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The African Academy of Sciences
Attention: Professor Iqbal Parker
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The African Academy of Sciences
our ref
Steven Powell your ref
17 June 2021 date

Dear Prof Parker

RE: AFRICAN ACADEMY OF SCIENCES | PROVISION OF FORENSIC LEGAL SUPPORT TO THE AFRICAN ACADEMY OF SCIENCES / ANALYSIS OF POTENTIAL LEGAL REMEDIES BASED ON THE FINDINGS OF THE DELOITTE FACTUAL FINDINGS REPORT DATED 18 JANUARY 2021 | MEMORANDUM OUTLINING ENSAFRICA'S FINDINGS

1. Background

- 1.1. The proposal dated 12 February 2021 (“**the Proposal**”) prepared by ENS Forensics (Pty) Ltd (“**ENSafrica**”) and addressed the African Academy of Sciences (“**AAS**”), as well as the Agreement concluded between ENSafrica and AAS on or about 8 April 2021 (“**the Agreement**”), refers. In terms of the Proposal read together with the Agreement, ENSafrica was appointed to provide forensic legal advice to the AAS pursuant to a review of the factual findings report prepared by Deloitte dated 18 January 2021 (“**the Deloitte Factual Findings Report**”). A copy of both the Proposal and the Agreement is enclosed hereunder, marked as Annexure “**A**”.
- 1.2. As more fully detailed below, ENSafrica was specifically requested to identify instances of potential fraud flowing from the Deloitte Factual Findings Report.
- 1.3. As part of our investigative process, we undertook a comprehensive review of the Deloitte Factual Findings Report as well as the Annexures thereto. Our findings are more fully detailed below are based on our review of the documentation which was provided to us. We caution that we are only qualified to provide opinions on South African law and accordingly our analysis below is based on our understanding of South African law.

2. Our findings

- 2.1. The findings contained in the Deloitte Factual Findings Report are not comprehensively restated below. Rather, given the specific nature of our mandate, only those findings which may be relevant to the determination, by ENSafrica, of potential instances of fraud committed by Prof Torto and/or other AAS officer are outlined below.
- 2.2. Prof Torto's 12 December 2018 Memorandum

2.2.1. As noted in our Proposal, based on our preliminary analysis of the Deloitte Factual Findings Report, we identified a potential instance of fraud committed by Prof Torto arising from his communication to staff by way of the memorandum dated 12 December 2018. Our full analysis in this regard is outlined below.

2.2.2. On 12 December 2018, Prof Torto sent a memorandum to “all staff” stating, amongst others, as follows:

“Following the 2018 salary and benefits survey done by PwC, and with the approval from the AAS governing council, the following benefits shall be implemented by management as per the dates indicated.

1. Housing accommodation allowance – 8-10% of gross monthly pay (effective January 2019)

2. 13th Cheque payment which is at the discretion of management, this shall be paid out once a year. A rate of 75% has been approved. (Effective December 2018)

3. Leave – 25 days per calendar year (effective January 2019)

4. Pension contribution 12% effective January 2019.

AAS endeavours to remain competitive within the market and the salary survey will be a continuous exercise that HR will be undertaking as necessary.”

2.2.3. A copy of the above memorandum is enclosed hereunder, marked as Annexure “**B**”.

2.2.4. In the above communication, Prof Torto indicates that the AAS Governing Council (“**the GC**”) approved:

2.2.4.1. the housing accommodation allowance of 8 to 10% of gross monthly pay effective January 2019 (“**the Housing Benefit**”); and

2.2.4.2. an annual 13th cheque payment at management’s discretion calculated at a rate of “75%”; (“**the 13th Cheque Benefit**”).

2.2.5. Based on our review of the Deloitte Factual Findings Report, together with the supporting annexures thereto, we note, amongst others, that as per the signed minutes of the 37th meeting of the GC held on 8 and 9 December 2018, there was no record of discussion on the 13th Cheque benefit and housing allowance. However, in terms of resolution 6, the GC approved the budget for the year 2019 for a total amount of USD 44,690,613.00.

