



EXHIBIT Z5

**THIRD
SUPPLEMENTARY
AFFIDAVIT
AND ADDITIONAL
DOCUMENTS**

FOR

**JOHAN WESSEL
BOOYSEN**



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

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THIRD SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

JOHAN WESSEL BOOYSEN

do hereby state under oath as follows:

1.

I am an adult male South African citizen residing in Pretoria, Gauteng Province.

2.

All the facts stated herein, unless the context indicates otherwise, are within my own personal knowledge and are to the best of my belief both true and correct.

3.

On 2 April 2019, I deposed to an affidavit which I provided to the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("**Commission**") [**"my main affidavit"**]. I subsequently deposed to a supplementary affidavit on 9 April 2019 and a second supplementary affidavit on 15 April 2019.

4.

The purpose of this third supplementary affidavit is to place additional evidence before the Commission that I first recalled after hearing the submissions relating to a conflict of interest issue concerning Advocate Mxolisi Zondo at the hearing on

11 April 2019. I first informed the Commission's Legal Team about such additional evidence which is outlined below on Sunday, 14 April 2019.

5.

ADDITIONAL EVIDENCE

Shortly after my suspension was found to be unlawful as described in paragraph 155 of my main affidavit, I was served with a notice to attend to a disciplinary hearing relating to the same allegations which were ventilated and determined in the Van Zyl judgment attached as annexure "JWB 21" to my main affidavit.

6.

I attended the hearing where I established that the Chairperson was Advocate Mxolisi Zondo and the employer representative was Advocate William Mokhari SC. I recall both having being involved in the same capacities with the disciplinary hearing of Major-General Shadrack Sibiya ("**Sibiya**"). Sibiya's hearing was concluded with him being dismissed from the South African Police Services ("**SAPS**").

7.

I was privy to the evidence against Sibiya and based on the lack of credible evidence I found it suspicious that he was dismissed. I therefore indicated to Advocates Zondo and Mokhari that I am not acquiescing to the hearing. I was told to do a written submission in this regard. I did so but was informed a month later that my submission had been considered and that they (SAPS) decided to proceed with the hearing ("**the decision**").

8.

Another date was set on which I presented myself at the hearing. I informed the Chairperson that I was not going to subject myself to the hearing. I excused myself



2

and informed them that I intended obtaining an interdict to prevent them to proceed with the matter.

9.

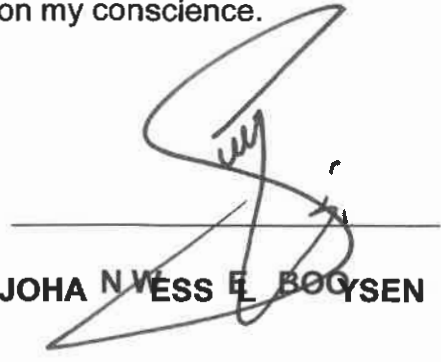
My attorney advised me to have 'the decision' to proceed with the matter reviewed and set aside in the Labour Court. My attorney wrote to the State Attorney indicating my intention to review and set aside the decision. He requested the State Attorney to file the Record of Decision of the Chairperson in order for me to prepare my papers. Subsequent to this, I have not heard from SAPS regarding this matter and, as far as I am aware, the disciplinary hearing did not proceed.

10.

I understand that Advocate Mxolisi Zondo is the brother of the Honourable Deputy Chief Justice Zondo who is the Chair of this Commission. I wish to place on record that I have no objection to Deputy Chief Justice Zondo hearing all submissions made by me at the hearing.

11.

I know and understand the contents of this declaration. I have no objection to take the prescribed Oath. I consider the oath to be binding on my conscience.


JOHA NWESS E. BOOYSEN

I certify that the deponent who acknowledges that he knows and understands the contents of this affidavit; that it is the truth to the best of his knowledge and belief and that he has no objection to taking the prescribed oath and regards the same as

binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended. This affidavit is signed and sworn to before me at Johannesburg on this 15th day of April 2019 at Midrand.



COMMISSIONER OF OATHS

EX OFFICIO: ESA

FULL NAMES:

Riaan Coetzee

PHYSICAL ADDRESS:

57 Labone, 152 Alethea
Street, Lyttelton, Centurion, 0157

DESIGNATION:

CA(SA) 0500 4962

2.

Adv Mxolisi Zondo

Veruschka V. September

From: Boipelo B. Ratshikana
Sent: Monday, 15 April 2019 12:19
To: mxo.zondo@thulamelachambers.co.za
Cc: Andre A. Lamprecht; Veruschka V. September; Ouma Thagane; Antoinette A. Griffiths
Subject: Letter to Advocate Mxolisi Zondo
Attachments: SKM_75819041512032.pdf

Dear Adv Mxolisi Zondo

Please find attached letter for your attention.

Kind Regards,

Boipelo Ratshikana
Executive Assistant to the Secretary
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown, Johannesburg, 2193
Tel: 010 214 0651 | Mobile: 071 319 7843 | Email: boipelo@commissionsc.or.gza | www.sastatecapture.or.gza





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

15 April 2019

Advocate Mxolisi Zondo
1A Protea Place
off Fredman Drive
Sandown

E-mail: mxo.zondo@thulamelachambers.co.za

Dear Advocate Zondo

**Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("the Commission"):
Submission on the correct process to apply where there is a conflict of interest**

1. The Commission's Legal Team intends to present the evidence of Mr Johan Booysen ("Mr Booysen") at its hearing held at 4th Floor, Hill on Empire, 16 Empire Road, Parktown, Johannesburg. The presentation of his evidence has been scheduled to commence on Monday, 15 April 2019 or so soon thereafter as his evidence may be heard.
2. There is an indication that the evidence that Mr Booysen intends to tender includes a reference to you, implicating you in alleged wrongful conduct. A Rule 3.3 Notice will be sent to you in due course.
3. In the interim, we can at this stage inform you that the alleged wrongful conduct concerns allegations to the effect that:

Shortly after his suspension was found to be unlawful, he was served with a notice to attend to a disciplinary hearing relating to the same allegations which were ventilated and determined in the Van Zyl judgement. He attended the hearing where he established that the Chairperson was Advocate Mxolisi Zondo and the employer representative was Advocate William Mokhari SC. He recalled both having been involved in the same capacities with the disciplinary hearing of Major-General Sibiya ("Sibiya"). Sibiya's

hearing was concluded with him being dismissed from the South African Police Services ("SAPS").

