



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

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**TO:** Mr S Luzipo  
Chairperson: Portfolio Committee on Mineral Resources and Energy

**COPY:** Ms P N Tyawa  
Acting Secretary to Parliament

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

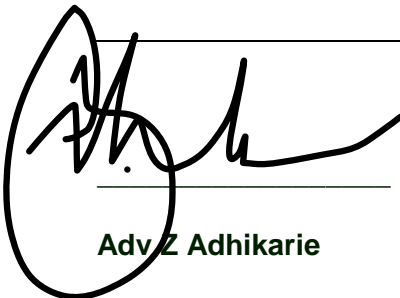
**DATE:** 26 May 2021

**REF:** 54/2021

**SUBJECT:** Opinion on the tabling of annual performance plan of a Schedule 2 entity

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



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Adv Z Adhikarie  
Chief Legal Adviser



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

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**MEMORANDUM**

**[Confidential]**

**TO: Mr S Luzipo, MP**

**Chairperson: Portfolio Committee on Mineral Resources and Energy**

**COPY: Ms. P N Tyawa**

**Acting Secretary to Parliament**

**FROM: Adv. Z Adhikarie**

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**INTRODUCTION**

1. Our Office was requested by the Chairperson of the Portfolio Committee on Mineral Resources and Energy (“the Committee”), Mr S Luzipo, MP (“the Chairperson”) to advise the Committee on the way forward regarding the tabling of the Annual Performance Plan of a Schedule 2 entity
2. According to the brief, the Department of Mineral Resources and Energy indicated that these entities submit their Corporate Plans for Ministerial approval. The Committee has requested to be advised specifically on whether the reason for not tabling the Annual Performance Plan is provided for in legislation.
3. The abovementioned opinion is solicited in the context of the obligations and responsibilities that are imposed by various legal instruments available to portfolio committees in the performance of their oversight functions. These are found in the Constitution of the Republic of South Africa, 1996 (“the Constitution”), the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 (“the PPI Act”) and the Rules of the National Assembly (“the NA rules”).

## **BACKGROUND**

4. Recently, the Committee dealt with the departmental budget vote and scheduled meetings with the Department of Mineral Resources and Energy (“the DMRE”) on their Annual Performance Plan for 2021/2022 and its Budget Vote No.34.
5. In addition, the Committee had engagements with the respective entities of the DMRE. However, prior to the respective briefings by the South African Nuclear Energy Corporation (NECSA) and the Central Energy Fund (CEF) SOC, the Committee received correspondence from the DMRE which indicated that because NECSA and CEF are Schedule 2 entities according to the Public Finance Management Act No. 1 of 1999, as amended, (“the PFMA”), they do not table Annual Performance Plans and Strategic Plans in Parliament.

6. According to the DMRE, the abovementioned entities submit Corporate Plans to the DMRE for Ministerial approval instead.
7. This opinion attempts to provide a way forward as to how best should the Committee proceed in conducting its oversight function on the abovementioned public entities.

## LEGAL FRAMEWORK

8. The PFMA provides for the term 'national government business enterprise', which is defined in section 1 as an entity which:
  - (a) is a juristic person under the ownership and control of the national executive;*
  - (b) has been assigned financial and operational authority to carry on a business activity;*
  - (c) as its principal business, provides goods or services in accordance with ordinary business principles; and*
  - (d) is financed fully or substantially from sources other than -*
    - (i) the National Revenue Fund; or*
    - (ii) by way of tax, levy or other statutory money.*
9. Importantly, all national government business enterprises are by definition 'national public entities' as described and referred to in the PFMA, of which some are companies and some not.
10. In terms of section 1 of the PFMA a 'national public entity' means –
  - (a) a national government business enterprise; or*
  - (b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is –*

- (i) *established in terms of national legislation;*
- (ii) *fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and*
- (iii) *accountable to Parliament.*

11. NECSA and CEF SOC are listed in Schedule 2 in terms of the classification of public entities in terms of the PFMA. These entities are referred to as the **major public entities** and are intended to generate profits and declare dividends. These entities have the most autonomy of all the public entities, as they operate in a competitive marketplace and are run in accordance with general business principles. In terms of section 66(3)(a) of the PFMA, Schedule 2 public entities may also borrow money through the accounting authority of that entity, which implies that they have extensive borrowing powers.
12. Section 51(1)(f) of the PFMA provides that an accounting authority for a public entity is responsible for the submission by the public entity of all reports, returns, notices and other information to Parliament or the relevant provincial legislature and to the relevant executive authority or treasury, as may be required by the PFMA.
13. Section 52 of the PFMA deals with the annual budget and corporate plan by Schedule 2 public entities and government business enterprises and provides that, *“the accounting authority for a public entity listed in Schedule 2 or a government business enterprise listed in Schedule 3 must submit to the accounting officer for a department designated by the executive authority responsible for that public entity or government business enterprise, and to the relevant treasury, at least one month, or another period agreed with the National Treasury, before the start of its financial year -*
- (a) a projection of revenue, expenditure and borrowings for that financial year in the prescribed format; and*
  - (b) a corporate plan in the prescribed format covering the affairs of that public entity or business enterprise for the following three financial years, and, if it has subsidiaries, also the affairs of the subsidiaries”.*

