



2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
Tel: (010) 214-0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

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

**Chairperson's Decision on Mr Thomas Swabehi Moyane's application for leave
to cross-examine Mr Pravin Gordhan***

ZONDO DCJ, Chairperson of the Commission

Introduction

[1] This is an application brought by Mr Thomas Swabehi Moyane for leave to cross-examine Mr PJ Gordhan, the Minister of Public Enterprises, who submitted a statement in this Commission last year and subsequently gave evidence. I shall refer to Mr Moyane as the applicant. A copy of Mr Gordhan's statement was sent to the applicant by the Secretary of the Commission in accordance with Rule 3.3 of the Rules of this Commission. A notice contemplated in Rule 3.3 was also sent to the applicant. In support of his application, the applicant delivered a founding affidavit with extensive annexures as well as a supplementary affidavit, also with annexures. Mr Gordhan opposes the applicant's application. In support of his opposition, Mr Gordhan delivered an opposing affidavit with extensive annexures. Thereafter, the applicant delivered a short replying affidavit – also with annexures.

* After the delivery of this decision on 16 April 2019 some minor editorial corrections were effected to the text by the Chairperson to ensure a better understanding of the decision.

[2] In due course the applicant's Counsel and Mr Gordhan's Counsel delivered written submissions on the applicant's application for leave to cross-examine and Mr Gordhan's opposition thereof. I subsequently heard oral argument presented by Counsel for the applicant, Mr Mpofu SC, Counsel for Mr Gordhan, Ms Le Roux and some limited comments by the Head of the Commission's Legal Team, Mr Pretorious SC. I am indebted to all Counsel for their written submissions and oral argument. After hearing argument, I reserved my decision and indicated that I would announce it in due course. This is it.

[3] In order to properly consider the applicant's application, it is necessary to first refer to the legal framework within which an application for leave to cross-examine a witness before this Commission must be evaluated in order to decide whether leave should be granted or refused.

The legal framework

[4] This Commission was appointed in terms of section 84 of the Constitution¹. The Commissions Act² has been made applicable to it. Certain regulations have been promulgated that apply to it³. Neither the Constitution nor the Commissions Act contains any express provision relating to the cross-examination of witnesses by anybody adversely affected by any statements or evidence of a witness in a judicial commission of inquiry. However, Regulation 8(3) of the Regulations applicable to this Commission provides:

“Any witness appearing before the Commission may be cross-examined by a person only if the chairperson permits such cross-examination should he deem it necessary and in the best interests of the function of the Commission.”

Regulation 15 reads:

¹ Constitution of the Republic of South Africa Act 107 of 1996.

² Commissions Act 8 of 1947.

³ Regulations of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Government Gazette No. 41436) (GN 105 of 9 February 2018).

“The Commission may determine its own procedures.”

[5] Pursuant to Regulation 15, the Commission has determined its own rules. Rule 3.1 of the Rules of this Commission provides in effect that, as a general rule, the Commission’s Legal Team bears the overall responsibility to present the evidence of witnesses to the Commission. This is subject to anything to the contrary contained in the Rules or subject to the Chairperson’s directions in regard to any specific witness.

[6] Rule 3.3 sets out what the Commission’s Legal Team is required to do if the Commission is in possession of a statement by a witness who is to give evidence before the Commission when his or her evidence implicates or may implicate another person. Rule 3.3 reads:

“3.3. If the Commission’s Legal Team intends to present to the Commission a witness, whose evidence implicates or may implicate another person, it must, through the Secretary of the Commission, notify that person (“implicated person”) in writing within a reasonable time before the witness gives evidence:

3.3.1. that he or she is, or may be, implicated by the witness’s evidence;

3.3.2. in what way he or she is, or may be, implicated and furnish him or her with the witness’s statement or relevant portions of the statement;

3.3.3. of the date when and the venue where the witness will give the evidence;

3.3.4. that he or she may attend the hearing at which the witness gives evidence;

3.3.5. that he or she may be assisted by a legal representative when the witness gives evidence;

3.3.6. that, if he or she wishes:

3.3.6.1. to give evidence himself or herself;

3.3.6.2. to call any witness to give evidence on his or her behalf; or

3.3.6.3. to cross-examine the witness, he or she must, within two weeks from the date of notice, apply in writing to the Commission for leave to do so; and

3.3.7. that the Chairperson will decide the application.”

I shall refer to the procedure set out in the provisions of this rule as the Rule 3.3 procedure.

[7] It will be seen from the introductory part of Rule 3.3 that the Rule 3.3 procedure only applies “[i]f the Commission’s Legal Team intends to present to the Commission a witness whose evidence implicates or may implicate another person. . .”. This means that the Rule 3.3 procedure does not apply if the evidence of the witness proposed to be presented to the Commission does not or will not implicate the person who seeks leave to cross-examine the witness.

[8] The purpose of the phrase “evidence [that]. . . may implicate another person” in the introductory part of Rule 3.3 is to ensure that, where the Commission’s Legal Team is not certain whether the evidence of a witness implicates a particular person but think that it is arguable that it does, they send a Rule 3.3 notice to that person and leave it to him or her to take a view whether or not he or she is implicated or will be implicated by the witness’s evidence. In both cases the Commission’s Legal Team will be obliged to send the affected person a Rule 3.3 notice.

[9] Once a person has received a Rule 3.3 notice, he or she must take his or her own view whether he or she is implicated and, if so, what steps he or she wants to take. Rule 3.3.6 makes provision for a person who, for example, seeks to cross-examine such a witness to apply to the Commission for leave to do so. If the person concerned does not wish to cross-examine the witness, he or she is not obliged to do anything. However, even where a person has taken the view that he or she is not implicated or has not done anything pursuant to the receipt of a Rule 3.3 notice, the Chairperson of the Commission still has power under both Regulation 10(6)⁴ as well

⁴ Regulation 10(6) reads:

“For the purposes of conducting an investigation the Chairperson may direct any person to submit an affidavit or affirmed declaration or to appear before the Commission to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person.”

as under Rule 3.10, should he choose to do so, to direct such a person to respond to allegations made against him or her. In terms of Regulation 10(6) the Chairperson may issue a directive requiring/directing any person to depose to an affidavit and deal with certain issues or directing the person to appear before the Commission and be questioned on matters falling within the terms of reference of the Commission.

