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Comment: Democratic Accountability in South Africa at a Crossroads

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Speaking from Cameroon in the wake of the assassination of Laurent Kabila Deputy President Jacob Zuma has encouraged other African countries to abide by democratic principles. Back home, however, the integrity of South Africa's own constitutional democracy is at risk of being compromised by the exclusion of the Heath Unit from an investigation into a massive arms procurement deal. And this despite a crucial parliamentary committee's recommendation to include the unit.

Some commentators have warned that President Thabo Mbeki's handling of this issue could mark a watershed moment for the entrenchment of democratic accountability in South Africa. What is at stake is the future of parliamentary accountability in accordance with our new democratic Constitution.

Aristotle once warned that it is essential to take precautions to defend ones Constitution and 'in particular to guard against the insignificant breach'. He observed that 'illegality creeps in unobserved; it is like small items of expenditure which when oft-repeated make away with a man's fortune'.

In terms of the South African Constitution, parliament (the National Assembly) has the responsibility to exercise oversight of the activities of the executive and to hold the executive to account.

This means that the President, Cabinet and all departments need to continually justify their performance and employment of public resources before parliament's committees. Perhaps, the most important such committee is that which is charged with the responsibility for exercising oversight of the manner in which ministers and departments spend their budgets - the Standing Committee on Public Accounts (SCOPA).

As a result of a number of allegations of reported irregularities in the recent defense procurement deal, a forensic audit was conducted into the deal by the Auditor-General's office. A report on this audit was then referred to SCOPA for its deliberation and for it to make a recommendation to parliament on appropriate action. The recommendation made by the committee was that the deal be subjected to a thorough review and investigation, and that amongst others the Heath Special Investigating Unit be invited to participate in the investigation.

Some background on the arms procurement deal

In September 1999 the Cabinet announced its decision to contract for a strategic arms package. It presented the total cost of this package to be R29.9 billion.

In September 2000 this price had risen to R43.8 billion on account of price escalations and foreign exchange rate changes. This is an increase of R13.9 billion on the original price estimate.

To set this total expenditure of R43.3 billion on armaments in its proper social context it should be noted that the combined Health and Welfare budgets for the Eastern Cape Province for 1998/99 was R6.5 billion. The value of the arms package (to be met out of tax payers money) translates into what could potentially have been six and a half years of expenditure on healthcare, disability grants and pensions (at 1999 rates) in one of South Africa's poorest provinces.

The basis on which government effectively got around public objections to spending such an enormous amount of money on armaments instead of social upliftment was by appealing to the 'offset' agreements which accompanied the arms deal. These 'offset' agreements involved guarantees to ensure investment in South Africa and counter-trade with South African companies valued at R104 billion. Government gave the public assurance at the time that 65 000 jobs would be created as a result of the deal.

Government duly entered into and signed 5 contracts for the procurement of corvettes, submarines, light utility helicopters, fighter trainer aircraft and fighter aircraft.

The Auditor-General's report

Due to numerous allegations of irregularities the Auditor-General's office decided to conduct a forensic audit into the awarding of these primary contracts.

In a report published on 15 September 2000 the Auditor-General, Shauket Fakie, expressed the concern that in the awarding of the contracts potential conflicts of interest were not adequately addressed by the process. He also drew attention to 'material deviations' from generally accepted procurement practices.

More importantly he expressed the view that the guarantees set in place to ensure that the successful consortiums would redeem their 'offset' agreements for investment and counter-trade were too low. He found that these guarantees were around 10% (of the contract price) and expressed the opinion that, in the event of non-performance of the offset arrangements, these guarantees would be inadequate to ensure the delivery of the much vaunted investment and trade undertakings.

This point is extremely important given that these investment and trade agreements (along with the job opportunities that they were to have created) formed the very basis for entering into the arms contracts in the first place. On a cynical view the penalty of 10% of the contract price for not meeting the 'offset' obligations could quite easily be covered by hiking the initial price to cover this relatively small amount.

