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LEGAL OPINION
[Confidential]

TO: Mr L. Landers, MP
Chairperson: Ad Hoc Committee established to consider and report
on Public Protector Report No. 13 of 2013/2014

COPY: Secretary to Parliament

FROM: Constitutional and Legal Services Office
(Vuyokazi Ngcobozi & Ntuthuzelo Vanara)

DATE: 23 October 2013

REF NO: 231/2013

SUBJECT: Legal opinion on the request of the Public Protector to the National
Assembly

1. Our Office received a request for a legal opinion from Mr Landers, the Chairperson of Ad Hoc Committee established to consider and report on the recommendations contained in the Public Protector Report No 13 of 2013/2014 (hereinafter referred to as "the Ad Hoc Committee"), on the request of the Public Protector to the National Assembly.

2. We were requested to advise specifically on the following legal questions:

- (a) Whether, considering the provisions of section 20(7) of the Electoral Commission Act 1996, (Act No.51 of 1996)¹ (hereinafter referred to as "the Electoral Act"), the Electoral Court has jurisdiction to consider the Public Protector Report since the current Chairperson of the Electoral

¹ The Electoral Court may investigate any allegation of misconduct, incapacity or incompetence by a member of the Commission and make any recommendation to a committee of the National Assembly referred to in section 7(3)(a)(ii)

Commission (Adv Tlakula) was not a Commissioner at the time of the incident under investigation;

- (b) Whether the Ad Hoc Committee is only authorised to implement the recommendations of the Public Protector and whether the Ad Hoc Committee has the mandate to question the findings of the report;
- (c) What is the responsibility of the Ad Hoc Committee in relation to the resolution adopted by the National Assembly in point 10(3) of the minutes of proceedings of 11 September 2013; and
- (d) What is the responsibility of the Ad Hoc Committee in relation to the Electoral Act and the Public Protector Act 1994, (Act No.23 of 1994) (hereinafter referred to as the "Public Protector Act")

3. We have been provided with the following documents which we attach as Annexure A, B, C, D and E, respectively.

- (a) Public Protector Report number 13 of 2013/2014 dated August 2013 (hereinafter referred to as the "Public Protector's report");
- (b) Letter dated 28 August 2013 from the Public Protector to the Speaker of the National Assembly;
- (c) The Order Paper containing the resolution of the National Assembly which establishes the Ad Hoc Committee and sets out its mandate;
- (d) Letter dated 9 September 2013 from the Electoral Commission to the Speaker of the National Assembly; and
- (e) Letter dated 2 October 2013 from the Public Protector to Mr Landers: Chairperson of the Ad Hoc Committee.

4. Prior to answering the legal questions posed we consider it appropriate to contextualise the legal opinion, by first giving our understanding of some of the documentation specified in paragraph 3 above. We further identify the Public Protector's request to the National Assembly, advise the Ad Hoc Committee on the factors that it must consider in applying itself to the request of the Public Protector and lastly advise on the four specific legal questions posed by the Ad Hoc Committee.

Public Protector Letter dated 28 August 2013

5. In paragraph 1 of her letter dated 28 August 2013 to the Speaker of the National Assembly (the Speaker), the Public Protector attaches her report. In paragraph 2 of the above mentioned letter, the Public Protector advises the Speaker that her report is provided in terms of section 8(3) of the Public Protector Act, which provides as follows:

“The findings of an investigation by the Public Protector shall, when he or she deems it fit but as soon as possible, be made available to the complainant and to any person implicated thereby.”

6. In terms of section 8(3) of the Public Protector Act, the Public Protector must, if he/she deems it fit to do so and as soon as possible, submit his/her report to both the complainant and the implicated person(s). In the instant case neither the Speaker nor the National Assembly were complainants nor implicated in the report. Therefore, section 8(3) finds no application in respect of the Speaker or the Speaker the National Assembly.
7. In paragraph 3 of her letter dated 28 August 2013, the Public Protector states that the conduct of the Chairperson of the Electoral Commission post her report raises serious concerns. The alleged conduct complained of relates to “the widely spread submissions made by Adv Tlakula, Chairperson of the Electoral Commission in the media, in which she challenges” the Public Protector’s investigation on grounds of both procedural and substantive fairness.
8. In paragraph 4 of her letter dated 28 August 2013, the Public Protector requests the Speaker to intervene in terms of section 2 (b) (iii) of the Public Protector Act, by considering to refer “the matter” to the Chairperson of the Electoral Commission for the latter to consider investigating the matter in terms of section 20 (7) of the Electoral Act. Copy of section 20(7) of the Electoral Act is attached for ease of reference.
9. We consider it necessary to point out that there is no to section 2(b) (iii) in the Public Protector Act. However, there is a section 2(b) in the Public Protector Act, although it deals with an unrelated subject matter to the legal issues under consideration. We submit that this was an erroneous reference and that the

Public Protector intended to refer to section 8(2)(b)(iii) of the Public Protector Act, which allows the Public Protector to refer her reports to the National Assembly in the event that he or she considers that the report requires the urgent attention of or intervention by the National Assembly.

10. In our view, this letter, the Public Protector requested the Speaker to intervene by considering referring what the Public Protector perceived as a conduct "raising serious concerns" namely, the alleged conduct of the Chairperson of the Electoral Commission post the Public Protector report.

11. We refrain from expressing a view on whether the conduct complained of *prima facie* constitutes misconduct for two reasons. Firstly, we have not been asked to advise on this matter. Secondly, we do not have all the relevant information at our disposal to formulate a legal view on the matter.

