

# Chapter 24B

## Auditor-General

### Stuart Woolman & Yolandi Schutte

24B.1 Introduction

24B.2 Independence of the Auditor-General

24B.3 Functions of the Auditor-General

- (a) Constitutional and statutory duties to report
- (b) Ad hoc investigative powers

---

OS 12-05, ch24B-p1

#### Functions of Auditor-General

**188.** (1) The Auditor-General must audit and report on the accounts, financial statements and financial management of

- (a) all national and provincial state departments and administrations;
- (b) all municipalities; and
- (c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of

- (a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or
- (b) any institution that is authorised in terms of any law to receive money for a public purpose.

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation.

#### Tenure

**189.** The Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years.

### 24B.1 Introduction\*

Unlike the other state institutions supporting constitutional democracy,<sup>1</sup> the Auditor-General antedates both the Interim Constitution<sup>2</sup> and the Final Constitution.<sup>3</sup> And unlike most of the other Chapter 9 Institutions, the unique legislative

\* The authors would like to thank Gus Washefort for his invaluable assistance with the research for and writing of this chapter.

environment within which the Auditor-General operates makes this institution the most likely to retain its independence and to discharge its responsibility to ensure

1 Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution') s 181(1) provides for the creation of the Public Protector; the Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General and the Electoral Commission. For a discussion of these institutions elsewhere in this work, see, eg, Stuart Woolman & Julie Soweto-Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F; Cathi Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; Justine White 'Independent Communication Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E; Michael Bishop & Stuart Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A.

2 Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

3 The Exchequer and Audit Act gave South Africa its first office designed to control the public purse. Act 21 of 1911. That Act remained essentially unchanged until repealed by a new Exchequer and Audit Act. Act 32 of 1956. In 1975, the Exchequer and Audit Act expanded the Auditor-General's powers to embrace performance auditing. Act 66 of 1975. The problem with the new Act and subsequent legislation was that the Office of the Auditor-General remained dependent upon the executive for its effective administration. See Auditor-General Act 52 of 1989. Only after the passage of the Audit Arrangement Act did the Auditor-General finally loose the chains of executive interference. Act 122 of 1992 ('AAA'). See also Office of the Auditor-General *Annual Report of 1990-91* ('The unique statutory responsibilities of the Office, supported by the image of autonomy, objectivity and integrity which it has earned over the years, not only places the Office in a position of trust vis-à-vis the general public but also carries special responsibilities in the new South Africa.') The AAA transferred 'overall supervision and related matters [from the executive] to a Parliamentary oversight body, the Audit Commission.' *Historical Review of the OAG* (2005), available at [www.agsa.co.za](http://www.agsa.co.za) (accessed on 1 November 2005). See also *Cekeshe & Others v Premier, Eastern Cape & Others* 1998 (4) SA 935 (Tk), 1997 (12) BCLR 1746 (Tk)(With respect to public entities in the Transkei, the Corporations Act 10 of 1985 s 10(2) provided that the 'accounts of all corporations shall be audited by the Auditor-General' while s 11(1) required the submission to the National Assembly of a financial report 'signed by the Auditor-General stating that, on the information supplied to him and to the best of his knowledge and belief, such balance sheet and statement of income and expenditure are true and correct: Provided that, if the Auditor-General is unable to make such a report or to make it without qualification, he shall set out in such report either the circumstances which prevent him from making such a report or the qualification itself.')

Whereas the Auditor-General Act ('AGA') served as the enabling legislation for the Auditor-General under the Interim Constitution, the Public Audit Act ('PAA') gives proper expression to the Final Constitution's conception of the Office of the Auditor-General. Auditor-General Act 12 of 1995; Public Audit Act 25 of 2004. Perhaps, the two most significant differences between the PAA and its predecessors are the new Act's grant of sweeping powers of search and seizure and the express expansion of the Auditor-General's authority to cover institutions in the public sector. See PAA s 16 and PAA s 4. The PAA, s 53 read with Schedule 1, repeals the Auditor-General Act and the Audit Arrangement Act in their entirety and the Public Finance Management Act 1 of 1999 ('PFMA'), ss 58 - 62.

that our government operates in an accountable, transparent and equitable manner.<sup>4</sup>

How did the Office of Auditor-General come to be the first among equals? By virtue of its position as 'the supreme audit institution of the Republic,'<sup>5</sup> the Auditor-General must produce financial audits and compliance audits with respect to all national and provincial departments, all municipalities,<sup>6</sup> all public entities and a host of other institutions.<sup>7</sup> The purpose of these audits is to ensure the proper use of public funds. These regular public reports to Parliament and to Treasury — some 1400 annually — provide critical information about how various arms of government are managing their budgets and enable the legislature to

---

OS 12-05, ch24B-p3

exercise meaningful oversight over the executive.<sup>8</sup> As the Constitutional Court noted in *President of the Republic of South Africa v South African Rugby Football Union*, the Final Constitution is,

committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the

- 
- 4 See *Rail Commuter Action Group & Others v Transet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 72 ('Accountability of those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution.' The Court cites FC ss 1, 41(1) and 195(1)(f) in support of this proposition.) See also *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 4 ('Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution . . . If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.')
- 5 PAA s 1 defines 'the supreme audit institution of the Republic'; as 'the institution which, however designated, constituted or organized, exercises by virtue of the law of a country, the highest public auditing function of that country'.
- 6 FC s 188(1)(b). PAA s 4(1).
- 7 FC s 188(1)(c). PAA s 4(2).
- 8 See, eg, *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* 2002 (3) SA 30 (T) (Enabling legislation for Trust requires annual audit by Auditor-General and tabling of report before the legislature); *Esack No & Another v Commission on Gender Equality* 2001 (1) SA 1299 (W), 2000 (7) BCLR 737 (W)(Commission transactions subject to audit by Auditor-General); *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 77 (Court notes that the Independent Electoral 'Commission's necessary expenditure is to be defrayed out of money appropriated by Parliament . . . and its records are to be audited by the Auditor-General. Comprehensive reporting duties are imposed on the Commission and in particular it is required annually to submit to Parliament . . . an audited statement on income and expenditure and a report in regard to its functions, activities and affairs in respect of such financial year.') See also I Rautenbach & E Malherbe *Constitutional Law* (2002) 212. Of course, someone must watch the watchers. The Auditor-General must submit an annual report to the National Assembly on its activities. See PAA s 10(2)(a)-(b). See also FC s 181(2)('These [Chapter 9] institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.') PAA s 10(3) requires that the National Assembly create the oversight mechanism contemplated by FC s 55(2)(b)(ii). Courts may play a role with respect to the oversight of the Auditor-General. See *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs & Others* 2005 (4) SA 212 (SCA) (Court dismisses applicant's suit against Auditor-General for improper discharge of duties that allegedly led to financial irregularities by other officials.)

lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The constitutional goal [of ensuring that the administration observes fundamental rights and acts both ethically and accountably] is supported by a range of provisions in the [Final] Constitution . . . [including the establishment of] the Auditor-General whose responsibility it is to audit and report on the financial affairs of national and provincial State departments and administrations as well as municipalities.<sup>9</sup>

The Auditor-General's powers extend beyond the coercive power of shame and include the threat of forensic audits.<sup>10</sup> Its reports and its forensic audits expose malfeasance, corruption, and incompetence in the discharge of public

---

OS 12-05, ch24B-p4

office that enable other law enforcement agencies to launch criminal investigations.<sup>11</sup> Case law suggests that the Auditor-General himself may even possess standing to seek rescission of decisions or contracts that manifest fraud.<sup>12</sup>

Whilst the breadth of its investigatory powers may distinguish the Auditor-General from other Chapter 9 Institutions, another unique feature of the Auditor-General is its

---

9 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at paras 133-134.

10 See Office of the Auditor-General *Activity Report for 2003 — 2004* RP 211/2004 (2005) 23 ('*Activity Report*') ('Forensic auditing is an independent process aimed at preventing or detecting economic crime in the public sector. The process mainly comprises an objective assessment of the measures instituted by accounting officers and other relevant role players to prevent and detect economic crime, but it can also include economic crime investigations when this is appropriate and seems necessary . . . [T]he term "economic crime" is used to describe various crime categories, including fraud, forgery, theft and other contraventions of applicable statutes (e.g. corruption).') See also *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 164.

11 Although this chapter speaks generally about the Auditor-General's role in rooting out corruption, the term 'corruption' here is broadly construed. As Sole notes, '[c]orruption may vary from the clearly illegal — such as fraud — to more subtle forms of unethical rent-seeking, patronage and abuses of power that may be just as damaging to the social fabric of a nation.' See Sam Sole 'The State of Corruption and Accountability' in John Daniel, Roger Southall & Jessica Lutchman (eds) *State of the Nation: South Africa 2004-2005* (2005) 86. Sole suggests the following definition — one that fits the broad brief of the Auditor-General's Office: 'corruption is the wilful subversion (or attempted subversion) of a due decision-making process with regard to the allocation of any benefit.' *Ibid* at 87. For example, an Auditor-General's report on Transnet led the National Prosecuting Authority to launch a probe into the inappropriate manner in which medical scheme benefits were handled by officials in the Department of Correctional Services. See Sheena Adams 'Scorpions Probe Medical Aid Fraud' *The Mercury* (5 October 2004). The corruption uncovered by the Auditor-General and the Scorpions in this matter fits a general pattern of political malfeasance. See John Hyslop 'Political Corruption: Before and After Apartheid' *Conference on State and Society in South Africa* (University of the Witwatersrand 2004) 17 ('Under Mandela, and even more, under Mbeki, government policy encouraged rent-seeking behaviour by black entrepreneurs through the economic preferences they were given through a whole gamut of policies, especially those relating to the awarding of state contracting and corporate ownership. The tendency of such policies was to create a climate in which the line between legal forms of rent-seeking and outright corruption and cronyism became . . . blurred. . . . [O]ld struggle networks provided political connections which could be parlayed into economic leverage.')

12 See *Minister of Local Government and Land Tenure & Another v Sizwe Development & Others: In re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (Tk), 678 - 679.

fiscal independence. The Auditor-General's ability to generate significant revenue streams from fees charged for audit services ensures that it has the money necessary to discharge its constitutional duties. These financial resources immunize the Auditor-General from some of the budgetary pressures that have undermined the independence of other Chapter 9 Institutions.<sup>13</sup>

## 24B.2 Independence of the auditor-general

Chapter 9 Institutions often struggle with two distinct but related forms of independence: political autonomy and financial viability.

The Constitutional Court addressed the nature of the political independence required of the Office of Auditor-General during the certification process for the Final Constitution. The crisp question before the Court in the *First Certification Judgment* was whether the Constitutional Assembly had given adequate effect to Constitutional Principle ('CP') XXIX. CP XXIX read as follows:

The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.<sup>14</sup>

---

OS 12-05, ch24B-p5

Section 194 of the first constitutional text submitted for certification by the Constitutional Assembly stated that a simple majority of the members of the National Assembly could remove the Auditor-General from office. The Constitutional Court held that this removal procedure was insufficient to vouchsafe the Auditor-General's independence and impartiality. The Court wrote:

[T]he Auditor-General is to be a watch-dog over the government. However, the focus of the office is not inefficient or improper bureaucratic conduct, but the proper management and use of public money. . . . Against the background of the purpose of the office, it is our view that the dismissal provisions . . . are not sufficient to meet the requirements of CP XXIX.

The dismissal provisions were subsequently amended. The Final Constitution now requires that a resolution for the removal from office of the Auditor-General receive the votes of at least two thirds of the members of the National Assembly.<sup>15</sup>

As we noted at the outset, the Auditor-General's ability to generate additional revenue from fees charged for auditing services enhances its political

---

13 PAA s 36.

14 *First Certification Judgment* (supra) at para 160.

