REPORT IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 23 OF 1994

PUBLIC PROTECTOR
SOUTH AFRICA

REPORT No: 42 of 2022/23

ISBN No: 978-1-998969-43-2

INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE EXECUTIVE ETHICS CODE BY THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA, MR MC RAMAPHOSA

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LIST OF ACRONYMS AND ABBREVIATIONS

ANC	African National Congress
Constitution	The Constitution of the Republic of South Africa No. 108 of 1996
DPCI	Directorate of Priority Crime Investigations
Endumeni	Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)
EMEA	Executive Members Ethics Act No. 82 of 1998
Executive Ethics Code	The Executive Ethics Code 2000 published by proclamation in Government Gazette: No. 21399 Notice No. 41 Regulation 6853
IC	ANC Integrity Committee
IPID	The Independent Police Investigative Directorate
NEC	The National Executive Committee
PPA	Public Protector Act No. 23 of 1994
PRECCA	Prevention and Combating of Corrupt Activities Act No. 12 of 2004
PPSA	Public Protector South Africa
Public Protector Rules	Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, (as amended) 2018
President	President of the Republic of South Africa, Mr MC Ramaphosa
SAPS	The South African Police Service
SCOPA	Standing Committee on Public Accounts
SSA	State Security Agency
UNCAC	United Nations Convention Against Corruption, 2003

1. INTRODUCTION

1.1 This is a Closing Report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution), and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act) and Rule 40(b) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018*[1] (Public Protector Rules) as promulgated under section 7(11) of the Public Protector Act.

1.2 The report relates to an investigation in connection with allegations that the President has violated the Executive Ethics Code 2000 published by proclamation in Government Gazette: No 21399 Notice No 41 Regulation 6853 ("Code"), in that he failed to inform and provide evidence to all relevant investigative authorities regarding the alleged misuse of state funds for party activities in order for them to investigate.

1.3 The report is submitted to the following persons in terms of sections 8(1) and 8(3) of the Public Protector Act:

1.3.1 The Speaker of the National Assembly, Ms Nosiviwe Mapisa-Nqakula;
1.3.2 The President of the Republic of South Africa, Mr CM Ramaphosa;
1.3.3 The Complainant, Mr Mervyn Dirks;
1.3.4 The Complainant, Mr Ellias Muller; and

2. THE COMPLAINT

2.1 The complaint was lodged with the Public Protector in terms of section 4(1) of the Executive Members' Ethics Act, 82 of 1998 (EMEA) on 26 January 2022 and 7

[1] Published under Government notice No 945, Government Gazette 41903 of 14 September 2018 and Amended in Government Notice No 1047, Government Gazette 43758 dated 2 October 2020.

February 2022 respectively by Mr Mervyn Dirks, MP ("Complainant") in connection with allegations that the President of the Republic of South Africa, Mr MC Ramaphosa ("the President") has violated the Executive Ethics Code 2000 published by proclamation in Government Gazette: No 21399 Notice No 41 Regulation 6853 ("Executive Ethics Code") in that he failed to inform and provide evidence to all relevant authorities that he had knowledge and evidence of misuse of state funds for certain political activities within the African National Congress ("ANC"). In his complaint, the Complainant alleged *inter alia* that:

2.2.1. As a public representative and a member of the National Assembly, he took an oath of office and therefore has the responsibility and duty of holding the Executive and the President accountable;

2.2.2. During December 2021, he requested the Standing Committee on Public Accounts ("SCOPA") to summon the President to answer questions and be held accountable for statements relating to improper, if not unlawful, utilisation of public funds during the 54th ANC National Conference held in 2017;

2.2.3. His letter to SCOPA was predicated on the leaked audio recording widely circulated in December 2021 wherein the President is heard saying that he was aware of how public funds were used for certain political campaigns within the ANC; and

2.2.4. The Public Protector should investigate the possible breach of the Executive Ethics Code by the President because "*The President in the leaked audio, is clearly heard saying that he is aware of the alleged misuse of public funds and therefore failing to report such constitutes not only gross misconduct but also (sic) violation of the oath of office that the President took whilst also being in conflict with the provisions of the Prevention and Combatting of Corruption legation*." *(SIC).*

2.2.5. On 2 February 2022, Mr Ellias Muller also lodged the same complaint with the PPSA. He was informed through a letter dated 28 February 2022 that his complaint was already the subject of an investigation under EMEA based on a complaint already lodged already Mr Mervyn Dirks.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2. Section 182(1) of the Constitution provides that:

"The Public Protector has power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,
(b) to report on that conduct ; and
(c) to take appropriate remedial action".

3.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

3.4. Section 4(1)(a) of EMEA, provides *inter alia* that, the Public Protector *"…must investigate in accordance with section 3, an alleged breach of the Code of Ethics on receipt of a complaint by the President, a Member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister…"*

3.5. This complaint was lodged by a Member of the National Assembly against the President and therefore the complaint fell within the purview and jurisdiction of matters that should be investigated by the Public Protector.

3.6. Section 7(1)(b)(i) of the Public Protector Act indicates that the format and the procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case. In line with this provision, the issuing of a subpoena to the ANC was a chosen and a preferred investigation option, method or format used by the Public Protector to gather from all identified sources information that could have a bearing on the preliminary investigation of this matter as envisaged in the *Mail & Guardian*[2] judgment.

3.7. Section 7(4)(a) of the Public Protector Act, 1994 provides that, "*for the purposes of conducting an investigation the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to provide any document in his or her possession or under his or her control which has a bearing on a matter being investigated, and may examine such person*."

3.8. Section 7(4)(b) of the Public Protector Act provides that "*the Public Protector or any person duly authorised thereto by him or her may request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being or to be investigated*."

3.9. Guided by the investigative powers as they flow directly from the preceding legal provisions, a subpoena was served to the ANC as the Public Protector reasonably believed that the ANC was in possession of information with a bearing on this investigation. However, it is apposite to emphasise *en passant* that a subpoena issued by the Public Protector does not always denote that the person(s) thus

[2] *The Public Protector v Mail & Guardian and Others* (422/10)(2011)ZA SCA108.

served are the subject matter of the investigation. At times, it could simply be that they are merely required by way of a subpoena to share information which may have a bearing on the investigation at hand, either as interested parties or as people in possession or control of such information.

3.10. The ANC, in its response to the Public Protector, sought to argue that the investigation of the Public Protector in this matter was unlawful and thus requested the Public Protector to clarify her powers or jurisdiction in this regard. On the other hand, the President did not deny his utterances on a leaked audio which he made during the ANC's NEC meeting. As a result, it was appropriate for the Public Protector to request the original audio or the minutes of the relevant meeting from its custodian namely, the ANC. This request should not be misconstrued to imply that the ANC was under investigation by the Public Protector. The subject of this investigation has always been the President as a member of cabinet as contemplated in terms of EMEA.

3.11. In a letter dated 13 March 2022, the Public Protector explained to Mr Mashatile, Treasurer General of the ANC, that there was nothing in both the context and tenor of the Public Protector's letter dated 14 February 2022, which suggests that the Public Protector is investigating the ANC, its affairs or any other private person. The Public Protector clarified that the request was for specific information (an audio record of the meeting) in possession of the ANC, which had a bearing on the complaint against the President, lodged in terms of EMEA.

3.12. Furthermore, the attention of Mr Mashatile was drawn to the provisions of section 7(4) of the Public Protector Act, which states that for the purposes of conducting an investigation, the Public Protector may direct **any person** to submit an affidavit or to appear before him or her to give evidence, produce **any document** in his or her possession, which has bearing on a matter being investigated.

3.13. In the matter between the *Public Protector v Mail & Guardian Ltd*[3] the following with regard to the subpoena powers of the Public Protector was accentuated by the Supreme Court of Appeal:

"....Although the conduct that may be investigated is circumscribed I think it is important to bear in mind that there is no circumscription of the persons from whom and the bodies from which information may be sought in the course of an investigation. The Act confers upon the Public Protector sweeping powers to discover information from any person at all. He or she may call for explanations, on oath or otherwise, from any person..."

