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MR ZOLANI RENTO
Secretary: The Select Committee On Finance
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By Email: zrento@parliament.gov.za

08 March 2019

Dear Mr Rento:

Re: AmaBhungane Centre for Investigative Journalism (amaBhungane) submission on the PUBLIC INVESTMENT CORPORATION AMENDMENT BILL, B4-2019.

1. We appreciate the opportunity to comment on the Public Investment Corporation Amendment Bill.

2. We make this submission as part of our advocacy mandate – which is to help secure the information rights that are the lifeblood of our field of investigative journalism.

3. We limit our comments to sections of the Bill that impact on the free flow of information and freedom of the media, since these fall within our advocacy mandate.

4. We note, however, that information rights are indivisible and that whatever benefit there may be for investigative journalists also apply to the rest of the media and the public in general.

5. Our submission follows, and we request an opportunity to elaborate in an oral presentation to the committee.

Yours faithfully,

Karabo Rajuili
Advocacy Coordinator
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INTRODUCTION

1. These submissions on the Public Investment Corporation Amendment Bill (**B4 - 2019**) are made by the amaBhungane Centre for Investigative Journalism NPC ("**amaBhungane**"), a non-profit company founded in 2009 to develop investigative journalism and promote a free, capable media and open, accountable, just democracy. AmaBhungane fulfils part of this objective through its advocacy programme, through which it aims to help secure the information rights that investigative journalists need to do their work. It is on the basis of this objective that these submissions are made.

2. AmaBhungane also requests that it be permitted to make oral submissions at the public hearings that will be conducted at Parliament on Tuesday, 12 March 2019.

3. AmaBhungane makes two main submissions, which will be dealt with in further detail below:

4. First, it is impractical (and we submit procedurally irrational) to effect any changes to the Public Investment Corporation Act 23 of 2004 ("**PIC Act**") while the commission of inquiry into the Public Investment Corporation ("**PIC**") ("**the PIC inquiry**" or "**the PIC Commission**") is ongoing – particularly where:

4.1 The Bill was passed by the National Assembly on 27 February 2019;

4.2 The time periods for the written submissions at this stage of the process have been extremely short;

4.3 One of the express purposes of the Commission is to identify amendments that should be made to the PIC Act in light of the established findings by the Commission;

4.4 The select committee's notice was published on Friday, 1 March 2019 for written submissions to be made by Friday, 8 March 2019 – just 5 working days later;

4.5 It cannot be ignored that the Parliamentary term ends on 20 March 2019 for the National Assembly and 28 March 2019 for the National Council of Provinces ("**NCOP**"). But as explained below – the Constitutional Court has found that the end of the Parliamentary term is no basis to truncate the public participation process; and

4.6 The final report by the PIC Commission is due to be released imminently, on 15 April 2019.

5. Second, regardless of whether the PIC Act is amended before or after conclusion of the PIC inquiry, the PIC Act should be amended to include provisions which enable public access to the records of the PIC's investment decisions. Public access to these records should be the default position. The Bill in its present form still suffers from constitutional defects regarding the public and the media gaining access to information. As will be set out in more detail below, such a provision would assist in ensuring greater accountability and transparency in investment decisions.

AMABHUNGANE'S PREVIOUS SUBMISSIONS

6. On 30 May 2018, amaBhungane made submissions based on the first version of the PIC Amendment Bill (**B1 - 2018**). A copy of those submissions, without annexes, is attached as "**A**". We do not intend to repeat in these submissions all the submissions made by amaBhungane on 30 May 2018.

7. In addition, we do not intend to repeat in these submissions those proposed amendments to the PIC Act, as contained in B1-2018 or B4 -2019, which amaBhungane supports.

8. While some of amaBhungane's proposals have been addressed and incorporated into the Bill – as set out in detail below – there are still constitutional deficiencies in the version passed by the National Assembly.

