



PUBLIC PROTECTOR  
SOUTH AFRICA

*Accountability. Integrity. Responsiveness. Justice. Good Governance*

## **STATEMENT ON THE TERMS OF REFERENCE FOR THE COMMISSION OF INQUIRY INTO STATE CAPTURE**

1. The lack of resources and inadequacy of the allocated funds for the investigation of the state capture allegations was at the core of the decision by the former Public Protector to refer all the state capture allegations to be investigated by a properly resourced and funded judicial commission of inquiry. The State of Capture report was taken on judicial review by the President and I opposed the President's application. I also filed a counter-application, wherein I requested the court ensure that the office of the Public Protector is properly resourced, should the report be review, set aside and remitted back to Office of the Public Protector. I indicated, in the court papers that the office is under-resourced and underfunded and therefore, will not have capacity to deal with the state capture allegations.
2. I issued a statement on the 10 January 2017. This statement has been misinterpreted in various media reports and by commentators. The publication of the statement was intended to suggest that all related allegations of state capture are investigated by the commission and that the commission's work is not limited to those identified for investigation in the state of capture report.
3. As you may be aware, the State of Capture report was issued in October 2016, with the following remedial action, which in terms of the report, I must monitor the implementation thereof:-

- 3.1 The President to appoint, within 30 days, a commission of inquiry headed by a judge solely selected by the Chief Justice who shall provide one name to the President. (NB- The President complied with this remedial action on Tuesday, January 9, 2018)
- 3.2 The National Treasury to ensure that the commission is adequately resourced.
- 3.3 The judge to be given the power to appoint his/her own staff and to investigate all the issues using the record of this investigation and the report as a starting point.
- 3.4 The commission of inquiry to be given powers of evidence collection that are no less than that of the Public Protector.
- 3.5 The commission of inquiry to complete its task and to present the report with findings and recommendations to the President within 180 days. The President shall submit a copy with an indication of his/her intentions regarding the implementation to Parliament within 14 days of releasing the report.
- 3.6 Parliament to review, within 180 days, the Executive Members' Ethics Act to provide better guidance regarding integrity, including avoidance and management of conflict of interest. This should clearly define responsibilities of those in authority regarding a proper response to whistleblowing and whistle-blowers. Consideration should also be given to a transversal code of conduct for all employees of the State.
- 3.7 The President to ensure that the Executive Ethics Code is updated in line with the review of the Executive Members' Ethics Act.
- 3.8 The Public Protector, in terms of section 6 (4) (c) (i) of the Public Protector Act, brings to the notice of the National Prosecuting Authority and the DPCI those matters identified in this report where it appears crimes have been committed. NB: this remedial action is in the process of implementation hence the National Prosecuting Authority's (NPA) **Asset Forfeiture Unit** to move to obtain a High Court order to seize and preserve assets worth R1.6-billion from McKinsey and Trillian as a result of a controversial deal involving state owned power company, Eskom.

4. The remedial action on paragraph 3.2 to 3.7 has not been implemented and I have an obligation to ensure successful implementation thereof, in terms of paragraph 9.1 of the State of Capture report. Issues such as the power to appoint own staff and to collect evidence are some of the issues which need to form part of the Terms of Reference and it is the Public Protector who has an obligation to ensure the successful implementation of all the remedial action. Accordingly, and in compliance with my monitoring obligation, I have to ensure that all the allegations of state capture, as highlighted below, are properly investigated by the Commission.
5. This statement is intended to clarify the views expressed above and the Public Protector's position with regard to allegations of state capture.
6. Based on an analysis of the complaints received at the time, the state capture report dealt with the **alleged breach of the Executive Member Ethics Act, 1998 and awarding of contracts by certain organs of state to entities linked to the Gupta family**. The following 12 issues were identified as relevant for investigation (see page 9 of the State of Capture Report):-
  - 6.1 Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be **involved in the process of removal and appointment of the Minister of Finance in December 2015;**
  - 6.2 Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to engage or **be involved in the process of removal and appointing of various members of the Cabinet;**
  - 6.3 Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, **to be involved in the process of appointing members of Boards of Directors of SOEs;**
  - 6.4 Whether President Zuma has enabled or turned a blind eye, in violation of the Executive Ethics Code, to alleged corrupt practices by the Gupta family and his son **in relation to allegedly linking appointments to quid pro quo conditions;**
  - 6.5 Whether President Zuma and other Cabinet members improperly **interfered in the relationship between banks and Gupta owned companies thus giving**

