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LEGAL OPINION

[Confidential]

TO:	**Mr C.T. Frolick, MP** **Chairperson: Ad Hoc Committee to consider the Report by the President regarding the security upgrades at the Nkandla private residence of the President**
COPY:	**Acting Secretary to Parliament**
DATE:	**6 November 2014**
SUBJECT:	**Legal Opinion on whether on the basis of the Reports before the Committee, a finding of undue enrichment could be made by the Committee**
LEGAL ADVISER:	**Mr N Vanara**
REFERENCE NUMBER:	**83 / 14**

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TO: **Mr C.T. Frolick, MP**
Chairperson: Ad Hoc Committee to consider the Report by the President regarding the security upgrades at the President's private residence at Nkandla

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1. Our Office was requested by Mr Frolick: Chairperson of the Ad Hoc Committee to consider the report by the President regarding the security upgrades at the Private residence at Nkandla (the "Committee") to advise on whether on the basis of the Public Protector Report, before the Committee, a finding of undue enrichment in respect of the upgrades at the President's private residence at Nkandla could be made by the Committee.

2. The background to this request is informed by the Public Protector's finding in her Report No. 25 of 2013/2014 entitled Secure in Comfort, that some of the upgrades effected at the President's private residence did not constitute legitimate security enhancements. It would appear that the Committee is concerned that the Public Protector, notwithstanding her not being a security expert, made findings on what constitutes and what does not constitute a security feature on the upgrades effected at the President's private residence.

3. Further, in the event of undue enrichment being established, how to determine the value (quantum) of such undue enrichment in light of the apparent cost escalations which took place during the implementation of the relevant security upgrades. This background requires both the determination of the merits and quantum of undue enrichment.

4. The legal questions are:

1. Whether on the Public Protector's report a civil claim based on undue enrichment can be successfully pursued?

2. How quantum is determined in an undue enrichment claim.

5. Our law provides for three main legal basis in terms of which civil claims may be instituted, namely a claim based on contract, one that is based on delict (a civil wrong) and one based on undue enrichment. Both the claims based on contract and delict are based on the element of fault, either intention or negligence. However, the one based on undue enrichment does not require fault as its basis. Thus a claim based on undue enrichment is called a no fault claim.

6. Of the four (4) reports considered by the Committee, only the report by the Public Protector finds the President responsible for the payment of the portion of the so-called non-security features upgrades at the President's private residence. The finding is based on the declaration of the President's private residence as a National Key Point by the then Minister of Police and current Minister of Arts and Culture in terms of section 2 of the National Key Points Act, 1980 (Act. No. 102 of

1980). I must indicate that the Public Protector did not base her findings and remedial actions on undue enrichment.

7. On the merits there are four (4) requirements for an undue enrichment claim. First, the defendant must have been enriched. Second, the plaintiff must be impoverished. Third, the defendant's enrichment must be at plaintiff's expense. The enrichment must be unjustified in law. See *Kudu Granite Operations (Pty) Ltd v Catering Ltd* 2003 (5) SA 193 (SCA), paragraph 17; *McCarty Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA), paragraph 2.

8. The onus is on the plaintiff to prove, on a balance of probabilities, that the defendant has been enriched at his/her expense. The defendant bears the onus of proving either that the enrichment is justified or that the extent of the enrichment is not as claimed by the plaintiff. In the Kudu Granite case, at paragraph 21, Navsa JA and Heher JA said:

   A presumption of enrichment arises when money is paid or goods are delivered. A defendant then bears the onus to prove that she/he has not been enriched.

9. In *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at p713 para F Muller JA said the question of whether or not there was undue enrichment is a factual inquiry. The Court quoted with approval the test in this regard as stated by Prof De Vos in Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg at 183,

   Die verweerder se aanspreeklikheid strek nie verder as die mate waartoe hy inderdaad deur ontvangs van die geld ten koste van die eiser verryk bly nie. Die eiser kan aanspraak maak op die maksimum bedrag wat die verryking bereik het, maar die verweerder is geregtig om 'n vermindering of wegval van die verryking te pleit mits hy nie deur die reëls ivm *mora* ens getref word nie. Ontvangs van geld, net soos van enige andere goedere, skep 'n vermoede van verrykking. Die las om 'n wegval of vermindering van verryking te bewys, rus op die verweerder. As die verweerder met inagneming van al die omstandighede, tog nie beter

daaraan toe is as wat hy sou gewees het indien die ontvangs van die geld nie plaasgevind het nie, kan hy nie as verryk beskou word nie en is hy nie meer aanspreeklik nie. As hy slegs gedeeltelik beter daaraan toe is, is sy aanspreeklikheid dienooreenkomstig verminder.

10. In the African Diamond Exporters case Muller JA at p713 para H said:

> I agree with the view stated by Prof De Vos that, where a plaintiff has proved an overpayment recoverable by the *condictio indebiti*, the onus rests on the defendant to show that he was, in fact, not enriched at all or was only enriched as to part of what was received.

11. In the present case, the basis of undue enrichment would rest on whether or not some of the enhancement could be classified as security enhancements. In view of the judgments quoted above, the State, as plaintiff, would bear the onus of proving this fact.

12. In what follows I consider some of what the Public Protector regards as non-security features and her reasons therefore. At page 429 of her report the Public Protector finds that:

> 10.3.1 A number of measures, including buildings and other items constructed and installed by the DPW at the President's private residence went beyond what was reasonably required for his security...
>
> 10.3.2 Measures that should never have been implemented <u>as they are neither provided for in the regulatory instruments, particularly the Cabinet Policy of 2003, the Minimum Physical Security Standards and the SAPS Security Evaluation Reports, nor reasonable, as the most cost effective to meet incidental security needs,</u> include the construction inside the President's residence of Visitors' Centre, an expensive cattle kraal with a culvert and chicken run, a swimming pool, an amphitheatre, marquee area, some of the expensive paving and the relocation of neighbours who

used to form part of the original homestead, at an enormous cost to the state...

