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## **LEGAL OPINION**

### **[Confidential]**

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TO: Hon M Hlengwa, MP  
Chairperson: Standing Committee on Public Accounts

COPY: X George  
Secretary to Parliament

FROM: Constitutional and Legal Services Office  
[Z Adhikarie, Chief Parliamentary Legal Adviser]

DATE: 20 September 2023

REF. NO.: 415 / 2023

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**RE: REFUSAL OF BRIGADIER JAP BURGER, FORMER SOUTH AFRICAN POLICE SERVICE OFFICER, TO APPEAR BEFORE THE SCOPA TO ANSWER QUESTIONS PERTAINING TO ALLEGATIONS OF CORRUPTION, COLLUSION AND MALFEASANCE AT ESKOM**

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### **Introduction**

1. Our office was requested to advise the Chairperson of the Standing Committee on Public Accounts (“SCOPA”) on the further treatment of a letter to the Speaker from Brigadier Jap Burger (‘Brig Burger’) indicating that he cannot avail himself to appear before the SCOPA

to answer questions in relation to the SCOPA's ongoing enquiry into allegations of corruption, criminal activity and maleficence at Eskom.

2. We have been requested to address the question of whether, considering his refusal to voluntarily avail himself for questioning, there is a legal basis to summons Brig Burger to appear before the SCOPA notwithstanding the reasons he has provided to the Speaker for not being able to do so.

## **Background**

3. On 23 February 2023 Mr Andre de Ruyter, the now former Group Chief Executive of Eskom, conducted an interview with journalist Annika Larson of ENCA in which he made serious allegations of corruption, criminal activity, and maleficence at Eskom.
4. Mr de Ruyter, on request of the SCOPA, submitted a written statement and appeared before it to answer questions in relation to the allegations. He informed the SCOPA that he had provided all the information at his disposal to a South African Police Service ('SAPS') officer who was designated by the National Police Commissioner, General Fannie Masemola, to be the liaison with the intelligence operation investigating the allegation. According to Mr van De Ruyter's statement, *'This officer has had full access to all of the intelligence gathered and has stated to me that he has kept his line command informed.'* Mr de Ruyter also indicated that specific questions the SCOPA may have on the allegations should be directed to relevant law enforcement authorities.
5. It was subsequently revealed that the 'liaison' was Brig Burger of the SAPS, who has recently retired. Brigadier Burger was requested to attend a meeting of the SCOPA on 7 June 2023 but failed to appear without providing any apology or tendering any reasons for his absence. General Masemola, informed the SCOPA that Brig Burger had concerns about appearing publicly including safety concerns.
6. In a letter addressed to the Speaker on 19 June 2023, Brig Burger explained that his non-attendance was due, inter alia, to Eskom being a National Key Point and the SCOPA not having a mandate to deal with national security matters. He noted that *'security competence'* requires that classified information or material should not be allowed to fall

into unauthorised hands thereby harming or endangering the security interests of the State.<sup>1</sup>

7. In addition, Brig Burger contended that national security matters and in particular investigations into organised crime and corruption are classified in nature and not open to public or political scrutiny until in court. He further noted a safety concern in respect of investigators, whistle-blowers, witnesses and ‘collaborators’ and the onus to ensure that their personal safety is protected. He also questioned whether the allegations should more appropriately be dealt with in a closed meeting by the Joint Standing Committee on Intelligence (‘JSCI’), which according to him is one of the portfolio committees (‘PC’) together with the PC: Police; PC: Justice and Correctional Services and the PC: Public Enterprises vested with the responsibility to conduct oversight in respect of the allegations.

## LEGAL FRAMEWORK

### Mandate of the SCOPA

8. National Assembly (‘NA’) Rule 245 (1) sets out the mandate of the SCOPA as follows:

*“245. Functions and powers*

*(1) The Standing Committee on Public Accounts —*

*(a) must consider —*

*(i) the financial statements of all executive organs of state and constitutional institutions or other public bodies when those statements are submitted to Parliament,*

*(ii) any audit reports issued on those statements,*

*(iii) any reports issued by the Auditor-General on the affairs of any executive organ of state, constitutional institution or other public body,*

*(iv) any reports reviewing expenditure of public funds by any executive organ of state and constitutional institution or other public body, and*

*(v) any other financial statements or reports referred to the committee in terms of these rules;*

*(b) may report on any of those financial statements or reports to the Assembly;*

*(c) may initiate any investigation in its area of competence; and*

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<sup>1</sup> The concept of security competence is dealt with in the Minimum Information Security Standards Policy, 1996. It defines ‘security competence’ as ‘a person’s ability to act in such a manner that he does not cause classified information or material to fall into unauthorised hands, thereby harming or endangering the security or interests of the State...’