**preferential treatment to such companies on a matter that should have been handled by independent regulatory bodies;**

- 6.6 Whether President Zuma improperly and in violation of the Executive Ethics Code exposed himself to any **situation involving the risk of conflict between his official duties and his private interest or used his position or information entrusted to him to enrich himself and or enabled businesses owned by the Gupta family** and his son to be given preferential treatment in the award of state contracts, business financing and trading licences; and
- 6.7 Whether any **state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the appointment or removal of Ministers and Boards of Directors of SOEs;**
- 6.8 Whether any state functionary in any organ of state or other person acted unlawfully, **improperly or corruptly in connection with the award of state contracts or tenders to Gupta linked companies or persons;**
- 6.9 Whether any state functionary in any organ of state or other person acted unlawfully, **improperly or corruptly in connection with the extension of state provided business financing facilities to Gupta linked companies or persons;**
- 6.10 Whether any state functionary in any organ of state or other person acted unlawfully, **improperly or corruptly in connection with exchange of gifts in relation to Gupta linked companies or persons;**
- 6.11 Whether anyone was prejudiced by the conduct of President Zuma; and
- 6.12 Whether any person/entity was prejudiced due to the conduct of the said state functionary or organ of state.
7. On paragraph 4.4, page 48 of State of Capture report, the following SOEs were implicated in alleged impropriety carried in media reports:
- 7.1 Eskom SOC Limited ("Eskom");

- 7.2 Transnet SOC Limited (“Transnet”);
- 7.3 Denel SOC Limited (“Denel”);
- 7.4 South African Airways (“SAA”); and
- 7.5 South African Broadcasting Corporation (“SABC”).
8. The following issues, though related to those investigated, were not covered by the investigation and the State of Capture report expressly reserved them for the next phase of the investigation into allegations of state capture.
- 8.1 Whether any state functionary in any organ of state or other person acted unlawfully, **improperly or corruptly in connection with exchange of gifts in relation to Gupta linked companies or persons**.( paragraph 11 on page 23, paragraph 6.4 on page 337 and paragraph 7.10 on page 351 of the report);
- 8.2 Investigation into Transnet, These allegations are detailed in page 54, paragraph 4.14 of the state of capture report;i.e contracts to provide support to Transnet to increase freight business, contract to provide professional services to Transnet in renegotiation of the Kumba Iron Ore and the role of Regiments Capital and Trillian Capital partners in the procurement process of Transnet freight locomotives
- 8.3 With regards to allegations raised against Denel, These allegations are detailed on page 60, paragraph 4.20 of the state of capture report. *the Public Protector investigated contracts concluded between Denel and VR Laser Services however, the investigation into Denel was expressly reserved to form part of the next phase of the investigation( see page 66, paragraph 4. 21 of the state of capture report);*
- 8.4 Allegations regarding SAA that it had spent **R9.4m on purchasing about six million copies of the New Age newspaper**, which is owned by the Gupta family and the newspaper was in circulation for just three months before SAA started buying the New Age. This allegations was also expressly reserved to form part of the next phase of the investigation( see page 67, paragraph 4. 25 of the state of capture report);

- 8.5 The investigation into **SABC**, regarding the contract(s) **awarded to the New Age newspaper and/or TNA Media by the SABC**, was expressly reserved for investigation in the next phase of the investigation. ( see page 68, paragraph 4. 30 of the state of capture report);
- 8.6 The conduct of the **Department of Mineral Resources** with **regards to the administration of the rehabilitation fund and the conduct of the Bank of Baroda in relation to the purchase of all shares in OCH by Tegeta** and the rehabilitation fund was not fully investigated and was expressly reserved for the next phase of investigation. Page 336 and 337 of the report.
9. Subsequent to the publication of the State of Capture report, the office received several complaints, which also alleged state capture. These complaints are interrelated with issues identified as relevant for investigation in the state of Capture report and those reserved for investigation in the next phase. The additional state capture complaints received are:-