CONSTITUTIONAL FRAMEWORK

THE NCOP'S WIDE POWERS

9. The starting point is that the NCOP has very wide powers to amend a Bill passed by the National Assembly. In exercising its legislative power, the NCOP may consider, pass, amend, propose amendments or reject legislation before it in accordance with Chapter 4 of the Constitution.[1]

10. Moreover, as summarised in the next section, the NCOP also has a separate (independent from the National Assembly's) constitutional duty to facilitate public participation in the legislative process.

11. It is critical for the NCOP and its committees to bear in mind these powers when it considers this Bill.

12. On this score, there is authority for the proposition that where a legislative body approves a Bill on the basis of a misunderstanding of its powers – this renders the decision irrational.

13. In ***Merafong Demarcation Forum v President of the Republic of South Africa***,[2] Moseneke DCJ stated:

> *"The inescapable conclusion is that the provincial legislature not only misconceived its constitutional obligations but also misconstrued the consequences of the exercise of its powers under the Constitution. This error led to its view that unless the provincial legislature reneged on its original mandate and supported the Bill as it stood, dire consequences, at odds with national interest, would follow. This, we know, is simply not so. The new decision of the provincial legislature was not taken to pursue a legitimate governmental purpose but to prevent consequences which, at best, were imaginary. In these circumstances, I find that the legislative*

1 Section 68(1)(a) of the Constitution of the Republic of South Africa, 1996 ("**the**
2 2008 (5) SA 171 (CC)

conduct of the provincial legislature in the exercise of its power and duty under s 74(8) of the Constitution is irrational and inconsistent with the Constitution."[3]

THE LAND ACCESS MOVEMENT OF SOUTH AFRICA CASE

14. AmaBhungane submits – with respect – that there is no basis for the NCOP to truncate the public participation process in the manner in has. The NCOP should provide an appropriate amount of time for the public to make submissions on the current version of the Bill after the PIC Commission has made its final findings.

15. In the ***Land Access Movement of South Africa*** case,[4] which dealt with the Restitution of Land Rights Amendment Act 15 of 2014, the Constitutional Court held that Parliament had failed to satisfy its constitutional obligation to facilitate public involvement in accordance with section 72(1)(a) of the Constitution.

16. Importantly, for present purposes, the Constitutional Court held that because of the NCOP's failure to facilitate public involvement in the law-making process - Parliament as a whole had failed in its constitutional obligation to facilitate public involvement because of the truncated public participation process. The Court struck down the Amendment Act as being unconstitutional and invalid.

17. The case is particularly relevant because one of the reasons proffered for the truncated public process was that the Parliamentary terms were about to end. We draw attention to the section of the judgment headed "Self-imposed timeline":

"Self-imposed timeline

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3 *Merafong* at para 192. While Moseneke DCJ was in the minority of the Court, commentators have argued that his judgment was correct and consistent with prior Constitutional Court authority. In this regard, du Plessis and Scott state: the decision "*is also consistent with the finding in SARFU as the principle of legality requires that the state actor must act personally, in good faith and without misconstruing the nature of his powers.*" M du Plessis & S Scott, "The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence" South African Law Journal (2013) 130 at 613.

4 *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22; 2016 (5) SA 635 (CC)

[65] Upon receipt of the Bill from the National Assembly, the NCOP treated it as urgent. The only reason the NCOP proffers for having done so is that Parliament had to finalise the Bill before the end of Parliament's term, which was fast approaching at the time. The NCOP adds that had the Bill not been finalised, it would have lapsed.

