape Province and all seats in the executive council were held by members of the DA.
- 30 From October 1998 until 5 December 2001, Mr Leon Markowitz ("Markowitz"), occupied the office of Minister of Finance in the executive council. From 28

¹³The Constitution of the Western Cape, 1 of 1998

¹⁴ *Ex parte* speaker of the Western Cape Provincial Legislature: in recertification of the Constitution of the Western Cape, 1997(4)SA795CC

¹⁵ *Ex parte* speaker of the Western Cape Provincial Legislature: in recertification of the amended text of the Constitution of the Western Cape, 1997, 1998(1)SA657CC

July 2000 to 5 December 2001, Bester was Minister of Community Safety in the executive council. The changing composition of these ministries appears from "Schedule B" annexed to this report. During 2001 the DA split as a result of certain disputes, *inter alia*, plans by Peter Marais, the then Cape Town Unicity mayor, to rename Adderley and Wale Streets. Those who wished to do so remained members of the DA, whilst others chose to adhere to the NNP outside the alliance. Morkel and Markowitz both opted to remain with the DA, Peter Marais being one of those who chose to follow the NNP.

- 31 Negotiations took place between various parties and, from December 2001, an alliance was formed between the ANC and the NNP, leaving the members of the DA in a minority. Morkel resigned as Premier and was in due course appointed Mayor of the Cape Town Unicity, which at that stage was controlled by the DA. Peter Marais, the former mayor, was appointed Premier of the Western Cape Province in his place, holding office from 5 December 2001. The executive council was then formed from members of the ANC and NNP respectively and it was Peter Marais (the then Premier) who established the Commission.
- 32 During May 2002, Peter Marais resigned as Premier with immediate effect and was replaced by the national leader of the NNP, Mr M van Schalkwyk.
- 33 The Provincial Administration of the Western Cape, being the administrative arm of government, is staffed by persons from the public service. As is provided for in terms of the Public Service Act,¹⁶ there shall be national departments and provincial administrations. In the case of the Western Cape Province, the provincial departments (each with a head of department who is a member of the public service) are the Department of Community Safety; Economic Affairs; Agriculture & Tourism; Education; Environmental Affairs; Finance; Health; Planning and Local Government; Housing; and Social

¹⁶PublicServiceAct,Act103of1994,andinparticularSection7

Services.¹⁷ Each head of department is responsible for the efficient management and administration of his or her department, including the effective utilisation and training of staff; the maintenance of discipline; the promotion of sound labour relations; and the proper use and care of state property, and he or she shall perform the functions that may be prescribed for him or her.¹⁸

- 34 During the period 1994 to 1 November 1996 the office of Director-General: Western Cape Provincial Administration, was held by one Mr Beukes. As from 1 December 1996, Barnard was appointed for a period of 5 years, which appointment was extended for a further period of 5 years during 2001. He resigned on 31 January 2002. On 5 June 2002 the post was filled by Lawrence, who had acted as Director-General in the intervening period.

METHODOLOGY ADOPTED BY THE COMMISSION

- 35 At the time of the commencement of the work of the Commission, during April 2002, the Commission sought to identify potential witnesses, in particular employees of the Western Cape Provincial Administration, who might be able to assist the Commission in shedding light upon the initial terms of reference of the Commission.
- 36 Interviews were conducted with possible witnesses and, if they were able to shed any light on the terms of reference, they were called to give oral evidence before the Commission. Expert witnesses were called to give evidence on matters such as the functioning of the WatchDog.
- 37 The Commission, in consultation with the Superintendent-General, Dr T Sutcliffe ("Sutcliffe"), in an attempt to encourage persons having information

¹⁷PublicServiceAct,Act103of1994,Section7readwithschedule2

¹⁸PublicServiceAct,Act103of1994,Section7(3)(b)

relating to the terms of reference of the Commission to come forward, arranged that:

- Advertisements be placed in public newspapers circulating in the Western Cape;
- Notices be circulated within departments of the Western Cape Provincial Administration, both in Cape Town and beyond;
- Notices be placed in prominent positions in the building of the Western Cape Provincial Administration in Wale and Burg Streets; and
- The advertisements contained references to two cell phone numbers, which were provided to the Commission for the exclusive use of those who might wish to make contact, and gave notice that information which might be provided would be on an anonymous basis.

38 A minimal response was obtained to the advertisements placed in the press and/or circulated in the Western Cape Provincial Administration.

39 The Commission was appointed in terms of the Western Cape Provincial Administration Act, Act 10 of 1998, and was subject to certain Regulations proclaimed in terms thereof which did not afford the Commission powers of search and seizure of documents, whether on the premises of the Western Cape Provincial Administration or in the private possession of employees or former employees of the Province. For this reason, the Commission was dependent upon the co-operation of existing officials and their willingness either to volunteer documentation which might be in their possession or who could direct the Commission's attention to the documentation.

40 With regard to written materials, the Commission was obliged to rely primarily on documents held in formal filing systems. The Western Cape Provincial

Administration does not maintain a single registry for documents and relies on a decentralised system in which each department or directorate retains its own formal filing system, in filing cabinets, with its own file references. The Commission inspected, *inter alia*, the formal filing system held by the Office of the Director-General and that held by the Minister of Community Safety. Files were also requested from other offices, such as Risk Management, Personnel Administration.

- 41 Many of the most significant documents which became available to the Commission were not volunteered by any person and came to the Commission by chance. In particular, a number of official documents were found in a box containing personal property of Barnard. A second source were four large cartons of documents, which originated from the office of Oliver, Deputy Director General in the office of the Director General. These boxes of documents had been cleared from his office after his resignation and were to have been removed to his home for sorting. After the work of the Commission had commenced, the Commission located these boxes and required that they be made available to it.
- 42 A third, and possibly the most significant single source of documentation relevant to the terms of reference of the Commission, were four further boxes of documents which were located behind the door in the messenger's room by officials of the Provincial Administration and handed over to the Commission. Notwithstanding these boxes of documents apparently having been available for some months, they were only located and brought to the attention of the Commission less than one week before the public hearings commenced. It is quite possible that many other documents of a similar nature may have been, and may remain, in the possession of officials of the Western Cape Provincial Administration who chose not to volunteer these documents to the Commission.

- 43 The Commission requested officials of the Office of the Public Service Commission, in particular Mr A Simpson and Ms F Viviers, to examine the contents of the various boxes of documents located by the Commission. Reports were prepared by these persons and presented to the Commission in evidence. No witnesses were called by any person to challenge their opinions and findings.
- 44 At the commencement of the hearings, legal representation for Barnard and Beneke was provided by the firm De Klerk and Van Gend Attorneys. In most, if not all, instances in which officials of the Administration gave evidence, cross-examination was reserved until a later date. No version was put to the witnesses and a request was made that witnesses could be recalled at a later date if Barnard and Beneke wished to question the witnesses.
- 45 The legal representatives of Barnard similarly requested that all witnesses dealing with the matters relating to the Administration be called prior to him being called as a witness. In the event, most witnesses were never recalled, and no version was put to them. The Commission did not consult with Barnard, whose evidence in chief was led by Advocate N J Treurnicht SC ("Treurnicht SC"). He was thereafter cross-examined by legal representatives of the other interested parties and by counsel for the Commission.
- 46 The impression was created with the Commission that, in many instances, an attitude of "wait and see" was adopted, to establish what officials would say prior to it becoming necessary to put a version. This approach was not limited to the legal representatives of Barnard but was also adopted by certain of the other representatives during these proceedings.
- 47 At a later stage, when evidence was led relating to the NIA, the NIA obtained legal representation by way of Advocate L J Bozalek ("Bozalek"). The Commission ensured that all witnesses who gave evidence on matters relating to the Western Cape Provincial Administration were afforded the opportunity

to obtain legal representation of their choice and that all interested parties were afforded the opportunity of cross-examining such witnesses. Arrangements were also made, in particular in the case of Barnard, to provide for dates upon which his legal team, led by Treurnicht SC, would be available.

- 48 Subsequent to the commencement of the public hearings, the then Premier, Peter Marais, caused the terms of reference of the Commission to be extended to include matters relating to Harksen. The methodology adopted in this regard was somewhat different to that relating to the issues of Public Administration in which the Commission had itself interviewed and then called witnesses. Harksen requested to have his evidence led by his own legal team, made up of Mr Michael Luck ("Luck") and Advocate Pete Mihalik ("Mihalik"). Immediately after Harksen's first disclosures, the DA and Morkel and Markowitz obtained legal representation in the form of Mr J J Brynard ("Brynard"), of Brynard & Brynard, and Advocate Peter Hodes SC ("Hodes SC") together with Advocate Alwyn Möller ("Möller").
- 49 In the case of Harksen, his evidence was first led by his own legal representatives. He was thereafter cross-examined by legal representatives for the DA, Morkel and Markowitz and thereafter by Advocate Craig Webster ("Webster") for the Commission. Mr Antonie Karsten ("Karsten"), (a one time associate of Harksen), Mr Bernhard Kurz ("Kurz"), (an attorney representing the trustees in Harksen's insolvent estate); Captain Piet Viljoen (the investigating officer into Harksen related matters); Mr Erik Marais ("Erik Marais"); Mr Werner Schwella ("Schwella") and Mr Earl Hunter ("Hunter") were all subpoenaed to give evidence before the Commission. The evidence of these persons was presented by Webster and they were subsequently cross-examined by the legal representatives of Harksen and the DA (Hunter was represented by Advocate Steve Goddard ("Goddard")). The evidence of Mr Tim Mertens ("Mertens") of Sovereign Trust was similarly presented by the Commission and he was thereafter cross-examined. The witnesses presented by the DA, including Morkel, Markowitz, Ivor Sindler ("Sindler"), Deblesse Smit

("D Smit") and Wilfred Sauerland ("Sauerland") were called by the DA, who presented their evidence in chief and they were thereafter cross-examined by legal representatives of the other interested parties by the Commission. The Commission assisted them by arranging subpoenas to be issued and served in respect of any witnesses which they wished to call.

- 50 The legal representatives of all parties, including the DA, Morkel, Markowitz, Harksen, NIA, the Provincial Administration, all expressed their satisfaction to the Commission that they and their respective clients had been afforded an adequate opportunity to present all the evidence which they wished to place before the Commission and to cross-examine the necessary witnesses.
- 51 The testimony heard by the Commission and the documents handed in as evidence and marked as annexures, have been appropriately recorded and preserved. The entire transcript of all the testimony delivered at the public hearings was recorded on tape and typed as a running record. This numbers over 3 000 pages. All exhibits and materials which were handed in, either by the Commission itself or by witnesses, were received and marked.

LIMITATIONS

- 52 From the outset, the Commission noted that a climate of fear prevailed within the Western Cape Provincial Administration, to the extent that potential witnesses expressed fear for their safety and an apprehension that they or their families might be physically harmed as a consequence of their co-operation with the Commission. In certain instances witnesses demonstrated a reluctance to give evidence. The Commission was furthermore advised that pressure was placed on potential witnesses to limit the scope and extent of their testimony. Certain witnesses who expressed a willingness to testify later indicated that they were no longer prepared to do so. There is, however, no doubt that the climate of fear severely hampered the Commission

in relation to obtaining access to written materials and with regard to the willingness of witnesses to come forward and give oral testimony.

- 53 The Commission was furthermore repeatedly warned by representatives of the NIA that there was a danger that the members of the Commission might themselves be under surveillance (including surveillance of their telephones and possible bugging of their offices by persons unknown) and that they themselves might be in physical jeopardy. All attempts by the members of the Commission to establish from the NIA, or from those provincial officials who expressed fears, as to who was responsible for the threats or perceived threats, were inconclusive.
- 54 It appeared likely to the Commission that documentation may have existed which was not volunteered or pointed out to the Commission. During the course of July 2002 the Commission became aware that the Director-General, Dr Lawrence, had caused an audit to be conducted of informal filing systems and documents held in the offices of various provincial officials. This activity would appear to have been relevant to the Commission's enquiry into the management and care of recorded information. The Commission was informed that this activity resulted in considerable objection from a number of officials. No documented reports relating to this audit were made available to the Commission. This is to be regretted as these might have contributed to the Commission's understanding of the issues relating to corporate memory.
- 55 The period of public sittings of the Commission was substantially delayed by reason of arrangements which the Commission made with the various legal representatives so as to ensure that the evidence of witnesses could be presented at a time that they were available and to ensure that all interested parties were afforded the opportunity of cross-examining all witnesses. As a result, postponements of some weeks at a time took place, largely due to the unavailability of legal counsel.

- 56 The transcripts of the evidence given at the insolvency hearing into the affairs of Harksen in terms of s152 of the Insolvency Act (and at which many of the persons who gave evidence before the Commission, relating to Harksen, had previously given evidence) were not handed in as evidence before the Commission because Harksen's trustees considered same confidential in terms of the Insolvency Act.
- 57 A further aspect which requires mention is that of a forensic accounting report relating to the affairs of the DA and Morkel and Markowitz. Significant media attention was created by the announcement that the DA had briefed a firm of chartered accountants, Ernst & Young, to prepare a forensic report to establish whether or not the DA, or Morkel or Markowitz, had received any monies from Harksen. In due course, a report prepared by one Advocate G Swartz of Ernst & Young was made available to the Commission by Hodes SC, and received as an exhibit¹⁹.
- 58 This report, to which no annexures/vouchers or supporting materials were attached, relied upon records of interviews with persons, and statements and documents which were not put before the Commission. The report also contained numerous qualifications relating to the materials which had been made available to Ernst & Young. It was in the form of an audit report rather than a forensic report, the mandate having been to audit material placed before it, rather than to conduct investigations. The report stated, with regard to the verification of the origin of the DM99 000.00 that the writers did not find sufficient proof to independently verify the source. At the time that the Ernst & Young report was made available, it was not clear to the Commission whether or not the DA wished to have the Commission take this report into account when considering its findings and it was considered prudent for the Commission to appoint a forensic accountant, one Mr G Johnson ("Johnson"), to analyse that report and furnish expert critique to the Commission. Because of the nature of the forensic report and because it

¹⁹Exhibit"BBB"

lacked any annexures or vouchers, it was not possible for Johnson to verify any of the findings in the report, or examine supporting documentation. The DA at no stage suggested that Johnson be given access to these materials. His report accordingly concentrated on the mandate given to Ernst & Young and the manner in which this had been carried out.

- 59 Once Johnson had completed his report and it had been made available to the legal representatives of the DA, the latter objected to him being called and to that report being handed in as evidence on the ground that the Ernst & Young Report had not been introduced by the DA in evidence and had merely been made available to the Commission. It was argued that the Ernst & Young report did not constitute evidence. The Commission was requested not to take the report into account, in any way, in reaching a finding. After considering the concerns of the DA, the Commission decided to accede to the request of the DA to entirely disregard the Ernst & Young Report and did not find it necessary, or appropriate, to introduce the critique by Johnson in respect of the report, which had been “withdrawn”.

LEGISLATIVE CONTEXT

- 60 In order to ensure accountable administration and decision-making, the public service operates within a strict legislative framework. Legislation regulates all areas of public administration and provides clear parameters within which the public service leadership may operate. The most important legislation, considering the Commission’s terms of reference, is discussed in this Chapter.
- 61 The Constitution provides, in section 195, that the following values and principles must govern public administration:

(a) "A high standard of professional ethics must be promoted and maintained.

- (b) Efficient, economic and effective use of resources must be promoted.**
- (c) Public administration must be development-oriented.**
- (d) Services must be provided impartially, fairly, equitably and without bias.**
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.**
- (f) Public administration must be accountable.**
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.**
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.**
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."**

62 The Public Service Act, 1994, prescribes the powers, roles and responsibilities of executing authorities and heads of department as far as the day-to-day administration of departments is concerned, with specific reference to organisation and staffing matters. This Act is supplemented by subordinate legislation in the form of the Public Service Regulations, Public Service Handbooks and Resolutions of the Public Service Co-ordinating Bargaining Chamber. In terms of the Public Service Act, 1994, each head of department is responsible for the efficient management and administration of his or her department, including the effective utilisation and training of staff; the maintenance of discipline, the promotion of sound labour relations, and the proper use and care of state property.

- 63 The Public Service Act further provides that each provincial administration shall have a head of Provincial Administration. Such a person is known as the Director-General of the specific province. In addition to the powers and duties entrusted to him under the Public Service Act and any other law, he/she is also the secretary to the Executive Council of the Province. He/she is responsible for inter-governmental relations between the relevant provincial administration and other provincial administrations, as well as with national departments, and for giving strategic direction on national policy frameworks issued by the Minister for Public Service and Administration in terms of section 3(2)(1) of the Act.
- 64 The Public Finance Management Act, 1999, prescribes the responsibilities of executing authorities and heads of department regarding financial administration and management. This Act specifically appoints heads of department as accounting officers of departments. The Act is supported by subordinate legislation such as the Treasury Regulations and State Tender Board Regulations.
- 65 The management and care of recorded information is regulated by Acts such as the National Archives Act, 1996 and the Protection of Information Act, 1982. These Acts are supported by the Registry Guide on Correspondence and Registry Procedures and by the Minimum Information Security Standards Document.
- 66 The extent to which legislative requirements have been observed, and the effect of actions by the Offices of the Premier and the Director-General on accountability, are further probed in this report.

PART B

THE WATCHDOG AND SURVEILLANCE OF PERSONS OR PREMISES

INTRODUCTION

67 The purchase of the WatchDog and the use to which it was put was an important focus of the Commission during the enquiry. Other allegations relating to surveillance were also investigated. This Chapter provides an overview of the Commission's findings in respect of the WatchDog, other surveillance devices, the secure room on the M Floor of the Provincial Legislature building, the information unit and the relationship with NIA.

THE WATCHDOG

Discovery of the WatchDog

68 During the evening of 5 March 2002 the NIA conducted a routine security audit of the Provincial Legislature building in Wale Street, Cape Town. The audit included electronic sweeps for listening or "bugging" devices on the premises. During the course of the audit a device, subsequently referred to as a "WatchDog WS100", was handed to the NIA officials. The device is depicted in annexure 4 hereto. The Director in the office of the Director-General, one Beneke, retrieved the device from a cupboard in his office and handed it to the NIA officials. The equipment was not connected or in use at the time. The device was made available to the Provincial Manager of NIA for the Western Cape Province, Fraser and was duly dispatched to NIA's head office where its capabilities were analysed.

69 Subsequent investigation revealed that the device and associated services were acquired from a private entity, TSCM SERVICES CC ("TSCM"), for the sum of R39 552.30. Details regarding the acquisition process are set out hereunder. On 7 September 2001 the device was received for installation on the wall of the strongroom on the M floor in

the Provincial Legislature building. The device was installed after certain physical changes had been made to the strongroom to render it secure from surveillance. The details of the preparation of the said strongroom and the changes made to render it secure are also set out in this report.

Capabilities of the WatchDog WS100

70 On 5 March 2002 NIA conducted a technical examination of the device to ascertain its capabilities. In a report dated 18 March 2002 Fraser stated:

"Preliminary tests conducted on the "Watchdog" equipment demonstrated that it does not transmit any radio frequency (RF) signals, but it can receive wide range of RF spectrums (sic). The equipment was not connected when discovered and therefore it is difficult to clearly determine how the equipment might have been used. However, the equipment is designed to operate either manually or automatically. It is capable of monitoring audio from targeted area 24 hours a day (sic), without being detected and can be remotely operated. It can also be used to monitor a meeting when RF microphones are used or when someone is carrying an eavesdropping device into a meeting." ²⁰

71 The user's manual supplied with the device was made available as an exhibit before the Commission.²¹ The WatchDog is described as a "bugging device detection system" on the face of the manual. In the introduction ²² it is stated that:

²⁰Page3,par a3ofthereport.

²¹ExhibitD

²²ExhibitD,p9

“The Watchdog has been designed to give you years of service as bugging device detection system (sic). After the complete and thorough sweep is performed by TSCM professionals, Watchdog can be easily set up for 24 hour monitoring for wireless bugging devices. ... After powered up, Watchdog searches the whole frequency range and automatically sets the reference frequency to determine whether there are any bugging devices or not (sic).”

72 Under “features”²³ it is stated that the WatchDog scans a wide range of frequencies and analyses the spectrum patterns with its advanced analytical algorithm. Further, that it alerts the user to the possible presence of wireless bugging devices, including hidden video cameras, and that it has a detection range of up to 1000 square foot. Included in the features is the fact that it is controllable in a remote location and can perform advanced interface with current security, surveillance systems, the internet and computer networks. It is stated that the WatchDog can also be connected to other WatchDog units, up to 35 units in series. It is stated that the WatchDog will ***“let you hear the demodulated signal with headphone set at the suspected frequency detected (sic).”***

73 Instructions relating to the basic operation of the WatchDog indicate how, when an event occurs and the alarm indicates that a frequency has been detected, it is possible to listen to sound at a specific frequency.²⁴

“1 By using **“Event list”**

- press “menu” key and then press F2 (event list key)
- move cursor to the event frequency

²³ExhibitD,p13

²⁴ExhibitD,p31

- after cursor is on the desired frequency, press "enter" key and the screen will show detailed information of the event
- press F4 key to "hear on" status
- **connect headphone set to the jack and you can listen to the sound (voice).**

2 By entering "specific frequency"

- press "menu" key and then F1 key to real time spectrum screen
- press F1 key again to show "enter frequency" box. Enter a specific frequency using number key pad (the unit is MHz), then press "enter" key
- **when you see "locked" on your LCD screen, connect the headphone jack to the unit to listen."**

74 The Commission heard the evidence of a technical expert employed by NIA, referred to under the pseudonym "John Tshabalala" ("Tshabalala"). His evidence was to the effect that the WatchDog has both defensive and an offensive capabilities. He stated that the effective range of the WatchDog depended upon the strength of the transmitter as well as the type of antennae connected to the WatchDog.²⁵ The range could extend as far as a few kilometers and beyond if converted to a signal transmissible over a telephone line.²⁶

75 During the course of his evidence Tshabalala carried out a demonstration during which the eavesdropping capability of the WatchDog was demonstrated. This was done by means of an individual speaking into an RF microphone in another room and that conversation being overheard by the WatchDog in the Commission's venue. It appears inherent in the defensive functioning of the device

²⁵Record,p31(3)

²⁶Record,p31(30)

that it also has an offensive capability. An eavesdropping device or "bug" is a device which transmits a signal. The WatchDog searches for such transmissions and locks onto the signal transmitted. Once it has locked onto the signal transmitted the user of the WatchDog is able to listen to what is being transmitted. Even without a "bugging" device being used, whenever RF microphones are used within the range of the WatchDog, whatever is conveyed through such microphones can be overheard by means of the WatchDog. In circumstances where a "bugging device" (electronic transmitting device) is placed within the range of operation of the WatchDog, the WatchDog may be used to listen to whatever signal is transmitted by the bugging device.

- 76 In his evidence Barnard disputed that the WatchDog could be used for offensive or eavesdropping purposes. This is contrary to what is set out by the manufacturer in the instruction manual of the device. It is clear from Tshabalala's evidence and the instruction manual of the device that the WatchDog has the capability both to detect transmissions within its field of operation as well as to listen in to any signal which might emanate from an electronic transmitting device.
- 77 Under cross-examination Tshabalala made certain concessions. He firstly conceded that he was not correct when he had stated in his evidence in chief that the acquisition of this type of instrument was not legal in South Africa.²⁷ Tshabalala made it clear that his task had been to ascertain what the capabilities of the device were.²⁸ He stated that he had, at that stage, not seen a report of a factual investigation done by any other section within NIA.²⁹ He indicated that there should be such a report and that it would form part of a main report.³⁰ He

²⁷Record:p2607(8)

²⁸Record:p2635(5);2643(23)

²⁹Record:p2643(30)

³⁰Record:p2644(10)

indicated that the main report should exist.³¹ No such report has been furnished to the Commission. He conceded that his initial evidence, that the WatchDog had a recording facility within, was incorrect.³² He explained that the device was equipped with RAM which meant that it was able to record in a digital format.³³

Conclusions and findings

78 Commission accepts that the WatchDog WS100, by its very nature, had the technical capacity (if properly set up) of performing offensive as well as defensive functions. This notwithstanding, the question to be answered was whether the WatchDog was ever used in an offensive role. No evidence was presented to the Commission which confirmed that the WatchDog was ever used in an offensive role by any person. The matter was rendered more difficult of determination by the fact that the WatchDog was removed from the "secure room" and decommissioned, prior to it being handed to NIA. As a consequence, it is impossible to establish with any degree of certainty how the WatchDog had been set up, to what it had been connected and what accessories may have been used in association with it.

79 The Commission is unable to find, on the evidence presented before it, that the WatchDog was ever used in an offensive role to eavesdrop on others. The Commission cannot, however, overlook the circumstance that the WatchDog had an offensive capability; was located in a private and secure environment where it could presumably have been utilized without observation; and that the circumstances at the time would have created the temptation to put its offensive capabilities to use.

³¹Record:p2644(21)

³²Record:p2688(25)

³³Record:p2699(19)

80 Insofar as the WatchDog may have been acquired for defensive purposes, it would appear that the perceived need for such equipment (associated as it was with the "secure room" described at times as a "bunker") was occasioned by the climate of paranoia and fear of being under surveillance by others, leading to what can be described as a "bunker mentality" in which a safe haven was sought for discussions of a sensitive nature. The Commission considers, for reasons set out further in this report, that this perception had no factual foundation.

The procurement process for the WatchDog

81 The Directorate of Forensic Audit in the Western Cape Provincial Government conducted an investigation into alleged procurement irregularities. This investigation included an investigation into the procurement of the WatchDog. The Director of Forensic Audit, Ms Renay Ogle ("Ogle"), produced a report, dated 20 May 2002, which was furnished to the Commission.³⁴

82 On 29 November 2000 TSCM submitted a written proposal to the Director-General regarding the supply of technical surveillance countermeasures services.³⁵ The proposal referred to a request for a quotation for technical surveillance services in the Western Cape Administration building (4 Dorp Street, Cape Town) (M floor and 1st floor) and in Leeuwenhof. It proposed a number of options, the second of which included the installation of a WatchDog WS100 in the offices of the Premier, Director-General and Cabinet Room. The summary of costs for option 2 related to survey fees of R154 561.20, and the cost of three WatchDog WS100's of R88 861.86, representing a total of R243 423.06. The survey fees related to various "debugging" activities which included physical searches and analysis of telephone systems. The proposal refers to a request from the then Director-

³⁴ExhibitE

³⁵ExhibitE,annexureU

General, Barnard, for such a quotation. No written request was found during the course of the investigations. The proposal stated that no services in contravention of the Interception and Monitoring Act 127 of 1992 would be performed. It also stated that TSCM did not engage in such activities.

- 83 During December 2000 this proposal was handed by Barnard to the Chief Director of Human Resource Management within the Provincial Administration, one Berte Le Roux ("Le Roux"). This proposal was scrutinized by Le Roux and returned to Barnard during January 2001, at which time Le Roux expressed his concerns about the costs of the proposal, the fact that a single service provider was utilized, and, given the role of NIA, the procurement of such services from a non-governmental entity.³⁶
- 84 On 16 February 2001 a meeting was held to discuss strategic security issues. This was attended by Barnard, Le Roux, Ronald Dearlove ("Dearlove"), J N P Saayman ("Saayman") and Adv Pretorius ("Pretorius"). At this meeting Barnard expressed concern about possible leaking of information from the Cabinet and former Premier's office. The possibility of electronically sweeping certain designated areas was discussed. At the same meeting Pretorius was requested to provide a legal opinion regarding the framework within which a security component could be established.³⁷
- 85 Subsequent hereto Advocate S Van Aarde ("Van Aarde") submitted a written legal opinion to the Chief Director of Human Resources. The opinion is dated 3 April 2001 and forms annexure V to exhibit E. The opinion deals with the legal framework within which a special component could be established to assist the former Director-General with the protection of information in the Provincial Administration.

³⁶Record,exhibitE,page34

³⁷Record,exhibitE,page34

The provisions of the Promotion of Access to Information Act 2 of 2000 and the contents of the minimum information security standard (MISS) were dealt with.³⁸ The essence of Van Aarde's opinion was that:

- In terms of the Promotion of Access to Information Act 2 of 2000 the Director-General is the individual who exercises control over access to information in possession of the Provincial Administration by virtue of his position as Information Officer. He is accordingly in a position to establish guidelines regarding the safeguarding of information and to take steps where necessary to prevent information leaking.³⁹
- A component should be established to identify that information which is open to protection in terms of the Act and to take steps to prevent information being compromised through eavesdropping.⁴⁰
- The component should form part of the office of the Director-General or the Sub-Directorate Risk Management.⁴¹

86 Approximately two weeks after furnishing the opinion to Le Roux, Van Aarde was requested to attend a meeting at which Barnard, Sutcliffe, Van Der Vyver, Saayman, Le Roux and Dearlove were present.⁴² At that meeting Barnard expressed concern regarding access to documentation processed on his computer as well as eavesdropping of conversations.⁴³

³⁸ExhibitE,annexureV

³⁹ExhibitE,annexureV

⁴⁰ExhibitE,annexureV

⁴¹ExhibitE,annexureV

⁴²ExhibitE:affidavitofVanAarde,para4

⁴³ExhibitE:affidavitofVanAarde,para9

- 87 Van Aarde expressed the opinion that steps to be taken to secure information should include "sweeps" of telephones and rooms.⁴⁴ At the meeting Barnard referred to equipment necessary to sweep telephones and offices. He expressed the view that steps should be taken to acquire such equipment.⁴⁵ On 21 May 2001 Dearlove submitted a Draft Cabinet Memorandum to Barnard which sought to inform the Cabinet of risks in respect of information security and to make recommendations to counter such risks.⁴⁶ The Draft Memorandum proposed that a dedicated unit be established to deal with information security. The Draft Memorandum sought Cabinet approval for the creation of such a component. In addition it was stated that the appropriate appointments would be done on a contract basis and that "*voorkomende defensiewe maatreëls*" be taken in the appropriate manner in respect of certain essential localities in the Legislature and in Leeuwenhof. There is no indication that this Memorandum was ever submitted to Cabinet.
- 88 A further document was compiled by Dearlove entitled "*Interne Reëlings: Wet op die Bevordering van Toegang tot Inligting*".⁴⁷ This document was signed by Barnard on 13 June 2001 and was circularized to and signed by the heads of various departments. The circular recommended *inter alia* that "*bykomende/verskerpte fisiese sekerheidsmaatreëls wat die behoorlike uitvoering van die wet mag vereis*" be put into place.⁴⁸ During July 2001 a Cabinet Memorandum was compiled by Saayman.⁴⁹ This Memorandum was analogous to the Draft Memorandum referred to elsewhere in this report. Barnard signed this Memorandum as Director-General during July 2001 and the Cabinet approved the Draft Resolutions contained therein on 8 August 2001. An essential part of this Memorandum was the proposal that

⁴⁴ExhibitE:affidavitofVanAarde,para11

⁴⁵ExhibitE:affidavitofVanAarde,para12

⁴⁶ExhibitE,annexureX

⁴⁷ExhibitE,annexureW

⁴⁸ExhibitE,annexureW,para6.2

"*verskerpte fisiese sekerheidsmaatreëls*" be put in place. The Memorandum differed in content to the draft prepared by Dearlove in that it did not propose the establishment of a specialised component.

- 89 On 21 August 2001 Barnard issued a circular to all heads of department stating that there was a need for an electronic sweep of various offices and that the Director-General's office was attending to the matter as the SAPS could no longer provide such services. On 4 September 2001 Mr Lorenzo Lombaard ("Lombaard") of TSCM telefaxed a quotation to the office of the Director-General for the attention of Mr V Du Toit ("Du Toit") for a TSCM survey of one boardroom and the installation of one WatchDog WS100 in the same room. This quotation was "*as requested by Mr Louis Steyn*"⁵⁰ The cost of the WatchDog was R27 695.00 and the travelling costs of the persons involved amounted to R7 000.00. No charge was levied for the TSCM survey of the room. The total amount, inclusive of VAT, was R39 552.30. The telefaxed quotation bears a handwritten endorsement, signed on 15 September 2001, by one Adams, the Acting Director Works: General Building to the effect that "***the funds for this service have been approved for payment by Human Resource Management (Mr B le Roux) please proceed.***"
- 90 By means of facsimile dated 5 September 2001 the said Du Toit informed TSCM that the quotation had been approved. A payment advice exists in respect of the payment for the WatchDog in the sum of R39 552.30. This document is dated 16 October 2001 and bears a handwritten notation to the effect that Le Roux authorized the payment in terms of Emergency Delegation 9.1.1 of the Provincial Tender Board Regulations.⁵¹

⁴⁹ExhibitE,annexureY

⁵⁰ExhibitE,ann exureZ

⁵¹ExhibitE,page40

Findings

- 91 The certificate as required by Delegation 9.1.1 could not be provided. Instead a memorandum was produced in which Le Roux noted that it had been agreed with the former Director-General and the Works Department that, in the light of the urgency of the matter, the services would be acquired in terms of Delegation 9.1.1.⁵² Attached to the payment records is an acknowledgement of receipt of the WatchDog signed by Beneke on 7 September 2001. Forensic audit concluded that the procedures followed for the acquisition of the WatchDog and the sweeping of "premises" was not in compliance with procurement directives.⁵³
- 92 There was no approved requisition in respect of the quotation for the WatchDog. This contravenes paragraph 10.4.1 of the Western Cape Provincial Treasury Directive which provides that services shall be requested from a supplier by means of an approved requisition form.
- 93 A single supplier was used for the purchase of the WatchDog equipment. No comparable quotes were obtained. The quote from the supplier, as a single source supplier, was further not referred to the Provincial Tender Board as required by the Provincial Tender Board General Conditions and Procedures. The Provincial Tender Board Regulations (KST 37), Annexure G, delegation 9, regulates the procedures to be followed in Urgent and Emergency cases. It states that such cases must be dealt with as follows:

***" Up to an estimated value of R50 000 per case-
Suppliers and services may be procured without inviting
comparative tenders in cases where early delivery is of
critical importance and the invitation of comparative***

⁵²ExhibitE,page40

⁵³ExhibitE,p40

tenders is either impossible or impracticable. However, this delegation excludes the finalisation of price quotation for security services. Price quotations for security services must be referred to the Office of the Provincial Tender Board for further attention/finalisation”.

Accountability / Responsibility

- 94 The prescripts that regulate financial and administrative conduct in the public service function in an integrated manner. It confers accountability and responsibility and provides for the delegation of powers to allow decision-making at different levels within departments. In terms of administrative law principles it is possible to delegate responsibility but not accountability.
- 95 In the evidence of Barnard, the former Director-General, he indicated that he gave the necessary instructions for the procurement of the WatchDog equipment and accepts that the relevant officials acted within the framework of their powers and duties. In terms of section 44(1)(a) of the Public Finance Management Act, 1999, the accounting officer for a department may in writing delegate any powers entrusted or delegated to the accounting officer in terms of the Act, to an official in that department. It is therefore correct that officials could proceed with decisions regarding procurement provided that the necessary delegations had been put in place. However, in terms of section 38(1)(n) of the Public Finance Management Act, 1999, a head of department as accounting officer ***“must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provisions of the Act.”*** Accountability to ensure adherence therefore remains that of the head of department.

- 96 Officials who have been assigned responsibilities in terms of section 44 of the Act, must in terms of section 45(d) of the Act comply with the provisions of the Act, including any delegations and instructions in terms of section 44. In terms of section 81(2) of the Act an official of a department to whom a power or duty is assigned in terms of section 44, commits an act of financial misconduct if that official willfully or negligently fails to exercise that power or perform that duty.
- 97 Through the evidence submitted to the Commission it became clear that a number of role players were involved in the process of purchasing the WatchDog. Amongst them were the Department of Works and the then acting Head of Corporate Services. In the final analysis, however, payment for the WatchDog was authorised by the Chief-Director: Operational Support, presumably in terms of delegated authority. The responsibility to ensure that the purchase was procedurally correct in terms of sections 44 and 45 of the Public Finance Management Act, therefore rested with the incumbent of this post.

Recommendation

- 98 It is recommended that disciplinary action in terms of Chapter 4 of the Senior Management Service Handbook and Treasury Regulation 33.1.1 be taken against the Chief-Director Operational Support for financial misconduct. The financial misconduct stems from his negligence not to ensure, before authorising payment, that a certificate as required by emergency delegation 9.1.1 of the Provincial Tender Board Regulations was issued to indicate the need and/or emergency as well as the losses that may have arisen had the WatchDog not been procured.
- 99 The PAWC should ensure that financial responsibilities are captured in each manager's performance agreement. The exact powers and duties that a manager may exercise in terms of delegated authority must be listed.

OTHER ELECTRONIC SURVEILLANCE, LISTENING DEVICES AND COMPUTER AND IT SURVEILLANCE

100 It was reported in the media that surveillance included telephone tapping equipment, micro-transmitters for bugging offices and other listening devices. There were also allegations that sophisticated information technology (IT) programmes were used to monitor staff computers. These allegations and reports were investigated by the Commission.

Findings

101 Notwithstanding the suggestions as to various other types of listening and surveillance devices, no evidence has been forthcoming to substantiate these reports.

**The Secure Room on the M Floor,
Provincial Legislature**

DESCRIPTION OF THE SECURE ROOM ON THE M FLOOR, PROVINCIAL LEGISLATURE

- 102 The facility was referred to in the evidence as a "strongroom" or a "bunker". It is depicted in the set of photographs received as Exhibit "C". The strongroom is accessed from the passage on the M floor through an adjoining strongroom. That door is depicted on page 3 of Exhibit "C". Having entered the adjoining strongroom through that door the access door to the facility is visible as depicted in photograph A on page 4. That door is equipped with both a combination and a key operated lock and is fitted with a peep hole. The interior of that door is visible on photograph B. Once inside the strongroom it is possible, in an emergency, to exit directly from the facility into the corridor of the M floor via a door which is not accessible from the outside. That door is depicted on page 2 of Exhibit "C". It too is fitted with a peep-hole. That door is permanently locked and a key is mounted on the wall for use from within should the need arise.
- 103 Within the facility a power point, mountings for the WatchDog and cable clips for securing the power lead are apparent on the wall. These are depicted in the photographs on pages 7 and 8. There are no windows to the facility.

