CYRIL RAMAPHOSA

EXHIBIT BBB 2

PRESIDENT OF
THE REPUBLIC OF SOUTH AFRICA

MATAMELA CYRIL
RAMAPHOSA

AS PRESIDENT OF THE
AFRICAN NATIONAL CONGRESS

ADDITIONAL INFORMATION RE: MC RAMAPHOSA & ANC

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

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
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Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

INDEX: EXHIBIT BBB 2

Item “1”

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

STATEMENT BY THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA, MATAMELA CYRIL RAMAPHOSA

I, the undersigned,

Matamela Cyril Ramaphosa

do hereby state under oath that:

1. I am the duly elected President of the Republic of South and thereby, in terms of section 83(a) of the Constitution of the Republic of South Africa, 1996, am the Head of the National Executive.

2. I depose to this affidavit on request of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, established in terms of Proclamation 3 of 2018, published in Government Gazette 41403 of 25 January 2018 ("*the Commission*"). The request of the Commission is recorded in a letter of 27 March 2019 addressed to my legal adviser (and attached to this affidavit marked "A"), and referring to conversations I have had in this regard with the Chairperson of the Commission, when he requested that I and my fellow Cabinet members "*state whether or not [we] had had any meeting or meetings or interactions or dealings with any one or more of the Gupta brothers and, if so, disclose the nature and extent of such interactions.*" The letter also refers to the suggestion by the Chairperson of the Commission that I and members of the National Executive "*also deal with any meetings or interactions*

that [I] and other members of the National Executive may have had with BOSASA or any BOSASA subsidiary or with any persons who are or were directors of managers or employees or agents of BOSASA or any of its subsidiaries."

3. The facts deposed to in this affidavit are within my own personal knowledge and belief and are true and correct.

4. The commission has requested me to state whether I have ever met or had dealings with some members of the Gupta family. I have met two of the brothers on three or four occasions.

4.1. The first time I met them was at a media briefing by held by the ANC officials that took place after the 53rd Conference of the African National Congress ("*the ANC*") in Bloemfontein. This took place on or about 21 December 2012, when the newly elected officials of the ANC were presenting the resolutions taken at the Conference at a breakfast media briefing broadcast by the South African Broadcasting Corporation ("*the SABC*"). I am not able to say which of the brothers I met at the time as I did not get to know their individual names.

4.2. As far as I can recall the second time I met the brothers was at a similar event after the 2014 national elections.

4.3. My interactions with the Gupta brothers were at events where nothing of any consequence was discussed. I never engaged with them beyond basic greetings, pleasantries and common courtesies.

4.4. The only occasion on which matters of substance were discussed was when the Gupta brothers requested a meeting with ANC officials (I gathered from the evidence of our then Secretary General Minister Gwede Mantashe that this was by letter of Nazeem Howa) to discuss their situation in relation to the closure of their bank accounts, and at which was also raised the controversy around them and their relationship with the then President, Jacob Gedleyihekisa Zuma. One of them arrived for the meeting and I think it was Tony Gupta. At this meeting, held during April 2016, various issues were discussed, including the closure of the bank accounts of one of their businesses – Oakbay. Tony Gupta made a presentation on their business model and detailed their various businesses, including those in the mining and media sectors. One of the issues that I raised at that meeting was the landing of 747 Jumbo Jet at the Waterkloof Airforce Base in 2013. I stated that they had, through their actions, placed the former President in an invidious position. Tony Gupta's reaction was that permission for the plane to land had been obtained and given by the Indian High Commissioner.

5. As regards African Global Operations, previously known as Bosasa, I wish to highlight the following:

5.1. I have been advised that Mr Angelo Aggrizzi worked for Grantham Catering, a subsidiary of the Molope Group. Grantham Catering specialised in providing catering services on the mines. I worked for the Molope Group of companies, and thereafter Rebserve (which bought the relevant portions of Molope), from 1999 to 2003. Prior to that I was Chair of the Molope Group from 1996. I understand that Mr Aggrizzi left the employ of Grantham Catering in 1997. It is entirely possible that I may have interacted with Mr Aggrizzi at the time but I have no recollection of having done so. In addition,

in my work with the Molope Group, the company would have been in direct competition with Bosasa at the time. I may therefore have interacted with Bosasa directors or employees at the time or been at the same events as them. However I have no personal recollection of any such interactions.

5.2. I am advised that Mr Gavin Watson and Mr Trevor Mathenjwa attended one of the Back-to-School parties organised by the Adopt-A-School Foundation and hosted by myself as a fundraising event as guests of Dahau Technology, a Chinese company that provides video surveillance products and services. The Adopt-A-School Foundation is a non-profit company which implements a 'Whole School Development' model with the committed support of private sector partners. It hosts annual fundraising functions since 2007 known as Back-to-School parties, at which money is raised for disadvantaged schools. It is one of the implementing partner entities through which the Cyril Ramaphosa Foundation ("*CRF*") delivers its mandate. CRF is an independent public benefit organisation that aims to improve lives by creating opportunities through education and enterprise development. CRF's vision is to be an innovative and effective agent of social and economic change focused on improving lives and creating opportunities in the communities it serves. Registered as a trust and public benefit organisation, CRF operates in the key areas of education, entrepreneurship, youth development, women and children, social cohesion and nation building. My role in CRF is limited to that of a Board member and I am not involved in the management and operations of the trust. The day-to-day operations are managed by an executive management team, supported by a staff complement across the partner entities of 133 people. The partner entities such as the Adopt-A-School Foundation have

independent boards on which the CRF has representation. Dahau had contributed R55,000 as a donation to the Adopt-A-School Foundation by buying a table at the dinner fundraising event which was held on 14 October 2017 (by buying a table they were entitled to bring 10 persons to attend the event). To my knowledge, no donation was ever made to the Foundation by Bosasa.

5.3. I have been informed that both Mr Watson and Mr Mathenjwa attended the wedding of my son Andile on 4 August 2018 in Uganda. Over a 1000 people attending this event including between 150 and 200 guests who flew from South Africa for the occasion. I have no recollection of any interaction with them at that event.

5.4. Mr Watson and some of his siblings were actively involved in the United Democratic Front in their home town of Port Elizabeth so it is entirely possible I may have met him or interacted with him in that context decades ago, though I have no personal recollection of ever doing so.

5.5. Lastly, sometime in July or August 2016, I took a tour of the call centre at which volunteers were assisting the ANC in its campaign in the local government elections. This call centre was situated at the headquarters of the Bosasa offices. I remember interacting there with ANC volunteers and party officials but may well have also interacted with Bosasa employees that were present at the premises at the time. I had no knowledge at the time of the source of funding for this centre as these matters were the purview of the elections team.

5.6. Other than the above, I have not to my knowledge had any interactions or meetings with any of its directors, former directors, employees or former employees, nor have

I had any interactions or meetings with any of the directors or former directors of its subsidiaries or employees or former employees. I cannot be sure of the identities of all persons that have ever worked for Bosasa or its subsidiaries.

6. I trust that the above will be of use to the Commission of Inquiry. I remain at its disposal should it require any further information that will assist it in fulfilling its mandate.

MATAMELA CYRIL RAMAPHOSA

I hereby certify that the deponent declares that the he knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at MAHIKENG NORTH on this 02 day of July 2019 and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

FULL NAMES: MMISI H.M

ADDRESS: CNR TROY AND PARK MAHIKENG

DESIGNATION:

AREA:

Stamp:

I certify that this is a true reproduction/copy of the original which was signed by me and that from my observations the original has not been altered in any manner

bevestig is en dat volgens my persoonlik die oorspronklike origineel wat deur my geteken is en dat daar nie op enige wyse gewysig is nie

2019-07-02

Datum/Date Handtekening/Signature Rang/Rank

SOUTH AFRICAN POLICE SERVICE
BRYNTIRION
STATIC GUARD SERVICES
2019 -07- 02
PROTECTION AND SECURITY SERVICES
PRETORIA
SOUTH AFRICAN POLICE SERVICE

Item “2”

Derick de Beer

From:	Secretary
Sent:	09 January 2021 16:30
To:	nomusa@presidency.gov.za; nokukhanya@presidency.gov.za; geofrey@presidency.gov.za; nokukhanyaj@presidency.gov.za
Cc:	Secretary
Subject:	Mhlanga//Rule 3.3//Ramaphosa Pres C
Attachments:	Mhlanga Rule 3.3 Ramaphosa Pres Cyril.pdf

Dear Sir/Madam

Please find the attached Rule 3.3 Notice in respect of Mr Mhlanga's evidence for your attention.

Annexure A and B referred to in the Rule 3.3 Notice will be available to download via the secure WeTransfer link https://we.tl/t-fGXL6w2pPh . Please email a selected cell number to the Secretary

(Secretary@commissionsc.org.za) to which the WeTransfer link password will be SMS'ed to you. The WeTransfer link expires 6 February 2021.

Please note that the Commission is required to comply with all COVID-19 Regulations. Please advise the Secretariat 48 hours in advance at Secretary@commissionsc.org.za if you elect to attend. Protocols, procedures and arrangements in place at the hearing venue will then be communicated to you.

Kindly acknowledge receipt hereof and contact the Secretariat regarding any queries that you may have.

Yours faithfully,

Secretariat
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown,
Johannesburg, 2193, Gauteng South Africa,
Email: Secretary@commissionsc.org.za
Website: www.sastatecapture.org.za

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

NOTICE IN TERMS OF RULE 3.3

TO : PRES CYRIL RAMAPHOSA

CONTACT : 072 054 3634 / 012 300 5502

EMAIL : nomusa@presidency.gov.za
nokukhanya@presidency.gov.za
geofrey@presidency.gov.za
nokukhanyaj@presidency.gov.za

IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION"), YOU ARE HEREBY GIVEN NOTICE THAT:

1 The Commission's Legal Team intends to present the evidence **MR LLOYD MHLANGA** ("**Mr Mhlanga**") at its hearing held at Old Council Chamber of the Municipality of the City of Johannesburg, 158 Civic Boulevard Braamfontein, Johannesburg. The presentation of the evidence of Mr Mhlanga will be heard between **25 and 29 January 2021**, or so soon thereafter as his evidence may be heard. In the event of a change of date, it will be announced on the Commission's website (www.sastatecapture.org.za) and in the media. The evidence in question implicates or may implicate you in unlawful, illegal or improper conduct in the respects set out below.

2 The allegations set out in the evidence of Mr Mhlanga implicate or may implicate you in the manner set out below:

2.1 Mr Mhlanga, employed at the State Security Agency ("**SSA**") at the time, compiled a report at the instance and request of Advocate Mahlodi Sam Muofhe ("**Advocate Muofhe**"), the then Minister's Advisor, relating to investigations that he referred to Directorate of Priority Crime Investigations ("**DPCI**") concerning Project Veza and PAN 2 and PAN 1. Advocate Muofhe complained that the referral to the DPCI was made before it was discussed with him to which the witness explained that the role of Minister's Advisor was not operational and that the report was provided as a courtesy in order for the Ministry to provide any input if they desired. Consequently, at a meeting on 24 April 2019, Advocate Muofhe criticised the investigation and instructed that all documentation be handed over as the Ministry was going to conduct its own investigation. The witness was also instructed to withdraw the matter from the DPCI. Handover of the documentation was refused as it was unlawful for the Minister to be involved in operational matters and to conduct such an investigation.

2.2 Six days after the meeting, on 30 April 2019, Mr Mhlanga was charged with an allegation that he received a double salary, both from DIRCO and SSA during the period of his transfer from DIRCO to SSA. It is alleged that Mr Mhlanga subsequently discovered that the charge of "double dipping" was laid by Advocate Muofhe.

2.3 On 15 May 2019, Mr Mhlanga addressed a letter to you in office appealing for your intervention on the basis that the charges laid against him were part of a stratagem to stop the investigation that he had been mandated to conduct. To the date of his affidavit, no response has been received.

2.4 In the result, no suspension processes were initiated against him and he was not afforded a hearing to make any representations which was viewed by the Office of the Inspector-General of Intelligence as an unfair labour practice. He has been left unemployed.

3 The relevant portions of the affidavit of Mr Mhlanga which implicate or may implicate you in the above allegations are annexed hereto marked "**A**". Your attention is drawn to **paragraphs 7, 11 to 14 and 21 to 43**. The relevant annexures thereto which are not classified, namely **LM7, LM8 and LM9**, are attached and marked "**B**". The letter

addressed to you in office, namely **LM6**, will be provided as soon as possible after its declassification.

4 Please note that the names of certain individuals recorded in the affidavit of Mr Mhlanga have been redacted for reasons of security. A pseudonym marked in red text will replace those names.

5 Due to the fact that you are implicated or may be implicated by the evidence of Mr Mhlanga, you are entitled to attend the hearing at which that evidence is being presented. You are also entitled to be assisted by a legal representative of your choice when that evidence is presented. The full statement of Mr Mhlanga will be uploaded on the Commission's website as soon as he concludes his evidence. The transcript will be uploaded daily.

6 If you wish to:

6.1 give evidence yourself;

6.2 call any witness to give evidence on your behalf; or

6.3 cross-examine the witness

then you must apply, within fourteen (14) calendar days of this notice, in writing to the Commission for leave to do so.

7 An application referred to in paragraph 6 above must be submitted to the Secretary of the Commission. The application must be submitted with an affidavit from you in which you respond to the witness's statement insofar as it implicates you. The affidavit must identify what parts of the witness's statement are disputed or denied and the grounds on which they are disputed or denied.

8 If you wish to apply to cross-examine the witness, your application must follow the requirements of Rule 11.3. In other words, it must be a substantive application on affidavit accompanied by a notice of motion.

9 In the event that you believe that you have not been given a reasonable time from the issuance of this notice to the date on which the witness is to give evidence as set out above

and you are prejudiced thereby, you may apply to the Commission in writing for such order as will ensure that you are not seriously prejudiced.

10 Please take note that even if you do not make an application under Rule 3.4:

10.1 in terms of Rule 3.10, the Chairperson may, at any time, direct you to respond in writing to the allegations against you or to answer (in writing) questions arising from the statement; and

10.2 in terms of Regulation 10(6) of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State GN 105 of 9 February 2018 published in Government Gazette 41436, as amended, the Chairperson may direct you to appear before the Commission to give evidence which has a bearing on a matter being investigated.

11 The witness statement and annexures provided to you are confidential. Your attention is drawn to Regulations 11(3) and 12(2)(c) governing the Commission, which make it a criminal offence for anyone to disseminate or publish, without the written permission of the Chairperson, any document (which includes witnesses' statements) submitted to the Commission by any person in connection with the Commission's inquiry.

12 Any response to or application in regard to this notice must be sent to Advocate André Lamprecht, Ms Shannon van Vuuren and Ms Rachel Niewenhuis at secretary@commissionsc.org.za.

DATED AT PARKTOWN ON THIS 9th DAY OF JANUARY 2021

PROF ITUMELENG MOSALA
Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

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

AFFIDAVIT

I, the undersigned,

Lloyd Mhlanga

do hereby make oath and state that:

1. At the time relevant to this affidavit, I was the Acting Director: Domestic Branch of the State

6.11. I was suspended from this position on 24 May 2019 under the circumstances set out below.

6.12. My services were allegedly terminated with effect from 30 June 2019, since which date, I have been unemployed.

C.THE HIGH-LEVEL REVIEW PANEL REPORT

7. Prior to my re-appointment to the SSA during November 2018, President Ramaphosa had established a High-Level Review Panel to investigate, *inter alia*, the politicization of the SSA for bi-partisan political purposes, chaired by Dr Sydney Mufamadi. The Panel released its report during December 2018, shortly after I was

appointed as the acting Director of the Domestic Branch of the SSA.

D.MY APPOINTMENT AS THE DIRECTOR OF THE DOMESTIC BRANCH OF THE SSA

8. During November 2018, I was employed by DIRCO and was perfectly happy and fulfilled in my position. At this stage, Advocate Vusi Pikoli and Mr Gibson Njenje were employed by the erstwhile Minister of State Security, Ms Letsatsi-Duba, as her advisors.

9. During 2010, I had been employed at SSA as aforementioned and had been involved in the investigation into the Parallel Agent Network (PAN) programme, at which time Mr Njenje was the Head of the Domestic Branch of the SSA.

despite him having been seriously implicated in the PAN programme.

11. Mr Fraser was re-deployed by President Ramaphosa to Correctional Services during April 2018, after he was implicated in further wrongdoing during his time as DG of the SSA.

12. During November 2018, Mr Njenje called me and asked whether I would be prepared to return to the SSA in order to assist in heading an investigation into the further irregularities that had been uncovered at SSA, as he was aware of my experience at SSA and my involvement in the PAN investigation. He informed me that the team hitherto appointed to investigate these

irregularities had not yet been able to produce comprehensive findings.

13. I was reluctant to move back to the SSA because I felt that I had served my time there and had already dealt with the investigation into the PAN programme and felt that the SSA needed fresh blood to conduct these further investigations. I, nevertheless, spoke to Minister Sisulu about the proposition and indicated that if it was the wish of President Ramaphosa that I take up this position, I would oblige.

14. On being told it was required of me to take up the position, I agreed.

F. THE INVOLVEMENT OF ADVOCATE MAHLODI SAM MUOFHE AND THE SUSPICIOUS TIMING OF MY SUSPENSION

21. The first affidavit compiled by me was finalised at 2 am on 10 April 2019 in view of my undertaking to Advocate Muofhe, who had replaced Advocate Pikoli as an advisor to the Minister, Ms Letsatsi-Duba, that I would have the report on our investigation ready on his return from his trip to Egypt with the Minister and President Ramaphosa. This had been prompted by a criticism by Adv. Muofhe about the delay in finalising our investigation prior to his departure who, in his words, had said: "*You guys are a joke! Why has it taken so long to do an investigation?*"

22. As I was not able to get hold of Advocate Muofhe, I put a copy of the affidavit which had been deposed to by me on 10 April 2019 under the door of his office on Thursday 12 April 2019. As it turned out, he did not receive my affidavit until Sunday 14 April 2019.

23. On receipt of my report, he contacted me and complained that I had referred the matter to the DPCI without first discussing it with him. I explained to Advocate Muofhe that his role as the Minister's advisor was not operational and that the report had been provided to him as a courtesy, in order to enable the Ministry to provide any input they desired, but that this would not in any way have impacted upon the content of my affidavit.

24. Advocate Muofhe subsequently requested that I attend a meeting with him together with my investigation team on 24 April 2019. At this meeting, Advocate Muofhe criticized our investigation and instructed us to hand over all of the documentation relied on in our investigation to him, as it had been decided that the Ministry was going to conduct its own investigation. He also instructed me to withdraw the matter from the DPCI. We refused to provide the documentation as it was unlawful for the Minister to be involved in operational matters and to conduct such an investigation. When we refused to hand over the documentation, Adv. Muofhe said he would "*deal with us*". I reported this to Mr Jafta, who supported us. I also reported this to the Minister, Ms Letsatsi-Duba, who appeared to understand our position.

25. However, 6 days later, on 30 April 2019, I was informed by the Minister that a charge had been laid against me anonymously, alleging that I had received a double salary, both from DIRCO and SSA during the period of my transfer from DIRCO to SSA (colloquially referred to as "*double-dipping*"). I provided the Minister with an explanation for this, which appeared to satisfy her; she at no stage indicated that she was considering suspending me. On the contrary, the Acting General Manager: Human Resources, explained the processes involved when a person is transferred from one Government Department to another and how the salary paid by the transferring department pending the finalisation of the transfer is recovered from the transferee Department.

26. I later discovered that the charge of *"double-dipping"* had been laid by Advocate Muofhe. At no stage did he give me an opportunity to present my side of the story; nor did he consult the relevant SSA and DIRCO officials to determine the processes that ensue when a government employee is transferred from one Department (under contract) to a position of permanent employment in another Department.

27. I can only surmise that there was some disquiet in the Ministry about the persons implicated in my referral to the DPCI and that it was, thus, necessary to discredit me. The truth is that the investigation was conducted by a competent team of investigators which evidenced criminality warranting the referral of the matter to the DPCI for

further investigation and possible prosecution. This had also been the finding of the Review Panel chaired by Dr Mufamadi.

28. The very next day after the charge of "*double-dipping*" had been laid against me (1 May 2019), the Project Veza Sponsor, Ian, was withdrawn with immediate effect and from his acting position as Deputy DG: Counter-Intelligence.

29. On 2 May, Mr Jafta, the acting DG, proposed the relocation of the project to his office, with the intention that a retired judge be appointed to lead the investigation.

30. On 3 May 2019, I repaid the double salary paid to me, on being provided with the details of the

amount owing by the Human Resources Department.

31. I wrote to President Ramaphosa on 15 May 2019, appealing to him to intervene on the basis that the charges laid against me were part of a stratagem to stop the investigation that I had been mandated by him to conduct. To date, I have not had a response. I annex a copy of my letter to President Ramaphosa marked "**LM 6**."

32. This notwithstanding, on 24 May 2019 at around 6pm, whilst I was preparing my suit to attend the inauguration of President Ramaphosa the following day on 25 May 2019, I received a notice from the Minister indicating that the charge of "*double-dipping*" against me was sufficiently

serious to warrant my suspension, annexed marked "**LM 7**". Prior to this, no notice of intended suspension had been served on me, affording me an opportunity to make representations.

33. I need to point out that prior to my reporting the matters to the DPCI, I had informed the Minister that during the course of our investigations, it had been discovered that she had been involved in operations conducted by the SSA and in particular, in setting up a front company to fund President Zuma's campaign against Mr Kgalema Petrus Motlanthe for the Presidency of the ANC at its electoral conference at Mangaung in 2012. The Minister insisted that the company which had been utilised for this purpose was her husband's company and that she had not been involved in

this, which in my view, did not exonerate her from culpability. I suspect that this may have motivated the scheme devised by the Minister and Advocate Muofhe to remove me.

34. Both Advocate Muofhe and the Minister would have known the protocols applicable to the payment of the salary of a transferred government employee and therefore, that both the charge laid against me by Advocate Muofhe and my suspension by the Minister was baseless: Prior to her appointment as Minister of State Security, Ms Letsatsi-Duba had been the Deputy Minister of Public Service and Administration, during which period Advocate Muofhe had also been her legal advisor. They would have thus both known the protocols governing the payment of salaries of

transferred government employees, which make it clear that the transferring department continues to pay the salary of the transferred employee until the transfer is processed, which is then re-claimed from the transferee department; even if this is not the case, the Minister was told as much by the acting General Manager: Human Resources.

35. I am fortified in this view by the fact that on 14 August 2019, the National Prosecuting Authority (NPA) declined to prosecute me. I annex the letter from the NPA to the Section Head: Anti-Corruption Unit: DPCI hereto marked "**LM 8**".

36. I received a salary from the SSA while on suspension until the end of July 2019, after which

my salary was stopped for no apparent reason. Prior to this, no suspension processes were initiated against me and I was not afforded a hearing to make any representations. I had, however, heard that a memorandum had been circulating indicating that I would be leaving the SSA as my contract had come to an end. No-one ever informed me of this.

37. After the new Minister, Ms Ayanda Dlodlo was appointed, I requested an audience with her to discuss my situation. This request was finally granted during September 2019. Minister Dlodlo indicated that she was aware of the matter and undertook to investigate the issue further. I, however, never heard anything further from her.

38. I then laid a complaint with the IGI and received a response on 9 December 2019 annexed marked "**LM 9**". Dr Setlhomamaru Dintwe found that the payment of my double salary had been as a result of an administrative error and had not been as result of any fraudulent conduct on my part. In the result, he found that the ground upon which I had been dismissed had been unlawful as it did not constitute misconduct as contemplated in Regulation 9(1) of Chapter XVIII of the Intelligence Services Regulations. What is more, Dr Dintwe found that neither Mr Jafta nor the then Minister, Ms Letsatsi-Duba, had consulted me when it was allegedly recommended by Mr Jafta and approved by Ms Letsatsi-Duba in January 2019 that I only be permanently appointed from 13 March 2019 to 30 June 2019. This confirmed the rumours that I had

heard that the stance taken by the SSA was that my contract had been terminated, which it was averred, superseded my suspension.

39. Nowhere in the Presidential Minute appointing me indicated that my appointment was so limited; had I known I would not have accepted it and would have preferred to have returned to my position at DIRCO, where `I was perfectly happy before being seconded to the SSA.

40. Although I have called for a copy of the documentation evidencing that I was only appointed from 13 March 2019 until 30 June 2019, a period of little more than 3 months, this has not been forthcoming. I find it unlikely that this was the case as, by the time that I was permanently

appointed, I had been acting in my position for almost 6 months and had the President not intended my permanent appointment to extend beyond a 3 month period, he would have left me acting in my position until he was able to find a suitable person to replace me.

41. The effect of the stance now taken by the SSA is that I have been denied the opportunity of making representations and to challenge my suspension, pending which, I would have received my salary and could have secured by re-instatement. I am now unemployed and unable to get a job with a suspension for fraud hanging over me; one does not get a chance in a job application to explain that the NPA declined to prosecute me and that the IGI had cleared me.

42. Needless to say, Dr Dintwe viewed this as an unfair labour practice and recommended that:

42.1. The Minister of State Security, Ms Dlodlo determine appropriate remedial measures to redress the real prejudice suffered by me; and

42.2. The Minister direct that the SSA implement these remedial measures without delay.

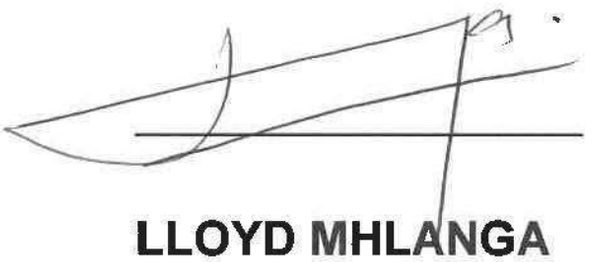
43. This notwithstanding, no remedial measures have been determined by the Minister and/or implemented by the SSA. In the circumstances, I have been forced to engage lawyers to represent me.

the investigation and that the capture of the SSA remains an issue today.

I know and understand the contents of this declaration.

I have no objection to taking the prescribed oath.

I consider the prescribed oath to be binding on my conscience.



LLOYD MHLANGA

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was

signed and sworn to before me at PRETORIA on this 30TH day of NOVEMBER 2020 and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

REBONE MATLAWA DIKOTLA
ADAMS & ADAMS
Lynnwood Bridge
4 Daventry Street
Lynnwood Manor
Pretoria 0081
COMMISSIONER OF OATHS
Practising Attorney R.S.A

COMMISSIONER OF OATHS

EX OFFICIO

FULL NAMES:

PHYSICAL ADDRESS:

DESIGNATION

ANNEXURE LM7

"LM 7"

MINISTER
STATE SECURITY
REPUBLIC OF SOUTH AFRICA

PO Box 51276, Waterfront, 8002, CAPE TOWN, 18th floor, 120 Plein Street, Parliament, CAPE TOWN Tel: (021) 401 1800 Fax: (021) 461 4644
PO Box 1057, Menlyn, 0077, PRETORIA, Ruth First Building, Bogare, Cnr Atterbury Road & Lois Avenue, MENLYN Tel: (012) 367 0700 Fax: (012) 367 0749
www.intelligence.gov.za

MIN/M20/6/1/14/5

24 May 2019

Mr. L Mhlanga
Director Domestic Branch
SSA

Dear Mr. Mhlanga

ALLEGATIONS OF DOUBLE SALARIES DIPPING

Allegations against you of double salaries dipping, one from State Security Agency and the other from DIRCO are a serious contravention of the PFMA.

As a consequence of these allegations, I accordingly suspend you with effect from Friday, 24 May 2019.

MS DB LETSATSI-DUBA, MP
MINISTER

ANNEXURE LM8

"LM8"

Specialised Commercial Crime Unit

NATIONAL PROSECUTING AUTHORITY

Enquiries: Adv PT Nkuna

PRETORIA

Tel: +27 12 401 0420
Fax: +27 12 322 9204

28 Visagie Street
Pretoria

P/Bag X297
Pretoria
0001
South Africa

www.npa.gov.za

2019.08.14

THE SECTION HEAD: DPCI – ANTI CORRUPTION UNIT H/O PRETORIA

CRIMINAL INVESTIGATION FRAUD – LLOYD MHLANGA
SUNNYSIDE CAS 218/06/2019
INVESTIGATOR: CAPT MOSUMA

1. I decline to prosecute
2. No reasonable prospects for successful prosecution.

INTRODUCTION

3. This was an enquiry file number 02/05/2019. The docket was subsequently registered and submitted for decision. Consultations were held with the investigator for case plan discussion. Further consultations were held with the Special Advisor – SSA Mr Mouthe and Ms Schreiber the Chief Director HR - DIRCO.

FACTS

4. On 01 November 2018, Mr Mhlanga was appointed as an Acting Director Domestic Branch in the SSA until 30 April 2019. He did not resign his position from the DIRCO, he continued drawing salary for the period November 2018, 2018 December 31, 2019 January 31, 2019 February 28, 2019 March 31, 2019 April 30 whilst being in the employ of the SSA.
5. The Director General of the State Security Agency, Mr Loyiso Jafta, Mr Moufhe (Special Advisor to the Minister), xxxxxxxxx informed the Minister Ms Dipuo Letsatsi – Duba that their Human Resource Section advised them that Mr Mhlanga was drawing monthly salaries from the State Security Agency as well as from the Department of International Relations and Co-operation (DIRCO).
6. Mr Moufhe, caused to be furnished with the salary payslips from the DIRCO and the SSA for the period December 2018, 2019 January, 2019 February, 2019 March.
7. The SSA Officials contend that Mr Mhlanga must have resigned his services from the DIRCO before taking up the position at the State Security Agency.
8. The State Security Agency alleges that Mr Mhlanga has committed fraud and contravened the Public

Finance Management Act by not disclosing that he was drawing salaries from both Departments.

9. Mr Louisa, the Acting General Manager in the SSA states that it came to his attention that the payroll for Mr Mhlanga was in the DIRCO.

10. Mr Louisa contacted Ms Schreiber at the DIRCO who confirmed that Mr Mhlanga was paid the salary for the month of November 2018 and that he is on the contract linked to the Minister, which is 31 March 2019.

11. Mr Louisa told Mr Mhlanga that, he cannot draw salary from two pay points in government. Mr Louisa told the official at the DIRCO that for any payment to Mr Mhlanga for any month should be invoiced to the SSA for reimbursement.

12. Louisa used his management discretion to initiate a process to ensure that Mr Mhlanga is not over-paid.

13. In the second week of March 2019 the SSA received the Presidential Minute and appointment authorisation from the Minster of the SSA for Mr Mhlanga as Director of Domestic Branch of the State Security Agency, with the fixed date being 13 March 2019 to 30 June 2019.

14. Mr Louisa states that, given that Mr Mhlanga's appointment happened after the payroll closure, he was not paid on 25 March 2019 pending the confirmation of his resignation from the DIRCO.

15. However, in April 2019 Mr Mhlanga was paid the *pro rata* salary of March 2019 and full pay in April 2019.

16. In April Mr Lauisa confirmed the allegation that Mr Mhlanga was drawing salaries from the two Departments and reported to the Senior management.

17. A few days later during the briefing to the Minister on the progress on salary negotiations Mr Lauisa confirmed the allegation.

18. Subsequent thereto Mr Mhlanga requested for settlement amount to be repaid to the DIRCO, he settled the over – payment.

19. Mr Lauisa states that accordingly both the SSA and DIRCO have suffered no loss.

20. Ms Schreiber, the Chief Director: Human Resource Practice & Administration at DIRCO, states that Mr Mhlanga was a former contract employee as Intelligent Co-ordinator on Research & Security Panel with effect from 01 April 2018.

21. She further states that she was informed by Mr Louisa that Mr Mhlanga will assume duty at the SSA from 01 December 2018 but DIRCO should continue paying his salary and claim it back from the SSA, until his appointment is finalised at the SSA.

22. There were further correspondence between the two departments to finalise the transfer, however the SSA was informed that this cannot be a transfer

since Mr Mhlanga was on contract in the DIRCO and was paid the April salary by the DIRCO.

23. Ms Schreiber further states that based on the letter of Mr Mhlanga's appointment at the SSA, Mr Mhlanga was requested to refund the DIRCO the salary for April 2019 to the amount of R79, 204.37.

24. Ms Schreiber states furthermore, that Mr Mhlanga was requested to refund the DIRCO for the overpayment of salaries for January, February and March 2019 to the amount of R237,556.60.

25. According to the official responsible for the Service Benefits, Remuneration Management, Ms xxxxxxxxxxxxxxxx was requested by their General Manager to assist to not load any remuneration values as the DIRCO was still remunerating Mr Mhlanga to avoid salary overpayment, where both Departments were paying salaries in the same months.

26. Ms xxxxxxxxxxxx further states that on 31th January 2019 notification was received from their General Manager HR to pay out the difference in salary to Mr Mhlanga from November 2018 to January 2019, the DIRCO remuneration package was lower than the SSA contract remuneration package, which implied an underpayment in salary. This was an amount of R50, 377.32 net salary for the three months.

(3) The relevant treasury may, in exceptional circumstances, approve or instruct in writing that a person other than the person mentioned in subsection (2) be the accounting officer for-

(a) a department or.....

(4) The relevant treasury may at any time withdraw in writing an approval or instruction in terms of subsection (3).

32. The suspect was a Head of Domestic Branch of the State Security Agency, not the Head of the Department, in terms of Section 36 of the Public Finance Management Act, the Director - General of the Department is the Accounting Officer.

33. There is no evidence to suggest that Mr Mhlanga is ever a person referred to in sub section (3) that provides that:

" *The relevant treasury may, in exceptional circumstances, approve or instruct in writing that a person other than the person mentioned in subsection (2) be the accounting officer for-*

(a) a department.

34. As for the allegations of fraud, the particular facts and circumstances of this case have to be considered within the context of the legal principles of fraud. Fraud is unlawful making with intent to defraud a misrepresentation which causes actual or potential prejudice to another. The characteristics of the allege offence are that the accused did not disclose (*which may be considered as fraud by non - disclosure*) to the Department of the SSA that he was drawing monthly salary from the Department of International Relations.

27. Ms xxxxxxxxxxxxxx explained the remuneration for Mr Mhlanga to the Minister DB Letsatsi-Duba, the Director-General: SSA Mr Loyiso Jafta and Mr Moufhe an advisor to the Minister.

28. Ms xxxxxxxxxxxxxxx furthermore, states that the abovementioned individuals were advised that it was common practice administratively for the two departments to agree on terms of reimbursement of funds from one department to another.

29. Ms xxxxxxxxxxxxxxx states furthermore that Mr Mhlanga has provided proof of payment to the DIRCO as a refund.

THE LAW

30. This case must be considered within the context of the allegations of contravention of the Public Finance Management Act and Fraud.

31. In terms of section 36 of the Public Finance Management Act, it provides that: *Accounting officers*

(1) Every department and every constitutional institution must have an accounting officer.
(2) Subject to subsection (3)-
(a) the head of a department must be the accounting officer for the department; and.....

35. The issue whether there was non – disclosure by Mr Mhlanga drawing the monthly salaries from the two Departments was dealt with in the case, *The State v Heller (2) 1964 (1) SA 524 (W) the court stated "that this breach must have been wilfully committed in such circumstances as to equate the non-disclosure with a representation of the non-existence of the fact with the knowledge of its falsity with intent to deceive and resulting in actual or potential prejudice to the representee").*

ANALYSIS

36. It was a well known fact since December 2018 to the Officials of the SSA and DIRCO that Mr Mhlanga was drawing salary from the two Departments. Mr Mhlanga had no intention to hide the double salary payment. Mr Mhlanga did not hide his double salary and it would be difficult to prove that he had the intention to conceal this fact.

37. Louisa contacted Ms Schreiber at the DIRCO who confirmed that Mr Mhlanga was paid the salary for the month of November 2018 and that he is on the contract linked to the Minister, which is 31 March 2019.

38. Louisa told the official at the DIRCO that for any payment to Mr Mhlanga for any month should be invoiced to the SSA for reimbursement.

39. The fact that Louisa used his management discretion to initiate a process to ensure that Mr Mhlanga is not over-paid, exclude intention to defraud and any wrong doing on the part of Mr Mhlanga.

40. Louisa states that the amount of money paid to Mr Mhlanga for the period from November to January was top - up to his salary as the difference.

41. It appears that the one arm of government was not properly talking to the other, even the President's Minute (Annexure B to Louisa's statement) to have Mr Mhlanga appointed as the Director Domestic Branch of the SSA does not have a date.

42. The contract of employment (marked annexure D") entered into between the Minister of the SSA, Ms DB Letsatsi - Duba and Mr Mhlanga appears to have not been signed.

43. Mr Mhlanga has provided the proof of payment to the DIRCO as a refund (see Annexure A in the supplementary statement of Ms Schreiber.

44. Louisa states that both the DIRCO and SSA have suffered no loss.

CONCLUSION

45. Based on the available evidence, no criminal liability could be attributed to Mr Mhlanga.

Adv Patrick T NKUNA
Senior State Advocate

ANNEXURE LM9

"LM9"

intelligence
Office of the Inspector-General of Intelligence
REPUBLIC OF SOUTH AFRICA

PO Box 1175, MENLYN PARK, 0077 Bogare, Cnr Atterbury & Lois Street, MENLYN
Tel: (012) 367 0845/47/61, Fax: (012) 367 0920

OIGI/IG10(IG50)6/1/14/5
DIR*D07:10000000000010154

9 December 2019

Mr L Mhlanga

Dear Mr Mhlanga

Complaint regarding allegations of unlawful suspension based on malicious allegations and wrongful termination of services against the former Minister of State Security and the State Security Agency (SSA)

1. Reference is hereby made to the complaint as lodged by yourself with OIGI on the 29 May 2019.

2. Kindly be advised that we have since completed our investigation of the complaint and have submitted our report with findings and recommendations to the Minister of State Security, Honourable Ms A Dlodlo (MP) for her attention and to the Acting Director General of the SSA, Mr LTM Jafta, for information.

3. Our report makes the following findings:

3.1. In the final analysis of the facts it was found that your suspension by the former Minister of State Security, Ms Dipuo Ms Letsatsi-Duba, was unlawful as the former Minister did not have the authority to suspend you as a member of the SSA as per regulation 9(1) of the Chapter XVIII (Disciplinary Procedure) of the Intelligence Services Regulations.

3.2. It was also found that the offence on the ground of which you were suspended, namely, 'double salary dipping' by the Minister was not a misconduct as defined in terms of Chapter XVIII (Disciplinary Procedure) of the Intelligence Services Regulations. It was

found that, if anything your receipt of two salaries, one from the SSA and another from the Department of International Relations and Cooperation (DIRCO) on the same month was an administrative error, which you brought to the attention of the SSA Human Resources authorities. Without any indication or allegation of a fraudulent behavior that occasioned the administrative error on your part it could not be found that you had committed an act of misconduct.

3.3. Furthermore, it was found that the then Minister of State Security, Ms Dipuo Letsatsi-Duba and the Acting Director General of SSA, Mr LTM Jafta failed to consult with you when in January 2019 Mr Jafta recommended by way of a submission to the effect that you be appointed as Director Domestic Branch (DB01) from 13 March 2019 to 30 June 2019 which submission was approved by the then Minister Letsatsi-Duba on the 28 January 2019. It was found that due to the failure to consult, you were oblivious to the fact that your service was extended to the abovementioned period. There is proof that by the 23 May 2019 you were not aware of this fact when you indicated to the Minister that you were no longer comfortable to work as a member without a signed contract. It was also found that failure by the then Minister to enter into a new contract with you within a reasonable time after the President had concurred with the then Minister on your appointment on 13 March 2019 and the Acting Director-General, Mr Jafta's failure to give you a reasonable notice of termination of your services on the 30 June 2019 while you were under suspension was an unfair labour practice. It was found that you have as a result suffered real prejudice occasioned by the failure to consult with you on your conditions of service and failure to give you reasonable notice of termination of your services.

4. The following recommendations are made in the report:

4.1. That the Minister of State Security, Honourable Ms A Dlodlo (MP), determines appropriate remedial measures to redress the real prejudice suffered by you in the circumstances.

4.2. That the Minister direct the SSA to implement those remedial measures without any further delay.

5. We thank you for lodging the complaint with us and shall revert to you upon receipt of the Minister's decision in this regard.

Yours sincerely

Dr SI Dintwe
INSPECTOR-GENERAL OF INTELLIGENCE

Derick de Beer

From: Secretary
Sent: 29 March 2021 19:12
To: nomusa@presidency.gov.za; nokukhanya@presidency.gov.za; geofrey@presidency.gov.za; njjele@law.co.za; roshene@presidency.gov.za
Cc: Secretary
Subject: Dintwe S//Rule 3.3//Ramaphosa C
Attachments: Dintwe Rule 3.3 Ramaphosa Pres Cyril.pdf; Annexure 'A'.pdf

Dear Sir/Madam

Please find the attached Rule 3.3 Notice in respect of Dr Dintwe' s evidence for your attention.

As referred to in the Rule 3.3 Notice, please also find Annexure A attached hereto.

Please note that the Commission is required to comply with all COVID-19 Regulations. Please advise the Secretariat 48 hours in advance at Secretary@commissionsc.org.za if you elect to attend. Protocols, procedures and arrangements in place at the hearing venue will then be communicated to you.

Kindly acknowledge receipt hereof and contact the Secretariat regarding any queries that you may have.

Yours faithfully,

Secretariat
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown,
Johannesburg, 2193, Gauteng South Africa,
Email: Secretary@commissionsc.org.za
Website: www.sastatecapture.org.za

2nd floor, Hillside House
17 Empire Road,
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2193
Tel (International): +27 (10) 214-0651
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Email: inquiries@sastatecapture.org.za
Web: www.sastatecapture.org.za

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

NOTICE IN TERMS OF RULE 3.3

TO : HIS EXCELLENCY, PRESIDENT CYRIL RAMAPHOSA

CONTACT : 072 054 3634 / 012 300 5502

EMAIL : nomusa@presidency.gov.za
nokukhanya@presidency.gov.za
geofrey@presidency.gov.za
nokukhanyaj@presidency.gov.za

IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION"), YOU ARE HEREBY GIVEN NOTICE THAT:

1 The Commission's Legal Team intends to present the evidence of the **INSPECTOR-GENERAL OF INTELLIGENCE** ("**IGI**"), **DR SETLHOMAMARU ISAAC DINTWE**, at its hearing to be held at the Old Council Chamber of the Municipality of the City of Johannesburg, 158 Civic Boulevard Braamfontein, Johannesburg. The presentation of the witness's evidence will be heard on a date to be advised. In the event of a change of date, it will be announced on the Commission's website (www.sastatecapture.org.za) and in the media. The evidence in question implicates or may implicate you in unlawful, illegal or improper conduct in the respects set out below.

2 The allegations set out in the evidence of the witness which implicates or may implicate you is as follows:

2.1 Section 7(8)(a) of the Oversight Act requires the IGI to consult with any of the responsible Ministers and the President prior to disclosing any information obtained from a Head of a Service and/or any employee. Pursuant to this provision, the IGI consulted with yourself and the other relevant Ministers.

2.2 Dr Dintwe avers that this consultative process has been completed. After it was completed, Dr Dintwe made a decision as to which aspects he could properly disclose to the Commission. He received written confirmation from your Office that he had duly completed the consultative process.

2.3 Dr Dintwe states that the consultation process was not without difficulty and it is alleged that an accusation was made that Dr Dintwe had disclosed information to the Commission prior to the consultative process. This was, amongst other issues, used by the three Ministers to lodge a complaint against him with you and to recommend that he should be suspended. This, it is alleged, was done in order to intimidate Dr Dintwe and prevent him from testifying at the Commission.

2.4 It is averred that following this complaint, you referred the matter to the Joint Standing Committee on Intelligence ("**JSCI**") and informed Dr Dintwe that he would be suspended if this was the recommendation of the JSCI. At this time, Dr Dintwe was awaiting the inputs from the Ministers with regard to the consultative process.

2.5 Dr Dintwe is of the view that this was done in order to intimidate him and prevent him from testifying at the Commission.

2.6 Dr Dintwe avers that the JSCI cleared him of any wrongdoing and found that the allegations against him were unsubstantiated.

3 The relevant portions of the statement of the witness which implicate or may implicate you in the above allegations are annexed hereto marked "**A**". Your attention is drawn to **paragraphs 4 to 6**.

4 Due to the fact that you are implicated or may be implicated by the evidence of the witness, you are entitled to attend the hearing at which that evidence is being presented. You are also entitled to be assisted by a legal representative of your choice when that evidence is

presented. The full statement will be uploaded on the Commission's website as soon as he concludes his evidence. The transcript will be uploaded daily.

5 If you wish to:

5.1 give evidence yourself;

5.2 call any witness to give evidence on your behalf; or

5.3 cross-examine the witness

then you must apply, within fourteen (14) calendar days of this notice, in writing to the Commission for leave to do so.

6 An application referred to in paragraph 5 above must be submitted to the Secretary of the Commission. The application must be submitted with an affidavit from you in which you respond to the witness's statement insofar as it implicates you. The affidavit must identify what parts of the witness's statement are disputed or denied and the grounds on which they are disputed or denied.

7 If you wish to apply to cross-examine the witness, your application must follow the requirements of Rule 11.3. In other words, it must be a substantive application on affidavit accompanied by a notice of motion.

8 In the event that you believe that you have not been given a reasonable time from the issuance of this notice to the date on which the witness is to give evidence as set out above and you are prejudiced thereby, you may apply to the Commission in writing for such order as will ensure that you are not seriously prejudiced.

9 Please take note that even if you do not make an application under Rule 3.4:

9.1 in terms of Rule 3.10, the Chairperson may, at any time, direct you to respond in writing to the allegations against you or to answer (in writing) questions arising from the statement; and

9.2 in terms of Regulation 10(6) of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State GN 105 of 9 February 2018 published in

Government Gazette 41436, as amended, the Chairperson may direct you to appear before the Commission to give evidence which has a bearing on a matter being investigated.