2.2.6. We conducted a review of the documents attached as Annexure 21 to the Deloitte Factual Findings Report, being: (i) the Report of the Audit, Risk & Compliance (“**ARC**”) committee (Document 10) as well as the annexes 10.2, 10.2A and 10.2B thereto. These documents indicate that the AAS 2019 budget provided for an amount of USD 4,720,116.00 for personnel costs, representing 11% of the budget. The narration provided supporting the figure stated that the budgeted amount included:

- 2.2.6.1. “13th month benefit to be paid as a 75% of monthly basic salary in the month of December every year” and
- 2.2.6.2. “Housing allowance benefit, consistent with the market to staff starting in January 2019 at the rate of 8-10%.”
- 2.2.7. A copy of the documents described in paragraph 2.2.6 above are enclosed hereunder, marked as Annexure “C”.
- 2.2.8. Accordingly, Prof Torto’s averment regarding GC approval as detailed in paragraph 2.2.1 above was factually correct given that the GC approved the 2019 budget which made provision for both the Housing Benefit and the 13th Cheque Benefit. However, in our view, the fact that the addition of these benefits was embedded in the notes to the 2019 budget as opposed to being distinct items for discussion and approval during the 37th GC meeting, is not ideal. In addition, and as discussed more fully below, we are of the view that it may be possible to argue that by not specifically bringing the introduction of the housing benefit and 13th cheque to the attention of the GC, Prof Torto may have committed a breach of his fiduciary duties as a director of the AAS and/or a fraudulent misrepresentation by silence.
- 2.2.9. By stating that the benefits described above were introduced “*following the 2018 salary and benefits survey done by PwC...*”, it may be argued that Prof Torto implied that these benefits were introduced as a result of the salary and benefit survey process which was undertaken by Pricewaterhouse Coopers (“PwC”). PwC’s findings are detailed in a report dated 6 November 2018 (“**the PwC Report**”).
- 2.2.10. The PwC Report provided, amongst others, that
- 2.2.10.1. “*...AAS is paying competitively in most of the positions, however, she may want to consider introducing some additional cash benefits to remain competitive in the research space.*”; and
- 2.2.10.2. “*...In order to attract, motivate and retain top talent, AAS may consider introducing some additional cash benefits especially for the hard to find skills...*”.
- 2.2.11. In our view, the recommendations contained in the PwC Report may be described as: (i) discretionary, insofar as they only prompt the AAS to “consider” the conferral of additional cash benefits; and (ii) non-specific, insofar as they do not recommend the conferral of specific benefits.
- 2.2.12. Whilst Prof Torto’s statement as described in paragraph 2.2.9 above may be interpreted as implying that PwC Report recommended the implementation of the

Housing Benefit and the 13th Cheque Benefit, we are of the view that: (i) given the vague nature of his statement; and (ii) the GC's approval was provided subsequent to/"following" the issuing of the PwC Report, Prof Torto's statement does not amount to a false statement. In addition, in our view there does not appear to be any element of fraud insofar as there does not appear to be any intention of inducement in the making of the statement, given that the aforementioned benefits had already been introduced. Furthermore, as the memorandum was addressed to all staff, even if there was a false statement, it was not directed at persons who would have been prejudiced thereby.

2.3. Is Prof Torto's failure to draw the GC's attention to the introduction of the benefits in the 2019 Budget actionable?

Potential breach of fiduciary duties

2.3.1. Whilst we understand that the 2019 Budget did make reference to the introduction of the 13th cheque and housing benefits, and that the 2019 was approved by the GC during the 37th meeting of the GC, it appears based on the information made available to us that Prof Torto, in failing to draw the GC's attention to the introduction of these benefits, may have tried to introduce these benefits "through the back door". Given the gravity of the financial impact that the introduction of these benefits has had (and likely could foreseeably have had at the time) in our view it may be argued that Prof Torto should have drawn the introduction of these benefits to the GC's attention during the 37th GC meeting. As discussed more fully below, we are the view that Prof Torto's conduct in this respect may potentially be actionable on two grounds, namely: (i) a breach of his fiduciary duties as a director of the AAS; and (ii) a fraudulent misrepresentation by silence.

