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MEMORANDUM
[Confidential]

TO: Ms Z Rantho
Acting Chairperson: Portfolio Committee on Public Enterprises

COPY: Ms PN Tyawa
Acting Secretary to Parliament;

Adv EM Phindela
Acting Deputy Secretary: Core Business; and

Ms R Begg
Division Manager: Core Business Support

FROM: Adv Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 15 August 2017

REF: 74/2017/SSI

SUBJECT: Proposed Process for the Portfolio Committee on Public Enterprises to Conduct the Inquiry into State Owned Enterprises

MESSAGE: Please find attached the above memorandum for your attention.


Adv Z Adhikarie

Chief Legal Adviser



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INTRODUCTION

1. Our Office was requested by Ms Z Rantho, the Acting Chairperson of the Portfolio Committee on Public Enterprises, to provide a legal opinion on the proposed process for the Portfolio Committee on Public Enterprises ("the Committee") to conduct the inquiry into State Owned Enterprises.

LEGAL QUESTION

2. The legal question to be considered is:

What is the process by which a committee of the National Assembly may conduct oversight over a State Owned Enterprise?

BACKGROUND

3. The Committee was briefed by the Eskom Board on 23 May 2017 on the reappointment of Mr Brian Molefe as the Group Chief Executive Officer. The Committee agreed that there are serious governance challenges with the current Eskom Board that need urgent intervention. The Committee consequently resolved to institute an inquiry into the governance failures at Eskom.
4. During a subsequent Committee meeting on 25 July 2017, members of the Committee considered the process to be followed in conducting an inquiry into the governance failures at Eskom. Members of the Committee were of the view that the inquiry should follow a similar process to the one followed by the Ad hoc Committee on the SABC Board Inquiry ("the SABC Ad hoc Committee). The process followed by the SABC Ad hoc Committee was to enable it to make a finding on the fitness of the SABC Board and it utilised an evidence leader to assist it in this regard.
5. Using the SABC Inquiry as a benchmark, it was proposed by members of the Committee that an evidence leader be appointed to question witnesses. It was suggested that a member of staff be identified as evidence leader or alternatively, an outside expert be appointed to undertake this task.

LEGAL FRAMEWORK

The Constitutional Mandate of the National Assembly

6. In terms of section 42(3) of the Constitution, the National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by, amongst others, scrutinizing and overseeing executive action.

7. The Constitution directs in section 55(2) that:

“The National Assembly must provide for mechanisms -

a. to ensure that all executive organs of state in the national sphere of government are accountable to it; and

b. to maintain oversight of -

i. the exercise of national executive authority, including the implementation of legislation; and

ii. any organ of state.”

8. Section 56 of the Constitution empowers the National Assembly and its committees to fulfil its mandate to scrutinize and oversee executive action. It provides that:

“The National Assembly or any of its committees may-

a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

b) require any person or institution to report to it;

c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and

d) receive petitions, representations or submissions from any interested persons or institutions.”

9. Section 57(1) of the Constitution provides that the National Assembly may determine and control its internal arrangements, proceedings and procedures.
10. The Rules of the National Assembly (“NA Rules”) reiterate and elaborate on the mandate of the National Assembly. Rule 227 sets out the functions of portfolio committees. Portfolio committees must maintain oversight of the exercise of national executive authority and any executive organ within its portfolio.¹ Portfolio committees “may monitor, investigate, enquire into and make recommendations concerning any such executive organ of state...including the legislative programme, budget, rationalisation, restructuring, functioning, organisation, structure, staff and policies of such organ of state...”²
11. To enable members to perform their functions without fear of repercussions, section 58(1) of the Constitution affords members parliamentary privilege as follows:

“Cabinet members, Deputy Ministers and members of the National Assembly–

 - (a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and
 - (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for–
 - (i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or

¹ Rule 227(1)(b) of the NA Rules.

² Rule 227(1)(c) of the NA Rules.

- (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.”

DISCUSSION

The Mandate of the National Assembly and its members

12. The Oversight and Accountability model adopted by Parliament defines oversight as “In the South African context, oversight is a constitutionally mandated function of legislative organs of state to scrutinise and oversee executive action and any organ of state.” In carrying out this oversight mandate, members as the representatives of the people ensure accountability and transparency in our constitutional democracy.
13. Members are mandated to hold the executive and organs of state to account as a multi-party body representing the diverse interests of the people of South Africa. This is one of the primary reasons for which members are elected into office by citizens of South Africa.
14. The National Assembly and its committees have in successive Parliaments conducted oversight through various mechanisms. All such process have always been led and directed by members. There is no precedent of the oversight powers of elected representatives and of a multi-party committee being delegated to either staff members or external service providers.
15. It is imperative that in carrying out their oversight mandate, members are provided with maximum support by staff and the necessary resources. However, it must always remain the purview of members to lead and direct oversight processes. This also ensures that multi-party interests and dynamics are voiced during oversight. In contrast, a member of staff or external service provider would have to adopt a politically neutral approach and will not be able to represent multiple interests in examining issues.

