



SUPPLEMENTARY REPORT TO PC PRESENTATION

Turnaround strategy



STATUS REPORT ON OFFICES OF STATE ATTORNEY

**PRESENTATION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE
JUSTICE & CORRECTIONAL SERVICES**

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OFFICE OF THE SOLISITOR GENERAL
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1. INTRODUCTION

This report is prepared to expatiate on the presentation prepared for the Portfolio Committee of Justice and Correctional services, briefing scheduled for the 16th February 2021. This report focuses on prioritised challenges, planned turn-around strategy and the plans of the implementation strategy from 16 March 2020 – 31 January 2021.

2. BACKGTOUND AND MANDATE OF THE ACTING SOLICITOR-GENERAL

2.1 The State Attorney's Amendment Act, 2016 (Act 13, 2014)

2.1.1 Prior to the 7 February 2020, the management of State litigation was governed by the State Attorney Act, 1957 (Act No. 56 of 1957) (the Act). The Act is one of the pillars of the defunct Apartheid State and was the re-enactment of the previous State Attorney Act of 1932, which was enacted by the colonial regime.

2.1.2 Notwithstanding the fact that the Act was amended on several occasions, the structural arrangements for the management of state litigation have remained unchanged, until the Amendment Act was passed in 2014.

2.1.3 The political climate and the context in which the Act was passed is significant. At the time of the enactment of the Act, government, in its legal architecture was still a Union comprising of four Boer and English Republics and Railway and Harbours was the only State-Owned Entity that was incorporated as part of the government machinery.

2.1.4 Government has changed fundamentally and substantially from what it was in 1957. The 1996 Constitution established a sovereign unitary State and constitutional democracy structured across three Branches of State and three spheres of

Government with over 300 State Owned Enterprises (SOEs) premised of the Rule of Law.

2.1.5 Transforming the State Legal Services to fit today's South Africa's constitutional setting is an intense and protracted transformation exercise which requires a comprehensive overhaul of the State legal services architecture. To this end, the President proclaimed the implementation of the State Attorney Amendment Act, 2014 (Act 13 of 2014) with effect from the 7 February 2020

2.1.6 The significance of building a capable State is reiterated in the 2019 – 2024 Medium Term Strategic Framework which it is listed as the first priority of the 6th Administration.

2.2 The mandate of the acting Solicitor General:

2.2.1 In implementing the **turnaround strategy** for the offices of State Attorney and management of state litigation is tasked with development of a **situational analysis** which will depict "the as is position" which will provide the following, amongst others:(a)the case load, (b) the number of state attorneys, (c) the number of support staff, (d) the current budget of the State Attorney, (e) the costs to defend litigation against the State (past 3 years), (f) Contingent liability for whole of national and provincial government.

2.2.2 The acting Solicitor General is also tasked with developing and implementing a multi-disciplinary solution in the handling of state litigation, which is geared at:

- (a) Reduction of contingent liability
- (b) Structured Litigation Approach supported by Historical Data,
- (c) Reduction in case Load
- (d) Alternative Dispute Resolution (ADR).

2.2.3 Development of Policies to address the systemic challenges;

- 2.2.4 Section 3(4) of the Amendment Act requires the Minister of Justice and Constitutional Development to determine policy relating to the functions of the Office of the State Attorney, after consultation with the Acting Solicitor-General. These policies include the coordination and management of all litigation in which the State is involved; the briefing of advocates; the outsourcing of legal work, including the instruction of correspondent attorneys; initiating, defending and opposing of matters; and implementing alternative dispute resolution mechanisms in the resolution of litigation against the State. The Amendment Act requires these policies to be approved by Cabinet and tabled in Parliament.
- 2.2.5 The current operations of the State Attorney is not guided by policy that are determined and approved at the level required by the Amendment Act, and the provisions of the said Act is intended to ensure consultation, buy-in and accountability for management of State litigation at the highest level of government. While addressing the need to implement changes for the improved management of State litigation, the State is the largest consumer of legal services, and holds immense power to transform the legal profession.
- 2.2.6 Section 3A(1)(c) provides that the Solicitor General, in implementing the policy referred to in section 3(4), shall issue directives and standards regarding the functions of the State Attorney, which standards and directives must be observed by all persons appointed in the offices of State Attorney.
- 2.2.7 Another critical work identified is the need for the development of Framework for the Briefing of Counsel, which is commensurate to the Constitution and procurement processes determined by the National Treasury.

2.2.8 There is no framework in place currently and this has led to the allocation of legal work to a few, or those available, at times not informed by transformation imperatives. The envisaged framework must satisfy the requirements of competitiveness, open and transparent processes for procurement, costs and value for money considerations. A framework contract is being developed to address this urgent challenge and all entities serviced by the State Attorney will be consulted in this regard.