The Auditor General concluded his report with a recommendation that a forensic audit also be conducted into numerous allegations of irregularities in the awarding of contracts to sub-contractors because this was beyond the scope of his existing audit. It is worth noting that it is primarily at the level of the sub-contacting arrangements that the 'offset' agreements for investment, trade and job creation opportunities would be realized in any event. The integrity of the sub-contracting arrangements entered into are consequently crucial to the integrity of the entire deal.

The Standing Committee on Public Accounts (SCOPA)
recommendation

After having deliberated the contents of the Auditor-General's report and having convened a hearing into the defense acquisition process, SCOPA issued its own report on the matter.

In this report SCOPA firstly expressed its concern at the increase from R29.9 billion to R43.8 billion in the original amount to be spent on the contracts. It reproached Cabinet for not making the public aware of the increased cost of the deal.

The report reiterated the Auditor-General's concerns over the weakness of the contractual guarantees for ensuring compliance with the 'offset' agreements. It expressed the additional concern that government had overestimated the number of jobs to be created through the arms deal.

The SCOPA report drew particular attention to the selection process that led to the awarding of the contract for the trainer fighter aircraft. This, it said, required further investigation. It also expressed concern over 'the possible role played by influential parties in determining the choice of sub-contractors by prime contractors'. The committee singled out Armscor's tendering processes for particular criticism. It said that the conflict of interest provisions in these processes were weak.

SCOPA concluded its report by recommending a thorough investigation and review of the entire arms procurement process. For this purpose it suggested 'an independent and expert forensic investigation' to look into the procurement process but placed 'no limitation on the scope of the investigation'.

On account of the complexities of the arms deal SCOPA concluded with a specific recommendation that the investigative expertise of the Auditor-General, Heath Special Investigating Unit, Public Protector and Office of Serious Economic Offences be combined for the purposes of the investigation. It expressed the need to employ 'the best combination of skills, legal mandates and resources' for the purpose of the investigation into the procurement and sub-contracting process.

SCOPA's request to the President to include the Heath SIU in the investigation

The SCOPA report was duly tabled in the National Assembly on November 3, 2000 and unanimously adopted. The Auditor-General, Heath Special Investigating Unit, Public Protector, Directorate for Public Prosecutions subsequently met on 13 November, 2000 and reached an agreement amongst themselves on what form their collaboration would take.

The chairperson of SCOPA, Dr Gavin Woods, subsequently wrote to President Thabo Mbeki on 8 December 2000 requesting that he issue a proclamation authorizing the involvement of the Heath Special Investigating Unit in the Inquiry. The Heath SIU itself had already sent a letter of motivation for a proclamation to the President in October 2000. The President, declined to take any decision at that point and referred the request to the Minister of Justice, Penuel Maduna, for his advice and recommendation.

It is worth noting that Penuel Maduna's personal track record as a member of Cabinet is more remarkable for his efforts to undermine the work of public protection agencies rather than to support them. As Minister of Mineral and Energy Affairs in June 1997 Maduna accused the then Auditor-general, Henri Kluever, of conspiring to cover up the disappearance of R170 million worth of oil. He later acknowledged during an inquiry into his claims by the Public Protector that he knew shortly after making his claims that they were groundless. The legal costs incurred by the Auditor-General's Office in the process of participating in the inquiry and clearing Kluever's name amounted to R6.5million (of tax payers money).

The Public Protector's subsequent report recommended to Parliament that it investigate disciplining Maduna. A committee chaired by a junior ANC MP was formed to consider this report. It has yet to propose any appropriate sanction against Maduna.

Minister Maduna's recommendation

On 15 January 2001 Minister Maduna issued a formal statement advising the President 'that the matter should not, at this stage, be referred to the Unit headed by Judge Heath, and that no other unit should be constituted for the purpose of pursuing this matter'.

Maduna listed a number of unconvincing reasons in support of his decision.