3.14. The above sentiments were further echoed in a matter between the *President of the Republic of South Africa vs The Public Protector and Others*[4] as per JP Mlambo:

"The investigative powers conferred on the Public Protector are of the widest ambit. In s 7 the Act gives the Public Protector extensive investigatory powers. On receipt of a complaint the Public Protector has the power to conduct a preliminary investigation for the purposes of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with. The Public Protector has the power to determine the format and procedure to be followed in conducting any investigation. The Public Protector is entitled to subpoena persons and require them to give evidence"

3.15. Section 3(4) of the EMEA expressly indicates that when conducting an investigation in terms of this section, the Public Protector has all the powers vested in the Public Protector in terms of the Public Protector Act.

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3 (422/10) [2011] ZASCA 108 (1 JUNE 2011) at paragraph 11.

4 President of RSA v Public Protector et al 2018 (2) SA 100 Gauteng Division Pretoria at Paragraph 76 and 78.

4. ISSUE IDENTIFIED FOR INVESTIGATION

4.1 On analysis of the complaint, the following issue was considered and investigated:

4.1.1. Whether the President of the Republic of South Africa, Mr MC Ramaphosa, violated the Executive Ethics Code in that, he failed to inform all relevant investigative authorities that he had knowledge and evidence regarding the misuse of public funds for the 54th African National Congress' National Conference held in 2017.

5. THE INVESTIGATION

5.1. Methodology

5.1.1. The investigation into the complaint is conducted in accordance with section 182(1) of the Constitution, read with sections 3 and 4 of EMEA and section 7 of the Public Protector Act.

5.2. Approach to the investigation

5.2.1. The approach to the investigation included analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

5.2.2. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

(a) What happened?
(b) What should have happened?

(c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to a violation of the Executive Ethics Code?

(d) In the event of a violation, what remedial action should be taken?

5.2.3. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the President violated the Executive Ethics Code in that he failed to inform all relevant investigative authorities that he had knowledge and evidence regarding the misuse of public funds for the 54th ANC National Conference held in 2017.

5.2.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the President to prevent violation of the Executive Ethics Code.

5.2.5. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the improper conduct.

5.3. **The Investigation Process**

5.3.1. The approach to the investigation included an exchange of documentation between the Public Protector, the Complainant, the President of the Republic of South Africa, Mr MC Ramaphosa the Speaker of the National Assembly, Ms Nosiviwe Mapisa-Nqakula, MP, the Chairperson of the Judicial Commission of Inquiry into Allegations of State Capture, Chief Justice Raymond Zondo, the Treasurer General of the ANC, Mr Paul Mashatile; the Premier: Eastern Cape Province, Mr Lubabalo Oscar Mabuyane, the ANC Member of the National

Executive Committee (NEC), Mr Tony Yengeni and the ANC Secretary General, Mr ES Magashule.

5.3.2. The Public Protector has concluded the investigation and based on the information and evidence obtained during the course thereof, is now in a position to make findings.

5.4. **The key sources of information**

Documents and correspondences exchanged

5.4.1 The original email complaint, dated 26 January 2022, from Mr Mervyn Dirks;

5.4.2 A clarity seeking letter from the Public Protector to Mr Mervyn Dirks dated 5 February 2022;

5.4.3 A response email dated 7 February 2022 from Mr Mervyn Dirks to the PPSA;

5.4.4 Allegations letter from the Public Protector to President Cyril Ramaphosa, dated 14 February 2022;

5.4.5 Letter from the Public Protector to Mr Paul Mashatile, dated 14 February 2022;

5.4.6 Letter from the Public Protector to Mr Tony Yengeni, dated 14 February 2022;

5.4.7 Letter from the Public Protector to Mr Ace Magashule, dated 14 February 2022;

5.4.8 Letter from the Public Protector to Mr Oscar Mabuyane, dated 14 February 2022;

5.4.9 Letter from the Public Protector to the Speaker of National Assembly: Ms Nosiviwe Mapisa-Nqakula, dated 14 February 2022;

5.4.10 Response letter from Mr Paul Mashatile to the Public Protector, dated 23 February 2022;

5.4.11 Response affidavit from Mr Tony Yengeni to the Public Protector, dated 24 February 2022;

5.4.12 Response letter from President Cyril Ramaphosa to the Public Protector, dated 3 March 2022;

5.4.13 Response letter from Mr Oscar Mabuyane to the Public Protector, dated 8 March 2022;

5.4.14 Letter from the Public Protector to President Cyril Ramaphosa dated 22 March 2022;

5.4.15 Response letter from President Cyril Ramaphosa to the Public Protector dated 31 March 2022;

5.4.16 Letter from the Public Protector to the Speaker of National Assembly: Ms Nosiviwe Mapisa-Nqakula, dated 26 April 2022;

5.4.17 Subpoena from the Public Protector to the Chairperson of the Commission of Inquiry into Allegations of State Capture: Chief Justice Zondo to request documents dated 18 April 2022;

5.4.18 Response affidavit from Chief Justice Zondo which is undated;

5.4.19 Subpoena from the Public Protector to Mr Paul Mashatile to request documents dated 26 April 2022; and

5.4.20 Response letter, affidavit and annexures from Mr Paul Mashatile to the Public Protector dated 26 May 2022.

5.5. **Legislation and other prescripts**

5.5.1 The Constitution of the Republic of South Africa, 108 of 1996;

5.5.2 The Public Protector Act, 23 of 1994;

5.5.3 The Executive Members Ethics Act 82 of 1998;

5.5.4 The Executive Ethics Code 2000 published by proclamation in Government Gazette: No 21399 Notice No 41 Regulation 6853 and

5.5.5 Prevention and Combating of Corrupt Activities Act 12 of 2004;

5.6. **Case Law**

5.6.1 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA);

5.6.2 *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19 (1 July 2021);

5.6.3 *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC),

5.6.4 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11 and

5.6.5 AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa [2022] ZACC

5.7. **Rule 41(1) Notice issued**

5.7.1 On 16 September 2022, the PPSA served the Complainant with a Notice issued in terms of Rule 41(1) of the Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, (as amended) 2018 (Public Protector Rules) to afford him an opportunity to reply.

5.7.2 Response email dated 30 September 2022, from the Complainant replying to a Notice issued in terms of Rule 41(1) of the Rules.

6. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS:

6.1. **Regarding whether the President of the Republic of South Africa, Mr MC Ramaphosa, violated the Executive Ethics Code in that he failed to inform**

all relevant investigative authorities that he had knowledge and evidence regarding the misuse of public funds for the 54th African National Congress National Conference held in 2017.

Common cause issues

6.1.1 The President made a statement at a meeting of the National Executive Committee (NEC) of the ANC, held between 26 and 28 March 2021. In the said meeting, he made reference to the misuse of public funds in internal elections for the leadership positions in the ANC.

Issues in dispute

6.1.2 The issue for the Public Protector's determination is whether the President is in possible breach of the Executive Ethics Code in that "*The President in the leaked audio, is clearly heard saying that he is aware of the alleged misuse of public funds and therefore failing to report such constitutes not only gross misconduct but also (sic) violation of the oath of office that the President took whilst also being in conflict with the provisions of the Prevention and Combatting of Corruption legation*."

Consideration of other relevant information available in the public domain.

6.1.3 On 31 January 2022, the online *Daily News IOL* wrote an article indicating that in December 2021, it published a ground-breaking story and revealed that it was in possession of an audio recording of an ANC NEC meeting where the President appeared to be replying to NEC member, Mr Tony Yengeni, (Mr Yengeni) and others in relation to allegations levelled against him about vote-buying during the CR17 campaign. Below is the audio transcripts of what the President is alleged to have said as published by the online *Daily News IOL* :

"About the whole issue of vote-buying and the allegations that he says have been levelled against me, and arising from the whole saga that unfolded in relation to the CR17 campaign … I am raising this because tomorrow we are meeting the integrity commission and one of the reports that will also be tabled is my appearance before the integrity commission…

When I went to see them and there was a bit of delay seeing them, but then I did finally see them, the integrity commission said the ... well, let me start off by saying I had prepared a detailed, fairly detailed account ... I guess they sought that would interest comrade Tony and that is why I want to speak before tomorrow's meeting. And as appeared they said, no, we are not interested in what happened in the past, we just want to talk to you about how campaigns should be regulated ... the ANC going into the future.

But I said we need to learn from the past so that we are better informed on how best to solve what could evolve as problems in the future, they basically said no we're not interested but I did say to them that I have prepared a 30-page document, which summarizes what I wanted to say and I gave it to them.

