IFAISA
ACCOUNTABILITY NOW

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The Honourable Minister of Finance
Mr Nhlanhla Musa Nene
40 Church Square
Old Reserve Bank Building
2nd Floor, Pretoria
0002
By Email

24 April 2018

Dear Minister Nene,

**Re: Finding funding for the education sector**

1. We are a small but determined NGO which interests itself in matters in which it is necessary to exact accountability and to promote responsiveness to the needs of the people. Some of our critics label us "relentless"; we prefer to think that we are steadfastly guided by the principles and values of the Constitution. If you so desire, you can find more information about our activities on our website: www.accountabilitynow.org.za.
2. We write to you to explore the possibility of persuading you and your colleagues in cabinet that the current woes of the fiscus and the concomitant shortfall of funding for delivery of services promised in the Bill of Rights need to be addressed urgently and with some lateral thinking too.

   In particular, we are concerned that not enough funding is finding its way to the education system. The recently published article by academic Nic Spaull refers: (https://www.businesslive.co.za/bd/opinion/2018-04-16-basic-education-thrown-under-the-bus--and-it-shows-up-in-test-results/.)

   The magnitude of the funding required to enable the state to provide fee-free education to undergraduates is particularly daunting, but the unheralded need to address the situation regarding early childhood development is surely even more

pressing as one of our directors has pointed out in response to the article by Spaull: (https://www.businesslive.co.za/bd/opinion/letters/2018-04-20-letter-baby-elephant-in-the-room/.

3. The amount of the funding needed is admittedly huge, but the Constitution requires that the state must respect, protect, promote and fulfil the rights to basic and further education in terms of section 29(1) of the Bill of Rights read with section 7(2) thereof.
4. The stark choice facing cabinet is to continue to "throw basic education under the bus" as Spaull puts it, or, more properly, to take reasonable measures to address the obligations of the state as regards the provision of education and other services. We want to be so bold as to suggest certain "reasonable measures" that would realise sufficient funding to address the current conundrum attributable to funding shortfalls.
5. South Africa is a member of BRICS and enjoys good relations with India.
6. One possible way of finding much needed funding within BRICS is that India is in need of fighter jets and submarines for its defence requirements. These facts have been reported in the Economic Times on 18 April as follows: https://economictimes.indiatimes.com/news/defence/sweden-india-agree-to-strengthen-cooperation-on-defence/articleshow/63803516.c
   This good news presents South Africa, in the spirit of BRICS, with the prospect of selling its excess armaments to India.
7. South Africa has fighter jets and trainers, acquired in the 1999 arms deal with British Aerospace, that are in excess of our current needs and languishing in mothballs or "protective maintenance" as the Air Force delicately puts it. There is currently insufficient budget to fly all of the aircraft and we have too few trained pilots to use them all and too few suitably qualified mechanics to service them all. They have never been used to defend the country and the need to keep them all is simply not rationally justifiable.
8. As you may know, the government has been sued by the Quaker Peace Centre for the invalidation or, alternatively, cancellation of the deal with BAe as can been seen from the combined summons available on our website here: https://accountabilitynow.org.za/summons-particulars-claim-bae-arms-deal/.
9. The action is currently bogged down in preliminary procedural skirmishing initiated by those instructed by the Zuma government to defend the matter. Their argument is that, in terms of the Promotion of Administrative Justice Act, the QPC ought to have proceeded by way of review, not action. You will know that the arms deals were all done before PAJA was placed on the statute book. It would appear that the point taking is designed to delay or defer dealing with the merits of the claims brought by the QPC. The instruction to defend the matter was given during former President Zuma's administration. It may be timely to reconsider government's position, given that he is now facing charges of corruption flowing from the arms deals.
10. There are three separate and self-standing causes of action which the QPC relies on in its summons. The first is that procurement requirements of the Constitution were not complied with in the acquisition, particularly in that the then Minister of Defence gave an instruction to adopt a "visionary approach" and to leave cost out of consideration. This stratagem is a clear violation of section 217 of the Constitution in that competitive and cost effective procurement is part of our supreme law. It is also arguable that the largely illusory "off-sets" in the deal are also inconsistent with the constitutional criteria prescribed in the section. The well-documented modus operandi used by Joe Modise renders the deal invalid. The second

cause of action is that your predecessor, Trevor Manuel, was not empowered by the old Exchequer Act, under which he purported to act, to borrow the funds needed for the transaction thus rendering the loan with Barclays Bank PLC invalid. The final cause of action is that the deal should be cancelled because it is tainted by corruption and fraud. The deal envisages pre-estimated damages of 5% of the contract price in such an event.

11. Whether or not there is merit in the claims (and the QPC has taken advice from senior counsel before embarking on the litigation) it is plain that the country has many more arms than it needs. This also applies in respect of submarines and warships. Their acquisition is open to attack in the same way as the BAe deal has been assailed by the QPC. More suitable ships could be built in the country thus creating jobs and promoting our ship-building industry. By all accounts the warships acquired are not fit for purpose given the sea conditions around the "Cape of Storms" and the actual defence needs of the country.
12. It is surely not beyond the wit of government to dispose of the excess aircraft to India in a manner and on terms that mollify the QPC. Similar deals could be done with the navy, or, the deals in respect of warships and submarines (and indeed the aircraft) could simply be invalidated or cancelled on the basis of the kind of claims brought by the QPC, with the arms being returned to the sellers and the prices paid, including interest, being refunded to the fiscus. If executed, this process would see a flow of in excess of R 70 billion into state coffers, which is a good start on securing the amount of $100 billion targeted by his "investment lions" in the current investment drive initiated by the President. Part of the beauty of this approach is that all bribes, illegal commissions and unauthorised facilitation fees have to be refunded to government by the sellers of the arms acquired. The arms deals page of our website is replete with information on undoing the arms deals.
13. Please take up our suggestions with cabinet. If you need more information to do so, we are willing to assist within the limits of our capacity. At this stage it is probably helpful to make available to you an instructive opinion which Geoffrey Budlender SC wrote in 2012 and a copy of the Barclays Bank PLC loan agreement. They are attached. The fact that the latter reflects that English law governs the loan does not detract from the illegality of the unauthorised borrowing it constitutes. We also point out that the arms deals were concluded before the PFMA became law. Under the PFMA the loan would have had to be authorised by a special resolution of parliament. This resolution was not passed or even requested because the loan was negotiated, by executive choice, while the old Exchequer Act was still in force. That Act does not authorise any borrowing for procurement purposes from a foreign bank, hence the illegality of the signature of Trevor Manuel on page 47 of the loan which illegality renders it invalid. Given the values of openness and accountability set out in section 1 of the Constitution, we intend to make this letter available to the media.

Yours in accountability,

Gail Washkansky
Operations Officer