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OPINION

1. My Consultant is the Auditor General.
2. My opinion is sought on various issues raised by my Consultant concerning the Draft Audit Amendment Bill, 2017 published in Government Gazette 41368 on 19 January 2018 ("the Bill").
3. A reference to sections in this opinion is a reference to the Act as amended by the Bill.
4. My Consultant is a Chapter 9 institution¹.
5. My Consultant is subject only to the Constitution and the law².

¹ Section 181(1) of the Constitution 1996

² Section 181(2)

6. The legislature is constitutionally enjoined to take legislative measures to ensure the effectiveness of my Consultant.³

7. Constitutional Principle XXIX reads as follows:

“The independence and impartiality of the Public Service Commission, a Reserve Bank, an Auditor General and Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.”⁴

8. The difference in function between the Public Protector and my Consultant is the following:

“Like the Public Protector, the Auditor General is to be a watchdog over the government. However, the focus of the office is not inefficient or improper bureaucratic conduct, but the proper

³ Section 181(3)

⁴ ***Ex parte*** Chairperson of the Constitutional Assembly; ***In re Certification of the Constitution of the Republic of South Africa, 1996*** 1996 (4) SA 744 (CC) at paragraph 160

management and use of public money.”⁵

9. National legislation which gives my Consultant functions and/or powers in addition to those set out in Sections 188(1) and 188(2) of the Constitution to ensure his/her effective⁶ enforcement of proper management and use of public money⁷ is in my opinion constitutionally permissible, and even required.

10. Section 5(1A) gives my Consultant a function and powers to refer:

“an act or omission identified from an audit performed under the Public Audit Act 25 of 2004 (“the Act”) that causes, or is likely to cause, a loss of public resources or which resulted or is likely to result in public resources not being used for its lawful purpose.” (my underlining)

⁵ ***Ex parte* Chairperson of the Constitutional Assembly; In re Certification of the Constitution of the Republic of South Africa, 1996** 1996 (4) SA 744 (CC) at paragraph 164

⁶ Section 181(3)

⁷ ***Ex parte* Chairperson of the Constitutional Assembly; In re Certification of the Constitution of the Republic of South Africa, 1996** 1996 (4) SA 744 (CC) at paragraph 160

to an appropriate body for investigation.

11. In my opinion my Consultant, even without the amendment, would have the power, if not the duty, to report such acts or omissions to appropriate law enforcement and regulatory authorities.
12. Sections 5(1A) and 5(1B) should, in my opinion, be linked with a triggering mechanism similar to the one contained in the Banks Act⁸:

“5(1A)(1) If as a result of an investigation in terms of section 5(1A), the Auditor-General is satisfied that any loss resulting from unauthorised, irregular, fruitless and wasteful expenditure as defined in any applicable legislation relevant to the auditee, and any other losses suffered by the auditee, including –

(i) money to the State, which has not been collected;

or

(ii) money which has been improperly paid,

⁸ Section 93 of Act 94 of 1990

the Auditor-General must act as set out in Section 5(1B)."

13. There is no difficulty in referring the undesirable audit outcome for "*investigation*" to another body.⁹

14. If the triggering mechanism is included as suggested, I see no problem with Section 5(1B).

15. The Auditor General would have to comply with the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). This would involve:
 - 15.1 giving the relevant accounting officer and/or officers or the accounting authority and/or authorities:
 - 15.1.1 adequate notice of the nature and purpose of the proposed administrative action;
 - 15.1.2 a reasonable opportunity to make representations;

⁹ The appointment of inspectors by Regulators in the Financial Services Sector is a good example. See Inspection of Financial Institutions Act 80 of 1998 and Chapter 9 of the Financial Sector Regulation Act 9 of 2017

- 15.1.3 a clear statement of the administrative action;
- 15.1.4 adequate notice of any right of review;
- 15.1.5 adequate notice of the right to request reasons for the administrative action.