*(d) must perform any other functions, tasks or duties assigned to it in terms of the Constitution, legislation, these rules, the Joint Rules or resolutions of the Assembly, including functions, tasks and duties concerning parliamentary financial oversight or supervision of executive organs of state, constitutional institutions or other public bodies.*

9. The SCOPA is accordingly mandated to conduct financial oversight over all organs of state. To some degree there will be an overlap between the functions of the SCOPA and the oversight mandate of other PC's. This is an intended overlap in our Parliamentary system and therefore there is no organ of state which is subjected to the exclusive oversight jurisdiction of any single PC to the exclusion of the SCOPA.

**General power of Committees of the National Assembly to summons persons to appear before it**

10. In terms of section 56(a) of the Constitution, read together with the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 ('Powers Act') the NA and any of its committees may summon any person to appear before it or to produce documents.

11. This power is an information-gathering tool to facilitate and strengthen the execution of the mandate of Parliament, including oversight over the executive and organs of state even in cases where individuals or entities are otherwise reluctant to appear before Parliament.

**ESKOM as a National Key Point**

12. Eskom as an entity is not a national key point for purposes of the National Key Point Act, 1980 (Act 102 of 1980) but rather the power stations under its control have separately been declared as such.<sup>2</sup>

13. In a press release issued by Eskom in 2015 relating to the Medupi Power Station, it stated that *"due to its critical importance to the National Grid in providing sustainability of electricity supply and limiting load shedding, it is imperative for the safety and security of the asset that it be declared a National Key Point as defined by the National Key Points*

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<sup>2</sup> There is no legal requirement in terms of the National Key Points Act, for sites declared as national key points to be gazette or made public. However, in terms of information publicly made available by the Minister of Police and Eskom of the following power stations are National Key Points: Lethabo Power Station – Eskom; Eskom Power Station – Drakensberg Pumped Storage and Medupi Power Station.

Act.”<sup>3</sup> It follows that this too is the rationale for declaring other power stations as National Key Points.

14. In terms of the National Key Point Act the declaration compels the owner of the National Key Point to take steps to secure it. In addition, s10(2) makes it an offence for any person to furnish information relating to the security measures applicable to a national key point or in ‘*respect of any incident that occurred there*’, without being legally obliged or entitled to do so, guilty of a criminal offence.
15. The National Key Point Act has been repealed in terms of the Critical Infrastructure Protection Act, 2019 (Act 8 of 2019). However, the section which repeals the Key Point Act in its entirety is still not in operation and therefore the Act is currently still in force.

### **Protection of security information**

16. Brigadier Burger raises concerns that his attendance and response to questions may compromise security information which may violate national security.
17. The legal requirements in respect of the protection of national security information in South Africa, is somewhat disjointed and currently there is no comprehensive statutory framework to define and regulate access to and disclosure of national security information. Nonetheless, we deal below with certain key pieces of legislation/policy which may assist:

### **18. *The Protection of Information Act, 1982 (Act 84 of 1982)***

- 18.1. The Protection of Information Act is an Apartheid era act that remains on the statute books.
- 18.2. Section 4 prohibits and makes it a criminal offence for any person to disclose information relating to the ‘*defence of the Republic*’ and information regarding a ‘*security matter*’ which is defined as including matters dealt with by the Intelligence Services or relating to its functions.

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<sup>3</sup> See press release dated 3 December 2015 at <https://www.gov.za/speeches/eskom-medupi-being-declared-national-key-point-3-dec-2015-0000#:~:text=The%20Medupi%20Power%20Station%20is%20of%20strategic%20and,6%20turbine%20generator%20units%20with%20air%20cooled%20condensers.>