[10] Rule 3.3.6 provides that the Rule 3.3 notice must notify the implicated person that, if he or she wishes to cross-examine the witness, he or she must, within two weeks from the date of notice, apply in writing to the Commission for leave to do so. Once the Secretary of the Commission has received an application for leave to cross-examine, he or she must place the application before the Chairperson and give a copy thereof to the Commission's Legal Team. The Chairperson may issue directions as to the future conduct of the application including giving the witness the opportunity to oppose the application by delivering an answering affidavit.

[11] The first important point to make in regard to an application for leave to cross-examine a witness is that it must be made by a person who is or may be implicated in the witness's statement or evidence. In other words, he or she must be able to state that he or she is implicated by the witness concerned in his or her statement. If a person is not implicated or cannot be said to be implicated in a witness's statement or in the witness's evidence, he or she is disqualified from making an application for leave to cross-examine.

[12] Furthermore, an applicant for leave to cross-examine must identify those parts of a witness's statement which he or she says implicate him or her. He or she may disagree with the contents of a Rule 3.3 notice in the sense that, while such a notice may state or suggest that he or she is or may be implicated in the witness's statement or evidence or is or may be implicated by a certain part or parts of a witness's statement, he may take the view that he is not implicated as suggested or at all.

[13] Rule 3.4 is the rule that governs the submission of an application for leave to cross-examine and its content. The rule reads:

“An application in terms of Rule 3.3.6 above must be submitted in writing to the Secretary of the Commission with [in] fourteen calendar days from the date of the notice referred to in Rule 3.3. The application must be accompanied by a statement from the implicated person responding to the witness’s statement in so far as it implicates him or her. The statement must make it clear what parts of the witness’s statement are disputed or denied and the grounds upon which those parts are disputed or denied.”⁵

[14] The second sentence of Rule 3.4 obliges an applicant for leave to cross-examine to make sure that his or her application is “accompanied by a statement from the implicated person responding to the witness’s statement in so far as it implicates him or her”. The word “from” in the second sentence of Rule 3.4 must be read as meaning “by” with the result that the statement that is said to be a statement from an implicated person is a statement by the implicated person. The part of Rule 3.4 which reads “responding to the witness’s statement in so far as it implicates him or her” qualifies the implicated person’s statement that must accompany the application for leave to cross-examine.

[15] That part of the first sentence of Rule 3.4 referred to in the preceding paragraph must be read with the last sentence of Rule 3.4. The third and last sentence of Rule 3.4 reads:

“The statement must make it clear what parts of the witness’s statement are disputed or denied and the grounds upon which those parts are disputed or denied.”

⁵ In so far as Rule 3.3.6 contemplates that an implicated person who wishes to give evidence, call a witness or to cross-examine a witness may apply in writing to the Commission for leave to do so, that provision must be read with Rule 11.3. The latter rule provides that whenever the Rules of the Commission make provision for any person to apply to the Commission such an application must be a substantive application on affidavit.

This sentence requires the implicated person's statement to make it clear what parts of the witness's statement are denied or disputed and the grounds upon which those parts are disputed or denied.

[16] The purpose of the second and third sentences of Rule 3.4 is to ensure that an implicated person does not simply provide a bare denial to a witness's statement that implicates him or her or to a part of a witness's statement that implicates him or her. Read together, the two sentences require or oblige an implicated person to do three things, namely:

- (a) identify the parts of the witness's statement that he or she accepts implicate him or her;
- (b) respond to the parts of the witness's statement that implicate him or her by stating whether he or she admits or denies them and setting out his or her version in regard to the incident or event or allegation, and,
- (c) ensure that his or her response or statement or affidavit provides the bases or grounds upon which he or she disputes or denies the version or allegation or evidence implicating him or her as reflected in the witness's statement or evidence.

[17] It should be clear from the above that part of the idea behind Rule 3.4 is that the Chairperson, who must decide the application for leave to cross-examine, is fully apprised of what is common cause between the respective versions of the witness and the implicated person or persons and where the areas of divergence between them are. This enables the Chairperson to have a full picture of the position when he considers the application for leave to cross-examine so that he can take into account the extent of the divergence in the two persons' versions in determining how much time will be appropriate to allocate for the cross-examination should he grant leave to cross-examine. If cross-examination is granted, it takes place within the context of the witness's version as well as the version of the implicated person and the grounds or bases upon which the witness's statement is or certain parts of the statement are

denied or disputed in so far as the statement implicates the applicant for leave to cross-examine.

[18] As already stated earlier, Regulation 8(3) reads:

“Any witness appearing before the Commission may be cross-examined by a person only if the chairperson permits such cross-examination should he deem it necessary and in the best interests of the function of the Commission.”

Rule 3.7 reads:

“In accordance with Regulation 8(3) there is no right to cross-examine a witness before the Commission but the Chairperson may permit cross-examination should he deem it necessary and in the best interests of the work of the Commission to do so.”

[19] Rule 3.6 provides:

“In deciding an application contemplated in Rule 3.3.6 the Chairperson may, in his discretion and on such terms and conditions as he may deem appropriate, grant leave to an implicated person to:

...

(c) to cross-examine the witness implicating him or her.”

[20] Rule 3.7 basically says the same thing as Regulation 8(3). What Regulation 8(3) and Rule 3.7 mean is that, in determining whether an application for leave to cross-examine should be granted, the Chairperson must ask the question whether “it is necessary and in the best interests of the function [or work] of the Commission to” grant the applicant leave to cross-examine the particular witness whom he or she wishes to cross-examine. If the Chairperson takes the view that it is, he grants leave. If he takes the view that it is not, he does not grant leave. Therefore, the test for determining the merits of an application for leave to cross-examine is whether it is necessary and in the best interests of the function of the Commission for the Chairperson to grant leave.