10 The witness statement and annexures provided to you are confidential. Your attention is drawn to Regulations 11(3) and 12(2)(c) governing the Commission, which make it a criminal offence for anyone to disseminate or publish, without the written permission of the Chairperson, any document (which includes witnesses' statements) submitted to the Commission by any person in connection with the Commission's inquiry.

11 Any response to or application in regard to this notice must be sent to Advocate André Lamprecht, Ms Shannon van Vuuren and Ms Rachel Niewenhuis at secretary@commissionsc.org.za.

DATED AT PARKTOWN ON THIS 29th DAY OF MARCH 2021

PROF ITUMELENG MOSALA
Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

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

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STATEMENT

I, the undersigned:

SETLHOMAMARU ISAAC DINTWE

do hereby state under oath:

1 I am an adult male of full legal capacity, the Inspector-General of Intelligence ("**IGI**") of the Republic of South Africa, duly appointed by the President on 15 March 2017 in accordance with the provisions of Section 7(1) of the Intelligence Services Oversight Act, 40 of 1994 ("**the Oversight Act**"). My place of work is at Bogare Building, Corner Lois and Atterbury Road, Menlyn, Pretoria.

2 The facts contained herein are, except where otherwise indicated or appears from the context, within my personal knowledge and are to the best of my belief both true and correct.

3 The purpose of this submission is to bring to the attention of the Commission the manner in which the Intelligence Services, over which I have oversight, has facilitated, enabled, enhanced and allowed state capture. Instances will be provided hereunder to illustrate this.

4 Section 7(8)(a) of the Oversight Act requires the IGI to consult with any of the responsible Ministers and the President prior to disclosing any information obtained from a Head of a Service and/or any employee. Pursuant to this provision, I consulted with the respective

Ministers of the South African Police Services, State Security and Defence and Military Veterans as well as with His Excellency, President Ramaphosa. This consultative process has been completed. After it was completed, I made a decision as to that which I could properly disclose to the Commission. This decision was made with due regard to section 10(4) of the Intelligence Services Act 65 of 2002 (**"the Intelligence Services Act"**), which seeks to protect national security intelligence, intelligence methods and sources of information, which I shared with the abovementioned persons. I received written confirmation from the President that I had duly completed the consultative process.

5 The consultative process was not without difficulty: an accusation was made that I had disclosed information to the Commission prior to the consultative process. This was, amongst other issues, used by the three Ministers to lodge a complaint against me with the President and recommended that I should be suspended. I then received a letter form the President informing me that this complaint has been referred to the Joint Standing Committee on Intelligence (**"JSCI"**). I was further informed in that letter that there was a consideration to suspend me but that will be done if the JSCI so recommended. This happened at an exact moment that I was expecting the inputs from the Ministers with regard to the consultation process. This, in my view, was done in order to intimidate me and prevent me from testifying at the Commission. There are several letters that I received from the Ministers which illustrate this view further. I appeared before the JSCI and was cleared of any wrongdoing. In fact, the JSCI found that the allegations were unsubstantiated.

6 An attempt was also made to persuade me to limit my evidence to only that which was expressly asked by the Commission. I declined to do so and have in this submission included all aspects which I believe fall within my mandate as IGI and fall within the terms of reference of the Commission.

SJ

it is necessary that the OIGI be entirely distinct from the SSA and be funded separately from it, have full access to all information and documentation and be granted powers of enforcement. It is also essential that such services be fully audited by the Auditor General and that there be proper consequent management. This includes not only that disciplinary steps be taken by those implicated but that law enforcement agencies are supported by declassifying documents required for prosecutions.

SETLHOMAMARU ISAAC DINTWE

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit is signed and sworn to before me at PRETORIA on this the 16 day of March 2021, and that the Regulations contained in Government Gazette No. R1258 of 21 July 1972 as amended by Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 have been complied with.

COMMISSIONER OF OATHS

Full Names: Natasha Vorster

Designation: NO

Address: 271 Johnny Clegg Street. Garsfontein

SOUTH AFRICAN POLICE SERVICE
GARSFONTEIN
2021 -03- 16
COMMUNITY SERVICE CENTRE
SUID-AFRIKAANSE POLISIEDIENS

Derick de Beer

From: Secretary
Sent: 19 April 2021 17:04
To: nomusa@presidency.gov.za; nokukhanya@presidency.gov.za; geofrey@presidency.gov.za; njjele@law.co.za; roshene@presidency.gov.za
Cc: Secretary
Subject: Koko(2)//Rule 3.3//Ramaphosa Pres C
Attachments: Koko (2) Rule 3.3 Ramaphosa Pres Cyril.pdf; Annexure A.pdf

Dear Sir/Madam,

Please find the attached Rule 3.3 Notice in respect of Mr Koko's evidence for your attention.

As referred to in the Rule 3.3 Notice, please also find Annexures A attached hereto.

Please note that the Commission is required to comply with all COVID-19 Regulations. Please advise the Secretariat 48 hours in advance at Secretary@commissionsc.org.za if you elect to attend. Protocols, procedures and arrangements in place at the hearing venue will then be communicated to you.

Kindly acknowledge receipt hereof and contact the Secretariat regarding any queries that you may have.

Yours faithfully,

Secretariat
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown,
Johannesburg, 2193, Gauteng South Africa,
Email: Secretary@commissionsc.org.za
Website: www.sastatecapture.org.za

2nd floor, Hillside House
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Tel (International): +27 (10) 214-0651
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Email: inquiries@sastatecapture.org.za
Web: www.sastatecapture.org.za

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

NOTICE IN TERMS OF RULE 3.3

TO : HONOURABLE PRESIDENT CYRIL RAMAPHOSA

CONTACT : 072 054 3634 / 012 300 5502

EMAIL : nomusa@presidency.gov.za
nokukhanya@presidency.gov.za
geofrey@presidency.gov.za
nokukhanyaj@presidency.gov.za
njjele@law.co.za
roshene@presidency.gov.za

IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION"), YOU ARE HEREBY GIVEN NOTICE THAT:

1 The Commission's Legal Team has been presenting the evidence of **MR MATSHELA KOKO** ("**Mr Koko**") at its hearing to be held at the Old Council Chamber of the Municipality of the City of Johannesburg, 158 Civic Boulevard Braamfontein, Johannesburg. The presentation of the evidence of Mr Koko will continue on **Tuesday, 4 May 2021 at 10h00** or so soon thereafter as the evidence may be heard. In the event of a change of date, it will be announced on the Commission's website (www.sastatecapture.org.za) and in the media. The evidence in question implicates or may implicate you in unlawful, illegal or improper conduct in the respects set out below.

2 The statement of Mr Koko, **dated 13 April 2021**, which implicates or may implicate you in the above allegations is annexed hereto marked "**A**". Your attention is drawn to **paragraphs 3, 5, 9, 11, 14, 16 and 17**.

3 Due to the fact that you are implicated or may be implicated by the evidence of Mr Koko, you are entitled to attend the hearing at which that evidence is being presented. You are also entitled to be assisted by a legal representative of your choice when that evidence is presented. The full statement of Mr Koko will be uploaded on the Commission's website as soon as he concludes his evidence. The transcript will be uploaded daily.

4 If you wish to:

4.1 give evidence yourself;

4.2 call any witness to give evidence on your behalf; or

4.3 cross-examine the witness

then you must apply, within fourteen (14) calendar days of this notice, in writing to the Commission for leave to do so.

5 An application referred to in paragraph 4 above must be submitted to the Secretary of the Commission. The application must be submitted with an affidavit from you in which you respond to the witness's statement insofar as it implicates you. The affidavit must identify what parts of the witness's statement are disputed or denied and the grounds on which they are disputed or denied.

6 If you wish to apply to cross-examine the witness, your application must follow the requirements of Rule 11.3. In other words, it must be a substantive application on affidavit accompanied by a notice of motion.

7 In the event that you believe that you have not been given a reasonable time from the issuance of this notice to the date on which the witness is to give evidence as set out above and you are prejudiced thereby, you may apply to the Commission in writing for such order as will ensure that you are not seriously prejudiced.

8 Please take note that even if you do not make an application under Rule 3.4:

8.1 in terms of Rule 3.10, the Chairperson may, at any time, direct you to respond in writing to the allegations against you or to answer (in writing) questions arising from the statement; and

8.2 in terms of Regulation 10(6) of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State GN 105 of 9 February 2018 published in Government Gazette 41436, as amended, the Chairperson may direct you to appear before the Commission to give evidence which has a bearing on a matter being investigated.

9 The witness statement and annexures provided to you are confidential. Your attention is drawn to Regulations 11(3) and 12(2)(c) governing the Commission, which make it a criminal offence for anyone to disseminate or publish, without the written permission of the Chairperson, any document (which includes witnesses' statements) submitted to the Commission by any person in connection with the Commission's inquiry.

10 Any response to or application in regard to this notice must be sent to Advocate André Lamprecht, Ms Shannon van Vuuren and Ms Rachel Niewenhuis at secretary@commissionsc.org.za.

DATED AT PARKTOWN ON THIS 19th DAY OF APRIL 2021

PROF ITUMELENG MOSALA
Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

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

HELD AT JOHANNESBURG

SUPPLEMENTARY AFFIDAVIT: M M KOKO

I, the undersigned,

MATSHELA MOSES KOKO

hereby state that:

1. I have in response to directives issued by the Chairman of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State ("the Commission") previously delivered five affidavits to the Commission. The first is dated 1 September 2020, the second is dated 22 September 2020, the third is dated 1 December 2020, the fourth is dated 2 December 2020 and the fifth is dated 20 December 2020.

2. I dealt with the conclusion of my career with Eskom in paragraphs 44 – 57 of my main affidavit. In paragraph 44 of my main affidavit, I made mention of the of the media statement of 21 January 2018 by the Presidency announcing a new Board for Eskom.

MMK JM

3. In the same statement Presidency directed the new Board, which was not yet in office, to,

"immediately remove all Eskom executives who are facing allegations of serious corruption and other acts of impropriety, including Mr. Matshela Koko…".

4. I was not facing "allegations of serious corruption and other acts of impropriety". Allegations of conflict of interest relating to my stepdaughter's shareholding in Impulse International (Pty) Limited had been made against me. I had met disciplinary charges in relation to it and had been vindicated.

5. In its statement of 20 January 2018, the Presidency was directing the Board of Eskom as newly constituted to find reasons to dismiss me. The Presidency was overreaching. Its directive to the new Board of Eskom was unlawful and unconstitutional.

6. The Labour Court issued an interim order on 26 January 2018 interdicting and restraining Eskom from unlawfully terminating my contract of employment based on the directive issued by the Presidency in terms of the statement that the Government put out on Sunday, 20 January 2018.

7. The interim order was made final on 21 February 2018 by Justice GN Moshoana of the Labour Court and he concluded that[1]:

"On the evidence before me, it is clear that the respondent [Eskom] is intent and actually is pressured to dismiss the applicant. Should the outcome of the current process not yield the desired results, there is a great possibility of the respondent pulling the ace up the sleeve. Legal advice has already been sought and dispensed with that the steps taken are justified in law. That being so, there is nothing that would prevent the respondent to flag the steps already interdicted to justify the termination once the interdict is gone. Therefore, the fear of the applicant is reasonable and ought to be entertained by this Court"

[1] **Koko vs Eskom Labour Court 2018-J200-18 Par [32]**

MMK

8. In terms of the of the final order of the Labour Court, Eskom was interdicted and restrained from unlawfully terminating my contract of employment on the basis of a directive issued to it by the Government of the Republic of South Africa in terms of a statement that the government put out on Sunday, 20 January 2018.

9. At the outset of the Commissions proceedings on Thursday, 3 December 2020 I made mention that Mr. Cyril Ramaphosa interfered in the affairs of Eskom by directing the Board of Eskom as newly constituted to find reasons to dismiss me. The new Board of Eskom had not even had its first meeting. I have since learned through the testimony of former Minister Lynne Brown at the Commission that three of the new Board members were not even vetted.

10. I was alerted by the then acting Director-General of Public Enterprises, Ms. Makgola Makololo and by the then Deputy Minister, Ben Martin of my impending dismissal by the then-Deputy President Ramaphosa and the new board. I received a call from Ms. Makgola Makololo about 30 minutes before the Presidency issued the statement to dismiss me.

11. Ms. Makgola Makololo told me that Mr. Ramaphosa is about to issue the statement directing the new Board of Eskom to dismiss me. I asked her what would be the reasons for my dismissal? She said Mr. Ramaphosa has directed the new Board to find the reasons to dismiss me. She then gave her phone to Mr. Ben Martin who confirmed same.

12. I resigned my employment with Eskom on 16 February 2018. I did so because it was clearly apparent that the then newly appointed Eskom Board was determined to act in accordance with Government's directive to dismiss me. I

was faced with powers that had been arraigned against me that I did not have the means to fight.

13. No-load shedding had occurred under my watch from 8 August 2015 until I resigned in February 2018. Load shedding came back in June 2018 four months after my resignation. CSIR has determined that R266-billion was lost to the economy between 2018 and 2020 because of load shedding after I left Eskom.

14. In a video recording at the University of Stellenbosch, Mr. Bonang Mohale who was then CEO of Business Leadership South Africa (BLSA) said that it was them who demanded that Mr. Ramaphosa dismiss the Board of Eskom and its Executives. If Mr. Mohale is to be believed, then Mr. Ramaphosa took illegal instructions from people who were outside of government and implemented them. This is nothing else but the capture of the state. The video recording of Mr. Bonang Mohale is attached[2] with this affidavit.

15. The World Bank, African Development Bank, European Investment Bank and KFW also demanded that the Eskom Board be dismissed. This they did in the attached letter dated 27 November 2017. They demanded from Government an Eskom Board that is constituted by "individuals who do not have conflict of interest".

16. Mr. Ramaphosa appointed Mr. Jabu Mabuza to be the new Chairman of Eskom and according to Mr. Bonang Mohale, Mr. Mabuza was one of the 5 names given to Ms. Lynne Brown by Business Leadership South Africa to be on the Board of Eskom.

[2] I also attach a similar video by Mr Paul Mashatile at the mining indaba suggesting that Government was taking instructions from external parties.

MMIC

17. It was the Board of Eskom led by Mr. Mabuza that was directed to dismiss me by Mr. Ramaphosa who was executing the demands of BLSA, World Bank, African Development Bank, European Investment Bank and KFW and none of them were in government.

18. Mr. Mabuza was not free of conflict of interest and I can not rule out that he was one of the three board members who were not vetted[3]. He was an executive chairman of a company that owned a company that had a contract to maintain a third of Eskom boilers. He also had interests in Eskom coal business through his son.

DEPONENT

SIGNED AND SWORN TO BEFORE ME ON THIS 13 DAY OF ~~DECEMBER~~ April 2021, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THAT HE HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND THAT HE CONSIDERS THE OATH TO BE BINDING ON HIS CONSCIENCE.

7085854 SGT J. Moatshe

COMMISSIONER OF OATHS

FULL NAMES: Jennifer Moatshe

ADDRESS: C/o Topaas & Douglas Drive Douglasdale

DESIGNATION: Sergeant

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
2021 -04- 13
DOUGLASDALE
SOUTH AFRICAN POLICE SERVICE

[3] Ms. Lynne Brown testified at the Commission that she was given names to be on the Eskom board and three of those names were not vetted.

MMK

Item “3”

AFFIDAVIT

I, the undersigned,

SAMSON GWEDE MANTASHE

do hereby make oath and state:-

1. I am an adult male of full legal capacity and the facts contained herein, except where otherwise stated, are within my personal knowledge and belief, both true and correct.

2. I am the National Chairperson of the African National Congress (hereinafter referred to as the "ANC"), having been elected to that position at the 54th National Conference of the ANC in December 2017. I am also the Minister of Minerals and Energy and was appointed to that position by President Ramaphosa in February 2018 and re-appointed in the 6th administration in May 2019.

3. Prior to my election as National Chairperson, I was the Secretary General of the ANC between December 2007 and December 2017.

4. On 8 October 2020, ANC Secretary General, comrade Elias Magashule, deposed to an affidavit on behalf of the ANC wherein he made recommendations to strengthen parliamentary oversight and accountability.

5. A few weeks ago, comrade Magashule made a request to the National Officials of the ANC that one of the other Officials should testify in his

place.

6. This responsibility was given to me in my capacity as National Chairperson and more especially since I was the Secretary General for ten years between 2007 and 2017 and would be able to respond to additional issues raised by the Commission, as detailed below, which occurred during my tenure as Secretary General and Chief Administrative Officer of the ANC.

7. I have read the affidavit of comrade Magashule and adopt and confirm the position in his affidavit on the recommendations to strengthen parliamentary oversight and accountability.

Closed party list system of proportional representation

8. At the multi-party talks at the Convention for a Democratic South Africa, political parties resolved that the electoral system shall be a closed party list system of proportional representation, meaning that voters vote for a political party and the number of seats allocated to that party in Parliament is in proportion to the number of votes it receives in a General Election. The agreement was subsequently incorporated into legislation.

9. A recent decision of the Constitutional Court has made it permissible for independent candidates to contest a General Election.

The goal of transformative constitutionalism

10. In a prestige lecture delivered at Stellenbosch University in October 2006, Pius Langa, former Chief Justice of the Republic of South Africa, dealt with the concept of transformative constitutionalism. The core idea of transformative constitutionalism, in his view, was framed in the

Epilogue of the Constitution in the following terms:-
"a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."

11. Chief Justice Langa regarded transformation as a social and an economic revolution. His view was that South Africans do not have to contend with unequal and insufficient access to housing, food, water, healthcare and electricity. Chief Justice Arthur Chaskalson cited with approval this sentiment in *Soobramoney's* case when he wrote, "for as long as these conditions continue to exist, that aspiration [that is substantive equality] will have a hollow ring."

12. The second aspect of transformative constitutionalism highlighted by Chief Justice Langa was legal culture. He said that the application of transformative constitutionalism to adjudication required an acceptance of the politics of law. By this he meant that law could not be kept isolated from politics. While they are not the same, they are inherently and necessarily linked. Under a transformative Constitution, he said, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.

13. He believed that upholding the transformative ideal of the Constitution requires judges to change the law to bring it in line with the rights and values for which the Constitution stands. The problem lies in finding the

fine line between transformation and legislation.[1]

14. Academic Solange Rosa provided the following advice about transformative constitutionalism in a democratic developmental state:- "In order for socio-economic transformation to have a real impact on the lives of the poor and marginalised, meaningful participation in the development of law and policy as well as administrative decision-making is required. Key policy choices to address the impact of poverty and inequality resonates with a participatory constitutional democracy and requires decisions to be considered in the light of certain fundamental norms and values. The developmental state theory in South Africa is being grounded in principles of representative democracy, participatory democracy and accountability of the state." [2]

15. I cite these legal scholars to demonstrate what the ANC believes to be the trajectory of our constitutional democracy and to locate the role of Parliament in that context because the organisation subscribes to the view that a primary purpose for the adoption of the Constitution was to establish a society based not only on democratic values and fundamental human rights but also on social justice.

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[1] *Justice Pius Langa, Transformative Constitutionalism, Stellenbosch Law Review, No.351, 2006, Stellenbosch University.*

[2] *Rosa, Solange: Transformative Constitutionalism in a Democratic Developmental State, Stellenbosch Law Review, 2011, Stellenbosch University.*

Contextualising ANC's approach to parliamentary oversight and accountability

16. In order to contextualise the ANC's approach to parliamentary oversight and accountability, I believe it would be helpful if I articulated to the Commission in broad terms how policy is formulated in the ANC, how the party candidate list is developed, how Cabinet members are chosen and how the ANC deployment policy was developed and is being implemented.

ANC policy formulation

17. Policy formulation starts with the development of a concept paper which is sent to branches for discussion and input. The paper is discussed further at regional and provincial conferences.

18. Once every five years the policies of the organisation are consolidated at a Policy Conference.

19. At this conference the views of the ANC alliance partners – COSATU, the South African Communist Party and the South African National Civic Organisation are taken into consideration after which the policy is adopted and a resolution taken that it be implemented.

20. The policies adopted become the manifesto of the ANC when it contests elections.

Compilation of party candidate list

21. All comrades who are placed on national and provincial party lists are required to commit to the manifesto.

22. Candidates are nominated by branches and after several organisational processes, successful candidates eventually make it onto the lists.

23. In the case of the National Assembly, there are two lists that are drawn from Provinces - a National to National List and a Province to National List – which is submitted to the Independent Electoral Commission prior to the General Election.

24. In compiling its lists of candidates, the ANC takes into consideration demographics, gender parity so that at least 50% of the candidates are women, representation from the youth sector, particular skills of candidates that could enhance the work of parliament and retention of experienced parliamentarians. In order not to undermine the democratic processes of branches, regional and provincial structures, the first 25% on the lists are not changed.

25. The National and Provincial List Committees may thereafter change the order of candidates after taking into consideration the criteria listed in paragraph 18 above. Both National and Provincial Lists are eventually finalised by the National Executive Committee.

26. The above system of candidate selection is designed to provide the organisation with its best option of representation in Parliament.

Choice of President and Cabinet members

27. In line with the Constitution of the country, every member elected to Parliament shall be eligible to be a candidate for the Presidency of South Africa.

28. Although the Constitution affords the President the prerogative to choose his Cabinet, the practice in the organisation is that the President chooses his cabinet after consultation with the ANC and its Alliance partners.

ANC Cadre development and deployment

29. I have addressed the issue of cadre deployment in my submission for two reasons:-

29.1 to give the Commission an appreciation of the genesis of the ANC policy of cadre development and deployment so that it can evaluate and pronounce on the validity of a request made by the Leader of the Official Opposition, Mr John Steenhuizen, on 3 February 2021 that the State Capture Commission should "tackle and end the ANC's policy of cadre deployment"[3]; and

29.2 to give the Commission an appreciation of the calibre of comrades and the procedures followed for their deployment.

30. Over time, the ANC Deployment Policy has been discussed and refined at National Working Committee meetings, National Executive Committee meetings and conferences of the organisation.

Cadre development

31. Elements of the cadre development policy can be traced back to the ANC's Kabwe Conference in 1985 when ANC President Oliver Tambo

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[3] *Njilo, Nonkululeko: SA's problems are due to cadre deployment says the DA as it calls on Ramaphosa to account, Times Live, 4 February 2021.*

called for the establishment of a political school.

32. Although there was informal training taking place since the late 1990s, the ANC developed its conceptual position of an ANC Political School and Cadre Development in April 2013.

33. The purpose of the political school is to conduct compulsory education for all elected leadership structures.

34. The overall vision is to provide a forum for collective learning through which members share experiences, learn from one other, assess the world around us and the challenges we face as a Movement and empower each other.

35. More specifically the objectives are:-

35.1 To provides resources, trainer-training and learning material for broader cadreship development and political education activities in the ANC and democratic Movement with the aim of re-building a culture of mass political education;

35.2 Develop middle-layer leaders who will be equipped with the necessary knowledge and skills to consolidate the ANC as a mass-based democratic Movement which must function as both liberation Movement and ruling party with the maximum and effective participation of members for the transformation of society.

35.3 Develop the capabilities of cadres to undertake the tasks to which they are deployed and develop the calibre of cadres to support specific ANC campaigns and policy interventions.

35.4 Recognise the potential and aptitude amongst middle layer leadership and from which more senior positions and deployments should be filled.

35.5 Develop linkages with tertiary education institutions and funding agencies in South Africa and abroad with a view to placing ANC cadres with potential.

35.6 Provide training and resources for progressive parties outside Africa, especially on the African continent.

36. The course content and curriculum includes:-

36.1 Ideological development and political consciousness;

36.2 Policy analysis and public management;

36.3 Organisational, technical and party building skills;

36.4 Development and community outreach work in practice.

37. In 2018 President Cyril Ramaphosa launched the OR Tambo Policy Leadership Institute and Dr David Masondo was appointed as the Principal.

Cadre deployment

38. I have drawn excepts of the ANC's cadre deployment policy to provide the Commission with an overview. The early working of the deployment

policy is drawn from academic writing.

39. The Mandela period starting in 1994 of giving substance to the capture of state power was one in which many state institutions were re-energised to give effect to the post-apartheid order to fit in with the new spirit of reconciliation and inclusivity but also embody new ideological directions. The ANC oversaw the gradual population of the state structures with civil servants that were seen to be able to actively promote the new political and administrative order.[4]

40. Institution building in the Mandela Presidential period projected messages of compromise and inclusivity in order to help consolidate the transition and set the foundation for nation building. Examples included:-

40.1 Shared executive power with both the NP and IFP represented in Cabinet, and the NP also holding one of the two deputy presidencies;

40.2 A proportional representation system to elect Parliament, provincial legislatures and half of the municipal councillors, applied without a minimum threshold, meaning that small parties would win recognition and feel included;

40.3 Recognition of provinces, as a compromise that included some semi-federal characteristics in the new South African state;

40.4 The National Council of Provinces (NCOP) which was intended to ensure that provincial-regional interests would have a guaranteed say in matters specifically affecting them; and

40.5 The guarantee that South Africa would in essence be a

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[4] *Booysen, S: The African National Congress and the Regeneration of Political Power, 2011, Wits University Press, Johannesburg.*

constitutional state, recognising the Constitution as the highest authority in the country, and affording supreme status to the Constitutional Court in assessing compliance with the Constitution.[5]

41. In 1994 the ANC recommended the deployment of suitably qualified personnel into structures of government at all levels with the proviso that a sunset clause was agreed to at the political negotiations process at the Convention for a Democratic South Africa (CODESA). The sunset clause in effect slowed down the implementation of deployment in the furtherance of transformation.

42. The ANC used the first term of government to perfect its deployment system, notably with:-

42.1 A deployment framework;

42.2 Guidelines on the relationship between ANC constitutional structures and government executives;

42.3 Guidelines on the role and criteria for ANC Premiers;

42.4 Guidelines on accountability and monitoring of ANC public representatives; and

42.5 Guidelines on the deployment of executive mayors for Local Government Elections.

43. Strategic deployment of ANC cadres played an important role in the ANC taking control of the post-liberation state. The ANC's deployment

[5] *Booysen, S: op sit.*

committees on national and regional levels played a crucial role in state transformation, contributing to reasonable success in deracialising the public service. This also helped to ensure that bureaucratic sabotage by reactionary forces, intent on undermining the democratic order, would be minimised.

44. The deployment policy of the ANC started in earnest at the 50th National Conference in Mafikeng in 1997. The resolution called for the establishment of deployment committees throughout the ANC's organisational hierarchy. It recognised that the ANC needs to put in place its own policy and code of conduct to guide those of its cadres deployed to the public service. There were concurrent discussions about curtailing corruption and the need for guidelines on ethics.

45. Between January and July 1999 the ANC considered and eventually adopted a deployment policy and framework and guidelines for use by the organisation.

46. The ANC gave priority to the following key centres of authority and responsibility within the state:-

46.1 Cabinet;

46.2 The entire civil service, but most importantly from director level upwards;

46.3 Premiers and provincial administrations;

46.4 Legislatures;

46.5 Local Government;

46.6 Parastatals;

46.7 Education institutions;

46.8 Independent statutory commissions, agencies, boards and institutes;

46.9 Ambassadorial appointments; and

46.10 International organisations and institutions.

47. Non-state centres of authority and responsibility include:-

47.1 Business (financial, industrial, agricultural, small and medium enterprises, monopolies etc) and

47.2 Other social and cultural institutions like religious bodies, sports bodies, cultural bodies etc

48. The ANC's general approach is that all strategic deployments should as far as possible be subjected to collective discussions by various structures of the Movement. A collective approach will enable the organisation to effectively combat careerism, patronage and opportunism.

49. In the deployment of comrades, a careful balance is struck between organisational deployment needs and personal circumstances. Consultations and discussions should take place with individuals, within the framework of prioritizing the needs of the organisation and transformation. Once comrades are deployed, the ANC seeks to create

an environment which allows people to balance their deployment commitments with their family and other responsibilities.

50. As shown below, the ANC deployment policy continually receives attention and refinement at every conference of the organisation:-

1997 National Conference

50.1 The Resolution on Peace and Stability resolved to deploy adequately trained and committed and loyal personnel.

50.2 The resolution on building the ANC resolved that the critical role of political leadership in the transition period and the need to deploy cadres to various organs of state, including the public service, and to the other centres of power in society and to put in place a deployment strategy which focuses on the short, medium and long term challenges, identifying the key centres of power.

50.3 The Conference also resolved to establish deployment committees in the NEC, PEC, REC and BEC which in implementing the above strategy should:-

50.3.1 discuss the deployment of comrades to areas of work of behalf of the Movement, including the public service, parastatals, structures of the Movement and the private sector;

50.3.2 such discussions of deployment of individual comrades be done with appropriate consultation with the cadre/s

concerned;

50.3.3 ensure capacity building to prepare comrades for deployment and redeployment in various spheres;

50.3.4 do probity checks on all deployees and in general on appointment of staff;

50.3.5 provide support and forums for accountability for cadres so deployed;

50.4.6 refer disputes about deployment or redeployment of cadres to the next highest structure for resolution.

2002 National Conference

51. The Conference resolved that the ANC should ensure the development of a Human Resource Development strategy aimed at deliberately developing ANC cadres to occupy strategic positions in the economy in line with our deployment strategy.

2007 National Conference

52. On the deployment of cadres, the conference instructed the incoming NEC to review the political management of the deployment process and ensure the implementation of the 1997 resolution on Deployment, with a view to strengthening collective decision-making and consultation on deployment of cadres to senior positions of authority. This includes strengthening the National Deployment Committee.

2012 National Conference

53. On organisational renewal, the Conference resolved:-

53.1 In the new phase of the National Democratic Revolution, deployment should always be preceded by systematic academic, ideological and ethnic training and political preparation. Cadre deployment should be underpinned by a rigorous system of monitoring and evaluation of the performance of cadres deployed and elected to leadership positions. This was done to avoid a situation wherein leadership assessment and evaluation take place only in the run up to conferences.

53.2 The ANC veterans and former combatants of MK should be deployed in the programme of rolling out the political education cadre development programme.

2017 National Conference

54. On organisational renewal, the Conference resolved to select and deploy capable leaders and public representatives with integrity, capacity, the correct orientation and expertise to drive and implement our programmes.

55. On cadre deployment, the Conference resolved that all leaders and candidates for deploy to government must ensure that they build their skills and qualifications to enhance their capacity and the ANC should

ensure that leaders deployed in government go through compulsory, regular and ongoing development. In addition it is the responsibility of individuals to continually develop themselves.

56. On capability and capacity building in the Public Service, the Conference resolved that the merit principle must apply in the deployment to senior appointments, based on legislated prescripts and in line with the minimum competency standards. However, employment strategies for young people into entry level positions within government should remove any impractical barriers of entry.

Functioning of deployment committee

57. In practice the secretariat of the deployment committee monitors the media and government bulletins for advertisements for vacancies.

58. The committee takes an interest only in those vacancies which it considers strategic and which could advance the developmental agenda of the state, such as vacancies for the post of Directors General and Board appointments of state-owned enterprises.

59. The deployment committee maintains a pool of suitably qualified candidates for deployment. If no suitably qualified candidate can be found in the pool, the ANC would normally encourage comrades to apply and ensure that they undergo psychometric testing.

60. Most State-owned enterprises would employ a human resources agency to engage senior staff. The role of the deployment committee is this instance would be to encourage suitably-qualified comrades to apply.

61. In the case of Board positions for State-owned enterprises, where public interviews are conducted, the ANC would encourage suitably-qualified comrades to apply.

62. In cases where the Minister has the final say in appointments, the role of the deployment committee is to comment on the shortlist - usually three candidates - presented by the Minister.

63. Focus is not only on academic or professional expertise but the deployment committee also takes into account skills and expertise in conducting constituency work and working with the masses on the ground.

64. Special attention is paid to the Youth and Women's League to support their human resource development strategies and assist cadres coming through the ranks of the Leagues with career-pathing.

65. At all times, we ensure an approach where we broaden the pool of cadres who have an understanding of the policies of the Movement and the have necessary experience and skills to be able to execute these

policies effectively, wherever they are deployed.

66. Our cadres deployed in whatever centre should take with them the qualities and attributes that we hold dear as a Movement. This includes putting service to the people first, an ethic of work and selflessness, respect for the senior structures and cadres of the Movement, responsiveness to the needs of the people and a collective approach to matters.

67. In our deployment we consciously strive to dispel the notion that we have become a Movement and a leadership which is distanced from the people whom we have served in our long struggle for liberation. We endeavour to be true to our tradition of putting the interests of our people and our country first.

68. Some of the situations and practices we avoid are:-

68.1 Allowing political structures to constantly interfere in the running of government and seeking to replace Executive structures of government;

68.2 Allowing government to change or modify policies without consulting the political structures;

68.3 Involving political structures in legalistic or technical debates, for example details of legislation;

68.4 Allowing government structures to utilise political structures as a rubber stamp to mobilise authority for decisions which have not

been debated in the Movement especially highly contentious ones that are seen to signal a change in policy or direction of the organisation.

68.5 Allowing demagoguery and populism to prevail where the political structures or individuals in these structures are at loggerheads with the Executive or its members.

68.6 Allowing political debates of a sensitive or strategic nature to be conducted outside the political and government structures, for example in the press, through avoiding the debates in the political structures.

68.7 Above all, political structures should ensure that political conduct, inside and outside government, is conducted in the tradition of the Movement, which is about allowing open debate coupled with decisive action, democracy, delegation of authority and power, and remaining true to the aims and objectives of the National Democratic Revolution.

69. The guidelines of the ANC deployment policy were revised by the National Working Committee in June 2009. These included:-

69.1 Cadres of the ANC should be ready to be deployed where the Movement deemed it necessary to deploy them;

69.2 The ANC should look critically at the calibre of candidates that it will field for the 2011 local government elections, as that will determine the organisation's performance.

69.3 Deployees of the ANC should always be loyal to the organisation;

69.4 The ANC should set clear standards to guide its deployees who are deployed at all levels and structures of government which should apply to everyone without exception.

69.5 Comrades who are deployed in cabinet should not staff their offices along tribal or racial lines.

69.6 The deployment process is not an easy process and is open for improvement.

70. In its report to the NEC meeting between 17 and 19 July 2009, the NWC raised and discussed the issue of the principles that informed deployment and the rights of cadres in the exercise of deployment. This discussion led the NEC to identify the need to strengthen the operational capacity of the ANC head office and provinces.

71. At a NWC meeting in August 2009 the ANC tabled its draft policy on declaration of interest to ensure that there is objectivity in decision-making at all levels of the organisation in the best interest of the organisation.

72. The ANC's range of national and regional deployment committees ebbed and flowed over time as the movement battled intra-organisation positioning, optimisation of state governance, factionalism, careerism, opportunism, desperation for employment, and the organisational dilemmas of having to act against corrupt comrades.

73. The national deployment committee consists of 15 members, primarily from the National Executive Committee, and is chaired by the Deputy President of the ANC, comrade David Mabuza.

The complexity of modern government - lessons from the UK

74. Our constitution has adopted the Westminster model of government.

75. Hence, reference to a discussion paper of the Institute for Government in the UK in 2018 would probably give the Commission a more objective understanding of the issues of accountability in modern government. The paper by Julian McCrae, Benoit Guerin, and Marcus Shepheard deals with the state of accountability in the UK, explores the main issues affecting accountability, the failures that flow from these issues and how they can be addressed.[6]

76. The minister's duty to account to parliament has its roots in the Haldane Report of 1918. The Report provided what has been regarded as the definitive judgement on all issues of accountability, setting a pattern for the UK government which has held for 100 years.

77. The Haldane Report however leaves some issues unresolved. For example, while ministers are formally accountable to parliament for their policy decisions, they are in practice not held accountable for the consequences of these decisions. Similarly, ministers are not expected to resign for errors made by civil servants in their department, although they have a duty to fix the issues once they become clear.

78. Modern governments, by virtue of their complexity, exhibit the following challenges:-

    78.1 Failure to develop the capability of staff and members to ensure accountability;

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[6] *McCrae, J. et al: Accountability in Modern Government, What are the issues? Institute of Government, UK, 2018*

78.2 Constant churn in how services and their oversight are structured; and

78.3 The lack of focus on overall objectives when multiple organisations with complex management contracts are involved in making things happen.

79. The challenges of modern government give rise to the following questions:-

79.1 Is there authoritative information about the project to perform the oversight function?

79.2 Is there a mechanism to monitor how the decisions of different organisations are affecting overall government objectives?

79.3 Is there an effective way to learn from failure?

79.4 What impact does political intervention have? The nature of political accountability means that when issues come to the forefront of the public debate, ministers sometimes intervene to respond to the public's reaction, taking ultimate responsibility for fixing the issue. However, such intervention seldom takes place, Instead, it is often left as a failure for the department to respond.

80. According to these authors, the potential direction for reform are the following:-

80.1 Clarify fundamental accountability of the civil service;

80.2 Improve transparency to enable meaningful scrutiny;

80.3 Establish cross-departmental accountability and avoid silos;

80.4 Develop mechanisms to prevent gaps in accountability;

80.5 Focus on issues that matter to the public; and

80.6 Change the culture of accountability.

Constitutional expectation of the function of parliamentary oversight and accountability

81. In terms of section 55(2) of the Constitution, the National Assembly must provide for mechanisms-

(a) to ensure that all executive organs of state in the national sphere of government are accountable to it: and

(b) to maintain oversight of -

(i) the exercise of national executive authority, including the implementation of legislation; and

(ii) any organ of state.

82. The National Assembly is required to do two things – hold organs of state accountable **and** exercise general oversight over national executive authority and organs of state.

83. Critically important is the provision of section 42(3) of the Constitution which requires members of parliament not only to oversee executive authority but to scrutinise the action of executives without fear, favour or prejudice and to take their oath of office very seriously viz. that they would be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution of the Republic and perform their functions to the best of their ability.

84. In essence, our constitutional democracy adheres to the norms and principles of separation of powers, the rule of law, democratic self-government, the protection of human rights and the existence of an independent judiciary and it is a non-negotiable condition that these values are upheld in the oversight and accountability obligation of members of parliament. It follows, the ANC will not tolerate any unlawful or unconscionable conduct by its members of parliament.

85. Precisely the same commitment is expected of members of provincial legislatures and councillors in local government.

The necessity of political will in the triangle of parliamentary oversight and accountability

86. The availability of budgets and oversight tools and legislative capacity (availability of material, technical and well-trained staff and the effectiveness with which legislative oversight is performed) is conditional.

87. The critical corner of the triangle is political will.

88. Over the past decade the moral fibre of society has been substantially hollowed out. This situation has deteriorated to such an extent that *City Press* editor, Mr Mondli Makanya, has decried the lowering of the morality bar to the point where we compare levels of immorality and unethical conduct in an effort to find some level of acceptable behaviour.

89. The effectiveness of legislative oversight is not a function of oversight capacity but of political will.

90. Echoing comrade Magashule, I give an unconditional undertaking on behalf of the African National Congress that the organisation has the political will to make parliament work and to ensure effective oversight and accountability.

Relationship between ANC Headquarters and ANC public representatives in Parliament

91. The Secretary General and Deputy Secretary of the ANC visit Parliament from time to time to liaise with members parliament.

92. Based on the experiences of African and international Parliaments, the ANC public representatives are not micromanaged by Luthuli House nor is the working of Parliament or the National Assembly rules discussed at NWC or NEC meetings. Bills of Parliament are discussed in ANC NEC subcommittees.

93. The comrade is charge of all ANC members of parliament is the Chief Whip of the party and decisions within Parliament are made within the Rules of the National Assembly and the legislative framework specific to Parliament.

2009 Parliamentary Oversight and Accountability Model

94. The 2009 Model sets out the oversight tools in the following terms:-

94.1 Parliamentary committees have various tools of oversight including departmental briefing sessions, annual and departmental budget analyses, calls for submissions and petitions from the public, the consideration of strategic plans and annual reports and public hearings.

94.2 Members can make statements on any matter in the House. Cabinet Ministers may make factual or policy statements in relation to government policy, executive action and other matters of which the House should be informed.

94.3 Members of all political parties can bring notices of motion which can be used to help fulfil their oversight responsibilities by bringing issues to Parliament for debate.

94.4 In plenary debates certain mechanisms for conducting oversight are used. These include question time, the consideration of committee reports, scrutinizing and debating the implementation of policy and budget votes, members' statements and questions by members of parliament which

draw the attention of the Executive to the concerns of members' constituents.

Recommendations made by the ANC to enhance the Model

95. The ANC recommends that to enhance oversight and accountability, parliament implements a number of mechanisms referred to in the 2009 OVAC Model but which are yet to be implemented.

96. These include;-

96.1 Institutional mechanisms;

96.2 Amendment of the Rules of the National Assembly;

96.3 Oversight Advisory Section;

96.4 Legislative reform to act as a deterrent against corrupt activity;

96.5 Early warning system to detect state capture and corruption;

96.6 Building our constitutional democracy;

96.7 Enhance oversight and accountability obligation of Portfolio Committees;

96.8 Upgrade training and increase research capacity;

96.9 Asset interest disclosure laws; and

96.10 Encourage gender mainstreaming.

97. Details of these recommendations are fully set out in comrade Magashule's affidavit.

Enhance oversight and accountability obligation of Portfolio Committees

98. At an ANC Caucus Oversight Workshop on 30 May 2020, the ANC identified the weaknesses in the current 2009 oversight and accountability model and proposed a sector oversight model for Legislatures in South Africa that would make parliament and its

portfolio committees more efficient.

99. In this regard I refer the Commission to comrade Magashule's affidavit which contains full details of how these weaknesses could be addressed.

Distinguishing between the party and free vote when democracy project at risk

100. By virtue of the Westminster model, whippery system and closed vote party representation system we have adopted for the functioning of our government, the practice of party discipline means that members of the same party, with rare exceptions, vote together in Parliament.

101. Party discipline ensures that the governing party in government and the opposing political parties are clearly demarcated and, second, it provides a degree of ideological certainty on which the voter can rely.

102. MPs have to balance two opposing principles – their loyalty to the party, its manifesto and the voters who voted for the party AND to remain faithful to their own political and moral principles and obligation to the Constitution.

103. In our parliamentary system MPs sort out their differences in caucus before speaking publicly with a united voice.

104. As the ANC we have stressed to our MPs that in the execution of their parliamentary responsibilities they should apply their minds to the purpose of their task in parliament to enhance our developmental agenda and not adopt a herd mentality by virtue of the ANC's majority position. In short, they should be thinking MPs.

105. The rules of the National assembly makes provision for a three-line whippery system.

106. In practically all parliamentary systems, the use of the free vote remains contentious. The situation is no different in our country.

107. Many commentators over the years have expressed views and so has our Constitutional Court.

108. One view is that party discipline should be relaxed on issues that are not part of the party's core manifesto.

109. In the case of the ANC which has as its constitutional objectives, *inter alia*, to unite all the people of South Africa; to end apartheid in all its forms; to defend the democratic gains of the people; to fight for social justice; and to build a South African nation, a determination about what is the party's core manifesto becomes a challenge.

110. There is also the argument that if individual MPs rather than government makes the decisions, it will become more difficult to hold the government accountable. This would lead to a blurring of the distinction between the governing party and parties in opposition and would therefore run counter to the principle that government is accountable to Parliament and ultimately, to the electorate in general elections.

111. Another concern raised by opponents of the free vote is that removing party discipline would leave MPs more vulnerable to lobbying and influence peddling from special interest groups

112. Some guidance was provided by the Constitutional Court in 2017 in the case of *United Democratic Movement vs the Speaker of the National Assembly and others.*

113. The court stated that the mechanism of a motion of no confidence is all about ensuring that our constitutional project is well managed and is not imperilled.

114. The court went further to explain that a motion of no confidence is fundamentally about guaranteeing or reinforcing the effectiveness of existing mechanisms in between general elections by allowing MPs as representatives of the people to express and act firmly on their dissatisfaction with the executive's performance.

115. The ANC as a party which supports transformative constitutionalism and the goals of a developmental state would be acting against its own interests if it did not allow its MPs a free vote when the constitutional democracy project is at risk.

116. However, South Africa is a very young democracy and the ANC's view is that we should tread with caution when making major decisions such as the removal of a sitting President without having a full appreciation of the consequences that such a decision could have on the country, the party and our fragile democracy. The recent events in the US have vividly demonstrated how fragile democracy can be.

117. As much as the ANC manifesto appears open ended, as National Chairperson, I can commit to a discussion in the ANC at the forthcoming National General Council conference this year to

emphasize that, as the governing party, the ANC should be decisive, having regard to all the consequences, when it is confronted with such monumental situations in the future and when it perceives the constitutional democracy project to be at risk and to be mindful of the burden of responsibility it carries as the leader of society.

118. Impulsive action, I believe. could unleash a set of negative forces which would have a detrimental impact on the democratic gains we have made thus far. The ANC can never take the Sampson option.

119. This was the approach comrade Jessie Duarte and I adopted in June 2017 when a motion of no confidence was proposed in President Zuma. We addressed the Study Group in Parliament and recommended that ANC MPs should not give the Opposition the satisfaction of removing a sitting President because it was clear to us that the votes of ANC MPs were required to remove President Zuma.

120. The removal of any member of parliament, more so the President, is a matter of party organisational discipline which should best be dealt with within the confines of the party.

121. For the record the NEC of the ANC was consumed with the issue of President Zuma since 2013 when the party's Integrity Commission recommended that he step aside as President of the ANC.

122. Even in 2011 the NEC discussed the concept of corporate capture when some comrades raised the issue of undue influence being exercised by business on the governance of the country.

Response to evidence tendered by comrade Makhosi Khoza

123. After the vote of no confidence dealt with above, comrade Makhosi Khoza posted four statements on Facebook between 7 and 17 July 2017 which attacked the ANC and the Provincial ANC structure in KwaZulu Natal which brought the ANC into disrepute.

124. From time to time I have called many comrades to Luthuli House to persuade them to tone down their public utterances. Similarly, I called comrade Makhosi to a meeting at Luthuli House and urged her to refrain from making public utterances.

125. However she persisted with her conduct which prompted the ANC in Kwa Zulu Natal to charge her for misconduct. She resigned before her disciplinary case was due to start.

Role of ANC Caucus and Study Groups

126. All ANC public representatives are allocated to Study Groups and each Study Group is headed by a Study Group Chairperson and is politically managed by a Whip.