## **19. *The Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (“PAIA”)***

- 19.1. PAIA gives effect to the constitutional right of access to any information held by any public or private body that is required for the exercising or protection of any rights as contained in section 32 of the Constitution.
- 19.2. Whilst PAIA is not directly applicable it is helpful in considering the meaning of security information and the protection of such information.
- 19.3. The principal objective of PAIA is disclosure of information and not secrecy. It is thus widely accepted by our courts that PAIA should therefore be interpreted to promote this purpose.
- 19.4. Notwithstanding the above, PAIA does contain exceptions to the general rule of transparency. Section 41 of PAIA deals with the mandatory protection of information related to defence and security and provides the most comprehensive legal framework for what would constitute information relating to national security.
- 19.5. Section 41 (1) of PAIA allows an information officer to refuse a request for access to a record if its disclosure could reasonably be expected to cause prejudice to the defence of the Republic or the security of the Republic. Examples of such records cited in PAIA include records relating to:
- (a) military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities;
  - (b) the quantity, characteristics, capabilities, vulnerabilities or deployment of weapons or any other equipment used for the detection, prevention, suppression or curtailment of subversive or hostile activities; or anything being designed, developed, produced or considered for use as weapons or such other equipment;
  - (c) the characteristics, capabilities, vulnerabilities, performance, potential, deployment or functions of any military force, unit or personnel; or any body or person responsible for the detection, prevention, suppression or curtailment of subversive or hostile activities; or records

(d) held for the purpose of intelligence relating to the defence of the Republic; the detection, prevention, suppression or curtailment of subversive or hostile activities; or another state or an international organisation used by or on behalf of the Republic in the process of deliberation and consultation in the conduct of international affairs;

(e) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d) above;

(f) on the identity of a confidential source and any other source of information referred to in paragraph (d);

(g) on the positions adopted or to be adopted by the Republic, another state or an international organisation for the purpose of present or future international negotiations; or

(h) that constitutes diplomatic correspondence exchanged with another state or an international organisation or official correspondence exchanged with diplomatic missions or consular posts of the Republic.

19.6. Notwithstanding that security information is contained as an exception to the general obligation of the state to disclose information, s 46 of PAIA contains a public interest override. It provides that records must be disclosed if the disclosure would reveal evidence of a substantial contravention of, or failure to comply with, the law; or an imminent and serious public safety or environmental risk and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

## 20. ***The National Strategic Intelligence Act (Act 39 of 1994) ('NSIA')***

20.1. Section 1 of NSIA defines national security intelligence as *'intelligence which relates to or may be relevant to the assessment of any threat or potential threat to the security of the Republic in any field'*.

20.2. In turn *national security* is defined in the NSIA as including, 'the protection of the people of the Republic and the territorial integrity of the Republic against—

(a) the threat of use of force or the use of force;

(b) the following acts:

- (i) Hostile acts of foreign intervention directed at undermining the constitutional order of the Republic;
  - (ii) terrorism or terrorist-related activities;
  - (iii) espionage;
  - (ii) exposure of a state security matter with the intention of undermining the constitutional order of the Republic;
  - (iii) exposure of economic, scientific or technological secrets vital to the Republic;
  - (iv) sabotage; and
  - (vii) serious violence directed at overthrowing the constitutional order of the Republic;
- (c) acts directed at undermining the capacity of the Republic to respond to the use of, or the threat of the use of, force and carrying out of the Republic's responsibilities to any foreign country and international organisation in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not,

but does not include lawful political activity, advocacy, protest or dissent.

## **21. *The Minimum Information Security Standards ("MISS") Policy***

- 21.1. State Information is classified in accordance with the provisions of the MISS Policy which was approved by Cabinet on 4 December 1998 as the national information security policy of the Republic.
- 21.2. In terms of the MISS classified information is *'sensitive information which in the national interest, is held by, is produced in, or is under the control of the State, or which concerns the State and which must by reasons of its sensitive nature, be exempted disclosure and must enjoy protection against compromise.'*
- 21.3. According to the MISS policy, the concept of national security is a broad concept encompassing peace, stability, development and progress as well as the basic principles and core values associated with and essential the quality of life, freedom, prosperity and development and the absence of threats, risk or danger.
- 21.4. Clause 3.4 of the MISS Policy clearly states, in respect of the classification of records that *'Security measures are not intended and should not be applied to cover*



*up maladministration, corruption, criminal actions, etc, or to protect individuals/officials involved in such cases.*

## **22. South African Police Service Act, 1995 (Act 68 of 1995) ('SAPS Act')**

22.1. Section 70 of the SAPS Act prohibits and makes it a criminal offence for members of the SAPS to wilfully disclose information in circumstances in which he or she knows, or could reasonably be expected to know, that such a disclosure will or may prejudicially affect the exercise or the performance by the SAPS of the powers or the functions referred to in section 205 of the Constitution.

22.2. Section 205(3) of the Constitution states that the objects of the SAPS are to prevent, combat and investigate crime, to maintain public order, to protect and secure inhabitants of the Republic and their property; and to uphold and enforce the law.

