



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

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

Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 03 June 2021

REF: 59/2021

SUBJECT: Opinion on various issues in relation to the Risk Mitigation Independent Power Producers Procurement Programme

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

Adv Z Adhikarie

Chief Legal Adviser



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

Enquiries: Andile Tetyana (X8287)

E-mail: atetyana@parliament.gov.za

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

Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 03 June 2021

REF: 59/2021

SUBJECT: Opinion on various issues in relation to the Risk Mitigation Independent Power Producers Procurement Programme

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 provide a legal opinion on various issues in relation to the Risk Mitigation Independent Power Producers Procurement Programme (“RMIPPPP”) undertaken by the Department of Mineral Resources and Energy (“the Department”).
2. The guidance sought by the Committee arises from the circumstances set out in the background outlined below.

BACKGROUND

3. The brief informs us that:
 - 3.1 In March 2021, the Department awarded the right to develop 1845 MW of generation capacity to eight companies, in order to alleviate intermittent power shortages in the country.
 - 3.2 After the announcement of the preferred bidders, the Committee scheduled an urgent meeting, on 20 April 2021, at the instance of the Chairperson, where the Department briefed the Committee on the RMIPPPP.
 - 3.3 A further meeting of the Committee took place on 28 April 2021, where it discussed and deliberated on the RMIPPPP. Some Committee members proposed that a comprehensive investigation be undertaken relating to the RMIPPPP, whilst others were of the view that such an investigation was unwarranted. Another view expressed by some Committee members was that the Committee should consider engaging with the Standing Committee on Public Accounts (“SCOPA”) responsible for, amongst others, exercising oversight over public finances and expenditure.

- 3.4 Another meeting of the Committee was held on 11 May 2021 to further discuss the RMIPPPP, by which date it had come to light that one of the unsuccessful bidders in the RMIPPPP had instituted High Court proceedings challenging the Department's award. Some members of the Committee requested the Committee to rescind its decision relating to an investigation in order to allow for fresh discussions given the court challenge.
4. It is this development – the institution of court proceedings challenging the RMIPPPP award – that has prompted the Chairperson to seek a legal opinion, with reference to the following five questions:
- 4.1 *“Whether the Committee has legal authority to investigate any procurement processes undertaken by the Department of Mineral Resources and Energy before the process is concluded.*
- 4.2 *“If not at which stage is the investigation of the above mentioned procurement process is justifiable.*
- 4.3 *“Whether the Committee can lawfully investigate any matter concerning the Department where a court action on the same matter is pending.*
- 4.4 *“Under which circumstances is the Committee justified to refer a matter to another Committee of Parliament or work in concurrence with e.g. Standing Committee on Public Accounts (SCOPA).*
- 4.5 *“The Committee’s approach on a matter that cuts across other relevant committees of Parliament, in this case, PC of Public Enterprises (i.e. ESKOM) PC of Environment, Forestry & Fisheries, ST on Auditor-General, ST on Finance and SCOPA.”*
5. As can be gleaned from the questions, the scope concerns the ambit of the Committee's authority in circumstances where another arm of state is seized with enquiring into some or all of the same issues that the Committee wishes to investigate. The crux of the question being

whether or not, in those circumstances, the Committee is restricted from performing its own functions, and exercising its powers.

6. These questions are addressed below.

LEGAL FRAMEWORK

7. The Portfolio Committee is a committee of the National Assembly, established in terms of Rule 225 of the Rules of the National Assembly, 9th Edition (“the NA Rules”).
8. The National Assembly, and by extension its committees, has both the power and the duty to hold the national executive to account. Accountability is one of the founding values of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). Section 1(d) of the Constitution adopts a multi-party system of democratic government “*to ensure accountability, responsiveness and openness*”. Section 41(1)(c) of the Constitution provides that all spheres of government and all organs of state within each sphere must provide “*effective, transparent, accountable and coherent government*”.
9. Section 55(2) of the Constitution 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.”*

10. Rule 227 of the NA Rules describes the role of portfolio committees such as this Committee 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;”*

11. 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;”

QUESTIONS

Question 1: Does the Committee have the authority to investigate any procurement processes undertaken by the Department before the process is concluded?

12. It bears pointing out upfront, in the course of answering this question, that on the facts with which we have been provided, the procurement process conducted by the Department on the RMIPPPP has in fact been concluded. The procurement process was concluded when the Department made the award to whom it considered the successful bidders.
13. In regard to the procurement process, the Department is *functus officio*, a legal principle which means that once an adjudicator renders a decision regarding an issue, it lacks any power to re-examine that decision.

14. It is the implementation of the completed procurement process that the High Court litigation is now seized with. In fact, the High Court litigation arose because an unsuccessful bidder was unhappy with the outcome of a completed procurement process.
15. There is no rule or law that says that Parliament may not enquire into and report on a matter merely because it also happens to be before the courts. Rule 89 of the NA Rules provides that no member may reflect on the **merits** of a matter on which a judicial decision is pending. Parliament and the judiciary perform different functions and may do so in parallel in relation to the same matter. Parliament and the judiciary are institutions of equal standing. Neither trumps the other. Therefore, the fact that a matter is pending before the other does not sterilise the other.
16. The Committee is consequently not in any way restricted if it wishes to undertake an investigation into the RMIPPPP, even if it overlaps with the issues before the court.

Question 2: If the answer to question 1 is no, at which stage is the investigation of the above mentioned procurement process justifiable?

17. The answer to question 1 is in the affirmative, and consequently question 2 does not arise for determination.

Question 3: Can the Committee lawfully investigate any matter concerning the Department where a court action on the same matter is pending?

18. This question has been answered above.
19. The Committee is not precluded in any way from the performance of its functions merely because its investigation overlaps with a matter before the courts.

20. The Committee is not in any event entitled to abdicate any of its functions merely because other organs of state happen to be investigating the matter, subject to its jurisdiction. The Committee's constitutional mandate remains obligatory.

Question 4: Under what circumstances is the Committee justified to refer a matter to another committee of Parliament or work in concurrence with another committee?

21. In terms of Rule 169(1) of the NA Rules, a committee may confer with any other committee of the Assembly. Whilst the circumstances under which a committee may confer with another are not specified, it follows that such conferral can only be justified if its purpose is to further the respective mandates of the committees concerned.
22. If, in the course of the Committee performing its functions and exercising its powers, an issue emerges that invokes, or falls properly within the mandate of another committee, the NA Rules permit for two or more committees to confer, for such meetings to be co-chaired by the chairs of the conferring committees and for decisions to be taken by the conferring committees to which their conferral relates.
23. According to NA Rule 169(5), if a committee is unable to meet to confer with another committee within reasonable time frames, the committee may invite the other committee to convey its views in writing.

Question 5: The Committee's approach on a matter that cuts across other relevant committees of Parliament, in this case, PC of Public Enterprises (i.e. ESKOM) PC of Environment, Forestry and Fisheries, ST on Auditor-General, ST on Finance and SCOPA.

24. This question has been answered above.

ADVICE

25. In view of the above, it is our opinion that there exists no impediment to the Committee pursuing an investigation on the RMIPPPP, in the performance of its oversight functions.
26. The NA Rules provide for the Committee to confer with another committee/s in the pursuit of their joint mandates, and to take decisions jointly, if needs be, in regard to those matters.
27. We advise accordingly.

A handwritten signature in black ink, appearing to be 'Z Adhikarie', written over a horizontal line.

Adv Z Adhikarie

Chief Legal Adviser