That document is still with them and it has not seen the light of the day. But I have now decided that, with their permission, I guess, that it should be released to any ... and I would like it to be emailed to NEC members so that it can be enlightened on what I sought to say to the integrity commission and what I actually outlined in the document because the narrative that has been propagated is that the CR17 campaign amassed a lot of money up to a billion rand and bought votes with that money.

And that is far from the truth and the document you will get in your inboxes will outline all that, the extent to which the campaign was run, the manner in which it was run, and I guess in the end maybe what we did with the comrades who were running the campaign where they made a mistake was just to be too methodical, and to be too professional, even as they sent money out for

services that have been given like hiring a venue or this, that and that, they recorded everything.

And I will outline all that in the document so that what concerns comrade Tony and indeed maybe many others, may be put out there in the open as you go through the document. And quite a lot of it actually, has also been covered in court papers up to including stuff such as who funded CR17. And even the case that's been launched by the EFF, they have all those records, those records were revealed in those papers, and in a way they are on a particular campaign.

But rightly so some of those people who funded CR17 were members of the ANC, none members, and there were business people both black and white, but comrade Tony what you should know, is that no money from the state was used, ever, and we made it a clear, a determined point that no state resources should be utilized. Comrade Oscar has just said that in campaigns money is used for a variety of things, and we all know that, but we also know as ANC cadres that in some cases state money has been used in some campaigns, we know that, we will not talk about it to the extent comrade Tony where some comrades had said, well, let's investigate all campaigns and not just one.

I even said to the officials, I think it's enough to focus on one only CR17, and even said because I don't want the ANC to be dragged, once again, in the mud when those assessments, investigations will reveal that a lot of money, of public funds, was used, and I said that in this case I am prepared to fall on the sword so that the CR17 campaign, yes should be the only one that is looked at, and not the others, because the image of the African National Congress is what I am most concerned about.

Each one of us knows that quite a bit of money that is used in campaigns, in busing people around, in doing all manner of things, is often from state

resources and public resources and we cannot kid ourselves when it comes to that. One of the officials said, you know as these people from the state security were testifying, one of the officials said, soon they will be revealing how about how money from the SSA was used for some campaign, and I said heaven forbid, I would rather they say yes you got money from this businessman for CR17 than for the public to finally hear that their money, public money, was used to advance certain campaigns.

So comrade Tony, and all comrades, for this, this need for transparency, I am all for it. And you will recall comrades that after the Nasrec conference, I was the first one to say we need to develop guidelines on how we run campaigns, I was the first one, and I will say comrade Tony that you're absolutely right. That rule, that decision that was taken, I think it was in the Polokwane conference … no it was at the Mangaung conference, where we said we need now to determine how money should not be used was dropped along the way.

"And I don't know how it was dropped, and as a result, a number of campaigns have evolved utilising money in all manner of campaigns. You will see it when you read my testimony to the integrity commission because I deal with that, but having said so I also made proposals to the integrity commission and I have said to them, we must now accept in the ANC that campaigning is going to happen, and rather than just leave (it) to happen clandestinely, and for people to raise clandestinely, let us regulate and made proposals in the integrity commission submission on precisely this issue.

So as far as I am concerned, nothing comrade Tony that I would want to hide, nothing that even politically, that I feel would be so devastating even against me because I know what we did in CR17, no money was used to buy any votes, and even where some comrades got tempted, yes we all get tempted, I said to comrades I would rather lose than to have money bought, be utilised to

buy votes, I said I would rather use, then it's not worth it, because once it get to that level as an organisation, then we have no organisation left but that practice has continued, now it is up to the NEC and indeed to the NGC must discuss this matter as should conference.

We must discuss this matter and regulate how campaigns should be conducted in the ANC. I wanted to discuss a whole number of other issues but I know you have said that we need to adjourn so I felt I needed to respond to this before Sunday papers are splashed with all manner of things about what was said here about CR17. I have no fear if investigations have to be launched by the NEC by anyone, no fear whatsoever," said Ramaphosa[5] *(sic).*

The President's response to the allegations:

6.1.4 The Public Protector, through the letter dated 14 February 2022, requested the President to respond to the Complainant's allegations of which a response was received on 3 March 2022.

6.1.5 In his response, the President attached his submission to SCOPA, which he stated contained a full response to the allegations. He further denied, that he has in any way contravened the Executive Ethics Code, or any other legislation.

6.1.6 The President further stated that his submission to SCOPA confirms that the contents of the leaked audio were part of statements he made at a meeting of the NEC of the ANC, held between 26 and 28 March 2021, and were made on 27 March 2021.

[5] https://www.iol.co.za/dailynews/news/what-president-cyril-ramaphosa-told-the-anc-nec-on-leaked-audio-clip, accessed on 31 January 2022.

6.1.7 He also submitted that he was not in a position to provide the Public Protector with a copy of a leaked audio of the meeting, as requested, as he does not know who leaked this audio nor how they may have sourced the recording.

6.1.8 The President further stated that his submission to SCOPA details publicly available information that informed his statement that public funds were allegedly used improperly. He submitted that he does not have direct or personal knowledge, other than this publicly available information, of who used public funds, from which institutions or entities they sourced these funds, how the misuse of public funds happened, and to whose benefits these funds were used.

6.1.9 In closing, the President referred the Public Protector to his submission to SCOPA, of which he provides that it details the steps he has taken to ensure that the alleged misuse of public funds is thoroughly investigated.

Statement to SCOPA dated 09 February 2022

6.1.10 The President submitted that on 27 January 2022, he received a letter from the Chairperson of SCOPA, asking him to make submissions to SCOPA in relation to a recording of a statement he made at a meeting of the ANC.

6.1.11 He provided that he welcomed the determination of SCOPA, in line with its mandate and responsibility, to probe any allegations of the misuse of public funds for whatever purpose. He further submitted that the statement was made at a meeting of the NEC of the ANC, held between 26 and 28 March 2021. In this statement, made during the day on 27 March 2021, he made reference to misuse of public funds in internal elections for leadership positions in the ANC.

6.1.12 The President submitted that regarding the recording that informed the SCOPA's request to him, he believes that it is important to take into account

the full context of what was said at the NEC meeting. He submitted that in his capacity as President of the ANC, he is focused on the party's renewal and one of the critical areas to which they are giving attention, is to promote transparency, accountability and ethical behaviour with respect to the funding of internal party activities. According to the President, this requires a recognition of practices that are unacceptable and taking the necessary steps to correct these.

6.1.13 The President further submitted that the ANC's internal discussions regarding the work it needs to do, to renew itself are part of a process that the ANC continues to execute and accordingly, he therefore wanted to confine himself in his submission to the SCOPA's request for information about the alleged misuse of public funds. The President responded as follows to the SCOPA enquiries:

Answers to the SCOPA's questions

Question a): The details relating to when, to whom, and in what context the statements of the President were made:

"As stated above, the statement recorded was made during a meeting of the NEC of the ANC held from 26 to 28 March 2021 and was made during the day of 27 March 2021.

The statement was made to those present at the NEC meeting."

Question b): Any information that the President may have which relates to the alleged misuse of public funds for the purposes of ANC election campaigns or the campaigns of any of its members:

“I do not have any direct and specific information on the alleged misuse of public funds for party political purposes. The statements I made in the NEC meeting were based on allegations already in the public domain and rumours circulating within the organisation and broader society.
Some of the information regarding this matter had already been in the public domain prior to the meeting at which the statement was made, of which Committee members are no doubt equally aware. Such information would include the following:

The contents of the High-Level Review Panel Report on the State Security Agency about the matter of alleged misuse of public funds. This Report has been in the public-domain since it was ·published on 9 March 2019. The Committee will have noted the challenges the Auditor General has had in auditing the funds of the State Security Agency. The Report has made useful recommendations to address these challenges.

The testimony of Ambassador Riaz "Moe" Shaik and Mr Lizo Gibson Njenje before the Commission of Inquiry into allegations of State Capture, Corruption, and Fraud in the Public Sector including Organs of State ("the Commission of Inquiry") on 26 November 2019. They testified about what they referred to as "misuse" of State Security Agency resources for unlawful purposes.

The court case pitting the Independent Police Investigative Directorate ("the IPID") against the senior leadership of the South African Police Service, regarding the alleged purchase of surveillance equipment at inflated prices. This matter unfolded in court during 2020. The allegations included information that monies in excess of the actual price of the equipment was intended to be used to influence the outcome of the ANC National Conference of December 2017.