2.3.2. In terms of South African law, directors are fiduciaries as they act on behalf of and in the interests of the company of which they are a director. Fiduciaries have a number of common law and statutorily imposed duties including, amongst others: (i) a duty to act in good faith and in the best interests of the company; and (ii) a duty to communicate information to the company. This particular disclosure requirement is codified in the South African Companies Act, 2008, as follows:

"a director of a company must... (b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director –
(i) reasonably believes that the information is -
(aa) immaterial to the company; or
(bb) generally available to the public or known to the other directors; or
(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality."

2.3.3. In light of the above, we are of the view that there may be scope to argue that Prof Torto acted in breach of his fiduciary duties as a director of the AAS in failing to be

fully transparent with the AAS (as represented by the GC) by not specifically drawing the GC's attention to the introduction of the benefits. We have been advised by the AAS' Kenyan counsel that whilst the AAS is a public benefit organisation and not a company, a separate analogous set of regulations exists in terms of Kenyan law which may be relied upon to hold Prof Torto accountable on the basis of a breach of his fiduciary duties.

- 2.3.4. In addition, as discussed more fully below, we are of the view that should the AAS elect to proceed with an action against Prof Torto, it would be advisable to provide the relevant adjudicating body with sufficient circumstantial evidence to illustrate to it what appears to have been a deliberate scheme by Prof Torto to conceal the introduction of the benefits, and to secure the approval of the GC "through the backdoor".

Potential fraudulent misrepresentation by silence

- 2.3.5. In addition to the above, we believe that there may be grounds to argue that Prof Torto committed a fraudulent misrepresentation by silence when he failed to specifically draw the GC's attention to the introduction of the housing benefit and the 13th cheque benefit contained in the 2019 Budget, prior to presenting the budget to the GC for approval.
- 2.3.6. In terms of South African law, a distinction is drawn between the civil wrong of fraud, and the crime of fraud. Whilst there is overlap between the two categories of fraud, the requirements for proving the existence of each vary, and most notably, the evidentiary burden for the AAS to overcome is higher in the criminal context, requiring proof beyond a reasonable doubt. For present purposes, the key hurdle which the AAS will likely have to overcome is proving that Prof Torto's silence was wrongful. Put differently, that Prof Torto had a duty to speak in the circumstances and to draw the GC's attention to the 13th cheque and housing benefits which were proposed in the 2019 Budget.
- 2.3.7. In terms of South African law, silence is not *prima facie* wrongful. However, in certain instances a person may be deemed to have a duty to speak and therefore silence in such instances would be deemed to be wrongful. One such instance is when there is a fiduciary relationship between the parties. As discussed above, as a director of the AAS, Prof Torto was a fiduciary and he therefore had a duty to, amongst others, act in good faith, in the best interest of the company, and to disclose material information to the company.
- 2.3.8. As aforesaid, should the AAS elect to proceed with an action in this regard, we recommend that its nominated Kenyan counsel draws the relevant adjudicating

body's attention to the circumstantial evidence which may point to a deliberate scheme by Prof Torto to conceal the introduction of the benefits, and to secure the approval of the GC "through the backdoor". By way of example, we were provided with an email from Tom Kariuki to Hannah Ngugi and Rosemary Akinyi (copying Prof Torto) dated 2 August 2018 wherein Tom stated as follows:

"Dear Hannah and Rosemary

Okay, let us see the final figures and we can decide.

I just had lunch with Nelson and we want to approach this issue of salary increments with lots of caution. We don't feel it is the right time to take back a paper to the GC on this matter and we also should not aim for a blanket application of the 75% percentile. However we can approve at the SMT level and implement over time, beginning with the easier ones like pension, house allowance...."

2.3.9. The above email may be illustrative of an awareness on the part of the above persons of the GC's reluctance to approve the introduction of increased costs for the AAS, and to therefore adopt a slow scheme to gradually introduce benefits.