Powers and Protection of members

16. As set out in the previous section, the Constitution empowers the National Assembly to carry out its oversight mandate. The National Assembly and its committees may summons a person or a document or require a person or institution to report to it. A failure to comply with a summons is a criminal offence. The Constitution also grants parliamentary privilege to members. Members have freedom of speech in the Assembly and its committees and immunity from civil or criminal proceedings, arrest, imprisonment or damages for anything said, produced or revealed in the Assembly or its committees.
17. The Constitutional Court has affirmed the importance of parliamentary privilege in ensuring effective oversight. The Court has stated that parliamentary privilege “encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government.”³ In *Democratic Alliance v Speaker of the National Assembly and Others* (CCT86/15) [2016] ZACC 8; the Court stated that:⁴

“Parliament is also entrusted with the onerous task of overseeing the Executive. Tyrannical rule is usually at the hands of the Executive, not least because it exercises control over the police and army, two instruments often used to prop up the tyrant through means like arrest, detention, torture and even execution. Even in a democracy, one cannot discount the temptation of the improper use of state organs to further the interests of some within the Executive. Needless to say, for Parliament properly to exercise its oversight function over the Executive, it must operate in an environment that guarantees members freedom from arrest, detention, prosecution or harassment of whatever nature. Absent this freedom, Parliament may be cowed, with the result that oversight over the Executive may be illusory.” (My emphasis)

³ *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at para 39.

⁴ *Democratic Alliance v Speaker of the National Assembly and Others*. Para 17.

18. These privileges cannot be extended to staff or external persons unless by statute. As neither staff members nor external persons enjoy the constitutional protection of parliamentary privilege afforded to members, they do not have the freedom of speech to put various allegations to witnesses without the possibility of being held civilly or criminally liable. Members, however, are not similarly constrained and are thus able to conduct oversight more effectively.

Oversight vs Statutory Inquires

19. As stated earlier, it has been suggested that the Portfolio Committee conduct its inquiry in a similar manner to that of the SABC Board Inquiry. In this inquiry, the National Assembly was mandated by section 15A of the Broadcasting Act, 1999, to recommend the dissolution of the SABC Board on one of the grounds listed in the Act.⁵ The National Assembly could make such a recommendation after “due inquiry and by the adoption of a resolution”. The SABC Ad hoc Committee was established to conduct the inquiry and make such a recommendation to the National Assembly after considering the evidence before it.
20. The mandate of the SABC Ad hoc Committee was very specific and narrowly defined. The process envisaged a start and an end date. The SABC Ad hoc Committee adopted a quasi-judicial process with an evidence leader putting questions to witnesses on a defined set of concerns. This was done as its recommendation to the National Assembly required that evidence be adduced and weighed up to establish if there were grounds as listed in the Act to find the Board unfit.
21. As this was a quasi-judicial process, the SABC Ad hoc Committee had to ensure stricter adherence to administrative law principles including to the

⁵Broadcasting Act, 1999, section 15A (b) provides:

The National Assembly may, after due inquiry and by the adoption of a resolution, recommend the dissolution of the Board if it fails in any or all of the following:

- (i) Discharging its fiduciary duties;
- (ii) adhering to the Charter; and
- (iii) carrying out its duties as contemplated in section 13 (11).

rules of natural justice. However, the use of an evidence leader was not the only options available to SABC Ad hoc Committee. The process could also have been conducted by members questioning witnesses, as a previous inquiry into the SABC Board had done.

