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LEGAL OPINION
[Confidential]

TO: Hon QR Dyantyi, MP
Chairperson: Committee for Section 194 Enquiry

COPY: Mr X George
Secretary to Parliament

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

DATE: 15 August 2022

REF. NO.: 106/ 2022

RE: Summonsing of President Ramaphosa to appear before the Committee for Section 194 Enquiry

Introduction

1. Our office was requested to advise the Chairperson of the Committee for Section 194 Enquiry ("Committee") on the processing of a request by the Public Protector, Adv B Mkwhebane, to summons President Ramaphosa ("the President") to appear before the Committee's enquiry into her removal.

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Background

2. The Committee is currently conducting hearings into the removal of the Public Protector, Adv Mkwhebane ("PP"). To date the evidence leaders have led various witnesses and the PP will be afforded the same opportunity to present evidence via witnesses if she so wishes.

3. On 19 July 2022, the PP, via her legal representatives, addressed correspondence to the President (in which the Committee Chairperson was copied) requesting that the President voluntarily agree to appear before the Committee as a witness in relation to "one of the charges the Public Protector is facing."

4. The 19 July letter goes further to request the President to appear before the Committee to answer questions in relation to the following 4 issues:[1]

   4.1. the suspension of the PP by the President;[2]

   4.2. the review of the PP's report in the so called CR 17 matter, the judgement of which was used by Hon Mazzone, MP in support of Charge 4 (particularly sub charges 11.3 and 11.4) in the motion;[3]

   4.3. the President's position in the current litigation that the PP "should not be represented by the legal representatives of her choice therein";[4] and

   4.4. accusations made by the President against the PP, "including but not limited to accusations of criminal conduct in the form of perjury" which if true could constitute impeachable conduct.[5]

5. On 25 July 2022, the State Attorney, acting on behalf of the President, replied to the PP's request indicating that the President will not accede to the request. Various reasons are put forward including that:

   5.1. the suspension matter is currently before the courts;

   5.2. the PP seeks testimony on matters that relate to the findings of the courts and the PP is misplaced in concluding that the Committee can engage in a process of 'relitigation' or reconsidering the findings by the courts;

   5.3. the threshold of relevance has not been met;

[1] In terms of paragraph 16 of the letter these issues are not exhaustive.
[2] Paragraphs 2 and 3 of the letter
[3] Paragraphs 4 to 11 of the letter
[4] Paragraphs 12 and 13 of the letter
[5] Paragraphs 14 of the letter

5.4. the President has not taken a position that the PP should not be represented by legal representatives of her choice; and

5.5. the accusations against the PP were made in affidavits deposed to by the President's attorney in the proceedings and not the President himself.

6. Subsequently, on 8 August 2022, the PP wrote to the Chairperson invoking directive 5.3 and requesting that the Chairperson take all the necessary steps to summons the President to appear before the Committee.

7. The letter to the Chairperson is narrower in scope than the request sent to the President. It requests that the President be summonsed in respect of the "CR17 or BOSASA case which resulted in the Courts making certain remarks about the Public Protector which in turn led to Charge number 11.3 and 11.4 in the motion before the Committee."

8. It thus appears as though the PP no longer wishes the President to testify on issues relating to the suspension, legal representation and the alleged accusations made by the President against the PP. Accordingly, this opinion is restricted to the CR17/BOSASA matter.

BRIEF SYNOPSIS OF THE CR 17/BOSASA MATTER VIS-À-VIS THE CHARGES IN THE MOTION

The Motion

9. Charge 4 in the motion is a mixed charge of misconduct and/or incompetence. It contains a sub-charge relating to the intimidation, harassment and/or victimisation of staff (paragraph 10 of the motion) and a sub-charge alleging that the PP has misconducted herself or is otherwise incompetent (paragraph 11 of the motion). The latter charge is further divided into 4 sub-categories (see paragraph 11.1 to 11.4 of the motion):

9.1. the first relates to the management of internal capacity and resources;

9.2. the second speaks to the alleged failure of the PP to prevent fruitless and wasteful and/or unauthorised public expenditure in legal costs;

9.3. the third concerns the alleged intentionally or grossly negligent manner in which the PP conducts her investigations thereby failing to ensure that investigations are conducted impartially and independently; and

9.4. the fourth alleges that the PP deliberately seeks to avoid making findings against certain officials while deliberately seeking to reach conclusions of unlawful conduct and

imposing far reaching disciplinary measures and remedial action in respect of other officials.