2.4. Finally, we confirm that, based on our review of the Deloitte Factual Findings Report and accompanying annexures, we did not identify further instances of potential fraud committed by Prof Torto and/or other AAS officers. However, we did identify:

2.4.1. instances of remuneration paid to Prof Torto above the relevant rates at which it has been approved by the GC, as required. These instances are summarised below and will be more fully detailed in a separate memorandum as the AAS' counsel in Kenya may wish to consider pursuing a claim against Prof Torto in order to recover these amounts; and

2.4.2. an instance in 2017 whereby Dr Tom Kariuki ("**Dr Kariuki**") signed his own salary review letter which exceeded the approved rate by 1%. This is referred to below and will be more fully detailed a separate memorandum as the AAS may wish to institute disciplinary proceedings against Dr Kariuki for misconduct.

3. **Our findings – unauthorised remuneration paid to Prof Torto**

3.1. Prof Torto's salary increased from USD 10,982 in 2017 to USD 14,168 in 2018, representing a 29% year-on-year salary increase. The minutes of the 35th meeting of the GC held on 17 November 2017 note the approval of a 10% salary increase for staff.

3.2. Section 11.4.6 of the AAS constitution indicates that the Executive Director's ("**ED**") remuneration is determined by the GC. Accordingly, given that Pro Torto's increase of 29% exceeded the GC approved increase rate, his increase does not appear to have been properly approved. Prof Torto therefore appears to have been remunerated at a rate which exceeded his approved salary increase by 19%. Prof Torto's salary should have increased by USD 1,098 (rounded down) to

USD 12,080. Therefore, Prof Torto appears to have been remunerated by an additional unapproved amount of USD 2,088 per month in the 2018 year. In addition, whilst Prof Torto's subsequent increases were in line with the approved rates, it may be argued that given that the unapproved amount of USD 14,168 was used as the basis for subsequent increases, there was a knock-on effect for subsequent years, as illustrated in the table below:

Year	GC approved increase rate	Approved pay (USD)	Actual pay (USD)	Difference (USD)
2018	10%	12,080	14,168	2,088
2019	5.6%	12,756	14,961	2,205
2020	4%	13,266	15,560	2,294

- 3.3. We have not been provided with the comprehensive payroll records and bank account statements for the above financial years. However we note that based on a simple calculation of the above basic salaries assuming a 12 month year (excluding benefits), it appears that as a result of Prof Torto's initial remuneration above his approved rate increase in 2018, Prof Torto was remunerated by approximately an additional USD 79,044 above the approved rate for the period 2018 to 2020. The AAS may wish to consider instructing its counsel in Kenya to institute a claim/counterclaim against Prof Torto to recover amounts made to Prof Torto exceeding his GC approved salary.
- 3.4. In addition to the above, based on our review of the Deloitte Factual Findings Report and the supporting Annexures, we understand that in January 2019 Prof Torto received a housing allowance calculated at 12% (USD 1,795.32) of his monthly salary for January 2019, which exceeds the approved rate of 10% (USD 1,496.00). The AAS may wish to consider instructing their counsel in Kenya to add this amount to any claims which it may elect to proceed with against Prof Torto.
4. **Our findings – potential misconduct by Dr Kariuki**
- 4.1. We have been provided with a copy of an undated salary review letter addressed to Dr Kariuki and signed by Dr Kariuki, approving Dr Kariuki's salary increase from KES 850,000 to KES 901,838 for the year 2017, representing a 6% year-on-year increase (see Annexure 12 to the Deloitte Factual Findings Report). This exceeded the GC approved rate of 5%, by 1%. We have not been provided with the comprehensive payroll records and bank account statements for the 2017 financial year, however based on a simple calculation based on a 12 month year net of benefits, it appears that Dr Kariuki was likely remunerated by KES 112,056.00 above his approved salary for 2017. Subject to compliance with applicable Kenyan laws, the AAS may wish to consider attempting to recover these amounts from Dr Kariuki.

- 4.2. We have been advised by the AAS that Dr Kariuki has since resigned and that it will therefore no longer be possible to institute disciplinary action against Dr Kariuki.
5. We caution that there are likely certain defences which Prof Torto may raise in respect of the above potential actions. On request from the AAS, we have not outlined these potential defences in this memorandum. However, we confirm that we have discussed these potential defences with the AAS' Kenyan counsel who are accordingly aware as to the content thereof.
6. Please do not hesitate to contact us should you have any queries.

Kind regards

(unsigned due to electronic submission)

Steven Powell
Executive, ENSafrica
Director, ENSafrica Forensics