127. It is expected of the Study Group to do political work in preparation for the legislative programme being dealt with by the respective Committee, exercise political oversight in respect of matters coming before the Committee and formulate ANC policy for the relevant area of work. In doing this work, the Study Group ensures that ANC policies find expression in Parliament.

128. Study Groups have researchers employed by the ANC which MPs have access to. ANC MPs come from different backgrounds, experiences and levels of formal education. The Study Group plays an important role in

empowering MPs to prepare them for their responsibilities in parliament.

129. Caucuses, in the Westminster parliamentary system are described as closed bodies tasked with selecting candidates and discussing matters relating to the party's policy and strategy.

130. All South African political parties operate caucus systems in all spheres of government – national, provincial and local.

131. In the minds of the public, the functioning of a caucus has progressively obtained a meaning which is associated with actions that are mostly regarded as negative or underhand.

132. The Commission has also raised this consideration with ANC witnesses who gave evidence on this workstream of oversight and accountability.

133. Drawing on international practice, academics Charles Napier and Pieter Labuschagne came to the conclusion that caucuses enforce party discipline by ensuring a unified and common strategy as a strategic objective of the party in maintaining solidarity. They go on to say that such a posture is "central for success within the parliamentary system in terms of the interaction with opposition parties."

134. They believe that whilst democratic values may be sacrificed for the sake of strategic gains, they maintain that caucuses play an important, if not pre-eminent, role in decision-making processes in legislatures. Consequently, their conclusion is that the two opposing and

contradictory principles and values cannot be served simultaneously.[7]

135. I accept that MPs find themselves in this contradictory position as raised by these authors. However, I hold a different view.

136. As the governing party the ANC will endeavour to reorientate its public representatives to appreciate the distinction and be able to differentiate between their participation in a caucus or Study Group, which may include the participation of the minister, and their constitutional obligation in terms of their oath of office to hold the same minister accountable in the portfolio committee in which other political parties participate. Their participation in both forums have entirely different objectives.

137. Maintaining this dual accountability role – to party and the public – can be achieved by explaining to MPs that both roles are necessary to enhance the functioning of our democracy and are mutually exclusive. When they enter the portfolio committee, the principal of majoritarianism has no place. The objective is to exercise oversight and exact accountability.

Electoral Reform

138. The ANC was scheduled to discuss electoral reform and the building of a national democratic society at its midterm review in May 2020. However, due to the pandemic, the review conference is expected to take place later this year.

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[7] *Napier, C & Labuschangne, P: Political Party Caucuses and Democracy, Contradictio In Terminis? Journal for Contemporary History, 2017, University of Free State, P.208.*

139. Despite the avenues for participation listed above, there appears to be a growing distance between citizens and the government.

140. The legitimacy and credibility of elections is also affected by the increasing use of fake news and the manipulation of big data and social media agencies as evidenced by the Cambridge Analytica scandal.[8]

141. At the National General Council midterm review this year, the ANC will focus on two aspects of our electoral system:-

141.1 Whether we should introduce elements of a constituency-based electoral system at national and provincial level; and

141.2 Whether national, provincial and local government elections should be synchronised and take place at the same time.

Measuring the ANC's performance in portfolio committees

142. Former chairpersons of portfolio committees, comrades Zukiswa Rantho, Vincent Smith, Dikeledi Magadzi and Dipuo Letsatsi Duba, and Chair of Chairs, comrade Cedric Frolic, testified on oversight and accountability in parliament in the years between 2014 and 2017.

143. I was the Secretary General in the period 2014 to 2017 and I am not aware of any directive to the Chief Whip or members of parliament not to discharge their obligations in the portfolio committees nor did I give such an instruction.

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[8] *Electoral Systems and the Building of a National Democratic Society, Umrabulo Journal, Special Edition NGC 2020, African National Congress, P.200.*

144. Since 2013, after the Integrity Commission recommended that former President Zuma should step down, the ANC has been undergoing a period of instability. A substantial part of that instability can be contributed to the entry of allegations about the Gupta family in ANC politics, in particular the perceived hold that the family had over former President Zuma.

145. Early indications of this perceived hold arose when a private plane carrying guests to a Gupta family wedding landed at Waterkloof Air Force Base in April 2013 and a remark made by comrade Fikile Mbalula at a meeting of the National Executive Committee in June 2014 after the General Elections that he was told of his appointment to the Executive by a member of the Gupta family.

146. In 2016 there were calls in the National Executive Committee for President Zuma to resign and in June 2017 it is common cause that a large number of ANC MPs supported a motion of no confidence initiated by an opposition party in parliament.

147. I have no doubt that during this period of turbulence many ANC MPs felt leaderless. This probably explains their lethargy in the portfolio committees. As stated above, I recommended to ANC MPs in June 2017 not to support a motion of no confidence in Presidents Zuma because it was an organisational matter which the ANC was seized with at the level of the National Executive Committee.

148. The occurrences in the ANC in that period would have evoked different emotions and views among ANC MPs. Whether these MPs made a deliberate decision not to executive their parliamentary obligations for whatever reason is beyond my comprehension. No ANC public

representative was told to stop thinking or not to executive their responsibilities in Parliament.

149. At the micro institutional level, I believe some of the ANC portfolio committee chairpersons could have been more proactive. In her evidence, comrade Letsatsi Duba was not satisfied with the legal advice given by parliament's legal services but nonetheless did not take up the matter with the ANC Chief Whip or the Speaker. She should have been more proactive. The allegations about Eskom, raised by the Official opposition, were serious and loomed large in the public domain.

150. Comrade Magadzi could not be totally blamed for her reliance to follow the party line discussed in the Study Group.

151. Comrade Rantho's innuendo that she did not return to parliament in 2019 because of the courageous stance she took in 2017 when she was chairperson of the public enterprises portfolio committee is not true. Besides comrade Rantho, many other comrades in parliament such as comrades Cedric Frolick and the members of the portfolio committee of public enterprises such as Pravin Gordhan were returned to parliament in 2019. Prior to general elections the ANC convenes elective processes at branch, regional and provincial levels to elect public representatives to be placed on the national list to the national assembly. According to ANC records, comrade Rantho was not nominated by her branch.

152. What is apparent is that there is room to reform the manner in which State-Owned Enterprises report to parliament. The parliamentary programme leaves little room for departure and little opportunity to deal with ad hoc challenges such as convening inquiries into State-

Owned Enterprises.

153. I believe that if portfolio committees develop a reporting template for State-Owned Enterprises and a framework for dealing with challenges in State-Owned Enterprises, a great deal more oversight will be achieved.

154. For example, portfolio committees can develop a table of escalation to help them decide, depending on the nature of allegations of malfeasance or wrongdoing, whether they should call for more information, visit the entity concerned or conduct a full inquiry. This graded approach would bring in a measure of certainty in the functioning of portfolio committees and help them achieve their objective of exercising effective oversight.

155. Mr David Lewis of Corruption Watch made an important point in his testimony that failures of governance and weak contracting occur within the State-Owned Enterprises. In the absence of conducting an inquiry, portfolio committees have no other option to exercise effective oversight.

156. I believe a mechanism must be developed for portfolio committees to satisfy themselves that the procurement and contracting environment is secure in State-Owned Enterprises. This pro-active measure would enable portfolio committee to execute their responsibility more effectively.

157. The lack of support staff to portfolio committees is a matter of concern. Comrade Cedric Frolick testified that eleven lawyers service forty committees. Moreover, the complex nature of contracts concluded by

entities and the sophisticated and diverse industries that report to parliament may require more than one content adviser to assist portfolio committees such as public enterprises.

158. Clearly, the manner in which portfolio committees function and the support structure around them is in urgent need of reform so that when we assess the performance of portfolio committees, we are comparing apples with apples.

159. The high turnover of chairpersons and even members of portfolio committees contribute to instability. For its part the ANC will endeavour to retain the institutional memory by ensuring continuity of tenure of its members.

160. I have dealt with the constitutional obligation of portfolio committees to hold the responsible minister to account above.

DEPONENT

THUS DONE AND SWORN TO before me at JOHANNESBURG on this 12 day of March 2021, the Deponent having acknowledged that he knows and understands the contents of this affidavit; has no objection to taking the prescribed oath and considers the said oath to be binding on his conscience, the regulations contained in Government Notice No. 1648 dated 19 August 1977 (as amended) having been complied with.

COMMISSIONER OF OATHS

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Commissioner of Oaths

Item “4”

SUBMISSION MADE BY THE AFRICAN NATIONAL CONGRESS TO THE JUDICIAL COMMISSION OF INQUIRY TO INQUIRE INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

1. Purpose of submission

1.1 The purpose of this submission is three-fold:-

1.1.1 To clarify the confusion that has arisen when the banking institutions presented their evidence about their meetings with the ANC and their meetings with the Inter-Ministerial Committee together;

1.1.2 To respond specifically to the evidence tendered by the banking institutions with reference to their meetings with the ANC at Luthuli House; and

1.1.3 To explain why the ANC met the banks and what internal processes were followed thereafter.

ABSA Bank

1.2 In her submission to the Commission, Ms Yasmin Masithela of ABSA Bank stated that the purpose of her statement was to deal with the facts within ABSA's knowledge regarding clause 1.7 of the Commission. She then went on to quote Clause 1.7 which provides that the Commission is to inquire into, *"whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies."*

1.3 The term "National Executive" in the Commission's terms of reference is a reference to the President of the Republic and the Ministers of State as set out in Chapter 5 of the country's Constitution.

1.4 The banks in their submissions make reference to the NEC which is an abbreviation for National Executive Committee of the ANC and should not be confused with the reference to 'national executive' in the Commission's terms of reference.

1.5 ABSA declined to meet with the Inter-Ministerial Committee.

1.6 The meeting between the ANC, at the request of its National Executive Committee (NEC), and ABSA Bank was by agreement and took place in April 2016.

1.7 For the record none of the persons who met with ABSA Bank at the ANC Headquarters at Luthuli House were members of the national executive as contemplated in the terms of reference

1.8 Consequently, it was incorrect for Ms Masithela to bring the meeting between ABSA and the ANC 'within the ambit of 'the facts within ABSA's knowledge regarding clause 1.7 of the terms of reference of this Commission'. The meeting between the ANC and ABSA Bank has no relevance to the terms of reference of the Commission.

1.9 The ANC submits that the conflation of events by Ms Masithela was misleading, created confusion and stands to be corrected.

First National Bank

1.10 The recollection of the exchange of communication between Mr Johan Burger, a director of First and Bank Limited, and Mr Godongwana of the ANC is a true reflection of what transpired between them.

1.11 For the record, the ANC did not meet First National Bank because the proposed date of 22 April 2016 was not convenient for some members of the ANC delegation.

Standard Bank

1.12 The witness statement of Mr Ian Sinton of Standard Bank was made in relation to paragraph 1.7 of the Commission's terms of reference and sets out information extracted from an affidavit deposed to by Mr Sinton in December 2016.

1.13 In paragraph 7 of his statement, Mr Sinton makes reference to pressure from the African National Congress without providing any substantiation to support his conclusion.

1.14 Mr Sinton took his unsupported logic further and came to the erroneous conclusion that Standard Bank was called by the African National Congress to account for its decision presumably to close the bank accounts of "Gupta entities" and to reverse its decision. Since the ANC requested the meeting with Standard Bank at the behest of Oakbay Investments, Mr Sinton in paragraph 20 went further to describe the ANC, by association with the Gupta entities, as a party that was willing to reverse a lawful and good faith decision taken in compliance with legal and regulatory obligations.

1.15 In paragraph 21 he prepared a letter to be sent to the ANC to record the issues discussed at the meeting. He states that the letter was 'polite, restrained and respectful in its terms', thereby insinuating that the ANC possibly had an unethical and unlawful intent when it met Standard Bank. For case of reference, a copy of Mr Tshabalala's letter is annexed.

1.16 The ANC is of the view that Mr Sinton should explain the material difference in his appreciation of the meeting with the ANC. In April 2016 he maintained that he adopted a patronising approach in the letter which he prepared for Mr Sim Tshabalala, the Group Chief Executive of Standard Bank. However, in August 2018

when he testified before the Commission, he chose to portray the ANC as a political party that was prepared to use its influence for the benefit of a private commercial entity and act unlawfully (see paragraph 39).

1.17 Mr Sinton's evidence before the Commission suggests that Mr Tshabalala was dishonest when he described the meeting with the ANC as cordial and constructive.

1.18 Moreover, Mr Sinton's evidence before the Commission placed in doubt the veracity of the under-mentioned salient points recorded by Mr Tshabalala in his letter to the ANC more than two years ago:-

1.18.1 The purpose of the meeting was not to discuss Standard Bank's relationship with any particular customer but rather to enable the ANC to obtain a better understanding of the process and criteria applied by Standard Bank in entering into and terminating banking relationships with its customers, especially when politically-exposed persons are involved;

1.18.2 In response to a concern expressed about a perception that race or political affiliation plays a role in Standard Bank's decisions to retain or terminate a relationship, the Bank responded that there was no basis for that perception. Standard Bank is committed to transformation, inclusive growth and treating all customers fairly and subjects all existing and prospective customers to the same objective standards for 'Know Your Client' and enhanced due diligence purposes;

1.18.3 In response to a concern expressed about possible collusion, Standard Bank gave an assurance that it has not colluded with any other bank or banks in its decision to terminate a customer relationship; and

1.18.4 In response to a concern that stringent requirements of FICA are forcing the dishonest into cash transactions outside of the banking system, Standard Bank conceded that to be the case but opined that cash only transactions are restrictive for the parties to them and cannot occur across national borders where millions of new (honest) participants have benefitted from entering the financial system since 1994.

1.19 According to Mr Sinton, Mr Tshabalala's letter was annexed as Annexure 'SB12' in a court application in December 2016.

Nedbank

1.20 The statement by Mr Michael Brown, Chief Executive of the Nedbank Group, about his meeting with the ANC on 20 April 2016 fully accords with the ANC's appreciation of that meeting. What is significant and correctly so in the view of the ANC, Mr Brown has not couched his evidence nor made any mention of the terms of reference of this Commission.

2. Circumstances leading up to meetings with the banks

On 8 April 2016, Nazeem Howa, the Chief Executive Officer of Oakbay Investments (Pty) Limited ('Oakbay'), requested a meeting with Mr Gwede Mantashe, the then Secretary General of the ANC, to discuss potential job losses at Oakbay. In his written request to meet, Mr Hawa stated that a number of banks had ceased to work with the company to the extent that it had become virtually impossible to continue conducting business in South Africa.

With the bank accounts having been closed, he said that the company was unable to pay salaries of more than 4 500 employees and the potential jobs losses across the group was about 7 500.

Mr Howa was of the opinion that the act of closing the bank accounts was the consequence of an anti-competitive and politically motivated campaign that was designed to marginalise the company's businesses. He stated that Oakbay had received no justification whatsoever to explain why ABSA, FNB, Sasfin, Standard Bank and Nedbank had decided to close the business accounts of the company. A copy of Mr Howa's letter is attached as **Annexure 'A'.**

Concerned about the impact of such action on the employment situation and the serious nature of the allegations made by Oakbay against the major banks, the ANC National Officials acceded to the request and met the executives of Oakbay on two occasions.

In the first meeting the company presented its structure and highlighted the difficulties it experienced in accessing mining rights for which it had applied.

The second meeting was held after Oakbay requested a meeting with the Officials after the closure of their accounts by the big four banks. The closure of Oakbay's accounts was started by ABSA, which was the main transactional bank of Oakbay, and was followed by FNB, Standard Bank and Nedbank.

ABSA refused to meet the company. First National Bank and Standard Bank discussed their decision telephonically with the company. Nedbank did not meet the company. When approached, Investec declined to do business with the company.

After the second meeting, the Officials deliberated over the issue and directed the Secretary General to meet with the four major banks and some of the relevant Ministers. Mr Enoch Godongwana was mandated to arrange the meetings with the banks. Pursuant to the decision by Cabinet

to set up an Inter-Ministerial Task Team, it became unnecessary for the Secretary General to meet the Ministers.

The Officials also provided a framework of principles for the engagement with the banks, in the following terms:-

1. The ANC must be mindful that banks are not permitted to share information about their clients with a third party; As such, the engagement with the banks should be about principles and general facts;

2. How consistent is the principle of account closures applied;

3. How widespread is the practice of account closures in the banking sector;

4. Is the internal debate on corporate capture in the ANC having an impact on the banks' decision-making processes in relation to closure of accounts.

Within the framework the mandate to the Secretary General was extended to seek clarity on the perception emanating from certain quarters within the ANC that:-

1. Banks are using their ability to terminate banking relationships to exercise the power of 'white monopoly capital' against black businesses to a degree that should concern policy makers; and

2. The four large banks are colluding or acting in concert in withdrawing banking services from a common customer.

3. Meetings with the Banks

Banking institutions, Absa, Standard and Nedbank, accepted the ANC's invitation to meet. First National Bank declined the meeting request and instead elected to meet with the Inter-Ministerial Committee which was subsequently established by Cabinet.

The Secretary General, Deputy Secretary General and Mr Enoch Godongwana, the Head of the ANC's Economic Policy Committee, met with the banks. At the very first meeting, which was with Absa Bank, the ANC legal adviser, Krish Naidoo, joined the delegation.

In their response, the banks tabled the following issues:-

1. Banks must comply with 210 (two hundred and ten) pieces of legislation in their everyday functioning. This includes legislation that governs their obligations in relation to money laundering and corruption. In general, banks experience a measure of difficultly coping with compliance.

2. South African banks have helped South Africa to be rated in the top ten in the world when it comes to banking.

3. Banks monitor sources of income, sources of wealth and shareholding of companies. Any deposit exceeding R25 000,00 is automatically reported to the regulator. All exchange control transactions are reported. For any client who applies to open an account, the bank conducts a 'know your client' due diligence and risk assessment.

4. For Politically Exposed Persons (PEPS), an enhanced due diligence is conducted and this includes family members of PEPS.

5. Banks can only discuss details of their dealings with a client with law enforcement agencies and the regulator.

6. Banks have an obligation not to compromise the country to allow them

to be used as a conduit for the illegal movement of money.

7. The regulator can instruct any bank to block or conduct surveillance on any account and no bank can inform a client of such instruction as that can be regarded as prior notification.

8. The banks gave an explanation of the distinction between the main banker, transactional banker and a secondary banker.
9. The banks take into consideration the resignation of auditors and sponsors to the Johannesburg Stock Exchange as part of the risk profile analysis.

10. Termination without notice can happen if a bank suspects that the account is being used illegally or negligently or the client has dealings with a listed person.

11. On any transaction conducted in US dollars, the United States has jurisdiction.

12. Banks follow the activities and analyse media reports whenever allegations are made that Cabinet posts have been offered in exchange for favours or allegations that a minister facilitated the sale of a mine in improper circumstances.

4. National Working Committee (NWC) meeting of 23 May 2016

At a meeting of the ANC's National Working Committee on 23 May 2016, the Officials reported the essence of their discussions of both meetings that were held with Oakbay. The Secretary General also reported on the meetings with the banks.

5. Observations made by NWC at meeting of 23 May 2016

After considering the report, the NWC made the following observations:-

5.1 The coordinated action by the banks smacks of collusion and the government and the regulator should confront that as an issue within the rules.

5.2 The power of banks to close businesses without being required to explain their action poses a threat in that these powers could be abused for various reasons including possible resistance to transformation.

5.3 The potential loss of jobs must be raised sharply without the ANC being seen as the spokesperson of any particular company.

5.4 The government must ensure that there is broad understanding of the pieces of legislation at government level. It would serve a good purpose if leaders and public representatives of the ANC are made to understand the concept of PEPS and the moral stigma attached to PEPS i.e. that they are inherently corrupt until proven otherwise.

5.5 The ANC must always be sensitive to public perceptions and appreciate the need to reassure society that its interventions are genuine.

The report to the NWC noted that, with hindsight, the engagement with the banks would have been more effective if they were conducted quietly and done through the regulator. Any other approach carried the risk that the ANC would be seen to be talking from a biased position without acquainting itself with the facts. As the ANC raised the issue of possible job losses, the meeting noted, the ANC must equally emphasise the importance of businesses complying with the laws and regulations of the country.

6. National Executive Committee (NEC) meeting of 28 to 30 May 2016

The NEC meeting held between 28 and 30 May 2016 adopted the NWC Report and resolved that the decision of the ANC to meet the banks was driven by the following concerns:-

1. Loss of jobs
2. Perception that the banks were colluding; and
3. Perception that the banks were exercising the power of 'white monopoly capital' against black businesses.

7. ANC assessment

The ANC was satisfied that all three concerns listed above were in the public interest and that as a public interest organisation it had a duty to act.

The Officials had developed a framework of principles for the meetings with the banks and there was no reason for the Secretary General's delegation to apply this framework differently in respect of any particular bank. The letter from the Group Executive of Standard Bank underscores the point that the meetings were held within the letter and spirit of the mandate given to the Secretary General by the National Officials.

The ANC has however, taken on board the wisdom offered by its NWC that engagement with the banks would have been more effective if conducted quietly and done through the regulator.

8. NEC Meeting of 28 to 30 May 2016

The NEC at its meeting held between 28 and 30 May 2016 also dealt with the allegation that the Gupta family influenced decisions in the State and in the ANC.

The Secretary General reported that 8 (eight) comrades responded to the public call for any person with information pertaining to such allegations.

There were two groups of three each and two individuals who came forward. All of them made their submissions orally. Only one submitted a written statement. Their preference was to make their submissions to an independent body for their own protection. They sincerely believed that making submissions to the ANC could have the effect of exposing them instead of helping the organisation to deal with the problem.

Among the issues raised by the 8 comrades were:-

1. The publicly-known allegations about members of the Gupta family summoning people to their private residence to offer them cabinet positions in return for working with them (the Guptas) to secure business opportunities.
2. Three former Directors General spoke to the ANC about the authority the family had over Directors General when they issued instructions directly to these individuals. They firmly were of the view that failure to comply could be career limiting.

3. The other area of concern was that the playing field was not level in competing for business opportunities. As a consequence, the Black Economic Empowerment Programme was being undermined.

4. The State Owned Entities were also being corroded systematically. They cited Transnet, Eskom, Safcol, SAA and Alexkor.

The NEC noted the preference of the 8 comrades that submissions should be made to an independent body.

9. ANC resolution on fighting corruption in the state and broader society adopted in December 2017

At its 54th National Conference held in December 2017, the ANC resolved on fighting corruption in the following terms:-

Believing that:

i) Corruption is a social ill that cuts across all sectors of society;

ii) There is a societal outcry regarding the problem of corruption in the organs of the state and in society more broadly;

iii) The ANC government must rigorously roots out all forms of corruption including tender rigging fraud, bribery and nepotism in all state institutions.

Resolves that:-

iv) The ANC needs to lead the moral regeneration of society, and the programme must be adequately funded and accounted for. The religious community and traditional leaders should be mobilised into a 'whole of society' approach;

v) The ANC must mobilise communities and society around issues of corruption, and position itself in a leadership role with respect to a culture of exposing corruption and rewarding whistleblowers within the organisation;

vi) The ANC government and leadership must implement a programme to prevent irregular or fraudulent practices within the ANC and in government including ethics; monitoring; transparency in procurement decisions; checks and balances and oversight mechanisms; the disbarring of both public servants and public representatives at all levels from doing business with the state; and the introduction of probity and life style audits.

vii) The public service and administration portfolio should fast track the establish of an Integrity and Ethics Management Office and build requisite capacity at all levels of government. The scope must extend to the SOEs.

viii) Reporting corruption to law enforcement agencies must be compulsory in the public sector. The capacity of prosecutorial divisions must be boosted.

ix) Government must introduce new regulations to implement the above provisions for dealing with corruption in the public sector; and

x) Parliamentary oversight mechanisms must pay special attention to corruption.

The resolution was adopted unanimously by the National Conference. In response, a month later on 23 January 2018, President Zuma in Cabinet appointed a Commission of Inquiry to investigate allegations of state capture, corruption and fraud in the Public Sector including organs of state and appointed Honourable Mr Justice Raymond Zondo, Deputy Chief Justice of the Republic of South Africa, as its Chairperson.

Dated at Johannesburg this 11th day of November 2018

MR GWEDE MANTASHE
NATIONAL CHAIRPERSON
AFRICAN NATIONAL CONGRESS

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ANNEXURE "SB 12"

Standard Bank

Office of the Chief Executive

Mr Gwede Mantashe
Secretary General
African National Congress

Per e-mail: mmavata@anc.org.za

22 April 2016

Dear Mr Mantashe

Re: Standard Bank and ANC meeting : 21 April 2016

On behalf of Standard Bank I thank you and your colleagues for our cordial and constructive meeting at Luthuli House on 21 April 2016 and hope you will find this note summarizing what we conveyed to you to be useful.

I confirm that you made it clear that the meeting was requested by the ANC not for the purpose of discussing Standard Bank's relationship with any particular customer(s) but rather to enable the ANC to obtain from Standard Bank -

(a) a better understanding of the process and criteria applied by Standard Bank in entering into and terminating banking relationships with its customers, especially when politically exposed persons ("PEPs") are involved;

(b) Standard Bank's response to the perception in some quarters that the banks are using their ability to terminate banking relationships to exercise the power of "white monopoly capital" against black businesses to a degree that should concern policy makers;

(c) its response to the perception that the four large banks are colluding / acting in concert in withdrawing banking services from a common customer.

In summary, Standard Bank responded with the following answers/submissions:

(a) The relationship between a bank and its customer is typically established by an indefinite contract and, as is typically the case in all indefinite contracts, can be unilaterally terminated by either party on notice. As was confirmed in the Bredenkamp v Standard Bank Appeal Court judgement, a bank is not obliged to give any reasons should it be the terminating party. More important than the contract terms is the implicit requirement of reciprocal trust between banker and customer, one manifestation being the legal obligation on banks to keep secret the private information of their customers that comes into the banks' possession through the banking relationship. When that trust is lost the relationship needs to be terminated.

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Standard Bank

(b) Banking is governed by at least 210 different statutes and is highly regulated. This is not a complaint but rather an affirmation that Standard Bank is aware of its legal responsibilities and regards the existence and application of such laws as a major contributor to South Africa's financial sector being ranked within the top 10 globally for safety and soundness.

(c) The statutes most relevant to the commencement and termination of banking relationships are the Financial Intelligence Centre Act ("FICA") and the Prevention and Combatting of Corrupt Activities Act ("PCCAA").

(d) FICA obliges all financial institutions to (i) undertake KYC (Know Your Client) procedures before establishing any new relationship with a customer, (ii) undertake enhanced due diligence if the KYC indicates that any PEPs (Politically Exposed Persons) have influence over the customer, (iii) monitor every customer's transactions to understand the source and application of all funds and (iv) report any suspicious transactions by customers to the Financial Intelligence Centre ("FIC").

(e) Failure to report a suspicious transaction to the FIC is a criminal offence subject to a R10 million fine or 15 years' imprisonment.

(f) Disclosure to any person that a suspicious transaction report has been made to the FIC is a criminal offence subject to a R10 million fine or 15 years' imprisonment.

(g) As regards the PCCAA, for ease of reference I will deliver a copy of the Act with this letter. You will see that it contains multiple categories of corruption and in Section 20 creates the offence of dealing in property or using property known or suspected to be part of any "gratification" which is the subject of a corruption offence.

(h) The best and most logical way for a bank to avoid criminal prosecution under FICA for failing to report any suspicious transaction and/or criminal prosecution under PCCAA for dealing in property that the bank ought to suspect is tainted by a corrupt activity is to simply not have any dealings with persons who foreseeably could be or become involved in suspicious transactions generally and corrupt activities in particular.

(i) Standard Bank expends in excess of R500 million per annum and employs in excess of 400 compliance officers in order to ensure that it has the systems and controls necessary to comply with the law generally and its obligations under FICA to detect and report transactions suspected to be related to criminality including money-laundering, terrorism financing, economic sanctions and corruption.

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Standard Bank

(j) To illustrate the gravity of the risks that it faces Standard Bank disclosed that it had in recent times been cautioned by the USA government against its funding of a customer with a subsidiary in Iran because that subsidiary was associated with Iran's nuclear program and this could result in Standard Bank itself being subjected to economic sanctions.

(k) Standard Bank also referred to the fact that its group had been investigated by the USA's Department of Justice (for possible bribery of a foreign public official in contravention of the USA's Foreign Corrupt Practices Act) and by the UK's Serious Fraud Office (for possible contravention of the UK's Bribery Act in failing to prevent bribery of a foreign public official) arising from Standard Bank's Tanzania subsidiary having engaged a local company partly owned by PEPs to assist in securing government business. After a 3 year struggle Standard Bank settled those investigations by paying fines and penalties of US$38 million to the governments of Tanzania, USA and UK whilst acknowledging that the settlement could be set aside and prosecutions could follow should evidence emerge of any other possible involvement in corrupt activities within the Standard Bank group.

(l) Standard Bank pointed out that the definitions of corruption contained in the PCCAA are no different to those used in the USA and UK and therefore Standard Bank has, in essence, been put on probation by the USA and UK governments and is compelled to be extra vigilant in its dealings with existing and potential customers who might expose Standard Bank to the risk of being associated with corrupt activities. In this regard Standard Bank opined that, hypothetically, an offer to a public officer to secure his / her promotion in exchange for favours would be an act of corruption as defined in the PCCAA.

(m) South Africa has a relatively small but open economy that is reliant for its very survival upon international capital and currency flows. If the governments of the UK or USA were to conclude that economic sanctions would be a more effective deterrent than criminal prosecution for perceived repeat offending on Standard Bank's part that could be catastrophic for Standard Bank and South Africa. Standard Bank for its own sake and that of our country simply cannot risk any exposure, direct or indirect, to possibly corrupt activities.

(n) In response to a concern expressed on behalf of the ANC about a perception that race or political affiliation plays a role in Standard Bank's decisions to retain or terminate a relationship, Standard Bank responded that there is no basis for that perception. Standard Bank is committed to transformation, inclusive growth and treating all customers fairly and subjects all existing and prospective customers to the same objective standards for KYC and enhanced due diligence purposes. Standard Bank does not lightly decide to terminate a relationship as evidenced by the fact that so far in 2016 it has terminated just 52 out of its ~11 million customer relationships; the decision was in each case taken by a competent committee applying objective criteria.

(o) Standard Bank does not decline a customer relationship simply on the grounds that a PEP is involved; for an adverse decision by Standard Bank it must be satisfied that the PEP is in a position to facilitate suspicious transactions and there is a possibility that he/she could do so.

Standard Bank

(p) In response to a concern expressed on behalf of the ANC, Standard Bank gave an assurance that it has not colluded or acted in concert with any other bank or banks in its decision to terminate a customer relationship; such would be both unethical and unlawful (in terms of the Competition Act).

(q) In response to a concern expressed on behalf of the ANC that the stringent requirements of FICA are forcing the dishonest into cash transactions outside of the banking system, Standard Bank conceded that to be the case but opined that cash only transactions are restrictive for the parties to them and cannot occur across national borders whereas millions of new (honest) participants have benefited from entering the financial system since 1994.

In closing may I re-iterate that we are willing to share the above with a wider audience if you so request. I also should re-iterate that we readily agreed to meet with you because we believe in open and honest engagements with all participants in our economy and especially with those that have influence over the policies, laws and practices that affect us.

If I have not summarized the meeting correctly please let me know.

Yours sincerely

Sim Tshabalala
Group Chief Executive

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ANNEXURE "A"

OAKBAY INVESTMENTS (PTY) LTD

8th April 2016

Mr Gwede Mantashe
Secretary General
African National Congress
Luthuli House
Johannesburg

Dear SG,

RE: 7,500 POTENTIAL JOB LOSSES AT OAKBAY INVESTMENTS & OUR PORTFOLIO COMPANIES

I wanted to request some time from you for Mr Moegsien Williams and myself to address the national officials on Monday to share with you our huge concerns that Oakbay Investments and our portfolio companies may soon be incurring significant job losses.

Following the unexplained decision of a number of banks, and of our auditors, to cease working with us, and of continued press coverage of unsubstantiated allegations against the Gupta family, it has become virtually impossible to continue to do business in South Africa.

We believe that this is the result of an anti-competitive and politically motivated campaign designed to marginalise our businesses. We have received no justification whatsoever to explain why ABSA, FNB, Sasfin, Standard Bank and now Nedbank have decided to close our business accounts. KPMG themselves said that there was no audit reason to end their work with us.

Oakbay has a 23 year track record of strong business performance and turnaround skills in a number of sectors. Our ability to be a disruptor in new sectors, challenging the dominant businesses and global players in South Africa, is the source of our success.

Between 2012 and 2015, 47,000 jobs have been lost in South Africa's mining sector. In fact, since 2015, the top three mining companies in South Africa have made more than 10,000 people redundant. In contrast, we have created 3,500 jobs in mining. Our acquisition of Optimum from Glencore also prevented a liquidation that would have seen more than 3,000 South African mining jobs lost.

All of these jobs are now at risk.

With our bank accounts closed, we are currently unable to pay many of the salaries of our more than 4,500 employees. We find it totally unacceptable that the tens of thousands of their dependents would have to suffer as a result of the campaign against Oakbay and the Gupta family.

Therefore the Gupta family have come to the conclusion that it is time to relinquish control of Oakbay Investments and have stepped down from all executive and non-executive positions and any involvement in the day-to-day running of the business.

By doing so, they hope to end the political campaign against Oakbay.

As the CEO I now hope to draw a line under the corporate bullying and anti-competitive practices we have faced from the banks. The livelihoods of too many people are at risk should our bank accounts remain closed.

I hope that you appreciate my candour and can see that we are doing everything we can to save thousands of South African jobs. We would like some times with the leadership of the ruling party to seek advice and assistance to avoid this eventuality.

If you have any questions, please do not hesitate to contact me.

Yours sincerely

Nazeem Howa
CEO, Oakbay Investments

Item “5”

PP3-MM-136

AFFIDAVIT

I, undersigned,

YASMIN DUARTE

do hereby make oath and say:-

1. I am an adult female of full legal capacity. The facts contained herein are within my personal knowledge and belief, both true and correct. I am also known as Jessie Duarte.

2. I am the Deputy Secretary General of the African National Congress (ANC), a voluntary political organisation, having been elected to that position for a period of 5 (five) years at the 54th National Conference of the ANC in December 2017.

3. In my capacity as Deputy Secretary General of the ANC, I am designated as one of the Officials in terms of the ANC Constitution.

4. Together with the President, Deputy President, National Chairperson, Secretary General and Treasurer General, we are collectively known as the National Officials and colloquially referred to as the "Top 6".

5. I received a Rule 3.3 Notice on 29 June 2020 informing me that the Commission's Legal Team intends to present the evidence of Mr Mzuvukile Maqetuka, known to me as comrade Jeff Maqetuka, and that such evidence implicates or may implicate me in, *inter alia*, participating in various acts of corruption, bribery, fraud, money laundering and//or tax evasion.

6. The ANC was instrumental in establishing the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State, having resolved to establish this institution at its National Conference in December 2017 as I have set out below.

7. The position of the ANC, which is also my personal position, is that the work of the Commission demands full support and co-operation of all South Africans to enable it to achieve its objectives.

8. In relation to the evidence of comrade Maqetuka, for which I have been called to account as an implicated person, my legal representative, Krish Naidoo, informed the Commission that I do not wish to give evidence myself, call any witness to give evidence on my behalf or cross-examine comrade Maqetuka.

9. I am indebted to the Commission for acceding to my request to present evidence on the memorandum addressed to the Top Six of the African National Congress and presented by comrade Maqetuka and others. In addition to submitting this affidavit, I am also willing to appear before the Commission at any stage, if so directed by the Chairperson, to give evidence on any matter related to comrade Jeff's testimony which is being investigated by the Commission if such evidence is deemed relevant to the work of the Commission.

10. On 31 March 2016, a meeting took place at Luthuli House between three of the Officials viz. Mr Gwede Mantashe, Dr Zweli Mkhize and I and a delegation of Senior Commanders and Commissars of the former Mkhonto we Sizwe, the military wing of the ANC, comprised of comrades

Maqetuka, Mo Shaik, Siphiwe Nyanda and Jabu Moleketi. Comrade Jackson Mthembu, a member of the ANC's National Executive Committee (NEC), also attended the meeting.

11. Comrade Nyanda who led the delegation and spoke first and informed us that they were concerned about a number of issues including;-

11.1 The influence of the Gupta family in State affairs;
11.2 Degeneration of the cadreship of the ANC;
11.3 Weaknesses in the ANC which they attributed to the quality of cadre and leadership of the organisation; and
11.4 Generally, what was happening to the ANC.

12. Comrade Nyanda made reference to two comrades who were marginalised and removed from office because they wanted to investigate the influence of the Gupta family in State affairs. He did not name them.

13. Comrade Nyanda said that he was aware that the NEC had made a call on comrades who had evidence of the influence of the Gupta family to present such evidence to the ANC for investigation. He said he had also heard that some people were intending to present evidence about wrongdoing by comrades within the structures of the ANC and that they have information about wrongdoing within the State-Owned Enterprises. Again, he did not provide further details.

14. Comrade Nyanda went on to state that he had already cautioned the Secretary General, comrade Mantashe, about wrongdoing at Denel, a State-Owned company, and that in the past two weeks prior to the

meeting the Chief Executive Officer, Chief Financial Officer and the Company Secretary were got rid of, leaving only person untouched because he had an interest in a Gupta-linked company. Within a month a new board was appointed at Denel. As a consequence, ANC comrades were left out in the cold. He said one of the first decisions of the new Board was to form a subsidiary called Denel Asia.

15. Finally he said that after comrade Mcebisi Jonas was attacked publicly by comrade Kebby Maphatsoe, chairperson of the MK Military Veterans Association, for speaking out against the Gupta family's attempt to buy his favour, he took a conscious decision not to remain silent any longer.

16. At that stage 25 (twenty-five) comrades had signed the memorandum he was presenting to the ANC leadership.

17. Comrade Jabu Moleketi, who spoke next, said he had received a number of phone calls and SMS from MK comrades who expressed an intention to sign the memorandum.

18. Comrade Jabu said that many people held the view that ANC policies were being subordinated due to the influence of a few comrades and that many people working in State institutions were beholden to the Gupta family.

19. He said that many members of the NEC privately expressed the view that the environment was such that they were afraid to speak out about what was happening in the ANC. According to him, the NEC members to whom he had spoken expressed the view that they were losing the ANC (presumably to forces outside the ANC).

20. Comrade Jeff Maqetuka aligned himself with the issues raised by the previous two speakers. Regarding the Gupta family, he said he raised his concerns with Minister Cwele and President Zuma.

21. Comrade Jeff said that an intelligence report which was produced by the domestic intelligence service and which was released in 2011 led to him, Gibson Njenje and Mo Shaik leaving the State intelligence service.

22. He was concerned about the influence of the Gupta family in the affairs of State. He said he had some ideas but did not share them at the meeting.

23. He wanted the ANC to deal with comrade Kebby Maphatsoe, the Chairperson of the MK Military Veterans Association, because of his activities which smacked of regime change.

24. Comrade Mo complained about being told by Ajay Gupta that he and Siphiwe Nyanda would be removed from the positions they were occupying in government.

25. He said he had met Salim Essa, who he referred to as a Gupta family enforcer, and upon inquiring why Mohamed Bhabha was removed from the Alexcor Board, he was told that Mohamed belonged to a wrong faction in the ANC.

26. He also questioned the appointment of Mark Pamensky to the Eskom Board and was not satisfied with the explanation by President Zuma that he removed Nhlanhla Nene as Minister of Finance to take up a position in the New Development Bank.

27. At the end of the meeting, these comrades made two specific recommendations:-

27.1 that an independent commission of inquiry be established composed of eminent persons within the ANC and civil society to investigate all claims of undue influence, especially by the Gupta family on the ANC and on the State.

27.2 that the ANC urgently convene a Special National Conference to assess the challenges they had spoken about and chart a way forward to restore the prestige of our glorious movement and the State.

28. The memorandum was not circulated. During the discussion, the issue about the Gupta family was not raised as sharply as is set out in Annexure "MM3". As I have detailed above, the Gupta family was discussed at the meeting but so were a number of other issues.

29. In addition to the ANC establishing its own internal inquiry to receive information about the influence of the Gupta family in the ANC and the State, the Officials also met a number of key stakeholders during April and May 2016.

30. On 19 April 2016, the full-time Officials (comrades Gwede Mantashe, Dr Zweli Mkhize and I) met with the Board of Directors of Business Leadership South Africa and the delegation included Bobby Godsell, Maria Ramos, Mark Lamberti, Jaco Maree and Sim Tshabalala. They raised a number of challenges facing the economy including the Public Protector Report on Nkandla, the erosion of State institutions and the fact that shares in the Johannesburg Stock Exchange were substantially

under foreign control. They also complained about the attacks by politicians on the South African Reserve Bank. They said they were willing to play their part to strengthen the economy and impressed on the Officials the need to restore political stability and improve leadership in key State-Owned Enterprises such as Eskom.

31. On the issue of whether President Zuma should be forced to step down, the majority view among these business leaders was that South Africa was a constitutional democracy and that despite the depressing political environment, the rule of law should be upheld.

32. On the same day i.e. 19 April 2016, the full-time Officials met with ANC veterans Zola Skweyiya, Pallo Jordan, Cheryl Carolus, Gill Marcus, Murphy Morobe and Barbara Masekela. They raised the Public Protector's report on Nkandla and a number of organisational challenges in the ANC which was dividing the organisation. They strongly expressed the view that the Top 6 should call on President Zuma to step down.

33. The full-time Officials also met a delegation from the South African Council of Churches on 6 May 2016, led by Bishop Malusi Mpumlwana. They lamented the political divisions and lack of leadership in the ANC. They also expressed the view that a key solution to get the country out of the political morass was to impress upon President Zuma to resign from office.

34. On 26 May 2016, the full-time Officials met a group of senior comrades including Anwar Dramat, Yolisa Pigi, Robert McBride, Ivan Pillay and Adrian Lackey, all of whom held senior positions in government agencies such as the South African Revenue Service and the Independent Police

Investigation Directorate.

35. They provided details of efforts to isolate them and drive them out of their positions in the State by forces whom they believed were enforcing the will of the Gupta family. They were facing disciplinary action and sought financial support from the ANC. They complained that they were unable to find employment and were unable to fund their defence.

36. I raise these matters primarily to show that the ANC was reaching out to key stakeholders, mainly from outside the political realm, to assist it with finding an appropriate course of action apropos the political situation and the and that the challenge was not as clear cut and simple as is set out in Paragraph 78 of comrade Jeff Maqetuka's submission viz. that had the ANC Officials acted on their memorandum in March 2016, a commission of the nature now established to investigate State Capture could have been instituted as early as 2016 and the further collapse of State-Owned Enterprises could have been avoided.

37. As I have stated in paragraph 28 above, the memorandum was not circulated. I am seeing Annexure "MM3" for the first time.

38. The NEC at its meeting between 28 and 30 May 2016 dealt with the allegation that the Gupta family sought to influence decisions in the State and in the ANC.

37. At the meeting comrade Gwede Mantashe, the Secretary General reported at this meeting that 8 (eight) comrades responded to the public call by the organisation for any person with information

pertaining to such allegations. He said that there were two groups of three each and two individuals who came forward. Save for one comrade who submitted a written statement, the rest made oral submissions. Their preference was to make their submissions to an independent body for their own protection. According to comrade Mantashe's report, these comrades sincerely believed that making submissions to the ANC could have the effect of exposing them instead of helping the organisation to deal with the problem.

38. He said that among the issues raised by the eight were:-

38.1 The publicly-known allegations about members of the Gupta family summoning people to their private residence to offer them cabinet positions in return for working with them (the Guptas) to secure business opportunities;

38.2 Three former Directors General spoke to the ANC about the authority the family had over Directors General in government when they issued directly to these individuals;

38.3 The other area of concern was the that the playing field was not even when competing for business opportunities. As a consequence, the Black Economic Empowerment Programme was being undermined; and

38.4 The State-Owned Entities were also being corroded systematically. They cited Transnet, Eskom, Safcol, SAA and Alexcor.

39. The NEC noted the preference of the eight comrades viz. that

submissions should be made to an independent body.

40. At its 54th National Conference held in December 2017, the ANC resolved on fighting corruption in the following terms:-

Believing that:

i) Corruption is a social ill that cuts across all sectors of society;

ii) There is a societal outcry regarding the problem of corruption in the organs of the state and in society more broadly;

iii) The ANC government must rigorously root out all forms of corruption including tender rigging fraud, bribery and nepotism in all state institutions.

Resolves that:-

iv) The ANC needs to lead the moral regeneration of society, and the programme must be adequately funded and accounted for. The religious community and traditional leaders should be mobilised into a 'whole of society' approach;

v) The ANC must mobilise communities and society around issues of corruption, and position itself in a leadership role with respect to a culture of exposing corruption and rewarding whistleblowers within the organisation;

vi) The ANC government and leadership must implement a programme to prevent irregular or fraudulent practices within the ANC and in government including ethics; monitoring; transparency in procurement decisions; checks and balances and oversight mechanisms; the disbarring of both public servants and public representatives at all levels from doing business with the state; and the introduction of probity and lifestyle audits.

vii) The public service and administration portfolio should fast track the establish of an Integrity and Ethics Management Office and build

requisite capacity at all levels of government. The scope must extend to the SOEs.

viii) Reporting corruption to law enforcement agencies must be compulsory in the public sector. The capacity of prosecutorial divisions must be boosted.

ix) Government must introduce new regulations to implement the above provisions for dealing with corruption in the public sector; and

x) Parliamentary oversight mechanisms must pay special attention to corruption.

41. The resolution was adopted unanimously by the National Conference and a month later on 23 January 2018, President Jacob Zuma, appointed a Commission of Inquiry to investigate allegations of state capture, corruption and fraud in the Public Sector including organs of state and appointed Honourable Mr Justice Raymond Mnyamezeli Mlungisi Zondo, Deputy Chief Justice of the Republic of South Africa, as its Chairperson.