[66] Nothing was placed before the Court indicating that – besides the desire by Parliament to finalise it before the end of term – the Bill itself was objectively urgent. In that case, why did the NCOP not allow the Bill to lapse and subsequently invoke its power to reinstate it under rule 238(1)? No cogent reason was given. It is so that the term of the 'fourth Parliament'[5] was fast coming to an end and the election of new Members of Parliament had to take place. But it has not been suggested that post the elections the Bill might not have been reinstated. All of this notwithstanding, the NCOP adopted a truncated timeline for itself and Provincial Legislatures to facilitate the involvement of the public in the legislative process. This timeline is the root cause of all the deficiencies in the process. …

18. Rule 238(1) of the NCOP's Rules, cited by the Court in paragraph 66, provides:

"All Bills introduced in the [NCOP] and which have not yet been passed by the [NCOP] in terms of Rule 197, when it rises on the last sitting day in any annual session, lapse, but may be reinstated on the Order Paper during the next ensuing session by resolution of the [NCOP]."

19. The Constitutional Court went on to summarise:

"[67] Given the gravitas of the legislation and the thoroughgoing public participation process that it warranted, the truncated timeline was inherently unreasonable. Objectively, on the terms stipulated by the timeline, it was simply impossible for the NCOP – and by extension the Provincial Legislatures – to afford the public a meaningful opportunity to participate.

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5 Of the five-year term democratic Parliaments, the first was elected in 1994 and the fourth in 2009.

…

[70] On a conspectus of all that is relevant, the adoption of the timeline was a classic breach of what was held in Doctors for Life, that is '[t]he timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable'.[6] *In drawing a timetable that includes allowing the public to participate in the legislative process, the NCOP cannot act perfunctorily. It must apply its mind taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue."*

20. We emphasise that many of the holdings in this case apply with equal force to the present public process.

21. The timeframes for the public process before the NCOP has been truncated. The notice inviting the public to make written submissions was published on 1 March 2019. Submissions were required to be submitted by 8 March 2019. These submissions have been prepared on an urgent basis.

22. We underscore that from the time that the notice is published a public interest organisation (and members of the public) must dedicate time to considering the Bill, tracing previous suggested amendments to changes that have been incorporated into the Bill. The public interest organisation then determines whether the matter warrants the preparation of submissions. Attorneys are instructed, counsel is briefed.

23. One of the critical processes that generally run in parallel from the time of a notice calling for submissions – are workshops held between public interest organisations themselves, as well as public interest organisations and members of the public. These fora are not expressly stipulated in the Constitution but we submit it is plainly one of the reasons for deadlines between the notice being published and written and oral submissions being due giving a reasonable time to make submissions.

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6 *Doctors for Life* at para 194.

24. Indeed, Parliament's own website makes clear that when making submissions it is advantageous to garner similar support:

> *"Who else supports you? – You may note how widely you have consulted during the writing of the submission. Your submission may have more standing if it has a wide support base."*

25. We attach in this regard the relevant section of Parliament's website as "**B**".

SUBMISSION ONE: AMENDMENT OF PIC ACT WHILE PIC INQUIRY IS ONGOING

26. In terms of Proclamation 30 of 2018, signed by the President on 4 October 2018, a commission of inquiry into allegations of impropriety regarding PIC was appointed.[7] As part of the terms of reference of the commission of inquiry, the commission is required to:[8]

> *"…enquire into, make findings, report on and make recommendations on…*
>
> *whether, considering its findings, it is necessary to make changes to the PIC Act, the PIC Memorandum of Incorporation in terms of the Companies Act, 2008, and the investment decision-making framework of the PIC, as well as the delegation of authority for the framework (if any) and, if do, to advise on the possible changes."*

27. In light of the above mandate the PIC commission is required, in its final report, to recommend that changes are made to the PIC Act based on the PIC inquiry's findings.

28. We submit that it is clear just from the testimony already before the PIC Commission, that there are serious allegations against the PIC, in particular with reference to investment decisions made by the PIC. If the PIC Commission makes findings based on these allegations, it may recommend that the PIC Act be amended. But the PIC inquiry is still ongoing. It would be pre-emptive at this

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7 Government Gazette No. 41979 of 17 October 2018.

8 Clause 1.16 of the terms of reference.

stage to finalise amendments (which at least in part) appear to address some of the allegations made in the inquiry.