10. In support of Charge 4 (including all the sub-charges as set out above), the motion included evidence related to various matters including the court papers in the matter of the *President v the Public Protector* in the Gauteng Division of the High Court under Case No. 55578/19.[6]

The CR 17 Report

11. On 6 November 2018 the President appeared before the National Assembly ("NA") to answer questions. As per NA Rule 140, the President was provided with questions from members in writing in advance and members were permitted during the sitting to put further supplementary questions to the President. As per NA Rule 142(6) supplementary questions must arise directly from the original question.

12. During the question session, the then leader of the Democratic Alliance, Mr Mmusi Maimane, put a new question to the President (that had not been provided in writing and which did not constitute a supplementary question for purposes of the NA Rules). The question related to an allegation that the President's son had received payment of the sum of R500 000 from BOSASA. Notwithstanding that the question did not comply with the NA Rules, the President responded by indicating that the payment was in respect of advisory services rendered by his son to BOSASA in terms of a contractual agreement.

13. Subsequently, on 14 November 2018, the President addressed correspondence to the Speaker of the NA, indicating that he had inadvertently provided incorrect information in his response. The President explained that he had since learnt that the payment referred to in the question was not related to his son's contract with BOSASA (which he confirmed does exist) but was rather in respect of a donation received from Mr Gavin Watson of BOSASA into a trust account that was used to raise funds for the President's campaign for president of the African National Congress (the so called Cr17 campaign). The President indicated that he was not aware of the donation at the time that he answered the question in the NA.

14. Thereafter, Mr Maimane and Mr Floyd Shivambu, MP of the Economic Freedom Fighters both lodged complaints with the Office of the Public Protector arising from the incident. The

[6] President of the Republic of South Africa and another v Public Protector and others (Information Regulator as amicus curiae) [2020] 2 All SA 865 (GP)

PP consolidated the complaints and issued a report titled "*Report on an investigation into a violation of the Executive Ethic's Code through an Improper relationship between the President and African Global Operations (AGO), formerly known as BOSASA- Report 37 of 2019/20"*[7] The Report is commonly referred to as the CR 17 Report.

15. The CR 17 Report made a number of adverse findings against the President. These included that the President:

    15.1. deliberately misled Parliament and so breached the Executive Ethics Code;

    15.2. acted in violation of section 96(1) of the Constitution; and

    15.3. acted in violation of the Parliamentary Code of Ethical Conduct and Disclosure of Members' Interests ("Parliamentary Ethics Code").

16. In addition, the PP found that there was *prima facie* evidence against the President of money laundering as defined in the Prevention and Combatting of Corrupt Activities Act, 2004 ("PRECCA").

17. As part of her remedial action, the PP directed the Speaker of the NA to, *inter alia*, refer the President's breach of the Parliamentary Ethics Code to the Joint Committee on Ethics and Members' Interests and to "demand publication of all donations received by President Ramaphosa because as he was the then Deputy President, he is bound to declare such financial interests into the Members' registrable interests register in the spirit of accountability and transparency."[8]

18. The PP further directed the National Director of Public Prosecutions to further investigate the *prima facie* evidence of money laundering as uncovered during her investigation.

Litigation relating to the CR17 Report

19. In July 2019 the President instituted review proceedings in the High Court to set aside the CR17 Report. The President asserted the following in the founding papers:[9]

    a) the PP had no legal authority to investigate the CR17 campaign;

    b) there was no factual or legal basis for the finding that the President was duty bound to disclose the CR17 donations;

[7] The full report can be accessed at SKM_C55819071910010 (pprotect.org)
[8] See page 103ff of Report 37 of 2019/20
[9] All the papers in the matter before the High Court are available at pages 2530 to 3033 of the Panel Record

c) the Executive Ethics Code is limited to the wilful misleading of Parliament and does not extend to inadvertent or inaccurate statements made to Parliament;

d) the finding is irrational and contradicted by the evidence;

e) he was not provided with copies of the notice of complaint;

f) he was denied an opportunity to question Mr Watson orally;

g) the investigation was not meaningful and the PP failed to apply her mind to the evidence before her.

