

20 November 2018

Honourable Themba Godi, MP  
Chairperson: Standing Committee on Public Accounts  
Parliament  
Plein Street  
Cape Town

Your Reference:

**MLUNGISI MVULANE**

☎ (012) 315-5265

✉ [mlungisi.mvulane@treasury.gov.za](mailto:mlungisi.mvulane@treasury.gov.za)

Dear Hounorable Godi

**REQUEST FOR PUBLIC INVESTMENT CORPORATION (PIC) TO APPEAR AT THE STANDING COMMITTEE ON PUBLIC ACCOUNTS (SCOPA)**

I refer to your letter to the Minister of Finance, Mr TT Mboweni, dated 6 November 2018 in regard to the proposed engagement between the PIC and SCOPA on 21 November 2018 and our telephone discussion on Monday in relation to the content of the letter.

Chair, I wish to bring it to your attention that after the PIC received the request from SCOPA, it sought a legal opinion to get advice on whether it would be lawful and not in violation of any statute to disclose all the information and or documents as listed in your correspondence.

I must indicate that this step was informed by a preliminary view that was held by our management that some of the information, if disclosed may lead to PIC being subjected to litigation from third parties as it is clients information that is confidential.

While I believe that it is important for the PIC to gain confidence from its stakeholders through being transparent and forthright with information when required, I have found myself unable to ignore the legal advice received. I have therefore deemed it fit that this opinion be presented to the committee for its consideration and further guidance. (see the attached)

Reg. No. 2005/009094/30 | FSP No. 19777 | Address: Menlyn Maine Central Square, Corner Aramist Avenue & Corobay Avenue, Waterkloof Glen Extension 2, Pretoria, South Africa | Telephone +27 12 742 3400

Directors: Mr Mondli Gungubele (Chairperson), Dr Xolani Mkhwanazi (Deputy Chairperson) | Dr Daniel Matjila (Chief Executive Officer), Ms Matshupo More (Chief Financial Officer), Ms Sandra Beswick, Mr Trueman Goba, Ms Dudu Hlatshwayo, Ms Mathukana Mokoka, Mr Pitsi Moloto, Ms Lindiwe Toyi, Ms Sibusisiwe Zulu | Acting Company Secretary: Deon Botha

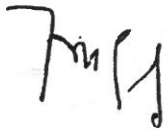
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Together with the CEO, we will attend tomorrow's meeting to deliberate on this matter, seek further counsel from Honourable members of your committee and thereafter chart a way forward in this regard.

Honourable Chair, I must also apologize for the delayed response from the PIC and specifically for myself as the chairperson of the board. The cause for this delay is that the board only convened on Friday, 16 November 2018, wherein this matter was tabled and deliberated upon in light of the legal opinion. I do undertake to endeavour that in future such delays are avoided.

I therefore request that you accept my apology for the inconvenience caused to the committee.

Yours sincerely



**MONDLI GUNGUBELE, MP**  
**CHAIRPERSON: PIC BOARD**

15 November 2018

By Email: [Winnifred.Setshedi@pic.gov.za](mailto:Winnifred.Setshedi@pic.gov.za)

Winnifred Setshedi  
Public Investment Corporation

## NORTON ROSE FULBRIGHT

Norton Rose Fulbright South Africa Inc  
15 Alice Lane  
Sandton 2196  
South Africa

Tel +27 11 685 8500  
Fax +27 11 301 3200

Direct fax +27 11 301 3214  
PO Box 784903 Sandton 2146  
Docex 215 Johannesburg  
[nortonrosefulbright.com](http://nortonrosefulbright.com)