## **Discussion**

23. There are two aspects that require consideration. The first question is whether the SCOPA is legally mandated to ask questions of and obtain information from Brig Burger notwithstanding the defence that the information relation to national security. The second is whether the SCOPA may summons Brig Burger to appear before it.

### **A. Is the SCOPA legally mandated to question or receive information relating to the Eskom allegations from Brigadier Burger?**

24. In the first instance as regards the appropriateness of the SCOPA to deal with matters related to the Eskom allegations (which Brig Burger describes as matters of national security), it is important to distinguish between the financial oversight role played by the SCOPA vis-à-vis the more general oversight role over Eskom by the PC: Public Enterprises and the oversight role over the SAPS as played by the Portfolio Committee on Police.

25. As indicated, the role of the SCOPA is limited to considering matters related to public expenditure. This purpose is distinguishable from the PC: Public Enterprises which conducts general oversight over ESKOM or the PC: Police which similarly conducts general oversight over the SAPS. Whilst the mandate of the PC: Public Enterprises is broad enough to include matters of financial oversight (in addition to the performance of ESKOM) this cannot preclude the SCOPA from considering financial matters. In the case

of the PC: Police, it conducts oversight in respect of the performance of the SAPS and is not concerned with individual investigations. It is unclear why Brig Burger would be more comfortable to report to these committees as they too ordinarily conduct meetings in a transparent manner and any safety concerns would not be dealt with differently in these meetings.

26. Given that the SCOPA is responsible for the oversight of the financial expenditure of public funds through engaging with and interrogating the financial statements, audit and other expenditure reports of organs of state, including Eskom, it may further investigate and consider any such matter related to same. By way of example the SCOPA can consider:

26.1. whether there has indeed been unauthorised/irregular/fruitless and wasteful expenditure. In other words what financial maladministration<sup>4</sup> has taken place in Eskom (in contravention of the Public Finance Management Act, 1999 and other applicable prescripts);

26.2. was such expenditure accurately recorded in the financial statements and if not why;

26.3. was such expenditure identified during the audit process and if not why;

26.4. whether action is being taken against any persons who may have contravened any financial prescripts or other laws and if not why;

26.5. what is the status of any action that is being taken including any steps to recover funds and hold persons accountable in law; and

26.6. have any remedial measures been put in place to prevent, detect and manage similar future occurrences.

27. Any questions to Brig Burger for purposes of determining information related to the above matters would be in pursuit of the SCOPA's oversight mandate i.e. questions focussed on financial management issues. On the face of it, Brig Burger's role would be limited therefore to providing information on whether the allegations of financial misconduct were reported to him; the nature of the financial misconduct as reported to him; whether steps

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<sup>4</sup> The term 'financial maladministration' is used in this opinion to denote the misappropriation of funds or poor management of finances and therefore includes any contravention of applicable financial prescripts, and which may be as a result of corruption; fraud or mismanagement.

were taken by himself as the main investigator to further investigate and pursue criminal action against any alleged perpetrators and if not why not and what the status of those investigations were at the time he retired.

28. However, Brig Burger raises a generalised defence for not accounting on the basis that the information related to the Eskom allegations amount to information on national security and organised crime/corruption and therefore the SCOPA is not legally entitled to consider such (without explaining why or how the PC: Police or PC: Public Enterprises is legally empowered then these allegations). Brig Burger also questions whether the JSCI is more suited to dealing with the allegations since it holds its meetings in closed sessions and is legally able to access information on national security even if it is classified.<sup>5</sup>
29. The question thus is whether the information related to the allegations made by Mr de Ruyter amount to information on national security and therefore notwithstanding that it relates to financial maladministration the SCOPA is precluded from receiving such information.
30. To support his argument, Brig Burger firstly raises the fact that 'Eskom' (as opposed to the individual power stations) is a national key point and arguably therefore all information in relation thereto is national security information.
31. The fact that the entity owns property that is declared a national key point does not automatically exempt information relating to financial maladministration of the entity from being subjected to open and transparent oversight processes. Such an argument would lead to a legal absurdity and offends the Constitutional principles of openness, transparency and accountability. The mere fact that power stations have been declared as national key points does not in and of itself justify a blanket refusal for any person to account on the financial matters of Eskom to the SCOPA. It would be akin to arguing that the Parliamentary administration is not legally required to account for its expenditure as the Parliamentary precinct has been declared a National Key Point. The question should rightly be whether the disclosure of the information relating to the allegations will compromise or threaten the security of individual power stations i.e. if the information does

