



**Cape Peninsula  
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**NON-COMPLIANCE WITH EXTERNAL CONTROL MEASURES IN SELECTED  
CASE STUDIES WITHIN THE NATIONAL SPHERE OF THE PUBLIC SECTOR**

**by**

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I found profound wisdom in the following words of another traveller:

She looked back and marvelled how far she had come...she didn't wonder how she made it... she already knew the answer. Only with God's help had she powered through. For without His strength, she could do nothing...  
(Anon, sourced from Women Who Changed the World quotes)

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## **DEDICATION**

For the people of South Africa

## **ABSTRACT**

Ethical conduct displayed by members of the public sector is integral to creating a sustainable democratic government, which upholds the constitutional tenets of accountability, transparency and professional ethicality. Furthermore, a true constitutional democracy emphasises and advocates the notion of service leadership that nurtures public participation and engages with citizens in a positive manner. Ethical conduct in the public sector earns public trust; it is hence a key principle in good governance. Yet, in the years since the advent of democracy in South Africa, the government has been plagued by rampant corruption and maladministration by public officials and politicians in leadership positions.

The external control measures passed by government in an attempt to ensure ethicality and accountability within the public sector include codes of ethics, rules of conduct and the enactment of legislation. These are intended to shape the mindset of members of the public sector, with the ultimate aim of an efficient, effective, ethical and responsive public service.

The purpose of the current study is to analyse non-compliance with external control measures within the public sector by means of selected case studies and to present the reasons for this occurrence. The three cases selected are: the South African Arms Deal, the corruption trial of Jackie Selebi, and the investigation of Bheki Cele regarding irregularities in the procurement of SAPS assets, the latter two who served as National Commissioners of the South African Police Service but were each dismissed from that post.

The reasons for non-compliance with external control measures in the public sector as well as recommendations based on the findings to improve compliance will be undertaken. The three case studies demonstrate the experience and impact of corruption and/or maladministration, which have contributed to the increasing loss of confidence in political leadership in the country as elsewhere in the world. A qualitative methodology of inquiry, including a review of literature covering the theories applied to the case studies will be employed. Owing to the subject nature of the current study, the findings will be validated by an independent source, which has been identified as the Office of the Public Protector.

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## LIST OF ABBREVIATIONS

ACCA	Association of chartered Certified Accountants
AIDS	Acquired immune Deficiency Syndrome
ANC	African National Congress
ANCYL	African National Congress Youth League
AU	African Union
AG	Auditor-General
Armcor	Armaments Corporation of South Africa SOC Ltd, (Act 51 of 2003)
CAAT	Campaign Against Arms Trade
CASAC	Council for the Advancement of the Constitution
CIPFA	Chartered Institute of Public Finance and Accountancy
CSR	corporate social responsibility (referring to the concept thereof)
CSVR	Centre for the Study of Violence and Reconciliation
DA	Democratic Alliance
DPADM	Division for Public Administration and Development Management (of the UN)
DPSA	Department of Public Service and Administration
DPW	Department of Public Works
ECA	Export Credit Agencies
EMAA	Executive Members Ethics Act (1998)
GOPAC	Global Organisation of Parliamentarians Against Corruption
ICD	Independent Complaints Directorate
IFAC	International Federation of Accountants
IoD	Institute of Directors
IFP	Inkatha Freedom Party
IMF	International Monetary Fund
ISS	Institute for Security Studies
King I	King Report on Corporate Governance (2002)
King II	King Report on Corporate Governance (2002)
King III	King Report on Governance for South Africa (2009)
MEC	Member of Executive Council
NACF	National Anti-Corruption Forum
NEC	National Executive Committee (of the ANC)
NPA	National Prosecuting Authority
NPAA	National Prosecuting Authority Act
NPAAA	National Prosecuting Authority Amendment Act
NPM	New Public Management

OECD	Organisation for Economic Cooperation and Development
PAA	Public Audit Act
PAMA	Public Administration Management Act
PALAMA	Public Administration Leadership and Management Academy
PCCAA	Prevention and Combating of Corrupt Activities Act
PFMA	Public Finance Management Act
PP	Public Protector
PPA	Public Protector Act
PSAA	Public Service Amendment Act 2007
PSC	Public Service Commission
SABC	South African Broad Casting Services
SADF	South African Defence Force
SADC	Southern African Development Community
SAICA	South African Institute of Chartered Accountants
SANDF	South African National Defence Force
SAPS	South African Police Services
SCOPA	Select Committee of Public Accounts
SDP	Strategic Defence Package (commonly referred to as the Arms Deal)
SIU	Special Investigating Unit
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UN-DESA	United Nations Department of Economic and Social Affairs
UNDP	United Nations Development Programme
UNPAN	United Nations Public Administration Network

# CHAPTER ONE

## BACKGROUND AND CONTEXT OF STUDY

### 1.1 Introduction

Ethics play an integral role in the everyday life of both public service managers and politicians. According to Lues & Bester (2007:93), ethics 'assist to set the climate, develop the vision, and shape the behaviour of public officials.' Importantly, ethical behaviour displayed by public managers serves as a model for the behaviour of lower ranking public officials and the public in general (Lues & Bester, 2007:93). The external control measures passed by government, including codes of ethics, rules of conduct and the enactment of legislation, provide the principles for the occurrence of good governance and accountability under democracy, by means of influencing positively the mindset and, in turn, the behaviour of members of the public sector. The ultimate anticipated result of an ethical and accountable public sector and good governance is service excellence.

Ethical conduct and accountability in the public sector earn public trust as they are an indication of the goals and practise of just state relations with all members of society as well as a main intention to provide excellent public service; it is hence a key principle in good governance in a democracy. In the absence of the public's trust, public officials would most likely display unethical, unprofessional, unlawful, unjust and incompetent behaviour, which would ultimately lead to a corrupt state (Nanabhay & Ballard, 2011:1). Ethics, law, professionalism and accountability thus form the cornerstones of good governance among governments worldwide. These concepts are valued for their ability to positively influence public governance, with non-compliance with regard to them perceived as corruption within the public sector. Thus the concept of and principles or ethics informing accountability and good governance form an integral part of public management curricula and programmes at tertiary and other institutions; they are aimed at adequately equipping prospective public officials with the knowledge to promote and enhance ethical behaviour (Nanabhay & Ballard, 2011:1).

These concepts are also interrelated. Within the context of this study, for public officials to conduct themselves in an ethical manner means that they must be held accountable for their actions. As a relatively young democracy emerging from apartheid, the notion of accountability and transparency ought to be at the helm of public administration,

guiding public officials to conduct their affairs in a transparent and open manner as well as to be accountable for their actions. This will ultimately, ensure ethical conduct.

Despite such measures as pointed out above, however, unethical conduct prevails in the South African public sector, continues to result in growing corruption and is viewed as an increasing challenge for the country in terms of its development as well as future long-term stability. The question of redress is hence a crucial one, yet, according to the National Anti-Corruption Forum (NACF), although the South African government has laid the foundations to combat corruption, the NACF as, an anti-corruption construction site that publically monitors corruption in the country, will maintain its watchdog position over government and business as long as corruption plagues the global community (NACF, 2015). (The NACF is comprised of members from three sectors, namely, business, civil society and government. It is a non-statutory and cross-sectoral organisation. (NACF, 2015)) The NACF thus importantly links the domestic situation with corruption to that occurring globally, highlighting the prevalence of the scourge globally and thus transcending national borders.

In the first United Nations Convention Against Corruption (UNCAC) review cycle which took place in July 2012, South Africa was among the group of countries reviewed. Parker & Van Vuuren (2012:1) of the Institute for Security Studies, commenting on the UNAC review, identify this global initiative as important *vis a vis* the growing concern over corruption among the country's citizenry. These authors point to the most recent Afrobarometer Survey, Round 5 of 2012 that found that 40% of South Africans perceived Members of Parliament and councillors to be corrupt, a figure that is up from 25% four years ago in the Survey's Round 4 of 2008 (Parker & Van Vuuren, 2012:1).

Parker & Van Vuuren (2012:2) point out that South Africa is not unique in terms of the challenges posed by corruption to democracy and progress. In fact, the international trend regarding corruption has led the authors to anticipate the widespread occurrence of such corrupt activities locally as tender irregularities, misuse of public monies and unchecked conflict of interests increasingly becoming the driving force in all sectors of society to promote transparency and monitoring of anticorruption efforts (Parker & Van Vuuren, 2012:2). According to the authors, as international experience suggests, local anti-corruption measures should include assessment of current legislation and implementation thereof, a position strongly supported by the current study.

In this study, a number of incidents relating to corruption in the public sector will be highlighted to demonstrate the prevalence of the phenomenon in the South African public sector. The public exposure of such cases via the media affords a critical opportunity for scholarship and practice, that is, scrutinising such incidents of corruption objectively with a cool lens to determine how to effectively close the legal, political and administrative loopholes that enable corruption to occur. This is important because information placed in the public domain by the National Prosecuting Authority (NPA) makes clear that successful prosecution of cases involving corruption in this domain is proving difficult (Parker & Van Vuuren, 2012:2). For, example, during the 2010–2011 period alone, 392 incidences of corruption were reported, of which only 183 (less than half) were prosecuted, with only 9 convictions being made (approximately 2%) (Parker & Van Vuuren, 2012:2). These figures bluntly demonstrate the difficulty of successfully prosecuting cases of corruption in the public sector.

At the time of writing, according to *The Economist* (Anon, 2011:1), it appears that an array of politicians, bosses of state owned companies or enterprises, intelligence officers and director-generals of government departments were in the process of fighting for their respective professional careers over allegations of fraud and other irregularities. The publication further argues that the Special Investigating Unit (SIU), established to investigate graft and organised crime, estimates that as much as 20–25% of state procurement expenditure, amounting to around R30 billion annually is squandered through overpayment and corruption (Anon, 2011:1). The SIU, which is accommodated in the National Prosecutor's office, was, at the time of writing, probing allegedly corrupt deals worth R12 billion at the time. The unit also revealed that of the latter figure, R3 billion comprised improperly awarded tenders in respect of the Ministry of Public Works alone, the latter which is one of the biggest spending government departments (Anon, 2011:1).

The Auditor-General stated that in 2011 alone, R26 billion had been spent 'irregularly' and officials in a third of government departments had awarded contracts to close family members (Anon, 2011:1). Further, an audit of the Social Security Agency, which distributes grants of approximately R100 billion a year to 15 million South Africans, almost a third of the total population, showed the agency's finances to be in chaos and riddled with fraud. A study had also revealed, according to the publication, that 7% of

social benefits (distributed by the agency) are illegally claimed by fraudulent beneficiaries, with more than 15 000 such fraudulent beneficiaries convicted in the previous five years (2007–2011). The agency's financial director was dismissed in July 2012.

Despite the enactment of various pieces of legislation, including the Constitution of the Republic of South Africa, 1996 as well as a number of ethical codes and rules of conduct adopted by the public sector, non-compliance with internal and external control measures within the public sector continues, with corruption remaining rife. Corruption in the public sector, as indicated above, continues to be reported, perhaps the most notable case to date being the Arms Deal, which created the first serious outcry against the ruling African National Congress (ANC) party in 1999. The corruption case of the Arms Deal began in 1999 and continues to date, 17 years later. Why did this case, and indeed other such cases, take this long to be tried? What are the challenges in effectively trying and resolving corruption cases in the public domain so that more speedy legal resolution can become a key means of public sector accountability to stem the tide of corruption in this sector?

In an attempt to discuss these and other similar questions, this study will provide an analysis of three case studies. The first is the Arms Deal, as mentioned above. The second case relates to that of Jackie Selebi, a former South African Police Services (SAPS) national Commissioner and Interpol Chief, who was found guilty in 2009 of corruption for accepting cash bribes from a convicted drug baron. The third and final case pertains to Bheki Cele, who succeeded Jackie Selebi as National Police Commissioner but who was himself dismissed in 2011 following misconduct in a tender process. Both the latter public figures were tasked with promoting and securing law and order in the country. Citizens of South Africa entrusted these individuals to fulfil this mandate in the interests of the public, but both failed to complete their respective terms of office due to probes and investigations, and eventually dismissal from office.

The remainder of this chapter will present the rationale, objectives, process and methods and research items used to study these cases. In this regard, first presented is a preliminary literature review, follow up by a brief further introductions of the three case studies selected. This is followed by the purpose statement, research question, an outline of the research design and methodology used, analysis, significance of the



study, a list of key words used throughout the current study and the organisation of chapters.

## **1.2 Preliminary Literature Review**

This section will provide some of the key readings, research areas, concepts and terms that inform the writing up and analysis of the selected case studies.

### **1.2.1 Public sector powers**

The public sector official is vested with the following powers:

- powers of authority (for example, to grant or refuse a residence permit);
- powers to exercise discretion in decision-making (for example, to appoint a preferential service provider); and
- powers to influence political office bearers (for example, to provide reliable and valid information to influence political policy) (Nanabhay & Ballard, 2011:4).

Misuse of these powers results in poor governance and, ultimately, a weak democracy. As will be shown below and argued throughout this study, researchers consistently point to reinforcement of ethics as a key mechanism to make the public sector viable in terms of its functioning and impact on society. Broadly speaking, ethics in the public sector and oversight mechanism to enforce them will produce the key features of democracy, which the public sector is majorly responsible for creating or failing to create. These key features are accountability, efficiency, openness, transparency, honesty, integrity, etc. The literature below discusses, links and presents these features as a pattern of inter-dependent relationships.

### **1.2.2 Public sector ethics**

In the exercise of these powers, the public sector official must promote the interests of the public in a selfless manner using public resources responsibly, and not for personal gain (Schwella, 1996:52). This public ethic is not a new principle; Cicero, cited in Schwella (1996:52), wrote 'On Obligations' (*De Officiis*) as early as 44 BC to provide early Roman society with guidelines to secure conduct that would lead to success and happiness. Cicero is observed to have tasked those securing government affairs to keep the 'good of the people clearly in view [... and to] care for the body politic as a whole and not serve the interests of one party to betray the rest'; the administration of government, like the office of a trustee, must be conducted 'for the benefit of those

entrusted to one's care, not those to whom it is entrusted' (Cicero quoted in Schwella, 1996:52).

If one compares Cicero's above position with the prescripts of the modern day South African Constitution (1996), the elements of fairness, justice, equitability and trustworthiness are loudly echoed. The Constitution (1996), places a firm and direct obligation on public officials to carry out their duties in a fair, unbiased and equitable manner (Section 195(1)(d) Constitution, 1996). The public official would, in Cicero's view, be regarded as a trustee, and would therefore have a moral obligation to protect and take responsibility for the welfare of the public as well as the utilization of public resources.

Ethics as defined by Dhali & McQuoid-Mason (2011:3) includes the 'systematic reflection on and analysis of actions and behaviour'. Morality is seen as 'the value dimension of human decision-making and behaviour includes nouns like 'virtue', 'good', 'bad', 'right', 'wrong', 'just' and 'unjust' (Dhali & McQuoid-Mason, 2011:3). This definition of ethics promotes equality, fairness, justice and trustworthiness. Again, it may be seen that the notions of trust and mindfulness of the public official that he or she is occupying an office of a trustee are emphasised.

Andrews (1988:35) defines ethics as the 'standards which guide the behaviour and actions of the personnel in public institutions, and which may be referred to as moral laws'. Further, advanced and progressive methods as well as technological advancements bear no fruits if the personnel who are required to apply these methods do not pursue or aim for high moral standards (Andrews, 1988:35).

Two important concepts, namely, deontology and consequentialism, influence ethics. Deontology may be described as philosophical theory that guides and assesses our choices of what we ought to do, in other words, what is required from us from a morality point of view. Deontologists believe that ethical rules place a moral duty on people to fulfil their moral obligation (Anon, 2015). The term 'deontology' derives from the Greek word '*deon*', meaning 'obligation' or 'duty' and science (or study of) *logos* (reason) (Anon, 2015).

Consequentialism, according to Moore's *Principia Ethica*, first published in 1903, is a doctrine advocating that actions should be judged right or wrong on the basis of their consequences (Anon, 2015). The simplest form of consequentialism is classical (or hedonistic) utilitarianism, which asserts that 'an act is morally right if and only if that act maximises the good' (Anon, 2015). Moore's consequentialism, known as 'ideal utilitarianism, recognizes beauty and friendship, as well as pleasure as intrinsic goods that one's actions should aim to maximise' (Anon, 2015) Combined with the guiding notion of preference, utilitarianism actions are good if there is desire satisfaction or preference fulfilment, while actions are bad if these preferences or desires are aggravated (Anon, 2015).

### **1.2.3 Chapter 9 institutions and public sector oversight laws**

According to Nanabhay & Ballard, 2011:1), the Constitution of the Republic of South Africa (South Africa, 1996) places major responsibility on public officials to conduct their affairs in accordance with the democratic values and principles enshrined in it. Of particular importance is the establishment of institutions to strengthen constitutional democracy, as contained in Chapter Nine of the Constitution, which are commonly known as 'Chapter 9 institutions' (Nanabhay & Ballard, 2011:3). In addition, the Public Protector Act (South Africa, 1994), the Public Audit Act (South Africa, 2004), the Special Investigating Units and Special Tribunals Act (South Africa, 1996), the National Prosecuting Authority Act (South Africa, 1998) (as amended by the National Prosecuting Authority Amendment Act (South Africa, 2008)), the Prevention and Combating of Corrupt Activities Act (PCCAA) (South Africa, 2004), and the Public Finance Management Act (South Africa, 1991), all place major emphasis on public officials conducting themselves in an ethical manner. It is clear from the above oversight institutions and mechanisms promulgated by the Constitution (1996) that the legislature was always intended to highlight the importance of openness, transparency and accountability in all government transactions via means of all the above mentioned Acts of Parliament (Nanabhay & Ballard, 2011:19).

### **1.2.4 Principles of good governance in King II: Accountability, efficiency, openness, transparency, honesty and integrity**

The King II report identifies the values that create the ethical behaviour that leads to good governance. These are accountability, efficiency, openness, transparency, honesty and integrity. These values constitute a key aspect of what may be considered

the public servant's professionalism and his or her professional and job performance is judged according to them. For example, professional performance is dependent on efficiency in all areas of job performance. It is maintained in this study that maladministration amounts, in the above terms, to unethically, non-accountability and poor governance. Thus it is important for each value in itself to be highlighted as important as well by being linked to the others.

Raga & Tailor (2005a:1) argue that accountability is the fundamental prerequisite to prevent the abuse of power and to ensure that power is directed towards the achievement of efficiency, effectiveness and transparency. An open, transparent and accountable government is a prerequisite for community-oriented public service delivery; without it, covert and unethical behaviour will result (Raga & Tailor, 2005a:2).

Schwella & Rossouw (2005:766-767) observe with regard to Core Management Competencies used in Performance Management and Development Systems used by government to assess individual competence and job performance as well as professional development that 'honesty and integrity' is listed as one of the Core Management Competencies. This again emphasises ethical behaviour by public officials as a crucial measure of performance in the public workplace.

A study conducted by Lues & Bester (2007:93), observes that despite the pursuit of effectiveness and the condemnation of unethical behaviour by public managers, unethical conduct in the South African public sector still prevails. In light of this, Lues & Bester (2007:93) propose that public managers need to show continuous commitment to, enforcement of and modelling of leadership in professional ethics by means of, among other things, policy structures. By these means, they will come to realise the importance of changing their personal mindsets or ethical values so as to accept the ethical standards established by the public service organisation, even if these differ from their general beliefs and practices (Lues & Bester, 2007:93).

Sindane's (2008:339) study on the topic also highlights the importance of ethics and accountability among public officials. Sindane (2008:339) recommends that:

cultured [learned, mature or professional] public managers need to cultivate a sense of accountability and ethics that transcends the legality of administrative

action to include organisational and professional behaviour as well as morality of administrative action' [addition mine].

Once again, professional behaviour should be focussed on accountability and transparency and interpreted to include the tenets of ethicality, integrity and efficiency. The basic assumption is that the state will be capacitated if its public administration, the vehicle of all government activities, possesses qualified, experienced, committed people, who operate in a stable political environment, the epitome of which is a public administrative culture geared for excellence (Sindane, 2008:339). (In the interest of the word cultured as used by Sindane (2008) above not being misconstrued; its use refers to the learned, mature and professional disposition of the public manager.) Moreover, according to Sindane (2008), the bases for such a public administrative culture in South Africa are encapsulated in the Constitution of the Republic of South Africa Act, 1996, and the principles embedded in the 1997 White Paper on Transformation of Public Service Delivery (South Africa. Department of Public Service and Administration, 1997). Regrettably, he observes, echoing previous authors mentioned, compliance with these principles and external control measures are currently virtually non-existent, and is borne out by the 2007 survey conducted by the Department of Public Service and Administration (DPSA) (Sindane, 2008:340).

The above discussion has discussed the key research areas and associated concepts of public sector powers, public sector ethics, Chapter 9 institutions and public sector oversight laws, and the values of accountability, efficiency, openness, transparency, honesty, and integrity in creating and maintaining good governance in state structures. The issue of good governance, with specific reference to the King (II) Report, being the lynchpin in eradicating corruption, these latter principles for good governance will be discussed in detail in Chapter 4 of this thesis.

The discussion has outlined the importance of adherence and compliance with ethical codes, legislative directives and policies pertaining to the public sector. It is clear that compliance with these external control measures is imperative for an accountable public administration to be created and maintained. Non-compliance, in this context, is therefore a considerable flaw that requires urgent and comprehensive redress and remedy, toward which this study attempts to contribute.

### **1.3 Purpose Statement**

The purpose of the current study is to analyse non-compliance with external control measures within the public sector by means of selected case studies and to present the reasons for this occurrence. Further, it is the purpose of the current study to formulate recommendations based on the analysis of the cases in order to improve compliance and to assess whether existing external control measures are effective or sufficient.

### **1.4 Research Question**

Why does non-compliance with external control measures occur in the public sector?

### **1.5 Research Methodology**

#### **1.5.1 A theory-making and inductive approach**

The current study will adopt a qualitative method of inquiry, including a review of literature that covers the theories applied in analysing three case studies selected from within the public sector as well as analysis of the three cases themselves. In particular, the current study will adopt an inductive approach, in other words, a theory-building approach to research.

According to Burns & Burns (2008:22), research involves both description and explanation. Research that begins with specific observations, that is followed by analysis that produces explanation of the observations or explanations results in an inductive process. If, however, as Burns & Burns (2008) observe, the sequence of description and observation is reversed, that is, the research starts with a theory from which other observations, explanations or implications follow logically, these latter implications can be tested and, on the basis of the results produced, the initial theory supported or rejected. This process is hence the deductive process, or a top-down strategy, working from the general to the specific (Burns & Burns, 2008:23).

Du Plooy-Cilliers, et al (2014:49) concur with Burns & Burns (2014:49) that in inductive theorising, the research moves from the specific to the general, with the researcher applying the findings to more abstract and broad theoretical constructs.. As such, according to Du Plooy-Cilliers, et al (2014:490), inductive theorising is thus a bottom-

up approach; hence, inductive theorising allows for the building of an existing or new theory.

Researchers following an inductive approach begin with an individual case or cases and then proceed to general theory (Welman & Kruger, 2001:29). Moreover, according to Welman and Kruger (2001:29), an inductive approach is concerned with generating theories on the basis of studying specific cases while a deductive approach seeks to test hypotheses in terms of data obtained. Gummesson (2000:64) reinforces the above by pointing out that deductive research primarily tests existing theories, whereas inductive research primarily generates new theories.

Further, according to Gummesson (2000:63-64), inductive research begins with real-world data, patterns, models and concepts, from which theories eventually emerge. Lancaster (2005:25), concurring with the above, adds that with an inductive approach theories may be developed to explain observed data and information. In addition, the researcher may also develop theories based on observed patterns of behaviour (Lancaster, 2005:25). Lancaster (2005) maintains that the greatest strength of an inductive approach is its flexibility. The research approach does not require a hypothesis, instead, one can build theories based on observations thereby allowing a problem to be studied in different ways with alternative explanations thus made possible (Lancaster, 2005:26). The inductive approach is thus particularly suited to the study of human behaviour, including behaviour in organisations (Lancaster, 2005:26).

Hence, the current study will analyse the three chosen case studies in terms of an inductive approach to develop common trends, themes and sub-themes within the context of the theories of ethics and the seven principles of good governance (King II, 2002). The themes will be tested against the substantive content of each of the cases, which means that this study will deliver findings based on application of the theory to each case study.

Owing to the subjective nature of the current study, the findings will be validated by an independent source, which has been identified as the Office of the Public Protector. The Public Protector will be approached to comment on the findings for purposes of external validation. Cognizance will be taken of the comments made by the Public Protector as additional value from an objective qualitative perspective. In addition, an

attempt will be made to avoid subjective views, especially with regard to each of the cases, in the context of the research study. External validation refers to the ability to generalise findings from a specific sample to a larger target audience and entails using the same research method on a different target audience and still make the same findings (Du Plooy-Cilliers et al, 2014:174-178).

According to Welman & Kruger (2002:2), research involves the ‘application of various methods and techniques in order to create scientifically obtained knowledge by using objective methods and procedures’. Different studies use different methods and techniques, as every study has unique aims. Since the current study is formulated as a theoretical and historical analysis of literature, it is hence classified as qualitative research.

The difference between qualitative and quantitative research methodologies, according to Welman & Kruger (2002:178), centres on whether or not researchers generate the data themselves. In contrast to quantitative research, theoretical or historical researchers, Welman & Kruger (2002:178) rely on locating resources. The researcher does not interfere with the events or does not observe them directly, but rather describes, analyses, and interprets the events or happenings that have already taken place (Wellman & Kruger, 2002:178). Du Plooy-Cilliers et al (2014:174-178) observe that the main aim of qualitative research is to investigate, to comprehend and to narrate, and not to quantify and compute as in the case of quantitative researchers. Further, according to Flick (2006:58-59), in qualitative research, the researcher makes use of information from existing literature in order to contextualise the research in question. An analysis of existing literature, Flick (2006:59) points out, provides the researcher with answers to a number of questions, such as:

- What is already known in the field of study in question?
- What concepts are used?
- What are unanswered questions?
- What aspects have not yet been investigated?

De Vos et al (2011:298) also emphasise the significance of the use of existing literature in applying qualitative research methodology to a study. De Vos et al (2011:298) point to Flinders and Mills apt argument that, presently, few researchers maintain entry into a field of study ‘tabula rasa, that is, unencumbered by preconceived notions of



phenomena'. In this regard, De Vos et al (2011:298) also mention Flick's observation that it is too simplistic a view to maintain that in this modern day and age that there are undiscovered areas or domains still to be investigated and examined.

Hence, the qualitative methodology used in the current study will involve describing, analysing and interpreting past and current non-compliance with regard to external control measures, the latter including national codes of conduct and legislative directives. In this regard, a detailed discussion of the Constitution (1996) will be undertaken, with particular reference to and emphasis on the significance of Chapter 9 institutions (Constitution, 1996).

As well, an analysis of various items of legislation will be undertaken, including the Public Protector Act 1994 (South Africa, 1994), the Public Audit Act 2004 (South Africa, 2004), the Special Investigating Units and Special Tribunals Act 1996 (South Africa, 1996), the National Prosecuting Authority Amendment Act 1998 (South Africa, 1998), the Prevention and Combating of Corrupt Activities Act 2004 (South Africa, 2004), the Public Finance Management Act 1991 (South Africa, 1991), the Public Service Amendment Act 2007 (South Africa, 2007), and the Public Administration Management Act (South Africa, 2013).

The South African Code of Conduct for the Public Service (South Africa, Public Service Commission, 2002) as well as the King II Report on Corporate Governance in South Africa (South Africa, 2002) will also be discussed in this regard. Legislation and the Code of Conduct for the Public Service (South Africa. Public Service Commission, 2002) will be analysed to demonstrate the existence of external control measures currently in place applicable to the South African public service as well as the means by which these external control measures were violated in each of the three case studies selected for discussion.

The current study further aims to describe, analyse and interpret literature in the field of ethics, governance and accountability within the public sector. In this regard, various theories on ethics will be discussed and explained. These include: duty-based ethics, consequence-based ethics, social-contract based ethics and character-based ethics. The analysis of the current research will test these theories on ethics against the three

case studies in order to understand their practical application in cases of unethical conduct.

### **1.5.2 A Case Study Approach**

As mentioned above, detailed description, analyses, and interpretation via inductive reasoning of the three selected case studies will be conducted. The research design adopted is hence a case study approach, which is discussed below.

De Vos et al (2011:312) point to Creswell's emphasis on the five types of qualitative research, of which the case study approach is one. The first form is narrative biography, which De Vos et al (2011:313) refer to Schwandt's explanation as consisting of inquiry based on the assumption that personal experiences of individuals can be most accurately explained from the personal perspective of the individual. The second is the ethnography approach, which, according to De Vos et al (2011:314) point to Creswell's explanation as relating to the study of a particular group of individuals over a long period of time. The third form of inquiry, phenomenology De Vos et al (2011:314), referring to Bentz & Shapiro, explain as an attempt to understand a phenomenon as it happens and 'to provide an account of human experiences as it is experienced by the subjects'. The fourth form of inquiry is the grounded theory approach, which De Vos et al (2011:318), explain as having been developed by Glaser & Strauss in 1967 note this form of inquiry as based on 'constant comparison of data incidents with one another during the stages of data analysis, and theoretical sampling', the rationale behind the comparison being to highlight 'similarities and differences in the data'. The fifth form of inquiry is the case study approach, which De Vos et al (2011:320), referring to Schramm, describe as a mode of 'conceptualising human behaviour', the strategic value of which 'lies in its ability to highlight lessons learnt from a single case'.

In the current study the explanatory case study approach was chosen because it serves to generate in depth knowledge about a specific issue, that is, non-compliance with external control measures in the public sector. The case study approach, it is hoped, will enable the reader to understand the relation between theoretical underpinning and praxis via the example of non-compliance in each of the three case studies selected for discussion.

The current study will critically test the legislative and theoretical propositions in each case of non-compliance. In other words, the South African Arms Deal and the individual cases of National Commissioners of Police Jackie Selebi and Bheki Cele will be critically analysed and the findings tested against the legislation and theoretical underpinnings relating to each and all three collectively. The study will then provide recommendations in terms of the way forward with regard to addressing non-compliance with external control measures within the public sector.

### **1.5.2.1 The case studies selected for study**

The current study will present and analyse three case studies: the Arms Deal involving corruption, unethicity, professional misconduct, non-compliance, non-accountability and non-transparency, amongst others on the part of high ranking public officials in the procurement of arms in the National Ministry of Defence, National Commissioner of the SAPS, Jackie Selebi, and National Commissioner of the SAPS, Bheki Cele.

#### **1.5.2.1.1 Case study 1: The Arms Deal**

The South African arms deal, or Strategic Defence Package (SDP), consists of a bundle of projects managed as a single package. It constituted the largest armaments deal ever concluded in South Africa. It consists of 28 Gripen Advanced Light Fighter Aircraft and 24 Hawk Lead in-fighter Trainers from BAE/SAAB, 4 corvettes from a German Frigate Consortium, 3 submarines from a German Submarine Consortium, and 30 Agusta 109 helicopters from Italy. The total contract value at date of signature was approximately R24.9 billion (US\$3.98 billion) at the rate of exchange prevailing at that time (R6.25 to the US dollar and R6.4 to the euro) (Botha, 2003).

The political and public reaction to the Arms Deal that ensued was premised on the following, inter alia:

- accusations of improper behaviour by a number of political office bearers and public sector officials, which questioned whether the deal was compromised,
- whether the deal was characterised by a fair process in place during the negotiations and signing of the contracts for the deal;
- whether there was corruption involved; and
- if there was corruption, whether it was being investigated or covered up (Botha, 2003).

Patricia De Lille, a Member of Parliament at the time, was instrumental in sounding the alarm on suspected irregularities (Holden, 2008:38). Concerns regarding irregularities in the decision-making process were raised by various parties, including a report by the Auditor-General to the Select Committee of Public Accounts (SCOPA) in September 2000. In its report to Parliament, SCOPA recommended that four bodies, the Public Protector, the Auditor-General, the Directorate Special Operations of the National Prosecuting Authority (NPA) and the Special Investigations Unit (SIU) be instructed to undertake a comprehensive forensic investigation of all aspects of the Arms Deal. According to Botha (2003:3), the South African government failed to appoint the Special Investigations Unit, despite ensuing acrimony. The three bodies that did form the investigative team found in its November 2001 report that there were no grounds to believe government had acted 'illegally and improperly' (Botha, 2003).

British and German investigators suspect that bribes of over R1 billion were paid to facilitate the deal (Basson et al, 2008) deal. Current State President, Jacob Zuma, previous State President, Thabo Mbeki, the Chief of Acquisitions at the Secretariat for Defence, Chippy Shaik and his brother, Schabir Shaik, as well as late Minister of Defence, Joe Modise, were mentioned as recipients. Andrew Feinstein, an ANC Member of Parliament and former ANC leader of Parliament's Public Accounts watchdog, SCOPA, resigned when the government moved to curtail investigations into the Arms Deal. This case illustrates corruption involving collaboration on multiple levels among ruling party elites with transnational business elites (Basson et al, 2008).

#### **1.5.2.1.2 Case study 2: Jackie Selebi**

Former National Commissioner of the South African Police Services (SAPS) and President of Interpol Chief, Jacob (Jackie) Sello Selebi, was also the President of African National Congress Youth League from 1987 to 1991. While in exile as a member of the ANC, Selebi and upon return after Apartheid came to an official end, Selebi occupied numerous high ranking positions both locally and internationally. Selebi was appointed National Commissioner of SAPS in 2000 when the organisation was in a process of deep transformation from the former militarised South African Police of the apartheid state to a more civilian oriented policing befitting a democracy. This attests to the level of confidence shown in him at the time, the prevailing belief at the time being that the former political activist would make a good crime fighter. Yet, in

January 2008 Selebi was put on extended leave as National Police Commissioner and resigned as President of Interpol following charges of corruption in South Africa.

During his trial, it was revealed that the lifestyle Selebi coveted was not affordable on his official salary and led him into a corrupt relationship with international drug baron, Glen Agliotti. Thus despite an illustrious work and struggle career Selebi ended up serving jail time. As deeper discussion of this case in Chapter Six will show, the charm and illustrious career of this individual hid a path that throughout housed a propensity for unethically. Judge Joffe, in handing down sentence attested to the gravity of the misconduct and impact of Selebi's corruption:

Mr Selebi... Firstly, you were an embarrassment to the office you occupied. It is inconceivable that the person who occupied the office of National Commissioner of Police could have been such a stranger to the truth. Secondly, you must have been an embarrassment to those who appointed you. Thirdly, you must have been an embarrassment to those who you led... [the] police men and women who are in the front line of the fight against crime... Fourthly, you must have been an embarrassment to all right thinking citizens of this country. For a citizen of this country it is incomprehensible that the National Commissioner of Police would be found to be an unreliable witness (Joffe, 2010:8).

Selebi was found guilty on the charge of corruption on 2 July 2010 and sentenced him to 15 years in prison on 3 August 2010. His appeal to the Supreme Court of Appeal was unanimously turned down on 2 December 2011. The case study is an example of a person with political struggle credentials who is seen to have shown clearly compromised ethics in terms of personal character throughout his work life.

#### **1.5.2.1.3 Case study 3: Bheki Cele**

Bheki Cele was appointed as National Commissioner of the South African Police Service in July 2009, replacing Jackie Selebi following suspension of the latter in January 2008 when allegations into corruption involving Selebi came to light. Cele himself had a long career of political activism and high ranking positions both during the anti-apartheid struggle and upon liberation. In this regard, he was a founding member for the National Education Union of South Africa, and served as an MEC and member of the Provincial Legislature in KwaZulu-Natal prior to taking up the post as SAPS National Commissioner. He was also a member of the ANC National Executive

Committee, a position he still occupies (South Africa. Department of Agriculture Forestry and Fisheries, 2015).