Persons having access to the Secure Room and the use to which it was put

- 104 Bester testified to having attended a meeting in the strongroom. The meeting was attended by him, Barnard, Markowitz, and, to the best of Bester's recollection, the then Premier, Morkel. The WatchDog was affixed to the wall. Those attending the meeting utilized the garden furniture which was in the strongroom.

- 105 Bester recalled attending only this one meeting in the strongroom.⁵⁴ The meeting took place either in the last two or three days of October or the first two to three weeks of November of 2001.⁵⁵ In explanation as to why the meeting was held in this particular venue, Bester explained that it had been a time of intense political contestation and that he had had a keen sense that they were being observed and watched during that time.⁵⁶ The meeting was held in that venue at the instance of the then Director-General. The WatchDog was mounted on the wall but Bester was unable to say whether it was operational or not.⁵⁷ It was explained to Bester by one of the consultants, Mr Steyn ("Steyn"), that the device enabled them to detect whether they were under surveillance.⁵⁸ Bester had not been aware of the fact that steps had been taken to acquire the WatchDog or to provide the safe room for meetings. In general terms he had been aware that discussions had taken place from time to time as to steps to be taken to safeguard against their deliberations being overheard.⁵⁹
- 106 Mr Phillipus Kalp ("Kalp"), occupied an office on the M floor during 2001. His office was directly opposite the strongroom.⁶⁰ According to Kalp, meetings were held on a regular basis in the strongroom involving persons he failed to recognise as employees of the Provincial Administration. Kalp initially stated that meetings took place on approximately a weekly basis in the strongroom. However, his evidence was not consistent in this regard. Usually Barnard and persons unknown to Kalp attended the meetings.⁶¹ Occasionally certain of the

⁵⁴Record,p125(14)

⁵⁵Record,p125(18)

⁵⁶Record,p126(6)

⁵⁷Record,p125(30)

⁵⁸Record,p128(8)

⁵⁹Record,p128(25)

⁶⁰Record,p305(10)

⁶¹Record,p309(27)

contract workers attended the meetings.⁶² Kalp was adamant that the persons unknown to him who attended the meetings were not employees of the Provincial Government.⁶³

107 Oliver, previously the Head of the Director-General's Office from February 1998 until the end of September 2000, testified that he had been aware of the strongroom on the M floor of the Provincial Legislature building.⁶⁴ Oliver testified to having attended two meetings in the facility.⁶⁵ The first meeting was between himself and Barnard and took place during October or November 2001. Oliver was unable to remember the purpose or subject matter of the first meeting⁶⁶ and did not regard the incident or subject matter as being significant.⁶⁷

108 The second meeting Oliver attended was also attended by Barnard and his secretary, Miss Pruis ("Pruis"). This was held shortly after the first meeting.⁶⁸ Oliver's recollection of the subject matter of the second meeting was Barnard's concern relating to the implications of the possible dismissal of the Premier and the need to prepare administratively for that eventuality.⁶⁹ Oliver saw no reason why the meetings were held in the strongroom as opposed to a normal board room or conference facility.⁷⁰ He regarded the subject matter of the meetings as perfectly innocuous.⁷¹

109 Mr Smit ("Smit"), one of the contract workers, stated that he had never attended a meeting in the strongroom.⁷² When he had needed to

⁶²Record,p310(11)

⁶³Record, p310(15)

⁶⁴Record,p399(18)

⁶⁵Record,p403(10)

⁶⁶Record,p405(3)

⁶⁷Record,p405(16)

⁶⁸Record,p407(23)

⁶⁹Record,p408(3)

⁷⁰Record,p408(30)

⁷¹Record,p409(6).

⁷²Record:p791(21)

meet with Barnard or Oliver he had met with them in their offices. There had been no concern as to persons listening in to such meetings as it would not have been an issue had that information leaked.⁷³ His perception was that the strongroom was established to create a facility for decision makers to hold sensitive discussions.⁷⁴ It was his perception that the facility had been intended for the use of cabinet ministers and senior members of the Administration.

- 110 Morkel testified to having attended a single meeting in the strongroom.⁷⁵ This meeting had taken place towards the end of 2001 and was attended by himself, Barnard, Bester, Markowitz and Oliver. He conceded that the circumstances of the meeting had been unusual but remarked that it had taken place in unusual times.⁷⁶ The subject matter of the meeting had been political and had concerned ***"the gerrymandering that was taking place between different political parties and the ANC's role to destabilise the Government of the Western Cape."***⁷⁷ In the normal course such a meeting would have taken place in a conference facility or a board room in the Provincial Legislature. In this instance this had not been the case. As Morkel explained: ***"Because it wasn't normal times. In the sense that many of the conversations that I thought I had had with members of my party and other, almost verbatim it appeared in the press, and my colleagues, and that is Mr Peter Marais who became the Premier, and Mr Cecil Heredien and others said to me that we must ask Dr Barnard to please have our rooms and telephones checked for bugging devices."***⁷⁸ He explained that it had been Barnard's suggestion that an existing strongroom be modified to be used for these purposes following Morkel's request that he should ensure that the place was not

⁷³Record:p792(6)

⁷⁴Record:p792(10)

⁷⁵Record:p2061(10)

⁷⁶Record :p2062(23)

⁷⁷Record:p2063(1)

bugged.⁷⁹ Morkel explained that he had not discussed the creation of this facility with the rest of the Cabinet, save for Bester, who had been the Minister of Community Safety.⁸⁰ Prior to the preparation of the facility Morkel had been aware of the fact that certain changes would have to be made to the existing strongroom and that the apparatus, subsequently known as the WatchDog, was to be acquired.⁸¹

111 Barnard testified that the reason for the establishment of the strongroom was that there had been indications that discussions which had taken place in the cabinet room had leaked.⁸² Further, that the computer in his office had been tampered with and that there was a lack of confidence in NIA's efforts in this regard.⁸³ As a result steps were taken to adopt defensive measures to ensure information security in the Province. The final decision to establish the room, and the instruction that it should be done, emanated from Barnard.⁸⁴

112 Barnard was adamant that the facility had only been used on three occasions as he had to give his approval prior to it being used.⁸⁵ On the first occasion he met in the facility with the contract workers Du Toit and Steyn.⁸⁶ The subject matter of that meeting was gang violence, drug dealing, perlemoen poaching and the dangers of the possible leakage of information from within the police in respect of sensitive issues.⁸⁷ This first meeting was not longer than ½ hour.⁸⁸

⁷⁸Record:p2063(19)

⁷⁹Record:p2064(8)

⁸⁰Record:p2064(23)

⁸¹Record:p2068(20)

⁸²Record:p2892(11)

⁸³Record:p2892(20)

⁸⁴Record:p2894(12)

⁸⁵Record:p2905(17)

⁸⁶Record:p2907(12)

⁸⁷Record:p2907(17)

⁸⁸Record:p29 23(25)

- 113 According to Barnard the second meeting that he attended in the facility was with Oliver and his secretary, Pruis.⁸⁹ As a result of political developments in the Province it had been necessary to compile a program of matters which warranted attention and of which the Premier and the Cabinet should be advised. He explained that the only reason they had met in the facility was to have a private place for an undisturbed meeting. It had not been necessary, in terms of the content of the meeting, to meet in a facility characterised by stringent security.⁹⁰ The duration of the second meeting had been approximately 4 hours.⁹¹
- 114 The third meeting held in the facility was that attended by Barnard, the then Premier, Morkel, Markowitz, Bester and Oliver. This meeting was of a duration of approximately 1½ to 2 hours.⁹² The conversation was of a sensitive nature in terms of political developments but, in the main, the facility represented a quiet place to meet.⁹³ Barnard denied the initial evidence of Kalp that the facility had been used on a regular basis⁹⁴ and was confident that it had only ever been used on these three occasions.
- 115 On Barnard's evidence the facility would not have been used for longer than a total of 6½ hours, of which the subject matter of no more than 2½ hours had called for the use of such a facility.

⁸⁹Record:p2923(30)

⁹⁰Record:p2926(27)

⁹¹Record:p2927(12)

⁹²Record:p2928(18)

⁹³Record:p2928(20)

⁹⁴Record:p2930(4)

Conclusions and findings

- 116 The Commission finds that the “secure room” was created on the instructions of Barnard, and was used by officials of the Provincial Administration and Politicians of the Western Cape Government.
- 117 The creation of the “secure room”, protected by the WatchDog, provides an extraordinary measure of security not to be found in other facilities of Provincial or National Governments. In considering the justification for the creation of the facility, which was on occasion referred to as a “bunker”, the following requires attention:
- a. The establishment of the “secure room” and the acquisition of the WatchDog to stand guard over its integrity presupposed that the matters discussed by persons in the facility were of a nature that other persons, having access to sophisticated electronic equipment, might wish to eavesdrop thereon for their own ends. The potential groupings who were suggested to the Commission to have such an interest, as well as the financial capacity and technical ability to perform such surveillance, were either NIA, (in respect of political discussions) or commercial entities (such as those wishing to get advantage as to tender considerations) or “gangs” wishing to gain access to strategy in the campaign against the theft of medicines from hospitals, or against organized crime in general;
 - b. If the possible groups are considered, the following improbabilities appear to be immediately apparent. If it was believed the group conducting surveillance was NIA, and the surveillance was for political reasons, the “secure room” was in fact constructed for what were essentially party political

purposes. If, on the other hand, the group was one bent on "commercial espionage", or made up of "gangsters", then it would have been assumed that the room would have been utilised for discussions relevant to that concern. It would then have been a facility which was considered an asset to the Provincial Administration, which would not have been dismantled or decommissioned (as it was), but rather handed over, intact, for use by politicians and officials who conducted the business of the Province after the change in government; and

- c. The Commission considers that the probabilities compellingly point to the "secure room" and the WatchDog as having been acquired for purposes associated with party political matters rather than "commercial espionage". The following circumstances are relevant to this conclusion:
 - (i) According to the evidence presented to the Commission regarding meetings attended in the "secure room", only one meeting was held relating to matters which would have been of interest to persons interested in "commercial espionage". This is apparent not only from the identity of those who had been in the meetings, but also the subject matter of the meetings. Only one brief meeting of no longer than an hour was held in the room, attended by Barnard and two of the contract workers, which dealt with organized crime syndicates and none involved confidential commercial transactions or tenders, or other such sensitive subjects;
 - (ii) No evidence was presented to the Commission that any criminal syndicates or "gangsters" had in fact been found

in possession of any surveillance equipment that would justify a fear that they would be in a position to eavesdrop upon conversations taking place behind closed doors in the Provincial Government Building in Wale Street;

- (iii) The evidence of Bester, Barnard, Oliver and others was that there was a concern that they were being spied on by NIA. It was never suggested that NIA would have been involved in "commercial espionage" against a Government Department for financial gain. The fear of surveillance by NIA, as also expressed by these persons, clearly related to matters in the party political sphere;
- (iv) Notwithstanding the fact that he remained in the post, the official who had been in charge of the facility, Beneke, retained the WatchDog in his office. No explanation was offered by any official as to why the facility – if it was intended for "commercial" as opposed to political purposes, was not left intact for continued use. No evidence was presented of any instruction by any person in authority to dismantle or decommission the facility, nor was the room required for any alternative purpose. Had the need for a secure room to guard against "commercial espionage" existed prior to March 2002, no reason was proffered to the Commission as to why this need no longer existed after that date;
- (v) The general reluctance of officials to give evidence to the Commission about who attended meetings in the secure room, and the nature and content of those discussions; and

- (vi) The circumstances surrounding the establishment of a "secure room" itself, especially the haste at which it was constructed during September/October 2001, at the time that party political matters, and the fate of the DA Government in the Western Cape in particular, came to the fore. As Bester put it, this was a time when there was, in his view, a deliberate attempt to "overthrow" the Government of the Western Cape and there were discussions which he and others wished to remain private. This being the case, the establishment of the "secure room" at that very time was no coincidence.

118 In conclusion, the Commission finds that it is probable that the "secure room" and WatchDog were acquired for purposes which were largely party political rather than designed to combat "commercial espionage". This, together with the fact that the room was decommissioned and dismantled in such a short time after it had been established at considerable expense, resulted in the expenditure relating thereto being a loss to the taxpayer.

Procurement relating to the establishment of the Secure Room

119 Le Roux, the Chief Director of Human Resources, gave oral evidence before the Commission and provided a detailed report of his involvement in events which led to the establishment of the secure room on the M floor.⁹⁵ He referred further to a meeting held on 22 February 2001 between himself, Barnard, Beneke and Mr D Steyn ("D Steyn") (Chief Director of Community Safety), and the contract workers

⁹⁵ExhibitH

Du Toit ("Du Toit"), Steyn and Smit.⁹⁶ The meeting focused on the subject of strengthening the security capacity of the Western Cape Government. The management of information was specifically dealt with.

120 On 25 April 2001 Le Roux met with Barnard who indicated that he was following up with the Head of Works, Mr J Van Heerden ("Van Heerden"),⁹⁷ the question of the safety of provincial cabinet members and the sweeping of offices. On 2 May 2001, on the instructions of Barnard, Le Roux met with Van Heerden in regard to the initial TSCM quotation furnished toward the end of 2000. Van Heerden undertook to pursue the matter directly with the Director-General and Smit, a contract worker. Smit was so informed and Barnard made available the original TSCM quotation to Van Heerden.⁹⁸

121 On 16 August 2001 a meeting took place which dealt with the question of "sweeping" for surveillance devices and the establishment of a safe room. Those present included Miss M Van Leeuwen ("Van Leeuwen"), the Director of Works, Mr P Wessels ("Wessels"), the Deputy Director of Works, the Chief Director, Operational Support and Le Roux. It was discussed that the Cabinet was to have considered the specific proposals on 8 August 2001. This had not taken place. The Chief Director (Operational Support) and Van Leeuwen were to take up the matter with the former Director General thereafter.

122 On 28 August 2001 Barnard requested Le Roux to assist in expediting the preparation and establishment of the safe room on the M floor. He stated that Van Leeuwen, Wessels and Beneke were already busy with the project. Le Roux was requested to arrange a meeting with the role players designated by the Director-General and to finalise the matter within two weeks.

⁹⁶ExhibitH,para19

⁹⁷ExhibitH,p7,para21

⁹⁸ExhibitH,para22

123 On 31 August 2001 such a meeting was held. Le Roux recorded Barnard's request in a memorandum to Wessels, the Deputy Director of Works, dated 5 September 2001. In the memorandum he refers to the various discussions with Barnard and the other role players as well as the most recent meeting of 31 August 2001 between Wessels, Dearlove, Du Toit, Steyn and himself. He states:

"2 Soos tydens die supra vermelde vergadering ooreengekom bevestig ek graag dat die werk as 'n saak van dringendheid (voorkeur prioriteit) onderneem en afgehandel word. Dit is noodsaaklik dat so 'n fasiliteit binne die volgende twee weke gefinaliseer and operationeel beskikbaar moet wees. Wetgewing wat op die bestuur van inligting van toepassing is, noodsaak so 'n fasiliteit.

3 Soos ooreengekom sal Mnre Louis Steyn en Herman du Toit in hierdie verband advies lewer en u ten opsigte van die daarstelling/toerus van 'n omgewing wat die integriteit van die lokaal verseker/instandhou ondersteun."⁹⁹

124 On 5 September 2001 Le Roux e-mailed Mr R Petersen ("Petersen") in regard to the foregoing telefax. He requested that the installation of electronic equipment (of a total value of R39 000.00) proceed as a matter of urgency, that the payment of the accounts be formalised between their respective departments and that the invoice be delivered to him for payment.¹⁰⁰ On 5 September 2001 Petersen replied by e-mail in which he confirmed that work as agreed would proceed in regard to "*instandhoudingsaksies*" in respect of the room and that

⁹⁹ExhibitH,annexureL

¹⁰⁰ExhibitH,annexur eL

Du Toit would liaise with Le Roux regarding arrangements for the appointment of the firm to finalise the installation of the electronic equipment. Petersen requested that payment be made directly to that firm by Le Roux's department.¹⁰¹

125 Wessels of Works undertook to deal with the process further, and obtain the necessary quotation in collaboration with L Steyn regarding specifications.

126 In regard to the procedures followed for the refurbishment of the strongroom Ogle testified that the procedures complied with the relevant Treasury directives.¹⁰² In addition to the refurbishment of the room and the acquisition and installation of the WatchDog WS100 after the premises had been swept, a set of garden chairs and a table were purchased for the room at a cost of R5 119.00. The garden furniture was constructed of lightweight plastic-coated aluminium and was utilised within the strongroom. The rationale for the use of such furniture in the strongroom was that, by its nature, it did not permit electronic bugging devices to be magnetically attached thereto,¹⁰³ that, by virtue of its lightweight construction, it could easily be turned upside down to facilitate checking for the attachment of bugging devices prior to any meeting being conducted and, that by virtue of the glass table top, any bugging device would be readily discernible.

Finding

127 It was the evidence of Ogle and is the finding of the Commission that, whilst the refurbishment of the strongroom did comply with Treasury directives, the procedures followed regarding the purchase of the

¹⁰¹ExhibitH,annexureL

¹⁰²ExhibitE,p40,Record

¹⁰³Record,p308(9)

garden furniture and the sweeping of the premises was not in accordance with the relevant Treasury directives.¹⁰⁴

¹⁰⁴ExhibitE,p40,Record

**THE APPOINTMENT OF CONTRACT
WORKERS BY THE DEPARTMENT
OF COMMUNITY SAFETY AND THE
OFFICE OF THE DIRECTOR
GENERAL**

INTRODUCTION

128 Whilst investigating matters related to surveillance in the Provincial Administration, it was brought to the Commission's attention that a number of contract workers had been appointed in the Office of the Director-General and the Department of Community Safety to deal with security related matters. The contract workers appointed in the Office of the Director-General formed part of an information secretariat. This chapter examines work performed by security contract workers prior to the establishment of the information secretariat, discusses the rationale for the establishment of the information secretariat and evaluates the recruitment and appointment of the relevant contract workers.

ACTIVITIES INVOLVING SECURITY CONTRACT WORKERS PRIOR TO THE ESTABLISHMENT OF THE INFORMATION SECRETARIAT

129 The first reference to any of the meetings between Barnard and any of the contract workers is a meeting dated 3 July 2000 between Barnard and Du Toit. This meeting was followed by meetings with the same person on 15 August 2000 and 1 September 2000.¹⁰⁵ The first reference to L Steyn and Smit, (who were in fact appointed in terms of written contracts as from 4 September 2000), is a reference to a meeting between them and Barnard on Monday, 4 September 2000¹⁰⁶. On 13 September 2000, L Steyn and Smit met with Barnard and thereafter with Bester and D Steyn.

130 It is not entirely clear what work was performed by Smit and Steyn during the period 4 September 2000 to 4 December 2000. It appears that meetings took place between themselves, Mr Joshua ("Joshua"), Du Toit

¹⁰⁵ElectronicDiary,DrBarnard.

¹⁰⁶Electronicdiary,DrBarnard,4September2000

and the Director General and that they facilitated the introduction to Mr S Whitehead ("Whitehead") of TSCM during October 2000.

- 131 No copies of written work appear for this period in any registry save for a memorandum dated 27 November 2000 from Steyn and Smit entitled: "***FBI – Offer to assist SAPS in psychological profiling of fanatical Muslim elements***", which was recovered from a cardboard box in the messenger's room at the Provincial Government Building. This stated that:

"In the past the SAPS has consistently referred any contact with the FBI to the NIA. The FBI on the other hand sees the NIA as an intelligence agency with a political character rather than a law enforcement body, and fails to understand why USA law enforcement can not deal directly with their South African counterparts"

- 132 It concluded that:

"It might therefore be of value to convey to the SAPS at an appropriate forum the FBI's willingness to share their profiling and interrogation techniques directly with detectives involved in the interrogation of suspects arrested for incidents of urban violence in the Western Cape".

- 133 On 27 November 2000 Smit met Mrs M Maritz ("Maritz") and Barnard.¹⁰⁷ At the time Maritz was still an employee of the South African Secret

¹⁰⁷Electronicdiary,DrBarnard,27November2000

Service ("SASS"), but subsequently during April/May 2001 was employed by the Province together with Smit and Steyn.

134 During the period September 2000 to March 2001, the following memoranda, of which the Commission is aware, were prepared by the contract workers appointed at that time:

- On 24 January 2001 Smit addressed a memorandum to D Steyn entitled "***A database for the Department of Community Safety: Discussion document***" which dealt with the possibility of the Department of Community Safety establishing a database as a storage facility for easily retrievable documents to be used as a basis of analysis of all issues relevant to the operational/administrative functioning of the Department. (This document was discovered in a box in the messenger's room).
- An undated memorandum prepared by Smit and Steyn and addressed to Bester and Joshua entitled "*Department of Community Safety: Introduction of a knowledge management (KM) program.*"¹⁰⁸ (This document was discovered in a box in the messenger's room).
- On 5 March 2001 a document entitled "*Strategic planning and information unit (SPIU) for the Western Cape Provincial Government: Draft proposal*".¹⁰⁹ (This document was discovered in a box in the messenger's room).

135 The last mentioned document proposed a strategic planning and information unit (SPIU) as a mechanism within the Provincial Government

¹⁰⁸Exhibit "F", page 27 to 40

¹⁰⁹Annexure "F", page 41 to 50

of the Western Cape aimed at ***“better harnessing information in the interest of sound decision making leading to improved service”***. The unit was described as, in addition, ***“in compliance with the minimum information security standards (“MISS”) guidelines – responsible for protecting sensitive data and information queried by, or revealed to Provincial Government Structures.”*** It was proposed that the unit be tasked with providing the service and that four functional workers be contracted from the private sector for a twelve-month period. A contract fee of R195.00 per hour was suggested. Operational expenditure of the unit was calculated at R50 000.00 per month, with an annual operating budget for R600 000.00. It was suggested that the unit would be attached to the Ministry of Community Safety during the first year. In the event of the unit becoming institutionalised and its functions expanded, the ideal location of the unit would be the office of either the Premier or the Director General / Administration. The mission statement of the SPIU was as follows:

“The Strategic Planning and Information Unit (SPIU) will timeously provide sufficient, reliable, relevant and analysed information of the highest quality to the top management of the Western Cape Provincial and Local Governments in support of sound, knowledge-driven strategic decision making; and

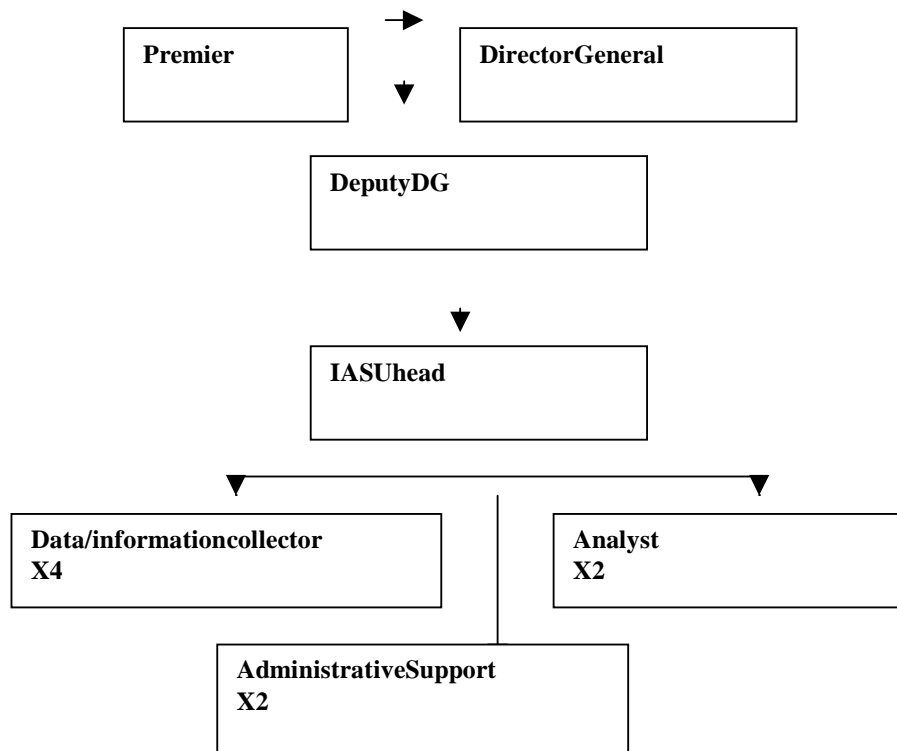
The unit will design and implement effective measures to protect sensitive information in compliance with the NIS guidelines prescribed by central Government.”

136 In the field of personnel, the memorandum recommended that the unit required functional personnel with skills, knowledge and experience in four close related fields:

- Information collection;
- Analysis leading to the production of new strategic knowledge;
- Data and information security;
- Oral communication.

137 The organigram for the structure was as follows:¹¹⁰

FINAL ORGANIZATIONAL STRUCTURE



¹¹⁰Exhibit“F”,page50

138 During this period, another function performed by the two contract workers was, in liaison with other contract employees, to establish a security project for the Ministry of Community Safety, with five components. This was headed by a support team and with sub-groups:

- Sub-group: Municipal police;
- Sub-group: Structuring of the Department of Community Safety;
- Sub-group: Co-ordinating with the criminal law system;
- Sub-group: Co-ordinating with other role players; and
- Sub-group: Strategic planning and information management.

139 The first meetings of the proposed support group (which was a larger group) and the sub-groups were held over the period 6, 7 and 8 March 2001. Smit and Steyn attended the support group and all meetings of the sub-groups. This was followed up with a work session over the period of 31 March to 1 April 2001 at Silvermine, where the support group met, as also each of the five sub-groups.¹¹¹ The first report,¹¹² sub-group 3: Structuring of the Department of Community Safety, delivered over the period 31 March to 1 April 2001 by Joshua (the co-ordinator of that group) stated that:

“Organisational development has now completed a study and recommend that the information unit be staffed as follows:

1 Component Head;

2 Researchers;

1 One Administrative Aid.

¹¹¹Exhibit“K”,page15to28

¹¹²Exhibit“K”,page17to21

The Head of Department supports this recommendation. Whilst it is not the intention to approach Cabinet with piecemeal recommendations, temporary capacity will be employed on a contract basis until the matter is formally ratified or otherwise. Accommodation for the Safety Monitoring and Strategy Centre has already been identified and is available"

- 140 On 26 February 2001 Barnard presented a document entitled: "***Formal approval for the implementation of a safety strategy for the Western Cape***", for the Department of Community Safety, the purpose being to obtain formal approval from Cabinet for the formulation of the strategy and the management thereof.
- 141 This suggested that there would be a ministerial task team for community safety, led by the Director General, Barnard, and that five sub-committees would be formed with special functional areas for planning on which they must report to the sub-group of the Director General. It was envisaged that the completion date for the report of all these sub-groups would be 30 June 2001. With regard to personnel implications, it was stated that: "***Outside expertise will as a necessity have to be brought in***". It was expected that the sub-groups would be serviced by a maximum of ten persons who would be employed at a projected cost of R1 400 000.00 per annum. Bester signed this memorandum on 23 February 2001. Pursuant to this memorandum, approval was obtained for the appointment of the rest of the contract workers.

THE ESTABLISHMENT OF AN "INFORMATION SECRETARIAT" AND THE ROLE AND FUNCTIONS THEREOF

Rationale for the creation of such a unit

142 The stated rationale of the information secretariat, was the collection of information from open sources and presentation in a form to be made available to politicians to assist them in making decisions on governmental policies. According to Barnard, the Director General had an obligation, in terms of section 7(3)(c)(i) of the Public Service Act 1994, to take responsibility for the management of information technology. According to him this statutory obligation was to make provision for the proper integration and use of information in general. From this perspective Barnard justified the establishment of the information unit.¹¹³ In the written statement read out by him at the Commission, he stated that:

"Die klaarblyklike doel van die eenheid was om dit ooreenkomstig die oogmerke van die Staatsdienswet aan te wend om ten opsigte van strategiese aspekte inligting te versamel, te bewerk, te integreer, en met voorleggings te kom wat korrekte besluitneming vergemaklik".¹¹⁴

143 Barnard explained that the information unit was but one of the components surrounding the implementation of a security structure for the Western Cape Province.¹¹⁵ He alleged that the purpose was not to overlap on the areas of interest of any other security structure, in

¹¹³Record,evidenceofDrBarnard,page2867

¹¹⁴Record,evidenceofDrBarnard,page2867

¹¹⁵Record,evidenceofDrBarnard,page2869

particular NIA. According to Barnard, the products of NIA were not of a good standard.¹¹⁶

- 144 Under cross-examination, Barnard emphasised that he denied that the information unit had been established in the Western Cape Province because of alleged shortcomings of information on the part of the intelligence community and in particular NIA.¹¹⁷ He sought to explain that part of the purpose of the unit was to assist NIA in making information relating to the province available and he stated:

"Ek het vanoggend verduidelik dat dit deel daarvan krities belangrik was om ons kollegas van die NIA te help en dat ons vir hulle al die inligting van die provinsie kon gee sodat hulle ook daarmee kon werk wanneer hulle hulle nasionale produkte moes klaarmaak."¹¹⁸

- 145 Barnard was taken aback when it was put to him in cross-examination by Bozalek that, when the information unit prepared the documentation for the bi-weekly cabinet presentations, NIA was never approached to share information with the information unit. Barnard alleged that one of the tasks of Smit, one of the appointed contract workers, was to have been to establish good relationships with the information community, and in particular NIA. He stated :

¹¹⁶Record, evidence of Dr Barnard, page 2870

¹¹⁷Record, evidence of Dr Barnard, page 2942

¹¹⁸Record, evidence of Dr Barnard, page 2991

"...ook met NIA in die besonder om die redes wat ek al 'n paar keer verduidelik het dat daardie inligting ook by die eenheid van die provinsie bygevoeg moes word".¹¹⁹

- 146 Smit had stated that the presentations were prepared without any requests to the NIA for information or collaboration.¹²⁰ Barnard could shed no light on why the information unit did not see fit to approach NIA for any assistance. Had they failed to do so, Barnard stated that it would have been wrong.¹²¹ Accordingly, if the motivation for the establishment of the unit was to make use of and obtain access to information available to NIA, that purpose was certainly not carried out by the consultants.
- 147 The evidence of Barnard is contradicted by that of Bester, the then Minister for Community Safety, who took political responsibility for the information unit. Bester stated that, as far as he was concerned, the information unit was established because of the failings and lack of information made available by NIA.

The formal procedure for the adoption of such unit

- 148 According to the presentations made by Steyn and Smit and the evidence of Barnard, it was intended to establish an information secretariat with a larger number of staff, on a permanent basis. Preparations were made for submitting a proposal to Cabinet in this regard, but were never finalised because of the change of Government during December 2001. Had these proposals been accepted, a permanent "information secretariat" would have been established. According to a report dated 29

¹¹⁹Record,evidenceofDrBarnard,page2996

¹²⁰Record,evidenceofMrSmit,page825 –826;Record,evidenceofDrBarnard,page2997

¹²¹Record,evidenceofDrBarnard,page2998

October 2001, prepared by Smit, and headed "proposed specialist information secretariat", the unit would serve the strategic information needs of the Cabinet and give effect to the responsibility of the Director General in respect of information management, strategic co-ordination and support.

- 149 This memorandum was prepared shortly before the change of Government. It is a matter of speculation whether or not the establishment of information secretariat would have received the necessary approval.

The functions of the members of such a unit

- 150 As appears from the memorandum of 29 October 2001, prepared by "F P Smit (*et al*)" to Barnard, it was envisaged that the secretariat would have eight full time workers and one functional support officer, all with experience and proven skills. The Deputy Director-General (who at the time was Oliver) was the proposed responsible accounting officer within the structure. The stated purposes of this secretariat were information management, the strategic co-ordination thereof and the presentation of such information in useful forms to Cabinet for purposes of decision making.
- 151 No memoranda from any of the members in the information component were available in any registry, but the following documents were subsequently found and constitute the only concrete evidence (apart from the record of numerous meetings in the electronic diary of Barnard) in respect of work performed by the information component:

- **Bi-weekly Cabinet Presentations**

- Seven bi-weekly presentations to Cabinet:
 - 23 July 2001, rural security;
 - 6 August 2001, land restitution;
 - 20 August 2001, land restitution and land tenure
 - 3 September 2001, housing need in the Western Cape;
 - 24 September 2001, implications of the 11 September attack for the Western Cape;
 - 8 October 2001, medium and long term implications of the terror attacks in the USA;
 - 22 October 2001, anthrax

- **Other memoranda and written documentation**

Certain further memoranda, which appear not to represent the full ambit of such memoranda were found in a file entitled:

“Research papers (in response to requests from clients) examples attached”:

- Using private security to enhance the effectiveness of the SAPS, being a memorandum dated 29 June 2001 and prepared for Barnard and Oliver by Smit and Maritz;
- The witness protection program (undated);
- SOS telephones alongside the N2 highway, prepared for Bester by Smit, dated 4 July 2001, to which is attached quotations for emergency telephones;

- A memorandum dated 6 July 2001 (which is dealt with elsewhere) addressed by Smit to Barnard and Oliver, headed: "*Skakeling met, en voorstelle van Gordon Brookbanks*".¹²²

152 The lastmentioned document related to meetings which had taken place between the Western Cape NICOC representative, Mr Gordon Brookbanks ("Brookbanks"), L Steyn and Smit during the period 28 June onwards. It would appear that Brookbanks had confided in the contract workers regarding what he considered to be the inadequacy of the NIA and SAPS in making information available to him, his reporting of this to his superiors in Pretoria, and various investigations and enquiries that Smit, Steyn, Du Toit and Dr Nel Marais ("Nel Marais") had made in Pretoria relating to the goings on in the Department of Intelligence, particularly in respect of new appointments in the President's office and elsewhere. The memorandum concluded with the following:

"My indruk is dat Gordon, Veary and Snel daarvan oortuig is dat die Wes-Kaapse regering nie besig is om 'n "intelligensiediens" in opposisie teen die bestaande intelligensiegemeenskap op te rig nie, en dat die Provinsie se inligtingsvermoë eerder as 'n bate vir die sentrale regering se intelligensie pogings beskou moet word (Ek aanvaar egter ook dat die voorgestelde plasing van 'n NICOC/NIA analis by die Wes-Kaap Provinsiale Administrasie as waarborg hiervoor sal moet dien). Hierdie ingesteldheid behoort aangemoedig word."

¹²²Exhibit "F":pages81 -86

153 In the report dated 29 October 2001, "Smit *et al*" had recommended the need for a specialist information secretariat.

"To serve the strategic information needs of Cabinet, and give effect to the responsibility of the Director General in respect of information management, strategic co-ordination and support."¹²³

154 The report went on further to describe the functions of such a secretariat, its personnel structure and the post levels required to best serve the functions of such a secretariat. The Deputy Director-General (who at the time was Oliver) would be the responsible accountable officer within such a structure.

155 Nel Marais, appointed on contract at a later stage to evaluate the work of the information secretariat, appears to have remained in Pretoria and travelled to Cape Town on a number of occasions to perform consultancy services for the Province at the request of Barnard and Oliver. There are various time sheets available of the following periods:

- 26 June 2001 to 29 June 2001, for which he consulted with Barnard, Oliver, Engele and others and prepared a report. For this he was paid R2 986.00.¹²⁴
- 23 October to 24 October 2001, for which he analysed certain documents and consulted with Barnard and Oliver. The total

¹²³Exhibit"F":pages104 -110

¹²⁴Exhibit"M",page91 -96

period worked was ten hours and the Province paid his airfare to and from Johannesburg.¹²⁵

According to this evidence, he travelled to Cape Town on a number of other occasions.

156 No copy of any of the reports prepared by Nel Marais were available in any registry in the Province, but he furnished these reports to the Commission when he gave evidence. The two reports related to the following matters:

- A possible structure for the information unit (1 page)¹²⁶ and a document entitled "*Inligtingsprojek*" dated 3 July 2001 (8 pages)¹²⁷
- An analysis of the bi-weekly Cabinet reports prepared by the other consultants and advice/reports in this regard (ie. Smit, Steyn and Maritz).

157 Nel Marais stated that he was on two occasions, subsequent to making proposals regarding the structure of the component, requested by Barnard and Oliver to look at a document which had been prepared for the bi-weekly cabinet presentations.

"En was die versoek van Dr Barnard en Advokaat Oliver se kant dat ek na die dokumente sou kyk en sou kommentaar lewer op die die struktuur, die inhoud, die waarde van die

¹²⁵Exhibit, "M", page 97 -100

¹²⁶Exhibit, "U". Record, evidence of Dr N Marais, page 680

¹²⁷Exhibit, "U". Record, evidence of Dr N Marais, page 680

***dokumente, verkieslik alvorens hulle aan die kabinet voorgelê word.*¹²⁸**

- 158 On the two occasions that he did so, he discussed the documents in a reasonable amount of detail with Oliver. He recalls that the two documents that he had considered were that relating to the 11 September incident in the USA and the other dealt with socio-economic circumstances in the Western Cape.
- 159 Nel Marais expressed the view that the information contained in the document relating to the September 11 incident was information which was easily obtainable on the Internet or from books by a person with a basic research background.¹²⁹ Nel Marais indicated what he considered the purpose of this document to have been.

