



**Draft Minutes of the Portfolio Committee on Mineral Resources and Energy (PCMRE)**

Date : Tuesday, 08 March 2022  
Venue : Virtual meeting @09:00 – 13:00  
Agenda :

- Briefing by the Parliamentary Legal Service on the recent High Court decision relating to the Risk Mitigation Independent Power Producers Procurement Programme (RMIP-PPP);
- Providing a clear way forward to the PCMRE, relating to its envisaged Inquiry, taking into consideration the recent court outcome
- Tabling of correspondence received
- Consideration and adoption of outstanding minutes: 01 March 2022

**Attendance by Committee Members**

Status	Name of Member	Political Party
Present	Hon. S Luzipo	African National Congress (ANC)
	Hon. M G Mahlaule	
	Hon J Bilankulu	
	Hon. MJ Wolmarans	
Apology	Hon V Malinga	Democratic Alliance (DA)
	Hon. S M Kula	
	Hon K Mileham	
	Hon. J. Lorimer	
Absent	Hon. P Madokwe	Economic Freedom Fighters (EFF)
	Hon T K Langa	
	Hon S Jafta	African Independent Congress (AIC)
	Hon V Zungula	
	Prof C Msimang	Inkatha Freedom Party (IFP)

## Parliamentary support staff

Parliamentary support staff	Designation
Ms. A Boss	Committee Secretary
Mr. A Kotze	Committee Secretary
Mr. S Maboda	Acting Content Advisor
Ms. V Makubalo	Committee Assistant

### 1. Opening remarks by the Chairperson

The Chairperson welcomed all to the meeting and highlighted the purpose of the meeting.

### 2. Briefings by the Parliamentary Legal Services

#### 2.1. Presentation by Adv. Andile Tetyana (Parliamentary Legal Advisor) - on the recent High Court decision relating to the RMIPPPP

Adv Tetyana proceeded to give a brief summary of the legal opinion, which the Parliamentary Legal Services had provided to the Committee last year, June 2021, including highlighting salient issues in the January 2022 Court judgement relating to the RMIPPPP. The matter was between the *DNG Power Holding (PTY) LTD and the Department of Mineral Resources and Energy others* [Case No.20899/21 (the "**Judgment**")].

Adv. Tetyana reminded Members that at the time the Committee requested the legal opinion, an unsuccessful bidder (DNG) in the RMIPPPP instituted legal proceedings in the Gauteng High Court against the Department of Mineral Resources and Energy (DMRE). Adv. Tetyana highlighted that in their legal opinion they stated that 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. The Committee was consequently not in any way restricted if it wished to undertake an investigation into the RMIPPPP, even if it overlaps with the issues before the court. In view of the above, according to the Parliamentary Legal Services, it was their opinion that there existed no impediment to the Committee pursuing an investigation on the RMIPPPP, in the performance of its oversight functions.

In relation to the January 2022 Court judgement, Adv. Tetyana highlighted very important and relevant observations which the Court had made in this matter, and these are summarised below.

- DNG, as the unsuccessful bidder, approached the Court in motion proceedings (Amended Notice of Motion) and made mention of the specific decisions which it requested the Court to review and set aside.
- Firstly, DNG expressly asked the Court to review and set aside the decision to disqualify its bid.
- Secondly, DNG requested the Court to review and set aside the decision to issue the five Briefing Notes.
- Thirdly, DNG asked the Court to review and set aside the decision to appoint the fifth respondent (Karpowership) as a preferred bidder instead of it.
- At the heart of DNG's case was that the procurement process was mired in malfeasance and this had a detrimental effect on its bid. As part of its case, DNG alleged that bid notification dates and bid submission dates were extended without prior public notice. DNG also alleged that preferred bidders were unlawfully and wrongfully granted various exceptions in respect of the material requirements of the Request for Proposals (RFP). In addition, DNG submitted that it had good reason to believe that undue influence played a decisive role, not only to the decision to appoint Karpowership and other preferred bidders in the tender process, but also in the decision to disqualify DNG from the procurement process.