15 The Constitutional Court found that the amended provision complied with CP XXIX, and went on to certify the amended text. *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC)* at para 134 ('*Second Certification Judgment*') ('The AT substantially enhances the independence of both the Public Protector and the Auditor-General. AT 193(5)(b)(i) now provides that the resolution of the NA recommending their appointment be passed with a supporting vote of at least 60% of the members of the NA and AT 194(2)(a) now provides that the resolution of the NA calling for their removal from office must be adopted with a supporting vote of at least two-thirds of the members of the NA. We are now satisfied that the terms of CP XXIX have been met in respect of both the Public Protector and the Auditor-General.')

independence.<sup>16</sup> (It also benefits from income streams derived from investments and the alienation of moveable property.) In 2003 and 2004, Auditor-General earned R525 000 000 and R495 000 000 from auditing fees charged to national, provincial and local government as well as other public and international entities.<sup>17</sup> While other Chapter 9 Institutions constantly complain that they are under-funded and under-resourced,<sup>18</sup> and therefore incapable of discharging their constitutional

---

16 PAA s 36.

17 *Activity Report* (supra) at 11 (Table 1). However, the fiscal independence promised by these fees is only as good as the ability or the willingness of the audited entities to make good. Local government has been notorious for its failure to pay its statutorily required fees. See Linda Loxton 'Fakie Seeks R100m from Municipalities' *Business Report* (12 March 2003).

18 Under-funding of the Chapter 9 Institutions is a common problem. Parliament has been put on notice that low levels of funding and an executive policy of malign neglect make effective operation of these institutions difficult, if not impossible. The Corder Report is absolutely scathing in this regard. See Hugh Corder, Sara Jagwanth & Fred Soltau 'Report on Parliamentary Oversight and Accountability' Report to the Speaker of the National Assembly (1999), available at [www.pmg.org.za/docs/2001/viewminute.php?id=811](http://www.pmg.org.za/docs/2001/viewminute.php?id=811) (accessed 10 January 2005) ('Corder Report'). Corder, Jagwanth and Soltau write that

In their submissions to us, many constitutional institutions have also pointed out that the present arrangement may result in a very low priority being given to constitutional institutions as government departments may be slow in recognising the interests of an institution which does not form part of the core business of the department. The very direct control by the executive of constitutional institutions can have a devastating effect on the independence and credibility of these offices. . . . In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government. Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases. This executive power could render impotent state institutions supporting constitutional democracy through the potential denial of both financial and human resources. Furthermore, the special constitutional features of these institutions are not recognised as executive priorities are set.

'Corder Report' (supra) at paras 7.2 and 7.2.1. The Corder Report suggests that, at a minimum, the budget of each Chapter 9 Institution be subject to a separate vote — a vote distinct from that for the budget for the department with line authority, and a vote distinct from that for the budget of other Chapter 9 Institutions. Ibid at para 7.3. To meet other constitutional imperatives, the Corder Report advocates the passage of legislation — an Accountability and Independence of Constitutional Institutions Act — and the creation of a parliamentary oversight committee — a Standing Committee on Constitutional Institutions. Ibid at paras 1.1, 7.3, 7.4, 8. Parliament has not acted on any of the Corder Report recommendations. Other Chapter 9 Institutions have noted this failure to act with dismay. See N Barney Pitso 'South African Human Rights Commission Presentation to the Justice Portfolio Committee — Budget Review and Programmes 2001/2002' (8 June 2001), available at [www.sahrc.gov.za](http://www.sahrc.gov.za) (accessed on 11 January 2005). Chairperson Pitso writes:

After five years of operations, it is very discouraging to have to report that questions about the independence of the Commission have not been resolved. . . . National Treasury continues to relate to the Commission through the Justice Department. This means that we have no direct means of having queries and problems resolved. . . . Since inception, the Commission has constantly raised concerns about the manner in which its budget was set. We pointed out *ad nauseum* that at no stage was there a proper assessment of the mandate of the Commission and the appropriate level of resources necessary to execute the mandate.

duties, the Auditor-General's Office has voiced no similar sentiment.<sup>19</sup> It is, perhaps, the only Chapter 9 Institution to be truly both financially and administratively independent of national government.<sup>20</sup>

---

OS 12-05, ch24B-p7

## 24B.3 Functions of the auditor-general

### (a) Constitutional and statutory duties to report

As FC s 188 makes clear, the Auditor-General must audit all state departments and administrations, all municipalities and any other institution or accounting entity so required by national or provincial legislation.<sup>21</sup> The Auditor-General may, in addition, audit other state institutions that receive public monies for public purposes.<sup>22</sup>

---

OS 12-05, ch24B-p8

---

Ibid at 4-5. For more on the under-funding of Chapter 9 Institutions, generally, and the under-funding of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, in particular, see Stuart Woolman & Julie Soweto-Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F.

19 But see Office of the Auditor-General *Activity Report for 2003 — 2004* RP 211/2004 (2005) 23 ('I am happy to report that over the last three years we have been able to achieve a significant improvement in the quality of our audits. Unfortunately there was some deterioration in the number of findings with regard to the fieldwork stage of the audit process during 2003-04. This is a matter of grave concern to my office and myself, which will be closely monitored in the next audit cycle. We are also implementing an enhanced quality control process to address quality management more holistically. It is envisaged that these measures will ensure that improvement is attained in the quality of our audits.')

20 As one of the authors has written elsewhere in this work, the Constitutional Court in *New National Party* establishes a two-part test for Chapter 9 Institution independence. See Michael Bishop & Stuart Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A, citing *New National Party v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('NNP') at paras 98 — 99 (Court defines 'financial independence' as the possession of sufficient funds to discharge its constitutional obligations. 'Administrative independence' denotes the absence of state control over the manner in which the institution performs its functions.) The Constitutional Court identified two essential desiderata for financial independence. Firstly, the Chapter 9 Institution must have sufficient funding to fulfil its constitutional mandate. Secondly, the funds must come from Parliament and not from the executive. Although the *New National Party* Court views the source of the funds as a requirement for financial independence, the source of funds would seem, at first blush, to only become relevant if the funds provided are insufficient. If the funds are sufficient for the discharge of the Chapter 9 Institution's duties, then any issue regarding the source of the funds could, as a logical matter, never arise. However, the *New National Party* Court, without saying as much, would appear to have concerns beyond those of mere fiscal viability. The Court seems somewhat vexed by the ability of Chapter 9 Institutions to discharge their oversight responsibilities with respect to the executive if the executive retains the discretion to decrease (or increase) funding. When questions of sufficiency of funds do arise, whether the executive is, in fact, the source of those funds will enter into the Court's assessment of the independence of the institution. Thus, it is for reasons of political autonomy that the *New National Party* Court signals its preference for Chapter 9 Institutions such as the Public Protector to be funded directly by Parliament. See also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) ('*Langeberg*') at para 27 (On the meaning of independence with respect to the Chapter 9 Institutions, the Constitutional Court wrote that 'independence cannot exist in the air, and it is clear that the chapter [on co-operative government] intends to make a distinction between the state and the government, and the independence of the Commission is intended to refer to independence from government, whether local, provincial or national.')