He was privy to the evidence against Sibiya and based on the lack of credible evidence he found it suspicious that Sibiya was dismissed. He therefore indicated to Advocates Zondo and Mokhari that he was not acquiescing to the hearing. He was told to do a written submission in that regard. He did so but was informed a month later that his submission had been considered and that they (SAPS) decided to proceed with the hearing ("the decision").

Another date was set on which he presented himself at the hearing. He informed the Chairperson that he was not going to subject himself to the hearing. He excused himself and informed them that he intended obtaining an interdict to prevent them to proceed with the matter.

His attorney advised him to have 'the decision' to proceed with the matter reviewed and set aside in the Labour Court. His attorney wrote to the State Attorney indicating his intention to review and set aside the decision. The State Attorney was requested to file the Record of Decision of the Chairperson in order for him to prepare his papers. Subsequent to that, he has not heard from SAPS regarding the matter and, as far as he is aware, the disciplinary hearing did not proceed.

4. Given that you are the younger brother to the Honourable Deputy Chief Justice Zondo who is the Chair of the Commission, you are invited as an affected party to make submissions to the Commission on:
 - 4.1 Whether you have any objections to the Deputy Chief Justice receiving the evidence of Mr Booysen; and
 - 4.2 In the event that you have not had sufficient time to consider the matter, whether you will agree that Mr Booysen's evidence still be received with you reserving your rights to submit a formal response to the Commission.
5. Your soonest response will be appreciated.

Yours faithfully



MR P PEDLAR

**Acting Secretary
Judicial Commission of Inquiry into Allegations
of State Capture, Corruption and Fraud in the
Public Sector including Organs of State**

Veruschka V. September

From: Mxolisi Zondo <Mxo.Zondo@thulamelachambers.co.za>
Sent: Monday, 15 April 2019 14:25
To: Boipelo B. Ratshikana
Cc: Andre A. Lamprecht; Veruschka V. September; Ouma Thagane; Antoinette A. Griffiths
Subject: RE: Letter to Advocate Mxolisi Zondo

Dear Boipelo,

Notwithstanding the time constraints in this regard in so far as not having been given sufficient time to apply my mind and make an informed decision which, for the record, does infringe on my right to a fair hearing, I have nonetheless decided to forgo my right, if only in the interest of justice, that is not to unduly delay the Commission's proceedings, subject to myself fully and strictly reserving my rights in so far as responding to what Mr Boysen is going to say in so far as my role in his still born disciplinary hearing is concerned at a later stage should a need arise.

To this end, I have briefly gone through Mr Boysen's paragraphs which are said to implicate myself and, other than the mere mention of my name in those paragraphs, I'm still battling to find anything that points to any wrongdoing or unprofessional conduct/ impropriety in any manner, shape or form on my part. Perhaps the word "*implicated*" has become so fashionable to some people such that the mere appearance of one's name equals to them being implicated which is quite disturbing to say the least. In the premises, I have, just like with regard to Mr McBride's evidence, for what such an exercise is worth, deliberately decided to take a passive stance to the extent that in all these matters I became a *functus officio* as soon as I handed down my rulings and therefore I have nothing to add as at all material times, the proceedings were mechanically recorded and therefore the record ought to speak for itself, unless of course any person has got some evidence of any form of impropriety against me in conducting such hearings which would be quite strange because, for all intents and purposes, I would have expected such people to have reported me to the Johannesburg Bar Council especially so because these matters took place sometime in 2015/2016 and three to four years later, as far as I am aware, I have never been reported to the Bar Council's Professional and Ethics Committee. This is especially so because the people involved herein, that is McBride and Boysen are quite litigious people, acutely aware of their rights and so one would surely have expected them to report me to the Bar Council immediately and without any further delay in the event they felt there was any impropriety or unprofessional conduct on my part.

Under these circumstances, the only inference to be drawn from the objective and common cause facts is that at no stage did any of these people feel there was any impropriety or unprofessional conduct on my part. It is therefore for this reason, amongst others, that I have elected to be passive and not entertain what clearly seems to me to be a fool's errand informed either by a publicity stunt or a desperate attempt at getting some form of relevance for whatever the reason may be. Accordingly, I wish to indicate that I have absolutely no qualms whatsoever in the Honourable DCJ hearing Mr Boysen's evidence and the latter proceeding with his evidence in due course subject to my rights being fully reserved to respond to Mr Boysen's testimony at a later stage, should such a need arise.

Regards;

Mxolisi Zondo

Advocate of the High Court of South Africa

Member of the Johannesburg Bar

Contact: +27 (0) 78 161 7176

Email: mxo.zondo@thulamelachambers.co.za

From: Boipelo B. Ratshikana <BoipeloR@commissionsc.org.za>
Sent: Monday, 15 April 2019 12:19
To: mxo.zondo@thulamelachambers.co.za
Cc: Andre A. Lamprecht <AndreL@commissionsc.org.za>; Veruschka V. September <septemberv@commissionsc.org.za>; Ouma Thagane <OumaT@commissionsc.org.za>; Antoinette A. Griffiths <AntoinetteG@commissionsc.org.za>
Subject: Letter to Advocate Mxolisi Zondo

Dear Adv Mxolisi Zondo

Please find attached letter for your attention.

Kind Regards,

Boipelo Ratshikana
Executive Assistant to the Secretary
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown, Johannesburg, 2193
Tel: 010 214 0651 | Mobile: 071 319 7843 | Email: boipelor@commissionsc.org.za | www.sastatecapture.org.za



3.

Major-General Shadrack Sibiya

Veruschka V. September

From: Boipelo B. Ratshikana
Sent: Monday, 15 April 2019 12:18
To: shadracks@joburg.org.za
Subject: Letter to Major General Sibiya
Attachments: SKM_75819041512031.pdf

Dear Major-General Sibiya

Please find attached letter for your attention.