General Cele served as the National Commissioner of the South African Police Service until he was suspended, pending investigation, in October 2011. In October 2011, President Zuma referred the matter of General Cele's alleged corrupt activities in relation to two police lease deals signed with business tycoon Roux Shabangu, one for a building in Pretoria, another for a building in Durban for use by the SAPS, to the Office of the Public Protector. The Public Protector in her investigations of the matter found that Cele and then Minister of the Department of Public Works Minister, Gwen Mahlangu-Nkabinde, had contravened procurement policies and processes in the attempt to lease the buildings owned by Shabangu, the evidence showing that R1.7 billion spent in this regard was unlawful, improper and constituted maladministration. The Public Protector's findings directed the President to take the necessary remedial action against Cele and Mahlangu-Nkabinde in terms of Section 182(1)(c) of the Constitution, 1996 (see External Research Validation Report by the Public Protector appended to this thesis, page 10).

A board of inquiry, headed by Judge Jake Moloï, known as the Moloï Board of Inquiry recommended Cele's dismissal (South Africa. Office of the Presidency. Moloï Board of Inquiry, 2011:112). In June 2012 Cele was officially dismissed from his position, as was Mahlangu-Nkabinde ((South Africa. Office of the Presidency. Moloï Board of Inquiry, 2011). It should be noted that in terms of ethicality, maladministration should be interpreted so as to include the notion of inefficiency. When public officials fail to comply with processes and procedures governing a particular action (for example, procedures governing the public procurement process in South Africa), such non-adherence/non-compliance therewith, should be interpreted as inefficiency on the part of the responsible public official.

Having briefly outlined the cases above, it is clear that the South African government has been plagued by corruption and unethical conduct by officials occupying high ranks in government. These three examples alone show blatant disregard for the rule of law, ethical codes of conduct, and most of all, disregard for the supreme law of the land—the Constitution of the Republic of South Africa (1996). Each case study depicts members of the public sector abrogating two major tenets of democracy,

namely, accountability and transparency, conduct which leads to citizens increasingly viewing the public sector official as perfidious. Inductions will be drawn and highlighted from the analysis of each case study.

The present research study aims to offer valuable insights and lessons for the three case studies as well as guidelines to ensure effective implementation and compliance of codes of conduct and relevant legislation to counter unethical conduct and corruption. It is suggested that compliance with relevant rules, codes of conduct and legislation relating to the public official will reduce corruption in all spheres of government.

### **1.5.3 Validation of Research**

As previously indicated, the Office of the Public Protector has been identified as the independent source for external validation of the research. Du Plooy-Cilliers et al (2014:252) draw attention to the distinctions in process regarding validation of findings between quantitative and qualitative research methods. Qualitative research methodology deems validity and reliability as significant to the research process as do quantitative researchers, the difference being merely the use of terminology in each method (Du Plooy-Cilliers et al, 2014:252). Qualitative research methodology refer to the notion of 'trustworthiness' which comprises four components, namely, credibility, transferability, confirmability and dependability (Du Plooy-Cilliers et al, 2014:253).

Du Plooy-Cilliers et al (2014) referring to Flick point out that it is only since the 1980s that researchers have begun developing alternative criteria for the assessment of qualitative research. The authors mention Flick as highlighting the first criteria mentioned above, namely, credibility, as key (Du Plooy-Cilliers et al, 2014). One of the strategies of establishing credibility in qualitative research that De Plooy-Cilliers et al (2014) point to In Flick's recommendations is 'member checks', defined as 'communicative validation of data and interpretations with members of the field under study. The current study hence seeks to comply with the criterion of credibility by obtaining an objective report of the validity of its findings from the Office of the Public Protector. The external validation of the research performed by the office of the Public Protector is intended to determine the study's accuracy in interpreting its data, or the three case studies selected. The credibility of the research will thus be enhanced by the validation process.

The selection of the Office of the Public Protector as the source of validation is based primarily on the status of the Office in terms of its powers and functions with regard to the Constitution (1996) as well as it being a key office responsible for the investigation of cases involving misconduct and maladministration within the public sector (Constitution,1996).

The next related component to trustworthiness is transferability, which Du Plooy-Cilliers (2014:258) cite Collis & Hussey in 2003) and Lincoln & Guba in 1985 as explaining as the possibility of applying the results and analysis of one project to another similar in nature. Dependability, the next component of trustworthiness, refers to the quality or competence of data collection and data analysis as well as the integration and theorising generated from the data, which Du Plooy-Cilliers (2014:259) again cite Lincoln & Guba in 1985, Shenton in 2004 and Collis & Hussey in 2003 as informative in this regard. Dependability is hence the integration of the various research phases: data collection, data analysis, findings and, finally, recommendations and conclusions.

Du Plooy-Cilliers et al (2014:259) explain confirmability as per the definition provided by Collis & Hussey in 2003, which is an indication of how well the findings correlate with the data. The process of confirmability therefore tests whether another study analysing the same data will reach similar conclusions or make similar findings. The Office of the Public Protector also tests the research in terms of transferability, dependability and confirmability. In essence, this Office will comment whether the findings on non-compliance with external measures within the public sector flow from the analysis of the case studies and theories of ethics. The Office will ultimately indicate whether another such study is likely to make similar findings with regard to the three case studies selected.

In terms of the above aspect of external validation of the current study, a draft of the study will be sent to the Public Protector for a report (included subsequently as Appendix A of this thesis). As well, any recommendations for the research in the research validation report by the Public Protector will be implemented and recorded as such before the final draft of the study is submitted for evaluation as well as in Appendix B.



## **1.6 Research Design**

The research design for this study is complex and involves the use of various theoretical concepts and approaches in order to generate new theory. The theory making approach allows for this via inductive reasoning. Each case study discussed and analysed presents inductions pertaining to that specific case. Yet, the inductive method and approach allows the research pertaining to these cases to move from specific findings toward broader generalised findings and theories to answer the research question posed. This is the method of argumentation and reasoning applied in this study, which begins with a review of the literature and concepts, going into greater depth into the concepts of ethics and accountability, focusing on each case study, collectively theorising the findings in the three cases to generate new theories and using these theories to make recommendations for redress. As well, the external validation of the research in terms of its theorising and applicability is incorporated into the design. This is to ensure that that research remains valid and loyal to the field of study for which it is intended, that is, public administration.

The methodology discussed above, involving the crucial components of professional values, concepts, theories and close analysis of three case studies as well as the various theoretical approaches used towards generating new theory regarding non-compliance in the public sector, is schematically presented here under, as Figure 1 for ease of reference.

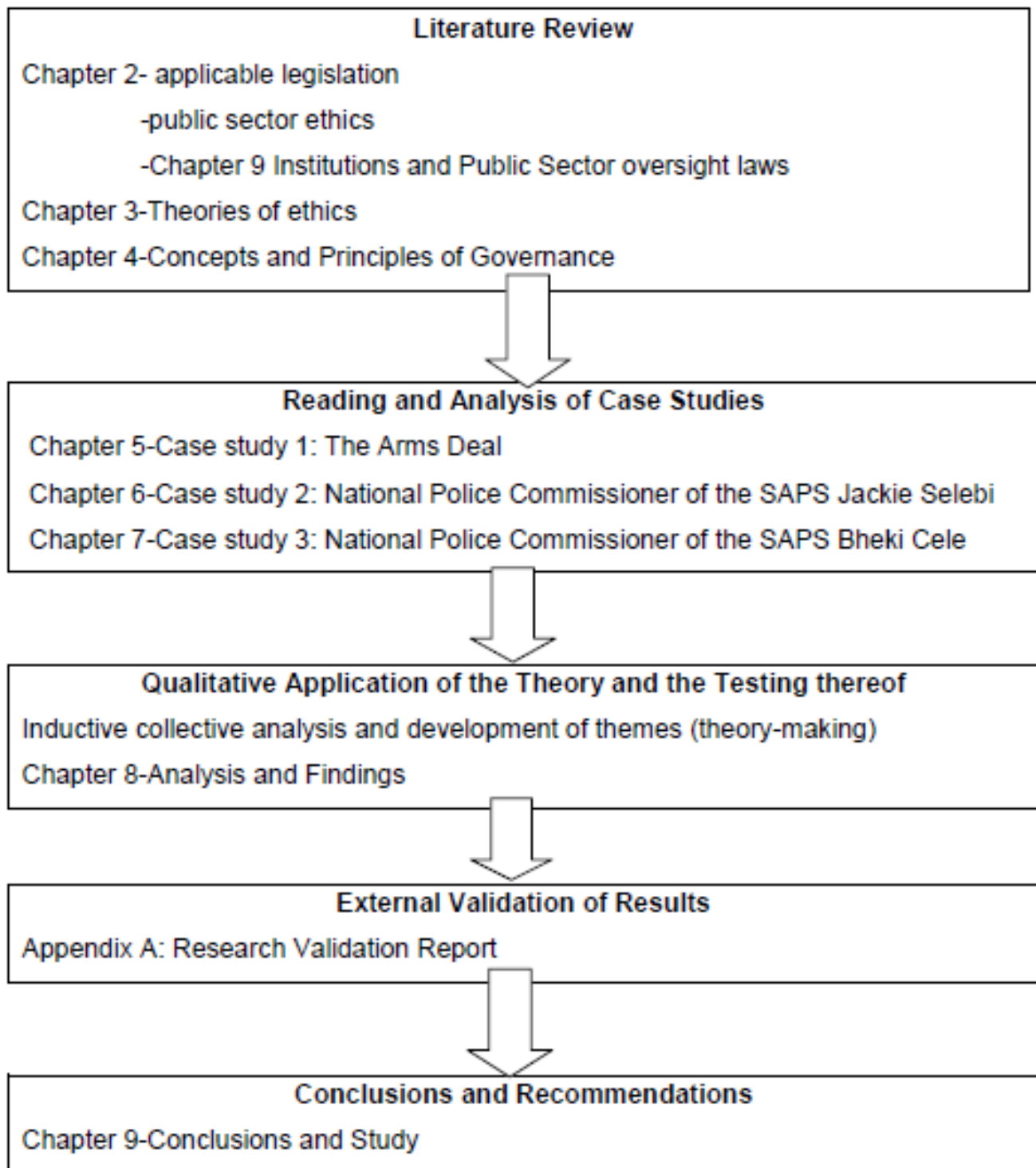


Figure 1: Schematic Representation of Research Method and Design

### 1.7 Analysis

The literature review will serve to define and identify the principles and theories with which to test non-compliance in terms of the themes and sub-themes emerging from the case studies in the current study. Examples of such themes are unauthorised decision-making and inadequate control and accountability. One or more of the theories of ethics identified will be linked to emerging themes in this regard.

Du Plooy-Cilliers et al (2014:232) discuss qualitative data analysis by pointing to De Vos et al 2011 following description: 'the process of bringing structure to the mass of data [...] and identifying significant patterns and constructing a framework for communicating the essence of what the data reveals'. Thus the key to qualitative data analysis is interpretation of the data, followed by justification of findings.

Du Plooy-Cilliers et al (2014:233) list a number of data analysis methods, namely, content analysis, discourse analysis, conversation analysis, multi-modal conversation analysis and semiotic analysis. For purposes of the current study, the content analysis method will be utilised. The relevance of this method to the current study stems from the notion that the method is used to identify concealed and unconcealed themes, sub-themes and trends embedded in the text (Du Plooy-Cilliers et al, 2014:234).

Du Plooy-Cilliers (2014:234) further mention Zhang & Wildemuth in 2009 having written about content analysis as a method emphasises the deeper meanings of the phenomenon 'rather than the statistical significance' of the occurrence of the phenomenon. Hence, the research will adopt the content analysis method, since data including the three selected case studies as well as the theories on ethics will be analysed to extract common themes and trends.

### **1.8 Significance of the Study**

The current study will provide recommendations regarding the improvement of the implementation of external controls, including the legislation, codes of conduct and ethical guidelines, for the public sector.

### **1.9 Key Words**

The following key words will be used in the study, in the way explained:

**Accountability:** a relationship based on obligations to demonstrate and take responsibility for conduct and performance

**Adumbral:** refers to a person's actions or conduct which demonstrates ambiguity and suspicion in the mind of the observer

**Code of conduct:** the rule(s) or law(s) to be complied with

**Code of ethics:** the tool used to enable or empower an individual with the quality of discernment when faced with an ethical dilemma

**Constitution:** refers to the Constitution of the Republic of South Africa (1996), which is the supreme law of the land; no law or policy may be passed in contravention thereof

**Ethics:** revolves around the character, conduct and morals of human beings; evaluates conduct against some absolute criteria on which is placed negative or positive values

**Good governance:** incorporates the six characteristics (as per King II Report) of discipline, transparency, independence, accountability, responsibility, fairness, and social responsibility

**Government:** refers to the political direction and control exercised over the actions of the members, citizens, or inhabitants of communities and affairs of the state; relates to political administration

**Graft:** personal gain earned by an individual at the expense of others; the gain is accrued without any exchange of legitimate compensatory services

**Implementation:** refers to the process of carrying out an instruction emanating from a rule or policy

**Justice:** the proper administration of the law as well as the fair and equitable treatment of all individuals subjected to the law

**Malfeasance:** refers to an illegal act or conduct by a public official

**Monitoring and evaluation:** a process that provides both internal and public oversight and accountability

**Non-compliance:** refers to the defiance or disregard of orders or rules

**Public sector:** refers to the area of the nation's affairs under governmental control; it is that part of the economy concerned with providing basic government services

### **1.10 Organisation of Chapters**

What follows below is a list of the chapters as presented in the study, outlining the focus of each.

**Chapter 1**, the current chapter, discusses the background and context of the study. It begins with a preliminary literature review that outlines briefly the main concepts or research areas to be covered, that is, public sector powers, public sector ethics, Chapter 9 institutions and public sector oversight laws and accountability, efficiency, openness, transparency, honesty and integrity. Next, the principles of good governance in the King Report (King II) are introduced. This is followed by the purpose statement, the research question, and the research methodology (i.e. inductive reasoning, and theory making and case study approaches), The three case studies selected for study are introduced, namely, the Arms Deal, Jackie Selebi, Bheki Cele and validation of the study discussed. The research design, analysis and significance of the study, as well as the key words used throughout the thesis are next explained.

**Chapter 2** serves both to present part of the literature review of this study and an in depth discussion focussing on the external control measures that have been established to guide and provide oversight over the public sector, in particular, to influence ethical behaviour, accountability, transparency and promote good conduct. These include constitutional and legislative frameworks and directives, and codes of ethics and conduct. The constitutional framework in this regard encompasses the Chapter 9 institutions, namely, the Public Protector and the Auditor-General. The legislative framework covers the Special Investigating Unit (SIU), the National Prosecuting Authority (NPA), the Prevention and Combating Corrupt Activities (PCCAA), and the Public Service Commission (PSC). Public Finance control measures are also discussed. As regards, codes of conduct and ethics, the following topics are covered: the importance and rationale of codes and the general content of a code of conduct, the South African code of conduct for the public service, and the King Reports

for maximising codes governing the public service. The chapter explains finally the difference between a code of conduct and a code of ethics.

**Chapter 3** serves both to present a section of the literature review of this study and a discussion on ethics, its definitions, perspectives and theories as well as the concept of ethical relativism and the inclusion of ethics in codes. Theories of ethics covered include duty-based ethical theory, consequence-based ethical theory, social contract-based ethics theory and character-based ethical theory. With regard to ethical relativism, the distinction between ethics and the law is made, including a focus on procedural fairness and the law in ethical practice; further the distinction between ethics, values and morals is made. Finally, the value of ethics in the drafting of codes to promote good conduct for good governance is discussed.

**Chapter 4** serves to present a section of the literature review of this study and an in depth discussion of the principles of good governance as highlighted in the King II Reports, in particular accountability and transparency. The purpose of the chapter is to emphasise the integral role and profound significance of the principles of good governance in attempting to ensure compliance with external control measures. The principles form the basis for the qualitative analysis of the three case studies.

**Chapter 5** presents in detail the first of the case studies, the South African Arms Deal. It provides background information on the case, covering the various controversies surrounding the deal, including allegations of corruption, a questioning of the reasons to acquire additional armaments in the first place and the offsets in the deal. It next provides an analysis the case by focussing on is the unconstitutional aspects of the deal, including the relevant sections in the Constitution and contradictions of the deal with regard to the Chapter 9 institutions, namely, the Public Protector and the Auditor-General. The chapter concludes by summarising the inductions made regarding non-compliance and looking at some of the issues in the ongoing saga of the Arms Deal.

**Chapter 6** presents in detail the second of the case studies, the corruption case of National Commissioner of SAPS, Jackie Selebi. It begins by providing background information, such as Selebi's background is discussed in detail, including the various high ranking positions he came to occupy in the struggle against apartheid, the new South Africa and internationally, as well as the very beginnings of his work career which

evidence a propensity for unethical behaviour. An analysis of the charges against Selebi is next undertaken, including that of corruption and obstructing the ends of justice. The chapter next provides an analysis of the constitutional obligations and legislation contravened by Selebi in the execution of his duties as a public official. The chapter concludes by summarising the inductions made regarding non-compliance in that instance.

**Chapter 7** presents in detail the third of the case studies, the corruption case against National Commissioner of SAPS, Bheki Cele. It begins by providing contextual information, including Cele's background, and goes on to provide an analysis of the allegations of maladministration against him, in particular, as regards the findings of both the Public Protector and the Moloi Board of Inquiry. The chapter concludes by summarising the inductions made regarding non-compliance in that instance and provides brief information about the outcome of the case, including the element of political interference.

**Chapter 8** provides in depth analysis and findings of all three cases collectively, in the form of eight common and main themes emerging in all three. The eight themes are: (i) inadequate control and accountability; (ii) inadequate training and emphasis on the significance of integrity and ethicality involved in the public decision-making process; (iii) inadequate emphasis on compliance with codes of ethics and codes of conduct for public officials; (iv) inadequate emphasis on sanctions relating to corrupt activities and the existence of soft penalties for perpetrators; (v) absence of incentives for upholding ethicality and integrity as a public official; (vi) investigative mechanisms have been subject to political manipulation; (vii) human nature and the theory of character-based ethics; and (viii) inadequate efforts by government to highlight the prevalence of the scourge of corruption and maladministration. Each theme is discussed in detail with specific recommendations for redress offered within the discussion.

**Chapter 9**, the final chapter, brings the study to a close by focusing on conclusions and recommendations. The question is posed as to whether the initial research question is answered in the study and general conclusions and recommendations regarding external control measures for improving ethicality in the public sector are made.

## **CHAPTER TWO**

### **CONSTITUTIONAL AND LEGISLATIVE DIRECTIVES AND FRAMEWORKS AND CODES OF CONDUCT AND ETHICS GOVERNING THE SOUTH AFRICAN PUBLIC SECTOR**

#### **2.1 Introduction**

This chapter serves to present part of the literature review of the study while providing an in depth discussion on the constitutional and legislative framework as well as codes of ethics and conduct undergirding the public administration system. Some of the theories developed as a result of the inductive reasoning approach, were based on this literature.



A number of legislative measures and codes have been drafted by the legislature and the Department of Public Service and Administration respectively to create propitious conditions for the proper functioning of the public sector in accordance with constitutional requirements. However, non-adherence and non-compliance of these by public officials remains rife, as indicated previously in Chapter One. To fully know whether these external control measures are effective, it is first important to understand them before proceeding with recommendations to guide and ensure compliance.

This chapter presents the full spectrum of external controls currently in place to positively influence the conduct of public officials and promote accountability and good governance in the South African public sector. The first section discusses the constitutional framework. The second section discusses the Chapter 9 institutions. The third section discusses legislative directives and policies. The fourth section discusses public finance control measures. The fifth section discusses codes of conduct and ethics, beginning with the South African Code of Conduct for the Public Service, followed by the King Reports and a look at the distinction between codes of conduct and ethics. The chapter ends with a brief conclusion.

## **2.2 The Constitutional Framework in South Africa pertaining to Good Conduct of Public Officials**

This section will focus on the Constitution (1996) of South Africa, which places a firm obligation on public officials to act in a manner that positively influences public governance. A number of applicable sections in the Constitution will be highlighted in this regard.

Chapter 1, Section 2 of the Constitution of the Republic of South Africa (South Africa, 1996) states: 'this Constitution is the supreme law of the Republic; and law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. Thus it is unambiguously clear that the legal and ethical imperatives oblige all citizens, even those holding public office, to act in accordance with the law for their actions to be regarded as valid or acceptable. Chapter 5, Section 83 states: 'the President is the Head of State and Head of the National Executive; and must uphold, defend and respect the Constitution (1996) as the supreme law of the Republic'. This section indicates the tremendous responsibility placed on the office of the President to fulfil his

or her obligations in a manner that does not contradict the values embedded in the Constitution (1996). The President, it is implied, is the first citizen and public official who sets the tone regarding compliance with the democratic values of the Constitution. Further, Section 84, Powers and functions of the President, Subsection 2(f), specifies the President's function to appoint commissions of inquiry. According to Nanabhay & Ballard (2011:10), this important constitutional function, the President, at the time, failed to carry out in the case of the notorious Arms Deal process (this will be discussed in detail in Chapter Five).

Section 92 of the Constitution (1996) relates to accountability and the responsibilities of the Cabinet of Ministers. Subsection 2 in this regard clearly indicates that Members of the Cabinet are both collectively and individually accountable to Parliament for the exercise of their powers and the performance of their functions. Members of Cabinet are instructed to keep in mind the notions of openness, honesty and transparency when carrying out their duties and functions. There is thus great responsibility placed by the Constitution on all Members of Cabinet to carry out their duties and functions in keeping with principles of good governance (Nanabhay & Ballard, 2011:10).

According to Cloete & Auriacombe (2007:193-207), good governance may be conceptualised as 'the achievement by a democratic government of the most appropriate developmental policy objectives to develop its society in a sustainable manner'. The authors go on to list the attributes of good governance as, inter alia, representivity and equity in resource control and allocation, a developmental and growth focus, participatory, responsive, people-centred strategies, democratic rights, stability, legitimacy and transparency of processes (Cloete & Auriacombe, 2007:193-207). Further, good governance also includes political and financial accountability; professionalism and ethical behaviour; flexible, effective, efficient and affordable processes; co-ordination, integration and holism of services; as well as creative, competitive and entrepreneurial practices; literate, educated, participating citizens as products; and sustainable outcomes (Cloete & Auriacombe, 2007:193-207). Craythorne (1997:198, in Cloete & Auriacombe, 2007:193-207) argues though that accountability and transparency seem to be 'mere mantras chanted but given no substance' if public officials use the power of the state for personal goals. Hence, the notion of transparency is a vital component in executing good governance.

In the next section, Chapter 9 institutions will be discussed with regard to aiding good governance and conduct of public officials. While the Chapter 9 institutions are indeed part of the constitutional framework, they merit discussion as a section on their own due to their strong oversight role in this regard.

### **2.3 Chapter 9 Institutions**

To ensure good governance has been the creation of a number of state institutions as stipulated in Chapter 9 of the Constitution (1996). It is clearly stated in Section 181(1): the following state institutions strengthen a constitutional democracy in the Republic:

- The Public Protector;
- The Human Rights Commission;
- The Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities;
- The Commission on Gender Equality;
- The Auditor-General; and
- The Electoral Commission (South Africa, 1996).

With regard to the current study, two of the above institutions, namely, the Public Protector and the Auditor-General, are the most relevant.

The Chapter 9 institutions, as they have come to be known, are directed to be 'impartial and must exercise their powers and perform their functions without fear, favour or prejudice' in terms of Section 181(2) of the Constitution (1996). It is crucial that the Chapter 9 institutions carry out their respective functions in a reasonable and justifiable manner, taking cognizance of the constitutional ideals of openness and democracy. In terms of Subsection 5, it is given that these institutions are accountable to the National Assembly and obliged to report on their activities and performance of their functions to the National Assembly at least once a year. This subsection places a firm responsibility on and obliges the National Assembly to perform its functions with openness, transparency and accountability. The notion of accountability is mentioned regularly and without exception in respect of all public offices held and state institutions, thus emphasizing its importance in positively influencing public governance (Nanabhay & Ballard, 2011:15). Webb (2005:151-165) observes in regard to this emphasis that where a culture of accountability is absent, corruption will manifest unchecked, which in developing countries is further compounded by lack of citizen education.

Thus, a developing country with a large percentage of the population illiterate faces greater challenges with regard to holding government accountable.<sup>1</sup> Moreover, according to Webb (2005:151-165), developing countries face even further challenges in that they are dependent on the World Bank and International Monetary Fund (IMF) for financial assistance. In return for loans from these institutions recipient countries have to undertake market driven reforms aimed at reducing public sector inefficiency, minimizing the budget deficit, streamlining public expenditure, improving service quality and increasing client satisfaction; requiring government departments to be run in accordance to business principles known as New Public Management (NPM) (Webb, 2005:151-165). This idea to re-invent government, so to speak, amounts to an attack on democratic accountability; since a government cannot fully control private contractors, the new system allows public officials a new type of managerial freedom; this in turn leads to excessive discretion which creates fertile ground for corruption (Webb, 2005:151-165).

It is also highly likely that the prevalence of unethical behaviour among public servants may be due to their being only directly accountable to political and administrative superiors, the courts, and internal governmental authorities, entities to which accountability is required by law or the administrative hierarchy. They are not directly accountable to pressure groups, the media or to the general public, although they may feel a sense of psychological or personal responsibility toward them (Kuye & Mafunisa, 2003:421-437).

### **2.3.1 The Public Protector**

According to Section 182(1) of the Constitution (1996), the Public Protector, as a state institution, has the power, as regulated by the Public Protector Act (South Africa, 1994), to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice. It is also the function of the Public Protector to report on that conduct and to take appropriate remedial action. Once again the notion of accountability is of paramount importance. The Public Protector is given additional

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1. Webb (2005) is referring here to the relationship between accountability and literacy as one in which if there is a high rate of illiteracy, a great majority of citizens and the voting public will likely remain unaware of the legal prescripts which clearly direct public officials to be accountable in executing their functions.

powers in terms of the Public Protector Act (South Africa, 1994) to investigate on his or her own initiative any alleged abuse or unjustifiable exercise of power, or other improper conduct, or undue delay by a person performing a public function.

In addition, Section 6(4)(a) of the Public Protector Act (South Africa, 1994) states that the Public Protector has the power to investigate on his or her own initiative, or on receipt of a complaint, any alleged-improper or dishonest act, or omission or offences referred to in sections 17, 20 and 21 of the Prevention and Combating of Corrupt Act (PCCAA) (South Africa, 2004) in respect of public money. The Public Protector also has the power to investigate any alleged 'maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity' as defined in Section 1 of the Public Financial Management Act (South Africa, 1999). It is stated by Nanabhay & Ballard (2011:15), that 'in terms of Section 1 of the Public Finance Act (South Africa, 1999), a public entity means a national or provincial public entity. (In the course of investigations into the Arms Deal, a public official in national government allegedly involved in the Deal, was stipulated as falling under the ambit of 'public entity' as defined in the Act.)

### **2.3.2 The Auditor-General**

The state institution created by Chapter 9 of the Constitution (1996) also relevant to the current study is the Auditor-General. In terms of Section 188 of the Constitution (South Africa, 1996), the Auditor-General must audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations; and municipalities; and any other accounting entity required by national or provincial legislation to be audited by the Auditor-General. In addition to the duties prescribed above, and subject to the Public Audit Act (South Africa, 2004), the Auditor-General may audit and report on the accounts, financial statements and financial management of:

- a) any institution funded from the National Revenue Fund or the Provincial Revenue Fund; or
- b) any institution that is authorised in terms of any law to receive money for a public purpose (Section 188(2) of the Constitution (1996)).

The office of the Auditor-General is further governed by the Public Audit Act (South Africa, 2004). The objects of this Act are to give effect to the provisions of the

Constitution (1996), establishing and assigning supreme audit functions to an Auditor-General. The Auditor-General may be described as the foremost institution in South Africa as far as public auditing is concerned, and is granted full jurisdiction by the Constitution (1996) to carry out investigations and fulfil its role as the principal audit institution in the country. In terms of Section 3 of the Public Audit Act (South Africa, 2004), the Auditor-General is accountable to the National Assembly, and Section 5(1) indicates that the Auditor-General may carry out an appropriate investigation or special audit of any institution referred to in Section 4(1) of all national and provincial state departments if the Auditor-General considers it to be in the public interest or upon the receipt of a complaint or request (Nanabhay & Ballard, 2011:15). This section emphasises not only the prime importance of the Auditor-General carrying out its functions in the public interest, but also the latter guarding against furthering a politically motivated objective.

In terms of accountability, Part 3, Section 10 of the Public Audit Act (South Africa, 2004), the Auditor-General is obliged to submit an annual report to the National Assembly on his or her activities and the performance of his or her functions. It is mentioned in Section 55(2)(b)(ii) of the Constitution (1996) that the National Assembly must provide for mechanisms to maintain oversight over the Auditor-General (Nanabhay & Ballard, 2011:16). In this regard, Nanabhay & Ballard (2011:15) point out that 'it is evident that although, supreme audit functions have been bestowed upon the office of the Auditor-General, such office is indeed accountable for all its actions carried out'. This oversight of and accountability on the part of the Auditor-General takes the form of an annual report on the work undertaken by the Auditor-General presented to the National Assembly.

From the above it may be seen that the government has installed an impressive array of mechanisms to ensure accountability, not only applicable to constitutionally created state institutions, but also to public servants and political officials. As Kuye & Mafunisa (2003:421-437) accurately observe, the primary concern is with public service accountability, with the mechanisms in question distinguishing between internal and external accountability. The constitutionally created state mechanisms, including the Chapter 9 institutions, ensure a process that holds public servants answerable to their line superiors for their own actions and the actions of their subordinates; while those applicable to public servants and officials, by implication, hold public servants

answerable to the public as well. Thus, it is evident that the notion of accountability is a strong thread running through all state institutions, commissions and boards; despite this, though, the question of non-compliance is raised, from national to local government.

## **2.4 The Legislative Framework in South Africa pertaining to Good Conduct of Public Officials**

Legislation aimed at curbing unethical conduct and maladministration in the public sector has also been promulgated, some of which were passed to create legal entities to deal directly and exclusively with combating corruption in this regard.

### **2.4.1 The Special Investigating Unit (SIU)**

The Special Investigating Unit (SIU) has been created by the Special Tribunals Act (South Africa, 1996). The purpose of the SIU is investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money. The enactment of this legislation reflects the legislature's recognition that malpractices do exist within state institutions and that steps be taken for legal redress if suspicion of malpractice arise (Nanabhay & Ballard, 2011:12). It is important to note that this Act makes mention of the Public Protector, with Section 6(b) stating that the head of the SIU may refer any matter which could best be dealt with by the Public Protector to the latter; in addition, the Public Protector may likewise do the same if it is deemed appropriate to do so.

The SIU is an independent statutory body that is accountable to Parliament and the President. Its strength lies in its powers to act speedily to save, recover and protect public assets through civil law procedure and to litigate through a special tribunal (Montesh (2009:31) cited in Nanabhay & Ballard, 2011:12). The SIU is an autonomous state institution and is neither part of the National Prosecuting Authority (NPA) nor the South African Police Service (SAPS) (Montesh (2009:39) cited in Nanabhay and Ballard, 2011:12). Although the SIU is on the same level as the Asset Forfeiture Unit, it is entirely independent and governed by a separate Act of Parliament (Montesh cited (2009:39) in Nanabhay and Ballard, 2011:12).

### **2.4.2 The National Prosecuting Authority (NPA)**

In addition to the SIU, the Constitution (1996) allows for a single national prosecution authority in the Republic as well as a National Director of Public Prosecutions, who is the head of the prosecuting authority, the latter who is appointed by the President, as head of the National Executive (Section 179 of the Constitution (1996)). To regulate matters incidental to the establishment by the Constitution (1996) of a single national prosecuting authority, Parliament passed in 1998 the National Prosecuting Authority Act (South Africa, 1998) (as amended by the National Prosecuting Authority Amendment Act, (South Africa, 2008). In terms of Section 179(4) of the Constitution (1996), the above mentioned Act must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. This is reiterated in the preamble to the National Prosecuting Authority Act (South Africa, 1998) (as amended by the National Prosecuting Authority Amendment Act (South Africa, 2008).

This Act further states in Chapter 6, Section 32, Subsection (1), that ‘a member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law’. Once again, it may be seen that emphasis is placed on the importance of ethical behaviour by a public sector official, as well as on notions of openness and transparency, and justice and equality. It is worth noting that Subsection 2 requires the prosecuting authority (for purposes of the current study, the public sector official) to even take an oath or make an affirmation to that effect. The rationale behind the enactment of legislation, it may be seen, is to effect openness, fairness, justice and accountability, which is indeed evident in all relevant legislation.

#### **2.4.3 Prevention and Combating Corrupt Activities Act (PCCAA)**

Another legislative measure is the Prevention and Combating of Corrupt Activities (PCCAA) (South Africa, 2004). The PCCA signals an increasing awareness of the threat of corruption to democratic practice, and aims to implement its obligations with regard to South Africa under the United Nations (UN) Convention against Corruption adopted by the General Assembly on 31 October 2003 (Burchell & Milton cited in Nanabhay & Ballard, 2011:13). Despite the criticisms levelled at this Act by various commentators in the field, on the whole, it may be argued that the Act is a valuable and effective weapon to combat corruption in South Africa. The strongest and most significant element of the PCCAA is the inclusion of Section 34 of the Act. Section 34 imposes a duty to report information or suspicion in relation to the commission of



offences as stipulated in sections 1–16 or sections 20 or 21 of the PCCAA, as well as theft, fraud, extortion, forgery or issuing a forged document involving an amount of R100 000 or more on certain persons with authority (Pragal (2006:23) cited in Nanabhay & Ballard, 2011:13).

Pursuant to Section 34(4), such persons referred to include the Director-General, municipal managers, public officers in the Senior Management Service of a public body, any head, rector or principal of a tertiary institution, managers, secretaries or directors of companies, executive managers of banks or other financial institutions, partners in a partnership, chief executive officers and persons responsible for the overall management and control of a business or employer (Pragal cited in Nanabhay & Ballard, 2011:13). According to sections 34(2) and 37(2) of the PCCAA, failure to comply with this duty is a criminal offence since 31 July 2004. This duty is indeed a very useful tool, with some scholars even referring to it as the ‘most onerous part of the Act’ (Swaine, 2005:22), in order to combat corruption because the number of undetected crimes is probably huge and also because ‘hints’ by ‘insiders’ are often the most important source of information (Pragal cited in Nanabhay & Ballard, 2011:13).

It is also worth noting that Section 35 of the PCCAA allows for extra-territorial jurisdiction, which allows for prosecution of these offences outside the Republic of South Africa. According to Pragal (cited in Nanabhay & Ballard, 2011:14), the PCCAA also gives effect to the obligations resting on South Africa, which derive from the Organisation For Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions, adopted by South Africa at the OECD on 21 November 1997.