The Public Audit Act extends these constitutionally-mandated audit functions to all constitutional institutions<sup>23</sup> and to any public entity listed in the Public Finance Management Act and the Local Government: Municipal Systems Act that may require the Auditor-General's services.<sup>24</sup> The Auditor-General demonstrates its even-handedness through the oversight process itself: on the one hand, it provides advice to legislatures and their committees assessing the performance of an agency or department; on the other hand, it assists auditees with their replies to inquiries launched by legislatures subsequent to the legislatures' review of an audit report.<sup>25</sup>

As a general rule, the Auditor-General carries out audits, but does not opine on the merits of particular government programmes. However, while the Auditor-

---

The courts have also developed an objective test for 'independence' with respect to courts and other tribunals that ought to apply equally to institutions such as the Auditor-General. See *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 71 quoting with approval *R v Valente* (1985) 24 DLR (4th) 161 (SCC) ('Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" . . . connotes absence of bias, actual or perceived. The word "independent" in s 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive branch of government, that rests on objective conditions or guarantees. . . . Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception'); *Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 164 (With respect to the independence of Magistrates, 'whose functions . . . [like those of the Auditor-General] involve matters of great sensitivity in which there could well be confrontation between the functionaries concerned and members of the Legislature and the Executive, a higher level of protection would certainly not be inappropriate'); *Freedom of Expression Institute & Others v President, Ordinary Court Martial, & Others* 1999 (2) SA 471 (C), 1999 (3) BCLR 261 (C) at paras 23-25 ('[T]he appropriate test is whether the tribunal from the objective standpoint of a reasonable and informed person will be perceived as enjoying the essential conditions of independence'); *South African National Defence Union & Another v Minister of Defence & Others* 2004 (4) SA 10 (T), 39, 2003 (9) BCLR 1054 (T) (On application of test for 'independence' to a military tribunal.)

- 21 FC s 188(1) and PAA s 4 identify the spheres of government and organs of state subject to mandatory audits and reports.
- 22 FC s 188(2) and PAA s 5 make provision for discretionary audits and reports.
- 23 PAA s 4(1)(b).
- 24 PAA s 4(3)(a). See Public Finance Management Act 1 of 1999 ('PFMA'); Local Government: Municipal Systems Act 32 of 2000 ('LGMSA'). For more on the constitutional and statutory framework to distribute, to control and to monitor the expenditure of public funds, see Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 25.
- 25 PAA s 5 (1)(c). The PAA and PFMA place a number of substantive constraints on the auditing activities of the Auditor-General designed to ensure its independence and impartiality. First, it may not undertake audits or offer services — for fees — that compromise its constitutional and statutory obligations. Second, the Auditor-General may not provide advice or services that have a direct bearing on the formulation of policy. PAA s 5(1)(a)(iii).



General will not 'question policy laid down by the legislative and executive authority, the arrangements for the implementation thereof, the controls applied, the cost incurred and the results achieved are all legitimate subjects for auditing.'<sup>26</sup> What this means is that although the government's objectives fall beyond the purview of the Auditor-General, the Auditor-General can interrogate the means the government employs to realize its objectives. When it comes to the expenditure of public monies, the Auditor-General has an obligation to state whether the financial audits and the compliance audits reflect a problem with the implementation of a policy or the delivery of services.<sup>27</sup>

I:\Products\CLOSA\Doc\Images\ch24Bp008Fig01.FFF

This diagram illustrates the role played by the Auditor-General in the accountability process. Parliament — through legislation like the PFMA — and the Department of the Treasury — through regulations issued in terms of the Division of Revenue Act — establish the reporting requirements that various state actors must follow. The diagram describes this as Process 1. The reporting requirements themselves focus largely 'on the financial performance of the entity.' Ibid. The problem with the information elicited in financial statements — Process 2 — is that the financial statements do not really satisfy the needs of the oversight bodies. What oversight bodies such as the Standing Committee on Public Accounts ('SCOPA') and Treasury really need are qualitative assessments of a public entity's performance. The real benchmark is delivery. Thus, the Auditor-General notes that 'an expectation gap' opens up between what the public entity and the Auditor-General are required by the Final Constitution and statute to provide — financial audits, Process 3 — and what the oversight bodies actually need to determine whether public monies have been well spent. As it stands, while the Auditor-General can undertake the kind of performance audits — Process 4 — meaningful oversight requires, it currently does so only on an ad hoc basis. Ibid at 20.

---

OS 12-05, ch24B-p9

The general reports, the special reports and the individual audits made publicly available by the Auditor-General over the course of the last five years offer a detailed account of both the achievements of and the maladministration in South African government. In 2000, some 38% of financial audits for national departments received qualified reports.<sup>28</sup> The reasons for the qualifications ranged from 'limited or no audit performed, resulting in a disclaimer of opinion or adverse opinion; liabilities and creditors that could not be verified; loans, debtors and investments that were either misstated, or of which the recovery was doubtful; assets, including stock, stores and inventory, that could not be verified; misstatement of income; irregularities in disclosing expenditure; unacceptable financial statements for trading accounts.'<sup>29</sup> The national departments fared even more poorly with respect to compliance audits: over 57% of national departments received qualified reports because of 'serious shortcomings in internal checking and control; non-compliance

---

26 Office of the Auditor-General *Report on the Financial Statements of the Provincial Administration of the Northern Cape* (31 March 1998) 7.