14. Section 65 (1) of the PFMA provides that, “*the executive authority responsible for a department or public entity must table in the National Assembly or a provincial legislature, as may be appropriate -*
- (a) *the annual report and financial statements referred to in section 40(1)(d) or 55(1)(d) and the audit report on those statements, within one month after the accounting officer for the department or the accounting authority for the public entity received the audit report; and*
- (b) ...”.
15. It is instructive to note that the above provision requires that the executive authority submit the annual report and financial statements of the department and any entity to Parliament. However, there is no requirement to submit Strategic Plans, Corporate Plans or Performance Plans.
16. Section 10(1)(c) of the Money Bills and Related Matters Act No. 9 of 2009 (“the Money Bills Act”) provides as follows:
- “(1) *After the adoption of the fiscal framework –*
- (c) *The relevant members of Cabinet must table updated strategic plans for each department, **public entity** or constitutional institution, which must be referred to the relevant committee for consideration and report.” [my emphasis]*
17. Importantly, section 3(3) of the PFMA provides that in the event of any inconsistency between the PFMA and any other legislation, the PFMA prevails.

## DISCUSSION

18. Annual reports, strategic plans and annual performance plans are mostly tabled in Parliament or provincial legislatures and are available to the general public. The publishing of financial and non-financial information of public entities are essential for **accountability** and, transparency and to improve trust and confidence in government service delivery.

19. Annual Performance Plans identify the indicators for performance and targets that the institution will seek to achieve in the upcoming financial year. It is important that these performance indicators and targets are aligned across an institution's annual plans, budgets, in-year and annual reports.
20. The Framework for Strategic and Annual Performance Plans (see [www.treasury.gov.za](http://www.treasury.gov.za)) provides a standardised approach to strategic and annual performance planning; it promotes accountability for performance and service delivery, and promotes alignment between the planning, budgeting and reporting processes.
21. Accountability is one of the founding values of our Constitution. Section 1(d) adopts a multi-party system of democratic government "*to ensure accountability, responsiveness and openness.*" Section 41(1)(c) provides that all spheres of government and all organs of state within each sphere must provide "*effective, transparent, accountable and coherent government.*"
22. Section 85(2) of the Constitution vests the executive authority in the national sphere of government in the President and the members of the cabinet. Section 92(2) provides that they are "*accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.*"
23. The national executive's accountability to Parliament is not limited to the cabinet. It extends throughout the national executive for instance to deputy ministers in terms of section 93(2); the state institutions supporting constitutional democracy in terms of section 181(5); the public administration in terms of sections 195(1)(f) and 196(5); and the security services in terms of section 199(8).
24. The National Assembly has both the power and the duty to hold the national executive to account:

24.1 Section 42(3) of the Constitution provides that the National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this in various ways. One of them is “*by scrutinising and overseeing executive action.*”

24.2 Section 55(2) imposes a duty on the National Assembly to provide for mechanisms to hold the national executive to account:

*“The National Assembly must provide for mechanisms –*

*(a) to ensure that all executive **organs of state** in a 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.**” [my emphasis]*

25. Rule 227 of the rules of the National Assembly describes the role of portfolio committees in the performance of this oversight function. Rule 227(1)(b) says that a portfolio committee,

*“must maintain oversight of –*

*(i) the exercise within its portfolio of national executive authority, including the implementation of legislation,*

*(ii) any executive organ of state falling within its portfolio,*

*(iii) any constitutional institution falling within its portfolio, and*

*(iv) any other body or institution in respect of which oversight was assigned to it;”*

Rule 227(1)(c) goes on to say that a portfolio committee,

*“may monitor, investigate, enquire into and make recommendations concerning any such executive organ of state, constitutional institution or other body or institution,*



*including the legislative programme, budget, rationalisation, restructuring, functioning, organisation, structure, staff and policies of such organ of state, institution or other body or institution,”*