The testimony of Ambassador Mzuvukile Maqetuka before the Commission of Inquiry, on 10 July 2020, during which he referred to misuse of public funds at the State Security Agency with specific reference to the Principal Agent Network.
The testimony of an unidentified witness before the Commission of Inquiry, on the State Security Agency, on 27, 28 and 29 January 2021.The witness made reference to the State Security Agency's budget not being accounted for and allegations that some of this money was meant to fund political party matters.

My statement to the Commission of Inquiry is also available to the public and to this Committee. I sought to inform the Commission of everything I could attest to under oath that was relevant to its mandate."

Question c): Information on whether there were any instructions to or from any Ministers, accounting officers or any other officials or persons to release public funds or to facilitate the release of public funds for party political purposes:

"I do not have such information. Some of the evidence proffered at the Commission of Inquiry contained such allegations. I refer the Committee to the publicly available transcripts of these records."

Question d): Whether the relevant Ministers or accounting officers were made aware of, or otherwise had knowledge of, any unauthorised spending in the event that such instructions to channel funds were done via someone other than themselves:

"I do not have such information. I refer the Committee in this regard to the work of the Commission of Inquiry, and any information that the Auditor General may be able to provide."

Question e): Whether there are any records or information at the disposal or within the knowledge of the President as to which such unauthorised funds (if applicable) may have been utilised for and how they were captured in the financial statements and reports of the relevant organs of state:

"I have no information in this regard. I refer the Committee to the publicly available records related to the information outlined in paragraph I have no further information in this regard." (sic)

Question f): Whether any other members of Parliament, officials of any organ of state, staff members of the ANC or any other person may have further relevant information to assist the Committee in determining whether public funds were misused for party political purposes:

"I do not have such information. I can only, in response to this question, again refer the Committee to the publicly available records related to the information outlined above."

Question g): Information on the contracts for goods and services alluded to in the audio clip and any other contracts entered into by the ANC or any person using (wholly or partially) public funds. Such information includes details of the service providers, the nature of the contracts and payment arrangements:

*"I have no knowledge of any such contracts for goods and services. Where I referred to 'bussing people around' for example, I spoke in general terms about activities common to campaigns, and that require resource*s."

Question h): Any other information the President may have which can assist the Committee to determine whether public funds were misused by the ANC or any of its party members, and if so, how such funds were channelled for such purposes and on whose instruction:

"I do not have any information in my possession that could assist the Committee in this respect. However, based on the evidence led before the Commission of Inquiry, there should be information in the Report of the Commission of Inquiry that can shed further light on this matter. The first part of the report was made public on 04 January 2022. Part 2 was made public on 01 February 2022, Part 3 will be submitted to me on 28 February 2022 and made public as soon as possible once submitted."

6.1.14 The President further submitted that he has outlined the information at his disposal on the alleged misuse of public funds and will not burden the submission to SCOPA with transcripts of the Commission of Inquiry's testimony referred to, or the Report, as these were readily accessible to the SCOPA on public platforms.

6.1.15 He further submitted that since his election as the President of the Republic he has taken a number of steps to uncover and end the misuse of public funds and some of the steps taken may not necessarily fall within the purview of SCOPA's mandate but they are important in the fight against corruption.

6.1.16 On 18 April 2022, the PPSA issued a subpoena to Chief Justice Raymond Zondo (Chief Justice Zondo) in his capacity as the Chairperson of the Commission of Inquiry into Allegations of State Capture. The purpose of the subpoena was to request the transcripts or the record of the evidence related to SSA, which was tendered to him during the inquiry by various witnesses. Chief Justice Zondo replied in an undated affidavit and indicated amongst

other things, that the requested information are public documents, which are accessible to the public.

Analysis of the President's responses

High-Level Review Panel Report on the SSA about the matter of alleged misuse of public funds

6.1.17 The PPSA noted that the Report of the High-Level Review Panel on the SSA is dated December 2018, and it recorded amongst its findings that *"the attempts to influence the trade union movement and civil society organisations in South Africa, through surveillance, was an improper use of public resources and violated the constitutionally mandated role of the SSA to remain politically impartial".*[6]

6.1.18 The Report of the High-Level Review Panel on the SSA further recorded on its conclusions that *"Due to wide-ranging resource abuse, the SSA became in effect a 'cash cow' for many of its members and external stakeholders".*[7]

The testimony of Ambassador Riaz "Moe" Shaik and Mr Lizo Gibson Njenje before the Zondo Commission of Inquiry into allegations of State Capture

6.1.19 PPSA noted that Mr Shaik appeared and testified at the Zondo Commission of Inquiry into allegations of State Capture on 26 November 2019 (day 193) - and testified amongst other things that "*I was not willing and I know that Ambassador Maqetuka was not willing to provide that documentation to the ANC, because then it would have been in violation of the very Constitution that*

6 Refer to page 69 of the Report of the High-Level Review Panel on the SSA.
7 Refer to page 99 of the Report of the High-Level Review Panel on the SSA.

we are furthering the aims of a political party and we did not want to get involved in that." [8]

The court case pitting the Independent Police Investigative Directorate ("the IPID") against the senior leadership of the South African Police Service, regarding the alleged purchase of surveillance equipment at an inflated price.

6.1.20 The PPSA has noted that a court judgment handed down in the Pretoria High Court on 13 January 2021, revealed that the SAPS may have attempted in 2017 to illegally procure an eavesdropping device at the inflated price of R45 million to protect the interests of the ANC and not the Republic of South Africa.[9] This was also reported in various newspapers including the *Daily Maverick* in 19 January 2021.[10]

The testimony of Ambassador Mzuvukile Maqetuka before the Zondo Commission of Inquiry into allegations of State Capture

6.1.21 PPSA noted that Ambassador Mzuvukile Maqetuka is the former Director General of the SSA, who also appeared before the Zondo Commission of Inquiry on 10 July 2020 (day 231). He testified amongst other things that *"Intelligence officers – Intelligence operatives must be political neutrality. I mean politically neutral. I cannot because I am a member of the ANC use that in my day to day function. Because that might be – might be to the detriment*

8 Refer to page 63 of the transcripts of the Zondo Commission of Inquiry into allegations of State Capture dated 26 November 2019 - Day 193.

9 Court case No: 49791/2018 delivered by N DAVIS Judge of the High Gauteng Division, Pretoria on 13 January 2021.

10 https://www.dailymaverick.co.za/article/2021-01-19-saps-embarked-on-procurement-before-2017-nasrec-conference-to-protect-and-benefit-the-anc-and-not-south-africa-court-finds, accessed on 11 September 2022.

of other political parties".[11]*(sic)* The testimony of Mr Maqetuka was also captured in newspapers.[12]

6.1.22 All of the above public hearings in the Zondo Commission of Inquiry, court cases, investigation report and media reports predate the meeting of the ANC's NEC in which the President made his utterances as recorded in the leaked audio on 27 March 2021.

6.1.23 *The President further listed the following as some of the steps he has taken*

6.1.23.1 His *"consistent and emphatic"* support for the work of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State;

6.1.23.2 He will be submitting an action plan on the implementation of the recommendations of the Commission to Parliament by the end of June 2022;

6.1.23.3 The Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service, chaired by retired Judge Nugent, and the implementation of its report's recommendations; and

6.1.23.4 The establishment of the Investigating Directorate in the National Prosecuting Authority in April 2019. This entity is empowered to investigate common law and statutory offences. These can include commercial crimes such as fraud, forgery, uttering and theft. Statutory offences related to legislation covered by the Prevention of Organised Crime Act 121 of 1998, the Public Finance Management Act 1 of 1999, and the Municipal Finance Management Act 56 of 2003, fall under the mandate of the directorate. Offences involving dishonesty

[11] Refer to page 83 of the transcripts of the Zondo Commission of Inquiry into allegations of State Capture dated 10 July 2020 - Day 231.

[12] https://ewn.co.za/2020/07/10/former-state-security-boss-maqetuka-to-appear-at-the-zondo-commission-today, accessed on 11 September 2022.

referred by the Financial Intelligence Centre (FIC), are investigated by this entity as well. The directorate is also mandated to investigate unlawful activity or criminal behaviour that comes to the fore through the work of various commissions of inquiry.

6.1.24 The President further submitted that the Commission of Inquiry into the allegations of impropriety at the Public Investment Corporation (PIC), the report was made public on 12 March 2020 and numerous proclamations for investigations to be conducted by the Special Investigating Unit (SIU), the results of these investigations have been presented regularly to SCOPA.