#### **2.4.4 The Public Service Commission (PSC)**

The Public Service Commission (PSC) is another oversight body, deriving its mandate from the Constitution (1996) in sections 195 and 196 thereof. The Public Service Commission’s primary role is monitoring and evaluating the state of public service and administration in South Africa (South Africa. Public Service Commission, 2015). The legislature further emphasises the importance of officials conducting themselves in an ethical manner in Chapter 10 of the Constitution, which states in Section 195(1) that the administration must be governed by the democratic values and principles enshrined in the Constitution. This includes the following important principle in Section

195(1)(b): 'A high standard of professional ethics must be promoted and maintained' (Nanabhay & Ballard, 2011:17). Section 196(2) also notes that the Public Service Commission is an independent body which must at all times remain impartial and should exercise its powers without fear, favour or prejudice in the interest of the maintenance of a high standard of professional ethics in the public service. Section 196(3) of the Constitution (1996) further states that other organs of state should protect and assist the Public Service Commission to ensure the latter's independence, impartiality, dignity and effectiveness.

With regard to maladministration in contradiction to the requirements of Constitution, Justice Arthur Chaskalson aptly stated:

Corruption and maladministration are inconsistent with the rule of law and the fundamental values of the Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedom. They are the antithesis of the open, accountable, democratic government required by the Constitution (Gildenhuys, 2004: 9).

Chaskalson made the above statement in an application brought before the Constitutional Court and was demonstrating the 'tension that often exists between the need on the part of government to confront threats to the democratic state, and the obligation on it to do so in a manner that respects the values of the Constitution' (Gildenhuys, 2004).

The Public Service Commission (South Africa. Public Service Commission, 2001:24) recognises that corruption is a problem in all spheres of government and therefore established the Chief Directorate of Professional Ethics and Risk Management. The role of this Directorate is to identify and address the weaknesses and vulnerability of state management systems and to highlight the likelihoods these pose for abuse. In particular, financial disclosures by senior public service managers reveal that conflict of interest is a major issue that needs monitoring and over which awareness needs to be raised (Kuye & Mafunisa, 2003:421-437).

During 1999 the Public Service Commission (South Africa. Public Service Commission, 2001:25) conducted an investigation into dismissals as a result of misconduct between 1996 and 1998. Out of a total of 2 247 cases, 1 077 were finalised

and 1 170 were, at the time of writing, in the process of being finalised. Almost 90% (964) of employees were found guilty of misconduct and as punishment 238 were dismissed from the public service, with the remaining number receiving sanctions other than dismissal. Of the finalised cases, 281 were corruption related. A total of 102 employees out of the 238 (42,8%) dismissed received the punitive measure of dismissal in respect to corruption related transgressions, including fraud, embezzlement and bribery (Kuye & Mafunisa, 2003:421-437).

From the discussion thus far, it is clear that the SUI, the National Prosecuting Authority and the Public Service Commission, as well as the previously mentioned, Public Protector and the Auditor-General are institutions that have been provided for by the Constitution and legislature to specifically deal with incidents of malpractice and maladministration. Malpractice and maladministration by public officials may be reported to these institutions that in effect play a 'watch dog' role over the public sector, bringing to justice offenders within it who compromise good governance in the democracy.

## **2.5 Public Finance Control Measures**

As with the Chapter 9 institutions, although linked to both the Constitutional framework as well as the legislative framework, controls and checks pertaining to public finance merits discussion as a separate section since it is a key locale within the public sector within which corruption can and does occur by public officials if unchecked. Although the Constitution (1996) throughout emphasises the importance of openness, transparency and accountability, special emphasis is placed on these tenets in chapters 9 and 10. With regard to public finance, it is important to note that public finance has undergone immense transformation since the advent of democracy in 1994. The South African budgeting system, which was secretive under Apartheid, imposed by the Executive and merely 'rubber stamped' by Parliament, was overhauled. According to Walker & Mengistu (1999), the secretive nature of the Apartheid budgeting process made it difficult to analyse and scrutinise service delivery trends prior to democracy and to conduct financial analysis as budget documents were not accessible. This type of set up is clear evidence of transparency and accountability being compromised.

The former Apartheid government's Department of State Expenditure as well as its Function Committees decided on budget and allocations. These committees were responsible for co-ordinating budget proposals and distributing allocations for a specific function, such as health or education. Thus the Executive remained the dominant role player in determining budget and spending allocations, with Parliament's role kept minimal (Walker & Mengistu, 1999:58). The Apartheid government's financial processes were based on a traditional form of budgeting, namely, the line-item budgeting system. In this regard, the Exchequer and Audit Act (South Africa, 1975) reflected the basis for expenditure control because the Act was not intended to 'manage' public finances but to 'control' them (Walker & Mengistu, 1999:54). Additionally, the Act was noted to be too prescriptive with no room for flexibility (Walker & Mengistu, 1999:54).

According to Arbedian et al (quoted in Walker & Mengistu, 1999:54), traditional budgeting focused on expenditure controls, with the aim simply to keep control over money spent on government; the objective of the Exchequer Act 1975, mentioned above, was to regulate the collection, receipt and control of state property and monies of the state. The Act was intended to be in-put and control oriented rather than focusing on results and management. Due to the nature of the Apartheid administration, accounting officers were not active within state organisations because management culture was not a key concern; rather, the organisational culture was rule-bound, with less flexibility and delegation; service delivery, as well, was not customer oriented and as a result the notion of 'value for money' suffered (Walker & Mengistu, 1999).

In contrast, since democratisation in 1994, the medium term expenditure framework was introduced in order to encourage a participative approach to the budgeting process as well as transparency, accountability and policy-budgeting co-ordination.

Moreover, Section 217(1) Chapter 13, Finance, of the Constitution (1996) states: 'When an organ of state in the national, provincial or local government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'. Once again, the legislature is seen to highlight the importance of openness and transparency in all government transactions (Nanabhay & Ballard, 2011:17). The Public Finance Management Act (PFMA), (South Africa, 1999) also highlights the ideals of transparency and accountability. The objective of the Act is 'to secure transparency, accountability and sound management of the revenue,

expenditure, assets and liabilities of the institutions to which the act applies. These institutions are: departments, public entities, constitutional institutions and provincial legislature’.

The Public Finance Management Act (PFMA) creates a more decentralised budget approach and allows for all spheres of government to participate in the decision-making process relating to budget matters. Additionally, relating to finance, Section 16A of the Public Service Amendment Act (South Africa, 2007), contains provisions similar to that of the Public Finance Management Act (PFMA) (South Africa, 1991) to assist with its enforcement. In terms of Section 16A, Executive authorities are compelled to take disciplinary steps against transgressing heads of department, with heads of department in turn compelled to do so against transgressing employees. Provision is also made for reporting such transgressions to the Minister of the relevant department, who is, in turn, bound to report such transgressions to the relevant legislatures (Public Finance Management Act (PFMA), South Africa, 2007).

The new Public Administration Management Act should be highlighted (South Africa, 2014). Two aspects of the Act are relevant to the current study. In terms of the Act, Parliament is intent on establishing a Public Administration Ethics, Integrity, and Disciplinary Technical Assistance Unit, as well as an Office of Standards and Compliance to ensure compliance with minimum norms and standards, as provided by the Minister. It is evident from the passing of an Act of this nature, that government is actively attempting to deal with the increase in corruption and misconduct within the public sector, the perception given is that such conduct is viewed as unacceptable. It is worth looking at some of the proposals of this Act in more detail.

Chapter 6 of the Act specifically stipulates one of the functions of the proposed unit as providing ‘technical assistance and support to institutions in all spheres of government regarding the management of ethics, integrity and disciplinary matters relating to misconduct in the public administration’ (Section 15(4)(a)). The unit will be further tasked with ‘the development of norms and standards on integrity, ethics, conduct and discipline within the public administration’ (Section 15(4) (b)); to ‘build capacity within institutions to initiate and institute disciplinary proceedings into misconduct’ (Section 15(4)(c)); to ‘strengthen government oversight of ethics, integrity and discipline; and where necessary, in cases where systemic weaknesses are identified, to intervene’

(Section 15(4)(d) (South Africa. Department of Public Service and Administration, 2014).

These stipulations in the Bill indicate Parliament's aim to promote and enforce a code of conduct for the public service (South Africa. Public Service commission, 2002) to keep officials in check, as well as the entrenchment of legislation that speaks directly to the promotion of ethical conduct (namely, the establishment of the ethics unit above). Further, it is clear that Parliament intends for specific measures to be taken by the various spheres of government should a case of misconduct arise, (namely, via the establishment of the Office of Compliance). With the advent of the new Bill, greater emphasis is placed on compliance and efficiency in addressing conduct of public officials. These may be observed especially in sections 15(5) (a) and (b) and 15(6) (b) and (c), which will form part of the law when the Bill is passed, as opposed to mere codes of conduct and codes of ethics, which would likely have lacked sufficient legal emphasis in regard to ethical conduct.

## **2.6 Codes of Conduct and Ethics**

Codes of conduct and ethics were created and implemented early on in the democracy to promote accountability and good governance in the public sector. While the previous sections presented the constitutional, legislative frameworks that establish, shape and guide the public sector environment in terms of governing rules and oversight measures, indeed providing the constitutional and legal parameters of the public sector under democracy, codes establish and guide the day-to-day or on-the-ground functioning of individuals working in this sector. In other words, they provide the ground rules against which actions taken in the performance of duty may be informed in relation to the values displayed in the execution of work. The performing of values by the individual produce or enable the environment of good governance, with codes acting to specify or guide the work performance behaviour expected of the public official.

Hence, the focus of discussion now shifts to the importance of codes of conduct. The imperative to include the latter for integrity within both public and private organisations for that matter cannot be stressed enough. As well, it is only once the importance of

these codes is fully understood can the importance of establishing effectiveness with regard to implementation be known as a key challenge for intense redress.

This section begins with a discussion of the importance and rationale behind codes and thus also covers the general content of a code of conduct. It then moves on to discussing the South African Code of Conduct for the Public Service, which constitutes one of the first external control measures to hold public sector officials accountable for their conduct in the work place. This is followed by discussion of the King Reports, which in key ways addressed the brevity and official language of the South African Code of Conduct for the Public Service to explicate a more comprehensive set of codes to govern the public service Finally, distinction between a code of conduct and a code of ethics will be discussed.

### **2.6.1 The importance and rationale of codes and the general content of a code of conduct**

According to Nagiah (2012), the integrity of an organisation is composed of a wide range of elements that is supported by a strong programme of internal controls, including standards of conduct. Further:

a code may be a combination of a legal framework which provides for legal obligations and corresponding sanctions and an ethical framework which describes core values which an organisation must aspire to. It also highlights what values are expected from employees and describes their legal obligations. In other words the codes tell the employee what his/her personal obligations are under the law and what the parameters of his/her accountability are. Apart from the aforementioned purpose, codes provide guidance on the management of the organisation (Nagiah, 2012).

The authors also emphasise that the organisation must ensure mechanisms to support the employee in complying with the code of conduct, the latter which could take the form of protected disclosure reporting mechanisms, especially if the employee has an obligation to report corruption.

### **2.6.2 The South African Code of Conduct for the Public Service**

The first external control measure that was established in 1997 is the South African Code of Conduct for the Public Service.<sup>2</sup> It is important to mention at the outset that the phrasing of this official code required brevity and use of official terminology, which made it cumbersome and daunting for the public official to understand. Hence, the Public Service Commission made available the *Explanatory Manual on the Code of Conduct for the Public Service: A Practical Guide to Ethical Dilemmas in the Workplace Departments* (South Africa. Public Service Commission, 2002). The various government departments are encouraged to use the manual adaptively, that is, to use examples from their respective offices when training public officials about the code.

Section 3.2.1 of the manual particularly emphasises the notion of professional ethics: 'in order to promote a high standard of professional ethics, public officials should be encouraged to think and behave ethically. It is hoped that the Manual will serve as a useful tool in developing and presenting training courses for all employees' (Public Service Commission, 2002) The manual also contains 'examples which illustrate ethical complexities in the work environment, which may serve as a basis for training and case studies' (Public Service Commission, 2002). It is further stated in Section 3.2.2 of the Manual (Public Service Commission, 2002) that 'as a companion to the code, the Manual can assist in maintaining public confidence in the integrity and impartiality of the public service by providing minimum expectations about acceptable behaviour and benchmarks for ethical practices'. The Department of Public Service and Administration (DPSA) clearly intends to emphasise the importance of training officials on acceptable and appropriate ethical behaviour.

Section 3.2.3 further emphasises the importance of Section 195(1) of the Constitution (1996) relating to the promotion of a high standard of professional ethics. It is there stated that in terms of a collective agreement (that is, the Public Service Co-ordinating Bargaining Council Resolution, 2 of 1999) (South Africa. Department of Public Service and Administration, 1999) 'all the employees in the public service have a responsibility to comply with the prescribed Code of Conduct. As this forms the basis on which proactive, corrective and disciplinary action rests, the employer must do everything possible to ensure that the contents of the Code of Conduct are known to all

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2. This document was prepared and developed by the Public Service Commission, and was initially issued as a GOVERNMENT NOTICE/GAZETTE: Regulation Gazette 5947, No. R. 825, on June 10 1997.



employees'. The Department of Public Service and Administration is seen here to be highlighting that compliance with the Code by employees not only means adherence to rules prescribed by the Department, but also upholding a constitutional directive.

In Section 3.3.3 of the Manual, it is reiterated that 'the primary purpose of the Manual is to promote exemplary conduct amongst public officials (South Africa. Public Service Commission, 2002). Notwithstanding this, an employee shall be guilty of misconduct in terms of the Act, if he/she contravenes any provision of the code of conduct'. It may be seen that the Department of Public Service and Administration has placed great emphasis on compliance with the Code by including a provision relating to the contravention of the code and the consequences that may follow, namely, a finding for an employee of 'guilty of misconduct'.

The stipulations above create the impression of a 'zero tolerance' policy on behalf of the Department of Public Service and Administration with regard to non-compliance with the Code by public officials. Further, Section 4 of the Manual again emphasises the importance of upholding the values of the Constitution (1996) and honouring its supremacy. The Code yet again states the importance of professional ethics in Section 4.2.2, whereby the public official is compelled to serve the public interest in a manner that is impartial and unbiased. In terms of Section 4.4.6, the public official is compelled to remove himself/herself from a decision-making process should a conflict of interest exist. The Department of Public Service and Administration can be seen here to be highlighting professional ethics once again.

Specific mention is made of corruption in Section 4.4.10, where it is stated that corruption is viewed as moral deterioration and synonymous with other criminal activities, such as drug-trafficking and fraud. Corruption is referred to as a contributing factor to social disintegration that undermines the legitimacy of a political system by destroying trust and confidence, not to mention frustrating the economic system by creating a disincentive to investment. Given all the above stipulations, it is seen that the Code unambiguously creates an express obligation on public officials to report corrupt activities.

### **2.6.3 The King Reports for maximising codes governing the public service**

Even before the increase in both, that is, non-compliance with external control measures and the resulting widespread corruption (which has indeed become a current phenomenon within the public sector) the King Committee on Corporate

Governance was tasked, between 1994 and 2009, with developing the King I, II and III Reports as part of the new democratic government's checks and balances in the public sector. The King Reports address the brevity and use of official language of the South African Code of Conduct for the Public Service to explicate a more comprehensive set of codes to govern the public service.

Post 1994, the *King Report on Corporate Governance* (South Africa, 2002) (otherwise known as King I) was published by the King Committee on Corporate Governance, under the leadership of former High Court judge, Mervyn King S.C. The King I Report produced the Code of Corporate Practices and conduct. The *King Report on Corporate Governance* (King II) (South Africa, 2002) introduced the basic tenets of good governance and replaced the King I Code with a new Code of Corporate Practices. King II covered topics ranging from auditing and compliance to issues of ethics, integrity and transparency (this report is most relevant to the current study) (South African Institute of Chartered Accountants (SAICA), 2009:1). The King Committee on Governance issued the *King Report on Governance for South Africa* (King III) (South Africa, 2009) and the King Code of Governance Principles on 1 September 2009. The issuance of King III was necessitated by the new Companies Act of South Africa and changes in international governance trends subsequent to the release of King II in 2002. The Companies Act, No. 71 of 2008 (South Africa, 2008) (which constitutes the redraft of the Companies Act, 1973) was assented to and signed by the President on 8 April 2009 (South African Institute of Chartered Accountants (SAICA), 2009:1).

The King II Report (2002) provides clear guidelines on the drafting and implementation of the 1997 South African Code of Conduct for the Public Service (South Africa. Public Service Commission, 2002). The *Explanatory Manual on the Code of Conduct for the Public Service: A Practical Guide to Ethical Dilemmas in the Workplace*, published by the Public Service Commission, built on the existing 1997 South African Code of Conduct for the Public Service in an attempt to clarify and specify issues related to ethics in the public service (South Africa. Public Service Commission, 2002). The King III Report (2009), in contrast, provides general guidelines in keeping with the ideals of good governance.

Further, the King II Report defines the characteristics of good corporate governance, including seven key principles for good governance, namely, discipline, transparency,

independence, accountability, responsibility, fairness, and social responsibility (Nanabhay & Ballard, 2011:4). In this regard, the King II Report is quite comprehensive and thorough in terms of the obligations for ethical conduct by public servants, and forms the basis for arguing that a good foundation has been established for external control regarding the public sector.

#### **2.6.4 Code of conduct versus code of ethics**

At this point it is necessary to distinguish between codes of ethics and codes of conduct. According to Wood & Rimmer (2003:181-195), it is difficult to find a universally acceptable definition of codes of ethics because of the complexity of the concept and the different perceptions around it. Nevertheless, Wood & Rimmer (2003:181-195) cite Hosmer's following definition as useful place to start:

Ethical codes are statements of the norms and beliefs of an organisation... they are the ways that the senior people in the organisation want others to think. This is not censorship. Instead, the intent is to encourage ways of thinking and patterns of attitude that will lead towards the wanted behaviour.

The above definition emphasises four significant elements as forming the fundamental core in a definition of an ethical code. First, the ethical code is a 'statement'. Second, the code deals with 'norms and beliefs' of the organisation, presumably concerning what constitutes good conduct. Third, the intent is to 'encourage ways of thinking and patterns of attitude', thus targeting the beliefs of individuals. Fourth, the preceding three elements will lead towards the preferred behaviour. Wood & Rimmer (2003) further interestingly and correctly argue that the construction of a code of ethics may be more favourably accepted by individuals if employees of an organisation have input in it.

Another definition differentiating between a code of ethics and a code of conduct is provided by the James Ethics Centre (Wood & Rimmer, 2003:181-195):

A code of Ethics expresses fundamental principles that provide guidance in cases where no specific rule is in place or where matters are of an ambiguous nature. In comparison to a Code of Conduct, a Code of Ethics will:

- be general in nature,
- contain fewer rules or principles,
- contain the words 'ought' or 'should' and not 'must',

- be addressed to persons of all ranks and not only employees,
- provide general guidelines on areas where the Code of Conduct is silent or vague.

Wood & Rimmer (2003:181-195) succinctly conclude that a code of ethics 'enunciates the philosophical values of an organisation, whilst the code of conduct contains the practical guidelines that enable the ethos of the code to come alive'. In other words, the code of ethics provides the guiding principles and the code of conduct is a set of prescriptive rules.

It may be claimed that the creation and implementation of these codes, namely, a code of conduct and a code of ethics, would have a positive influence on an organisation, and, at best, provide employees with an awareness of good governance as well as cautioning individuals against any form of misconduct. Petersen & Krings (2009:501-514) proposes eight mechanisms by which codes may influence an employee's behaviour as follows:

1. Codes function as a rule book,
2. Codes function as sign-posts, indicating that they encourage employees to consult other individuals or organisational policies to determine what kind of behaviour is appropriate,
3. Codes serve as mirrors, whereby they provide employees with an opportunity to confirm whether their behaviour/ or intended behaviour is acceptable or not,
4. Codes function as magnifying glasses, because they render employees more cautious and encourage them to consider the negative consequences before acting,
5. Codes serve as shields, they enable employees to challenge unethical behaviour of colleagues and even superiors,
6. Codes function as smoke detectors, because through codes, employees who are more likely to engage in unethical behaviour will be more readily warned by others,
7. Codes serve as fire alarms, because in the case of a violation of the code, employees are encouraged to report the violation as a matter of urgency,
8. Codes function as a club; knowing that ethical codes exist and that violations thereof will be sanctioned may ensure compliance.

However, despite the many ways discussed above regarding ethical codes possible influence on employee behaviour, Petersen & Krings (2009:501-514) also

acknowledge that empirical studies have not been able to reliably demonstrate whether such codes actually have the desired impact. It is therefore of the utmost importance that governments continue to monitor compliance with codes of conduct and increase training and education relating to both codes of conduct and ethics. This will, at the very least, ensure awareness of acceptable forms of conduct for a public official; failure to do so, will result in such codes remaining what Petersen & Krings (2009) appropriately refer to as 'toothless tigers'.

## **2.7 Conclusion to Chapter**

Throughout time and all over the world, governments have made explicit efforts to battle corruption and unethical conduct among public sector officials. The French Napoleonic Code of Conduct of 1810 is a good example, according to Gildenhuis (2004:124), of the age old scourge of corruption in the public sectors of the modern world and attempts to contain it. Thus, the importance of emphasising public service codes of ethics and conduct as well as compliance therewith may be seen as not biased toward the current democratic dispensation in South Africa, but rather as an essential component of moving towards the establishment of a stable and sustainable democratic state.

## **CHAPTER 3**

### **ETHICS: DEFINITIONS, PERSPECTIVES, THEORIES AND CODES**

#### **3.1 Introduction**

This chapter serves both to present a section of the literature review of this study and a discussion on ethics, its definitions, perspectives and theories as well as the concept of ethical relativism and the inclusion of ethics in codes. Some of the theories developed as a result of the inductive reasoning approach used in this study were based on this literature.

This chapter's discussion on various aspects of ethics include a number of theories of ethics that enable a greater understanding of unethical leadership as displayed in the cases presented in this study as well as the need for including ethics in codes. It is imperative to have a nuanced understanding of ethics, including its definitions, perspectives, theories and related concepts such as values and morals in order to determine how and why these play an integral role in the content of codes of conduct and ethics. The discussion in this chapter will cover the following: some definitions of ethics, perspectives of ethics, theories of ethics, ethical relativism with regard to procedural fairness and the law in ethical practice and the distinction between ethics, values and morals, the value of ethics in the drafting of codes to promote good conduct for good governance and a short conclusion.

#### **3.2 Some Definitions of Ethics**

Coicaud & Warner (cited in Vayas Doorgapersad & Ababio, 2010) argue that ethics is concerned with that which is essentially human in our nature, that is, thinking and acting in an ethical manner amounts to the individual making him or herself witness to that which positively distinguishes humans—the quest for dignity. Ethics, according to the authors, is therefore, not about the self in isolation but fundamentally has a social quality (Coicaud & Warner cited in Vayas Doorgapersad & Ababio, 2010). Thus, one may define ethics as a process and a system of attitudes, beliefs, principles and values that have been acceded to and that steer and dictate the behaviour, conduct and action of a person (Coicaud & Warner cited in Vayas Doorgapersad & Ababio, 2010:411-427).

The above definition implies that ethics come into play or ethical decisions are made when an individual is faced with a situation or problem with a number of solutions at his or her disposal, thus making it the prerogative of the individual to choose or not to choose the 'ethical' solution. In keeping with this, Cranston (cited in Doorgapersad & Ababio, 2010:411-427) observes that functionaries in the work place:

may often be faced with choices that require them to make decisions that have no clear cut resolution and are likely to be highly problematic... they are likely to find themselves confronted with ethical dilemmas... and an ethical dilemma arises from a situation that necessitates a choice among competing sets of principles, values, beliefs, perspectives.

Thus ethical codes and codes of conduct are intended to provide the guidance to the public official faced with the ethical dilemma. However, codes of ethics are merely guiding principles, as Nagia (2012), points out, and if a public official fails to adhere or comply with it, no sanctions are applied to the non-complying party. The emphasis on 'choice' in the resolving of the ethical dilemma points to the nature of the ethical dilemma and hence the code of ethics meant to guide behaviour as non-prescriptive, merely guiding or gesturing to the preferred choice but still requiring major input in the making of that choice on the individual him or herself. Hence, it may be argued in terms of public officials that such a functionary may not be sanctioned for non-compliance with a code of ethics since the latter merely serves as a 'guiding force' when the official is faced with ethical dilemmas. As will be discussed later on in this chapter, codes of ethics are aspirational whereas codes of conduct prescriptive or directional and therefore enforceable (Nagia, 2012).

The above argument begs the following question? Does ethics only come into play when an individual is faced with an ethical dilemma? This study maintains that ethicality also encompasses professionalism, which has at its very core the notion of efficiency. Hence, efficiency is an integral component of professionalism and in turn, ethicality. The public official's ability to conduct himself/herself in a professional and efficient manner would enhance the official's ethicality.

While the above discussion shows some of the attempts by researchers to pin down definitions or general meanings to ethics, the discussion that follows refers to the key sites of meaning to emphasise or create ethical approaches where they are applied.

### 3.3 Perspectives on Ethics

The various perspectives on ethics point to different aspects of meaning associated with good or ethical conduct, all which need to be considered. The approach to ethics is thus never monolithic or uni-dimensional but multi-dimensional, depending the stand point from which one is looking at the issue of ethics and the kind of impact envisaged and sought in an organisation; in other words, with regard to what is being protected, what promoted and what not.

It is thus useful to elaborate the various perspectives on ethics as described by Rossouw (cited in Sing, 2009), who articulates the perspectives as follows:

- Social scientific perspective;
- Managerial perspective;
- Organisational interest perspective;
- Ethical guidance perspective; and
- Ethical development perspective.

The above perspectives provide us with various ways to approach the issue of ethics in the code of ethics for public officials in South Africa and will help shape understanding of the perspective(s) adopted in the current study.

According to the social scientific perspective (Sing, 2009:54-72) great emphasis is placed on research strategies aimed at enabling senior managers to understand the dynamics of ethical conduct and for obtaining a result predicting behavioural patterns. The managerial perspective, on the other hand, advocates that managers apply relevant knowledge to deal with ethical issues in the workplace. Relevant knowledge includes the available documents relating to ethics and good conduct. For example, the code of ethics for various sectors within the public sector such as the Code of Conduct for the public sector, the PCCA Act (Prevention and Combating of Corrupt Activities Act (South Africa, 2007), Executive Members Ethics Act (South Africa, 1998) and the Batho Pele Principles, to name but a few (*batho pele* is SeSotho meaning 'people first'; the Batho Pele principles were drafted by the South African legislature, taking cognizance of government's intention to adopt a citizen-centred approach to service delivery.

Batho Pele was initially informed by eight principles, namely, consultation, service standards, access, courtesy, information, openness, information, openness and



transparency, redress, value for money. Subsequently, three more principles were added, namely, encouraging innovation and rewarding excellence, leadership and strategic direction, and customer impact. The Batho Pele principles should not be construed, according to the *Step By Step Guide for the Development of Effective, Realistic and Credible Service Delivery Improvement Plans (SDIP)* (South Africa. Department of Public Service and Administration, 2013:14), as a separate document to be attended to but rather 'embraced as an integral part of management activities and cascaded to the coalface of service delivery'. Hence, under this perspective, managers ought to have knowledge of all the legal prescripts relating to ethical conduct within the public sector.

The organisational interest perspective focuses on aligning ethical principles with the vision and mission of the public sector organisation or institution. This alignment is intended to create a uniform approach to all tasks and decision-making processes. The perspective reflects the idea of creating a single ethical culture within that particular organisation. The ethical guidance perspective promotes the establishment of mechanisms to measure compliance with ethical codes. It is more practical and prescriptive than the former three approaches discussed. This perspective regards ethical prescripts as the ruling force within the organisation, so much so that the organisation will be able to test whether there is in fact compliance with the ethical prescripts applicable to it. The ethical development perspective, on the other hand, directs senior managers to promote the creation of an environment that supports ethical behaviour as an integral part of an effective public service (Sing, 2009:54-72).

Although these different perspectives might guide public managers in promoting an ethically oriented public service, Clapper & Rossouw (cited in Sing, 2009:54-72) argue that the managers themselves are required to determine whether right or wrong depends on, first, the nature of the action, second, the consequence of the action and, last, the character of the person committing the act. The emphasis is thus always on the praxis of how ethics are determined in each case and through a process of evaluation of specific conduct rather than on the guiding rules, which at best serve as recommendations or guidelines to consider right from wrong in a situation. The discussion will now focus on introducing and explaining various theories of ethics.

### **3.4 Theories of Ethics**

In order to fully comprehend the meaning of ethical behaviour in the public sector, it is important to understand ethics as defined and described in the study of philosophy. To this end, various theories of ethics will be discussed. Raga & Tailor, (2005a) refer to Singer's 1994 discussion of Aristotle, who as far back as the fourth century BC, contended that human beings are not inherently virtuous and that notions of ethics and morality must be taught and practiced. In the same 1994 discussion, Singer (cited in Raga & Tailor, 2005a) mentions that Immanuel Kant concurred with Aristotle, arguing that ethics is not derived from human feelings but can be identified by the use of reason. The literature on the subject is immense but the discussion here is confined to two key philosophers who have at two key moments in Western philosophical discourse made important pronouncement on ethics, morality and behaviour as linked to the individual and society.

At the dawn of Western philosophy, Aristotle is seen to have placed emphasis on character as inherently unstable or diverse and therefore in need of training and oversight to encourage good conduct in the social group. Kant, at the time of the height of Western Enlightenment in the eighteenth century, a period which gave rise to the political and social notions that influence the modern nation state and its practices, is seen to have placed emphasis on rationality rather than feeling as being the key way by which morality may be discerned, distinguished and practised. It is these two very broad or general philosophical imperatives that are of direct relevance to the current study. Many of the tenets of both these philosophers will be noticed in the various theories of ethics to be discussed.

Moving from the abstract in philosophy to its praxis in the real, and more specifically to the public sector, it is hence seen that since public officials operate in a diverse society, resulting in diverse value systems, their ethical convictions are bound to be tested. Raga & Tailor (2005a) therefore correctly advocate that training in ethics is essential as an initiative for the establishment of an efficient and effective ethical and accountable public service. In this regard, a variety of ethics-bound theories influence codes, each placing emphases on different aspects of morality in decision-making and conduct of the individual in the work place. They will be discussed as follows: duty-based ethical theory, consequence-based ethical theory, social contract-based ethical theory, and character-based ethical theory.

#### **3.4.1 Duty-based ethical theory**

The first theory to be discussed is duty-based ethics. Deontological ethics or deontology (from the Greek *deon*, meaning obligation or duty; and *logia*, meaning logic) refers to the normative ethical position that judges the morality of an action based on the action's adherence to a rule or rules. It is sometimes described as 'duty' or 'obligation' or 'rule'-based ethics, because rules 'bind you to your duty' (Kay, 2013). Kant's theory of ethics is considered deontological for several reasons. Firstly, Kant argues, firstly, that to act in the morally right way, people must act from duty (*deon*) and, secondly, it is not the consequences of actions that make them right or wrong but the motives of the person who carries out the action (Kay, 2013). Niamh Kinchin (2007:112-120) claims that Kant spoke of 'rules as universal law; rules of correct moral behaviour that are determined by their universality, or the fact that they apply to every person equally'.

Duty-based ethical theory is also referred to as non-consequential theory, and affirms duty as to be obeyed, regardless of the consequences (Sing, 2009:54-72). Historically, then, the concept of duty is embedded in universal principles, that is, for example, performance of duty as foremost; thus performance constitutes the key or major part of the ethics of the situation (Sing, 2009:54-72). Thus Brady & Goree (cited in Sing, 2009) point out that a manager with a duty-based outlook will focus on questions such as: what is my standpoint? What is the accepted ethical, moral and principled action to take? Sing (2009) further notes that principle-based thinking in duty-based ethics directs public managers to ascertain whether or not an action or conduct is in violation of a universal principle, such as a violation of the Constitution (1996) which prohibits the violation of human rights and emphasises equality for all persons. Duty-based ethics or deontological ethics is commonly contrasted with consequentialism, which will be discussed next.

### **3.4.2 Consequence-based ethical theory**

Consequentialism in ethics may be defined as the doctrine that actions should be judged right or wrong on the basis of their consequences. The simplest form of consequentialism is 'classical utilitarianism, which asserts that an action is right or wrong according to whether it maximises the net balance of pleasure over pain in the universe' (*Merriam-Webster Dictionary*, 2013). Dellaportas et al (cited in Sing, 2009:54-72), argue that even the best intentions do not hold great value if the result is not an ethical one; hence right from wrong action is determined by the consequences

of the action concerned. Fritzche (cited in Sing, 2009:54-72) succinctly points out that this theory of ethics is primarily based on 'outcome and impact and end result' of a decision.

An example of classic utilitarianism is the maximum amount of social security for the greatest number of old people; therefore, if the particular action were to result in less benefit and more harm, it should be avoided. But, if the effect of the action results in more benefit, it should be carried out. A number of pertinent questions arise:

- Is it really possible to balance and weigh up all options before taking a particular course of action?
- Will it ever be possible to render an account of all consequences of a particular action?
- What is the timescale and timeframe for calculating benefits and harm?
- Is there presupposing occurring that a numerical value can be advanced for each benefit and each harm? (Lawton cited in Sing, 2009:54-72).

The next theory to be discussed is social-contract based ethics.

### **3.4.3 Social contract-based ethics theory**

It is worth noting at the outset that in the recent past increased attention has been given to ethical theories that place emphasis on social contracts and the rights of the individual (Tavani cited in Sing, 2009:54-72). The reason for this increase in focus on social contract-based theory seems to be that unlike consequence and duty based theories, social contract theory provides individuals with the motivation to pursue their individual self-interest by creating and sustaining an ethical and moral system with laws and rules. For example, the South African Constitution (1996) (the supreme law of the land) provides that the state must respect and protect the human rights enshrined in it (the Constitution being an ethical and moral system) (Sing, 2009:54-72). In so doing, that is, via abiding by the Constitution (law/rule), the actions of the state will lead to benefits for all, with rights for one leading to rights for all, which would ultimately lead to harmony in society. In other words, by one individual exercising a right in the Constitution (1996), such an individual must be weary of the limitation clause in the Constitution Section 36(1), which states that any right may be limited, provided the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality.

Fritzsche (cited in Sing, 2009:54-72) maintains that the social contract is an informal contract that exists between the public official and the citizen. It is described as a 'higher form and manifestation of ethical and moral authority', representing the convictions of the public official as serving the interests of the masses (Fritzsche cited in Sing, 2009:54-72). Goree (cited in Sing, 2009:54-72) asserts that the existence of the social contract strengthens the legitimacy of the state in the eyes of the people it serves. Fritzsche (cited in Sing, 2009:54-72) identifies three elements underpinning the social contract-based theory. The first element focuses on universal norms applicable to humankind, for example, the right to equality and protection of one's dignity. The second element relates to the macro social contract, which focuses on norms applicable to a particular context, for example, the Batho Pele principles which are specifically applicable to the South African public service. The third element relates to the micro social contract, which states that individuals who 'disagree with the social contract should withdraw from it' (Fritzsche quoted in Sing, 2009:54-72).

Thus it may be seen that while the existence of the social contract is a valuable and significant entity, there are positive and negative arguments surrounding it. A positive argument stated by Quinn (quoted in Sing, 2009:54-72) suggests that the mere existence of a social contract encourages people to abet rather than to obstruct or oppose each other, thereby creating a harmonious society. A negative argument, on the other hand, could be that persons who do wrong may use the excuse that they did not understand the implications of the social contract. Hence there is the need to articulate and stipulate the meritorious and moral behaviour that keeps the positive aspects of the social contract alive and in practice. The final theory to be discussed is the character-based theory.

