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LRC

Legal Resources Centre

23 October 2015

ATT:

Hon. Baleka Mbete
Speaker of the National Assembly
By fax: 021 461 9462
By email: speaker@parliament.gov.za

Copied to:

Hon. Thandi Modise
Chairperson of the National Council of Provinces
By fax: 021 461 9640
By email: ljiyane@parliament.gov.za

and

Ms Cornelia Carol September
Chairperson of the Joint Standing Committee on Intelligence
By email: cseptember@parliament.gov.za

Dear Speaker

NATIONAL ASSEMBLY VOTE ON NOMINATED CANDIDATE FOR THE INSPECTOR-GENERAL OF INTELLIGENCE

1. We act on behalf of the Right2Know campaign ("R2K" or "our client").
2. In terms of section 210(b) of the Constitution and section 7 of the Intelligence Services Oversight Act 40 of 1994 ("the Act"), the Inspector General of Intelligence ("IGI") is a critical constitutional head of the Office of the Inspector General ("the Office"), which together with Parliament is tasked with providing oversight to the intelligence agencies. The IGI is intended to fulfil the function of an ombudsman for the public and who will receive complaints from the public about alleged maladministration, abuse of power, transgressions of law and policies, corruption and improper enrichment within the intelligence services. Such is the constitutional importance of this position, that it must muster a special majority vote in the National Assembly ("NA").
3. Parliament carries a constitutional responsibility to ensure effective oversight of key institutions. Section 42(3) of the Constitution read together with Section 55(2) outline the crucial oversight duties imposed on the NA. Section 237 of the constitution states: '*All constitutional obligations must be performed diligently and without delay*'. This includes ensuring that crucial appointments are effected within reasonable timeframes.
4. Parliament also has a constitutional obligation in terms of s 210(b) to approve the appointment of the IGI.

5. The position of IGI remains vacant seven (7) months after the end of the previous incumbent, Advocate Faith Radebe's, term on the 31 March 2015. This delay in a NA vote and appointment for this crucial office is unprecedented.
6. The previous IGI nomination in 2008/2009 was approved by the NA two months after the end of the previous incumbent's term, following an open interview process, and despite the high threshold a special majority vote places on the NA. Cognizant of the oversight vacuum the absence an IGI would cause, the Office of the ANC Chief Whip at the time recommended that the Minister of State Security extend the term of office the serving Inspector General, Mr Zola Ngcakani to ensure adequate interim oversight.
7. The continued failure to approve the appointment of the IGI constitutes a failure to fulfil a constitutional obligation.
8. The vacancy of an IGI over the last seven months (and the absence of even an acting head) has had serious repercussions for R2K, and others affected by the alleged unlawful conduct of the intelligence services. R2K has submitted a number of complaints to the Office of the Inspector General during this period, which continue to go unresolved thus infringing on the rights of the complainants.
9. More recently, reports of outrageous and unsubstantiated accusations levelled at the R2K campaign by a State Security official during the Parliamentary staff vetting procedures, also now urgently require independent investigation by an effective intelligence oversight body.
10. We further attach supplementary letters from the M&G Centre for Investigative Journalism (amaBhungane) and Mr Tom Nkosi, an investigative journalist in Mpumalanga, who have similarly submitted complaints to the IGI (marked as Annexures A and B), and to date have gone unresolved. These two parties provide detail of specific harm suffered by the continued delay in finalising their complaints.
11. We understand that there is a view that the office of the IGI is unable to finalise any reports until a new IGI, or acting IGI is appointed. While R2K disputes the correctness of the position, it believes the simplest solution is the urgent appointment of a new IGI. That is so because the Act does not make provision for the appointment of an acting IGI. While it permits the IGI to delegate her powers, as far as R2K is aware no delegations were issued prior to the conclusion of the IGI's term of office.
12. If, contrary to the information that has been provided to R2K, there is an acting IGI with the designated authority to finalise complaints, we request:
 - a. Confirmation that such interim arrangements have been put in place;
 - b. Details of the acting IGI's delegated authority (including that of signing off on reports); and
 - c. An explanation of the legal authority under which the acting IGI was appointed, or authority was delegated to him or her.
13. For this reason, this letter is also directed at the Chair of the Joint Standing Committee on Intelligence and the Chief Whips of all represented political parties.
14. In summary, R2K submits that the IGI is a critical constitutional position. The continued vacancy has serious negative consequences not only on the ability of this oversight body to fulfil its constitutional mandate, but indeed that of Parliament to play an effective oversight role. The failure of the NA seven months after the end of the term of the previous head, and four months after the

Intelligence Committee finalised its nomination process to vote on this matter has rendered the NA in breach of its constitutional obligations.