Kind Regards,

Boipelo Ratshikana
Executive Assistant to the Secretary
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown, Johannesburg, 2193
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**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

15 April 2019

Major-General Shadrack Sibiya

E-mail: shadracks@joburg.org.za

Dear Major-General Sibiya

**Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud In the Public Sector including Organs of State ("the Commission"):
Submission on the correct process to apply where there is a conflict of interest**

1. The Commission's Legal Team intends to present the evidence of Mr Johan Booysen ("Mr Booysen") at its hearing held at 4th Floor, Hill on Empire, 16 Empire Road, Parktown, Johannesburg. The presentation of his evidence has been scheduled to commence on Monday, 15 April 2019 or so soon thereafter as his evidence may be heard.
2. There is an indication that the evidence that Mr Booysen intends to tender includes a reference to Advocate Mxolisi Zondo who is the younger brother of the Deputy Chief Justice who is the Chair of the Commission. Mr Booysen implicates Advocate Mxolisi Zondo in alleged wrongful conduct.
3. In the interim, we can at this stage inform you that the alleged wrongful conduct concerns allegations to the effect that:

Shortly after his suspension was found to be unlawful, he was served with a notice to attend to a disciplinary hearing relating to the same allegations which were ventilated and determined in the Van Zyl judgement. He attended the hearing where he established that the Chairperson was Advocate Mxolisi Zondo and the employer representative was Advocate William Mokhari SC. He recalled both having been involved in the same capacities with the disciplinary hearing of Major-General Sibiya ("Sibiya"). Sibiya's

hearing was concluded with him being dismissed from the South African Police Services ("SAPS").


He was privy to the evidence against Sibiya and based on the lack of credible evidence he found it suspicious that Sibiya was dismissed. He therefore indicated to Advocates Zondo and Mokhari that he was not acquiescing to the hearing. He was told to do a written submission in that regard. He did so but was informed a month later that his submission had been considered and that they (SAPS) decided to proceed with the hearing ("the decision").

Another date was set on which he presented himself at the hearing. He informed the Chairperson that he was not going to subject himself to the hearing. He excused himself and informed them that he intended obtaining an interdict to prevent them to proceed with the matter.

His attorney advised him to have 'the decision' to proceed with the matter reviewed and set aside in the Labour Court. His attorney wrote to the State Attorney indicating his intention to review and set aside the decision. The State Attorney was requested to file the Record of Decision of the Chairperson in order for him to prepare his papers. Subsequent to that, he has not heard from SAPS regarding the matter and, as far as he is aware, the disciplinary hearing did not proceed.

4. You are hereby invited as an affected party to make submissions to the Commission on:
 - 4.1 Whether you have any objections to Deputy Chief Justice receiving the evidence of Mr Booysen; and
 - 4.2 In the event that you have not had sufficient time to consider the matter, whether you will agree that Mr Booysen's evidence still be received with you reserving your rights to submit a formal response to the Commission.
5. Your soonest response will be appreciated.

Yours faithfully


MR P PEDLAR
 Acting Secretary
 Judicial Commission of Inquiry into Allegations
 of State Capture, Corruption and Fraud in the
 Public Sector including Organs of State

Veruschka V. September

From: Boipelo B. Ratshikana
Sent: Monday, 15 April 2019 14:28
To: Andre A. Lamprecht; Veruschka V. September
Subject: FW: Response to letter dated 15 April 2019 _ Judicial Commission of Inquiry (State Capture)
Attachments: SGROUP_FORE19041514070.pdf

From: Pearl A. Pomuser <PearlPo@joburg.org.za>
Sent: Monday, 15 April 2019 14:02
To: Boipelo B. Ratshikana <BoipeloR@commissionsc.org.za>
Cc: Victor Nkhwashu <victor@vnainc.co.za>; Shadrack Sibiya <ShadrackS@joburg.org.za>
Subject: FW: Response to letter dated 15 April 2019 - Judicial Commission of Inquiry (State Capture)



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Good afternoon Boipelo

Please receive the attached letter for your information

Kind regards

Pearl Angel Pomuser

Personal Assistant - Group Forensic and Investigation Service

8th Floor - Group Forensic and Investigation Service

46 Ameshoff Street - Braamfontein

Email: PearlPo@joburg.org.za

Tel: 011 407 7858

Cell: 081 728 8810

Fax: 011 407 7859



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Shadrack Sibiya
48 Ameshoff Street
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15 April 2019

Judicial Commission of Inquiry into State Capture
2 nd Floor, Hillside House
17 Empire Road
Parktown
2193

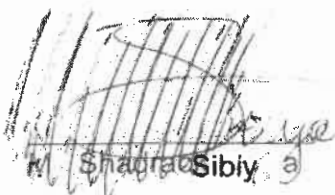
Cc: Victor Nkhwashu Attorneys Inc.
171 Katherine Street
Liberty Life Office Park
Building No. 1, First Floor
Sandton

RE: JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("the Commission"): SUBMISSION ON THE CORRECT PROCESS TO APPLY WHERE THERE IS A CONFLICT OF INTEREST

Receipt of your letter dated 15 April 2019 regarding the subject matter cited above is hereby acknowledged.

In response to paragraph 4.1 to 4.2 of your letter, I wish to state that I personally do not have any objections whatsoever with regard to making submissions to the Commission because I will be making my own submissions relating to the very same subject.

Yours faithfully



M. Shadrack Sibiya

Veruschka V. September

From: Pearl A. Pomuser <PearlPo@joburg.org.za>
Sent: Monday, 15 April 2019 16:54
To: Veruschka V. September; Shadrack Sibiya
Cc: Boipelo B. Ratshikana; Andre A. Lamprecht; Antoinette A. Griffiths; Paul P. Pretorius
Subject: RE: Response to letter dated 15 April 2019 - Judicial Commission of Inquiry (State Capture)
Attachments: Response to letter dated 15 April 2019 - Shadrack Sibiya.pdf



www.joburg.org.za



Good day Veruschka

The amended letter was sent to Boipelo. Please advise if you are satisfied with the amendment.