#### **3.4.4 Character-based ethical theory**

The underlying principle of this theory is that the character of the person determines his or her actions. A morally good person will commit good actions and vice versa (Reynolds & Quinn cited in Sing, 2009:54-72). Another description of character-based ethics is virtue ethics. Reynolds & Brady (cited in Sing, 2009:54-72) maintain that the human being possesses a conscience which enables the making of a decision between a good action and a bad action; it is the existence of virtue that encourages one to perform good actions while vices steer one to perform bad or immoral actions. Virtue or rectitude may be described as a good habit that dominates human character.

Human conscience is strengthened and moulded by repetition and positive construction of one's self. This argument echoes and reinforces Aristotle's view mentioned earlier that the development of moral character is a long process that requires reinforcement and awareness throughout one's lifetime.

Thus, virtue or character-based ethics is premised on the notion that a virtuous character is a prerequisite for promoting and upholding basic human rights. Spitzer (cited in Sing, 2009:54-72) lists the characteristics of a virtuous person, as envisaged by Plato and others, as follows: courage, forgiveness, humility, temperance, compassion and care. These characteristics are antithetical to vices like cowardice and boastfulness. Spitzer (cited in Sing, 2009:54-72) further asserts that in order to promote ethicality and virtuosity in the public service, it is obligatory upon public managers to be fiercely aware of their own virtues and vices. Spitzer (cited in Sing, 2009:54-72) further suggests that public managers may complement their application of virtue ethics in practice by paying regard to the following questions when carrying out their day-to-day duties:

- Do I have the inclination to be courageous and humble in applying my principles in a caring manner?
- Am I persevering and yet generous in applying principles in a sensitive manner?
- Will ego-rewards and ego-rage project my character as being boastful?
- Is my willingness to forgive and be fair really motivated by a deep regard for the intrinsic dignity of the other individual?

Like with the other theories of ethics, there are strengths and weaknesses related to the character-based theory. These include the notable weakness, according to Spitzer (cited in Sing, 2009:54-72), of the possibility of a clash of virtues. One person's idea of what constitutes the virtuous may differ to that of the next. Thus, it is recommended by Spitzer (cited in Sing, 2009:54-72) that public managers apply all the above mentioned theories in an integrated manner while at the same time remaining aware of the positive and negative aspects of each. Further, it is the opinion of the writer of the current study that public officials undergo extensive and ongoing training with the aim of gaining deeper understanding of the application of ethical concepts and theories of ethics in practice. This is because ethical theories and codes by their very nature are merely aspirational and not prescriptive.

### **3.5 Ethical Relativism**

The discussion now turns to the concept of 'ethical relativism'. Ethical relativism is defined by Sing (2009:54-72) as a concept of moral reasoning that is widely known owing to the absence of objective criteria to evaluate the various ethical theories. There cannot be a universal ethical principle that may be applied to every situation. The ethical system prevalent at a particular time becomes the order of the day. Ethical relativism advocates that there are no universal ethical norms of right and wrong. As an example, Quinn (cited in Sing, 2009:54-72) points to the possibility of different individuals holding completely opposite views of an ethical problem, with both being right.

At this stage one must draw the link between ethics and the concept of law. In the absence of a universal ethical principle, society has evolved by developing rules and/or laws to govern a people to ensure harmony. To this end, what were mere guiding principles that have gone before become enforceable rules. In the modern context, these rules become known as the law and are interpreted and applied by institutions of the state. Enforcement means that some form of sanction will be the result of non-compliance with the law. The concept of the 'law' is defined as a 'body of rules governing human conduct that is recognized as binding by the State and, if necessary, enforced' Kley (2001). Kley (2001:12) goes on to state that various other normative systems similar to the law govern human conduct, namely, religion, individual morality and community mores. None of the normative systems are indeed enforceable, but act merely as the guiding principles of acceptable moral conduct. Hence, in the absence of a universal ethical or moral norm, the resultant chaos is avoided by the existence of the rule of law, which is binding and enforceable.

### **3.5.1 Procedural fairness and the law in ethical practice**

Despite the existing differences among the theories of ethics pointed out in the discussion above, Kinchin (2007:112-120), however, argues that all theories are concerned with a central consideration of what is fair, and that the challenge of the public service is to convert this contentious principle (fairness) to a workable ethics goal. He defines fairness in the public service as a sense of justice produced by consistent, impartial and neutral decision-making (Kinchin, 2007:112-120).

Trustworthiness is the 'social foundations of public ethics' as are privacy, due process, human dignity and a commitment to the common good. All these equate with the

private sector notion of 'equity', that is, a sense of individual justice (Uhr in 1991, Denhardt in 1991, Allars in 1991 cited in Kinchin, 2007:112-120). Kinchin (2007), moreover, correctly asks the question: 'how can a seemingly subjective principle be translated to a concrete public sector ethic and converted to writing and codified?' An obvious challenge lies in the fact that an individual's perception of fairness depends on his or her personal values. Kinchin (2007) highlights the notion of impartiality as an example to explain this challenge. It is said that impartiality requires an individual to 'abandon preconceived ideas, bias and opinions' when making a decision. But just as fairness cannot be imposed on an individual, preconceptions cannot be forcibly removed. Thus the challenge remains for the public sector to provide the public official or decision-maker with an inspirational ethical framework that encourages internalisation of its guiding rules as well as a structure that ensures accountability. According to Kinchin (2007), this framework already exists in the name of procedural fairness, a key principle of administrative law.

Procedural fairness, in relation to public decision-making means two key things. The one is that a public servant making a decision must examine the facts, apply the law pertaining to them, and do so impartially. The first is that the decision-maker should also be objective and consistent in all his or her decisions. The second is that an individual evaluating ethics must be presented with any and all material that the decision-maker takes into account in making a decision and that the decision-maker must be accorded an opportunity to respond to an evaluation of his or her ethics (Kinchin, 2007:112-120). Hence, the importance for Parliament to be mindful of the principle of procedural fairness when improving on the current ethical guidelines applicable to the public service.

In the following section, given the nuanced definition and description of the elements that constitutes ethics, distinction is made between ethics, values and morals to further clarify and distil these concepts as regards their applicability to service in the public sector.

### **3.5.2 Distinction between ethics, values and morals**

Hanekom in 1984 (cited in Raga & Tailor, 2005a) contends that ethics revolves around the character, conduct and morals of human beings and evaluates conduct against



some absolute criteria on which it places negative or positive values. Guy in 1990 (cited in Raga & Tailor, 2005a) defines ethics as 'the study of moral judgements and right and wrong conduct'. Guy succinctly defines ethics as 'both a process of inquiry and code of conduct; as a code it is like an inner eye that enables people to see rightness or wrongness of their actions' (cited in Raga & Tailor, 2005a). It may then be concluded then that a code of conduct is the rule or law to be complied with and a code of ethics the tool used to enable or empower an individual with the quality of discernment when faced with an ethical dilemma.

Ethical values, integrity and rule of law, according to Hondeghem in 1998 (in Raga & Tailor, 2005a), are some of the key elements of every democratic society. Public officials, in the daily execution of their duties and management of public funding, exercise discretionary powers. Thus, the above values should not only protect the citizens against arbitrary use of public power but also the public institution against improper use of power by its public officials. Furthermore, according to Hondeghem (cited in Raga & Tailor, 2005a), ethical behaviour is essential for an effective political-administrative authority and social and economic structures. Corruption can derail economic competition and endanger free trade on which the free market economy is based, according to Hondeghem (cited in Raga & Tailor, 2005a). Similarly, the current study suggests that ethics and the application thereof in the everyday business of the public functionary be seen as an ongoing activity and not the attainment of a desired outcome.

Ethics is not about merely establishing a set of rules or guidelines but an ongoing management process that underpins the work of the South African government. A similar view is held by Denhardt (as referred by Hondeghem cited in Raga & Tailor, 2005a):

Ethics is not a set of rules or values waiting to be discovered, that provides all the answers. In a complex world of public administration, norms and values rarely provide clear-cut answers to difficult problems. Ethics should be thought of as helping to frame relevant questions about what government ought to be doing and how public administration ought to go about achieving those purposes.

A code of ethics may therefore be described as 'aspirational' (Nagia, 2012:37). Ethical behaviour, as pointed out by Rossouw in 2006 (cited in Nagia, 2012), refers to behaviour that is not only good for oneself but also good for others. Hence, behaviour that concentrates solely on acts that are good only for oneself is seen to be unethical. Values, it is claimed, are the standards that are used to determine whether an action or behaviour is good beyond the benefit of oneself. For instance, if it is believed that freedom or equality is good, the test being to determine whether it is good for only oneself or for others; if an individual believes that only he deserves freedom and equality, such an action will not be good (Rossouw cited in Nagia, 2012).

Gildenhuis (2004:14) argues that 'ethics is the science of morals in human conduct' and is concerned with the study of the conduct and character of people; as such, it is the systematic study of the principles that distinguish right from wrong and good from evil. Furthermore, according to Gildenhuis (2004:14):

morals and ethics are not the same thing; whereas ethics refers to a set of moral principles, morals are made by humans in their quest to control their environment, morals are common sense guidelines for a happier society. Morals should be defined as a code of conduct laid down on the basis of experience to serve as a uniform yardstick for the conduct of individuals... ethics is a personal thing and cannot be enforced. Morals on the other hand can be enforced as they tend to become the law.

Gildenhuis (2004:14) rather aptly summarises the difference between ethics and morals as follows: 'morals are actually laws while ethical conduct includes adherence to the moral codes of society in which we live'. Following the above differentiation, it may be seen that codes of conduct are prescriptive, while codes of ethics aspirational (Nagia, 2012:37).

Values play a major role in the governance of an organisation. They contribute largely to the integrity framework, which promotes the code as a tool in that framework (Nagia, 2012). Values may also be extended to incorporate the notion of efficiency; thus maladministration on the part of a public official points to inefficiency of the public official in question.

Heyns, in 1986 (cited in Raga & Tailor, 2005a), points out that values are basic perceptions of the relative importance of our elements of existence and that these perceptions always have to do with priorities, whereas norms are the function which direct and evaluate human attitudes and actions. According to McMurray in 1977 (cited in Raga & Tailor, 2005a:13), the influence of values on the individual is powerful for the following reasons:

- First, they principally determine what a person regards as right, good, beautiful or ethical;
- Second, they provide the standards and norms by which a person guides his or her day-to-day behaviour;
- Third, they chiefly determine a person's attitude toward the causes and issues, such as political, economic, social and industrial, with which he or she comes into contact daily; and
- Fourth, values determine which ideas, principles and concepts a person can accept, assimilate, remember and transmit without distortion.

In addition to the above, Raga & Tailor (2005a:14) maintain that individuals may temporarily or permanently discard their value systems in favour of special goal attainment. This no doubt explains the widespread existence of unethical conduct in the public sector and intensifies the challenge and difficulty of ensuring ethical behaviour among public functionaries.

### **3.6 The Value of Ethics in the Drafting of Codes to Promote**

#### **Good Conduct for Good Governance**

If individuals are capable of discarding their value systems in pursuit of a desired goal, there is no guarantee that functionaries within government will place the needs of the public before their own desires and goals. Hence, the constant and ongoing emphasis on the code of ethics and its importance to the decision-making process, which cannot be stressed enough. This leads the discussion to the importance of drafting codes and principles for functionaries to abide by and uphold. For example, the Batho Pele principles, which serve as a guide to public officials in their daily service delivery activities.

The Batho Pele principles are indeed similar to the Nolan Committee's Seven Principles of Public Life in the United Kingdom (Chapman cited in Raga & Tailor, 2005a:15), the latter which are listed as follows:

1. **Selflessness:** Public officials should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family or friends;
2. **Integrity:** Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties,
3. **Objectivity:** In carrying out public business, including making public appointments, awarding contracts or recommending individuals for rewards and benefits, holders of public office should make their choices on merit;
4. **Accountability:** Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office;
5. **Openness:** Holders of public office should be as open as possible about all the decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office. They should give reasons for their decisions and restrict information only when the wider public interest demands it;
6. **Honesty:** Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
7. **Leadership:** Holders of public office should promote and support these principles by leadership and example.

The very existence of the Nolan principles of the United Kingdom indicate that the phenomenon of unethical behaviour in the public sector is indeed a global one, with legislatures the world over concerned with the challenges facing functionaries, hence the need to put forward guidelines as tools to nurture ethical behaviour.

According to the Organisation for Economic and Cooperative Development (OECD) in Africa, it is recommended that codes within an organisation be both aspirational (providing ethical guidelines) and prescriptive (providing the rules of conduct and consequences for misconduct). The combination of both codes has proven to be most successful in regulating organisational conduct, because while it describes the values that the organisation wants to foster in its employees, it also attaches penalties for non-compliance (Nagia, 2012). It is worth noting in this regard that some writers in the field refer to ethical codes as 'inspirational' while others refer to it as 'aspirational'. It may be argued that, in fact, ethical codes be both-inspirational and aspirational. Ethical

norms, like transparency, accountability, honesty and fairness, should become intrinsic values in the public official's value paradigm, but at the same time these values should be continuously improved upon and emphasised as important by superior functionaries. Ultimately, enforcing ethical norms requires superior functionaries leading by example.

It is worth mentioning at this stage that the importance of ethics, ethical principles and ethical conduct has always been highlighted and emphasised by leaders in business and the public sector. It has become an accepted norm that corruption compromises growth within the public and private sectors alike. Vicki Harris, Chairman of Global Corporate Governance, has stated in this regard that 'corruption is probably the single major factor impeding private sector investment and growth' (Gildenhuis, 2004:6-11). Similarly, Beyers Naude warned that 'a country that allows corruption to take over loses its soul' (Gildenhuis, 2004:6-11). As well, former President Thabo Mbeki acknowledged at the National Anti-Corruption Summit in 1999 that 'only the mentally blind would fail to see that the things that happen in our country everyday point precisely to this—that among many of our fellow citizens there is no ethical barrier which blocks them from actions that are wrong' (Gildenhuis, 2004:6-11).

Vayas Doorgapersad & Ababio (2010:411-427) list the values below, which they refer to as principles, to ensure good governance and an ethical local government. It is suggested that these values may be extended to apply to all three spheres of government in South Africa as they transcend hierarchical boundaries. The values referred to by Vayas Doorgapersad & Ababio (2010:411-427) are:

- participation: to encourage citizens to exercise their right to express their opinion in the process of decision-making;
- rule of law: to realise law enforcement which is fair and impartial for all, without exception;
- transparency: to build mutual trust between the government and the public through the provision of information with guaranteed easy access to accurate and adequate information;
- equality: to provide equal opportunities for all members of society to improve their welfare;
- responsiveness: to increase the sensitivity of government administrators to the aspirations of the public;

- vision: to develop the region based on a clear vision and strategy, with participation of the citizenry in all the processes of development so that they acquire a sense of ownership for the progress of their regions;
- accountability: to increase the accountability of decision-makers with regard to decisions involving public interest;
- oversight: to increase the efforts of supervision in the operation of government and the implementation of development by involving the private sector and the general public; and
- efficiency and effectiveness: to enhance the capacity and moral disposition of government administrators so that they are capable of providing easy, fast, accurate and affordable services.

These principles are, without exception, presented by the authors as key imperatives for enhancing an ethical environment for good governance (Vayas Doorgapersad & Ababio, 2010:411-427).

Codes of ethics promote the public service values listed above. However, Mafunisa (2000:73-74) advises that these values should also be promoted and supported by unions within the public sector, with the latter compelled to make their members aware of these values and taking the lead in campaigning for their implementation. Revered as they are by their members, unions possess the most favourable position from which to advocate ethical conduct in the public sector and to emphasise upholding the values of transparency and accountability. Mafunisa (2000:73-74) correctly argues that 'unions must be seen to be at the forefront of efficiency, effectiveness and service delivery'. Fighting unethical behaviour of public officials, thus cannot be left in the hands of the government alone; unions should take precautionary and preventative measures to enhance public service efficiency, which should include training in ethics (Mafunisa, 2000:73-74). Further, it is the role of unions to promote the commitment of their members to the Constitution (1996) and to national interests rather than partisan allegiance and factional interests' (Mafunisa, 2000:75).

All of the above recommended measures mention the importance of good leadership as integral in the battle against corruption and in upholding ethical behaviour. These propositions reflect what the King III Report (2009:10) on corporate governance refers to as effective leaders who are characterised by 'ethical values of responsibility,

accountability, fairness and transparency and based on moral duties'.<sup>3</sup> The King III Report (2009:20) further adds that 'responsible leaders do business ethically and not merely being satisfied with legal compliance'. According to the *Ethics Monitor* (Schoeman, 2014), the King III Report promotes the monitoring, evaluation, reporting and disclosure of an organisation's ethical performance. This emphasises the paramount importance of 'leaders who emulate the ethical values of accountability and transparency.

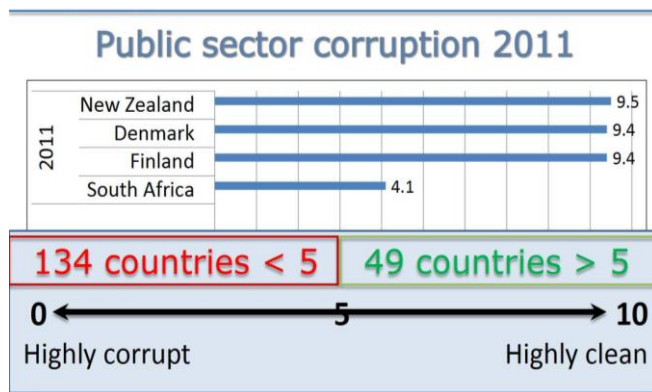
Yet, as already noted, in South Africa, a number of political figures holding high ranking positions within the government have demonstrated unethical conduct. Some of their misconduct will be discussed in detail in chapters five, six and seven. In this regard, the notorious Arms Deal saga, the demise of former police chief, Jackie Selebi as well as maladministration involving Bheki Cele who succeeded Selebi as chief of police, will be discussed as case studies focussed on the particular aspect of corrupt leadership. In this regard, the Public Protector, Advocate Thuli Madonsela (Anon, 2013), stated: 'there is massive maladministration in South Africa because of unethical leadership... ethical leadership is the lifeblood of sustainable leadership in your personal life and in business... with ethical leadership Africa would live up to the idea of an African renaissance'.

The statistics presented in Figure 2, following, compiled by the Transparency International Corruption Perceptions Index in 2011 show the alarming score for corruption by South Africa in relation to the global survey.

Figure 2: 2011 Index on Public Sector Corruption Globally

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3. King III (2009) was subsequently amended as a result of the amendment to the companies Act 2008, which became effective on 1 April 2011. In order to align King III with the amended Companies Act 2008, the King Committee established a task team to effect certain changes to King III. According to the Institute of Directors (Practice Notes on King III Amendment, February 2012:2), it is stated that amendments to King III were only made where King III was in direct conflict with the new legislation. It further added that in so far as King III goes beyond what the Act directs, these will remain part of King III as best practice principles.(Institute of Directors, Practice Notes, February 2012:2).



Source: Corruption Perceptions Index 2011 (Transparency International, 2014)

The statistics reflected in Figure 2 points to the seriousness and depth of the problem of corruption and unethical behaviour in the public sector. Moreover, in terms of global monitoring, it is a shocking revelation that 149 countries are classified as 'highly corrupt' and only 49 countries as 'highly clean', attesting to the widespread nature of corrupt governance, and the South African experience as not nearly unique in this regard, as mentioned previously. Although South Africa appears only at 4, 5, as compared to other countries ranging from 9, 4 to 9, 5, the fact that it appears on the graph at all in the range displaying levels of public sector corruption is disappointing. Corruption, as indicated above, indicates unethical behaviour, which in turn indicates non-compliance with external control measures. Hence, there is an urgent need for transformation of mindset in public sector leadership as well as that of the public functionary.

The quest for an ethical, accountable and transparent public sector has also been emphasised by the United Nations Department of Economic and Social Affairs (UN-DESA), Division of Public Economics and Public Administration. This body highlights good governance and sound public administration as the underpinning element of sustainable development. Thus, the impact of unethical and criminal practices in the public sector is unsupportable in the development of nations, especially emerging democracies such as South Africa's, resulting in a loss of confidence in public institutions and an erosion of the rule of law itself (United Nations Development Programme Bureau for Africa, 2001). The United Nations report referred to consistently speaks of guiding, managing and controlling conduct in the public sector. This is another indication of the seriousness and widespread nature of corruption and misconduct within the public sector. A universal body like the United Nations has even



taken the matter further by investigating unethical behaviour, transparency and accountability within the public sector as an area that requires attention globally.

Derivatively, it is thus evident that high standards of ethics, openness and transparency and accountability are globally recognised as prerequisite values of good governance and sustainable development. Not only is it suggested that these values buttress 'responsive public policy and high levels of public sector performance, but also play a crucial role in preventing the onset of systemic corruption' (Division for Public Administration and Development Management (DPADM), United Nations Public Administration Network (UNPAN), 2008–2010:1). As damningly noted, the pernicious effects of corruption and the lack of an ethical public sector are indeed borne by those least able to do so—the poor (Division for Public Administration and Development Management (DPADM), United Nations Public Administration Network (UNPAN), 2008–2010:1).

### **3.7 Conclusion to Chapter**

From the discussion of ethics in this chapter, the important aim of the current study becomes clear, that is, to illuminate the ethical framework for the South African public sector, one which emphasises the principles of good governance and ultimately advances sustainable government. Indeed, the current study will show that it is not the lack of existence of such a framework that is the problem but the failure to properly implement it on a constant, ongoing and day-to-day basis, which is especially due to the poor example of corrupt leadership in key areas of the public sector.

## **CHAPTER 4**

### **PRINCIPLES OF GOOD GOVERNANCE**

#### **4.1 Introduction**

This chapter serves both to present a section of the literature review of this study and an in depth discussion of the principles of good governance as highlighted in the King II Reports, in particular, accountability and transparency. Some of the theories developed as a result of the inductive reasoning approach used in this study were based on this literature. This chapter discusses the principles for good governance outlined in the King Report (II) for South Africa, 2002. In addition, it serves to provide the link between ethical conduct and good governance within the public sector, which since the beginning of the 21st century, there has been increased interest in, especially regarding the commercial advantages of good governance.

#### **4.2 Formation of the Institute of Directors (IoD)**

The Institute of Directors (IoD) was originally founded in 1903 in London in the United Kingdom (Institute of Directors, 2006). The IoD was later formed independently in South Africa in 1973 and was registered as a Section 21 company in terms of the Company's Act, 1973 (Act No.61 of 1973). The IoD was formed to improve efficiency and effectiveness within the private and public sectors through the promotion of integrity in business and government practices; in South Africa, it was formed by means of the declaration of the King Reports (Institute of Directors: History, Mission, and Purpose of 2006, 2006).

#### **4.3 Rationale for the Release of the King Report on Governance in South Africa, 2002 (King II)**

According to the IoD (Institute of Directors, 2006:1), the ushering of democracy in South Africa created the need to investigate and scrutinize how the country's business was being conducted. This was especially because under apartheid South Africa had experienced a relatively closed economy, with economic sanctions also being the order of the day as a result of the anti-apartheid struggle. Under National party rule and apartheid conditions, business practices and government involvement in business

practices were unscrutinized and inevitably skewed in favour of white business interests and politics.

It is thus widely claimed that the King Report (King I) was released in 1994 to promote corporate governance and thereby advocate for the highest code of best practices in South Africa (Institute of Directors: History, Mission and Purpose, 2006). Tempelhoff (2003:6) in Parker (2009: 47) correctly points out that the political instability and the need to adapt to the changing socio-economic climate in South Africa was the underlying rationale for the release of the second King Report on Governance in 2002. The King Reports paved the way for new measures to be taken into account to ensure accountability, transparency and good governance as challenges emerged and loopholes became identified with regard to corporate and government practices as the new democracy took hold. With the emergence of the democratic order, came the emergence of state governed and guided principles for good governance which King I established and King II attempted to consolidate.

#### **4.4 Seven Principles of Good Governance**

The function of good governance in the public sector, according to the Chartered Institute of Public Finance and Accountancy (CIPFA) and the International Federation of Accountants (IFAC) is to ensure that government departments and entities conduct themselves in the interest of the public at all times (International Federation of Accountants, 2013, 11). It is further explained that 'public interest', firstly, requires a strong commitment to integrity, ethics and the law, and, secondly, openness and intensive stakeholder consultation (International Federation of Accountants, 2013; 11). In addition to the requirements for acting in the public interest, achieving good governance in the public sector also requires the following according to CIPFA and IFAC:

- defining outcomes in terms of sustainable economic and social benefits;
- determining the interventions necessary to optimize the achievement of intended outcomes;
- developing the capacity of the organization/department as well as its leadership;
- managing risks and performance through vigorous internal control and intense public financial management; and

- implementing good practices in transparency and reporting to deliver effective accountability (International Federation of Accountants, 2013: 11).

Good governance has further been defined by the United Nations in its policy paper, *Governance for Sustainable Human Development*, as participatory, transparent, accountable, effective, equitable and promoting the law' (Weiss and Steiner, 2006:1549). Good governance in this regard seeks to ensure that political, economic and social priorities are based on broad consensus in society and that the concerns of the underprivileged and vulnerable sectors of society are heard in decision-making with regard to the allocation of development resources (Weiss and Steiner, 2006: 1549).

Maladministration, corruption and fraudulent business practices highlights the need to transform the conduct of public as well as private sector officials. As Parker (2009: 47) states, good governance is not only imperative for a successful South African government and economy, the need for it has been recognized universally. The seven principles of governance as presented in the King Report on Governance for South Africa in 2002 (King II) embodies the following seven key characteristics of good governance:

- Transparency
- Accountability
- Discipline
- Independence
- Responsibility
- Fairness, and
- Social Responsibility.

Each of the seven principles is explored below in detail.

#### **4.4.1 Transparency**

Transparency means that 'decisions are taken and their enforcement are done in a manner that follows the law. It also means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement' (Weiss &Steiner, 2006:1553). Transparency therefore means that

access to all information is guaranteed and that the decision-making process is an open one. Another definition of transparency by Johnston (2006:2), is that it is 'official business conducted in such a way that substantive and procedural information is available to, and understandable by, people and groups in society, subject to reasonable limits protecting security and privacy.' This definition highlights the limitations applicable to the notion of transparency, that is, that transparency is not a blanket guarantee to access to all information but rather access to information within reason.

Further, according to Johnston (2006:3), transparency rests on a partnership. On the one hand, officials must make information available and on the other hand, there must be people and groups with reasons and opportunities to apply the information in a useful manner. Key players in this regard are an independent judiciary, a free responsible press and, crucially, an involved civil society (Johnston, 2006:3). Moreover, the rules and procedures must be open to scrutiny and understandable (Johnston, 2006: 3). In other words, transparency allows for a government to make it known what is being done, how and why things are done and what the decision-making process involves. The obligation is hence for open and transparent conduct of government institutions to uphold the best practice and behavior stipulated in the King Report on Governance (King II, 2002).

Johnston (2006:3) acknowledges that transparency requires enormous resources and may slow down administrative procedures, but highlights that good governance without transparency does not mean much at all and may not be possible even.

Bushman, Piotroski & Smith (2003, in Parker, 2009) assert that transparency is a measure of the degree of openness in processes which enables stakeholders to make sound analysis of the organizational performance. Parker (2009:51) correctly maintains that transparency with regard to information inevitably results in precise analyses being made; hence the action taken will be based on correct information intended at improving results.

Bushman, Piotroski & Smith (2003, in Parker, 2009:207) draw a clear distinction between financial transparency and governance transparency. Financial transparency deals with the timelines of financial disclosures and their interpretation by analysts and the media while governance transparency focuses on governance disclosures by outside stakeholders to hold directors accountable. It is the contention of Bushman,

Piotroski & Smith (2003, in Parker, 2009:207) that governance transparency is closely linked to a country's judicial regime while financial transparency is linked to political economy.

Disclosure of financial reports and statements provide investors and stakeholders with insight into organizational performance and enables them to determine whether performance targets have been met or not (Bushman, Piotroski & Smith, 2003, 209). Non-disclosure of pertinent information inevitably results in distrust among stakeholders; hence, in order to maintain the legitimacy of the organization or the government of the day, openness and transparency are key. Transparency as a best practice assists in combating misconduct such as embezzlement of funds, bribery and corruption since regular disclosure of information and reporting to stakeholders keep officials in check.

#### **4.4.2 Accountability**

Accountability, in essence, concerns the relationship between the rulers and the ruled, and as such has at its core the issues of politics and power (OECD, 2014:23). According to the OECD (2014:23), accountability comprises the following three essential components:

- i) transparency, which refers to stakeholders having access to information about undertakings made by the state and gauging whether these are met or not;
- ii) answerability, which refers to stakeholders being in a position to demand that the state justifies its actions or inactions; and
- iii) enforceability, which refers to stakeholders being able to sanction the state if it fails to maintain certain standards (OECD, 2014:23).

This apt description of accountability shows that transparency is an integral part of ensuring accountability. They are interdependent as well, according to Johnston (2006:2-3), who notes that accountability requires transparency and that both function best where laws are sound and widely supported. Williams (2007) reiterates the interdependent link between transparency and accountability, claiming as well that the existence of accountability ensures transparency and openness. Business invests in organizations that show accountability because they recognize the damaging effects

of the lack of oversight and accountability regarding profit and public image (Williams, 2007).

Accountability has both horizontal and vertical dimensions, according to the OECD (2014). The horizontal dimension comprises the system of checks and balances among the executive, the legislative and judicial branches while the vertical dimension comprises the relationship between citizens and decision-makers, including the ability of citizens to influence the decision-making processes (OECD, 2014). As previously stated, accountability relates to the relationship between the rulers and the ruled, the state and the citizen, hence the perception of the state by the citizens remains a crucial factor in ensuring the legitimacy of the state. These relationships pose a challenge for the state and achieving accountability and state legitimacy in this regard is a preoccupation of all countries (OECD, 2014:23).

Accountability is possibly the key to both better business and better governance, but unfortunately, according to Williams (2007), the exploitation of natural resources and the prevalence of corruption in many countries are intricately linked, with the absence of accountability allowing such corruption to thrive (Williams, 2007). The Global Organisation of Parliamentarians Against Corruption (GOPAC) has proposed improving accountability among governments by lobbying for national revenues of resources to be published as separate line items in public accounts thereby building transparency (Williams, 2007).

In South Africa, the Public Financial Management Act (PFMA, 2000) holds managers accountable to the Accounting Officer, hence, managers must justify and motivate reasons for the decisions they make. The Accounting Officer is, in turn, accountable to the Minister of a government department. Thus accountability is seen to be facilitated by a process of vigorous reporting to senior management.

As the research highlights, most states and organisations invest significant amounts of time and money to ensure effective oversight of these entities. The question still remains, however: why do we continue to see high profile instances in which the matrix of accountability collapsed? Williams (2007), correctly claims that merely embracing the notion of accountability is not enough; sustainability of good governance requires ongoing vigilance from officials in leadership positions to ensure effective accountability.

#### **4.4.3 Discipline**

Discipline within an organisation is understood to be a reflection of the commitment of senior management to comply with shared commercial behavioural standards which are recognized and accepted universally (Bittner, 2001, in Parker, 2009:48). Discipline involves senior management abiding by the policies that relate to best practice and good governance, coupled with legislation enforcing ethical behavior. (Bittner, 2001, in Parker, 2009:48).

#### **4.4.4 Independence**

As reflected in the King II Report, (2002:13), independence relates to those mechanisms put in place to minimize conflict among officials in leadership or management positions. Independence may thus be construed as mechanisms that ensure impartiality in the decision-making process. Independence, according to Association of Chartered Certified Accountants (ACCA) (Student Accountant Technical, 2011:1), refers to the avoidance of being unduly influenced by a vested interest and to being free from any constraints that would prevent a correct course of action being taken. Independence may thus be interpreted as conducting in a strictly impartial or non-partisan manner during the decision-making process. The interrelation between independence and transparency is noticeable, since independence in the decision-making process promotes transparency.

#### **4.4.5 Responsibility**

The King II Report (2002:12) promotes responsibility within government structures, which provide for penalties in the case of mismanagement.

#### **4.4.6 Fairness**

The King II Report (2002:12) maintains that fairness within an organization may be attained by the balancing actions of systems in place, which makes provision for the future interest of not only the organization but also for the reinforcement of governance whilst renouncing fraud and corruption.

#### **4.4.7 Social Responsibility**

Corporate social responsibility (CSR) has, according to Gill (2008:452), increasingly focused on corporate governance as a vehicle for incorporating social and environmental concerns in business decision-making processes to benefit financial



investors, employees, consumers and communities. CSR should be interpreted as a business strategy to make the goals of corporations more achievable as well as increasingly transparency, demonstrating responsibility towards communities and the environment, and ultimately taking into account the interests of employees and consumers during the decision-making process (Gill, 2008:463).

#### **4.5 The Universal Application of Good Governance**

The King II Report on governance (2002:12) suggests that all the above principles are inter-related and that application of them by senior officials will ensure a high standard of ethical conduct and across all levels of management. Bigg & Ward (2004:3), support the view that globalization has led to new demands for corporations to play a central role in efforts to eliminate poverty, achieve equitable and accountable methods of governance and ensure environmental security. The new approach views business as part of society and searches for means to maximize the positive benefits that business ventures can bring to human and environmental well-being (Bigg & Ward, 2004:3).

The application of good governance is evident in the financial practices adopted by organisations, according to Solomon (2004, in Parker 2009:60). Global fusion in governance has been attributed to a greater awareness of financial investor relations. (Parker 2009:60). The advent of globalization has urged organisations to reform their policies and to adopt an inclusive approach (Solomons in Parker 2009: 61).

#### **4.6 Conclusion to chapter**

The above principles will be referred to again and utilised in the presentation of the each of the three case studies and more especially in Chapter Eight that draws together a qualitative analyses of the three case studies.

## **CHAPTER FIVE**

### **CASE STUDY 1: THE SOUTH AFRICAN ARMS DEAL**

#### **5.1 Introduction**

The South African 'Arms Deal', or Strategic Defence Package (SDP), consisted of a bundle of projects, managed as a single package, which constituted the largest armaments deal ever concluded in South Africa. The deal consisted of the acquisition of 28 Gripen advanced light fighter aircraft and 24 hawk leader in-fighter trainers from BAE/SAAB, 4 corvettes from a German frigate consortium, 3 submarines from a German submarine consortium and 30 Agusta 109 helicopters from Italy (Holden, 2008). The total value of the Strategic Defence Project (SDP) at the conclusion of the contract was R29.992 billion (Corruption Watch, 2014).<sup>4</sup> The magnitude of expenditure is said to have constituted one of the largest armament contracts globally at the time. The Arms Deal was entered into by the government with the above suppliers on 3 December 1999, five years after the first democratic elections.

This chapter will begin its discussion of the Arms Deal with a look at the various controversies surrounding the Arms Deal, including the allegations of corruption, the reasons in the first place to acquire armaments of the magnitude undertaken and offsets in the deal. Next, it will undertake an analysis of the non-compliance applicable to it by focussing on its unconstitutional aspects, with particular emphasis on the Chapter 9 institutions, namely, the Public Protector and the Auditor-General. This chapter concludes by providing a summary of the inductions that were made about non-compliance in this instance as well as a summary of the ongoing nature of the investigations into the Arms deal.

#### **5.2 The Various Controversies Surrounding the Arms Deal**

The Arms Deal was surrounded by a variety of controversies and criticisms against it from its very inception, ranging from the issue of unethical or corrupt practise by public

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4. Corruption Watch is a non-profit organisation launched in January 2012, which provides a platform for reporting corruption. It uses reports from the public as a source of information to fight corruption and hold leaders accountable for their actions. The organisation also investigates cases of alleged acts of corruption, in particular, those that have the most serious impact on South African society. Its members submit their findings to the relevant authorities to take further action, and continue to monitor the progress of each case. The organisation works with media to make sure that corruption is fully exposed. Corruption Watch publishes on its website various articles relating to the topics as well as a variety of cases (Corruption Watch, 2015).

officials and politicians, to the need for the deal in the first place and the financial cost to the South African economy and society. Each controversy merits discussion in its own right to provide an understanding of how deeply the Arms Deal impacted South Africa.