6.1.25 He also submitted that the establishment of the Presidential State-Owned Enterprises Council by Cabinet in May 2018, to provide stronger oversight over State-Owned Enterprises and improve their management. The result of its work is meant to eradicate abuse of state assets, through mismanagement of these entities and the adoption of the National Anti-Corruption Strategy, by the Executive in November of 2020.

6.1.26 In conclusion, the President stated that the detail and extent of the misuse of public funds, as referred to in the matter will no doubt become clear once the Commission of Inquiry in State Capture's final report is submitted and once consequential investigations as well as those already underway, are finalised, and *"he has faith, that they will uncover the evidence needed to determine who ought to face the might of the law for these infringements."*

6.1.27 In correspondence from the President to the PPSA, dated 31 March 2022, wherein the PPSA requested a copy of the leaked audio and the transcripts thereof, the President responded and informed the PPSA that the ANC Secretary General's Office is the custodian of records of meetings of the ANC's NEC.

6.1.28 He further emphasised that he denies the allegations in the complaint and any suggestion that he violated the Executive Ethics Code as alleged, as he cannot have failed to *"act in good faith and in the best interest of good governance"* or to *"act in all respects in a manner that is consistent with the integrity of (my) office or government"* as provided for in the section of the Executive Ethics Code since he had no knowledge of how funds were used in certain political campaigns within the ANC.

The ANC's response to the allegations

6.1.29 The PPSA through a letter dated 14 February 2022, requested Mr Paul Mashatile (Mr Mashatile), the Treasury General of the ANC, to respond to the Complainant's allegations of which a response was received on 23 February 2022. In his response, Mr Mashatile submitted that he understands that the Public Protector addressed some letters to all National Officials of the ANC, and that the Secretary General, Mr Magashule, has been suspended and cannot participate in the activities of the ANC and he has been authorised by the NEC to assume the responsibilities of the Secretary General, and that he is responding on behalf of the ANC, the National Officials and the NEC.

6.1.30 Mr Mashatile submitted that it is public knowledge that the Complainant has lodged a complaint with the PPSA and the ANC accepts that, in terms of section 4 of the EMEA, the PPSA has a legal obligation to investigate an alleged breach of the Executive Ethics Code. He further outlined that section 2 of the EMEA sets out the Executive Ethics Code, which is amplified in Proclamation R41 of 2000, published in Government Gazette No. 21399 Notice No R41 of 2000. He further submitted that, it is also apposite to make reference to section 182 of the Constitution. He submitted that the said sections provide that the PPSA has the power to investigate any conduct in State affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice.

6.1.31 He indicated that it follows from the above narrative that in order for the Public Protector to exercise the jurisdiction she has assumed, the conduct complained of must meet the following requirements in that the conduct must emanate from state affairs or in the public administration: the conduct complained of, by the Complainant must fall squarely within the ambit of the Executive Ethics Code set out in section 2 of the EMEA.

6.1.32 Mr Mashatile further submitted that the ANC is not convinced that the complaint lodged by the Complainant and the Public Protector inquiry meets the legal requirements and is of the view that, in the circumstances, the PPSA does not have the necessary jurisdiction to conduct such an enquiry and to request documents and information from a private voluntary association. This contention by Mr Mashatile was addressed by the PPSA, as indicated in the preceding paragraphs above.

6.1.33 On 26 May 2022, Mr Mashatile deposed an affidavit as per the subpoena served on him in terms of section 7(4)(a) and 5 of the Public Protector Act, dated 26 April 2022. In his response, he informed the PPSA that, he believes that the subpoena is unlawful and was issued pursuant to an unlawful investigation, and in this regard he reserve his right to approach a High Court to review and set aside the subpoena.

6.1.34 Mr Mashatile reported that in the interim, he would provide the interim information sought in the subpoena and that he has been advised by the minute taker of the ANC NEC that the meeting was not recorded, and that the minutes of the meeting in question are yet to be approved by the NEC and once this is done, he would undertake to forward either the entire set of minutes or a redacted copy to the PPSA.

6.1.35 According to the draft agenda of the meeting submitted by Mr Mashatile as ***Annexure A*** of his affidavit, this was a video conference of the ANC NEC held

from 26 - 28 March 2021. The name list of the ANC members who attended said video conference were also attached as ***Annexure B*** of Mr Mashatile' s affidavit and the President's name is on the list. Mr Mashatile further clarified in his affidavit that no structure of the ANC was enjoined to address the allegations of misuse of public funds.

Mr Lubabalo Oscar Mabuyane's, the Premier: Eastern Cape Province, response to the allegations

6.1.36 The PPSA through a letter dated 14 February 2022, requested Mr Mabuyane to respond to the Complainant's allegations, of which a response was received in correspondence dated 8 March 2022.

6.1.37 In his reply, Mr Mabuyane submitted that he is not a custodian of the NEC meetings and decisions and these matters are handled by the office of the Secretary General of the ANC and therefore all enquiries related to the NEC meetings, decisions and resolutions should be directed to that office. He also confirmed that he attended the meeting, however, he submitted a late arrival apology and was in and out of the meeting and he is not aware and privy to submissions alleged to have been made by the President.

Mr ES Magashule, the Secretary General of the ANC's response to the allegations

6.1.38 The PPSA, through a letter dated 14 February 2022, requested Mr Magashule to respond to the Complainant's allegations, and in his response he also suggested that all the information the PPSA requires is with the Office of the Secretary General.

6.1.39 He further advised that the PPSA should request, minutes of the relevant meeting under reference and a copy of the Zoom recording of the meeting in question.

Mr Tony Yengeni, the ANC Member of the NEC's response to the allegations

6.1.40 The PPSA through a letter dated 14 February 2022, requested Mr Yengeni to respond to the Complainant's allegations. Mr Yengeni deposed to an affidavit dated 25 February 2022, and he confirmed that he is aware of the audio clip relating to the President's statement during the meeting of the NEC of the ANC, and also confirmed that he was in attendance at this virtual meeting of the NEC held from 26 to 28 March 2021.

6.1.41 Mr Yengeni submitted that in this meeting, he pointed out that the President should bring his own NEC into his confidence, by telling them what was in the sealed bank statements and what he was hiding by sealing those bank statements. He further submitted that he told the President that he must lead by example and do the honourable thing and step aside, because of accusations of corruption against him which were very serious. According to Mr Yengeni, he did this to ensure that members see that the leadership is consistent in calling for others to step aside, and also this was important for the President to appreciate the seriousness of the allegations against him, regardless of whether he had been charged or not.

6.1.42 He submitted that the President responded to the points he had made and informed them that he was prepared to step aside at any time and in fact, it would be of great relief, and there was nothing wrong or criminal that he did in those bank statements and that no state funds were used in his campaign to become President. Mr Yengeni confirmed the contents of the leaked audio clip/tape as part of the President's response to the issues he had raised with him in the meeting. Mr Yengeni submitted that the President stated

empathetically and categorically that he knew of people who had used state funds for their own political campaigns.

6.1.43 In his submission, Mr Yengeni submitted that the President mentioned that the SSA was one such state institution whose funds were used for the campaigns of other candidates. He submitted that he was alarmed and surprised by this submission, given the fact that the President had just *"underserved"* the importance of the fight against corruption and the abuse of state funds.

6.1.44 Mr Yengeni also submitted that at the end of the speech, the President mentioned that he went to the ANC's Integrity Committee (IC), and was surprised that the IC was not interested in quizzing him about the claims or allegations of him *"buying the Nasrec conference"*. Mr Yengeni further provided that the President claimed that he took the initiative to present himself before the IC, with a four hundred (400) page document explaining himself on the whole issue of buying the Nasrec conference and offered to give the NEC members copies thereof, which was never done.

6.1.45 In conclusion, Mr Yengeni submitted that he wants to confirm that what the President said in the leaked tape was his response to him to step aside because of the seriousness of the accusation and the allegations of corruption he is facing, and he believes that this would send a very strong message about the ANC's seriousness about ethical leadership and its fight against the scourge of corruption.

News24 media article of 4 April 2020

6.1.46 During the investigation of this matter, the PPSA was made aware of a *News 24* media article of 04 April 2020, titled, "*SSA DECLASSIFIED | The shadowy office manager accused of embezzling millions to influence ANC votes",* it was reported that:

"A shadowy and enigmatic State Security Agency (SSA) employee known by the code name "Helen" is at the centre of a flurry of accusations that she embezzled and laundered more than R260 million, and allegedly colluded with ANC politicians to influence votes ahead of the party's watershed 2017 Nasrec conference.