29. The final report is due to be released on 15 April 2019 – less than a month away. The extent to which legislative recommendations will be made by the PIC commission based on the inquiry is at this stage uncertain. If amendments are passed now, amaBhungane submits that it will – in effect – be rendering the Commission and its findings redundant.

30. On this score we emphasise in ***Democratic Alliance v President of the Republic of South Africa*** 2013 (1) SA 248 (CC) (the Simelane case) the Constitutional Court held:

> *'The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.'*

31. In ***Albutt***,[9] which dealt with the issue of presidential pardons for politically-motivated crimes, the Constitutional Court held that it would be impossible to achieve the stated purpose of reconciliation without hearing from the victims of the political crimes, and accordingly the decision not to hear from the victims before making a determination on the pardons was irrational.

32. Apart from the end of the Parliamentary terms no reason has been proffered for the need for the NCOP to approve the Bill before the end of its current term. As the Land Access Movement of South Africa case makes clear – the end of the

9 *Albutt v Centre for the Study of Violence and Reconciliation* 2010(3)SA293(CC).

Parliamentary terms is no basis whatsoever to fast-track the public participation process.

33. We submit that these holdings apply with even greater force in the present case – where the enactment of the amendments would pre-empt the findings made by the PIC Commission. The public should have an opportunity to comment and make submissions on the Bill after the Commission has published its findings. Given that a central purpose of the Commission is that it is required to consider what amendments should be made to the Bill - it would be procedurally irrational (and impractical) for the current version of the PIC Amendment Bill to be finalised and approved before the NCOP rises on 28 March 2019, given the likelihood that further amendments will have to be made to the PIC Act once the PIC commission's final report is released.

34. In the circumstances, we submit that the most practical route would be for the NCOP not to consider the Bill before it rises on 28 March 2019. This would avoid the situation where the PIC Act is formally amended now only to have to be further amended once the PIC inquiry is complete.

SUBMISSION TWO: THE NEED FOR PUBLIC ACCESS TO THE PIC'S INVESTMENT DECISIONS

35. The testimony of Mr Victor Seanie and Mr Vuyo Jack before the PIC inquiry have brought to light serious issues regarding the manner in which investment decisions are made by the PIC. For purposes of these submissions, we refer to the written statements of Mr Seanie and Mr Jack, copies of which are attached as "**C**" and "**D**" respectively.[10] We submit that the testimony of Mr Seanie and Mr Jack indicate that there is a need for greater accountability and transparency in the way in which the PIC makes investment decisions. We submit that the amendment to the PIC Act suggested below is necessary regardless of whether the PIC Act is amended before or after the conclusion of the PIC inquiry.

10 Accessed from http://www.justice.gov.za/commissions/pic/.

Government's interest in greater accountability and transparency

36. The PIC is an investment manager which is wholly owned by the South African Government. The PIC's largest client is the Government Employees Pension Fund ("**GEPF**"), which accounts for 87.12% of the assets managed by the PIC. The Government is the guarantor of last resort for the obligations of the GEPF, meaning that a failure of the PIC or of any of the significant investments for the GEPF, exposes the Government to significant financial vulnerability.

37. Based on the manner in which investment decisions are made by the PIC, as set out in Mr Seanie's testimony referred to below, it is imperative that there is greater transparency in the way investment decisions are made and that the PIC can be held accountable for its investment decisions. This will ensure that the public is placed in a position where investment decisions can be interrogated and that investment decision makers can be held accountable to the extent that it is necessary to do so. Such an oversight is of particular importance to Government, given the substantial financial risks Government is faced with should an investment ultimately turn out not to be beneficial to the GEPF.