Kind regards

Pearl Angel Pomuser

Personal Assistant : Group Forensic and Investigation Service

8th Floor: Group Forensic and Investigation Service

48 Ameshoff Street, Braamfontein

Email: PearlPo@joburg.org.za

Tel: 011 407 7858

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From: Veruschka V. September [mailto:septemberv@commissionsc.org.za]
Sent: Monday, April 15, 2019 4:27 PM
To: Pearl A. Pomuser; Shadrack Sibiya
Cc: Boipelo B. Ratshikana; Andre A. Lamprecht; Antoinette A. Griffiths; Paul P. Pretorius
Subject: Re: Response to letter dated 15 April 2019 - Judicial Commission of Inquiry (State Capture)
Importance: High

Greetings Major-General Shadrack Sibiya,

Many thanks for your letter. Further to our earlier telephone discussion, thank you for kindly agreeing to clarify your position. In your ease of reference, such paragraphs read:

- "4. You are hereby invited as an affected party to make submissions to the Commission on:*
4.1 Whether you have any objections to Deputy Chief Justice receiving the evidence of Mr Booysen; and
4.2 In the event that you have not had sufficient time to consider the matter, whether you will agree that Mr Booysen's response to the Commission."

We look forward to hearing from you by return of e-mail.

Kind regards,

Veruschka September (Adv)

COMMISSION OF INQUIRY INTO STATE CAPTURE | Hillside House, 3rd Floor, 17 Empire Road, Parktown,
 Johannesburg, 2193 | Gauteng | South Africa | email: septemberv@commissionsc.org.za | Mobile: 071 322 7608 | www.sasti.org.za



From: Boipelo B. Ratshikana <BoipeloR@commissionsc.org.za>

Sent: Monday, 15 April 2019 14:28

To: Andre A. Lamprecht <AndreL@commissionsc.org.za>; Veruschka V. September <septemberv@commissionsc.org.za>

Subject: FW: Response to letter dated 15 April 2019 - Judicial Commission of Inquiry (State Capture)

From: Pearl A. Pomuser <PearlPo@joburg.org.za>

Sent: Monday, 15 April 2019 14:02

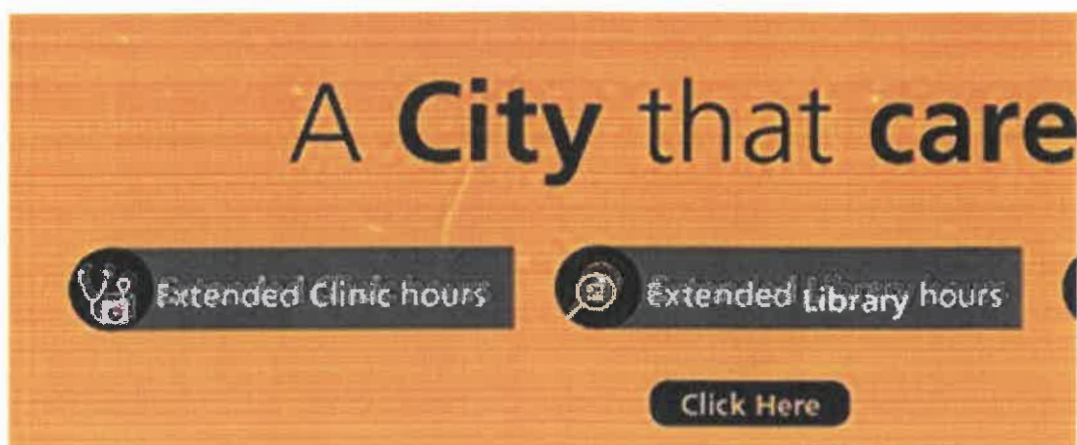
To: Boipelo B. Ratshikana <BoipeloR@commissionsc.org.za>

Cc: Victor Nkhwashu <victor@vnainc.co.za>; Shadrack Sibiya <ShadrackS@pburg.org.za>

Subject: FW: Response to letter dated 15 April 2019 - Judicial Commission of Inquiry (State Capture)



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Good afternoon Boipelo

Please receive the attached letter for your information

Kind regards

Pearl Angel Pomuser

Personal Assistant : Group Forensic and Investigation Service

8TH Floor, Group Forensic and Investigation Service

48 Ameshoff Street, Braamfontein

Email: PearlPo@joburg.org.za

Tel: 011 407 7858



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Shadrack Sibiya
48 Ameshoff Street
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15 April 2019

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2 nd Floor, Hillside House
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Cc: Victor Nkhwashu Attorneys Inc.
171 Katherine Street
Liberty Life Office Park
Building No. 1, First Floor
Sandton

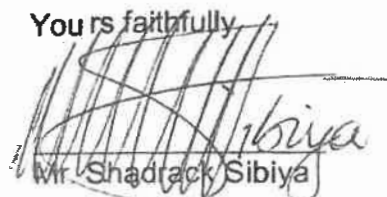
RE: JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("the Commission"): SUBMISSION ON THE CORRECT PROCESS TO APPLY WHERE THERE IS A CONFLICT OF INTEREST

Receipt of your letter dated 15 April 2019 regarding the subject matter cited above is hereby acknowledged.

In response to paragraph 4.1 to 4.2 of your letter, I wish to state that I personally do not have any objections whatsoever and I further agree that Mr Booysens evidence be received by the Deputy Chief Justice.

I hope this clarifies the misunderstanding in my previous response.

Yours faithfully



Mr. Shadrack Sibiya

4.

Adv William Mokhari SC

Veruschka V. September

From: Boipelo B. Ratshikana
Sent: Monday, 15 April 2019 12:15
To: wmokhare@duma.nokwe.co.za; wmokhare@gmail.com
Cc: Veruschka V. September; Andre A. Lamprecht; Ouma Thagane; Antoinette A. Griffiths
Subject: Letter to Advocate William Mokhari
Attachments: SKM_75819041512030.pdf

Dear Adv William Mokhari

Please find attached letter for your attention.