[21] It can be seen from the above discussion of the Rules of the Commission that the first requirement that an applicant for leave to cross-examine must satisfy is that the statement or evidence of the witness whom he or she wishes to cross-examine implicates him or her. If he or she fails to show this, his or her application is fatally defective and will be dismissed. If an applicant for leave to cross-examine succeeds in showing that he or she is implicated in the statement or evidence of the witness, then he or she must state, in accordance with the second and third sentences of Rule 3.4, what he or she admits in the witness's statement or evidence and what he or she denies or disputes, set out his or her full version of the incident or to the allegation and state what the grounds are for denying or disputing the witness's statements or part or parts thereof. He or she must then show that it would be necessary and in the best interests of the function of the Commission for the Chairperson to grant him or her leave to cross-examine the particular witness. If he or she succeeds in showing all this, the Chairperson grants or may grant him or her leave to cross-examine the witness. If he or she fails to show all this, the Chairperson will or may dismiss the application.

[22] Rule 3.6 makes it clear that, in deciding an application for leave to cross-examine, the Chairperson exercises a discretion. That discretion must be exercised judiciously with due regard to all relevant circumstances.

[23] From the above analysis of the provisions of Regulation 8(3) and various rules of the Commission what emerges is that some of the important requirements that a person who applies for leave to cross-examine a witness before this Commission must satisfy are that:

- (a) there is no right to cross-examination but the Chairperson may grant leave to cross-examine in certain circumstances;
- (b) the witness implicates the applicant for leave to cross-examine;

- (c) the applicant must clearly identify the part or parts of the witness's statement or evidence which implicate(s) him or her;
- (d) the applicant for leave to cross-examine must state whether he admits or denies or disputes the witness's allegation(s) or evidence that implicate(s) him or her and;
- (e) he or she must set out his or her version in relation to any allegation or evidence by the witnesses or in relation to each incident and the grounds upon which he or she denies or disputes or qualifies the allegation made, or, evidence given, by the witness;
- (f) the Chairperson exercises a discretion in granting or refusing an application for leave to cross-examine;
- (g) in determining whether to grant or refuse an application for leave to cross-examine, the Chairperson considers whether it is necessary and in the best interests of the function of the Commission to grant leave to cross-examine.

[24] A principle that is not expressly articulated in the rules but is of obvious application is that an applicant for leave to cross-examine must take the Commission into his or her confidence and disclose his or her true and full version in regard to any allegation made, or, evidence given, by the witness that implicates him or her. Obviously, an applicant for leave to cross-examine who fails to take the Commission into his or her confidence and disclose his or her true version of matters risks having his or her application refused.

[25] Despite the fact that the applicants' affidavits were deposed to in support of an application for leave to cross-examine, they reflect the applicant's attitude as being that he has a right to cross-examine Mr Gordhan. This position is also reflected in the applicant's Counsel's written submissions. However, to his credit, when Mr Mpofo SC presented his oral argument on behalf of the applicant, he, quite correctly, made it clear that he accepted that in this Commission the applicant has no right to cross-

examine but has to apply for leave to cross-examine and will only have that right if I grant it to him. Mr Mpofo also accepted that the applicant is required to also give his version in regard to matters in which he is implicated in Mr Gordhan's statement or evidence.

Application of the requirements of the Regulations and Rules to the applicant's application

[26] Now that I have discussed the requirements that an applicant for leave to cross-examine must satisfy, it is necessary to consider the applicant's application and determine whether it satisfies all the requirements of the Regulations and Rules and, if applicable, determine whether it is necessary and in the best interests of the function of the Commission to grant the applicant leave to cross-examine Mr Gordhan.

[27] In applying the Rules as discussed above to the applicant's application and Mr Gordhan's opposition of that application, the first issue for the applicant is whether the applicant has shown that he is implicated in Mr Gordhan's statement or evidence. In respect of many issues in his founding affidavit where the applicant articulates issues in respect of which he seeks leave to cross-examine, the applicant has not shown that he is implicated in Mr Gordhan's statement or evidence. Fortunately for the applicant there are a few areas in his founding affidavit in which it is shown that he is implicated in Mr Gordhan's statement. I shall deal with these in due course.

[28] I have also made the point that Rule 3.3 requires from an applicant for leave to cross-examine "a statement . . . responding to the witness's statement in so far as it implicates him or her". This means that an applicant for leave to cross-examine must respond to those parts of the witness's statement which implicate him or her. The applicant's statement in this case does not at all respond to certain important parts of Mr Gordhan's statement which implicate him or does not respond adequately to some parts of Mr Gordhan's statement or evidence. One example of this relates to paragraphs 127 to 127.4 of Mr Gordhan's statement where Mr Gordhan implicates the applicant of blatant refusal "to account to [him] as Minister of Finance on material

issues (such as the operating model of SARS)”. Mr Gordhan accuses the applicant of even refusing to acknowledge his authority. Mr Gordhan suggests that this conduct on the applicant’s part appeared to have been part of a campaign aimed at forcing him to resign as Minister of Finance. He says the applicant made serious allegations against him and continued to refuse to accept that he was accountable and answerable to him as Minister of Finance. In his founding affidavit the applicant does not respond to these allegations in Mr Gordhan’s statement.

[29] Furthermore, I have also stated that Rule 3.4 requires the statement of an applicant for leave to cross-examine to make it “clear which parts of the witness’s statement are disputed or denied and the grounds upon which those parts are disputed or denied”. Because the applicant’s affidavits in this case do not identify or do not clearly identify the parts of Mr Gordhan’s statement that are denied or disputed, it cannot be said that it complies with that part of Rule 3.4 that requires that an applicant’s statement make it clear what parts of a witness’s statement are disputed or denied. One struggles to see which parts of Mr Gordhan’s statement the applicant admits or disputes. The applicant’s statement should have made this quite clear. Rule 3.4 also obliges an applicant for leave to cross-examine to give his version in regard to allegations made by a witness or in regard to evidence given by a witness.