3. AS IT WAS: CHALLENGES PRIOR THE APPOINTMENT OF THE ACTING SOLICITOR- GENERAL

Here is the summary experienced by the branch prior period preceding the appointment of the Acting Solicitor-General:

3.1. POLICY AND OR LEGISLATION GAP

3.1.1 The state attorney offices operated for a long time without proper policies relating to managing and coordination of state legal services. Lack of policies created many operational challenges for state attorney and client departments. Although the State Attorney Amendment Act was proclaimed in 2014, the delay in the proclamation of the Act resulted in policies geared at management and coordination of state legal services not being implemented,

3.1.2 The business processes for the State Attorney were developed and approved in 2012 and reviewed in 2018 but they were never implemented. This led to lack of standardisation in the operations in the the then various branch offices of state attorney.

3.2. STRUCTURE, LEADERSHIP, CAPACITY AND OSD

- 3.2.1 Although the coming into effect of the Constitution in 1996 encouraged people to exercise their rights, this increased the scope and complexity of work in the State Attorney offices. The structure in the Office of the State Attorney has largely been unchanged since its inception in 1957, and consisted of a head of office, attorneys and support staff. Office managers have been recently added to the structure but without fully assimilating a meaningful role for them within the structure of the office.
- 3.2.2 The implementation of OSD resulted in all senior managers in the Office of the State Attorney being translated or converted to OSD, meaning that they translated to a class of work that is viewed as 80% production work and 20% management. This erased the entire management structure in the State Attorney offices. One of the negative judgments that dealt with the conduct of the State Attorney itself (the G4S case) centred on the issue of lack of supervision of junior attorneys.
- 3.2.3 The implementation of the OSD created a flat structure that resulted in the Heads of Offices of State Attorney being on the same salary level as their Deputy State Attorneys. This had a rippling effect and negatively impacted on management positions, which in turn lead to lack of leadership in the various offices.
- 3.2.4 The implementation of the OSD prescribes entry level salaries at very low levels and the high volume of work does not justify the salaries paid. Coupled with the poor working conditions, this phenomenon discourages well qualified attorneys from applying for positions at the OSA.

3.3. INFRASTRUCTURE

- 3.3.1 Office space and working conditions are dilapidated. Some attorneys have to share offices, office furniture is broken and there is no access to proper boardroom facilities to hold meetings with counterparts (those in private practices) in the conduct of litigation. This is not the image one would want to portray to one's opponent in litigation.
- 3.3.2 The Office of the State Attorney lacks a proper system for electronic diary and alerts; the management and sharing of knowledge within the offices (in the form of precedents and tools to develop learning through best practices) and sustained training and development in the field of trial advocacy. The small changes that have been affected is superficial and has not developed the existing infrastructure in line with new realities and challenges.
- 3.3.3 State Attorney offices are not equipped with appropriate electronic tools, including computers. Their systems are managed as part of the DOJ&CD's IT system, which focuses on administration. This infrastructure is not in keeping with that of an attorney's practice.
- 3.3.4 Whilst the Department subscribes to electronic resources, the question is whether State Attorneys have are capacitated in accessing these resources. Many private law firms invest in the development of their staff through training, upskilling, newsletters and other forms of enhancing their ability to access up to date and relevant information. Being armed with information on updates to legislation and case law is crucial to an attorney's operations but this is an acute limitation to the State Attorney model. There is no such system or planned investment in this sphere to equip Offices of the State Attorney to be fit for purpose.

3.4. HIGH COST OF LITIGATION

- 3.4.1 On average, the branch spends over One Billion Rand on legal fees relating to appointment of private legal practitioners to render legal services on behalf of the State through the various offices of the State Attorney. The Department of Justice and Constitutional Development (DoJ&CD) pays the legal costs on behalf of client Departments, which it then claims back through the agency fee agreement. However, most client Departments fail or refuse to reimburse DoJ&CD and this leads to the DoJ &CD to operate on an overdraft, whilst also triggering negative audit findings. It is noteworthy that the Offices of State Attorney themselves do not charge a fee to client departments, as the baseline budget for the operations of the Offices of State Attorney is borne by DoJ&CD.
- 3.4.2 In its then form prior to February 2019, procurement of state legal services by client departments through Offices of State Attorney was, due to absence of policy guidelines and inconsistencies, deemed to be inimical and contrary to section 217 of the Constitution of the Republic as well as constituting an affront to its regulatory framework as provided for by the PFMA, its related Acts and Regulations.
- 3.4.3 At the same time, it has been established that this system and its controls as applied by the Office of the State Attorney were inadequate to prevent a wide range of corruption, collusion and fraud in which state attorneys, client department officials, Attorneys and Advocates in private practice, as well as members of the public may have participated in.
- 3.4.4 These allegations (fraud, theft, corruption and malfeasance) are currently being investigated by the SIU in accordance with such related proclamation. A number of reports have been completed and filed with the Office of the Acting Solicitor-General with consequent management and referral to law enforcement agencies in certain instances.