Parts of the Public Protector's Report that are relevant to the National Assembly

12. There are two sections in the Public Protector report that relate to the National Assembly. The first is paragraph 11.1 which reads as follows:

"The Speaker of Parliament, in consultation with the Electoral Commission to the exclusion of the Chairperson, consider whether action should be taken against Adv. Tlakula for her role in the procurement of the Riverside Office Park building to accommodate the Head Offices of the Commission in light of the undisclosed and unmanaged conflict of interest and her contravention of the procurement laws and prescripts dealt with in this report and accordingly, advise the President of the appropriate action to take,"

13. The second is paragraph 12.1 which reads as follows:

"The Secretary of Parliament to advise the Public Protector of action taken by the Speaker within 60 days of receipt of this report."

14. The Speaker of the National Assembly (and not "of Parliament" as suggested by the Public Protector) is requested to consider, in consultation with the Electoral

Commission to the exclusion of its Chairperson, whether disciplinary action should be taken against the Chairperson of the Electoral Commission for the latter's role "in the procurement of the Riverside Office Park Building to accommodate the Head Offices of the Commission in light of the undisclosed and unmanaged conflict of interest and her contravention of the procurement laws and prescripts dealt with" in the Public Protector's report. Further, to advise the President of the appropriate action to take.

15. The Electoral Commission in its letter dated 9 September 2013 to the Speaker advised as follows:

"3. Our understanding is that the Electoral Commission is not empowered to deal with this matter insofar as it relates to one of the Commissioners. Accordingly, we will wait for the Honourable Speaker to advise us of the advice given to the President on the appropriate action considered to be taken".

16. In our view the National Assembly is not requested to consider referring the Public Protector report to the Electoral Court but rather to deal with it in terms of paragraph 11.1 of the report. The only matter the National Assembly is requested to consider referring to the Electoral Court is the conduct of the Chairperson of the Electoral Court post the Public Protector report. However, the Public Protector holds a different view, as is apparent from her letter dated 2 October 2013 to the Chairperson of the Ad Hoc Committee. As the Public Protector is the author of the letters concerned it is not our intention to challenge what she says she meant in her earlier letter.

House Resolution

17. The Order Paper dated 11 September 2012 which contains the National Assembly resolution is attached for ease of reference. In paragraph 1(2) of the Order Paper the House "further notes that in correspondence to the Speaker, the Public Protector requested that consideration be given to referring the report to the Electoral Court to allow it to investigate the matter in terms of section 20(7) of the Electoral Commission Act, 1996 (Act No. 51 of 1996)"

18. As advised above, it is not the Public Protector report that the National Assembly is requested to consider referring to the Electoral Court, but the alleged conduct of the Chairperson of the Electoral Commission after the report was released. In paragraph 1(3) of the Order Paper, the National Assembly established an Ad Hoc Committee to consider and report on the recommendation contained in the Public Protector report in so far as it relates to the mandate of the National Assembly.

Public Protector Letter dated 2 October 2013

19. On 30 September 2013, Mr Landers, the Chairperson of the Ad Hoc Committee requested clarity on paragraph 4 of the Public Protector's letter dated 28 August 2013. Copy of said letter is attached for ease of reference. In the second paragraph of the letter dated 2 October 2013, which letter is in response to a letter dated 30 September 2013 from Mr Landers, the Public Protector corrects the incorrect reference in her earlier letter dated 28 August 2013 to the Speaker. She makes it clear that her report was referred to the Speaker not in terms of section 2(b)(iii) of the Public Protector Act, but in terms of section 8(2)(b) (i) and (iii) of the Public Protector Act.

20. Section 8(2) of the Public Protector Act provides as follows:

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

- (i) he or she deems it necessary;
- (ii) ...
- (iii) it requires the urgent attention of, or an intervention by, the National Assembly."

21. As is evident from section 8(2) (b) of the Public Protector Act, the Public Protector deemed it necessary to refer her report to the National Assembly. Further, that she considered her report as requiring the urgent attention of or intervention of the National Assembly. In our view the National Assembly's attention or intervention is in respect of paragraph 11.1 of the Public Protector's report.

22. The Public Protector in paragraph 3 of her letter dated 2 October 2013 further explains that it was never her intention to have her report tabled in Parliament. She merely referred the matter to the Speaker "to consider the report as both institutions of the Public Protector and the Electoral Commission report to the Speaker, administratively."
23. Paragraph 3 of the Public Protector's letter dated 2 October 2013 raises the question of whether the Public Protector's report is appropriately before the Ad Hoc Committee. In what follows we address this aspect of the Public Protector response for the sake of the completeness of our legal opinion.
24. Section 181(5) of the Constitution provides that "state institutions supporting constitutional democracy are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year." The office of the Public Protector and the Electoral Commission are amongst others, those state institutions supporting constitutional democracy.
25. Section 8(2)(b) of the Public Protector Act provides that the Public Protector must at any time, submit a report to the National Assembly on the findings of a particular investigation if the Public Protector deems it necessary, deems it in the public interest, the report requires the urgent attention of, or an intervention by the National Assembly, the Public Protector has been requested to submit a report to the National Assembly by the Speaker of National Assembly or has been requested to submit a report to the National Council of Provinces ("the NCOP") by the Chairperson of the NCOP.
26. In the instant case, the Public Protector in her letter dated 28 August 2013 and as amplified by her letter dated 2 October 2013, referred her report to the National Assembly on the basis that she deemed it necessary to do so. Further that the report required the urgent attention of, or intervention by the National Assembly.
27. In our view, whilst the Public Protector's letter dated 28 August 2013 was correctly addressed to the Speaker, the matter was correctly referred to the National Assembly for the consideration of the Public Protector's request by the

House. This must be so, as the Public Protector referred her report in terms of section 8(2) (b) (i) and (iii) of the Public Protector Act.