[30] It will also have been clear from the discussion of Regulation 8(3) and Rule 3.7 that an applicant for leave to cross-examine is required to show that it is necessary and in the best interests of the function or work of the Commission that he or she be granted leave to cross-examine. Neither in his founding affidavit nor in his supplementary affidavit did the applicant deal with the issue of why it can be said that granting him leave to cross-examine Mr Gordhan is necessary and in the best interests of the function of the Commission. I have read his affidavits carefully and I am satisfied that he does not address this important issue. As an applicant for leave to cross-examine, he should have addressed the question of why I should conclude that it is necessary and in the best interests of the function of the Commission that he be granted leave to cross-examine Mr Gordhan.

[31] By contrast, in his opposing affidavit Mr Gordhan specifically contended that the first reason why he opposes the applicant's application is that it "fails to comply with the requirements of Rules 3.4 and 3.7" of the Commission's Rules. Both Rule 3.4 and Rule 3.7 have been quoted above. Rule 3.4 is the rule that, among other things, requires an application for cross-examination to be accompanied by the applicant's or implicated person's "statement . . . responding to the witness's statement in so far as it implicates him or her" and that such statement by the applicant or implicated person "must make it clear what parts of the witness's statement are disputed or denied and the grounds upon which those parts are disputed or denied". Rule 3.7 is the rule that effectively mirrors Regulation 8(3) and is to the effect that in this Commission there is no right to cross-examine but that the Chairperson "may permit cross-examination should he deem it necessary and in the best interests of the work of the Commission to do so". Rules 3.4 and 3.7 are, therefore, together with Regulation 8(3) at the heart of the consideration of an application for leave to cross-examine a witness before this Commission.

[32] In support of his contention that the applicant's application fails to comply with Rule 3.4 and 3.7, Mr Gordhan said in his affidavit:

“6.1 Contrary to those requirements, the application fails to ‘make it clear what parts of the witness’s statement are disputed or denied and the grounds upon which those parts are disputed or denied’

6.2 Nor does it establish that cross-examination is ‘necessary and in the best interests of the work of the Commission to do so’

6.3 This defect is a basis to dismiss the application in its entirety.”

[33] Mr Gordhan also pointed out that he was advised that the purpose of cross-examination would be to test his evidence against an alternative set of facts provided

by the applicant but, said Mr Gordhan, the applicant did not put up any alternative set of facts or any evidence contradicting his evidence.

[34] Mr Gordhan stated in his opposing affidavit that in his evidence before this Commission he had testified about the applicant in three respects. He said that:

(a) he expressed his concerns about the applicant's appointment and the applicant's resistance to his executive oversight when he was the Minister of Finance to whom the applicant was accountable.

(b) he provided evidence to the Commission "regarding the apparent irregularity of a contract approved by [the applicant] in terms of which New Integrated Credit Solutions (NICS) was appointed as a debt collector at SARS and [the applicant's] misleading statements to Parliament regarding his involvement".

(c) he testified about the campaign against him "when [he] was re-appointed as Minister of Finance that included the launching and subsequent withdrawal of criminal charges against [him] arising from a docket opened by [the applicant]. I testified regarding its impact on me personally".

[35] After setting out the above three issues as the only issues that related to the applicant that he testified about in this Commission, Mr Gordhan made the point in the next paragraph that the applicant has not placed "a competing factual version before the Commission with which to test any of this factual evidence through cross-examination". He said that the applicant's disagreement with his personal impressions and experience does not assist the Commission.

[36] Mr Gordhan thereafter pointed out in his opposing affidavit that "all three of the issues identified above regarding which I testified have been confirmed by Justice Nugent in the work of the Commission of Inquiry into Tax Administration and

Governance by the SARS ('Nugent Commission')". Mr Gordhan went on to say: "As set out below, that judicial commission has investigated, considered and made several findings that render this application by [the applicant] redundant".

[37] In his replying affidavit the applicant does not deny or dispute Mr Gordhan's assertions that the three respects in which he says he testified about the applicant in this Commission are the only respects in which he testified about him nor does he deny or dispute Mr Gordhan's evidence that "all three of the issues identified have been confirmed by Justice Nugent in the work" of the Commission he chaired. The applicant also does not deny Mr Gordhan's assertion that the Nugent Commission "investigated, considered and made several findings" about those issues.

[38] Before I deal with what the applicant says in his replying affidavit, let me make one point. That is that, after Mr Gordhan had delivered and served his opposing affidavit, the applicant had an opportunity to respond meaningfully and directly to Mr Gordhan's opposing affidavit. However, in his replying affidavit the applicant said in part:

"I do not propose to deal with the allegations contained in the opposing affidavit ad seriatim due to the nature of my responses, which are thematic and cut-across the gist of such opposition. Any allegations which are not specifically addressed but which are inconsistent with the version contained in this, the founding and supplementary affidavits, including annexures thereto, must be regarded as having been specifically denied and disputed."

[39] There are three points to be made in connection with this passage from the applicant's replying affidavit. The first is that the applicant says that he will not respond to the "allegations" made in Mr Gordhan's affidavit one by one because his responses are thematic and cut across the gist of Mr Gordhan's opposition. The danger with this approach adopted by the applicant is that there may be material parts in Mr Gordhan's affidavit and evidence to which he may end up not responding which may, therefore, stand as undisputed or uncontroverted.

[40] The second point is that, where Mr Gordhan's affidavit contains a version on a certain issue and that version is inconsistent with the applicant's affidavits and the applicant relies simply on the second sentence in the passage quoted above to say that he denies or disputes Mr Gordhan's allegation or evidence, his denial will be nothing more than a bare denial of what Mr Gordhan may have said in his opposing affidavit. That will not assist the applicant's application for leave to cross-examine Mr Gordhan.