22. Other quasi-judicial processes conducted by Parliament is the disciplinary process envisaged by the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 (“PPIPLA”) and hearing into breaches of the Code of Ethical Conduct and Disclosure of Members’ Interest for Assembly and Permanent Council Members (“the Code”).
23. In terms of PPIPLA, a member may be charged with misconduct and be subjected to a disciplinary process. In terms of the NA Rules, an initiator is appointed to present “evidence regarding the allegations and may cross-examine the member and any witness giving evidence on behalf of the member” during the disciplinary hearing. The initiator may be a member or a duly qualified person, who is not a member of the committee. The member must plea to charges and may, in complex cases, be legally represented.
24. The Code also prescribes a process where members are charged for breaches of the Code. In terms of Code, the Joint Committee on Ethics and Members Interest (“Ethics Committee”) may decide to hold a hearing to determine whether a member has breached the Code. The hearing is inquisitorial in nature and the Registrar presents evidence on behalf of the Ethics Committee and may call witnesses. At the end of the process, the Ethics Committee must make a finding supported by reasons, if it is satisfied that the member contravened a provision of the Code on the balance of probabilities.⁶ If the Ethics Committee makes such a finding, it then recommends an appropriate penalty to the National Assembly.
25. As the examples cited above indicate, statutory inquiries must be differentiated from an oversight inquiry in the parliamentary context. A statutory inquiry is conducted in terms legislation or Rules with the aim of

⁶ Code of Ethical Conduct and Disclosure of Members’ Interest for Assembly and Permanent Council Members. Clause 10.7.6.1.

making a specific finding on specific conduct. A statutory inquiry often resembles a quasi-judicial or administrative process and requires a more stringent adherence to rules of natural justice.

26. Thus, the closer an inquiry resembles a quasi-judicial or administrative process, the greater the need for the Committee to follow the rules of natural justice. Consequently, such processes become more susceptible to judicial review. For instance, in *Maimane vs Chairpersons of the Joint Committee on Ethics and Members' Interest*⁷, the Western Cape High Court held that members of the Ethics Committee were required to adhere to the fundamental rules of procedural justice, the Constitution and the procedure set out in the Ethics Code.
27. In contrast, an oversight inquiry seeks to oversee and hold to account the executive or an organ of state to determine if they have carried out their responsibilities in terms of the law, their mandate, ethically and in the best interest of the country. Consideration is given to both law and policy. Thus, besides the examples cited above, statutory inquiries are the only basis that have served as justification for an administrative type of inquiry.
28. The process that the Portfolio Committee must undertake falls squarely within its oversight mandate. The Committee is embarking on a fact-finding inquiry as envisaged in rule 227 of the NA Rules. It will, only after a proper analysis of the evidence and information presented to it, arrive at conclusions that could result in recommendations for proposed action by appropriate authorities. This may include referral to the Disciplinary or Ethics Committee. Even though the inquiry will focus on specific issues, its purpose does not differ from other oversight processes. Unlike a statutory inquiry, the Committee is not seeking to come to specific conclusions. Further, unlike the narrow focus of the SABC Ad hoc Committee, the Committee has a broader oversight mandate and may extend its scope as required during the process.

⁷ *Maimane vs Chairpersons of the Joint Committee on Ethics and Members' Interest*. (Western Cape High Court: CCT 4606/16) .

Other Considerations

29. It must also be noted that the Committee is not conducting a criminal investigation or a criminal trial. The National Assembly process differs greatly from court proceedings. Such a process is best left to the appropriate authorities where the requisite prosecutorial skills resides.
30. The inquiry may extend beyond the current issues identified and may take considerable more time than envisaged. As a result, procuring the services of an outside expert is cost prohibitive and impractical. Other portfolio committees may also request to follow a similar process in future and this will be unsustainable.

Proposed Process

31. Parliament's Oversight and Accountability Model envisages that committee driven oversight processes be conducted by members who are supported by staff members and provided with adequate resources. Staff are skilled to provide this support.
32. The Standing Committee on Public Accounts (SCOPA) for example has illustrated how effective oversight inquiries can be conducted. It is advised that regard be had to such a process. SCOPA divides various issues amongst members with each member required to lead questions on specifically assigned areas. The rest of the members are then allowed to ask further questions. This process allows members to direct, steer and own the process of the inquiry.

CONCLUSION

33. In conclusion, the following points are reiterated:

- 33.1. The Constitution mandates the National Assembly and its committees to

conduct oversight. This process is distinct from statutory inquiries. The inquiry to be conducted by the Portfolio Committee is in terms of this oversight mandate.

- 31.2 The Constitution envisages that parliamentary process be conducted in a multi-party environment to enable the various interests of citizens to be represented. Only elected representatives are able to fulfil this obligation.
- 31.3 While members must receive support from staff and have access to resources to ensure that they effectively conduct oversight, they should not relinquish this power to unelected officials or third parties. Members must both lead and direct oversight processes.
- 31.4 Members enjoy parliamentary privileges which empower them to carry out their oversight responsibility without the threat of civil or criminal liability. They are afforded these protections to ensure parliamentary process are conducted in a robust and effective manner. Parliamentary privileges does not apply to members of staff and third parties.



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