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<sup>5</sup> The JSCI is distinct from other PC's, in that it is a statutory joint committee established in terms of section 2 of the Intelligence Services Oversight Act 40 of 1994 (Oversight Act). All the members of the JSCI and staff members have been vetted and have "top secret" clearances thereby allowing the JSCI access to sensitive information and information that has been classified "confidential", "secret" or "top secret". It is the only competent committee at Parliament with the statutory authority to access classified and sensitive information.

not involve the disclosure of information relating to security measures or security incidences it will not be protected in terms of the National Key Points Act. This is in keeping with Eskom's own explanation as to why power stations should be declared as National Key Points.

32. Furthermore, to the extent that information relating to the allegations is national security information, that information may only be protected as necessary to safeguard national security interests. Such interests cannot extend to the non-disclosure of information for the purposes of avoiding accountability or protecting any individuals. Information can be disclosed in part where necessary to avoid compromising national security if for example it would reveal the name of informants thereby compromising their safety. From our understanding of the allegations, there is no reason to believe that Brig Burger would not be able to share information in a manner which does not raise national security concerns. It is highly unlikely (if not impossible) that the totality of information constitutes information that if revealed would compromise national security as understood with reference to the PAIA and NSIA.
33. Furthermore, Brig Burger has not provided any information on whether the records at his disposal have indeed been classified for purposes of the MISS Policy as sensitive information which must be protected, in which case he may validly refuse to share such information with the SCOPA.
34. However, it is noted that the SCOPA may follow other processes requesting declassification. This is especially so as the MISS Policy itself states that the system of classification should not be used to hide corruption, maladministration, and criminal offences and thus the SCOPA could request information on which documents have been classified and why. The abuse of the MISS Policy to hide criminality was a subject traversed at the State Capture Commission and therefore the rationale of the classification of records should be interrogated where necessary.<sup>6</sup> However, we accept that it is not within Brig Burger's powers to declassify information.
35. While it is agreed that for purposes of national security, information relating to the detail of physical security measures and systems to detect criminality<sup>7</sup> or intelligence information which provide detail on for example attempts to sabotage or overthrow the government or cause economic disruption by destabilising ESKOM or the power supply may justifiably be

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<sup>6</sup> See for example the part of the report relating to the State Security Agency; [https://www.statecapture.org.za/site/files/announcements/667/OCR\\_version\\_-\\_State\\_Capture\\_Commission\\_Report\\_Part\\_V\\_Vol\\_I\\_-\\_SSA.pdf](https://www.statecapture.org.za/site/files/announcements/667/OCR_version_-_State_Capture_Commission_Report_Part_V_Vol_I_-_SSA.pdf)

<sup>7</sup> For example, where security cameras and alarm systems are located.

withheld it does not follow that information related to the procurement goods or services or non-compliance with financial prescripts (which is at the core what SCOPA should focus on) will necessarily threaten national security. In any event, the Protection of Information Act (like all legislation which may seek to limit the disclosure of information) must be understood against the Constitutional values of accountability, openness and transparency as well as the public interest.

36. It is advised that if Brig Burger is to appear before SCOPA that he be sworn in and afforded the protection in terms of the Powers Act so that information provided cannot be used against him except in relation to a charge of perjury.
37. In respect of the safety concerns that Brig Burger raises, it is possible that he accounts or provide information without compromising the safety of any individual (e.g. by not naming or identifying such person). In respect of his own safety, the SAPS should be requested to advise whether they have conducted a security assessment to ascertain whether there is any threat to the safety of Brig Burger which would be compromised if he were to appear before the SCOPA to answer questions related to its oversight mandate over Eskom.

#### **B. *Can the SCOPA summons Brigadier Burger to appear before it***

38. The SCOPA is legally mandated to summons any person to appear before it provided that the questions put to the person, or the information sought from the person is in pursuit of the SCOPA's oversight mandate.
39. The fact that Brig Burger is now retired and therefore discharged from the SAPS is not an impediment to him being asked to provide oral evidence and/or to submit records or information in pursuit of the SCOPA's oversight enquiry.
40. The power to summon is however not an unfettered power. In light of the principle of legality, the SCOPA may only summon persons for the purpose of performing its constitutional and statutory obligations, including holding them to account or maintaining oversight related to the mandate of the SCOPA.
41. It is further contended that the summoning of any individual by a body that is not a court is extraordinary in nature and therefore to be exercised only when objectively necessary.