Kind Regards,

Boipelo Ratshikana
Executive Assistant to the Secretary
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**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

15 April 2019

Advocate William Mokhari SC
The Duma Nokwe Group Of Advocates
Cnr. Maude Street & Gwen Lane
Sandown Village Office Park
SANDTON
2196

E-mail: wmokhare@duma.nokwe.co.za

Dear Advocate Mokhari

**Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("the Commission"):
Submission on the correct process to apply where there is a conflict of interest**

1. The Commission's Legal Team intends to present the evidence of Mr Johan Booyen ("Mr Booyen") at its hearing held at 4th Floor, Hill on Empire, 16 Empire Road, Parktown, Johannesburg. The presentation of his evidence has been scheduled to commence on Monday, 15 April 2019 or so soon thereafter as his evidence may be heard.
2. There is an indication that the evidence that Mr Booyen intends to tender includes a reference to you which may implicate you in alleged wrongful conduct. A Rule 3.3 Notice will be sent to you in due course.
3. There is also an indication that the evidence that Mr Booyen intends to tender includes a reference to Advocate Mxolisi Zondo who is the younger brother of the Deputy Chief Justice who is the Chair of the Commission. Mr Booyen implicates Advocate Mxolisi Zondo in alleged wrongful conduct.

4. In the interim, we can at this stage inform you that the alleged wrongful conduct concerns allegations to the effect that:

Shortly after his suspension was found to be unlawful, he was served with a notice to attend to a disciplinary hearing relating to the same allegations which were ventilated and determined in the Van Zyl judgement. He attended the hearing where he established that the Chairperson was Advocate Mxolisi Zondo and the employer representative was Advocate William Mokhari SC. He recalled both having been involved in the same capacities with the disciplinary hearing of Major-General Sibiya ("Sibiya"). Sibiya's hearing was concluded with him being dismissed from the South African Police Services ("SAPS"):

He was privy to the evidence against Sibiya and based on the lack of credible evidence he found it suspicious that Sibiya was dismissed. He therefore indicated to Advocates Zondo and Mokhari that he was not acquiescing to the hearing. He was told to do a written submission in that regard. He did so but was informed a month later that his submission had been considered and that they (SAPS) decided to proceed with the hearing ("the decision").

Another date was set on which he presented himself at the hearing. He informed the Chairperson that he was not going to subject himself to the hearing. He excused himself and informed them that he intended obtaining an interdict to prevent them to proceed with the matter.

His attorney advised him to have 'the decision' to proceed with the matter reviewed and set aside in the Labour Court. His attorney wrote to the State Attorney indicating his intention to review and set aside the decision. The State Attorney was requested to file the Record of Decision of the Chairperson in order for him to prepare his papers. Subsequent to that, he has not heard from SAPS regarding the matter and, as far as he is aware, the disciplinary hearing did not proceed.

5. You are hereby invited as an affected party to make submissions to the Commission on:
 - 5.1 Whether you have any objections to Deputy Chief Justice receiving the evidence of Mr Booysen; and
 - 5.2 In the event that you have not had sufficient time to consider the matter, whether you will agree that Mr Booysen's evidence still be received with you reserving your rights to submit a formal response to the Commission.
6. Your soonest response will be appreciated.

Yours faithfully



MR P PEDLAR
Acting Secretary
Judicial Commission of Inquiry into Allegations
of State Capture, Corruption and Fraud in the
Public Sector including Organs of State

Veruschka V. September

From: Veruschka V. September
Sent: Monday, 15 April 2019 13:12
To: wmokhare@duma.nokwe.co.za; wmokhare@gmail.com
Cc: Andre A. Lamprecht; Ouma Thagane; Antoinette A. Griffiths; Boipelo B. Ratshikana; Paul P. Pretorius
Subject: RE: Letter to Advocate William Mokhari
Importance: High

Greetings Adv Mokhari,

Following our telephone discussion a few minutes ago regarding the letter sent to you as per the email below, I confirm that:

1. You have no objection to Deputy Chief Justice Zondo receiving the evidence of Mr Booysen; and
2. To the best of your recollection, you were appointed to prosecute General Johan Booysen and Major-General Shadrack Sibiya on behalf of the South African Police Services, as instructed by Hogan Lovells.

I send this confirmatory email since you informed that you are out of the office until after Easter .

Kind regards,

Veruschka September (Adv)

COMMISSION OF INQUIRY INTO STATE CAPTURE | Hillside House, 3rd Floor, 17 Empire Road, Parktown, Johannesburg, 2193 | Gauteng | South Africa | email: septemberv@commissionsc.org.za | Mobile: 071 322 7608 | www.sastatecapture.org.za



From: Boipelo B. Ratshikana <BoipeloR@commissionsc.org.za>
Sent: Monday, 15 April 2019 12:15
To: wmokhare@duma.nokwe.co.za; wmokhare@gmail.com
Cc: Veruschka V. September <septemberv@commissionsc.org.za>; Andre A. Lamprecht <AndreL@commissionsc.org.za>; Ouma Thagane <OumaT@commissionsc.org.za>; Antoinette A. Griffiths <AntoinetteG@commissionsc.org.za>
Subject: Letter to Advocate William Mokhari

Dear Adv William Mokhari

Please find attached letter for your attention.

Kind Regards,

Boipelo Ratshikana
 Executive Assistant to the Secretary
COMMISSION OF INQUIRY INTO STATE CAPTURE
 Hillside House, 2nd Floor, 17 Empire Road, Parktown, Johannesburg, 2193
 Tel: 010 214 0651 | Mobile: 071 319 7843 | Email: boipelor@commissionsc.org.za | www.sastatecapture.org.za



5.

**Submissions on the apparent conflict
of interest that has arisen in respect of
Mr R McBride's evidence**

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

**SUBMISSIONS ON THE APPARENT CONFLICT OF INTEREST THAT HAS
ARISEN IN RESPECT OF MR. R MCBRIDE'S EVIDENCE**

Introduction

- 1 The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State ("the Commission") has received the affidavit of Mr. Robert McBride ("Mr. McBride"), the former Head of the Internal Police Investigative Directorate ("IPID").
- 2 Included in the matters that Mr. McBride will bring to the attention of the Chairman of the Commission is an allegation that his brother, Advocate Mxolisi Zondo, acted contrary to established fair process principles and the law when he presided in the disciplinary hearing of Mr. Matthews Sesoko ("Mr. Sesoko"), a member of IPID.
- 3 These allegations have prompted the Chairman to request the evidence leaders and affected parties to make submissions to him on whether he should preside over that portion of the evidence that will be presented by Mr. McBride, or whether it is more prudent and legally permissible to find another avenue for the taking of that evidence.