- 3.4.5 In light of the foregoing, It is therefore incumbent that if any new system is developed, it must be adequately designed to adhere to the relevant requirements of section 217 of the Constitution and to prevent and/or detect materialisation of any risks in relation to procurement of legal services including criminal acts which can be hidden *in acts of so called “professional discretion and alleged professional standards”*.
- 3.4.6 The State does not have a clear guideline on the management of its contingent liability. The determination of the quantum of the State's Contingent Liability is determined by National Treasury but its configuration or the metrics used might not holistically cover the full extent of the contingencies that require to be made year-in and year-out. The current practise by some departments is that there are no clear guidelines to determine what constitutes contingent liability, seeing that some amounts are registered as they appear in the letter of demands. This practise has the potential of these claim amounts being inflated.
- 3.4.7 If it is accepted that Offices of State Attorney are to give assurances on the exposure of the State, through the various client departments, it follows therefore that a multidisciplinary approach is required, enabling the Office of the Acting Solicitor-General to assist in the management of the Contingent Liability arising through litigation and other opportunistic claims against the State whilst at the same time assisting in the reduction of State Liability.

3.5. MANDATE OF OSA

- 3.5.1 Section 3 of the State Attorney Act 57 of 1957 envisaged the mandate of the State Attorney to cover all spheres of government including the State-Owned Enterprises (SOEs).

- 3.5.2 It is noted that the State Attorney has never been able or enabled to finalise many file audits over the past ten years preceding the creation of the Office of the Acting Solicitor-General. A proper assessment of the current state of affairs is that the accuracy of the number of active files is questionable as these, without a proper audit, also include dormant files or matters that have, for various reasons, stagnated.
- 3.5.3 In general, the public (including client departments) perceives the Offices of State Attorney and processes as ineffective and inefficient to the extent that the Public Service Commission (PSC) had to undertake a study into the effectiveness and efficiency of the processes and practices of the OSA.
- 3.5.4 The perception of the public is evident enough by the complaints lodged with the PSC and some of the High Courts judgments that critiqued the operations of the OSA. An example of such case is *“Minister of Rural Development and Land Reform v Griffio Trading CC; In Re: Griffio Trading CC v Minister of Rural Development and Land Reform (12440/11) [2014] ZAGPPHC 666 (2 September 2014)”*. The judge concluded that:

“The present condition of this Office causes significant unnecessary expenditure of public funds that are wasted by costs orders granted against organs of state because of the poor quality of professional service provided by these officers of the court. Eventually the very essence of the rule of law is endangered if regular litigants fail to observe the most basic principles that protect the independence and quality of justice dispensed by our courts. It is high time that this malaise is addressed. The client’s fundamental right to legal representation was rendered nugatory if the attorney tasked with representing it is guilty of as grave a dereliction of duty as the State Attorney is in this case. Legal representation must mean effective legal representation if that right is to be observed and respected in practice.”

- 3.5.5 According to PSC (2016: 11), such perception is shared by some of clients departments as they consider attorneys in the OSA as inexperienced and unable to deal with litigation at the higher courts. The State Attorney may defend the State, but are unable to make a positive contribution to the development of jurisprudence, brought on largely because it operates in crisis mode; there is lack of thorough preparation of its cases; and an absence of alternate dispute resolution mechanisms which could avert huge financial costs and precedent setting judgments.
- 3.5.6 A vast majority of work of State Attorneys is outsourced to private legal practitioners. The majority of this work is outsourced to advocates at the Bar. We need to take particular note of this practice of and subsequent reliance on outsourcing to private legal practitioners. The State Attorney is criticised for being “brief-carriers” to consultations with counsel, who determine the defence, prepare the documents and argues the case before court. In effect, as government, the most important link in the value-chain of litigation has been outsourced.
- 3.5.7 While recognising the important role private legal counsels play and continue to play in State litigation, there is, in certain instances, considerable risk to the State in not having full control of the entire process in litigation. Furthermore, this curtails in-house skills development and capability due to over-reliance on private legal counsel