15.2 The Auditor General would also have to give them an opportunity to:

- 15.2.1 obtain assistance and/or legal representation;
- 15.2.2 present and dispute information and arguments;
and
- 15.2.3 appear in person.¹⁰

16. As currently phrased the Auditor General is at large to refer the undesirable audit outcome to an *“appropriate body for investigation”*.

17. My Consultant may consider a change to *“law enforcement agency or*

¹⁰ See Section 3(2) and Section 3(3) of

regulatory authority”.

18. I am of the opinion that the debt begins to prescribe when the accounting officer fails to give a satisfactory explanation for the failure to recover the loss and a certificate is issued.¹¹
19. Prior to the forming of the opinion that the explanation is unsatisfactory and the issuing of a certificate, the Auditor General has no cause of action nor is the debt due.¹²
20. My Consultant should consider the following additions to Section 5(1B):

“The failure to pay the debt to the Auditor General shall for the purpose of any law relating to the sequestration of insolvent estates, be deemed to have committed an act of insolvency, and the Auditor General shall, notwithstanding anything to the contrary contained in any law, be competent to apply for the

¹¹ **Standard Bank of South Africa Limited v Miracle Mile Investments 67 (Pty) Limited and Another** 2017 (1) SA 185 (SCA)

¹² **Standard Bank of South Africa Limited v Miracle Mile Investments 67 (Pty) Limited and Another** 2017 (1) SA 185 (SCA), paragraph 24

sequestration of the estate of such a person to any court having jurisdiction.”

And:

“The Auditor General may notwithstanding anything contrary contained in the law of insolvency, apply to a competent court for the sequestration of the debtor in terms of the Insolvency Act, 1936 (Act 24 of 1936). The Auditor General shall have the right to oppose any such application made by any other person.”

21. Although the recovery mechanism set out in the Act can be widened to include recovery from third parties, I would suggest that the relevant government departments should litigate to invalidate agreements and/or payments to third parties through a process in the courts.

22. As an alternative, the Auditor General may report as part of its normal reporting function to the National Assembly suggesting that the executive appoint a special investigating unit¹³ to effect a civil

¹³ Special Investigating Units and Special Tribunals Act 74 of 1996

recovery in terms of the applicable legislation.

23. It has already been held that the awarding of a contract by an organ of State and/or the cancellation thereof is an administrative act.
24. Such an administrative act would have to be set aside by a Court before repayment could be claimed.
25. Section 49 of the Act contains a limitation of liability which is sufficient to protect the Auditor General from liability arising from the issuing of a certificate.
26. My Consultant may consider widening the wording of Section 49 to cover the publication of the certificate and/or the names of the accounting officers to which the certificate or certificates relate.
27. In my opinion, Section 188(4) of the Constitution clearly preserves the National Assembly's prerogative to legislate as it deems fit within the broad prescripts of the Constitution.
28. Legislating for international audits by the Auditor General is not *per se* unconstitutional even if it cannot be directly related to the

strengthening of constitutional democracy.

29. I am, however, by no means convinced that the engagement in international audits does not and cannot strengthen our constitutional democracy by *inter alia* fostering international relations.
30. I also am mindful of the fact that the Auditor General may already in terms of Section 5(2) of the Act co-operate with persons, institutions and associations, nationally and internationally, and to do any other thing necessary to fulfil the role of Auditor General effectively.
31. Being involved in international audits will expose the Auditor General's staff to new audit areas and development worldwide and with the knowledge and skills gained from these audits can be brought back to the Republic and applied by the Auditor General.
32. A solid, independent supreme audit office is invaluable to boost investor confidence in the Republic.
33. I am therefore of the opinion that the submissions critical of the amendments allowing international audits are without merit.

A handwritten signature in black ink, appearing to read 'E L Theron', with a stylized initial 'E'.

E L THERON SC
Chambers
Sandton
7 March 2018