***"... ek dink nie die bedoeling van die dokument was om enigsins 'n unieke intelligensiebeeld aan die kabinet voor te gee nie. Ek dink die bedoeling was om die kabinet breedweg te sensiteer oor die risiko's wat ook vir die Provinsie mag bestaan het na aanleiding van die voorval en dan moontlik ook voorstelle te maak oor hoe om dit te hanteer.*¹³⁰**

- 160 With regard to the quality and usefulness of that document he expressed the following views:

¹²⁸Record,evidenceofDrNMarais,page681

¹²⁹Record,evidenceofDrMarais,page682

¹³⁰Record,evidenceofDrMarais,page682

Voorsitter: *"... maar dis ook so dat 'n persoon wat rondom lees, koerante lees op 'n gereelde basis sou wat daarin vervat is, daarvan kennis dra ..."*

Dr Marais: *"Ek deel u opinie daaroor. Ek het nie die dokument gesien as 'n dokument van wesenlike waarde nie, nee."*

Voorsitter: *"Sal u saamstem dis nie 'n dokument van wesenlike waarde nie?"*

Dr Marais: *"Nee dit was nie ..."*

Voorsitter: *"En die politici of politikusmense verwag dat hulle oral kennis dra van die gebeurte rondom hulle, so hulle sou daarvan weet, tensy hulle nie lees nie. Stem u saam?"*

Dr Marais: *"Ek sou glo dat hulle daarvan sou kennis dra ja."*

- 161 Nel Marais was also asked to express his views as to the activities of the information component, as observed by him during the period that he was involved. He explained as follows:

Dr Marais: *"Ek dink hulle was tot 'n groot mate nog in 'n verkennende fase om self presies te probeer vasstel wat die funksie daarvan sou wees. Die een hoofsaak sou beslis die voorligtings gewees het maar daar is ook gesê dat daar ander inligtingsdokumente sou voorberei moes word vir die kabinet. Daar was gepraat oor die moontlikheid van 'n daaglikse bulletin, later ook gepraat oor die moontlikheid van 'n weeklikse produk wat sake van belang sou identifiseer en onder hulle aandag bring. Dit sou met ander woorde 'n tipiese inligtingsfunksie gewees het in terme van die oordra van inligting om die verstaanbaarheid en die besluitnemings-relevansie daarvan te verhoor."*

Mnr Webster: *"Maar die eintlike werk wat gedoen is in die tydperk is in verband met die kabinetvoorligtings, is dit reg?"*

Dr Marais: *"Dit was my indruk. Ek moet net weerens daarop uitwys dat ek in daai hele priode dink ek slegs op drie geleenthede hier was en in kontak was. Dis vir my moeilik om kommentaar te lewer op wat hulle daaglikse taak behels het."¹³¹*

The relationship of the members of such a unit with members of the provincial government, NIA, SASS and other agencies

162 The information secretariat was never established. However the information unit which was established, which was to serve as its temporary predecessor, can be considered. It would appear that the members of the information unit were intended to liaise with other members of the intelligence community, including the Defence Force and SAPS. It would appear that this may have taken place through structures such as MADAM.

163 Barnard stated that it was intended that the information unit establish close ties with NIA. It would appear that this is not what happened. The members of the unit did not liaise with NIA but merely handed over copies of the cabinet presentations to NIA once they had been completed. The only other contact with NIA appears to have been presentations by Mr Brookbanks, the NICOC representative in the Western Cape. The function of these presentations was not, however, an information unit function, and would have taken place even had the information unit not been established.

¹³¹Record,evidenceofDrMarais,page684

164 It would appear that NIA was concerned and suspicious at the establishment of the unit and of its members. The latter, from their side, similarly, did not attempt to build a relationship with NIA on an official level. According to Barnard this failure was contrary to his express instructions and he was surprised that NIA's input had not been sought in respect of the cabinet presentations. Much of the failure of the information unit to liaise with NIA may be ascribed to the stated perception amongst officials and politicians of the Western Cape Government that NIA was inclined to be party political, and did not wish to assist the Western Cape Government, which was controlled by a party which was in opposition to the ANC on a national level.

Conclusions and findings

165 The Commission finds that, commencing on 1 September 2000, various contract workers were employed by the Provincial Administration on short-term contracts and remunerated at an hourly rate. The various contract workers can be divided up according to their functions - some were attached to the Department of Community Safety and involved in training of municipal policemen, the Philippi Police College and so forth; others (such as Du Toit) principally performed functions of a "security" nature for the Department of Community Safety and others again formed the so called "information unit" which moved into the offices on the M-floor and resorted under the direct control of the office of the Director General. These latter employees were Steyn, Smit and Maritz. A further member, Nel Marais, remained in Pretoria and gave advice from time to time when necessary. Smit, Steyn, Du Toit, Maritz and Nel Marais were all former members of NIS, NIA or SASS. It is primarily with this latter category of contract workers that the Commission is concerned.

166 The members of the unit were perceived not only to be responsible to Barnard, but also to be his proteges. The perception appears to have been well-founded, in that:

- The members of the unit were (with the exception of Maritz) all known to Barnard prior to their appointment. Maritz worked with Steyn in Washington and was recruited to the information unit by him;
- Barnard's electronic diary for 2000 and 2001 records regular meetings which took place between Barnard, Smit and Steyn and on occasion also with Du Toit. The subject matter of these numerous meetings is unclear;
- Barnard conceded that he also met socially (on occasion during working hours), away from the office, with certain of these contract employees;
- Confidential memoranda, particularly with regard to the "Brookbanks" memorandum, were addressed to Barnard. In that specific instance all other persons – including Bester and Oliver – denied that they had ever had sight of it;
- The unit not only reported to Barnard, but was accommodated on the M-floor close to where his own office was located;

- A camaraderie, remaining from their common experience in the intelligence community, would have existed between them and Barnard, of a nature which would, inevitably, not have been shared with other officials from outside that circle; and
- The fact that the contract workers were allowed to keep their own hours of work and perform functions in Cape Town, Pretoria, or elsewhere, as appears from their time sheets.

167 The Commission finds that the previous occupations of the contract workers and the fact that they were engaged in giving advice relating to security matters (including sweeping; contacts with TSCM; the establishment of the safe room; and the acquisition of the WatchDog), contributed to the atmosphere pervading the Provincial Administration, and engendered and contributed to the feeling of fear amongst employees of the Province in general. The latter perception was supported by the view, expressed by various of the persons whom the Commission interviewed, that Barnard had employed some "oud spioene" or "retired spies" with whom he had previously had associations.

168 The Commission further finds that the function of the contract workers was not limited to the role of collection and analysis of information, but at least Steyn and Smit appeared to have acted in a role of "security advice" to the Province. These functions appear from the fact that one or more of them, performed, *inter alia*, the following:

- Involvement in the process of establishing contact with TSCM (the members of whom were former members of the intelligence

community) arrangements for sweeps for bugs in the Legislature building and Premier's residence and advice as to anti-surveillance measures, such as the WatchDog;

- Supervision of the personnel of TSCM when they performed after hours work relating to sweeping for bugs;
- Involvement in the establishment of the secure room and the acquisition of garden furniture with which to equip it;
- The meeting of persons such as Bester, and leading them to the secure room for the purpose of meetings;
- Establishing and maintaining contact with the FBI;
- Participation on the trip to the United States as part of the official delegation of the Province, for the purpose of making use of prior contacts;
- The liaison with Brookbanks, the NICOC representative, and the guidance of that official in respect of his reporting functions to his employer;
- The assistance given to Barnard in removing his personal trunks and possessions from the building prior to his retirement; and

- Liaison and planning as to the correct strategies for the Department of Community Safety, in the initiative which was commenced during March/April 2001.

169 The Commission noted the numerous allegations and concerns expressed by various persons that the information unit was in fact an alternative intelligence structure in competition with NIA and did not merely participate in information gathering and analytical functions.

170 In considering these allegations, the functions officially performed by the information unit require consideration:

- Apart from the cabinet presentations, presented only during the latter part of 2001, very little physical product was available which provided evidence of what work was performed at substantial cost over a period of many months;
- Many of the products which were produced by the unit, in particular memoranda, were not preserved in any registry but were found by chance in cardboard boxes;
- The cabinet presentations, apparently produced from open sources only, were not of a high standard. This was readily conceded by Nel Marais, the former SASS specialist analyst employed during 2001 to assess and comment upon these products. The Commission finds it inconceivable that these highly qualified and experienced persons

would have spent many hours and produced, during the relevant time, only those cabinet presentations; and

- The considerable qualifications and experience of persons such as Smit and Steyn (both former operational members who served abroad and were qualified in the collection of information by covert means and the handling of agents) were apparently not suited to the limited information gathering role accorded to the information unit. These persons were accordingly either "over-qualified" for the tasks which they were to perform, or were "inappropriately qualified".

171 The Commission finds that the introduction of the contract employees – former senior intelligence operatives who might colloquially be called "spies" - into an Administration already permeated by fear of being under surveillance by others and under threat from outside forces, in itself probably served to fuel such perceptions. The presence of these persons on the M-floor, close to the office of Barnard, followed by the appointment of outside security consultants, such as TSCM, for the purpose of sweeps; the establishment of a secure room and the WatchDog, no doubt simply served to confirm perceptions of officials that the Provincial Government was under some real threat and that security and intelligence measures had been put in place to assure necessary protection. On commencing its work the Commission noted this climate of paranoia and the Commission was left in no doubt as to the existence of a residual level of fear of the contract workers and matters associated with them.

172 The Commission finds further, even if the appointment of the contract workers had not been improper, that the requirements of open and

transparent Government – both for the public and civil servants – required the existence and mandate of the unit to be properly conveyed to interested persons. In the light of the functions performed by them and their background, the mere fact that it was stated that an information unit was being formed was inadequate to meet this purpose. An apparent failure to have provided such a public explanation instead gave credence to unease and an aura of secrecy and conspiracy.

- 173 Insofar as evidence is available to the Commission, particularly having regard to the paucity of records of the physical products of the information unit, the Commission is unable to arrive at a reliable conclusion on the contentious issue as to whether the Western Cape Government was in the process of establishing an independent intelligence capability in competition with NIA. What the Commission does find, however, was that the profile and experience of the personnel, and the creation of the unit, gave the Provincial Government the capacity to conduct intelligence operations, either on an *ad hoc* basis in respect of specific requirements, or generally. Given the times, the temptation would have been present for the utilisation of this capability to a greater or lesser extent. Had the unit been expanded, this capacity would only have been extended and its potential for improper use further enhanced.

RECRUITMENT AND APPOINTMENT OF THE CONTRACT WORKERS

Persons recruited

- 174 On 15 March 2001, Bester, then Minister of Safety and Security, signed a memorandum (signed by Barnard on 14 March 2001) which made formal

proposals in accordance with a Cabinet decision on the implementation of a safety strategy for the Western Cape. This proposed that nine candidates be appointed for the performance of the support function, these being:

- Mrs I Engelbrecht, as a permanent appointment, to be transferred from the NIA;
- General T B Beyleveld, the focus on municipal policing in the Department of Community Safety;
- Le Roux, to focus on municipal policing and training in the Department of Community Safety;
- Mr J Bruin, to focus on criminal law in the Department of Community Safety;
- Du Toit, a former member of SASS, to focus on the co-ordination with the private sector, and to be employed with the Department of Community Safety;
- Maritz, a former member of SASS, to focus on the evaluation of security information. She was to be employed with the Department of Community Safety;
- Mr C M Joubert, to focus on the relationship with the SAPS. He was to be employed in the Department of Community Safety;
- Smit, who it was stated was already on contract with the Department of Community Safety, and whose contracts were to be

renewed to 28 February 2002. They were to be employed to focus on the evaluation of security information and the collection thereof. His task was to remain unchanged.

- L Steyn, who it was stated was already on contract with the Department of Community Safety, and whose contracts were to be renewed to 28 February 2002. They were to be employed to focus on the evaluation of security information and the collection thereof. His task was to remain unchanged.

175 The persons who would eventually form the information component and be housed on the M-Floor of the Provincial Government building, the same floor as Barnard and report directly to Oliver, were Steyn, Smit and Maritz. Du Toit would remain at Community Safety (where he was employed on a three year contract on an hourly basis). In due course an additional person was employed, Nel Marais, who attended from time to time from Pretoria to analyse the work performed by the other contract workers.

Method of recruitment

176 The "security contract" workers in the Office of the Director-General were, according to Oliver,¹³² Joshua¹³³ and Bester,¹³⁴ all recruited by Barnard. There is no evidence that any of these posts were advertised and there is a consensus that they were hand-picked. Barnard accepted that he had personally selected the contract workers who formed the information unit, and that no advertising or other process had been followed. He stated, in particular:

¹³²Record,evidenceofMrOliver,page426 -428

¹³³Record,evidence ofMrJoshua,page319

¹³⁴Record,evidenceofMrBester,page135

"Dit was nie nodig om die poste te adverteer nie, Advokaat. Die punt was om te werk met wat genoem is in hierdie provinsie, 'n uiters, in hierdie kommissie, 'n uiters geheime projek, maar dit laat ek nou daar.

Ons het gewerk met die projek om te help om die veiligheidssituasie, saam met die ander veiligheid rolspelers van die grond af te kry, en te hanteer, en daarvoor het ons vir die inisiële afskop vaardkundige mense nodig gehad. Ek het toevallig heelwat van die kundige mense geken, sommige van my voormalige kollegas by NIA en anders as wat die indruk gelaat word, hoegenaamd nie almal.

As 'n mens 'n spesiale projek loots, dan probeer jy kundige mense in die hande kry om die projek van die grond af te kry. Hier is ook getuienis afgelê voor die Desai Kommissie dat daar ook 'n werkstudie ondersoek aan die gang gesit is om mettertyd 'n permanente struktuur daar te stel, aan die hand daarvan die poste daarna, klaarblyklik geadverteer sou word en die beste beskikbare kandidate die poste aangevul sou word".

- 177 Barnard added, confirming that he personally "head-hunted" the persons appointed that:

"Die feit ... dat vir hierdie projek en om met hierdie eenheid te werk, daar deur my mense onder andere geïdentifiseer is op grond van hulle besonderhede en besondere kundigheid, is so. As dit die woord is, "head-

hunt”, dan is dit so. Ek kom uit daardie omgewing, ek ken daardie mense goed, ek wou graag vir die belang van die provinsie die beste beskikbare mense kry om dit te doen ...¹³⁵

178 When questioned as to why the posts had not been advertised, Barnard explained that it was a special project, where specific persons with specific qualifications were required within a short period of time, to get the project off the ground.¹³⁶ In the light of the above, Barnard did not explain the logic of having appointed one of the consultants, Du Toit, for a period of three years on an hourly basis.

Employment contracts concluded before the establishment of the information secretariat

179 Before the appointment of the contract workers mentioned above, contracts were first concluded between the Province and Smit and Steyn as follows:

- On 1 September 2000 and at Cape Town a contract¹³⁷ was concluded between L Steyn and the Department of Community Safety, represented by Joshua, in his capacity as head of the department, for the employment of Steyn in that department for the period of 4 September 2000 until 4 December 2000. The task, as appearing from that contract was:

¹³⁵Record,evidenceofDrBarnard,page2951

¹³⁶Record,evidenceofDrBarnard,page2951

¹³⁷Annexure“M”page10to14

“It is recorded that the employee shall be directly responsible for assisting the employer in:-

Making an impact assessment of the physical risk to public and private property with the wave of terror;

Evaluating the department’s compliance with the minimum information security standard;

Evaluating reports received by the department on policing matters to identify shortfalls of both information and processes.”

- 180 It is not apparent to the Commission who drafted the “task”. The remuneration payable to Steyn for the work was in the sum of R195.00 per working hour (taxable), paid monthly.
- 181 A written contract ¹³⁸ was concluded on 1 September 2000, at Cape Town, between Smit and the Department of Community Safety, represented by Joshua, in his capacity as head of that department. The task was identical to that in respect of L Steyn, as was the rate of remuneration and terms of the contract.
- 182 The employment contracts of Steyn and Smit were further extended. This was undertaken in terms of a memorandum signed by Joshua and Barnard dated 5 October 2000 ¹³⁹ which had the express purpose of contract appointments at an hourly rate. The rates were calculated on the scales of Director and Chief Director, levels 13 and 14. Funds were stated

¹³⁸Annexure“M”page42to46

¹³⁹Exhibit“M”,page9

to be available under Budget Post 4, Program 2, Sub-program 1. It was recommended that the special advisors be paid at an hourly tariff of R195.00 per hour.

- 183 The employment of Steyn was thereafter, in terms of a contract signed on 28 February 2001, extended (on behalf of the Department of Community Safety) from 4 December 2000 to 4 March 2001¹⁴⁰. That contract was then extended in terms of a written contract dated 3 March 2001 from 4 March 2001 to 31 May 2001. The contract of Smit was similarly extended on 28 February 2001 (similarly on behalf of the Department of Community Safety) from 4 December 2000 to 4 April 2001¹⁴¹ and thereafter on 3 April 2001 was extended in the Department of Community Safety from 4 April 2001 to 31 May 2001¹⁴². No application for employment or Curriculum Vitae appears in the personal files of either of the above two persons.

Employment contracts concluded for purposes of the information secretariat

- 184 Contracts¹⁴³ were concluded with the Administration, represented by Oliver, (Head support services) and Steyn, Smit and Maritz, dated 4 May 2001, 14 May 2001 and 18 April 2001 respectively. The period of the contract in all three instances was until 31 December 2001 The task was described as:

¹⁴⁰Exhibit“M”,page15 and16

¹⁴¹Exhibit“M”,page38and38

¹⁴²Exhibit“M”,page40and41

¹⁴³Exhibit“M”,page18 -22

“Daar word geboekstaaf dat die werknemer se hoof funksie as operasionaliseringsbestuurder (Veiligheid en Sekuriteit) sal wees, om op die evaluering van veiligheidsinligting en die insameling daarvan te fokus en ondersteuning te lewer aan gemeenskapsveiligheid en munisipale polisiëring se funksieterrein”.¹⁴⁴

185 On 7 June 2001 a contract was concluded between the Administration (represented by Oliver in his capacity as Head: Support Services) and Nel Marais¹⁴⁵. The salary package was R180.00 per hour (taxable) for the period up to 31 December 2001. The task was described as follows:

“Daar word geboekstaaf dat die WERKNEMER se hoof funksie sal wees om die evaluering van veiligheidsinligting, ontwikkelingswerk en beleidanalise te fokus en ondersteuning te lewer aan gemeenskapsveiligheid en munisipale polisiëring se funksieterrein. Die WERKGEWER sal hierdie pligte/verantwoordelikhede gepas met die WERKNEMER formaliseer.”

186 He was not one of those contract workers whose employment had been approved in the minute signed by Bester on 15 March 2001, but was additional thereto. No similar authorisation, or other form of written authorisation, for this appointment has been located by the Commission.

¹⁴⁴Exhibit“M”,page47 -51

¹⁴⁵Exhibit“M”,page86 -90

Further employment contract concluded at the Department of Community Safety

187 On 23 May 2001 a contract¹⁴⁶ was concluded between the Administration, represented by Joshua (Head of the Department of Community Safety) and Du Toit, with a salary package of R190.00 per hour (taxable) it being provided that the contract would be for a period of three years. The task was described as:

"Daar word geboekstaaf dat die werknemer se hoof funksie as operasionaliseringsbestuurder (Veiligheid en Sekuriteit) sal wees, om op koördinerende van die insette van die privaatsektor, ontwikkelingswerk en beleidanalise te fokus en ondersteuning te lewer aan gemeenskapveiligheid en munisipale polisiëring se funksieterrein".

Administrative Findings

188 The manner in which the contract employees were appointed raises a number of questions. Barnard indicated during his testimony that the relevant persons were knowledgeable and that the acquisition of their services was in line with a decision of Cabinet. The following should, however, be noted in relation to the manner in which the appointments were effected:

- It is clear from the evidence provided that in recruiting the "knowledgeable" persons, Barnard mainly head-hunted persons he knew. They were also appointed in haste with due process being

¹⁴⁶Annexure "M", page 69 to 73

ignored. This is clearly illustrated by the fact that their applications were only dated after assumption of duty.

- There was no competition for the relevant positions and no regard was given to address the imbalances of the past. The provisions of section 11(2) of the Public Service Act, 1994 were ignored. Section 11(2)(a) specifically indicates that in the making of any appointment all persons who qualify for appointment, transfer or promotion shall be considered and that the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress the imbalances of the past. The relevant positions were not advertised and only white, predominantly male, persons were appointed.
- In terms of Public Service Regulation VI.C.2.1 vacant posts are to be advertised so as to reach the entire pool of applicants, especially persons historically disadvantaged. This Regulation creates a grey area in that it does not specify what should happen in the case of appointments that are not effected to specific posts but are additional to the establishment. It is the Commission's opinion that the Office of the Director-General made use of this grey area in not advertising the positions. As illustrated above this is, however, in conflict with section 11(2) of the Public Service Act, 1994.
- If it was such a specialized service that had to be provided by the contract workers, the question may be asked whether it would not have been more appropriate to appoint consultants. In such a case S3 of the Treasury Regulations would have applied which would have enabled open competition for the services of consultants for special contracts. Although Barnard indicated in his evidence that the services of consultants would have been more expensive. His reference is to

the appointment of individual consultants and not to a firm that could have tendered to provide the services. It would appear that the reason that this route was not followed was to obviate the national norms and standards of recruitment and selection such as open competition, fair procedure and addressing of transformation objectives.

- 189 The accountability of the decision to appoint the contract workers in the manner that it was done must be questioned. The Constitutional principle that public administration must be broadly representative of the South African people was clearly ignored. The Commission is of the opinion that the appointment of the contract workers in this manner by the Office of the Director-General is an example of poor management practice.
- 190 Whilst the choice of appointment was in Barnard's own discretion, it is noteworthy that certain of the contract workers and, in particular, Steyn, Smit and Du Toit, were experienced as "intelligence operatives" and in the covert collection of information in foreign countries.
- 191 An inspection of the personal files of the security contract workers revealed the following further irregularities/areas of concern:
- Du Toit assumed duty on 1 July 2001 in the Department of Community Safety according to the "diensaanvaarding" form on his file. Despite only officially assuming duty on 1 July 2001, he was paid for April 2001 (R 9 651,40) and May 2001 (R 23 855).
 - Beyleveldt assumed duty on 1 July 2001 in the Department of Community Safety according the "diensaanvaarding" form on his file. He was, however, paid for May 2001 (R 21 210,20) and June 2001 (R

24 740,15). The copy of the employment contract on his file is not valid as it does not have signatures of witnesses.

- Maritz assumed duty on 19 April 2001 and was paid from this date. Her application form for the position is, however, dated 31 May 2001.
- Smit assumed duty on 1 May 2001 and was paid from this date. His application form for the position is, however, dated 11 June 2001.
- Steyn assumed duty on 1 June 2001. His application form for the position was, however, dated 4 June 2001.
- Le Roux assumed duty on 10 February 2001. His application form for the position was, however, dated 15 June 2001.
- Nel Marais assumed duty on 26 June 2001. His application form for the position was dated 27 June 2001.

Recommendation

192 The Province should review its departmental policy on recruitment and selection to take into account the provisions of Section 11(2) of the Public Service Act, 1994. The principle of open competition should be used to reinforce accountability in its recruitment processes.

REMUNERATION OF CONTRACT WORKERS

Remuneration of contract workers during the period September 2000 to March 2001

193 During the above period, the two contract workers employed at that stage were paid at an hourly rate of R195.00 as follows (without mileage claims):

2000	Smit	Steyn
September 2000	31 200.00	22 035.00
October 2000	35 100.00	32 370.00
November 2000	37 635.00	26 910.00
December 2000	17 940.00	10 725.00
January 2001	36 465.00	8 580.00
February 2001	38 220.00	14 040.00
March 2001	31 200.00	12 870.00
TOTAL	227 760.00	217 530.00

194 It is at this stage not clear whether any of the contract workers were paid for the period April 2000 to 1 September 2000, as alleged by Smit. For the period 1 September 2000, until their appointment in terms of the Cabinet resolution of February 2001, it would appear that they were paid out of the budget of the offices of either the Director General or the Department of Community Safety. Thereafter, and subsequent to the Cabinet authorization and signature of the memorandum by Bester on 14 March 2001, the consultants attached to the information unit were

transferred to the office of the Director General for supervision and accounting purposes. Oliver handled the transfer.¹⁴⁷

Remuneration of contract workers during the period March 2001 to December 2001

195 In accordance with a memorandum signed by Mr J Eder ("Eder") dated 27 August 2001, it is confirmed that Smit; L Steyn, Maritz and Nel Marais, who were being paid monthly from the budget of the offices of the Director General, were transferred to a new structure which was being created, namely information management ("*Bestuursinligting*"). It was requested that their remuneration be allocated to that component with immediate effect. It was similarly requested that the remuneration which had been paid to these workers for the months April to July 2001 be reallocated to the correct budgetary post.¹⁴⁸

196 The remuneration paid to the various contract workers for the period April 2001 to December 2001 is the following:

2001	L Steyn	F P Smit	M Maritz	Nel Marais
April 2001	12 870.00	15 405.00	8 385.00	0.00
May 2001	0.00	36 660.00	33 150.00	0.00
June 2001	31 200.00	35 295.00	31 200.00	4 320.00
July 2001	31 200.00	33 735.00	31 200.00	0.00
August 2001	31 200.00	37 830.00	31 785.00	0.00
September 2001	28 860.00	Unavailable	Unavailable	0.00
October 2001	31 200.00	38 025.00	35 880.00	1 800.00

¹⁴⁷Record,evidenceofMrJoshua,page318 -319

¹⁴⁸Annexure"M',page85

November 2001	0.00	0.00	0.00	0.00
December 2001	0.00	0.00	0.00	0.00
TOTAL	166 530.00	196 950.00	171 600.00	6 120.00

197 The manner in which the hourly paid contract workers submitted requests for remuneration was simply to submit a timesheet detailing the number of hours spent and kilometers travelled. If these exceeded the number stipulated in the contract a request for additional or "overtime" hours at the same rate was submitted. This request was, without exception, approved by Oliver who was the Official to whom they reported. On enquiry by the Commission, Oliver stated that the submission of claims was based upon the "honour system" and that no verification system was in place or was utilised to ensure that the hours had either been worked or effectively utilised.

Findings

198 The honour system used to submit and approve claims for the hours worked does not allow accountable control over financial expenditure. The system used did not allow a verification of work performed. It appears from the information obtained on the nature of the worked performed that the contract workers were remunerated at higher levels than actually required. The claims for the use of private transport for official purposes of the majority of the contract workers could not be verified from the claim forms submitted by them. No place of departure or destination is indicated, nor is an indication provided of the odometer reading of the vehicle at the beginning and end of the journey.

Recommendation

- 199 The ineffective control measures in the office of the Director-General to monitor the hours of work performed by contract workers and to approve claims for official journeys with private vehicles must be reviewed.

**THE RELATIONSHIP BETWEEN NIA
AND THE WESTERN CAPE PROVINCIAL
GOVERNMENT**

THE RELATIONSHIP BETWEEN NIA AND THE WESTERN CAPE GOVERNMENT

INTRODUCTION

200 The relationship between NIA and the Western Cape Government took on considerable importance once it became apparent that this relationship – or perhaps the lack of it – was to be regularly cited by witnesses before the Commission as being the motivating factor, or the justification, for their actions. In this way the WatchDog WS100: the sweeps for listening devices by outside parties; the secure room; the information unit and its activities; and the apparent lack of co-operation with NIA in the mutual exchange of information, were all explained in the context of the position, or perceived position, of NIA. It was for this reason that an examination of the relationship was considered crucial to the understanding of the matter within the terms of reference of the Commission.

LEGISLATIVE REQUIREMENTS & STRUCTURES

201 The intelligence community is governed by the Intelligence Services Act, Act 38 of 1994 (“the Intelligence Services Act”) and the National Strategic Intelligence Act, Act 39 of 1994 (“Strategic Intelligence Act”), both of which commenced on 1 January 1995. The Intelligence Services Act regulates the establishment, organisation and control of the NIA and SASS and provides for matters connected therewith. The Strategic Intelligence Act defined the functions of members of the National Intelligence Structure; established a National Intelligence Co-ordinating Committee, defined its functions in respect of intelligence relating to the security of

the public; provided for the appointment of a co-ordinator for intelligence as Chairperson of the National Intelligence Co-ordinating Committee and defined his or her functions.

202 The NIA and SASS were created from the former National Intelligence Service ("NIS") which in its turn was created from the former Bureau of State Security ("BOSS"). The Bureau of State Security was established by General van der Bergh at the time of the Premiership of B J Voster. Subsequently on 1 June 1980, under the Premiership of Mr P W Botha, Barnard was appointed (at the age of 27) as the Director General in charge of National Intelligence Service, a post he held until 31 January 1992 when he was appointed Director General of Constitutional Development. As at 1 January 1995, former members of NIS were either allocated to NIA or to SASS, depending upon their functions. The National Strategic Intelligence Act¹⁴⁹ established the functions of NIA to be:

- "(a) To gather, correlate evaluate and analyse domestic intelligence, in order to –**
 - i) Identify any threat or potential threat to the security of the Republic or its people;**
 - ii) Supply intelligence regarding any such threat to NICOC;**
- (b) To fulfil the national counter-intelligence responsibilities and for this purpose to conduct and co-ordinate counter-intelligence and to gather,**

¹⁴⁹Section 2 of Act 39 of 1994

correlate, evaluate, analyse and interpret information regarding counter intelligence in order to-

- i) identify any threat or potential threat to the security of the Republic or its people;***
- ii) inform the President of any such threat;***
- iii) supply (where necessary) intelligence relating to any such threat to the South African Police Service for the purpose of investigating any offence or alleged offence; and***

- (c) To gather departmental intelligence at the request of any interested department of State, and, without delay to evaluate and transmit such intelligence and any other intelligence at the disposal of the Agency and which constitutes departmental intelligence, to the department concerned and to NICOC."***

203 The function of SASS was defined in the National Strategic Intelligence Act¹⁵⁰ to be:

"(a) to gather, correlate, evaluate and analyse foreign intelligence, excluding foreign military intelligence, in order to:

- i) identify any threat or potential threat to the security of the Republic or its people;***
- ii) supply intelligence relating to any such threat to NICOC;***

(b) to institute:

¹⁵⁰Section 2(2) of Act 39 of 1994

- i) Counter- intelligence measures within the Service; and*
- ii) to in consultation with the Agency, counter-intelligence matters outside the Republic; and*
- (c) to gather departmental intelligence at the request of any interested department of State, and, without delay to evaluate and transmit such intelligence and any other intelligence at the disposal of the Service and which constitutes departmental intelligence, to the department concerned and to NICOC.”**

204 The National Strategic Intelligence Act further provides¹⁵¹ that if any law expressly or by implication requires any department of State, other than the Agency or the Service, to perform any function with regard to the security of the Republic, or the combating of any threat to the security of the Republic, such law shall be deemed to empower such department to gather departmental intelligence, and to evaluate, correlate and interpret such intelligence for the purpose of discharging such function, provided that such department of state (other than the National Defence Force and the SAPS) shall not gather departmental intelligence within the Republic in a covert manner. Similarly, no such department may gather department intelligence outside the Republic in a covert manner.

205 Section 3(3) of the Strategic Intelligence Act imposes a duty upon any department of the State that comes into possession of national security intelligence or information which may be of value in the preparation of the national intelligence estimate referred to in Section 4(2)(c), to transmit

¹⁵¹Section 3 of Act 39 of 1994

- such intelligence and information without delay to the relevant service forming part of the National Intelligence Structures with an indication of the reliability of the source of such information.
- 206 The Strategic Intelligence Act further creates the National Intelligence Co-ordinating Committee (known as "NICOC") and which shall have the function of co-ordinating the intelligence supplied by the members of the National Intelligence Structures to NICOC and interpreting such intelligence to be used by the State and the Cabinet.¹⁵² At the request of any department of State, it is to co-ordinate the gathering of intelligence and without delay to evaluate and transmit such intelligence and any other intelligence at the disposal of the National Intelligence Structures, and which constitutes departmental intelligence, to the department concerned. The Co-ordinator of Intelligence, appointed in terms of the Act,¹⁵³ is required (subject to the directions and supervision of the Minister) to manage and administer the functions of NICOC and to establish the structures and committees necessary for the efficient functioning thereof.
- 207 It would appear that, for the purpose of co-ordinating the functions of NICOC, a Provincial Intelligence Co-ordinating Committee was established, known as PICOC, which served the Western Cape Province and reported to NICOC on a national level.

¹⁵²Section 4(2)(e) of Act 39 of 1994

¹⁵³Section 5 of Act 39 of 1994

208 Intelligence gathering, evaluation and assessment is accordingly a national function, and is not one of those functional areas of concurrent national and provincial legislative competence or of exclusive provincial legislative competence, as provided for in the 1996 Constitution.¹⁵⁴

THE ISSUE OF CO-OPERATION BETWEEN NIA AND THE WESTERN CAPE GOVERNMENT

Formal Co-Operation

209 During the period 2000 to 2002, the Director General, NIA was Mr S W Sigxashe and subsequently Mr Vusi Mavimbela ("Mavimbela"). The Minister in the National Cabinet responsible for Intelligence was Minister Sisulu.

210 Documentation at the disposal of the Commission suggests that, during the early part of 2000, co-operation and material exchange of information took place between NIA and the Western Cape Government. By way of example, on 19 June 2000, Barnard addressed a letter to the Chairperson of NICOC,¹⁵⁵ headed "*Intelligence in regard to violence in the transport industry in the Western Cape*". The letter referred to a resolution of the Cabinet of the Western Cape taken on 12 June 2000 to the effect that an *ad hoc* Cabinet committee would be established to exercise control of and to manage the situation in terms of the conflict in the transport industry in

¹⁵⁴Schedule 4 and Schedule 5 of Act 108 of 1996

¹⁵⁵Letter Dr Barnard to the chairperson NICOC dated 19 June 2000, without a file reference

the Western Cape. High level and detailed intelligence was sought from NIA on issues relating to the taxi industry; the attacks on the Golden Arrow bus company; issues relating to the existence of so called hit squads originating from the Eastern Cape with the apparent goal to intimidate and even kill bus drivers; and the possibility of so called self defence units being involved in the on-going violence. A letter dated 28 June 2000 addressed by Minister Wiley (the former Minister of Community Safety who was replaced by Bester on 28 July 2000) to Minister Tshwete, Minister of Safety and Security, Pretoria¹⁵⁶ similarly requested co-operation.

- 211 The above letter addressed to NIA was responded to on 4 July 2000, by the office of the Co-ordinator of intelligence, Pretoria, and was signed by L M Mti.¹⁵⁷ The relevant portion of this letter is as follows:

"Response to correspondence headed: Intelligence in regard to violence in the transport agency in the Western Cape, dated 19 June 2000.

- 1. I am in receipt of your letter on the above topic, dated 19 June 2000, and have consulted with the PICOC in the Western Cape and the NICOC representative in your province, Mr Brookbanks, in order to reply to your queries.***
- 2. Let met start by addressing the issue of the availability of intelligence to you through the PICOC***

¹⁵⁶Letter28June2000MinisterWileytoMinisterTshwete,referenceDCS13/4/1/4/2

¹⁵⁷Letterof4July2000,officeoftheCo-ordinatorforintelligence,referenceNICOC/B1/DGW/Cape/2

Western Cape. I wish to ensure you that I am in receipt of no intelligence on matters pertaining to violence within the province that is not available to you through the PICOC Western Cape. I am under the impression that your provincial government and administration have received good service from PICOC and would appreciate feedback if this is not the case.

3. I also attach your report that I have received from NIA on the issue of taxi violence in the Western Cape transport industry, which is an assessment done on the basis of the NIA intelligence database, which feeds into the PICOC database."

212 The letter then dealt with the request for direct intelligence and attached the report referred to.

213 During 2000 it was decided to restructure NIA, which decision was implemented during September 2000. NIA had previously functioned through a number of regional offices around the country, each of which reported directly to the head office in Pretoria. This had not ensured a satisfactory relationship between NIA and the various provincial governments, even though NIA had allocated a so called "provincial coordinator" to serve at regional level for the purpose of liaison and coordination. Under a policy of decentralisation, these former regional offices were consolidated into a provincial directorate, one for each of the nine provinces, to give that provincial office the responsibility for carrying out all of NIA's functions in the particular province, including counter-

intelligence. The provincial manager for the Western Cape appointed with effect from 1 September 2000, was Fraser.¹⁵⁸

214 So as to introduce the various provinces to the restructured NIA, Mr Barry Gilder ("Gilder"), (Deputy Director General of NIA, responsible for operations) conducted extensive visits through the provinces to meet with and brief colleagues in the South African Police Services; Defence Intelligence, the Provincial Information Co-ordinating Committees ("PICOC") and so forth. He and the Director-General of NIA, either individually or together, visited each province for the purpose of meeting with the provincial Premiers and/or the Directors-General so as to introduce the newly appointed managers and to introduce the leadership of the provinces to the changes that NIA was undergoing.¹⁵⁹

215 On 14 September 2000¹⁶⁰, in line with the above strategy, the Western Province Government was advised by the National Director General of Intelligence, Mavimbela, that a Provincial Manager had been appointed for the Western Cape and an audience with both the Premier and the Provincial Director-General was requested for this purpose.