### **5.2.1 Allegations of corruption**

The political and public reaction against the deal was premised on the following, *inter alia*:

- Accusations of improper behaviour by a number of political office bearers and public sector officials, which questioned whether the deal was compromised,
- Whether there was a fair process in place during the negotiations and the signing of the contracts; and
- Whether there was corruption and if so, whether it was being investigated or it being covered up (Botha, 2003).

Questions about the deal were first raised in Parliament by Minister of Parliament at the time, Patricia de Lille, in September 1999. De Lille presented Parliament with a dossier (compiled by ‘concerned MPs’), that subsequently became known as the ‘De Lille Dossier’, with allegations of extensive corruption in the Arms Deal negotiations. De Lille called for a full judicial investigation (Corruption Watch, 2014; Holden, 2008:38).

The following timeline by Corruption Watch (2014) captures some of the further information about the Arms Deal between 1999 and 2000:

- In November 1999, ‘Joe Modise admits he is a Director of Conlog, which is expected to get a contract from contractor BAE/SAAB, the supplier that has benefited the most from the arms deal’;
- In March 2000, ‘Zuma, Shaik and Alain Thetard of Thint allegedly meet to discuss paying Zuma R500 000 a year in return for protection against a probe into Thomson’<sup>5</sup>
- In October 2000, ‘SCOPA conducts a hearing into the deal, at which Chippy Shaik and Jayendra Naidoo are questioned—they admit that the arms deal will now cost R43.8-billion, and subsequently request that a “super-investigating” team be

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5. According to Corruption Watch (2014), this emerged during the Shaik trial.

formed, and specifically request that the Heath special investigating unit be included.’

Concerns regarding irregularities in the decision-making process were raised by various parties, including a report by the Auditor-General to the Select Committee of Public Accountants (SCOPA) in September 2000. In its report to Parliament, SCOPA recommended that four bodies, namely, the Public Protector, the Auditor-General, the Directorate of Special Operations of the National Prosecuting Authority (NPA) and the Special Investigations Unit (SIU) be instructed to undertake a comprehensive forensic investigation of all aspects of the Arms Deal. According to Botha (2003:3), the South African government declined to appoint the SIU despite much acrimony. The three other entities that comprised the investigating team found in their November 2001 report that there were no grounds to believe that the government had acted ‘illegally and improperly’.

Yet, the outcry continued. Current President Jacob Zuma (then the Deputy President), former President at the time, Thabo Mbeki, the then Chief of Acquisitions at the Secretariat for Defence, Chippy Shaik and his brother Schabir Shaik and the late Minister of Defence, Joe Modise, were mentioned as recipients. According to Corruption Watch (2014), Andrew Feinstein, an ANC Member of Parliament and former ANC leader of Parliament’s public accounts watchdog SCOPA, was demoted from his position in 2001 as SCOPA’s ANC spokesperson following his opinion publicly that the Arms Deal was tainted; he resigned shortly thereafter when the party moved to curtail investigations into the deal (Corruption Watch, 2014).

### **5.2.2 Controversy over the reasons to acquire additional armaments**

According to Wrigley (2003:3) of the Campaign Against Arms Trade (CAAT), the Arms Deal was a mystery to begin with. Entering into one of the largest armaments contracts in the world by a country like South Africa, just emerging from the tyranny of Apartheid and facing a magnitude of social and economic challenges, begs the question: What possessed the architects of the SDP to pursue it in the first place? South Africa had no enemies, was a new found democracy and was ‘not at war or likely to be at war; any military action outside its borders [would likely] take the form of peace-keeping in a troubled African region’ (Wrigley, 2003:1). Moreover, there were grounds for deep concern regarding the magnitude of the Arms Deal, especially since there was urgent domestic need to ‘spend money on the development of civil society, education,

supplying adequate housing and health care, above all on mitigation of the catastrophe that is AIDS' (Wrigley, 2003:1). With regard to the possible argument advanced about South Africa's peace-keeping role on the continent, similarly, lead only to conclusions that the country's 'peace-keeping in the African region need[ed] troops and light equipment, not warships, fighter planes and tanks' (Wrigley: 2003:1). All the above factors beg the logic behind an arms contract of the magnitude entered into.

Given the context of controversy surrounding it, it came as no surprise that the Arms Deal contract was only concluded five years after the date of signing, and after much debate within government and the country had occurred. Wrigley (2003:1) observes that the debate also involved domestic peace movements, promoted by churches, and politicians who prioritized social and economic development. On the other hand, those supporting the deal 'were the vested interests of the armed forces and military industry, and politicians who felt that a well equipped South African National Defence Force (SANDF) was a patriotic necessity (Wrigley, 2003:1). The militarists emerged victorious in the long debate that had gone on following the allegations of corruption. Wrigley (2003:1) further observes the remarkably 'easy financial terms with which South Africa was able to negotiate as well as the promise of offset expenditures amounting to more than twice the value of the purchases'. The militarist arguments and arrangements for financing the deal became key factors in persuading a favourable of conclusion of the Arms Deal.

In order to fully understand the reasons behind South Africa's extravagant arms purchases, it would be useful to understand and analyse the politics of transition from the Apartheid regime to a democratic dispensation. Wrigley's (2003:3) points to an explanation with which the writer of the current study concurs, that is, the Arms Deal arose in a culture of historical militarism, so to speak, that is, the transition centred around a democratic South Africa emerging as a result of an armed struggle, 'there hence being no fierce promotion of the notion of pacifism'. To this end, the ANC had during the anti-apartheid struggle formed a military wing under the ANC party, namely, *Umkhonto we Sizwe*, translated as 'spear of the nation', affirming the ANC as a political party with a strong military foundation.

Furthermore, Wrigley (2003:3) claims that the democratic dispensation of 1994 was the result of 'a compromise whereby the non-white majority was granted political power

in return for guarantees of essential white interests, with the ANC with its communist strain having to 'accept a capitalist South African society as well as the military industrial complex'. Intense negotiations in 1993 between Nelson Mandela, Jacob Zuma and Thabo Mbeki, on the one hand, and right-wing politician and then retired General Constant Viljoen, on the other, as well as talks between the then commander of the Apartheid South African Defence Force (SADF), led to the birth of the new government in 1994 (Wrigley, 2003:3). Although to many it appears that Nelson Mandela was pro-pacifism, Wrigley (2003:3) points out that the latter never professed pacifism but was rather open to the notion that South Africa should be a respectable military power in the region for there to be 'basis for an accord'.

Immediately following the first national democratic elections, the SADF was renamed the SANDF, 'N' for national, absorbing the former guerrillas active during the armed struggle, but retaining its capacity to be a fighting force (Wrigley, 2003:3). The above trajectory of the transition and the fact that the Interim Constitution (1994) prescribed 'a modern... technically advanced National Defence Force' added great support to the conclusion of the arms contracts in December 1999 (Wrigley, 2003:3). The final contract was signed by Trevor Manuel, Minister of the Department of Finance at the time; the contract signed by Manuel related to the loan and purchase agreements for the SDP to the amount of R29.992 billion (Corruption Watch, 2014). According to Wrigley (2003:3), further, the appointment of Joe Modise as Minister of Defence and Ronnie Kasrils as his deputy, both heroes of the armed struggle, guaranteed a future for both the armed forces and the arms industry.

The South African dream or ideal of freedom for all and the entrenchment of human rights was seen as quickly moving towards what some called 'military opportunism' (Wrigley, 2003:7). When the government launched a 'Defence Review' in early 1997, Wrigley (2003:7) argues that the Ministry of Defence used the opportunity to promote the idea of a strong and powerful South Africa in the SADC region and on the continent. Soon after the Defence Review was launched, Parliament approved the idea of modernising arms in post-Apartheid South Africa (Wrigley, 2003:7). Subsequently, Parliament sent out a request for information to a number of international countries possessing the ability to 'supply armaments including corvettes, submarines, light fighters, light helicopters and main battle tanks' (Wrigley, 2003:7). At the inquiry stage, funds were not available for the proposed purchases, with military commanders

making negative statements such as 'expenditure was a function of the threat which was nil, and of the purse which was empty' (Wrigley, 2003:7). However, Joe Modise, then Minister of Defence counterpointed such sentiments by stressing the importance of defending South Africa's new found freedom against any 'unforeseen aggression' (Wrigley, 2003:7).

### **5.2.3 Controversy regarding offsets in the Arms Deal**

Offsets were an interesting feature of the Arms Deal. In return for the purchases, Wrigley (2003:3) claims that the vendor countries promised offset expenditures totalling R110 billion. However, the question remains: What exactly do the offsets entail? Offsets 'took partly the form of purchases from South African suppliers and partly of capital sums for future investment in military and civil society' (Wrigley, 2003:3). Offsets were anticipated to create thousands of jobs in a country suffering from the inherent problem of unemployment post-Apartheid.

Nevertheless, it is reported that funds were severely depleted, with '700 million rand [...] cut from the defence budget while the 'arms deal' was being negotiated, and it was further reported that a 400 billion rand gap existed between the sum demanded by the Defence Review and what the government was actually providing' (Wrigley, 2003:7). As a result, the South African government realised the necessity of a package deal as opposed to individual contracts with the prospective vendors, which was viewed as more financially favourable (Wrigley, 2003:8).

In February 1998, the State President announced in Parliament that it was now possible to start re-equipping the SANDF without strain to the budget and with benefit to the economy (Wrigley, 2003:9). Following the announcement, both the Finance Minister and the Treasury were won over. The concerns of the latter two about this being an extravagant purchase that would place undue strain on the economy were laid to rest by such arguments as: 'the government had secured unprecedentedly favourable arrangements; payment was to be spread over 14 years; and the purchases (that is the total programme minus local expenditure) would be funded by low-interest loans, totalling 29,3 billion rand, from the United Kingdom, German, French and Italian banks which were not disclosed but were said to be highly attractive to the South African government' (Wrigley, 2003:12). Wrigley (2003:9) highlights the fact that South Africa had chosen 'the most expensive possible package: both a high-tech specialised

fighter for which there was no reasonably conceivable opponent, and also a trainer with combat capability but no prospective combat role’.

The Minister of Finance argued that he had three options regarding the Arms Deal package: ‘he could raise taxes; build the amount needed into his government’s normal borrowing requirements, or he could use ECA (Export Credit Agencies) finance arrangements’ (Wrigley, 2003:12). By choosing the ECA option, the Minister argued, he had made savings of over R600 million; further, ‘at the end of 1999, the South African government claimed that the impact of the arms purchases would be ‘relatively’ attenuated and entirely manageable’ (Wrigley, 2003:12). Economic commentators stated otherwise, that is, that the purchase would impact the economy adversely, prophesying that the government would, as a result of the debt incurred by the Arms Deal, spend less on social development and more on increasing financial difficulties. In February 2002, the government estimated that the total cost of the Arms Deal would be R52,7 billion or R3,7 billion rand per annum over the duration of the contract or programme (Wrigley, 2003:12).

### **5.3 The Unconstitutional Aspects of the Arms Deal**

The arms procurement package contradicted many of the tenets that the Constitution of the Republic of South Africa Act of 1996 seeks to uphold. The Constitution (1996) places immense responsibility on all public officials to conduct their affairs in accordance with the democratic values and principles enshrined in it. Of particular importance is the establishment of certain institutions to strengthen a constitutional democracy, as contained in Chapter 9 thereof. Contraventions of the Constitution raised serious questions about ethicality, accountability, transparency and compliance, which will be discussed in detail in Chapter Eight of this thesis.

This section will provide observation and analysis regarding the unconstitutional aspects. Firstly, the transgression of Section 83 and 84, specifically compelling the President to carry out all his functions in accordance with the Constitution, and appointing commissions of inquiry, respectively. It may be seen that the President’s failure to appoint such a commission in the case of the Arms Deal highlights the need for strong redress in this regard since the head of State seems not to have felt obliged to have his actions pass constitutional muster.



Furthermore, with regard to the Chapter 9 Institutions, including the Office of the Public Protector, it is evident that grave transgressions occurred therewith, relating to the Public Protector at the time of the Arms Deal, with the Public Protector seen to have fallen short in conducting an in depth inquiry into the Arms procurement package. Again this suggests the strong need for redress in this regard since an institution created by the Constitution, the supreme law of the land, did not carry out an investigation simply because it did not suit the ideals of the political party heading the state at the time.

With regard to the office of the Auditor General, another Chapter 9 Institution, there was blatant disregard by the President, at the time of the Arms Deal, to take cognizance of the request by the Auditor General and Standing Committee on Public Accounts (SCOPA) to carry out an in depth investigation into the acquisition of arms. It thus becomes clear that redress is required as far as all constitutionally created Institutions are concerned. Clearly, from the details of the Arms Deal case, it is evident that these institutions had fallen prey to political manipulation. (Professor Woods' account of the events that transpired at the time elsewhere in this chapter is informative in this regard Standing Committee on Public Accounts.)

Various external control measures impress upon government to conduct its affairs in an open and transparent manner, but as has been highlighted above, despite such enactment, non-compliance still exists. Hence the question: Why is there non-compliance with external control measures? As indicated earlier, Chapter Eight of this study will attempt to answer this.

The actions described above are a clear indication of government undermining the office of the Auditor-General, and thereby not complying with both the Constitutional prescripts and the Public Audit Act (South Africa, 2004). If one can understand these transgressions as being unconstitutional, it will help to theorise about the translation of the Constitution into the life of a public official still being a focal point. The Constitution may be regarded as the supreme law of the land and thus compelling the public official to conduct his or her affairs in accordance therewith.

It can be induced from the various constitutional transgressions in the Arms Deal that this is a main issue of non-compliance; the inductions will help reasonably establish a more general theory in this regard, and help especially with regard to redress.

### 5.3.1 Relevant sections in the Constitution (1996)

The Constitution (1996) and other legislation place a firm obligation on public sector officials to act in a manner that positively influences public governance. In this regard, various pertinent sections of the Constitution (1996) will be highlighted, followed by reference to the relevant associated legislation. Table 1, following, tabulates the constitutional sections and relevant legislation with additional notes on implementation. The content of the table will be discussed, followed by explanations of various sections in certain legislation that is particularly relevant to the Arms Deal corruption case.

Table 1: Relevant Constitutional Sections and Legislation with regard to the Arms Deal

Name of Legislation	Objective of Legislation	Chapter/Section Number	Implementation
1. Constitution of the Republic of South Africa, 1996	To establish a society based on democratic values, social justice and fundamental human rights, to lay the foundations for a democratic and open society	a) Chapter 5 Section 83	This Section places great responsibility on the President to carry out all the functions of his office in a manner that is in harmony with and that does not contradict the values and principles entrenched in the Constitution.
		b) Section 84	The powers and functions of the President, Subsection 2(f), specifically mentions that the President has a function to appoint commissions of enquiry. (A function the President failed to carry out during the Arms Deal investigation process.)
		c) Section 91 and Section 92	Relate to Cabinet, clearly indicating that members are both collectively and individually accountable to Parliament for the exercise of their powers and the performance of their functions. This places great responsibilities on all members to carry out their duties and functions in accordance with the principle of good governance.
		d) Chapter 9 Institutions	Certain state institutions were brought into existence in order to strengthen a constitutional democracy in the Republic.
		e) Section 182 (1) – The State Institution created – Public Protector	The Public Protector has the power (as regulated by the Public Protector Act (South Africa, 1994) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is, alleged or suspected to be improper or to result in any impropriety or prejudice. It is also the function of the Public Protector to report

			on that conduct to Parliament to take appropriate remedial action
2. Public Protector Act, (No. 23 of 1994)	To report on improper conduct and take appropriate remedial action in order to strengthen a constitutional democracy in South Africa.	a) Section 6(4)(a)	The Public Protector has the power to investigate on his/her own initiative or on receipt of complaint, any alleged improper or dishonest act/omission/offences referred to in sections 17, 20 and 21 of the Prevention and Combating of Corrupt Activities Act, (South Africa, 2004), in respect of public money. The Public Protector is given power in terms of this Act, to investigate on his/her own initiative any alleged abuse or unjustifiable exercise of power, or other improper conduct or undue delay by a person performing a public function.
3. Public Audit Act, (No. 25 of 2004)	To give effect to the provisions of the Constitution, establishing and assigning supreme audit functions to the Auditor-General	<ul style="list-style-type: none"> <li>Section 3 – The State Institution created – Auditor-General</li> </ul>	The Auditor-General is accountable to the National Assembly.
		<ul style="list-style-type: none"> <li>Section 5(1)</li> </ul>	The Auditor-General may carry out an appropriate investigation or special audit of any institution referred to in Section 4(1) of all national and provincial state departments if the Auditor-General considers it to be in the public interest or upon the receipt of a complaint or request.
		<ul style="list-style-type: none"> <li>Part 3 Section 10</li> </ul>	The Auditor-General is obliged to submit an annual report to the National Assembly on his/her activities and the performance of his/her functions.
4. Special Investigating Unit (SIU) and Special Tribunals Act, (No. 74 of 1996)	To establish a special investigating unit to investigate serious malpractices or maladministration in connection with the administration of state institutions, state assets and public money. According to this act, 'public money', may be defined as money withdrawn from the National Revenue Fund or Provincial Revenue Fund, and any money acquired, controlled or paid out by a state institution.		This legislation emphasizes the legislature's recognition that malpractices do exist in state institutions and should suspicion of such malpractice arise, these are the steps that should be taken: The Special Investigating Unit (SIU) is an independent statutory body that is accountable to Parliament and the President. Its strength lies in its power to act speedily to save, recover and protect public assets through the civil law procedure and litigate through a special tribunal (Montesh, 2001:31). The SIU is an autonomous state institution (Act No. 74 of 1996) and is neither part of the National Prosecuting Authority or the South African Police Service (SAPS) (Montesh, 2009:39). Although the SIU is on the same level as the Asset Forfeiture Unit, it is entirely independent and governed by a separate Act of Parliament.
5. National Prosecuting Authority Act, (No. 32 of 1998) (as	To regulate matters incidental to the establishment by the Constitution of the Republic of	a) Section 179(5) (of the Constitution, 1996)	This Section indicates that the National Prosecuting Authority Act (South Africa, 1998), as amended, must ensure that the Prosecuting Authority exercises its functions without fear, favour or prejudice.



	are: departments, public entities, constitutional institutions and provincial legislatures		
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Source: Adapted from Nanabhay & Ballard (2011:12)

The above table succinctly outlines the various pieces of legislation that impress on government to conduct its affairs in an open and transparent manner.

### **5.3.2 Contradictions in the Arms Deal with regard to Chapter 9 institutions**

Of particular relevance to the current study is the Chapter 9 Institutions created by the Constitution (1996). There are a number of Chapter 9 Institutions that have been created following the adoption of the Constitution (1996), but the institutions of the Public Protector and the Auditor-General are directly related to the current study and will therefore be discussed in detail.

It is clear that the Constitution (1996), as discussed in Chapter Two of the current study, created the institutions of both the Public Protector and Auditor-General as bodies to oversee state affairs and where necessary to investigate state matters. In terms of Section 182(1) of the Constitution, the Public Protector and the Auditor-General respectively possess the power to investigate any conduct in state affairs or in the public administration in any sphere of government that is suspected of being improper. The Public Protector must then report to Parliament on the conduct and take the appropriate remedial action.

Section 181(2) equips the Chapter 9 institutions to uphold democracy by further enabling them to 'act independently, and impartially; and to exercise their powers and perform their functions without fear, favour of prejudice'. This Section commands the Chapter 9 institutions to carry out their functions in a reasonable and justifiable manner. In terms of Subsection 3, it is imperative that all organs of state assist the Chapter 9 institutions to ensure independence and impartiality, with Subsection 4 serving to prevent any person or organ of state from interfering with the functions and duties of the Chapter 9 institutions. These Subsections serve to highlight the importance of these institutions in enhancing the notion of openness, transparency and impartiality that a democracy stands for.

In terms of Subsection 5, Chapter 9 institutions are held accountable to the National Assembly and should present the latter with reports on all their activities. It was clearly the intention of the drafters of Constitution to highlight the notion of accountability with respect to the Chapter 9 institutions. According to Nanabhay & Ballard (2011:13), 'the notion of accountability is one that is mentioned regularly and without exception, in respect of all public offices held and state institutions, thus emphasizing the importance of accountability in positively influencing public governance'. Thus the Constitution binds these institutions to act in accordance with the democratic principles of justice, fairness and rationality.

#### **5.3.4 The Arms Deal with regard to Public Protector**

Of particular relevance to the powers of the Public Protector and the Arms Deal case is that in terms of Section 1 of the Public Finance Management Act (South Africa, 1999), which stipulates that the Public Protector may also investigate any alleged 'maladministration in connection with affairs of any institution in which the State is the majority shareholder or of any public entity'. A public entity is defined in the same Section of the same Act as a national or provincial public entity. In the Arms Deal, it was observed that 'a public official in National Government, allegedly involved in the Deal, did fall under the ambit of 'public entity', as defined in the Act' (Nanabhay & Ballard, 2011:13). In other words, those parties at National Government level, (namely, then President Thabo Mbeki, his then deputy Jacob Zuma, Minister Trevor Manuel and Minister Joe Modise (now deceased)), allegedly involved in the Arms deal, were eligible for investigation, based on the interpretation of Section 1 of the Public Finance Management Act (South Africa, 1999). Hence, the Public Protector had a mandate based on this legislation to conduct an investigation into the Arms Deal and to report back to Parliament. In this case, the Public Protector report would be addressed to Parliament since it was a Member of Parliament, at the time, namely, Patricia De Lille, who had sounded the alarm regarding the arms contracts (Corruption Watch, 2014).

It is worth noting that in Section 6(4) of the Public Protector Act (South Africa, 1994) specific and direct mention is made to corruption in respect of public funds. One can infer that the legislature was clearly intent on granting the Public Protector wide authority in terms of types of matters to investigate, namely, matters concerning public funds. However, this Section emphasises that should there be alleged corruption relating to public funds, it would be mandatory to pursue the investigation. The alleged

improper or corrupt types of activities are listed in sections 17, 20 and 21 of the Prevention and Combating of Corrupt Activities Act (South Africa, 2004). The power granted to the Public Protector is wide, and may be explained in terms of the fact that he or she may even pursue an investigation into a corrupt matter relating to public funds on his or her own initiative. Hence, the legislature bestows upon the Chapter 9 institution of the Public Protector a monitoring and policing role over and above its investigative and reporting role.

The Head of the Public Protector's Office, at the time, Selby Baqwa, announced in August 2000 (Holden, 2008:293), that his office was undertaking an investigation into the Arms Deal (Holden, 2008:43) Holden (2008:42) maintains that what was lacking was co-ordination between the Chapter 9 Institutions, the Office of the Public Protector, the Auditor-General and other oversight bodies such as the SIU headed by Judge Willem Heath, the latter who had begun preliminary investigations based on the De Lille Dossier. It should be noted that following the De Lille Dossier being presented to Parliament, the President at the time, Thabo Mbeki, failed to direct the matter to the office of the Public Protector for further investigation regarding the merit of the claims made in the Dossier. In fact, to the contrary, he has been described as a president who at the time had 'played a central role in the deal and was determined to undermine the thorough and unfettered investigation into it' (Feinstein quoted in Holden, 2008:vii).

It is worth noting that Lawrence Mushwana was appointed the next Public Protector (from 2002–2009) when Baqwa's term of office expired in 2002. Mushwana is said to have a reputation steeped in controversy; it was reported that throughout his term of office, Mushwana had succeeded 'only in protecting the ANC from the people instead of protecting the people as his mandate required' (Mataboge, 2009). It is claimed that Mushwana had never acted or ruled against the ANC or any person affiliated to the party, pointing to a complete contravention of the Constitutional prescripts directing the Public Protector to conduct its affairs and investigations impartially and without favour or prejudice, in accordance with Section 181(2) of the Constitution (1996).

### **5.3.5 The Arms Deal with regard to the Auditor-General**

With regard to the institution of the Auditor-General, the powers bestowed upon this office are in essence to audit and report on the accounts, financial statements and financial management of all organs of state (Section 188(1) of the Constitution (1996)).

In addition to the functions and powers mentioned in Section 188(1) and subject to the Public Audit Act (South Africa, 2004), the Auditor-General may audit and report on the accounts, financial statements, and financial management of any institution funded by the National or Provincial Revenue Fund or by a municipality, or any institution that legally receives money for a public purpose (Section 188(2) of the Constitution (1996)). It is important to note that the Auditor-General is the supreme audit institution of the Republic, and is only subject to the Constitution and related legislation, namely, the Public Audit Act (South Africa, 2004).

In the case of the Arms Deal, the Auditor-General at the time, Shauket Fakie, submitted the first official report of his investigation into the Arms Deal on 15 August 2000 (Holden, 2008:293; Corruption Watch, 2014). Holden (2008:293) notes that on 15 August 2000 the Auditor-General identified, in a report, the Arms Deal as being 'high-risk' from an auditing point of view, and requested permission to investigate it. In October 2000, the Heath Unit (the SIU headed by Judge Willem Heath) also lodged a request to be granted a presidential proclamation to investigate the Arms Deal, both which were never granted. Holden (2008:50) emphasises that then President Mbeki wrote a formal letter of rejection to Judge Heath as Head of the SIU in this regard, accusing the latter of 'touting for work out of desperation'. This was a blatant disregard of the status awarded the SIU by the legislature in terms of the Special Investigating and Special Tribunals Act (South Africa, 1996), which emphasises the SIU's power to 'act speedily to save, recover and protect public assets' as well as its independence from all other investigative bodies. Mbeki's rejection blatantly disregarded the SIU's autonomy, which the legislature was bent on securing via the above Acts.

The Auditor-General's report was handed to Andrew Feinstein, a member of the Standing Committee on Public Accounts (SCOPA), the latter which monitored public expenditure and instituted remedial action if evidence of over-expenditure of public funds emerged (Holden, 2008:43). To steer clear of political manipulation, SCOPA was usually headed by a member of the opposition party, in this case, MP Gavin Woods of the Inkatha Freedom Party (IFP). Both Feinstein and Woods were disturbed at the Auditor-General's report and moved that the Arms Deal be further investigated in more depth (Holden, 2008:44). As a result SCOPA submitted its own report, known as the 14th Report, which called for an expert forensic investigation into the Arms Deal (Holden, 2008:47). SCOPA's 14th Report, moreover, called for an investigative body



to be set up, which should include the Auditor-General, the Health SIU, the Public Protector and the Investigating Directorate of Serious Offences (also known as the Scorpions).

President Mbeki responded by attacking the recommendations of both SCOPA and the Auditor-General, claiming that both bodies had failed 'to understand the basics of the defence acquisition process' (Holden, 2008:48). This was a striking comment according to Holden (2008:49, 52) since the Cabinet Sub-Committee itself had 'steered' and guided the Auditor-General's initial probe into the Arms Deal (Holden, 2008:49). Mbeki also delivered a speech to the nation in which he claimed that the conclusions drawn by SCOPA and the Auditor-General were wrong (Holden, 2008:52). These actions are a clear indication of government undermining the office of the Auditor-General, and thereby not complying with both the Constitutional prescripts and the Public Audit Act (South Africa, 2004). Section 181(3) of the Constitution (1996) compels other organs of the state 'to protect and assist the Office of the Auditor-General and all other Chapter 9 Institutions to ensure their independence, impartiality, dignity and effectiveness'. This did not happen as is clear from Mbeki's attack and adoption of an antagonistic stance towards the respective reports of the Auditor-General and SCOPA.

In terms of the Public Audit Act (South Africa, 2004), Section 3 once again highlights the notion that even a 'policing' body such as the Auditor-General, which has been created by the Constitution (1996), is accountable to the National Assembly. In addition, Section 10 Part 3 of the Public Audit Act (South Africa, 2004) places an obligation on the Auditor-General to submit an annual report to the National Assembly on his or her activities and the performance of his or her functions. In addition, the SIU, although a creature of statute, is also accountable to Parliament for its actions and duties. None of the above mentioned institutions are free from being questioned or from accountability. It is clear that a continuous thread of openness and transparency flows through these all the Chapter 9 institutions created by the Constitution (1996) and institutions created by other statutes.

Finally, the Public Finance Management Act (South Africa, 1991) also highlights and places strong emphasis on conducting monetary affairs in a transparent and sound manner. This legislation was created to particularly target government institutions,

namely, government departments, public entities, constitutional institutions and provincial legislatures.

With regard to the above mentioned legislation, most importantly, the Constitution (1996), it is evident that the conclusion of the arms procurement package occurred without strict adherence to the rule of law. This non-compliance will be analysed in detail in Chapter Eight further.

#### **5.4 Conclusion to Chapter**

The conclusion here provides a summary of the inductions that may be made regarding non-compliance in this instance of corruption. Additionally, some of the ongoing developments with the Arms Deal at the time of writing will be provided.

Based on the analysis above in section 5.3, the following three inductions were made regarding non compliance in the Arms Deal.

- The President's failure to appoint such a commission in the case of the Arms Deal highlights that strong redress is required since the head of state does not feel obliged to have his actions pass constitutional muster.
- Strong redress is required since an institution created by the Constitution, the supreme law of the land, does not feel obliged to carry out an investigation simply because it does not suit the ideals of the political party or government heading the state at the time.
- Further redress is required as far as all constitutionally created institutions are concerned. Clearly, from the analysis above regarding of the Arms Deal case in section 5.3, it is evident that certain Chapter 9 institutions had fallen prey to political manipulation.

Regarding the inductive approach or /methodology adopted by this study, it may be concluded from the analysis of constitutional abrogations provided that non-compliance stemmed from the failure to understand and accept that no person or institution, even a high ranking public official, is above the law. The inductions made above will help in formulating themes (see Chapter Eight in this regard) and building new theory to help answer the research question: Why is there non-compliance with external control measures?

It is worth mentioning that to date, investigations into the Arm Deal 'saga', as it has come to be known, is still ongoing. The Arms Procurement Commission or Seriti Commission was appointed in 2011 (Corruption Watch, 2015) to investigate the details of the arms procurement contracts, to ascertain whether there was compliance with the law and, most importantly, whether there was malpractice, impropriety, fraud or corruption in the acquisition process leading to the conclusion of the package. The commission is headed by Judge Willie Seriti.

According to a proclamation issued by President Jacob Zuma, the Arms Procurement Commission was given a two year period within which to complete its mandate. This period expired in November 2013, but the Commission was given an extension until December 2014 (Anon, 2014). The Commission will be hearing testimony of officials from various sectors, namely, the Department of Trade and Industry, including the current Director-General, Lionel October, and Alec Erwin (then Minister of Trade and Industry); officials from ARMSCOR<sup>6</sup> will testify regarding the offset programme; the Department of Defence, including former Defence Minister, Mosiuoa Lekota, former Deputy Minister, Ronnie Kasrils, as well as former Secretary of Defence, Pierre Steyn; the former treasury officials, including Deputy Head of the Reserve Bank, Lesetja Kganyago, and Treasury Head of International Financing and current Deputy Director-General, Andrew Donaldson; the chief negotiator for the arms deal, Jayendra Naidoo; former Minister of Finance, Trevor Manual, as well as former President, Thabo Mbeki have also been subpoenaed to testify (Anon, 2014).

The credibility of the Seriti Commission has been tainted by ongoing remarks from three prominent Arms Deal critics. Former ANC Member of Parliament and anti-corruption activist, Andrew Feinstein, author Paul Holden and Hennie Van Vuuren announced that that they were distancing themselves from the Commission. All three had been subpoenaed to testify but the subpoenas have since expired. Each have each stated that 'they could no longer co-operate with an institution that is so deeply compromised that its primary outcome will be to cover up' (Anon, 2014).

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6. The Armaments Corporation of South Africa Ltd (ARMSCOR) is a South African state-owned entity mandated by the Armaments Development and Production Act, 1968 (No. 57 of 1968), and continues its existence through the Armaments Corporation of South Africa, Limited (Ltd) Act, 2003 (No. 51 of 2003). The Minister of Defence and Military Veterans is the executive authority responsible for ARMSCOR.

These allegations relating to the Seriti Commission is of grave concern. Furthermore, media reports allege that the Seriti Commission and its chairperson may be undermining the objectives of its terms of reference. A senior investigator of the Commission, Norman Moabi, in his resignation letter to the chairperson, Judge Seriti, alleged that the latter was pursuing a 'second agenda', which included the obsessive control of the flow of information to and from the Commission and selective inclusion of information in briefs to only certain investigators, thus censoring information to some investigators (Kruger, 2013).

Minister Jeff Radebe announced the following Terms of Reference of the Seriti Commission (Kruger, 2013):

the establishment of this Commission and the commencement of its work, represent a watershed moment in the history of democratic South Africa, in a quest to rid our nation of what has become an albatross that must now cease to blemish the reputation of our government and the image of our country.

The objective of the Seriti Commission should therefore be to extract the truth about allegations of bribery and corruption that has plagued the Arms Deal and South Africa for more than a decade now (Kruger, 2013).

## **CHAPTER SIX**

### **CASE STUDY 2: JACKIE SELEBI**

#### **6.1 Introduction**

The criminal investigation and subsequent trial of Jackie Selebi gained local and international interest. That a high profile public official was criminally charged, prosecuted and sentenced without political interference was regarded a victory for the South African justice system (Basson, 2010:285). This was indeed important for the country in light of South Africa's justice system having been tainted by political interference in the Arms Deal from as early as 1999.

This chapter begins by providing contextual information regarding Selebi's character and background as well as the corruption saga in which he became involved. This will be followed by an analysis of the allegations against Selebi in terms of constitutional and legislative obligations to which public servants are subject in South Africa. The conclusion to the chapter provides a summary of the inductions regarding non-compliance in this instance.

#### **6.2 Case Background**

Jacob (Jackie) Sello Selebi was the National Commissioner of the South African Police Service (SAPS) between 2000 (Institute for Security Studies (ISS), 2014). Selebi was also President of African National Congress (ANC) Youth League from 1987 to 1991. He also served as president of Interpol from 2004 until January 2008 when, faced with charges of corruption in South Africa he was put on extended leave as National Police Commissioner, he resigned this post at Interpol (Interpol, 2015). Selebi was later found guilty of corruption and sentenced to 15 years imprisonment. He was released on medical parole on July 2012, the Department of Correctional Services being satisfied with his compliance with parole conditions and the fact that he was frequently hospitalised (South Africa, 2015).

Adriaan Basson (2010), in his book *Finish and Klaar: Selebi's Fall From Interpol to the Underworld*, describes Selebi as the most notable civil servant facing corruption charges in South Africa's post apartheid era. Basson (2010), in an attempt to understand Selebi's fall from grace, traces the latter's various work and career endeavours from beginning to end. As a teacher by profession, teaching at Musi High

School in Pimville, Soweto, Basson (2010:9) was informed by ex-pupils of Selebi that the latter was an unorthodox teacher who preferred reading mafia novels and was always enticed to make a 'quick buck'. In fact, as Basson (2010:9) learned, even before, as a student working in a bookstore in Johannesburg, Selebi was known to cut a good deal with other students and sell set work books at reduced prices outside the store in a dark passage. Musi High school was regarded as one of the most unsafe high schools in Soweto; whereas many teachers did not last long there, Selebi was tough and had fast become a favourite amongst the pupils. A former pupil described Selebi as 'fast on his feet and good with his fists... he shadow-boxed... we loved him, he was something of a maverick' (Basson, 2010:9).