Issues with investment decisions arising from Mr Seanie's testimony

38. Mr Seanie is employed by the PIC as an assistant portfolio manager. He describes his role as being that of "*an equity analyst without the authority to directly manage company share portfolios with full discretion*". Mr Seanie makes investment recommendations on publicly listed companies to portfolio managers. It is then ultimately the investment views and decisions of the portfolio managers, general managers and senior executives that are reflected in listed equity investments.[11]

39. The issues dealt with in Mr Seanie's written statement traverse three main investments considered by the PIC, namely, investments in AYO Technology Solutions ("**AYO**"), Sagarmatha Technologies ("**Sagarmatha**") and Vodacom Tanzania. We submit that the manner in which the PIC dealt with the investments

11 Mr Seanie's written statement para 8.

indicates that there is a need for stricter accountability and transparency controls in the PIC. We set out below some of the issues regarding these investments that are evident from Mr Seanie's written submissions.

39.1 Mr Seanie indicates that large listed investments, such as AYO, require prior approval by the PIC's Portfolio Management Committee - Listed Investments ("**PMC**"). The PMC considers a number of reports in coming to its decision, including an "appraisal" or "equity report" which is prepared to some extent by Mr Seanie. The first concerning statement made by Mr Seanie is the confirmation that, whilst he prepares the equity reports, the most important aspects of those reports, being the sections on valuation, conclusion and recommendation, are dictated by Mr Seanie's seniors who review the draft report;[12]

39.2 In Mr Seanie's experience, "*sound investment recommendations are often ignored at PIC*" and the independent researched views of investment professionals are undermined;[13]

39.3 The PIC does not have a trusted independent whistle blower hotline available. Mr Seanie believes that part of the reason he was suspended was because he was suspected of whistleblowing;[14]

39.4 The PIC has strict rules regarding participating in initial public offerings ("**IPO**") of companies. *Inter alia*, the PIC was required to conduct a proper due diligence in such cases. The prescribed process was not followed in the case of the AYO investment;[15]

39.5 AYO approached the PIC with an IPO listing price of R43 per share, which was a fixed amount that the PIC was not permitted to negotiate. This was

12 Mr Seanie's written statement paras 12 and 15.
13 Mr Seanie's written statement para 19.
14 Mr Seanie's written statement para 19 and 92.
15 Mr Seanie's written statement para 37.

irregular, as the PIC Listed Equities team would usually be engaged to negotiate an IPO price;[16]

39.6 The manner in which the AYO subscription agreement was signed was irregular, for the following reasons that appear from Mr Seanie's statement:[17]

39.6.1 the subscription agreement was signed by the then-CEO, Dr Dan Matjila, on 14 December 2017, before the PMC had approved the AYO transaction;

39.6.2 the due diligence on the transaction had not been completed at the time the subscription agreement was signed;

39.6.3 At a meeting which Mr Seanie attended, Dr Matjila informed the meeting that he would have the decision to enter into the AYO transaction ratified at the next PMC meeting;

39.6.4 later on the day the subscription agreement was signed, Mr Seanie completed his equity report and expressed a negative view of the investment on the basis of significant risks of AYO;

39.6.5 because the subscription agreement had already been entered into, the reviewers of Mr Seanie's report required that the conclusion and recommendation of the report reflect a favourable investment recommendation for AYO;

39.6.6 the other due diligence reports, from the environmental, social and governance, legal, and risk departments were only received later on 14 December 2017 and on 15 December 2017 (after the subscription agreement was signed);

39.6.7 the PMC meeting where the decision to enter into the AYO transaction was to be ratified took place on 20 December 2017;

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16 Mr Seanie's written statement para 54.
17 Mr Seanie's written statement paras 62 - 80.