27 For example, the Auditor-General in its *Report on the Financial Statements of the Provincial Administration of the Northern Cape* found that only 1 of 17 departments warranted an unqualified financial audit report — 7 were qualified and 9 had disclaimers — and only 5 out of 17 departments deserved unqualified compliance reports — 11 were qualified and 1 has a disclaimer. These findings stand as a scathing indictment of the provincial administration and raises serious doubts about the capacity of current personnel asked to carry out policy. Ibid at 9. If the capacity does not exist to execute the policy, then the policy itself must be called into question. Activity Report (supra) at 19.

with other prescripts, including legislation and Treasury regulations; unauthorised expenditure that was incurred; insufficient control over personnel expenditure; and serious deficiencies in provisioning administration.<sup>30</sup> The financial state of provincial government and local government was abysmal. So few adequate controls existed at the provincial level that

---

OS 12-05, ch24B-p10

the Auditor-General could not issue a report on the 1999-2000 fiscal year and was obliged to limit his assessments to completed audits from the previous financial year. Even with respect to these audits, the majority had to be qualified because internal departmental audits were largely unreliable and asset registers were either non-existent or incomplete. Given the parlous state of local government at the time — the report noted the 'short-term deteriorating financial position at many municipalities' — some solace could be taken in the fact that 31% of the municipalities audited received unqualified reports.<sup>31</sup>

The most recent general report illustrates both an improvement in the administration of government and the increased vigilance of the Auditor-General.<sup>32</sup> The report noted that nearly 25% of national departments — 8 of 33 — received

---

28 A financial audit is the examination of financial records of an organization in order to verify that the figures in the financial reports are relevant, accurate, and complete. A financial audit fulfils the 'attest' function: an independent party — in this case the Auditor-General — provides written assurance (the audit report) that financial reports are 'fairly presented in conformity with generally accepted accounting principles.' Unlike financial audits — which interrogate the effectiveness of management — compliance audits examine compliance with statutory and regulatory obligations. A compliance audit requires the review of organizational records so as to determine to test for the adequacy of system controls, to ensure that policy and operational procedures are followed, to detect breaches in security, and to recommend any indicated changes in control, policy and procedures. A qualified report signals the absence of sufficient information, the presence of misinformation or other forms of non-compliance with accepted accounting procedures that does not permit the auditor to come to a meaningful conclusion about the actual fiscal state of the entity under review. A disclaimer indicates a wholesale failure to keep adequate financial records and implies negligence bordering on the criminal.

29 Office of the Auditor-General *General Report for 1999-2000* RP 75/2000 (2001) 15 ('*General Report 2000*') 3, 15-21.

30 Ibid at 4, 22-30.

31 *General Report 2000* (supra) at 6, 36-45. A better indication of the improvement in local government internal control mechanisms is reflected in the number of timeous audits. In the financial year 1997-1998, only 3% of municipalities delivered the required information at the end of the financial year. See Office of the Auditor-General *General Report on Local Government* (2003) 12. By 2001-2002, that number had increased to 67%. Ibid. The reporting requirements of the Municipal Finance Management Act ('MFMA') provides another rubric through which one might assess local government capacity. Act 56 of 2003. See Office of the Auditor-General *Report on the Submission of Financial Statements by Municipalities for the Financial Year Ended 30 June 2005* (2005). In the most recent report, the Auditor-General, acting in terms of MFMA s 126, declared that '[o]f the 284 municipalities, only 148 (52 per cent) met the submission date . . . prescribed by the MFMA and a 'further 35 (12 per cent) submitted annual financial statements' within the month thereafter. Ibid at 3. In the preceding year, 2004, only six per cent met the submission date of 31 August 2004, and a mere twenty-nine per cent submitted annual financial statements in the month thereafter. Ibid.

32 Office of the Auditor-General *General Report for 2003-2004* RP 210/2004 (2005) ('*General Report 2005*').

'qualified' audit opinions.<sup>33</sup> Of the remaining audits, the Auditor-General identified ongoing problems associated with asset management, administration of transfer payments and internal auditing.<sup>34</sup> Inaccurate asset registers and inadequate administration of transfer payments make national departments susceptible to fraud, irregularities and poor performance and pose a material risk to public funds.<sup>35</sup> Viewed in isolation, the Auditor-General's report would be quite alarming indeed. However, when viewed against the background of earlier reports, the most recent general report warrants a cautious optimism. For not only are the numbers better, the high numbers of qualified audits identified in previous reports have had the intended consequence of forcing improved internal departmental compliance with PAA, PFMA and other statutory reporting requirements.

Even provincial departments — whose history of maladministration regularly elicits calls for their elimination — have fared better. While only 14 out of 27 provincial departments of education, health and social development (52%) received unqualified opinions,<sup>36</sup> that 52% reflects a marked improvement over

---

OS 12-05, ch24B-p11

the mere 15% of provincial departments that received unqualified opinions for 1999.<sup>37</sup> The rest of the news from the provinces will not silence critics. The Auditor-General notes that risks associated with the failure to follow basic accounting protocols and the lack of qualified personnel to enforce such protocols pose short-term and long-term risks for the health of the fiscus.<sup>38</sup>

These Auditor-General's reports — and the problems the reports identify — have a critical role to play in the creation of a polity committed to the rule of law and for the restoration of society's faith in a government of, by and for the people.<sup>39</sup> The power of these reports to shame some government officials into taking appropriate action is reflected in several of the cases that have arisen out of normal audits and forensic investigations undertaken by the Auditor-General.<sup>40</sup> It is also echoed in constructive responses to criticism<sup>41</sup> and promises to root out sources of corruption and inefficiency.<sup>42</sup>

---

33 Ibid at 3-11.

34 See Ted Keenan 'Auditor-General: Fighting Fraud with the Best of Them' *Finance Week* (12 July 2002) 16 (Explains reports of continued high levels of maladministration in terms of the increase in the Auditor-General's powers, staff and capacity.)

35 *General Report 2005* (supra) at 12-26.

