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LEGAL OPINION
[Confidential]

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

COPY: Ms P Tyawa
Acting Secretary to Parliament

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

DATE: 15 February 2022

REF. NO.: 15 / 2022

RE: Consideration and way forward in respect of President Ramaphosa's response to SCOPA on allegations related to the misuse of public funds

Introduction

1. Our office was requested by the Chairperson of the Standing Committee on Public Accounts ("SCOPA" / "Committee") to consider and advise on the options available

to SCOPA pursuant to President Ramaphosa's ("the President") written response to allegations relating to the use of public funds for ANC party political purposes.

Background

2. Following the widespread leak, in December 2021, of a recording of the President allegedly stating that public resources were used for political party campaigning, SCOPA received a request from Mr. Mervyn Dirks, MP requesting that it summons the President to answer questions in relation to the allegations.
3. The Committee sought legal advice on the matter and resolved on 25 January 2022 to request the President to respond, in writing, to a series of questions pertaining to the allegations. The aim of this request was for SCOPA to secure information and records that would enable it to fulfil its oversight mandate.
4. On 9 February 2022, the President duly complied and submitted a written response to SCOPA within the required time.

Broad Overview of the President's Response

5. The President explained that the audio recording was captured during a meeting of the ANC National Executive Committee held on 27 March 2021.
6. The crux of the response is that the President does not have any "direct or specific information on the alleged misuse of public funds for party political purposes."
7. Instead, the President directs SCOPA to consider information and testimony that was provided during the *Judicial Commission of Enquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* (the so called "Zondo Commission"). This information is already in the public domain and accordingly the President's response does not contain any new information or leads in respect of the allegations. He indicates that he has no direct knowledge beyond what was presented at the Zondo Commission.

8. Nonetheless, it is important to note that the President did not deny that public funds may have been used for party political purposes. He stated that, as President of the ANC, he is focussed on the party's renewal and understands that this requires a "recognition of practices [related to party political funding] that are unacceptable" and "taking the necessary steps to correct these." This is consistent with what he can be heard saying on the clip.

The Zondo Commission

9. As correctly pointed out by the President, the issue of party political funding has been raised during oral hearings at the Zondo Commission and is referred to in the first report of the Commission. In this regard, the Committee is directed to pages 802-804 and 854.
10. The following witnesses (as also referred to by the President) made reference to the misuse of State Security Agency (SSA) funds or attempts to corruptly influence their decisions:
 - a) Mr Riaz "Moe" Shaik – former Director-General of the SSA (testified before the Zondo Commission on 25 November 2019);
 - b) Mr Lizo Gibson Njene - former Director- General of the SSA (testified before the Zondo Commission on 26 November 2019); and
 - c) Mr Mzuvukile Maqetuka - former Director-General of the SSA (testified before the Zondo Commission on 10 July 2020).
11. In addition to the above-mentioned names, in the Presidents response, we note that the following persons (who either testified or were mentioned by other witnesses during the proceedings of the Zondo Commission) may have further information on some aspects of alleged financial mismanagement at the SSA. The list should not be seen as exhaustive:
 - a) Mr Siyabonga Cwele - former State Security Minister (testified before the Zondo Commission on 29 June 2021);
 - b) Mr Loyisa Jafta - Acting Director-General of the SSA (testified before the Zondo Commission on 26 January 2021);

- c) Mr David Mahlobo - former State Security Minister (testified before the Zondo Commission on 29 June 2021);
- d) Mr Bongani Bongo - former State Security Minister (testified before the Zondo Commission on 29 June 2021);
- e) Mr Arthur Fraser – former Director-General of SSA;
- f) Mr Moruti Nosi - former Head of SSA Special Operations Unit;
- g) Ms Ayanda Dlodlo – former Minister of State Security; and
- h) Mr Thulani Dlomo – former Head of Counter-Intelligence of SSA.

12. We note further that the first report of the Zondo Commission does not provide any significant detail on the issue of political-party funding. In paragraph 550 of the Report the following is stated:

“The evidence before the Commission did not seek to establish the full extent of corruption associated with political party financing or the extent to which other political parties may also have been implicated. However, the two examples mentioned¹are more than enough to sound the alarm.”

13. It is expected that the 3rd part of the report will contain further relevant information on the misuse of funds at the SSA.

Auditing and Financial Oversight of the SSA

14. The State Security Agency is a creature of statute, established and regulated in terms of the Intelligence Services Act, 2002 (Act 65 of 2002), and is audited by the AG. Prior to 17 January 2021, the State Security Agency fell under the authority of the Minister of State Security. It has since been assigned to the Minister in the Presidency, Mr M Gungubele.