Adv. Tetyana added that the Court had weighed the evidence in this matter and made the following observations:

- At paragraph 93 the Court held that the argument proffered by the state respondents and Karpowership was that there were no merits in the allegations of undue influence as contended by DNG and the Court agreed with this contention.
- At paragraph 101 the Court held that DNG had not advanced cogent evidence of bad faith, bias, corruption, dishonesty or fraud on behalf of state respondents or Karpowership.
- At paragraph 127 the Court observed that the review was not about the 6<sup>th</sup> to the 13<sup>th</sup> respondents, but that DNG's gripe was about its disqualification and Karpowership appointment. The Court held that this case was therefore between DNG, the state respondents and Karpowership.
- At paragraph 128 the Court held that the state respondents succinctly provided reasons for DNG's disqualification. The said reasons are spelled out from paragraphs 129 to 148 of the judgment.
- The Court further observed at paragraph 149 that the failure of DNG to comply with the RFP requirements was substantial and material and fatal to its application to review and set aside the decisions of the state departments.
- At paragraph 160 the Court held that DNG was appropriately disqualified because it did not substantially and materially meet the requirements.
- At paragraph 165 the Court held that the decision to disqualify DNG was made by Transaction Advisors exercising their special expertise and experience to come to their findings of fact. The Court further held that the assertion by DNG that Transactions Advisors cannot stand in the place of the officials has no merit.
- At paragraph 170 the Court held that, in its view, there was no malfeasance in respect of the Briefing Notes.
- At paragraph 178 the Court held that DNG's bid submission did not make it to the comparative evaluation phase of the evaluation process in Part C, DNG's bid submission failed during the Part B assessment because the bid submission did not meet the threshold functional qualification criteria prescribed in Part B.

Furthermore, the quantum of the mega wattage for which DNG bid, compared to the megawatts for which the 6<sup>th</sup> to 13<sup>th</sup> respondents have been appointed as preferred bidders are incomparable. The Court further observed that in their initial answering papers, the state respondents have made it clear that the order of substitution is not likely to make a material change in any reconsideration of the bids because the bid prices of DNG projects were “substantially higher” than those of any of the preferred bidders as they ranged from R2506.92 to R2519.20 per megawatt-hour (MWH), whilst the bid prices of the preferred bidders ranged from R1468 to R1885 per MWH.

- At paragraph 187 the Court held that DNG has failed to present credible evidence implicating the DMRE and its officials. The Court further observed that it has already expressed its disgust in the Director General (DG) and the Deputy Director General (DDG) of their continued attendance of the Kream meeting. However, the Court made it clear that it was not convinced that this had affected the bid to the extent that the process was rendered invalid and therefore unlawful.
- Finally, the Court concluded that the application must be dismissed with costs on the basis that DNG had failed to comply with the requirements of the RFP.
- According to Adv, Tetyana, his takeaway from the court judgment is that, the Court has put the procurement process of the RMIPPPP under a microscopic eye and came to a finding that the procurement process was fair, equitable, transparent, competitive and cost-effective. The only unsavoury assessment which the Court makes is found in paragraph 109 of the judgment and it reads as follows: *“I pause to say that one is disgusted and disappointed in the conduct of the DG and the DDG by attending a meeting at Kream with a potential preferred bidder. The best they could have done was to immediately leave the venue once Mr Mbalati started to make the request that he is alleged to have insinuated. Such overtures ought to have rang a bell in the minds of the two officials.”*
- 

This, in Adv Tetyana’s view, can be pursued by the Committee by requesting a report from the Minister regarding what he intends to do about the conduct of these officials even though the Court at paragraph 187 expressly states that it is not convinced that

this has affected the bid to the extent that the process is rendered invalid and therefore unlawful.

## **2.2. Way Forward - The Committee Inquiry into RMIPPPP**

According to Adv. Tetyana, it appears that issues which the Committee makes reference to in the Terms of Reference (ToRs) are the issues that have already been ventilated in the High Court judgment. He further stated that, it was important to note that this matter was set down for 3 full days of hearings and the Court had the benefit of being assisted with 4 reputable Senior Counsel in interrogating the issues before it.