¹⁵⁸Record,evidenceofMrBPGilder, page1176and1184 -1185

¹⁵⁹Record,evidenceofMrBPGilder,page1184 -1185

¹⁶⁰Letterdated14September2000fromMrVusiMavimbelaofNIA,tothePremier,MrGNMorkel, referenceNIA/A1/12/3/11/2,Exhibit"F",page1

- 216 On 15 September 2000 the office of the Premier confirmed to Barnard, the Director-General¹⁶¹, that a meeting had been scheduled for 27 September 2000 to meet the new NIA manager for the Western Cape.
- 217 On 20 September 2000 a meeting took place attended, *inter alia* by Barnard, Bester and others regarding intelligence structures.¹⁶² This was followed by a letter dated 26 September 2000 addressed by Barnard to Provincial Commissioner L H Max, SAPS; Major General C H van Zyl, SANDF and Brookbanks, Provincial Co-ordinator, NICOC,¹⁶³ and which confirmed that the Provincial Administration would, with immediate effect, participate in the co-ordinating structures of the intelligence community, the nodal point for the involvement of the Provincial Government being the office of the Director General. The letter continued that:

“Advocate G A Oliver, Waarnemende Adjunk Direkteur Generaal: Ondersteuningsdienste, verantwoordelik vir institusionele koördinerings, sal, as die gedelegeerde van die Direkteur-generaal, names hom die Provinsiale Regering: Wes-Kaap verteenwoordig op die Provincial Intelligence Co-ordinating Committee (PICOC); Adv Oliver sal ook optree as die kommunikasiekanaal van die PICOC na die provinsiale Departement van Gemeenskapsveiligheid:”

¹⁶¹Letter dated 15 September 2000 Office of the Premier to Director General, Exhibit “F”, page 3

¹⁶²Electronic diary, Dr Barnard, 20 September 2000 and exhibit “F” page 5A

¹⁶³Letter 26 September 2000 (reference DG3/2/4/3), Exhibit “F”, page 5A –5B (the letter was dated by Advocate Oliver and signed by Dr. Barnard) Record of evidence, Advocate Oliver, page

“Bilaterale skakeling tussen die Provinsiale Administrasie: Wes Kaap en die Departemente van die Intellegensiegemeenskap word aanvaar en die uitvoering sal spoedig gefinaliseer word.”

- 218 On the same day, 26 September 2000, a further letter was addressed by Barnard to Premier Morkel, on copy to Bester and the head of Community Safety, Joshua marked ***“Persoonlik en Geheim”***.¹⁶⁴
- 219 The letter referred to the meeting which was about to take place with the new Provincial Head of NIA, and referred to the following issues for consideration:

“Skakeling in die toekoms kan alleenlik op politieke vlak met uself of Minister Bester plaasvind indien u die inisiatief daartoe neem of die Direkteur-Generaal ondersteun deur Mnr M Joshua en Adv G A Oliver met sodanige versoek te ondersteun. Tot tyd en wyl anders ooreengekom word sal alle skakeling in die toekoms via Adv G Oliver plaasvind wat die nodige koördinerings in die verband sal doen. Die NIA moet skriftelik – onderteken deur die Hoof van NIA, die Hoof van NIA in die Wes-Kaap en die Minister verantwoordelik vir Intelligensiedienste – onderneem en onderteken dat geen openbare politieke figuur of provinsiale amptenaar enige koverte intelligensie aandag

¹⁶⁴ Letter26September2000(withoutfilingreference)addressedbyDrBarnardtoPremierMorkel,exhibit “F”page4.

van enige lid van die Suid-Afrikaanse Intelligensiegemeenskap ontvang nie. Indien sodanige tegniese dekking of telefoonmeeluistering byvoorbeeld oorweeg word in die geval van byvoorbeeld misdaad en dwelms die Direkteur-Generaal van die Provinsie in alle gevalle, voordat die handeling plaasvind, uitdruklik daarvan ingelig word.

Ek meen dat 'n verstandhouding oor minstens bogenoemde en ander aangeleenthede aangewese en krities belangrik is voordat enige ondernemings van die Provinsie Wes-Kaap gegee word om samewerking op inligtingsgebied met die NIA te bewerkstellig en die vloeï van inligting vanuit daardie oord aan die NIA te magtig"

220 The meeting, designed to introduce the Premier, Bester and Barnard to the new Provincial Manager (Fraser) and for Mavimbela and Gilder to explain the restructuring, took place on 27 September 2000. At that meeting, Mavimbela explained the purpose of the meeting, and briefed the Premier Morkel on the re-organisation of NIA, of the Provincial Directorate and of NIA's intention to provide a wider range of intelligence services and counter-intelligence services to Government. He formally introduced Fraser as the new Provincial Manager and made the point to those present that Fraser would be the contact person between the Western Cape Province and NIA.¹⁶⁵

221 At the meeting of 27 September 2000, Barnard raised concerns as to whether any members of the Provincial Government or Administration

¹⁶⁵Record,evidenceofMrBPGilder,p1186

were under any form of surveillance by NIA and asked for assurances that this was not the case. This request had been foreshadowed by the previous two letters written on the eve of the meeting, dated 26 September 2000, dealt with above. At that meeting, Mavimbela responded to Barnard by stating that no such surveillance was taking place. As far as he was concerned this assurance appeared to satisfy those present and no written undertaking was demanded.¹⁶⁶

222 It was likewise the evidence of Oliver¹⁶⁷ and Smit¹⁶⁸ that such a request was made to NIA, but no evidence of any written request has been located by the Commission. It also appears from the evidence of Bester¹⁶⁹ that, because no such undertaking was given, co-operation of the nature sought by NIA was not afforded to it by the Western Cape Province.

223 On 1 September 2000, and contemporaneously with the creation of the new structure, various contract workers, formerly members of NIS, NIA or SASS, in particular L Steyn and Smit, were appointed by the Department of Community Safety, on the recommendation of Barnard, to assist in certain functions.

¹⁶⁶Record,evidenceofMrBP Gilder,p1187

¹⁶⁷Record,evidenceofPSmit,page745 -746

¹⁶⁸Record,evidenceofGOliver,page401 -402

¹⁶⁹Record,evidenceofMrBester,page141 -143

- 224 The function of the NIA, which is performed for Provincial Government, also includes the sweeping of offices for various forms of surveillance. According to evidence heard by the Commission, no request was made by the Province for any sweep to be performed by NIA for the period September 2000 to January 2002. As will appear elsewhere in this report, steps were taken to arrange with a private company, TSCM, of which the managing members were Whitehead (a former member of the SAPS) and Lombaard, (a former member of SASS, where he served as a technical expert).¹⁷⁰ On 13 October 2000 a meeting took place in Cape Town between Barnard, Whitehead and the two contract workers Smit and Steyn.¹⁷¹ On 29 November 2000 after various inspections (which were dealt with elsewhere) a proposal for the supply of technical surveillance counter measures services was submitted to Barnard on behalf of the Western Cape Administration by TSCM.¹⁷² This service was to consist of various sweeps and also the supply of three WatchDog WS 100's. The proposed cost of the survey fee was R154 561.20 and the three WatchDogs R88 861.86 (being a unit price of R25 983.00 plus VAT each).
- 225 Subsequent to the aforesaid, various sweeps were conducted by TSCM. During the following year, in particular during the period 7 to 8 November 2001, TSCM conducted sweeps in various offices in the Provincial Government building; inspected telephone lines, and installed one WatchDog WS 100 in a specially prepared "safe room" where meetings could be held without the possibility of some outside party conducting

¹⁷⁰CommunicationDrBarnardandlegaladvisorsSASS

¹⁷¹Electronicdiary,DrBarnard,13October2000

¹⁷²Exhibit"E",annexure"U"

eavesdropping activities.¹⁷³ The cost of the debugging exercise was R28 451.03 and of the installation of the WS 100 WatchDog in the sum of R39 552.30¹⁷⁴. Captain R P Strydom of the South African Police gave evidence before the Commission that, on Thursday, 8 November 2001, at 00h58, he came upon two men sitting at the Premier's desk in the Provincial Legislative Building. One was working on the telephone and the other had in his possession a "large black box with electronic equipment". These persons identified themselves as a Mr Niehamer and Lombaard of TSCM. Steyn, one of the consultants, was present in the building and explained to Captain Strydom that a sweep was taking place for "bugs" and listening devices.¹⁷⁵ According to Captain Strydom, sweeps had in the past years been conducted by the Police Support Unit.¹⁷⁶ It was the evidence of Fraser that NIA had the responsibility for sweeping the Western Cape Legislative Building and ensuring that there were no "bugs" because of NIA's statutory role of dealing with and analysing and interpreting information. Private companies should not be used for this purpose as a matter of policy.¹⁷⁷ It should be noted that the services of NIA are performed "free of charge" to Provincial Legislatures, whereas services by private companies were required to be paid for at commercial rates.

¹⁷³Annexure "L" being the offices of the Premier, the Director General, and a secure room "as also the Premier's office at Leeuwenhof".

¹⁷⁴Exhibit "J", annexure "M"

¹⁷⁵Record, Evidence of RP Strydom, page 61 -65

¹⁷⁶Record, Evidence of RP Strydom, page 66

¹⁷⁷Record, evidence of A Fraser, page 4

- 226 On 31 May 2001 the Director General, Barnard received a letter from NIA¹⁷⁸ entitled "***Use of private companies contractors and consultants***". The letter referred to the regulations of the use of private intelligence and security companies (local and foreign) by government departments in the Republic and the fact that same was considered to be irregular and unacceptable. NIA requested the Director-General to furnish information, by 30 June 2001, of *inter alia* "***any private company, contractor, consultant or other private service provider that your institution is using or used since the beginning of 2000 until now***" as also the type of service being provided, the purpose of the service, the duration of the contract, whether the organizations or persons providing the service had been vetted by NIA and whether the service provider had access to sensitive areas of information in the institution. If this was the case, particulars of the type of information or area involved was requested.
- 227 According to information available to the Commission, despite of the fact that at the time the province was not only using the services of TSCM for sweeping and debugging procedures and also had in its employ (as hourly remunerated contract employees) a number of former NIS/NIA/SASS employees for the purpose of collecting information and offering consultancy services in respect of security matters, the form was apparently never completed and returned.

¹⁷⁸Exhibit "A", NIA/A1/W1/13/7

228 The only co-operation which the Commission found had taken place during the period September 2000 to December 2001 was:

- Representation by the Province on the PICOC structure;
- Meetings between the Director General and the Minister for Intelligence, Ms Sisulu;
- The furnishing of certain cabinet minutes to a representative of NIA;
- Formal contact, through various security consultants employed by the Western Cape Province, including Smit, Steyn and Nel Marais, with existing members within the NIA/SASS structures;
- Contact between those persons and Brookbanks, the NICOC representative of the Western Cape (both on a formal and informal basis) as also all meetings between the Director General, Barnard and Brookbanks.

229 The attempts of NIA to perform its function in respect of MISS, and the failure of the Western Cape Province to perform its obligations in that regard, are dealt with elsewhere in this report.

STATED PERCEPTIONS BY OFFICIALS OF THE PROVINCIAL ADMINISTRATION TOWARDS NIA

230 The evidence of certain of the witnesses before the Commission, and the conduct of establishing the safe room containing the "WatchDog", all indicated a climate of fear and paranoia that the confidential affairs of the Provincial Government were being monitored by others, and that they

were under surveillance. For the same reason, so it was stated, the services of NIA were not utilised, it being considered that they were an instrument of the National Government which was opposed to the political dispensation in the Western Province.

Mr H Bester

231 Bester gave evidence that he attended one meeting in the so called "strongroom" and that it was explained to him that the "WatchDog" device on the wall was designed to detect surveillance. He explained with regard to the period October/November 2001, that:

"It was a time then of grave and intense political contestation and I think I certainly had a very keen sense that we were being observed and watched during that time. One had a sense that people knew what you were doing. Now you know that may have been paranoia. I don't think it was entirely although I have no proof of, of being observed or watched and they wanted discussions in various places and I was told that we should meet here because you know this was a place where you could not be overheard. ... I thought it was a bit odd but certainly there it was but it wasn't that odd because in an environment of intense distrust where there was a very deliberate attempt to overthrow the Government which then prevailed and

there were certainly discussions that one wanted to have in private...¹⁷⁹

232 Bester also indicated that there had been many discussions from time to time of being placed under surveillance and people overhearing what was done.¹⁸⁰ He described it as a time of *"unbelievable suspicion and distrust"*.¹⁸¹

233 Although the stated feeling of intense *"suspicion and distrust"* prevailed in late October to early November 2001, (at the time that the alliance between the DP and NNP was in the balance), this distrust of National organs of State, and failure to co-operate with them, had apparently prevailed for some period of time. Bester explained that he was aware of the fact that a private company had been employed to conduct sweeps in the Provincial Legislature Building, the private company being employed because of :

"our suspicion was that we were surveilled by agencies of the National Government. So why would you then contract that the National Government to come and do the sweeping."

¹⁷⁹Record,evidenceofMrBester,page126

¹⁸⁰Record,evidenceofMrBester,page127

¹⁸¹Record,evidenceofMrBester,page128

234 As far as he was aware, the sweep did not turn up any bugs.¹⁸² Bester also recalled the meeting with the Director General of National Intelligence, which took place in September 2000, and indicated that he was aware of both of the letters of 26 September 2000.¹⁸³

Mr Bester: "Well I think the first one deals with liaison at political level and the second one deals with the fact, I mean I mentioned to you earlier that we had real suspicion that we were being placed under surveillance and we wanted assurance that that was actually not going to take place."

Mr Webster: "Was the request that the NIA in writing should disclose that people are not being bugged in essence?"

Mr Bester: "Yes".

Mr Webster: "And the paragraph that follows beneath those two bulleted items, refers to the fact that they are not as I understand it. There isn't going to be co-operation until that undertaking is given. Was that (instinct)?"

Mr Bester: "I understand that like that".

Mr Webster: "Was that undertaking ever forthcoming in writing or any other form?"

Mr Bester: "I couldn't recall that I saw that. It may be."¹⁸⁴

¹⁸²Record,evidenceofMrBester,page13 1to132

¹⁸³Letter26September2000,exhibit"F",page5Ato5Bandletter26SeptemberaddressedbyDrBarnard toPremierMorkel,exhibit"F"p4

¹⁸⁴Record,evidenceofMrBester,p141to143

235 Bester, in dealing with the position as early as November 2000 (in relation to correspondence with the FBI in respect of direct contact between the law enforcement agencies Western Cape and the USA)¹⁸⁵ stated that:

"I take you back to the point I made earlier and that is we ourselves had serious reservations about the political impartiality of the National Intelligence Agency".

236 With regard to the use of consultants, Bester stated that:

"It is a point I made earlier as well that the intelligence products which we received from the community was in many instances not up to standard and you know on certain occasions I requested some essential stuff that we had to deal with and we just never got it."¹⁸⁶

237 He explained that the proposed information component could not augment this deficiency because it was not lawful for it to gather intelligence covertly. He explained that the Province was not entitled to gather intelligence covertly, it being contrary to legislation, and was obliged to work with intelligence agencies. At the same time, he stated ***"there is this relationship of distrust because of the many instances we got a clear sense and we got a cold shoulder"***. The

¹⁸⁵Memorandum 27 November 2000 L Steyn (FPSmit to Minister Bester) entitled "FBI: Offer to assist SAPS in psychological profiling of fanatical Muslim elements"

¹⁸⁶Record, evidence of Mr Bester, p174

concept, as far as he was concerned, was to gather information for the Western Cape which was available in the normal course from "overt" sources, without relying on obtaining information by covert means.¹⁸⁷

238 With regard to the memorandum dated 6 July 2001 addressed by Smit to Barnard and Oliver, regarding the intelligence structures¹⁸⁸ (that relating to the discussions with Brookbanks), he denied that he had previously had sight of same.¹⁸⁹ After being offered the opportunity of considering the document, he commented that:

"It was the whole issue of mutual suspicions I've referred to. I assume and I think a part of this Commission's activities are there because the National Government suspected that the Cape ran intelligence agencies. The Cape suspected that National Government was spying on it"¹⁹⁰

Advocate G Oliver

239 Oliver, in his evidence before the Commission, similarly touched on the level of distrust and the requests for written assurances that no persons in

¹⁸⁷Record,evidenceofMrBester,p174to175

¹⁸⁸Exhibit"F",p81 -86

¹⁸⁹Record,evidenceofMrBester,p174

¹⁹⁰Record,evi denceofMrBester,p179

the employ of the Provincial Government were under surveillance by NIA. He stated that:

"Ja, my understanding initially was that we were concerned about, because of break-in, attempts to hack into the DG's computer, other reasons like the security of the information in the Province. At some stage also I was present at discussion that we had with the Director General of the National Intelligence Agency where he was specifically requested to give a written assurance that our building was not being bugged and that never happened; we didn't get such a confirmation from him. And that became a concern I think for some of the politicians and also for the senior management."¹⁹¹

240 He explained that Barnard asked for this assurance in the presence of Premier Morkel, Bester and two members of NIA. In the context of the meeting of 27 September 2000, when NIA sought co-operation from the Province, he stated that:

"Dr Barnard specifically wanted the assurance – they had approached us for co-operation, which was agreed upon, making information available to them when they needed it, and Dr Barnard had asked them for assurance that they would co-operate with them but then he wanted the assurance that none of the people in the building were being bugged without his knowledge".

¹⁹¹Record,evidenceofAdvGOliver,p400to4001

Chairman: "Yes, but you say the request was for written assurance."

Mr Oliver: "Yes, he requested written assurance"¹⁹²

241 When pressed on the question of who might be committing such surveillance, he explained that:

"My understanding also was that it was not only a concern relating to NIA but also other people who may bug the Province. We were involved in sensitive investigations around the loss of medicines from hospitals and those things and we suspected criminal syndicate involvement, those kinds of things".¹⁹³

Mr F P Smit

242 The apparent decision not to co-operate with National Intelligence Structures after September 2000, is borne out of the evidence of one of the contract employees, Smit. Smit stated that he considered the relationship between Barnard and representatives of NIA in Cape Town to be, at best, only formal. He had been advised by Barnard that, even prior to his involvement with the Western Cape Provincial Administration, a request had been made to the Head of the NIA office in Cape Town for a written confirmation that neither his telephone nor the telephone of any other Senior Official of the Western Cape Province or Government was

¹⁹²Record,evidenceofGOliver,p401 -402

¹⁹³Record,evidenceofGOliver,p402 -403

being unlawfully monitored. He understood that no undertaking had been given, that much of the relationship between the office of the Director General and NIA was to be attributable to this failure. He further alleged that, during mid 2001, Barnard had requested him and Steyn (one of the other contract employees) to attempt to improve the relationship with NIA in Cape Town and that they had arranged for meetings with Fraser, through the offices of the NICOC representative in Cape Town, Brookbanks.

- 243 Smit testified that at these meetings Barnard repeated the request to Fraser that NIA was to give him the written undertaking relating to telephones and so forth.¹⁹⁴ Smit testified that the collection of security information was an important aspect of the task for which he was employed¹⁹⁵ but alleged that all material used came from overt sources. When questioned regarding information from NIA, he explained that the information component at no stage made use of information from NIA and that the presentations to Cabinet and other work performed by it was prepared and drawn up by them without any input from NIA and that they never approached NIA for any information.¹⁹⁶ He stated that various briefings took place by Brookbanks of NIA on a regular basis in the context of the Ministerial Task Teams, but that in respect of the information sought by the Province for decision making purposes, NIA was never approached. He did not know what information was available from NIA and accordingly could not comment on whether or not NIA was in a

¹⁹⁴Record, evidence of Mr Smit, p745 -756

¹⁹⁵Record, evidence of Mr Smit, p766

¹⁹⁶Record, evidence of Mr Smit, p825

position to furnish useful information as it had not been requested to do so.¹⁹⁷

Dr L D Barnard

244 Barnard held the post of Director General of the Provincial Administration: Western Cape for the period 4 December 1996 until December 2001. He had previously been Director General for constitutional development from 1 February 1992 to 30 November 1996, and prior to that Director General of the NIS for the period 1 June 1980 to 31 January 1992. During the course of his evidence he rejected any suggestion that he had been a party to the surveillance of others, or that he had retained files on the politicians and officials. As the senior official in the Western Cape Provincial Administration, he was able to shed light on his attitude, and that of the politicians, with regard to the relationship with NIA.

245 Barnard testified that the products which were received from NIA, during the period that he performed service in the Western Cape as Director General, were generally speaking not of a good quality. In particular, he was of the view that the information presented by NIA failed to answer specific questions which the Provincial Administration required.¹⁹⁸ It was for this reason that, in October 2001, it was suggested that a member of NIA be permanently placed with the Western Cape Government to

¹⁹⁷Record,evidenceofMrSmit,p424 -429

¹⁹⁸Record,evidenceofDrBarnard,p2870 -2871

facilitate good communication with NIA, but this had proved impossible due to a shortage of personnel on NIA's part.¹⁹⁹

- 246 In describing the relationship with NIA, Barnard went back to 1997, when the Western Cape was ruled by a Government of National Unity, with four members of the ANC in the Cabinet. At that time, on being asked by Cabinet members whether facilities such as the cabinet room were secure, he explained as follows:

“Ek het voorts die mening gehuldig dat die NIA meer gesofistikeerde aksies sou kon en behoort uit te voer. Vanweë die feit dat die NIA, as 'n regeringsinstelling onder beheer van 'n ander politieke party val en in die versoeking mag wees om juis wanneer hulle die defensiewe funksie moet uitoefen, die offensiewe funksie kon uitoefen van meeluistering in 'n provinsie wat nie onder hulle politieke beheer was nie, was daar ongemak omtrent die aanwending van die NIA.”²⁰⁰

- 247 This view was repeated in the context of the establishment of a secure room:

“Ek het in my hoofgetuienis gister aangetoon dat daar aanduidings was van lekkasies in – van die begin van '97 af oor politieke gesprekke wat in die kabinetskamer

¹⁹⁹Record, evidence of Dr Barnard, p2884

²⁰⁰Record, evidence of Dr Barnard, p2881 -2882

plaasgevind het. Ek het verder aangetoon dat daar op my persoonlike rekenaar, die rekenaar op my kantoor ingebreek is. Verder het ek aangetoon in my hoofgetuienis gister dat daar nie vertroue was – ek gebruik die woord vertroue was, die nodige vertroue was en dat die NIA wat in die sentrale regering onder ander partypolitieke beheer staan as in die provinsie, die werk so sou wou doen soos wat 'n mens dit graag sou wou hê nie. Gevolglik het ons 'n hele proses aan die gang gesit, waaroor ek ook gister getuig het in terme van die wetgewing in die verband, om defensiewe maatreëls te neem sodat inligtingsekerheid in die provinsie toegepas kon word.²⁰¹

248 These concerns on the part of Barnard seemed to have been misplaced, as, notwithstanding more than one sweep which was conducted by TSCM, no surveillance devices were found.²⁰² The other concern mentioned by him was tampering with his own personal computer, but he could not conclude that this had not taken place internally.

249 Although there was no evidence that any surveillance of the affairs of the Province was taking place, Barnard was concerned that NIA might be participating in such conduct. He explained his concerns, which were expressed at the meeting on 27 September 2000, as follows:

²⁰¹Record,evidenceofDrBarnard,p2892

²⁰²Record,evidenceof DrBarnard,p2897

"Ek het vir NIA pertinent, in 'n gesprek wat my kollega baie goed van weet, met die hoof van NIA, my kollega, Vusi Mavumbela, en Arthur Fraser wat ek sien wat hier is, in die teenwoordigheid van Mr Bester and Premier Morkel gevra: "Doen julle meeluistering in hierdie gebou of nie?" En daar's 'n eenvoudige rede, ons kan teruggaan na die getuienis van my kollega Gilder toe, "doen julle meeluistering in hierdie provinsie of nie?" Of op politici of amptenare?" Want ek het vir hom gesê as dit gaan oor inligting van amptenare dan kan ons dit vir jully vry en verniet op enige manier gee. As dit gaan oor gesondheid en administrasie en alle ander sake kan julle dit verniet van ons kry."

"By die een geleentheid in die teenwoordigheid van die Premier, en Mr Bester, is die onderneming gegee: "Nee dit vind nie plaas nie." Toe het ek gesê, en ek vind daarin ook hoegenaamd niks vreemd nie, "gee dit net vir ons op skrif dat dit so is." Dat ons dit op skrif kan kry. As 'n mens 'n huis koop moet jy 'n skriftelike brief kry en alles. Gee dit vir ons op skrif. Dit het nooit gekom nie."²⁰³

250 Barnard explained that he was concerned that officials in the province may be involved in syndicates, for example for the theft of medicines, in respect of which the province lost many millions of rand. He was therefore of the view that NIA might, for justified reasons, place those who were involved in such activities under surveillance. For this reason, he wanted NIA to inform him that they were involved in surveillance, or

²⁰³Record,evidenceofDrBarnard,p2920 -2921

technical attention, in respect to specific officials. Accordingly his demand, to be given the assurance in writing, was simply to have it placed beyond all reasonable doubt that it was not taking place. In the circumstances, he could find no good reason why a written response could not be furnished.²⁰⁴

251 With regard to the request, as set out in the letter of 26 September 2000, that a written undertaking be given that no surveillance of officials were taking place, Barnard explained that he had not asked Minister Sisulu for a written undertaking to be furnished by herself, but had, at a meeting on 27 September 2000, indicated to those present that he wished the undertaking to be in writing. On a subsequent occasion, he repeated this request to Fraser.²⁰⁵ In this regard, he took issue with Gilder's evidence that he had not asked for a written undertaking at the meeting held on 27 September 2000.

252 Barnard was asked to comment upon the fact that Smit had testified that, in preparation of the Cabinet presentations, no liaison had taken place between NIA and the information unit. In particular, in response to a question as to why the information unit did not deem it fit to approach NIA for assistance, he stated that:

"Daar kan geen rede wees en as dit so is, as dit feit is, wat deur Mnr Piet Smit – verskoon wat deur Mnr Piet Smit

²⁰⁴Record,evidenceofDrBarnard,p2922 -2923

²⁰⁵Record,evidenceofDrBarnard,p2974 -1975

getuig is dat hulle nie NIA in die verband van hulle kant af genader het nie, is dit 'n fout.²⁰⁶

253 In so far as Gilder of NIA had expressed concerns after establishment of the information unit, Barnard explained that he had not discussed the creation of the unit with Gilder, or officials of NIA, until it had already been established. He explained that he was not required to do so.²⁰⁷

254 The concerns of the politicians, relating to the possibility that NIA might be involved in monitoring or surveillance, were shared by Barnard personally on the ground that he did not receive the written undertaking that he sought. Barnard explained that:

“Ek het die ongemak gedeel omdat ek die skriftelike onderneming nie gekry het nie.²⁰⁸

STATED PERCEPTIONS BY OFFICIALS OF NIA

Mr B Gilder

255 Gilder was called as a witness before the Commission by NIA, in particular to testify regarding the relationship between NIA and the Western Cape

²⁰⁶Record, evidence of Dr Barnard, p2998

²⁰⁷Record, evidence of Dr Barnard, p3025 -3026

²⁰⁸Record, evidence of Dr Barnard, p3038

- Provincial Government from 2000 to date. He testified that, since January 2000, he had held the post of Deputy Director General, NIA, responsible for Operations. Previous to that, he was Deputy Director General of the SASS, External Intelligence Department. In his present post he was responsible for supervising all the operational activities of NIA, including the work of NIA's nine Provincial Directorates.
- 256 Gilder explained that NIA was represented in the Western Cape by a Provincial Directorate, which was headed by a Provincial Manager, Fraser, who was responsible for all NIA's work in the Western Cape Province, both in the intelligence and counter-intelligence field. Co-ordination in the province was facilitated by a non-statutorily established body, known as the Provincial Intelligence Co-ordinating Committee, otherwise referred to under the acronym of "PICOC".
- 257 Gilder prefaced his evidence by explaining that the legislation which created NIA had given it three main functions, being Domestic Intelligence to Government; National Counter Intelligence and the provision of Departmental Intelligence to any department of Government requiring it. In the field of Counter Intelligence, much of NIA's responsibility related to ensuring that Government, at all levels (be it national, provincial or local) took place in what would be described as a "secure environment". This involved the protection of information and to this end security advice was provided to Government departments. This included security screening of Government employees who might have access to classified information; sweeping actions to detect electronic monitoring devices in Government offices and boardrooms and conducting investigations into breaches or

suspected breaches of security in Government institutions.²⁰⁹ When dealing with the domestic intelligence mandate, he explained that the role of NIA was, *inter alia*, to provide Government with a wide range of intelligence to support decision making. This information, much of which was not obtained by covert or “traditional spying methods”, was designed to assist Government in reaching appropriate decisions, and particularly in an attempt to predict proactively those issues that might have a potential to threaten security or stability.²¹⁰

258 Gilder, in the context of electronic surveillance, explained that NIA was subject to the Interception and Monitoring Prohibition Act, Act 127 of 1992, which dealt with the monitoring of communications or conversations by electronic means, and the fact that such monitoring could not lawfully take place without having been authorised by a High Court Judge, in terms of section 3 of that Act. During 1999 Mavimbela was appointed Director General of NIA and during the first half of 2000 NIA underwent restructuring. For the purpose of greater efficiency, and to achieve decentralisation, the provincial offices of NIA in each province were consolidated into Provincial Directorates, to each of which was appointed a Provincial Manager. The new Provincial Manager, Fraser, was introduced to the then Premier and Provincial Director General during September 2000. The meeting, held with Premier Morkel, Barnard and Bester on 27 September 2000, was similarly attended by the then Director General of NIA, Mavimbela, himself and Fraser. At this meeting Fraser was formally introduced as the new Provincial Manager. Mavimbela made

²⁰⁹Record,evidenceofMrBPGilder,p1177to1178

²¹⁰Record,evidenceofMrBPGilder,p1179

the point that Fraser would be the contact person on behalf of the National Director General of Intelligence to establish links between the Western Cape Province and NIA.²¹¹

259 During the course of that meeting on 27 September 2000, Barnard raised a concern as to whether any member of the Provincial Government or Administration was under any form of surveillance by NIA and asked for assurances that this was not the case. According to Gilder, Mavimbela gave that assurance. Had surveillance been necessary, NIA's normal practice was to take the senior leadership or management of the province concerned into the confidence of NIA. As far as he was aware, this explanation satisfied Barnard. NIA would not have been prepared to give any form of undertaking that no such person would be under surveillance in the future. He was asked specifically whether or not the undertakings were requested in writing and he testified that no request was ever made that such undertaking be put in writing. He had also consulted with Mavimbela and with Minister Sisulu. They had informed him that they had similarly never received a request for a written undertaking from the Western Cape Government.²¹² Had written undertakings of the form suggested in exhibit F, page 4, been requested, they would not have been granted. The attitude of NIA was that it was obliged to perform its lawful function and it would not give undertakings limiting this function. Any suggestion that it would conduct surveillance on persons outside this legal framework amounted to a suggestion that NIA was obliged to give an undertaking that it would not act unlawfully.

²¹¹Record,evidenceofMrBPGilder,p1186

²¹²Record,evidenceofMrBPGilder,p1188 -1189

260 It was during the latter part of 2000 that NIA became concerned, particularly in the context of the fight against urban terror in the Western Cape, that the Provincial Government was developing its own program or strategy in respect of the issue and that NIA was not invited to be involved in this provincial approach.²¹³ One of the specific aspects with which NIA became concerned during the latter part of 2000, and early 2001, was that the Provincial Government was initiating contact with certain foreign Governments on the issue of urban terror and in particular with foreign intelligence services.²¹⁴ It was in this context that NIA became aware of the fact that the Western Cape Government had established contact with the United States intelligence agency known as the FBI. This was a matter of concern to him as Smit, one of the consultants appointed to the Information Unit, had previously been stationed in Washington, United States, with the purpose of establishing links with American agencies during the time that he was employed by SASS. The reason for this concern about links with the FBI was that it was considered to be the counter intelligence agency of the USA, with a similar mandate to NIA, and that the Provincial Administration might become the target of intelligence gathering. In addition to this concern, there was an agreement with the American intelligence community that all interaction with that community would take place through the CIA representative, rather than directly with the FBI. It was also of concern to NIA that a Provincial Government was involved in co-operative relations with an arm of another foreign Government whilst national Government was similarly conducting its own relations with agencies of that foreign

²¹³Record,evidenceofMrBPGilder,p1 191

²¹⁴Record,evidenceofMrBPGilder,p1192 -1193

Government. The matter was taken up when a meeting was held on or about 10 October 2001 between Gilder and Fraser, on behalf of NIA, and Bester and Barnard on behalf of the Province. It was then agreed that any future contact with an agency such as the FBI would be handled jointly.²¹⁵

- 261 With regard to the relationship between NIA and the Western Cape Government, Gilder was aware of the fact that, at a meeting held on or about September 2001 between Barnard and Minister Sisulu, Barnard had advised Minister Sisulu that he "had no contact with NIA in the province".²¹⁶ As a consequence, Gilder was requested by the Minister to meet with Bester and Barnard, which meeting took place during or about 10 October 2001. According to him, this was the first meeting that has taken place between himself and Barnard since the introductory meeting during September 2000 and that in the past year there had been insufficient contact at high level between NIA and the Provincial Government. According to him, Barnard acknowledged that there was a problem in the relationship between the Provincial Government and NIA, due to insufficient contact between NIA and the Province and that this was the reason why NIA was not involved or consulted in matters such as contacts with the FBI.²¹⁷ At the same meeting Barnard briefed Gilder about the information unit which had been set up by the Province and he was, according to Gilder, at pains to explain that the unit was not an alternative intelligence unit. Its task was primarily to provide information

²¹⁵Record,evidenceofMrBPGilder,p1198

²¹⁶Record,evidenceofMrBPGilder,p1197

²¹⁷Record,evidenceofMrBPGilder,p1198

to the Provincial Government to assist it in its decision making and he requested Gilder to second an analyst from NIA to the unit. Because no such person was available, Gilder undertook to appoint a liaison person to interface with the unit. This was done in due course.²¹⁸

262 The liaison person appointed to the Province was Ms Lorna Daniels ("Daniels"), her duty as liaison commencing in October / November 2001. During the course of this interaction, NIA received copies of the information briefing which were submitted to Cabinet by the information unit.²¹⁹ In the case of at least two of these topics (being land distribution and Anthrax) NIA had itself a product on those issues. As far as he was aware, the NIA product on Anthrax was made available to Provincial Governments during or about November 2001. Similarly, NIA had done extensive work on the implications of the terrorist attacks of September 11th. NIA provided the sort of information contained in these cabinet presentations, having extensive access to open sources. Much of its work was involved in the gathering of intelligence from such sources. According to Gilder the value which NIA could add was the information which it could obtain from less open sources which were not readily available.²²⁰

263 Gilder further testified, with regard to the concerns by the Province as to the quality of intelligence received from the intelligence community, that

²¹⁸Record,evidenceofMrBPGilder,p1199

²¹⁹Record,evidenceofMrBPGilder,p1201 -1202

²²⁰Record,evidenceofMrBPGilder,p1205

this issue had been raised with him by Bester at the meeting during October 2001.

264 With regard to the question of whether or not NIA had ever been approached by the Western Cape Government to furnish it with any products, information or documentation on the various matters which were the subject of the Cabinet presentations, he explained that, as far as he was aware, no approach had been made by the Province.²²¹ He added that had NIA been approached it would have been willing, and indeed able, to have produced information on these topics and made it available to the Western Cape Government.

265 NIA first became aware of the establishment of the SPIU, within the Western Cape Provincial Government, during April 2001, when the Provincial Manager, Fraser, advised him, that persons such as Smit had been employed by the Province for this purpose.²²² The first time he became aware of the concern with the quality produced by NIA was when this was expressed to him by Bester during October 2001.²²³

266 Gilder was asked to comment upon the concerns relating to the relationship with NIA expressed by various of the witnesses who had given evidence previously. He was asked to comment on the comment

²²¹Record,evidenceofMrBPGilder,p1206

²²²Record,evidenceofMrBPGilder,p1210

²²³RecorderevidenceofMrBester,p123

made by Bester that: "***we are listened to be quite honest, our suspicion was that we were being surveilled by agencies of the National Government***".²²⁴ Gilder stated that this concern on the part of Bester, or others in the Provincial Administration, was never, as far as he was aware, conveyed to NIA. When he and others had been questioned about concerns during the September 2000 meetings, NIA believed that it had answered the question satisfactorily and the concern was never again brought to his attention. When he later met with Bester and Barnard during October 2001, concerns that NIA might have been placing members of the Western Cape Provincial Government under surveillance were not expressed to him.²²⁵ Gilder added that it was not the policy of NIA to target, for intelligence purposes, any registered political party.²²⁶

267 Gilder had considered that, after the provincial managers had been introduced to premiers and directors general of Provinces during 2000, the relationship between NIA and the Provinces had, in the most part, developed into strong relationships. Unfortunately, such a relationship had not developed between NIA and the Western Cape Province. After the meeting during September 2000, when Fraser was appointed, the relationship appeared to Gilder (apart from some areas of co-operation) to have been one in which NIA was kept at arms length. NIA was included

²²⁴ Record, evidence of Mr Bester, p131

²²⁵ Record, Gilder, p1236

²²⁶ Record, Gilder, p1237

in certain provincial committees but excluded from others. With a change of political leaders within the Provincial Administration during late 2001, the relationship had changed to one that Gilder described as a **"very good relationship"**. Gilder stated:

"as far as I can tell it is a very good relationship. I don't know whether I should say this, Chairperson, but it appears to me that that good relationship has started very soon after the change which led to the formation of the Commission, partly at least, in the sense that we were approached immediately to do a security appraisal, at least an initial one, that led us to the discovery of the WatchDog, documents being taken out. We have now completed a proper security appraisal of the Provincial Administration, with the full co-operation of all the departments of the Province and our own security advisors. And I understand even informally in my discussions with Mr Fraser, that he meets quite frequently with both political and administrative leaders in the Province".²²⁷

268 With regard to the relationship between himself and Barnard, he described their relationship, in terms of a "one on one relationship", as having been cordial and that meetings between himself and Barnard had been productive and constructive.²²⁸

²²⁷ Record, Gilder, p1241 -1242

²²⁸ Record Gilder, p1242

269 Apart from the Cabinet briefings which had been handed over to Daniels, no other documentation in the form of internal memoranda, or relating to the workings of the special information unit, were handed over to NIA.²²⁹

270 Gilder expressed concern that, in the light of the lack of contact between the Western Cape Provincial Administration and NIA, and due to the fact that the unit comprised primarily of former members of the intelligence structures, their purpose might have been to provide an alternative to what the Provincial Administration felt they were not receiving from the NIA by way of intelligence products.²³⁰ In reading through the documentation put before the Commission, this concern was reinforced. In particular, his concern was that the information unit was acting "on the playing fields of NIA".²³¹ The conclusion that the information unit was transgressing onto NIA's field of operation was not based on a single paragraph or single document but as part of a total picture which was available to him. This concern was enhanced by the fact that one of the purposes of the information unit was the administration of MISS, which was primarily one of the roles of NIA in counter-intelligence, being the protection of information. The so called "Brookbanks memorandum" similarly caused him concern, due to the fact that it appeared that sources within NIA were exchanging information with the information unit in a

²²⁹Record, Gilder, p123

²³⁰Record, Gilder, p276

²³¹Record, Gilder, p2778

manner which he considered could be described as the collection of "covert" information by means of the use of a source/s.