15. The President makes reference in his statement to the challenges faced by the Auditor-General in auditing the funds of the State Security Agency.

¹ These examples relate to donations by a company called EOH for purposes of the 2016 local government elections and the award of tenders by the Free State Government to a company called Blackhead Consulting. See paras 546 to 554 of the first Zondo Report.

16. These auditing challenges are described in the December 2018 *High Level Panel Review Report on the State Security Agency*. In this regard the Committee is directed to pages 7;10;53-4 and 58 of the report.²
17. Of particular concern is the findings in the report that the AG does not enjoy unfettered access to the financial, procurement and performance activities of the SSA. The result of this limited access is that the AG is forced to automatically provide a qualified audit of the SSA every year.
18. Our previous opinion to the Committee noted that the Joint Standing Committee on Intelligence (JSCI) has a specific mandate to look into the accounts of the State Security Agency as provided for in section 3 of the Intelligence Services Oversight, 1994 (Act 40 of 1994).
19. However, it is important to highlight that this mandate is not framed as an exclusive legislative mandate. In other words, there is no reason in law which automatically precludes SCOPA from considering the financial statements and related matters of the SSA as per the oversight functions of the Committee.
20. It is our understanding that the historic reason for SCOPA not conducting financial oversight over the SSA may be due to the SSA citing confidentiality as meetings of SCOPA are held openly whereas meetings of the JSCI are closed.
21. However, we are of the view that there is no reason in law why SCOPA cannot close its meetings for purposes of conducting financial oversight over the SSA. Such closure is provided for in NA Rule 184. In addition, closure would only be necessary in as far as the SSA can demonstrate that the disclosure of information could reasonably be expected to prejudice the defence, security or international relations of the Republic.

² A copy of the report can be accessed at [High-Level Review Panel on the State Security Agency \(www.gov.za\)](http://www.gov.za)

Advice

22. As part of its mandate, 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.
23. Whilst the President's response does not provide any concrete evidence of the alleged misuse of public funds for party political purposes (except by reference to the proceedings of the Zondo Commission) there appears to be sufficient information in the public domain in respect of the SSA that would warrant a further consideration by SCOPA.
24. As previously advised, of particular interest to SCOPA will be whether and how the alleged unauthorised expenditure at the SSA was captured in the financial statements, who authorised such expenditure and why it was not detected by the AG.
25. We note that the 3rd part of the Zondo Commission report is only due to be submitted to the President on 28 February 2022 and will only be made public after the President has considered same. It is expected that the 3rd part of the report will contain additional information related to financial mismanagement at the SSA.
26. Whilst it is clear that there are serious allegations pertaining to the financial mismanagement of the SSA (these may or may not be related specifically to the issue of political party funding), it may be helpful to await the third part of the report to avoid duplications and to allow the SCOPA to consider the matter holistically. In considering this issue SCOPA may:
 - a) Invite any of the persons listed in paragraphs 10 and 11 above, to provide a written statement to the Committee on any issues related to the misuse of public funds at the SSA during their tenure or in their capacity as political head of the SSA;
 - b) Call for oral testimony from any person(s) who has made written submissions should the Committee wish to further engage with their statement;

- c) Request the AG to present and report to SCOPA on the challenges it faces in auditing the SSA with a view to considering legislative reform, if necessary, or other means by which the AG can be supported. Consideration should be given, in respect of such a meeting, for this briefing to take place in a joint session with both the Standing Committee on the Auditor-General and the JSCI; and/or
- d) Request the current Director-General of the SSA to provide SCOPA with an update on the implementation of recommendations contained in the SSA Panel Report.

27. The Committee may further want to consider whether it wishes to form a sub-committee to consider matters related to the SSA more closely and in camera.

28. The sub-committee may be better suited to study the relevant portions of the Zondo Commission Reports (including the forthcoming 3rd part thereof) and the SSA Panel Report more closely. In doing so it would be able to identify specific persons of interest and formulate questions to be put to those persons. The sub-committee could further determine the extent to which it may be necessary for SCOPA to work together with the Standing Committee on the Auditor-General and the JCSI.

29. In the interim, the Committee may find it useful to receive a briefing from the AG on the challenges faced when auditing the SSA and any proposals the AG may have in this regard. A briefing of this nature will equip members with an understanding of whether and how it is possible that funds are irregularly used for party political purposes.

30. 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