28. In terms of section 57 of the Constitution, the National Assembly determines and controls its internal arrangements, proceedings and procedures. When the Public Protector's report was tabled in the National Assembly, the House determined the manner in which it would deal with the Public Protector's request. It is apparent from the National Assembly's resolution that the House decided to establish the Ad Hoc Committee to deal with the Public Protector's request. Thus in our view the Public Protector's request is appropriately before the Ad Hoc Committee for consideration.

29. In paragraph 4 of her letter dated 2 October 2013, the Public Protector advises that in requesting the Speaker to consider referring her report to the Electoral Court, she was mindful that the issues investigated and reported on, occurred when the Chairperson of the Electoral Commission was still the Chief Electoral Officer of the Electoral Commission and not a Commissioner.

30. In paragraph 5 of the letter dated 2 October 2013, the Public Protector states that in view of the comments made by the Chairperson of the Electoral Commission in the media, she felt that "it would be fair for the Speaker to consider whether it would not be appropriate to refer the matter to another forum such as the Electoral Court with a view to affording it an opportunity to look into the matter as the court would perhaps come to a different conclusion". Notwithstanding our view that it was the alleged misconduct of the Chairperson of the Electoral Commission post the Public Protector's report that was to be referred to the Electoral Court, it is apparent that the Public Protector wants her report to be referred to the Electoral Court.

What is the Public Protector's request?

31. Having considered the documentation that we were furnished with, we now proceed to identify the Public Protector's request to the National Assembly. In her report the Public Protector requests the National Assembly to "consider whether action should be taken against Adv. Tlakula for her role in the procurement of the Riverside Office Park building to accommodate the Head Offices of the Commission in light of the undisclosed and unmanaged conflict of

interest and her contravention of the procurement laws and prescripts dealt with in the report and to advise the President of the appropriate action to take”.

32. In her letter dated 28 August 2013 and as amplified by her letter dated 2 October 2013, the Public Protector requests the National Assembly to consider referring her report to the Electoral Court for investigating the matter as the latter might come to a finding different that of the Public Protector.

33. The remedial action in paragraph 11.1 of the report presupposes that the report is final and ready for action, whilst the request to consider referring the report to the Electoral Court presupposes the Public Protector's report is not final as it is still to be reviewed or further investigated by the Electoral Court. Therefore, in our view paragraph 1(3) of the House resolution accurately reflects the mandate of the National Assembly in relation to the Public Protector's request.

34. It follows the two requests of the Public Protector to be considered by the Ad Hoc Committee are firstly, in consultation with the Electoral Commission to the exclusion of its Chairperson, to consider taking disciplinary action against Adv Tlakula for her role in the procurement of the Riverside Office Park Building. Secondly, consider referring the Public Protector report to the Electoral Commission the latter to view the Public Protector's report or investigate the Chairperson of the Electoral Commission.

35. However, the two requests are mutually exclusive of each other. In our view the Assembly could not do both. In what follows we advise the Ad Hoc Committee on how to consider the two requests from the Public Protector.

36. Section 181 of the Constitution provides that:

“[3] Other organs of State, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

“[4] No person or organ of state may interfere with the functioning of these institutions.”

37. The institutions referred to in section 181(3) and (4) of the Constitution are those state institutions supporting constitutional democracy, including the Public Protector and the Electoral Commission. In our view, it is in the context of

section 181(3) and (4) of the Constitution that the Public Protector's request must be considered by both the National Assembly and the Ad Hoc Committee.

38. The doctrine of legality requires that the assistance and protection offered to state institutions supporting constitutional democracy by other organs of state must be provided within the law. In other words whatever assistance or protection other organs of state offer to the state institutions supporting constitutional democracy must be authorised by law. In *Speaker of the National Assembly v De Lille and Others* 1999 (4) SA 863 (SCA) Mohammed CJ, as he then was, in examining the legal authority of the National Assembly to suspend its member said:

"[14] This enquiry must crucially rest on the Constitution of the Republic of South Africa...It is Supreme, not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however *bona fide* or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the courts. No Parliament, no official, and no institution is immune from Judicial scrutiny in such circumstances.

39. In *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247(CC) the Honourable Justice stated that:

"[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution

entrenches the principle of legality and provides the foundation for the control of public power.”

Referral of the Public Protector report to the Electoral Court

40. The request of the Public Protector for her report to be referred to the Electoral Court raises the following questions:

- (a) Does the Electoral Court have the competency to review the Public Protector report? and
- (b) Does the Assembly have the competency to refer the Public Protector report to the Electoral Court or another forum?

41. The Public Protector's reasons for requesting the National Assembly to refer her report to the Electoral Court are based on her belief that the latter might come to a different finding. Further, that the Chairperson of the Electoral Commission has challenged her investigation on grounds of both substantive and procedural fairness.

42. In terms of section 182 of the Public Protector Act, the Public Protector has the power to investigate allegations of misconduct, to report on such conduct and to take appropriate remedial action. In our view the Public Protector's findings are not subject to confirmation, ratification or approval by any other institution or organs of state, due to the independence of the office of the Public Protector.

43. Section 181(2) of the Constitution provides that state institutions supporting constitutional democracy are independent and subject only to the Constitution and the law. They must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

44. Section 1 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) defines "administrative action" to mean any decision taken or any failure to take a decision by, amongst others, a juristic person, other than an organ of state when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect.

