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

**Chairperson's decision on the remaining issue in Mr T Moyane's application for leave to
cross-examine Minister Gordhan**

ZONDO DCJ, Chairperson of the Commission

Introduction

1. The only issue that I left undecided in my judgment of 16 April 2019 in Mr Moyane's application for leave to cross-examine Minister Pravin Gordhan was whether I should grant Mr Moyane leave to cross-examine Minister Gordhan on what I said was an allegation by Mr Gordhan that, in laying the criminal charges that he laid against Minister Gordhan, Mr Moyane had acted maliciously.
2. It was not clear to me whether Mr Gordhan intended to allege or alleged in his affidavit that Mr Moyane had acted maliciously in laying those charges against him.¹ I stated in that judgment that in due course I would issue directions on the way forward.

¹ See paragraph 67 of the judgment of 16 April 2019.

The Chairperson's directions

3. Subsequent to the delivery of my judgment, I issued directions with regard to the outstanding issue. The relevant parts of the directions read:

“1. Mr Gordhan must deliver to the Commission and serve on Mr Moyane on or before Wednesday 15 May 2019 a short clarificatory affidavit in which he clarifies whether, in stating in his statement of 11 October 2018 that Mr Moyane acted maliciously in laying charges against him and others, he meant that:

(a) in laying the charges against Mr Gordhan and others, Mr Moyane was motivated wholly, or, in part by, or, he sought to advance, the objectives of State Capture or he was abusing a legal process for his own personal goals that had either nothing or little to do with a legitimate complaint relating to an alleged crime.

2. To the extent that 1(a) above may not correctly reflect what Mr Gordhan meant, he must succinctly state what he meant when he stated that Mr Moyane had acted maliciously in laying the charges against him and others.”

Mr Gordhan's clarificatory affidavit

4. In due course Mr Gordhan delivered a clarificatory affidavit. In that affidavit he, among other things, said:

(a) he had never said that Mr Moyane had acted maliciously when he laid charges against him.

(b) it was Mr Moyane who had said in his affidavit that Mr Gordhan had implied that he had acted maliciously in laying the criminal complaint against him.

(c) he did not know Mr Moyane's state of mind when Mr Moyane laid the criminal complaint against him.

- (d) Mr Moyane's motive in laying the charges against him was irrelevant.
- (e) he disagreed with Mr Moyane's explanation that, in laying the criminal complaint against him, Mr Moyane had acted as any reasonable Commissioner of SARS in his position would have acted;
- (f) he personally believed that "Mr Moyane did abuse legal processes for reasons already explained in [his] evidence."
- (g) his belief that Mr Moyane had abused legal processes was "based on [his] experience of [Mr Moyane's] defiant attitude and vilification of [Mr Gordhan] following [his] re-appointment as Minister of Finance which [Mr Gordhan believed] was aimed at forcing [him] to resign from that position so that the capture of National Treasury could proceed under a different Minister."
- (h) "(t)o use the words of the Chairperson's directions, *I therefore do mean that Mr Moyane 'was motivated wholly or in part by or he sought to advance, the objectives of State Capture' and that 'he was abusing a legal process for his own personal goals that had either nothing or little to do with a legitimate complaint relating to an alleged crime.'*" This statement by Mr Gordhan appears to be linked to that part of the directions which required Mr Gordhan to say whether he meant that, in laying the charges against him, Mr Moyane "was motivated wholly or in part by or he sought to advance, the objectives of State Capture..."
- (i) "[he] believe[s] that Mr Moyane's 'personal goals' while he was SARS Commissioner included the advancement of the state capture project."
- (j) his belief that Mr Moyane's 'personal goals' while he was Commissioner of SARS "included the advancement of the state capture project" "is founded on what we all now know about how 'the failure of integrity and governance at SARS, soundly evidenced by the change over four years, has certainly compromised the performance of its core function of collecting tax to the

detriment of the country at large’, as found by Justice Nugent in the Commission of Inquiry into tax administration and governance by SARS (‘the Nugent Inquiry’) (p 477 para [19] of the Final Report of the Nugent Inquiry).”

Did Mr Gordhan ever allege malice on Mr Moyane’s part?