#### **9.1 ESKOM HOLDINGS SOC LTD**

- a) Allegations that Mr Matshela Koko channelled contracts to a company partly owned by his step daughter;
- b) Allegations that Matshela Koko leaked a legal opinion to the Guptas;
- c) Failure of corporate governance by Eskom's board;
- d) Allegations of Minister Lynne Brown's failure to exercise the required executive oversight over Eskom, its board and management;
- e) Allegations by former Minister of Mineral Resources, Ngoako Ramatlhodi, that former Eskom CEO, Mr Brian Molefe and former Eskom Board chairperson, Ben Ngubane pressurised him to help the Guptas take over Glencore's coal mine in 2016;

#### **9.2 TRANSNET SOC LTD**

- a) Allegations regarding kickback agreement totalling R5.3 billion, regarding the procurement of locomotive at Transnet;
- b) The role of then Minister of Public enterprises Malusi Gigaba in the appointment of Iqbal Shama and Mr Molefe to Transnet board of directors, chair of the board acquisition and disposal committee, and senior management respectively;
- c) Role players in the procurement process for freight locomotives in July 2012;

9.3 In view of the new allegations published in different media, i.e. "*Gupta emails leaks*", I propose that the following allegations should also form part of the commission's Terms of Reference:

- a) The role of the Guptas with regard to the appointment Minister Gigaba as Minister of finance;
- b) Allegations that Guptas received high-level confidential information from then Minister of communications, Faith Muthambi;
- c) Allegations that the Guptas paid for luxury travel by several members of the executive and senior management and board members of Eskom, Transnet and Denel; and
- d) Allegations that at least two immigration officials (Gideon Christians and Ms Munyadziwa) were specially positioned in India by them Minister of Home affairs, to assist the Gupta associate Mr Ashu Chawla to the benefit of Gupta-owned businesses, liaising through Mr Major Kobese (a music producer and director in the foreign office of the Department of Home Affairs.

10. As indicated on page 354, paragraph 8.6 of the report and confirmed by the Court (paragraph 4.1 of the judgment) in the State of Capture report review judgment, Deputy Chief Justice Zondo must investigate all the issues using the record of the investigation and the State of Capture report **as a starting point**.

11. My view is that the report and judgment do not limit the issues to be investigated, but provide the starting point for the commission.

12. It is my further view that all the issues, as identified for investigation, reserved for investigation on the next phase and any other related issues to those identified and reserved, as reported in the media, (so-called "**Gupta leaks**") need to form part of the Commission's Terms of Reference.
  
13. Nowhere in the statement I issued on 10 January 2018 did I say that there is a need for historical investigation dating back to 1994. Broadening the scope is **related** to the issues identified for investigation in the State of Capture report. Though some of the contracts investigated in the state of capture report dates back 30 years back or more for example in Eskom therefore during the investigation it would be critical to determine what happened, what should have happened and what prescripts should have been complied with.
  
14. Lastly, my office has not been properly resourced, despite the important role it plays in South Africa. The Public Protector remains one of the most independent corruption busters and Chapter Nine institutions. However, government has failed to properly resource this institution. In the current financial year, despite the fact that I have requested and motivated for a budget of at least R800 million, the National Treasury has cut this institution's budget by R8 million. As a result of the above and considering the nature of the issues to be traversed and available resources, I will not be able to promptly investigate all the allegations of state capture, as reported after the publication of the state capture report.

**Issued on behalf of the Public Protector, Adv. Busisiwe Mkhwebane, by;**

Ms Cleopatra Mosana

Spokesperson

**PUBLIC PROTECTOR SOUTH AFRICA**

Cell: 072 321 7585

Tel: 012 366 7006

Email: [cleopatram@pprotect.org](mailto:cleopatram@pprotect.org)

Website: [www.publicprotector.org](http://www.publicprotector.org)



@PublicProtector



Public Protector South Africa