As somewhat of a maverick, Selebi was not liked by many of the other teachers, who regarded him as a bad influence on the vulnerable minds of young learners; he permitted smoking in the classroom, for example (Schwella, 2013). On one occasion, Selebi returned two days late with a school group he had accompanied on a school trip; when reprimanded by the school authorities for absconding, the learners resorted to protest action in support of him (Schwella, 2013). Selebi dealt with the situation of criticism by his colleagues by not interacting much with them and instead 'hanging around' with the pupils (Schwella, 2013). Selebi is described by one of his former pupils to have been arrogant, abrupt and disrespectful as a youth and young adult. This informant, who went on to become a journalist for *Drum*, wrote in an article in that magazine subsequent to Selebi's conviction:

Who among the boys who sat in his classroom, hanging onto his every word, would have thought it would come to this? A philosopher once said the ills we suffer result from mistaken beliefs of what is truly good. Jackie wanted the good life but along the line he forgot that greed can lead to corruption. And that greed can be a real source of misery for humankind (Basson, 2010:11).

In his last years as a teacher Selebi became increasingly involved in politics and clashed with the apartheid police. After being imprisoned for terrorism for ten months, he went into exile in Tanzania in 1979 (Schwella, 2013). During his time in exile he taught at the Solmon Mahlangu Freedom College in Tanzania (Basson, 2010:12). While serving the ANC in exile and after returning to South Africa following democratisation, Selebi filled the following important domestic positions and offices (Schwella, 2013:15):

- Representative of the Soviet Union's World Federation of Democratic Youth, in Budapest, Hungary, from 1983 to 1987;
- Head of the ANC Youth League in 1987 while in exile in Zambia;
- Member of the Executive National Committee of the ANC in 1987;
- Official responsible for the repatriation of ANC exiles back into South Africa in 1991;
- Head of the Department of Welfare of the ANC in 1993;
- Elected Member of Parliament in 1994;
- South African Ambassador and Permanent Representative to the United Nations from 1995 to 1998; and
- Director-General of the Ministry of Home Affairs from 1998 to 1999.

Internationally, Selebi also took up a number of important positions. As previously mentioned, from 2004 up until the time of his resignation in 2008, he served as president of Interpol. In the same period, he also served as Chair of the Anti-Landmine Conference, Oslo, Norway, and as Chair of the Justice, Crime Prevention and Security Cluster for the United Nations, as Chair of the Human Rights Commission of that same organisation, 54th Session, and as a permanent member of the United Nations between 1995 to 1998 (Cosatu, 2015). Former editor of the *Mail & Guardian*, Howard Barrell, commended Selebi's role at the United Nations at the time of his appointment to that organisation, referring to him as an individual who had 'won credibility for South Africa in multilateral forums and showed he could lead huge cumbersome structures and rally people... [and who] was extremely charming and clever and ... [could] put these talents to good use' (Basson, 2010:15).

When Selebi was appointed National Commissioner of the SAPS in 2000, the institution was in a process of rigorous transformation. Transformation of SAPS post 1994 had been a complex process and had presented the new government with many challenges (Schwella, 2013). President Mandela went so far as to appoint the Chairman of the South African Breweries, Meyer Kahn, to the SAPS in 1997 in the hope of creating its stability. After serving his term at SAPS, Kahn reported that 'it was like trying to fix a bus full of people while it was running downhill' (Basson, 2010:18). Kahn resigned from the SAPS at the end of 1999, after which Selebi was appointed as special advisor to George Fivaz, the latter who had taken up the post as first National Commissioner of SAPS with Selebi touted as the next National Commissioner

(Schwella, 2013:16). Fivaz retired on 31 December 1999 and was immediately succeeded by Selebi on 1 January 2000.

The appointment of Selebi was welcomed with open arms, the widespread belief being that the political activist would make a good crime fighter (Schwella, 2013:82). Further, according to Ferial Haffejee (2010:v), Selebi himself believed himself to be unerring, yet the ease with which he was subsequently enticed into corruption while in that position creates the impression of a man who had 'not mastered the ways of the world, even though he was a globe trotter'. Haffejee (2010:v) also expresses the view that convicted drug dealer Glen Agliotti had 'found Selebi's Achilles heel, a love for bling' and had exploited this weakness in gaining the National Police Commissioner's favour by inviting Selebi to engage in corrupt activities.

Dianne Muller, a leading witness in the Selebi's corruption trial and ex-fiancée of Agliotti, testified that the latter himself believed his friendship with Selebi placed him above the law (Joffe, 2010). Muller further testified that she 'packed R110 000 into a white bank bag for Agliotti to hand over to Selebi (who had referred to the latter as 'my china', meaning 'my friend') when Selebi was going on overseas on holiday (Joffe, 2010:177). Muller also testified that she had been instructed by Agliotti to prepare various envelopes with cash, each marked with different initials, one of which had been 'JS', the latter envelope collected by Selebi soon after in person (Joffe, 2010:181). Further, Muller testified she had overheard a telephone conversation between Selebi and Agliotti, in which Selebi had asked Agliotti for a loan of R10 000 for his son's birthday, collecting the money from Agliotti's office a day later (Joffe, 2010:182). Muller informed that Selebi also received gifts on more than one occasion over and above cash payments, for example, designer handbags for Selebi's wife Anne that Agliotti had purchased (Joffe, 2010:184).

Selebi it is thus seen to have traded his reputation by associating with a drug dealer involved in organised crime, squandering the trust placed in him by the public through greed and a loose personal value system; the ethics he was obliged to follow as a public servant did not seem to matter to him. This calls to mind the discussion in Chapter Three of the current study which discusses the need not only for the establishment but the continuous enforcement of ethical codes precisely to prevent



such behaviour from occurring in public leadership positions, which Chapter Eight will also pick up on further.

### **6.3 Analysis of the Allegations against Selebi**

The discussion will now move on to an analysis of the allegations against Selebi. The allegations will incorporate the specific legislation and/ or codes of conduct that were contravened.

On 5 October 2009, Selebi was officially charged with two main counts by the state in a court of law. The first count was the crime of corruption in contravention of Section 4(1)(a) of the Prevention and Combating of Corrupt Activities Act (South Africa, 2004). The second count was the crime of defeating or obstructing the administration of justice.

#### **6.3.1 Count 1: Corruption**

The charge sheet against Selebi narrates the history of the relationship between Selebi and Glen Agliotti (Basson, 2010:199-200). This relationship began in 1990 when Agliotti desired to do business with the ANC and stumbled upon Selebi, the latter who had then been tasked with the repatriation of former ANC members in exile (Basson, 2010). According to the court papers, in 2000/2001 Agliotti suggested the idea of a project with children suffering from mental ill health to Selebi and subsequently SAPS became a partner in the project. Soon thereafter, in 2002, Agliotti was appointed as a police informer, after which the liaison between Selebi and Agliotti began to spiral into a generally corrupt relationship (Basson, 2010:199-200). According to the court papers Selebi received cash and clothing for himself and his sons from Agliotti (Joffe, 2010). This gratification was unlawful, since the act of receiving such gratification is denounced in Section 4(1)(a)(i) to (iv) of the Prevention and Combating of Corrupt Activities Act (Joffe, 2010).

It is further stated in the charge sheet that Agliotti's 'friendly' relationship became known to Brett Kebble, John Stratton and Paul Stemmet, who, together with Agliotti, abused and exploited the relationship by bribing Selebi via discreet methods (Basson, 2010:199-200). Basson (2010:200) notes from the following excerpt from the charge sheet: 'It was agreed between the parties that the bribes would be paid to the accused

(Selebi), but that some method of payment would be employed that was calculated to disguise the true nature of the payments, so as to avoid detection'. Soon after, Brett Kebble transferred \$1 million 'for the purpose of conducting investigations and campaigns and to buy the favour and support of the accused (Selebi) to promote their business' (Basson, 2010:200). According to the charge sheet, there were other instances where monies were allegedly transferred to Selebi from Agliotti, for example, August 2004, a crucial time in Selebi's career when he was preparing and campaigning to be elected president of Interpol (Basson, 2010:200). At this time, he requested money from Agliotti to cover the costs of a dinner in Paris to the sum of R30 000. Further, in November 2004, Selebi asked Agliotti for R1 million and Agliotti transferred R310 000 (Basson, 2010:201). Selebi also received money from Agliotti for an overseas holiday with his family (Joffe, 2010:paragraph 248). Agliotti testified in court to the effect that he made payments to Selebi because of an ulterior motive, that is, he needed Selebi to be part of his business dealings which made it necessary for him to keep Selebi close to him (Joffe, 2010:paragraph 257).

Basson (2010:201) further notes that the charge sheet mentions that Brett Kebble and his father Roger Kebble had urged Agliotti to make contact with one Billy Rautenbach, a Zimbabwean businessman, from whom they wished to gain access to valuable information. Rautenbach, in subsequent meetings with Agliotti and others, asked for their 'help' with regard to tax evasion in South Africa (Basson, 2010:201). Subsequently, according to the charge sheet:

Agliotti discussed Rautenbach's request with the accused (Selebi), and the latter agreed to assist on more than one occasion... the accused attended a meeting with Tidmarsh (lawyer for Rautenbach), and gave an undertaking that Rautenbach's request **will** be attended to (Basson, 2010:201).

The charge sheet also reveals that Rautenbach allegedly transferred the sum of \$100 000 to Agliotti for securing Selebi's presence at the meeting, \$30 000 dollars of which was paid to Selebi. It was revealed that a further sum of R30 000 was transferred to Selebi a few days after the murder of mining boss, Brett Kebble (Basson, 2010:201). The charge sheet estimates that approximately R1,2 million in bribes had been paid to Selebi from Agliotti, Kebble and Rautenbach's companies, a sum that could not be justified from a business perspective (Basson, 2010:202).

According to Basson (2010), it appears from the charge sheet that Selebi committed a number of other acts and /or omissions in return for the bribe payments. First, during a drug bust in 2002, Agliotti's name featured prominently on a list of suspected criminals involved in the crime. Selebi dissolved the investigation and released persons arrested for the drug bust on the basis of an 'inadequate/incompetent' police investigation (Basson, 2010:202). Selebi clearly acted in this instance as a protective shield between Agliotti and the law.

Second, the charge sheet, according to Basson (2010:202), states that in 2004/2005 the SAPS had received word from the United Kingdom Intelligence office that Agliotti was suspected of drug smuggling, warranting institution of legal action against the latter. Selebi, acting gravely unethically, showed Agliotti the documentation with this information to enable the latter to take steps to protect himself and entered into discussions surrounding the matter (Basson, 2010:202). Third, when information about Selebi's corrupt liaison with Brett Kebble was publicised, Selebi had shared part of a highly privileged document, a National Intelligence Estimate report, with Agliotti, requesting the latter to investigate and trace the person responsible for publicising such information (Basson, 2010:202). In a fourth instance, it is revealed in the charge sheet, that Selebi used his position, on Agliotti's request, to administer extra care and consideration to a housebreaking incident involving Agliotti's friends; it is stated that Agliotti, in fact, called Selebi from the scene of the housebreaking (Basson, 2010:202). The investigating officer at the scene, one Schlugman, was told by Selebi that 'he (Agliotti) is a good friend of mine, you must look after him' (Joffe, 2010). Finally, with regard to Selebi's corrupt relationship with Agliotti, it is indicated that Selebi was also charged with informing Agliotti that his contact details were highlighted in the murder investigation of Brett Kebble (Basson, 2010:203).

### **6.3.2 Count 2: Obstructing the ends of justice**

This count is elaborated on extensively in Basson (2010), in which the author succinctly lists numerous instances of illegal and unethical conduct by Selebi, which the court viewed as amounting to the obstruction of justice. They were:

- First, Selebi imparted official information contained in the United Kingdom intelligence reports to Agliotti, which contained information that the latter was allegedly involved in drug smuggling;

- Second, Selebi sheltered Agliotti from a police investigation by discussing with him particulars contained in a National Intelligence Estimate report in 2005;
- Third, in 2002, Selebi omitted to divulge Agliotti's involvement in a Mandrax drug bust;
- Fourth, Selebi agreed with Agliotti to use his (Selebi's) office to manipulate the prosecution of Billy Rautenbach;
- Fifth, Selebi shared privileged information regarding tenders for work in Sudan, that the police were intending to advertise; and
- Selebi granted Agliotti preferential treatment regarding police services after a report of a housebreaking at Agliotti's residential complex (Basson, 2010:203).

#### **6.4 Constitutional Obligations and Legislation contravened by Selebi in the Execution of his Duties as a Public Official**

From the discussion of both counts above, it may be seen that the Jackie Selebi case presents a clear example of a high profile public official contravening legislation that governs his office as well as the ethical manner expected of a public official in the course of conducting his duties. The relevant legislation that was contravened according to the first count above is the Prevention and Combating of Corrupt Activities Act (PCCAA) (South Africa, 2004). Selebi was specifically charged with contravening Section 4(1) (a) of this Act, the latter section which creates an offence in respect of 'any public officer who directly or indirectly, accepts or agrees or offers to accept any gratification'; it further creates an offence in respect of 'any person who directly or indirectly, gives or agrees or offers to give any gratification'. Whilst the Act criminalises the actions of both the corruptor and the corruptee, as indicated in the judgement against Selebi, it clearly and expressly, does not require the existence of an agreement between them; the Prevention and Combating of Corrupt Activities (South Africa, 2004) is therefore in line with the common law crime of bribery (Joffe, 2010:paragraph 316).

In support of the notion that Selebi, by virtue of his accepting these payments from Agliotti and the other persons mentioned above, created an obligation on his part to reciprocate a 'favour', the judgement referred to the corruption trial of Schabir Shaik in which Judge Joffe made the following interpretation of the corruptor-corruptee relationship:

and even if nothing was ever said between them to establish the mutually beneficial symbiosis that the evidence shows existed, the circumstances of the

commencement and the sustained continuation thereafter of these payments, can only have generated a sense of obligation in the recipient (Joffe, 2010:paragraph 316).

Hence, although there was no express contract between Selebi and Agliotti, the fact that the former accepted monies from the latter inevitably generated a sense of obligation in the former. This follows that subsequent meetings with Agliotti and the Kebbles were not attended out of friendship but because Selebi was obligated to attend by reason of the payments made to him by Agliotti (Joffe, 2010:paragraph 404). This was a symbiotic relationship that evolved over time. Selebi, the charming ex-president of Interpol must have known the old adage that 'there is no such thing as a free dinner' (Joffe, 2010:paragraph 404). It should be highlighted that this decision of the court to classify Selebi's relationship with Agliotti and the Kebbles as a symbiotic one should be regarded as a warning in no uncertain terms to all public officials as far as the acceptance of monies or any form of gratification and the continuation thereof is concerned.

As far as the court verdict on the second count is concerned that Selebi's conduct amounted to defeating or obstructing the administration of justice, the court found that as far as the sharing of privileged information was concerned, the action represented the benefit which Agliotti received by reason of his corrupt relationship with Selebi. Hence, a conviction of obstructing the ends of justice in respect of this conduct would amount to duplication of convictions. In other words, the judgment for the second count was incorporated into that of the first (Joffe, 2010:paragraph 424). In summation, the court verdict was as follows:

- Despite Selebi's claim that he was denied a fair trial as enshrined in the Constitution (1996) and that he was prosecuted mala fide, Selebi was found guilty of the first count, that is, contravening Section 4(1)(a) of the Prevention and Combating of Corrupt Activities Act (South Africa, 2004) ; and
- Not guilty on the second count.

In the judgement presented, Judge Joffe placed strong emphasis on the importance of the notion of trust and faith that the public place in government officials, and more so, in the case of high profile law enforcement officials like Selebi. Judge Joffe indicated that 'mostly this reliance is not misplaced' (Basson, 2010:295). However, in the case

of Jackie Selebi, the latter was found not to have set an example to be followed, and instead South African policemen and women were exhorted by the judge to realise the integral role of honesty, integrity and accountability placed on their official roles (Basson, 2010:295). It goes without saying that members of a particular organisation, in this case, SAPS, look up to the leadership of the organisation and generally attempt to emulate the general practices and conduct of their leaders. It follows then, that Selebi, placed in a position where he was expected to lead by example, by going against the basic tenets of the SAPS Code of Conduct (South Africa. South African Police Service (SAPS), 1997) (discussed below) and the Constitution (1996), planted the seeds of mistrust in the hearts of SAPS officials.

Indeed, to ensure the above, external control measures exist which compel the SAPS to adhere to principles of ethicality, accountability and integrity in the discharge of its responsibilities. The first item in this regard to be highlighted is chapter 11 of the Constitution (1996). In terms of Section 205(3), the objectives of the police service is to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the country and to uphold and enforce the law. It might seem obvious and trite, but once again the Constitution, deemed the supreme law of the land, not only advises but compels the SAPS to uphold the law. Yet Selebi's actions show an attitude of blatant disregard as police commissioner for his actions to pass muster with the constitution.

Indeed, the drafters of the Constitution dedicated an entire chapter, namely, chapter 11, to the Security Services of South Africa. This demonstrates the great significance of the SAPS as a government institution and its noteworthy role in upholding the tenets of a democracy. Section 207(1) makes specific mention of the office and appointment of the National Commissioner of the police service to 'control and manage' the SAPS. As the National Police commissioner, Selebi was tasked to exercise such vast control in accordance with the national policing policy as well as the directives from the Ministry of Police in accordance with Section 207(2) of the Constitution (1996). Such directives include codes of ethics and codes of conduct applicable to the SAPS. Yet again it becomes evident that Selebi's own conduct as a high ranking public official indicates an attitude that his very status could allow him to choose otherwise, that is, to transgress the constitution.

It will be useful at this stage to highlight both the SAPS code of ethics and the SAPS code of conduct. According to the SAPS Code of Ethics (South Africa. South African Police Service (SAPS), 2014), ethical policing demands that all members of the SAPS carry out their duties according to five stated principles. The first of these principles and most relevant to the current study is that of integrity. The principle of integrity is elaborated in the SAPS Code of Ethics SAPS Code of Ethics ((South Africa. South African Police Service (SAPS), 2014) as one which encourages members of SAPS to 'continually strive to uphold... ethical principles and ethical standards,... behave in a manner that is consistent with these values,... to act honestly and responsibly in all situations'. It is further stated in the code that 'employees of SAPS regard the truth as being of utmost importance' ((South Africa. South African Police Service (SAPS), 2014). In addition to contravening the Prevention and Combating of Corrupt Activities Act (PCCAA) (South Africa, 2004), Selebi's actions further violated the very code which governs the institution, at which he himself was at the helm. As National Police Commissioner, he was tasked to take control and manage all the SAPS personnel throughout South Africa. His violation of the very code that governs all his staff makes his unlawful and unethical conduct almost utterly inconceivable.

Furthermore, the SAPS Code of Conduct (South Africa. South African Police Service (SAPS), 1997) emphasises the SAPS commitment to providing a safe and secure environment for all South Africans, and in realising this commitment, to do so by upholding the Constitution and the laws of the country. Selebi's conduct was again a violation of this commitment. The code further states that in order to achieve a safe and secure environment, SAPS undertakes to 'with integrity, render a responsible and effective service... to act impartially... honestly... transparently and in an accountable manner... and work actively towards preventing any form of corruption and to bring the perpetrators to justice' (South Africa. South African Police Service (SAPS), 1997). Selebi's conduct with regard to this code was a blatant violation thereof. This code makes specific mention of SAPS making a concerted and strong effort to combat corruption and to ensure the prosecution of the corrupters and corruptees. What makes Selebi's conduct such a grave violation is the fact that he was at the helm of an organisation, nationally and internationally, at the time, whose members are pledged to conduct themselves with integrity and transparency. Contrary to how Selebi chose to interpret his ethical obligations that came with high rank, it is clear that there is a need for demanding accountable conduct by high ranking officials precisely to obviate

any misperceptions that such high ranks come with a choice in the matter; the constitution itself having paid put to any such ambivalent understandings.

Corruption is endemic in South Africa, with media reporting on a daily basis cases within government institutions. South Africans believe that the police force is responsible to take the lead in the fight against the scourge of corruption. After the demise of Selebi due to corruption, it is incomprehensible that any South African citizen could continue to have faith in the SAPS, the country's foremost law enforcement agency. This is, in effect, the damage done by Selebi's misconduct to the country and its citizens.

At the time of his conviction, Judge Joffe, after finding Selebi guilty on the charge of corruption and sentencing him to 15 years in prison, stated the following:

Mr Selebi, from 2000 until 2008 you occupied the position of National Commissioner of the South African Police Service. You led the service that is constitutionally enjoined to secure and preserve law and order in our country, to fight crime in all its forms and to protect all who find themselves within the borders of our country. This is indeed a high and illustrious office. Those under your command looked up to you with respect. They looked to you for guidance and direction. The citizens of this country likewise looked up to you in your exalted office. They sought leadership in you in the fight against the scourge of crime which the people of South Africa were experiencing.

Mr Selebi, you were an embarrassment in the witness box. Firstly, you were an embarrassment to the office you occupied. It is inconceivable that the person who occupied the office of National Commissioner of Police could have been such a stranger to the truth. Secondly, you must have been an embarrassment to those who appointed you. Thirdly, you must have been an embarrassment to those who you led. It is not possible to measure the embarrassment of police men and women who are in the front line of the fight against crime, who daily put their lives on the line for their fellow citizens and whose credibility and truthfulness is relied upon by their fellow countrymen, when confronted by the reality that their former National Commissioner jettisons the truth when he thinks it will advance his case. Fourthly, you must have been an embarrassment to all right thinking citizens of this country. For a citizen of this country it is



incomprehensible that the National Commissioner of Police would be found to be an unreliable witness. Whilst there may be debate and difference of opinion as to competence, effectiveness, suitability and ability, it cannot be doubted that all the people of South Africa would join in rejecting a National Commissioner of Police who is found to be an untruthful witness (Joffe, 2010).

The above words of Judge Joffe no doubt echo the views of the reasonable South African person. South African citizens look up to the SAPS officials to be at their very core, honest, accountable and responsive public officials. In the above excerpt, an indication is given of the disgust with which the judge looks upon the heinous crime of corruption by the chief police commissioner of a country, one of the highest and most esteemed positions in public office.

Furthermore, the legislature was, at the time, focusing on passing anti-corruption legislation as corruption was seen, then as indeed now, as a grave threat to the tenets that a democracy seeks to uphold, namely, impartiality, accountability, transparency and, above all, justice for all. Selebi's friendship with Agliotti, as he described their relationship, was prima facie inconceivable. The chief police commissioner and a notoriously known drug smuggler from the underworld in a friendship was immensely difficult to fathom. But, as Basson (2010:6) points out, Selebi was a brilliant public servant and a struggle stalwart, both of which guaranteed him respect from citizens and his fellow public officials, and most importantly, it protected him from scrutiny and criticisms.

As Schwella (2013:82) indicates, 'this turn of events would have been difficult to predict at the time of Mr Selebi's appointment, which [had been] hailed as a great appointment'. The editorial of *City Press* (cited in Schwella, 2013:82) had praised the appointment praised: 'Hearty congratulations to Jackie Selebi on his appointment as new Commissioner of Police... We believe he will acquit himself well in his new position'. Selebi himself proclaimed that he was dedicated to combating crime within South Africa as well as transnational organised crime. Ironically, Agliotti, notoriously known for his involvement in drug trafficking, as the discussion has pointed out, was instrumental and at the forefront of transnational organised crime, making the subsequent friendship of Selebi with the latter inconceivable (Basson, 2010:5).

Selebi appealed against his sentence, an appeal that was denied by the Supreme Court of Appeal on 2 December 2011. However, he was released on medical parole in July 2012 (Corruption Watch, 2015; South Africa, 2015).

## **6.5 Conclusion to Chapter**

The conclusion here provides a summary of the inductions that may be made regarding non-compliance in this instance of corruption. Additionally, some remarks regarding the ongoing problem of political interference in corruption investigations involving high ranking officials will be made.

Based on the analysis above, the following three inductions were made regarding non-compliance by Selebi in his position as police commissioner of the SAPS.

- Selebi's blatant disregard for the constitution shows the need for strong redress measures that compel high ranking officials to remain accountable to the constitution; their accountability must, in other words, pass final muster with the constitution itself, the latter which does not place any citizen in the country above the law.
- The succumbing of a high profile public official like the National Commissioner of Police to corrupt activities points to the need for profound redress measures that disallow any misperception or ambivalent understanding by high ranking officials; this means ensuring that the process to hold high ranking public officials accountable is not interfered with.
- Furthermore, despite the fact that the Public Service Commission is compelled, in terms of Section 196 to investigate, monitor and evaluate the public administration, which by implication includes the SAPS, it was seen above that the Public Service Commission omitted to investigate the SAPS in terms of Selebi's non-compliance with ethical codes. One may induce that, there is a lack of adequate emphasis by oversight bodies to emphasise compliance with external controls and that this needs redress.

The inductions made above will help in formulating themes (see Chapter Eight in this regard) and building new theory to help answer the research question: Why is there non-compliance with external control measures?

The prosecution of high ranking public officials in South Africa is quite often tainted by political interference. A number of cases may be mentioned in this regard, most notably

the Arms Deal (as discussed in Chapter Five of the current study). One may go so far as to say that state authority has come to be known as a protective shield for favoured individuals. In fact, at the outset of the Selebi saga, the then National Director of Public Prosecutions, Vusi Pikoli, was suspended by then President Mbeki following his refusal to surrender to pressure to prevent him from instituting action against the former National Police Commissioner (Bruce, 2008). Bruce (2008:3) observes that when Selebi's office began to be investigated by the Scorpions many interpreted this as the Scorpions 'targeting' the ANC since Selebi had at the time been a high ranking member of the ANC and Keble a major benefactor of many ANC members and structures. However, the prosecution and subsequent conviction of Selebi, Chief of Police, at the very least, provided some reassurance to South African citizens that despite such political clamour and interference justice can and will still be served against corrupt public officials. The first prize, however, as this study consistently argues, is to prevent such corruption taking place in the public service in the first place.

## **CHAPTER SEVEN**

### **CASE STUDY: BHEKI CELE**

#### **7.1 Introduction**

The findings of both the Public Protector and the Molozi Board of Inquiry (South Africa. Office of the Presidency. Molozi Board of Inquiry, 2011), the latter which was mandated by the President, was that the conduct of former National Commissioner of SAPS, Bheki Cele, in the procurement process of building leases for the SAPS was improper and unlawful. Yet, no criminal action has subsequently been instituted against him (South Africa. Office of the Presidency. Molozi Board of Inquiry, 2011). This case study demonstrates non-compliance by high profile government officials with the laws and prescripts of the land, in particular, with regard to public sector procurement prescripts.

This chapter begins with a contextual overview of Cele's profile and the background to his suspension from duty. This will be followed by an analysis of the constitutional and legislative contraventions of his misconduct as National Police Commissioner of the SAPS. The chapter will conclude with a summary of inductions relating to non-compliance regarding in this instance, specifically, the procurement process in the supply chain, as well as remarking on his dismissal and re-appointment in another high ranking government post.

#### **7.2 Case Background**

Bhekokwakhe Hamilton Cele was the National Commissioner of the South African Police Service from July 2009 until October 2011, a post he took up when Jackie Selebi was suspended when allegations into the conduct of the latter occurred. Cele's work record boasts an impressive list of responsible high ranking posts with leadership responsibilities.

In 1994 Mr Cele was elected to the KwaZulu-Natal Provincial Legislature as the Chairperson of the Portfolio Committee on Safety and Security. He was later appointed as Chairperson of Chairpersons in the KwaZulu-Natal Legislature (Democratic Alliance (DA), 2014). From 2004 to 2009 he was a member of the Executive Committee for Transport, Community Safety and Liaison in KwaZulu-Natal. In this portfolio, Cele distinguished himself in a number of areas, including successfully redressing taxi violence in the province, successfully leading anti-crime campaigns and highlighting

road safety on provincial roads and highways. Cele, also positively impacted rural under-development by prioritising road infrastructure development in neglected rural areas in KwaZulu-Natal. He was a member of the National Executive Committee (NEC) of the ANC. He is the founding member of the National Education Union of South Africa and has tremendous experience in the educational field (South Africa. Department of Agriculture, Forestry and Fisheries, 2015). He also holds membership in the ANC.

In October 2011 he was suspended from his duties as National Commissioner of SAPS following allegations of maladministration. It should be noted that non-compliance with applicable legal prescripts amounts to maladministration, which in turn amounts to inefficiency and hence unprofessional conduct on the part of the public official. Although such unprofessional conduct may not be deemed to be corruption per se, it may still be regarded as unethical.

### **7.3 Analysis of the Allegations against Cele**

In this section the allegations against Cele will be analysed, including the applicable legislation and/ or codes of conduct and prescripts that were contravened during the procurement of the leases in question. The analysis will focus on two reports, namely, the Public Protector's report of 14 July 2011, dubbed 'Against the Rules Too', and the Report by the Moloi Board of Inquiry (South Africa. Office of the Presidency. Moloi Board of Inquiry, 2011), mandated by the President. The analysis also aims to demonstrate how the procurement of the two leases in question contradicted the many tenets which the Constitution of the Republic of South Africa Act of 1996 seeks to uphold.

'*Against the Rules Too*' is the second and final report of the Public Protector in response to a complaint lodged with her office on 2 August 2010 in connection with the alleged improper procurement of the lease of office accommodation for the SAPS in the Middestad building (previously known as the Sanlam Middestad building) in Pretoria and the Transnet Building in Durban (South Africa. Office of the Public Protector, 2011:9). These complaints originated from a newspaper article published on 1 August 2010, which alleged improper conduct and maladministration by the National Commissioner of the SAPS and the Department of Public Works (DPW) (South Africa. Office of the Public Protector, 2011:9).

The first and primary complaint lodged with the office of the Public Protector related to the alleged non-compliance with the procurement requirements of Section 217 of the Constitution of the Republic of South Africa Act (1996) by the South African Police Service (SAPS) and the Department of Public Works. The second was the alleged improper involvement of Cele, then National Commissioner of the SAPS, in the procurement of two buildings, namely, the Middestad Building in Pretoria and the Transnet Building in Durban. The investigation also focused on the relationship between the SAPS and the preferred service provider as well as the cost effectiveness of the transaction (South Africa. Office of the Public Protector, 2011:9).

The estimated costs of the two leases were as follows:

- Middestad Building Lease—approximately R614 million;
- Transnet Building Lease—approximately R1,16 billion; and
- Combined value of two leases—R1,78 billion.

The above prodigious amounts relating to leasing costs raised concerns regarding expenditure within a government department.

A number of general findings were made by the Public Protector following a detailed investigation into the alleged leasing scandal. The first finding was to the effect that similarities were identified in the procurement of the Transnet Building lease and the Middestad building lease. The similarities related to non-compliance with legal requirements and prescripts in respect of procurement in the public sector. The similarities included the following:

- Documentation indicated that both buildings were identified by the National Commissioner of the SAPS, Bheki Cele;
- The SAPS engaged the owners of the buildings prior to the Department of Public Works becoming involved in the procurement process, as was required;
- The total lettable area of the respective buildings had a direct influence on the demand management requirements of the SAPS, as both buildings had been identified prior to the formal demand management process being initiated;
- In both instances no legitimate urgency existed that justified a deviation from the prescribed open tender process;
- Roux Property Fund (of which the owner Roux Shabangu was implicated in the lease scandal investigation) signed purchase agreements for both buildings shortly before the SAPS identified the buildings as alternative accommodation;

- In both instances the procurement strategy adopted by the Department of Public Works resulted in negotiations with Roux Property Fund exclusively;
- The procurement of both leases was not reflected in the User Asset Management Plan;
- In both instances funds had to be reprioritised due to insufficient funds being available in the SAPS leasing budget;
- In both instances the deviation from the prescribed tender process was not recorded or reported to the National Treasury and the Auditor-General of South Africa, as required by Treasury prescripts;
- In both instances the service provider (Roux Property Fund) made contact with officials at the SAPS and the Department of Public Works and is alleged to have put pressure on them in regard to the finalisation of the procurement process; and
- In both cases the buildings leased were of a Grade C standard, thus requiring major renovations at the cost of the state and were leased at a rental much higher than the market rate for such buildings (South Africa. Office of the Public Protector, 2011:110).

The Public Protector ruled that as a result of the above mentioned similarities, a number of the findings made in respect of the procurement of the lease of the Middestad building were also applicable to the Transnet building lease.

It may be inferred from the similarities mentioned above that both the SAPS and Roux Property Fund were intending to be contractants of the leasing contracts. One may draw a further inference to the effect that the SAPS was paving the way for a favoured contractant, namely, Roux Property Fund. The most notable similarity is that in both instances there was an unjustified deviation from the prescribed open tender processes, which is required by law, a deviation that, additionally, was not recorded or reported to the National Treasury and the Auditor-General of South Africa, as prescribed by Treasury regulations and directives. Such digression from the rule of law by a high profile public official is inconceivable, at the very least.

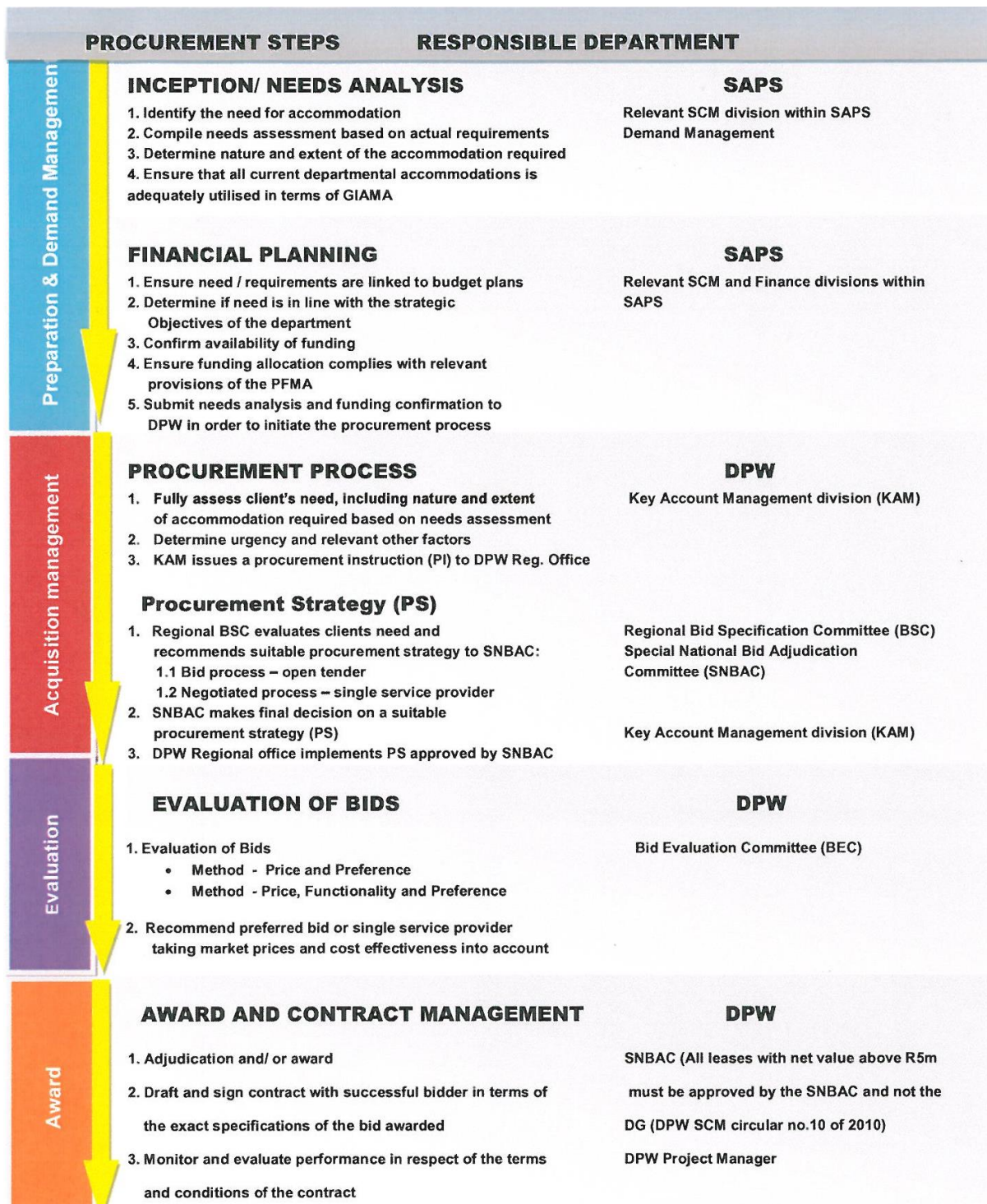
A number of other findings were made with regard to the procurement process. The first finding related in effect to the 'need' for the buildings in question, that is, such a need was not reflected in the SAPS Immovable Asset Management Plan, and, furthermore, not budgeted for. In terms of Section 8 of the Government Immovable Asset Management Act (GIAMA) (South Africa, 2007), 2007, a user immovable asset

management plan must consist of a strategic needs assessment. In addition, the SAPS Strategic Plan for 2010–2014 specifically provided that the ‘management of existing assets will be guided by the development of an Immovable Asset Management Plan to comply with the Government Immovable Asset Management Act, 2007’ (South Africa. Office of the Public Protector, 2011:111). In this instance, the SAPS failed not only to comply with the applicable legislation, but also digressed from the directives of the SAPS Strategic Plan which compels the SAPS particularly to comply with the Government Immovable Asset Management Act (GIAMA) (South Africa, 2007).

