



**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE OF CAPTURE,
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

**COMMISSION'S DECISION ON THE DEMOCRATIC ALLIANCE'S
REQUEST TO PARTICIPATE IN THE PROCEEDINGS OF THE
COMMISSION**

Introduction

[1] The Democratic Alliance (DA) has requested me to grant it leave to participate in the proceedings of the Commission at its own cost. Asked to clarify precisely what it meant by its request for leave to participate in the proceedings of the Commission, the DA said that it sought to have:

- (a) the right of access to all non-confidential evidence formally submitted to the Commission;
- (b) the right to submit documentary evidence to the Commission;
- (c) the right to request that the Commission call witnesses to testify at the Commission;
- (d) the right to examine witnesses who testify before the Commission;
- (e) the right to make written and oral argument at the conclusion of the Commission.

I shall deal with these in turn.

Consideration of components of the DA's request

(a) The right of access to non-confidential documents submitted to the Commission

[2] As a general rule, the Commission intends to allow the public to have access to all documents submitted to the Chairperson of the Commission during a hearing except those documents that the Chairperson will decide, for one or other reason, should not be made available to the public. Obviously, documents submitted to the Chairperson during a hearing *in camera* will not be made available to the public. To the extent that the DA seeks this right of access, like everyone else, it will have access to non-confidential documents submitted to the Chairperson during a hearing. However, as a general rule documents given to or obtained by, the investigators of the Commission or by the Commission will not be released to the public before they are handed over to the Chairperson during a hearing. The same rule will apply to the DA.

(b) The right to submit documentary evidence to the Commission

[3] The Commission issued a public notice a few weeks ago inviting members of the public in possession of evidence relevant to any of the allegations or matters that the Commission is required to investigate to submit that evidence to the Commission. That invitation still stands and applies to the DA as well. However, that evidence must be submitted to the Secretary of the Commission who will pass it on to the Commission's Legal Team for assessment.

[4] If the Commission's Legal Team takes the view that the evidence is relevant and will add value to the work of the Commission, then, subject to the final decision of the Chairperson of the Commission, the Commission's Legal Team will take the necessary steps to present that evidence before the Commission. If the Commission's Legal Team takes the view that the evidence is either irrelevant or is relevant but will not add value to the work of the Commission, they will not present the evidence to the Chairperson and they will advise the person concerned.

[5] If that person is aggrieved by the view taken by the Commission's Legal Team, he or she may then apply to the Chairperson for leave that that evidence be presented and the Chairperson will make a decision on the matter. This means that, if the DA has relevant documentary evidence that it wishes to be placed before the Chairperson, it must submit that evidence to the Secretary of the Commission who will pass it on to the Commission's Legal Team.

(c) The right to request the Commission to call witnesses

[6] Anybody is free to ask the Commission to call a certain witness or certain witnesses. However, that person must present to the Commission information or evidence that will satisfy the Commission that that witness is likely to give evidence that is not only relevant but will also add value to the inquiry of the Commission. A person who would like the Commission to call a certain witness must submit his or her request to the Commission through the Secretary of the Commission who will furnish the original thereof to the Chairperson of the Commission and a copy thereof to the Commission's Legal Team. That request must be accompanied by the particulars of the potential witness including those of the whereabouts of the potential witness and contact details. The Commission's Legal Team will take a view on the request and communicate their view to that person.

[7] If the view taken by the Commission's Legal Team is not to present that witness to the Commission to testify and the person who had made the request is not satisfied with the view taken by the Commission's Legal Team, he or she may request the Chairperson of the Commission to make a decision on the request. For that purpose, that person will need to furnish the Chairperson with sufficient information or evidence indicating the relevance and likely value of that potential witness's evidence. Therefore, to the extent that the DA wishes to participate in the proceedings of the Commission by requesting the Commission to call certain witnesses, this is the procedure that it must follow. It is in line with the Commission's invitation to the public that was published as Notice No 1 a few weeks ago.

(d) The right to examine witnesses

[8] The DA also seeks the right to examine witnesses who give evidence before the Commission. In support of its request, it points out that it has an interest in the proceedings of the Commission because it was one of the complainants who lodged complaints with the Public Protector which led to the “State of Capture” report. The “State of Capture” report is the one which contained the Public Protector’s remedial action that this Commission be established. The DA also points out that, even in the review application that was brought in the High Court, Pretoria, by former President Jacob Zuma, it was recognised as an interested party. This Commission’s rules contemplate that an implicated person may apply to the Chairperson of the Commission for leave to call a witness to give evidence or for leave to put questions to a witness who is giving evidence and the Chairperson will have a discretion whether to grant or not to grant leave.

