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**MEMORANDUM**

**[Confidential]**

**TO:** Mr VC Xaba  
Chairperson of the Portfolio Committee on Defence and Military Veterans

**COPY:** Ms P Tyawa  
Acting Secretary of Parliament

Mr M Xaso  
Acting Deputy Secretary: Core Business

**FROM:** Constitutional and Legal Services Office

**DATE:** 13 September 2019

**REF:** 90/19

**SUBJECT:** Independence of the Office of the Military Ombud in terms of the Military Ombud Act



## INTRODUCTION

1. Our Office was requested to provide the Portfolio Committee on Defence and Military Veterans ('the Committee') with a legal opinion clarifying the statutory position of the Office of the Military Ombud with respect to its independence in terms of the autonomy of the office in carrying out its tasks, the effect of its reports and reporting to Parliament.

## LEGAL QUESTION

2. In light of the above request, the legal question can be phrased as follows—

Does the Office of the Military Ombud lack the legislatively required institutional protection for it to function independently?

## LEGISLATIVE FRAMEWORK

3. Section 2 of the Military Ombud Act, 2012 (No 4 of 2010) ('the Act') establishes the Office of the Military Ombud, while section 12 determines that the Office may only 'be disestablished or placed under judicial management or liquidation... by an Act of Parliament'.
4. The long title of the Act reveals the legislative intent that the so established Office is to function as an independent Office, with the powers, functions and jurisdiction of the Ombud clearly set out in sections 6 and 7. Furthermore, in terms of section 6(11), the Minister may only assign any additional functions to the Ombud if such are not inconsistent with the Act.
5. Independence is specifically provided for in section 8 of the Act, which reads as follows:

### **8 Independence and impartiality**

- (1) **The Ombud and the staff members must serve independently and impartially** and must perform their functions in good faith and **without fear, favour, bias or prejudice**, subject to the Constitution and the law.

- (2) The **Minister must** afford the Ombud such assistance as **may be reasonably required for the protection of the independence**, impartiality and dignity of the Ombud.
  - (3) **No person may hinder or obstruct the Ombud** or members of his or her staff in the performance of his or her or their functions.
  - (4) **Members and employees of the Department must cooperate with the Ombud** and the Deputy Ombud in the performance of their functions, which includes providing them reasonable access to facilities, information or documents.
  - (5) The Ombud must preserve confidentiality in respect of any information acquired in terms of subsection (4).
6. The section 8 entrenched independence is re-enforced by section 14 'Offences and penalties', which provides that—
  - (1) Any person who hinders or obstructs the Ombud or a member of his or her staff in the performance of his or her or their functions, commits an offence and is liable on conviction of a fine or imprisonment for a period not exceeding 12 months, or to both a fine or such imprisonment.
  - (2) Any person who contravenes section 8(5) is guilty of an offence and liable on conviction to a fine or imprisonment to a period not exceeding 24 months or to both a fine or such imprisonment.
7. The Act further entrenches the independence provided for in section 8 by—
  - a. allowing for the appointment and (if required) removal of the Ombud by only the President —with no involvement by the Minister or the Department— in terms of sections 5;
  - b. empowering the Ombud to appoint his or her staff in terms of section 9(1); and
  - c. requiring the concurrence not only of the Minister but also the Minister of Finance in the Ombud's determination of the remuneration and other terms and conditions of service of the staff in terms of section 9(2).
8. Reporting in terms of the Act —as far as the reporting line between the Ombud and the Minister— appears limited to section 10 'Finances' and section 11 'Reporting'. Contextually this does not extend to functional or operational matters of the Office.

9. Sections 10 and 11 of the Act read as follows:

## **10 Finances**

- (1) Expenditure connected with the administration of the Office must be funded by monies appropriated by Parliament for that purposes, as part of the budget vote of the Department.
- (2) The Ombud must, subject to the Public Finance Management Act, 1999 (Act 1 of 1999)—
  - (a) *account for all monies received or paid by the Office; and*
  - (b) *cause the required accounting and other records to be kept.*

## **11 Reporting**

- (1) The Ombud must, within 30 days after the end of each financial year, submit to the Minister an annual report on the activities of the Office during the previous financial year.
- (2) The Ombud must report to the Minister on the activities of the Office as and when requested to do so by the Minister.
- (3) The Minister must table the report contemplated in subsection (1), in Parliament within one month of receiving such report from the Ombud

10. As far as empowering provisions are concerned, only section 15 of the Act allows the Minister, after consultation with the Ombud, to make regulations regarding the form and format in which complaints are lodged and investigations are conducted. The scope of these regulations however remain subject to the independence standard prescribed by the Act.

## **LEGAL ANALYSES**

### **Institutional Independence**

11. In *Van Rooyen v The State*,<sup>1</sup> Chaskalson CJ in the majority judgment interpreted the scope of judicial independence by looking into the manner in which independence was approached in the Canadian case of *R v Généreux*.<sup>2</sup>

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<sup>1</sup> 2002 (5) SA 246 (CC).