A News24 investigation, based on a comprehensive analysis of affidavits filed by SSA spies to the Zondo Commission of Inquiry into State Capture and interviews with several spooks, has unmasked "Helen" as Roxanne Human.
In a series of affidavits to the Zondo Commission, Human is accused of defrauding the agency of millions, colluding with former Ministers Bongani Bongo and David Mahlobo to further political objectives, and attempting to stifle investigations into wrongdoing at the SSA."

6.1.47 The PPSA established that the above complaint lodged by the Complainant and the above News24 media article are correlated.

Responses to a Notice issued in terms of Rule 41(1) of the Public Protector Rules:

6.1.48 Rule 41(1) of the Public Protector Rules provides that when the Public Protector intends concluding a complaint by means of a closing report provided for in terms of Rule 40(b), the Complainant shall accordingly be informed in writing and be given an opportunity to make representations in connection with the intended closure of the complaint, within fourteen (14) days of delivery of the notification.

6.1.49 On 16 September 2022, the PPSA served the Complainant with a Notice issued in terms of Rule 41(1) of the Public Protector Rules, to afford him an opportunity to reply. On the same day, the Complainant acknowledged receipt

of the Rule 41(1) Notice, via a WhatsApp message and indicated that he will respond as soon as possible, after consulting his attorneys. On 30 September 2022, the Complainant responded to a Rule 41(1) Notice via an email and stated the following:

"I have noted your progress update.

Could you kindly inform me if any changes was affected in your preliminary report during its submission for quality insurance and upon signature of this report by the Deputy Public Protector?

If any changes to the report was affected, could you kindly supply me with those changes and the reasons thereof.

I believe that your good office has erred in your findings for the following reasons:

(1) Mr Ramaphosa was responding directly to a question by cde Tony Yengeni regarding him revealing his donors for the NASREC conference.
The question put to Mr Ramaphosa was not about his knowledge of the misuse of public funds by ANC members that are in the public domain.
It was a direct question about the 'one billion' that bought him the presidency.
Instead of answering the questions that cde Yengeni put to Mr Ramaphosa, he decided to respond that he is aware of other candidates that have also used money for their elections campaigns.
He went on to say that he would prefer to reveal his own donors instead of revealing his comrades corrupt used of public funds for campaign purposes.
He further stated that he would 'rather fall on his sword than revealing information that the public purse were being used by his comrades'

Falling on 'His Sword' is the extend that a sitting president would go, in order to protect corruption by his fellow comrades (sic).

In conclusion:

The only efferent (sic) one can arrive at by what Mr Ramaphosa said in that NEC meeting, is that he lied to his comrades in the NEC about his knowledge of other presidential candidates campaign funding in order to avoid revealing his own campaign donors.

But most damning is that we have a president who in his own words are prepared to fall on his sword to protect his corrupt comrades that are using public funds.

I respectfully submit that your findings are flawed.

I have been suspended for playing my oversight role to hold the Executive accountable and yet your report is silent about the persecution and abuse that I have suffered at the hands of the president and his praisingers in parliament.
Your silence on this matter can only breed more silence regarding corruption by those who took an oath of office to hold the Executive accountable.

Presidents come and go and Mr Ramaphosa may soon be gone by the will of ANC delegates in December but you as public servants will remain and will be judge by history and discarded as people who serve an individual instead of the nation and the country…." (sic).

6.1.50 The above response from the Complainant was considered and duly reflected upon by the PPSA before concluding the matter. In reviewing this response, it suffices to keep in mind that PPSA conducted its investigation in terms of the EMEA and that the central question for determination by PPSA was whether the utterances made by the President in the leaked audio constitutes the breach of the Executive Ethics Code.

6.1.51 As it currently stands, Executive Ethics Code does not expressly require the disclosure of donations made to campaigns for positions within political parties. However, the PPSA has graciously taken note of the recent Constitutional Court judgement delivered on 20 September 2022. In this case, the Constitutional Court[13] has confirmed the decision of the Full Court of the Gauteng Division, Pretoria in declaring that the Executive Ethics Code was unconstitutional and unlawful to the extent that it did not require the disclosure of donations made to campaigns for positions within political parties.

6.1.52 However, this declaration of unconstitutionality and the operation of the constitutional court order was suspended for a period of 12 months to enable the respondent to remedy the defect and it does not apply retrospectively.

6.1.53 It should also be noted that the application that led to the most recent Constitutional Court Judgment originates from Public Protector Report 37 of 2019/2020 released on 19 July 2019, entitled: "*Report on an investigation into a violation of the Executives Ethics Code through an improper relationship between the President and African Global Operation (AGO), formerly known as BOSASA"*. One of the findings of the Public Protector in the report was that the President had breached his duties under the

13 *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC at Paragraph 75.

Executive Ethics Code, in that, among other things, he had failed to disclose donations that had been made to an internal party-political campaign (CR17 campaign) that supported his election as President of the ANC, (which is exactly what the Complainant seeks to re-introduce in the matter at hand).

6.1.54 The Public Protector's findings in the above report, including the finding that the President had breached the Executive Ethics Code by failing to disclose donations to the CR17 campaign, were set aside by the High Court, which finding was confirmed by the Constitutional Court. The constitutional challenge to the Executive Ethics Code was remitted back to the High Court, which upon remittal, the found that the duty to disclose arises when any benefit, including that derived from campaign funding for a member's internal party-political campaign, is received by the member in his or her personal capacity. The High Court upheld the challenge and proceeded to declare the Executive Ethics Code unconstitutional and invalid, which was recently confirmed by the Constitutional Court.

6.1.55 The findings in this matter were however, not made with retrospective effect, and the limitations found in respect of the Public Protector's previous investigation and findings on the subject matter of the donations made to internal party-political campaigns, will remain until the Executive Ethics Code has been reviewed in line with the Constitutional Court's judgment.

6.1.56 The PPSA will await the amendments of the Executive Ethics Code which will then allow that the *"financial interests"* contemplated in the Executive Ethics Code must be interpreted broadly to include all donations, not just those giving rise to a personal benefit. This will ensure that the need for transparency in political campaign donations must be understood against the backdrop of and in the context of the pressing need to curb and strive towards eradicating corruption.

Application of the relevant law

6.1.57 Section 96 of the Constitution provides that:

(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not—

(a) *……;*

(b) ***act in any way that is inconsistent with their office****, or expose themselves to any situation involving the risk of a conflict between their* ***official responsibilities*** *and private interests; or*

(c) *use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.....*"

6.1.58 Section 83 of the Constitution impose certain obligations on the President in particular. It provides that:

"*The President—*

(a) is the Head of State and head of the national executive;

(b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and

(c) promotes the unity of the nation and that which will advance the Republic".

6.1.59 Schedule 2 of the Constitution further binds the President upon assumption of office by way of an oath or solemn affirmation to obey, observe, uphold and maintain the Constitution and all other law(s) of the Republic of South Africa. The President is further expected to promote all that will advance the Republic, and oppose all that may harm it and to devote himself to the well-being of the Republic and all of its people.

6.1.60 EMEA is the national legislation referenced in section 96(1) of the Constitution and the bedrock of the Executive Ethics Code.

6.1.61 Section 1 of EMEA provides that a cabinet member includes the President. Therefore the Public Protector can investigate breach of the Executive Ethics Code attributable to the President in terms of section 3 of EMEA.

6.1.62 Section 2(1) of EMEA read thus:

"*The President must, after consultation with Parliament, by proclamation in the Gazette, publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members*, *Deputy Ministers and MECs must comply in performing their official responsibilities."*

6.1.63 The general standards which the members of the Executives[14] must comply with are contained in clause 2.1 of the Executive Ethics Code which provides that:

2.1 "*Members of the Executive must to the satisfaction of the President or the Premier, as the case may be-*

(a) perform their duties and exercise their powers diligently and honestly;

(b) fulfill all the obligations imposed upon them by the Constitution and law;

(c) act in good faith and in the best interest of good governance;

(d) *act in all respects in a manner that is consistent with the integrity of their office or the government.*"

[14] Member of the Executives means a Cabinet member, a Deputy Minister or a Member of a Provincial Executive Committee, and 'member' and 'Executive' have corresponding meanings.