CONCLUSIONS AND FINDINGS

- 271 It would appear to the Commission that the relationship between the Western Cape Government and NIA, particularly during the period of September 2000 to December 2001, was strained and characterised by distrust on the part of the Provincial Government and concern on the part of NIA.
- 272 Insofar as the Provincial Government was concerned, a request was made of NIA, during September 2000, as set out in an internal letter dated 26 September 2000,²³² for an undertaking that no public political figure or provincial official was the subject of any covert intelligence attention by any member of the South African Intelligence community. Furthermore, the undertaking sought was to include that Barnard be informed prior to any such technical surveillance or telephone monitoring being considered. The approach adopted by the Provincial Government was furthermore that such undertakings were to be furnished, in writing, prior to any undertakings being made by the Provincial Government to NIA for co-operation in the information field or authorization being given for the flow of information from the Province to NIA.

²³²Exhibit "F", page 4

- 273 The Commission finds the demand for such an undertaking, whether oral or in writing, was not one which the Province could lawfully expect to be fulfilled as a precondition for co-operation with NIA. Section 3(3) of the National Strategic Intelligence Act, Act 39 of 1994, imposes an unconditional duty upon Departments of State to transmit information and intelligence to NIA without delay, which duty cannot lawfully be curtailed by unilateral preconditions imposed upon NIA.
- 274 Furthermore, the Interception and Monitoring Prohibition Act, Act 127 of 1997, which provides for the authorization by a High Court judge for surveillance and monitoring of individuals by the intelligence services, does not contain any stipulation that no such authorization may be granted, or surveillance commenced, unless and until any Director General or other official has received notification thereof. To require such prior notification was once again not a demand which could lawfully be insisted upon. Notwithstanding the fact that NIA was not obliged to give any undertaking of the kind, Barnard and Gilder were *ad idem* that an oral undertaking was furnished during September 2000 to the effect that no public political figure or provincial official was then the subject of any covert intelligence attention by NIA.
- 275 A further fact to be mentioned in this regard is that NIA could hardly have been expected to give undertakings on behalf of other members of the intelligence community – such as Military Intelligence, the South African Police Services - and could only have given undertakings which were limited to its own activities.

276 The Commission finds that the question relating to the request for a written, as opposed to an oral undertaking, to be somewhat intriguing. As appears from the relevant letter, Barnard, Bester (and possibly the then Premier, Morkel) had decided – prior to the introductory meeting on 27 September 2000 – that no such co-operation would take place unless and until the necessary written undertakings were furnished. According to the evidence of Barnard, this request was put to those NIA members present at the meeting on 27 September 2000, and the oral undertaking referred to above was furnished. Gilder, who was present at the same meeting, denied that a written undertaking was ever requested. Barnard did not suggest in his evidence before the Commission that NIA was ever requested in writing to furnish the written undertaking (and no such letter was located by the Commission), nor did he suggest that NIA was ever warned that the exchanges of information and co-operation with NIA were dependant upon the written undertaking being furnished. It can therefore be assumed that, even on Barnard's view of events, he knew that the higher echelons of NIA were unaware of why proper co-operation was not taking place. Notwithstanding the grave potential consequences of this policy, Barnard conceded that he had never raised the failure to provide a written undertaking with either the Minister of Intelligence or the Director General despite having had meetings with them during the relevant period, nor had he ever warned of the consequences of such failure. He would therefore, logically, have at all material times been aware that the senior personnel of NIA were unaware of the real reason behind the lack of co-operation on the part of the Province but he chose not to enlighten them.

277 The Commission is left with the impression that it suited Barnard, other officials and Bester, that no undertaking had been furnished. For this

reason that they took no formal steps to insist upon the written response (or appeal to higher levels) because that failure was to be used as justification, and provided a convenient alibi, for them keeping NIA at arms length and for them to proceed to order the province's affairs without the involvement or participation of NIA. The comment by Bester that NIA was considered as being an agency of the ruling party and hostile to the DA Provincial Government provides explanation for the desire to keep NIA at arms length and suggested that the approach adopted was motivated and inspired by party political considerations alone.

- 278 The Commission finds that the failure to furnish a written undertaking (and whether or not such written undertaking was ever in fact requested from NIA) was thereafter used as, *inter alia* the justification for the failure to afford co-operation with NIA in the development of the strategy for the implementation of MISS; the performance of sweeping activities with surveillance devices; participating in routine security audits; the establishment of the secure room; the acquisition of the WatchDog for the specific purpose of guarding against being bugged by others; the establishment of the information unit; the failure to authorize the transfer of information to NIA and the failure of the information unit members to even approach NIA for input into the cabinet presentations.
- 279 The Commission finds that the decision taken not to co-operate with NIA until certain unilateral preconditions were met, and the subsequent failure to so co-operate, amounted to a deliberate, premeditated and sustained breach of the Province's obligations in terms of the Strategic Intelligence Act and the Requirements of Co-Operate Government as set out in 1996 Constitution. The Commission further finds that, in any event, the

suspensions against NIA were without any factual foundation and that no reasonable grounds existed for believing that NIA was undertaking surveillance on the politicians and senior officials of the Province to serve party political interests. No form of bug or surveillance equipment was ever detected by TSCM (who performed the sweeps) and no single fact was presented to the Commission which could reasonably have created such a belief that NIA was party to such surveillance.

FINAL CONCLUSION

280 In reaching a finding it is necessary to contextualise the events and have regard to the totality of the facts reliably established on the evidence. These may be summarised as follows:

- In the words of Bester the events occurred during a time of "*intense political contestation*".
- A secure facility was created which is without precedent in terms of its description and level of security.
- The facility was equipped with a device which has an ostensible defensive capability but which, undeniably, also has an offensive capability in terms of electronic surveillance. The acquisition of this device did not follow the prescribed procedures.
- On the explanations furnished for the use of the room there had been no justification to establish it.

- Contract workers were hand-picked by Barnard, many of whom had historic ties with him in the intelligence community as ex-NIS or NIA operatives.
- A number of these contract workers were ex-intelligence operatives who had skills in covert intelligence gathering and who were, in many instances, over-qualified for the tasks they were supposedly appointed to carry out.
- The appointment of these operatives was not done through the approved and acceptable channels but done in a highly irregular fashion.
- A significant amount of the documentation relating to the creation of the information unit and its activities was not to be found in any formal registry. The only copies of certain significant documents found were found in cardboard boxes, *inter alia* behind the door of the messenger's room, which were destined for removal from the building.
- The manhours expended by the contract workers is not proportional to the extent of their admitted activities and the products of those activities.
- When the provincial government of the day changed, the unit disbanded and the facility was dismantled. These facilities were not made available to the successive administration.
- When the Commission commenced its investigations it became aware of a distinct climate of fear and lack of co-operation from witnesses (to the extent that even initially co-operative witnesses subsequently demonstrated a marked and fearful change of attitude).

- 281 On the evidence furnished to it, the Commission is unable to find that the strongroom, the WatchDog or the information unit were used for any nefarious purpose. However, given the above factual exposition, the inference is inescapable that the temptation to use the facility and the information unit for less than legitimate purposes must have been compelling, particularly given the intensity of the political contestation. It is not beyond contemplation that this was done, although no positive finding can be made in this regard.
- 282 These facts, in the very least, demonstrate a significant level of paranoia within the ranks of the then provincial administration.
- 283 The Commission expresses considerable disquiet as to the potential use to which the facility and the unit might have been put had the use of the unit and the facility become entrenched and had the politics of the day not led to a change in provincial government.

THE MANAGEMENT AND CARE OF RECORDED INFORMATION

INTRODUCTION

284 This Chapter deals with the adherence to procedures and practices, followed by the Office of the Premier and Office of the Director General from 1994 to date, in relation to the management and care of recorded information. In this regard, the Commission has inspected various documents, as well as the filing systems utilised in the said Offices. Findings and recommendations are made with a view to assisting the province to manage information effectively.

BACKGROUND

285 Fraser, Provincial Manager of the NIA in the Western Cape, during an interview with Beneke,²³³ observed two female employees of the Administration removing a number of cardboard boxes from Beneke's office on the 1st floor of the Provincial Legislative Building to a vehicle parked in the VIP parking lot. On investigation it transpired that the vehicle belonged to Beneke and that six cardboard boxes, containing official documentation, were loaded in the vehicle. Beneke conceded that the contents of the six boxes that were loaded into his vehicle belonged to Barnard.

286 Four large cartons of documents, which originated from the office of Oliver, Deputy Director-General in the Office of the Director-General, which had been cleared from his office after his resignation, were also made available to the Commission.

²³³Record,evidenceofMrFraser,page14

287 Lastly, four further boxes of documents, which were located behind the door in the messenger's room, were handed to the Commission. The contents of the above-mentioned boxes were analysed by the Commission and an evaluation of the procedures and practices applied by the Province, in terms of the legislative context, were made.

INSPECTION OF THE MANAGEMENT OF DOCUMENTATION AND INFORMATION

288 The management of documentation and information by the PAWC was investigated through an inspection of files and filing systems, documents obtained in filing cabinets of Beneke and Oliver, as well as documents that would have been removed from the premises on behalf of Oliver and Barnard. An analysis of the documentation uncovered the following:

289 The National Archives of South Africa Act, 1996, provides for the proper management and care of the records of government bodies. Both the Offices of the Premier and the Director-General have filing systems formally approved by the National Archives. The filing systems are, however, not well maintained. Documents are not numbered and a register is not kept of documents that were filed. This makes it impossible to determine whether documents have been removed.

290 A filing cabinet found in the office of Beneke contained three (3) files dealing with the purchasing of computer and related equipment (Departmental IT Committee) and computer network and workstation matters. The files contained original documentation that should have been kept by the Chief-Directorate Support Services as the component responsible for the Departmental IT Committee. The files included documents up to the end of March 2000.

- 291 The original reports of a Consultant, Mr I H Robson, dealing with organisational restructuring and departmentalisation were kept in an unofficial file in the filing Cabinet of Beneke. The official file for contract workers and consultants that exists on the approved filing system for the Office of the Director-General (file DG1/2/4) should have been used for this purpose.
- 292 A total of 96 official documents (letters, minutes etc.) were contained in a box that would have been removed from the premises on behalf of Barnard. Various classified documents were contained in the relevant box. These included the following:
- "Security Focus Western Cape Province", classified confidential – date stamp 29-09-1998.
 - Document of the Provincial Intelligence Secretariat of the SAPS in the Western Cape dated 13-05-1998, classified confidential.
 - Confidential Minutes of the "Ministeriële Taakspan: Beveiliging van die Wes-Kaapse Gemeenskap" – 21 April 1998.
 - Letter from the Chairperson of the " Wes-Kaapse Raad op Dobbelary en wedrenne" dated 19 February 1998 and marked Strictly Confidential.
 - "Domestic Security Review" of 12 November 1998 – marked confidential.
 - Confidential document regarding the financial position of the Western Cape – Constitutional possibilities.

- "Request for legal opinion: Legalities surrounding possible means of dealing with budget shortfalls" – 168/96 – marked confidential.

293 It would have been highly irregular if any of the documents, especially the classified documents, had been removed from the premises as was intended. This would have been in violation of the provisions of section 5(2) of the Protection of Information Act, 1982 and the MISS document. Section 5(2) of the Protection of Information Act, 1982, determines that any person who retains for any purpose prejudicial to the security or interests of the Republic any official document, when he/she has no right to retain it or when it is contrary to his/her duty to retain it, or neglects or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof, shall be guilty of an offence and liable on conviction to a fine not exceeding R5000 or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.

294 In terms of the MISS document -

- the removal of classified documents shall be prohibited as far as possible,
- classified documents may not be taken home without the approval of the head of the institution or his delegate, and
- a list of documents to be removed must be handed to the person in charge of record keeping.

295 The relevant classified documents should also have been properly stored as required by paragraph 10.4.2 of the MISS document. The following requirements apply:

- **Confidential** documents must be stored in a reinforced filing cabinet.
- **Secret** documents must be stored in a strongroom or reinforced filing cabinet.
- **Top secret** documents must be stored in a strongroom, safe or walk-in safe.

296 It appears as if the documents that were confiscated formed part of a larger informal filing system kept by the Director-General's Office. This opinion is based on the following:

- a. In some instances documents were contained in labelled white folders. The contents of the folders corresponded with the labels.
- b. Barnard instructed in writing that a file be opened for a specific topic.
- c. The documents all emanated from a period during 1998 indicating a systematic ordering of documents according to date.

297 In evidence Barnard refuted the opinion that an informal filing system existed in his Office. The documents inspected and the labelled white folders that were found, however, suggests that documents were stored outside the approved filing system of his office, if not by himself then by personnel of his office. No other documents or files were found that could have formed part of such an informal filing system. The Commission is of the opinion that the rest of the documents and files may have been destroyed.

- 298 The keeping of informal filing systems appears to be a common practice in the PAWC. Elaborate informal filing systems were observed in the Offices of Oliver and the Chief-Director Human Resource Management. Whilst informal filing systems are helpful in ensuring quick access to information, original documents should always be filed on official files. Classified documents should further be stored as directed by MISS.
- 299 The establishment and maintenance of an effective filing system for the department in consultation with National Archives is, in the case of the PAWC, the responsibility of the Head of Corporate Services. Each manager in the Department further has the responsibility to ensure that documents are correctly filed on the prescribed filing systems.
- 300 The vast majority of documents contained in the four boxes of Oliver are official documents which should not be in the possession of persons who are not employed by the Public Service. The provisions of section 5(2) of the Protection of Information Act, 1982 and the MISS document again apply. Amongst other, the following classified documents were found in the boxes:
- Confidential note by Joshua on his visit to Deon Mostert: 11 December 1999.
 - Confidential letter to Dr. SW Sigxashe, DG of NIA, regarding the appointment of the NIA Provincial Co-ordinator – 4 November 1999.
 - “Brief for Premier Morkel: Situation: Communications in the Office of the Premier” – marked Highly Confidential – 25 October 2000.

- "Security Review Western Cape", NICOC, Western Cape, Serial Number Sec Rev 16-52-99 – marked confidential.
 - "Intelligence Briefing Premier, Western Cape 21 August 1998" – marked confidential.
 - "Draft plan for the 1998/99 festive season: Stamp out Crime Campaign" – marked confidential.
 - "Intelligence Briefing, Provincial Security Appraisal, Key security concerns Western Cape, 18 August 1999" – marked confidential.
- 301 A file containing a number of original receipts for, amongst others, computer equipment, maintenance of electronic equipment, printing and overseas travel was found amongst the documents of Oliver. These receipts should have been filed in appropriate files of the finance and procurement sections to be available for auditing purposes.
- 302 Files kept by the risk management component of the PAWC were inspected to obtain information on the activities of the security contract workers, the purchase and use of the WatchDog equipment and liaison between the PAWC and the NIA. No relevant documents were found. It should, however, be pointed out that the majority of files only contained documents up to 1997/98 whilst in others there were a gap from 1997/98 to 2002 with no documents filed for this period. Significantly, only one document was found on the file that deals with the destruction of classified documents (K9/1/4).
- 303 In terms of section 13(2)(a) of the National Archives Act, 1996, no public record under the control of a governmental body shall be destroyed,

erased or otherwise disposed of without the written authorization of the National Archivist. Even where informal filing systems are kept, the destruction of classified documents must be properly authorized. In terms of the MISS document, adopted by Cabinet in 1996, an officer who destroys classified documents must give a certificate of destruction to the head of the institution or his delegate.

- 304 Four boxes containing official documents belonging to Beneke were found in a messenger's office. Once again a number of documents of a confidential nature were found in these boxes. These included the Agenda and Minutes of various Cabinet meetings as well as Cabinet Memoranda. The relevant documents should have been stored in terms of prescribed procedures.

FINDINGS

- 305 It is the opinion of the Commission that the manner in which filing is handled by the PAWC in general and by the Office of the Director-General in particular does not promote good governance.
- 306 The multitude of files and documents that were inspected points to serious deficiencies in the management of documentation by the Provincial Administration: Western Cape. The following should specifically be noted:
- Documents on official files are not numbered and the majority of files do not have a register of documents contained therein. This makes control over the removal of documents from files virtually impossible. The numbering of pages in files is advocated by Chapter 4.75 of the Registry Guide on Correspondence and Registry Procedures of the National Archives.

- Documents are not filed chronologically. The personal files of officials that were inspected were specifically in disarray. Documents dealing with different periods of the careers of officials are filed in no logical order.
- Documents that should have been filed on the personal files of officials, such as personnel evaluation/merit assessment documents, are in many cases not contained therein.
- The large quantity of original documents that were found in the boxes of Oliver, Barnard and Beneke suggests that informal filing systems are preferred to the approved filing system of the Office.
- The filing system of the Provincial Administration is confusing as duplicate filing ranges exist at different departments. This further hampered the investigation as documents could not be traced according to the file references on them.

RECOMMENDATIONS

307 The quality of filing and filing systems inspected were poor. This appears to be a systemic problem in the PAWC. The Director-General as head of department is responsible for the effective management and administration of the department in terms of section 7(3)(b) of the Public Service Act, 1994. The ultimate responsibility in terms of adequate record keeping practices therefore also rests with him/her. Chapter 3.1 of the Minimum Information Security Standards Documents places overall responsibility to maintain information security on heads of department. In terms of this document, it is necessary to prepare a clearly formulated

policy signed by the head of the institution with regard to security in order to maintain information security and to ensure physical security. This security function may be delegated in writing.

- 308 The National Archivist should audit the filing systems of the PAWC and recommend good practice for adoption by the PAWC.
- 309 The PAWC should follow the guidelines contained in the Registry Guide on Correspondence and Registry Procedures of the National Archives. The numbering of pages in files is of utmost importance to ensure that documents are not illegally removed or tampered with.
- 310 The tendency to keep informal filing systems should not be discouraged as such filing systems serve as easy points of reference. However, only copies of documents should be filed on such filing systems and not originals. All original documents should be filed on the appropriate official files. Failure to do so will result in an erosion of the PAWC's corporate memory and its ability to comply with the provisions of the Access to Information Act.
- 311 The PAWC should in liaison with the National Archives, revise its filing system to avoid duplication of file numbers between components.
- 312 Confidential documents should be handled in terms of the Minimum Information Security Standards Document adopted by Cabinet. Transgressions in this regard should be dealt with through disciplinary proceedings.
- 313 All documents found by the Commission should be sorted and appropriately filed in the applicable registries.

PART C

OTHER PUBLIC ADMINISTRATION IRREGULARITIES

BACKGROUND

314 In dealing with personnel administrative issues the Commission had two areas of focus, namely the full-time staff in the Office of the Director-General and the persons appointed on contract to deal with information security. The appointment of persons on contract was discussed in full in the section dealing with what issue. The personal files of the following officials, appointed on a full time basis, were inspected:

- Ms R van Aardt
- Pruis
- Beneke, Director.
- Eder, Director.
- Oliver, former Deputy Director-General.
- Barnard, former Director-General.

INSPECTION OF PERSONAL FILES OF FULL-TIME STAFF

315 The following areas of concern were found through an inspection of the personal files of the full-time employees in the Office of the Director-General:

- a. Pruis was awarded the second notch of salary range 9 with effect from 1 July 2000. The personnel evaluation questionnaire as well as the findings of the moderating committee are not on her personal file.
- b. Amongst Oliver's documents a copy of a report that dealt with a merit award and out of turn assessment for Beneke was found.

This copy did not have Beneke or the Chairperson of the moderating committee's signatures on it but was already signed by the Director-General on 5 April 2001. The relevant report was rewritten but marks allocated remained exactly the same. The report was eventually signed by the Chairperson of the moderating committee on 26 June 2001 and by the Director-General on 28 June 2001. It is, however, clear that the Director-General had already concurred with the assessment of Beneke even before the matter was taken to the moderating committee.

- c. After applying for the advertised post of Director in the Office of the Director-General, Beneke was found to be the most suitable candidate and was promoted with effect from 1 November 2001. Beneke was appointed despite the fact that his appointment had a negative effect on the achievement of employment equity in the Office. At the time of his appointment, white males filled 37,1% of posts at managerial level in the Office whilst the demographic target was 10,3%.
- d. With effect from 1 April 1999, Eder was promoted to the second leg of Deputy-Director. No personnel evaluation questionnaire or other supporting documents in terms of Eder's promotion were filed on his personal file.
- e. Eder was appointed as Director: Human Rights Programmes with effect from 1 November 2001 (the same date that Beneke was promoted). As in the case of Beneke, his appointment as a white male had a negative effect on the achievement of employment equity in the Office. The job contents of the post that he was

appointed in differ substantially from his previous position in the Office of the Director-General.

- f. On 20 April 2001, Oliver was awarded a cash bonus based on the salary of a Deputy Director-General (DDG). The cash bonus of a member of the Senior Management Service should be calculated on the salary that applied to that member during the period for which his/her performance was evaluated. At the time that the cash bonus was recommended (12 March 2001), Oliver was only a DDG for three months and therefore the cash bonus should have been calculated on his salary as a Chief-Director.
- g. Barnard declared his intention to sign a performance contract by 30 April 1999 on 15 February 1999. This was necessary to qualify for an adjustment to his salary with effect from 1 July 1998. However, the only signed performance agreement on his file is dated 30 December 1999 for the period 1 January 2000 to March 2001. If no performance agreement was signed by 30 April 1999 then the salary adjustment that was awarded to Barnard with effect from 1 July 1998 would have been *ultra vires*.
- h. Barnard received a higher notch on 1 February 2001 in terms of Section 37(2)(c) of the Public Service Act. The following should be noted in this regard:
- Cabinet did not approve the awarding of this salary notch. This appears to be contrary to the practice that prevailed regarding the application of Section 37(2)(c) to heads of department in the province. The awarding of a cash bonus to the four Superintendents-General in the Province in terms of Section

37(2)(c) was, for example, approved by Cabinet on 21 July 1999.

- The only relevant document on Barnard's file is a memorandum to the Premier in which it is proposed that the matter be considered by a Panel consisting of Markovitz and Bester under the Chairpersonship of the Premier. The matter was discussed with Sutcliffe who indicated that he recalls presenting the case to the relevant panel and that the panel approved the granting of the higher notch as well as a substantial cash amount.
- In the first paragraph of the memorandum to Premier Morkel it is stated that Barnard is in a relatively weaker salary position than two heads of department in the Province. This appears to have been the major motivating factor in applying section 37(2)(c) to Barnard. The contents of a memorandum prepared by the Chief-Director: Human Resource Management regarding options available to facilitate the awarding of higher salary notches to persons on salary level 16, reinforces the perception that the whole process to apply section 37(2)(c) was initiated by the fact that Barnard was in a weaker salary position than the two heads of department. This is against the spirit and intention of section 37(2)(c).
- The draft letter that was prepared for Premier Morkel's signature was obtained from the Personnel Component. In terms of the letter the panel approved that Barnard be awarded a package of R681 909 per annum and a cash amount equal to R40 000. No information could be obtained on how this cash amount was

calculated. A copy of the signed letter and the minutes of the panel meeting could not be obtained.

Findings

- 316 A thorough analysis of personnel administration in the Office of the Director-General was hampered by the poor quality of filing on the personal files of the relevant officials. Documents are not filed chronologically and, as indicated, some documents have not been filed at all.
- 317 The irregularities discussed points towards a lack of professionalism in dealing with personnel administrative matters. The simultaneous promotion of two white male officials notwithstanding the state of representativeness in the PAWC further illustrates a lack of commitment to the transformation objectives of Government.
- 318 The accountability of the system applied by the Provincial Administration to evaluate the performance of heads of department is questioned. Cash awards are granted on the basis of an assessment certificate completed by the relevant executing authority and signed by the HoD. Although the relevant policy requires that comprehensive documents verifying good performance should be recorded, it would appear as if this is not happening. The approval of Barnard's cash awards did not have any supporting documents attached.

Recommendations

- 319 The calculation of Oliver's cash bonus should be re-assessed and any overpayment should be recovered in terms of Section 38(2)(b) of the Public Service Act, 1994.
- 320 The PAWC must determine whether a performance agreement was signed by the former Director-General by 30 April 1999. If not, overpayments should be dealt with in terms of Section 38(2)(b) of the Public Service Act, 1994.
- 321 The PAWC should reassess the manner in which it strives to achieve representivity. Appointments should be reflective of the demographic targets set by the province. However, the PAWC must also take into consideration the guidance provided by the White Paper on Affirmative Action in the public service. In terms of figures as at June 2002, the Western Cape was still 16% and 14% behind achieving the 1999 national targets, set as a yardstick in the White Paper, for race and gender respectively.
- 322 The PAWC must ensure that legislative provisions, such as Section 37(2)(c) of the Public Service Act, 1994, are used as intended. Section 37(2)(c) of the Act provides a mechanism to reward persons of exceptional ability, possessing special qualifications or who have rendered meritorious service. The purpose of the section is not to provide a mechanism to adjust salaries to achieve parity with other employees as would appear to be the case with the adjustment awarded to Barnard.

- 323 Considering the relevant small size of the component and the number of problems identified, it is of real concern how effectively personnel administration is dealt with in the rest of the PAWC. It would therefore be to the benefit of the PAWC to request an appropriate institution to conduct a full evaluation of its personnel administrative procedures and practices.

OTHER PROCUREMENT RELATED IRREGULARITIES IN THE OFFICE OF THE DIRECTOR-GENERAL

- 324 Testimony heard by the Commission and the report of the forensic audit component of the PAWC, referred to a number of irregularities that raised further questions about the accountability of procurement administration by the Office of the Director-General. An analysis of the irregularities uncovered the following:
- 325 Corporate image items were procured for substantial amounts without approved requisition forms. This is contrary to paragraph 10.4.1 of the Western Cape Provincial Treasury Directives. In addition, payments were authorised without sufficient funds being available.
- 326 Corporate image goods were ordered from two suppliers without obtaining comparable quotes. This was done without Provincial Tender Board approval and was in contravention of paragraphs 4.6.3 and 5.6.2 of KST 37 of the Provincial Tender Board General Conditions and Procedures.
- 327 Provision is made in the public service (through resolution 3 of the PSCBC) to reimburse a person for the reasonable actual expenses incurred whilst away from office on official duty. In some instances an advance is provided so as not to inconvenience officials financially. However, such advances are based on the expected actual expenses of individual officials.

The following was found in respect of the use of travel and subsistence claims and advances by the Office of the Director-General:

- Travel and subsistence claims in the Office of the Director-General were in certain instances used to cater for entertainment, "bosberaads" and meetings, rather than for the intended purpose of official journeys. Advances were also not immediately settled and certain amounts were still outstanding on the date that the report of the Forensic Audit component was compiled.
- Numerous claims were submitted without original receipts or without receipts at all.
- Contrary to the prescripts regulating travel and subsistence advances, advances obtained by Beneke of the Office of the Director-General was used to purchase liquor.
- Receipts were tampered with in respect of claims against advances. A claim of 6 February 2001 had two receipts attached to it as claims for purchases made for catering purposes. The dates were removed from both receipts and it was ascertained that one of the purchases was for a bicycle combination lock and school shoes.

Recommendations

- 328 The Commission has noted that disciplinary action was taken against Beneke and that this ultimately led to the termination of his services. Disciplinary action should be considered against Eder and Kalp for authorising payments for corporate image items without confirming that funds were available and that proper procedure for authorisation had been

followed. Their actions contravened Paragraph 10.4.3 of the Western Cape Provincial Treasury Directives which states that "persons authorising the placing of orders and the payment of accounts shall satisfy themselves that a need for the stores or services exist and that the expenditure is justified and that funds are available."

- 329 The PAWC should establish control mechanisms to ensure that travel and subsistence advances and claims are used for the intended purpose and that purchasing of goods occur through the regulated procurement procedures.

- 330 The risk management strategy of the PAWC, to be implemented in terms of Chapter 3 of the Treasury Regulations, 2001, should list the inherent risks involved in procurement administration and propose a strategy to limit those risks.

PART D
JÜRGEN HARKSEN

BACKGROUND AND PUBLIC REPUTATION

- 331 Harksen, a German national, arrived in South Africa with his wife and children during November/December 1993, at a time that the criminal authorities in Germany were seeking his arrest on numerous charges of fraud and/or tax evasion. Harksen had previously been a prominent businessman in Hamburg, Germany, where he alleged that he had become entitled to great wealth through investments in Scandanavian oil fields. Harksen had persuaded a considerable number of so-called "investors" that this wealth could not be paid out for tax reasons but that investors could, by paying him monies, acquire the right to share in the expected profits when they became available, the promised return being a thirteen-fold return on the initial "investment". Prior to his departure from Germany, various dates which he had announced for the maturation of the investment had come and gone without investors receiving the expected profits, or payment of their investment. According to the German authorities, it was estimated that, in the years up to 1993, Harksen had persuaded investors to part with as much as DM150 million.
- 332 Shortly after Harksen's arrival in South Africa, he was briefly detained in terms of an international warrant of arrest, obtained at the behest of the Hamburg criminal authorities. During February 1994 the first of five extradition proceedings commenced in Cape Town, seeking his extradition to Germany to stand trial. His German creditors also followed him to Cape Town and a series of legal proceedings and provisional sequestration orders concluded in November 1995 when his estate was finally sequestrated by order of the Cape High Court as a consequence of his

- failure to meet his obligations to his German creditors. Since that date Harksen remained an unrehabilitated insolvent.
- 333 Notwithstanding the fact that his estate had been sequestrated, Harksen continued to hold himself out as a wealthy financier, and he embarked upon an extravagant and lavish lifestyle. Using front companies, he spent millions of rand developing a luxury home at Klaasenbosch, Constantia; ostentatiously drove luxury sports cars; and indulged in a lavish lifestyle. He became engaged in protracted legal contests with his Trustees, who sought to recover these monies for his creditors. A highlight of these contests was the successful and much publicised eviction of Harksen from his home in Constantia, following a High Court judgment²³⁴ (delivered on 11 July 1997), in which was found that Harksen was in fact the beneficial owner of the shares in the company owning the property. This was followed by the subsequent highly publicised sale of the property by public auction. Significant media interest, often attracting banner headlines, described events such as the discovery and seizure of millions of rands in foreign currency hidden under Harksen's bed and in his wife's underclothes, which were recovered for his creditors. A selection of these newspaper reports was admitted in evidence.
- 334 On 12 April 2000 a lengthy article appeared in the Fair Lady magazine²³⁵, entitled "***The fugitive, the wife and the flash life***". The subtitle acted as an apt preface for what followed, stating:

²³⁴ A copy of the judgment of the Cape High Court, delivered by His Lordship Mr Justice Farlam, under case number 4840/96, was received in evidence as Exhibit "Z".

²³⁵ A copy of this article was received in evidence as Exhibit "WW".

"The strange life of wanted German businessman Jürgen Harksen and his wife Jeanette plays out like a weird board game: shopping, security, more shopping, hidden assets and litigation – lots of litigation. Intrigued by the endless court battles, Maureen Barnes went in search of Jeanette – and met several people along the way who've been unfortunate enough to fall under the Harksen spell."

335 This article, which detailed the activities of Harksen since his arrival in South Africa, received attention before the Commission, as Markowitz testified that, after reading a copy of *Fair Lady* containing this article, he decided to arrange a meeting with Harksen for the purpose of soliciting a political donation/s for the DA. It can therefore be accepted that, at least in the case of Markowitz, he initiated contact with Harksen, and invited him to the Provincial Government building to discuss political donations, with full knowledge of the allegations against him.

336 During September 2000 the fourth extradition proceeding against Harksen was dismissed by a Cape Town magistrate on technical grounds. Harksen stated to the *Cape Times* that he had enough money never to have to work again, and talked openly about his alleged fortune of DM1,8 billion.²³⁶ This celebration was short-lived and the *Cape Times* of 27 September 2000 reported, under the headline ***"Harksen faces new battle"***, that the Department of Justice intended to have the decision of the Cape Town magistrate reviewed and set aside and the extradition

²³⁶CapeTimesheadlinedated7/09/2000,Exhibit"WW",p11.

proceedings were to continue.²³⁷ The Department of Justice was successful in its challenge and the extradition proceedings recommenced during the first half of 2001. By January 2002 Harksen's activities once again received banner headlines, with the *Cape Times* reporting "**How Harksen hid millions**", with the subtitle: "**allegations of foreign currency smuggling**". It was stated that: "**Harksen has brought into South Africa – and had the use of – tens of millions of rands.**"²³⁸ The latter article is relevant because the relationship between Harksen and Morkel and Markowitz extended until Harksen's final arrest during March 2002.

- 337 At the time that the terms of reference of the Commission were extended to "**investigate and report upon allegations in the media relating to the possible receipt of monies by persons from Jürgen Harksen**", the latter had been in custody since March 2002, having been arrested on charges of criminal conduct committed in South Africa, including fraud and theft. The fifth in the series of extradition proceedings finally proved successful and Harksen was extradited during October 2002 to stand trial in Germany.

²³⁷CapeTimes,27September2000,Exhibit"WW",p12.

²³⁸CapeTimes,9January2002,Exhibit"WW",p13.

THE EVIDENCE OF JÜRGEN HARKSEN

The Introductory Meeting on 28 November 2001

338 Harksen gave evidence that, out of the blue and without any prior contact between them, his secretary received a phone call from the office of the Premier during the latter part of 2000, some time after he had been discharged from the latest extradition proceedings.²³⁹ He had never previously met Morkel, the then Premier of the Western Cape Province, or Markowitz, the then Minister of Finance. Shortly thereafter, he received a letter arranging for a meeting and for the parking for his vehicle. The letter, dated 27 November 2000, on a letterhead of the DA, was subsequently admitted into evidence.²⁴⁰ This letter, addressed to Harksen's secretary, Hakime, and signed by one Sue Carpentier ("Carpentier"), confirmed an appointment between Harksen and Premier Morkel at 17h00 on 28 November 2000, and stated as follows:

"I refer to our telephone conversation of this morning and as requested advise herewith details of parking arrangements for Mr Harksen.

Parking will be available in the security underground parking at the rear of the Provincial Administration building, Wale Street, Cape Town.

Access is obtained by driving up Wale Street, turning left into Long Street, left again into Dorp Street. Continue to the end until Keerom Street, then turn left again. A boom

²³⁹Recordofproceedings,page325

²⁴⁰Record,Exhibit"X",page18and19

blocks the way and the security staff will open it on identification, then proceed sharp right into the parking garage.

There are doors to the left which lead to the lifts. The Premier's office suite, first floor, room 185.

To facilitate the parking arrangements, please could you advise me of the color and type of car – Many Thanks”

339 Harksen explained that he travelled to the office of the Provincial Administration in his 600 CL Mercedes Benz and parked alongside the motor vehicle of Morkel. He was then brought up to Markowitz's office, where Markowitz introduced himself. A friendly conversation took place between them, of some considerable duration, during the course of which refreshments were served.

Donations for the Democratic Alliance

340 During the course of the meeting on 28 November 2000, Markowitz explained that the DA had financial difficulties, being an overdraft for R2.5 million rand, and a requirement for funding for electioneering. Harksen was requested to support the DA. Harksen suggested that Markowitz created the impression that, because he had just been discharged from his extradition case, and was a free man in South Africa, he had a future in the country. To this end it would be of assistance to Harksen to have friends in the DA, which was at the time the ruling party in the Western Cape Province.

- 341 Later that afternoon he and Markowitz joined Morkel, and the question of donations was further discussed.²⁴¹ According to Harksen, Markowitz pressed him at this first meeting to indicate how much he would be prepared to donate to the DA, and Harksen indicated that he was willing to donate the sum of R250 000.00.²⁴²
- 342 Harksen testified that, subsequent to that meeting, further discussions took place between himself and Markowitz, during the course of which he was requested to double the donation to the sum of R500 000.00²⁴³, which he agreed to do. At a later stage the amount of the promised donation was increased to the rand equivalent of US\$75 000.
- 343 Harksen's evidence with regard to the amounts, the methods, and the dates and places of payment of the promised donation were often vague and contradictory and his version was altered, particularly under cross-examination. A brief overview of this evidence follows hereunder.
- 344 Harksen initially testified that during January 2001 he and Markowitz went to the Bukhara Restaurant, situated in Church Street Mall, where they had lunch and then proceeded elsewhere. That afternoon he handed over the sum of DM105 000.00 in cash to Markowitz²⁴⁴. This money had previously

²⁴¹Record,p349

²⁴²Record,p350

²⁴³Record,p351

²⁴⁴Record,p352to353

been held in cash at his home in Constantia, and was worth approximately R400 000.00. Under cross-examination, Harksen changed his version and suggested that the sum of DM105 000.00 in cash was handed over to Markowitz on 29 November 2000.²⁴⁵

345 Subsequent to the handing over of the money, he was once again contacted by Markowitz and it was pointed out to him that the sum of DM105 000.00 did not make up the R500 000.00 pledged, and he was requested to "top up" the sum. Later, and at a breakfast at Leeuwenhof (the official residence of the Premier of the Province of the Western Cape), he handed over the balance in rands, to make up the sum to R500 000.00.²⁴⁶ Harksen testified that, by this time, he was on close terms with the Morkels' and Markowitzs', being invited to Leeuwenhof on a number of occasions and offering hospitality to them at restaurants and at braai's hosted by him at his Clifton bungalow.