45. In terms of section 5(1) of the Public Protector Act, the office of the Public Protector is a juristic person exercising a public power and performing a public function in terms of both the Constitution and the Public Protector Act. The Public Protector's finding at times adversely affects the rights of individuals and has legal consequences. Therefore, the Public Protector performs "administrative action" which can be reviewed by High Court in terms of section 6 of the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000) (hereinafter referred to as "PAJA").
46. Therefore any person who intends challenging the procedural or substantive fairness of the Public Protector's investigation has a right to have the report judicially reviewed by the High Court in terms of section 6(1) of PAJA. In our view the Electoral Court lacks the competency to review the Public Protector's report.
47. The powers, duties and functions of the Electoral Court are spelt out in section 20 of the Electoral Act. In our view the powers, duties and functions of the Electoral Court do not include the power to review the Public Protector's report or the competency to investigate misconduct of the Chief Electoral Officer.
48. In respect of the removal from Office of Commissioners, section 7 provides that:
- [3] A Commissioner may-
- (a) only be removed from office by the President-
 - (i) on the grounds of misconduct, incapacity or incompetence;
 - (ii) after a finding to that effect by a committee of the National Assembly upon the recommendation of the Electoral Court; and
 - (iii) the adoption by a majority of the members of that Assembly of a resolution, calling for that Commissioner's removal from office.
49. In our view section 7(3) (a) of the Electoral Act requires a person to be a Commissioner of the Electoral Commission at the time of the misconduct, or he or she suffers from the incapacity to perform his or her functions or be incompetent to perform his or her duties or functions as a Commissioner. The misconduct, incapacity or incompetence must have been investigated by the Electoral Court.
50. In the event the Electoral Court is of the view that the Commissioner has committed misconduct, or suffer from incapacity or performed his or her duties incompetently,

the Electoral Court must recommend to the National Assembly for a removal of Commissioner from office. After a finding of misconduct, incapacity or incompetence by a committee of the Assembly on the recommendation of Electoral Court, the Assembly may, by the adoption by the majority of the members of the Assembly, adopt a resolution calling for that Commissioner's removal from office. The National Assembly's resolution is then communicated to the President for a decision.

51. The process outlined in section 7(3) (a) of the Electoral Commission Act, is not applicable in the instant case. The current Chairperson of the Electoral Commission was the Chief Electoral Officer at the time she is found to have committed the misconduct.
52. The question then arises whether or not the Electoral Court has jurisdiction to investigate the alleged misconduct in terms of section 20(7) of the Electoral Act.
53. Section 6(1) of the Electoral Act provides that the Electoral Commission must consist of 5 members, one of whom must be a judge appointed by the President. Section 12 (1) of the Electoral Act provides that the Electoral Commission must appoint a suitable qualified and experienced person as the Chief Electoral Officer. In terms of section 12(2) of the Electoral Act the Chief Electoral Officer is the head of the administration and the accounting officer of the Electoral Commission.
54. It is apparent from the above that the Chief Electoral Officer is an employee of the Electoral Commission and not a Commissioner. In the event the Chief Electoral Officer commits misconduct it is the Electoral Commission that must take disciplinary action against the Chief Electoral Officer, not the Electoral Court. In our view such disciplinary action may only be instituted by the Electoral Commission, in the event the Chief Electoral Officer is still in the employment of the Electoral Commission.
55. In the instant case the then Chief Electoral Officer resigned and was appointed as the Chairperson of the Electoral Commission. Due to her resignation, the Electoral Commission lacks the jurisdiction to discipline the former Chief Electoral Officer as she is no longer an employee of the Electoral Commission. As advised the Electoral Commission does not consider itself to have the powers to discipline its Commissioner under the circumstances.
56. As the Chairperson of the Electoral Commission she is a Commissioner. However, she has not committed any misconduct in her capacity as such. In our view therefore,

the Electoral Court lacks jurisdiction to investigate the current Chairperson of the Electoral Commission in respect of misconduct committed at the time she was the Chief Electoral Officer and not a Commissioner.

Can the National Assembly or its Committee(s) refer the Public Protector report to Electoral Court?

57. In terms of section 181(3) of the Constitution, Parliament is obliged through legislative and other measures, to assist and protect the state institutions supporting constitutional democracy to ensure their independence, impartiality, dignity and effectiveness.
58. Section 181(4) of the Constitution, prohibits interference by anyone, including organs of state with the functioning of state institutions supporting constitutional democracy. The Principle of legality requires action in accordance with the law in referring the Public Protector's report to the Electoral Court as requested.
59. The legal question is whether the National Assembly or its committee has the legal power to refer a Public Protector's report to any other forum, particularly the Electoral Court. We have not found any law, nor have we been pointed to any law by the Public Protector as the basis for the National Assembly or its committees to refer the Public Protector's report to any forum, including the Electoral Court.
60. Section 181(4) of the Constitution prohibits individuals and organs of state from interfering with the functioning of state institutions supporting constitutional democracy. As the National Assembly is in our view not legally empowered to refer the Public Protector's report to other forum, including the Electoral Court, it is our view that referring the said report to the Electoral Court, would not only undermine the independence, dignity and the effectiveness of the office of the Public Protector. Such conduct would also offend the doctrine of legality and might expose the National Assembly to successful judicial challenges.
61. In our view, the National Assembly can assist the office of the Public Protector to ensure its independence, dignity and effectiveness, by advising the Public Protector that it is against referring her report to the Electoral Court for the following reasons:-

- (a) Public Protector reports are not subject to review by the Electoral Court;
- (b) Subjecting the Public Protector to other forums, including the Electoral Court, has the potential of compromising the independence, dignity and effectiveness of the office of the Public Protector ; and
- (c) Electoral Court has no jurisdiction to investigate the misconduct of Chief Electoral Officer. It has jurisdiction to investigate the misconduct of Commissioners of the Electoral Commission who commit misconduct whilst they are Commissioners; and
- (d) Any person aggrieved by the findings in the Public Protector's report can approach the relevant High Court for judicial review since her work constitutes "administrative action";

62. It is to the second request of the Public Protector, namely consideration of disciplinary action against the current Chairperson of the Electoral Commission that we now turn to deal with.