6.1.64 Clause 2.2 provides that "*In deciding whether members of the Executive complied with the provisions of clause 2. 1, the President or Premier, as the case may be, must take into account the promotion of an open, democratic and accountable government*."

6.1.65 Clause 2.3 of the Executive Ethics Code provides that:

Members of the Executive may not:

(a) wilfully mislead the legislature to which they are accountable;
(b) wilfully mislead the President or Premier, as the case may be;
(c) act in a way that is inconsistent with their position;
(d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;
(e) use information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties;
(f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;
(g) receive remuneration for any work or service other than for the performance of their functions as members of the Executive or
(h) make improper use of any allowance or payment properly made to them, or disregard the administrative rules which apply to such allowance or payments.

6.1.66 In the case of ***Public Protector and Others v President of the Republic of South Africa and Others*** **(CCT 62/20) [2021] ZACC 19 (1 July 2021**) (*the President case*). In par 11, the court denoted that:

"*Section 3 empowers the Public Protector to investigate any breach of the code. The scheme that emerges from the reading of this provision is that the Public Protector's power to investigate is subject to a formal complaint.* ***This suggests that the scope of an investigation is determined by the breach of the code contained in the complaint****. It is important to note that section 3 does not authorise the Public Protector to investigate a violation of the Act itself but limits her authority to investigating a breach of the code."*

6.1.67 In the main, the issue raised by the Complainant was whether the President violated the Executive Ethics Code and the Constitution in that he failed to inform all relevant investigative authorities that he had knowledge and evidence regarding the misuse of public funds for the 54th ANC national conference held in 2017.

6.1.68 In his reply the President did not deny the leaked audio and his expressions therein. Instead the President stated categorically that he does not have any direct and specific information on the alleged misuse of public funds for party political purpose and the statements he made in the NEC meeting were based on allegations already in the public domain and rumours circulating within the organisation and broader society.

Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA)

6.1.69 The prologue of PRECCA provides the rationale for the Act and read thus:
"*To provide for the strengthening of measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences relating to corrupt activities; to provide for investigative measures in respect of corruption and related corrupt activities; to provide for the establishment and endorsement of a Register in order to place certain*

restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts; to place a duty on certain persons holding a position of authority to report certain corrupt transactions; to provide for extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities; and to provide for matters connected therewith."

6.1.70 Section 34 of PRECCA provides thus:

(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-

(a) an offence under Part 1, 2,3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

(4) For purposes of subsection (1) the following persons hold a position of authority, namely-

(a) the Director-General or head, or equivalent officer, of a national or provincial department;

(b) in the case of a municipality, the municipal manager appointed in terms of 45 section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);

(c) any public officer in the Senior Management Service of a public body;

(d) any head, rector or principal of a tertiary institution;

(e) the manager, secretary or a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973), and includes a member

of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1981);

(f) the executive manager of any bank or other financial institution;

(g) any partner in a partnership;

(h) any person who has been appointed as chief executive officer or an equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organisation, whether established by legislation, contract or any other legal means;

(i) any other person who is responsible for the overall management and control of 10 the business of an employer; or

(j) any person contemplated in paragraphs (a) to (i), who has been appointed in an acting or temporary capacity.

6.1.71 According to section 34(1) of the PRECCA, any person who holds a position of authority (defined in section 34(4) of the Act), who knows or ought reasonably to have known or suspected that any other person has committed an offence (of corruption) in terms of sections 3 to 16 or 20 to 21 of the Act or theft, fraud, extortion, forgery or uttering of a forged document involving an amount of R100 000,00 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

6.1.72 The PRECCA defines the people in positions of authority as the Director-General/ Head of National or Provincial Government; the Municipal Manager of the municipality; the principal or head of a tertiary institution; the director of a company; the executive manager of a bank; a partner in a partnership; Chief Executive Officer.

6.1.73 The Complainant requested the Public Protector to investigate the possible breach of the Executive Ethics Code by the President because "*The President in the leaked audio, is clearly heard saying that he is aware of the alleged misuse of public funds and therefore failing to report such constitutes not only gross misconduct but also (sic) violation of the oath of office that the President took whilst also being in conflict with the provisions of the Prevention and Combatting of Corruption legation*."

6.1.74 Section 39(2) of the Constitution stipulates that:

> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

6.1.75 Simply put, the above implies that when interpreting any legislation, an interpretation that promotes and falls with the bounds of the constitution should be preferred over the one that is incompatible with the constitution. It follows therefore that provisions of all legislation(s) must be read in conformity with the Constitution.[15]

6.1.76 The Rules of statutory interpretation are a useful place to start in this regard. The starting point is always to consider the plain, ordinary, grammatical meaning of the words in question. However, the *classic case or example* on legal interpretation, Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA) (*Endumeni),* explains that we must go further:

15 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* at Paragraph 21 – 23.

"… Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document"[16]

6.1.77 The people in position of authority as described in section 34 of PRECCA do not include the President, Cabinet Ministers, Premiers and Members of the Executive Council, Mayors and Councillors. Although the President is not expressly included in the scheme or category of people in positions of authority, it can be noted, that the duty of the President to uphold the law and the Constitution does arise from Constitution itself and other legal instruments which all require the President to act in manner that conforms to a prescribed ethical standards when performing his functions. It is now axiomatic that the interpretation of legislation must follow a purposive approach. A purely textual approach has been jettisoned many a time by our courts and legal scholars alike.

16 *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (Endumeni) at para 18.

6.1.78 In his complaint, the Complainant did not allege violation of a specific clause of the Executive Ethics Code apart from indicating that the complaint was lodged in terms of section 4(1) of EMEA and requested the Public Protector to investigate whether the President violated the Executive Ethics Code and the Constitution in that he failed to inform all relevant investigative authorities that he had knowledge and evidence regarding the misuse of public funds for the 54th ANC national conference held in 2017.

6.1.79 In reviewing the actions of the President against the provisions of the Executive Ethics Code the Public Protector sought to evaluate the allegations and evidence in terms of the above-mentioned legal and non-legal standards and norms, with the view to, *inter alia* determine-

a) the duty on the President to report or share information on the alleged misuse of or wrongdoing in relation to public funds;
b) the circumstances in which such a duty would arise;
c) the objective factual circumstances from which any inference or conclusion about the information within the knowledge or awareness of the President, can be drawn; and
d) whether or not the President's actions in the matter at hand demonstrated failure on his part to comply with his reporting or sharing obligations.

6.1.80 It is clear that a person who holds a position of authority has a positive duty to report known or suspected corrupt transactions, including transactions involving public funds, in terms of the the relevant sections of PRECCA.

6.1.80.1 Based on the definition of a person who holds a position of authority, however, it is unclear whether these provisions extend to the President of the country. Section 83(1) of the Constitution makes clear that the President *"is the Head of*

State and head of the National Executive". Section 85(1) further states that the "executive authority of the Republic is vested in the President".

6.1.80.2 This might mean that the President has a duty to report alleged corruption relating to members of his or her executive, such as when a Minister is offered a bribe or otherwise implicated in corrupt activities. But the wording of section 34(4) of PRECCA is not clear. What is clear is that PRECCA does not impose a blanket legal duty on the President to report corruption by members of his or her party who are not members of the executive.

6.1.80.3 The President must, however, take heed of section 96(2) of the Constitution which states that members of the Cabinet (which includes the President) may not: "*act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."*

6.1.80.4 In 2016, the Constitutional Court held in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*[17] (the Nkandla judgment) that the mere fact that the then President Zuma was aware of the non-security related renovations at his home at state expense:

"*exposed him to a 'situation involving the risk of a conflict between [his] official responsibilities and private interests'. The potential conflict lies here. On the one hand, the President has the duty to ensure that State resources are used only for the advancement of State interests. On the other hand, there is the real risk of him closing an eye to possible wastage, if he is likely to derive personal*

[17] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016].

benefit from indifference. To find oneself on the wrong side of section 96, all that needs to be proven is a risk. It does not even have to materialise."

6.1.80.5 The President is *"uniquely positioned, empowered and resourced to do much more than what other public office-bearers can do*."[18] For this reason section 83(b) and Schedule 2 of the Constitution singles him out to uphold, defend and respect the Constitution and all other law(s) of the Republic of South Africa. Purposively interpreted and properly contextualised, the President equally carries a positive duty to act in the best interest of good governance and that may include a legitimate expectation to report and/or cause action to be taken against crime(s) that may have come to his knowledge.