Firstly, he made reference to a recent Constitutional Court judgment in favour of the South African Association of Personal Injury Lawyers to the effect that it was unconstitutional for a member of the judiciary to head up a Special Investigating Unit. Maduna construed this ruling to mean something very different. He read the judgment to mean that:

'To continue referring new matters to the Unit would in my view fly in the face of the Constitutional Court judgment, therefore undermining its spirit and essence'.

Maduna's interpretation would appear to be the reverse of the decision set out by the Judge President of the Constitutional Court. Judge Chaskalson clearly acknowledges that 'the fact that the head of the SIU is a judge does not prejudice the persons being investigated'. For this reason he intentionally gave a one year grace period in which the Special Investigating Unit could replace its head with someone who is not a member of the judiciary. At no point does he declare the Unit to be unconstitutional. On the contrary, he states that while the necessary amendments are being made to the legislation 'in the meantime the important work of the unit can continue'.

Secondly, Maduna argued against the inclusion of the Heath Unit on the grounds that he had not yet been provided with any information to suggest an unlawful appropriation of public funds. Now, besides the fact that a number of allegations about irregularities in the awarding of prime and sub-contracts had been aired publicly in the media it should be remembered that the entire point of the investigation recommended by SCOPA was to establish if indeed there had been any unlawful appropriation of public funds. It is safe to assume that if this information could be established beyond all reasonable doubt at the outset of the investigation then no investigation would be necessary.

It should also be pointed out that in terms of Section 2.2 of the enabling legislation for the Heath Unit, the Special Investigating Units and Special Tribunals Act No. 74 of 1996, the President may refer a matter to the Unit 'on the grounds of any alleged

unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof'.

So, in terms of the legislation the Heath Unit can become involved in investigations on the basis of allegations rather than fully formed information, and on the basis that it may prevent a loss to the state rather than simply recover money that has already been lost. This is an important point to bear in mind given the Auditor General's and SCOPA's warnings about the risk of the 'offset' component of the arms procurement contracts being defaulted on. If all of the successful consortiums were to default on their 'offset' undertakings this would result in 'serious harm to the interests of the public' to the tune of R104 billion.

Thirdly, Maduna asserts that 'it would be absurd and illogical for me to recommend that the President should give additional work to Judge Heath's Unit that is already so overladen' with work. He expresses particular concern that the Unit has yet to complete almost two hundred thousand investigations.

Besides the fact that the SIU has disputed the authenticity of these figures as outdated (it claims to have since resolved tens of thousands of these cases) the question that needs to be asked is: what kind of impact would its involvement in the arms procurement investigation realistically have on the SIU's current work? The answer to this question is that out of a total complement of around 100 staff the investigation would require the secondment of a maximum of 5 Unit members (conceivably a lawyer, a

manager, 2 senior investigators and perhaps a junior investigator). This could hardly be construed as a dramatic impact on the work of the Unit.

Another point worth noting on this issue is that if Maduna were truly concerned by the excessive workload of the SIU then surely it would be better for him to recommend to the President that the budget of the Unit be increased in order to facilitate its good work.

The fourth argument that Maduna advances in support of his recommendation to exclude the Heath Unit is that 'there is no statutory provision for the establishment of such a joint investigative body'. He adds that 'a joint investigative body will have no status in law, cannot issue enforceable subpoenas, and cannot compel witnesses to answer questions, among other things'.

The point to remember here is that SCOPA suggested a multi-agency investigation with 'the best combination of skills, legal mandates and resources' for the purpose of the investigation. At no point did it suggest that a new body be constituted with a separate legal persona.

Maduna's statement concludes with a request to the President that he extend an invitation to 'any person who may be in possession of any information that warrants a criminal investigation' to furnish this to the National Director of Public Prosecutions or to the National Commissioner of Police 'or lay charges at police stations of their choice at their earliest convenience'.