346 On another occasion, Markowitz asked for further assistance for the DA and it was arranged that a cheque for either R200 000.00 or R250 000.00 would be paid. This was drawn on the banking account of a trust known as The Voyager Trust and was handed over by one Karsten, either to Morkel or Markowitz.²⁴⁷ The Voyager Trust was an entity of which Karsten was trustee, and acted as a "front" for Harksen, millions of rands in foreign currency being channelled to Harksen through this trust. At a

²⁴⁵Record,p1061

²⁴⁶Record,p355

²⁴⁷Record, p357

later stage, and allegedly because Markowitz had failed to pay timeously for wine delivered to him by Advocate Johnny van der Bergh, SC of Groene Cloof Wine Estate, Darling, Harksen requested Karsten to stop the cheque so as to teach Markowitz a lesson.

347 During cross-examination, Hodes SC, put it to Harksen that this version was untrue, and that Markowitz would testify that he had in fact paid for the wine on the day that it was delivered.²⁴⁸ He handed up a cheque²⁴⁹ in the sum R7 784.00 dated 8 August 2001, and an invoice from Groene Cloof Wine Estate, reflecting the purchase of ten cases of Pinotage and ten cases of Cabernet Sauvignon.²⁵⁰ The rear of the cheque reflected that it had been banked and honoured on 8 August 2001. Notwithstanding this evidence having been put to him, Harksen persisted that the wine had not been paid for when it was delivered, and that he had therefore stopped the cheque to get a reaction from Markowitz. According to him, after the point had been made, the wine was paid for.²⁵¹ After this incident, according to Harksen, Markowitz indicated that he did not wish any such cheques to be payable to the DA directly and requested that alternative arrangements should be made.

²⁴⁸Recordp1008

²⁴⁹Exhibit, "EE1"

²⁵⁰Exhibit, "EE2"

²⁵¹Record,p1013

- 348 On some later date, and to replace the cheque, Harksen allegedly handed over approximately R285 000.00 in cash,²⁵² at a location and on a date which Harksen could no longer recall.²⁵³
- 349 A number of documents were seized by Captain Viljoen of SAPS at the business premises of Mrs Jeanette Harksen ("J Harksen"). These included two letters on the letterhead of the DA, which referred to donations to be made to the party by a company known as Global Finance SA ("Global").
- 350 A document on the DA letterhead, dated 14 December 2000, signed by Schwella, Secretary-in-Chief, DA Western Cape stated:

"To whom it may concern

This confirms that Global Finance SA has agreed to give a donation of \$75 000.00 as a political donation to the Democratic Alliance (DA). The branch account of the DA is at ABSA, Adderley Street, Cape Town. A/C No. 405226 7951 (Branch code 312109)"

- 351 A further document dated 17 January 2001, on a DA letterhead, addressed "***To whom it may concern***", stated:

"I would refer to the attached certificate relating to a donation from Global Finance SA dated 14 December 2000.

²⁵²Record,p1020

²⁵³Record,p359

In that there would appear to be some confusion in regard to the two bank accounts of the Democratic Alliance this confirms that in terms of our original request the \$75 000.00 should be paid into the account of the Voter Education Fund at ABSA, Adderley Street, Cape Town – Account number: 405 2226 7228, Branch Code: 312109”

The letter was signed by the secretary in chief for the DA, Western Cape, Schwella.²⁵⁴

352 Harksen explained that the company Global was a company of which he was the beneficial owner, registered in Monte Carlo and in the Bahamas. His explanation for the letter was that he had agreed to pay a total sum of \$75 000.00 in whatever currency. This was the maximum amount (which at the time was worth R750 000.00) which he agreed to donate, and this sum had been paid in various tranches, including the payment of DM105 000.00 (which he had referred to), and the balance in rands.²⁵⁵

353 A further contentious document was on the letterhead of one “Walter Studer” (“Studer”) which had been found by the trustees of Harksen’s insolvent estate and was handed over to the SAPS. This letter, dated 16 February 2001, was addressed to the DA, Western Cape Provincial office and simply stated as follows:

²⁵⁴Exhibit“X”,page17

²⁵⁵Record,p866

"Dear Sirs

In the name of family Harksen and others, I am very proud to send you the attached donation.

Yours faithfully

***Walter Studer*²⁵⁶**

354 Harksen confirmed that this document had been prepared at his offices in Cape Town and had been signed by a person other than Studer. According to a letter despatched by Studer to Hodes SC, dated 13 June 2002, Studer stated that he had never written, signed or even seen the letter with the letterhead dated 16 February 2001.²⁵⁷

355 Harksen testified that he was subsequently advised that the DA was looking for an amount of R4 000 000.00 per year, up to the year 2004, to finance campaigns. He was requested to help the DA by introducing friends of his, in particular businessmen who were keen to support the DA.²⁵⁸ It was to this end that various functions were held at his Clifton residence, during which Morkel and Markowitz were introduced to various members of Cape Town's German community in the hope that they would become benefactors of the party.

356 Harksen also alleged that, during late 2001, a trust had been established by Morkel, for the establishment of which he had paid. He furthermore

²⁵⁶Exhibit "X", page 22

²⁵⁷Exhibit "AA"

²⁵⁸Record, page 365

described a meeting which took place at Leinster Hall, a private club and restaurant situated behind the Mount Nelson,²⁵⁹ This was attended by himself, Morkel, Markowitz, Mr Abe Swersky (a Cape Town attorney), and two Germans, a Mr Heiner Hamann and a Mr Hülse Reutter. On this occasion Morkel sought funding as a matter of extreme urgency for the purpose of DA campaigning. According to Harksen this social meeting took place during March 2002, presumably shortly before Harksen was arrested later that month.

Funding of "Morkel Litigation"

357 During late October and early November 2001, legal proceedings took place relating to the breakaway of certain NNP members from the DA, which events were shortly thereafter followed by Morkel's resignation and the collapse of the DA government in the Western Cape. Two applications were brought to court, being G N Morkel v M van Schalkwyk and one other, under case number 9431/01 and G N Morkel and D C H De La Cruz, under case number 9585/01.

358 Morkel was represented in both matters by the firm C & A Friedlander Inc., the attorney being Mr Paul Katzeff ("Katzeff"), who had acted as Harksen's attorney for the previous eight years under an exclusive retainer. By 27 November 2001, when the matters had been finalized, the

²⁵⁹Record,p858

bill for legal costs and disbursements payable to C & A Friedlander Inc. was in the sum of R219 182.00.²⁶⁰

359 Harksen explained that Morkel asked him whether he was willing to provide support by way of financing the proceedings, or find somebody who would be willing to assist therein, and also asked him to make proposals as to suitable counsel and attorneys who might act for him. Harksen undertook to find Morkel a "legal team" and he proposed Katzeff as the attorney and Coetzee SC and M van Heerden as counsel, both of whom had previously acted for Harksen in other matters. Morkel took this advice and briefed the attorney and counsel recommended to him.

360 An original invoice for the legal fees and disbursements incurred to C & A Friedlander Inc, and dated 27 November 2001, addressed to Morkel as the client, was seized by the SAPS (together with other documents) from the business premises of J Harksen in Burg Street, Cape Town. Harksen stated that he had not only recommended the "legal team" to Morkel, but had assisted in the funding of the litigation. The invoice and subsequent statement of account handed into evidence reflected the receipt of R100 000.00 on 5 November 2001; R24 789,41 on 13 November 2001 and R48 000.00 on 30 January 2002. The balance of R46 392.59 remained unpaid at the time that Morkel and Katzeff testified before the Commission during July and August 2002.

361 Harksen initially stated that he believed that R100 000.00 came from a good friend of Morkel, a Mr Rabie ("Rabie"); that R45 000.00 was paid by

²⁶⁰Exhibit"X",p2to15andExhibit"BB"

himself to Sauerland for payment to the attorneys; a further DM10 000.00 in cash had been made available by him to Morkel;²⁶¹ and that an amount of approximately R45 000.00 to R48 000.00 was transferred by Sauerland from his account in Switzerland.

362 When required to analyse and comment upon the accounts submitted by the attorneys, Harksen recognised the sum of R100 000,00 as being the contribution from Rabie, confirmed that the amount received on 30 January 2002, in the sum of R48 000.00, had originated from Sauerland²⁶², but was unable to explain what had become of his alleged financial contributions.

363 With regard to the conduct of the litigation, the statement of fees prepared by C & A Friedlander Inc. reflects that, in addition to the legal representatives, Oliver (Deputy Director General, Provincial Administration), Markowitz, Bester and Mr P Uys attended from time to time in the chambers of Coetzee SC, at Keerom Street, Cape Town. The first lengthy consultation on 31 October 2001, lasted from 10h00 to 22h00. Harksen stated that he remained in senior counsel's chambers during the drafting of the papers, even though he had no real or direct interest in the proceedings.²⁶³ In giving evidence, Bester confirmed that Harksen had been in counsel's chambers from time to time, and Oliver, in his evidence, indicated that he had similarly observed Harksen's presence

²⁶¹ Record,p370

²⁶²Record,p921

²⁶³Record,p371

in counsel's chambers during the giving of instructions and drafting of papers. He expressed concern that this had been allowed to happen. Harksen suggested that Bester was aware of his funding the litigation. During cross-examination by Hodes SC, however, he conceded that Bester did not make any comment regarding the funding, but similarly did not object to his presence. He had, so he then alleged, drawn the conclusion that Bester must have been aware that he was funding or participating in the funding of this litigation. Such a conclusion was vehemently denied by Bester when he gave evidence.

364 According to Harksen, however, and notwithstanding that he allegedly used Sauerland as a "go between", it was quite clear to Morkel, that he was paying the fees, albeit through third parties.²⁶⁴

Rental for Morkel's Accommodation at Higgovale

365 365 Subsequent to his resignation as Premier on 11 November 2001, Morkel was required to vacate Leeuwenhof and needed suitable accommodation pending the completion of his house in Westlake.

366 An original of a pro forma invoice, dated 28 November 2001, on a Seeff Residential Properties ("Seeff") letterhead, was seized by the SAPS from J Harksen's business premises. This reflected the proposed terms for the lease of furnished accommodation for a six month period from December 2001 to May 2002 at a monthly rental of R8 000.00 for the initial period,

²⁶⁴Record,p945

increasing to R8 500.00 for any extension. The total amount of the invoice was R60 570.00, which included a refundable deposit of R12 000.00, six months rental payable in advance, and various sundries. Harksen explained that he came into possession of this document after it had been delivered to his wife's business premises by Mr George van Dieman ("Van Dieman"), the private secretary of Morkel.

367 Harksen testified that he had contributed towards the rental by paying the sum of approximately R45 000.00, into the trust account of Seeff, the balance being paid by Sauerland.²⁶⁵ During cross-examination by Hodes SC, he was confronted with a Seeff receipt, dated 10 December 2001²⁶⁶, reflecting the payment of the rental and deposit by Van Dieman in the sum of R55 655,00. Harksen was unable to provide an explanation for the document which suggested that neither he nor Sauerland had made a contribution towards the rental, but he persisted in stating that he had paid money into that account. He thereafter altered his version and stated that he had paid the R45 000,00 contribution directly to Morkel, in cash, and not into the trust account of Seeff.²⁶⁷ He also persisted in stating that Sauerland had made a contribution to the rental and made reference to a letter which had been drafted and sent to Sauerland and himself by Morkel's chartered accountant, Sindler, requesting a contribution towards rental in the sum of approximately R92 000,00 or R94 000,00. His cross-examination continued as follows:

²⁶⁵Record,p966to967

²⁶⁶Exhibit"DD13"

²⁶⁷Record,p977

"Mr Hodes: So you paid the R45 000?"

Mr Harksen: Yes, but this letter, Mr Hodes, was approximately. We got a letter later, drafted or sent by Mr Morkel's chartered accountant, I've forgotten his name now, and he wrote a letter to us where he asked for R92 000.00 or R94 000.00. I am sure we can find this letter and this is the letter I'm referring to.

Mr Hodes: I see. Not – by his chartered accountant, is that Mr Sindler?

Mr Harksen: Sindler, exactly yes.

Mr Hodes: And he asked for R94 000.

Mr Harksen: Ja, 90 – in the 90s' ja.²⁶⁸

368 No concession was made by Hodes SC, on behalf of Morkel (who was present at the enquiry) relating to the request of Sauerland for R92 000.00 or R94 000.00, and Hodes SC's cross-examination continued:

"Mr Hodes: What happened to your 45 000 and what happened Mr Sauerland's extra money? Because as I understand from you, it was in the 90's, so if you gave 45 000 Mr Sauerland would have given 45 and more.

Mr Harksen: Exactly.

Mr Hodes: I wonder what happened to all that?

Mr Harksen: Well we will find out.

²⁶⁸Record,evidenceofMrHarksen,page968

Mr Hodes: I see.....

Mr Harksen: Well I don't know that time Mr Sauerland paid. I only know that we got a letter from the chartered accountant from Mr Morkel, you have mentioned the name, and on this letter was a figure mentioned I think around R90 000, 94 or whatever and this comes, and this the reason why I mention I paid half this and Mr Sauerland paid the other half.

Mr Hodes: When did that happen? That letter by Mr Sindler?

Mr Harksen: That was ...could be January, February, it could be – we celebrate Mrs Morkel;s birthday at Mr Sauerland's house, we also discuss it there – I cannot really remember.

Mr Hodes: But wasn't it before he moved into the house that the rental was paid?

Mr Harksen: No, he was already moved in. He was already moved into the house, Mr Hodes.

Mr Hodes: But as a matter of fact you will see that Mr Van Diemann paid R55 655 on the 10th of December, you see that?...

Mr Hodes: No, well nobody's suggesting that Mr ... Why would you pay another R94 000? Why would there be R94 000 paid?

Mr Harksen: Well I'm convinced that the answer is the letter of the chartered accountant of Mr Morkel. He requested 92 whatever the money involved and I'm

convinced that we can subpoena this gentleman and he will give evidence exactly why he asked for this money.

Mr Hodes: Who, Mr Sindler?

Mr Harksen: Yes.

Mr Hodes: So you think it's a good idea that Mr Sindler should give evidence?

Mr Harksen: Yes, I think this is a very good idea.

Mr Hodes: Thanks for the suggestion.

Mr Harksen: My pleasure.²⁶⁹

369 It is significant that the evidence of Harksen, at least in respect of the letter from Sindler; the fact that it was discussed at the house of Sauerland during February 2002; and that the letter was sent out by Sindler during February 2002, is all correct and substantiated by both witnesses and documentation, the authenticity of which is not questioned. Similarly, it is further correct that Sauerland did pay the sum of approximately R45 000.00 during February/March 2002 in respect of Morkel's rental. The only issue which remained in dispute was whether Harksen, in addition, himself paid the sum of R45 000.00 in cash to Morkel. It is also correct that, notwithstanding the fact that the amount had been paid in December 2001, Morkel continued attempting to obtain assistance from Sauerland (and perhaps others) as late as February 2002.

²⁶⁹Record,evidenceofMrHarksen,p976 -977

The Occupation by Markowitz of the Bungalow at Clifton and the Sports Cafe

370 Harksen testified that Markowitz had, during the months of August to October 2001, sub-let his Clifton bungalow whilst building alterations were taking place to the Markowitz home. Harksen explained that the main lease was held in the name of his wife Jeanette, and that Markowitz agreed to sub-let the bungalow at a rental of R20 000,00 per month, and undertook to pay various sundry extras. According to Harksen, Markowitz failed to pay any rental whatsoever²⁷⁰, but did pay the sundry extras after being requested to do so.

371 During cross-examination, a letter dated 26 July 2001, addressed to J Harksen by Markowitz was admitted in evidence²⁷¹ and, which stated that:

“Dear Mrs Harksen

Thank you for agreeing to sub-let the Bungalow during the period of alterations of our home.

I thought it appropriate that I should record the broad arrangements that we arrived at-

- 1. The period of the sub-let would be from the 23 July 2001 for approximately three (3) months:***
- 2. The monthly rental shall be R20 000.00 per month;***
- 3. I will be responsible for electricity consumed and telephone charges;***

²⁷⁰Record,p870 -871

²⁷¹Exhibit“Y”andRecordp869 -870

4. I will be responsible for any damage caused (taking into consideration that the property and contents is fully insured);

5. You have advised the owner and he has consented to the sub-let.

I thank you for your co-operation and assistance that you have given to my wife in arranging this transaction.

372 It was further put to Harksen by Hodes SC, during cross-examination, that Markowitz would testify that he, at the request of Harksen, made a single payment to Harksen of R60 000,00 in cash at or about the time of the commencement of the lease. This represented the full amount of the rental. Markowitz subsequently repeated these allegations in his testimony. Harksen, however, persisted in his denial that any amount of rental had been received.

Other Allegations of Benefits Received by Morkel and Markowitz

373 Harksen made various further allegations relating to benefits received from him by Morkel, Markowitz and/or the DA. These can be dealt with briefly as follows:

- a. Harksen testified that Markowitz was to travel to the USA during approximately April 2001 on an official visit undertaken with Morkel and a delegation of officials from the Western Cape Province. According to him, Markowitz enquired whether he was able to help him with US dollars for his personal use during the trip, and Harksen lent him US\$20 000,00 in cash. At the same time he

commissioned Markowitz to purchase a designer suit for him in the USA using a part of the money. He alleged that the loan was never repaid, nor was the suit acquired.²⁷² Markowitz, in his evidence, denied that he had received any such money from Harksen and, dismissed the entire incident as a fabrication.

- b. Harksen testified that he had handed over a sum in US dollars to Kent Morkel to pay for the cost of party activities. This allegation was likewise disputed by Kent Morkel, who testified that the sum of US\$2 500,00 had been received from Sauerland during late 2001 and used to defray the costs of a DA congress in Stellenbosch. When he testified in his turn, Sauerland confirmed that these were his funds and that he, and not Harksen, had provided the financial support for this occasion.
- c. Harksen further testified that he had, on a number of occasions, and at his own cost acted as host to Morkel and Markowitz for meals and refreshments; that he had arranged two braais at his cost at the Clifton bungalow, attended by a group of Germans and other potential benefactors of the DA, as also by Morkel (and one occasion Markowitz), to afford these two fund-raisers the opportunity of soliciting for donations; and that he had paid for a fund-raising lunch at Constantia Uitsig on 4 December 2001, once again attended by Morkel and potential donors, and at which the party leader, Leon, made a brief appearance. In his evidence Morkel conceded that this was the case, and estimated that he had

²⁷² Recordp378

enjoyed Harksen's hospitality at restaurants on perhaps eighteen occasions, of which he had personally paid the bill for only one or two, the balance being settled by Harksen.²⁷³ Neither Morkel nor Markowitz disputed having being the recipients of Harksen's hospitality. One of the last such occasions attended by Morkel was on 9 February 2002 at Maximillian's Restaurant, where a whole page of the visitors' book was taken up with comments by, *inter alia*, Morkel and the Harksen couple. Morkel chose to record:

"A wonderful evening in a superb 'eating house' among lovely friends. I will be back again."²⁷⁴

Morkel admitted that on this occasion Harksen similarly settled the bill.

EVALUATION OF HARKSEN'S EVIDENCE

374 The Commission finds Harksen to have been an evasive and most unsatisfactory witness. The quality of his evidence was such that, save where same finds corroboration in the evidence of other witnesses, or is supported by other objective evidence, it cannot be relied upon.

²⁷³ Recordp2141

²⁷⁴ Exhibit "QQ"

- 375 It is quite apparent that, by reason of the fact that Harksen became so close to Morkel and Markowitz, he also became aware of much confidential information relating to the affairs of Morkel, Markowitz and the DA, including the extent of the DA overdraft and its financial needs for the following four years; the nature of the litigation in which Morkel became involved; the cost of such litigation; the choice of a residence in Higgovale for Morkel after his departure from Leeuwenhof, and the costs associated therewith; the rental of the bungalow in Clifton to Markowitz; the establishment of the Western Cape Democracy Development Trust ("WCDDT"); and the association between Morkel and Sauerland. For this reason, it was easy for Harksen to refer to events which actually took place, expenses which were in fact incurred, and donations made by third parties. It was accordingly possible for him to lend credence to claims of having made certain payments.
- 376 There is no dispute that Markowitz initiated contact with Harksen for the purpose of soliciting donations for his party. Furthermore, from the 28 November 2000 until the time of his arrest during March 2002, Harksen remained in regular contact with both Morkel and Markowitz, and became a confidant, especially of the former. The three enjoyed numerous luncheons and other occasions, at expensive restaurants and other locations, paid for by Harksen.
- 377 Harksen's evidence relating to the donations to the DA, in the sum of US \$75 000.00 and/or DM 105 000.00 was vague and inconsistent when it came to the precise amounts which were paid, the dates and places of such payments, or whether the monies were handed to Morkel or Markowitz. He persisted, however, in maintaining that he had handed over the sum of DM 105 000.00 to Markowitz, and that the total sum of

his donations to the DA was R750 000.00. The only fact which can be objectively established is that some person donated the sum of DM99 000,00 in cash to the DA during 2001, and handed same to Markowitz. Morkel and Markowitz gave evidence in which they sought to explain how they came to receive this money, and to show that the donor was neither Harksen nor one of his associates. Their evidence, and the inherent probabilities relating thereto, are analysed under separate heads below. Suffice to state that the Commission places no reliance upon Harksen's evidence with regard to the date, place, amount or manner in which any monies were paid.

- 378 The evidence of Karsten was that Harksen requested him to make out a cheque in the sum of R500 000.00 dated 16 February 2001, in favour of the DA, drawn on the account of the Voyager Trust, and that no cheque for R285 000,00 (or any similar amount) had ever been drawn on that banking account or presented for payment. Karsten, however, was unaware of what had become of the cheque for R500 000,00, stating that he handed it to Harksen, but that it was never presented for payment to the trust's bankers. The bank statements and returned cheques of the trust were made available to the Commission by Harksen's Trustees. A review thereof showed that no cheque for R285 000,00 had ever been countermanded, nor had a cheque for R500 000,00 been presented for payment. Harksen's evidence with regard to these cheques is questionable. Similarly, Harksen's evidence in respect of the non-payment of wines from Groene Cloof Wine Estate, and the alleged attempt to teach Markowitz a lesson by stopping the cheque drawn on the Voyager Trust, must be rejected as false.

- 379 With regard to Harksen's claim that he contributed towards the rental for Morkel's Higgovale accommodation, the evidence of Harksen that he made a payment to the Seeff trust account is open to considerable doubt. It is significant, however, that Harksen was aware of the approximate figure paid in rental by Sauerland. Morkel alleged that, at the time that Harksen gave evidence, he was himself unaware of the payment having been effected by Sauerland. Sauerland stated that he had advised Harksen that he had made the payment. Even if Harksen did not himself make any contribution towards such rental, same was paid by a person whom Harksen had introduced to Morkel, and Harksen was clearly fully aware of the attempts by Morkel to obtain funds from Sauerland and the amount of that request.
- 380 With regard to the legal proceedings, Harksen clearly enjoyed Morkel's confidence to the extent that he made arrangements for the choice of both attorney and counsel for the purpose of the litigation. He was furthermore permitted to sit in on privileged consultations in counsel's chambers relating to that litigation.
- 381 The Commission is unable to find, as alleged by Harksen, that he in fact made any financial contribution to the legal costs. There is, however, no doubt that Harksen was actively involved in obtaining contributions from others towards the costs of that litigation. An original of the account of C & A Friedlander was delivered to Harksen on the instruction of Katzeff, on the very day that it was drawn up, so that Harksen could facilitate payment of the bill by Morkel and/or Sauerland.²⁷⁵ Katzeff testified that

²⁷⁵ Recordp2271

there was no doubt in his mind that Harksen was assisting in the coordination of the raising of monies to pay Morkel's legal fees, that he put pressure on Harksen to ensure that the bill was paid, and that Harksen phoned Sauerland, in his presence, on a number of occasions, asking when he would honour his undertaking to make a contribution towards the legal costs.²⁷⁶

382 Harksen suggested, during evidence, that Bester and Leon of the DA were aware of the fact that he was contributing financially to the costs of that litigation. During the course of cross-examination he conceded that he was unable to state that Leon could have been under the impression that he had made any financial contribution to the litigation. The Commission finds that Harksen's mention of Leon was opportunistic and intended to evoke sensation. At the very least, as an attorney, Bester should have registered some surprise at Harksen's appearance at the consultations. There is no evidence that Leon believed or suspected that Harksen was funding the litigation.

383 The association between Morkel, Markowitz and Harksen appears to be one in which Harksen sought to be seen with prominent persons and hoped to obtain benefit therefrom. These associations with the Premier and Minister of Finance of the Province no doubt gave him credibility in Cape Town society and served to gainsay the fact that he was a fugitive from justice. On the other hand, Morkel and Markowitz were attracted to Harksen because of his apparent wealth and connections. This association was inappropriate given Harksen's background. It, *inter alia*,

²⁷⁶Recordp2270andp2294

afforded him the opportunity to use this information which he had gleaned from this association to serve his own ends.

EVIDENCE OF GERALD MORKEL :- HIS ASSOCIATION WITH JÜRGEN HARKSEN

Background

384 Morkel testified that he entered politics during 1984, when he became a member of the House of Representatives in the Tricameral Parliament. His political career reached its zenith during 1998 when he was appointed Premier of the Western Cape Province, a position he held until his resignation on 11 November 2001. During October 1998 he invited Markowitz to join his Cabinet as Minister of Finance, and he stated with some pride that he and Markowitz were regarded as a highly effective and successful team of fundraisers within the ranks of the DA.²⁷⁷ In Morkel's own words: "***we were the top team when it came to fundraising for the NNP and for the DA in this province.***"

Initial Meeting with Jürgen Harksen & the Promises of a Donation

385 Morkel was questioned at the Commission with regard to the extent of his knowledge of the public persona and reputation of Harksen prior to his meeting with him on 28 November 2000. He was initially reluctant to admit that he was so informed, but was obliged to concede that, prior to

²⁷⁷Record: p1821(14)

that first meeting, he had read of Harksen's exploits from time to time in the media.²⁷⁸ He elaborated that he read the headlines but did not read the newspapers in detail, seeking to justify limited knowledge by explaining that he did not pay detailed attention to media reports because, as he put it, "**.. a lot of the time it's such bladdy nonsense that I don't bother to read it anyhow.**"²⁷⁹ He later added that: "**... my wife reads the newspapers to me in the morning and tells me what's happening and I try to read it at night, if I've got a chance.**"²⁸⁰

386 When asked to describe his perception of Harksen prior to meeting with him for the first time, Morkel stated:

"... he had bucked the law for eight years and with all the allegations made against him the top people in the Department of Justice could still not get him out of the country, so one says to yourself, 'perhaps this guy has got some sort of story if after eight years he is still here.'"²⁸¹

²⁷⁸Record:p1909(27)

²⁷⁹Record: p1826(12)

²⁸⁰Record: p1909(8)

²⁸¹Record: p1912(27)

387 Morkel conceded that he was aware, prior to meeting Harksen, that he was sought in Germany on charges of tax evasion.²⁸² He contended that he had at that stage been unaware of the fact that he was also wanted on fraud charges.²⁸³ He added that, in any event, had he been aware that Harksen was sought in Germany on charges of fraud as well as tax evasion, he would not have known whether there was substance to such allegations until a trial had taken place,²⁸⁴ and accordingly would in that event not have refrained from contact with Harksen. Once he became aware of the true nature of the allegations against Harksen, he did not break off or limit such contact.

388 Morkel stated that he was "buzzed" by Markowitz, and informed that the latter had a visitor called Harksen who would like to meet him.²⁸⁵ Shortly thereafter, Markowitz and Harksen entered his office.²⁸⁶

389 During the course of this first meeting, Harksen repeated an offer which he had already made to Markowitz to build 100 houses in an informal

²⁸²Record: p1913(5)

²⁸³Record: p1913(18)

²⁸⁴Record: p1916(6)

²⁸⁵Record: p1917(20)

²⁸⁶Record: p1918(16)

settlement to replace homes lost in a fire shortly before.²⁸⁷ Morkel estimated the value of the 100 houses would be R1 500 000.00.²⁸⁸ Morkel declined this offer,²⁸⁹ and explained to the Commission that he had been motivated by a concern that if 100 houses were built to replace 500 houses burnt down, those not receiving houses would be dissatisfied and likely to destroy the 100 replacement homes.²⁹⁰ It should be noted that the first offer by Harksen was not to a political party or individual, but to the community. That the nature of this offer was not one of the kind anticipated by Markowitz and Morkel is also indicated by the letter of invitation having been addressed to Harksen by the DA (on a DA letterhead), and not by the provincial government.²⁹¹

390 Rather than make an alternative proposal for the manner in which Harksen's proposed donation could be utilised for the people of the Western Cape, the meeting passed on to the possibility that Harksen would make a political donation to the DA.²⁹² Markowitz informed Morkel, referring to the discussion which had already taken place with Harksen at the office of Markowitz, that "**Mr Harksen has offered to give the**

²⁸⁷Record: pp1817(28);1923(20)

²⁸⁸Record: p1925(10)

²⁸⁹Record:p1923(28)

²⁹⁰Record: p1924(9)

²⁹¹Exhibit"X"18

²⁹²Record: p1925(25)andp1926(4).

party a donation.²⁹³ This statement is inconsistent with later protestations by both Morkel and Markowitz that Harksen was never to have made a donation, (nor would they have received one from him), by reason of his insolvency, and that they would only have accepted donations from some company or other legal entity. Morkel stated that, although the amount of the donation was not mentioned at that stage, he had welcomed the offer and had responded enthusiastically thereto.²⁹⁴ He emphasised that Harksen had at that meeting stated that his estate had been sequestered in South Africa, and that the promised money would come from a source outside South Africa. No mention was made of the donation coming from anybody other than Harksen himself.

391 Morkel testified that he was subsequently advised by Markowitz that he had agreed with Harksen that the donation would be in the sum of approximately R500 000.00.²⁹⁵

392 Morkel's evidence under cross-examination as to whether a donation would have been accepted from Harksen personally, was inconsistent and evasive. He initially stated that had Harksen paid the donation to the DA, he would have been happy to accept it provided it was "**legitimate money**".²⁹⁶ When asked, under cross-examination, how he would have

²⁹³Record: p1926(10)

²⁹⁴Record: p1926(18)

²⁹⁵Record: 1927(3)

²⁹⁶record: p1927(10)

responded had Harksen arrived a day, or a week, after the first meeting bearing R500 000.00 in cash, he initially stated: "***I wouldn't have known then what to do.***"²⁹⁷ When pressed, he responded "***I wouldn't have - only when I did get the money would I know what to do.***"²⁹⁸ He later was forced to concede that he "might" have accepted the money,²⁹⁹ and then admitted that: "***Chances are that I would have accepted it.***"³⁰⁰ . When he was asked the same question in regard to a quantity of Deutsche Mark, he stated: "***... if I had the money I would've decided what to do with it.***" He then conceded that he might have accepted it.³⁰¹ Morkel later testified that, if he had received the proffered R500 000.00 after the meeting on 28 November 2000, and it had come from Harksen personally, he would have returned it to him.³⁰² He explained:

"Of course I would have to give it back. I couldn't be allowed to keep money from Mr Harksen personally"³⁰³ and "***I would be prepared to accept from Mr Harksen the fact that he would***

²⁹⁷Record: p1932(25)

²⁹⁸Record: p1932(30)

²⁹⁹Record: p1933(10).

³⁰⁰Record: p1933(12)

³⁰¹Record: p1934(3)

³⁰²Record: p1977(18)

³⁰³Record: p1977(18)

introduce us to business people that would make a donation to the DA.³⁰⁴

393 Morkel further stated that Harksen had explained to him that his sequestration in South Africa did not affect his overseas interests,³⁰⁵ and that if money had come from one of Harksen's overseas companies they would have "*checked it out*" before accepting it.³⁰⁶

394 The difficulties experienced by Morkel in explaining whether or not he would have accepted money, from whom, and from what entity, was occasioned by the knowledge that Harksen was an insolvent.

395 Morkel maintained throughout his testimony that the donation of R500 000.00 offered by Harksen was never forthcoming,³⁰⁷ and that no money (or "blue cent", as he put it) had been received by the DA or himself from Harksen. Morkel testified to himself and Harksen becoming friends³⁰⁸ and enjoying frequent telephonic and social contact.³⁰⁹ The

³⁰⁴Record: p1977(23)

³⁰⁵Record: p1977(29)

³⁰⁶Record: p1978(5)

³⁰⁷Record: P1 935(5)

³⁰⁸Record: p1935(19)

contact between himself and Harksen furthermore endured for a period of approximately sixteen months until Harksen's arrest in March 2002. When asked whether he had not at any stage mentioned to Harksen that it would be appropriate if he honoured his promises, and made the donation, he explained that, because he did not wish to interfere with the arrangement reached between Markowitz and Harksen, he never even raised the issue with Harksen.³¹⁰ Morkel stated that, from a fundraising point of view, his association with Harksen had been a failure.³¹¹ Such reticence on the part of someone who described himself as one of the most effective fundraisers, and who appears to have enjoyed a relationship with Harksen in which Harksen would not have taken umbrage at a gentle reminder, appears highly improbable and stands to be rejected.

396 Subsequent to the discussion on 28 November 2000, it appears to have been resolved that the donation which the DA was to receive from Harksen was to be paid by an offshore company known as Global. Morkel explained:

"I was informed by Mr MARKOWITZ that Mr Harksen was going to make a contribution, I think, of US \$75 000."³¹²,

³⁰⁹Record: p1935(17)

³¹⁰Recordp1936(20);1937(16)

³¹¹Recordp1939(29)

³¹²Record: p1951(10)

and added:

"I didn't know the name of the company, all I knew that it was coming from outside the country and if it was Harksen's company or not, I wasn't sure."³¹³

And further, that:

"... it would've come via a company that I assumed Harksen was connected with."³¹⁴

397 Morkel further explained that it was his perception that the US \$75 000.00 would have been a part of the total sum of the R500 000.00 that had initially been offered.³¹⁵ He stated that he first heard of the offer of US \$75 000.00 during the early part of 2001,³¹⁶ and also that it was his understanding that ***"Mr Harksen via his connections in the international community was going to get us a donation of US \$75 000,00."***³¹⁷ He protested that he did not know whether Harksen was connected with the company.³¹⁸

³¹³Record: p1951(14)

³¹⁴Record: p1951(18)

³¹⁵Record: p1951(30)

³¹⁶Record: p1953(1)

³¹⁷Record: p1954(6)

³¹⁸Record: p1954(29)

398 Once again, Morkel's evidence is open to criticism for his failure to commit himself as to whether, and from whom, he would have been prepared to receive money. This "over cautious" approach is incongruous, given the fact that Morkel continued to conduct an open and public relationship with Harksen. His evidence is furthermore evasive and contradictory. The possibility strongly exists that this sensitivity as to the source of the donation was not one held contemporaneously with the attempts to obtain the donation, but was an afterthought.

The Receipt of the Sum of DM99 000,00:

399 The uncontested evidence of Markowitz was that the DA received a donation of DM99 000.00 in Deutsche Mark banknotes. The only question to be determined is who donated that money. Markowitz's evidence regarding the DM99 000.00 will be dealt with in detail elsewhere in that part of the report which considers his evidence. Furthermore, the Commission's conclusions with regard thereto appear under a separate heading. The analysis which follows is therefore limited to a consideration of Morkel's evidence regarding the sum of DM99 000.00, and the comparison of his evidence with that of other witnesses.

400 Morkel testified that he was first informed of the receipt of DM99 000.00 by Markowitz, and that he had been so informed "***possibly between the months of July and August***" of 2001.³¹⁹ On being advised

³¹⁹Record: p1973(12)

telephonically by Markowitz that the donation had been received, and that it was in banknotes of Deutsche Mark denomination, he immediately asked Markowitz whether the donation was from Harksen, to which Markowitz replied in the negative, advising that the money had been received from an anonymous donor.³²⁰ Harksen sprang to mind because of the ongoing promises which Harksen had made, and which were as yet unfulfilled.³²¹ Markowitz requested him to have the cash collected from his office.³²² According to Morkel he did not enquire further regarding the donor, nor whether Markowitz himself was aware of his name.³²³

- 401 In accordance with Markowitz's request that the cash be collected, Morkel contacted Schwella personally and requested him to fetch the cash from Markowitz.³²⁴ He instructed Schwella to fetch the money and deliver it to Erik Marais, who was employed as a bank manager by ABSA Bank ("Absa").³²⁵ Morkel similarly contacted Erik Marais and requested him to

³²⁰Recordp1973(28)

³²¹Record1974(11)

³²²Record1973(20)

³²³Recordp1981(3)

³²⁴Record: p1987(30)

³²⁵Record: p1986(3)

receive the money from Schwella and deposit it into the DA banking account, which was held at ABSA.³²⁶

402 Both Morkel and Erik Marais testified that Erik Marais was requested by Morkel to deal with the money with which he was being entrusted "confidentially and personally".³²⁷ Morkel testified that he gave no further instructions as to how the money was to be dealt with and Erik Marais stated that Morkel furnished him with no explanation for this request, nor was the manner in which the funds were to be dealt with "confidentially and personally" disclosed. He accordingly did what he considered was appropriate in the circumstances, having apparently formed the impression from his conversation with Morkel that the money should be deposited into the banking account of the DA in such a way that it did not attract any undue attention, in particular with regard to a "lump sum" or the fact that foreign currency was involved.