63. In paragraph 11.1 of her report, the Public Protector requested the National Assembly in consultation with the Electoral Commission, to the exclusion of its Chairperson, to consider taking disciplinary action against the Chairperson of the Electoral Commission.

64. As advised in paragraph 38 of the legal opinion that the doctrine of legality requires that the assistance and protection provided to state institutions supporting constitutional democracy by other organs of state must be provided within the law. The doctrine of legality entails that the legislature, amongst others, is constrained by the principle that it may exercise no power and perform no function beyond that conferred upon it by the law.

65. The consequences of the legislature or National Assembly acting in a manner not properly authorised by the law, is that its actions will in terms of section 2 of the Constitution be declared invalid by the courts.

66. In our view, it is in this context that the second legal question posed by the Ad Hoc Committee, namely whether it is only authorised to implement the recommendations in paragraph 11.1 of the Public Protector report without questioning the relevant findings of the Public Protector report, should be considered.

67. Flowing from the above, the legal question is whether the National Assembly and the Ad Hoc Committee have the legal authority to discipline the Commissioner of the Electoral Commission and more particularly for the misconduct committed by such a Commissioner whilst he or she was the Chief Electoral Officer.
68. We note that the request for the National Assembly to consider disciplinary action against the current Chairperson of the Electoral Commission is not supported by legal authority that the National Assembly has the legal competence to discipline the Chairperson under the circumstances. The process of removing a Commissioner of the Electoral Commission is outlined in section 7(3) (a) of the Electoral Act and is discussed in paragraphs 48 – 51 of the legal opinion. The role of the National Assembly in the process of removing a Commissioner from office is clearly spelt out.
69. In our view the process outlined in section 7(3) (a) of the Electoral Act, is no authority for the National Assembly to discipline a Commissioner of the Electoral Commission.
70. We have found no legal authority for the National Assembly to institute disciplinary action against a Commissioner of the Electoral Commission. Neither were we referred to any such legal authority by the Public Protector in her request to the National Assembly. In our view the National Assembly and the Ad Hoc Committee lack the competence to institute disciplinary action against the Commissioners of the Electoral Commission.
71. As the Chief Electoral Officer of the Electoral Commission is an employee of the Electoral Commission, disciplinary action against the Chief Electoral Officer can only be instituted by the Electoral Commission whilst he/she is still in the employment of the Electoral Commission.
72. For above mentioned reasons, we hold the view that the National Assembly and the Ad Hoc Committee lack the competence to discipline the Chairperson of the Electoral Commission. In order to avoid offending the doctrine of legality the Ad Hoc Committee is advised against considering instituting disciplinary action against the Chairperson of the Electoral Commission as requested by the Public Protector.

73. In order to be of assistance to the Public Protector in respect of similar incidents in future, and acting in terms of section 181(3) of the Constitution, the National Assembly may consider a legislative intervention to address the legal challenge that became evident in the instant case.

74. In view of the above, we now proceeding to respond to the four specific legal questions posed by the Ad Hoc Committee.

a) Considering the provisions of section 20(7) of the Electoral Commission Act 1996, (Act No.51 of 1996)², does the Electoral Court have jurisdiction to consider the matter since the current Chairperson was not a Commissioner at the time of the incidents under investigation

75. It is our consider view that the Electoral Court, for reasons articulated in this legal opinion, lacks the competence to consider the Public Protector's report in the circumstances of this case.

b) Whether the Ad Hoc Committee is only authorised to implement the recommendations of the Public Protector and whether the Ad Hoc Committee has the mandate to question the findings of the report

76. The Ad Hoc Committee is in terms of its mandate required to consider the request of the Public Protector. To consider means to apply one's mind to the matter at hand. This necessarily involves the consideration of a number of factors before making a decision. As advised in the instant case, a major factor to consider is whether the National Assembly has the legal authority to act as requested by the Public Protector. As advised above, in the event the National Assembly lacks the competence to institute such disciplinary proceedings notwithstanding the request of the Public Protector, the National Assembly may refuse to accede to the request due to the doctrine of legality.

77. However, the Ad Hoc Committee's enquiry is limited to the request of the Public Protector to the National Assembly as captured in paragraph 11.1 of the Public Protector report. Any enquiry beyond the consideration of the Public Protector's

² The Electoral Court may investigate any allegation of misconduct, incapacity or incompetence by a member of the Commission and make any recommendation to a committee of the National Assembly referred to in section 7(3)(a)(ii)

request borders on offending section 181(4) of the Constitution which prohibits interference with the functioning of the Public Protector. This might be viewed as not supporting the office of the Public Protector, but as undermining the independence, dignity and effectiveness of the Office of the Public Protector.

- c) **What is the responsibility of the Ad Hoc Committee in relation to the resolution adopted by the National Assembly in point 10(3) of the minutes of proceedings of 11 September 2013**

78. The responsibility of the Ad Hoc Committee is to consider the two requests of the Public Protector to the National Assembly, namely:

- a) to consider, in consultation with the Electoral Commission to the exclusion of its Chairperson, taking disciplinary action against Adv Tlakula for her role in the procurement of the Riverside Office Park Building;
- b) to consider referring the Public Protector report to the Electoral Commission for the latter to either review the Public Protector's report or investigate the Chairperson of the Electoral Commission.