26. The tools available to portfolio committees in the performance of their oversight function are scattered through various legal instruments, including the Constitution, the PPI Act and the rules of the National Assembly.
27. National Assembly rule 167(f) confer a wide mandate on a portfolio committee to “*determine its own working arrangements*” in the performance of its oversight function. Portfolio committees thus have a wide and open-ended power to conduct public hearings in whatever way they deem appropriate, subject only to the Constitution, statutes and the rules.
28. A committee may summons witnesses to produce documents and give evidence relevant to its public inquiries.
- 28.1 Section 56 of the Constitution 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) and (b).”*
- 28.2 This constitutional provision is supplemented by section 14 of the PPI Act. It describes the form and content of a summons by which a witness is compelled to produce documents or give evidence in a committee inquiry.
- 28.3 These provisions are echoed in rule 167(a) which provides that a committee may “*summon any person to appear before it to give evidence on oath or affirmation, or to produce documents.*”

29. Section 57 of the Constitution allows the National Assembly to determine and control its own internal procedures and to make rules to do so. Rule 167(f) is in the nature of a default rule that allows a portfolio committee “to determine its own working arrangements” where no other rule provides otherwise.

30. The Constitutional Court recognised this open-ended mandate of the National Assembly in the performance of its oversight of the executive in the EFF<sup>1</sup> case. Chief Justice Mogoeng put it as follows:

*“Is holding the executive accountable a primary and undefined obligation imposed on the National Assembly? Yes! For the Constitution neither gives details on how the National Assembly is to discharge the duty to hold the executive accountable nor are the mechanisms for doing so outlined or a hint given as to their nature and operation”.<sup>2</sup>*

*“Both sections 42(3) and 55(2) do not define the structures within which the National Assembly is to operate in its endeavour to fulfil its obligations. It has been given leeway to determine how best to carry out its constitutional mandate...How to go about this is all left to the discretion of the National Assembly”.<sup>3</sup>*

31. A portfolio committee thus has a wide discretion to determine its own procedures and ultimately to compile its own report to the National Assembly. The only legal requirement is that it must do so within the bounds of rationality. It means that both its procedure and its report must be rational. Rationality is a low threshold which requires only a minimum standard of procedural; fairness and substantive reason.

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<sup>1</sup> Economic Freedom Fighters v Speaker, National Assembly 2016 (3) SA 580 (CC)

<sup>2</sup> Para 43

<sup>3</sup> Para 87

32. It cannot be gainsaid that the two public entities in question are organs of state, in that, they exercise a public power or perform a public function in terms of the Nuclear Energy Act No.46 of 1999.
33. The PFMA requires the submission of Corporate Plans of the two public entities listed in Schedule 2 to the DMRE. The PFMA does not require the tabling of Annual Performance Plans and Strategic Plans by public entities listed in Schedule 2.
34. Even though the scope and ambit of the PFMA, read with the National Treasury Instruction No.10 of 2020/2021 regarding the implementation of the Revised Framework for Strategic Plan and Annual Performance Plans, does not make mention of Schedule 2 entities submitting Strategic Plans and annual performance plans to Parliament, this does not negate Parliament from requesting such plans. However, if Parliament wants these plans tabled, the appropriate way would be to include such a requirement in legislation - viz. the PFMA.
35. There appears to be a rational connection between what Parliament requires; namely, submission of Strategic Plans and Annual Performance Plans and the achievement of a legitimate governmental purpose – namely, for accountability, transparency and to improve trust and confidence in government service delivery. Be that as it may, the format of the information that may be requested in this regard may not be consistent with those that are under an obligation in terms of the PFMA to table these plans in Parliament.

## **ADVICE**

36. In view of the foregoing, the Committee has a wide discretion to determine its own procedure and ultimately to compile its own report to the National Assembly. The only legal requirement is that it must do so within the bounds of rationality.

37. As regards the submission of Strategic Plans and the Annual Performance Plans, there seems to be a rational connection between what Parliament wants to achieve and how it is to be achieved.
38. In light of the abovementioned legal submissions and in the absence of a specific provision that requires Schedule 2 public entities from tabling Strategic Plans and Annual Performance Plans, Parliament is at liberty to request these plans or similar documents that will assist Parliament with its constitutional mandate.
39. Notwithstanding the above, there is no legal obligation on the two Schedule 2 entities in question (NECSA and CEF SOC) to table Strategic Plans and Annual Performance Plans to Parliament in terms of the PFMA. The intention of the legislature and the rationale for this is premised on the fact that if the two entities in question do not receive money through the Appropriation Bill, then there is a less burden and/or no duty placed on them to table these documents and show how they will be spending the money.
40. We advise accordingly.



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**Adv Z Adhikarie**  
**Chief Legal Adviser**