**Direct line**  
+27 11 685 8801

**Email**  
[patrick.bracher@nortonrosefulbright.com](mailto:patrick.bracher@nortonrosefulbright.com)

**Your reference**      **Our reference**  
Patrick Bracher/amdp/PIC216

Dear Sir/Madam

### SCOPA meeting attendance

- 1 You want our opinion in regard to the request of the Standing Committee on Public Accounts (SCOPA) on 6 November 2018 to engage with the Committee in a meeting at Parliament on 21 November 2018 from 18h00 to 21h30.
- 2 In its notice to the Minister of Finance, the Committee said it has "resolved to engage the Public Investment Corporation to lay to rest concerns that continue to fester about governance issues, insofar as these have a bearing on the prudent financial management".
- 3 In a letter to the chairperson of the Board of the PIC dated 4 June 2018 SCOPA uses the same phrase and call for documents previously requested by the former Minister of Finance. The letter goes on to say that their "main and only concern remains the prevention of mismanagement of public funds". It is mentioned that the government employees' pension money is managed by the PIC and that SCOPA has "seen SOEs slide into servers of corruption and becoming a burden to the State". The Committee says it cannot crisis manage issues and "any malfeasance must be nipped in the bud" because the PIC has "been in the news for far too long for wrong reasons and SCOPA cannot ignore these".
- 4 SCOPA has called for documents previously requested by the Minister of Finance on 9 October 2017.
- 5 The large volume of documents has been requested as follows:
  - 5.1 All PIC transactions (both listed and unlisted investments) concluded in the last three years;
  - 5.2 Amounts on transactions concluded;
  - 5.3 Transactional advisors or sponsors;
  - 5.4 Amounts paid by PIC to those transactional advisors or sponsors;

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- 5.5 Disclosure of all the BEE Consortiums in those transactions stating specifically each individual or legal entity that has participated in that Consortium (eg company, trust);
- 5.6 In the case of a legal entity, directors and shareholders of the entity must be disclosed;
- 5.7 A list of transactions concluded with parties classified as PIPs (prominent influential persons);
- 5.8 Details of individuals or companies who have been funded by PIC or participated in PIC transactions more than once in the past three years reflecting the amount of the transactions.

## 6 **Commission of Enquiry**

By proclamation dated 17 October 2018 and acting in terms of s 84(2)(f) of the Constitution, the President appointed a Commission of Enquiry into allegations of impropriety regarding the PIC with extensive terms of reference. Without going into detail of the terms of reference, they will duplicate matters which SCOPA proposes to deal with at the meeting.

## 7 **PIC**

- 7.1 The PIC is a public company created by s 2 of the Public Investment Corporation Act, 2004 with the Minister of Finance acting on behalf of the State as its only shareholder.
- 7.2 PIC invests and manages the funds of public bodies such as the Government Employees Pension Fund, the Compensation Commission Fund, the Unemployment Insurance Fund and other pension funds. It has vast sums of money under its management.
- 7.3 PIC is a financial services provider subject to the Financial Advisory and Intermediary Services Act, 2002 (FAIS Act).
- 7.4 Under the common law and under the FAIS General Code of Conduct for Authorised Financial Service Providers, PIC has a duty of confidentiality in relation to the information in its possession regarding the confidential information acquired or obtained from clients unless the written consent of the client is given.
- 7.5 There is a real concern that if all the investment information and strategies of PIC are disclosed publicly it will affect the investment market and the investment values.
- 7.6 According to s 32 of the Constitution, everyone has the right of access to information held by the State which is dealt with according to national legislation enacted to give effect to the right. The national legislation in question is the Promotion of Access to Information Act, 2000 (PAIA).
- 7.7 PIC is accountable to its shareholder, the State, by ordinary principles of corporate law as well as the shareholder's compact between PIC and the government.
- 7.8 The Protocol on Corporate Governance in the Public Sector deals with governance issues of state-owned enterprises. It provides that the Executive Authority of Parliament should exercise control over SOEs consistent with their accountability to Parliament and the public.
- 7.9 According to the provisions of the investment management agreements between PIC and its clients, PIC has an obligation to keep clients' and its own information confidential. That obligation is not absolute. PIC can be required by statute or regulation, order of court or other law to disclose information after giving the clients the opportunity to resist the disclosure or consent to it, if possible.