In summary the Ad Hoc Committee is required to apply itself to all the relevant factors to enable the National Assembly to respond to the Public Protector's requests. Some of the factors to be considered are discussed in the legal opinion.

- d) **What is the responsibility of the Ad Hoc Committee in relation to the Electoral Act and the Public Protector Act**

79. The responsibility of the Ad Hoc Committee in relation to both the Electoral Act and the Public Protector Act is to comply with the provisions of the law. This would ensure that the Ad Hoc Committee does not offend the doctrine of legality.


Mr N Vanara

Senior Parliamentary Legal Adviser

Annexure

"B"



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CAPE TOWN

Dear Hon. M Sisulu

"INAPPROPRIATE MOVES": REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND CORRUPTION IN THE PROCUREMENT OF THE RIVERSIDE OFFICE PARK TO ACCOMMODATE THE HEAD OFFICES OF THE ELECTORAL COMMISSION

1. Kindly find attached hereto my Report on an investigation into the above matter.
2. The copy of the Report is provided to you in terms of section 8(3) of the Public Protector Act, 1994, for your information on the outcome of my investigation.
3. The widely spread submissions made by Adv. Tlakula, Chairperson of the Electoral Commission, in the media in which she challenges my investigation's procedural and sustentative fairness has raised serious concerns.
4. In view of the above and in order to ensure that fairness prevails, I would humbly request you, the Honourable Speaker, to intervene in terms of section 2(b)(iii) of the Public Protector Act, 23 of 1994, and consider referring the matter to the Chairperson of the Electoral Court to allow him an opportunity to consider investigating the matter in terms of section 20(7) of the Electoral Commission Act, 51 of 1996, which states that: "*The Electoral Court may*

investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a committee of the National Assembly referred to in section 7 (3)(a)(ii)."

5. I trust that you find above in order and await your response.

Best wishes



**ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 28 August 2013**

Wednesday, 11 September 2013]

516

No 42—2013] FIFTH SESSION, FOURTH PARLIAMENT

PARLIAMENT OF THE
REPUBLIC OF SOUTH AFRICA

NATIONAL ASSEMBLY

ORDER PAPER

WEDNESDAY, 11 SEPTEMBER 2013

Meeting of House: 15:00

QUESTIONS:

Cluster 2: Social Services.

MOTIONS:

1. Draft resolution (Chief Whip of the Majority Party): That the House -
 - (1) notes that Public Protector Report No 13 of 2013/2014 entitled *Report on an Investigation into Allegations of Maladministration and Corruption in the Procurement of the Riverside Office Park to Accommodate the Head Offices of the Electoral Commission* was tabled on 28 August 2013 (Announcements, Tablings and Committee Reports, 28 August 2013, p 3318);
 - (2) further notes that in correspondence to the Speaker, the Public Protector requested that consideration be given to referring the report to the Electoral Court to allow it to investigate the matter in terms of section 20(7) of the Electoral Commission Act (Act 51 of 1996);
 - (3) establishes an ad hoc committee to consider and report on the recommendations contained in Public Protector Report No 13 of 2013/2014 in so far as they relate to the mandate of the National Assembly and also to consider the request of the Public Protector that the report be referred to the Electoral Court, the Committee to -
 - (a) be constituted as follows: African National Congress 7; Democratic Alliance 2; Congress of the People 1; Inkatha Freedom Party 1 and other parties 1;

(b) exercise those powers in Rule 138 that may assist it in carrying out its functions and take the steps it deems necessary to fulfil its mandate; and

(c) submit a report with its findings and recommendations to the House by 31 October 2013.

13dn330e

ORDERS OF THE DAY:

1. Consideration of **Recommendation of a person for appointment as Auditor-General** (Report of Ad Hoc Committee on Appointment of Auditor-General, see Announcements, Tablings and Committee Reports, 10 September 2013, p 3377).

FURTHER BUSINESS

ORDERS OF THE DAY:

1. Consideration of Report of Portfolio Committee on International Relations and Cooperation on **Workshop held on Role of Parliament in treaty-making processes** (Announcements, Tablings and Committee Reports, 9 September 2013, p 3367).
2. Consideration of Report of Portfolio Committee on International Relations and Cooperation on **Oversight Visit to Headquarters of Department of International Relations and Cooperation** (Announcements, Tablings and Committee Reports, 9 September 2013, p 3348).
3. Second Reading debate - **Merchant Shipping (International Oil Pollution Compensation Fund) Bill** [B 19B – 2013] (National Assembly - sec 75) – (Minister of Transport).
4. Second Reading debate - **Merchant Shipping (Civil Liability Convention) Bill** [B 20B – 2013] (National Assembly – sec 75) - (Minister of Transport).
5. Consideration of Report of Portfolio Committee on Social Development on **2011/12 Annual Report of Central Drug Authority (CDA)** (Announcements, Tablings and Committee Reports, 29 August 2013, p 3323).
6. Consideration of Request for Approval by Parliament of **Southern African Development Community (SADC) Protocol on Trade in Services** in terms of section 231(2) of Constitution (Report of Portfolio Committee on Trade and Industry, see Announcements, Tablings and Committee Reports, 28 August 2013, p 3320).
7. Consideration of Request for Approval by Parliament of **The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage** in terms of section 231(2) of Constitution (Report of Portfolio

Annexure A

Tanyon.