4. TURN-AROUND STRATEGY POST THE APPOINTMENT OF THE ACTING SOLICITOR-GENERAL

4.1. POLICY & LEGISLATION

- 3.1.1 The State Attorney Amendment Act 13 of 2014 requires the Acting Solicitor-General to determine policy relating to the functions of Offices of State Attorney which must include; (a) Coordination and Management of State Litigation,(b) Alternative Dispute Resolution Mechanism (Mediation), (c) Briefing and Outsourcing of Legal work to Legal Practitioners and (d) State Legal Representation (e) Initiating and Defending of Matters.
- 3.1.2 The aforesaid policies have already been developed in line with Amendment Act and wide consultation has been conducted with various stakeholders (including Interested and Affected Parties). The following policies: Coordination and Management of State Litigation, Alternative Dispute Resolution Mechanism (Mediation) and State Legal Representation were assessed and are in the process of being certified and issued with the requisite Socio-Economic Impact Assessment and Quality Assurance (SEIAS) certificates. It is anticipated that these policies would be ready for submission to Cabinet by the Minsiter before the current financial year-end whilst the remaining two (2) policies would be ready for submission in Q1 of the next financial year.
- 3.1.3 The business process for legal services and the standard operating procedure will be reviewed and approved in line with the State Attorney Amendment Act. Once implemented, they will standardise operation in the offices of State Attorney.
- 3.1.4 The Briefing, performance reporting and file allocation standard operating procure are in the process of being approved and would be operational befoire the end of the current financial year.

4.2. CREATE AUTHORITY FOR STATE LEGAL SERVICES

4.2.1. Organisational structure and business model

- (a) The branch requires a new structure to implement the State Attorney Amendment Act and the implementation of the new Strategic mandate of the Office of the Acting Solicitor-General. To achieve the desired change, the branch will implement the Litigation Strategy and the Stakeholder Management. The Litigation Strategy has been developed and consultation processes are underway.
- (b) In terms of the State Attorney Act, 1957, as amended, the office of the State Attorney, established in Pretoria and the branches thereof, existing at the commencement of the State Attorney Amendment Act, 2014, are deemed to have been established as offices of State Attorney. With the implementation of the amendment Act on the 7 February 2020, there are now 13 offices of State Attorney across South Africa.
- (c) As alluded to in the background submission hereto, the operations of the 13 Offices of State Attorney require to be properly streamlined to ensure a coordinated approach in the handling of matters, including development of responsive protocols in handling constitutional matters in which the State is involved. There is an immediate need for a nerve-centre for streamlining these matters and to obviate the fragmented manner in the handling of state litigation. The Office of the Solicitor General - is enjoined with development of policies and directives to streamline and harmonise the operations of Offices of State Attorney.

- (d) To date, 6 Heads of Offices (Bloemfontein; Nelspruit; Johannesburg; North-West; Polokwane and Pretoria) have been appointed, 2 (Kwazulu-Natal and Western Cape) are awaiting confirmation of appointment and 5 (Mthatha; East London; Port Elizabeth and Thohoyanfou) are in the process of being advertised. It is envisaged that the process for appointment and capacitation of all 13 Offices of State Attorney would be completed through selection of fit-for-purpose Heads of Office would be concluded by Q1 of FY2021.02.09
- (e) The branch, in consultation with the HR Unit of the DoJ&CD's Corporate Services Branch is fast-tracking the appointment of the remaining office Heads and the a feasibility study for the conversion of the Deputy State Attorney from OSD level to Senior Management level is being explored.
- (f) The SG has fostered closer relations with different organs of state including the National School of Governance (NSG), Legal Practise Council (LPC) and Legal Aid South Africa and other Government Stakeholders and maintains a functional collegial relationships with accounting officers both at National and the Provincial sphere of Government.
- (g) In order to achieve an impactful turn-around strategy, a number of selected in-service training courses have been identified by the Acting Solicitor-General for training and reskilling both attorneys and support staff through the auspices of the Justice College. This is intended at professionalising the service offerings by Offices of the State Attorney.
- (h) Regulation 13 of the COVID-19 Disaster Management Regulations issued pursuant to the Disaster management Act, 2002 enjoins the Acting Solicitor-General to facilitate and co-ordinate mediation and arbitration services in

relation to COVID-19 disputes. Owing to operational challenges, the Acting Solicitor-General was able to negotiate and have an agreement with the Arbitration Foundation of South Africa (AFSA) for utilisation of its facilities, at no cost to the State. Retired Judges are rotated as Mediators and Arbitrators and a number of COVID related disputes have to date been resolved, again at no cost to the State.