[41] The third point is that there may be parts of Mr Gordhan's affidavit and evidence which might not be said to be inconsistent with any of the contents of the applicant's affidavits. In such a case the effect of the last sentence in the passage quoted above would be that such evidence is not denied or disputed because the sentence says only what is inconsistent with the applicant's affidavits and annexures must be regarded as denied or disputed.

[42] The applicant also does not dispute or deny any explanations that Mr Gordhan may have given in his opposing affidavit in respect of what he may have said in his statement or evidence. In his replying affidavit the applicant attacked Mr Gordhan's reliance on the findings of the SARS Commission on the basis that they are irrelevant opinions. However, he failed to substantiate this contention. All he said was that they are hit by at least three exclusionary rules relating to opinion evidence but he did not say what those three rules are. He then set out some of his complaints about the SARS Commission which included that:

- (a) the SARS Commission had its own terms of reference;
- (b) he was allegedly denied the right to participate in the SARS Commission;
- (c) he will shortly be "setting down part B of [his] challenge to the SARS Commission Report seeking relief to review and setting it aside" and mentioned some of his intended grounds of review.

[43] I am unable to agree with the applicant's contention that findings made by the SARS Commission in respect of issues on which he requests leave to cross-examine Mr Gordhan are irrelevant. He himself fails to say why such findings are irrelevant other than to say that the SARS Commission had its own terms of reference. Although the SARS Commission had different terms of reference, it may have made findings of fact that relate to some of the allegations of facts on which the applicant seeks leave to cross-examine Mr Gordhan. Obviously, its findings are not and cannot be binding on me. However, I must have due regard to them when, among others, I consider whether it is necessary and in the best interests of the function of the Commission to grant the applicant leave to cross-examine on an issue that has been considered by the SARS Commission and in respect of which that Commission has made a finding.

[44] The applicant points out that his application was prompted by a Rule 3.3 notice that he received from the Secretary of the Commission. He says that that notice stated that Mr Gordhan had submitted to the Commission a statement that implicated him in wrongdoing and pointed out two respects in which it said Mr Gordhan implicated him. In his founding affidavit the applicant states that the one respect in which the Rule 3.3 notice said Mr Gordhan implicated him was in his statement. It quoted that part as well as the other respect in which the Rule 3.3 notice suggested that Mr Gordhan had implicated the applicant. The applicant put it in these terms:

“5.1. My alleged participation in the awarding of the contract or tender to New Integrated Credit Solutions, a company owned by my alleged friend, Mr Patrick Monyeki; and

5.2 My alleged refusal to account to Minister Gordhan as Minister of Finance on material issues, the deteriorating relationship between the two of us, alleged ongoing personal and institutional attacks by me and Minister Gordhan and related relationship issues.”

The applicant set this out in paragraph 5 of his founding affidavit. I deal later with these two respects in which the Rule 3.3 notice said Mr Gordhan had implicated the applicant.

[45] A proper reading of paragraph 6 of the applicant's founding affidavit reflects that the applicant makes the point that a cursory reading of Minister Gordhan's statement submitted to this Commission reveals that the issues that Mr Gordhan raised in his statement, which, directly or indirectly affected him (i.e. the applicant), included the following:

- “6.1 The role played by Minister Gordhan as Minister of Finance to assist or oppose perceived state capture;
- 6.2 Minister Gordhan's requests for my removal;
- 6.3 His complaints about the manner in which I was employed;
- 6.4 His belief that I was responsible for the charges against him and others of the alleged rogue unit;
- 6.5 The lawfulness or otherwise of the rogue unit and, if it existed, Minister Gordhan's role in it;
- 6.6 My allegation of racism and disrespect towards me by Minister Gordhan;
- 6.7 His conduct and abuse of power related to his return to the Ministry of Finance in 2015 and more recently, the victory of President Cyril Ramaphosa at the ANC Conference. This is coupled with a personal vendetta and campaign driven by Minister Gordhan to influence President Ramaphosa to complete Minister Gordhan's dream of my removal as Commissioner of the South African Revenue Services (“SARS”) for sake of revenge and misplaced hatred towards me.”

For convenience I shall refer to the issues listed under paragraph 6 of the applicant's founding affidavit as the paragraph 6 issues.

[46] In paragraph 7 the applicant lists seven “additional issues” which he says “are related to [the paragraph 6 issues] but are not directly raised in the papers”. I shall refer to the issues he lists in paragraph 7 as the paragraph 7 issues. Paragraph 7 reads:

- “7. Additional issues which are related to the above but are not directly raised in the papers include:
- 7.1 Mr Gordhan’s narrative that, when it comes to state capture there is a line between the devils (led by former President Zuma) and the angels, [of] which he counts himself as one;
 - 7.2 Related to the above Minister Gordhan’s misleading of Parliament about his relationship with the Guptas which is similar to that of other self-styled angels such as former Minister Nene;
 - 7.3 Minister Gordhan’s role in rogue unit saga;
 - 7.4 Minister Gordhan’s improper leading role in my disciplinary inquiry;
 - 7.5 Minister Gordhan’s improper role in the Nugent Inquiry; including his holding of an improper and undisclosed meeting with the Commissioner, Judge Robert Nugent and the legal implications thereof;
 - 7.6 Minister (or Commissioner) Gordhan’s track record of mismanagement, lawlessness and flagrant breach of procurement rules which I was confronted with at SARS;
 - 7.7 Reports of the above of one of my predecessors, Mr Oupa Magashula, by Minister Gordhan and his rogue unit and the views of the current Acting Commissioner thereon.”

[47] In the first sentence of paragraph 8 of his founding affidavit the applicant states:

“The above make up 7 topics for intended cross-examination.”

It is not clear whether the reference to “above” in the first sentence of paragraph 8 of the applicant’s founding affidavit is a reference to the paragraph 6 issues or the paragraph 7 issues because, under both, seven issues are listed. However, it would seem that he must have intended to refer to the paragraph 6 issues because he said that those were raised by Mr Gordhan in his statement whereas he says that the paragraph 7 issues are not “directly raised in the papers”. Accordingly, this matter must be approached on the footing that the issues or matters in respect of which the applicant seeks leave to cross-examine Mr Gordhan are the paragraph 6 issues.