DEPONENT

THUS DONE AND SWORN TO before me at Johannesburg on this 7th day of July 2020, the Deponent having acknowledged that she knows and understands the contents of this affidavit; has no objection to taking the prescribed oath and considers the said oath to be binding on her conscience, the regulations contained in Government Notice No. 1648 dated 19 August 1977 (as amended) having been complied with.

COMMISSIONER OF OATHS

AJAY CHAGAN
Practising Attorney of R.S.A
Commissioner of Oaths Ex-Officio
12TH Floor, Metal Box Building
25 Owl Street
Auckland Park

AFFIDAVIT

I, the undersigned,

JACKSON MPHIKWA MTHEMBU

do hereby make oath and say that:-

1. I am an adult male and the facts contained herein are within my personal knowledge and belief, both true and correct.

2. I am currently the Minister in the Presidency responsible for monitoring and evaluation.

3. In the African National Congress (ANC) I am a member of the National Executive Committee (NEC) and a member of the NEC sub-committee on Communications which I previously chaired.

4. I received a Rule 3.3 Notice on 29 June 2020 informing me that the Commission's Legal Team intends to present the evidence of Mr Mzuvukile Maqetuka, known to me as comrade Jeff Maqetuka, which implicates or may implicate me in, *inter alia,* participating in various acts of corruption, bribery, fraud, money laundering and/or tax evasion.

5. In relation to the evidence of comrade Maqetuka, for which I have been called to account as an implicated person, my legal representative, Krish Naidoo, informed the Commission that I do not wish to give evidence myself, call any witness to give evidence on my behalf or cross-examine comrade Maqetuka.

6. I am indebted to the Commission for acceding to my request to present evidence on the memorandum addressed to the Top Six of the African National Congress and presented by comrade Maqetuka and others.

7. In addition to submitting this affidavit, I am also willing to appear before the Commission at any stage, if so directed by the Chairperson, to give evidence on any matter related to comrade Maqetuka's testimony which is being investigated by the Commission, if such evidence is deemed relevant to the work of the Commission.

8. At the invitation of the then Secretary General comrade Gwede Mantashe, I attended a meeting at Luthuli House, the ANC Headquarters, in Johannesburg on 31 March 2016 between some of the Officials of the ANC and senior commanders and commissars of the ANC's military wing, Mkhonto we Sizwe.

9. I have known the MK commanders and commissars in the meeting – comrades Siphiwe Nyanda, Mo Shaik, Jabu Moleketi and Jeff Maqetuka – for a long time and hold them in high esteem.

10. I have read the affidavit of comrade Jessie Duarte, the Deputy Secretary General of the ANC, and confirm that her account of the meeting is an accurate recordal of what transpired.

11. To the best of my knowledge the meeting lasted for about 90 minutes.

12. The perception that the Gupta family was exercising undue influence in the functioning of government was a matter of concern for many comrades in the ANC, including myself.

13. On a number of occasions I and other members raised our concern in the NEC about the undue influence of the Guptas family and the fact that some in the ANC and in government were aiding and abetting the Guptas.

14. I recall that the NEC decision in the first quarter of 2016 to establish an internal inquiry and to call on comrades to relate their experiences of undue influence by the Gupta family was approved unanimously.

15. I was present at the NEC meeting held between 28 and 30 May 2016 which dealt with the allegation that the Gupta family influenced decisions in the State and in the ANC. For me, it was a step in the right direction to deal with this pervasive view that the ANC was pandering to the whims and wishes of a single family whose only objective, in my view, was to seek unfair economic advantage to enrich themselves.

16. At the 54th National Conference held in December 2017, I participated in the debate in the Plenary which dealt with the scourge of corruption and the moral regeneration of our society.

17. The establishment of the Judicial Commission of Inquiry in January 2018 to investigate allegations of state capture, corruption and fraud in the public sector was, for me, a crowning moment which put our country firmly on the road to root out corruption and was a culmination of the effort and courage of my organisation, the ANC.

DEPONENT

THUS DONE AND SWORN TO before me at PRETORIA on this 08 day of July 2020, the Deponent having acknowledged that he knows and understands the contents of this affidavit; has no objection to taking the prescribed oath and considers the said oath to be binding on his conscience, the regulations contained in Government Notice No. 1648 dated 19 August 1977 (as amended) having been complied with.

7219010-8
Mphakela Gus
Commissioner

COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
BRYNTIRION
STATIC GUARD SERVICES
2020 -07- 08
PROTECTION AND SECURITY SERVICES
PRETORIA
SOUTH AFRICAN POLICE SERVICE

AFFIDAVIT

I, the undersigned,

LAWRENCE ZWELINI MKHIZE

do hereby make oath and say that:-

1. I am an adult male and the facts contained herein are within my personal knowledge and belief, both true and correct.

2. I am currently the Minister of Health of the Republic of South Africa.

3. In the African National Congress (ANC) I am a member of the National Executive Committee (NEC) and I chair the NEC sub-committee on constitutional and legal affairs.

4. At the 53rd National Conference of the ANC in December 2014 I was elected as the Treasurer General of the organisation and designated as one of the Officials in terms of the ANC Constitution.

5. Together with the President, Deputy President, National Chairperson, Secretary General and Deputy Secretary General, we were collectively known as the National Officials and colloquially referred to as the "Top 6".

6. I received a Rule 3.3 Notice on 29 June 2020 informing me that the Commission's Legal Team intends to present the evidence of Mr Mzuvukile Maqetuka, known to me as comrade Jeff Maqetuka, which implicates or may implicate me in, *inter alia,* participating in various acts of corruption, bribery, fraud, money laundering and/or tax evasion.

7. In relation to the evidence of comrade Maqetuka, for which I have been called to account as an implicated person, my legal representative, Krish Naidoo, informed the Commission that I do not wish to give evidence myself, call any witness to give evidence on my behalf or cross-examine comrade Maqetuka.

8. I am indebted to the Commission for acceding to my request to present evidence on the memorandum addressed to the Top Six of the African National Congress and presented by comrade Maqetuka and others.

9. In addition to submitting this affidavit, I am also willing to appear before the Commission at any stage, if so directed by the Chairperson, to give evidence on any matter related to comrade Maqetuka's testimony and which is being investigated by the Commission if my further evidence is deemed relevant to the work of the Commission.

10. On 31 March 2016 I attended a meeting at Luthuli House, the ANC

Headquarters, in Johannesburg between some of the Officials of the ANC and senior commanders and commissars of the ANC's military wing, Mkhonto we Sizwe. I was a member of the Top 6 at the time.

11. I have read the affidavit of comrade Jessie Duarte, the Deputy Secretary General of the ANC, and confirm that her account of the meeting is an accurate recordal of what transpired.

12. I further confirm that I was present at the NEC meeting held between 28 and 30 May 2016 when the then Secretary General, comrade Gwede Mantashe gave a report regarding the ANC's public call for any person with information pertaining to the allegation that the Gupta family influenced decisions in the State and in the ANC to come forward. This was then followed by a resolution at the 54th National Conference held in December 2017, for the establishment of an independent body to investigate corruption.

DEPONENT

THUS DONE AND SWORN TO before me at BRYANSTON on this 8th day of July 2020, the Deponent having acknowledged that he knows and understands the contents of this affidavit; has no objection to taking the prescribed oath and considers the said oath to be binding on his conscience, the regulations contained in Government Notice No. 1648 dated 19 August 1977 (as amended) having been complied with.

COMMISSIONER OF OATHS

8/07/2020
THIROSHA GOVENDER
COMMISSIONER OF OATHS
EX-OFFICIO NON-PRACTISING ATTORNEY
2526 MOTLATSE DRIVE, WATERFALL ESTATE, MIDRAND

Item “6”

STATEMENT OF MS BARBARA HOGAN TO THE HONOURABLE DEPUTY CHIEF JUSTICE, MR RAYMOND ZONDO: CHAIRPERSON OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE

CONTENTS

THE PURPOSE OF THIS STATEMENT

1 The purpose of this statement is to illustrate from my personal experience as Minister of Public Enterprises (from 11 May 2009 to 31 October 2010) the extent to which the former President of South Africa, President Jacob Zuma (President Zuma), improperly and recklessly interfered in matters relating to the appointment of Board Directors and Chief Executive Officers (CEOs) of State Owned Enterprises (SOEs). In doing so, I will make specific reference to SOEs such as Eskom and Transnet. The actions of President Zuma, set out below, damaged the performance of these entities and embedded an ethos of political cronyism, nepotism, lack of accountability and corruption in our body politic.

PERSONAL HISTORY

2 I was born and schooled in Benoni, and I obtained an Honours degree in Development Studies from the University of the Witwatersrand.

3 I joined the African National Congress ("ANC") as an underground political activist in 1977. In 1979, I enrolled for a Master's degree focusing on unemployment in South Africa.

4 In 1981, I was detained and sentenced to ten years imprisonment, having been found guilty of high treason relating to my political activities as a member of the ANC. During my incarceration, I enrolled for a Bachelor of Commerce degree and midway through my Honours degree, I was released, a week after the ANC was unbanned on 9 February 1990.

5 In April 1990, I was appointed by the Interim Leadership Core of the ANC, under the direction of Walter Sisulu, to the Interim Leadership Committee of Gauteng which was mandated to set up the structures of the ANC in Gauteng. Later that year, I was elected as the full-time General Secretary of the Gauteng ANC, a position I held until the end of 1992.

6 In 1994, I was elected as an ANC MP in the National Assembly and served mainly on the Portfolio Committee on Finance (which I chaired from 1999 to 2004) and on the

Standing Committee on Public Accounts. I also chaired the Standing Committee on Oversight of the Auditor-General's Office.

7 I participated in the Finance Theme Committee that formulated the financial clauses of the Constitution for the duration of the Constitutional Assembly, and I was later appointed to the Accounting Standards Board.

8 In September 2008, the President of South Africa, President Kgalema Motlanthe, appointed me to his Cabinet as the Minister of Health.

9 On 11 May 2009, following the national elections, President Zuma appointed me as the Minister of Public Enterprises and Mr Enoch Godongwana (**Mr Godongwana**) was appointed as the Deputy-Minister of Public Enterprises.

STRUCTURE OF OWNERSHIP AND CONTROL OF SOEs

10 A total of 9 (nine) SOEs and public entities fell within the jurisdiction of the Department of Public Enterprises (**DPE**), including Eskom, Transnet, SAA, SA Express, Denel, Infraco, PBMR, Alexkor, and SAFCOL. All of these are classified as Schedule 2 Major Public Entities in terms of the Public Finance Management Act No 1 of 1999.

11 When SOEs were corporatised in the 1990's, the structure of ownership and accountability was similar to any other company under the legal jurisdiction of the Company's Act, 71 of 2008 but with some differences. Simply put, the CEO and senior management run the SOE and are accountable to the Board of Directors who provide the shape and strategic direction of the SOE. These directors ensure compliance with the laws and obligations applicable to the SOE. Directors have onerous fiduciary responsibilities and must act at all times in the interests of the SOE.

12 Unlike in profit-oriented companies, the focus of major SOEs such as Eskom and Transnet is on performance, because in both these cases they provide the essential infrastructure (energy and freight transport) on which the entire economy and South Africans depend. Of course, they must produce a financial surplus sufficient enough to cover operating costs and to maintain a healthy level of reserves. They must also operate as efficiently and economically as possible so as not to impose punitive tariffs

on services they provide to the public, municipalities, corporates and to the whole economy.

13 These large SOEs raise the bulk of their capital from user tariffs, from the raising of loans for big capital projects and through the issuing of bonds. At that time, government provided virtually nothing in the form of equity and, when I was there, National Treasury would sometimes have to issue loan guarantees to maintain a SOE as a going concern. SAA is a case in point. These become contingent liabilities on the State. Financial risk and debt is a major issue in these SOEs and that is why ratings agencies and National Treasury carefully monitor them.

14 DPE is not a policy department. Other departments such as the Department of Transport and Department of Energy develop policies for their sector and once these are approved by Cabinet, and hopefully by Parliament, it is the responsibility of DPE to align the work of SOEs with these policies via the mechanism of a Shareholders' Compact that is reviewed regularly.

15 As the representative government shareholder, the Minister of Public Enterprises (the **Minister**) must appoint Directors to the Boards of SOEs as and when vacancies arise or terms of office of Directors expire. This is usually done at the Annual General Meeting (**AGM**) of the SOE. It is the job of the Minister to screen and carefully select professional, competent and experienced Board members to ensure that a Board has the right mix of skills and experience, and also to give due regard to the demographics of the country in accordance with government's commitment to transformation.

16 In most companies, the Board appoints the CEO and other senior management and that is the norm that applies to SOEs as well; however, a Memorandum of Incorporation or the founding legislation of a particular SOE may empower the Minister to appoint the CEO of that SOE, as was the case with Transnet.

17 However, a Minister would not unilaterally appoint a CEO above the heads of a Board, because a CEO is ultimately accountable to the Board, and not the Minister. Similarly, it is the Board that enters into an employment contract with the CEO, not the Minister. As such, there should always be consultation between the Board and the Minister when appointing the CEO of a SOE.

18 A general illustration of the appointment process of a CEO and / or Board member during my tenure as the Minister of the DPE was that, under the direction of the Director General of DPE ("DG"), the DPE would conduct professional searches, head hunt candidates, follow up on recommendations by industry experts or, in some cases, recommendations by the Board. Mr Godongwana and I would constantly engage on these issues and the DG would draw on the skills and expertise of specialist sectoral units within the DPE with respect to suitable candidates.

19 Once I had approved of the composition of a Board, I would send a Cabinet Decision Memorandum to the Economics Sub-Committee of Cabinet for approval, and then to Cabinet for final approval. A Minister may make a special appeal to the President to by-pass the sub-committee process and proceed straight to Cabinet for final approval of matters that are urgent.

20 Sub-Committees of Cabinet meet every second week and Cabinet meets in the week following the Sub-Committee meeting. The President chairs Cabinet meetings and approves the Agenda drawn up by the Cabinet Secretariat, so he has a decisive role on what goes on to the Agenda. As part of the Cabinet collective, ministers do, however, tend to involve Cabinet in the exercise of their powers to appoint the CEO, both as the Executive Authority in terms of the Public Finance Management Act and as the shareholder representative on behalf of the State.

21 The Department of Public Enterprises conducted an assessment of the extent of Cabinet's involvement in order to establish the trend and the nature of its involvement. To this end, a review was conducted of previous decisions of cabinet spanning from April 2002 to February 2009 relating to appointments of CEOs of a variety of SOEs. The results showed that Cabinet's involvement varied between approval (ten times), concurrence (six times), and noting (twice) of the relevant Minister's decision, indicating that every CEO appointment is dealt with on a case by case basis, having considered the size, importance and circumstances facing the SOE at the time of making the appointment.

22 In practice however, there were parallel behind-the-scenes processes. As the ruling party, the ANC had expectations that they would have influence over who was appointed to Boards via the Deployment Committee of the ANC. When the ANC came into power in 1994, the Deployment Committee played a useful role in identifying appropriate candidates from among the ranks of progressive forces to fill crucial

positions as the State, at that time, was staffed entirely by previous apartheid government appointees.

23 However, the usefulness of such a Deployment Committee these days is debatable. How can just a handful of people possibly have the institutional knowledge and resources to pronounce on suitable candidates for every senior position in government and the private sector? It cannot be that closeness to or membership of the ANC, or any of its Alliance structures (or to factions within these structures), should be the determining factors in the selection of candidates for senior positions. In this day and age, there are a host of capable black and white professionals (women and men) from which to choose, who clearly understand and have an appetite for making the economy grow. Directorships on Boards should never be granted to the favoured few, as a reward for loyalty to a party or a faction of a party, or as a retirement benefit for the well-connected.

24 When I took office, 18 months after the divisive Polokwane conference, those in power in the ANC, including the Tripartite Alliance, were intent on rolling back the so-called neo-liberalism of the Mbeki era and on installing an interventionist Developmental State.

25 Regrettably, these factional battles in the ANC only served to encourage and entrench nepotism and patronage from within the ranks of the ANC and the Tripartite Alliance, and this would have very damaging consequences for SOEs and, by extension, for our economy which I will illustrate below with regard to my experiences in the appointment of board members and CEOs of Transnet and Eskom, during my time as the Minister of DPE.

26 It is important to note that there were three damaging processes afoot in my time with regard to SOE related appointments: there were the very public political maneuverings of certain elements within the ANC and Tripartite Alliance to get their way; then there were the ways that President Zuma, and some Cabinet colleagues, thwarted my attempts to get Cabinet approval for Board appointments; and finally, the inexcusable interference with my responsibilities as a Minister by President Zuma that eroded my executive authority.

27 In the international literature on SOEs it is common cause that political interference is one of the greatest risks encountered by parastatals. If anything, the narrative that follows shows how great that risk is. The experiences I had during my time as Minister were just the beginning.

TRANSNET

28 A simple but important job of appointing a CEO to Transnet, after the resignation of Maria Ramos at the end of February 2009, became the site of an ugly protracted battle between President Zuma and I, in which he thwarted all the legal and legitimate procedures that I took to obtain Cabinet approval for any appointments whatsoever to Transnet, including the appointment of a CEO. As a consequence, Transnet had an Acting Chairperson, an Acting Group CEO (GCEO), an Acting CFO, and later on, an Acting CEO in one of their divisions, Transnet Freight Rail (TFR), for one and a half years.

29 When Maria Ramos resigned as the CEO of Transnet in February 2009, the Transnet Board, after a careful selection process, and extensive engagement with the then Minister of Public Enterprises, Bridget Mabandla (**Minister Mabandla**), recommended Pravin Gordhan (**Mr Gordhan**)as their only candidate for the CEO position. I attach hereto marked **Annexure "A1"**, a memorandum dated 13 February 2009 indicating the Board's decision to appoint Mr Gordhan as the CEO of Transnet and, as **Annexure "A2"**, a letter dated 9 March 2009 from the then Chairperson of the Transnet Board, Mr Fred Phaswana ("**Mr Phaswana**"), addressed to Minister Mabandla, wherein Mr Phaswana confirms that "*...the Nominations Committee fully supported by the Board, recommended the appointment of Mr Pravin Gordhan on the basis of the strengths he displayed against the competency profile and in comparison with the other candidates who were interviewed... Each of the other previously shortlisted candidates was not recommended for appointment for various reasons...*"

30 A week later, Mr Gordhan withdrew his candidature and several months later, he became the Minister of Finance after the General Elections of May 2009. A fiction arose at that time, which was untrue, that Siyabonga Gama ("**Mr Gama**"), then CEO of TFR, was second on the list of preferred candidates for the position of Transnet CEO. There was no such preferential list. The Transnet Board was adamant that Mr Gordhan stood head and shoulders above the rest, and that he was the only

candidate that they wanted to recommend for the position. But this fiction of a second in line candidate, Mr Gama, did not go away.

31 After Mr Gordhan's withdrawal, the Board had difficulties getting a firm direction from government. They wanted to commence with a new search but could not get an unequivocal endorsement to do this. At this point, the election period had begun. There are many correspondences in this regard, including the letter from Mr Phaswana to Minister Mabandla (**Annexure A2**) and a memorandum dated 19 March 2009 from the then DG. Minister Mabandla did however approve the appointment of the Chief Financial Officer ("CFO") of Transnet, Mr Chris Wells ("**Mr Wells**"), as the acting CEO of Transnet and Anoj Singh, a Transnet employee, as the acting CFO of Transnet.

32 The Transnet Board nevertheless embarked on a further search, as they felt that they could not abandon their fiduciary responsibilities. On the 18th of June 2009, the Transnet Chairperson Mr Phaswana, met with me and submitted a memorandum, dated 9 June 2009, which has been attached hereto marked **Annexure "B"** which, amongst other things, recommended the appointment of a candidate for the position of CEO. This was a highly capable and experienced black candidate who had the requisite experience and admirable managerial capabilities. Again, it is important to note that the Board had nominated only one candidate for appointment. However, the fiction persisted that Mr Gama was next in line. They did not recommend an internal candidate, although, as noted by the Board, *"the preference was to appoint a suitably qualified internal candidate, after consideration of the current global 'meltdown' and the global recession, its current and future potential impact on Transnet, and a thorough consideration of these individuals, the Corporate Governance and Nominations Committee, fully supported by the board, **recommends the appointment of Mr X** ["Mr X" our insertion] on the basis of the strengths he displayed against the competency profile and in comparison with the other candidates who were interviewed."*

33 Approximately a month after my appointment as the Minister of DPE, I met with President Zuma and gave him a full background about the developments in Transnet. I informed him that the Transnet AGM was coming up very soon and that a GCEO and a Chairperson of Transnet would have to be appointed as a matter of urgency. I briefed him about the Board's candidate of choice (whom I too endorsed) and the inquiry potentially implicating Mr Gama.

34 I was shocked and disappointed when President Zuma informed me that he was adamant that Mr Gama was his only choice for GCEO. I informed him that that was not possible and that Mr Gama was not the Board's choice and I could not override the Board as they had undergone a very professional selection process. I further informed President Zuma that Mr Gama was the subject of an inquiry into procurement irregularities and it would be very messy to appoint a GCEO who could potentially be facing fairly serious charges. President Zuma said that, if that was my view, no appointment whatsoever was to be made at Transnet until Mr Gama's disciplinary process was over. We agreed that I would provide him with more detailed information for him to further apply his mind to.

35 The problem was that President Zuma, two of my Cabinet colleagues and elements within the ANC and the Tripartite Alliance, including the Secretary-General, Gwede Mantashe, were very vocal that the candidate of their choice, Mr Gama, would become the next GCEO of Transnet, despite the fact that the black dominated Board of Transnet, after a rigorous and professional selection process, were clearly of the view that Mr Gama was not an appropriate candidate. In fact, the Board had nominated a highly recommended person who had scored well in all the professional assessments and had the requisite experience.

36 There were further complications that were very worrying. After several whistle-blower tip-offs, an investigation into procurement irregularities had already started in 2008, which was raising concerns about Mr Gama's role in irregularly signing off contracts. Unfortunately, one of these contracts was with a company that had been owned at the time by a Cabinet colleague, Mr Nyanda. In this regard, I attach hereto, marked **Annexure "C"**, a letter dated 6 March 2009 annexed to a summary report by Transnet Internal Audit into the aforementioned investigation.

37 Notwithstanding all this, Mr Gama's supporters claimed he was being victimized by an anti-transformation white cabal that had instituted an inquiry (and later disciplinary proceedings) to prevent him from being appointed the GCEO. Moreover, it was falsely claimed that Mr Wells himself wanted to be GCEO and had started the inquiry in order to eliminate his rival, Mr Gama. Mr Wells had, in fact, put his name forward to apply for the GCEO position in November 2008 when the process started, but retracted his application within days of applying.

38 In the months to come, Mr Wells was to face a tirade of insults, slander and racist slurs for the rest of the time he was at Transnet.

39 Mr Gama was later found guilty of unwarranted criticism of Transnet Executives, a charge serious enough to warrant dismissal.

40 On or around 28 July 2009, I sent President Zuma a comprehensive report, attached hereto marked **Annexure "D"**, with annexures detailing the selection process, the strong motivation for the appointment of the candidate that had been recommended to me by the Transnet Board, details of the procurement irregularities under investigation by the Transnet Audit Committee, the corporate governance aspects of CEO appointments, including the legal opinions prepared by Michael Katz and Advocate Wim Trengove SC in this regard. However, President Zuma did not respond.

41 The Transnet AGM was postponed from July 2009, and took place on 11 August 2009. I was in an embarrassing position as I could not appoint a CEO or a Chairperson, nor could I fill the four vacancies on the Board. I endorsed the continuation of office of the existing Board members for their terms of office were due to expire the following year.

42 The inability to appoint a Chairperson and a CEO of Transnet at the AGM was a very serious breach of corporate governance. In all good faith, the Transnet Board had conducted a thorough and very professional search for a CEO, always in close consultation with Minister Mabandla and then with myself when I took over. I can count no less than 18 engagements between Transnet and the Government in that six-month period with regard to the GCEO succession. I am however mindful that the political turmoil of the time, the turbulence of a general election, and the ascension to power of a new political elite aligned to President Zuma probably made decision-making for an out-going Minister very problematic. As for myself, it was the absolute dogged insistence of President Zuma that no-one be appointed to *any* position in Transnet until his candidate of choice, Mr Gama's disciplinary case was over, that prevented me from making an appointment.

43 Cabinet was due to meet on 26 August 2009 and recognizing the urgency of the situation in Transnet, and still not having received a reply from President Zuma, I sent

an urgent letter on 25 August 2009, attached hereto marked **"Annexure E"**, requesting his assistance to expedite the placement of Cabinet Memo 7/2009 on the Cabinet Agenda. He gave me instructions to withdraw the Cabinet Memo and now wanted the names of three potential chairpersons for Transnet.

44 Mr Gama was formally charged by Transnet and later suspended on 1st September 2009. Immediately before, and in the days following his suspension, Minister Jeff Radebe, ("Gama will become CEO"), Minister Siphiwe Nyanda ("Gama is being persecuted like Jacob Zuma"), and also the ANC, the SACP, the South African Transport Workers Union (SATAWU) and the ANC Youth League (under Julius Malema at the time) all issued strong and harsh statements in support of Gama, accusing Transnet of persecuting him[1]. This was reflected in numerous statements and reports in the media, which I attach hereto marked **Annexure "F1" to "F13"**.

45 I quote from SATAWU's statement made by the General Secretary, Randall Howard, attached hereto marked **Annexure "G"**:

> *"SATAWU will ensure that no puppet appointment takes place until the disciplinary process of Gama is completed even though at the cost of keeping the untransformed cabal in place a little longer. SATAWU is in the process... to clean up the lily white Transnet Capital Projects..."*

46 The accusations of an "untransformed" cabal and "puppet appointments" was outrageously insulting of the Transnet Board and the proposed candidate. The candidate was black, as were the majority of the members of Transnet Board who were also very senior and professional people. All I could conclude from this fusillade of insults hurled at Transnet was that there were concerted attempts to improperly and irregularly influence the appointment process of the Transnet CEO, with blatant disregard for the Board and myself as Minister.

47 An editorial in the City Press on 13 September 2009, attached hereto marked **Annexure "H"** warned:

> *" The level of political interference at Transnet does not bode well for the effective management of parastatals...The question of who is right and*

[1] Zwelenzima Vavi, the then General Secretary of COSATU, did not add his voice to these criticisms as he had his reservations.

who is wrong is not for the ANC to determine. Neither is it terribly good practice to level the race card at the Board and the executive team at Transnet. The Board is diverse…Their reputations are being sullied and it will be little surprise if they walk in the next fortnight."

48 On 7 October 2009, the South Gauteng High Court handed down its judgement, which is attached hereto marked **Annexure "I"**, dismissing with costs Mr Gama's application to have his suspension set aside on the grounds of bias against him and faulty procedures. Paragraph 107 of the judgement reads: :*"There is also no case made out of the perceived bias that can affect the legality of the process. Much less that of institutional bias"*.

49 On 4 June 2010, Mr Gama was found guilty on 3 out of 4 charges, namely, exceeding his delegated authority by approving a GNS Security Contract; failure to comply with the Board's stipulated condition for the 50 like-new locomotives contract, and unwarranted criticism of Transnet's Executives. Mr Gama was not found to have personally benefitted; however, he was found to have acted negligently by signing off on contracts without properly applying his mind.

50 The outcome of the disciplinary enquiry conducted into the conduct of Mr Gama, which is attached hereto marked **Annexure "J"**, confirms in paragraphs 364 and 365 that,

"…A reasonable person in Gama's position would not in my view have been prepared to utter the criticisms which he did, some in public and others in correspondence, unless he had certain evidence in support of his claims which it appears Gama did not have. The statements are critical of Wells in particular, but also infer a wider criticism of Transnet executives and arguably even of the Transnet board for having an ulterior motive and conspiring in preferring the charges against Gama."

51 After Mr Gama had been found guilty, a separate, independent hearing on what sanctions should be applied, found that the charges were serious enough to warrant dismissal on each charge. Accordingly, on 28 June 2010, Mr Gama was fired from Transnet.

52 I, together with my Deputy-Minister, Mr Godongwana, proceeded to put together a Cabinet Memorandum (finally dated 27 October 2010), which is attached hereto marked **Annexure "K"** for the appointment of a new Transnet Board who would then commence a fresh search for a new CEO as the last proposed candidate had withdrawn. The Transnet Board, Acting GCEO and Chairperson at the time had shown remarkable resilience in keeping the show on the road, but they were approaching exhaustion: no-one should have to bear the level of abuse and government dysfunctionality which they endured.

53 In a letter to President Zuma dated 8th September 2010, attached hereto as **Annexure "L"**, I thanked him for the telephonic conversation I had had with him the previous evening regarding the Transnet Chair, and I attached two CV's of my proposed candidates for his ease of reference and requested a meeting with him prior to submitting to Cabinet. I was targeting the Cabinet meeting of 15th September 2010. In the same letter I stated:

> *"Given the importance of Transnet to the SA Economy, and the need for stable leadership at the Board level, it is absolutely necessary to proceed with the appointment of a Chairperson and other Board members with the requisite skills. To this end my department has prepared a Cabinet Memorandum for discussion at Cabinet* [15th September 2010] *but which it has not yet submitted. This is because we agreed that we would discuss the matter first so that I can ascertain your final views on the composition of the Board and in particular the Chairperson."*

54 On 10th September, and again on the 11th September 2010, my office sent reminders to the President's office regarding the request for a meeting, and providing times of my availability. I heard nothing.

55 The Transnet Memorandum (9/2010) (**Cabinet Memo 9/2010**) did not appear on the Cabinet Agenda of 15 September 2010 (**Annexure "K"**).

56 On 27 October 2010, I sent a Letter to the Presidency requesting his assistance to expedite the placing of the Transnet Cabinet Memo 9/2010 onto the Cabinet Agenda. I did not get a reply.

57 Three days later, on Sunday 31 October 2010, the President's office called me to a meeting with him and in the presence of Gwede Mantashe, the Secretary-General of the ANC, President Zuma said that the NEC had decided to re-deploy me as the Ambassador to Finland. I declined the re-deployment and informed them that I would be resigning as a Member of Parliament.

58 I immediately packed up my office and left the following day, requesting a handover meeting with the incoming Minister, which is the norm in government. Minister Gigaba declined my request.

59 My Transnet Cabinet Memo 10/2010 appeared 3 days later as an Agenda item on the Cabinet ESEID Sub-Committee of 3 November 2010, and was withdrawn. (This meeting took place 3 days after President Zuma dismissed me.)

60 On 8 December 2010, Cabinet approved Mr Gigaba's recommendations for the Board at Transnet. Iqbal Sharma, a former business partner of Gupta associate, Salim Essa, was on that list and was later appointed as head of the procurement committee at Transnet.

61 On 16 February 2011, Cabinet approved the appointment of Brian Molefe as Group CEO Transnet and a little while later Mr Gama was re-appointed as CEO of TFR on the grounds that his misconduct had not been serious enough to warrant his dismissal.

62 On 16 March 2011, the Transnet Board approved the re-appointment of Mr Gama as CEO of TFR, justifying it on the grounds that the findings in his disciplinary hearing had not warranted a dismissal.

ESKOM

63 During a robust Eskom Board breakaway session on 28 October 2009, Mr Jacob Maroga, the CEO of Eskom, offered to resign and left the room so that the Board could discuss the matter. At that point, Mr Bobby Godsell, the Chairperson of Eskom, said that he too offered his resignation and left the room for the Board to consider both offers of resignation.

64 The Board agreed that they would accept Mr Maroga' s resignation and delegated two directors to inform him of that fact. This was done at a dinner meeting that evening, and

arrangements were made to meet the following day to discuss the content of a communication informing the public of the CEO's resignation.

65 I came to the Eskom Head Office early the next morning on Friday 29 October 2009, and whilst meeting with Mr Godsell in his office, Mr Maroga walked in and handed me a letter which stated, amongst other things, that he had not offered to resign and that he was not offering to resign. This letter is attached hereto marked **Annexure "M"**.

66 I thereupon met with the Board and requested each and every member of the Board to tell me their view of the account that Mr Maroga had offered to resign and that they had accepted his offer - a decision that Mr Maroga had accepted the previous night. I said that if any Board member were not in agreement, they should say so and there would not be any repercussions.

67 Every Board member confirmed that Mr Maroga had offered to resign and that they had accepted his resignation. They felt Mr Maroga was dishonest. They had accepted his resignation because of their deep frustration at his poor performance as a CEO, for example, failing to consistently appreciate the enormity of Eskom's financial crisis; a failure to re-negotiate long-term contracts with aluminium producers and long term coal contractors; and the development of a strained relationship with his executive team.

68 I thereupon sought legal advice from my Department and senior counsel and conferred with the Deputy-Minister, Mr Godongwana, at the offices of Eskom. I requested the Deputy-Minister to meet privately with Mr Maroga and try to persuade him to take an elegant exit to prevent further damage to himself, because it was clear that he was not going to easily win his argument with the Board, and Eskom could certainly not afford a public crisis of this order.

69 Mr Godongwana and Mr Maroga met the next day, Friday 30th October 2009, and the latter said that he would revert by the following Sunday on his proposed terms of exit. However, Mr Maroga did not revert back on the proposals and refused to meet with Mr Godongwana, stating that he would only meet with me.

70 Thereafter, the Board issued a letter to Mr Maroga confirming his resignation and stating that his incapacity as a manager constituted further grounds for terminating the relationship, should the resignation dispute not be settled. I was unaware that this letter had been sent.

71 I met with Mr Maroga on Wednesday 4 November 2009 and offered him a dignified exit, or mediation or arbitration as options to resolve the dispute. He refused all of those options, insisting that I confirm his appointment as the CEO of Eskom and return him to his office. I refused his request, because it was not my job to be interfering in a relationship between a CEO and a Board from a corporate governance point of view and because the employment contract was between Mr Maroga and the Board; not with me. After the meeting, I informed the Chairperson of the Board that there was nothing further that I could do to resolve the dispute, and that the Board should go ahead with whatever they needed to do.

72 The next day, 4 November 2009, I briefed Acting President Motlanthe on developments and informed him that Eskom would be announcing Mr Maroga's resignation that same day. President Zuma was abroad at the time.

73 The Chairperson of Eskom announced the resignation of Mr Maroga to a large gathering of senior managers at Eskom on the morning of Thursday 5 November 2009. Whilst this was happening, I was in my office and received a call from an enraged President Zuma asking me bluntly what did I think I was doing? (He was briefly in the country en route to Mozambique). He furiously instructed me to tell Bobby Godsell to stop immediately. I warned President Zuma of the dire consequences this would have, but he would not listen. He said he would speak to me again once he was in Mozambique, in an hour or so, but he did not take my repeated calls thereafter. I informed Acting President Motlanthe and said that, much against my better judgment, the President had issued me with an instruction which I was bound to obey. It made me deeply unhappy.

74 As a consequence of President Zuma's instruction, Bobby Godsell was forced to cancel the media briefing scheduled to announce Mr Maroga's resignation after he had finished briefing the staff; the media were already sitting waiting. This really put the cat amongst the pigeons: the media speculation about whether Mr Maroga was, or was not, the CEO of Eskom reached a crescendo, hitting headlines, newscasts and talks shows. There was great consternation in the country. This was not at all good for Eskom's reputation, given its financial and operational problems. Neither I, nor the Board, were in a position to provide any clarity whatsoever and the President was simply unavailable. I was lambasted for my silence.

75 I finally managed to get an appointment with President Zuma on the morning of Friday 6 November 2009. He had just finished breakfast and told me that he could only meet with me for 10 minutes. I briefed him and then he said he had to go to a NEC meeting in Kempton Park and would meet with me at lunchtime to continue our conversation. No meeting took place and, although I waited the whole day in Kempton Park, I was never summoned as he had promised.

76 That night, and the following day, I lodged my strongest objections with Jessie Duarte, who was Chief of Operations in the Presidency and made repeated calls to the Presidency to try and set up a meeting with President Zuma.

77 Finally, I got to see the President on Sunday 8 November 2009 in Kempton Park in the midst of a media uproar. He really did not want to discuss anything, he just informed me that he had decided that Mr Maroga will return to Eskom and, over a certain period, he would write his version of events and the Board would do the same and then I, the Minister, would decide. I was horrified. I said to the President that if that was the route he wanted to take then he, not I, should convey this to the Board and Mr Maroga, as I thought this was a disastrous path to take. We agreed, finally, that I would inform the Board of his decision, he would inform Mr Maroga and I would make arrangements for his meeting with Mr Maroga. Upon contacting the President's Housekeeper to make arrangements for Mr Maroga to meet the President that afternoon, my secretary was rather puzzled because she was told that Mr Maroga had already met with President Zuma earlier on, and asked if Mr Maroga wanted to see President Zuma again?

78 That same day, I met with the Board and informed them of the President's decision. They were not at all happy but finally agreed, in the interests of settling the media furor about the CEO position. But there was one condition: that they personally meet with the President. He very reluctantly agreed and they extracted a concession from the President that Mr Maroga would immediately go on leave once he returned to Eskom. They were very worried about his disruptive presence at Eskom.

79 I met with the Board later that night after their meeting with the President to plan the process going forward. In the middle of the meeting, I got a call from President Zuma saying that Mr Maroga does not accept the deal. The Board was furious and Bobby Godsell resigned.

80 The following day, 9 November 2009, President Zuma phoned me to say that hee had given Mr Maroga permission to return to Eskom as the CEO and that Mr Maroga would then proceed to write out his version of events, as discussed before. President Zuma and I had a heated argument on the matter. On the same day, 9 September 2009, Mr Maroga arrived at Eskom, accompanied by Jimmy Manyi and a few others, and went upstairs to his office.

81 Mr Maroga then proceeded to send a letter, dated 9 November 2009, addressed to me, the Board, EXCO and the Chairperson of the Portfolio Committee in Parliament, which is attached hereto marked **Annexure "N"**, announcing that he remained the CEO and Director of Eskom and that the shareholder at the highest level had confirmed that all decisions regarding his status must be formally requested from and granted by the shareholder, and all unauthorized actions taken by the Board since 28 October 2009 were rescinded.

82 Mr Godongwana and I were so shocked that we were both of a mind to resign. I was going to ask for a special slot in Parliament to make an announcement about the matter and prepared to leave for Cape Town, as Ministers are accountable to Parliament. Mr Godongwana took the letter to Luthuli House in an absolute fury and a little while later, the President phoned Mr Maroga and instructed him to immediately vacate his office at Eskom, leave the building and return only once I had given him permission to do so.

83 On the following day, I requested Yunis Shaik (at that time the labour advisor to DPE) and the Acting Chairperson of Eskom, Mr Mpho Makawana, to meet with Mr Maroga to negotiate his terms of departure. They reached a stalemate and, finally, Mr Maroga left Eskom with no package.

84 On 12 November 2009, I made an announcement in Parliament that Mr Maroga was no longer CEO of Eskom and Eskom did likewise.

85 Yunis Shaik informed me that the President had requested that I ask Mr Godsell to return as Chairperson of the Board, which I did. Later, however, the President phoned me and asked me to tell Mr Godsell that he will not return as Chairperson of the Board. Gwede Mantashe made a similar demand, although during this entire episode he had made it quite clear to me that he did not support what the President was doing.

86 As a consequence of this fiasco, Eskom, like Transnet, had an Acting Chairperson and an Acting CEO.

87 Later, Mr Maroga sued Eskom and I for R65 million compensation. He lost the case as well as the appeal.

SAFCOL

88 The South African Forestry Company Ltd (**SAFCOL**) was due to have its Annual General Meeting on 28 September 2010. In preparation therefor, I submitted a Cabinet Memorandum (7/2010) dated 26 August 2009 for the appointment of Non-Executive Directors, including the Chairperson, to the Board of SAFCOL, retaining some Board members and appointing new ones, including the Chairperson.

89 In a letter to the President dated 8th September 2010, attached hereto marked **Annexure "O"** and headed 'SAFCOL Chairperson', I thanked him for the telephonic conversation I had had with him the previous evening regarding the SAFCOL Chairperson and I attached the CV of my proposed candidate for the position of Chairperson.

90 In this same letter of 8th September 2010, I said to the President that,

> *"in order for us to have a more meaningful opportunity to discuss this position before taking it to Cabinet, early yesterday, I withdrew the item from the agenda of today's ESEID [Cabinet Sub-Committee) meeting. However given the urgency of the matter as a result of the AGM for SAFCOL .....[and] Parliamentary and other legislative reporting requirements, I trust then that you will revert to me with your views on the proposed candidate for Chairperson quite soon and before the next Cabinet meeting. Kindly note that I have written to your office for permission to submit the memo to the next Cabinet meeting. I am available to meet with you at any time....."*

91 On 10th and 11th September 2010, my Personal Assistant, Ms. Nthabiseng Borotho sent follow-up reminders to President Zuma's office for the meeting and giving details of my availability. I heard nothing.

92 On 15th September 2010, Cabinet approved my Memorandum, despite an attempt by the President to have it withdrawn at the actual meeting itself.

ISSUES RELATING TO THE TERMINATION OF SOUTH AFRICAN AIRWAYS' SOUTH AFRICA – MUMBAI ROUTE

93 In early June 2010, I was part of an official South African state visit to India, led by President Zuma. Whilst I was there, I was informed by my special advisor, Ms F Hassan, that she had received information that South African Airways (**SAA**) intended to terminate its South Africa – Mumbai route. On receipt of this information, I sent a text message to the then Chairperson of the SAA Board, Ms Cheryl Carolus ("**Ms Carolus**"), enquiring whether this information was true. The text, which was sent on the 2nd of June 2010, stated as follows:

> *"Cheryl, I am in India with the President now. Is there any truth to the rumour that SAA is going to terminate its route to Mumbai? This is a rumour here and we need clarity".*

94 It should be noted that as part of the same conversation, Ms Carolus stated:

> *"No, we will not be terminating Mumbai. It must be Jet Airways still lobbying for this. We remain on the route with full frequencies. All the best for India."*

The abovementioned SMSs are attached hereto marked **Annexure "P"**.

95 It should further be noted that during the course of my visit to India as part of President Zuma's state visit, the Chairperson of Jet Airways, Mr Naresh Goyal, was persistently following me around and attempting to arrange a meeting with me. I declined to engage with Mr Goyal as I did not have the authority to make any business decisions on behalf of the SAA Board.

96 It should be noted that during the state visit to India, referred to above, as part of the visit, we attended a fashion show. At the conclusion of the fashion show, I was walking out of the hall and Mr Goyal literally jumped over the chairs and came and stood in front of me and said "*Minister I need to see you*". I said to him "*Before you meet with me you have to meet with the Board and with the CEO. I have nothing to say to you.*"

97 On the 30th of August 2010, Ms Carolus sent me another text message, attached hereto marked **Annexure "Q"** stating as follows:

> *"Note that the CEO from Jet Airways will be in South Africa for the India/South Africa meeting. He is lobbying hard for SAA to end the Mumbai flight. We reject this. Please let me know if he is trying to meet you, so that we can brief?*

98 On the 31st of October 2010, I was removed from office by President Zuma. SAA's Mumbai flight was later cancelled.

VYTJIE MENTOR

99 It should be noted that during the latter part of my tenure as the Minister of Public Enterprises, there were rumours circulating that I would be dismissed as the Minister of Public Enterprises. In this regard, on 7 June 2010 I received an SMS (A screen shot of which is attached as **Annexure "R "**) from my special advisor, Ms F Hassan, stating as follows:

> *"Rumours*
> *Dm becomes min*
> *U Dm for health*
> *VM the Dm for DPE"*

100 It is acknowledged that there were numerous rumours circulating at that time, however the specificity in mentioning Vytjie Mentor by name is worth noting.

101 On the 31st of October 2010, I was dismissed from my post as Minister of Public Enterprises by President Zuma.

CONCLUSION

102 The legal framework for the appointment of boards of SOEs and hence the CEOs of SOEs is comprehensively set out in the opinion of Michael Katz of Edward Nathan Sonnenbergs as well as Advocate Wim Trengove SC (**Annexure D**). Suffice to say that this information was conveyed to President Zuma on a number of occasions including in my memorandum to President Zuma on the 28th of July 2009 (**Annexure D**), wherein I state the following in paragraph 3.1.8:

"This was also confirmed by senior counsel's advice, attached as ***Annexure "A"****. Counsel advised that the Minister is the functionary who holds the shares and exercises the rights on behalf of the State. The Minister's exercise of the shareholder rights is part of her exercise of the State's executive powers. If Cabinet has formulated policy relating to such exercise, then the Minister should exercise the powers within the parameters of such policy. The Minister is not obliged to consult Cabinet in the exercise of his/her power, but may choose to do so as a matter of personal discretion or any protocol or custom developed in this regard. Counsel advised that the Minister's exercise of her shareholder powers on behalf of the State remain valid in law even if Minister does not adhere to any Cabinet policy developed on this issue."*

103 The facts set out above bear testimony to my repeated, and unsuccessful, attempts to appoint a CEO at Transnet, over one and a half years, as well as those of the Board, which attempts by the Board to appoint a CEO of Transnet had commenced some time prior to my appointment as Minister. The conduct of President Zuma and certain members of his Cabinet in relation to Transnet and Eskom was not only negligent, it was reckless and designed to frustrate the sincere attempts of the boards of those state owned entities to exercise their fiduciary duties as directors and the exercise of sound corporate governance in their respective state owned entities.

104 The above course of conduct by President Zuma in relation to Transnet and Eskom was improper and irregular. His conduct revealed, at best, a fundamental misunderstanding and misconception of his role as President of South Africa, and the exercise of his presidential duties and functions. His actions not only undermined me as the Minister responsible for Public Enterprises, but undermined the efforts of the boards of Transnet and Eskom, and many of their senior management, who attempted to carry out their responsibilities and duties in a professional manner under very trying circumstances.

105 It is not for me to speculate as to what the motives of President Zuma were in unduly and improperly influencing the appointment of CEOs and board directors in certain of the state owned entities, referred to above. Suffice to say that, in my view, the actions set out above resulted in severe and extremely detrimental consequences for Transnet and Eskom, which consequences undermined and broke the morale of

Boards, staff and management, and also resulted in severe reputational damage to those entities and negative consequences for their efficient functioning.