- (i) The Acting Solicitor-General has issued directives to the Offices of State Attorney on matters relating to:
 - the handling of Covid-19 and Constitutional related matters
 - the authority who has a final say on briefing of private legal practitioners
 - circular on disposal on legal records (clearing of filling space)
 - auditing of all files to determine file loads per office (this is assisting in resources allocation)

4.2.2 Salient Submissions on Turn-around Strategy

- (a) To the extent that the mandate of the Office of the Acting Solicitor-General extends to management of the State Contingent Liability as well as reduction of State Liability, the acting Acting Solicitor-General has:
 - (i) determined that the branch requires policy or guideline to manage State's Contingent Liability that will assist of the State (National Treasury) in accurately determining and quantifying contingent liability arising from litigation and other related claims against the State.

- (ii) That with the implementation of cross-cutting policies as envisaged in the enabling legislation and other prescripts, reduction of State Liability is possible if there is a nerve-centre for oversight on consumption of legal services across all spheres of Government. With an enabling environment and proper policies in place, the savings could be extended to all SOE's and Government parastatals that are tax funded.
- (b) To this end, OSG branch is assisting DoJ&CD in developing guidelines to determine and manage contingent liability. This guideline will be piloted to establish its feasibility at the DoJ&CD and if successful, it will be rolled out to other organs of the state.
- (c) As mentioned above, the offices State Attorney were found wanting when it comes to compliance with the rules relating to competitive bidding when procuring legal services and this also resulted in a lot of unfavourable audit findings by the AGSA.
- (d) The Acting Solicitor-General has determined that the briefing patterns by offices of the State Attorney are inequitable and lacking in transparency. To this end, a framework contract strategy is in the process of being developed to remedy this. The Acting Solicitor-General has established the national briefing committee which will closely assess and monitor the briefings issued across the various Offices of State Attorney to ensure fair distribution of briefs as well as compliance with relevant prescripts.

- (e) To the extent that there currently are resource limitations hampering the Offices of State Attorney to render services across the entire State and with a view to harnessing transformation of State Legal Services, the Acting Solicitor-General intends, within Q1 of FY2021-2022 to establish a central database of legal service providers for expression of interest to render services to the State.
- (f) In order to meaningfully protect the security of the State, one of the critical mandates of the Office of the Acting Solicitor-General is to re-establish a Constitutional Litigation Unit. Once the strategy and structure of the OSG is completed, envisaged to be Q2 of FY2021-2022, it is instructive that a Unit specifically equipped to deal with Constitutional Litigation intended to buttress Jurisprudence on behalf of the State is created.

4.3. ICHALLENGES WITH IT SOLUTIONS

- 4.3.1 The Acting Solicitor-General halted the tender processes to procure off the shelf practise management system in order to determine a solution that is financially viable for the use of existing systems within the broader government. The system previously utilised by State Attorneys is not fit for purpose or inadequate to deal with the challenges of a modern law-firm. Offices of State Attorney require an automated solution that is secure and reliable; Relevant; Easy to use and seamless. The need to be an investment in ensuring that Offices of State Attorney are digitally enabled and data management ensures the security of the State.
- 4.3.2 The Branch is currently using the Integrated Case Management System (ICMS) as an interim measure to clean and ensure the integrity of data and confirm the file loads on hand. The total file load will be confirmed by the end of the 2020/21 financial year. National Operations Centre Information Management Tool (NOCIMT) was implemented to improve the management and the quality of management data.

4.4. INTERGOVERNMENTAL RELATIONS AND MANDATE

- 4.4.1 In order to ensure adequate implementation of the State Attorney mandate, the Intergovernmental National Litigation Forum has been resuscitated and plans to convene a meeting with the broader stakeholders by the end of the 2020/21 financial year are afoot.
- 4.4.2 To improve the level and quality of service offered by the Offices of State Attorney, the branch has developed the training manual which will address the skills gaps and capacitate the State Attorney workforce. To this end, it is the desire of the Acting Solicitor-General that in order to build a capable state, a digitally confident workforce should be inculcated within Offices of the State Attorney.

5. CONCLUSION

- 5.1 Although the turn-around strategy is forward looking, it is heavily dependent on the availability of enough resources.
- 5.2 The current allocated resources are insufficient to meaningfully cover the implementation of the planned projects, taking into account the austerity measures, limitation of both resources and further projected future budget cuts.
- 5.3 In order to attain full implementation of the State Attorneys Amendment, and enabling the OSG to be a nerve centre for State Legal Services, the magnitude of the statutory mandate should be measured by adequate resources.
- 5.4 At the moment, with human resource limitation and absence of an agile State Attorney multidisciplinary management solution to streamline data across client departments, the State will always be found wanting in protecting its security in relation to litigious and other claims preferred against it.

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