[48] If I am correct that the reference to the 7 topics in the first sentence of paragraph 8 is a reference to the paragraph 6 issues, then the first sentence of paragraph 8 of the applicant's founding affidavit must be understood to mean that those are the seven topics for the applicant's "intended cross-examination". However, the applicant goes on to say in paragraph 8 that these seven topics "can be reduced to 5 broad cross-examination themes". He lists those themes as follows:

“8.1 The general credibility and general attitude of Minister Gordhan characterised by a propensity to distort and spin the facts;

8.2 Bias, hostility and vindictiveness as guiding attitude of the relation between the two of us, leaving no room for professionalism, objectivity and impartiality in our mutual dealings. This calls for any evidence given by Gordhan about me in any ongoing forum, including this one, [to] need to be taken with more than the proverbial pinch of salt;

8.3 The distortion of the evidence in order to support his false narrative of devils and angels, and specifically my alleged breach of procurement procedures;

8.4 Racism and other unbecoming behaviour by Minister Gordhan towards me symbolises regrettable behaviour which has no place in the nation we are all trying to build in which there is no place for looking down upon African people;

8.5 The deep role of Minister Gordhan in the rogue unit saga also referred to as 'Sunday Evening project', which was a form of state capture.”

It seems to me that the applicant's case is that he seeks leave to cross-examine Mr Gordhan on the paragraph 6 issues using the cross-examination themes which he sets out in paragraph 8 of his founding affidavit.

[49] After outlining in paragraph 8 what he calls his cross-examination themes, the applicant says in paragraph 9:

“The rest of this affidavit will briefly outline my submissions herein, organised along the lines of the abovementioned 5 cross-examination themes or headings and in respect of each of which my version will be outlined and the relevant supporting documents, where applicable, will be identified and annexed.”

Paragraph 9 seems to emphasise that, if one wants to consider the basis of the applicant's application, the proper place to look at is not after paragraph 8 except for what the applicant indicates are his versions. Paragraph 10 of the applicant's founding affidavit simply contains a request about the amount of cross-examination time I should allow the applicant should I grant him leave to cross-examine. It is important to point out that from paragraph 1 to paragraph 9 of the applicant's founding affidavit, the applicant does not anywhere draw attention to any allegation made by Mr Gordhan that implicates him in any wrongdoing. The closest to which he comes is in paragraphs 6.3 and 6.4. In paragraph 6.3 the applicant suggests that Mr Gordhan had "complaints about the manner in which [he] was employed". That does not say that Mr Gordhan implicated him in any wrongdoing in regard to his appointment. In paragraph 6.4 the applicant refers to "[Mr Gordhan's] belief that [he] was responsible for the charges against [Mr Gordhan] and others of the alleged rogue unit". On its own this does not amount to Mr Gordhan implicating the applicant in any wrongdoing. In any event the applicant has admitted in his affidavit that he laid a complaint with the Police which led to Mr Gordhan and others being criminally charged. Other than this, none of the paragraph 6 issues refers to any statement by Mr Gordhan that can be said to have implicated the applicant in any wrongdoing.

[50] When one goes to the paragraph 7 issues, there, too, what the applicant does is to list his own allegations or complaints or accusations of alleged improper conduct by Mr Gordhan. They are not instances or areas in Mr Gordhan's affidavit where he implicates the applicant. By the applicant's own admission, the paragraph 7 issues are not directly raised in Mr Gordhan's statement. Therefore, he cannot apply for leave to cross-examine Mr Gordhan on issues that are not raised in his affidavit or in his evidence.

[51] I have already referred to paragraph 8 of the applicant's founding affidavit which contains what the applicant calls his five broad cross examination themes. In paragraph 11 of his founding affidavit the applicant states that he is proceeding "to

outline issues to be raised by [him] as [his version] in respect of each of the broad themes identified above”. The so-called cross-examination themes start from paragraph 11 and go up to paragraph 30.7 of the founding affidavit. The balance of the founding affidavit is then taken up by a condonation application. Subject to what is contained in the applicant’s supplementary affidavit, with which I shall deal shortly, the applicant’s case on whether or not he should be granted leave to cross-examine Mr Gordhan is based on paragraphs 5-30.6. I have dealt with all the above paragraphs except that I have not dealt with the contents of paragraphs 11 to 30.6. These paragraphs relate to the so called cross-examination themes. I deal with them below one by one.

Cross-examination Theme 1

General credibility

[52] Under this theme the applicant does not state what Mr Gordhan said about him in his statement or evidence which implicates him. He simply sets out his version on certain issues. In the first sentence under this theme, the applicant states that his “version is that Minister Gordhan’s affidavit is more significant for what it omits than what it says”. I have examined everything that the applicant says under this theme. ~~He does not anywhere state that Mr Gordhan implicated him. Accordingly, there is no~~ basis for him to apply for leave to cross-examine Mr Gordhan on an issue in regard to which Mr Gordhan does not implicate him.

Cross examination Theme 2

Anti-Moyane Bias and Hostility

[53] Under this cross-examination theme the applicant states that he “will seek to demonstrate that the levels of acrimony, hostility, enmity and anger harboured by Minister Gordhan towards [him] as a person are sufficient to disqualify him as an impartial and dispassionate commentator on any issue in which [he is] allegedly involved”. Elsewhere under this cross-examination theme the applicant states that “it will be demonstrated that Gordhan has made it his life-long mission to have me

removed from office, by hook or by crook.” He also alleges that “Minister Gordhan’s meddling in [his disciplinary inquiry and the Nugent inquiry] is, in the circumstances improper, unlawful, unfair and in breach of the Constitution and the rule of law in various ways.” I have also examined everything said by the applicant under this theme in his founding affidavit. He does not anywhere articulate anything that was said by Mr Gordhan that he says implicates him in wrongdoing.