The Public Protector further found that the involvement of the SAPS proceeded beyond the demand management phase of the supply chain management process. In this regard, Figure 3 following provides the schematic illustration of the Public Protector’s report (South Africa. Office of the Public Protector, 2011:51). The illustration represents a summary of the supply chain management process as it pertains to the procurement of leased accommodation, as well as the respective responsibilities of the SAPS and the Department of Public Works.

Figure 3: Procurement Steps and Areas of Responsibility in Respect of Leased Accommodation (Supply Chain Management)





Source: Report of the Public Protector (South Africa. Office of the Public Protector, 2011:51)

As indicated in procurement prescripts, the leased accommodation on behalf of government departments falls within the ambit of the Department of Public Works. The relevant statute, that is, the Appropriation Act (South Africa, 2010), which in the Schedule to the Act, indicates that the Department of Public Works is to 'provide and manage the accommodation, housing, land and infrastructure needs of National

Departments'. Thus, the Department of Public Works will only commence with the procurement process once a comprehensive needs analysis has been concluded and funding in respect of the need or requirements is confirmed as available. It is useful to understand what information was required in terms of funding in this regard. First, in terms of the schematic provided in Figure 3, the SAPS was required to link the need for the accommodation in terms of the lease to its budget plans. Second, the SAPS ought to have determined if such need was in line with the strategic objectives of the organisation. Third, the SAPS was required to confirm the availability of funding in respect of the acquisition of both the leases. Fourth, the SAPS was responsible to ensure that such funding allocation complies with relevant legislation, namely, the Public Finance Management Act (South Africa, 1999). Only once all of these steps were completed and finalised, should the needs analysis have been submitted to the Department of Public Works in order for the latter to formalise the procurement process. The report of the Public Protector (South Africa. Office of the Public Protector, 2011) shows that this did not occur for both of the buildings in question.

The SAPS involvement beyond the demand management phase, as referred to in Figure 3, is neither required nor warranted. It is mentioned in the Public Protector's report (South Africa. Office of the Public Protector, 2011:113), that the SAPS conduct amounted to unwarranted involvement in the role of the Department of Public Works and thus compromised the procurement process (South Africa. Office of the Public Protector, 2011:113). The identification by the SAPS of a building and proceeding with the further step of negotiating with a single service provider, namely, Roux Property Fund, was a clear transgression beyond the procurement prescripts. It is stated in the Public Protector report (South Africa. Office of the Public Protector, 2011:113) that in the case of the Transnet Building, the SAPS, that is, by implication, the National Commissioner, Cele, by engaging with a preferred bidder, Roux Property Fund prior to the Department of Public Works' involvement in the matter, clearly exceeded its involvement in the supply chain management process. It is important to note that the National Commissioner conceded to this point (South Africa. Office of the Public Protector, 2011:113). According to Figure 3 above, the involvement of the client department, namely the SAPS, should have come to a halt at the conclusion of the demand management phase (South Africa. Office of the Public Protector, 2011:12). The next phase of the supply chain management process, the acquisition phase, is solely reserved for the Department of Public Work, a phase that involves the

procurement process and strategy. As indicated in Figure 3, it is the role of the Department of Public Works to assess the client's need, in this case, the SAPS, based on the needs analysis provided by the client/SAPS. This function is delegated to the Key Account Management Unit within the Department of Public Works. The Key Account Management Unit determines the urgency in the matter and then issues a procurement instruction (or PI) to the Department of Public Works' Regional Office (South Africa. Office of the Public Protector, 2011:12). The next step in the acquisition phase is the Procurement Strategy (or PS), a process that includes an evaluation by the Regional Bid Specification Committee, the latter that, if necessary, would recommend an appropriate procurement strategy to the Special National Bid Adjudication Committee. The procurement strategy could take the form of either a bid process involving an open tender process, or a negotiated process involving a single service provider. It is the prerogative of the Special National Bid Adjudication Committee to decide on the appropriate procurement strategy to be implemented by the Department of Public Works (South Africa. Office of the Public Protector, 2011). It is worth noting that the client department, in this case, the SAPS, is removed at this point from the procurement process.

This process clearly indicates that once the client/SAPS indicates a need, in this case, for office accommodation, the Department of Public Works then takes hold of the reins as far as the procurement process is concerned. It is stated in the Public Protector's report (South Africa. Office of the Public Protector, 2011:113) that the SAPS had known that the procurement of leased accommodation ought to have been carried out by the Department of Public Works, which, the report claims, was substantiated by documentary evidence. This demonstrates a case of a government department, headed by the National Commissioner, showing complete disregard for adherence towards the rule of law. Hence, the conduct of the SAPS by negotiating with Roux Property Fund exclusively and not engaging in a proper tender process, as prescribed by law, contradicted the fundamental constitutional requirement of competitiveness and thus constituted maladministration.

Another finding made by the Public Protector (South Africa. Office of the Public Protector, 2011:114) in this matter was that the Transnet Building was identified by the SAPS prior to the conducting of the needs analysis, which contradicted the basic principles of demand management. Yet another finding refers to the fact that the

procurement of the lease was not a cost effective one (South Africa. Office of the Public Protector, 2011:114). This finding was based on an option analysis report by the Department of Public Works, dated 1 October 2010, which stated that the market rental rate for a building, such as the Transnet building in question, was until the latter part of 2009, R40 per square metre; yet the contract of lease between Roux Property Fund and the Department of Public Works reflects a rate of R102.50 per square metre, with a further cost of R22.80 per square metre for operational costs. Hence, the total cost per square metre, excluding parking bays, amounted to R125.30 per square metre. As correctly pointed out by the Public Protector (South Africa. Office of the Public Protector, 2011:115), the latter rate was obviously not cost effective.

A further finding by the Public Protector (South Africa. Office of the Public Protector, 2011:116) relates to competitiveness and urgency, that is, that there was 'no legitimate justification for a deviation from the prescribed tender process'. In terms of legislation, it is stated in Regulation 16A6.4 of the Treasury Regulations that if in certain instances it is not practically possible to follow the prescribed tender process, the accounting officer has the option of utilising other means in order to procure the goods or services, with the proviso that clear and detailed reasons for such deviation are recorded and consented to by the accounting officer. In light of Regulation 16A6.4 (Treasury Regulations) (South Africa. National Treasury, 2007/2008), the SAPS and the Department of Public Works both acted illegally by contravening the above law.

It is worth clarifying the contraventions by Department of Public Work as a result of Cele's actions, that is, as a result of him not following the proper procurement process. At an initial meeting held on 21 April 2010 between the SAPS and the Department of Public Works in the KwaZulu-Natal regional office, Mr Ngema of the latter office, expressed great concern at the non-compliance by SAPS with procedures and expressed the view that SAPS was encroaching on the functional area of the Department of Public Works (South Africa. Office of the Public Protector, 2011:58). According to the Public Protector's report (South Africa. Office of the Public Protector, 2011:58), Ngema, shortly after sending an email to this effect, was removed from his area of responsibility. A similar instance occurred when another Department of Public Works official, Ms. Nel, wrote to the SAPS Deputy National Commissioner at the time, General Hlela, detailing concerns regarding the SAPS not following proper

procurement processes; Ms Nel was also transferred to another position within the Department of Public Works (South Africa. Office of the Public Protector, 2011:66).

Such actions do create doubt in the minds of members of the public regarding the ethicality with which public sector departments carry out their functions and whether openness and transparency is forfeited for the advancement of personal gain on the part of public sector officials. In the above mentioned instances, the removal of two officials from the Department of Public Works from their positions and involvement with the procurement process highlights the SAPS's non-compliance with the procurement process and is a clear transgression of the basic ethical principle of integrity in the SAPS Code of Ethics (South Africa. South African Police Service (SAPS), 2014). Here one may also draw the link between ethicality, integrity and maladministration. The very removal of the respective public officials from their positions in office owing to maladministration points to unprofessional conduct on the part of both Department of Public Works and the SAPS. Hence these Departments, by virtue of their actions may be deemed to be inefficient and unethical.

As far as the conduct of the Minister of the Department of Public Works, at the time, Mhlangu-Nkabinde, is concerned, the latter was seen as uncooperative with the Public Protector's investigation (South Africa. Office of the Public Protector, 2011:94). It was noted that Mhlangu-Nkabinda was hesitant to answer questions posed to her by the Public Protector, the latter who claims that this behaviour made it intractable to obtain the Minister's version of the events. From the evidence of the Director-General of the Department of Public Works, it emerged that the latter, succumbing to undue pressure from both Roux Shabangu and Minister Mhlangu-Nkabinda, subsequently agreed to the lease, despite non-compliance issues surrounding the agreements in question. It was also claimed that a directive was issued from the Head Office of the Department of Public Works to proceed with the procurement of one of the buildings in question (South Africa. Office of the Public Protector, 2011:94). It is also worth noting the Minister's personal contact with Roux Shabangu both at and outside her office on a few occasions (South Africa. Office of the Public Protector, 2011:94). For all the above reasons, the Public Protector found the Department of Public Works to have contravened the procurement requirements of 'fairness, equitability and transparency' (South Africa. Office of the Public Protector, 2011:118). By implication, the Department of Public Works may be deemed to be inefficient in carrying out its duties.

The next finding in the Cele lease saga was that the Department of Public Works did not record and report reasons for deviating from the competitive bidding process, as required by prescripts. The Public Protector report (South Africa. Office of the Public Protector, 2011:117) states that in addition to the above mentioned regulation, the National Treasury Practice Note No. 8 of 2007/08, effective from 1 December 2007, makes specific prescripts clear. In this regard, the Public Protector pointed to paragraph 3.4 relating to any transaction exceeding R500 000 (VAT included):

3.4.3 Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4.

The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process (South Africa. Office of the Public Protector, 2011:117).

The Public Protector (South Africa. Office of the Public Protector, 2011:117) found that the Department of Public Works failed to record the deviation from the prescribed procurement process as well as reporting such deviation as required above, which amounted to maladministration. The intention of the legislature with Treasury Regulation 16A6.4 (South Africa. National Treasury, 2007/2008) is to allow the National Treasury, as the curator and guardian of public funds, to oversee the procurement processes. The Public Protector (South Africa. Office of the Public Protector, 2011:118) correctly noted that failure to report such deviation on the part of the Department of Public Works prevented the National Treasury such an opportunity. In itself, the disregard by government officials towards the rule of law and adherence to prescripts is unacceptable, but when such misconduct is carried out by a high profile

government official such as the National Police Commissioner, it is extremely implausible.

It is further stated in the Public Protector's report (South Africa. Office of the Public Protector, 2011:118) that the procurement process in respect of the leases was not in line with the Constitution's (1996) requirements of fairness, equitability and transparency. The fact that the service provider, Roux Property Fund, had been involved in the process from the beginning tarnished the procurement process even further. The report states that, opting for a negotiated process instead of a competitive bidding process, as well as failure to prove a legitimate deviation from the prescripts, indicates that the notion of fairness, equitability and transparency were obviously not considered (South Africa. Office of the Public Protector, 2011:118).

The Public Protector also found that the lease agreement entered into between the Department of Public Works and Roux Property Fund was invalid, since the lease process contravened the legal requirements of the Constitution, the Public Finance Management Act and the Treasury Regulations and instructions for procurement by state institutions (South Africa. Office of the Public Protector, 2011:120). In terms of Section 2 of the Constitution (1996), 'any conduct that is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. The lease agreements in question were therefore declared invalid by the Public Protector.

Thus far, the discussion has demonstrated that the conduct of both the Department of Public Works and the SAPS, the latter with Cele as the Head at the time, constituted maladministration in terms of the procurement of the leasing contracts.

Another finding in the Public Protector's report (South Africa. Office of the Public Protector, 2011) relates to discrepancies between the norm documents drafted by the Department of Public Works in respect of the floor space leased and the letter of acceptance from the Department of Public Works to Roux Property Fund. The report indicates that according to the Department of Public Work's norm document, which was based on the needs analysis of the SAPS, the total area being leased amounted to 41 440.23 square metres (South Africa. Office of the Public Protector, 2011:119), yet the letter of acceptance from the Department of Public Works to Roux Property Fund reflected that an amount of 45 499.10 square metres had been approved. The

difference amounts to 4058.87 square metres. The financial impact of the additional floor space is huge and, as illustrated in a table compiled by the Public Protector, indicates wasteful expenditure (South Africa. Office of the Public Protector, 2011:120). Table 2 below, directly reproduced from the latter report, clearly indicates the financial impact of additional floor space.

Table 2: Financial Impact of Additional Floor Space

<b>Financial Impact of Additional Floor Space</b>			
<b>Letter of Acceptance</b>	<b>DPW Norm Document</b>	<b>Difference</b>	<b>Additional Cost over Lease Period Due to Difference</b>
45499.10 m2	41440.23 m2	4058.87 m2	Year 1: R4 992 410.10
			Year 2: R5 466 689.06
			Year 3: R5 986 024.52
			Year 4: R6 554 696.85
			Year 5: R7 177 393.05
			Year 6: R7 859 245.39
			Year 7: R8 605 873.70
			Year 8: R9 423 431.70
			Year 9: R10 318 657.72
			Year 10: R11 298 930.20
			<b>Total: R77 683 352.29</b>

Source: Report of the Public Protector. (South Africa. Office of the Public Protector, 2011:120)

The table indicates an amount of R77 683 352.29 million as additional expenditure; the Public Protector (South Africa. Office of the Public Protector, 2011:120) reported that, such 'additional expenditure could further have led to fruitless and wasteful expenditure, as contemplated in Section 1 of the Public Financial Management Act (1999)'. Section 1 of the Public Finance Management Act (South Africa, 1999) patently defines 'fruitless and wasteful expenditure' as 'expenditure which was made in vain and would have been avoided had reasonable care been exercised'. This is a clear and unambiguous definition of wasteful expenditure and Public Protector correctly classified such additional expenditure in the leasing of the SAPS buildings as 'fruitless and wasteful' (South Africa. Office of the Public Protector, 2011).



The next finding of the Public Protector relates to the conduct of the SAPS/Cele as National Commissioner of Police and Department of Public Works officials in the course of the procurement process, which is stated as improper and unlawful (South Africa. Office of the Public Protector, 2011:121). For purposes of this case study, it is important to note that the SAPS is an organ of state and as such is legally bound by the Public Finance Management Act (South Africa, 1999) and the Regulations and Treasury Instructions issued by the National Treasury in terms of Section 76 of the Public Finance Management Act (Treasury Regulations) (South Africa. Office of the Public Protector, 2011:36). In terms of Section 76(4)(c) of the Public Finance Management Act (South Africa, 1999), the National Treasury may make regulations and issue instructions on procurement processes. In this regard, the supply chain management framework is included in Regulation 16A of the Draft Treasury Regulations (South Africa, 2004). The supply chain management system for all government departments must adhere to the following stipulations, as stated in Regulation 16A.3.1 (Draft Treasury Regulations) (South Africa, 2004):

- a) be fair, equitable, transparent, competitive and cost effective;
- b) be consistent with the Preferential Procurement Policy Framework Act (South Africa, 2000);
- c) be consistent with the Broad Based Black Economic Empowerment Act (South Africa, 2003); and
- d) provide for at least the following:
  - (i) demand management;
  - (ii) acquisition management;
  - (iii) logistics management;
  - (iv) disposal management;
  - (v) risk management; and
  - (vi) regular assessment of supply chain performance.

In addition to the above, it should be further noted that the legislature has enacted the Preferential Procurement Policy Framework Act (PPPFA) (South Africa, 2000). The objective of this Act is to give effect to Section 217(3) of the Constitution (1996) by providing a framework for the implementation of the procurement policy contemplated in Section 217(2) of the Constitution; and to provide for matters connected therewith (South Africa, 2000).

The Public Protector's Report (South Africa. Office of the Public Protector, 2011:36) correctly highlighted the above regulation as particularly relevant to the case. Regulation 11(a) of the Regulations (South Africa, 2005) issued in terms of the Preferential Procurement Policy Framework Act (South Africa, 2000) provides that an organ of state must, prior to making an invitation for tenders, properly plan for and, as far as possible, accurately estimate the costs of the provision of services or goods for which an invitation for tenders is to be made. This prescript places a firm obligation on the organ of state, in this case, the SAPS, to meticulously and scrupulously estimate costs of intended services, in this case, the leasing of office accommodation, for which an invitation of tenders is to be made. In this case, no such invitations were made, but the SAPS instead negotiated exclusively with a preferred service provider, namely, Roux Property Fund. Such conduct amounts to gross maladministration.

As stated in the Public Protector Report (South Africa. Office of the Public Protector, 2011:121), accountability for budgetary control and the procurement of services within all organs of state involves the accounting officer(s), who at all times were the National Commissioner of Police and the Director-General of the Department of Public Works. It was found that the National Commissioner, Cele, as accounting officer of the SAPS, transgressed the legal requirements applicable to him in terms of Public Finance Management Act (South Africa, 1999) and the Constitution (1996). Section 217 of the Constitution (1996) and the relevant provisions in the Public Finance Management Act (South Africa, 1999) and the Treasury Regulations (South Africa, 2005) all place an obligation on the accounting officer (in this case, the National Police Commissioner), to ensure that services and goods are procured in accordance with 'a system that is fair, equitable, transparent, competitive and cost effective' (South Africa. Office of the Public Protector, 2011:121).

The National Commissioner was found to have issued a directive withdrawing all delegations in respect of procurement of services and goods that exceeded an amount of R500 000 from 30 September 2009 (South Africa. Office of the Public Protector, 2011:121). Such action, in effect, meant that the National Commissioner had taken complete and full responsibility to ensure that all legal requirements in respect of the procurement of the leased property was complied with. It is worth noting that the defence of the National Commissioner in respect of the non-compliance referred to above entailed that he was reliant upon the advice of senior supply chain management

officials within the SAPS (whose delegated powers he had withdrawn on the basis their dubious activities) for his approval of the procurement of the R1.1 billion lease; such a defence cannot be accepted. The SAPS National Commissioner's awareness of questionable practices by senior SAPS procurement staff ought to have made him more vigilant when approving procurement related documents (South Africa. Office of the Public Protector, 2011:122). Cele, moreover, stated on this matter that by passing the above mentioned directive (withdrawing all delegations relating to procurement matters) he was not solely responsible in ensuring compliance with the applicable legal requirements (South Africa. Office of the Public Protector, 2011:99). Countering this, the Public Protector (2011:99) cites Section 44(2) of the Public Finance Management Act (South Africa, 1999), which clearly indicates that a 'delegation by an accounting officer (in this case Cele as Head of SAPS) of responsibilities does not divest him/her of responsibility'. Thus the National Commissioner claims that he was not 'solely liable' and had relied on the advice of officials, some of whom he did not trust, did not lessen, but in fact increased, his responsibility to ensure compliance with applicable legal requirements. It is further stated in the Public Protector's report (South Africa. Office of the Public Protector, 2011) that the National Commissioner approved the expenditure prior to the Chief Financial Officer advising him of the budgetary implications resulting from the prospective lease agreements.

The Public Protector's Report (South Africa. Office of the Public Protector, 2011:122) correctly points out that non-compliance with legal requirements and prescripts by the National Commissioner resulted in the invalid conclusion of the lease agreements with Roux Property Fund, and may be classified as grave mismanagement on the part of a high profile state official. The impact of the non-compliance by the SAPS and the Department of Public Works with the legal requirements and prescripts pertaining to prescribed procurement processes was also highlighted in the report.

In regard to the above, the Public Protector's report (South Africa. Office of the Public Protector, 2011:128) stated that due to the fact that the procurement of the leases was not cost effective, it resulted in a potentially prodigious monetary loss to the state and contradicted the Batho Pele principle of 'value for money', which promises the tax payer value and optimum service delivery in return for paying their taxes. The non-compliance further displayed blatant disregard for the rule of law by a high profile state official. This was a clear example of non-compliance with procurement procedures and

therefore points to maladministration as well as inefficiency on the part of the SAPS. Hence, such conduct constituted unethicity. The public had looked up to the SAPS, perceived its members to be the leaders in the fight against crime, only to have learned that the head of the organisation himself had failed to comply with the law, displaying such conduct which amounted to maladministration. Such non-compliance created a loss of public confidence in the SAPS as well as organs of state in general. The Public Protector's report also claims that the non-compliance created a perception among potential service providers to SAPS, or indeed the government in general, that procurement processes by government departments were not to be trusted and likely tainted by unfairness, inequality and favouritism.

#### **7.4 Conclusion to Chapter**

The conclusion here provides a summary of the inductions that may be made regarding non-compliance in this instance. Additionally, some remarks regarding the ongoing problem of political interference in stemming corruption or non-accountability involving high ranking officials will be made with specific reference to Cele's reappointment to another high ranking position by the ruling party..

Based on the analysis above, the following inductions were made regarding non-compliance by Cele in his position as police commissioner of the SAPS.

- Increased explicit reporting and lines of accountability are required in the procurement process which will act as a deterrent towards malpractice and non-compliance. As was seen in this case with the head of the national police, the absence of adequate control measures and accountability over high ranking officials opens the way for such persons to exploit the situation for personal gain as well as favour non-compliance with external control measures.
- The absence of specific and greater mention of accountability in respect of the National Commissioner of the SAPS as opposed to the specific and precise mention of the Provincial Commissioners of Police in Section 207 of the Constitution could lead one to argue that the malfeascent behaviour on the part of Cele stems from the lack of emphasis in the Constitution regarding the expected degree of liability and responsibility on the part of the National Commissioner.
- As was seen with Cele, a lack of understanding of the significance of integrity and ethicality involved in the public decision-making process contributes to high ranking officials' non-compliance with procurement procedures.

- There is a need for more intense training that emphasises the importance and crucial role of integrity and ethicality in the decision-making process; to this end as well, more stringent sanctions should be introduced for unethical behaviour during the decision-making process.
- The failure on the part of the President to take remedial action against Cele following directives made by the Public Protector, suggests that although the Chapter 9 institutions have been created by the Constitution, great redress is needed as far as upholding the directives issued by these institutions, in the context of this case, the Public Protector.

The inductions made above will help in formulating themes (see Chapter Eight in this regard) and building new theory to help answer the research question: Why is there non-compliance with external control measures?

At the conclusion of the investigation, the Public Protector recommended that the Minister of Police should take ‘appropriate action’ as soon as was possible against all SAPS officials who had contravened the relevant laws and policies relating to procurement processes in South Africa (South Africa. Office of the Public Protector, 2011:131). Subsequently, the Moloi Board of Inquiry also recommended that criminal charges be considered and reportedly found against Cele as follows:

- ‘Guilty of gross misconduct regarding the procurement of the Sanlam Middestad building in Pretoria and Transnet building in Durban;
- Favoured procuring buildings owned by property mogul, Roux Shabangu;
- Caused procurement processes of the SAPS supply chain management to be manipulated by Roux Shabangu;
- Failed to appreciate the nature and importance of responsibilities attached to his position;
- Failed to appreciate the importance and consequences of the provisions of the Public Finance Management Act (South Africa. Office of the Presidency. Moloi Board of Inquiry, 2011).

The Moloi Board of Inquiry followed the Public Protector’s findings that Cele’s conduct in the police lease deal scandal was improper, inconsistent with the rule of law and constituted maladministration on the part of a senior state official (South Africa. Office of the Presidency. Moloi Board of Inquiry, 2011). Once again, maladministration may

be interpreted to include unprofessional conduct in the form of inefficiency and therefore the conduct may be described as unethical.

To date, no criminal action has been instituted against Cele, who currently holds the portfolio of Deputy Minister of Agriculture Forestry and Fisheries in the South African government, a portfolio he assumed on 25 May 2014.

## **CHAPTER EIGHT**

### **ANALYSIS AND FINDINGS**

#### **8.1 Introduction**

This chapter will present collective analyses and findings regarding the three case studies discussed in chapters five, six and seven as well as on the earlier chapters dealing with arguments and theories about ethicality and accountability in the public service. The inductive theory-making approach adopted by this study led to a number of inductions being made following analysis of each of the cases in chapters five, six and seven. From the analysis of these chapters and the inductions based on these, common emerging themes regarding the issue of non-compliance in the public sector will be identified. These common themes running through the cases will be focussed on as they allow and enable new theorising regarding issues of cause and redress related to non-compliance, non-accountability, non-ethicality and non-transparency, inter alia.

All three cases were selected to demonstrate a number of contraventions of constitutional and legislative norms as well as codes of ethics and conduct in the public sector. In particular, the three cases each demonstrate corruption and/or non-accountability by public officials in leadership positions. While each case displays its own unique mix of contraventions, dynamics and outcomes (both in terms of the original conduct as well as legal processes undertaken for redress), they all have in common serious misconduct, unethical behaviour, non-accountability, non-transparency and corruption committed by officials in top ranking positions in the government.

Each case also displays, respectively, attitudes held by government towards the occurrence of and the individuals involved in public sector scandals. Hence it is not just the contraventions or instances of corruption but governmental responses to them that is important in order to understand the current attitudes and effectiveness of measures in place, measures that to produce compliance, accountability, transparency, ethicality and integrity in the public service and democratic state.

As indicated in Chapter One, this study has adopted an inductive approach, in other words, a theory-building approach to research. Lancaster (2005) maintains that the

greatest strength of an inductive approach is its flexibility. The research approach in this frame does not require a hypothesis; instead, the researcher can build theories based on observations thereby allowing a problem to be studied in different ways with alternative explanations thus made possible (Lancaster, 2005:26). The inductive approach is thus particularly suited to the study of human behaviour, including behaviour in organisations (Lancaster, 2005:26). In this case, the organisation in question is the public sector institutions of the state. The methodology involving inductive reasoning has been adopted in the study to analyse and address the non-accountable, non-transparent, unethical and non-compliant behaviour of officials in top ranking positions in South Africa's relatively new democracy.

Du Plooy-Cilliers, et al (2014:49) together with Burns & Burns (2008) concur that in inductive theorising, the research moves from the specific to the general, with the researcher applying the findings to more abstract and broad theoretical constructs and concerns. As such, according to Du Plooy-Cilliers, et al (2014:49), inductive theorising is thus a bottom-up approach, allowing for the building of an existing or new theory. In this study, the close analysis and reading of the three case studies involving non-compliance in the public sector, based on inductive reasoning, has enabled the researcher to generate new theories about non-compliance on the basis of the individual case analyses. The findings of the case studies, looked at collectively in this chapter are the theories that are explained via eight emergent themes and presented below.

## **8.2 Eight Emergent Themes**

From the analysis and findings of the current study, including the three case studies, emerged the following eight prevalent themes:

- Inadequate Control and Accountability;
- Inadequate training and emphasis on the significance of integrity and ethicality involved in the public decision-making process;
- Inadequate emphasis on compliance with codes of ethics and codes of conduct for public officials;
- Inadequate emphasis on sanctions relating to corrupt activities and the existence of soft penalties for perpetrators;
- Absence of incentives for upholding ethicality and integrity as a public official; poor salaries for government officials as a contributing factor to succumb to bribes;



- Investigative mechanisms have been subject to political manipulation;
- Human nature and the theory of character-based ethics; and
- Inadequate efforts by government to highlight the prevalence of the scourge of corruption and maladministration.

Each theme is discussed in detail.

### **8.2.1 Inadequate control and accountability**

Masiapata (2007:46) claims that organisations with inadequate control measures and accountability are likely to encounter ethical malpractices among its employees who take advantage of the vulnerable situation for their own personal gain. Masiapata (2007:46) correctly points out that, by implication, inadequate control measures have the potential to make public officials deviate from ethical codes and principles. In a study with a focus on the members of the SAPS conducted by Masiapata (2007:46), it was found that deficient control measures and lack of accountability had the potential to lead to a 'negative work ethic and ethos' among police officials. In both the Selebi and Cele case studies, it was seen that inadequate control measures and lack of accountability no doubt lead to utter malfeasance in the case of Selebi and non-compliance with procurement policies and procedures in the case of Cele. Moreover, such non-compliance amounts to unprofessional conduct and may therefore be classified as unethical.

Furthermore, in terms of the Constitution (1996), Section 207 states that the President shall appoint the National Commissioner of Police to control and manage the police service. Section 207 further indicates that the National Commissioner (with the concurrence of the Provincial Executive, must appoint the Provincial Commissioner of that province in that regard (Section 207(3). Subsection 5 specifically states that the Provincial Commissioner is obliged to report to the Provincial Legislature annually and to send a copy of the report to the National Commissioner. Subsection 6 further adds that, should the Provincial Commissioner lose the confidence of the Provincial Executive, appropriate proceedings, including disciplinary action, may be instituted against that Commissioner. This section places a degree of control and accountability on the Provincial Police Commissioner, yet no mention is made of any such control and accountability with reference to the National Police Commissioner.

All that is stated with regard to the National Police Commissioner is that he or she is obliged to exercise control and manage the police service in accordance with the national policing policy and directions of the Minister of Police. One cannot assume that, by implication, the National Commissioner should report and be accountable to the Cabinet Minister. More explicit mention of reporting and lines of accountability are required, which will act as a deterrent towards malpractice and non-compliance. One may deduce that the absence of adequate control measures and accountability over the head of the national police service opens the way for persons in such positions to exploit the situation for personal gain as well as favour non-compliance with external control measures. This was displayed by both national commissioners of police, namely, Selebi and Cele.

In terms of Section 92 of the Constitution (1996) members of the Cabinet are accountable to Parliament for the performance of their functions. In order to promote compliance and accountability, two committees have been established, namely, Portfolio Committees and the Standing Committee of Public Accounts. In the Arms Deal, Professor Gavin Woods (personal interview in Nanabhay & Ballard, 2011), then chairperson of SCOPA, claims that the findings of the Standing Committee of Public Accounts were neither accepted by the Executive nor the Legislature (as stated previously in Chapter Five); as well, in terms of Section 84 of the Constitution (1996), the recommendation made by SCOPA to establish a Commission of Enquiry into the Arms Deal was disregarded by Cabinet Mbeki also delivered a speech to the nation in which he claimed that the conclusions drawn by SCOPA and the Auditor-General were wrong (Holden, 2008:52).

The above actions are a clear indication of government undermining the office of the Auditor-General, and thereby not complying with both the Constitutional prescripts and the Public Audit Act (South Africa, 2004; interview with Gavin Woods in Nanabhay & Ballard, 2011:19).

Furthermore, the Auditor-General failed to react with appropriate remedial action despite being aware of severe improprieties and maladministration claims by Professor Woods (interview in Nanabhay & Ballard, 2011:19), which were supported in Holden (2008).

### **8.2.2 Integrity and ethicality involved in the public decision-making process**

The state utilises public funds or tax payers' money, which creates an emphasis on ethicality in the public decision-making process. A number of codes of conduct and codes of ethics exist in the latter regard and are applicable to various sectors within government. More intense training and workshops should be introduced emphasising the importance and crucial role of integrity and ethicality in the decision-making process. To this end, more stringent sanctions should be introduced for unethical behaviour during the decision-making process. In all three case studies examined, it was demonstrated, that not even the high profile public officials seemed fearful of sanctions that could be applied against them.

Despite the existence of the SAPS ethical code and code of conduct, which include sanctions, both National Commissioners, Selebi and Cele, were investigated for improper and unethical conduct. The question remains: how can society expect ethical conduct from the public official if the very heads of public institutions and organisations are engaging in improper and unethical conduct? With regard to Bheki Cele, the case study has shown that even though the Public Protector made a recommendation that the State take appropriate remedial action against the then National Police Commissioner, to date, no such action has been taken, with Cele currently holding the portfolio of Deputy Minister of Agriculture. In regard to the latter case, it is worth noting that subsequent to the writing and presentation of a draft of the current study to the Public Protector for validation, the latter made the following responses to this point. According to the Public Protector, the establishment of the Molozi Board of Inquiry into General Cele's fitness and his subsequent dismissal from SAPS occurred as a response to the Public Protector's report (South Africa. Office of the Public Protector, 2011) (also see Appendix A in this thesis, the External Research Validation Report by the Public Protector). Further, the Public Protector pointed out that the report made 'directives' as opposed to 'recommendations' that remedial action be taken in terms of Section 182(1)(c) of the Constitution (1996) (see Appendix A in this thesis, the External Research Validation Report by the Public Protector).

On 10 November 2014, approximately three years after the investigation into Cele came to an end with his dismissal from the SAPS, the latter lodged court papers challenging his dismissal as the National Police Commissioner in 2011. In essence, he is challenging the validity of the State President's decision at the time to release him

of his duties, based on the outcome of the Moloi Board of Inquiry. This begs the question: Was dismissal from his position in the absence of any charges being brought against him for corruption adequate in resolving the Cele saga? Further: What kind of message regarding personal accountability on the part of sanctioned public officials does such an action reflect? The complacency of government to take robust action against unethically and impropriety will doubtless create a lack of trust in public officials and ultimately lead citizens to doubt the legitimacy of the government of the day.

The Explanatory Manual on the Code of Conduct for the Public Service (South Africa, Public Service Commission, 2002) refers to training in Section 3.2, highlighting its importance in order to promote and ensure a high standard of professional ethics in the workplace. The Section further recommends that the manual serve as an aid in developing training courses for all public servants. Yet, merely mentioning training as an essential component of fighting the scourge of corruption and ensuring professional ethics is woefully insufficient. The drafters of the manual ought to have included a monitoring and evaluation component to such training, in accordance with the prescripts of the Code of Conduct for the Public Service (South Africa, Public Service Commission, 2001). Monitoring and evaluating training programmes and holding managers accountable in terms of ensuring that such training programmes occur, comprehensive training programmes will more likely be put in place and thereby lead to greater awareness of the integral role of ethicality and integrity in the day-to-day business of the public official.

