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MEMORANDUM
[Confidential]

TO: Mr M Xaso
Secretary to the National Assembly

COPY: Mr F Beukman, MP
Chairperson of the PC on Police

Adv ME Phindela
Acting Deputy Secretary: Core Business

Ms RK Begg
Division Manager: Core Business Support

FROM: Constitutional and Legal Services Office
[Dr BE Loots – Legal Adviser]

DATE: 2 December 2016

REF: 69/2016

SUBJECT: NA RESPONSIBILITY IN MCBRIDE MATTER RE MINISTER'S
REQUEST FOR INQUIRY

MESSAGE: Attached please find a memorandum for your attention


Adv Z Adhikarie
Chief Legal Adviser



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1. INTRODUCTION

- 1.1 Our Office was requested to provide a legal opinion on what the National Assembly's level of responsibility is in the McBride matter following the recent Constitutional Court judgment in *McBride v Minister of Police and Others* CCT 255/15.
- 1.2 Specifically we are required to address the two letters directed by the Minister of Police to the Speaker of the NA (dated 10 and 16 November respectively) requesting that the Portfolio Committee on Police hold an enquiry into the fitness of Mr McBride to hold office as the Executive Director in the IPID, as such enquiry would empower the Minister to suspend Mr McBride pending the outcome thereof.

2. LEGAL QUESTION

2.1 The legal question for consideration is therefor as follows:

What are the powers and responsibilities of the National Assembly (and by extension the Portfolio Committee on Police) in the context of the Minister's request for an enquiry following the recent Constitutional Court judgment?

3. BACKGROUND

3.1 On 6 September 2016, the Constitutional Court in *McBride v Minister of Police and Others* CCT 255/15 ruled that –

- a. sections 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act 1 of 2011, sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act (Proclamation 103 of 1994), as well as regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate, are invalid to the extent that these authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or remove from office the Executive Director of the Independent Police Investigative Directorate;
- b. Parliament has 24 months to cure the mentioned legislative defect, and that until such steps are taken section 6(6) of the Independent Police Investigative Directorate Act 1 of 2011 is to be read as per sections 17DA(3) to 17DA(7) of the South African Police Service Act 68 of 1995;
- c. the decision of the Minister of Police to suspend Mr McBride (as taken in terms of the sections declared invalid) is similarly invalid and set aside; and
- d. following a prayer from the Minister that notwithstanding invalidity the Constitutional Court “endorse the disciplinary proceedings already underway and for them to be deemed to be undertaken by the relevant Portfolio Committee of the National Assembly”,¹ that the order of invalidity re the suspension decision taken by the Minister “is suspended

¹ *McBride v Minister of Police and Others* CCT 255/15 at par 21.

for 30 days in order for the National Assembly and the Minister of Police, if they so choose, to exercise their powers in terms of the provisions referred to” in the South African Police Service Act 65 of 1995 (‘the Act’).²

- 3.2 On 7 September 2016, the Minister wrote to the Speaker of the National Assembly, requesting that the Portfolio Committee on Police consider exercising their powers in terms of the Act. The Speaker subsequently on 12 October 2016 referred the matter for consideration to the Portfolio Committee on Police (as per the ATC).
- 3.3 Since then, the Minister of Police addressed additional letters to the Speaker of the National Assembly, dated 10 and 16 November 2016 respectively (attached for ease of reference), the Minister has reiterated his initial request. He proffered additional evidence that, in his opinion, Mr McBride is not fit to hold the office of Executive Director and Head of the Independent Directorate, highlighting that –
- a. potential witnesses fear victimisation since his return to work following Mr McBride’s return (as reflected in statements made by the State Prosecutor); and
 - b. Mr McBride has refused to provide written and oral replies to parliament questions.
- 3.4 In light of the above, the Minister of Police has again in the letter of 10 November 2016 appealed to the Speaker “to prevail upon Parliament”, to start the allowed removal process against Mr McBride. The Minister is only legislatively empowered to suspend Mr McBride once the relevant parliamentary committee has initiated a removal process.