Cross examination Theme 3

Alleged breach of procurement procedures by Mr Moyane (“the Monyeki case”)

[54] This is one heading or cross-examination theme under which the applicant points out that Mr Gordhan made a direct accusation against him. The applicant states that Mr Gordhan made a direct accusation that he:

- “2.1 (i) improperly participated in the award of a tender to my friend, Mr Patrick Monyeki; and
- 2.2 (l) lied to Parliament about such involvement by denying it.”

[55] In response to this the applicant provides a bare denial. After pointing out that ~~it is not clear where Mr Gordhan made the above accusations because they are not included in his affidavit nor in his evidence before the Commission, the applicant says: “In any event, I deny these accusations and will put questions to Gordhan to demonstrate their falsity”.~~ He does not say whether he admits that he participated in the award of the contract but denies that his participation was improper. He simply denies the entire allegation.

[56] In his opposing affidavit Mr Gordhan points out that he mentioned the Monyeki case in his evidence. He says that he has no personal knowledge of the matter, but mentioned it in his evidence before the Commission as a suggestion that the Commission should consider investigating the case because there appeared to have been no compliance with procurement procedures. He points out that the Monyeki

case has already been dealt with by the SARS Commission of Inquiry. He refers to passages in the final report of the SARS Commission in which that Commission made a clear finding that the applicant participated in the award of a tender to a company called New Integrated Credit Solutions.

[57] It is also stated in the SARS Commission report that the applicant approved the appointment of New Integrated Credit Solutions to the panel of service providers on 17 December 2015. It is also stated in that report that the applicant approved the appointment of that company for Phase 2 of the project on 15 February 2018. It is said that in each case he did so by signing the report of the National Bid Adjudication Committee. Later on, the SARS Commission made this finding in its report:

“It is also not true that [Mr Moyane] does ‘not get involved’ in such appointments. His was the final approval for the award of the contract. Indeed, that assertion contradicts the assertion he made in the application to set aside the contract with LTC, the very foundation of which was that he was ‘involved’ in the award of the contract. In his replying affidavit he acknowledged expressly that he had been ‘involved’ in the award of the contract: ‘As a matter of fact, I was ‘involved with’ the evaluation and adjudication of the bids. The National Bid Adjudication Committee’s process resulted in a recommendation made to me in my capacity as SARS’ accounting [officer] which recommendation I personally signed. I was also involved with the evaluation and adjudication, in the sense that I am responsible for ensuring that all procurement occurs in accordance with a lawful system and in that the ultimate recommendations emanating from that system needed my approval.”

[58] The SARS Commission also made this finding:

“(so) far as Mr Moyane conveyed that he had no hand in the appointment of New Integrated Credit Solutions, that is not true. It is apparent from the documents that on each of the occasions that New Integrated Credit Solutions was appointed to the panel, and again appointed to Phase 2, the National Bid Adjudication Committee made a recommendation to Mr Moyane who then approved it by appending his signature to the report. He cannot but have known that the NBAC’s decision was not

the end of the process and cannot but have known that New Integrated Credit Solutions was appointed, bearing in mind that he approved it.”⁶

[59] In regard to the allegation that he lied to Parliament about his involvement, the applicant does not say what exactly he said to Parliament. Accordingly, the applicant has not furnished his version on whether he was involved in the appointment of the New Integrated Credit Solutions to the panel or to Phase 2 nor does he set out the grounds for his denial. If in Parliament the applicant said that he did not participate or he was not involved in the appointment of New Integrated Credit Solutions, that would be in conflict with the later SARS Commission finding that it was not true that the applicant did not participate or get involved in the appointment of that company. It seems to me that on this issue the applicant has failed to take the Commission into his confidence and given it his version and say what he told Parliament.

[60] It is also important to point out that Mr Gordhan attached to his statement, among others, an affidavit that he submitted to a disciplinary inquiry which had been set up by the President to inquire into certain allegations of misconduct against the applicant. In that affidavit Mr Gordhan made the allegation (and put up what appeared to be credible evidence or proof) that, as Commissioner of SARS, the applicant participated in the awarding of a debt collection contract to a company associated with a friend of his, Mr Monyeki, but that, when the applicant was asked about this in Parliament, he denied having been involved at all but admitted that Mr Monyeki is his friend. The applicant was aware of this affidavit when he prepared his founding affidavit for his application for leave to cross-examine Mr Gordhan. In his opposing affidavit Mr Gordhan referred to the passages in the SARS Commission report to which reference has been made above which make it clear that that Commission found that the applicant took part in the awarding of that contract and that, to the extent that in Parliament he said that he had not taken part, that was untrue. In this Commission the applicant fails to deal with this issue and to tell this Commission what he has to say about all this. He ought to have taken this

⁶ Par 25 of the SARS Commission Report.

Commission into his confidence and told it what the truth is or offer an explanation but he has not done so. Instead, he has simply said that these allegations are false. Given the applicant's failure to furnish his version in regard to the allegations against him in this regard and his failure to take the Commission into his confidence, I am unable to grant him leave to cross-examine Mr Gordhan in regard to these allegations.

Cross-examination Theme 4

Alleged racist and hurtful utterances, impairment of dignity and vendetta

[61] This is the fourth cross-examination theme on which the applicant seeks leave to cross-examine Mr Gordhan. Under it, the applicant simply says:

- “26. These issues, which will be treated as a discrete theme, will have already been alluded to in different contexts above.
27. Under this theme, the issue will be invoked in the separate context of the constitutional obligation contained in, inter alia, section 96(2)(b) of the Constitution as well as section 195 thereof.
28. No new documentation will be relied on other than what has already been annexed (e.g. TM2, the Constitutional Court affidavit⁰, annexure, ‘TMZ3’) hereto.”