The structure of these submissions

- 4 The structure of these submissions will make reference to:
- 4.1 the Bangalore Principles of Judicial Conduct read with the Code of Judicial Conduct For Judges Adopted In Terms of Section 12 of the Judicial Service Commission Act, 1994 (Act No. 9 of 1994)
 - 4.2 case authority that has given effect to the rule of law within the context of maintaining a judiciary of unimpeachable conduct, thereby securing the “Public acceptance of its authority and integrity”¹
 - 4.3 Where the legislative power to so delegate the powers of the Chairman lie;
 - 4.4 the mandate of the Commission, what scope there is for the designation of some of the functions of the Chairman of the Commission, and whether such designation is rational and justifiable in the given circumstances;

¹ Preamble to the Code of Judicial Conduct for Judges Adopted in terms of Section 12 of the Judicial Service Commission Act, 1994 (Act No. 9 of 1994) (“The JSC Act”)

4.5 The specific recommendations of the legal team

Overview

- 5 The Chairman's concern arises from the possibility of a reasonable perception of partiality or bias on the part of the affected parties and the public in general, and the principle that justice should not only be done, but be manifestly seen to be done². This concern is encapsulated in the following extract:

"A Judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such Judge might be biased acts in a manner that is inconsistent with s 34 of the Constitution and in breach of the requirements of s 165(2) and the prescribed oath of office."³

- 6 In essence, there ought not to be any relationship or association, whether social, political, professional, financial or personal, that raises doubts about the impartiality of a presiding officer. It is not in the public interest that there should be any apprehension that the Commission, or its presiding

² *S v Dube and Others* 2009 (2) SACR 99 (SCA) at para [8]

³ *President of the RSA v South African Rugby Football Union* 1999 (4) SA 147 (CC) at para [30]

Chairman, did not approach the evidence that is tendered by any witness with an open and impartial mind.

- 7 Within the framework of the rule of law, the above proposition on impartiality has been articulated as follows:

"The reason why judicial independence is of such public importance is that a free society exists only so long as it is governed by the rule of law... the rule which binds the governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought. However vain it may be perceived, however inarticulate may be the thought, there is an aspiration in the hearts of all men and women for the rule of law. That aspiration depends for its fulfilment on the competent and impartial application of the law by judges. In order to discharge that responsibility it is essential that judges be and be seen to be independent. We have become accustomed to the notion that judicial independence includes independence from the dictates of Executive Government. But modern decisions are so varied and important that independence must be predicated of an influence that might tend, or be thought reasonably to tend, to a want of impartiality in decision making. Independence of the

Executive Government is central to the notion, but it is no longer the only independence that is relevant.”⁴

- 8 Section 165 of the Constitution as well as the oath of office taken by judges, requires them to apply the law impartially and without fear, favour or prejudice. This position was endorsed by the Constitutional Court in the **SARFU** matter⁵ where the Court stated:

“...A cornerstone of a fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies of course to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the officials who have the power to adjudicate on disputes.”⁶

⁴ Extract from United Nations Office on Drugs and Crime - “Commentary on the Bangalore Principles of Judicial Conduct” dated September 2007 p. 27 – 28 – Sir Gerard Brennan, Chief Justice of Australia, “Judicial Independence”, The Australian Judicial Conference, 2 November 1996, Canberra available from www.hcourt.gov.au.

⁵ **President of the RSA v South African Rugby Football Union** 1999 (4) SA 147 (CC)

⁶ *Ibid* at p. 170 para [35]

- 9 Later the Court sets out the following principled approach, which proposition must find application even where a Judge presides at a Commission or Tribunal:

"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel."⁷

- 10 It is important to clarify that the issues to be responded to have no nexus to the substantive evidence that either Mr. McBride or Mr. Sesoko may wish to tender. Rather, these submissions relate to the processes and proceedings of the Commission, and whether, either directly or by implication, it might be said that the proximity of the relationship of the Chairman of the Commission, and Mr. Mxolisi Zondo, being siblings, requires that the Chairman recuse himself from presiding over the aspect of the evidence that implicates Mr. Mxolisi Zondo in possible wrongful conduct.
- 11 To illustrate the point, regard can be had to the matter of **S v Dube** 2009 (2) SACR 99 (SCA) which, among others restates the legal principles that are

⁷ **President of the RSA v South African Rugby Football Union** 1999 (4) SA 147 (CC) at para [48]

applied in South Africa and abroad⁸. In summary, the Dube matter was an appeal against the merits and a special entry on an alleged irregularity was made in terms of section 317 of the Criminal Procedure Act 51 of 1977. The alleged irregularity arose from the fact that the then Judge President of the Bophuthatswana High Court presided in an appeal which was prosecuted by his wife. Given that he did not recuse himself, the essential question that arose for determination was whether, in the circumstances, "his failure to recuse himself constituted an irregularity which vitiated the proceedings".

- 12 The Court restated the test for the recusal of a judicial officer from court proceedings where a litigant, or the general public, entertains a reasonable apprehension of bias, and stated:

"13 The rule is clear: In *General v. Eakin* a judicial officer must not sit in a case where he or she is aware of the existence of a factor which might reasonably give rise to an apprehension of bias. The rationale for the rule is that one cannot be a judge in one's own cause. Any doubt must be resolved in favour of recusal. It is imperative that judicial officers be sensitive at all times. They must

⁸ In para [11] the Court notes that in some states of the United States of America, such as the State of Arkansas, the rule regarding the impartiality of a judge is mandatory when a judge's spouse or relative to the third degree is a party. At para [18] the Court cites *R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte (no 2)* [1999] 1 All ER 577, where the Court stated that "in any case where the impartiality of a judge was in question, the appearance of the matter was just as important as the reality..."

of their own accord consider if there is anything that could influence them in executing their duties or that could be perceived as bias on their part. It is not possible to define or list factors that might give rise to a apprehension of bias – the question of what is proper will depend on the circumstance of each case.