106 It is submitted that the nature of the interventions described by me in Transnet and Eskom manifested the beginnings of the President, and certain members of his Cabinet, unduly influencing the appointments of key executives and board members in SOEs. We now know that this course of conduct escalated over the years and has resulted in a litany of maladministration, abuse of resources and theft from state owned entities in South Africa. The consequences of such actions are public knowledge, as are the disastrous economic effects on the state of the South African economy. They are the reason for this Commission of Inquiry.

107 Once there is collusion between the CEO of a state owned entity and the chairperson of the board of that state owned entity in order to influence the conduct of business of that entity, particularly the allocation of contracts and tenders, the decline and the effects thereof will be felt for years to come.

108 It is my firm belief that my resistance to the strong views of President Zuma in relation to the appointment of certain preferred candidates to the positions of CEO and members of boards of directors, including the CEO and Chairperson of Transnet, at the time that I was Minister, led him to the conclusion that I would not do his bidding and behave improperly and unlawfully. I believe that it was for that reason that I was dismissed by President Zuma as Minister of Public Enterprises on the 31st of October 2010.

109 I would like to place it on record that while my resistance to the attempts of President Zuma to improperly influence the appointments of CEOs and boards of directors at SOEs may have had a significant negative effect on my own career, I deeply regret that the actions of President Zuma and others during the course of the Transnet and Eskom sagas, set out in detail above, also had a significant negative impact on the careers and reputations of a number of fine South Africans who were only attempting to fulfill their responsibilities in terms of their appointments in the entities referred to above.

Dated at **JOHANNESBURG** on this 8th day of October 2018.

BARBARA HOGAN

Item “7”

64.1. Mr. Sparks Motsei; and

64.2. Mr. Riaz Salojee who was the Group Chief Executive Officer at the time.

65. It must be borne in mind that all appointments to the boards of State owned Entities must also be approved by the African National Congress' Deployment Committee whereafter it gets approved by Cabinet. The 2015 Board was no exception. I think at the time it was chaired by the then Deputy President of the ANC.

66. From the above it is clear that the appointment of the 2015 board was a rational and objectively justifiable process. It was not an act of a frolic of my own with sinister motives.

67. In the premises, I humbly request that I be granted leave to give evidence disputing the evidence of Ms. van Rensburg.

CONDONATION

68. This application will be filed out of the 14-day period prescribed by the Rules of the Commission.

Item “8”

SSA-02-033

STATE SECURITY AGENCY

EXHIBIT YY 3

LOYISO JAFTA

SSA-02-034

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

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INDEX: EXHIBIT YY 3

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SUBMISSION OF MR L JAFTA, ACTING DIRECTOR-GENERAL OF THE STATE SECURITY AGENCY, TO THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

AFFIDAVIT

I, the undersigned

LOYISO JAFTA

do hereby make oath and state that:

1.

I am the Acting Director-General and Accounting Officer of the State Security Agency ("the Agency") referred to in section 3 of the Intelligence Services Act, 2002 (Act No. 65 of 2002).

2.

The contents of this affidavit are, unless the context indicates otherwise, within my own personal knowledge and are, to the best of my belief, both true and correct.

3.

Where I make submissions of a legal nature, I do so on the advice of my legal representatives, whose advice I accept.

4.

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I limit this affidavit in terms of its contents to narrow issues at this stage, as I am conscious of the need to respect matters of national security. The Director-General of the Agency is compelled in terms of section 10(4) of the Intelligence Services Act, 2002 (Act 65 of 2002) to as far as reasonably practicable, take steps to ensure that national security intelligence, intelligence collection methods, sources of information and the identity of members of the Agency, are protected from unauthorised disclosure. Consequently, all information contained herein and matters that I deal with, at this stage, and the identities of the persons involved, are those that are already in the public domain.

5.

On assuming office as the Acting Director-General and responsibilities as the Accounting Officer for the Agency on 17 April 2018, I soon became aware of some of the challenges that this department of the state had faced. I will not elaborate on these in detail, because the nature and extent of those challenges has been adequately covered in the Report of the High Level Review Panel on the State Security Agency ("the Panel") appointed by the President of the Republic of South Africa in June 2018, by the submissions of Dr SF Mufamadi, the Chairperson of the High Level Review Panel, and those of Messrs Maqetuka, Njenje and Shaik.

6.

On page 2 of the Report of the Panel released in December 2018, the Panel apart from its specific findings and recommendations asked itself the question "What went wrong?" In answering this question, it must be emphasised that the findings of the Panel do not impugn every member of the SSA and its management, but focus on

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the things that went wrong. The Panel identified five high-level answers to this question:

- **Politicisation**: The growing contagion of the civilian intelligence community by the factionalism in the African National Congress (ANC) progressively worsened from 2009;
- **Doctrinal Shift**: From about 2009, there was a marked doctrinal shift in the intelligence community away from the prescripts of the Constitution, the White Paper on Intelligence, and the human security philosophy towards a much narrower, state security orientation;
- **Amalgamation:** The amalgamation of (the) National Intelligence Agency (NIA) and the South African Secret Service (SASS) into the SSA did not achieve its purported objectives and was contrary to existing policy;
- **Secrecy:** There is a disproportionate application of secrecy in the SSA stifling effective accountability;
- **Resource abuse:** The SSA had become a 'cash cow' for many inside and outside the Agency.

7.

It has also been my observation from my experience as the Acting Director-General that there was a doctrinal shift in the civilian intelligence agency from serving the national security of the citizens of the country to a state security doctrine, and in that respect predominantly serving the interests of the governing party and the person of the President of the Republic and of the party. This was particularly evident in the subversion of systems and processes for good and accountable governance; and

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enabling the Agency to carry out projects and activities that broadly fell outside its legal mandate.

8.

During my tenure at the helm of the Agency, I have been seized with curing the systemic ills that underlie the challenges identified and correcting the governance failures by putting in place systems, processes and controls to support clean governance.

8.1 Firstly, the office of the Director-General plays an oversight rather than an operational role and is not directly involved in operational matters. The DG has a birds-eye view over the workings of the Agency and should ensure that it functions in a synergistic manner and in synchrony with other national intelligence structures to achieve the policy imperatives of government. I am mindful of the government priority to eradicate corruption in the 2019-2024 Medium Term Strategic Framework and the role of the Agency to address the scourge of corruption. To this extent, the Agency has implemented several initiatives to address the systemic issues that enable corrupt practices, and is implementing appropriate systems, processes and controls to prevent its occurrence and recurrence.

8.2 Secondly, I was seized with the responsibility to deal with malfeasance within the Agency, and with regard to which we are steadily making progress.

Policy and Architecture

9.

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The creation of the State Security Agency in 2009 resulted in an architecture in which all the authority and power over the civilian intelligence architecture was concentrated into the hands of a single Director-General, subject to the Executive oversight of a single Minister of State Security in accordance with section 12 of the Intelligence Services Act, 2002 (Act 65 of 2002). The provisions for the Agency's establishment in terms of which the National Intelligence Agency, the South African Secret Service, Electronic Communications Security (Pty) Ltd (COMSEC) and the South African National Academy of Intelligence were absorbed into and make up the Agency, were legislated in section 3 of the Intelligence Services Act, 2002 (Act 65 of 2002). The functions of the Agency are set out in the National Strategic Intelligence Act, 1994 (Act 39 of 1994) and its governance processes are regulated in terms of various regulations and directives issued by the Minister of State Security. The civilian intelligence architecture created in terms of the above-mentioned legislation and which obtains presently is represented on **Annexure A.**

10.

By comparison, the civilian intelligence architecture that obtained prior to 2009 and was based on the White Paper on Intelligence, disaggregated power into the hands of two Directors-General of three Schedule 1 National departments, namely the National Intelligence Agency, the South African National Academy of Intelligence and the South African Secret Service. The mandates of the intelligence services were distinguished between the domestic mandate of the National Intelligence Agency and the foreign intelligence mandate of the South African Secret Service and they reported independently to the Minister for Intelligence Services. Under this structural configuration, the Directors-General of these two last mentioned

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Departments had no direct authority over other centres that performed a support function to them viz. the National Communications Centre, the COMSEC, the South African National Academy of Intelligence and the Office for Interception Centres. As a result, they were only in very regulated circumstances empowered to request the use of such capabilities for intelligence gathering. These structures were overseen individually by the Minister, the Joint Standing Committee on Intelligence (JSCI), the Inspector General of Intelligence (IGI), Chapter 9 institutions and the judiciary. The structural configuration is illustrated on **Annexure B.**

11.

The amalgamation of the intelligence services in 2009 promised enhanced integration and co-ordination of functions in the intelligence community with Directors heading each of the Domestic and Foreign Branches and a single Accounting Officer viz. the Director-General. However, upon my arrival at the Agency in 2018, I was greeted by the over-concentration of power in the hands of the Director-General, because the two positions for the Directors of the Domestic and Foreign Branches were done away with as a result of the implementation of the Strategic Development Plan (SDP) on 1 April 2018. As a result, the Director-General was:

- singularly informed of all operational and strategic intelligence pertaining to the national security of the country;
- had the authority to direct all the intelligence activities conducted by civilian intelligence inside and outside the country;
- exercised command and control over all the civilian intelligence capabilities and all resources of the various components of the civilian intelligence architecture.

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The SDP was stopped in July 2018 and two Directors of the Domestic and Foreign Branches were subsequently appointed.

12.

In the performance of its functions, the Agency is subject to a host of oversight structures as a safeguard against abuse of power:

12.1 The Minister and Director-General account to the JSCI which oversees the performance of the intelligence and counter-intelligence functions of the Agency in accordance with section 3 of the Intelligence Services Oversight Act, 1994 (Act 40 of 1994);

12.2 The JSCI reports to Parliament on the intelligence and counter-intelligence functions of the Agency, which include the administration, financial management and expenditure of the Agency in accordance with section 2(1) of the Intelligence Services Oversight Act, 1994 (Act 40 of 1994).

12.3 The Agency is overseen by the IGI established in terms of section 7 of the Intelligence Services Oversight Act, 1994 (Act 40 of 1994) who conducts compliance inspections of the work of the Agency and investigations into its activities, *inter alia*, complaints of maladministration and corruption against the Agency.

12.4 The Agency is also subject to oversight by Institutions Supporting Constitutional Democracy provided for in Chapter 9 of the Constitution of the Republic of South Africa, 1996, especially by means of audits conducted by the Auditor-General of South Africa.

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12.5 Finally, the Agency is subject to judicial oversight with regard to the performance of its functions and labour relations matters.

13.

It is submitted that the corrosion of governance in the Agency and systemic breakdown of governance systems and processes that obtained in the Agency and is reported on by the Panel, is enabled considerably by the intelligence architecture. The over-concentration of power in the hands of a single Director-General resulted in a span of control and authority that is too wide, and such authority consequently enabled that resources could be hidden or moved so that there is no or limited concomitant or robust oversight.

14.

It is further submitted that the cure is to disaggregate the authority and split or separate the powers and functions so that it makes for better, more effective and transparent control, accountability and oversight.

15.

There are several reasons, however, for the abuses reported on by the Panel. Another factor is the limited remit of the Auditor-General of South Africa (AGSA). In terms thereof, all areas of intelligence activity, bar covert operations, fell within the remit of the AGSA. This meant that activities that fall within covert operations did not receive the same level of scrutiny that other aspects of the SSA receive from the

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AGSA. One of the recommendations of the Panel that was approved by the President, was that the remit of the AGSA in the Agency should also cover covert operations. This recommendation obtains in various jurisdictions the world over, particularly where oversight and control instruments and systems have matured.

16.

The expansion of the purview of oversight of the AGSA is being implemented, subject to reasonable considerations so as not compromise operations. The Agency has already embarked on a review of the auditing process with the office of the Auditor-General with the goal to improve the combined assurance conducted between the Agency's Internal Audit and the Auditor-General's office. They have, with Finance, conducted benchmarking with comparable jurisdictions in 2019 to study compliance and auditing measures that have been implemented in intelligence structures nationally and internationally with a view to enhancing auditing practices in the Agency.

Restoring appropriate administrative systems and processes for good and accountable governance

17.

The Agency always had in place adequate systems for corporate governance underscored by sound policies, procedures and processes set out in comprehensive directives. Upon my arrival in April 2018, I found that these were systematically subverted and bypassed, and in their stead, new systems were installed that did not

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comply with legal requirements. This was particularly evident in the running and management of operations in relation to:

- The use of funding instruments for operational purposes:

  The approved funding instrument for operations was not applied consistently across the Agency. Where the approved instrument was no longer utilised, a separate instrument, that serves a different purpose, was employed to fund operations. This resulted in some operational members taking into their possession the full amount of money for a project, for example R 20 million on the day that a project is approved.
- Reporting and record-keeping of operational expenses:

  Where the Operational Directives required that regular reports must be generated and submitted, and records updated, these were not always complied with.
- Accounting for operational expenses:

  Monies were taken on the basis of a certificate, and accounting for operational expenditure was similarly reconciled on the basis of a certificate.

In respect to the above, the appropriate funding instrument was restored and all legal protocols governing the conduct of intelligence operations were applied.

18.

Furthermore, operations were also conducted from the office of the Accounting Officer. While this approach may be justified under certain circumstances, it is an approach fraught with risks for it puts the Accounting Officer in the middle of operations. It begs the question: who scrutinises the projects that are run from the

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office of the Director-General for probity and who approves the projects and the expenses? It is not optimal for the Accounting Officer to be the originator of projects and their implementer, because his or her objectivity could be compromised when having to ensure that proper controls are being implemented in projects in which she or he is directly involved. The safeguards against abuses are also significantly weakened when there is less or a lack of transparency in the utilisation of resources. In this regard, the remedial measure that was implemented is that entities in the office of the Accounting Officer that conducted operations were reassigned to operational entities within the Agency. In this way, the office of the Accounting Officer is no longer conducting intelligence operations.

19.

The following corrective measures were implemented in the management and administration of operations after my arrival:

- illegal operations were terminated;
- 'relations' with a large number of people outside the Agency who had been utilised in various projects, often unwittingly, were terminated;
- members who were in possession of resources of the Agency, *inter alia*, funds, firearms, cars, leases, and immovable property were instructed to return them, with the assurance that all of it is properly accounted for; and
- an investigation was commenced in respect of the relevant infractions, so that, where appropriate, consequence management could be implemented with respect to the responsible persons.

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19.1 Terminating Illegal Operations

Operations that the Agency sustained up to April 2018 of the following description were terminated immediately:

- security services provided illegally to public figures such as protection services for Messrs Eugene De Kock and Collen Maine, as well as Ms Dudu Myeni under Project Tin Roof;
- community based organisations established as a cover to influence political developments in the country; and
- political intelligence operations conducted outside the legal mandate of the Agency.

These projects were terminated one by one, with the result that funding to these projects was also terminated and redirected to legitimate operations.

19.2 Terminating Relations with Persons utilised by the Agency

19.2.1 The termination of the projects and the attendant funding triggered calls and threats of litigation by approximately two hundred people who had been utilised by the Agency in various roles. The majority of these people had been recruited by the erstwhile Deputy Director-General: Special Operations under very dubious circumstances. In the majority of cases, there were no written contracts concluded; some people had been promised permanent employment in the Agency; and the majority were paid in cash, which meant that they did not pay tax on their monthly income. Some of these individuals were

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trained in South Africa and abroad in various elements of intelligence and other security-related skills.

19.2.2 An extensive exercise was undertaken to investigate cases on a case-by case basis, and to close them after assessing their individual merits. There were instances where the organisation, taking into account various considerations and based on the merits of the matter, elected to sustain relations with the parties involved.

19.3 Directing that officers who were in possession of resources of the state surrender those to the state

19.3.1 Members who had taken operational funds and retained them in their personal possession were instructed to return such funds to the Agency, with a proviso that the relevant operations will continue to be funded. It is self-evident that it did not extend to irregular or illegal operations.

19.3.2 In this way, all the monies that were taken for operational expenses were accounted for and where members had outstanding balances owing to the Agency, the relevant directive authorising the Agency to recover debt from the member's salary was instituted. The recovery of monies owing to the

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Agency was not restricted to the above circumstances, as efforts were made to recover all funds that was owed to the fiscus. The process is on-going.

19.3.3 There are several firearms, namely pistols and assault rifles, which some members had kept in their custody in breach of corporate policy. For a number of years, no-one within the Agency management knew where the firearms were stored, what they had been used for, or if they had been used at all. Investigations in this regard resulted in the Agency confiscating all the firearms, and immediately surrendering them to the South African Police Services to conduct ballistics examinations to determine whether any firearm had been used in the commission of a crime and to hold the responsible person(s) to account. This process is yet to be completed and the Agency is awaiting feedback from the South African Police Service in this regard.

19.3.4 Investigations are underway with respect to movable and immovable property that may have been registered in the names of members or external contacts of the Agency. There were instances where the ownership of movable property, such as motor vehicles, was irregularly transferred from the Agency to members and contacts who had been utilising it. In this regard,

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the relevant investigations will extend to the other law enforcement authorities of the state.

19.4 Directing that an investigation is pursued on all of the above

Subsequent to my appointment, a number of investigations have been initiated from May 2018 into a wide range of legal infractions. As a result, several members of the Agency have been suspended from official duty pending the finalisation of the investigations. The investigations have yielded evidence of flagrant contraventions of the law. In such instances, the matters have been referred for criminal investigations to law enforcement and prosecuting authorities, namely the Directorate of Priority Crime Investigations and the National Prosecuting Authority, as well as the South African Revenue Service. Where appropriate, disciplinary steps are being instituted against errant members. It is the aim that where members unduly benefitted from the abuse of state funds, that such funds and the proceeds of crime should be repaid to the state.

20.

In addition to the reasons advanced above for the systemic erosion of corporate governance in the Agency, I submit that Executive overreach into the operational domain and the absence of a framework that governs illegal instructions contribute to create conditions that undermine compliance with prescripts in the civilian intelligence community. The Minister for State Security is empowered in terms of section 12 of the Intelligence Services Act, 2002 (Act 65 of 2002) to "***do or cause to***

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be done all things which are necessary for the efficient superintendence, control and functioning of the Agency". In a real and practical sense this creates the opportunity for the Minister to assert this right to *inter alia* enter the operational terrain, recruit and handle agents, recruit members to the Agency, and instruct the Management of the Agency to fund operations conducted by the Minister and persons in the Ministry acting on his or her behalf. These activities undermine the governance systems and processes as compliance measures are flouted. It is submitted that a framework that governs instructions given by the Executive to Heads of Departments should be instituted for the public service which will provide for all instructions to the Directors-General to be recorded in writing and even tabled with the Annual Report of the Department.

21.

The scrutiny over the intrusive measures used by law enforcement and intelligence services in the matter of ***Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others*** 2020 (1) SA 90 (GP) provides the opportunity to better refine controls and management of signals and cyber capabilities of the country. Such an assessment of the intelligence gathering capabilities must take into account the reality of the threats to the country and its people and the stability that is necessary for the attainment of national security articulated in section 198 of the Constitution viz.

> "(a) ***National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.***"

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The doctrine of human security is central to the national interest and it is premised on the creation of a secure environment and economic prosperity, but does not negate the role of the security services to protect and preserve national security.

22.

In similar vein, the national security doctrine that is espoused in the White Paper on Intelligence promotes the creation of a societal environment that is free from violence and instability, while engendering respect for the rule of law and human life. It is mandatory for members in the performance of their functions to obey all lawful directions received from a person having the authority to give such directions in terms of section 11(1) of the Intelligence Service Act, 2002 (Act 65 of 2002). The White Paper advocates the adherence to a code of conduct for intelligence officers premised on loyalty to the State and the Constitution, obedience to the laws of the country and compliance with democratic values and ethical norms and standards. It is therefore imperative that the intelligence community instil ethical intelligence practices through the establishment of an autonomous Ethics Office within the Office of the Director-General of the Agency and the institutionalisation of integrity testing for members.

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.

So help me God.

CG VAN SCHANKE
CAPTAIN
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AFFIDAVIT OF MR L JAFTA, ACTING DIRECTOR-GENERAL OF THE STATE SECURITY AGENCY, TO THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

LOYISO JAFTA

I certify that the deponent acknowledged that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath and that he considers this oath to be binding on his conscience. I also certify that this affidavit was signed in my presence at Pretoria on this the 30 day of **NOVEMBER 2020** and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.

CG VAN SCHANKE
CAPTAIN
5530690-6
COMMISSIONER OF OATHS

FULL NAMES: Christoffel Cornelius van Schanke
STREET ADDRESS: Serious Economic Offences Unit, 83 Office Bltw Street, Proclia
CAPACITY: Captain
AREA: Pretoria

SOUTH AFRICAN POLICE SERVICE
SERIOUS ECONOMIC OFFENCES UNIT
2020 -11- 30
ERNSTIGE EKONOMIESE MISDRYWE EENHEID
SUID-AFRIKAANSE POLISIEDIENS

Item “9”

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

10

21 NOVEMBER 2018

DAY 21

FINAL

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authority if it is to benefit someone close to you or along those lines. So there is a constraint, a Minister or President cannot be doing if it is to benefit some unknown persons.

CHAIRPERSON: No thank you very much.

MS BARBARA HOGAN: Thank you.

CHAIRPERSON: I thought at a general level it was important just us to understand what your views are in regard to that.

MS BARBARA HOGAN: Yes.

CHAIRPERSON: Because it may be that the problem might not really be consultation, the problem might be how consultation is understood and how everyone understands their role. Thank you very much. Mr Mokoena?

ADV PHILLIP MOKOENA SC: Ms Hogan if I understood your interaction with the Chair you emphasised on a distinction between a consultation and an interference, and those interferences, we will deal with them in due course when you talk to specifics. For now just to complete the picture, can you explain to the Chair what happens once you had approved the composition of the Board and in relation to the Cabinet so that we get a full picture of your evidence?

MS BARBARA HOGAN: Once the Board is approved, you are saying what is the process or before?

ADV PHILLIP MOKOENA SC: Yes once you had approved as the Minister.

MS BARBARA HOGAN: Oh once I approved then it goes to a subcommittee of Cabinet and that goes through the Cabinet secretary. You know the Cabinet had a secretariat and they run all the processes so that, I have to sign off on it and then that would go to the Cabinet subcommittee. Sometimes the secretariat would say oh you have not added this in and you know there is a certain protocol about what must

go into a memorandum.

Then your fellow Ministers will discuss it and then it will go to Cabinet based, your decision will go to Cabinet, the decision of that subcommittee goes to Cabinet as a recommendation to Cabinet. Cabinet can further engage, the President chairs that Committee and that is the process that takes place and then it is announced the next day.

ADV PHILLIP MOKOENA SC: Yes, and whatever that the President does will have to be within those structures that you have actually testified upon, that Cabinet Committee and those are the processes.

MS BARBARA HOGAN: Those are the processes that I understood and once you become a Minister you are given a handbook which explains the Cabinet decision-making process.

ADV PHILLIP MOKOENA SC: Yes.

MS BARBARA HOGAN: And it is very carefully run. In each department there is one person who is responsible only for Cabinet documentation. That person links into the Cabinet secretariat. There is a very sophisticated filing system. The minutes of those Cabinet meetings are taken very seriously. If you have to do something in terms of a decision of Cabinet the secretariat will remind you. So those documents, and as you know they are State secret, those documents and that process is the ultimate decision-making process of a Government.

ADV PHILLIP MOKOENA SC: Yes.

MS BARBARA HOGAN: Of an executive authority.

CHAIRPERSON: Well let me just ask this question because I think it probably belongs at this stage when you are just talking in general; we have looked at the role of a Minister and the President and the Cabinet. Is there a legitimate role for the

ruling party in the appointments of CEOs and Boards of SOEs? Obviously I ask this question because I have read your statement.

MS BARBARA HOGAN: Yes, ja. Well that is what ...[intervenes]

CHAIRPERSON: In other words I am saying.

MS BARBARA HOGAN: Ja.

CHAIRPERSON: You have told us your understanding about what role the President has, on your understanding he cannot instruct you to say you may or may not appoint so and so.

MS BARBARA HOGAN: Ja.

CHAIRPERSON: And you have said as a Minister you will not just go and just appoint whoever you want, you would want to hear what your fellow Cabinet members have to say you know, but you will appreciate that in the end I think if the power is given to you it is the power you must exercise. Now is there any legitimate role for the ruling party to make any input to a Minister who is a member of the ruling party, when she has to consider whether a particular CEO must be appointed, whether certain people must be put on the Boards or is there none?

MS BARBARA HOGAN: Chair, in law obviously it does not exist you know, the ruling party, there is nothing in law that requires a Minister to consult with the ruling party. The problems that I think many of us may have experienced with the ruling party was that in 1994 when we came to Government the ANC set up a Deployment Committee. Now at that time the entire civil service was occupied by people from the apartheid era. There needed to be transformation, there needed to be transition. At the same time there were large numbers of people who had been in a struggle or had been sympathetic or who were wanting to use their professional skills for a new South Africa and how were they now going to be deployed. And in that sense the

ANC set up a Deployment Committee which would say you Mr Gordhan, you will – no they did not say that to him but you know that it would be preferable if you ... [intervenes]

CHAIRPERSON: You want to say ... [intervenes]

MS BARBARA HOGAN: Let me not interfere with the Minister.

CHAIRPERSON: You are Mr X or Ms X.

MS BARBARA HOGAN: Mr X, Mrs X, you know we would want you to go. Like they said to my partner Mr Kathrada we would like you to be the parliamentary advisor to the President, to President Mandela. And so it was a question when you had to look at the resources available to you, the capable people, the people who understood what a new South Africa actually meant, to be deployed, and it had to be on a massive basis and those are the issues that come up with any change, fundamental change in Government.

I – my own view after an experience nowadays is that I sincerely wonder if a Deployment Committee plays a useful role now. You know it is a handful of people, if you see the number of appointments that go to Cabinet every time, I mean it is huge numbers of people, you do not know how many institutions Government has got, and for a handful of people just simply to decide that this is their preferred candidate, on what basis, what transparency is there?

I am not saying that that Deployment Committee did not always operate with honesty and integrity but the weakness of the system is that if that Deployment Committee is captured by whatever forces it can have a fundamental impact on Government. And so we do have to protect Government from undue influence.

Now that again does not mean, I did it myself, I spoke to the Secretary General. We had differences of views on some matters and we agreed on other

matters, on other appointments. He never wanted to know the full Board or the – you know it was on sensitive matters. Often those sensitive matters were related to issues of transformation but the President – but you know I would consult but I was very clear that I was hearing, because I needed to hear what the issues were, and on the basis of hearing everything then I would apply my mind.

But it became apparent during my time, and we will see it later in a press statement issued by the ANC or statements to the press that even the NWC, the National Working Committee, which is the Executive Committee of the ANC saw it as their right to instruct a Minister who should be appointed and not appointed. That is an abuse of power and that is usurping executive authority. Why have a Minister if you are going to instruct that Minister about what happens.

I feel the same way very strongly about Parliament. When you become an NP your responsibility is to a constitution. You take into consideration of course, ruling party views, but to be instructed by a ruling party about what you should do is usurping the legislative authority of you know finally MPs must make a decision. But yes, robust engagement. Yes discussion, yes persuasion. You do not want anyone appointed who is going to be knifed in the back by some political formations but it cannot be instructions.

CHAIRPERSON: And you may or may not be able to say, to answer this one and feel free to say so if you are unable to, do you know whether there is clarity within the ruling party as to where their role starts and where it stops in regard to for example the appointments of SOEs, Boards and CEOs, and I know you have raised the question of Parliament, it is a very important question as to what a party can say to members of Parliament who are there on his ticket as it is said, and that issue may become quite a big issue in regard to the work of this Commission because one

of the things that we have to look into is what environment existed that may or may not have provided fertile ground for State capture.

MS BARBARA HOGAN: Ja.

CHAIRPERSON: Is there anything in our legislation, is there anything in our electoral system, is there anything in our laws that may have made it easy for certain things to happen which should not have happened? So – but we will deal with those and I hope that people, political parties, Government and everybody can start thinking about that very wide and important issue. But for now my question is simply whether you know whether there is clarity in the ruling party about whether their role starts and where it ends in regard to the appointment of Boards of SOEs, CEOs of SOEs and so on. In other words maybe they can be – their views can be sought but it is just views and nothing more, or whether they can insist on certain appointments.

MS BARBARA HOGAN: Chair, I can only speak to my experience at the time. There was no clarity on this even when there were talks of a Deployment Committee I would ask now who is on this Deployment Committee and who is doing what, and I would be told well it is really not functional. So you know that leaves you very confused about what is happening.

But my first experience of this, my first negative experience of the relationship between the party and State emerged very early on in my career as a Minister. As you will know the ruling party, on the question of State owned enterprises had vetoed any privatisation, and that was the position of the tripartite alliance, and had accepted though that there needed to be restructuring, and that was left very open-ended.

You will recall that I came into that position as – from the Minister of Health into Public Enterprises. In Health I had to deal with the Free State Government

running out of antiretrovirals in August. Government did not have money, I had to go and speak to the American and British Governments to make grants. Now that is how desperate funding is for people on the ground.

So when I came to the portfolio and I had a look at it one of the first things I noticed was how financially stressed, apart from Transnet, many of these SOEs were under control, and SAA, within two days of my appointment I was already harassing the Minister of Finance to give them a guarantee to keep them a going concern. And so I was really concerned about it and I was interviewed by a reporter and I said you know there will have to be an equity partner somewhere in this game, and I was saying that not in defiance, I was saying it because the reality was Government would not – did not have the resources to fund the deficit.

We were also – it was shortly after the 2008 financial crisis so the revenue that we were going to expect was terrible. That was reported. The Secretary General and the Deputy Secretary General kicked up a huge fuss in the media and publically summonsed me to explain myself at Luthuli House, myself and the Deputy Minister. We both went and we explained you know, at that meeting I explained that SAA was in severe problems and it was not easy to see a funding model, and I said trust me you are going to have real problems there and they would not release a statement after that meeting.

But my concern at that stage was if I was seen to be going outside of Government policy it should have been the President who summonsed me not the party. And so I am not saying that I was saying the right or the incorrect thing but it is the President not the party. And what made things even more vulnerable at that time was that a certain faction, and I hate using these words but a certain faction who was supporting a President who came in, President Zuma, was very powerful in

that NEC at that stage. If you look at the National Working Committee at that stage it consists almost entirely of his very vocal supporters.

So there is a weakness there. You know they were driving a whole agenda and they saw themselves as super powerful and they could now dictate. The tripartite alliance could dictate to the Government what it should be doing down to the level of who should be a CEO or not. And I think there are real problems there.

CHAIRPERSON: Thank you very much and again part of the context for this is that as we investigate these allegations of State capture and so on, at a certain stage I will have to make findings and reach conclusions, and one of the things we have to look at is where did things go wrong. And if things that go wrong include the role of a ruling party we would need to deal with that to say this may or may not have contributed to facilitating certain things happening and what needs to be done in the future. What should future ruling parties not do if we are to avoid a repeat of things such as those that we are looking at, so that is the context.

MS BARBARA HOGAN: Yes, absolutely.

CHAIRPERSON: Ja thank you. Mr Mokoena?

ADV PHILLIP MOKOENA SC: Ms Hogan, the issues arising from the Chair's questions, would I be correct that they are dealt in your witness statement with reference to paragraphs 22 to 27? That is where you are talking about a parallel behind the scene processes.

MS BARBARA HOGAN: Yes.

ADV PHILLIP MOKOENA SC: And you are also talking about the Deployment Committee of the ANC. Now if I have understood the debate between yourself and the Chair correctly, what you are saying it is not necessarily that you are not ... [intervenes]

CHAIRPERSON: More a conversation than a debate.

ADV PHILLIP MOKOENA SC: A conversation with the Chairperson.

CHAIRPERSON: We did not have any debate.

ADV PHILLIP MOKOENA SC: There is a thin line Mr Chair, the conversation with the Chairperson, you do not take issue with the question of having to consult the ruling party but I think what we describe as the weakness is the lack of transparency or where there could be inherent conflict.

MS BARBARA HOGAN: Yes.

ADV PHILLIP MOKOENA SC: And that would result in people who are conflicted being appointed regardless of the proper lawful process that you had actually undertaken am I correct?

MS BARBARA HOGAN: Correct yes.

ADV PHILLIP MOKOENA SC: Ja, now you in fact summarise that conversation with the Chair, it is captured in paragraph 21, if you can go there, of your statement, and if you can read paragraph 21 and also for completeness read paragraph 25 and 26 so that at least we get a proper picture of what you wanted to convey to the Chairperson about the parallel behind the scene processes, on page 6 of your witness statement, paragraph 21.

MS BARBARA HOGAN: Okay I have read part of the paragraph 21 that said the pro – you know the assessment of how many came, of how many you appointments were approved, concurred, noted. That and then page 20 ... [intervenes]

ADV PHILLIP MOKOENA SC: Page 7.

MS BARBARA HOGAN: Page 7 then it is ... [intervenes]

ADV PHILLIP MOKOENA SC: Paragraph 25 and 26.

MS BARBARA HOGAN: And 26.

ADV PHILLIP MOKOENA SC: If you can read that so that we can be able to understand better what you are conveying to the Chair.

MS BARBARA HOGAN: Yes, I was appointed a Minister shortly after the Polokwane Conference and that Conference was noted for the emergence of very strong factional tendencies within the ANC. So I say from paragraph 25:

> "Regrettably these factional battles in the ANC only serve to encourage an entrenched nepotism and patronage from within the ranks of the ANC in the tripartite alliance and this would have very damaging consequences for State owned enterprises and by extension for our economy, which I will illustrate below with regard to my experience in the appointment of Board members and CEOs of Transnet and Eskom during my time. It is important to note that there were three damaging processes afoot in my time with record to SOE related appointments. There were the very political and public manoeuvrings of certain elements within the ANC and the tripartite alliance to get their way. Then there were ways that President Zuma and some Cabinet colleagues thwarted my attempts to get Cabinet approval for Board appointments, and I stress the word thwarted. And finally the inexcusable interference with my responsibilities as a Minister by President Zuma that eroded my executive authority, and I refer in particular to Eskom in that regard."

ADV PHILLIP MOKOENA SC: And that is what you were conveying to the Chair is it not?

Item “10”

MR MANTASHE: Yes.

ADV FREUND SC: ...or recording the decisions taken by the 65th National Conference.

MR MANTASHE: Yes, the report. Yes.

ADV FREUND SC: And on the question of Cadre Deployment, we can read for ourselves what we see at 614. You can confirm that those were the decisions taken?

MR MANTASHE: By the resolution of the conference, yes.

ADV FREUND SC: Now I want to take you to something that I am sure that will be a lot more controversial. Page 418, 100.418.

MR MANTASHE: 418...

CHAIRPERSON: You said page 100.418?

ADV FREUND SC: That is correct, Chair.

MR MANTASHE: 418?

ADV FREUND SC: Yes. It is a document on an ANC Secretary General's office letterhead.

MR MANTASHE: Yes, with no signature.

ADV FREUND SC: Yes, with no signature. Quite correct.

MR MANTASHE: Okay.

ADV FREUND SC: Now Chair, you will recall that at the commencement this morning that I said to you that we had put together a bundle of media reports and then I said, the very last page is of a different character that has been included for convenience at that point in the record.

MR MANTASHE: Yes.

ADV FREUND SC: It is obviously not a media report and – but it has a relevance to a media report because this was widely published in the media and there were a number of reports. This is, approximately, in the middle of last year during 2020 or something, asserting that this was a document prepared in the office of – or in the Thule House. And the Thule House issued a denial. They said this is a forgery. There is no such document.

But various journalists have asserted that five different sources within the party confirmed that this is an authentic document. And I want to make clear, I do not know who those people are. I cannot vouch for the accuracy of it but I want to hear, if I may, from you what, if anything, you can tell us about this document?

MR MANTASHE: I will have difficulties to deal with sources and informants in the Commission. My gut feel – it is a gut feel, what I call it, any document of the ANC that has no signature, is not *an ANC document.* [Speaker is not clear.] You may issue a directive to start this. I write a letter. I sign that letter. The evidence now, it is a little – I – my gut feel or my first impression(?) was that, it is a fake.

ADV FREUND SC: But let us look at the content of it. I mean, it is admitted – and it is obviously not signed. And

one of the media reports suggested that it was a draft to be submitted to a meeting. I do not know. But let us look at the content of the report.

MR MANTASHE: My submission is that. It is a document with no signature of anybody in the ANC. We cannot pin anybody down and say what is your reason of this content because anybody who issue correspondence take responsibility for that correspondence. We do not have that correspondence. So if it is no content to date in 2021 or 2020, it will be fake because anybody can craft a fake document and circulate it and make it an ANC document. But if it had a signature, even if you want to call it a fake, we will find it difficult to make it a fake.

ADV FREUND SC: Well ...[intervenes]

CHAIRPERSON: I guess it is strange that it does not even have the position of whoever would have written it.

ADV FREUND SC: No, indeed it does not.

CHAIRPERSON: Ja.

ADV FREUND SC: But what I would like to explore with your leave, Chair, is not its authenticity but the correlation between the content and what is the views of the witness.

CHAIRPERSON: Ja, okay.

ADV FREUND SC: If I may do that.

MR MANTASHE: I cannot talk to contents of a fake document.

ADV FREUND SC: Well, let me ask this then ...[intervenes]

MR MANTASHE: ...to the Commission.

CHAIRPERSON: Ja. Well, it may be that it is a question of how you tried to get the information that you want to get which you might get without reference to the document. [laughs]

ADV FREUND SC: Let me ask you this Mr Mantashe. Is it or it is not compatible with the deployment policies of the African National Congress ...[intervenes]

MR MANTASHE: What?

ADV FREUND SC: ...that the following procedure should be followed with regard to deployment of the following positions, director generals, Chairperson, CEO's and all board of SOE's and the procedure is that the office of the Deputy Secretary General should be informed of all such posts prior to them being advertised and be sent the advertisement once they have been published and that thereafter what is supposed to be presented to the... Well, let me stop there. Is any of that compatible with correct policies and procedures?

MR MANTASHE: I do not have the right to refuse to answer questions but I think I need projection here where I am expected to answer questions on a fake document.

ADV FREUND SC: Are you saying under oath that this is

a fake document?

MR MANTASHE: I am saying nobody – there is no title, there is no date.

CHAIRPERSON: But I do not know Mr Freund whether you want to make any reference to the document at all as opposed to simply asking questions with no reference to the document and see whether ...[intervenes]

ADV FREUND SC: Well, I wish to do both, if I may?

CHAIRPERSON: Ja, okay.

ADV FREUND SC: I wish, firstly, to just confirm because I do not know which further evidence may come before the Commission.

CHAIRPERSON: H'm, h'm.

ADV FREUND SC: And I would definitely wanted to establish as a matter of fact whether Mr Mantashe is telling us of his personal knowledge that he knows. We know it is an unsigned document. We know it is an unnamed document but I want to establish as a matter of fact whether he was saying to us that you know this is a fake or that you assuming and guessing it is a fake.

MR MANTASHE: From February 2018, I was deployed to government. If it was directed to deploy cadres or declare a comrade, I would have read it.

CHAIRPERSON: H'm, h'm.

MR MANTASHE: I would have read it.

CHAIRPERSON: H'm, h'm.

MR MANTASHE: So that is why I regarded it as fake.

CHAIRPERSON: H'm.

ADV FREUND SC: alright. So what you can say from your personal knowledge is that as a cadre who had been deployed, you did not receive it?

MR MANTASHE: Yes.

ADV FREUND SC: Alright. I understand that.

CHAIRPERSON: H'm, h'm.

ADV FREUND SC: Now I have not taken the Chair today through some of the proposing(?) documents that we have been talking about, but I want to understand your testimony about how the processes should work under the ANC policy when the question arises as to the appointment of director generals, chairpersons, CEO's and boards of SOE's. What is the procedure that should be followed in your opinion having regard to the policy documents that you are familiar with.

MR MANTASHE: I am a Minister today deployed by the ANC. I have appointed few deputies. I have appointed boards of state entities in the portfolio... What I do, you see, I inform the Deployment Committee. We are going to advertise this board... because you know why I do that?

I do not want them at the point of actually interviews to say here is a cadre... We are looking for a

something this morning that took me a little bit by surprise. If I can take you to page 100.432 or let us just call it 432.

MR MANTASHE: 432?

ADV FREUND SC: 432. This is your opening statement this morning.

MR MANTASHE: Yes. It took you by surprise?

ADV FREUND SC: Well, the – one detail in it took me by surprise.

MR MANTASHE: Okay?

ADV FREUND SC: I am not saying that it may not also appear in your affidavit. It had. But the point is. I had never – it has never run the bell that it now rings.

MR MANTASHE: I have got it.

ADV FREUND SC: At the foot of page 432, paragraph 61. Do you have that?

MR MANTASHE: Yes.

ADV FREUND SC: You say there:

> "Since 2013... [which is the time we are now talking about] ...after the Integrity Commission recommended that the former President Zuma should step down, the ANC has been undergoing a period of instability..."

And my question is one of fact. What can you tell me about a recommendation by the Integrity Commission and when was it made?

MR MANTASHE: Since 2013, we say so, after the Integrity Commission recommended.

ADV FREUND SC: So are you saying that there was an Integrity Commission recommendation in 2013?

MR MANTASHE: Yes.

ADV FREUND SC: That President Zuma should step down?

MR MANTASHE: Yes.

ADV FREUND SC: Do you know on what basis that recommendation was made?

MR MANTASHE: On what basis?

ADV FREUND SC: They made that recommendation. If this is an Integrity Commission recommending the President should stand down.

MR MANTASHE: No, no ...[intervenes]

ADV FREUND SC: What was it that they relied upon?

MR MANTASHE: No, I cannot be able to give details of the Integrity Commission. I am not a member of hearing the hearing with somebody who is not myself, who was not there.

CHAIRPERSON: I think what Mr Freund is looking at is whether you having being the Secretary General of the ANC at the time, you are aware whether the Integrity Commission's recommendation that President Zuma should step down or – ja, step down. I see there, yes, it says step

down not step aside. Step down. The recommendation that President Zuma should step down was connected in any way with the allegations of the friends of the Gupta family ...[intervenes]

MR MANTASHE: Yes, it was.

CHAIRPERSON: It was connected?

MR MANTASHE: Yes.

CHAIRPERSON: Okay alright.

ADV FREUND SC: And just remind us ...[intervenes]

MR MANTASHE: He did not ask that question.

CHAIRPERSON: Sorry?

MR MANTASHE: He did not ask that question.

CHAIRPERSON: Oh, okay. [laughs] Alright.

ADV FREUND SC: Well, but I will take all the help that I can get.

CHAIRPERSON: [laughs]

ADV FREUND SC: Mr Mantashe, this is an important picture we are now dealing with.

CHAIRPERSON: I think it is very important.

ADV FREUND SC: It is not something that I personally was aware of and I do not know whether the Commission was aware of it.

CHAIRPERSON: Actually, I was not. If you ask me whether the Integrity Commission of the ANC was there in 2013, I was likely to think that no it was not there at that

time but obviously you know that it was there and it made a recommendation.

MR MANTASHE: It was there.

ADV FREUND SC: Ja.

MR MANTASHE: Very active, chaired by Andrew Mlangeni(?).

CHAIRPERSON: Yes.

ADV FREUND SC: Chaired by?

MR MANTASHE: Andrew Mlangeni.

CHAIRPERSON: Yes. Mr Andrew Mlangeni.

ADV FREUND SC: Mlangeni. And staffed by its senior in respect of members of the African National Congress. When I say start, the personnel of the Integrity Commission will fall into that category.

MR MANTASHE: Yes.

ADV FREUND SC: And in fact, I speak now just from my general recollection as a citizen reading newspapers, the very creation of the institution of the Integrity Commission was the product, presumably, of conflict resolution which saw this as a proper device to address allegations of malfeasance and misconduct. Would that be right?

MR MANTASHE: Yes, yes.

ADV FREUND SC: So you have now got a serious problem. You got an Integrity Commission which is recommending that the president of your organisation and

the President of the country must step down. That would obviously been a matter of very great personal concern to you what to do about this problem. Correct?

MR MANTASHE: *Ja, relatively(?) we were all worried*. [Speaker is unclear.]

ADV FREUND SC: Yes.

CHAIRPERSON: I guess ...[intervenes]

MR MANTASHE: Not individually.

CHAIRPERSON: Not individually?

ADV FREUND SC: Collectively ...[intervenes]

MR MANTASHE: Not individually, collectively.

CHAIRPERSON: Ja, ja.

MR MANTASHE: We get this report.

CHAIRPERSON: Can I just ask whether that recommendation was made after the Waterkloof landing?

MR MANTASHE: Yes.

CHAIRPERSON: Or do you not ...[intervenes]

MR MANTASHE: Yes, it was after the Waterkloof ...[indistinct] [Speaker is unclear.]

CHAIRPERSON: Ja, okay alright.

MR MANTASHE: So it was after the Waterkloof landing.

CHAIRPERSON: Ja, okay.

MR MANTASHE: Ja.

FREUND SC: And I understand that you were not a member of that committee. I understand that you would

not have attended and heard the evidence. But my common sense tells me that on the probabilities, if the Integrity Commission was recommending that the President should stand down, they would have had at least summarised the reasons for which they were making that recommendation. Is that correct?

MR MANTASHE: Ja, they would have submitted a report.

ADV FREUND SC: Right. And to the best of your recollection, what were those reasons?

MR MANTASHE: I cannot recollect except that it was connected to the Gupta influence.

ADV FREUND SC: And I do not know whether you have authority to answer this question but would you have any difficulty in making that report available to this Commission?

MR MANTASHE: I am not Secretary General.

CHAIRPERSON: [laughs]

MR MANTASHE: I am not keeping records of the ANC.

CHAIRPERSON: Well, I think the Deputy Secretary General is here. [laughs]

MR MANTASHE: No, he is not here. He is not here.

CHAIRPERSON: [laughs] Well, let me say that if the ANC could make that record available to the Commission, that would be appreciated.

MR MANTASHE: Ja... Except that Deputy Chief Justice,

the problem in converting the Commission into an inquiry into the ANC rather than the state capture.

CHAIRPERSON: Ja. No, no, no.