39.6.8 members of the PMC had however already signed the AYO payment memo on 19 December 2017, indicating that they must have been aware that the agreement had been entered into before the 20 December 2017 meeting and without PMC approval;

39.6.9 conditions precedent for the AYO transaction were only proposed and accepted at the 20 December 2017 PMC meeting, i.e., after the agreement had already been entered into;

39.6.10 the conditions precedent agreed to by the PMC indicated, in Mr Seanie's view, that there was little confidence in the investment;

39.6.11 the protection against a share price decline that was agreed to at the PMC meeting was insufficient, meaning that the PIC was unprotected for almost half of the share price. This protection was also only put in place for a period of 90 days and therefore would not protect the PIC in the long term;

39.7 In the case of the Sagarmatha investment, the following appears from Mr Seanie's written statement:[18]

39.7.1 Mr Seanie was of the view that the shares of Sagarmatha were worth significantly less than the listing price of the shares that had been set by Sagarmatha. This was reflected in Mr Seanie's equity report. Mr Seanie was of the view that Sagarmatha would not accept the lower price which had been included in his equity report;

39.7.2 Despite the above, management wanted to continue with the Sagarmatha investment. Minutes of the Investment Committee ("**IC**") meeting where the IC granted permission for the transaction do not indicate whether the transaction was authorised for the higher share price (as set by Sagarmatha) or the lower share price (as suggested by Mr Seanie);

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18 Mr Seanie's written statement paras 81 to 87.

39.7.3 PIC management then tried to conclude the Sagarmatha transaction, but negotiations ultimately failed due to a potential Financial Services Board rule violation; and

39.7.4 At a further IC meeting, it was recorded that the IC declined to approve the transaction in which the PIC would participate in the listing at the PIC's estimated share price (being the lower price suggested by Mr Seanie), but the minutes do not record the events or reasons referred to above.

40. In addition to the above, in one instance relating to Vodacom Tanzania, Mr Seanie was instructed by his line manager to amend his report concerning Vodacom Tanzania. This was in circumstances where it had already been decided that the PMC would decide in favour of the transaction.[19]

Issues with investment decisions arising from Mr Jack's testimony

41. Mr Jack was involved in the PIC from December 2012 until November 2015 in various capacities, which included being a non-executive member of the board and serving on a number of the PIC's board committees.[20]

42. The main point of interest in Mr Jack's written statement is the detailed account of the draft findings of a governance report on the PIC; which was prepared by KPMG. Some of the issues arising from that draft report in relation to the PIC's investment decisions, as set out in Mr Jack;s written statement, were the following:

> *3. Dereliction of fiduciary duties by the executive*[21]
>
> *There were several limitations to the review, however, which effectively prevented further investigation of the impact of the practices at the PIC on its core business: investments. Some evidence emerged which suggested derelictions of the fiduciary duties of leadership which should be*

19 Mr Seanie's written statement paras 23 - 24.
20 Mr Jack's written statement paras 1 - 23.
21 Mr Jack's written statement page 22.

investigated. They include deliberate and conscious efforts by EXCO to dissemble crucial oversight bodies such as Risk from an independent look at investment processes and decisions. At least one consequence that came to light during the review was a raft of reclassifications of listed companies in which the PIC is invested to 'unlisted'. There are others, which will be taken up in the final report to be presented to the Board in July. (emphasis added)

7. Low specificity and oversight of deals[22]

The final conclusion of the review is a conceptual observation. A great deal of organisational theory outlines mechanisms to bring the incentives of principals into greater alignment with the agent's utility functions. By contrast, there appeared to be a low utility functionality by investment teams at the PIC. In other words, much energy and attention in the past year has been on getting as many deals as possible to push the quantity line and meet numerical outputs irrespective of the quality of the return benchmarks set by clients in their investment mandates. While this was not explicit in our interviews with staff, it was most certainly implicit in data from PIC documents supplied to us. The danger with such an approach is that it compromises quality and results in an exponential rise in the number of bad deals… (emphasis added).