14 In situations where the judge has a relationship with a party or legal representative appearing before him or her, it is always appropriate for the judge to consider the degree of intimacy between him or herself and the person concerned. The more intimate the relationship, the greater the need for recusal. In the case such as the present, where there is a close relationship between the presiding officer and one of the legal representatives, it appears to be undesirable if not improper for such judicial officer to sit in the matter. No general rule as to the kinds of relationship that should require recusal need be laid down, however. Given the clarity of the test in *SARFU*”⁹

- 13 In providing possible solutions to the above scenario, the Court suggested that in some instances it may be prudent to:

⁹ *S v Dube* 2009 (2) SACR 99 (SCA)

"... bring in other judicial officers or legal representatives from different jurisdictions. If it is not feasible then the relationship must be brought to the attention of the Parties and their consent canvassed before the commencement of the hearing. If such consent is given it must be entered into the record."¹⁰

- 14 It is in the public interest that the integrity and credibility of the inquiry, as well as its findings and recommendations, must be secured through the implementation of fair procedures.

- 15 It is patent from a reading of the above that the pertinent issue for determination by the Chairman is to make an assessment on whether, on the facts and circumstances of the issues raised in the affidavit of Mr. McBride, he ought to recuse himself from presiding over the hearing when Mr. McBride and Mr. Sesoko testify because of the proximity of his relationship with an implicated person, to wit his brother, Mr. Mxolisi Zondo. In reflecting on the course to follow, relevant considerations would include whether

¹⁰ **S v Dube** (Id) at para [15]

15.1 he should simply recuse himself from the portion of the evidence that deals with the disciplinary hearing that his brother presided over; or

15.2 he should recuse himself at all, given the attitude of the affected parties none of whom seek his recusal.

16 In interrogating the above options, we refer below to the legislative framework that bounds the establishment and functioning of the Commission, and set out the legislative provisions that inform the options open to the Chairman in deciding on how to proceed with this matter.

The Legislative framework

The Commissions Act and Regulations

17 The Commissions Act 8 of 1947 ("the Act") makes provision in section 1 (1) for the appointment of a commission by the President of the Republic for "the purpose of investigating a matter of public concern". In this instance, the matter of public concern relates to the allegations of state capture, fraud and corruption that were foreshadowed in the October 2016 report of the Public Protector.

- 18 Section 1(b) provides for the making of regulations that give effect to the purpose for which the commission was established.
- 19 In the making of such regulations, provision is made in section 1(b)(i) for the President to confer additional powers on the commission, and in section 1(b)(iv) for such to President to provide "generally for all matters which he considers it necessary or expedient to prescribe for the purposes of the investigation".
- 20 The Regulations to the Act were published on 8 February 2018. In Regulation 1 thereof the Chairperson is defined to mean the "Deputy Chief Justice who heads the Commission and (is) appointed by the President after selection by the Chief Justice".
- 21 The term "Officer" is defined in Regulation 1 as meaning "any person appointed by the Chairperson and any other person in the service of the State who has been duly seconded to the Commission to provide administrative support to the Commission"
- 22 Regulation 3 provides for the Chair person to "designate one or more knowledgeable or experienced persons to assist the Commission in the performance of its functions, in a capacity other than that of a member".

- 23 Though the term "member" is not defined in the Regulations, its meaning can be ascertained from the contextual reference to member that is found in Regulation 12 which provides as follows:

~~"An Y Person who insults, dis Par a es or belittles the Chair Person or an Ymember of the Commission or Pe'udice the in Qui rYor findin g of the Commission is Guilt Yof an offence and liable on conviction to a fine or to im Pisonment for a Period not exceedin g six months."~~

- 24 Regulation 15 provides that the Commission may determine its own procedures.
- 25 For purposes of comparison, in the United Kingdom the Inquiries Act 2005 (the 2005 Act¹¹) provides for the establishment of inquiries of the nature that the Commission's Act caters for in our country.
- 26 The 2005 Act has more detailed provisions, however, with respect to the appointment of a Chairman and or panel to assist him or her¹¹, and it accommodates further appointments to the inquiry panel¹². It is the Minister who establishes an inquiry, and it is that Minister who either appoints a

¹¹ Section 3 of the 2005

¹² Section 7 of the 2005 Act

chairman alone or a chairman with other members. When appropriate, again it is the Minister who appoints other members to the inquiry panel. In the latter instance, the consent of the Chairman must be sought.

- 27 Care must be taken to apply the letter of the law, and to avoid the use of language that does not give effect to what Regulation 3 permits. So, by way of an example drawn from an article¹³ citing an Irish case, there is no power to substitute the Chairman. The power accorded in Regulation 3 is for a designated person to "assist the Commission".

Discussion of o nitions

- 28 The discretion to designate a person to assist the Commission lies squarely with the Chairman.
- 29 The Act and Regulations do not prescribe the content and procedures of an inquiry in the same manner in which the English 2005 Act does. More specifically, in terms of Regulation 3, the discretion to designate a "knowled eable or ex perienced" person to assist the Commission "in a ca acit vother than that of a member" is an express power that lies with the

¹³ Irish Legal News: High Court: Commissioner of An Garda Siochana does not have power to substitute presiding officer to Board of Inquiry" 25 May 2018

Chairman. The power in Regulation 3 is not conferred on the President (or a Minister).

30 The clear implication of this is that the discretion conferred on the Chairman enables him to limit the tasks of the designated person. This includes requiring that person to simply consider portions of evidence in isolation from the rest of the fact finding functions. This is not so in the English scenario where the Minister appoints the panel. In that instance there is authority for the proposition that the "fact-finding Panel cannot divide up fact finding tasks, nor consider portions of evidence in isolation from each other."¹⁴

31 It is clear from a reading of the above legislative framework, and in particular Regulation 3, that provision has been made for the Chairman to appoint a qualified person to assist the Commission in the performance of its functions. Regulations 3 read with Regulation 12(1) clarifies that the person designated by the Chairman need not be a member of the Commission.