<sup>2</sup> (1992) 88 DLR (4<sup>th</sup>) 110 (SCC).

12. *Généreux* considered the independence of a legislatively established military tribunal. The factors identified in the evaluation of institutional independence were—
- a. sufficient security of tenure;
  - b. financial security; and
  - c. protection from any possible arbitrary interference in the exercise of its essential authority and function,
13. Drawing on these considerations, Chaskalson CJ in *Van Rooyen* noted that in determining whether **the benchmark for independence** has been met one must consider **whether, ‘from the objective standpoint of a reasonable and informed person’<sup>3</sup>, the entity in question (be it court, tribunal, ombud or alike) can be ‘perceived as enjoying the essential conditions of independence’.**
14. This observation by Chaskalson CJ in turn points to an **objective test for independence**,<sup>4</sup> for which formulation the Constitutional Court in *Van Rooyen* looked to a further Canadian case, *Valente v The Queen*,<sup>5</sup> as also relied upon by Ackerman J in *De Lange v Smuts*.<sup>6</sup>
15. In *Valente*,<sup>7</sup> it was stated that independence connotes ‘a status or relationship to others particularly the Executive Branch of government, that rests on objective conditions or guarantees.’ It is this rationale the court in *Généreux* relied upon in holding that **independence requires a guarantee of freedom from interference from any external force in the exercise of functions.**
16. In *Van Rooyen*, Chaskalson CJ found that the approach to independence as set out in *Valente* and *Généreux* to be—

‘similar to the test adopted by this [Constitutional] Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* for determining whether there are grounds for recusal:

“The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring **an impartial mind to bear in the adjudication of the case, that is a mind open to persuasion by the evidence** and the submissions of counsel.”.’

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<sup>3</sup> This reasonable person was benchmarked in *US v Jordan* 49 F 3<sup>rd</sup> 152 (5<sup>th</sup>) Cir 1995, as referred to in *Van Rooyen* 2002 (5) SA 246 (CC) at par 34, as ‘well-informed, thoughtful and objective, rather than the hypersensitive, cynical, and suspicious person’.

<sup>4</sup> *Van Rooyen* J 2002 (5) SA 246 (CC) at par 30. See also, Farnco & C Powell, ‘The meaning of institutional independence in *Van Rooyen v The State*’, 2004 SALJ 562 at 563.

<sup>5</sup> (1986) 24 DLR (4<sup>th</sup>) 161.

<sup>6</sup> 1998 (7) BCLR 779 (CC).

<sup>7</sup> (1986) 24 DLR (4<sup>th</sup>) 161 at 169 – 170.

17. In the recent case of *Sonke Gender Justice NPC v President of the RSA*,<sup>8</sup> the Western Cape High Court once again grappled with the issue of independence in the context of the Correctional Services Act, 1998 (No 111 of 1998), 'which deals with the establishment of the Judicial Inspectorate of Correctional Services(JICS), its structure and its functioning, and the Independent Correctional Centre Visitors ("ICCV") respectively'.<sup>9</sup> The applicant relied on *Glenister v President of the Republic of South Africa*<sup>10</sup> to argue for independence that places the JICS at the level 'that is sufficiently independent to enable it to function effectively'.<sup>11</sup>
18. In evaluating the placement of the JICS, Boqwana J in *Sonke* highlighted that '[i]n *Glenister* the Court observed that creating a separate corruption-fighting unit within the SAPS was not in itself unconstitutional, and thus the DPCI legislation could not be invalidated on that ground alone'.<sup>12</sup> It was further also noted that IPID—
 

'is financed with money appropriated from Parliament... The Executive Director must prepare and submit an annual report to the Minister. The Minister tables the report and financial statements in Parliament. It seems as if IPID gets its funding from Parliament, and reports to Parliament, via the Minister of Police'
19. As far as institutional independence in relation to financial reporting through a department is concerned, Boqwana J also relied on *Helen Suzman Foundation v Judicial Service Commission*<sup>13</sup> where the Constitutional Court held that 'there is nothing wrong with accounting to the Executive on financial and budgetary matters. It seems to me that the fundamental issue is the lack of control that JICS has over its budget'.<sup>14</sup>
20. Based on these objective independence considerations highlighted in jurisprudence, one can measure whether the Act effectively secures the required institutional independence of the Ombud.

## Tenure, Finance and Reporting

21. Section 10(1) of the Act determines that '[e]xpenditure in connection with the administration of the Office must be funded from monies appropriated by Parliament for that purposes, as per the budget vote of the Department'.

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<sup>8</sup> [2019] ZAWCHCH 117.

<sup>9</sup> *Sonke* [2019] ZAWCHCH 117 at par 1.

<sup>10</sup> 2011 (30 SA 347 (CC).

<sup>11</sup> *Sonke* [2019] ZAWCHCH 117 at par 20.

<sup>12</sup> *Sonke* [2019] ZAWCHCH 117 at par 23.

<sup>13</sup> 2018 (4) SA 1 (CC).

<sup>14</sup> *Sonke* [2019] ZAWCHCH 117 at par 68.