43. On reflecting on the reasons why he ultimately left the PIC, Mr Jack states that "*the bottom line*" is that he could not rely on escalation processes to deal with issues at the PIC because it was not possible to bring accountability to the executives of the PIC. Mr Jack states that he was never able to bring Dr Matjila to account and give his insights into the investment decisions under his watch.[23]

Summary of issues with the investment decisions of the PIC

44. The written statements of Mr Seanie and Mr Jack above indicative of serious issues within the PIC. As identified by Mr Seanie and Mr Jack, these include:

22 Mr Jack's written statement page 23 - 24.
23 Mr Jack's written statement para 67.

44.1 equity reports, which are intended to indicate whether investments will be beneficial to the PIC's clients, are amended by the people responsible for reviewing the reports, leading to situations where the conclusion and recommendations of the authors of the reports who have done the necessary research on the transaction are removed from the final versions;

44.2 the authors of equity reports are instructed by their managers to amend their recommendations on investments even if these amendments do not accord with the author's views based on their research and due diligence;

44.3 the lack of accountability can lead to investments being concluded in highly irregular ways, as with the AYO transaction, where the subscription agreement was signed before the PMC had approved the transaction and before the due diligence into the transaction was complete;

44.4 the lack of accountability could also lead to a situation where senior management ratify investment decisions after they had already been finalised, despite recommendations from the assistant portfolio managers that the investments pose a risk to the PIC;

44.5 protection for the PIC in cases of loss due to a share price decline were considered as an afterthought and only after a transaction had already been entered into;

44.6 recommendations of assistant portfolio managers, who are largely responsible for investigating the prospects of investment transactions before they are concluded, are not taken into account by management;

44.7 members of the PIC's executive management appeared to be deliberately preventing oversight bodies within the PIC from an independent look at investment decisions;

44.8 even a non-executive board member, like Mr Jack, was unable to hold senior executives like the CEO, Dr Matjila, accountable for the investment decisions made under his watch; and

44.9 employees of the PIC cannot come forward with allegations like the above due to the fact that there are no whistle blower protections in place and that, as with Mr Seanie, the PIC may even want to suspend suspect whistle blowers.

45. The written statements paint the picture of an organisation which is run by executives who cannot be held to account for the main business of the organisation, being the investment of the PIC's clients' funds. This lack of accountability can, and has in the past, as evidenced by the AYO saga, lead to reckless investments being entered into by the PIC. It appears as though the executives of the PIC were able to agree to investments even in cases where those investments were not in the best interests of their clients. The reason, we submit, that investments such as the AYO transaction could take place, was simply because there was no real control of senior executives, and because those senior executives cannot be held accountable for their actions. Employees of the PIC cannot come forward with information for fear of being branded whistle blowers, and the public in general cannot hold the PIC accountable for the investments it makes because the PIC Act does not allow the public to gain access to records relating to those investment decisions.

RECOMMENDED AMENDMENT TO THE PIC ACT

46. In light of the above, amaBhungane submits that a specific provision allowing access to the minutes of the PIC's investment decisions should be added to the PIC Act. AmaBhungane proposes that the provision allow for, *inter alia*, access to minutes of the PMC, IC and the board of the PIC to the extent that they deal with investment decisions.

47. As set out in amaBhungane's submissions of 30 May 2018, the Promotion of Access to Information Act 2 of 2000 ("**PAIA**") would not be an appropriate mechanism for access to such records, because section 44 of PAIA allows a public body such as the PIC to refuse access to records, *inter alia*, if the record contains an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purposes of

assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law.[24]

48. AmaBhungane therefore submits that the PIC Act should be amended to include a general provision which allows for access to records of investment decisions to be the default position. This accords with the principle of open justice and various holdings by the Constitutional Court which confirm that openness must be the general rule, and any secrecy – the exception.[25]

49. AmaBhungane submits that the Bill in its present form would plainly have a negative impact on openness and transparency. It seriously harms the right of the public, directly or via journalists, to hold to account an institution whose wellbeing is critical to the wellbeing of public servants and the entire nation.

50. The Bill (in its present form) thus plainly limits the right to freedom of expression. The Constitutional Court has noted that the media has a duty to report accurately, as "*[t]he consequences of inaccurate reporting may be devastating.*"[26]

51. It follows that journalists must be able to access information such as the vital information regarding investment decisions: "*Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.*"[27]

52. Significantly, the right to freedom of expression is not limited to the right to speak, but also the right to receive information and ideas.[28] When the press is prevented from reporting fully and accurately, it does not only violate the rights of the journalists who want to publish those ideas, it violates the right of all the people who rely on the media to provide them with "*information and ideas*".