² Underlining added for emphasis. It must be noted that the specific referral to Parliament in relation to the 30 day suspension of the order is in direct relation to the prayer that the Minister placed before the Constitutional Court, namely “for them to be deemed to be undertaken by the relevant Portfolio Committee of the National Assembly”. In light of the read in provisions following the judgment there is a discretion to be exercised by “a Committee of the National Assembly” as to whether steps are taken to recommend removal from office of the person in question, **as** highlighted in the “Legal Analysis” section of this opinion.

4. LEGAL ANALYSIS

Legislative Framework

4.1 For purposes of this opinion, the following excerpt of the relevant portions of section 17DA of the Act, now read into section 6(6) of the Independent Police Investigative Directorate Act 1 of 2011, must be considered –

(3)(a) The National Head of the Directorate may be removed from office on the ground of misconduct, incapacity or incompetence on a finding to that effect by a Committee of the National Assembly.

(b) The adoption by the National Assembly of a resolution calling for that person's removal from office.

(4) ...

(5) The Minister –

(a) may suspend the National Head of the Directorate from office at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person; and

(b) shall remove the National Head of the Directorate from office upon adoption by the National Assembly of the resolution calling for the National Head of the Directorate's removal.

Impact of the Constitutional Court Judgment

4.2 The fact that the 30 day suspension of the Constitutional Court's decision regarding the Minister of Police's decision to suspend Mr McBride has lapsed does not imply that Parliament is prevented from taking steps which it is legislatively empowered to do as set out above. The lapsing of the 30 days allowed Mr McBride to return to his post. The fact that Mr McBride is in his post does not imply that he may not be suspended in future or that removal processes may not be instituted against him.

4.3 It must further be noted that the "new" section 6(6) (read as the relevant portions of section 17DA of the Act), empowers "a Committee of the National Assembly" to reach a recommendation finding to the effect that the Executive

Director in the IPID be removed from office on grounds of misconduct, incapacity or incompetence.

Steps Taken By Parliament To Date

- 4.4 On 12 October 2016, the Speaker in line with National Assembly Rule 338(1) referred the matter of the Minister's request that the section 6(6) power be exercised, to the Portfolio Committee on Police "*for consideration*". The referral in the Announcement, Tablings and Committee Reports (ATC) states:

"A letter dated 7 September 2016 has been received from the Minister of Police, requesting the Assembly to mandate the Portfolio Committee on Police to consider exercising its powers in terms of section 6(6) of the Independent Police Investigative Directorate Act, 2001..."

- 4.5 For purpose of the current processes underway, the Portfolio Committee on Police is therefore to be regarded as "a Committee", as referred to in section 6(6) read as section 17DA of the Act.

Current Situation

- 4.6 The manner in which to proceed is at the discretion of the Portfolio Committee, as the National Assembly and its Committees are at liberty to determine its own internal processes to give effect to legislation, within the confines of the prescribed rules and legislative parameters.
- 4.7 The Portfolio Committee may *consider* the information proffered by the Minister in his letters but there is no obligation on the Portfolio Committee to take such an enquiry step if it does not deem it appropriate in the circumstances. The referral of the issue "*for consideration*" implies that the Portfolio Committee is called upon to formally consider the request, apply its mind, and then record the decision (whether to take further steps or not) in its minutes. At this stage there is no formal obligation on the Portfolio Committee to report its decision to the National Assembly, as the matter was referred "*for consideration*" only. There is also no mandate (resolution) from the National Assembly for the necessary removal steps to be undertaken as yet (if at all) in terms of the Act by the Portfolio Committee.

5. CONCLUSION

- 5.1 Although the Act empowers the Minister to suspend the person in question once the Portfolio Committee has commenced proceedings for the removal of the person, there is no obligation on the Portfolio Committee to undertake such steps at this stage.
- 5.2 All that is required is that the Portfolio Committee apply its mind to the referral by the Speaker of the National Assembly and formally note its decision.



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Quality assured by:



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