ELECTORAL COMMISSION

8 September 2013

The Honourable Mr Max Sisulu
Speaker of the National Assembly
Parliament
Cape Town

[Email: speaker@parliament.gov.za]

Dear Honourable Speaker,

RE: REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND CORRUPTION IN THE PROCUREMENT OF THE RIVERSIDE OFFICE PARK TO ACCOMMODATE THE HEAD-OFFICES OF THE ELECTORAL COMMISSION

1. The Electoral Commission is in receipt of the final report of the Public Protector dealing with the procurement of the Riverside Office Park to accommodate its head-offices. In the event that your good office has not been furnished with the report, we attach hereto a copy thereof.
2. One of the recommended remedial actions contained in the report is that *"The Speaker of Parliament, in consultation with the Electoral Commission to the exclusion of the Chairperson, consider whether action should be taken against Advocate Tlekula for her role in the procurement of the Riverside Office Park building to accommodate the head-offices of the Commission in light of the undisclosed and unmanaged conflict of interest and her contravention of the procurement laws and prescripts dealt with in this report and accordingly, advise the President of the appropriate action to take."*
3. Our understanding is that the Electoral Commission is not empowered to deal with this matter insofar as it relates to one of the Commissioners. Accordingly, we will wait for the Honourable Speaker to advise us of the advice given to the President on the appropriate action considered to be taken.
4. This understanding is based on our reading of the relevant provisions of the Constitution of the Republic of South Africa Act No. 108 of 1996, the Public Finance Management Act, No. 1 of 1999 and the Electoral Commission Act, No. 51 of 1996 respectively, which provide the governing legislative framework for the Electoral Commission.
5. In the light of the above, we shall await your advice.

We look forward to hearing from you.

Yours faithfully,



MR TERRY ISMAEL TSELANE
VICE CHAIRPERSON

ELECTORAL COMMISSION

ENSURING FREE AND FAIR ELECTIONS

SOUTH AFRICA



Annexure E



PUBLIC PROTECTOR
SOUTH AFRICA

MOSIRELETSI WA BATHO • MOSIRELETŠI WA BATHO
MUSIRHELELI WA VANHU • MUSIRELEDZI WA VHATHU
OPENBARE BESWENGER • UMKHUSELI WABANTU • ISIVIKELI YABANTU

HEAD OFFICE: PRETORIA
Private Bag X677, Pretoria 0001 • 175 Lunnon Street • Hillcrest Office Park, 0083
Tel: (012) 366 7000 • Fax: (012) 362 3473

Please quote this reference in your reply: 7/2 – 46829/11

2 October 2013

Enquiries: Adv. T N Madonsela
Tel: 012 366 7108
Julietn@pprotect.org

The Hon. Luwellyn Landers, MP
The Chairperson of the Ad-hoc Committee
appointed to consider and report on the
Public Protector Report No. 13 of 2013/2014
Parliament of the Republic of South Africa
Plein Street
CAPE TOWN
8000

Dear Hon. Landers

“INAPPROPRIATE MOVES”: REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF
MALADMINISTRATION AND CORRUPTION IN THE PROCUREMENT OF THE RIVERSIDE
OFFICE PARK TO ACCOMMODATE THE HEAD OFFICES OF THE ELECTORAL
COMMISSION

1. Thank you for your correspondence to me of 30 September 2013, the contents of which have been noted.
2. At the outset, I wish to sincerely thank you for pointing out the error in my correspondence addressed to the Speaker as contained in paragraph 4 thereof. Kindly be advised that the correct section of the Public Protector Act that I intended referring to is section 8(2)(b)(i) and (iii) which reads as follows:

"8 *Publication of findings*

...

(2) (a) ...

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

(i) *He or she deems it necessary;*

(ii) ...

(iii) *it requires the urgent attention of, or an intervention by, the National Assembly;"*

3. My intention for referring the matter to the Speaker was for him to consider the report as both institutions of the Public Protector and the Electoral Commission report to the Speaker, administratively. With respect, it was never my intention to have the report tabled in Parliament.
4. In making my submission to the Speaker, I also took into account the fact that the issues investigated and reported on, occurred when Adv. Tlakula was occupying the position of a Chief Electoral Officer of the Commission and not necessarily a Commissioner.
5. In the wake of the comments made by Adv. Tlakula in the media, I felt that it would be fair for the Speaker to consider whether it would not be appropriate to refer the matter to another forum such as the Electoral Court with a view to affording it an opportunity to look into the matter as the Court would perhaps come to a different conclusion from mine.
6. I trust that the above clarity is in order and thus apologize for any inconvenience caused.

Best wishes



ADV. T. N. MADONSELA

PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 02/10/2013



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
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LUWELLYN LANDERS MP
National Assembly
e-mail: llanders@parliament.gov.za

30 September 2013

Ref: PP Report 13-2013/2014

Adv. T. Madonsela
Public Protector,
Private Bag X677,
PRETORIA 0001.

Dear Advocate Madonsela,

***"INAPPROPRIATE MOVES" REPORT:
REQUEST FOR CLARITY ON SECTION 2(b)(iii) OF THE PUBLIC
PROTECTOR ACT***

Your letter to Hon. M. Sisulu MP, Speaker of the National Assembly, dated 28 August, refers.

On behalf of the Ad-hoc Committee appointed by the National Assembly to consider your request, it would be appreciated if clarity could be provided to Paragraph 4 of your letter.

In Paragraph 4 of your letter reference is made to Section 2(b)(iii) of the Public Protector Act (Act 23 of 1994). Together with Parliament's law advisors, we have carefully looked at Section 2 of that Act, which deals with Remuneration, vacancies in office and other terms and conditions of employment of Public Protector. However, we find no sub-section (iii) in Section 2(b).

-Page 2-

Is this reference in Paragraph 4 of your letter correct? If not, can you please provide us with the appropriate reference? Thank you.