403 The method adopted by Erik Marais for dealing with the cash was not to convert the money into rands using the "Form E" required of foreign exchange transactions. Instead, he made periodic payments of small amounts into the banking account of the DA over a number of months; retained the money at home rather than at his office; initially exchanged a quantity of Deutsche Mark into rands using his personal passport in South Africa; and partly by taking the cash with him overseas on vacation

³²⁶Record: p1986(7)

³²⁷ Record1989

and exchanging it into rands in the Netherlands and Portugal, thereafter returning the rands to South Africa. He furthermore disguised the deposits into the banking account of the DA by requesting personnel at his branch to fill in deposit slips, onto which markings representing fabricated signatures were placed, and describing each deposit as a "donation", without indicating the name of the depositor on the slip. As a result, the banking account reflected a number of smaller anonymous donations over a period of months.

404 Erik Marais sought to explain his conduct by stating that he had no experience in exchanging foreign currency, and had not intended to do anything unlawful or irregular. This explanation cannot, in the light of the carefully planned *modus operandi*, be accepted as true.

405 Morkel was questioned as to the reason for his not having dealt with the donation in the same manner as any other donation would have been dealt with within the party structure. His initial response was that the normal procedure, which would not have involved Erik Marais, was not followed:

"because it was the first time that we'd received a donation in foreign currency in cash".³²⁸

406 He later elaborated that the matter was sensitive because it was money donated to a political party where the donor wished to remain

³²⁸Record: p1986(19)

anonymous.³²⁹ He had conveyed the sensitivity to Erik Marais.³³⁰ This explanation was undermined by Morkel conceding that an anonymous donation made in cash banknotes with a rand denomination would have been processed through the normal channels and Erik Marais would not have been requested to deposit it.³³¹ Accordingly, the sole factor warranting this donation being treated any differently from any other became the fact that it was in foreign currency.

407 Morkel was unable to provide any satisfactory or logical explanation, in the light of the foregoing, as to why it was necessary for the cash to be handled with such circumspection rather than in an open manner. When confronted with the procedure adopted by Erik Marais in dealing with the cash received, he was unable to offer any explanation for the unusual and complicated process.³³² He was adamant that he had not given Erik Marais an instruction to deal with the money in the manner that he did.³³³ Subsequent to the conduct of Erik Marais reaching the attention of his employer, ABSA, his employment was terminated. Once the donation of DM99 000.00 was revealed, the identity of the donor, - and in particular whether same was Harksen – became an issue between the DA and the

³²⁹Record: 1989(25)

³³⁰Record: p1989(20)

³³¹Record: p1991(3)

³³²Record: p1993(27)

³³³Record: p1993(30)

trustees of Harksen's insolvent estate, who wished to establish whether the money was not recoverable for the benefit of his creditors.

408 After the printed media had first become aware of, and reported on, the donation of DM99 000.00, Morkel questioned Markowitz closely about the circumstances of the donation and the identity of the donor prior to making the press release which appeared on 12 April 2002.³³⁴ Markowitz informed him that the donor was anonymous, but that he was a German male and might have been present at the fundraising occasion held at Harksen's Clifton bungalow. In the press release, he stated that:

"This DM99 000 was received from a well known local financier at a fundraising event held at Harksen's home. Because of this gentleman's business dealings with Government he has asked to remain anonymous since he fears a backlash from the ANC."

409 The reference to a "well-known local financier" cannot be reconciled with the evidence that neither Morkel or Markowitz knew anything about the donor other than that his name was "Hans" and that he was alleged to be a businessman.

410 Morkel and Markowitz were both called to give evidence before an enquiry convened by the Master of the High Court in terms of section 152 of the Insolvency Act. Morkel testified that he had never been informed by

³³⁴Record: p1981(14)&(22)

Markowitz, prior to that enquiry, (which commenced before Morkel gave evidence before the Commission) that the donor was called "Hans". According to him, it was the trustees who first informed him that it was alleged that the name of the person from whom the money emanated was called "Hans", but whose further particulars were unknown.

The "Morkel Litigation"

411 The circumstances relating to this litigation have been dealt with in some detail when considering the evidence of Harksen, and will not be repeated.

412 Morkel did not dispute that Harksen arranged his legal team and made promises to assist in arranging funding. Morkel, however, denied that Harksen made any financial contribution towards the cost of that litigation and confirmed that same had been funded by way of R100 000.00 from Rabie; DM6 000.00 (valued at R24 789,41) in cash from Sauerland; and R48 000.00 representing a contribution which Sauerland caused to be transferred to the trust account of C & A Friedlander Inc. He conceded that, at the time of his giving evidence, the sum of R46 392/59 remained outstanding and due to his attorneys in respect of the litigation.

Rental for Morkel's Accommodation at Higgovale

413 Morkel resigned as Premier on 11 November 2001 and was accordingly required to vacate the official residence of the Premier at Leeuwenhof. Morkel testified that he was in the process of building a home in Westlake, which was not completed, and that he needed suitable alternative

accommodation in the interim. This hiatus was no doubt also occasioned by the fact that the need for his resignation had been somewhat unexpected, due to the political turn of events in the Province. Morkel asked Harksen, amongst other people, to look out for suitable furnished accommodation³³⁵ and in due course Morkel concluded a short-term lease for a property situated in the upmarket Cape Town suburb of Higgovale. The monthly rental for the property was R6 000,00 per month and Morkel set about seeking contributions from private individuals towards this rental.

- 414 The lease of the premises in Higgovale became an issue once an original of a pro forma invoice³³⁶, provided by Seeff (the letting agent) and dated 28 November 2001 was discovered in J Harksen's business premises (where Harksen also kept an office) by Captain Viljoen of the South African Police Services. Morkel explained this circumstance by stating that he had requested his private secretary, Van Dieman, to have it delivered to Harksen, but did not give an instruction as to how this was to be done. Van Dieman stated that he hand delivered the invoice to J Harksen's premises in Burg Street, taking it himself as he had never had the opportunity of meeting Harksen "face to face" and that he considered that it would be an honour to shake Harksen's hand. His description reveals the high regard in which Harksen was held by Morkel's staff:

"Commissioner: Why did you want to meet Mr Harksen?"

³³⁵ Recordp1885(22)

³³⁶ Exhibit "X", p16

Mr van Dieman: Because he is a very important person, he was a very, very important person at that time, to meet Mr Harksen was an honour, man.

Commissioner: Why would you have considered it an honour?

Mr van Dieman: Because I mean, everything was, they said I must get this to Mr Harksen, Mr Morkel had discussions with Mr Harksen and ...

... Commissioner: I am coming to the question of honour, why would it have been an honour?

... Mr Van Dieman: No, no, for myself I haven't met Mr Harksen where I can now really say, here is my hand, Mr Harksen.

... Mr van Dieman: I wanted to shake his hand and say, this is George."³³⁷

415 To Van Dieman's disappointment, Harksen was not there and he was obliged to simply deliver the document.

416 Morkel testified that the reason for the Seeff invoice being in the possession of Harksen was that Harksen had alleged that he knew the owner and Seeff and would be able to arrange a discount for Morkel.³³⁸ He added that, despite numerous telephone calls to Harksen, the matter

³³⁷ Recordp3184

³³⁸ Recordp1885

was not finalised and Van Dieman then volunteered that he would pay the rent to Seeff and that Morkel could repay him in due course. Morkel added that he did have money at the time, but that he had purchased land in Westlake for cash (in the sum of R295 000.00),³³⁹ and was in the process of building a double-storeyed house thereon for cash, wishing to do so without a mortgage bond.³⁴⁰

417 In due course, on 10 December 2001, Van Dieman issued a cheque drawn on his personal banking account in the sum of R55 655.00, made up of a deposit of R12 000.00; administrative fee of R450.00; revenue stamps of R108,00 and rental paid in advance for December 2001 to May 2002 in the sum of R43 097.00, and received a receipt.³⁴¹ The agreement of lease with Mr M Kahn was signed by Morkel and dated 11 December 2001, and confirmed the amount of the refundable deposit of R12 ,000.00 and the monthly rental of R8 000.00. No provision was made for the payment of value added tax (VAT) on any of the amounts.

418 Harksen alleged in his testimony that he had paid a sum of R45 000.00 to Morkel as a contribution towards his rental, and that Sauerland had contributed a similar sum. Morkel denied that Harksen had made any such contribution but conceded that, in response to an approach by

³³⁹Record: p2036(19)

³⁴⁰ Recordp1887

³⁴¹ Exhibit“DD”2&13

himself, Sauerland (in the circumstances dealt with below) caused his company ATC Consultants SA Switzerland, to transfer a sum of R49 ,825,00 to the banking account of Slip Knot Investments 76 (Pty) Limited ("Slip Knot").

- 419 Harksen's evidence had been that Morkel, through his accountant Sindler, had despatched a letter to Sauerland, requesting approximately R92 000.00 towards his rental. Morkel dealt with this allegation by stating that he had attended a function at the home of Sauerland during February 2002, attended by Harksen, Sauerland and Sindler. At that meeting the question of the rental for the Higgovale property (which had already been paid in advance up to the end of May 2002) was raised, Morkel seeking assistance in that regard, and Sauerland promised to assist Morkel in an undisclosed amount.³⁴² Sauerland described this discussion as follows:

"Mr Hodes: And Mr Sindler also indicated that on that occasion it was raised, the possibility of your making a contribution towards Morkel's rental of a property in Higgovale. He had recently left Leeuwenhof. Did that come up? (Emphasis supplied)
Mr Sauerland: Yes, it – that was the discussion, that – because I think Gerald's house was still being built and he had moved into a place in town, that he had to pay rent and that there was a shortage and I said, you know, I will help."³⁴³

³⁴² Recordp1891to1892

³⁴³ Recordp3325

420 Sauerland further elaborated upon his understanding of what Morkel had conveyed to him as follows:

"Commissioner: So what was it, a loan or a gift?"

Mr Sauerland: It was a gift, yes.

Mr Webster: But your understanding from him was that there was a shortage, there was a lack of funds, there was a shortage, he couldn't pay the rent, is that right?

Mr Sauerland: That's correct. I think he went over his head to rent this house.

.....

Mr Sauerland: No I mean, you know apparently he rented it and it was too far for what, too far for what he could afford, because he had this court case coming up and he ...

Commissioner: Oh, so he couldn't afford it?

Mr Sauerland: That's correct, yes.³⁴⁴

421 Sindler testified after Morkel, and confirmed that he met Sauerland at the function at Sauerland's home in Llandudno on 12 February 2002. On 13 February 2002 he received a phone call from Morkel, or from Van Dieman on Morkel's behalf, and was informed of the necessary information with

³⁴⁴ Recordp3332 -3333

regard to the rental so that it could be forwarded to Sauerland.³⁴⁵ On the same day he despatched a facsimile to Sauerland, setting out how the rental was made up and the banking account of Slip Knot to which any contribution should be made. This letter was handed in as an exhibit.³⁴⁶ The information contained in that facsimile, as received from Morkel, was at variance with the amounts of rental that had actually been paid. The rental for December to May was stated as R48 000.00 (not R43 097.00); the administrative fee as R600.00 (not R450.00); the refundable deposit as R16 250.00 (not R12 000.00) and VAT was included (which was not provided for in the lease and had apparently not been paid) in the sum of R9 500.00. The balance was made up of the correct amount of rental for the extended period of the lease, being June and July 2002 in the sum of R17 000.00. Sindler was unable to comment on this discrepancy and Morkel did not deal with it in his evidence, the letter only being handed in as an exhibit after Morkel had testified.

422 Sauerland stated that he was unaware, at the time that he was requested to make a contribution towards the rental, that Van Dieman had already paid it in December 2001, and:

“Mr Webster: If you’d been informed that the rental had already been paid and wasn’t outstanding, would you still have given Mr Morkel the money?”

³⁴⁵ Recordp3282 -3283

³⁴⁶ Exhibit“HHH”

***Mr Sauerland: Then there was no necessity really.*³⁴⁷**

423 No evidence, except for Harksen's allegations, was presented to the effect that Harksen had paid any money towards the rental. The latter was, however, very well informed, as he was aware of the amount which was contained in the letter despatched to Sauerland on 13 February 2002, and of the approximate amount paid by Sauerland by bank transfer on 7 March 2002. Curiously, Harksen first mentioned payment by himself of R45 000.00, and the balance by Sauerland (albeit to the Seeff Trust Account) during his evidence on 28 May 2002. Later, on 18 June 2002, during cross-examination by Hodes SC, on behalf of Morkel, he testified to the approximate sum of R92 000.00 being the total amount sought in the letter of request; and a payment of approximately R45 000.00 by Sauerland. Sindler and Morkel, however, testified that they only became aware in July 2002 that Sauerland had transferred a contribution to the rental to the account of Slip Knot.

424 The company known as Slip Knot was one of which Van Dieman was the beneficial shareholder, but of which one Daphne Perrins ("Perrins"), an employee of Sindler's Incorporated, was the sole director. Sindler had been the accountant for Morkel for almost thirty years and had known Van Dieman since at least 1992 when Van Dieman became Morkel's private secretary.³⁴⁸

³⁴⁷ Recordp3334

³⁴⁸ Recordp3205 -3207

The Western Cape Democracy Development Trust (WCDDT):

425 Morkel testified that he had caused a South African trust, known as the WCDDT, to be established and registered with the Master of the High Court. He explained that this entity was intended to be a vehicle for the receipt of donations for the DA in the Western Province. The idea of establishing the trust was discussed with Harksen, who gave him advice in this regard, and it was Harksen who recommended that he contact an attorney, Hunter³⁴⁹ – (with whom Morkel had not previously had dealings) – for this purpose. The deed of trust, which was registered with the Master and accorded the number “IT/3659/2001” was signed on 20 December 2001³⁵⁰ and the letters of authority issued by the Master, reflecting Morkel, Hunter and Markowitz as trustees, were dated 21 December 2001.³⁵¹

426 Although the trust was established after Morkel had ceased to be premier, the issues relating to its establishment and possible funding were considered by the Commission because of the allegations that Harksen had, as a continuation of the earlier association with Morkel, been involved therein.

³⁴⁹Record2001(26)

³⁵⁰Exhibit“HH”

³⁵¹Exhibit“FF”

427 Morkel testified that the trust was established without the knowledge of the DA.³⁵² The funding of the trust was to have come from overseas persons or entities and be paid into the trust.³⁵³ As he put it, the donors of the funds

"... would have been connections and business associates of Mr Harkser"

and

"also, any sort of anonymous donor that would want to contribute to the trust and its founding principles."³⁵⁴

428 Subsequent to the establishment of the WCDDT, Morkel caused investigations to be made into the possible establishment of a foreign trust, perhaps in Gibraltar, which would be used as a vehicle into which foreign donations would be paid prior to them being transferred to South Africa. To this end, a meeting was arranged with Mertens, of Sovereign Trust SA Limited, which is a subsidiary of an offshore company specialising in the establishment and administration of foreign trusts in Gibraltar and elsewhere. The meeting, held during late January 2002, was attended by Morkel, Sindler – Morkel's accountant – and Hunter³⁵⁵, Morkel stating that the objective of the meeting was to explore the

³⁵²Record: p2001(8)

³⁵³Record: p2001(12)

³⁵⁴Record: p2001(20)

³⁵⁵ Recordp1092 -1094

possibility of establishing such an offshore trust.³⁵⁶ The evidence of Mertens was that those present at the meeting had been uncertain as to the identity of the proposed founder of the trust; had indicated that the funds for the trust would be likely to originate in Switzerland; and that Morkel had stated that the cashflow was likely to be in the order of R10 million.³⁵⁷

429 When he was asked, under cross-examination, where that sum would have originated, Morkel's initial response was:

"It didn't matter where it came from, as long as it was by legal means."³⁵⁸

430 He was then referred by counsel to the fact that Mertens had testified that he had been informed that the R10 million was to come from a source in Switzerland,³⁵⁹ to which Morkel responded:

"I wouldn't say it was Switzerland, it could've been anywhere."³⁶⁰

³⁵⁶Record: p2002(17)

³⁵⁷ Recordp1095

³⁵⁸Record: p20 05(10)

³⁵⁹Record: p2005(12)

³⁶⁰Record: p2005(15)

431 When pressed on this point, Morkel's evidence was evasive, as follows:

"I could've said that, yes."³⁶¹,

432 The following exchange then took place, which is an example of how Morkel failed to furnish clear answers:

"Mr Webster: And if you did say it, why was there reference to Switzerland? That's what I'm asking.

Mr Morkel: I wouldn't know.

Mr Webster: You can't answer that?

Mr Morkel: Could – no, well it could be that – no, let me rather not answer that.

Mr Webster: You can't answer that?

Mr Morkel: No. I don't recollect that, so ...

Commissioner: Mr Morkel what did you say there?

Mr Morkel: I said let me rather not – I'm not going to speculate now on what I thought at the time.³⁶²

³⁶¹Record: p2005(26)

³⁶²Recordp2005 -2006

433 Morkel was questioned as to the possible origin of funds from Switzerland, given that evidence had been heard by the Commission that Global, the company in which Harksen claimed he had an interest and which was to have made the donation to the DA, was administered from Switzerland by Stüder. The latter had visited Cape Town during 2001 and had met Markowitz. Sauerland, who had previously, during November 2001, supported Morkel in the litigation in the amount of DM6 000,00, was also known to reside for part of the year in Switzerland.

434 Morkel's testimony in this regard was as follows:

"Commissioner: But did you think Mr Harksen would bring the money?"

Mr Morkel: No, not Mr Harksen, no. No. No.

Commissioner: Mr Stüder?"

Mr Morkel: No, not Mr Stüder, no. No look, let me tell you. I thought that my friend, Mr Sauerland, was very interested to assist us and I thought via him that it – because he is stationed in Switzerland, I thought perhaps that...

Mr Webster: So he's based in Switzerland, so the R10 million was possibly going to come from him from Switzerland?"

Mr Morkel: Not from him but perhaps his friends where he is based, you know what I mean. But I think that what must have gone through my mind at the time, because Mr

***Sauerland did say that he would assist, that he would perhaps instrumental (sic) in assisting this.*³⁶³**

435 In the event, the offshore trust was never established and no funds, other than an initial donation of R100.00, paid by Morkel, was received by the WCDDT.

Evaluation of Morkel's Evidence

436 The evidence of Morkel was unsatisfactory in several respects, particularly in relation to the inherent probabilities of the events. In considering his evidence, the following should be noted:

- a. Morkel met with Harksen on 27 September 2000, at the office of the Provincial Government, notwithstanding the fact that he was aware that Harksen was a fugitive from justice, who was wanted in Germany to stand trial for criminal conduct. He himself subsequently conceded, in evidence, that the meeting was inappropriate.
- b. On the very first evening that Morkel met with Harksen, the question of possible donations to the DA was raised. At the same time, suggestions by Harksen that he would make donations which would benefit the community of the Western Cape (for example by

³⁶³ Recordp2006 -2007

the building of houses) were ignored without any suitable alternatives raised, in favour of the suggestion that Harksen make a donation to the DA. As was apparent in his evidence, this desire to obtain donations from Harksen was not limited to the hope of benefits for the DA, but soon extended to hope, or even expectations, that Harksen, or persons introduced by him, would benefit Morkel personally.

- c. Morkel denied that Harksen, or any entity controlled by him, paid any money to the DA or to himself. This notwithstanding, he maintained a close relationship with Harksen from September 2000 to March 2002, a period of some sixteen months. The closeness of this relationship extended to social occasions at the home of Harksen and Sauerland (to whom he was introduced by Harksen); the introduction of Harksen to his family; the invitation for Harksen to attend official functions at Leeuwenhof and be seen in his presence, in the public eye; the giving of confidences to Harksen with regard to the state of finance of the DA, his own personal finances and housing needs, his litigation (in respect of finding a legal team and the funding of same) and finally the project of setting up a local trust and investigating the establishment of an offshore trust for the purpose of channelling money from overseas to South Africa. During this time he enjoyed Harksen's hospitality on a number of occasions, in restaurants, cigar bars and at Leinster Hall. It is improbable that, had Harksen not honored at least some of his promises to Morkel and the DA, that Morkel would have seen it fit to continue being associated with him in this manner.

- d. Morkel has denied that the sum of DM 99 000.00 came from Harksen, or that any other monies ("blue cent") was received from him. The evidence of Markovitz is analysed elsewhere in this report, but suffice to say that the Commission finds the existence of "Hans" improbable, and the probabilities are that the DM99 000.00 was received from Harksen. Morkel's subsequent conduct and that of Erik Marais the banker, is consistent with such a conclusion, rather than with an innocent belief that the money had been received from an anonymous donor. In particular, he took the trouble of ensuring that the cash received did not go through the usual channels, and personally intervened to ensure that Erik Marais, a senior manager at ABSA, dealt with the money. According to Erik Marais, he received an instruction from Morkel to deal with same "confidentially and personally". Morkel's first question on being informed by Markovitz that he had received DM99 000.00, was to ask him whether it had come from Harksen. Had Morkel believed that the money was from a lawful and unproblematic source, there was no reason for him to have intervened, and not simply have allowed the donation to be dealt with by party officials such as Schwella in the normal manner. The subsequent explanation that he failed at any time to ensure that this money had in fact been paid into the account of the DA or even check the bank statements to make sure that any payment had been made, is also highly improbable. On the probabilities, it would appear that Morkel was aware of the fact that receipt of the sum of DM99 000.00, and its source, required to be dealt with confidentially and should not be disclosed to public scrutiny, and further that the source was probably Harksen himself.

- e. Morkel appears to have taken the view that he was, in his personal capacity, in some way entitled to receive donations and benefits from party supporters. By way of example, he enlisted the personal support from Sauerland, receiving monies for his litigation and a contribution towards his personal rental at Higgovale. Similarly Rabie, a property developer, contributed monies to the litigation. When it was put to Morkel that some form of explanation was required as to why he considered it appropriate that he, as a public official, should have expenses such as rent for his personal property paid for by third parties, he was unable to offer any explanation other than he did not consider it to be inappropriate. The Commission finds the receipt of such "donations" from third parties by politicians, in respect of personal expenses, to be most undesirable and likely to lead to abuse.

- f. Morkel appears to have misrepresented to Sauerland the amount of the rental to be paid for the property in Higgovale, as also the fact that it had already been paid. According to Sindler, the information in the letter dispatched to Sauerland was offered by Morkel. As has already been dealt with elsewhere, the rental reflected in the letter dispatched to Sauerland in February 2002 was incorrect and inflated, several thousand rands of "padding" having been added to the bill. Sauerland further indicated that, had he been aware of the fact that the rental had already been paid by way of a loan from Van Diemenn, he would not have made the payment towards the rental during March 2002. The Commission finds that Morkel, in his dealings with Sauerland acted improperly, if not dishonestly, in seeking personal donations under false pretences.

- g. Morkel, as an experienced politician, expected to receive approximately R750 000.00 for his party from a man who he had only met shortly before, must reasonably have been aware of the fact that Harksen would expect something in exchange for his "investment". At no stage during his evidence did Morkel ever suggest, notwithstanding lengthy evidence relating to his dealings with Harksen, that Harksen was a supporter of the DA out of conviction, or an adherent of any of its principals. Accordingly, it is reasonable to expect that Morkel either performed favours for Harksen in exchange for the promises of funds, or else put Harksen under the impression that this association gave him influence and access to some form of favour. Some of this influence, was no doubt represented by Harksen's invitation to official functions as Leeuwenhof, to which Harksen would otherwise not have been invited. Similarly, Morkel was able to assist Harksen by personally arranging for Harksen's father in law, Mr Tzschuke ("Tzschuke"), to have his South African visa extended from two to three months by the Department of Home Affairs. Although the evidence does not suggest that Morkel influenced the official concerned, or acted in any way unlawfully, it is of interest that Morkel took it upon himself to take an interest in this matter personally, directing his personal secretary Van Diemann to make all the necessary arrangements and collect Tzschuke from Harksen's home. Morkel later sought to explain this by saying he would have done the same for any other citizen. This is highly improbable, given that he was the Premier and that there were presumably many citizens who might have wished to receive personal favours from him. Secondly, he suggested, that the favour was nothing out of the ordinary and that he simply acted as a facilitator. Whilst this may be the case, the impression of the use of influence may well have been conveyed,

as also the representation that Morkel was a person upon whom Harksen could rely and who could assist Harksen with government authorities.

- h. Morkel's evidence with regard to the investigation as to the suitability of establishing a foreign trust, and in particular the source of the anticipated funds and Harksen's role in that process, was evasive and Morkel was not prepared to commit himself to unequivocal answers to the questions put to him.
- i. Furthermore, the Commission finds that Morkel made use of his political position as Premier, and as a career politician, to obtain the payment of personal expenses relating to residential accommodation for himself and his wife. Whilst not unlawful, the manner in which Morkel solicited such donations from Harksen, or Harksen's associates, is unfortunate and lends support to public calls for accountability and transparency by public officials of personal benefits received by them from third parties.

THE EVIDENCE OF LEON MARKOWITZ: HIS ASSOCIATION WITH HARKSEN

Background

437 Markowitz testified that his political career commenced in 1980, when he was elected to the Cape Town City Council. He held the office of Mayor of Cape Town during 1985 to 1987. He was thereafter approached by Mr Hernus Kriel and joined the NP in 1995 and was leader in the NNP in the

Cape Town City Council from 1996 to 1998. He went into retirement until he was approached by Morkel, then Premier of the Western Cape, in October 1998, to accept the position of Minister of Finance in the DA Government in the Western Cape Province, which position he accepted. He held this portfolio, together with various other offices which were added to it, until 5 December 2001, when the DA Government was replaced by a Government created by a coalition between the ANC and the NNP.³⁶⁴

- 438 Prior to his very first meeting with Harksen, Markowitz had read an article which appeared in the Fair Lady magazine, dated 12 April 2000, entitled "*The fugitive, the wife and the flash life*"³⁶⁵ In cross-examination it was put to Markowitz that this article described Harksen as a fugitive; a man who was served with a warrant of arrest on four charges involving R3.6 billion; and that his extradition from South Africa to Germany was ongoing. It also mentioned that he had defrauded hundreds of victims in an investment scam, and had thereafter been sequestered by order of the Cape High Court. Markowitz confirmed that he had read this portion of the article; the reports therein of specific victims who raised complaints against Harksen; the warrant issued in Germany on charges of fraud and the applications for his extradition to Germany,³⁶⁶ as also the comments by the trustees of his insolvent estate. It can therefore be accepted that, prior to his first meeting with Harksen, Markowitz was fully acquainted with the salient facts and the various unresolved allegations. This

³⁶⁴Record,evidenceofMrMarkovitz,page2347

³⁶⁵AcopyofthisarticlewashandedintotheCommissionasexhibit"WW",pages7,8&9

³⁶⁶Recor d,page2429

notwithstanding, no attempt was made to contact Harksen's trustees; the Director of Public Prosecutions or the German Consulate General or any other person to establish the truth of the allegations appearing in the Fair Lady article.³⁶⁷ Despite this knowledge, he proceeded to take the initiative by inviting Harksen to meet himself and the Premier of the Province.³⁶⁸

The Initial Meeting and the Promises of Donations

439 Markowitz explained that during November 2000, and when the DA was seeking or "arranging" ³⁶⁹ funds for the election to be held on 5 December 2000.³⁷⁰ he decided to take the initiative to contact Harksen for the purpose of seeking political donations for the DA. He stated that he had gained the impression that Harksen was a man of means, and had a certain social standing in Cape Town. This view was held notwithstanding the fact that he was at all material times aware that Harksen was an unrehabilitated insolvent, and that his trustees had, after legal action, recovered substantial assets from him, such as his Constantia Home, Klaasenbosch, which had been held through the vehicle of a company. The impression of means appears to have been created in Markowitz's mind as a consequence of Harksen's very public and ostentatious expenditure of funds as mentioned in the article in *Fair Lady*, and various

³⁶⁷Record,page2356

³⁶⁸Recordpage2424 -2429

³⁶⁹Record,page2430

³⁷⁰Record,page2437

lavish functions such as that for the opening of his wife's clothing boutique in Burg Street.³⁷¹ No substantiation was offered for the belief that Harksen, an apparent fugitive from justice, had any social *standing* "in the true sense of the phrase".

440 Markowitz arranged that his secretary, Carpentier, make arrangements with Harksen for him to meet himself and the Premier, Morkel, at the offices of the Provincial Government on 28 November 2000. It was on this occasion that he met Harksen for the first time. He soon found him to be very engaging, having a way with people and in his own words "***I grew to like the man very much***"³⁷². It appears that Harksen initially proposed building 100 houses at an informal settlement known as Joe Slovo (where shacks had shortly before been destroyed by fire), but the proposal for funding of projects for the community appears to have been quickly brushed aside, without much further discussion or the proposal of any suitable alternative, and turned to the possibility that a political donation in a substantial amount might be made available to the DA itself.³⁷³ As Markowitz put it:

"Mr Hodes: Now, did the question of an offer by him to build 100 houses to replace shacks that had been burnt down in Joe Slovo camp come up?"

³⁷¹Recordpage2349

³⁷²Record,p2351

³⁷³Record,p2452 -2453

Mr Markowitz: *It did come up, but it didn't come up – oh yes, no, it's quite correct, it did come up during my discussion in my office and that's when I felt that maybe that the then Premier should hear what he had to say, in order to take that particular matter a stage further...*

Mr Hodes: *And then you introduced him. I'm not going to go over it again, the question of the 100 houses at Joe Slovo came up and you did indicate to Mr Morkel that this man was prepared to procure from overseas, a donation for the party?*

Mr Markowitz: *Absolutely, Sir.*

Mr Hodes: *Did you say, is this your sort of phraseology: "I think we have a friend".*

Mr Markowitz: *I could certainly, I could certainly have said that. I can't remember the actual language I may have employed, but I think somebody who is offering 75 000 US dollars to obtain from a company overseas, would be a friend of a political party.³⁷⁴*

Mr Hodes: *Now, he says, if I have to summarise it, that you indicated you wanted money for your party from him?*

Mr Markowitz: *Yes. Very early on and in the conversation he did indicate to me that he was insolvent in this country, and that how he would pay – be able to arrange for a donation to come into the country. And we spoke in rand, but was eventually converted ...³⁷⁵*

³⁷⁴Record,evidenceofMrLMarkovitz,p2356 -2357

³⁷⁵Record,evidenceofMrLMarkovitz,page2351

441 The conversation on 28 November 2002 passed briefly over the fact that Harksen was insolvent in South Africa, but he emphasised that he would be in a position to make use of substantial funds from overseas sources which, he alleged, were not subject to his trustees and were held by various companies. At that time, or some time later, it was negotiated that the sum of \$75 000.00 would be made available to the DA:

"Mr Markowitz: And whether we started off with R250 000.00, then went to R500 000.00, went into R750 000.00 and whether a chicken-and-egg what came first, and how it came, and whether it was a day or two later that we got the figure up to US\$75 000.00, is not clear in my mind as to what came first, ...³⁷⁶

442 The entity finally agreed upon to make this donation was Global, although Markowitz was unsure as to when this foreign company was first mentioned in the discussions.

443 According to Markowitz, the negotiations on 28 November 2002 or shortly thereafter concluded with an undertaking by Harksen that Global would donate the sum of \$75 000.00 to the DA.³⁷⁷ Thereafter, on 14 December 2000, Harksen indicated to him that he required a letter from the DA's bankers, which he could show to persons overseas. Accordingly, a letter

³⁷⁶Record,evidenceofMrLMarkovitz,page2352

³⁷⁷Record,page2349

of that date was prepared, furnishing Harksen and Global with a DA bank account into which money could be transferred. A further document dated 17 January 2001, similarly on a DA letterhead and addressed to "*to whom it may concern*" confirmed that \$75 000.00 should be paid into the banking account of the DA Voter Education Fund held at the ABSA branch. According to Markowitz, Harksen did not in fact pay any portion of the cash sum of \$75 000.00, or any other amount to himself or the DA. In particular, he denied ever receiving the sum of DM 105 000.00, alternatively DM 100 000.00, alternatively DM 99 000.00 from Harksen.

Further Contact Between Markowitz & Harksen

444 In general terms, the evidence of Harksen and Karsten which Markowitz was required to meet, was that after the promises had been made to the DA for political funding, a cheque in the sum of R500 000.00, drawn on the banking account of the Voyager Trust, was handed over. Because of a lack of funds in the account, and the DA apparently preferring to receive cash rather than cheques, the money was paid in cash. According to Karsten the sum of DM 100 000.00 was paid over as the first tranche of the promised \$75 000.00. According to Karsten, he met with Markowitz on 23 February 2001 at the office of Markowitz, where both he and Harksen attended, and a package containing what he was told was the DM100 000.00 in cash was handed over. This evidence was not, however, consistent with the evidence of Harksen who had conflicting, vague and various versions of how the money had been paid over. According to Harksen, the balance of the donation was paid in rands, the dates, times and places of which he could no longer recall.

- 445 In response to these allegations, Markowitz stated that he met with Harksen on a number of occasions, including at his office. As far as he could recall, he met with Karsten (whom he was aware was an "associate" of Harksen) at his offices in the Provincial Government Building on 23 February 2001. He could not recall whether Harksen accompanied Karsten on this occasion; but could not exclude the possibility. He however testified that he was certain that he did not receive any cash on that day, as alleged by Karsten.³⁷⁸
- 446 Markowitz further denied at any time receiving a cheque drawn on the Voyager Trust, and in particular not in the sum of R500 000.00.
- 447 Markowitz conceded that he and the then Premier, Morkel, had attended a braai at a bungalow rented by Harksen at Clifton, at which various Germans were present, the purpose of the exercise being to solicit political donations from those present. Although he was very vague about when this function took place, it is clear that it took place in the first half of 2001. In any event, they hoped that the persons introduced by Harksen would be likely donors to the DA. To this end Morkel made a short speech describing the party and its aims.
- 448 With regard to the other allegations made by Harksen, he confirmed that he visited the United States on official Provincial Government Business during early 2001, in the company of Morkel, but denied categorically that \$20 000.00 cash had been made available or loaned to him by Harksen for the purpose of the trip, or that he had ever been requested (as alleged

³⁷⁸Record,page2362 -2363

by Harksen), that he should purchase, whilst in the United States, a new and expensive suite for Harksen.³⁷⁹

The Receipt of the Sum of DM99 000.00

449 Markowitz testified that he had received the sum of DM99 000.00 in cash, in DM1 000.00 notes, from an unknown German speaking male who had arrived anonymously at his office, who did not give his name, and described himself only as "Hans". To the best of his belief, he had met this person in the reception area of his office, and after having exchanged a few words, "ushered him into my office". To the best of his belief, he had met this person at the fundraising braai held earlier that year at Harksen's bungalow.³⁸⁰ According to Markowitz, this person had refused to disclose to him his surname, address or personal details, allegedly for fear that the ANC would prejudice him due to the fact that he did business with the Government but at the same time was supporting the DA in opposition to the ruling party. No explanation was forthcoming as to why this person would fear that the disclosure of his name to Markowitz would result in it being communicated to the ANC. Markowitz was unable to place a date for this meeting, but he felt that it could have been somewhere between 9 July 2001 and mid August 2001.³⁸¹ He advised Morkel of the receipt of the fortunate and much needed donation, as well as the fact that it was anonymous in nature. Morkel immediately asked

³⁷⁹Record,page2369 -2370

³⁸⁰Record,page2403

³⁸¹Record,p2403,(6 -15)

him if the anonymous donor was Harksen to which he responded in the negative and was told that Schwella would attend at this office shortly and collect the money. In cross-examination, Markowitz conceded that he could not dispute the possibility that "Hans" **"was sent by Mr Harksen"** to **"make the donation"**³⁸² or that he was a courier for Harksen.

450 The only witness of any kind presented by Markowitz to support his version of the existence of the mystery person called "Hans" was his former private secretary, Smit. The latter, gave a rather different version of the visit by "Hans" to that testified to by Markowitz. By way of example, Markowitz testified that he had been called to his reception area, where he had met "Hans", had spoken to him briefly, and then ushered him into his private office³⁸³. Smit, on the other hand, testified that "Hans" did not come to the reception area but that he was informed that a person was at security on the ground floor and was being denied access because he would not reveal his name. According to Smit, he conveyed this to Markowitz who then went down to the foyer on the ground floor and arranged for "Hans" to gain access to the building and thereafter brought him to his office where the two met briefly. Smit testified that, after "Hans" had left, Markowitz was in possession of a white envelope and proudly announced **"I've got some money"**³⁸⁴. He was not shown

³⁸²Record,p2510

³⁸³ Recordp2484 -2485

³⁸⁴ Recordp2568 -2569

the contents of the envelope, nor did he see any money.³⁸⁵ When he read in the media about Markowitz having received money in an envelope, he remembered the white envelope and thought that this was possibly the DM99 000,00 donation.³⁸⁶ This circumstance was not testified to by Markowitz himself. Smit, furthermore, was unable to furnish any accurate date for the visit by "Hans", and had no knowledge that the name furnished by this mystery person was in fact "Hans" . According to him he did not ask Markowitz about the mysterious visitor after that person's departure.³⁸⁷ Smit's evidence was contradictory and far-fetched in several respects. He was an appalling witness and the real possibility exists that his evidence was fabricated.