Now this invitation, it should be pointed out, is practically meaningless. As mentioned, the whole point of the proposed investigation was to establish whether there has been any untoward or criminal activity in the first place. In order to lay criminal charges presupposes that one would have to be in possession of such compelling information so as to be able to prove ones case

'beyond a reasonable doubt' - which is the standard of proof in a criminal case.

The only basis on which information of this quality could be obtained is if an in-depth investigation forming the basis of these allegations had already been completed. It is inconceivable that uninitiated individuals would stumble on information of such quality as would enable them to drop this off at their local police station as the basis for pressing criminal charges.

Criminal versus civil proceedings

This raises a very important distinction between the standard of proof in criminal and civil cases. In order to successfully prosecute a civil case one need only demonstrate one's case 'on a balance of probabilities'. This distinction is of critical importance in a complex investigation into a procurement deal involving international consortiums, primary and sub-contractors, hard-deals and soft 'offset' agreements. Potentially it could mean the difference between losing a case because of a failure to prove the criminal theft of public funds or the deliberate criminal defrauding of the state, on the one hand, and obtaining a successful civil judgment in terms of which lost state assets can be recovered, on the other.

A useful analogy is the OJ Simpson murder case. Although state prosecutors could not sustain a criminal charge of murder against OJ Simpson, the victim's family successfully prosecuted a civil case against him and managed to win substantial damages.

Arguments in favour of the inclusion of the Heath Unit in the Arms Procurement Investigation

The modus operandi of the Heath Special Investigating Unit is to recover lost state assets and make interventions so as to prevent

losses to the state by pursuing civil proceedings against implicated individuals.

Given the close relationship between the Investigating Unit and the Special Tribunal and the Unit's powers of search and seizure, taken together with the Head of the Unit's ability to authorize searches and have interdicts issued against individuals to prevent the disposal of state assets, the Unit has a set of very unique capabilities.

What makes the powers of the SIU different to those of the Public Protector, for instance, is that once an investigation is completed the Public Protector is limited to making recommendations either to the relevant prosecuting authority, Parliament or to the relevant departmental disciplinary authority, on potential corrective action. The SIU by contrast has the ability to take the case directly from its investigation stage and initiate civil proceedings against implicated individuals before the Special Tribunal. Again, unlike the Directorate of Public Prosecutions, who are bound by the normal criminal court proceedings, the Special Tribunal can dispense with certain court rules (such as the application of any rule of evidence) in order to save both time and costs.

It is the uniqueness of these capabilities taken together with the accumulated investigative experience of having settled hundreds of thousands of individual cases, set up a massive information technology and management infrastructure and having recovered millions of Rands for the state over a four year period that makes the unit an indispensable component of any investigation into the arms procurement deal.

As President Mbeki points out in his public broadcast on 19 January, 2001 there may well be no prima facie evidence of a criminal offence at this preliminary point in the arms investigation - which was the advice of State Advocates Lubbe and Kahn. But

this point is entirely irrelevant to the fate of the Special Investigating Unit given that its terms of reference are to pursue civil proceedings.

No other public protection agency can match the Heath SIU's capacity to speedily and efficiently investigate and initiate civil recovery proceedings. Neither can the other public protection agencies proposed by SCOPA match the investigative resources that the SIU has at its disposal. Whilst the SIU has 55 investigators and 9 lawyers, the Public Protector only has 27 investigators, and the Office for Serious Economic Offences has 9 state advocates and 22 special investigators.

In this light, the oft-repeated suggestion made by members of government (as a threat to sideline the Heath Unit) to the effect that additional Special Investigative Units could be set up for the purpose of investigating corruption are clearly ill-considered. They pay no regard to the massive investment required in human resources and capital equipment that would be required to create such units.