He stated that, besides, a decision to pursue an inquiry and appoint an Evidence Leader should not be taken lightly. The Committee has to show demonstrable proof that it has done its work and it has crystalized the issues it wishes to be the subject of an inquiry. The Committee cannot merely pick up stories from the media and abruptly demand an inquiry without having delved into the issues in detail. Equally, the Committee cannot willy-nilly outsource its duties and obligations to an Evidence Leader without just cause. The Committee must have done some work and formulated a prima facie view prior to arriving at a decision of pursuing an inquiry. There is a statutory duty on all of us to jealously guard against any possible wastage of public resources.

## **3. Discussions**

- Some Committee Members (Hon Mileham) sought clarification whether the PCMRE's envisaged enquiry is rehashing the finding of the Court. According to the Parliamentary Legal Services, the problem statement has always been whether the procurement process was above board and beyond reproach. Adv. Tetyana further explained that the court judgement is about the procurement process. He reminded members that one of the unsuccessful bidders, i.e. DNG approached the High Court to set aside the whole procurement process on the basis that the process was tainted, that there was undue influence, corruption, dishonesty etc.
- Some of the Members of the Committee (Hon M Mahlaule) were of the view that issues raised by the Committee in its ToR for the Inquiry had been addressed by a competent court, especially the investigators and the forensic investigations which took place to get to the bottom of the issues. Some of the Committee Members were of the view that the Committee may not have basis to proceed with the Inquiry, as the Committee might be rehashing the same process. Additionally, some of the

Committee Members stated that it would be a waste of money and time if the Committee is to proceed with the Inquiry.

- Some Committee Members (Hon Kula) agreed with the view that the legal advice given is thorough and clear and that there is no basis to continue with the Inquiry.
- Some Members enquired if the court judgement addresses the ToR as agreed to by the Committee. Adv. Tetyana reiterated that the court judgement addressed the procurement processes. He continued to state that the issue of affordability of the RMIPPPP, is a policy matter, which is the responsibility of the Executive.
- Some Members were of the opinion that, if the Committee was to use its resources better in this case, to say that there were members in society who wanted to corrupt the officials of the DMRE, and if anything need to be investigated it needs to be this attempt to corrupt officials. In saying the aforementioned, Members highlighted that the Court judgement stated that they are disgusted that the DG and DDG did not leave the meeting immediately when they saw that there was an attempt to talk about what is not be spoken about.
- According to Adv. Tetyana, nothing prohibits the Committee to conduct its oversight over the executive. He highlighted the negative remarks made in the court judgement relating to the two DMRE officials and stated that the Committee can still call the Minister to come and account, i.e. to report to the Committee what has been done to address the issue of the two (2) officials. Adv Tetyana further reiterated that the actions of the two officials have not in any way affected the process.
- Adv. Tetyana then explained the difference between Committee and a Court judgement. He noted that the Committee can only inquire and make recommendations, in other words the character of the findings would be a fact finding process. The Court, however, has not only embarked on a fact finding mission, it goes beyond this. It further made legal findings, and according to adv Tetyana, this is not the space of Parliament.
- According to Adv. Tetyana, the unsuccessful bidder (DNG) had not appealed the judgement itself, and in the period of 15 days within which the appeal should have been lodged, thus, has lapsed on the 18<sup>th</sup> of February 2022.
- Adv. Tetyana stated that some of the issues which the Committee wanted to investigate, have been dealt with in the judgement. Adv. Tetyana highlighted that the Court sat for three full days of hearing and the court had the benefit of four Senior Councils in interrogating the issues before it.
- According to Adv. Tetyana, some of the issues do not require an Inquiry, e.g. actions of the 2 DMRE officials. He continued to state that a decision to proceed with the enquiry and appoint an Evidence leader, should not be taken lightly. He stated that

the Committee need show demonstrable proof that it has done its work and need to crystallize issues which it wants to address in the inquiry. He further stated that the Committee cannot “nilly-willy” discharge of its duties externally, and that the Committee must guard against the wasting of resources.