A notable example of the lack of training and awareness among public officials about anti-corruption strategies is their degree of awareness of the Public Service Anti-Corruption Strategy (the Strategy). As stated in the Department of Public Service and Administration's assessment report relating to the Strategy, this was reported at the considerably low figure of only 33%. (South Africa, Department of Public Service and Administration, 2008). Furthermore, a compliance audit of the strategy involving all spheres of government, with a total of 78 strategic elements tested revealed that only 28 elements were complied with, which is equivalent to only 36% partial compliance. (South Africa, Department of Public Service and Administration, 2008:13). In addition to the Strategy, referred to above, the Gauteng Anti-Corruption Strategic Framework (South Africa, Gauteng Provincial Legislature, 2009:25) also highlighted a lack of

awareness about corruption and its manifestations as a weakness that needs to be addressed in Gauteng province.

This evidence, presented as statistics from the Department of Public Service and Administration, lends itself to the understanding that inadequate training within the public service on government policies relating to ethical conduct, anti-corruption strategies and relevant legislation is indeed prevalent. The lack of awareness among public officials stems from inadequate training in that regard.

It is worth noting the findings of a study conducted by the Public Service Commission (South Africa. Public Service Commission, 2014) regarding the areas requiring further training offered by Public Administration Leadership and Management Academy (PALAMA).<sup>7</sup> The Commission found that future training interventions by PALAMA should include generic competencies and soft skills such as employee attitude and commitment, which are 'integral to the values and principles' that rule the public administration (South Africa. Public Service Commission, September 2014). Training regarding these principles of commitment and attitude, would, by implication, instil in public sector employees the importance of good governance, ethical behaviour and the upholding of applicable policies and the rule of law.

### **8.2.3 Inadequate emphasis on compliance with legislation and codes of conduct**

In terms of the Constitution (1996), Chapter 10, Section 195 (1) (a), 'a high standard of professional ethics must be promoted and maintained'. In addition, Section 196(4) (a) clearly states that, the Public Service Commission is tasked with the function 'to promote the values set out in Section 195 throughout the public service'; by implication, it is tasked with ensuring that the entire component of public service officials conducts their affairs in a professional and ethical manner. Furthermore, the Public Service Commission is compelled, in terms of Section 196 to investigate, monitor and evaluate the public administration; by implication, this includes the SAPS as well as the Executive. In the cases looked at in the current study, it was seen that the Public

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7. PALAMA is constituted as a schedule 1 department by the Public Service Act, No 5 of 1999 and reports to the Minister of the Department of Public Service and Administration. PALAMA's main purpose is to build a competent public service through development-oriented programmes (South Africa. Public Administration Leadership and Management Academy (PALAMA), 2015). The author also acknowledges the creation of the National School of Government (NSG), established in terms of the Public Administration and Management Act of 2014.

Service Commission omitted to investigate the SAPS in terms of Selebi and Cele's non-compliance with ethical codes, nor did it hold the Executive accountable in terms of the Arms Deal.<sup>8</sup> For purposes of analysis, the Executive is deemed to form part of the public administration.

The drafters of the Constitution (1996) had foreseen the challenges facing the South African government in terms of carrying out its functions in an ethical and professional manner and therefore went as far as creating an independent body, namely, the Public Service Commission, to be impartial and to carry out its functions of monitoring and evaluating the public administration without fear, favour or prejudice (Constitution, 1996, Section 196).

Furthermore, the conduct of the Executive, in the Arms Deal, as was discussed in the case study in Chapter Five, contradicted the Executive Members' Ethics Act (South Africa, 1998). In terms of this Act, the Cabinet shall be deemed to include the President (Section 1(i), thereby holding the highest state authority accountable. The purpose of this Act is to provide for a code of ethics governing the conduct of Cabinet members, Deputy Ministers and Members of Provincial Executive Councils.

Furthermore, Section 2, subsection 2(a) of the Act (South Africa, 1998) compels the President after consultation with Parliament, to publish a code of ethics to entrench the notion of an open, transparent, democratic and above all accountable government, which Cabinet, Deputy Ministers and Members of Provincial Executive Councils must comply with in executing their official duties and functions. Clearly, in terms of the Arms Deal, the President at the time violated these very tenets of accountability and openness as prescribed by the Act.

The purpose and primary objective of the code of conduct for the Public Service is to give effect to the Constitutional provisions as stated above, that is, to promote exemplary conduct within the public service (South Africa. Public Service Commission, 2002:57). It is stated in the Code that public officials will serve the public in an unbiased

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8. Strictly speaking the Public Service Commission does not have an oversight mandate over the Executive, but rather over the administrative apparatuses that report to it', this according to a response by the Chairperson of the Public Service Commission on the role of Constitutional Institutions supporting Democracy in Facilitating effective and proactive oversight over the Executive (see Appendix A: Validation Report by the Public Protector, 7 July 2015:8 of this thesis).

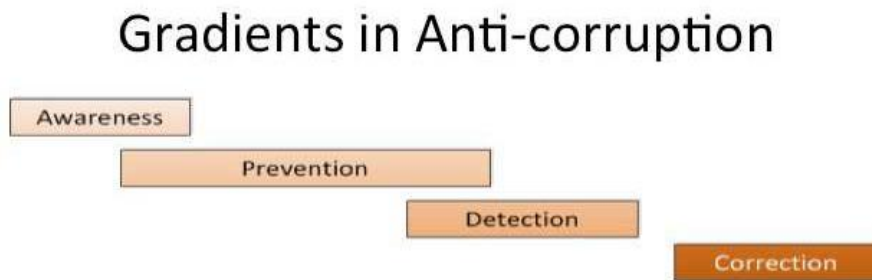
and impartial manner in order to instil public trust in the public service (South Africa. Public Service Commission, 2002:58). In all three case studies discussed blatant transgression and contravention of the Code is evident, . Both national police commissioners, in the cases of Selebi and Cele, and the Executive in the case of the Arms Deal violated the basic principle enshrined in the Code: to promote ethical conduct within the public service. This notion of non-compliance with following procedure and process amounts to unprofessionalism which encapsulates the notion of efficiency; hence the conduct is deemed unethical.

In terms of the Public Service Act (South Africa,1994) (as amended), it is indicated in Section 3, Subsection 1 that the Minister of Public Service and Administration is 'responsible for establishing norms and standards relating to integrity, ethics, conduct and anti-corruption in the public service'. Further, according to the Public Service Act, the Minister 'shall give effect to Subsection (1) by making regulations, determinations and directives' (South Africa, 1994) (as amended). In the respective cases of Selebi, Cele and officials involved in the Arms Deal, there is no evidence that the Minister of Public Service and Administration had at any point in time made any directives with regard to ethical conduct.

Indeed, the Batho Pele principles were drafted to be aligned with the Constitutional directives and principles of upholding professionally ethical behaviour within the public service. One of these principles specifically relates to accountability, openness and transparency. The purpose of including this principle is defeated if public officials receive inadequate training of legislation and relevant prescripts in such codes as the Batho Pele principles; if they did non-compliance, malpractice and unethicity would not be so dominant in the public service and we would ultimately not be faced with the widespread corruption that we are. Non-compliance with external control measures diminishes the integral components of good governance, namely, accountability, ethicality, transparency and responsiveness.

Anti-corruption activist, Brian Pinkowski (2014) advocates that in dealing with the scourge of corruption and maladministration, prevention is of utmost importance. Pinkowski (2014) goes so far as to say that prevention is the heart of anti-corruption. Figure 4 following displays a graphic explanation of Pinkowski's (2014) strategy to deal with corruption and would be useful in the South African context.

Figure 4: Gradients in Anti-corruption



Source: Pinkowski (2014)

According to Pinkowski's (2014) diagram above, the gradients are first, awareness, second, prevention, third, detection and fourth, correction. Furthermore, many anti-corruption programs worldwide are focused primarily on criminal investigation, with little emphasis on 'prevention' and if attention is paid to this it takes the form usually of the simplest forms of awareness, such as rallies, t-shirts and banners (Pinkowski, 2014). In the context of the current study and the cases examined, the enactment of the Prevention and Combating of Corrupt Activities Act (South Africa, 2004) is in line with Pinkowski's (2014) proposal of 'prevention' as a key component of an anti-corruption strategy. One might argue, that even if the focus is on 'prevention' and not criminal investigation as Pinkowski (2014) states, the problem of non-compliance with such control measures to 'prevent' corrupt activities and malpractice still remain a major challenge.

It is worth mentioning that in terms of creating 'awareness' as Pinkowski (2014) indicated, a comprehensive awareness campaign was conducted in September 2014 by the KwaZulu-Natal Provincial Government known as the 'I do Right Campaign' (Anon, 2004) The intention of the KwaZulu-Natal Provincial Government was to create and enhance the awareness of corruption and the duty of all South Africans to uphold integrity and report malpractice when it surfaces. This campaign was undertaken following reports that since 2010, approximately 1 300 government officials have been arrested for corruption, with only half of them having been successfully convicted. In this regard, it was reported that the Provincial Agriculture Department is set to release



a forensic investigation over missing funds amounting to close to R1 billion (Anon, 2004).

Another organisation which aims to actively address corruption in South Africa is the Council for the Advancement of the Constitution (CASAC). In 2011, CASAC launched a notable anti-corruption campaign known as the Red Card Corruption Pledge to highlight the notion that corruption affects everybody and degrades society as a whole and encouraged fellow South Africans to stand up against it (CASAC, 2014).

#### **8.2.4 Inadequate emphasis on sanctions relating to corrupt activities and the existence of soft penalties for perpetrators**

In terms of this theme, analysis of the various codes of conduct for public officials and relevant legislation pertaining to the cases focused on has revealed that although these external measures exist, there is little emphasis on sanctions or the impact of such sanctions. Where sanctions do exist, they are deemed too soft or disproportionate to the act of corruption or ethical transgression.

The Code of Conduct for the Public Service lacks detailed explanation of sanctions applicable in the event of transgression. The recent Code of Ethical Conduct and Disclosures of Members' Interests for Permanent Assembly and Council Members (South Africa, 2014), speaks of sanctions in the event of a transgression of the code. However, these penalties appear too soft and disproportionate to the heinous acts of corruption and unethicity.

In terms of Section 10.7.7 of the Code of Ethical Conduct and Disclosures of Members' Interests for Permanent Assembly and Council Members (2014:33), penalties are listed as follows in respect of a member failing to disclose interests or wilfully or grossly negligently providing incorrect or misleading details about registerable interests:

- A reprimand in the House;
- A fine not exceeding the value of 30 days' salary;
- A reduction of salary or allowances for a period of not exceeding 30 days; and
- The suspension of a Member's right to a seat in Parliamentary debates not exceeding 30 days.

The Code further lists the following penalty in respect of contravention of Section 4, which relates to standards of ethical conduct, and Section 5, which relates to the prohibition of the acceptance of gifts, benefits or rewards from any person or body:

- The committee shall not impose any of the sanctions above, but shall recommend 'any greater sanction it deems appropriate to the House and the House shall either approve the recommended sanction or ask the committee to reconsider the sanction' (South Africa, 2014:33).

The above Code (South Africa, 2014) clearly displays the disproportion between the unethical act of corruption and the sanction applied. A reprimand, imposition of a fine, reduction in salary or allowances or suspension, all of which should not exceed 30 days, is too light a sanction for the perpetrator, amounting to a mere slap on the wrist. Such contravention of a code of conduct should warrant disciplinary action and, pending the outcome of a disciplinary committee, the member should be suspended. A transgression of any code of conduct or code of ethics should warrant disciplinary action. The precise intention of the legislature with the Prevention and Combating of Corrupt Activities Act (PCCA) is to strengthen measures to prevent and combat corrupt activities and, indeed, to establish the very crime of corruption. The mild sanctions mentioned above in terms of the Code (South Africa, 2014) the House is in effect acting against this legislative intention.

Furthermore, the Guide to the Prevention and Combating of Corrupt Activities Act (PCCA) (South Africa, National Anti-Corruption Forum (NACF), 2004) states that, it was written to bring our laws in line with the United Nations (UN) Convention Against Corruption and the African Union (AU) Convention on Preventing and Combating Corruption. One of the requirements imposed upon a signatory like South Africa is not only to take steps to prevent corruption but also to impose strict penalties (Guide to the Prevention and Combating of Corrupt Activities Act (PCCA) (South Africa, 2004). Yet the 2014 Code (referred to above) fails to comply with these requirements by imposing mild sanctions for corrupt activities and malpractice.

#### **8.2.5 Absence of incentives may lead to unethicity and malpractice within the public service**

Since 1994 and the enactment of the South African Constitution government institutions and organisations have been focusing on improved service delivery and

matters relating to good governance. The notions of transparency, accountability and value for money are the features expected from the newfound democracy. The concerns of public officials across government departments regarding remuneration remain on the 'back burner'. In a study conducted by Masiapata (2007:52), the author observes that poor salaries and the absence of reward policies could lead to a negative work ethic among police officers. By implication, the absence of reward policies could be extended to all public officials, thus causing them to engage in corrupt activities. Such corrupt activities include grand fraud, as in the case of Selebi and the Arms deal, 'bribery, kickbacks, circumventing laws and regulations to aggrandise personal advantage by using government funds and time for private gain' (Masiapata, 2007:52). Masiapata (2007:52) further argues that uncompetitive salaries for members of the SAPS have the potential to lead them to partake in unconventional means of supplementing their income in order to pay the bills.

As Masiapata (2007:52) correctly points out police officers, and in the context of the current study, high ranking police officers such as Selebi and Cele, enjoy high level status which is not commensurate with their salaries. Further, the monetary incentive structure plays a big role in determining the police officials' openness to taking bribes (Masiapata, 2007). In the context of the current study, Selebi, it was seen, transgressed the SAPS Code of Conduct (South Africa, 1997) by obtaining undue benefits and accepting gifts and money for personal gain from Glen Agliotti.

Mehen (2013:52) reflects Masiapata's view to an extent in a study revealing a positive correlation between income inequality and corruption. It may be added that public officials should be rewarded for efficiency and professionalism in carrying out their duties and obligations. Non-compliance should not be the only aspect highlighted but recognition and acknowledgement of public officials who steer clear of contravention and digression from legal prescripts.

#### **8.2.6 Investigative mechanisms have been subject to political manipulation**

The Public Service Commission (2001) identifies a number of government oversight bodies as primary offices tasked with investigating corruption and maladministration within the public service. These are:

- the National Prosecuting Authority (NPA);
- the Independent Complaints Directorate (ICD), renamed as the Independent Police Investigative Directorate (IPID);<sup>9</sup>
- Special Investigating Unit (SIU);
- Public Protector (PP);
- Auditor-General (AG);
- South African Police Service Anti-Corruption Unit;
- South African Police Service Commercial Crime Unit;
- Directorate of Special Operations;<sup>10</sup>
- Asset Forfeiture Unit (a specialised unit under the NPA); and
- Public Service Commission.

As previously indicated, the respective offices of the Public Protector and the Auditor-General are constitutionally created institutions, tasked with promoting constitutional democracy in terms of Section 181 and Section 182 of the Constitution (1996). These institutions are commonly referred to as Chapter 9 institutions. In terms of Section 181 these institutions are independent and only subject to the Constitution and the law. In carrying out their functions, they are directed to do so in an impartial manner, and without fear, favour or prejudice. It is worth noting that Section 181(4) specifically states that no person or organ of state may interfere with the functioning of these institutions (Constitution, 1996).

In the context of the current study, particularly the Arms Deal case revealed investigative mechanisms having been subjected to political manipulation. As Professor Woods (personal communication in Nanabhay & Ballard, 2011:19), the chairperson of SCOPA at the time, indicated that the then Auditor-General had failed to carry out its function 'without fear favour or prejudice'. In fact, the Auditor-General was criticised for not being prepared to conduct a special audit relating to the deal. A shocking allegation in this regard surfaced when it was revealed that the report of the

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9. The IPID is a creation of statute, namely, the Independent Police Investigative Directorate Act of 2011. This creation is in keeping with Section 206(6) of the Constitution (1996), which calls for an impartial police complaints body to be established by legislation.

10. The Directorate of Special Operations DSO (SCORPIONS) was disbanded in 2008 and replaced with the Directorate for Priority Crime Investigation (HAWKS), as per the South African Police Service Amendment Bill (2008). It should be noted that this occurred despite the findings of the Khampepe Commission mandated to analyse the role of the DSO (South Africa. Office of the Presidency. Khampepe Commission, 2006:8; Montesh & Berning, 2012:3) that it found no constitutional reason for disbanding the DSO.

then Auditor-General, Shauket Fakie, on the Arms Deal had been edited by Cabinet (Holden, 2008:64-65). Even at the present moment, there is no *kalla facta* as to who effected such changes to the report. Andrew Feinstein, who was at the time, the head of the ANC Study Group, which formed the ANC component that served on SCOPA (Holden, 2008:43), noted that it was 'widely alleged that the instructions given were written by the Auditor-General himself during meetings with the executive' (Holden, 2008:65).

In the case of Selebi, the National Commissioner of Police, as the head of the SAPS, he was seen to have violated the Section 205 of the Constitution (1996) by failing to uphold and enforce the law.

In the case of Cele, the findings and recommendations by the Public Protector were seen to not precisely being adhered to. The latter had recommended that the Minister of Police take 'appropriate action' as soon as possible against all SAPS officials who had contravened the relevant laws and policies relating to procurement processes in South Africa (South Africa. Office of the Public Protector, 2011:131). Subsequently, the Moloi Board of Inquiry established by the President reportedly found, inter alia, that Cele was 'guilty of gross misconduct regarding the procurement of leased premises, and caused procurement processes of the SAPS supply chain management to be manipulated by Roux Shabangu' (South Africa. Office of the Presidency. Moloi Board of Inquiry, 2011).

A senior researcher in the Criminal Justice Programme at the Centre for the Study of Violence and Reconciliation (CSVR), David Bruce (2008:14) agrees with the theme presented in this section that investigative mechanisms have been subject to political manipulation. He proposes that if the ANC wishes to prevent such manipulation, it should motivate and urge government to set guidelines regulating and managing the relationships between senior political officials and the heads of the investigative organisations (Bruce, 2008:15). The author interestingly points out that the demise of the Scorpions and centralisation of all investigative powers under the SAPS will not reduce the risk of this type of abuse, but rather enhance it (Bruce, 2008:15).

It is important to point out that the powers of the Public Protector were specifically clarified and emphasised in a recent case heard by the Supreme Court of Appeal

(South Africa. (SCA)[2011]ZASCA 108;422/10, 2011). The court confirmed that the Constitution (1996) upon which the nation is founded is a solemn promise of a representative and accountable government functioning within the framework of the Chapter 9 institutions; most notably, in the context of the current study, the institution of the Public Protector (South Africa. (SCA)[2011]ZASCA 108;422/10, 2011:4). The court further stated that the Public Protector is an integral part of a democratic dispensation and provides 'a last defence against bureaucratic oppression, corruption and malfeasance in public office that is capable of insidiously destroying the nation' (South Africa. (SCA)[2011]ZASCA 108;422/10, 2011:5). The court confirmed that if the institution of the Public Protector fails in carrying out its Constitutional mandate, or 'finds itself undermined, the nation loses an indispensable constitutional guarantee' (South Africa. (SCA)[2011]ZASCA 108;422/10, 2011:5).

As previously pointed out, the Public Protector, as with the other Chapter 9 institutions, should carry out its mandate without 'fear favour or prejudice' (Constitution, 1996, Section 182). The court stated that Chapter 9 institutions fulfilling their constitutional mandate 'will call for courage at times, but it will always call for vigilance and conviction of purpose' (South Africa. (SCA)[2011]ZASCA 108;422/10, 2011:5). The Supreme Court of Appeal not only clarified the constitutional and other legislative powers bestowed upon the office of the public protector but also the integral and significant role of this institution in ensuring good governance and organisational integrity within the public service. Allowing political manipulation of an investigative mechanism such as the Public Protector, it ruled, will without doubt defeat the purpose of the very existence of this Chapter 9 institution to fulfil its mandate without fear favour or prejudice.

### **8.2.7 Human nature and the theory of character-based ethics**

This theme relates to the basic challenge that human beings are faced with on a continuous basis, the internal moral compass. Since time immemorial, humankind has dealt with the internal matter or the moral compass, its members constantly having to make a choice between good and evil, right and wrong. This tells us that the external control measures put in place by governments and society will, at best, only remain guidelines. No matter how stringent, sanctions will not alter the fact of occurrence of the considerable battle against the self or one's human nature.

The age old adage by Lord Acton dated 5 April 1887 (in political circulation in varying forms from the nineteenth century onwards (perhaps earlier in other words entirely), *power tends to corrupt, absolute power corrupts absolutely*-proposes power and corruption as intertwined, with the acquisition of power ultimately and inevitably leading to corruption. As long as governments exist, positions of power exist, the marriage between these two, it must therefore be assumed, will inevitably lead to corruption amongst those in positions of power. To continue the metaphor, it was Thomas Paine, one of the architects of the United States Constitution, in the eighteenth century, who because of the intertwined nature of power and corruption, noted that *government is a necessary evil*.

Character-based ethical theory may be linked to this theme. According to Reynolds and Quinn (in Sing, 2009:54-72), the basic principle is that the character of a person determines his or her actions. In other words, all human beings are born with a conscience, with conscience the tool which enables a person to either perform a good deed or a bad one. In Sing's (2009:54-72) view, it is the existence of virtue that motivates a human being to perform a good deed; vices, on the other hand, steer the human towards performing a bad, immoral or unethical deed. Virtue may therefore be described as a positive character trait, which can only be strengthened by reinforcement and reminders (Sing, 2009:54-72).

Sing (2009:54-72) further agrees with the view held by Aristotle that in order for a human being to be of moral character, he or she is required to be constantly aware and reminded of the interplay between virtue and vice in influencing actions. From such arguments, it may be concluded that the achievement of moral character may be perceived as a journey, one that involves reinforcement throughout the journey of one's life with every action that is taken and deed that is performed. In this journey of moral rectitude vigilance must never be allowed to slip and each occasion for action involves a thinking through and reinforcement of positive character traits.

Character-based theory, as applied to the three case studies in this thesis, that the character of the respective individuals concerned misguided their actions. In the words of Sing (2009:54-72): 'it is the existence of vices' that may seem to have contributed to steering the individuals concerned to engage in immoral and unethical conduct. It is suggested that if these individuals were constantly reminded of the rules, codes and

laws applicable to the public service, their moral character would have been strengthened, keeping their vices at bay. In other words, increased and adequate training, increased awareness of ethical conduct and the importance thereof particularly in the public sector, together with the implication of non-compliance therewith would have guided them toward making morally acceptable decisions.

Spitzer (in Sing, 2009:54-72) claims, that ethicality in the public sector will be promoted if public managers are made 'fiercely' aware of their own vices and virtues. Indeed, in keeping with the findings above, it is proffered that awareness of both the 'virtues' and 'vices' as well as the awareness of the laws and codes of conduct applicable to the public service will substantially guide and direct a public official towards the making of ethical decisions. Thus both internal and external reflection and awareness should form a crucial and comprehensive complement in the training of public officials.

It should also be noted that this theme not only relates to character in terms of morality but also in terms of professionalism, and professionalism includes the notion of efficiency.

### **8.2.8 Inadequate efforts by government to highlight the prevalence of the scourge of corruption and maladministration**

In a modern democracy, civil society is viewed as the watchdog, and in order to ensure the stability of a democracy two-way feedback is of paramount importance. It is evident from all the case studies discussed that it is necessary for government to partner with civil society in dealing with corruption and maladministration. We should strive towards developing a democratic government that is interactive and values public participation, a democratic government that is open to criticism, and thereby in keeping with the basic tenets of a constitutional democracy, namely, openness, transparency and accountability. The Public Service Commission, stated in a report on corruption and its related risks, that preventative actions relating to corruption, should focus on increased transparency of decision-making procedures and public participation (South Africa. Public Service Commission, 2015). The notion of public participation has also been highlighted by the Public Protector, Advocate Thuli Madonsela, in her address at a government leadership summit advised the following: 'We need to recognise and enhance the culture of being a servant of citizens and not a servant of government as a prerequisite of the public service delivery programmes' (Quantal, 2012).



### **8.3 Conclusion to Chapter**

The eight themes discussed above and common to all three case studies presented in the current study provide many lessons to improve the training, conduct of and support for the legislative and constitutional requirements circumscribing the lives of public officials in their day to day work activities. If anything, these cases should be looked at as valuable in the opportunity they provide the country and state to note and fix the gaps in its oversight and control measures in the public service. It is not just the technical aspects of this task that these cases, and indeed the widespread corruption presently afflicting the South African democracy, but the more bracing one of teaching and understanding that human character and nature and responding to deal with it constructively to develop character on the part of public officials is part of their job description in essence and a task facing the civil service at present. In the next and final chapter some valuable recommendations towards achieving some, if not all, of the above will be made.

## **CHAPTER NINE**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **9.1 Introduction**

According to Bless et al in a paper published in 2006 (cited in Du Plooy-Cilliers et al, 2014: 278), the findings of any research is only as valuable as its possibility to add value or improve a particular situation. Furthermore, the purpose of including recommendations at the end of a research investigation is threefold, namely, to emphasise the authenticity of the research finding, to determine new areas of research flowing from the existing study, and to pinpoint gaps in the knowledge area in question (Du Plooy-Cilliers et al, 2014:278). Bless et al (cited in Du Plooy-Cilliers et al, 2014:278) also emphasise that recommendations flow from determining whether a research question has been answered or not.

#### **9.2 Answering the Research Question**

In the current study, the fundamental research question posed is: Why is there non-compliance with external control measures within the public sector? In proposing recommendations to this question, the study will draw on the analysis and findings of the previous chapters. It is submitted that the stated research question has been profoundly answered. In terms of the prevalence of the themes, as highlighted in the analysis and findings in Chapter Eight, each theme may be applied to all three case studies, namely, the Arms Deal, Jackie Selebi and Bheki Cele.

It is further submitted that cognizance has been taken of the External Research Validation Report provided by the Office of the Public Protector (see Appendix A in this thesis) in respect of this thesis as well as responses to the relevant recommendations included in that Report (see Appendix B in this thesis), which have been implemented in the various chapters of the current study.

#### **9.3 Recommendations of the Current Study**

In keeping with the purpose of the study, which is to formulate recommendations to improve compliance within the public sector, the following recommendations are offered :

- That more stringent legislative sanctions be enforced regarding unethicity and malpractice in the public service; and

- That all institutions tasked with investigating maladministration and corruption in the public sector, in particular, the Office of the Public Protector, be granted increased protection and support for them to carry out their functions. The notion of implementing the constitutional mandate of Chapter 9 institutions 'without fear, favour or prejudice', should be reinforced and intensified. It is suggested that such reinforcement should take the form of stringent legislation, which specify in detail what is meant by the term. Such reinforcement will, at the very least, create a barrier against the possibility of political manipulation in high profile cases.
- That a deeper understanding of what constitutes ethicality as opposed to unethicity, maladministration, efficiency, professionalism and leadership should be incorporated into the training of public officials.

Finally, it is suggested that the findings reveal the possibility for further studies in the field. It is proposed that further research be conducted in order to develop a framework within which to ensure compliance with external control measures within the public sector.

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**APPENDIX A**  
**EXTERNAL RESEARCH VALIDATION REPORT**



































## **APPENDIX B**

### **RESPONSES TO COMMENTS AND RECOMMENDATIONS MADE BY THE PUBLIC PROTECTOR IN THE EXTERNAL RESEARCH VALIDATION REPORT**

## **RESPONSE TO PUBLIC PROTECTOR'S REPORT DATED 7 JULY 2015 IN RESPECT OF MASTERS THESIS**

It should be noted that the thesis was submitted in draft form to the Office of the Public Protector prior to a copy edit being done, as per the recommendation of the supervisor.

The response adopted the numbering that of the Public Protector's External Research Validation Report (see Appendix A of this thesis) for ease of reference.

### **4.1 General Comments**

#### **4.1.1 The Public Protector in her report mentioned the lack of language editing.**

The thesis was submitted for editing post the Public Protector's External Research Validation Report, as recommended by the supervisor; hence, the Public Protector had considered a draft version of the thesis. The thesis has subsequently been thoroughly copy edited for language and style.

#### **4.1.2 The Public Protector in her report noted the selection of literature in respect of thesis.**

This has now been covered in Chapter One in the section on a Preliminary literature review and noted there as such.

#### **4.1.3.1(a) The Public Protector in her report noted the use of the tabloid press in the thesis.**

The tabloid press was used to sketch the context of the cases and to describe the views of the public. Wikipedia as a reference to consequentialism was removed as the principal source and replaced with GE Moore's *Principia Ethica*, accessed via Encyclopaedia Britannica (<http://global.britannica.com>); accessed on 27 August 2015).

**c) The Public Protector in her report queried the use of a quote on the Selebi case from a journal article.**

The quote in question emphasises the aptness and pertinence behind the reasons for the judge's decision to find Selebi guilty. The words used by Judge Joffe were strong and of considerable impact. For example, he repeats the words 'you were an embarrassment a total of five times in this quote alone, emphasizing his anger and disappointment, firstly, at the miscreant, Selebi, and secondly, because of the resultant mistrust created by Selebi's misconduct among members of the police force and society at large. The quote aptly conveys the judge's view regarding corruption and maladministration, which is shared by the current writer.

**d) The Public Protector in her report noted and queried the use of tabloid press articles when discussing the Cele case study.**

The research makes specific mention on page 99 of the draft thesis (page 97 in current version) that the Report of the Public Protector (South Africa. Office of the Public Protector, 2011) is being utilised to a large extent. Reference to this Report has indeed been made and is evident from page's 100–110 of the draft thesis (pages 98-111 in the current version).

**4.2.1.1 The Public Protector in her report noted that reference was not made to certain legislation.**

The research does refer to the Preferential Procurement Policy Framework Act, No. 2 of 2000 and the Prevention and Combating of Corrupt Activities Act, No.12 of 2004. The writer of the current study does not deem the Promotion of Access to Information Act, No. 2 of 2000; the Promotion of Administrative Justice Act, No, 3 of 2000, and the Protected Disclosures Act, No 26 of 2000 relevant within the context of the cases and research study.

**4.2.1.2 The Public Protector in her report noted that chapter 9 institutions were referred to as investigative bodies in the study.**

Chapter 9 institutions have not been classified as investigative bodies in the current study. The thesis thus only refers to Chapter 9 'institutions'.

**4.2.1.3 The Public Protector in her report noted the use of the concepts**



of 'public service'; 'public sector' and 'public administration'.

These concepts are used interchangeably.

**4.2.1.3(c)(ii) The Public Protector in her report pointed out the mandate of the Public Service Commission (PSC) in respect of oversight.**

This point has been included as a footnote in the appropriate place in the thesis.

**4.2.1.3(c)(iii) The Public Protector in her report pointed out that the Executive Members' Ethics Act No.82 of 1998 should be cited.**

This reference has been cited to confirm the statement made in the thesis.

**4.2.2.1 The Public Protector in her report queries the use of a previous conference paper co-written by the writer of the current study.**

The supervisor of the current study deems that it is acceptable to make use of the conference paper in question, the website for which has been included in the list of references.

**4.2.2.2 The Public Protector in her report noted the absence of a source to substantiate a point relating to SCOPA.**

Corrections in this regard have been effected in the thesis.

**4.2.2.3 The Public Protector in her report noted the reliance on Wrigley S. (2003) and Basson A. (2010) in respect of the Arms Deal and Selebi case studies respectively.**

The following have been cross-checked:

(a) information from Wrigley S. (2003) on the Arms Deal with Corruption Watch, *Ethics Monitor South Africa* and Paul Holden's (2008): *The Arms Deal in your pocket*, and

(b) information from Basson A. (2010) on Selebi with Corruption Watch, various government websites, for example, the SAPS website; Basson A. (2010) as a

reference was mainly utilized for background and identification of factual aspects of Selebi as a person. The trial court case of Selebi was referred to extensively in the study (S v Selebi 25/2009; ZAGPJHC 58; SAFFLI 3 August 2010).

**4.2.3 The Public Protector in her report noted the use of the word ‘recommendations’ in the study with reference to the Cele case study as opposed to ‘directives’ issued.**

The view of the Public Protector in this regard is included in the thesis.

**4.2.4 The Public Protector in her report noted the typo in the text relating to the quote by Lord Acton.**

The spelling in this regard was corrected during the copy editing process.

**4.3.1.1 The Public Protector in her report noted the absence of a focus area.**

This aspect was included in the delineation, that is, the primary focus area of the current research study which is the national sphere of the public sector. The purpose statement and research question in Chapter One provide a clear focus.

**4.3.1.2 The Public Protector in her report pointed out that it was not clear why the case studies discussed were selected for the study.**

The cases were selected because of immense public interest in them, the fact that high profile public figures were or are involved and because all are all sufficiently substantive to evaluate as a unit of analysis.

**4.3.2 The Public Protector in her report queried the understanding of or link between ethics and corruption in the current study.**

The views of the Public Protector in this regard are acknowledged, are identified in the research findings and reflected both in Chapter 6 and Chapter 7.

**4.3.3.1 The Public Protector in her report pointed out the importance of emphasising the analysis of the case studies.**

The analysis focuses on the emergent themes and sub-themes from the analysis of the cases. Refer to page 115 of the draft thesis (page 114 in the current version) in this regard.

**4.3.3.2(a) The Public Protector in her report noted the application of *all* of the themes to the case studies in question.**

The author of the current study concurs that the two themes mentioned specifically by the Public Protector in this regard may perhaps not be directly relevant; however, the remaining themes are fully applicable.

**4.3.3.2(b) The Public Protector in her report noted the application of the themes to the case studies in question.**

The author of the current study concurs that the two themes mentioned themes are perhaps not relevant; however, the remaining themes are applicable.

**4.3.3.2(c) The Public Protector in her report noted the point made regarding the current state of the Arms Deal case.**

The writer of the current study concurs; it is indicated in the study that the Seriti Commission's final report is due at the end December 2015. The statement has thus been withdrawn.

**4.3.3.2(c) The Public Protector in her report queried the accuracy**

**of a statement made by the DPSA.**

The writer of the current study concurs; the wording has been corrected.

**4.3.3.2(d)The Public Protector in her report questioned reliance on Professor Gavin Woods' evidence in the Arms Deal.**

Professor Gavin Woods was the Chairperson of SCOPA when the Arms Deal became public knowledge and is therefore regarded as a credible source.

**4.3.3.2(e)The Public Protector in her report recommended that mention should be made of PALAMA.**

The PALAMA (Public Administration and Leadership Management Academy) has been included in chapter 7.

**4.3.3.2(f)The Public Protector in her report expressed concern regarding sanctions applied in respect of unethical conduct and/or corruption.**

The conclusion is confirmed in the penultimate paragraph on page 124 of the draft thesis (paragraph 2 page 124 in current version).

**4.3.3.2(g)The Public Protector in her report expressed concern regarding the link being made in the thesis between unethical conduct and remuneration.**

Conclusions regarding the link between unethical conduct and remuneration is based on a study conducted by Masiapata (2007); refer to page 125 of the draft thesis (page 125 in current version).

**4.3.3.2(h) The Public Protector in her report questioned the use of evidence provided by Professor Gavin Woods.**

The wording in the thesis has been corrected. It is submitted that the evidence of the head of the Steering Committee on Public Accounts, Professor Woods,

is deemed credible as the evidence he refers to was reiterated by Holden (2008) in *The Arms Deal in your Pocket*. Refer to Chapter Seven, subsection 7.7.

**4.3.3.2(i)The Public Protector in her report expressed some concern regarding application of character-based theory of ethics.**

The justification for applying character-based theory is explained in Chapter Seven.

**4.4.4The Public Protector in her report expressed concern regarding application of the findings to the public service.**

The findings are unique to the case study under analysis, with no generalisations being made.

**4.5.3The Public Protector in her report questioned the use of evidence presented by Professor Gavin Woods.**

Professor Gavin Woods as a credible source in the current study is justified. Refer to the earlier response on this matter.