- 451 The cash was later collected from Schwella, as arranged. Although being the chief fundraiser for the party, Markowitz alleged that he had never been congratulated by the finance committee of the DA. for his successful fund raising "coup".³⁸⁸ Nor was this donation ever referred to again until early 2002 when allegations began to surface of the DA having received funds from Harksen. He also testified that he at no stage took the trouble of ensuring that the money was paid into the account of the DA. Had he done so, either personally or on enquiry to a person such as Mr Allen

³⁸⁵ Recordp2590

³⁸⁶ Reocrdp2578

³⁸⁷ Recordp2592

³⁸⁸Record,page2531to2533

Winde, chairman of the finance committee, it would have become apparent that the money had been deposited into two banking accounts of the DA in small tranches over a period of months by an employee of ABSA, Erik Marais, after the Deutsche Mark had been exchanged into rands both in South Africa and in two overseas countries.³⁸⁹ It would also have become apparent that, as late as February 2002, approximately R140 000.00 had never been deposited at all, but was still in the possession of Erik Marais. His description, in retrospect, of the conduct of Erik Marais was to say that it was simply "lunacy" to have acted in the way Erik Marais did.³⁹⁰

452 According to Markowitz, he kept the identity of the person known as "Hans" secret even from his own party members, including Morkel, until March 2002 when he first disclosed the name "Hans" to his attorney. He thereafter disclosed same to the enquiry convened in terms of Section 151 of the Insolvency Act into the affairs of Harksen, after having been ordered to disclose the identity of the donor of the funds by the Presiding Officer of the Enquiry. He added that, prior to giving such evidence at the enquiry, he had not even disclosed the name "Hans" to Morkel. It was, therefore, not surprising that Morkel had first heard of the name "Hans" from Kurz, the attorney of the trustees of Harksen's estate.

453 The logical consequence, in the event of his having conceded that the person who had donated the funds was Harksen (if this was in fact the truth) would not only have been possible political embarrassment, but also

³⁸⁹Record,page2419 -2120

³⁹⁰Record,page2538

the certainty that steps would be taken by Harksen's trustees to recover the monies from the DA. Notwithstanding this denial, it has been brought to the attention of the Commission that the trustees of Harksen's insolvent estate have themselves instituted action against the DA for the recovery of these monies, claiming that they originated from Harksen.

454 When it became necessary to seek to identify this donor, he appointed a private investigator during June 2002, with the brief to locate and identify the mystery person known as "Hans". These efforts had been to no avail.

455 In his explanation seeking to justify that the DM 99 000.00 had not originated from Harksen or been sent by Harksen, he explained that, after receiving DM 99 000.00 in or about August 2001, he continued to see Harksen regularly. In that period, he continued to ask Harksen when the \$75 000.00 could be expected from Global; Harksen continued promising that the money would be received in due course.³⁹¹ By early 2002, according to him, he had almost lost faith of ever receiving this money, but rather than disassociating himself from Harksen, continued to meet with Harksen until approximately 28 March 2002, on which date Harksen was arrested on criminal charges. It was only after Harksen's arrest that he appreciated that Harksen had been dishonest in relation to various matters, and that he had, to use his words, "taken advantage" of him.³⁹²

³⁹¹Record,page2420 -2421

³⁹²Record,page2460

The Occupation by Markowitz of the Clifton Bungalow

456 A further aspect which has been raised by Harksen, and was conceded by Markowitz, was that for a three month period from August 2001 to October 2001 he had sub let the Harksens' bungalow in Clifton from J Harksen (being the nominal landlord), at a monthly rental of R20 000.00 per month, whilst his own house was being redeveloped. He had not yet moved out during the first week of November shortly after he had suffered a crisis in his health. He explained that the rental of R20 000.00 per month was paid, in cash, in advance. According to him the cash was handed over to Harksen, at the latter's request, after he had been requested by Harksen to furnish cash as opposed to a cheque.³⁹³ No receipt was requested nor furnished. Correspondence was handed in to the Commission relating to certain unpaid extras, such as electricity and so forth, which Markowitz subsequently deposited into a banking account for J Harksen. Because of his poor state of health, and that access to the bungalow required the traversing of numerous steps up and down a hill side, he and his wife vacated the bungalow during early November 2001, shortly after his collapse. According to Markowitz, he placed considerable trust in Harksen in mid 2001, and accordingly did not consider it necessary or appropriate to request a receipt for the payment of the sum of R60 000.00 rental paid in advance.

457 It was only in October 2001 that he became concerned as to Harksen's *bona fides*, that he set up a meeting with the German Consul-General in Cape Town, to enquire about Harksen's past and the allegations against

³⁹³Record,p2389

him, particularly in the light of what he described as the promises Harksen was made, or was then still making.³⁹⁴

458 Notwithstanding the negative view of Harksen received as a result of these enquiries, and the realisation that he needed to act with great caution or circumspection when dealing with Harksen, he did not disassociate himself entirely from Harksen³⁹⁵ He spoke with Morkel and Harksen at Leinster Hall during February 2002, with regard to the possibility of German businessmen associated with Harksen arranging to buy property in Cape Town, and the proceeds of which would fund the WCDDT, recently founded by Morkel during December 2001, and of which Markowitz had accepted the position as trustee. There was some debate as to the nature of this property and Markowitz recommended commercial property. In the end, nothing came of this suggestion.

The "Morkel" Litigation

459 During late October 2001, he was present at a function for Cheshire Homes, held on the lawns at Leeuwenhof, the official residence of the Premier, at which Sauerland, Harksen and others were present, and to which Morkel returned after attending a political meeting at Goudini. He had met Sauerland for the first time approximately two to three months earlier, having been introduced to him by Harksen at the famous Butcher & Grill in Cape Town. He did not dispute that Harksen offered there and

³⁹⁴Record,p2399

³⁹⁵Record,p2399

then to find an attorney and counsel for Morkel. He recalled that on 31 October 2001, in the late afternoon, he attended a meeting at the chambers of Coetzee SC, in Keerom Street, where consultations were under way with a view to drafting court papers in the applications being brought in the High Court, and Harksen was present in counsel's chambers whilst instructions were being given to counsel. According to him, he sought to obtain a contribution to the costs of such litigation from one Rabie, in the sum of R100 000.00, and this amount was telephonically pledged by that person.³⁹⁶ That same evening he collapsed with a bleeding stomach ulcer and was removed to hospital. The next month and a half he effectively disappeared from the picture, as he required urgent and extensive medical treatment which included a lengthy period of hospitalisation, and it was only in early 2002 that he had recuperated sufficiently to recommence social intercourse. In the circumstances, he had no further dealings with Harksen relating to this litigation and was not otherwise involved in the legal proceedings which took place in early November 2001.

Evaluation of the Evidence of Markowitz

460 The evidence of Markowitz was, like that of Morkel, unsatisfactory in a number of respects, particularly in relation to the inherent probabilities. In considering his evidence, the following should be taken into account:

- a. It was Markowitz who, without any approach from Harksen, took the initiative of establishing contact. The invitation to meet with Harksen at the Premier's office, extended on the letterhead of the

³⁹⁶Record, page 2384

DA, was made in the full knowledge of the allegations of Harksen's past, as had appeared in the *Fair Lady* article which Markowitz admitted he had previously read.

- b. Harksen was approached for the sole purpose of fundraising for the DA. Markowitz would have known, having read the *Fair Lady* article, that the man he was inviting was not only of doubtful reputation but also an unrehabilitated insolvent. Markowitz's subsequent attempt at furnishing a justification for apparently soliciting donations from an unrehabilitated insolvent – by explaining that he would not have taken money from the man personally, but from overseas entities with which Harksen was associated, or that Harksen would have facilitated donations from others - is improbable and unacceptable.
- c. Once Harksen, or Global (being a company apparently controlled by him) had agreed to make a donation of R250 000.00, Markowitz used his best endeavors to successfully negotiate the figure up to R500 000.00 and then to R750 000.00. The nature of the arguments, promises or inducements that Markowitz used to increase the proffered donations three-fold were never disclosed, but it is probable that Harksen was correct in stating that Markowitz created the impression that his association with the DA would benefit his future in South Africa. Certainly, Markowitz in his evidence did not take issue with this general assertion, or provide any acceptable alternative motivation.
- d. On Markowitz's own version, he alleged that he had been concerned about seeking donations from an unrehabilitated insolvent. This notwithstanding, and in addition to the attempt to

obtain donations from an overseas company such as Global – in which Harksen apparently had an interest – he also met with Studer who represented himself as being the president of Global. If no donation was received, it was certainly not due to a lack of application on the part of Markowitz the fundraiser. At no stage did he take the precaution of taking legal advice as to the correctness of Harksen's repeated assertions that the latter was only insolvent in South Africa.

- e. Markowitz, though aware of Harksen's insolvency, did not shrink from accepting an invitation to a braai at Harksen's Clifton bungalow (at Harksen's expense) or accepting Harksen's hospitality in the form of meals and refreshments at various up-market hotels and restaurants. Furthermore, he appears not to have considered it any impediment, despite this awareness of insolvency – and the circumstance that it was inappropriate for Harksen to have access to such funds - to pay Harksen the sum of R60 000.00 in cash in respect of the rental of the Clifton bungalow, after Harksen had requested him to do so. No receipt was asked or provided despite the magnitude of the cash transaction and in spite of the fact that the alleged recipient was not the landlord.

- f. The Commission draws the inevitable conclusion that Harksen's insolvency was not considered a bar to association with him, or the acceptance of benefits from him, but that same was raised as an afterthought in the hope of distancing the fundraisers from allegations of improper conduct. For the same reasons allegations were made that other parties might have received similar benefits. Furthermore, despite this alleged sensitivity which he had at the time, and the high profile of Harksen's trustees in their efforts to

recover assets for creditors, Markowitz appeared not to have taken the prudent step of discussing the situation with Harksen's trustees. These trustees were situated in Cape Town, represented by attorneys, and nothing would have been easier than for Markowitz to make a discreet inquiry.

- g. Markowitz, as an experienced businessman and politician, ought to have been aware of the inappropriateness of Harksen remaining in counsel's chambers whilst instructions were being taken and matters of grave political import discussed. This notwithstanding, he made no attempt to request Harksen to leave, nor did he even raise his concerns with counsel. This failure must be considered in the context of Markowitz having, prior to that date, already spoken to an official of the German Consulate and had been cautioned about associating with Harksen. At its best, this incident only serves to confirm the extent to which Harksen had become a confidant of Morkel, and to an extent Markowitz, and had been accepted by them and others as part of the circle of persons closely associated with Morkel.
- h. Markowitz himself held the key to the true identity of the person who had donated the sum of DM99 000.00 to the DA. As found later herein in the Commission's conclusions regarding the donation of DM99 000.00, the Commission regards it as probable that the mystery "Hans" is a fabrication created by Markowitz, either to deal with the donor having been Harksen, or the fact that the money was delivered by a courier sent by him. Only Markowitz and his private secretary, Smit were alleged to have set eyes on the mystery "Hans". For this reason, the evidence of Smit was crucial to the attempts by Markowitz to provide corroboration for the

existence of "Hans". This notwithstanding, the evidence of Smit was itself unsatisfactory, and in many ways differed materially from that of Markowitz and did not serve to provide corroboration but rather placed further doubts as to the acceptability of Markowitz's own version.

- i. If the various separate circumstances, being the allegations such as the uncertainty regarding the existence of Hans; the uncertainty as to the date when the donation was allegedly made; the failure to disclose the identity of Hans to Morkel or the DA, the strange allegations of anonymity; the conduct of Morkel and Erik Marais in dealing with the money; and the failure to check whether money had been paid into the banking account of the DA, considered individually and in isolation, are capable of logical explanation. However, taken as a whole, and in context, all these circumstances, on the probabilities, cannot be accepted as true and are entirely inconsistent with the innocent explanation of an anonymous donor contended for by Markowitz. Accordingly, the inevitable and inescapable inference is that the entire version of Markowitz as to the identity of the donor must be rejected as improbable and unacceptable. Furthermore, the continuing social interaction with Harksen for a period of sixteen months, and Markowitz's apparent failure at any time to withdraw from the association, or even complain as to the failure of Harksen to honour any of his promises, are also indicators that some of the promised benefits were indeed received from Harksen.

461 The Commission accordingly rejects the evidence of Markowitz and finds, on the probabilities that Harksen personally or through a third party on his instructions, was the donor of the DM99 000.00.

POSSIBLE DONATIONS BY HARKSEN TO OTHER POLITICAL PARTIES

462 The terms of reference of the Commission were limited to the investigation of whether monies had been received by Morkel and Markowitz (or their families) from Harksen. The Commission was not mandated with the task of investigating the question of the funding of political parties, or the propriety of receiving donations from a particular source. There is, furthermore, at present no statutory law governing the receipt of donations by political parties, or requirements that such donations be disclosed in any way. We shall revert to this aspect in due course.

463 The extension of the terms of reference of the Commission to include the investigation of claims that Morkel and Markowitz had received monies from Harksen, was effected against a background that the persons concerned had, at the time they allegedly received monies from Harksen, been the holders of the highest office in the Western Cape Provincial Government, and that their open and close association with Harksen was not to be denied. The inevitable question of whether donations had been received or solicited in exchange for favours, influence or some other form of patronage from the office holders could not but attract attention.

464 An attempt was made to justify the receipt of donations by Morkel, Markowitz and the DA, by persistently making reference to the possibility that the ANC had similarly been the recipient of an earlier donation. Even before the Commission began its work Morkel sought to obtain an affidavit

- from Harksen to the effect that the DA and he had received no money from Harksen, but that the ANC had in fact received monies. Prior to the Commission's terms of reference being extended, Morkel requested Katzeff, his then attorney, to establish whether or not Harksen would be prepared to depose to an affidavit to the effect that he had made no donations to the DA or to Morkel personally but had made donations to the ANC. In the event, Harksen declined to depose to an affidavit to the effect that the ANC had received money, but did accede to the balance of the request. Incongruously, Morkel explained that his belief that Harksen had made donations to the ANC was based solely on articles he had read and that he had never questioned Harksen to establish whether or not he had in fact given a donation to the ANC.
- 465 Morkel and Markowitz both professed to learning about the alleged donation to the ANC in the *Fair Lady* of 12 April 2001. We shall refrain from comment upon a politician's reliance on this genre of literature. In the article there is the suggestion that the ANC had received R100 000,00 from Harksen. The source of this information is not cited and the donation is denied by Harksen.
- 466 According to Harksen, he was asked by Mr André Lincoln ("Lincoln"), then a member of the Presidential Task Force, to make a donation of R100 000.00 to his father's karate school. This was in 1994, prior to the final sequestration of Harksen's estate. This was the highwater mark of these allegations. Lincoln was not called as a witness to admit or deny the allegation.
- 467 These alleged donations are outside our terms of reference. There was no acceptable evidence before us of such donations and, in any event,

even if such donations had been made they would not have served as a justification for the receipt of monies by others.

468 The legal representatives of Harksen, in a similar fashion, sought to introduce into evidence allegations that Morkel and Markowitz had solicited political donations, or sought personal gain from other persons, repeated references in this regard being made to Mr Vito Palazzolo. The Commission declined to permit such avenues of enquiry to be explored, as they were similarly outside its terms of reference.

CONCLUSION: THE RECEIPT OF DONATIONS FROM HARKSEN

469 Harksen alleged that he had given money to Morkel and Markowitz either to be used by them personally or earmarked for their political party.

470 The Commission as stated above, finds Harksen to be an unreliable witness, and his evidence regarding the payment of monies to Morkel and Markowitz cannot be accorded any weight whatsoever unless supported by other acceptable evidence.

CONCLUSION: THE ORIGIN OF THE SUM OF DM 99 000.00

471 The question of the DM99 000.00 has already been dealt with extensively in the analysis of the evidence of Morkel and Markowitz. In summary, it is not disputed that a sum of DM99 000.00 was paid in cash to Markowitz, at his offices, during 2001 and at a time that Markowitz was pressing

Harksen to honour his promise to make a substantial donation to the DA. Harksen and Karsten suggested that the sum of DM99 000.00 represented a part of a payment of either DM105 000.00 or DM100 000.00 which was paid in cash by Harksen either to Morkel or Markowitz. The explanation offered by Morkel and Markowitz was that the money was delivered to the offices of Markowitz, on a date during late July or early August 2001, by a German who identified himself only as "Hans". According to Markowitz, the person would not disclose his name and insisted that the donation was only to be made if his identity was to be protected. Markowitz stated that he was at all times under the impression that he had met the person known as "Hans" at a function held by Harksen at his Clifton bungalow earlier that year. The only other witness who testified as to the existence of "Hans" was Smit, the secretary of Markowitz.

472 Considering the probabilities relating to the identity of the donor or source of the sum of DM99 000.00, the following factors require to be taken into consideration:

- a. The donation was made at a time that Harksen was being pressed to honour promises he had made to make a substantial donation to the party;
- b. Markowitz himself linked the mystery "Hans" to the function held by Harksen, and himself associated the donor in this way to Harksen;

- c. The explanation given by Markowitz of the arrival of "Hans" at the Provincial Administration Building is inconsistent in material respects with that testified to by Smit, as already dealt with above;
- d. The explanation of "Hans" that he wished to protect his identity, because of his business with the ANC, is also improbable. It would be understandable if he disclosed his name to Markowitz, but requested that Markowitz not divulge it to another person. What is strange, however, is that "Hans" potentially jeopardised his own identity by bringing the donation in person, in circumstances where he might be recognised and identified, and further that in those circumstances he did not take Markowitz into his confidence. If he was so fearful, one would have expected him to send his own courier to Markowitz to make the anonymous donation.
- e. Markowitz conceded that he had no way of establishing whether or not, "Hans" was a courier sent by Harksen, or a person associated with him. Although a private investigator had been appointed to attempt to establish whether "Hans" existed, and identify him, all efforts to do so over a substantial period had proved fruitless.
- f. If the money had in fact been delivered to Markowitz by a courier known as "Hans", and had that courier been sent by Harksen, nothing would have been easier than for Harksen to have testified that Hans was a courier sent by him to Markowitz. Furthermore, had Harksen fabricated a version, nothing would have been easier than for him, in the course of that fabrication to have alleged that the mystery Hans was in fact his courier. This notwithstanding,

Harksen at no stage claimed that he had sent "Hans" to Markowitz or that he was aware of the identity of "Hans".

- g. The evidence of Harksen and Karsten, albeit in somewhat differing circumstances was that Harksen himself had handed over the funds, and accordingly that "Hans" and Harksen were one and the same person.
- h. A further factor which tends to push the balance of probabilities away from the version offered by Markowitz, is the manner in which the donation of DM99 000.00 was dealt with after its receipt. Had the monies been considered by all to have been perfectly regular, and been paid in a normal fashion to a banking account, this would have been indicative of the fact that Markowitz and Morkel were satisfied that the money did not originate from Harksen. Instead of dealing with the money in the normal course a convoluted and furtive procedure was adopted, which is suggestive of the fact that some or all persons concerned were aware of the fact that the DM99 000.00 (whatever its source) presented a problem as to its origin. These include the following:
- Morkel, who had established close ties with Harksen, informed Schwella that he would himself make the arrangements for the monies to be dealt with;
 - Morkel contacted Erik Marais, Regional Manager for ABSA, and requested that he collect the money personally from Schwella;

- Erik Marais testified that Morkel requested him to deal with the cash “personally and confidentially”.

- Erik Marais did not pay the money into the account of the DA in one tranch, but made periodic payments of small amounts over a number of months. A balance remained in his possession as early as 2002 when the Scorpions took it into their possession. Monies were changed into rands in an irregular manner, partly using Erik Marais’ passport in South Africa and partly being taken overseas by Erik Marais on holiday and exchanged in the Netherlands and Portugal to rands, the rands being returned to South Africa by Erik Marais. Furthermore the cash was not retained by Erik Marais at his office, but at home;

- Erik Marais requested personnel at his branch to fill in deposit slips for payment of the various tranches of money into the DA's account, and various differing markings, representing a fabricated signature, were placed on the document. In each occasion, the deposit was described as “donation” but no name was furnished;

- Although the DA was apparently in financial need, and had a finance committee which oversaw the financial needs of the party, Morkel, Markowitz and Schwella all suggested that none of them ever checked the DA’s account to ensure that the money had been paid in by Erik Marais. Had any one of them done so, they would have immediately noted that the DM99

000.00 had not been paid in one amount, and would not be identifiable on the bank statements. They would furthermore have established that although some months had passed, part of the donation remained in Erik Marais own possession, and had never been deposited. No explanation was provided for the failure by any person to notice the absence of a deposit of such significance in the DA's bank account, an action which, if taken, would have immediately exposed Erik Marais failure to pay the monies.

- i. A further factor to be considered was the reluctance of Markowitz to reveal the identity or name of the donor, in particular "Hans", this only being revealed after he had been ordered by the presiding officer of an insolvency enquiry held into Harksen's affairs to reveal that name. According to him, the name "Hans" was not even disclosed by him to Morkel prior to his testifying at the enquiry. Morkel stated that he heard the name "Hans" for the first time from Kurz, who advised him that that name had been disclosed by Markowitz. In the light of the fact that the person "Hans" is clearly not identifiable from the name alone, and that a diligent search has not produced him, it is strange that Markowitz was so reluctant to disclose the name "Hans" to the insolvency enquiry and required to be ordered to furnish such name when the furnishing of his name would in any event not have led anyone to the true identity of the person (if there was such a person) who delivered the monies to Markowitz.

473 In conclusion, the Commission finds there was no "Hans" and that the donor was in fact Harksen or one of his associates.

CONCLUSION: THE "MORKEL" LITIGATION

474 Morkel made no financial contribution to the so-called "Morkel Litigation" which took place during October/November 2001 and that it was funded entirely by way of donations from third parties. The Commission is unable to find that Harksen was one of the persons who made a financial contribution towards this litigation – though Sauerland who he introduced to Morkel did so – and Harksen's evidence in this regard is accordingly not accepted.

CONCLUSION: CONTRIBUTIONS TO THE RENTAL OF MORKEL'S ACCOMMODATION AT HIGGOVALE

475 On 11 December 2001 the rental for the property at Higgovale was, in the first instance, paid by Van Dieman on Morkel's behalf directly to Seeff. No evidence was presented to the Commission as to how the balance of the rental for June and July 2002 (being the extension of the six month lease at the increased cost of R8 500.00 per month) was paid. This money was repaid, apparently with interest, only during the course of the proceedings before us.

476 The Commission finds that Morkel approached Sauerland during February 2002 for assistance in payment of the rental, and that Sauerland contributed the sum of R49 825.00, which was transferred to the account of Slip Knot. According to Morkel and Sindler, they only became aware of this transfer during July 2002, by which time arrangements had been made for the payment of all the rental, and the money remained unutilised in the banking account of Slip Knot.

- 477 The Commission is unable to find that Harksen made any financial contribution towards the rental of the Higgovale property.
- 478 The Commission, however, considers it somewhat surprising, although it makes no finding in this regard, that Morkel considered it appropriate to solicit and obtain payment of the rental for his home from private individuals, rather than paying the rental himself.

CONCLUSION: THE OCCUPATION BY MARKOWITZ OF THE CLIFTON BUNGALOW

- 479 The Commission finds that Markowitz sub-let the Clifton bungalow from J Harksen for the period August to October 2001 and that he and his wife moved out of the property during the first week of November 2001, shortly after Markowitz had collapsed at counsel's chambers on 31 October 2001.
- 480 Markowitz testified that he had in fact paid the full amount of the rental by way of a single cash payment of R60 000.00 to Harksen, and denied the suggestion that he had never paid it.
- 481 The Commission has found that Harksen was an unsatisfactory witness and it cannot accept his unsupported and uncorroborated evidence that Markowitz did not pay the rental. It is, however, unusual that Markowitz, an experienced businessman, who by that time should have been aware that Harksen's reputation was not beyond reproach, did not at least

ensure that he received a receipt, if such large payments had to be effected in cash.

CONCLUSION: THE RECEIPT OF OTHER MONIES OR BENEFITS BY MORKEL OR MARKOWITZ FROM HARKSEN AND SUNDRY ALLEGATIONS OF IMPROPRIETY

482 The Commission finds that there is no acceptable evidence to suggest that Morkel and Markowitz received any other monies from Harksen. As they themselves conceded, they were the beneficiaries of generous hospitality at Harksen's expense. Notwithstanding the fact that they were at pains to persuade the Commission that they were aware of Harksen's insolvent state, and that they ought not to receive monies directly from him, they do not appear to have had any compunction in enjoying such benefits.

483 During the course of his evidence Harksen alleged that Markowitz had boasted to him that he had received some improper advantage arising from the Arabella Country Estate in Hermanus arising from the approval of the project, and that it had been suggested that Markowitz had been guilty of improper conduct with regard to the tenders in respect of the Cape Town International Convention Centre Company (Pty) Ltd, known as CONVENCO. Markowitz denied that he had made any such boasts to Harksen, and furthermore denied that these allegations contained any element of truth whatsoever. The evidence of Mr Braun, Chief Executive Officer of Arabella South Africa Holdings Limited, and Mr Douglas, Chief Executive Officer of CONVENCO, was presented before the Commission and was to the effect that no improper conduct had occurred. The

Commission finds that it is not impossible that Markowitz could have made idle boasts to Harksen in this regard. However, it finds that no such improper conduct in regard to Arabella and CONVENCO took place.

AFTERWORD

Private funding of political parties

The Commission was invited by Mr Richard Calland and Ms Judith February of IDASA to deal in its report with the issue of private funding to political parties and the need for regulation in this regard. While the Commission agrees that there may be a need for such regulation, the Commission is reluctant to make any firm recommendations in the absence of specific inputs from political parties and other role players. On the other hand, the conduct of the politicians detailed in this report does give rise to some concern as it diminishes the political process. In these circumstances the suggestion by IDASA is not without merit. However, it is an issue which must be dealt with nationally by an agency which is duly entrusted with this task.

Ryan Coetzee

The Commission was approached by the United Democratic Movement ("UDM") to extend its work to include the activities of one Mr Ryan Coetzee, apparently an employee and/or member of the DA. Although the allegations referred to by the UDM may have fallen within our terms of reference, it would have resulted in a considerable increase in our workload and a further delay in the finalisation of this report. The situation was explained to the UDM who appreciated the problem. The Commission is indebted to them for their cooperation.

COMMENDATIONS

In conclusion, the Commission records its thanks to all the parties who participated in the hearings and generally assisted it in the effective conclusion of its mandate. The following persons warrant special mention:

- Dr I Meyer, the secretary for the Commission, Dr T Sutcliffe, his predecessor, and Dr Meyer's staff, for setting up the infrastructure and ensuring the smooth functioning of the Commission's activities.
- Ms Odette Ramsingh for her sterling role and especially her invaluable advice on the Public Administration aspects of the Commission's work.
- Director (now Deputy Commissioner) Mzwandile Petros for the investigative work done on behalf of the Commission.
- The many members of NEHAWU who supported the Commission in different ways.
- The lawyers and witnesses for their cooperation.
- The members of the public who attended the proceedings regularly.
- The media who comprehensively, and largely objectively, reported on the hearings.
- The Public Service Commission for its assistance in several respects and the encouragement at all times.

- Ms Louise Jeken, Judge Desai's Registrar, who diligently and competently carried out all the tasks entrusted to her.
- Lastly, but not least, the Commission's legal counsel Advocates Craig Webster and David Gess for their professionalism, commitment and hard work throughout the inquiry and in the preparation of this report.
- And, of course, our respective families for their love and support!

APPENDIX1

COMPOSITION OF WESTERN CAPE GOVERNMENT

PREMIER

FROM 11 MAY 1998 TO 5 DECEMBER 2001

G.N. Morkel

CABINET

FROM 11 MAY 1998– 14 FEBRUARY 2000

Health and Leader of the House :	P.J. Marais
Planning, Administration & Cultural Affairs :	J.W.H. Meiring
Finance & Agriculture :	L.H. Fick
Housing :	C.B. Herandien
Trade, Industry & Tourism :	H.J. Bester
Local Government & Gambling :	P.C. McKenzie
Social Services :	A.J. de Jager
Transport & Labour :	P. Meyer
Education & Sport :	N.J.J. Koornhof
Asset Management, Public Works & Media :	M. Louis
Community Safety & Environmental Affairs :	M. Wiley

FROM 14 FEBRUARY 2000 – 28 JULY 2000

Housing & Leader of the House :	C.B. Herandien
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Economic Affairs & Tourism :	H.J. Bester
Transport & Works :	P. Meyer
Health :	N.J.J. Koornhof
Community Safety, Sport & Recreation :	M.G.E. Wiley
Finance & Development Planning :	L.D. Markowitz
Minister in the office of the Premier :	F.J. Adams
Local Government :	P. Uys
Education :	H. Zille
Agriculture :	H.G. Van Rensburg
Environmental & Cultural Affairs :	G. Adams
Social Services & Poverty Relief :	F.J. Adams (acting)

FROM 28 JULY 2000 – 19 DECEMBER 2000

Housing & Leader of House :	C.B. Herandien
Community Safety :	H.J. Bester
Social Services & Poverty Relief :	P.J. Marais
Transport, Sport & Recreation :	P. Meyer
Health :	N.J.J. Koornhof
Finance, Business Promotion & Tourism :	L.D. Markowitz
Local Government & Development Planning:	P. Uys
Education :	H. Zille
Agriculture, Property Management & Works :	H.G. Van Rensburg
Environmental & Cultural Affairs :	G. Adams

FROM 19 DECEMBER 2000 – 18 JUNE 2001

Housing & Leader of the House :	C.B. Herandien
Community Safety :	H.J. Bester
Transport, Sport & Recreation :	P. Meyer

Health :	N.J.J. Koornhof
Finance, Business promotion & Tourism :	L.D. Markowitz
Local Government & Development Planning :	P. Uys
Education :	H. Zille
Agriculture, Property Management & Works :	H.G. Van Rensburg
Environmental & Cultural Affairs :	G. Adams
Social Services & Poverty Relief :	D.M. Malatsi

FROM 18 JANUARY 2001 – 5 DECEMBER 2001

Housing & Leader of the House :	C.B. Herandien
Community Safety :	H.J. Bester
Transport, Sport & Recreation :	P. Meyer
Health :	N.J.J. Koornhof
Finance, Business Promotion & Tourism :	L.D. Markowitz
Local Government & Development Planning :	P. Uys
Education :	H. Zille
Agriculture, Property Management & Works :	H.G. Van Rensburg
Environmental & Cultural Affairs :	G. Adams
Social Services & Poverty Relief :	D.M. Malatsi
Constitutional Affairs & Technology :	A.E. Van Zyl

APPENDIX 2

LIST OF LEGAL REPRESENTATIVES

FOR THE COMMISSION

Adv Craig Webster, Adv David W. Gess, Ms Odette Ramsingh

INVESTIGATOR

Dep. Commissioner Mzwandile Petros

SECRETARY TO THE COMMISSION

Dr Ivan Meyer

(Previously Dr T J Sutcliffe : March-June2002)

FOR Dr LD Barnard

Adv N J Treurnicht, SC, Mr C A Albertyn , Ms Marcelle Treurnicht

FOR Mr Pierre Beneke

Mr B F Rheeder [Withdrew 12 August 2002]

FOR PAWC

Adv E P Maytham, Adv P Setati, Ms Bardine Hall

FOR NIA

Instructed by Head Legal Services NIA

Adv L J Bozalek, Ms Dalene Warrassaly, Mr W J J Hanekom

FOR DA, Mr G Morkel & Mr DL Markowitz

Adv Peter B. Hodes, SC, Adv Alwyn P. Möller, Mr J J Brynard

FOR Mr J Harksen

Adv P. Mihalik, Adv W. King , Mr Michael Luck

FOR Mr Earl Hunter

Adv S C Goddard

FOR Mr Antonie Karsten

Mr F J Schoeman

FOR Mr Paul Katzeff

Adv Paul Hoffman, SC

FOR Trustees (Eileen Fey & Michael Lane)

Mr Bernhard Kurz

TRANSCRIPTION SERVICES

Veritas

APPENDIX 3

LIST OF WITNESSES

1	Arthur Joseph Peter Fraser
2	"John Tshabalala"
3	Kapt Renier Petrus Strydom
4	Mrs Renay L. Ogle
5	Hendrik Jacobus Bester
6	Berté Le Roux
7	Ronald Dearlove
8	Philipus Arnoldus Kalp
9	Melvin Carl Joshua
10	Jürgen Harksen
11	Gary Alexander Oliver
12	Annerie Barbara Pruis
13	Erik Johannes Marais
14	Admill Heinrich Simpson
15	Werner Schwella
16	Werner Wiehart
17	Dr Nel Marais
18	Francois Pieter Smit
19	Timothy Roland Mertens
20	Earl Quentin Mark Hunter
21	Trevor Garth Hinrichsen
22	Barry Philip Gilder
23	Lefiena Catharina Viviers
24	Antonie Karsten
25	Bernhard Kurz
26	Gerald Norman Morkel
27	Paul Katzeff
28	David Leon Markowitz
29	Dirk Jacobus Petrus Deblesse Smit
30	Dr Lukas Daniel Barnard
31	Kent Hercules Morkel
32	George Edward van Dieman
33	Ivor Sindler
34	Stefan Löther Hans Braun
35	Ian Rory Douglas
36	Wilfred Sauerland

APPENDIX 4

DESCRIPTION OF DOCUMENTARY EXHIBITS

20 May 2002 – 18 October 2002

A	Letter from Dir.Gen NIA to Dir.Gen, in respect of use of private companies, contractors & consultants. Placed on record by Adv Webster
B	Letter from NIA to premier of WC Prov Gov. dd 18/3/02 in respect of TSCM
C	Bundle of photographs
D	WatchDog WS-100 manual
E	Mrs Ogle's report: Directorate: Forensic Audit
F	Bundle of docs handed to Mr H.Bester – papers gathered by the Commission
G	Copies of correspondence iro Mr H. Bester
H	Report prepared by Mr Berté Le Roux
J	Report prepared by Mr Ronald Dearlove
K	'Veiligheidsprojek' – prepared by Commission in respect of Mr Dearlove
L	Bundle of correspondence from former DG's office – G.A. Oliver
M	Bundle of CV's, employment contracts
N	Copy of 2 nd affidavit signed by Jürgen Harksen – original with the DA (Provisionally admitted)
O	Aansoek vir voorsiening van inligtingstegnologie: AB Pruis
P	Large bundle of printouts from electronic diary at request of Forensic Audit: AB Pruis
Q	Bundle of copies of printouts – laptop: AB Pruis
R	Report by Admill Simpson
S	Electronic diary printouts for Niel Barnard

T	Electronic diary printouts for Gary Oliver
U	1 bladsy verslag deur Dr Nel Marais
V	Verslag deur Dr Nel Marais gedateer 3 Julie 2001
W	Verklaring deur Francois Pieter Smit
X	Bundle of docs from Capt Piet Viljoen (<i>duces tekem</i>)
Y1	Letter from Leon Markovitz to Mrs J Harksen
Y2	Fax from Jeanette Harksen to Mr Markovitz 1/8/2001
Y3	Letter from Jeanette Harksen to Mr Markovitz 20/11/2001
Y4	Deposit slip R4 291,75 – Unitrade 21/12/01
Z	Copy of judgment by Farlam J, case no. 4840/

OTHER EXHIBITS

1	WatchDog WS-100 #1000 524-5-101
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AA	Letter from Walter Studer to Adv Peter Hodes, SC
BB	Letter & account from Katzef to Morkel
CC	Copy of SMS from Harksen to Katzef
DD	Bundle – Adv Hodes – DD13 – original receipt
EE	EE1 – Copy of cheque DL Markovitz made out to Groene Cloof wine estate EE2 – Invoice from Groene Cloof wine estate
FF	Letters of Authority
GG	Due Diligence document
HH	Deed of Trust

JJ	Letter from Hunter to Sauerland
KK	Copy of cheques
LL	Report by Mrs Viviers
MM	Copy of foil – c/no. 183 – Voyager Trust – Antonie Karsten
NN	Documents made available by Mr Kurz
OO	Subpoena – Commission/Kurz
PP	Response to subpoena by Mr Kurz
QQ	Extract from guest book – Maximilian’s Restaurant
RR	1-5 copies of deposit slips
SS	Affidavit by Antonie Karsten
TT	NODAL document
UU	Letter from Speaker (W.Doman) to Mr Morkel in respect of pension
VV	Form E – offer to sell foreign currency
WW	1-13 bundle of extracts from newspaper articles
XX	List of Mr Morkel’s mobile phone billing
YY	Copy of article in Cape Times
ZZ	Bundle of docs – Adv Mihalik

AAA	Bundle of docs – Paul Katzeff
BBB	Forensic Audit Report – Ernst & Young
CCC	Letter from Mr Markowitz to Joe Surkont (Investigator)

DDD	Mr Markowitz's itemised cellphone billing for Oct & Nov
EEE	Report No 2 by "John Tshabalala"
FFF	Affidavit by Dr L D Barnard
GGG	Wilfried Sauerland's contact details
HHH	Fax to Sauerland from Sindler
JJJ	Copy bank statements for Slip Knot Investments
KKK	Overberg District Council correspondence
LLL	Fax from Arabella Country Estate to Desai Commission
MMM	Overberg District Council – objection to Dept Housing 1996
NNN 1&2	Flow diagrams Cape Town International Convention Centre NNN1 –Procurement, NNN2 – Selection & Process
OOO	Documents in respect of Mr Beneke
PPP	PPP1 Findings Disciplinary Enquiry PPP2 Findings Disciplinary Enquiry – Sanction