## 8 **Parliamentary committees**

- 8.1 The National Assembly must provide mechanisms to ensure that all executive organs of State in the national sphere of government are accountable to it and the National Assembly must maintain oversight of all organs of State.
- 8.2 The National Assembly Rules have established various standing committees including the Standing Committee on Finance (SCOF) and SCOPA.

- 8.3 SCOF derives its powers from the Money Bills Amendment Procedure and Related Matters Act, 2009. According to s 4, Parliament must establish a committee on finance which has the powers and functions conferred on it by the Constitution, legislation, the standing rules or resolutions of Parliament including considering and reporting on:
- (1) National macro-economic and fiscal policy;
  - (2) Amendments to the fiscal framework, revised fiscal framework and revenue proposals and Bills;
  - (3) Actual revenue published by the National Treasury; and
  - (4) Any other related matter set out in the Act.
- 8.4 SCOPA is established by Part 10 (Rules 204 to 208) of the Rules of the National Assembly.
- 8.5 According to Rule 206, SCOPA must consider:
- (1) Financial statements of all executive organs of State and constitutional institutions when those statements are submitted to Parliament;
  - (2) Any audit report issued on those statements;
  - (3) Any reports issued by the Auditor-General on the affairs of any executive organ of State, constitutional institution or other public body; and
  - (4) Any other financial statements or reports referred to it.
- 8.6 SCOPA may "initiate any investigation in its area of competence".
- 8.7 The powers of portfolio committees generally are dealt with in Part 9 of the Rules. A portfolio committee "must maintain oversight of any body or institution in respect of which oversight was assigned to it" including the right to "monitor, investigate, enquiry into and make recommendations concerning any such executive organ of State, constitutional institution or other body or institution".
- 8.8 PIC is a public body. Therefore SCOPA is entitled to monitor, investigate, enquire into and make recommendations concerning PIC. SCOPA recently exercised similar powers in relation to Eskom.
- 9 Limitation on SCOPA's powers**
- 9.1 The first issue relates to the FAIS Act and PAIA.
- 9.2 The FAIS Act and the common law require PIC to keep the private information of its clients confidential except when they are required by law to disclose the information.
- 9.3 It depends on the nature of the information sought whether PIC may refuse to disclose information. For instance, PAIA permits the protection of the following confidential information:
- (1) Under s 36(1)(b), information must be refused if the information is financial or commercial information of a third party and disclosure would be likely to cause harm to the commercial or financial interests of that third party.
  - (2) According to s 36(1)(c), access to information may be refused if the information was supplied in confidence by a third party and the disclosure could reasonably be expected to prejudice that third party in commercial competition.
  - (3) Under s 37(1)(a), PIC may refuse a request for access to a record of information if disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement (such as PIC's mandates from clients).