20. The Speaker and the National Director of Public Prosecutions ("NDPP") both joined the proceedings to review and set aside the remedial action directed at them respectively. By agreement between the parties the PP's remedial action was suspended until judgement in Part B of the application was delivered by the Full Court.

21. The Full Court found in favour of the President and set aside the CR17 Report. It found, inter alia, that:

21.1. the Executive Members Ethic's Code only prohibits the wilful, deliberate or intentional misleading of Parliament and does not include the concept of "inadvertently" misleading Parliament. The PP's findings that the President inadvertently and/or deliberately misled Parliament is fatally flawed due to a material error of law;

21.2. the PP lacked jurisdiction to investigate the CR17 campaign as the contributions fell squarely within the private domain;

21.3. the PP failed to act with an open mind;

21.4. the PP did not substantiate her conclusion that the President had received a direct personal sponsorship through the contribution to his campaign;

21.5. there was no evidence to support the findings in respect of money laundering and that the PRECCA Act which was referred to by the PP did not deal with money laundering which is in fact dealt with in the Prevention of Organised Crime Act, 1998.

21.6. the PP did not grasp the concept of prosecutorial independence and she does not have the power to direct the NDPP to investigate any criminal offence or to direct how such an investigation should be done

22. The Full Court went further and granted a punitive personal cost order against the PP.

23. The PP filed an application for direct leave to appeal the judgement of the High Court in the Constitutional Court, which appeal leave was granted.

24. On 29 June 2021, the Constitutional Court handed down judgement. The majority judgement[10] found that:

24.1. the PP misconceived the Code by changing the wording of the Code from “wilfully” to “inadvertent” by holding that the President’s reply breached paragraph the Code and her finding therefore constituted a material error of law and fell to be set aside;

24.2. the PP’s conclusion that the President had personally benefitted was not substantiated by her own report, which contained the summary of the evidence she heard during the investigation. In this regard the Court held that the PP’s acceptance of e-mail evidence over conflicting evidence was contrary to the settled principle that where evidence is inconclusive or diverges, the PP is obliged to carefully evaluate it to determine the truth;

24.3. the PP was not authorised to investigate whether the President personally benefitted from donations made to the CR17 campaign or to investigate the affairs of the CR17 campaign. In this regard the Court found that section 182(1) of the Constitution is concerned with state affairs and the affairs relating to the CR17 campaign were private affairs;

24.4. the evidence in the PP’s report did not support the finding that the President had involved himself in illegal activities sufficient to evoke a suspicion of money laundering and the PP was not legally empowered to investigate money laundering allegations;

24.5. the PP was obliged to afford an affected person an opportunity to respond to the implicating evidence, if the implication may be detrimental to that person or if an adverse finding was anticipated, and the failure to afford the President a hearing before the decision on the remedial action was taken, was fatal to the validity of that remedial action; and

24.6. the PP’s remedial action fell to be set aside for additional reasons, including ordering the Speaker of the NA to take steps in respect of which she had no authority in law and issuing supervisory orders against the Speaker, the NDPP and the National Commissioner.

25. There was no order as to costs of the parties but the President was ordered to pay the costs of AmaBhungane Centre for Investigative Journalism NPC , including costs of two counsel.[11]

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[10] Penned by Jafta J concurred in by J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

[11] Amabhungane had challenged the Constitutional validity of the Executive Ethics Code. The apex Court remitted this matter to the High Court for consideration and granted a cost order against the President being the only party who had opposed the relief sought by AmaBhungane

26. In a dissenting judgment, Mogoeng CJ concluded that:

26.1. Maimane's formal complaint allowed the PP to investigate every aspect of the President's CR 17-related conduct that she considered as potentially unethical;

26.2. the financial assistance constituted a personal benefit to the President and created a situation that involved a risk of conflict between the President's private interests, his pursuit of the ANC Presidency and his official responsibilities and the President ought to have, while still a Member of Parliament and Deputy President, disclosed the sponsorship to the NA;

26.3. the emails which the President effectively admitted are authentic and true revealed that he deliberately represented a falsehood to the Public Protector. This together with the President's failure to disclose the private donations to his campaign ran against his obligations laid out in sections 96(2)(b), 83(b) and 181(3) of the Constitution and the values of transparency and accountability.