The failure to distinguish between Judge Heath's persona and the Special Investigating Unit

In the week prior to Minister Maduna reaching his decision the entire issue of the participation of the Heath Special Investigating Unit in the arms procurement deal became intensely personal. A few days before Maduna's announcement the ANC's spokesperson, Smuts Ngonyama, reported to the media that the party's executive committee had been disturbed by Judge Willem Heath's relations with other political parties. Ngonyama was reported as saying:

'The view of the ANC is that we don't want Heath to be part of this probe. He has used the information he has obtained to lambaste the

government and blackmail the government by saying that 'unless you put me to work, there is a cover up'.

Maduna's comments to the press when he released his recommendation seemed to echo these sentiments. He was sharply dismissive of suggestions that Heath's participation was vital to unearth the truth about the arms deal:

'What makes him the best equipped man? I don't want to believe it's proper for anyone to regard themselves as completely indispensable'.

What is clear from these remarks is that Maduna has collapsed the distinction between the participation of Judge Willem Heath in the arms probe and the participation of the Special Investigating Unit. His reduction of the formidable investigative powers of the Unit to the personality of Judge Heath represents a noteworthy turn-around in the Minister's previous appreciation for the Unit's special powers. A few months earlier, Maduna had delivered a robust defense of the special powers of the Unit in the Constitutional Court in opposing SAAPIL's appeal to have the Unit declared unconstitutional. In an affidavit to the Constitutional Court Maduna is on record as arguing that:

'It is a regrettable and notorious fact that the levels of crime in South Africa are unacceptably high. One aspect of crime which requires special investigative measures relates to corruption and unlawful conduct involving state institutions, state property and public money. Very often, such conduct is perpetrated by public servants and state officials. The experience of other countries suggests that the investigation of conduct of this nature requires special measures beyond the routine investigations conducted by conventional law enforcement agencies'.

What are governments real reasons for wanting to exclude the Heath SIU from the arms procurement investigation?

It is an unfortunate and regrettable fact that government views Judge Heath as a political liability. It would appear that government believes that on the basis of Judge Heath's track record he cannot be trusted to deal with the findings of his unit in a sufficiently discrete and subtle fashion. The Judge's personal style (and tendency to take the constitutional principle of transparency a little too literally - according to some critics) taken together with the formidable powers of the SIU to fast-track the trial of civil cases before the Special Tribunal carry an enormous potential for public embarrassment in the eyes of government. Particularly if the investigation implicates senior government officials or even Cabinet members.

Government concerns over its own image aside, however, the public is becoming increasingly suspicious of its handling of the arms procurement deal. The decision to exclude the Heath SIU from the investigation will simply serve to convince the public that government has something to hide.

The perception that government was bent on excluding the Heath Unit from the investigation because Judge Willem Heath is a political outsider in the corridors of power is also increasingly taking hold. People are beginning to question why it is that most of the public protection agencies 'authorized' to become involved in the probe are all headed by political appointees. Jackie Selebi, the Commissioner of Police, Bulelani Nguca, the Director of Public Prosecutions and Willie Hofmeyer of the Serious Economic Offences Unit all fall into this category. All, at some point, have been closely aligned to the ANC political establishment.

Surely, for the sake of preserving public confidence in these bodies, this is a set of perceptions that the government cannot allow to become entrenched.

Rightly, or wrongly, Judge Heath's supposed lack of political subtlety is fast becoming seen by ordinary members of the public as their last resort for becoming informed of the internal workings of the government arms procurement deal. The most effective manner in which the President might allay the fears of ordinary citizens in this regard would be to increase the degree of transparency surrounding the investigation. Excluding the participation of those bodies perceived by the public to be politically 'independent' will only serve to confirm their worst suspicions.

Worse still, when this exclusion is engineered contrary to the express wishes of a parliamentary committee, it also heralds the arrival of a much more ominous attitude on the part of the executive. That of calculated disregard for the wishes of the constitutionally appointed oversight committees of parliament. President Mbeki's decision opens the door to the creeping process of not so 'insignificant breaches' of our democratic Constitution that may well lead to the eventual unravelling that Aristotle warns of.