[9] I do not think that the fact that the DA or its leader lodged a complaint with the Public Protector confers upon the DA the right to be allowed to examine witnesses who will give evidence before this Commission. It had no such right before the Public Protector when she conducted the investigation that led to the “State of Capture” report. The Public Protector Act¹ does not confer any such right on a complainant. Even in regard to an implicated person, that Act provides that an implicated person is only entitled to question witnesses through the Public Protector.² Neither the DA nor Mr Maimane was an implicated person before the Public Protector. There is also nothing so far that suggests that either the DA or its leader is an implicated person before this Commission. Accordingly, it can safely be concluded that under the Public Protector Act a complainant is not given any right to examine witnesses.

[10] In our law a complainant in a criminal case also has no right to examine in person or through a lawyer witnesses who give evidence. He or she has to rely on the

¹ 23 of 1994.

² Section 7(9)(b) (ii) reads: “Such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section.”

public prosecutor to put the right questions to the witnesses. In a Commission of Inquiry such as this one it also seems to me that a person or an organisation which lodged a complaint with the Public Protector who, after some investigation, took remedial action that the President establish a Commission such as this one has no right to examine witnesses who give evidence before the Commission.

[11] Even if the DA accepts, as it does, that it does not have a right as such to examine witnesses but asks that I exercise my discretion to give it such a right, I do not think that there are proper grounds that I give the DA or any person who may be in the same situation as the DA such a right. I do not find the grounds advanced by the DA persuasive. The Commission has a Legal Team whose job includes interviewing potential witnesses, taking statements from them and presenting them to the Commission as witnesses. There is no reason why a person or organisation in a position such as the one the DA is in should not rely upon the Commission's Legal Team. Unlike in civil litigation, in an inquiry such as this one there are no parties who have a dispute with each other. Accordingly, one cannot speak of parties to a dispute in respect of this inquiry. This is a Commission of Inquiry into certain allegations or matters. I, therefore, decline the DA's request to be allowed to examine witnesses who testify before the Commission.

(e) The right to make written and oral argument at the conclusion of the Commission

[12] There is a possibility that at some stage in the future the Commission may issue an invitation to political parties represented in Parliament, the public in general and to certain organisations and bodies to make written representations on recommendations that the Commission should make on certain issues. If that ultimately materialises, the DA might get an opportunity to make at least written representations. It seems that the DA should wait and see how the work of the Commission unfolds. If, closer to the end of the hearings and investigations, the DA realises that the Commission has not yet publicly announced a decision in this regard, it should consider renewing its request for leave to present both written and oral argument and I will consider it and make a decision at that stage.

Conclusion

[13] I conclude that, in respect of some of the components of the DA's request, the DA, like any member of the public, does have a right to make some contribution to the work of the Commission using the channels of the Commission but that, in respect of other components of its request, like any member of the public, it has no right to exercise and there are no proper grounds to justify giving it such rights just as there would be no grounds to justify giving a member of the public such rights.


[14] This decision is made after the Democratic Alliance has placed before the Commission everything it wanted to place before the Chairperson. By way of a letter from the Secretary of the Commission written at my instance dated 17 May 2018, the DA was invited to place any other submissions it wished to place before the Chairperson. It did so by way of a letter from its attorneys, Mindes, dated 4 June 2018.

[15] In the result the Commission's decision on the DA's request is that:

1. Subject what is said above:

- (a) the DA, like any member of the public, will have access to all non-confidential documents presented to the Commission during a public hearing which are not subject to an order by the Chairperson precluding the public's access to them.
- (b) the DA, like any member of the public, is free to present any relevant documentary evidence to the Commission's Legal Team through the Secretary of the Commission for consideration as evidence to be placed before the Chairperson of the Commission but its request to present such evidence directly to the Commission in a hearing is declined.
- (c) the DA's request that it be granted the right to examine witnesses giving evidence before the Commission is dismissed.

- (d) Like any member of the public, the DA may request the Commission to call a witness or witnesses but it must submit its request to the Commission's Legal Team through the Secretary of the Commission. If the Commission's Legal Team decides not to present that witness or those witnesses before the Commission to give evidence and the DA is aggrieved by that decision, it may apply to the Chairperson of the Commission for his decision on the request.
- (e) the DA's request to present written and oral argument at the conclusion of the proceedings of the Commission is declined at this stage but the DA is granted leave to resubmit its request at a later stage should it still wish to present written and oral argument at the conclusion of the proceedings of the Commission.


ZONDO DCJ
CHAIRPERSON OF THE COMMISSION
14 August 2018