- During the proceedings of the meeting, Hon Mileham stated that the unsuccessful bidder, DNG, has applied for leave to appeal the Court judgement.
- Some Members of the Committee were of the view that the information regarding the appeal by the unsuccessful bidder has not come through proper and formal channels, but from a Member, who has not disclosed where the information comes from.

#### **4. Motions and Voting**

##### **4.1. Rescinding the Committee Decision**

- **Motion – Rescinding its decision**

Hon M Mahlaule proposed that the Committee rescind its decision on proceeding with the Inquiry, in light of the legal advice provided for by the Parliamentary Legal Services.

The motion was seconded by Hon M Wolmarans.

- **Objection:**

Hon Mileham objected to the decision of the Committee to rescind its decision.

Hon J Lorimer, seconded the objection.

- **Voting**

In line with the rules of the Virtual Platform, Hon M Mahlaule outlined how the party's members voted. Those in favour of rescinding the Committee decision were: Hon S Luzipo, Hon M Mahlaule, Hon M Wolmarans, Hon V Malinga, Hon J Bilankulu, Hon S Kula.

In line with the rules of the Virtual Platform, Hon K Mileham outlined how the party's members voted. Those not in favour of the Committee rescinding its decision were: Hon K Mileham and Hon J Lorimer



**The EFF abstained from voting.**

The motion was agreed to – 6 Committee Members against 2.

#### **4.2. Way forward of the Committee**

##### **Motion 1**

Hon K Mileham proposed that in light of the Committee decision to rescind its decision, the committee commence with an Inquiry on all aspects of the RMIPPPP.

Hon J Lorimer seconded the proposal

##### **Motion 2**

Hon M Mahlaule proposed that in light of the Committee decision to rescind its decision, there is nothing on the table and the Committee discontinue the inquiry on the RMIPPPP.

Hon M Wolmarans seconded the motion.

##### **Voting:**

Motion 1 – 2 Members for the motion and 6 Members against

Motion 2 – 6 Members for the motion and 2 Members against

**EFF abstained from voting**

**Decision:** In light of Parliamentary Legal Advice, the motion that the Committee will not continue with the Inquiry, was agreed to.

#### **5. Other matters:**

Hon Kula stated that Committee needed to make a decision to close this matter. He further stated that Members of the Committee must remember that South Africa is democratic state, where we have a minority, which is not making any sound political sense, dictating to the majority, is not going to happen, “that Christmas will not never

occur". He noted that the objections he was making was based on "superiority of believing whiteness and nothing else, that because we are white, we are correct, there is no sense and not logic..."

Hon Mileham raised a point of order. Hon Mileham stated that Hon Kula's comments are untenable and absolutely un-parliamentary. He further stated that "there are no racial motivation whatsoever to any of the statements made today". He stated his disappointment that an MP would degenerate to such a degree. Hon Mileham then requested the Chairperson to make a ruling in this regard, and that it is unacceptable and be dealt with appropriately.

The Chairperson stated that it is the opinion of an individual. The Chairperson stated that he has always cautioned Members, to stick to the text. He stated that, instead of Members addressing the issue, they question each other's bona fides.

Hon Mileham stated that he rejects the ruling by the Chairperson, and stated that Hon Kula's utterances will be referred to the Rules Committee.

## **6. Consideration and adoption of minutes:**

### **6.1. 01 March 2022**

Hon. S Kula moved for the adoption of minutes, which was seconded by Hon. M. Wolmarans.

## **7. Tabling of correspondences received**

- The Committee Secretariat proceeded to provide from whom the correspondence was from and a summary of its content. The Committee agreed that the correspondences will be taken forward and decisions will have to be taken on how to address these.

## **8. Resolutions**

- The Committee will compile a report on its processes regarding RMIPPPP, which will have to come back to the Committee to be considered and adopted.

## **9. Adjournment**

The meeting adjourned at 11:56.

---

**Mr. S Luzipo, MP**

**Chairperson: PC on Mineral Resources and Energy**

---

**Date**