32 It follow that consideration ought to be given to whether the Chairman should invoke the provisions of Regulation 3, in the public interest and in

¹⁴ The Queen on the application of Patricia Armani Da Silva, John Burke-Monverville, Jessica (a pseudonym) v Secretary of State for the Home Department v Sir John Mitting, Chair of the Undercover Policing Inquiry, and others [2018] EWHC 3001 (Admin), 2018 WL 05822983 at para 56

the interest of addressing any perceptions of bias or partiality, and designate a knowledgeable or experienced person to assist the Commission in the performance of its functions.

- 33 Such designated person would either preside over the portion of the testimony of those witnesses who will mention the role played by Mr. Mxolisi Zondo at the disciplinary hearing of Mr. Sesoko or preside over all the testimony that Mr. McBride and other witnesses wish to present to the Commission.
- 34 The scope of the functions of the designated person are determined by the Chairman as the appointing authority. The purpose of the appointment of a designated person must be "to assist the Commission in the performance of its functions". There would thus be a legal obligation on the designated person to discharge his or her functions within the context of the Commission's terms of reference. He or she cannot go off on a frolic of his or her own.
- 35 The powers of investigation accorded to such designated person will thus be determined by the Chairman. Those powers of investigation cannot be greater than those of the Chairman. In this instance, the scope of the functions of the designated person will simply be to participate in the investigation that the Commission is seized with by hearing the testimony

that the affected parties wish to tender to the Commission, and to making factual and credibility findings in relation to that testimony

Recommendations

36 In consideration of the above, the evidence leaders of the Commission have considered the issues and make the submissions set out below for the consideration of the Chairman.

37 In the submissions received to date from the affected parties, it is clear that they do not hold the view that the Chairman ought to recuse himself from hearing the evidence relating to Mr. Mxolisi Zondo's conduct of the disciplinary hearing of Mr. Sesoko. Though this can be seen as a "waiver" of their rights to object to the continued participation of the Chairman even when evidence relating to his brother is led, such "waiver" should be approached with due caution and circumspection.

38 Impartiality is the key to a fair process. The issues under discussion are complex, have a polycentric/political slant to them. Any appearance of bias or partiality must be avoided.

Recommendation

39 It is the considered view of the evidence leaders that there are ~~three options~~ open to the Chairman with respect to how to proceed. These are set out below.

40 The ~~first option~~ is to note the views of Mr. McBride, Mr. Zondo and Mr. Sesoko that they have no objection to the Chairman hearing the totality of the evidence that they wish to testify to at the Commission hearings, including the evidence relating to the conduct of Mr. Zondo. On the strength of the authority of **S v Dube**, this would not be the evidence leaders preferred recommendation.

41 The ~~second option~~ is for the Chairman to invoke the authority granted to him in Regulation 3 and designate a person with the requisite knowledge and experience, preferably a Judge, to assist him in the taking of the evidence relating to the conduct of Mr. Zondo. To a degree, this option avoids any possibility that the public may conclude that the outcome of the hearing was influenced by the relationship between the Chairman and his brother. This approach is consistent with the dicta in **S v Dube**¹⁵, where the Court opined that "~~the more intimate the relationship the greater the need for recusal~~"¹⁶. It is however not the preferred option of the evidence leaders.

¹⁵ 2009 (2) SACR 99 (SCA) (supra)

¹⁶ **S v Dube** (id) at para [14]

- 42 The ~~third option~~ which is the preferred recommendation of the evidence leaders, is that the Chairman distance himself completely from the appointment of the individual who will take the evidence relating to the conduct of Mr. Zondo.
- 43 In this regard, section 1(1)(b)(iii) and (iv) of the Commissions Act find relevance. Section 1(1)(b)(iii) provides for the President to make regulations relevant to the Commission "~~which he may deem necessary or expedient to prevent the commission or a member of the commission from being insulted, disgraced or belittled or to prevent the proceedings or findings of the commission from being prejudiced, influenced or anticipated~~".
- 44 Section 1(1)(b)(iv) provides for regulations to be made that cater generally for all matters which the President considers "~~necessary or expedient to prescribe for the purposes of the investigation~~". This approach is also consistent with the provisions of the Interpretation Act No. 33 of 1957 ("the Interpretation Act") as amended. Section 10 thereof provides for the construction of provisions as to the exercise of powers and the performance of duties.
- 45 Section 10(1) of the Interpretation Act provides that "~~when a law confers a power or imposes a duty then unless the contrary intention appears the power may be exercised and the duty shall be performed from time to time as occasion requires~~".

- 46 Section 10(2) provides that "~~Where a law confers a Power, Jurisdiction or right or imposes a duty on the holder of an office as such then unless the contrary intention appears the Power, Jurisdiction or right may be exercised and the duty shall be performed from time to time by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder~~"
- 47 Finally, section 10(3) provides that "~~Where a law confers a Power to make rules, regulations or by-laws the Power shall unless the contrary intention appears be construed as including a Power exercisable in like manner and subject to the like consent and conditions if an authority to rescind, revoke, amend or vary the rules, regulations or by-laws~~"
- 48 The provisions of the Interpretation Act complement those of the Commissions Act, by conferring the power on the President to make regulations that will ensure the smooth running and conclusion of the investigation that he has commissioned.
- 49 In the result, the evidence leaders propose that once the regulations have been amended, the President would then request the Chief Justice to nominate the name of a Judge to assist the Chairman in the taking of the evidence relating to Mr. Zondo. This approach would provide the requisite distance between the Chairman and his brother in the appointment of the individual who is to assist him on this narrow and specific issue. It is also

an approach that is consistent with the manner in which the Chairman was selected to head the Commission.

50 Within the broader and more practical scheme of the hearings, there should be no impediment to the Chairman taking the evidence of Mr. McBride and Mr. Sesoko, save for that relating to the conduct of Mr. Zondo, prior to the President amending the Regulations. This approach will enable the evidence leaders to schedule the hearing of the broader batch of evidence at any time.

The Legal Team

4 April 2019