5. The directions of 6 May 2019 were issued on the basis that Mr Gordhan had alleged in his statement of 11 October 2018 to this Commission that Mr Moyane had acted maliciously in laying the charge(s) that he had laid against him. In his clarificatory affidavit Mr Gordhan says he never made such an allegation.
6. Here is why it was stated in the directions that Mr Gordhan had alleged that Mr Moyane had acted maliciously in laying the charge(s) that he laid against him:

- (a) in the last sentence of paragraph 104 of Mr Gordhan’s statement of 11 October 2018, Mr Gordhan said:

“Charges against me relating to that unit had been filed by Moyane on 15 May 2015 (SAPS Brooklyn Case No 427/05/15)”. (underlining supplied)

- (b) in paragraph 113 of the same statement Mr Gordhan states:

“This set of events, combined with what is set out below, was the beginning of what appeared to be a campaign to force me to resign as Minister of Finance and continue the efforts to capture the National Treasury thereafter”.

The “set of events” referred to at the beginning of paragraph 113 seems to include the event of the filing of the charges by Mr Moyane against Mr Gordhan mentioned in paragraph 104 of Mr Gordhan’s statement.

- (c) in paragraph 130 of his October 2018 statement, Mr Gordhan said that “the orchestrated campaign against [him] and other leaders of National Treasury raged within Cabinet, the institutions of state and on certain media and social media platforms.” He then says that that campaign “shifted to yet another front later in the year when [he] became the target of malicious and seemingly politically-motivated criminal charges.”

The charges which Mr Gordhan describes in this quotation as “malicious and politically-motivated criminal charges” are the “charges” that he says in para 104 of his statement were filed by Mr Moyane against him. I think it is what Mr Gordhan says in paragraphs 104, 113 and 130 of his statement and, possibly, elsewhere as well that suggests that Mr Gordhan meant that Mr Moyane had acted maliciously in laying the charges against him. Mr Moyane says in his affidavit in the application for leave to cross-examine Mr Gordhan that Mr Gordhan implied such allegation in his statement. Counsel for Mr Moyane submits that whether Mr Gordhan made the allegation expressly or by implication is neither here nor there as what is important is that it was made.

7. Bearing in mind that earlier in his statement Mr Gordhan had talked of Mr Moyane having laid charges against him, it would have been difficult to think that, when Mr Gordhan said he became the target of malicious and seemingly politically-motivated criminal charges, he did not also intend to mean that the person who laid those charges against him had also acted maliciously in laying them.

Mr Gordhan’s reliance on the findings of Justice Nugent

8. Mr Gordhan also highlights certain findings by Justice Nugent which, he says, form “the basis for [his] belief that Mr Moyane’s actions as SARS Commissioner were part of the state capture project.” Mr Gordhan then deals with these findings in paragraphs 23 to 33 of his affidavit whereafter comes the last paragraph of the affidavit.
9. Mr Gordhan refers² to paragraphs 35 to 50 of Justice Nugent’s interim report. He states that in those paragraphs Justice Nugent set out “the extraordinary turmoil at SARS, and

² In par 26 of clarificatory affidavit.

for its senior management in particular, that followed Mr Moyane's appointment." He then says in the following paragraph that '(t)his included the filing of his criminal complaint against me in circumstances that Justice Nugent found 'unclear, [and] which were later withdrawn (p 670 par 44). This turmoil saw the removal of many senior SARS officials, creating the opportunity for Mr Moyane to appoint new senior management at SARS who failed to show the same integrity, skill or commitment to its critical functions."

10. Mr Gordhan goes on to state that³, in his statement to this Commission dated 11 October 2018, specifically in paragraphs 104, 127 and 127.4, he "recorded numerous examples of the acrimonious nature of Mr Moyane's rejection of [his] oversight while [he] was Minister of Finance, and his insulting attacks on [him] following [his] re-appointment as Minister of Finance in December 2015." Mr Gordhan then says in the next paragraph:

"This provides the context to, and the basis for, my belief that [Mr Moyane's] laying of a complaint against me was something other than the actions of a reasonable Commissioner of SARS".

The reference to 'this' at the beginning of this passage includes what Mr Gordhan said in paragraph 26 of the clarificatory affidavit.