10.3.3 Measures that are <u>not expressly provided for, but could have been discretionally implemented in a manner that benefits the broader community</u>, include helipads and a private clinic, whose role could have been fulfilled by a mobile clinic and/or beefed up capacity at the local medical facilities. The measures also include the construction, within the state occupied land, of permanent, expensive but one roomed SAPS staff quarters, which could have been located at a centralized police station.... [My emphasis]

13. As can be observed from the preceding paragraphs, the Public Protector finds the following features are non-security enhancements that should never have been erected: Visitors' Centre, cattle kraal with a culvert and chicken run, a swimming pool, an amphitheatre, marquee area, paving and the relocation of neighbours. The reason these features are non-security features appears to be that they are neither provided for in the regulatory instruments, particularly the Cabinet Memorandum of 2003, the Minimum Physical Security Standards and the SAPS Security Evaluation Reports, nor are they reasonable, as the most cost effective to meet incidental security needs. Further, that Mr Makhanya, a non security expert and at whose insistence some of the features were erected, battled to explain these items. (See page 33 of the Public Protector Report on sub-paragraph (10).

14. On page 42 of the Public Protector Report and paragraph 1 one gets an idea of how the Public Protector got to eliminate the Visitors' Centre, cattle kraal, chicken run, amphitheatre, marquee area and the swimming pool from the security enhancement, where she says:

All I did here was to ascertain from the relevant state actors what the proximity of such non listed measures to the list in the Minimum Security Measures Instrument and the list prepared in pursuit of the security evaluations were. I also engage them on whether or not cheaper but

equally effective measures had been considered. The arguments made were simply not convincing as the discretional security concerns sought to be addressed could have been addressed through much cheaper options...

15. On the private clinic, helipads and staff homes the Public Protector "found no reason why these were located near the private residence rather than at a central place that could benefit the entire impoverished Nkandla community".

16. In my view what constitutes security enhancement can properly be determined by security expert(s). In *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616 the court, referring to *Wigmore on Principles of Evidence* (3ed) Vol Vii para 1923 stated that "the true and practical test of the admissibility of the opinion of a skilled witness is whether or not the Court can receive "appreciable help" from that witness on the particular issue..." In *Seyisi v The State* (117/12) [2012] ZASCA 144 Tshiqi JA said the following regarding expert witnesses:

> Expert witnesses are in principle required to support their opinions with valid reasons. But no hard-and-fast rules can be laid down. Much will depend on the nature of the issue involved and the presence or absence of an attack on the opinion of the expert. Where the expert personally conducted experiments it is easier for the court to follow the evidence, accept it and rely on it in deciding the issue.

17. It is common cause that the Public Protector is not a security expert. The Cabinet Memorandum of 2003 outlines ten (10) steps to be followed when security measures are to be installed at the private residences of a sitting President, Deputy President, former Presidents and Deputy Presidents as follows:

- A request from the President followed by an Evaluation by the South African Police Service (SAPS) based on a threat analysis by the State Security Agency (SSA) of structures that the State shall construct to

secure the safety of the President and his immediate dependents including their personal property;

- Formulation by the SAPS and the SSA of a proposal on appropriate measures (staff and structures) to be put in place by the State. These measures shall be submitted to the Interdepartmental Security Coordinating Committee (ISCC) for technical assessment;
- The DPW prepares a cost estimate based on the proposed structural security measures and submit this to the SAPS;
- The SAPS then advises the Minister of Safety and Security on the proposed security measures and the related costs;
- The Minister of Safety and Security approves and communicates such measures to the President for consent;
- SAPS submits measures as approved by the President to the DPW which approaches the Minister of Public Works for approval of costs of the structural security measures;
- Structural security measures that were approved are then implemented as follows:
- SAPS personnel and related costs provided and funded by SAPS;
- Structural additions and amendments to the property is made, and thereafter maintained, from the DPW budget;
- The security situation at the President's private property should from time to time be revisited by SAPS to ensure continued security assessments and threat analyses.
- These assessment reports may from time to time necessitate up or down grades or termination depending on the dynamic security requirements of the political principal;
- Where downgrades or termination takes place, any permanent structures become the property of the owner on which said structures were erected who shall then maintain them.

18. All the Reports prepared on the security upgrades at the President's private residence are unanimous that the aforementioned ten (10) steps were not complied with.

19. In my view, absent the security expert advice on what constitute security and non-security features in respect of the upgrades effected at the President's private residence, coupled by the failure to comply with the ten (10) steps outlined in the Cabinet Memorandum of 2003, the state would not succeed in discharging its onus of proving undue enrichment on a balance of probabilities. Therefore, in my view it would be premature for the Committee to make a finding of undue enrichment prior to the matter having been attended to by the relevant security experts consistently with the Cabinet Memorandum of 2003.

20. Thus I recommend that the Committee considers referring the matter of what constitutes security and non-security upgrades back to Cabinet to be determined by the relevant security experts in line with the Cabinet Memorandum of 2003.

How to determine quantum in undue enrichment claims

21. The second question relates to how quantum is determined in undue enrichment claims. In the Kudu Granite case Navsa JA and Heher JA stated that the quantum of the enrichment is the lesser of either the amount by which the party benefiting has been enriched or the amount by which the other party has been impoverished. (See Mndi v Malgas ECJ NO: 074/2005 [2005] ZAECHC 34)

22. In the instant case therefore the issue of cost escalation would be a factor to be considered in determining quantum in the event undue enrichment is proven.

Mr N Vanara

Senior Parliamentary Legal Adviser