15. Accordingly, R2K demands that the NA inform us of what steps it intends to take to fulfil its constitutional obligation in terms of s 210(b) of the Constitution to approve the appointment of the IGI diligently and without delay.
16. Given the urgency of this matter, we request a response to this letter by no later than **30 October 2015**.
17. All our client's rights – including the right to approach a court for the appropriate relief – remain reserved.

Yours faithfully,


S Kahenovitz
LEGAL RESOURCES CENTRE

CC:

Dorries Eunice Dlakude
Chief Whip: African National Congress
By email: ddlakude@parliament.gov.za

And

John Henry Steenhuisen
Chief Whip: Democratic Alliance
By email: jsteenhuisen@parliament.gov.za



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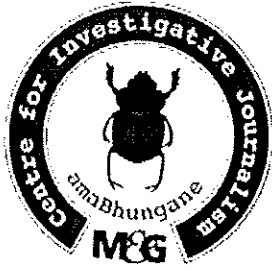
Hon Baleka Mbete (MP)
Speaker of the National Assembly
Parliament of the Republic of South Africa

22 October 2015

The Speaker:

National Assembly vote on the Inspector-General of Intelligence

1. The M&G Centre for Investigative Journalism NPC ("amaBhungane") is a non-profit company founded to promote open, accountable and just democracy, and a free press capable and worthy of performing this duty. To achieve this object, we develop investigative journalism in the public interest, by engaging in its best practice, transferring investigative skills to other journalists, and helping to secure the information rights investigative journalists need to do their work.
2. We submit this letter to express our concern at the continued vacancy of the position of Inspector General of Intelligence ("IGI"). We outline the negative consequences this gap in intelligence oversight has had not only for us, but also for press freedom in general.
3. The IGI is there to ensure that the rule of law is upheld and that the rights of South Africans are protected, by investigating complaints regarding alleged maladministration or abuse of powers by the Intelligence Services. In terms of section 7(7)(cA) of the Intelligence Services Oversight Act, 1994, amaBhungane and/or our publication partner, the Mail & Guardian, have lodged two complaints to the IGI within the last two years, both of which have gone unresolved.
4. The first complaint was lodged in response to a City Press report which confirmed that the State Security Agency (SSA) intended to investigate leaks of the Public Protector's provisional report on the Nkandla security upgrades. This was after amaBhungane, via the Mail & Guardian, had published information contained in the Public Protector's provisional report. The complaint was lodged with the IGI soon after the City Press report of January 2014.
5. The second complaint arose from the revelation that certain communications of amaBhungane managing partner Sam Sole had been intercepted. On 15 April 2015, in an affidavit before the Pretoria High Court, the President's attorney cited these intercepted



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telephonic communications and attached transcripts of them in an annexure to an affidavit in the so-called "Spy Tapes" matter. The complaint was lodged in June 2015.

6. There has been no outcome to either investigation, and our understanding is that such investigations cannot be completed in the absence of a properly appointed IGI.
7. The continued delay in appointing a permanent IGI, with the authority to finalise and sign off on reports, is an infringement not only on our rights, but also of the broader rights to freedom of the press.
8. We emphasise that the confidentiality of journalists' sources is an indispensable part of the right to freedom of the press, and is recognised as such in both national and international jurisprudence. It would appear that the interception of the communications was unlawful and unconstitutional. Confidential communication with sources is an integral part of an investigative journalists' daily work.
9. We urge your office to act expeditiously in ensuring that the National Assembly finalises the process of voting for a new IGI.

Kind regards,

Karabo Rajuili
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"B"

22 October 2015

Hon. Baleka Mbete (MP)
Office of the Speaker of the National Assembly

I am publisher of an investigative newspaper, Ziwaphi. Our newspaper has been responsible for exposing corruption in Mpumalanga province, exposés which have saved our government millions of rands.

On 12 February 2015, I made a complaint to the Office of the Inspector General of Intelligence, requesting an investigation following a statement by Mpumalanga premier, David Mabuza, that he was receiving intelligence briefings on the movements and activities of journalists in Mpumalanga.

In this statement, made at a press briefing on 29 January 2014, Premier Mabuza alleged that I personally was working with a rival faction in the African National Congress. He claimed that the SSA was the source of his information.

I believe that any surveillance on my activities would both violate my personal rights, and also infringe on my freedoms as a journalist as the threat of surveillance compromises the safety of my sources. Any such surveillance would be illegal and constitutes abuse of power on the part of the SSA and the Minister of State Security Agency, David Mahlobo.

To this date, the Office of the Inspector General has not concluded an investigation of this matter. I have reason to believe that this delay stems from the unseemly delay in appointing a permanent Inspector-General with the authority to finalise investigations of these kinds of abuses.

Sincerely,

Tom Nkosi
PUBLISHER