11. Mr Gordhan then refers to a certain finding made by Justice Nugent⁴ and quotes the following passage from Justice Nugent's final Report:

"The effective functioning of SARS calls for close collaboration between SARS and other state institutions. It is to be expected that the Commissioner of SARS will liaise closely with the Minister of Finance but while Mr Gordhan held that position there was active defiance. When Mr Gordhan became concerned at the steps being taken to change the operating model, he asked for it to be suspended, but that was ignored. When he disapproved the extent of bonuses to be paid Mr Moyane again defied him

³ Paragraph 27 of clarificatory affidavit.

⁴ At p617 par 1 of Chapter 18 of his final Report.

bringing [Moyane] into conflict with the Auditor-General. According to Treasury officials, the relationship between Treasury and Mr Moyane has all been broken down.”

12. Mr Gordhan also states that, “(c)onsidering [his] interactions with Mr Moyane over this period and the subsequent findings of the Nugent Inquiry, [his] personal belief remains that Mr Moyane abused his position as the former SARS Commissioner to institute criminal proceedings against [him] and others, under SAPS Brooklyn Case No 427/05/15 since there was no reasonable basis for him to do so.”
13. Mr Gordhan goes on to state that he viewed Mr Moyane’s conduct “in filing the charges against [him] as yet another expression of the defiant attitude he exhibited towards [him], as found by Justice Nugent.” I pause here to make the point that this allegedly defiant attitude by Mr Moyane towards Mr Gordhan of which Mr Gordhan says the laying of the criminal charge or complaint was another expression is said by Mr Gordhan elsewhere in his clarificatory affidavit to have been part of a campaign aimed at putting pressure on him to resign as Minister of Finance so as to capture National Treasury under a different Minister. Mr Gordhan added that Mr Moyane’s conduct in “filing the charges” “against [him]” “also served the political purpose of attempting to pressure [him] and others to resign, thereby advancing state capture and the capture of the National Treasury in particular.”
14. The last paragraph in Minister Gordhan’s clarificatory affidavit is to the effect that Mr Gordhan stands by his contention that his cross-examination by Mr Moyane’s legal representatives regarding Mr Moyane’s “personal motive for filing the complaint that led to criminal charges being brought against [him] and [his] personal belief that those charges were part of the campaign to force [his] resignation from the position of Minister of Finance so as to facilitate the capture of National Treasury, is unlikely to assist the important and urgent work of the Commission given its time and resource constraints.”
15. Mr Gordhan also states that his statement that Mr Moyane abused legal processes when he laid a complaint against him is based on his experience of Mr Moyane’s “defiant attitude and vilification of me following my re-appointment as Minister of Finance.” Mr Gordhan then states that he believes that Mr Moyane’s “defiant attitude” and

vilification “[were] aimed at forcing or pressuring [him] to resign from that position so that the capture of National Treasury could proceed under a different Minister”.⁵

Mr Moyane’s response to the clarificatory affidavit

16. Mr Moyane did not deliver an affidavit in response to Mr Gordhan’s clarificatory affidavit. He delivered written submissions. This was not inconsistent with the directions issued on 6 May 2019. In the written submissions, Counsel for Mr Moyane pointed out that the reason why Mr Moyane did not deliver an affidavit was that: “Mr Gordhan’s affidavit actually confirms the allegations of malice on the part of Mr Moyane”. In support of this, Counsel for Mr Moyane referred to, among others, Mr Gordhan’s statements quoted in paragraph 3(b) and (i) above. Mr Moyane’s Counsel submitted that Mr Moyane had already said that, in laying the criminal complaint against Mr Gordhan, he did not act maliciously but acted in good faith and reasonably.

Merits

17. While Mr Gordhan states that he never alleged that Mr Moyane acted maliciously in laying the criminal complaint he laid against him, he states that, as SARS Commissioner, Mr Moyane had adopted a defiant attitude towards him and had vilified him with the aim of forcing or pressuring him into resigning as Minister of Finance so that the capture of National Treasury could proceed under a different Minister.⁶ Mr Gordhan also states that Mr Moyane “was motivated wholly or in part by, or, he sought to advance ‘the objectives of State Capture’. Thereafter, he states that he believes that, while Mr Moyane was SARS Commissioner, his “personal goals” included the advancement of the state capture project.
18. There can be no doubt that, if Mr Moyane’s defiant attitude towards, and vilification of, Mr Gordhan were aimed at forcing or pressuring the latter into resigning as Minister of Finance so that the capture of the National Treasury could proceed under a different Minister of Finance, it would, generally speaking, be in the interests of the work of the

⁵ Paragraph 22.3.