6.1.80.6 There is no doubt that the President as the first citizen cannot be seen as passive spectator or observer when crime is committed and has such knowledge or first-hand information. There are other passages in the above-mentioned judgment that suggest that, at the very least, a sitting President has a constitutional and an ethical obligation always to act in an honest manner in the best interest of the country and to obey and uphold the law. In that judgment Chief Justice Moegoeng explained:

"Unsurprisingly, the nation pins its hopes on [the President] to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the

[18] *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 65 states: "Ultimately the President, as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands. Pof P De Vos: Constitutionally Speaking: *Jacob Zuma: is it a crime to admit knowledge of corruption and not report it?* https://tinyurl.com/y5rypz7m 18 June 2018

quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project. He is required to promise solemnly and sincerely to always connect with the true dictates of his conscience in the execution of his duties. This he is required to do with all his strength, all his talents and to the best of his knowledge and abilities."

6.1.81 To the extent that the duty to report corruption or misuse of public funds is triggered by the actual or reasonably suspected substantive knowledge and information of the person concerned, Article 28 of the UNCAC[19] provides that any knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from "*objective factual circumstances*".

6.1.81.1 In this regard it is worth noting that the President's own statement about his awareness and/ or knowledge of misuse of public funds in internal elections for leadership positions in the ANC, is central to the probe into the alleged violation of the Executive Ethics Code, as no other information is alleged or presented to suggest or imply that his suspected awareness or knowledge can be verified against tangible objective factual circumstances on for instance the sources of such information.

6.1.81.2 The test would therefore be whether or not an inference can be drawn from an objective assessment of the President's statement, which serves as a clear and convincing admission of substantive knowledge and awareness of misuse of public funds for party-political purposes. In this regard the President's version and explanation is treated with the necessary circumspection and safeguards

[19] Articles 15 – 42 of Chapter III: Criminalization and Law Enforcement and articles 44 – 50 of Chapter IV: International Cooperation, of the United Nations Convention against Corruption.

relating to the balance of probabilities, against any inherent inconsistencies and discrepancies which may demonstrate a lack of credibility.

6.1.82 Turning to the factual circumstances that demonstrate whether or not the President had actual or direct knowledge of misuse of public funds other than what is widely reported in the media as professed in this case, the Public Protector had to first establish his exact subjective knowledge of substantive or material misuse of public funds. This kind of knowledge must not be nominal, fanciful or imaginary. Neither should it be something which the complainant, observer or commentator wishes; rather it should be a factually established concrete knowledge. In inquisitorial proceedings such as this one by the Public Protector it must be established on a balance of probabilities.

6.1.83 Equally, in tackling the question whether the words uttered by the President in the impugned audio during a conference hosted under the banner of his political party resulted in him contravening the Code, the Public Protector is enjoined to consider the *context and the purpose* together, under which those words were uttered. In order to arrive at an equitable and sensible results, this question must not be approached in a mechanical fashion. The import of this is that a solely literal approach to interpretation of words has been emphatically rejected to avoid absurdity and this has now crystallised in many authorities, *Endumeni* being a leading landmark case of a typical move away from a purely textual to contextual interpretation approach.

6.1.84 In this case, it becomes apposite to make mention of the fact that the Complainant has not furnished any form of evidence to support his contention that the President has the first-hand knowledge of a specific misuse of public funds which he failed to report to the relevant authorities. In the absence of such evidence, if follows that only the President and those present in NEC

meeting can testify about the context in which he made those utterances as captured in the leaked audio.

6.1.85 Furthermore, from the evidence at hand, it does not appear that the Complainant was present in the said NEC meeting. Besides, what to make of the utterances contained in a leaked audio and the context in which it was said, is precisely for the Public Protector's investigation to establish if same amounts to contravention of the Code as alleged. Section 4(1) of EMEA vests only to the Public Protector the power to investigate, in accordance with section 3, an alleged breach of the Code on receipt of a complaint.

6.1.86 As already articulated above, the President submitted that he does not have any direct and specific information on the alleged misuse of public funds for party political purposes. The President further indicated that his words were based on allegations already in the public domain and rumours circulating within the organisation and broader society.

6.1.87 In support of his response, the President cited examples such as the *High-Level Review Panel Report on the State Security Agency* about the matter of alleged misuse of public funds, which has been in the public-domain since it was published on 9 March 2019. The challenges the Auditor General has had in auditing the funds of the State Security Agency. Some testimony given before the Commission of Inquiry into allegations of State Capture, Corruption, and Fraud in the Public Sector including Organs of State ("the Commission of Inquiry") on 26 November 2019, relating to what was referred to as "misuse" of State Security Agency resources for unlawful purposes. The court case pitting the *Independent Police Investigative Directorate* ("the IPID") against the senior leadership of the South African Police Service, regarding the alleged purchase of surveillance equipment at inflated prices. This matter unfolded in

court during 2020. The equipment was intended to be used to influence the outcome of the ANC National Conference of December 2017.

6.1.88 In this regard, there was no evidence upon which to conclude that the President had specific details of the alleged misuse of state funds. Consequently, it cannot be said that the President did not act in good faith and in the best interest of good governance or to act in all respects in a manner that is consistent with the integrity of his office or government.

6.1.89 It was further noted that the President had since taken various measures to refer matters to the appropriate authorities and has established structures that would deal with issues of criminality within the state. It could therefore not be concluded that he did not fulfil all the obligations imposed upon him by the Constitution and the law or did not act in a manner that is consistent with the integrity of his office or the government.

Conclusion made with regard to application of the law

6.1.90 In view of the above mentioned, the President did not breach section 34 of the PRECCA and neither is there evidence in the PPSA's possession to support the allegations that he violated the Code. As said, the President did not have any direct and specific information on the alleged misuse of public funds for party political purpose and the statements he made in the ANC's NEC meeting were merely based on allegations and information readily available in the public domain.

6.1.91 With regard to the *News 24* media article of 04 April 2020, the PPSA is of the view that this issue falls under the jurisdiction of the South African Police Service's (SAPS) mandate, which is derived from section 205 of the Constitution. The objectives of the SAPS is to: prevent, combat and investigate

crime, maintain public order, protect and secure the inhabitants of the Republic and their property, uphold and enforce the law and the SAPS will be the appropriate body to deal with the aforementioned allegations.

7. FINDINGS

In view of the foregoing, the PPSA closes this investigation based on the following findings:

7.1.1 The allegations that the President, violated the Code when he failed to inform all relevant investigative authorities that he had knowledge and evidence regarding the misuse of public funds for the 54th ANC National Conference, held in 2017, is **not substantiated**.

7.1.2 There is no doubt that the President as the first citizen has a higher duty to uphold, defend and respect the Constitution and all other law(s) of the Republic of South Africa and cannot be seen as passive spectator or observer should he/she have substantive knowledge or first-hand information of the plundering of public funds.

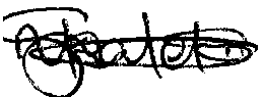
7.1.3 The President's explanation to both SCOPA as an integrity and oversight structure of Parliament, as well as the Public Protector, sought to provide the perspective that he did not have any direct and/or specific information on the alleged misuse of public funds for party political purposes and the statements he made were based on allegations already in the public domain and rumours circulating within the organisation and the broader society.

7.1.4 There are no objective factual circumstances uncovered in the Public Protector's extensive investigation in the matter, which demonstrate on a balance of probabilities that the President's statement during the ANC's NEC meeting in March 2021, served as an admission that he was aware of or that

he had actual knowledge of substantive and material information on the misuse of public funds for party-political purposes, or that he failed to report or share such information to the relevant authorities.

7.1.5 There is no evidence upon which the Public Protector is able to find that the President contravened any provisions of the Executive Ethics Code. In the circumstances, the Public Protector is satisfied that the utterances of the President in the audio was not in violation of the Executive Ethics Code.

8. The complainant was afforded an opportunity to make representations in connection with the intended closure of the complaint in accordance with Rule 41(1) of the Rules. Any party may consider the legal remedies at their disposal if there is a belief that the decision by the Public Protector to close the file was wrong because it was based on irrelevant evidence or information, inaccurate facts, errors of the law and if there is new evidence which has the potential to yield a different result.



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ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 30 SEPTEMBER 2022

Assisted by: *Mr Vusumuzi Xolani Dlamini*
Acting Executive Manager: Investigations Branch