MR MANTASHE: The ...[intervenes]

CHAIRPERSON: I understand that.

MR MANTASHE: That is quite ...[intervenes]

CHAIRPERSON: Ja.

MR MANTASHE: ...in the ANC that the time you fail(?) in a sense that the Commission is actually trying the ANC.

CHAIRPERSON: H'm.

MR MANTASHE: So a number of documents that are here, internal ANC documents that were brought to the Commission.

CHAIRPERSON: H'm, h'm.

MR MANTASHE: I was even shocked to see ...[indistinct] you have ...[indistinct] meanings of the NWC. They gave the report so ...[intervenes] [Speaker is unclear.]

CHAIRPERSON: Well, I ...[intervenes]

MR MANTASHE: So ...[intervenes]

CHAIRPERSON: I am not even aware that ...[intervenes]

MR MANTASHE: Okay.

CHAIRPERSON: ...about that ...[intervenes]

MR MANTASHE: So the point I am making is that it is an issue that I will have to refer to the organisation.

CHAIRPERSON: No, no that is fine. That is fine.

Item “11”

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

20 JULY 2020

DAY 235

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COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

DATE OF HEARING:	20 JULY 2020
TRANSCRIBERS:	B KLINE; Y KLIEM; V FAASEN; D STANIFORTH

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opt out. He took care of the family, including most of the matters that have to do with the up keeping of the home, as well as, our safety and moved to National Cabinet.

Throughout my term in Gauteng, security matters were the responsibility of the state. Even when the Sunday Times paddled the news before the Commission said, my husband actually reported through an SMS to say this is hogwash. This is [speaking vernacular].

Unless Mr Agrizzi does not know, my husband is a proud African man. A very proud Basotho. Very selfless who has tried everything Chair, even under these conditions, Ever Green Project in Eskom.

Until today, my husband was fighting that case where his preference, including the application of the 30% quota, was ignored because the Ever Green been anyway a Secret Intelligence operator of the African National Congress, the person of Mr Agrizzi.

In my serving the ANC, being the member of, I have seen various business organisations momentarily coming forward to support ANC leaders and programmes, including sharing campaigns and parties of... and parties of leaders of the ANC.

This has not only happened during Comrade President Zuma's term, but with all leaders starting with Comrade President Mandela up to now. I am not sure if Mr

Agrizzi is saying it was because of other ulterior motives that we were working and BOSASA was supporting and working with us in the African National Congress. What would he say of the taxi industry? To date the taxi industry is not subsidised by the State but the taxi industry has worked with us in the ANC using their cars as mobile bill boards, telling supporters of the ANC to rally a state owned entity, national – Chairperson, I beg your pardon, Chairperson, a state owned entity Telkom was one of those who sponsored our national conferences and many other businesses that are included here.

And this has been something that is being done not only for the ANC, not only for me, not only for members of the ANC but this has been part of the democratic operations here in this country where businesses had chosen to support those that they prefer would pursue their interests and would also help to reconstruct and rebuild this country.

The support that was given and the relationship had no strings attached and that is an assertion that Mr Agrizzi himself says that at some point he got frustrated about this relationship. He himself and Mr Nixon, one of the investigators, also confirmed that there has never been a contract or a tender when I was MEC for Environment but I can proudly say my legacy and the legacy of the ANC when

Item “12”

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

26 JANUARY 2021

DAY 331

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COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

DATE OF HEARING:	26 JANUARY 2021
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the questions that the panel raised what went wrong. From your own knowledge and experience you highlight five issues or high level answers that the panel identified, what is your own view of those five points that appear at paragraph 6 of your affidavit?

MR JAFTA: The first point is around the politicisation of the State Security Agency. This is fact, there are – and this is how I understand it was manifested itself and you see it in the projects that were being run. There are monies that left the agency for the purposes of funding political activity principally within the African National Congress, and often when you drill into it, it is not funding the African National Congress credibly, it is to fund activities authored by a particular faction within the African National Congress.

So there would be monies disbursed for that purpose, there would be operations intended to if you will to drill into the credibility of those who were not on the faction, but that is within the African National Congress.

You then have another situation where particularly whenever we go towards an election there would be projects that would be intended and funded to enhance the political fortunes of the ANC and these projects were prosecuted. Now if you go to – this is a matter of public record once again, there's ample which at the time

appeared to be quite strong compared to the NUM and the State Security Agency is used, is employed to found an alternative union that would weaken CAMCU around the platinum belt and then there's – so what I am saying Chair is there is politicisation that manifests itself on participating in inter-ANC activities and now I am into civil society and then you have got projects that talk to, and some of these things ...[indistinct] they talk to the ...[indistinct], they talk to the point I was talking about earlier the uneven effectiveness of compliance assurance instruments.

Then you have got projects where a media, and it is established, and the State Security Agency is employed to fund that. Now nowhere in the mandate of the State Security Agency do you find that the lawmaker anticipated that this entity would also fund a media entity within South Africa, towards what end? There must be a political objective.

Then there is – I am sure Dr Mufamadi spoke to this, there is a project Justice intended in part to influence the judiciary. I put it in this category on purpose because by the time you have a project intended to influence the judiciary it presupposes that there is other work that has been done and the determination has since then been made that to ...[indistinct] whatever in there is with the

Item “13”

MINISTRY: PUBLIC SERVICE AND ADMINISTRATION
REPUBLIC OF SOUTH AFRICA

NATIONAL ASSEMBLY

QUESTION FOR WRITTEN REPLY

DATE: 11 FEBRUARY 2021

QUESTION NO.: 152

Mrs M O Clarke (DA to ask the Minister of Public Service and Administration:

What (a) is the total number of senior managers who do not have the required qualifications and credentials for the positions they currently occupy and (b) in which (i) national and (ii) provincial government departments are they employed and (c) what is being done to rectify this situation?

NW155E

REPLY:

(a) According to information from **PERSAL** as at 15th February 2021, there are currently a total of **9477** Senior Managers employed in the Public Service. Out of this total**, 3301 members** do not have the required qualifications. However it needs to be stated that many Departments do not capture the qualification information on **PERSAL** and therefore the information in the tables below are skewed. The information also excludes the Department of Defence and State Security Agency.

(b) A total of **5447** SMS members are employed in the National departments, **1987** of them do not have the required qualifications. These are from the following departments :

(i) NATIONAL

Name of Department	**Number of SMS Members with qualifications below NQF Level 7/ Not captured**
Agriculture, Land Reform and Rural Development	227
Arts and Culture	1
Basic Education	5
Civilian Secretariat for the Police Service	11
Communication and Digital Technologies	17
Cooperative Governance	34
Correctional Services	67
Education	1
Employment and Labour	79
Environment, Forestry and Fisheries	107
Government Communication and Information System	8
Health	56
Higher Education and Training	52
Home Affairs	56
Human Settlement	46
Independent Police Investigative Directorate	9
International Relations and Cooperation	81
Justice and Constitutional Development	189
Military Veterans	4
Mineral Resources and Energy	31
National School of Government	10
National Treasury	64
Office of the Chief Justice	10
Office of the Public Service Commission	15
Planning, Monitoring and Evaluation	16
Police	228
Public Enterprises	22
Public Service and Administration	32
Public Works and Infrastructure	67
Science and Innovation	44
Small Business Development	15
Social Development	39
Sports, Arts and Culture	22
Statistics South Africa	24
The Presidency	17
Tourism	23
Trade, Industry and Competition	128
Traditional Affairs	7
Transport	25
Water and Sanitation	78
Women, Youth and Persons with Disabilities	20
TOTAL	**1987**

(ii) Out of a total of **4028** Senior Managers who are currently employed at various provincial government department, **1314** of them do not have the required qualifications as described by the aforementioned Directive and they are from the following departments in the following provinces:

EASTERN CAPE

Name of Department	**Number of SMS Members with qualifications below NQF Level 7/ Not captured**
Cooperative Governance and Traditional Affairs	12
Economic Development, Environmental Affairs and Tourism	17
Education	25
Health	47
Human Settlement	14
Office of the Premier	5
Provincial Treasury	1
Roads and Public Works	8
Rural Development and Agrarian Reform	15
Safety and Liaison	1
Social Development	15
Sport, Recreation, Arts and Culture	12
Transport	13
TOTAL	**185**

FREE STATE

Name of Department	**Number of SMS Members with qualifications below NQF Level 7/ Not captured**
Agriculture	18
Cooperative Governance and Traditional Affairs	12
Economic Development, Tourism and Environmental Affairs	8
Education	14

Health	19
Human Settlement	3
Office of the Premier	7
Police, Roads and Transport	15
Provincial Treasury	6
Public Works	9
Social Development	12
Sports, Arts, Culture and Recreation	4
TOTAL	**127**

GAUTENG

Name of Department	**Number of SMS Members with qualifications below NQF Level 7/ Not captured**
Agriculture and Rural Development	25
Cooperative Governance and Traditional Affairs	14
Community Safety	8
E-Government	26
Economic Development	14
Education	42
Health	57
Human Settlement	25
Infrastructure Development	31
Office of the Premier	34
Provincial Treasury	36
Roads and Transport	31
Social Development	22
Sports, Arts, Culture and Recreation	16
TOTAL	**381**

KWAZULU-NATAL

Name of Department	**Number of SMS Members with qualifications below NQF Level 7/ Not captured**
Agriculture and Rural Development	4
Arts and Culture	7
Cooperative Governance and Traditional Affairs	17

Community Safety and Liaison	6
Economic Development , Tourism and Environmental Affairs	25
Education	42
Finance	23
Health	28
Human Settlement	8
Office of the Premier	29
Public Works	11
Social Development	16
Sports and Recreation	6
Transport	24
TOTAL	**246**

LIMPOPO

Name of Department	**Number of SMS Members with qualifications below NQF Level 7/ Not captured**
Agriculture and Rural Development	6
Cooperative Governance, Human Settlement and Traditional Affairs	17
Economic Development, Environment and Tourism	19
Education	23
Health	46
Office of the Premier	6
Provincial Treasury	3
Public Works, Roads and Infrastructure	12
Social Development	4
Sports, Arts and Culture	5
Transport and Community Safety	13
TOTAL	**154**

MPUMALANGA

Name of Department	**Number of SMS Members with qualifications below NQF Level 7/ Not captured**
Agriculture, Rural Development, Land and Environmental Affairs	6
Co-operative Governance and Traditional Affairs	5

Community Safety, Security and Liaison	5
Culture, Sports and Recreation	3
Economic Development and Tourism	9
Education	15
Health	31
Human Settlement	15
Office of the Premier	7
Provincial Treasury	11
Public Works, Roads and Transport	16
Social Development	8
TOTAL	**131**

NORTH WEST

Name of Department	**Number of SMS Members with qualifications below NQF Level 7/ Not captured**
Agriculture and Rural Development	0
Arts, Culture, Spots and Recreation	0
Community Safety and Transport Management	7
Cooperative Governance and Traditional Affairs	1
Economic Development, Environment, Conservation and Tourism	3
Education	0
Health	6
Human Settlement	0
Justice and Constitutional Development	1
Office of the Premier	5
Provincial Treasury	0
Public Works and Roads	2
Social Development	2
TOTAL	**27**

NORTHERN CAPE

Name of Department	Number of SMS Members with qualifications below NQF Level 7/ Not captured
Agriculture, Land Reform and Rural Development	1
Cooperative Governance, Human Settlement and Traditional Affairs	1
Economic Development and Tourism	1
Education	4
Environment and Nature Conservation	0
Health	3
Office of the Premier	3
Provincial Treasury	1
Roads and Public Works	0
Social Development	3
Sport, Arts and Culture	0
Transport, Safety and Liaison	1
TOTAL	**18**

WESTERN CAPE

Name of Department	Number of SMS Members with qualifications below NQF Level 7/ Not captured
Agriculture	0
Community Safety	0
Cultural Affairs and Sport	0
Economic Development and Tourism	4
Education	4
Environmental Affairs and Development Planning	6
Health	9
Human Settlement	2
Local Government	2
Provincial Treasury	3
Social Development	5
The Premier	5
Transport and Public Works	5
TOTAL	**45**

(c) In order to rectify this situation, a Directive on Compulsory Capacity Development, Mandatory Training Days and Minimum Entry Requirements for SMS was issued to departments with effect from 1 April 2017, as determined in terms of Section 3(2) of the Public Service Act as Amended by MPSA. The **Objectives** of the Directive are:

(i) To promote continuous professional development of members of the SMS;
(ii) To ensure that training on identified skills gap is implemented in departments;
(iii) To ensure that compulsory training programmes aimed at addressing the developmental needs of senior managers within the Public Service have been identified;
(iv) To promote and encourage SMS members to be trained in a structured manner;
(v) To promote minimum entry requirements for appointment into the SMS through obtaining a compulsory Public Service specific qualification;
(vi) To achieve a highly competent SMS cadre; and
(vii) To strengthen the recruitment process at SMS level, inter-alia.

It is therefore, compulsory for the identified development needs of SMS members to be reflected in their Performance Agreements as Personal Development Plans. Departments must ensure that such developmental needs are addressed through ensuring that sufficient funding is made available for such interventions.

End

Item “14”

OECD Working Papers on Public Governance No. 6

Study on the Political Involvement in Senior Staffing and on the Delineation of Responsibilities Between Ministers and Senior Civil Servants

Alex Matheson,
Boris Weber,
Nick Manning,
Emmanuelle Arnould

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OECD

STUDY ON THE POLITICAL INVOLVEMENT IN SENIOR STAFFING AND ON THE DELINEATION OF RESPONSIBILITIES BETWEEN MINISTERS AND SENIOR CIVIL SERVANTS

Alex Matheson, Boris Weber and Nick Manning, with Emmanuelle Arnould

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Boxes

ACRONYMS

APA	Administrative Procedures Act (United States)
CSC	Civil Service Commission
ECIE	Executive Council on Integrity and Efficiency (United States)
GAO	General Accounting Office (United States)
GSA	General Services Administration (United States)
HRM	Human resource management
LOLF	La Loi Organique Relative aux Lois de Finances (du 1er Août 2001) (France)
MSPB	Merit Systems Protection Board (United States)
OGE	Office of Government Ethics (United States)
OMB	Office of Management and Budget (United States)
OPM	Office of Personnel Management (United States)
OSC	Office of Special Counsel (United States)
PCIE	President's Council on Integrity and Efficiency (United States)
PSC	Public Service Commission
SELOR	Bureau de Sélection de l'Administration Fédérale (Belgium)
SGAE	Secrétariat Général des Affaires Européennes (France)
SSC	State Services Commission (New Zealand)

INTRODUCTION[1]

Overview

In their quest for legitimacy, democratic regimes find themselves having to balance two values that can be in some tension: fair and non-politically partisan public service delivery and, subject to the law, the responsiveness of public servants to the policies of the current executive.[2]

Neutrality, in the sense of political non-partisanship in public administration, is of course a precondition for ensuring that, regardless of their political orientation, citizens are treated fairly and in an equitable manner. Operationally it is delivered by emphasising professionalism, merit and competence amongst public servants. These values are important to the level of justice and continuity in public administration – arguably a significant determinant of how much trust citizens place in their system of government. At the same time public servants must be accountable to the government[3] for the effective delivery of its programme, and responsiveness of the administration to the government of the day within the law and the constitution is key to the effective implementation of government policies (Sossin: 2006).[4]

This report depicts the way in which different countries have developed institutional arrangements which balance these two concerns, to avoid the extremes of a self-serving public service immune to political leadership, or an over-politicised public service hostage to patronage and serving partisan rather than national interests.

Although informed by a systematic survey of expert respondents, the conclusions of the study are inevitably somewhat speculative for two reasons. First, day-to-day practice can differ strikingly from constitutional, legal or administrative theory – and without other survey data, it is hard to know how closely reported behaviours reflect reality.[5] Second, political neutrality is not a sharply defined goal – it is a broad judgment that can be made only over a considerable period of time. The tensions between the values of neutrality and responsiveness are not always evident in the short term. Political responsiveness can be enhanced by selecting staff on the basis of both merit and commitment to a particular policy programme. The question is whether those staff would just as willingly assist in the implementation of the policy priorities of a new government, and the next.

The study considers appointments to mainstream public service managerial positions. Other than for some occasional comparisons, it does not consider the appointment of political advisors outside of the usual public service hierarchy. In some settings this can be a significant body of staff.[6]

The report highlights that political involvement in administration is essential for the proper functioning of a democracy. Without this an incoming political administration would find itself unable to change policy direction. However public services need protection against being misused for partisan purposes, they need technical capacity which survives changes of government, and they need protection against being used to impair the capacity of future governments to govern.

In summary, the key findings of the report are:

1. While principles of public service neutrality in the sense of non-partisanship are espoused by all countries in the survey, this does not equate to an apolitical process for senior appointments.

2. Countries have a range of laws, conventions and procedures which spell out the division of responsibility between ministers and civil servants, and in some cases by prohibiting politicians or civil servants from being involved in certain areas.

3. There is diversity in the institutional oversight arrangements for enforcing limitations on political involvement in staffing matters and in complying with restrictions on functional roles.

4. Informal arrangements, and particularly long-standing popular conventions, are very significant when assessing arrangements for ensuring non-partisan public services.

5. Constraints on party political influence on the public service vary with constitutional type and administrative history – and that political involvement can be a rational response to situations where the executive faces structural arrangements which generate a multiplicity of principals who might block change. Put starkly, when there are multiple principals, the single political principal with some responsibility for the sector portfolio (minister, secretary in the United States, etc.) faces a distinctive incentive for politicization as it gives them a stronger handle on an otherwise unresponsive bureaucracy. This conclusion argues against the assumption that underpins much public management literature, which warns about the negative effects of political involvement and often suggests that purely administrative determination of staffing decisions is the preferred state and that any steps down the path of political involvement are intrinsically damaging to governance.

These findings appear to encompass both the *Rechtsstaat* continental European civil service traditions and the Anglo-Saxon "public interest" tradition.[7]

In offering a framework for any country level review of the political/administrative boundary, the report suggests that there are four key questions which merit consideration:

1. Is there a problem to be solved?

2. Could this problem implicate the political/administrative interface?

3. Is the nature of the existing oversight arrangements fully understood?

4. Are the oversight arrangements, formal and informal, appropriate for the degree of political involvement envisaged in staffing issues?

In each case, it provides the detailed lines of inquiry which can throw light on these questions.

There are three modest claims that the authors make for this study. First, it should assist in opening up an issue for discussion amongst practitioners in the OECD. There has been a tendency, particularly in Westminster-based systems, to assume that a completely apolitical appointment process is in some way the ideal, and that any evidence of political involvement is a departure from a preferred path. This study might provide some encouragement for those that note that the issues are rather more shaded than this would suggest and that the part played by informal institutions in support of merit and of separation between administrative and political roles is significant.

Second, and related, the study identifies a series of questions which will be pursued in future OECD surveys of human resource management within the public sector.

Finally, and consistent with its part-funding from the World Bank, the study may offer interested practitioners outside of the OECD a slightly more realistic overview of the nature of political involvement in the senior civil service than has been available to date.

Methodology

This report draws on an empirical examination of how different national systems define the sphere and boundaries of political influence in the management of the public service. It does not assess whether these arrangements are, of themselves, "effective". Such a judgement can be made only after observing a governmental system over a period of time, and assessing whether it earns a broader legitimacy and trust from its citizens or whether these ends have been undermined by a self-serving and politically unresponsive civil service, or by politically partisan patronage by ministers in their use of public resources.

The research for the report is based on:

- a literature review;
- a study of legal texts, constitutions, laws, regulations, codes of conduct;
- a survey and subsequent interviews with 12 country contacts (federal government of Belgium,[8] Denmark, France, Italy, Korea, Mexico, New Zealand, Poland, Sweden, the United Kingdom, the United States and South Africa). The countries selected offer diversity in regards to region and to political systems.

The country experts responded to a survey covering general arrangements, historic development, personnel management, the delineation of functional responsibilities, variations of terms during the period of elections and oversight arrangements. Those contacts were current or former high-level public servants, some of them the heads of general staffing or recruitment offices. It should be noted that they responded with experience and considered judgement, but did not speak formally on behalf of their respective governments. The survey focused on the appointment and management arrangements for the five most senior levels directly below the politically appointed minister.[9]

The study looks at various means by which the systems of government achieve a balance between political neutrality in the sense of non-partisanship and responsiveness of the public service. These include legal and conventional constraints on ministerial decision-making, the promotion of a culture of apolitical professionalism amongst public servants (however appointed), formal delegations and divisions of labour between ministers and public servants, openness of process, and oversight by legislative or judicial authorities.

Unless otherwise stated, the source for all tables within the report is the OECD survey of expert respondents undertaken between March and June 2006.

The research takes core ministries as the "base case", but also examines whether and how agencies or other arm's-length bodies diverge from this.

The research was significantly funded by the World Bank.

CONTEXT

1. The public service is inherently political

Discussions about the relationship between bureaucrats and politicians frequently take Max Weber's model of bureaucracy as a starting point (Weber: 1980). Weber argued that the division of labour between politicians and bureaucrats would work best when there is a clear distinction between the two sets of actors. He saw administrators as instrumental and subordinate to politicians – as technical experts who should advise and efficiently execute the decisions of politicians as the sovereign representative. He saw "neutral competence" as a determining characteristic of the administrator.

However while politicians are in charge of defining the policies to be implemented by bureaucrats, Weber pointed out the danger that career civil servants might dominate politicians through their superior knowledge, technical expertise and longer experience, in contrast to the frequently changing ministers. This observation corresponds to what new institutional economics refers to as "information asymmetry" – the possibility that the "principal" may be thwarted in their efforts to control and direct the "agent", because the agent is in a position to hide, or fail to reveal important information. The modern movement to formalise agreements on goals and reporting requirements between the political and administrative domains (and between the legislative and executive domains) can be seen as attempting to reduce this informational disadvantage.

Weber's theoretical model, often considered as an ideal type of bureaucracy, was, however, rarely found in practice. (Peters *et al*: 2004) argue that the public service is inherently a political creation, and, thus can never be made fully apolitical. Bureaucrats, in delivering a public service to the citizens, inevitably participate in the political role of deciding who gets what from the public sector (Christensen and Laegreid: 2004).

However, many authors claim politicisation has increased over the years, citing a "thickening" with added layers of political appointees even in countries that already possessed several politically appointed echelons such as the United States (Dunn: 1997; Light: 1995; Peters *et al*: 2004). (Aberbach, Putnam *et al*.: 1981; Aberbach and Rockman: 1994; Hart: 2006) similarly report a growing involvement of political actors in roles which are traditionally played by public servants.

Critics point to the negative effect this has on policy making. Politicians' options become more limited when civil servants do not feel free to deliver free and frank advice and do not "speak truth to power" undermining the key "challenge" function in policy assessment. Furthermore, they argue, it makes career civil service less attractive since the lead is taken by more and more political appointees (Campbell and Wilson: 1995; Dunn: 1997).

Others argue that this is not only understandable but to some extent necessary. Ministers in a legally appointed government have a legitimate right to control their government's organisation and reduce deflection from their policy direction. (Peters *et al*: 2004) observe that the delegation and deregulation of New Public Management reforms has in effect reduced the control of politicians over bureaucrats. However, because in the public eye ministers are still held responsible for the actions of their departments, ministers may seek to control their administration by appointing loyal followers whom they would trust to implement their policy decisions without tampering with them.

Rose (1976) offered the criticism that career civil servants were historically often not responsive enough to changes in the priorities of their political leaders. Responsiveness to the elected officials is now widely seen as a legitimate way of being responsible to the citizens (Dunn: 1997; Hood and Peters: 2004; Self: 1972). The "neutral competence" of civil servants is therefore complemented by the somewhat contrasting value of "responsive competence".

2. Balancing values and making tradeoffs

2.1. A hierarchy of public service behaviours

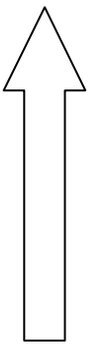
How would we know if the balance between fair and non-politically partisan public service delivery and the responsiveness of public servants to the policies of the current executive was about right? We could make the connection with public trust – but this is a rather slippery issue as trust is capable of many meanings and is very resistant to precision (OECD: 2005a).

Arguably, the balance is right when the resulting behaviour of the public service supports a perception of the legitimacy of government. Values such as probity or propriety are thus not just ends in themselves; their demonstration through the behaviour of public servants contributes to the public willingness to be governed (OECD: 2000).

If this is a key test, then there are several areas in which we might look for evidence of legitimacy-supporting behaviours as depicted in Figure 1.

Figure 1. Hierarchy of public service behaviours underpinning the legitimacy of government as an institution

Short term significance for government legitimacy



Long term significance for government legitimacy

RESPONSIVE PUBLIC SERVICE	PERFORMING PUBLIC SERVICE
Civil service faithfully executes policies of the day. ***Legitimacy is supported through responsiveness to political priorities***	Meets needs of client groups. Communicates and consults with them. ***Legitimacy is supported through proficiency/quality in service delivery***
IMPARTIAL AND INCLUSIVE PUBLIC SERVICE	
Serves interests of all citizens, attends to long-term impact of policies. Whole-of-government interest not subordinated to sectoral interests. Does not burden future generations. Adaptive – takes "hard" resource and organisational decisions when necessary. ***Legitimacy is supported through visible concern for the collective interest***	
CONSTITUTIONAL RESPECT AND CONTINUITY	
Constitution and law-abiding in spirit/action. Respects individuals and communities. Sense of security maintained. Transparent decision-making. Use of coercive power safe-guarded. Collective interest protected from private gain. Professional civil service under legitimate political direction, ensures policies are carried consistently and without political bias. A government is constrained from taking action which jeopardises the legitimacy of future governments. ***Legitimacy is supported through stability and maintenance of trust in public institutions***	

Source: Developed from OECD (2005b).

These four domains of public service behaviours are in a hierarchy, with respect for the Constitution and institutional continuity as both the most traditional requirement on the public service, and also the area in which the legitimacy that they support is likely to be long-lasting. By contrast, earning legitimacy through quantitatively demonstrated "performance" measures is a relatively recent arrival on the scene – and the legitimacy that behaviours in this domain earn for government could be seen as somewhat more fragile.

Setting these out in more detail:

1. *Respect for the constitution and for institutional continuity*. Public service institutions do not have authority over political institutions, but they do act as a quasi-constitutional constraint on those institutions. Legitimacy derives from adherence to constitutional and legal requirements, regardless of the implications for the elected government.

2. *An impartial and inclusive public service.* Moving one step up the hierarchy, a demonstrable concern for the collective interest from the public service provides assurance that non-elected public officials do not exert power arbitrarily in their own interests, to support their friends, to harm their enemies, or act with impunity to deny citizens basic rights (for instance by unlawful detention, or denial of benefits), also provides a lasting legitimacy for governments (OECD: 2000). Impartiality in this sense is a widely recognised aspiration of the public sector. However, many commentators have associated this with representativeness on the basis that impartiality is all but impossible in practice without this.[10] Legitimacy in this sense can be undermined by arrangements which allow the public service and the public powers and resources they administer, to be used as party political tools – for example if political opponents are subjected to more active tax investigations than ruling party supporters, or if permits or licences for trade go only or mainly to the party faithful.

3. *A responsive public service.* It seems increasingly the case that governmental legitimacy can be improved through demonstrated responsiveness on the part of the public service to political priorities. Responsiveness to the elected officials is now widely seen as a legitimate way of being responsible to the citizens (Dunn: 1997; Hood *et al*: 2004; Self: 1972). Rosenthal (1977) stresses the role modern media plays. In times of increasingly frequent public-opinion polls, e-mail, call-in radio and television surveys greater responsiveness is expected of legislators and subsequently of the government and its administration. This is most readily but perhaps most dangerously achieved by emphasizing political criteria in the selection, retention, promotion, rewarding and disciplining of public servants.

4. *A performing public service.* Finally, as Schick (2005) has pointed out, governments must increasingly earn their legitimacy through delivering on their service delivery promises. Garrett, Thurber *et al.* (2006) provide some examples of how an excessive concern for politically loyal senior executives to increase political responsiveness can undermine efficiency and service delivery.

2.2. The political/administrative interface

Managing the political/administrative interface is a key aspect of the tradeoffs that must be made. In industrialised democracies, the objectives of political involvement in senior appointments are usually politically responsive policy and implementation, rather than patronage in the form of jobs to party faithful or family members (Peters *et al*: 2004). This is doubtless because there are other mechanisms, particularly transparency, which inhibit nepotism in those countries, although this is certainly not to suggest however that "jobs for the boys" has become extinct amongst governments of industrialised countries. Moving too

far down the path of politicised appointments opens up the risk that responsiveness will be achieved at the expense of the other key behaviours of the public service (OECD: 2003).

In countries with weaker governance systems, politicisation in civil service recruitment and management presents greater risks, and exposes the system to the associated problem of senior officials lacking the competence to carry out their functions.

Box 1. Pressure for political responsiveness in the United Kingdom

The pressure to find mechanisms that encourage responsiveness in the administration has arguably been particularly strong in the Westminster model as the distinction between political and administrative appointees within the traditional career civil service is very clear resulting in what many consider to be a public service that is particularly resistant to political priorities.

In the United Kingdom the most senior levels are occupied by professional career officials who, for a long time, have held the monopoly of advice to the government. Campbell *et al.* (1995) claim that in no other system ministers are so dependant on bureaucrats. Fast-track civil servants write answers to Parliament and speeches for ministers. Neutrality in the sense of non-partisanship is strongly valued and civil servants are expected to work for any government with the same commitment. (Campbell *et al*: 1995) have noted that the same officials have had to enact contradictory policies for subsequent Labour and Conservative governments, for example the nationalisation and then privatisation of ports, leading them to conclude that civil servants in the Westminster model should not only be politically neutral but politically "promiscuous".

Historically, critics have argued that the resulting generalist approach has led to amateurism (Lord Fulton (chair): 1968). Ministers have often voiced a concern about their strong dependence on civil servants and reported that they feel that civil servants are insufficiently responsive. Conversely, civil servants have often reportedly felt their advice was ignored. At the end of the 1980s, these tensions were particularly strong and Campbell *et al.* (1995) note that Prime Minister Thatcher explicitly identified what she saw as an unresponsive civil service as an obstacle to implementing her policy changes. Through the Next Steps Programme the Thatcher Government created agencies outside the traditional civil service. None of the chief executives came from the traditional fast track whose members have held top positions so far and, as James (2003) reports, one-third were recruited from outside the civil service. Responsiveness to government priorities was a priority and James (2003) observes that ministers sometimes intervened *ad hoc* on a day-to-day basis when they felt it necessary. In his survey, the staff of the Benefits Agency, for example, complained about unjustified interference of the department of Social Security, including the minister.

The original focus of the Next Step agencies was responsiveness in service delivery. However, by the mid-1990s, policy analysis and advice had increasingly been contracted out also. Policy units were introduced, with some half of their staff recruited from outside of the civil service. Campbell *et al.* (1995) argue that such measures and the rise of think tanks have broken the monopoly of civil servants over policy and allowed the politicians to regain dominance over the administration.

Schick (2005) has pointed at the risk that responsiveness and service delivery performance could be achieved at the expense of the long-term and more fundamental foundations of legitimacy (stability and trust in the public institutions and concern for the collective interest). Flexibility and service delivery are popular – but as Figure 1 highlights, they do not by themselves sustain the legitimacy of government. In fact, if they are achieved by unconstrained political involvement which erodes the impartiality and inclusiveness of the public service and the degree to which it is seen to respect the constitution, then they undermine the longer term legitimacy of the government.

Box 2. Pressures for inclusiveness in Mexico

The case of the administrative reform in Mexico in 2003 is an example of how a deeply politicised public service is seen to undermine the legitimacy of government because of its exclusion of key actors. Before the reform public officials were hired in a way that excluded followers of opposition parties and merit criteria were neglected in the selection process.

Octavio (2004) reports the widespread concern about "the lack of a true democracy" in Mexico. Gault and Klinger (2004) characterise the situation in Mexico since the 1920s as a one-party system with, in addition, power strongly centralized in the executive branch. Philip (2003) differentiates three phases: pre-1994 as authoritarian; 1994 to 2000 as democratisation; and from 2000 on as a democratic phase. This successful democratisation has been strengthened by the reform of the public service in 2003.

Prior to the reforms, the upper level of the bureaucracy comprised about 2 700 political appointees, with connections. The President chose his cabinet secretaries and they would choose their own immediate subordinates, who would then select theirs. High-level bureaucrats belonged to groups of allies known as "*camarillas*", bureaucratic politicians who moved from one short-term posting to another, building their career on political stances.

This situation led to widespread problems of corruption and led to rising criticism from international agencies and donor countries. The election of Vicente Fox in 2000 was the first change of power since the 1910 Revolution. In the following years, Congress agreed a major reform of the public service introducing a career-based merit system for mid and high levels of the public service.

Approved in April 2003, the Professional Career Service Law (*Ley de Servicio Profesional de Carrera*) decreed that, following a procedure that assessed performance, and competencies, around 42 000 bureaucrats will be given “tenure”. Since 2003 their further advancement and the recruitment of new administrators depends on merit criteria judged by collegiate bodies formed by public officials from within the agency, the Selection Committees. The number of purely political appointees was reduced to a few hundred.

The beginning of this reform movement can be found in independent agencies such as the statistics agency (*Instituto Nacional de Estadística Geografía e Informática*) which was considered as a "Weberian island" within the Mexican spoils system. The set up of the Federal Electoral Institute staffed by a professional career civil service as early as 1990 led to more efficient oversight of elections and to some observers it seemingly served as a model for subsequent broader administrative reform.

Further examples are the independent and highly reputed Central Bank (*Banco de México*), an autonomous institution since 1994, and the Diplomatic Service, which was created as a career civil service in the 19th Century.

While in the United Kingdom independent agencies in the framework of the Next Step strategy were seen as a means to enhance responsiveness of the administration, the Mexican agencies were associated with steps towards increased political neutrality within a newly created career civil service.

Under any combination of arrangements, the institutional arrangements for oversight can be dauntingly complex, as Box 3 suggests for the United States. Further details are provided in Recent developments leading to re-examination of the political/administrative boundaries in Annex 1. Reported Trends.

Box 3. Developments in oversight agencies in the United States

The 1970s saw the creation of the Federal Elections Commission, the Office of Government Ethics (OGE), the Merit Systems Protection Board (MSPB), and the Office of Special Counsel (OSC). Also in the late 1970s a system of Inspector General offices was created. The 1980s witnessed the establishment of the President's Council on Integrity and Efficiency, and the strengthening of OGE and OSC. The 1990s have seen the establishment of the Office of Federal Financial Management within the Office of Management and Budget and the reauthorization of the independent counsel law.

A second development has been the use of disclosure as a tool for achieving greater accountability on the part of public officials. A public financial disclosure system for all three branches of government was established by law in 1978. The 1989 Ethics Reform Act provided for an improved system of confidential financial disclosure. These financial disclosure systems, which apply the principle of transparency to the financial interests of public officials, are a basic tool for identifying potential conflicts of interest and working out appropriate remedies.

A third development has been the promulgation of more detailed rules to govern the conduct of government officials in both the executive and legislative branches. Standards of Conduct for the executive branch recently issued by the Office of Government Ethics provide specific guidance on such questions as gifts, conflicting financial interests, impartiality, seeking employment, misuse of position and outside activities.

Source: Gilman (2003).

FINDINGS

3. Formal institutional arrangements

3.1. Codification of the Principles of Political Neutrality

The principle that civil servants should undertake their duties in a manner that serves the collective rather than a partisan interest is espoused by all countries in the survey, either by entrenching the principle within the Constitution, a law or regulation, or by limitations on political involvement in administration, or by strong conventional or customary support.

Table 1. Principle of political neutrality in administrative actions

	Principle of political neutrality spelled out in Constitution, law or regulation	Administrative law places limits on political involvement in public service administration
Belgium	Yes	Yes
Denmark	No	Yes
France	Yes	Yes
Italy	Yes	Yes
Korea	Yes	--
Mexico	Yes	Yes
New Zealand	Yes	Yes
Poland	Yes	Yes
Sweden	No[11]	Partly[12]
United Kingdom	Yes	Yes
United States	Yes	Yes
South Africa	Yes	Yes

Note: **Bold** = strong public or customary support of the principle of political non-partisanship.

The legal framework and principles of political neutrality are usually present, but expressed in many different ways. Country respondents generally agreed that the laws and/or associated conventions did establish the principle of apolitical public service. Denmark and Sweden are both countries with strong administrative law which is very specific about how government policies are to be executed and, while most countries had laws which asserted political non-partisanship as a positive value, for these countries political non-partisanship was seen as the logical consequence of clearly defined administrative processes.[13]

Political non-partisanship is entrenched in the constitution for Korea and Italy, but most countries spell out the principle in civil service laws or codes that define political non-partisanship as a value. In the United Kingdom, a Civil Service Code and Civil Service Management Code also sets out various restrictions on involvement in political activity. In France certain categories of civil servants face more severe restrictions than the general public service. For example members of the military are not allowed to belong to any association of a political nature.[14]

Of the countries assigning less importance to political non-partisanship of public servants (though still acknowledging it), the United States have a strong constitutional framework in which the relatively powerful role of the legislature imposes an external constraint on the public service, which is not so present

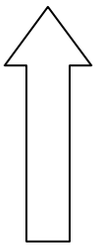
in other countries. In Italy, another country with less customary support of the principle, legal arrangements limiting political involvement in public service administration have been introduced for the first time in 1993. However, the direction of change for direct political control of the public service has been reversed several times in recent years.

3.2. Political involvement in the careers of senior civil servants

While there is near universal agreement on the general principle of political non-partisanship, it is not necessarily equated with an apolitical process for senior appointments. The survey showed there is wide diversity in the level of involvement by politicians in the appointment and management of senior civil servants. It is important to note that in the tables that follow, the fact that a politician is involved in appointments or dismissals does not, *per se*, make that appointment or dismissal political or partisan. For example, the Swedish Constitution requires that all appointments to posts in the public administration should be made "on objective grounds such as skills and merits" even though they might be made by politicians.

Table 2. Who appoints?

More political



More administrative

Country	Level 1	Level 2	Level 3	Level 4	Level 5	Special political advisors outside normal hierarchy
United States	Political	Political	Political	Political-hybrid	Political-hybrid	Political
Sweden[15]	Political	Political	Political	Political	Adm.	Political
Italy[16]	-	-	Political	Political	Adm.	Political
South Africa	Political	Political	Hybrid.	Hybrid.	Adm.	--
Mexico	Political	Political	Adm.	Adm.	Adm.	Hybrid
France	Political	Hybrid	Hybrid	Hybrid	Adm.	--
Belgium	Hybrid	Hybrid	Hybrid	Hybrid	Hybrid	Political
Poland	Political	Hybrid	Adm.	Adm.	Adm.	--
Korea	Political	Adm.	Adm.	Adm.	Adm.	--
New Zealand	Hybrid[17]	Adm.	Adm.	Adm.	Adm.	Hybrid
Denmark	Hybrid	Adm.	Adm.	Adm.	Adm.	--
United Kingdom	Adm.	Adm.	Adm.	Adm.	Adm.	Political

Notes:

Adm. = administrative.

Hybrid refers to a procedure in which administrative selection criteria are combined with political considerations. The situation in the United States is referred to as political-hybrid as purely politically driven appointments coexist with administratively determined Senior Executive Service appointments at some levels – and in some agencies most if not all senior managers are political appointees.

On this measure, the countries sampled diverge significantly, with the biggest contrast being between the United States where most senior appointments are directly made by politicians, and Denmark and the United Kingdom where there are no politically-driven appointments at all (apart from political advisers outside of the normal hierarchy).

Most senior levels in the public service in the United States serve "at the pleasure of the President" and can in principle be dismissed readily. The dominant role in most appointments is played by the Personnel Office of the White House which is run by politically selected administrators, appointed by the President. The only non-political actor involved is the FBI which conducts a background check on candidates but which has no other direct influence in the appointment procedure. Exceptionally, in the case of a conflict of interest, the Office of Government Ethics may be involved.

Political involvement in the appointment procedures in Sweden and Italy is only slightly shallower. In these countries, public servants are appointed administratively at level 5 and below.

Conversely, in the United Kingdom even the most senior positions are filled by administratively appointed career officials who are expected to serve any elected minister with the same commitment (see Box 1).

As far as the intermediate systems are concerned, there are two types. One can be seen in the Mexican system which draws a clear line between different levels of senior civil servants where the higher ranks are appointed politically and the lower ones using an administrative procedure.

The second type is illustrated by the systems in the federal government of Belgium where senior civil servants – unlike staff working in the political cabinets – are appointed by a hybrid procedure. For example at level 1 (position of Chairman of the Board), administrative selection criteria like merit and experience are combined with a final political decision. Typically there is first an administrative selection procedure made by the *Bureau de Sélection de l'Administration Fédérale* (SELOR) which establishes a shortlist of suitable candidates from which the minister makes the final choice. During the administrative procedure, SELOR puts together a jury which consists of high level civil servants as well as human resources, management and technical experts from the public and private sector. They engage in a complex procedure in which applications are studied and interviews evaluated and which leads to a shortlist that is then presented to the minister (see Annex 3: Hybrid Appointment Procedures: The Example of Belgium).

Appointment is the most powerful personnel instrument that politicians can wield – although appointing political sympathisers does not guarantee they will follow a party line, just as administrative appointment does not necessarily prevent the courting of political favour. Potentially, influence could also be exerted through management procedures such as for dismissal, promotion or even transfer to another position. In most cases the power of dismissal rests with the same body that makes appointments. In Westminster systems, transfer is sometimes used to move senior public servants who for one reason or another are not able to work effectively with a particular minister. This is sometimes referred to as when "the face doesn't fit".

Table 3. Who dismisses?

More political

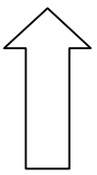
More administrative

Country	Level 1	Level 2	Level 3	Level 4	Level 5	Special political advisors outside normal hierarchy
United States	Political	Political	Political	Political	Political	Political
Italy	-	-	Political	Political	Adm.	Political
South Africa	Political	Adm.	Adm.	Adm.	Adm.	--
Mexico	Political	Hybrid	Adm.	Adm.	Adm.	Political
Poland	Political	Hybrid	Adm.	Adm.	Adm.	--
France	Political	Hybrid	Hybrid	Hybrid	Adm.	--
Belgium[18]	Hybrid	Hybrid	Hybrid	Hybrid	Hybrid	Political
New Zealand	Hybrid	Hybrid	Adm.	Adm.	Adm.	Hybrid
Sweden[19]	Hybrid	Hybrid	Hybrid	Hybrid	Adm.	Political
Korea	Political	Adm.	Adm.	Adm.	Adm.	-
Denmark	Hybrid	Adm.	Adm.	Adm.	Adm.	--
United Kingdom	Adm.	Adm.	Adm.	Adm.	Adm.	Political

The picture emerging from the overview of appointment arrangements is more or less replicated in looking at dismissal procedures. However, in the case of South Africa, the autonomy of administrators on levels 2, 3 and 4 is strengthened. All are appointed by a political or hybrid procedure, but can only be dismissed through a purely administrative process.

Table 4. Who promotes?

More political



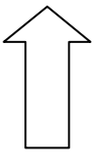
More administrative

Country	Level 1	Level 2	Level 3	Level 4	Level 5	Special political advisors outside normal hierarchy
United States	Political	Political	Political	Political	Political	Political
Italy	--	--	--	Political	Political	--
South Africa	--	Political	Hybrid	Hybrid	Hybrid	--
France	Political	Hybrid	Hybrid	Hybrid	Adm.	--
Mexico	Political	Hybrid	Adm.	Adm.	Adm.	--
Poland	Political	Hybrid	Adm.	Adm.	Adm.	--
Belgium[20]	--	--	--	Adm.	Adm.	Political
Korea	Political	Adm.	Adm.	Adm.	Adm.	-
New Zealand	--	Adm.	Adm.	Adm.	Adm.	
Denmark	Hybrid	Adm.	Adm.	Adm.	Adm.	--

In South Africa, the strengthening of administrative autonomy identified in Table 3 is somewhat attenuated by the promotion arrangements. Table 4 indicates that although administrators on levels 2, 3, and 4 cannot be dismissed on political grounds, their career advancement does depend on political considerations. The same observation is valid in Italy where an administrator at level 5 can be appointed to level 4 and an administrator at level 4 can be appointed to level 3.

Table 5. Arrangements for transfer to another position at the same level

More political



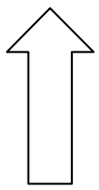
More administrative

Country	Level 1	Level 2	Level 3	Level 4	Level 5	Special political advisors outside normal hierarchy
United States	Political	Political	Political	Political	Political	Political
Italy	--	--	--	Political	Adm.	-
South Africa	Political	Hybrid	Hybrid	Hybrid	Adm.	-
Mexico	Political	Hybrid	Adm.	Adm.	Adm.	Political
Poland	Political	--	--	Adm.	Adm.	--
France	--	Hybrid	--	Hybrid	Adm.	--
Belgium[21]	--	--	--	Adm.	Adm.	Political
Korea	Political	Adm.	Adm.	Adm.	Adm.	-
Denmark	Hybrid	Adm.	Adm.	Adm.	Adm.	-
United Kingdom	Adm.[22]	Adm.	Adm.	Adm.	Adm.	Political

It can be argued that the United Kingdom case indicates that arrangements for transferring an administrator at level 1 to a position at the same level can potentially be open to political involvement – but any replacement will have to be administratively chosen.

