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**MEMORANDUM
[CONFIDENTIAL]**

TO : Hon M Khoza, MP
Chairperson: Ad hoc Committee on the Public Protector

TO : Mr G Mgidlana
Secretary to Parliament

FROM : Constitutional and Legal Services Office
[Nathi Mjenzane, Parliamentary Legal Adviser]

DATE : 01 June 2016

SUBJECT : LEGAL INTERPRETATION OF THE WORDS "FIT AND PROPER PERSON" TO HOLD OFFICE IN TERMS OF THE CONSTITUTION AND THE PUBLIC PROTECTOR ACT

MESSAGE : Attached please find the Memorandum for your attention



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MEMORANDUM

TO: Hon M Khoza, MP Chairperson to the *Ad hoc* Committee on Appointment of the Public Protector

COPY: Mr G Mgidlana, Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Nathi Mjexane, Parliamentary Legal Adviser]

DATE: 01 June 2016

REF. NO.: 38/2016

SUBJECT: LEGAL INTERPRETATION OF THE WORDS “FIT AND PROPER PERSON” TO HOLD OFFICE IN TERMS OF THE CONSTITUTION AND THE PUBLIC PROTECTOR ACT

Introduction

We received an urgent request for legal advice from the Chairperson of the *Ad hoc* Committee on the appointment of the Public Protector (“the Chairperson”). The legal question to be answered is: **what is the legal interpretation of the words “fit and proper person” requirement for the appointment of the Public Protector which is set out in both the Constitution and the Public Protector Act?**

In providing this urgent advice, due to associated constraints and given the timeframe within which we are required to provide our advice, we do not recite the mandate of the Office of the Public Protector, we reasonably assume that it is common cause.



We set out below, under the heading Legal Advice, the background of this concept of “fit and proper person” as it applies to the Office of the Public Protector, we outline how this principle has been applied in general and under the heading Conclusions, we advise how it could be applied as the **character screening** on whether a person is suitable to hold the Office of the Public Protector.

Legal Advice

Section 2 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) provides that the Constitution is the supreme law of the Republic and all law or conduct inconsistent with it is invalid and obligations imposed by it must be fulfilled.

In chapter 9, the Constitution provides for State Institutions Supporting Constitutional Democracy (“chapter 9 institutions”). The Public Protector forms part of the chapter 9 institutions. The “fit and proper person” person requirement for the appointment of the Public Protector is provided for in section 193 of the Constitution. This section states that the Public Protector must be a South African citizen, who is fit and proper to hold Office and must comply with any other requirements that are prescribed in national legislation.

The Public Protector Act 23 of 1994 (“the Act”), in section 1A provides for the appointment of the Public Protector. It states that the Public Protector shall be a South African citizen who is a “fit and proper person” person to hold Office and who is either a judge of the High Court or admitted Attorney or Advocate or lectured law for a minimum period of 10 years or has specialised knowledge in public finance management, public management, administration of justice for a period of 10 years or



has been a member of Parliament for more than 10 years or who has lectured law for a period of 10 years.

It is important to note that whilst the “fit and proper person” person requirement is stringent as outlined in both the Constitution and the Act, it is neither defined nor described in any legislation. It is mainly the Courts that have provided much needed jurisprudence on this common law principle of “fit and proper person” to hold Office. Legal scholars on the other hand have termed the requirement of a “fit and proper person” person a “warranty given to the public that a person will act ethically”.¹

The burden of proof that a person is “fit and proper person” to hold Office is vested on the Applicant. It is commonly accepted that in order to be “fit and proper person” a person must **show integrity, reliability and honesty** as these are the characteristics which could affect the relationship between such a person and the public.²

The Courts have interpreted the requirement of “fit and proper person” for a person to hold Office. The Courts have held that the “fit and proper person” person standard is a value-judgment. In *Ex Parte Re Ngwenya v Society of Advocates, Pretoria and Another 2006 (2) SA 87 (W)*, the Applicant applied to be admitted as an advocate. He unfortunately pleaded on the one hand that he had been wrongly convicted of a crime and on the other hand that he had since reformed. The court argued that reformation can begin only when a person acknowledges that he has committed a wrongful act. His character references supporting the statement that he had reformed were irreconcilable with his allegation that he had been wrongfully convicted.

¹ Slabbert M, “The Requirement of being “fit and proper person” for the legal profession, PER 4, 2011.

² Slabbert M, “The Requirement of being “fit and proper person” for the legal profession, PER 4, 2011.



The court concluded that if the references were true, his statement that he had been wrongfully convicted was untrue, which, in turn, meant that he was not a “fit and proper person” person to be admitted as an advocate.

In *Law Society of Transvaal v Machaka* 1998 (4) 413 (T), the Applicant argued that the “fit and proper person” requirement violated the right to dignity, equality, the right not to be subjected to cruel, inhuman and degrading treatment and the right to choose one’s trade, occupation or profession. The court rejected the claim as well as the idea that membership of the legal profession should not be subjected to the **character screening of the person involved**. The court held that the **character screening** prevented the right to freely choose one’s profession from being abused by criminally minded attorneys.

In *Vassen v Law Society of the Cape* 1998 (4) SA 532 (SCA), the attorney had stolen money by convincing an insurance company to pay the proceeds due under a life insurance policy to himself instead of the beneficiary. He then used the money for personal purposes and denied doing so despite clear evidence to the contrary. The court ruled that he was not a “fit and proper person” person to practise. The Court said that **honesty, reliability and integrity** are expected of an attorney.

In *Democratic Alliance v President of the South Africa* 2012 ZACC 24, the decision by the President to appoint a National Director of Public Prosecutions was challenged. The Supreme Court of Appeal ruled that President’s decision to appoint a National Director of Public Prosecutions was irrational. The Court ruled that the requirement that the National Director of Public Prosecutions must be a “fit and proper person” person constituted a **jurisdictional fact capable of objective ascertainment**. When the matter was taken to the Constitutional Court to confirm or set aside the decision of the Supreme Court of Appeal, the Court confirmed that whilst there may be differences of



opinion in relation to whether or not objective criteria have been established or are present. This does not mean that the decision becomes one of subjective determination, immune from objective scrutiny. Another factor that points to the criteria being objective is requirement that the National Prosecuting Authority must **perform its functions without fear, favour or prejudice.**

Conclusions

The “fit and proper person” person requirement/standard involves character screening of the person involved in the interview to be appointed as the next Public Protector. The honesty, integrity, reliability of a person is screened or interrogated to determine whether such a person is indeed “fit and proper person” to occupy the said Office. The Committee in this regard would be called upon to objectively make a value judgment on whether a person is fit and proper to be the Public Protector.

It is sacrosanct to note that the value judgment that has to be made in this instance is not a subjective but an objective one. This value judgment that has to be made in screening the person to be recommended for appointment as the Public Protector will require the Committee to inquire whether a reasonable person of that person’s qualification and who is meant to exercise his/her powers and perform his/her functions without fear, favour or prejudice would have acted in the manner that such a person acted in a given set of circumstances.



Whilst the final appointment of the Public Protector is the preserve of the President of the Republic, the Committee through the process of interviews has the obligation to screen individuals who will be recommended for appointment, on whether they are sufficiently honest, have integrity, are reliable and therefore “fit and proper person” to hold the Office of the Public Protector.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a vertical stroke and a small crossbar.

Nathi Mjenxane

Parliamentary Legal Adviser

Quality Assured by:

A handwritten signature in black ink, appearing to read 'N Vanara' in a cursive style.

Adv N Vanara

Senior Parliamentary Legal Adviser