**TO:**

**Mr S Luzipo**

**, MP**



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**MEMORANDUM**

**[Confidential]**



**TO:**

**Mr**

**B M Maneli, MP**

**Chairperson: Portfolio Committee on Communications**

**COPY:**

**Ms P**

**N Tyawa**

**Act**

**ing Secretary to Parliament**

**FROM:**

**Adv Z Adhikarie**

**Chief Legal Adviser: Constitutional and Legal Services Office**

**DATE:**

**08**

**June**

**2022**

**REF:**

**63/2022**

**SUBJECT:**

**Opinion on**

**various**

**issues relati**

**n**

**g**

**to the report of the Public Protector No.114 of**

**2021/22**

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

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**Adv Z Adhikarie**

**Chief Legal Adviser**





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| **TO:** | **Mr B M Maneli, MP** |
|  | **Chairperson: Portfolio Committee on Communications** |
|  |  |
| **COPY:** | **Ms P N Tyawa** |
|  | **Acting Secretary to Parliament** |
|  |  |
| **FROM:** | **Adv Z Adhikarie** |
|  | **Chief Legal Adviser: Constitutional and Legal Services Office** |
| **DATE:** | **08 June 2022** |
| **REF:** | **63/2022** |

# SUBJECT: Opinion on various issues relating to the report of the Public Protector No.114 of 2021/2022

# INTRODUCTION

1. Our Office was requested by the Chairperson of the Portfolio Committee on

Communications, Mr. BM Maneli (“the Chairperson”), to provide a legal opinion on various issues relating to the abovementioned Public Protector’s report on the investigation into allegations of irregular expenditure procurement processes and unauthorized deviations and expansions within the State Information Technology Agency (“SITA”) by the former Chief Executive Officer (“CEO”), Dr Setumo Mohapi.

1. The opinion sought by the Chairperson arises from the circumstances set out in the background outlined below.

# BACKGROUND

1. The Chairperson of the Portfolio Committee on Communications (“the Committee”) briefed us that:
   1. The Public Protector’s report was referred to the Committee for consideration in the ATC dated 17 May 2022.
   2. The Committee deliberated on the issue on 24 May 2022 and resolved that a legal opinion should be sought from the Constitutional and Legal Services Office (“CLSO”) regarding the processing of specific remedial action directed to the Speaker of the

National Assembly (“the Speaker”), and subsequently to the Committee for consideration.

* 1. The scope of the legal opinion must include an evaluation of the extent to which the Committee can take action as per the remedial action in paragraph 8.7 of the Public Protector’s report.
  2. Furthermore, the Committee requires clarity on the implications of paragraph 9 of the Public Protector’s report on the Committee’s programme.

1. It is this development – the Public Protector’s report and, particularly the remedial action directed to the Speaker – that has prompted the Chairperson to seek this legal opinion.
2. The remedial action directed to the Speaker is framed as follows:

“*To ensure that the report is tabled before the Communications Portfolio Committee for deliberation regarding*:

* 1. “*Investigations conducted into allegations of financial misconduct committed by members of the Accounting Authority in terms of Treasury Regulations 33.1.3;*
  2. *Instances of irregular and fruitless and wasteful expenditure that have been investigated to determine if disciplinary steps need to be taken against liable officials; and*
  3. *Whether disciplinary steps have been taken against any official who made or permitted irregular expenditure based on outcome of investigation in terms of section 51(1)(e)(iii) of the Public Finance Management Act No.1 of 1999, as amended, (“the PFMA”).”*

1. As can be gleaned from the remedial action itself, its scope concerns the ambit of the Public

Protector’s authority in circumstances where her office directs the Speaker to table the report and oversee other organs of state to implement remedial action. The crux of the question being whether or not, in those circumstances, the Public Protector is empowered to do so.

1. These issues shall be addressed below.

# LEGAL FRAMEWORK

1. 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 enshrines 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*”.

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*.”
2. 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 –*

* 1. *to ensure that all executive organs of state in the national sphere of government are accountable to it; and*
  2. *to maintain oversight of,* 
     1. *the exercise of national authority, including the implementation of legislation, and*
     2. *any organ of state.*”

1. Section 92(2) of the Constitution provides that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
2. 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); ***state institutions supporting democracy in terms of section 181(5)***; the public administration in terms of section 195(1)(f) and 196(5); and the security services in terms of section 199(8) of the Constitution. ***[Our emphasis]***
3. In terms of the PFMA, accounting authority means a body or person mentioned in section 49. Section 49(1) of the PFMA provides that every public entity must have an authority which must be accountable for the purposes of this Act. In addition, section 49(2) provides that if the public entity has a board or other controlling body, that board or controlling body is the accounting authority for that entity.
4. Section 51(1)(e)(iii) of the PFMA deals with general responsibilities of accounting authorities and provides that an accounting authority for a public entity must take effective and appropriate disciplinary steps against any employee of the public entity who makes or permits an irregular expenditure or a fruitless and wasteful expenditure.
5. In terms of section 1 paragraph (c) of the PFMA, in respect of the definition of “executive authority”, the executive authority in relation to a national public entity, means the Cabinet member who is accountable to Parliament for that public entity or in whose portfolio it falls. Treasury Regulation 33.1.3 provides that if an accounting authority or any of its members is alleged to have committed financial misconduct, the relevant executive authority must ensure that appropriate disciplinary proceedings are initiated immediately.
6. The office of the Public Protector is a constitutional creation. The Public Protector’s office and other Chapter 9 institutions exist for the purpose of “*supporting constitutional democracy*”. These institutions potentially find themselves in a precarious situation. On the one hand, they have to act as watchdogs to prevent the abuse of power, often by state entities, and are required to act in a scrupulously fair and impartial manner. On the other hand, these institutions are often required to work with the legislature and the executive and may have to rely on their cooperation to fulfil their respective mandates.
7. The Constitution clearly guarantees the independence of these institutions in general terms by proclaiming in section 181(2) that:

“*These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice*.”[[1]](#footnote-1)

1. Section 181(3) of the Constitution further requires other organs of state to ‘assist and protect these institutions’ to ensure their ‘independence, impartiality, dignity and effectiveness’. This provision places a duty on any department of state or administration in the national, provincial or local sphere of government, every other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution, and anyone exercising a public power or performing a public function in terms of any legislation, to assist Chapter 9 institutions with their work.
2. In the *New National Party v Government of the Republic of South Africa and Others*[[2]](#footnote-2), in considering the independence of the Independent Electoral Commission as a Chapter 9 institution, the Constitutional Court made it clear that section 181(3) of the Constitution requires the executive to engage with these institutions in a manner that would ensure their efficient functioning.. The Constitutional Court further indicated that a failure on the part of the executive to comply with such obligations ‘may seriously impair the functioning and effectiveness of those State institutions supporting constitutional democracy and cannot be condoned’.[[3]](#footnote-3)

# LEGAL ANALYSIS

1. It bears pointing out upfront that the remedial action in relation to SITA is against the accounting authority of the entity i.e. its Board. SITA is a listed public entity in terms of Schedule 3A of the PFMA, reporting to the Minister of Communications and Digital Technology (“the Minister”).
2. The Public Protector’s report makes a finding against the SITA Board; namely, that it failed to hold its former CEO, Dr Setumo Mohapi, accountable for irregular expenditure incurred during his tenure in terms of its responsibility as required by section 51(1)(e)(iii) of the PFMA.
3. In addition, the Public Protector makes a finding that even though SITA became aware of the continuing irregular expenditure, both the former CEO, Dr Setumo Mohapi and the Board failed to take decisive action to prevent same from recurring in terms of the Board’s responsibility as envisaged in sections 51(1)(a)(iii) and 51(1)(b)(ii) of the PFMA. Furthermore, the Public Protector finds that the Board failed to act in a manner that was consistent with its fiduciary responsibilities as contemplated by sections 50(1)(b), 50(1)(d) and 50(2)(a) of the PFMA. The Public Protector makes a serious observation that this is evident in that the irregular expenditure is still occurring to date, in some of the contracts.
4. Moreover, the Public Protector makes a finding that, in these circumstances, the failure by the SITA Board to hold the former CEO, Dr Setumo Mohapi, accountable for the irregular expansion of contract equated to improper conduct as envisaged by section 182(1)(a) of the

Constitution, 1996 and maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act No. 23 of 1994.

1. In this regard, SITA falls under the auspices of the executive branch of government and the

Public Protector’s report regarding the aforesaid remedial action should, first and foremost, be dealt with by the Minister responsible for overseeing the entity; namely, the Minister of Communications and Digital Technologies. It would be premature for the Speaker to intercede without the Public Protector’s report having been given due consideration by the executive authority in whose portfolio SITA falls. We are not suggesting that the Public Protector’s report requires such intervention.

1. In the result, the Committee should, as part of its oversight function over the Minister, schedule a meeting with the Minister calling on her to account and report on all the issues in which the Committee has been directed to deliberate on as spelled out in paragraph 5 above.
2. It is worth noting that the remedial action directed to the Speaker is what the Constitution requires from the National Assembly. However, the remedial action has a specific focus on what must be overseen by the Committee and reported to the House. Furthermore, the remedial action is peremptory and cannot be ignored. In *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and others the Constitutional Court* the Constitutional Court (per Mogoeng CJ) held that the remedial action taken by the Public Protector has a binding effect.[[4]](#footnote-4)
3. In amplification of the above, section 181(3) of the Constitution requires other organs of state to ‘assist and protect these institutions’ to ensure their ‘independence, impartiality, dignity and ***effectiveness***’. ***[Our emphasis]***
4. The Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; ***to report on that conduct*** and to take appropriate remedial action. This best describes the character of the Public Protector’s remedial action as directed to the Speaker. The Public Protector is merely discharging her constitutional obligations by reporting on that conduct and by directing the Speaker to ensure the report is tabled and for the National Assembly, through its committees, to deliberate on it. ***[Our emphasis]***
5. It is worth mentioning that paragraph 9 of the Public Protector’s report deals with monitoring time frames insofar as the submission of the action plan and implementation plan by the SITA Board. This does not have any direct bearing on the implementation of remedial action as directed to the Speaker or on the programme of the Committee in processing the Public Protector’s report. However, the Committee should schedule a meeting with the Minister within a reasonable space of time.

# ADVICE

1. The Committee should schedule a meeting with the Minister as part of its oversight over the executive. The Minister should account and report to the Committee at that meeting on the Public Protector’s report, particularly on the remedial action directed at the Speaker as set out in paragraph 5 above. Simply put, the Minister should account on what she has done in processing the Public Protector’s report, including addressing its findings and remedial action.
2. We reiterate that paragraph 9 of the Public Protector’s report does not have any direct bearing on the implementation of remedial action as directed to the Speaker or the programme of the

Committee in processing the Public Protector’s report. However, the Committee should schedule a meeting with the executive authority as soon as it is reasonably possible to do so as the Public Protector’s remedial action cannot be ignored without legal consequences.

1. We advise accordingly.

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**Adv Z Adhikarie**

**Chief Legal Adviser**

1. Section 181(2) of the Constitution. [↑](#footnote-ref-1)
2. New National Party v Government of the RSA and Others (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999) para 53. [↑](#footnote-ref-2)
3. New National Party para 95. [↑](#footnote-ref-3)
4. [2016] ZACC 11; 2016(3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76]. [↑](#footnote-ref-4)