Table 6. Arrangements for performance assessment

More political



More administrative

Country	Level 1	Level 2	Level 3	Level 4	Level 5	Special political advisors outside normal hierarchy
United States	Political	Political	Political	Political	Political	Political
France	Political	Political	Political	Hybrid	Hybrid	--
Italy	--	--	Political	Adm.	Adm.	Not applicable[23]
South Africa	Political	Hybrid	Hybrid	Hybrid	Adm.	
Poland	Political	Hybrid	Adm.	Adm.	Adm.	--
Belgium[24]	Political	Hybrid	Adm.	Adm.	Adm.	Political
Mexico	Political	Hybrid	Adm.	Adm.	Adm.	Political
New Zealand	Political	Adm.	Adm.	Adm.	Adm.	Hybrid
Denmark	Hybrid	Adm.	Adm.	Adm.	Adm.	
Korea	Hybrid	Adm.	Adm.	Adm.	Adm.	--

Arrangements for performance assessment confirm the overall picture seen in relation to appointment and promotion procedures. Again it shows the potential of using the different levers for some balancing as, despite the political considerations taken into account in promotions, the performance assessment which precedes such promotion decision is based on administrative or hybrid procedures – attenuating the purely political character of such decisions to some degree (see levels 2 and 3 in Mexico, level 5 in South Africa). However, performance assessment can also be used as a counterweight measure in the reverse sense. While appointments, dismissal, promotion and transfer place France in a middle position depicting a balanced picture from political (level 1) to hybrid (levels 2, 3 and 4) and on to administrative (level 5) arrangements, a shift towards political or hybrid proceedings can be noted in regards to performance assessment. This places France close to the situation of systems with more political involvement such as the United States and Italy. As France has a strong tradition of equal and non-partisan access to the civil service, this might be seen as a balancing lever to ensure responsiveness to the minister's political agenda.

3.3. Formal delineation of the roles of politicians and public servants

3.3.1. Restrictions on public servants

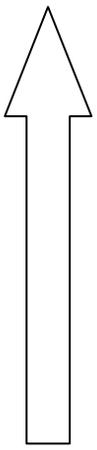
As noted above, the principle that civil servants should undertake their duties in a manner that serves the collective rather than a partisan interest is, in one way or another, espoused by all countries in the survey. The study showed that countries have a range of laws, conventions and procedures which seek to ensure that partisan politics are excluded from administration by spelling out the division of responsibility between ministers and civil servants, and in some cases by prohibiting politicians or civil servants from being involved in certain areas.

Table 7 highlights the key legal restrictions on the political actions of public servants. It indicates that the United States, Korea and South Africa have the most comprehensive restrictions on the rights of civil servants to engage in political activities.[25] The numerous restrictions in Mexico and Poland are the result of relatively recent changes in policy towards a merit-based career civil service. In Mexico, following the election of a new government, several concrete rules were established for the first time in 2003/2004, shaping the principle of political non-partisanship.[26]

In total, seven of the 12 countries legally prevent civil servants from engaging in high profile political activity and in Sweden such activity is restricted by long-standing convention. Half of the countries limit administrators from standing for public office.

Table 7. Laws, codes or customs which limit political actions of public employees

Most restrictions



Least restrictions

Country	Standing for public office?	High profile party political activity?	Other party political activity?	Trade union activity?
United States	**Yes**	**Yes**	Yes – except the many political appointees, as long as they separate party from public activities	**Yes**
Korea	**Yes**	**Yes**	**Yes**	Only lower grades
South Africa	**Yes**	**Yes**	**Yes** – public employees may not preside party meetings or speak at them	No
Mexico	Yes	Yes	Yes	Yes
Poland	Yes	Yes	Yes	Yes
United Kingdom	Yes	Yes	Yes	No
New Zealand	No	*Yes, Senior public servants*	No	*Yes, Senior public servants*
Italy	Yes[27]	No law – but avoided by convention	No	No
Sweden	No	No law – but unacceptable to the public by convention	No	No
France[28]	No	No	No	No
Denmark	No	No	No	No
Belgium	No	No	No	No

Note:

Bold = limits are for all public employees.

Non-bold = limits are only for those holding civil service status.

Italic = limits are only for senior civil servants.

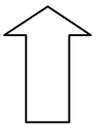
3.3.2. Restrictions on politicians

In considering politically partisan actions by politicians in the administration, Table 1 showed that only one country, Sweden, does not place legal limits on political involvement in public service through the Constitution, law, regulation or administrative law – and here, political non-partisanship is strongly supported by custom and convention. Sweden also has a long established system of delivering public services through agencies with strong protection against involvement by ministers.

The functional areas which are outside of ministerial oversight in Westminster countries (New Zealand and the United Kingdom) concern statutory decision rights in specialised areas such as land registration, or in areas of importance to governance such as the head of the electoral commission, and the State Services Commissioner. In the United Kingdom this assignment of statutory responsibilities is recorded for the accounting officer role of senior public servants. This way of rendering some administrative decisions politically neutral was not noted by the other countries. It may be a feature of the Westminster system only, where this might be construed as a counterweight to the wide legal discretion given to ministers for public administration matters.

Table 8. Constraints on administrative actions of politicians

Most restrictions



Least restrictions

Country	Civil servants hold administrative responsibility not subject to ministerial oversight?
New Zealand	Yes
United Kingdom	Yes
Denmark	Yes
Belgium[29]	Yes (with exceptions)
United States	Yes, but those are rare exceptions
France	No
Sweden	No
Mexico	No
Poland	No
Italy	No

An interesting finding is that some countries like New Zealand and Sweden have conventions which support the principle of “free and frank” advice to ministers as a dimension of political non-partisanship, while for other countries like Mexico and Korea the convention is rather the opposite, that a civil servant should not give contrary advice to ministers.

3.3.3. Particular issues arising in election periods

During changes of government, the public service, in the absence of an elected government, has a constitutionally important role in providing continuity. There are significant risks. On the one hand, a politicised administration can take action to tip the electoral balance. On the other, a government seeing the prospect of electoral defeat might seek to take administrative action to affect adversely the prospects of any in-coming government. Most countries therefore have rules and conventions both to inhibit inappropriate political decisions, and to ensure that the public service plays a care-taking role only and does not use the absence of political direction as an opportunity to push its own agenda. As James (2006) notes, not having adequate rules could not only harm the legitimacy of the government but also the public servants themselves. The perception that officials arbitrarily supported the former government could create incentives for a new government to remove those public servants.

The United Kingdom, federal government of Belgium and New Zealand each operate under a law or convention that no high-level appointments are made in the lead-up to an election. This may be explained by the fact that in these countries the role of ministers in senior civil service appointments is restricted.

Such a provision may be unnecessary in countries where any pre-election appointments could be easily undone by the incoming government. In Italy, the civil service law states that heads and boards of non-ministerial or departmental agencies appointed by the government in the last semester before a general election can be removed by the new government.

Table 9. Special arrangements before elections

High level appointments are … **Restricted**	**There are no restrictions**
Belgium (by convention) Italy New Zealand (by convention) United Kingdom	Denmark France Korea Mexico Poland Sweden United States

With the exception of the United States and Belgium, respondents noted that there are conventions for the public service to provide information to prospective members of an incoming government fairly. New Zealand, which recently moved from a first-past-the-post to a proportional representation electoral system, has restrictive "caretaker" provisions for public servants in the government formation period.

Table 10. Special arrangements between elections and the formation of a new government

Civil servants face additional restrictions on activities that might be construed as political	**Civil servants must provide impartial advice and information to all prospective members of the government**	**There are no restrictions**
Denmark New Zealand United Kingdom – from the announcement of the election	New Zealand – when the election does not yield a clear result Sweden – information to the new government as soon as its identity is known United Kingdom	Belgium (federal government) France Korea Poland Mexico United States – not applicable: government comes into office with the presidential election

3.4. Institutional oversight of the political/administrative boundary

Respondents were asked about the relative importance of the influence of other branches of government in ensuring an appropriate delineation between politics and administration.

Five of the eight countries answering this question considered that the legislature was most important and for one of these, the United States, the role was *ex ante*.[30] There, for 1 500 of the most senior civil service appointments, the executive's nominations have to be approved by the Senate before they can proceed. This is a very powerful check on the executive's power to appoint.

New Zealand as a Westminster tradition country, and Denmark, which has many of the features of a Westminster system, did not rate the legislature as important. In the case of New Zealand, this is consistent with the general perception of Westminster countries having relatively weak parliaments. For those two countries, the most important oversight body was the Auditor General.

No respondent in this sample assigned importance to the role of the judiciary. However some countries, especially Sweden, gave high importance to the law itself in ensuring the delineation. In Belgium oversight is the responsibility of an administrative court, the *Conseil d'Etat* which forms part of the executive branch but takes fully autonomous and may nullify any administrative act.

Arguably an important factor may be whether administrative law allows wide discretion, as in the Westminster systems, or whether it is prescriptive as in many systems in continental Europe. It would appear that where control is exerted through more prescriptive administrative law, there are fewer other mechanisms for constraining political influence.

Table 11. Institutional oversight arrangements

Country	Legislature		Judiciary		Auditor General		Other institutions	
	Active or infrequent	*Ex ante* or *Ex post*	Active or infrequent	*Ex ante* or *Ex post*	Active or infrequent	*Ex ante* or *Ex post*	Active or infrequent	*Ex ante* or *Ex post*
Belgium	None		None[31]		None		Conseil d'État	*Ex post*
Denmark	Infrequent	*Ex post*	Infrequent	*Ex post*	Active	*Ex ante* and *ex post*	Active and infrequent	*Ex ante* and *ex post*
France	None	None	Infrequent	*Ex post*	Infrequent	*Ex post*	-	-
Italy	Infrequent	*Ex post*[32]	n/a	n/a	Active[33]	*Ex ante*	n/a	n/a
Korea	Active	Both	Infrequent	*Ex post*	Infrequent	*Ex post*	Active-constitut-ional court, election manage-ment commiss-ion	*Ex post*
Mexico	Active	*Ex post*	Infrequent	*Ex post*	Active	*Ex ante* and *ex post*	Active	*Ex ante* and *ex post*
New Zealand	None	None	Infrequent	*Ex post*	Active	*Ex post*	Infrequent -Governor General in Executive Council	*Ex post* Governor General in Executive Council
Poland	Infrequent	*Ex post*	Infrequent	*Ex post*	-	-	-	-
Sweden	Active	*Ex post*	None	None	Not yet	*Ex post*	None	None
United States	Active[34]	*Ex-ante*	No role	-	No role	-	*Ex ante*[35]	-

The missing variable in this review of formal oversight arrangements concerns the degree to which the convention of political neutrality is internalised and held as a strong public value. The case of Sweden seems to provide the key insight that politicisation can be constrained with relatively few formal rules is because of the deep internalisation of these values. The significance of the popular acceptance of the convention of political neutrality is explored further below.

3.5. Arm's-length agencies

The arrangements for oversight of arm's-length agencies are clearly distinctively different and this could be a useful subject for further work (see Table 12 and OECD: 2002). It seems likely that the differences arise from the fact that such bodies tend to be more heavily engaged in implementation than policy, and with high managerial delegation, are therefore less exposed to politicisation. However in at

least two countries (the United Kingdom and New Zealand) the governing boards of many such bodies have real decision-making, as opposed to advisory, powers. In these cases the risk of inappropriate political involvement moves from the appointment and management of the senior executive to the appointment and dismissal of board members.

Table 12. Special arrangements for arm's-lengths agencies

Country	Do arrangements limiting political involvement apply to arm's-length agencies?	Do personnel procedures differ in arm's-length agencies?	Oversight arrangements apply to non-departmental arms-length public bodies with equal force, less force, more force?
Belgium	Yes	Yes	Less force
Denmark	Not relevant	--	Equal force
France	-	No	Equal force
Italy	Yes	No	Equal force
Korea	Yes	--	--
Mexico	Yes[36]	Yes	Equal force
New Zealand	Yes	No	Less force
Poland	No	Yes	Less force
Sweden	No	Yes	Equal force
United Kingdom	Yes	Yes, not as strict	Less force
United States	Yes	Yes	Not at all

4. Characterising problems

In considering potential difficulties at the political/administrative interface, two likely candidates emerge as potentially indicative of an imbalance between the arrangements for ensuring fair and non-politically partisan public service delivery and those that ensure the responsiveness of public servants to the policies of the current executive: high turnover of staff following elections and ministerial interference in management issues.

4.1. Turnover of staff following elections

In considering the change of staff, at senior levels the United States is an extreme case. However, in the senior civil service (non-political appointees largely but not entirely below the top five levels investigated in this study) only 1-2% is typically changed following elections. By contrast, the political appointees at the top five levels are exchanged on a large scale even if a newly elected president belongs to the same party as the previous one (Savoie: 1994). Turnover is not dependent on party-membership as much as on loyalty to the elected president. In the transition from the Reagan to the first Bush presidency, for example, there was a turnover of 97%. The federal government of Belgium and Denmark are extreme in the other direction; in Belgium however, staff of the ministerial cabinets (political appointees) change with governments.

Table 13. Public servants change with change of government

High turnover

Low turnover

Country	Are there levels/positions of public servants who change with change of government?	If senior civil servants are selectively changed for political reasons are these changes…
United States	Yes	Widespread
Italy[37]	Yes (levels 3)	Widespread (levels 3)
Mexico	Yes	Significant (levels 1 and 2)
Poland	Yes (level 1, Cabinet)	Significant
Korea	Yes (level 1, vice ministers)	--
France	Yes (level 1, Cabinet)	Few
Belgium	No[38]	Few – only one position
United Kingdom	No[39]	Not applicable
New Zealand	No	--
Denmark	No	If any, very few
Sweden	No	Few - extremely rare

Table 14. Percentage of senior civil servants who changed jobs for any reason, including transfers[40]

High turnover

Low turnover

Country	Level 1		Level 2		Level 3		Level 4		Level 5		Special political advisors outside normal hierarchy	
	A	**B**	**A**	**B**	**A**	**B**	**A**	**B**	**A**	**B**	**A**	**B**
United States	6	100	6	100	6	100	6	100	6	100	-	-
Mexico	55	100	55	100	55	70	55	70	55	70	55	100
Italy	-	-	-	-	-	100		0[41]		0	-	100
France	-	-	2-6	1-5	2-6	1-5	-	-	-	-	-	-
Belgium	0	0	0	0	0	0	0	0	0	0	0-100[42]	0-100
Denmark	0	0	0	0	0	0	0	0	0	0	-	-

A= recent re-election of an existing government or election won by the governing party.

B= recent election of a new government.

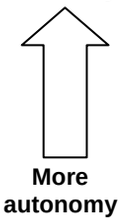
Mexico and Italy offer two interesting half-way positions. In Italy there is a sharp distinction between the level 3 which is completely exchanged and levels 4 and 5, where staff stay in post. In Mexico, the turnover is more tapered. The top two levels are completely exchanged, and the turnover in lower levels is also relatively high – with 70% of the administrators being exchanged following the election of a new government.

4.2. Ministerial interference in management issues

Respondents considered that the United Kingdom and New Zealand have less interference in management responsibilities and more demarcated responsibilities that are set outside of the oversight of the minister. Elsewhere, respondents considered that ministers tend to interfere in the management responsibilities of high level administrators occasionally or, in countries like Italy, Poland and Denmark, even frequently.

Overall, the degree of autonomy senior civil servants enjoy tends to be a stable arrangement in most countries. With the exception of the United States, Poland and Mexico this matter does not change with a change in government. As the system in Mexico has recently been reformed from a deeply politicised spoil system to a very different, politically neutral career system such stability has not yet been reached. Mexico is still in a state of transition with some political key players leaning towards the former politicised system and others towards the new career system.

Table 15. Administrative actions of politicians

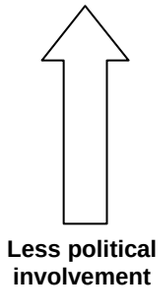


Country	Ministers tend to interfere in management responsibility of senior civil servants?	Degree of involvement by politicians in administrative matters changes with changes of government?
Italy	Frequently to seldom	No [43]
Poland	Frequently	Yes
Denmark	Frequently	No
United States	Frequently to seldom	Yes
Belgium	Frequently to seldom	No
Mexico	Seldom	Yes
Sweden	Seldom	No
France	--[44]	No
United Kingdom	Seldom	No
New Zealand	Never	No

5. The significance of informal conventions

Table 16 summarises previous responses to provide a broad overview of the involvement of politicians in key staffing decisions in the countries studied. As one would expect, political involvement in one dimension of human resource management is a strong predictor of political involvement in others.

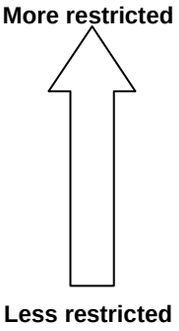
Table 16. Overview of political involvement in staffing



Country	Appointment	Dismissal	Promotion	Transfer to another position	Performance assessment
United States	High	High	High	High	High
Italy	High	High	High	High	Medium
South Africa	High	Medium	High	High	High
Mexico	Medium	Medium	High	Medium	Low
France	Medium	Medium	Medium	Medium	High
Poland	Medium	Medium	Medium	Medium	Medium
Belgium	Medium	Medium	Medium	Medium	Medium
Sweden	Medium	--	--	--	--
New Zealand	Low	Medium	Low	--	Low
Korea	Low	Low	Low	Low	Low
Denmark	Low	Low	Low	Low	Low
United Kingdom	None	None	--	Low	--

The similarities between the rankings in Table 16 and Table 17 suggest that more extensive involvement in staffing matters by politicians tends to be associated with more formal delineation of the respective roles of politicians and public servants.

Table 17. Overview of restrictions on functional responsibilities



Country	Restrictions on political activities of public servants	Restrictions on administrative activities by politicians
Korea	High	High
United States	High	Medium
South Africa	High	--
Poland	High	Low
United Kingdom	Medium - High	--
Italy	Medium	Medium to High
Mexico	Medium - High	Medium
New Zealand	Medium	Medium
Belgium	Low	Low
France	Low	Low
Denmark	Low	Low
Sweden	Low	Low

The United States provides the starkest example of the association between political involvement in senior staffing issues and restrictions on functional responsibilities through the staff confirmation role of the Senate and the "line by line" *ex ante* involvement of the House of Representatives in public expenditure.[45]

The interesting finding here concerns the exceptions. Although Korea has a distinctly different traditional career-based civil service[46] with little political involvement in staffing decisions, it has established very strict rules even prohibiting their public servants to join a party or any other political organisation. In Sweden, despite higher levels of political involvement, staffing restrictions on the political activities of public servants are low. In Italy medium restrictions on political activities are associated with medium to high restrictions on administrative activities by politicians, who reportedly tend to interfere in managerial responsibilities by senior civil servants

The respondents were asked to assign relative weights to various factors in ensuring the separation of politics from administration, including the active development of a culture of political neutrality for the civil service. The results are not reproduced as the striking finding is how much they vary and that each issue is considered by some of the respondents to be of major significance. In sum, boundaries are often overseen by formal political institutions, however this is not always the case and broader popular support for political neutrality in administration is significant.

Overall, it appears that more extensive involvement in staffing matters by politicians is associated with more formal delineation of the respective roles of politicians and public servants, unless, as in the case of Sweden, there is a long-standing and well-recognised popular acceptance of the convention of political neutrality.

Korea highlights the significance of such popular conventions in a different way. As was noted above, it displays very strict rules concerning the delineation of roles even though this seems unnecessary given the low level of political involvement in staffing decisions. This seemingly highlights the somewhat tentative popular acceptance of the significance of political neutrality in the public service.

6. Particular pressures for political responsiveness

Table 18 summarises the data to highlight issues that are often associated with particular concerns for responsiveness of public servants to the policies of the current executive.

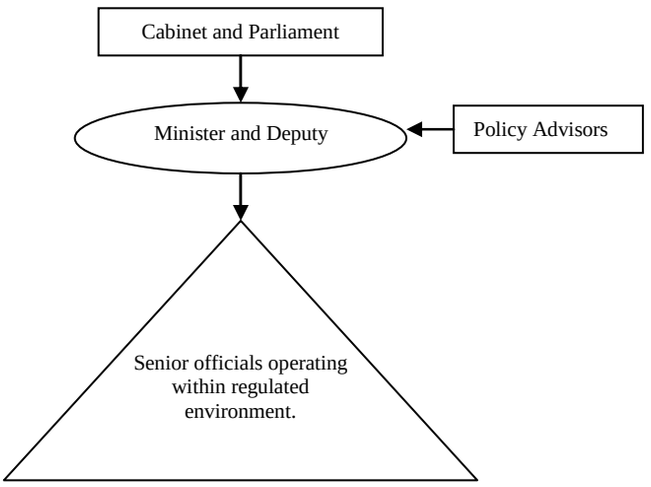
Table 18. Issues associated with strong concern for political responsiveness

	Country	Turnover of staff following elections	Reported ministerial interference in management issues
Suggestive of strong push for political responsiveness ↑ **Less suggestive**	Italy	Medium	Frequent to seldom [47]
	Poland	Medium	Frequent
	United States	High	Frequently to seldom
	Mexico	High	Seldom
	Korea	Medium	--
	Denmark	Low	Frequent
	France	Low	--
	Belgium	Low	Frequently[48] to seldom
	Sweden	Low	Seldom
	United Kingdom	Low	Seldom
	New Zealand	Low	Never

One way to interpret this is to examine the types of arrangements for providing political control over executive bodies.[49]

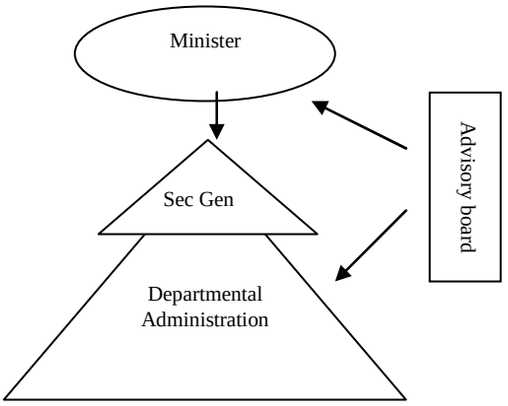
The “Few Principals” model, most readily captured in the Westminster systems, provides a structure for ministries and departments that is closest to the Weberian idea of a bureaucracy (Gerth and Mills: 1958; Rheinstein: 1968). In such systems, and in stylised term, a single principal, the minister, has responsibility for policy, and makes those decisions based on information provided by professional and impartial career civil servants. In reality of course there can be a layer of politically appointed advisors who support ministers in their policy-making. Sweden is a more complex case because of the strict division of powers between the Parliament, the government and the administration, and independently managed agencies for all implementation of parliament and government decisions. However, within both ministries and agencies, the managerial arrangements are relatively unconstrained by other veto players and so it falls within this category.

Figure 2. The "Few Principals" model



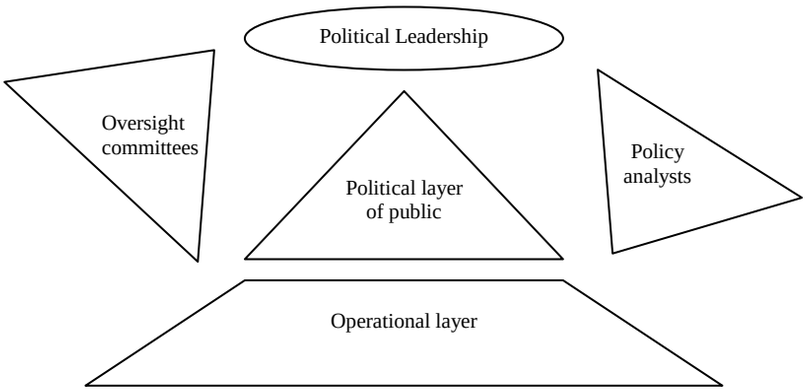
The “More Principals” model, unlike the Westminster model, somewhat weakens the authority of the minister over the department, as her control is mitigated through a powerful Secretary General or equivalent with an extensive armoury of administrative law. At the same time, advisory boards from outside the government oversee and provide policy advice. This model is most readily recognised in continental Europe, especially France.

Figure 3. The "More Principals" model



The “Multiple Principals” shows more fragmentation in political authority over executive bodies. Participation of interest groups is facilitated and the legislature is actively involved in public administration matters and assumes a control function, as does the judiciary. This model is characterized by deep political penetration into the department with non-public service appointments and the absence of clear boundary between political appointments and public service appointments. The United States exemplifies this tradition.

Figure 4. The "Multiple Principals" model



Annex 2 provides further details. It reviews the range of actors that comprise the principals in these stylised models. It notes that principals can be considered as veto-players whose agreements are a condition for the successful policy implementation within a ministry – in effect competing with the minister to act as a principal in relation to key “agents” within the ministry.[50] Loosely defined in this way, the following institutions can act as competing principals:

1. the legislature;

2. other ministries or departments;

3. veto players deriving authority from legal frameworks or professional rules;

4. special inspection bodies.

Table 19 shows that, unsurprisingly, the perceived need for strong political responsiveness as defined above in Table 18 is strongly correlated with the multiplicity of principals for ministries and departments.

Table 19. Structural elements and the push for political responsiveness

Countries	Principals	Turnover of staff following elections and reported ministerial interference in management issues
New Zealand	Few	Low
Korea	Few	Low
Sweden	Few	Low
Denmark	More	Low
Belgium	More	Low
France	More	Low
Italy	More	Medium
Mexico	Multiple	Medium
United States		High

CONCLUSION

7. Reviewing the findings

Five key findings emerged.

The first finding of the study is that while principles of public service neutrality in the sense of non-partisanship are espoused by all countries in the survey, this does not equate to an apolitical process for senior appointments. Of course the fact that a politician is involved in appointments or dismissals does not make the decision politically partisan.

Most systems are intermediate systems. In some cases a clear line drawn between senior staff appointed politically and lower ones appointed using an administrative procedure. In others, senior staff are appointed by a hybrid procedure in which administrative selection criteria like merit and experience are combined with political considerations. In one case (the United States), purely politically driven appointments coexist with administratively determined appointments at some levels – and in some agencies most if not all senior managers are political appointees.

Political involvement in one dimension of human resource management is a strong predictor of political involvement in others.

The second finding is that countries have a range of laws, conventions and procedures which spell out the division of responsibility between ministers and civil servants, and in some cases by prohibiting politicians or civil servants from being involved in certain areas.

The degree of these formal restrictions varies with the United States and Korea seemingly the most restrictive on the roles of civil servants, and with Denmark, the federal government of Belgium and Sweden the least. Formal restraints on politicians' actions are the greatest in New Zealand and the United Kingdom, and the least in Sweden, Mexico and Poland.

In many cases, particular formal restrictions apply during changes of government.

The third finding was the variety of institutional oversight arrangements for enforcing limitations on political involvement in staffing matters and in complying with restrictions on functional roles. The variations in the ways in which the legislature and judiciary are involved, and the diversity of roles played by the Auditor General, *Cour des Comptes* and other bodies such as the Constitutional Court, election management commission, Governor General, *Conseil d'État* make it clear that there is nothing that approaches a single model.

The fourth finding was the significance of informal arrangements, and particularly long-standing popular conventions.

The study revealed that there are major variations in the turnover of staff following elections, and in reported ministerial influence in administrative matters. In considering the change of administrative staff, at senior levels the United States is particularly high and the federal government of Belgium and Denmark

reportedly very low. In considering ministerial interference in management issues, the United Kingdom and New Zealand have less perceived interference in management responsibilities in contrast to Italy, Poland and Denmark.

These differences are only partly explained by formal arrangements. While in general more political involvement is associated with more restrictions on roles, the exceptions suggest the significance of informal conventions. Overall, it appears that more extensive involvement in staffing matters by politicians is associated with more formal delineation of the respective roles of politicians and public servants, unless, as in the case of Sweden, there is a long-standing and well-recognised popular acceptance of the convention of political neutrality.

The fifth finding is that constraints on party political influence on the public service vary with constitutional type and administrative history. In this sample, countries with a very strong executive, most notably Westminster-style systems, have such constraints within the executive itself through independent appointment arrangements. In countries where the executive is more constrained in its authority, having to co-exist with the veto power that derives from administrative law or the power of the legislature, there is greater political influence on personnel matters. The interpretation offered by the paper is that political involvement is a response to situations where the executive faces structural arrangements which generate a multiplicity of principals who might block change. Put starkly, when there are multiple principals, the single political principal with some responsibility for the sector portfolio (minister, secretary in the United States, etc.) faces a distinctive incentive for politicization as it gives them a stronger handle on an otherwise unresponsive bureaucracy. If correct, this suggests that some degree of political involvement in staffing decisions is widespread, and is a reasonable strategy as it is one way to obtain responsiveness to political priorities within ministries and departments that might otherwise resist, not least because they are subject to pressures from other competing principals.

This situation of multiple principals is primarily a constitutional point. However, arguably, countries that are recently emerging from political transition such as from a spoils system or from a strongly authoritarian government are also situations of multiple principals because of the depth of extra-constitutional capture by special interest groups. Thus constitutional type and administrative history are probably both implicated in creating the context for politicisation.

This conclusion argues against the assumption that underpins much public management literature, which warns about the negative effects of political involvement and often suggests that purely administrative determination of staffing decisions is the preferred state and that any steps down the path of political involvement are intrinsically damaging to governance.

8. A tentative framework

There is likely to be continuing evolution of the political/administrative boundary. In general those surveyed consider that their historical trend is towards less politicisation – despite the prevalence of political advisory posts, position-based employment arrangements, and arm’s-length public bodies (see Annex 1). In principle, the movement could be either way. In public services which are not strongly checked by the legislature, the sheer technical demands of public service management may make politicians more disposed towards meeting credible requirements for merit and competence, when making political appointments. In others, the pace of new government initiatives in response to increasing social change may lead to the conclusion that a public service that was previously considered sufficiently responsive is in fact creating bottlenecks to rapid policy change.

There seem to be four key questions which merit consideration in any review of the political/administrative boundary.

8.1. Is there a problem to be solved?

In many areas of public administration, the issues are sufficiently nuanced and uncertain to apply the general maxim that things that are not broken need not be fixed. The framework used by this study suggests key areas of inquiry for assessing whether there are grounds for concern:

1. Does the public service function adequately as a quasi-constitutional constraint on political institutions, ensuring adherence to constitutional and legal requirements, regardless of the implications for the elected government?

2. Is the public service inclusive or are there concerns that it and the powers and resources it administers can be used as party political tools?

3. Is it responsiveness to changing political priorities?

4. Does it deliver on its service delivery promises?

8.2. Could this problem implicate the political/administrative interface?

1. Is there distinctively high turnover of staff following elections?

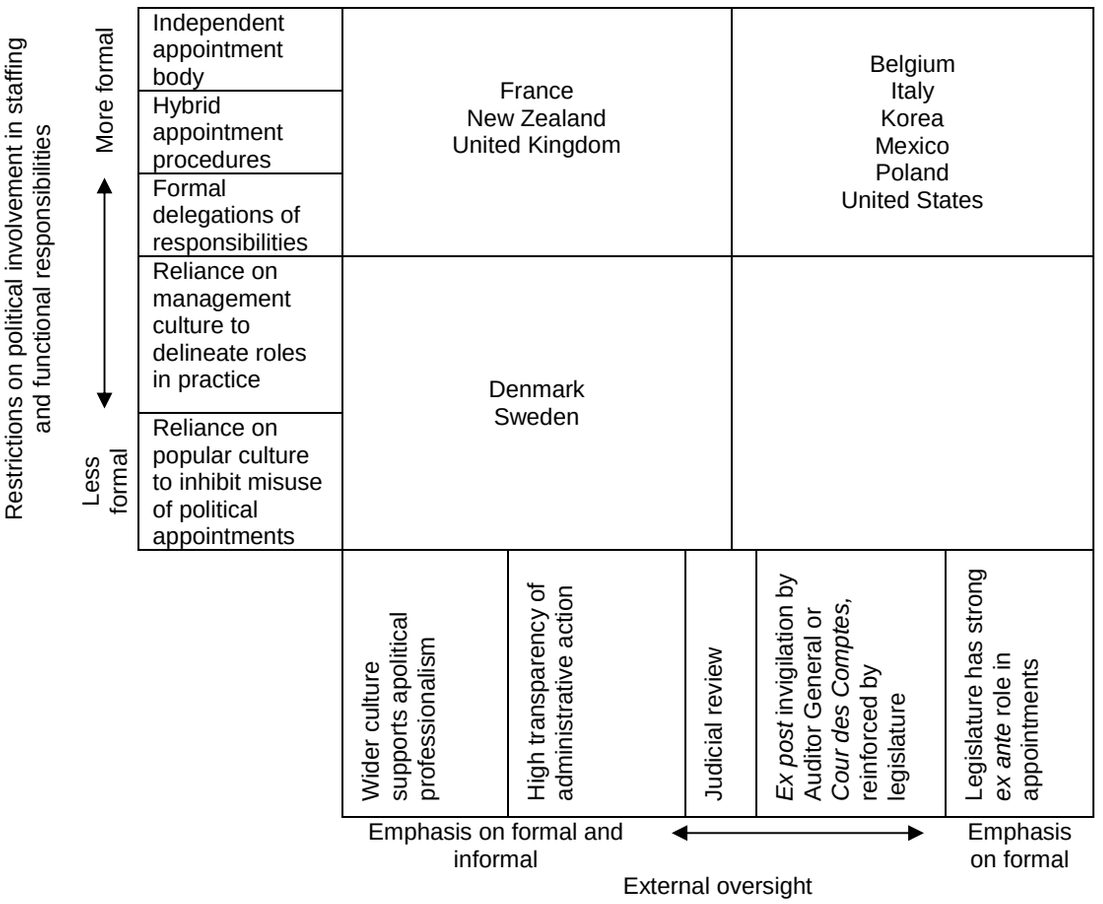
2. Is there unwarranted ministerial interference in management issues?

3. Is there insufficient political traction over public service policy implementation?

8.3. Is the nature of the existing oversight arrangements fully understood?

Table 20 offers a stylised approach for setting out the contribution of the formal and informal arrangements for providing oversight of the political/administrative boundary.

Table 20. Stylised representation of the contribution of formal and informal arrangements



8.4. Are the oversight arrangements, formal and informal, appropriate for the degree of political involvement envisaged in staffing issues?

We note that some pressures for political involvement emerge from the political structures, with situations of multiple principals giving rise to particular pressures for deeper political involvement. Where an executive is left with few levers through which to enforce policy, some increase in the risk of the misuse of political influence may be a price worth paying in the wider governance interest.[51] However, the counterbalance for such political involvement is heavily dependent on the wider social context, and when there is strong popular support for a neutral, apolitical public service, informal arrangements can be very effective. Conversely, when such popular support is yet to form or otherwise absent, particularly strong formal oversight arrangements are necessary.

In sum, the study suggests that more political influence in staffing matters may work well, if there are other checks and balances overseeing functional responsibilities, and may be essential if the alternative is very weak political traction on the public service. Getting the balance wrong could provoke an unexpected backlash. In particular, a too strictly drawn Weberian boundary between ministers and public service may provoke pressure for alternative or duplicate systems to increase political responsiveness.

The devil however is in the detail and the risk is that countries under the banner of promoting more responsiveness will be tempted to increase the level of political involvement in administration without paying attention to the checks and balances which ensure this does not harm deeper legitimacy issues such as inclusiveness, respect for the constitution and continuity.

ANNEX 1. REPORTED TRENDS

Reported trends in politicization

Many respondents noted that the overall tendency in their system leans towards less political control. In some cases scandals or incidents have led to major changes in political control in administration. The federal government of Belgium, for example, has engaged in the Copernicus reform following two scandals, the Dutroux and the Dioxine affairs, which led to a large citizen's movement. In 2001 the Copernicus reform wanted to strengthen the cooperation between ministers and their senior civil servants with the aim of regaining public confidence in the public service. A key element has been to introduce a "mandate system" for senior civil service positions, to increase the accountability of top management and provide a clearer delineation of responsibilities between political and administrative functions.

However, one of the key reforms that Copernicus sought was to remove the large political cabinets, which were considered overstaffed and responsible for politicization of the system. This reform has failed and ministerial cabinets are still in place with control over setting strategic goals. Cabinet staff are still politically appointed and these form a significant group with currently 797 such appointments, significantly more than the number of executive senior civil servants (173 members in August 2006).

Table A1.1. Perceptions of changing political control

Countries moving towards less political control for executive Senior civil service positions	Neutral	Countries moving towards more political control
(Poland, until 2005) Mexico New Zealand United Kingdom[52]	Belgium Denmark France Korea Sweden	Italy (since 2000) United States

In Italy, there was widespread public criticism of corruption at the national and local levels. In the early 1990s, a number of corruption scandals uncovered inappropriate relationships between politicians and business companies. The consequent criticism has led to major reforms. In 1993, the principle of delineating functions between politicians and senior civil servants was established for the first time. In the late 1990s the principle was reinforced by several additional decrees. The reform movement lasted for about a decade emphasizing a clear cut between political and administrative actors. Since the early 2000s, there are some signs of a reversal in this trend.

Similar experiences in Mexico led to the newly elected government introducing a neutral career-based civil service in 2003/2004.

In Denmark, in the mid-1990s a minister had reportedly asked civil servants to act illegally. A subsequent court case showed that there was no clear guidance for civil servants concerning their right or their obligation to refuse to implement an illegal order from the minister. In 2005 a Code of Good Public Governance for Senior Public Officials was established. This code specifies that each senior public official ought to define clearly his or her specific managerial space in relation to the minister.

The most important impact on the involvement of political actors in the United States was provoked by the Watergate scandal. Between 1977 and 1979, many institutions were created as a direct consequence of this affair, including the Office of Government Ethics, the Inspector General, and the Office of Special Council. The law in regards to the delineation of responsibilities between the two sets of actors changes constantly.

There are countervailing trends. In the United States, President Clinton allowed the public servants to involve in more partisan political activities than his predecessors. In Korea, where even ministers traditionally came from the pool of career bureaucrats, a movement towards politicisation in the appointment of ministers can be observed with more ministers coming from outside the career civil service. This has been linked to the recently strengthened status of the legislature. As a consequence of the public management reform movement in New Zealand, some incidents have been reported where arm's-length entities wanted to act politically, disregarding their obligations for impartiality.

Reported trends arising from other public management reforms

In the literature, some authors have investigated the influence of reforms such as agencification, deregulation of personnel matters, performance management and the shift in power to lower-echelons. Those measures, Peters and Pierre (2001) argue, were in part intending to regain political control over the bureaucracy by breaking the monopoly of the civil service, destroy well established "villages" within the administration, opening it for outside applications and decentralising its structure.

However, paradoxically, some reforms are reported to have achieved the contrary by increasing the powers of non-political officials and thus creating new areas of conflict, introducing more contractual employees who are more concerned about performance targets than the government as a whole. Offering the prospect of private company alternatives to senior officials by facilitating movement between public and private sector employment may make them less responsive to conform to the demands of politicians.

Toonen (2001) agrees with Peters *et al.* (2001) that the recent public governance reforms share the objective to break "closed shops" and wish to create more competition, checks and balances, transparency and open villages. However, the effect this had on the delineation of political responsibilities varies significantly between jurisdictions.

Table A1.2 indicates whether the reform movements towards more contractual staff and towards more arm-length agencies are considered to represent an increasing or decreasing political influence.

Table A1.2. Different employment trends and impact on politicisation

Country	Is there a tendency towards…				This tendency is generally seen as:
	More politically appointed staff	**More contractual staff**	**More arm's-length agencies**	**None of these**	**1. increasing political influence 2. reinforcing political non-partisanship 3. having neither effect**
Belgium	-	[53]	Yes	-	Having neither effect
Denmark	-	Yes	Yes	-	Having neither effect
France	-	Yes	-	-	Having neither effect
Italy	Yes	Yes	Yes	-	Increasing political influence
Korea	-	Yes	-	-	Having neither effect
Mexico	-	-	-	Yes	Reinforcing political non-partisanship
New Zealand	-	-	Yes	-	Having neither effect
Poland	Yes	-	-	-	Increasing political influence
Sweden	Yes[54]	Yes	-	-	Having neither effect
United Kingdom	-	-	-	Yes	Having neither effect
United States	Yes	Yes	Yes (until 1960-70s)	-	Increasing political influence

Of the four countries which have increased the number of political appointees (Italy, Poland, Sweden and the United States) three have also increased contractual staff and two arm's-length agencies. In three of these states this trend is perceived as increasing political influence. However, most country respondents

considered that public management reforms did not have an effect on political involvement. Mexico recently chose a path contrary to the general employment trends by introducing a career-based civil service. Not increasing contractual staff and arm's-length agencies in Mexico is consequently seen as a way to reinforce the principle of political non-partisanship.

Table A1.3. Term contracts and politicisation

Country	Where there are limited term contracts are appointments, dismissals or transfers for political reasons, more likely, less likely or as likely as before
Belgium	As likely as before[55]
Denmark	As likely as before
France	More likely
Italy	Less likely
Mexico	Less likely
New Zealand	As likely as before
Poland	As likely as before
Sweden	As likely as before
United States	Political appointees serve "at the pleasure of the president" and can always be asked to leave

Two of the countries mentioned above (Italy, United States) as well as France also report an increased use of limited term contracts, where dismissals or transfers for political reasons are likely.

Recent developments leading to re-examination of the political/administrative boundaries

Suggestions of partisanship and unresponsiveness from the public service are relatively commonplace in all OECD member countries. In offering a few examples of the lines of argument which have evolved in Sweden and the United States, the purpose of this section is not to suggest that these are particularly extreme cases. The intention of this section is rather to illuminate how the conflicting concerns about partisanship and unresponsiveness inevitably implicate the administrative/political interface and lead to different arrangements for oversight of the appointment and management arrangements for senior staff with an emphasis on formal and informal arrangements respectively.

Sweden

Concerns

There are few cases reported in Sweden where the public service has been used in an inappropriate way for party political purposes. Even those public service appointments, which are made by the government, those on the highest public service level of the Director General, are generally based on merit, include opposition party members and usually the nominee's competencies are widely recognised.

In the 1970s almost all Director General positions had been filled with apolitical candidates. However, during the last decade, while it is not necessarily an affiliation with the governing party that is required, party political backgrounds have become more important and in some cases have become subject to criticism. Molander, Nilsson *et al*. (2002, p.10) noted that: "Over the last three decades, an increasing percentage of senior administrators in the Government Office and the agencies have a political background as members of some political party, whereas the enrolment of the population at large in political parties is rapidly falling." They speculated about a risk that that the distinction between the political and administrative levels is blurred by the fact that individuals belonging to these categories sometimes change positions – politicians become senior civil servants and vice versa.

There have been about five appointments where the government's choice has been widely considered inappropriate and the candidates unsuitable for the respective assignment. The subsequent public uproar led to the removal of those public servants. One prominent example was the appointment of a person with strong political connections as Director General of the Swedish Board of Agriculture. The person was widely seen as unsuitable for the position and, after all second level heads of the Board declared their opposition to her, a new position was offered and accepted. Other cases leading to some criticism regard occasional public relations campaigns of the government where the opposition suspects that public money is used to support the governing party indirectly.

The most recent concern about responsiveness of the bureaucracy to the rapid implementation of political priority programmes emerged from the actions of the bureaucracy following the Tsunami disaster. An active public debate questioned the capacity of the public service to react adequately to such a catastrophe as it was generally acknowledged that ministries and agencies did not react sufficiently fast in assisting Swedish and non-Swedish citizens in the affected countries. It transpired that defence and rescue agencies had no authority to spend money on the necessary operations without a decision of the government as a whole. The development agency could only help in selected countries as they were only allowed to become engaged in countries that were officially recognised as aid recipients. Sri Lanka had that status but Thailand did not, thus hindering the development agency from helping in this heavily affected country.

The context is that the Director-Generals and Deputy Director Generals in the Government Office are not appointed for limited terms. They cannot be removed unless there is a disciplinary action against them which is extremely rare. They usually stay until they accept an alternative post or retire. A minister that wanted to replace one would, pragmatically, have to make an attractive offer. The result is that staff turnover at the senior levels is very low (see Table 14).

Implications for the administrative/political interface

As with the United States, the conflicting concerns about patronage and responsiveness have led to a series of inquiries suggesting the degree to which there is a frequent need for fine-tuning of the administrative/political interface. This takes a particular shape in Sweden because of the administrative tradition of assigning considerable autonomy to the administration, and the widely valued independence of the implementing agencies. The ministries are relatively small – the ministries have together about 4 000 employees – and are mainly providing information for the ministers and drafting government decisions. Government instructions to state agencies must be in writing, adopted at a formal meeting of ministers and made public. This transparency is regarded as the prime protection against political misuse of administrative powers. In addition, a recent proposal of the Ministry of Finance aims at strengthening the internal audit and evaluation processes in about 50 important agencies. According to this proposal these agencies will have to analyse their businesses practices regularly and provide the government with a written guarantee that their internal control is satisfactory.

When the debate concerning the political/administrative interface emerges, it tends to raise questions about whether the agency arrangement prevents sufficient political authority in the decision-making process, with the government unable to control the agencies to ascertain that appropriate action is taken when political decisions are to be implemented.

Table A1.4. Recent inquiries concerning the political/administrative interface in Sweden[56]

The Commission on Public Administration (‘*Förvaltningsutredningen*’)	A parliamentary committee analysed the autonomy that Sweden's administrative tradition assigns to the administration. It asked the question whether the political level has full control over the administrative apparatus, in particular in relation to the paragraph in the Constitution that prohibits political interference in agency decisions concerning individuals or legal personalities. The committee recommended that the controllability aspect should be upgraded.
The Committee on governance of agencies (‘*Verksledningskommittén*’)	The committee on agency governance focused on the internal workings of agencies, in particular the relationship between the Director-General and the board of an agency. It analysed alternatives for ensuring political influence over administration and other forms of channelling popular influence, such as lay representation on agency boards.
The Commission on Public Administration Policy (‘*Förvaltningspolitiska kommissionen*’)	The Commission undertook a broad review of problems in public administration – governance, control and audit, appointment policies, civil servant ethics, etc. It identified general problems of governance, inadequate control of large resource flows (notably transfers), and a need for increased transparency in decision-making in general as well as concerning appointments.
The Cost of Government (‘*Vad kostar det att regera*?’)	The report analyses the Government Office from a number of different angles – size, tasks, efficiency, etc.
Internal Government Office studies	The Government Office has produced a large number of internal studies. They concern a range of subjects relevant to the present discussion – supply of competence, personnel policy, the merging of the ministries into one single agency, etc.

Overall, and in contrast to the formal and extensive institutional checks and balances system of the United States, Sweden has a highly informal system with few rules or institutions in charge of guaranteeing merit and the proper delineation of responsibilities between ministers and in the senior public service. The principle of political non-partisanship of the public service is not spelled out in the Constitution, law or regulation. However, a Government Act states the principle of government by law, and requires that all appointments are made on objective grounds such as merit and skills. The informality and the deeply consensual basis for the neutrality of senior positions means that the inquiries in many ways are the response, as they refresh the informal culture and provide a steer which is widely accepted.