⁶ Paragraph 7 of his clarificatory affidavit.

Commission to grant Mr Moyane leave to cross-examine Mr Gordhan. Equally, there can be no doubt that if, in laying the criminal complaint against Mr Gordhan, Mr Moyane was “motivated wholly or in part by or he sought to advance, the objectives of State Capture”, it would also, generally speaking, be in the interests of the work of this Commission that I grant Mr Moyane leave to cross-examine Mr Gordhan.

19. Mr Gordhan did not, in his statement of 11 October 2018, expressly say that he believed that, in adopting the defiant attitude that he says Mr Moyane adopted towards him after his re-appointment as Minister of Finance and in vilifying him as he says Mr Moyane did, Mr Moyane sought to force him or to put pressure on him to resign from his position as Minister of Finance so that the capture of National Treasury could proceed under a different Minister. Nor did Mr Gordhan say in that statement that his position is that, in laying the complaint Mr Moyane laid against him with the Police, Mr Moyane “was motivated wholly or in part by, or, he sought to advance, the objectives of State Capture.”
20. Mr Gordhan also did not say in that statement that Mr Moyane’s “personal goals” while he was SARS Commissioner included the advancement of the “state capture project.” However, Mr Gordhan seems to explain this when he says in his clarificatory affidavit that relevant findings made by Justice Nugent form the basis of his belief that Mr Moyane’s “personal goals” while he was SARS Commissioner included the advancement of the state capture project. It would seem that, since those findings had not been made as yet when Mr Gordhan made his statement in October 2018, Mr Gordhan could not have formed that belief at the time. Hence, the absence of such allegations in that statement. Mr Gordhan’s belief seems to be a belief that he formed after Justice Nugent had made the “relevant” findings to which Mr Gordhan refers in his clarificatory affidavit.
21. In the directions I issued on 6 May 2019, it was stated that the directions were “not intended to invite’ Mr Gordhan or Mr Moyane “to furnish new facts which were not contained” in their respective affidavits that had already been delivered to the Commission but that only clarification was sought. Those directions were also to the effect that “(s)hould Mr Moyane wish to comment on Mr Gordhan’s clarificatory

affidavit, he must deliver to the Acting Secretary of the Commission and serve on Mr Gordhan a short affidavit on or before 21 May 2019.”

22. As already indicated above Mr Moyane elected not to comment by way of an affidavit on Mr Gordhan’s clarificatory affidavit. The result is that Mr Moyane has not responded by way of an affidavit or affirmed declaration to Mr Gordhan’s clarificatory affidavit to the effect that he does “mean that Mr Moyane was motivated in whole or in part by or he sought to advance, the objectives of State Capture or that Mr Gordhan believes, in the light of certain findings made by Justice Nugent in his reports, that Mr Moyane’s “personal goals” while he was SARS Commissioner “included the advancement of the state capture project.” Indeed, he has not, therefore, given his version to this evidence.
23. Ordinarily, I would not grant an applicant leave to cross-examine a witness if he has not given his version to the allegations or evidence implicating him. Indeed, this is what happened when I considered Mr Moyane’s application for leave to cross-examine Mr Gordhan in respect of other issues. However, this time Mr Moyane did not consider it necessary to deliver an affidavit to deal with the allegations or evidence in Mr Gordhan’s clarificatory affidavit. The directions I had issued did not oblige him to do so.
24. The day before the hearing of argument on whether I should grant Mr Moyane leave to cross-examine Mr Gordhan on the outstanding issue, I caused a letter to be sent to Messrs Gordhan’s and Moyane’s legal representatives in which I indicated that my *prima facie* view was that I should grant Mr Moyane leave to cross-examine Mr Gordhan but that, should I grant such leave, it could be necessary that I direct Mr Moyane to deliver an affidavit or affirmed declaration in which he would set out his version. In response to the letter Mr Moyane’s legal representatives furnished the Commission with a letter which was to the effect that Mr Moyane’s primary contention was that I should grant him leave to cross-examine Mr Gordhan without any pre-condition. The letter was also to the effect that the other options were for me to either grant Mr Moyane leave to cross-examine Mr Gordhan but direct him to provide his version first as a pre-condition or direct Mr Moyane to first deliver his affidavit or affirmed declaration setting out his version and only grant him leave to cross-examine

Mr Gordhan thereafter. Mr Moyane's Counsel confirmed this position during the hearing of argument. If I grant Mr Moyane leave to cross-examine Mr Gordhan, I will have to direct him to give his version.