36 Ibid.

37 To give one a sense of how significant provincial expenditure is — and how critical proper provincial administration is for both service delivery and the public fiscus — the Auditor-General notes that the total expenditure of R119 billion by the provincial departments of Education, Health and Social Development exceeds the total expenditure of R114 billion for all national departments. See *General Report 2005* (supra) at 12-26.

38 Public entities appeared to fare even worse. Most had failed to comply with the public reporting requirements of Public Finance Management Act and an equal number had failed to meet statutory requirements for tabling reports before Parliament. In addition, four public entities received disclaimers of audit opinions. Ibid at 27-35.

The courts have reinforced this power to shame by expressly recognizing that the Auditor-General is the most appropriate arbiter of disputes over the use or misuse of public funds.<sup>43</sup> Whether the directly accountable branches of government — Parliament and the provincial legislatures — will heed the Auditor-General's words or reduce it to the role of Cassandra remains to be seen.<sup>44</sup>

## (b) Ad hoc investigative powers

Both the Final Constitution and the Public Audit Act grant the Auditor-General the power to launch ad hoc investigations.<sup>45</sup> The Auditor-General is authorized to carry out any appropriate investigation where the public interest or the gravamen of a

- 
- 39 Experts ranked the Auditor-General second, after the Special Investigating Unit, with respect to their perceived success in combating official corruption. See Lala Camerer *Corruption in South Africa: Results of an Expert Panel Survey* Institute for Security Studies Monograph 65 (September 2001) Chapter 6 ('A significant proportion (48%) of the respondents saw the office of the Auditor-General as effective in fighting corruption, with more than a quarter (26%) seeing it as very effective. Slightly more than a tenth (14%) of the respondents regarded the office as not very effective, while a mere 5% saw it as not effective at all. A total of 7% responded that they did not know enough to rank the office.')
- 40 See *Mthembi-Mahanyele v Mail & Guardian Ltd & Another* 2004 (6) SA 329 (SCA), 2004 (11) BCLR 1182 (SCA)(Auditor-General's report of irregularities in tender for housing contract and a call for a commission of inquiry into improper benefits bestowed upon friends of the Minister supported Court's finding that published criticism of the appellant was reasonable under the circumstance and thus not defamatory); *Young v Shaikh* 2004 (3) SA 46 (C) (Arms deal report by the Auditor-General, the Public Protector, and the Director of Public Prosecutions led to accusations, in the media, of corruption. Court finds accusations made by the defendant — based in part on the report, but otherwise not fully corroborated — to be defamatory.) See also *Kruger v Johnnic Publishing (Pty) Ltd & Another* 2004 (4) SA 306 (T) (Findings by Auditor-General of mismanagement and irregularities at a school led to allegations of corruption that prompted an ultimately unsuccessful suit for defamation.)
- 41 Yearly criticism of the South African Revenue Service ('SARS') by the Auditor-General in annual reports tabled before SCOPA ultimately led SARS to overhaul its internal auditing systems and to procure the technology necessary to manage its assets. The tabling of an unqualified financial audit of SARS before SCOPA was hailed by a SARS commissioner, Pravin Gordan, as a clear indication that SARS is a 'service organization that handles taxpayers' money efficiently.' Linda Loxton 'Gordhan Delighted with SARS Clean Bill of Health' *Business Report* (24 September 2004).
- 42 After receiving two consecutive years worth of disclaimers by the Auditor-General in reports to Parliament, and in the face of mounting evidence that the Unemployment Insurance Fund had failed to comply with the PFMA, the Minister of Labour committed himself to the appointment of managers who would ensure future compliance with the PFMA. See Christine Terrblanche 'Minister under Pressure over UIF' *The Mercury* (20 September 2004). Similarly, a forensic audit by the Auditor-General that revealed millions of rands in losses at Transnet due to an irregular scrap metal contract that had by-passed normal procurement procedures was hailed by SCOPA — which had called for the investigation — as evidence that corruption could be effectively rooted out of government. See 'Audit Finds Transnet Lost Millions through Irregular Scrap Metal Deal' *Business Report* (18 July 2003).
- 43 See *Ritchie & Another v Government, Northern Cape, & Others* 2004 (2) SA 584 (NC) at paras 21 – 23 (Court held that that the state's decision to fund the private defamation actions of public officials was an internal provincial government matter not susceptible of review by the courts, and that the matter fell within the domain of the Auditor-General for a determination as to whether the expenditure had been authorized.)

particular complaint justifies such an intervention.<sup>46</sup> The Arms Deal Report issued by the Auditor-General, the Public Protector and the National Director of Public Prosecutions offers a portrait of the kinds of challenges that the Auditor-General faces when wielding his investigatory powers in the face of stiff political opposition.<sup>47</sup>

The Auditor-General was involved in the 'arms deal' procurement process from the very beginning. It had recognized the procurement of the Strategic Defence Package ('SDP') as an area fraught with risk as early as November 1998. However, nearly two years elapsed before the Department of Defence ('DoD') and the Parliamentary Standing Committee of Public Accounts ('SCOPA') agreed to a special review of the procurement process.<sup>48</sup> The Auditor-General, the Public Protector and the National Director of Public Prosecutions were then given the authority to conduct a joint investigation.<sup>49</sup> The Auditor-General compared the actual procurement process with the approved process, analyzed possible conflicts of interest and interrogated the reported cost and the real cost of the arms deal to the state.