42. In the Supreme Court of Appeal ('SCA') matter of *Government Employee Medical Scheme v the Public Protector*<sup>8</sup>, the SCA noted that "*Because subpoena powers are extraordinary coercive powers, they 'are generally reserved for courts'. This means that where the power is granted to a body other than a court, the power should be interpreted restrictively. Subpoenas should accordingly only be used where 'there is an appreciable risk, to be judged objectively' that the evidence cannot be obtained by following a less invasive route.*

43. Accordingly, a further attempt should be made to secure the voluntary attendance of Brig Burger. If he maintains his refusal, the Committee may summon him provided that the information it seeks from him is within his personal knowledge and cannot be obtained in a less restrictive manner.

### **Way Forward**

44. The legal regime governing the protection of information related to national security is disjointed and has not been consolidated and streamlined in a manner that balances the Constitutional right to information held by the State and the need for transparency, openness, and accountability against the need to protect legitimate state interests. These matters are thus largely left to interpretation and may have to be challenged in court where there is a refusal of any person or institution to account.

45. SCOPA is legally mandated to consider information relating to financial administration of Eskom. Vague and generalised attempts to prevent the SCOPA from conducting its oversight responsibilities and ensuring accountability of state institutions should be rejected and secrecy should only be allowed in cases where there is a genuine need for such.

46. There appears to be no reasons as to why Brig Burger cannot account and raise issues of national security in response to specific questions as needed by explaining why the information constitutes national security information the disclosure of which will compromise national security notwithstanding the principles of openness, transparency, and accountability together with the public interest.

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<sup>8</sup> *Government Employees Medical Scheme and Others v Public Protector of the Republic of South Africa and Others* (1000/19) [2020] ZASCA 111; [2020] 4 All SA 629 (SCA); 2021 (2) SA 114 (SCA) (29 September 2020)

47. However, the SCOPA will first need to ascertain whether the information it seeks from Brig Burger is necessary for it to ensure accountability of Eskom in line with the SCOPA's mandate and whether Brig Burger is the correct person to provide such information.

48. If SCOPA resolves to summons Brig Burger to provide written and/or oral evidence, such engagement must:

48.1. be based on the understanding that the information sought by the SCOPA is not available from any other person (i.e. it is within Brig Burger's personal knowledge) or using any less restrictive means than issuing summons it being recognised that the summoning procedure is a measure of last resort;

48.2. be for the purpose of and pursuant to maintaining oversight over Eskom in relation to the expenditure of public funds (It is not the role of the SCOPA to deal with any alleged ethical breaches of any member of the Executive<sup>9</sup> or to deal with operational and policy issues relevant to Eskom which is the responsibility of the PC: Public Enterprises. The focus therefore should be on what information Brig Burger has in relation to the allegations that can assist SCOPA in fulfilling its financial oversight mandate);

48.3. be limited to the extent that Brig Burger is not compelled to answer questions which will undermine national security as understood with reference to PAIA and the disclosure of which will be in contravention of the Protection of Information Act or the MISS Policy;

48.4. be based on an undertaking from the SAPS that it absolves Brig Burger from any criminal liability in terms of s70 of the SAPS Act; and

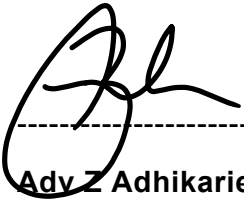
48.5. be limited to matters which will not potentially prejudicially affect the exercise or the performance by the SAPS of the powers of their function to investigate the offences. In this regard we note the concerns raised by the SIU that certain information if revealed may jeopardise ongoing investigations. However, this cannot be a reason to refuse to account completely as information can be shared in a manner that is sensitive and alive to these concerns.

49. The SCOPA may also consider liaising with the JSCI to assist it by requesting that Brig Burger table a written statement to that Committee so that it may guide the SCOPA on the further conduct of the matter and whether the information indeed constitutes information pertaining to national security as alleged.

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<sup>9</sup> In terms of the Executive Members' Ethics Act, the alleged breach of the Ethics Code falls within the purview of the Public Protector who is responsible for making such a determination.

50. Should you require any further information please do not hesitate to contact the writer or our Ms Fatima Ebrahim.

A handwritten signature in black ink, consisting of a large, stylized 'Z' followed by a cursive flourish. The signature is positioned above a horizontal dashed line.

**Adv Z Adhikarie**

**Chief Parliamentary Legal Adviser**