LEGAL FRAMEWORK

The Constitution and the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004

27. In terms of section 181(5) of the Constitution, all state institutions supporting democracy are accountable to the NA and must report on their activities and the performance of their functions to the NA at least once a year.

28. The oversight role of the NA, in respect of state institutions supporting democracy, is further extended in section 194(1) of the Constitution which provides that the members of a commission, the Auditor-General and the PP may only be removed from office if the NA makes a finding of misconduct, incapacity or incompetence and thereafter resolves to remove them from office. In the case of the PP the threshold for removal is a supporting vote of at least two-thirds of the NA.

29. Section 56 (a) of the Constitution, read together with the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004[12] ("Powers Act"), provides that the NA and any of its committees may summon any person to appear before it or to produce documents.

[12] Act 4 of 2004

Rules of the Assembly

30. On 3 December 2019, the NA adopted new Rules setting out the process for the removal of office-bearers in institutions supporting constitutional democracy. These "Removal Rules" set out the functions and powers of the Committee. Rule 129AD specifically sets out the powers and functions of the Committee and provides that it:

    12.1 must conduct an enquiry and establish the veracity of the charges and report to the NA;

    12.2 must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable time frame;

    12.3 must afford the holder of the public office the right to be heard in his or her defence and to be assisted by a legal practitioner or other expert; and

    12.4 has all the powers and functions applicable to Parliamentary committees.

Terms of Reference and Directives of the Committee

31. On 22 February 2022 the Committee adopted Terms of Reference (TOR). The TOR sets out the following salient points:

    31.1. the enquiry is not a judicial or quasi-judicial process- it is inquisitorial in nature and the principle of fairness is paramount to the manner in which the Committee conducts the enquiry (para 4 of the TOR);

    31.2. the Committee will invite witnesses to answer questions relating to the subject-matter of the enquiry and may use its power of subpoena if a witness refuses (para 4.1 of the TOR); and

    31.3. the PP may call witnesses and the Committee and evidence leaders shall have a right to put questions to those witnesses (Para 4.4 of the TOR).

32. The Chairperson further issued directives (as amended) in terms of NA Rule 183 to govern the appearance of witnesses and other persons before the Committee (including the evidence leaders and legal representatives of the PP). These directives set out the procedures for the hearing portion of the enquiry.

33. In developing the directives, the Chairperson had due regard to the fact that the PP may encounter difficulty in securing the appearance of witnesses. As such the directives provided for a procedure whereby the PP could request the Committee to summons any person on her behalf if such person has declined to participate voluntarily. The request must be considered by the Committee in terms of the Powers Act.

34. Directive 3.2 further provides that "only evidence relevant to determining the veracity of the grounds of incompetence and/or misconduct set out in the motion should be put before the Committee, and any evidence, not so relevant, that may be placed before the Committee will be disregarded."

Discussion

35. The power to summons serves as an important information-gathering tool to facilitate and strengthen the execution of the oversight mandate of Parliament.

36. This power enables committees to exercise their oversight function even in cases where individuals or entities are otherwise reluctant to appear before them to answer to any allegations or to provide information that a committee may require to fulfil its oversight functions.

37. The power to summon is however not an unfettered power. In light of the principle of legality, Parliament 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 performance of public functions in terms of the law. Each individual committee is further restricted to summonsing those persons who may be able to answer questions or produce information related to that committee's particular mandate.

38. It is further contended that the summonsing of any individual by a body that is not a court is extraordinary in nature and therefore to be exercised only when objectively necessary. In the matter of the *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v President Zuma*[13] the Constitutional Court stated in respect of the Commissions Act which provides for summonsing of witnesses before commissions of enquiry:

"It cannot be gainsaid that the Commissions Act authorises serious limitations of fundamental freedoms and rights guaranteed by the Bill of Rights. To mitigate the intrusion upon individual rights the Act restricts its application to a commission established for the purpose of investigating a matter of public concern."[14]

[13] Case Number CCT 295/20; [2021] ZACC 2
[14] Ibid,para 15

39. The apex court then further considered whether the State Capture Commission was a matter of public concern and whether the appearance of former president Zuma was necessary for the performance of the Commissions functions. In considering same the Court noted that President Zuma was the subject-matter of various allegations contained in the Commissions terms of reference and these placed him squarely at the centre of the investigation. Furthermore, the Court noted that certain matters fell particularly within the personal knowledge of President Zuma and that some matters may not be properly investigated without his participation.