- (4) Section 42(3)(b) entitles PIC to refuse a request for information if the record contains financial or commercial information and the disclosure would be likely to cause harm to the commercial or financial interest of the State or a public body.
  - (5) The request can be refused under s 43(3)(c) if the disclosure of the information could reasonably be expected to put the PIC at a disadvantage in contractual or other negotiations or prejudice PIC in commercial competition.
  - (6) The trade secrets of the PIC are also protected (s 42(3)(a)).
- 9.4 When information is disclosed to a Parliamentary committee it is done in a public hearing unless the document was placed before the Committee as a confidential document and is declared by the Committee to be a confidential document (Rule 157(1)(c)).
- 9.5 The Committee has the power to exclude the public and the media from the meeting when considering any matter which is confidential in terms of legislation or of such a nature that its confidential treatment is reasonable and justifiable in an open and democratic society. It is up to SCOPA to decide whether anything will be public or confidential and that decision is not in your hands.
- 9.6 You must claim confidentiality in regard to any investment information which would give PIC and its clients a disadvantage in the investing world and an advantage to those who obtain the information regarding the investments and strategy of PIC. If the SCOPA allows you to give information in confidence there is no basis for refusing that request for information insofar as the FAIS Act is concerned.
- 10 Attendance at Portfolio Committee**
- 10.1 There are two issues relating to the requested attendance at the SCOPA meeting, namely:
- (1) Confidentiality; and
  - (2) The Commission of Enquiry.
- 10.2 Before you attend any meeting of SCOPA you will want an assurance from the Committee that documents which are confidential and relate to the private information of your clients or your investment strategies will be treated as confidential and that a hearing in that regard will not be open to the public and the media.
- 10.3 It seems unlikely that SCOPA will undertake to hold private hearings because they normally want to be seen to be doing their work by the public. If confidentiality of confidential documents cannot be assured you will have to consider postponing the hearing whilst you get a ruling from the court in that regard.
- 10.4 The committee meetings of SCOPA are, like everything else, subject to the principles of fair administrative justice legality. That entitles you to a fair hearing and issues of bias and confidentiality have to be dealt with before you attend the meeting.
- 10.5 The issue of legality also affects the basic question of whether you should be required to attend the SCOPA meeting at all at this stage.
- 10.6 The request for the meeting is dated 6 November 2018. The purpose of the meeting ("our main and only concern") is the "prevention of mismanagement of public funds".
- 10.7 The Commission of Enquiry appointed was appointed by the President on 4 October 2018 and gazetted on 17 October 2018.
- 10.8 The terms of reference of the Commission include:
- (1) That PIC is the investment manager of the funds of public service employees;



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- (2) That the investment of funds must be adequately safeguarded with the highest standard of ethics, integrity and efficiency;
  - (3) That there are persistent and continued negative reports about alleged improprieties regarding investments by PIC;
  - (4) That the veracity of the alleged improprieties must be investigated.
- 10.9 In other words, the work to be done by the Commission is the same as the proposed monitoring, investigation, enquiry into and making recommendations concerning the PIC that SCOPA intends to perform.
- 10.10 Both the functions of the Commission and the functions of SCOPA are subject to the requirement that you have the right to administrative justice in terms of s 33 of the Constitution. The Commission is constrained by duty to act fairly and the rights of witnesses before the Commission are protected (*President of the RSA v SA Rugby Football Union 2000 (1 SA 1 CC)*).
- 10.11 It is not fair administrative justice for you to be required to appear before two separate bodies calling for the same documents, dealing with the same issues, requiring the same evidence and effectively subjecting the persons appearing to double jeopardy in the sense that they can be sanctioned or prejudiced by reason of having to give the same evidence on the same documents to different bodies on different occasions.
- 10.12 The courts have a discretionary power to stay the interrogation of a witness where there is potential prejudice to the person sought to be interrogated (*Lane v Magistrate Wynberg 1997 2 SA 869 CBD*).
- 10.13 In our opinion the authority of the Commission and its obligation to do its work efficiently is more important than and trumps the enquiry by SCOPA.
- 10.14 You should express your willingness to cooperate with SCOPA in the confidential manner described above but only after the Commission has done its work and to the extent that the investigation and recommendations by SCOPA are still needed in the light of what happens at the Commission.
- 10.15 The Commission is required to do its final report by no later than 15 April 2019 so there is no reason to think that there will be an undue delay in SCOPA being able to investigate anything that may still be necessary (which in itself seems unlikely).
- 10.16 We recommend that you write to SCOPA accordingly and send copies to the Commission asking them to intervene to avoid the duplication of enquiries which will undoubtedly and unfairly be to your prejudice. We will be surprised if the Commission countenances a parallel process to what they are doing as it will make the whole process less efficient. If you agree we can draft the letters.

11 We await your instructions.

Yours faithfully

  
Patrick Bracher  
Director  
Norton Rose Fulbright South Africa Inc

Copy to: Deon Botha