---

44 The Office of the Auditor-General has, in the recent past, been quite critical of the government's lassitude with respect to the Office's reports of egregious, and often willful, maladministration by national and provincial departments, municipalities and public entities. In its *General Report 2000*, the Office wrote:

The extent to which audit information effectively contributes toward accountability and transparency not only depends on the quality of the information provided in the various audit reports. It is also critically dependent on the success with which such information is further processed and the response it evokes in the concluding phase of the accountability process. In this respect the role of the public accounts committee is vital. . . . The Standing Committee on Public Accounts (SCOPA) is the mechanism through which the National Assembly exercises oversight over the receipt and expenditure of public money. The extent to which the committee appreciates the issues raised in the respective audit reports and pursues them through effective oversight practices will determine whether appropriate and sufficient pressure will be brought to bear on the various accountable authorities. . . . The committee also did not always succeed in following up unresolved matters. Given the reconsideration of roles and processes, to a large extent brought about by the Public Finance Management Act, it may be prudent to examine the weaknesses of SCOPA's post-review processes in order to ensure that its recommendations have the desired impact on financial management in the public sector at national level. As it will be in the interests of accountability and useful for the committee and the public, and given the lack of resources of the committee, I shall in future report periodically on the status of implementation of the committee's recommendations. This is in line with international practice

Office of the Auditor-General *General Report of the Auditor-General: Year Ended 31 March 2000* (2001) 10. Recent reports in the media suggest that that SCOPA's post-review process is improving as a result of the pressure applied by the Auditor-General. See Linda Loxton 'Gordhan Delighted with SARS Clean Bill of Health' *Business Report* (24 September 2004)(After years of qualified reports, and criticism from SCOPA, SARS received an unqualified financial audit.) However, the ANC's decision to 'break with tradition and permanently take over the chair' of SCOPA — thus departing from Commonwealth practice of having the chair come from the ranks of an opposition party — have led to inevitable questions over whether SCOPA possesses sufficient independence to operate as a meaningful check on executive power. See Christine Terrblanche & Mzwakhe Hlangani 'Opposition Dismay as ANC Takes Over Control of SCOPA' *Cape Times* (10 May 1994); Sam Sole 'The State of Corruption and Accountability' in John Daniel, Roger Southall & Jessica Lutchman (eds) *State of the Nation: South Africa 2004–2005* (2005) 107 ('Party heavies were deployed to lay down the party line in SCOPA, thus destroying the tradition of non-partisanship the committee had built up.') A recent report by the United Nations Report on Drugs and Crime underwrites the Auditor-General's scepticism about the capacity of Parliament to rein in errant members of the executive and officials in the state apparatus. See *United Nations Report on Drugs and Crime Country Corruption Assessment Report: South Africa* (2003)(*UN Corruption Report*), available at <http://www.info.gov.za/otherdocs/2003/corruption.pdf> (accessed on 9 March 2009)(*'Members of Parliament, who are aware of corruption within the ranks, feel they are supposed to act but, all too often, when a corrupt official is exposed, party discipline is imposed.'*)

The Auditor-General's role in the arms deal investigation led to litigation between the Auditor-General and CCII Systems (Pty) Ltd ('CCII').<sup>50</sup> After being

deselected during the tender process, CCII filed a specific complaint with the joint investigative team. Upon release of the Joint Investigative Team's Report ('JIT Report'), CCII brought suit against the Auditor-General.

CCII had, during the investigation, contended that the product of the contractor chosen for the SDP was inferior to that of CCII, that CCII's competitors were given unfair access to the specifications of CCII products and price structure and that the tender process was rife with irregularities and conflicts of interest.<sup>51</sup> The Joint Investigative Team largely agreed with CCII's contentions. It found that: the list of nominated suppliers did not satisfy the requirement of a 'fair and transparent procurement practice';<sup>52</sup> proper tender procedures were not followed; a 'probable conflict of interest amounted to non-compliance with good procurement practice';<sup>53</sup> and CCII's bid was solicited solely to lower its competitors' bids.<sup>54</sup>

---

46 PAA s 5(1)(d). These investigations are limited to the bodies identified in PAA ss 4(1) and 4(3). See, eg, *Nextcom (Pty) Ltd v Funde No & Others* 2000 (4) SA 491 (T) (Regarding a dispute over the tender process for, and the subsequent award by the government of, a 3rd cell-phone operator license, a report by the Auditor-General to Parliament expressed concern about the SATRA CEO's apparent conflict of interests with respect to the tender process.)

47 During the period 1995–1996, the Ministry of Defence engaged in a strategic defence review. The review analyzed current stock and existing shortcomings in the equipment of the South African National Defence Force ('SANDF'). The Department of Defence developed, contemporaneously, four different force design options. The Strategic Defence Package approved by Parliament served as the template for the SANDF's acquisition and procurement process. Charges of corruption and tainted tenders have plagued the 'arms deal' for almost a decade. *Strategic Defence Packages Joint Report* (2001), available at <http://www.agsa.co.za> (accessed on 15 September 2005) ('SDP Joint Report').

48 *Special Review by the Auditor-General of the Selection Process of Strategic Defence Packages for the Acquisition of Armaments at the Department of Defence* RP161/2000 (2000), available at [http://www.agsa.co.za/Reports/special/Special/RP161\\_2000.pdf](http://www.agsa.co.za/Reports/special/Special/RP161_2000.pdf) (accessed on 15 September 2005). It was not until 28 September 1999 that the Minister of Defence gave authorization for the SDP audit. The report was signed and finalized on 15 September 2000.

49 The Heath Special Investigation Unit (SIU) did not form part of the joint task force. In January 2001, long after the fact, the President made his reasons for this decision public. He stated that, given the findings of the Constitutional Court in *South African Association of Personal Injury Lawyers v Heath & Others*, the SIU could not, as it was then constituted, contribute meaningfully to an independent investigation of the SDP. 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) (Court held that a judge cannot head a special investigation unit).

50 *CCII Systems (Pty) Ltd v SA Fakie NNO & Others (Open Democracy Advice Centre, as Amicus Curiae)* 2003 (2) SA 325 (T) ('CCII').

51 See *SDP Joint Report* (supra) at para 11.3.

52 *Ibid* at para 11.11.2.3.

53 *Ibid* at paras 11.11.3.4–5.