22. It is a general practice that entities that require institutional independence are included in the related departments' budget votes. The fact that section 10(1) allows for the funding of the Office of the Military Ombud through the budget of the Department does not automatically imply that this line item makes it impossible for the Ombud to perform the powers and functions 'in good faith and without fear, favour, bias or prejudice, subject to the Constitution and the law', as required by section 8(1) of the Act.
23. The responsibility of the management of those funds falls to the Ombud as the head of the Office of the Military Ombud. This is evident from the fact that section 10(2) of the Act stipulates that—

'The Ombud must, **subject to the Public Finance Management Act, 1999 (Act 1 of 1999)**—

- (a) *account for all monies received or paid by the Office; and*
- (b) *cause the required accounting and other records to be kept.'*

24. The responsibility set out in section 10(2), provides context and clarity as to the scope of the Ombud's reporting responsibilities set out in section 11 of the Act, namely to annually report 'on the activities of the Office during the previous financial year', which report the Minister in terms of section 11(3) is obligated to table in Parliament.
25. When reading sections 10 and 11 of the Act together, as far as reporting is concerned, one can conclude (in line with the reasoning in *Sonke*) that the Office of the Military Ombud gets its funding from Parliament, and reports to Parliament, via the Minister.
26. Section 11(2) further provides that '[t]he Ombud must report to the Minister on the activities of the Office as and when requested to do so by the Minister.' This, I submit, must be viewed within the holistic context of the Act, keeping in mind the following: that the Minister—
- a. The Minister is not involved in the appointment of the Ombud (who in turn appoints his or her own Deputy and Staff in terms of sections 5 and 9).
  - b. The Minister has no say over the Ombud's legislatively prescribed non-renewable tenure of 7 years, with remuneration and other terms and conditions of services of the Ombud.
  - c. The Minister cannot in terms of the principle of legality put in place section 15 authorised regulations in a manner that undermines the performance of Ombud's duties within the prescribed mandate. If the Ombud feels that any regulations so issued inhibits its independent functioning she or he can report that limitation and/or interference to Parliament for consideration as part of the Portfolio Committee's oversight function.
  - d. The Minister as 'any other person'—

- i. is subject to the safeguards for the institutional and operational safeguards put in place for the Ombud for purposes of independence required by section 8 and protected throughout the Act; and
  - ii. can only challenge a decision made by the Ombud in terms of section 13 of the Act that allows for a decision of the Ombud to be taken on review through an application to the High Court.
27. The Ombud therefore has sufficient security of tenure and, unlike the *Sonke* reference to *Helen Suzman*, the Ombud does not lack control when it comes to its budget. Nothing in terms of the reporting line prevents the Ombud from reporting any presumed restriction or infringement as to its independent function to Parliament for consideration by the Committee in the exercise of its constitutionally endorsed oversight functions.
28. Furthermore, it must be noted that even though the Ombud must act in terms of the Public Finance Management Act, the Office of the Military Ombud is not listed as a Schedule 3 Entity. Section 47(2), in addressing the issue of unlisted public entities provides that—


‘[t]he accounting authority for a public entity that is not listed in either Schedule 2 or 3 must, without delay, notify the National Treasury, in writing, that the public entity is not listed’.
29. If the Ombud regards the current financial structures to be too restrictive when it comes to the functioning of the Office of the Military Ombud, there is therefore another legislative option open to the Ombud to strengthen the position of the Office of the Military Ombud by placing reliance on section 47(2) of the Public Finance Management Act.

## CONCLUSION

30. **In light of the above outlined legislative structure and legal analyses, the Act is carefully crafted to safeguard the institutional independence of the Ombud and the Office of the Military Ombud to allow it to enjoy the essential conditions of independence:** In terms of scope and provisions of the Act, the Office of the Ombud is sufficiently independent to enable it to function effectively free from interference in its decision-making processes and exercise of its functions.
31. The limited power the Act assigned to the Minister (and by implication the Department) is also legislatively checked by the fact that neither the Minister or the staff of Department (like any person) are allowed to interfere with the exercise of the powers and functions of the Ombud.



32. No reasonable person can in terms of the provisions of the Act question that the Ombud is empowered and safeguarded in a manner that allows it to retain its independence.
33. In the event that the provisions of the Act are infringed or incorrectly applied contrary to the intent of the legislature, Parliament retains its overarching oversight power and the Ombud can submit any concerns or perceived interference by the Minister or the staff of the Department to the Committee for oversight purposes.
34. **If the Committee is of the opinion that the Act (although drafted to ensure the independence of the Office of the Military Ombud) can go further in providing safeguards against unnecessary interference in the exercise of its powers and functions, the Committee can report such as a policy decision to the National Assembly and request permission to amend the Act by means of a Committee Bill in terms of Parliament's primary constitutional mandate to legislate.**
35. If there are institutional practices that the Acting Ombud feels undermines the independence of her office, she must report those practices to the Committee so that the Committee can deal with the issues through its normal oversight mechanisms.



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