Yours faithfully

A handwritten signature in black ink, appearing to read "Landers", written in a cursive style.

LUWELLYN LANDERS MP

**Chairperson: Ad-hoc Committee Appointed to Consider & Report on
Public Protector Report No. 13 of 2013/2014**

(ii) which indicates that persons will not be admitted to membership of the party or welcomed as supporters of the party on the grounds of their race, ethnic origin or colour.

(2) The Commission may not cancel the registration of a party on the grounds set out in subsection (1) (d) unless it has served a notice on the party giving it an opportunity to withdraw or change the offending amendment or part of the amendment and the party has not done so to the Commission's satisfaction within three months.

(3) A registered party shall within two months after having changed its deed of foundation or constitution submit a copy of the changed deed of foundation or constitution to the chief electoral officer.

[S. 17 substituted by s. 31 of Act 34 of 2003.]

CHAPTER 5

ELECTORAL COURT (ss 18-20)

18 Establishment of Electoral Court

There is an Electoral Court for the Republic, with the status of the Supreme Court.

19 Composition of Electoral Court

(1) The Electoral Court shall consist of the following members appointed by the President upon the recommendation of the Judicial Service Commission:

(a) A chairperson, who is a judge of the Appellate Division of the Supreme Court, and two other judges of the Supreme Court; and

(b) two other members who are South African citizens.

(2) The terms of office of the members of the Electoral Court, their conditions of service, remuneration, leave and other benefits, shall be determined by the President.

20 Powers, duties and functions of Electoral Court

(1) (a) The Electoral Court may review any decision of the Commission relating to an electoral matter.

(b) Any such review shall be conducted on an urgent basis and be disposed of as expeditiously as possible.

(2) (a) The Electoral Court may hear and determine an appeal against any decision of the Commission only in so far as such decision relates to the interpretation of any law or any other matter for which an appeal is provided by law.

(b) No such appeal may be heard save with the prior leave of the chairperson of the Electoral Court granted on application within the period and in the manner determined by that Court.

(c) Such an appeal shall be heard, considered and summarily determined upon written submissions submitted within three days after leave to appeal was granted in terms of paragraph (b).

(3) The Electoral Court may determine its own practice and procedures and make its own rules.

(4) The Electoral Court shall—

(a) make rules in terms of which electoral disputes and complaints about infringements of the Electoral Code of Conduct as defined in section 1 of the Electoral Act, 1993 (Act 202 of 1993), and appeals against decisions thereon may be brought before courts of law; and

(b) determine which courts of law shall have jurisdiction to hear particular disputes and complaints about infringements, and appeals against decisions arising from such hearings.

(5) The hearings and appeals referred to in subsection (4) shall enjoy precedence in the courts of law determined in accordance with that subsection.

(6) The Electoral Court may hear and determine any matter that relates to the interpretation of any law referred to it by the Commission.

(7) The Electoral Court may investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a committee of the National Assembly referred to in section 7 (3) (a) (ii).

(8) The Director-General: Justice shall provide the necessary accommodation, administration and financial support for the Electoral Court.

CHAPTER 6

GENERAL PROVISIONS (ss 21-25)

21 Offences and penalties

- (1) Any person commits an offence who—
- wilfully hinders or obstructs the Commission, the chief electoral officer or a member of the staff of the Commission in the exercise of its or his or her powers or in the performance of its or his or her duties or functions;
 - wilfully interrupts the proceedings of a meeting of the Commission or a sitting of the Electoral Court or misbehaves in any other manner in the place where such meeting or sitting is held;
 - does anything calculated improperly to influence the Commission or that Court in respect of any matter being or to be considered by the Commission or that Court in connection with any decision or order.
- (2) Any person convicted of any offence referred to in subsection (1), may be sentenced to a fine or to imprisonment for a period not exceeding five years.

22 Legal proceedings against Commission

- (1) The State Liability Act, 1957 (Act 20 of 1957), applies with the necessary changes in respect of the Commission.
- (2) In such application a reference to a Minister of a department shall be construed as a reference to the chairperson of the Commission.

23 Regulations

- (1) The Commission may make regulations regarding—
- the time limits within and manner in which appeals may be noted or decisions may be brought under review by the Commission in terms of this Act;

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- the compiling and maintaining of voters' rolls;
 - the registration of parties in terms of this Act;
 - the regulation of the conduct of all persons, parties and candidates in so far as such conduct may promote or inhibit the conduct of a free and fair election;
 - any matter required or permitted to be prescribed in terms of this Act;
 - the holding of a referendum declared under section 2;
 - and generally, all matters which are necessary or expedient to be prescribed in order to achieve the objects of this Act.
- (2) A regulation may prescribe penalties for any contravention thereof, or any failure to comply therewith, of a fine or imprisonment for a period not exceeding two years.
- (3) Any regulation which affects state expenditure, shall be made with the concurrence of the Minister of Finance.

24 Repeal of laws, legal succession and transitional provision

- (1) The laws mentioned in the Schedule are hereby repealed.
- (2) The Commission is the successor in title to the Independent Electoral Commission established by section 4 of the Independent Electoral Commission Act, 1993 (Act 150 of 1993), and is empowered to control all electoral equipment and material held by any organ of state in any sphere of government.
- (3) The Special Electoral Court established by section 32 of the Independent Electoral Commission Act, 1993, shall, notwithstanding the repeal of that Act by subsection (1), dispose of any matter pending before it as if this Act had not been passed.
- [Date of commencement of s. 24, to be proclaimed.]

25 Short title and commencement

This Act shall be called the Electoral Commission Act, 1996, and shall come into operation on a date fixed by the President by proclamation in the Gazette.

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