40. In the Supreme Court of Appeal (SCA) matter of *Government Employee Medical Scheme v the Public Protector*[15], 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.*

ADVICE AND WAY FORWARD

41. The Committee may only use its constitutional powers to summon the President (or any other person for that matter) to provide information that is necessary for it to determine the veracity of the charges.

42. Whilst we note that the request by the PP to the Committee is apparently narrower than the request to the President we note nonetheless that the President should not be called to answer questions related to the suspension of the PP and the current litigation processes before the courts. This Committee is neither empowered nor seized with any enquiry into the suspension of the PP which, in terms of section 194(3) of the Constitution, is a prerogative of the President. The appropriate forum to deal with such matters remain the courts.

43. We take note of the fact that Messrs Johan Van Loggerenberg and Pillay both provided evidence to this Committee in relation to reports issued by the PP in which they were mentioned and on their version therefore affected by it. Whilst the President was the subject matter of the CR 17 Report he is distinguishable from Messrs Van Loggerenberg and Pillay in as far as their appearance before the Committee followed their response to the call for

[15] 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)

public submissions. It has not been the case that persons mentioned in the various reports of the PP referred to during the enquiry by this Committee have been summonsed or even invited to give evidence. Neither has it been the case that the President has made any submission to Parliament or this Committee calling for the removal of the PP or otherwise tendering any information for the consideration of the Committee in relation to the charges.

44. To date the Committee has taken a restrictive approach to the issuing of summons, in line with the principles set out in paragraphs 38-40 above. Only one summons has been issued thus far, in respect of Mr Kekana.[16]

45. As such, in determining whether or not to summons the President, the decision should be based on the President answering questions related to the CR 17 matter only. In consideration of same the Committee should take the following into account:

45.1. the PP has requested that the President is summonsed to answer questions in relation to a matter that is settled by the Courts;

45.2. the President, as the subject-matter of the CR-17 Report, was not involved in the investigation, drafting or issuing of the CR-17 Report and it is that process that is ultimately to be scrutinised by this Committee;

45.3. the President's version in relation to the events that led to the complaints against him and the subsequent challenge to the Report forms part of the court record and is contained in sworn affidavits. The evidence of the President is thus readily available;

45.4. whilst Parliament must exercise oversight over the President, this Committee is not mandated to conduct oversight over the President – its singular task is to establish the veracity of the charges against the PP and to report to the NA. Thus the oversight process it is currently engaged in relates to the conduct of the PP; and

45.5. the President may have an executive function to perform after the Parliamentary process and therefore should not lightly be drawn into any preliminary stages.

46. Thus, whilst there is no legal impediment that prohibits the Committee from summonsing the President or any other person to appear before the enquiry it may do so only where:

[16] Mr Kekana made a protected disclosure to the former Speaker alleging "several instances" of what he considered to be "improper behaviour" within the Office of the Public Protector. These included very serious allegations in respect of both the CIEX and Vrede Dairy matters both of which form a substantial portion of the motion. In respect of these matters Mr Kekana's protected disclosure indicated personal knowledge of the alleged improper behaviour. However, despite making the disclosure, Mr Kekana thereafter did not avail himself to appear voluntarily and accordingly a summons was issued.

46.1. the person being summoned is able to provide the Committee with information that is necessary for the Committee to determine the veracity of the charges; and

46.2. the information sought is within the personal knowledge of the person and not available through other less restrictive means.

47. In the event that the Committee is of the view that the President's presence before this Committee is necessary, we advise that in the spirit of co-operative governance the Committee itself first invites the President before proceeding with the issuing of a summons.

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

Adv Z Adhikarie

Chief Parliamentary Legal Adviser