[62] What the applicant says under this cross-examination theme does not anywhere refer to anything allegedly said by Mr Gordhan in his statement or evidence before this Commission which implicates the applicant in any wrongdoing. What Mr Gordhan may have said about the applicant in another forum cannot be a basis for seeking leave to cross-examine him in this Commission if he has not repeated in his statement or evidence before the Commission. The applicant also does not make any effort in his discussion of this cross-examination theme to demonstrate how it is necessary and in the best interests of the function of this Commission that he should be granted leave to cross-examine Mr Gordhan on these issues or this theme.

Cross-examination Theme 5

The Role of the so-called "Rogue" unit

[63] Under this cross-examination theme the applicant seeks leave to cross-examine Mr Gordhan on "the [alleged] rouge unit, its existence and lawfulness." The applicant does not say under this theme what it is that Mr Gordhan said in his affidavit or evidence before this Commission that implicated him in state capture or corruption in regard to the unit. Interestingly, the applicant states in paragraph 30.1 of his founding affidavit under this theme:

"This issue plays a central role in that:

30.1. The existence and lawfulness of the rouge unit was repeatedly and independently exhausted. The likes of Minister Gordhan falsely assert that this is not the case. In this regard I attach a copy of the Sikhakhane report as annexure 'TMZ4'. I will soon also provide a copy of the KPMG Report in due course."

[64] The question arises: if the existence and lawfulness of the alleged rogue unit have been repeatedly and independently exhausted, why is it necessary and in the best interests of the function of the Commission to allow cross-examination on it? In his opposing affidavit Mr Gordhan points out that the SARS Commission considered these very issues in regard to the unit and concluded that the unit was lawful. For the reasons that the applicant does not state how and where in his affidavit and oral evidence Mr Gordhan implicated him in regard to the unit, I am of the view that there is no proper basis for me to grant the applicant leave to cross-examine Mr Gordhan on this issue.

[65] In his supplementary affidavit the applicant indicated that he or his legal team had had the opportunity of studying the transcript of Mr Gordhan's oral evidence. He said that, except for one issue, he saw no reason to add to what he had already covered in his founding affidavit. He said that the exception related to Mr Gordhan's evidence regarding his laying of criminal charges relating to the so-called rogue unit against him with the Hawks on 15 May 2015.

[66] The applicant quoted what Mr Gordhan said about him having laid charges against him. The applicant said:

“About that issue, Gordhan had the following to say:

‘This envelope contained 27 questions addressed to me from the Hawks demanding that they be answered by 2 March 2016. The questions related to the High Risk Investigations Unit within SARS formed years earlier. Charges against me relating to that unit had been filed by Mr Moyane on 15 May 2015.’”

After quoting this passage, the applicant then says: “I intend to cross-examine Gordhan extensively on this issue so as [to] the assist the Commission in evaluating” a number of issues which the applicant then sets out. He gives a list of three issues. The applicant says that these are:

- (a) the actual events and evidential material which led him to lay charges against, among others, Mr Gordhan so as to assess whether or not there was probable cause, or whether, as implied by Gordhan, I was acting out of malice and personal vindictiveness and the like;
- (b) “the credibility of Mr Gordhan as a witness and whether anything he says including his implication of me in alleged state capture, can ever be taken with anything less than a pinch of salt;”
- (c) “his motives in painting himself as innocent, untainted by state capture and a paragon of virtue, namely to conceal his own central role in state capture.”

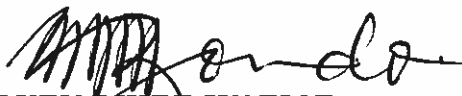

[67] Out of all these three issues that the applicant has set out in the preceding paragraph, the only issue that has caused me some concern is the one relating to the allegation that Mr Gordhan alleged malice on the part of the applicant in laying charges against him. When one reads Mr Gordhan’s founding affidavit (i.e. the sworn statement he submitted to the Commission in 2018) there are places where one gets

the impression that he may be suggesting that, in laying charges against him, the applicant was part of a scheme that sought to capture the National Treasury. However, when one reads certain paragraphs in the founding affidavit, one may also get the impression that what he says in that regard might be directed only at the Hawks who served him with 27 questions when they were under the leadership of General Ntlemeza. Also, when one has regard to Mr Gordhan's opposing affidavit filed in response to the affidavit of the applicant, it appears that he might be equivocating with regard to whether he presses the point relating to what the motives of the applicant were in laying the charges. When one has regard to the applicant's founding affidavit, one can see that in paragraph 6 where the applicant sets out what I've called the paragraph 6 issues in regard to which he seeks leave to cross-examine Mr Gordhan, there is no reference to any allegation by Mr Gordhan that he (i.e. the applicant) acted with malice or Mr Gordhan was accusing the applicant of acting with malice in laying the complaint against Mr Gordhan with the Police.

[68] It seems to me that it would be better that I get clarification from both sides in regard to this issue before I take a final decision. I, therefore, propose that in regard to this particular issue I will issue directions in the next few days in which I will set out clearly what I would like both parties to address before I make a decision. Other than that issue in respect of which I will make a decision in due course I am satisfied, having regard to all the circumstances, that there is no issue in regard to which the applicant should be granted leave to cross-examine Mr Gordhan. Therefore, in regard to all other issues the applicant's application falls to be dismissed. In regard to the issue to which I have referred, my decision on that issue remains reserved and I will issue directions and direct the parties to file written submissions so as to give me clarity as to where exactly they stand in regard to that issue. Once all the written submissions have been delivered I will give the issue further consideration and announce my decision in due course. Therefore, the decision I make is the following:

- (a) Subject to (b) below, the applicant's application for leave to cross-examine Mr Gordhan is dismissed.

- (b) Directions will be issued in the next few days for the parties to deliver written submissions in regard to the issue of whether or not Mr Gordhan's position is that in laying charges against him the applicant did so with malice and both parties will submit written submissions and then I will make my decision thereafter.


DEPUTY CHIEF JUSTICE
and

CHAIRPERSON OF THE COMMISSION

Date of delivery of decision: 16 April 2019