25. On behalf of Mr Moyane it was submitted that the *prime facie* view I had expressed with regard to granting Mr Moyane leave to cross-examine Mr Gordhan was justified and correct and that I should grant Mr Moyane's application. On behalf of Mr Gordhan it was submitted that I should dismiss Mr Moyane's application because Mr Gordhan had never said that, in laying the complaint that Mr Moyane laid against Mr Gordhan, he had acted maliciously. The difficulty that arises from this submission on behalf of Mr Gordhan is that, although Mr Gordhan does say that he never alleged that Mr Moyane acted maliciously in laying the complaint he laid against him, he says elsewhere in his clarificatory affidavit that the laying of the complaint by Mr Moyane had little or nothing to do with a legitimate complaint relating to an alleged crime. He also says that Mr Moyane abused a legal process by laying the complaint that he laid against him. I also understand his evidence to be to the effect that, in laying the criminal complaint that he laid against him, Mr Moyane sought to advance the objectives of state capture.
26. A question that may be asked is whether, by requiring Mr Moyane to give his version to this Commission on the issues raised in Mr Gordhan's clarificatory affidavit, this Commission is not repeating work that has already been done by the SARS Commission. This Commission does not wish to repeat the work of the SARS Commission. However, two or three observations need to be made in this regard. The first is that the terms of reference of the SARS Commission did not include an investigation into allegations of state capture. Secondly, this Commission cannot make findings that Mr Moyane, or, anyone for that matter, performed their duties in order to advance the state capture project or the objectives of State Capture without giving such a person the opportunity to be heard. It is necessary for this Commission to hear Mr Moyane's version or side of the story and, if it is in the interests of the work of this Commission that he be granted leave to cross-examine Minister Gordhan, grant him such leave. An allegation that someone performed his or her duties in order to advance the state capture project is a serious allegation and those facing such an allegation should be given an opportunity to defend themselves against it.

27. I consider that, subject to the one condition, it is in the interests of the work of the Commission to grant Mr Moyane leave to cross-examine. Before this Commission it must rank as the most serious allegation or statement for it to be said that you performed your official duties in order to advance the objectives of State Capture and, speaking generally, such a person should be granted leave to cross-examine. The condition is that Mr Moyane will have to deliver an affidavit or affirmed declaration in response to Mr Gordhan's clarificatory affidavit so as to give this Commission his version on the issues raised in Mr Gordhan's affidavit. I will, therefore, grant Mr Moyane the required leave subject to that condition.

28. In the result my decision is the following:

1. Subject to 2 below, Mr Moyane is hereby granted leave to cross-examine Mr Gordhan on:


- (a) whether, in laying the criminal complaint or charges against Mr Gordhan, Mr Moyane acted maliciously.
- (b) whether, in laying the criminal complaint against Mr Gordhan, Mr Moyane was motivated wholly or in part by, or, he sought to advance the objectives of State Capture.
- (c) whether, in laying the criminal complaint against Mr Gordhan, Mr Moyane was abusing a legal process for his own personal goals that had either nothing or little to do with a legitimate complaint relating to an alleged crime.
- (d) whether, as Commissioner of SARS, Mr Moyane, sought to advance "the state capture project."
- (e) whether, Mr Moyane's "personal goals" while he was SARS Commissioner included the advancement of the state capture project.

2. Mr Moyane is directed to deliver to the Acting Secretary or Secretary of the Commission on or before 15 January 2020 an affidavit or affirmed declaration in which he responds to the clarificatory affidavit delivered by Mr Gordhan.

3. Mr Moyane's affidavit or affirmed declaration must make it clear which averments or allegations or statements in Mr Gordhan's affidavit he admits or denies, what the

bases are for denying or disputing those he denies or disputes and give Mr Moyane's full version in regard to the allegation or averments.

4. The amount of time that will be granted to Mr Moyane to cross-examine Mr Gordhan will be determined at a later date.


Zondo DCJ
Chairperson of the Commission
25/11/2019