However, rather than recommend that the DoD initiate a new tender process, the joint report advised that systems be put in place to ensure that such irregularities should not recur.<sup>55</sup> The host of documented irregularities throughout the report married to the Joint Investigative Team's refusal to implicate the government in wrongdoing 'severely compromised' the credibility of the each member of the Joint Investigative Team ('JIT').<sup>56</sup>

CCII was, quite naturally, not satisfied with the purely prospective nature of the remedies recommended in the joint report. In anticipation and in furtherance of litigation to overturn the tender award, CCII applied to the Auditor-General, in terms of s 18 of the Promotion of Access to Information Act ('PAIA'),<sup>57</sup> for access to: (a) all draft versions of the report; (b) all audit files concerning the SDP for the period 1 January 1998 to 20 November 2001; (c) all correspondence concerning the SDP between the Auditor-General and the DoD for the period 1 January 1998 to 20 November 2001; (d) all the documents concerning the SDP between the Auditor-General and the Public Protector, again from 1 January 1998 to 20 November 2001.<sup>58</sup> The Auditor-General denied the request on grounds ranging from an assertion that the document production process was so onerous that it would divert the Auditor-General from its core business, to an unsubstantiated contention that the disclosure of some documents would violate third party confidentiality agreements, to the rather pedestrian defence that disclosure of some documents would prejudice

---

OS 12-05, ch24B-p15

the defence and security of the Republic.<sup>59</sup> The CCII Court found baseless the Auditor-General's blanket rebuff to the PAIA request. Hartzenberg J held that, under PAIA s 81, the onus lay on the Auditor-General to identify the specific documents it wished to withhold and to describe the basis upon which it claimed protection.<sup>60</sup> The Auditor-General's 'overwhelming volume' approach to this document request ran counter to the more nuanced assessment of privilege required by PAIA. As a result, Hartzenberg J held that Auditor-General was obliged to produce the relevant documents and offer reasons for the redaction of or refusal to produce any

---

54 Ibid at paras 11.11.6.2-3.

55 Ibid at Chapter 14.

56 Sole (supra) at 86. See also Gavin Woods 'A Critique of the JIT Report' available at [http://www.armsdeal-vpo.co.za/special\\_items/reports/accountability\\_failure.html](http://www.armsdeal-vpo.co.za/special_items/reports/accountability_failure.html) (accessed on 9 March 2009).

57 Promotion of Access to Information Act 2 of 2000.

58 CCII (supra) at para 3.

59 See CCII (supra) at para 4. Perhaps most disappointing to supporters of the Auditor-General's efforts is the willingness to fall-back on this standard refrain of government actors when it comes to non-compliance with statutes and regulations designed to facilitate good governance: it is too time-consuming. See *UN Corruption Report* (supra)(UNODC study finds '[s]erious weaknesses and shortcomings in the capacity and the will of public sector bodies to implement and to comply with the laws. For example, certain public bodies view some of the legislation — (eg, Access to Information) — as too demanding of resources.')

60 CCII (supra) at paras 16-17.

document.<sup>61</sup> The Auditor-General's role as a government watchdog meant that it had to take extraordinary steps to ensure that it was viewed as impartial and independent — even if that meant the Auditor-General was obliged to employ extra staff.<sup>62</sup>

Despite the rather disconcerting conclusions reached by the Auditor-General with respect to an especially damning body of evidence, the Joint Investigative Team Report led, almost inexorably, to the conviction of Shabir Shaik on three counts of corruption and the axing of former Deputy President Jacob Zuma. Other ad hoc investigations conducted by the Auditor-General have produced probes of correctional services officials by the National Prosecuting Authority,<sup>63</sup> the revocation of the Government Printing Works' overdraft facilities at the Reserve Bank because they contravened national treasury regulations,<sup>64</sup> the identification of several thousand senior and junior officials who had failed to declare their interests in firms doing business with their departments,<sup>65</sup> the mooted of possible criminal charges against a former advisor to the Premier of Mpumalanga<sup>66</sup> and serious and as yet unresolved allegations of fraud within the Department of Justice and Constitutional Affairs.<sup>67</sup> As we

---

OS 12-05, ch24B-p16

noted near the outset, the PAA effectuates such investigations by granting the Auditor-General quite extensive powers of search and seizure.<sup>68</sup>

---

---

61 Ibid at para 22.

62 Ibid at para 17. In addition, Hartzenberg J suggested that given the importance of transparency and accountability in our constitutional democracy, 'one of the objects of [PAIA] must be that citizens can get information regarding wrongs perpetrated against them to enable them to hold the wrongdoers accountable in a court of law.' Ibid.

63 See Office of the Auditor-General *Report on Findings Arising from a special investigation into Alleged Irregularities among senior officials of the Department of Correctional Services* RP 123/1999 (1999); Sheena Adams 'Scorpions Probe Medical Aid Fraud' *The Mercury* (5 October 2004).

64 See Frank Nxumalo & Wiseman Khuzwayo 'State Printer Castigated for Unauthorized Overdraft' *Business Report* (23 January 2004).

65 See Linda Loxton 'Fakie Fingers the Government's Black Sheep of Financial Management' *Business Report* (20 January 2005).

66 See Office of the Auditor-General *Special Report on Donor Funding and the Remuneration of a Former Adviser in the Office of the Premier of Mpumalanga* PR 123/1999 (1999).

67 See Office of the Auditor-General *Report on the Special Review of the Deposit Account Administrated by the Department of Justice and Constitutional Development & Related Matters* RP 196/1999 (1999).



---

68 The Auditor-General may obtain a warrant from a judge or a magistrate to enter and to search the property, premises or vehicle of a person for documents, books or written or electronic records or information or an asset, if the Auditor-General needs this record to properly conduct a specific audit, and the relevant record is hidden or kept on such property, premises or vehicle. See PAA s 15(1)(a)-(b)(When the Auditor-General is performing an audit he will 'have unrestricted access to document, book or written or electronic record or information of the auditee or which reflects or may elucidate the business, financial results, financial position or performance of the auditee; or any of the assets of or under the control of the auditee'.) See also PAA s 16(1)(a); *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204, 220 (T)(Search and seizure that invades privacy must be endorsed by an independent authority, i.e. in terms of a warrant.) During such a search the Auditor-General may also search any person on the premises. While this grant of power may limit rights to privacy, property and just administrative action, it would appear to satisfy the three primary constitutional requirements for search and seizure provisions: (1) the authorizing provision properly defines the scope of the power; (2) an independent authority issues the warrant; (3) the warrant is based on evidence taken under oath that there are reasonable grounds for conducting the search. See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 20 (No search and seizure will be constitutionally justifiable in the absence of a reasonable suspicion); *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC); *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC); *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C).