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24 Section 44(1)(a)(ii).

25 See for a summary of these propositions: ***Van Breda v Media 24 Limited and Others; National Director of Public Prosecutions v Media 24 Limited and Others*** [2017] ZASCA 97; [2017] 3 All SA 622 (SCA); 2017 (2) SACR 491 (SCA).

26 ***Brümmer v Minister for Social Development and Others*** 2009 (6) SA 323 (CC) ("**the *Brümmer* case**") at para 63.

27 The *Brümmer* case at paras 62 to 63.

28 Section 16(1)(b) of the Constitution.

53. Allegations before the PIC Commission bear these submissions out. In circumstances such as those detailed in the submissions of Mr Seanie and Mr Jack, and in relation to any other investments going forward, the addition of such a provision would allow members of the public to scrutinise the manner in which an investment was ultimately approved by the PIC.

54. By way of example, if the public were granted access to the records in the case of the AYO, Sagarmatha or Vodacom Tanzania, the following would become apparent from those records:

54.1 that the AYO subscription agreement was concluded, and the payment memo was signed, before the PMC approved the investment, meaning that PMC approval was nothing more than a rubber stamping exercise;

54.2 that due diligence reports were only completed after the AYO subscription agreement was entered into;

54.3 that the protections of a loss in share price were nothing more than an after-thought, only proposed and agreed to at the PMC meeting (held after the agreement was already concluded). This would indicate that the senior executives, and the PMC, did not have the best interests of their clients in mind when entering into investment transactions; and

54.4 in the case of Sagarmatha, where the minutes of a meeting did not indicate which share price was approved, this would indicate reckless decision making on the part of the PIC, that failed to consider the best value for their clients.

55. Only once information like the above can be accessed by the public, will it be possible for senior executives and decision makers within the PIC to be held accountable for investment decisions.

56. We submit that the fact that investment decisions can be accessed and interrogated by the public may also serve as a deterrent for the conclusion of transactions in the manner in which the AYO investment was concluded.

57. It should be kept in mind that there are significant risks to Government if the PIC makes bad investment decisions. We submit that these risks, to the extent that they may exist, can at least be identified and mitigated if the public is allowed to scrutinise the manner in which the investment decision was made.

CONCLUSION

58. Given the testimony from the PIC inquiry, it is probable that the PIC Commission's final report will include recommendations that the PIC Act is amended. However, the NCOP should not pre-empt the considerations of the allegations made by the Commission. That was a central reason why the Commission was established.

59. This is not a scenario in which the amendments to the PIC Act need to be made before the Parliamentary term ends (the Land Access Movement of South Africa case makes this clear. Nor is it a case where the amendments need to be passed before the national elections in order to ensure that the elections are free and fair (for example, as various public interest organisations have, correctly, submitted is the case with appointing new members to the SABC Board – which is presently inquorate).

60. If the NCOP decides to approve the Bill on the basis of a truncated opportunity to make written and oral submissions – before the PIC Commission publishes its findings, the end of the Parliamentary term would not offer any rational basis for it to do so. AmaBhungane submits that this would be procedurally irrational.

61. We submit therefore that the NCOP should not make a decision on the current iteration of the draft Amendment Bill. Rather, all the proposed amendments to the PIC Act should be considered and approved at the same time and once the PIC inquiry has been concluded.

62. In any event, whether the PIC Act is amended now or after conclusion of the PIC inquiry, amaBhungane submits that the amended PIC Act should include a provision which allows the public to access records relating to investment decisions of the PIC as a general rule. As has been set out above, this will ensure that the PIC can be held accountable for its investment decisions. Such

an amendment will also benefit Government, which may be exposed to significant financial loss if bad investment decisions cannot be identified and mitigated.