Table A1.5. Oversight institutions in Sweden

The Parliament's Constitutional Committee	Since 1634 Sweden has a constitutional division of powers between the Parliament, the government and the administration. There is no Constitutional Court. Instead, Parliament is the supreme authority on constitutional interpretation. As there is no Constitutional Court, the Parliament's Constitutional Committee is in charge of reviewing and debating the government's appointments of Director Generals and this means in effect that the opposition has access to the relevant papers. As the Constitutional Committee is not a court it cannot sanction the government in the event of wrongdoings and can only publish a critical statement. The only ultimate sanction would be a vote of non-confidence of the Parliament as a whole, which is a rather unlikely possibility as the government usually has a majority in the Parliament that could reject any such vote.
The Supreme Audit Agency	The Supreme Audit Agency has a supervisory body which is elected by the Parliament and it is managed by three national auditors who are appointed for seven years and cannot be reappointed so that their independence is guaranteed. To date, the Supreme Audit Agency has shown no interest in the questions of merit or appropriateness of potential political interference in administrative management issues.
Strong popular and management culture in support of merit and delineation of roles	The most effective instrument to guarantee merit and proper delineation of roles between political and administrative actors is the popular support and a solid management culture favouring those principles. Popular reaction led to the removal of about five Director Generals considered not possessing the required skills.

United States

Concerns

Watergate undoubtedly had the most wide-ranging political and institutional consequences of any recent political scandals concerning partisan actions. Watergate refers to a series of events in which the Executive abused its powers in order to undermine the opposing party and the movement against the Vietnam War. The scandal took its name from burglaries of the headquarters of the Democratic National Committee in the Watergate Hotel in Washington, D.C. where five men tried to repair wiretaps that were not working. Many new laws, institutions and oversight arrangements have been created as a direct consequence of the problems revealed by the subsequent inquiry. The Office of Government Ethics, the Inspector General and the Office of Special Council were all created in the period from 1977 to 1979. New campaign financing laws, several amendments to the Freedom of Information Act, and laws requiring new financial disclosures by key government officials have also been adopted.

More recently, there have been discussions about alleged party political usage of the public service in the preparation of the Iraq war.

The most evident expression of concern about the unresponsiveness of the administrative machinery is, of course, during election campaigns. Such concerns can inevitably contain some proportion of rhetoric with little or no specific policy content (Fishel: 1985). However, it can also highlight specific political concerns with very specific programmatic substance, such as the 1980s concern to devolve responsibility for education fully to the state level. These concerns have been well documented by researchers.[57]

Implications for the administrative/political interface

Perhaps the starkest expression of political frustration with the perceived unresponsiveness of the bureaucracy was from Richard Nixon, who asserted in his presidential memoirs "I regretted that during the first term...we had failed to fill all the key posts in the departments and agencies with people who were loyal to the President and his programs....I was determined that we would not fail in this area again...." (Nixon: 1978, p.768). This point was made against a context of a public service in which there is extensive turnover amongst political appointees following the election of a new president, even if he belongs to the same party as his predecessor. As was noted earlier, in the handover from the Republican Reagan administration to the Republican Bush (senior) administration, there was a turnover of about 97%.

Table A1.6. Recent initiatives impacting on the political/administrative interface in the United States[58]

Federal Elections Campaign Act of 1974	This statute set limits on contributions by individuals, by political parties, and by political action committees. It also established an independent agency, the Federal Elections Commission, to enforce the law, facilitate disclosure, and administer a public campaign-funding program.
Ethics in Government Act of 1978	The act established the Office of Government Ethics within the Office of Personnel Management and charged it with providing overall leadership of ethics programmes. It established a comprehensive public financial disclosure system. It also enacted procedures for the appointment of a special prosecutor with authority to conduct independent investigations and prosecutions of government officials and thereby remove politics from the administration of justice in certain highly sensitive cases. Finally, it strengthened the post-employment restrictions on former officials of the Executive branch.
Inspector General Act of 1978	This act established Offices of Inspector General within a number of executive branch departments and agencies. The Inspectors General were given a significant degree of independence (as well as subpoena power) to carry out their responsibility for the detection and prevention of fraud, waste and mismanagement in government programmes.
Civil Service Reform Act of 1978	This legislative measure created the Merit Systems Protection Board (MSPB) to oversee the personnel practices of the Executive branch and protect the integrity of the federal merit systems. It protects the democratic rights of public servants including the right to exercise free speech without fear of retaliation and the right to exercise union activities and it prohibits a number of improper personnel practices including acts of reprisal against whistleblowers. Their complaints would be received by the Office of Special Counsel, an investigating and litigating office, which has been provided with enlarged powers. The act such as participating in officer elections and inspecting collective bargaining agreements.
Federal Managers' Financial Integrity Act of 1982	This act required ongoing evaluations of the adequacy of internal accounting and administrative control of executive agencies. Agencies were required to report on any material weaknesses in their internal control systems.
Office of Government Ethics Reauthorisation Act of 1988	This law established a separate executive agency which had been removed from the Office of Personnel Management in order to ensure the effectiveness of ethics programmes, to clarify the offices' mandate and to increase its independence.
Whistleblower Protection Act of 1989	This law established the Office of Special Counsel (OSC) as an independent agency within the Executive branch that litigates before the Merit Systems Protection Board. The 1989 enactment stated that the primary role of OSC was the protection of federal employees, especially whistleblowers, from prohibited personnel practices.
Office of Federal Procurement Policy Act Amendments of 1988	These amendments contained new provisions to ensure the integrity of the federal procurement process, treating four areas: *i)* post employment; *ii)* seeking employment; *iii)* gratuities; and *iv)* disclosure of information. A wide range of rules also covers contractors, subcontractors, consultants, experts and advisors.
Executive Order 12668 of 25 January 1989	The order established a Commission on Federal Ethics Law Reform to review existing federal ethics laws, regulations and policies and to "make recommendations to the President for legislative, administrative, and other reforms needed to ensure full public confidence in the integrity of all federal public officials and employees". In March 1989, the Commission submitted its report making 27 recommendations dealing with issues during employment, post-employment restrictions, financial disclosure, structure of federal ethics regulation, and remedies and enforcement mechanisms.

Ethics Reform Act of 1989	It expanded the coverage of post-employment law so that it covered Members of Congress and top congressional staff. The act made changes in the areas of trade and treaty negotiations, the representation of foreign entities and in the public financial disclosure system as well as the criminal conflict of interest statutes. It prohibits public servants from soliciting or accepting gifts from certain prohibited sources and authorized the supervising ethics office to issue implementing regulations. The act limits outside earned income to a maximum of 15% of the annual salary and imposes employment restrictions on covered senior officials. Finally, it banned the receipt of honoraria by public servants or a Member of Congress. Honoraria were defined as a payment of money or anything of value for an appearance, speech or article. This provision was declared unconstitutional by the Supreme Court insofar as it applied to certain executive branch employees.
Executive Order 12674 of 12 April 1989	This executive order sets forth 14 principles of ethical conduct. The first one states that public office is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain. The order prohibited full-time non-career officials in the executive from receiving any earned income for any outside employment. It directed executive branch agencies to conduct annual ethics training for certain covered employees and directed the Office of Government Ethics (OGE) to promulgate a clear set of Executive branch standards of conduct. They cover gifts, conflicting financial interests, impartiality, seeking employment, misuse of position and outside activities.
Chief Financial Officers Act of 1990	The act aims at improving the financial management within the Executive branch and preventing losses through fraud, waste, abuse and mismanagement of government programs and established an Office of Federal Financial Management to set financial management policies. It also established the position of Chief Financial Officer within the cabinet departments and certain large agencies.
Hatch Act Reform Amendments of 1993	It places restrictions on the political activities of government employees. The 1993 law relaxed some of the restrictions on federal civilian employees to allow greater participation, as private citizens, in the political process. At the same time, it continued to protect federal employees and the general citizenry from improper political solicitations.
Congressional Resolutions on Gifts	The House and the Senate adopted rules to restrict drastically the acceptance of gifts. The definition of gift is comprehensive and covers any item of monetary value, including gifts of services, transportation, lodging and meals.
Lobbying Disclosure Act of 1995	The bill addresses concerns about undue influence by special interests. It requires lobbyists to register and to report on the identity of their clients, the issues they are lobbying on, and the amount of money they are being paid. It also restricts post-employment of the US Trade Representative and the Deputy US Trade Representative who are barred for life from representation of certain foreign entities after they leave office.

Note: Italicised initiatives were developed by the Executive.

However, in practice the concerns about partisanship outweighed those concerning unresponsiveness and this led to some significant pushing back against political involvement. The consequence has been, as Gilman (2003) notes, that there have been significant new government offices or agencies established to promote ethics and financial integrity in government programs and operations. Following their establishment, a number of these agencies have subsequently been strengthened and given enhanced authority. These newer developments added to the longstanding arrangements which sought to enhance the independence of a few particular positions. In particular, by tradition Inspector Generals in customs and the Controller General are not changed following elections, even though it is in principle possible to exchange them after a new President comes into office. The Head of the Office of Government Ethics is appointed for five years. In order to give the post holder some independence from the President, the tenure has been deliberately set for one year longer than the four years of the legislature. See Table 14 for more details of the turnover of staff following elections.

In sum, as Table A1.6 highlights, this is a contested area of public policy and the political/administrative interface remains the subject of frequent interventions and reforms.

Table A1.7. Oversight institutions in the United States

The Executive Office of the President	The Office of Government Ethics (OGE) works closely with the White House Office in the process of clearing presidential nominees to Senate confirmed positions. It participates as a member of two interagency groups located within the Office of Management and Budget (OMB): the President's Council on Integrity and Efficiency (PCIE) and the Executive Council on Integrity and Efficiency (ECIE). Both groups are charged with promoting integrity and effectiveness in federal programs. Also located within OMB is the Office of Federal Procurement Policy, which has responsibility for providing overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. OGE coordinates with the Federal Acquisition Regulatory Council on the issuance of regulations under the Procurement Integrity Act. OGE also maintains a close liaison with OMB regarding legislation with ethics implications.
The US Department of Justice	The responsibility for bringing both criminal and civil actions to enforce the federal conflict of interest statutes resides with the Public Integrity Section within the Criminal Division of the US Department of Justice and the Offices of the United States Attorneys. As with all other agencies, OGE is obligated by statute to refer to the Justice Department cases that may involve possible violation of the criminal conflicts statutes. OGE also consults with the Office of Legal Counsel in the Department.
Inspectors General	The investigation of fraud, waste and mismanagement is generally conducted by an agency Inspector General. S/He may investigate allegations of violations of ethics rules and laws as well as other federal statutes and regulations.
Merit Systems Protection Board	Each individual agency initially reviews allegations of violations of ethics rules. However, an employee may appeal an adverse action to the Merit Systems Protection Board (MSPB). Administrative decisions of the MSPB establish authoritative precedent regarding the appropriate disciplinary sanction for violations of administrative rules, including violations of the standards of conduct.
Office of Special Counsel	Regulation of political activity, on the part of federal employees, is carried out by the Office of Special Counsel (OSC). It investigates and rules on allegations that employees have violated restrictions on political activity. In addition, OSC investigates cases of reprisal for "whistle blowing" and other prohibited personnel practices.
General Services Administration	The General Services Administration establishes policy for and manages government property and records. It has responsibility for regulations on the proper use of government property, equipment and vehicles. GSA consults with OGE on regulations issued by GSA on the acceptance by agencies of gifts of travel. Agency reports regarding the use of travel reimbursement authority are filed with the Office of Government Ethics.
Office of Personnel Management	The Office of Personnel Management (OPM) has general responsibility for federal personnel law throughout the executive branch. OPM has responsibility for certain conduct-related areas such as nepotism and gambling. OGE consults with OPM in connection with the issuance of regulations.
Federal Elections Commission	The Federal Elections Commission is an independent agency that oversees the public financing of Presidential elections, provides for public disclosure of campaign finance activities, and administers the law with respect to limits and prohibitions on contributions and expenditures made to influence federal elections, *i.e.* the Presidency, the US Senate, and the US House of Representatives.
General Accounting Office	The General Accounting Office (GAO) is an investigating and auditing arm of the Congress and is not in the Executive branch, but has a significant impact on ethics matters within the Executive. It issues opinions by the Comptroller General, which deal with a wide range of ethics-related subjects including frequent flyer benefits, appropriations law and various fiscal matters. GAO performs audits of federal programs and issues reports on its findings.

ANNEX 2
INSTITUTIONAL CONSTRAINTS TO POLITICAL RESPONSIVENESS WITHIN EXECUTIVE BODIES

This annex reviews the range of actors that comprise the principals in the stylised models depicted in the earlier discussion of Section 6. Principals can be considered as veto-players whose agreements are a condition for the successful policy implementation within a ministry – in effect competing with the minister to act as a principal in relation to key "agents" within the ministry.[59] Loosely defined in this way, the following institutions can act as competing principals:

1. the legislature;
2. other ministries or departments;
3. veto players deriving authority from legal frameworks or professional rules;
4. special inspection bodies.

This annex provides further explanations of each of those potentially competing principals in the policy implementation process, before summarising four country examples to illustrate in which systems the respective institutional actors may more readily adopt a veto position.

Competing principals

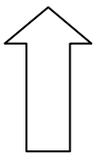
The legislature

Responsiveness of civil servants towards the minister is likely to be significantly affected by the location of authority for determining the agency's budget. If the budget is formulated with little involvement from the minister who issues policy directives to the public servants, their motivation will not be enhanced by any possibility that agency or programme funding will be enhanced by exemplary policy implementation. In particular, if budget preparation is significantly undertaken by the legislature, the minister's position towards her or his administration might be weakened as public servants would be inclined to give the interests of the legislator priority. Thus, authority in budget preparation gives the legislator a potential veto position.[60]

Table A2.1. Budgetary authority of legislatures

Parliament has:

Many budgetary rights



Few budgetary rights

Country	Index	Veto position
United States	10	Strong
Sweden	9	
Italy	7	
Denmark	4	Medium
Belgium	4	
France	4	
Korea	4	
Mexico	3	Weak
United Kingdom	1	
New Zealand	0	

Source: Results of the Survey on Budget Practices and Procedures (2003).

In order to assess the extent to which the legislator might be motivated to make use of this quasi-veto position in practice, two further indicators are helpful:

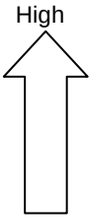
1. *The remit of audit bodies.* Audit bodies generally report to the legislature. The more mandates they are vested with the more reasons they could give the Parliament to use their ability to determine budgetary allocations.

2. *The degree of parliamentary/legislature contact with interest groups and lobbyists.* Extensive contact between the legislature and interest groups or lobbyists gives members of Parliament an informational advantage and, again, might provide incentives to use their authority in budget formulation. If, on the contrary, lobbyists mainly turn to ministers or civil servants, the legislature does not have this incentive.

Table A2.2. Motivation for the legislatures to exert veto powers

Motivation to exert veto:

High



Low

Country	Audit bodies: number of mandates /a	Index of parliamentary contact with interest groups /b	Motivation to exert veto
New Zealand	--	5	High
United States	5	4	
Denmark	4	--	
Sweden	3	3	Medium
Italy	3	2	
United Kingdom	3	1	
South Africa	3	--	
Belgium	2	1	Low
France	1	0	

Note:

Index of parliamentary contact with interest groups is defined as follows:

5= only with Parliament, 4 = mainly with Parliament, 3= partly with Parliament, 2= mainly with ministers, 1= mainly with civil servants, 0= only with civil servants

Sources:
a/ OECD/World Bank Budget Practices and Procedures Database (http://www.oecd.org/document/3/0,2340,en_2649_33735_2494461_1_1_1_1,00.html)
b/ Schnapp (1999).

Table A2.3 shows that, in regards to policy implementation, the legislature is likely to act as a competing principal in the United States, Sweden and Italy (with a strong veto position and high to medium motivation to exert its veto power) as well as in Denmark (with a medium veto position but a high motivation to exert it).

Table A2.3. Summary of the veto powers of the legislature and motivation to exert them

		Motivation to exert veto		
		High	**Medium**	**Low**
Veto position	**Strong**	United States	Italy Sweden	
	Medium	Denmark		Belgium France
	Weak	New Zealand	United Kingdom	

By contrast, in the following countries the legislature does not act as a relevant principal in the policy implementation process: New Zealand and the United Kingdom (where Parliament posses a weak veto position) and Belgium and France (where the veto position is slightly stronger but the motivation to exert it is low).

Other ministries or departments

In countries where ministers decide mainly individually on policy issues within the competency of their department, other ministries might not agree with their measures and can provide administrators with a justification for failing to implement a minister's decision fully. Such a veto position is less likely to arise when ministers decide collectively on policy issues (Blondel and Manning: 2002).

Table A2.4. Collective cabinet decision-making

Ministers usually act …	
Individually	Collectively
Denmark France Italy United States	Germany The Netherlands Sweden United Kingdom

Source: Schnapp (1999).

Unlike some other presidential systems, the United States cabinet rarely takes collective decisions. In the United States opposing positions of other departments may serve public servants as grounds for not implementing fully the policy decisions of their chief executive. Hence, in the United States – as well as in Denmark, France and Italy – other secretaries or ministers represent principals in regards to the model established in this paper.[61]

Sweden provides a polar opposite case. Collective decision taking is one of the constitutional principles. All instructions to civil servants must be agreed on collectively by the Council of Ministers and must be made in writing. Any violation of that rule would be sanctioned by Parliament. Consequently no public servant could use conflicting views from other ministers, or their less than whole-hearted support, as the basis for weak implementation of an instruction given by the minister. Thus, in countries like Sweden and the United Kingdom, other ministries are not competing principals in the sense outlined in this section.

Veto players deriving authority from legal frameworks or professional rules

Competing principals in this category draw legitimacy of their veto position from tightly specified professional rules or administrative procedures such as the Administrative Procedures Act (APA) in the United States. Under this law about 55 government regulatory agencies create rules and regulations concerning the implementation and enforcement of major acts such as the Food Drug and Cosmetic Act or the Occupational Health and Safety Act. The APA lists in detail administrative procedures concerning public information rights, record management and public rights to confidentiality and to information. The heads of the agencies are accountable for the proper application of such proceedings and the Office of Management and Budget (OMB) and the General Accounting Office (GAO) report to Congress in regards to them. In this way, those institutional actors outside of the ministry or department have veto powers in key aspects of the policy implementation process.

Similarly, the Head of the Home Civil Service in the United Kingdom oversees the implementation of the Civil Service Management Code (setting out standards for managers and employees across the civil service and including the Civil Service Code which gives civil servants guidelines on standards of conduct) and the career management framework for the UK civil service. The post holder is also the Cabinet Secretary, working for the Prime Minister and chairing the Civil Service Management Board. Thus while day-to-day responsibility for a wide range of terms and conditions has been delegated to departments and agencies, the Cabinet Secretary is in charge of overseeing that general administrative procedure rules are properly applied by the civil servants. In this respect, these centralised managerial and professional rules mean that the Cabinet Secretary in the United Kingdom also can act as a competing principal in some areas. [62]

Administrative actors may derive some veto powers from laws, acts and codes of conducts intended to promote ethical behaviour. If the focus of those rules is primarily on compliance with formal procedures, they may be used pre-emptively to require the deferment of policy implementation even where unethical behaviours are merely anticipated. Thus a compliance-based ethics regime, as opposed to an integrity-based system, strengthens derived veto positions of institutional actors. On that basis, countries such as Mexico, Portugal and the United States have potentially competing principals which derive their authority from prescriptive administrative-legal frameworks for maintaining ethical standards. New Zealand, the Netherlands, Australia and Norway focus less on rule compliance and thus provide a weaker basis for such a veto position. The same situation applies to Sweden, which has a particularly informal system. The United Kingdom and Finland take an intermediate position.

Table A2.5 provides an indication of the degree to which the ethics regime is compliance-based (comprising readily enforceable explicit rules) or based around somewhat more generalised aspirations to integrity for four of the countries studied for this report.

Table A2.5. Basis of the ethics regime

Basis of the ethics regime:	Country
Integrity aspiration ("high road", hard to enforce)	New Zealand
	United Kingdom
	Mexico
Compliance-based (readily enforceable explicit rules)	United States

Source: OECD (1996).

Special inspection bodies

While audit bodies generally report to the legislature, in the United States there is a special institution, combining audit, inspection and political powers, which reports to the President: the Inspector Generals of the Presidents Council on Integrity and Efficiency (PCIE). This is distinct from the Inspector Generals of the Executive Council on Integrity and Efficiency (ECIE). The latter can be viewed as an internal oversight body as they are appointed (and can be removed) by the head of the agency which they control. By contrast, the PCIE Inspector Generals are appointed by the President (and confirmed by the Senate). They are independent from the department in which they are located as they can only be removed by the President. They not only function as a general auditor of the operations of the department to prevent misconduct, such as waste, fraud and theft, but also they ensure that operations are in compliance with general established policies of the government. PCIE Inspector Generals are considered to be political appointees and are frequently chosen for their loyalty to the President. As they are placed within the department they have the information and the power to develop a veto-position in relation to the Secretary.

In France there is also an additional body vested with political competencies on the level of the executive – with a different task and arguably less powerful than the Inspector Generals but nevertheless competing with the ministries. The *Secrétariat Général des Affaires Européennes* (SGAE) is a central policy unit serving the Prime Minister with the task of coordinating the policies of all ministries in relation to the European Union. As potentially almost any policy issue involves coordination with the European Union, the SGAE has a role in many diverse policy areas and observers have commented that its role is such that political powers are being concentrated in the Prime Minister's office at the expense of ministerial autonomy.

The PCIE Inspector Generals in the United States and the SGAE in France can provide an institutional point of resistance to the implementation of a minister’s policy and thus can constitute competing principals in the sense of this paper.

Country examples of the “few”, “more” and “multiple principals” models

The comparison of the strength of the potentially competing principals investigated in this annex reveals large differences between the countries. In the United States each of the principals is relatively strong and the country provides an example of the “multiple principal” model.

In France three out of the four principals have significant veto powers and the country provides an example of the “more principals” model.

In Sweden, except for the strong position of the legislature, none of the other principals investigated is strong. Sweden is one of the “few principals” countries. The same applies to the United Kingdom where it is not the legislature but the somewhat strong position of the Cabinet Secretary which constitutes the “few principals”.

Table A2.6. Competing principals in four countries

Competing principals	Country	Potential strength as competing principals				Summary position regarding institutional constraints to political responsiveness within executive bodies
		The legislature	Other ministries or departments	Veto players deriving authority from legal frameworks or professional rules	Special inspection bodies	
Multiple ⇧ Few	United States	Strong	Strong	Strong	Strong	Multiple principals
	France	Weak	Strong	Strong	Strong	More principals
	United Kingdom	Weak	Weak	Mixed	Weak	Few principals
	Sweden	Strong	Weak	Weak	Weak	

ANNEX 3
HYBRID APPOINTMENT PROCEDURES: THE EXAMPLE OF BELGIUM

Following a series of public outrages concerning the performance of key public services in Belgium, most famously the Dutroux and the Dioxine affairs, extensive reforms of human resource management arrangements were undertaken within the public sector. The Copernicus reform in particular sought to enhance managerial capacity and hence the performance of the federal civil service.

The special Federal Selection body, called SELOR, was an important instrument in the process. One of its primary tasks is to guarantee merit criteria in the appointment procedures of high-level executive civil servants. Except for some special policy advisors outside the normal hierarchy, and above all except for the politically appointed staff of the ministerial cabinets, SELOR is involved in the selection of all civil servants comprising all senior executives in the federal civil service.

Levels beneath the three top tiers of the Belgian federal civil service are selected by an internal administrative procedure where the *Comité de Direction* of the ministry holds a secret vote to recommend which candidate should be chosen. The result is then sent to the minister whose task it is to make the final choice. However, the minister is expected to follow the recommendation of the *Comité de Direction*. If its vote is unanimous it is extremely difficult for a minister to override their recommendation.

By contrast, the three top levels in a Belgian ministry (Chairman of the Board N, Director General N-1 and Director N-2) are mandate functions which are selected through a procedure involving the Selection Office of the Federal Administration (SELOR) to guarantee merit criteria and the hierarchically superior. In the case of the level one this superior is the minister who, in addition to merit, also focuses on political responsiveness. As ultimately the minister has to give his agreement the selection procedure for all three top levels has been qualified as hybrid.

As an example of hybrid appointments, this annex concentrates on the selection procedure of level 1 in Belgium.

The appointment process is divided into two phases. The first phase, the administrative part, is directed by SELOR, the second one consists of the minister’s decision.

In the first phase, SELOR oversees a complex procedure leading to the pre-selection of a pool of suitable candidates based on merit criteria. In this process they study the *curriculum vitae* and the experience of candidates, conduct examinations and hold interviews. The selection jury, which is set up by SELOR and which conducts those steps, includes various independent experts.

Phase 1: Pre-selection

The pre-selection process conducted by SELOR can be divided into four steps:

1. **Preliminary pre-selection:** Based on the information provided by applicants in a standardised CV-form, SELOR identifies those candidates which fulfil the general appointment conditions for a public service position at the executive level and the particular conditions required for the respective post.

2. **Computerised examination:** During a test, which typically lasts for three hours, candidates who passed the preliminary pre-selection go through a large number of multiple choice and further exams that can be corrected with the help of standardised computer analysis and which aim at evaluating the candidate's management capacities as well as their personality. The results are forwarded to the selection commission which interprets them.

3. **Oral examination:** During another three-hour test the candidates are then asked to analyse a practical case which relates to the management task for which they have applied. They present their results and recommendations to the selection commission which will interview them in regards to their presentation and their professional background. The selection commission is composed of equal numbers of French- and Dutch-speaking members and includes technical experts in the specific area, public servants who exercise an equivalent assignment at the same grade of the post to be filled and independent experts. In addition to those members, union representatives have the right to be present as observers at any given examination session except for the selection commission's deliberations. The commission evaluates the candidate's expertise in relation to the respective assignment as well as their general management competencies.

   The selection committee consists of: the director of SELOR or his representative as chairman, an external management expert and an external human resources management expert, two external experts with experience in or knowledge of the specific duties of the position to be filled, two federal senior civil servants who have at least the same hierarchical position as the one of the vacancy.

4. **Rating:** In accordance with the *Arrêté royal of 29.10.2001* modified by the *Arrêté royal of 15.06.2004* applicants are graded into four groups by the selection commission going from A "very capable", B "capable", C "less capable" to D " not capable". This classification must be justified in writing and communicated to the candidates. Candidates are informed about their result in writing and, according to the Law of 11.04.1994 on Publicity in the Administration, candidates may ask for further written explanations within a "reasonable delay" of three months. Those graded into group A or B have passed the examination process and are considered as pre-selected.

Phase 2: Ministerial decision

Based on the commission's final rating the minister holds further meetings with those candidates who received an A grade. From this pool the minister makes the final selection or may decide to select nobody. She or he needs to motivate his final choice. If there are no laureates with an A grade or if none of them is willing to accept the job, laureates of group B may also be taken into consideration.

ANNEX 4
CIVIL SERVICE COMMISSIONS[63]

Background

Civil Service Commissions (CSC) are independent bodies, with responsibilities and authority often entrenched in the Constitution, intended to ensure that the merit principle is observed in public appointments and promotions and that the civil service is protected from patronage and unsuitable or unlawful political interference (Polidano and Manning: 1996).

Unlike audit institutions, which usually report to the legislature, CSCs report to the executive government, *e.g.* the Head of State. However, commissioners are granted an independent status and are protected from arbitrary dismissal. They are chosen for their recognized expertise and, even though appointed by the Head of State, they are not part of the civil service.

Typically, CSCs publish an annual report, which can be attentively followed by the media and parliaments.

CSCs originate from the United Kingdom, where the first Civil Service Commission was established in the mid-19th century, following the Northcote-Trevelyan Report of 1854. The civil service of that time was small, and recruitment was chiefly through patronage, based on personal recommendation from highly placed patrons. The limitations of such a system were becoming increasingly apparent. As the Industrial Revolution advanced, the tasks of government expanded, the electorate broadened and the middle class began to demand more open access to civil service jobs and better performance. After a faltering start, in 1870, following a succession of critical reports by the commissioners on the fitness of candidates, the Cabinet approved competitive exams for entrance into the civil service, and promotion thereafter on merit.

Similar commissions were established in Australia, Canada and New Zealand in the late 19th and early 20th centuries, and civil service commissions were established in other British-ruled territories particularly in the period immediately preceding independence. For many colonies, the constitutional entrenchment of the commissions was deeper, and their authority significantly larger, than in the United Kingdom, as part of a deliberate attempt to prevent a return to patronage within the newly independent countries (Polidano *et al*: 1996). Thus civil service commissions in the Indian sub-continent were in place when independence came in 1947. Malaya established a public service commission in 1949, the predecessor of similar bodies in Malaysia and Singapore. Many civil service commissions were established in Anglophone Africa in the 1950s and 1960s.

The United States was also a promoter of civil service commissions. The Pendleton Act of 1883 "provided for adoption of the British civil service system" (Van Riper: 1991, p.7) and created a civil service commission for the federal government. However, initially the U.S. Civil Service Commission was not fully independent as the President could remove members at will. Its initial coverage was only 10% of the public service, with the President having the authority to extend coverage at his own pace. For constitutional reasons (the President alone had the power of appointment) the Commission was restricted to providing a short list of candidates from which an appointee could be chosen.[64] The scope and impact of the commission was gradually extended and subsequently almost all states enacted similar legislation, as

did many major cities. Countries influenced by US models of government, such the Philippines and, later, Japan and Korea, followed this pattern.

By contrast, continental European states generally do not have such regulatory bodies but rather rely upon judicial review of administrative law or codes of conduct.

Country examples

There are many types of CSCs, ranging from those that perform only a minimal regulatory role to those that act as appeals, policy-making or management bodies exercising control over the civil service.

While CSCs in countries of the Indian sub-continent, very much like the early commissions in Britain and the United States, still exercise primary functions in the recruitment and promotion processes, CSCs in many western and most OECD member countries focus on a guardian role of standards and values and do not become actively involved in the selection process in order to avoid a potential conflict of interest.

Consequently, countries such as the United Kingdom, New Zealand or South Africa concentrate on their control and appeals function, leaving the primary tasks of appointments and promotions to other governmental bodies.

Civil Service Commissions as guardians of standards and values

In the United Kingdom and New Zealand, the CSCs undertake an important, albeit limited, role in relation to the core values of integrity, honesty, impartiality, objectivity and merit. They advise departments on the promotion of the Civil Service Code and are the final appeal body in the event that a civil servant wishes to complain that he or she is being asked to act in a way that is contrary to the code. Generally they are not directly engaged in appointments and promotions.[65]

CSCs in OECD member countries such as the United Kingdom and New Zealand were, arguably, able to move beyond the traditional task of undertaking selection, appointments and promotions because the merit principle in appointments is well entrenched by decades of practice and internal and external accountability mechanisms are very strong. The Public Service Commission of post-apartheid South Africa has now adopted a similar stance.

United Kingdom[66]

In the United Kingdom, all strategic civil service management responsibilities are shared between the Cabinet Office and the line departments. The Civil Service Commissioners are independent from these bodies, appointed by Order in Council ("by the Crown under the Royal Prerogative") and usually exercise their assignment part time with the assistance of some full time staff.

The CSC's main role is to oversee appointments and standards by:

- publishing a Recruitment Code interpreting the principles of openness, fairness and merit. When a vacancy has been opened to candidates from outside the Civil Service, departments must follow the Code;

- chairing selection boards and approving appointments to the top 600 posts in the senior civil service where these have been opened to recruitment from outside the civil service;

- auditing departments' recruitment systems for compliance with the Recruitment Code;

– advising departments on the promotion of the Civil Service Code and hearing complaints from civil servants under it;

– publishing an annual report.

The Commissioners are strictly bound to party-political neutrality. They may not hold any posts in a political party or support or criticise a political party publicly.

New Zealand[67]

As one of the earliest, and one of the most radical, proponents of New Public Management, New Zealand delegated appointments and many human resource management authorities to individual departments and agencies. The chief executives in these departments and agencies hold extensive managerial flexibility, within a strong accountability framework for outputs and outcomes.

New Zealand's CSC, the State Services Commission (SSC), is in charge of selecting those chief executives and drafting their performance contracts with ministers. As established by the State Sector Act, 1988, the SSC is also responsible for:

– advising on state services management;

– defining and promoting good practice;

– e-government;

– training of public servants;

– integrity and conduct.

Recently, the SSC has been charged with ensuring that "a system of world class professional state services, serving the government of the day, and meeting the needs of New Zealanders" will be accomplished. In this context a set of six development goals has been adopted:

– employer of choice – emphasizing the role of government as a good employer;

– excellent state servants – achieved through public sector training and leadership development;

– networked state services – through e-government;

– coordinate state agencies – managing for outcomes, greater flexibility in vote structures via the Public Finance Act Amendment, accountability for results, broadened beyond individual agencies;

– accessible state services – coordinated decisions on delivery of state services;

– trusted state services – reliability and integrity, respect of citizens, codes of conduct.

The SSC also gives guidance to civil servants on what political neutrality of the public service means in practice.

State employees are free to belong to any lawful organization, including a political party. However, when taking a role in a political party, a state servant must avoid “bringing politics into the job” or “the job into politics”.

South Africa[68]

Similar to the United Kingdom and New Zealand, primary responsibility for managing the public service does not lie with the CSC but other central management agencies, most prominently the Ministry of the Public Service and the National Treasury. Those bodies are in charge of the human resource management tasks such as disciplining staff, promotions, schemes of service, job descriptions, training and skills development, salary scales and allowances.

The South Africa Public Service Commission (PSC) has the following functions:

- promote the values and principles of the public service;
- investigate, monitor and evaluate personnel practices of the public service;
- propose measures to ensure effective and efficient performance of the public service;
- recommend on personnel procedures relating to recruitment, transfers, promotions, dismissals;
- investigate grievances;
- monitor and investigate adherence to or breach of procedures and practices;
- advise national and provincial organs on personnel practices;
- make regular reports to appropriate state bodies.

However, the PSC has no authority in regard to teachers, health workers and local government staff personnel. Their rules and guidelines are the responsibility of their respective ministries.

Civil Service Commission as an appellate body in the United States[69]

The equivalent body in the United States is called the Merit Systems Protection Board (MSPB), formed by President Carter’s reorganization of 1978 which abolished the Civil Service Commission and divided its functions among the Merit Systems Protection Board, the Office of Special Counsel and the Office of Personnel Management. It seeks to ensure that merit is respected in appointments and promotions for all federal employees and to protect them from partisan political and other prohibited personnel practices or abuses by agency management.

It is mainly characterised by its quasi-judicial functions:

- appeals against personnel actions – removals, suspensions, furloughs, demotions;
- appeals of individual actions affecting individual rights;
- complaints;
- special concern cases;

- requests to review regulations of Office of Personnel Management;
- ordering compliance;
- conducting studies.

In its decisions, the MSPB is required to be guided by principles such as merit, non-discrimination, protection of whistleblowers and against unlawful partisan-politics in the office.

Amongst other laws it oversees compliance with the Civil Service Reform Act of 1978, the Whistleblower Protection Act, the Uniformed Services Employment and Reemployment Rights Act, and the Veterans Employment Opportunities Act and the Hatch Act prohibiting some political activities.[70]

Operational civil service management is the responsibility of another agency, the Office of Personnel Management, which makes rules and issues guideline to departments on a variety of personnel matters. Its functions are to assist departments in recruiting, assessing, promoting and retaining employees. It classifies positions, evaluates programmes and restructures divisions in regards to downsizing and outplacement.

The distinctiveness of the US Civil Service Commission, the MSPB, is its focus on hearing appeals from individual civil servants against disciplinary and other personnel actions taken by the Executive.

Civil Service Commission as a management and oversight body in Korea[71]

Amongst the country situations depicted in this annex, the Korean Civil Service Commission has the most extensive role. It is the central government's main civil service management agency and consists of several units: Office of Policy Management and Public Relations, Bureau of Personnel Policy, Bureau of Human Resource Development, Bureau of Performance and Remuneration, Office of Human Resource Information, Bureau of the Senior Civil Service.

The principal functions of the CSC are to:

- establish basic personnel policies and the civil service reform agenda;
- screen appointments and promotions of the senior civil service;
- introduce job analysis and performance-based personnel systems;
- coordinate training and education for civil servants;
- administer recruitment examinations;
- develop a human resources database for the public service, and manage the human resource management system;
- hear and determine appeals of civil servants;
- provide improved remuneration and benefits.

Some training and appeals tasks have been delegated to additional bodies such as the Central Officials' Training Institute and the Appeals Commission.

However, in distinction to Civil Service Commissions in other OECD member countries, the Korean commission combines monitoring adherence to the civil service law with functions of policy-making and implementation. It sets basic personnel policy, designs the civil service reform agenda, coordinates training, makes recommendations on pay, and maintains the government's central human resource database, while also performing the traditional functions of recruitment and promotion screening and appeals. In order to deliver effectively on this large variety of assignments it is relatively large with a correspondingly elaborate departmental structure.

Country comparison and conclusions

Traditionally most civil services were centrally managed, with a clear set of rules leaving little discretion to ministries and agencies. As many OECD member countries have shifted their focus on service delivery performance, line departments and agencies have been granted greater autonomy by transferring HR functions to them (Polidano *et al*: 1996). However, this new flexibility is supported by a growing role for the commission in quality assuring the processes that the line departments follow. In some cases the powers of the commission have also been expanded to an extent that the CSC functions almost like a civil service ministry.

The resulting dividing line between the commission's oversight functions and other civil service management institutions can be clear, with the Civil Service Commission acting as a watchdog agency reporting on the executive's performance in managing the civil service with commissioners typically appointed from outside the public sector and vested with independent powers to perform their regulatory role. In such a setting the HRM policy-making remains the responsibility of a civil service ministry or department, directly accountable to a minister. However, it can also be more graduated, with less bright line clarity concerning the distinction between the CSC and other central civil service management bodies.

There are three constraints on the institutional design choices. First, and most obviously, delegation is limited by the degree to which line departments and agencies have come to accept merit-based HRM approaches as fundamental to their daily practice. A hands-off CSC will not be able to identify all cases of inappropriate recruitment or promotion. Second, there is a potential conflict of interest between the appointment and promotion function, and the appeals function. Third, locating the strategic management function within a significantly autonomous commission represents a balance between two risks. On the one hand, there is the significant risk that without creating a locus outside of government, the management tasks simply will not get done in any effective way. On the other, there is the equally significant risk that the commission will effectively become captured by the civil service and will undertake its planning, organizational restructuring and its pay and grading work with little or no regard for larger government priorities.

Table 4A.1 gives an overview of the country examples, along a scale indicating the degree to which the CSC focus includes operational human resource management responsibilities.

Table 4A.1. Different types of Civil Service Commissions

CSCs main focus	Countries
Recruitment, oversight, and appeals	Korea
Recruitment	India Pakistan Bangladesh
Appeals	United States
Oversight	United Kingdom New Zealand South Africa

ANNEX 5
THE QUESTIONNAIRE

General arrangements

– Is the principle of political neutrality of the public service spelled out in constitution, law or regulation?
 yes
 no

– If yes, please cite main instances.

– Is convention or custom supportive of the political neutrality of the public service?
 Strongly
 Somewhat
 Not at all

– Is there administrative law which places limits on political involvement in public service administration?
 yes
 no

– If yes, cite the most relevant provision.

– Are there laws, codes or customs which limit involvement of public employees in:

	1, Are there laws, codes or customs? (yes or no)	If you answered yes in column 1, is this for a)all public employees? b) only public employees holding civil service status? c) for senior public servants only?
Standing for public office?		
High profile party political activity?		
Other party political activity?		
Trade union activity?		

– Please quote the most relevant provisions. Are these provisions actively enforced?

- Do these arrangements also apply to arms-length non-departmental service public bodies?
  - ☐ yes
  - ☐ no

- If no, how are they different?

- Public servants and outside observers generally regard the formal provisions for political neutrality on administrative matters as …
  - ☐ credible.
  - ☐ more or less credible.
  - ☐ not credible.

- Are alleged breaches of the principle of the political neutrality of the civil service actively pursued by Parliament and the news media?
  - ☐ yes
  - ☐ no

Historic development

- Has the law relating to the political/administrative interface been changed in the past? When and why?

- The historical tendency is towards …
  - ☐ more
  - ☐ less direct political control in administration

- Have there been any scandals/incidents which have led to major changes in this area?
  - ☐ yes
  - ☐ no

  If yes, please give an example.

- Does the degree of involvement by politicians in administrative matters tend to change with changes of government?
  - ☐ yes
  - ☐ no

  If yes, identify main areas of difference between the parties

- In your country is there a tendency towards …
  - ☐ more politically appointed staff
  - ☐ more contractual staff
  - ☐ more arm's-length agencies
  - ☐ none of the above

- This is generally seen as:
  - ☐ increasing political influence
  - ☐ reinforcing political neutrality
  - ☐ having none of these effects

Personnel management

- List the five most senior levels of your public service, starting with the highest level directly below the Minister, for example the Vice-Minister, State-Secretary or the Cabinet of the Minster. The key criteria should be who has authority over whom.

- Please provide an organisational chart. (If your civil services has different designation of ranks across ministries please give a "typical" listing).

- For these procedures, appointment, dismissal, promotion, transfer and performance assessment, please identify in the table below, by assigning a, b, or c, whether the procedure is
  a. purely political (*e.g.* by ministers / other political actors)?
  b. purely administrative (independent of ministerial involvement)?
  c. a hybrid of political and administration (*e.g.* an administrative process chooses short-list of candidates, but final choice is political)?

	Level 1	Level 2	Level 3	Level 4	Level 5	Institutions involved	Special political advisors outside normal hierarchy
Appointment							
Dismissal							
Promotion							
Transfer to another position at same level							
Performance assessment							

- Do those procedures (for appointment, dismissal, promotion, transfer and performance assessment) differ …
  - ☐ in arm's-length agencies
  - ☐ for contractual staff at these five levels
    - ☐ in the centre of government (the body providing direct support to Head of Government and Council of Ministers)
    - ☐ in none of the above

- How do they differ (*e.g.* institutional arrangements? different for different levels?)

- Are there some levels/positions of public servants who automatically change with a change of government?
  - ☐ yes
  - ☐ no

  If yes, indicate which levels/positions.

– If senior civil servants are selectively changed for political reasons with changes of government please indicate whether such changes are …
  □ widespread?
  □ significant?
  □ few?

– Where limited term employment contracts have been introduced, appointments, dismissals or transfers for political reasons are perceived as
  □ more likely?
  □ less likely?
  □ as likely as before?

– Is the principle of political neutrality actively espoused in training material for staff development?
  □ yes
  □ no

– Do political appointees undergo any organised induction process to become acquainted with the operation and values of the public service?
  □ yes
  □ no

– Roughly what percentage of senior civil servants changed their existing jobs for whatever reason including transfer?

	Title and grade:	1	2	3	4	5	special political advisors outside normal hierarchy
a) following most recent re-election of government							
b) following last election of a new government							

Delineation of functional responsibilities

– Is there law, doctrine, regulation, custom or process (*e.g.* budget process) which delegates significant levels of management responsibility to senior civil servants?
  □ yes
  □ no

– Do ministers nevertheless tend to interfere in such areas of delegated authority?
  □ frequently
  □ seldom
  □ never

– Is there a legal or customary obligation on senior public servants to provide ministers with independent professional advice (“free and frank advice”) even in circumstances where the advice may be politically unpalatable? Cite examples.

– Do some laws/statutes give specific senior civil servants administrative responsibility that is not subject to ministerial oversight?
  □ yes
  □ no

  If yes, give examples.

– Do civil servant positions with such statutory authority tend to be filled by people who are…
  □ politically appointed?
  □ administratively appointed?

Variations of terms during the period of elections

– During the period leading up to an election …
  □ appointments are prohibited (moratorium of appointments)
  □ appointments are restricted
  □ there are no restrictions

– Please specify:
  During the period between an election and the formation of a new government …
    □ civil servants must provide impartial advice and information to all prospective members of the government
    □ civil servants face additional restrictions on any activities that might be construed as political
    □ there are no such arrangements or restrictions

Oversight of political/administrative delineation arrangements

– Please indicate the involvement of the following institutions in overseeing the political/administrative interface as a) either active or infrequent or b) *ex ante* (*e.g.* does the legislature have to confirm proposals for senior appointments?) or *ex post*, (*e.g.* does it investigate alleged breaches after the event).

Institution	1) Active or 2) Infrequent	1) *Ex ante* or 2) *Ex post*
The legislature		
The judiciary (*e.g.* civil service courts, *Cour des Comptes*)		
The auditor general		
Other institutions (please name)		

  Please give an example of a major recent instance of oversight by institutions listed above.

– These oversight arrangements apply to non-departmental arm's-length public bodies with …
  □ equal force?
  □ less force?
  □ more force?

  Please cite a major instance of this oversight in action.

Relative importance of different means of political administrative delineation

– Please rank the following factors from 1 “high importance” to 7 “low importance” in ensuring the separation of politics from administration in your governmental system. Do not use any rank more than once- this is a forced choice question.

Factor	Rank
General legal constraints on political involvement in administrative decisions	
The active development of a culture of political neutrality for the civil service	
The oversight of administrative decision making by the legislature	
The review of administrative decision-making by the judiciary	
Public transparency and rights to redress	
Statutory/institutional protections around specific politically sensitive decisions (including personnel matters)	
The creation of arm’s-length bodies outside of the civil service system	

ANNEX 6
THE TOP FIVE LEVELS AS INDICATED BY COUNTRY RESPONDENTS

Country	Level 1	Level 2	Level 3	Level 4	Level 5
Belgium	*Président du Comité de Direction* (Chairman of the Board)	*Directeur général* (Director general)	*Directeur* (Director)	*Conseiller général*, A5 (General Advisor, A5)	*Conseiller général*, A4 (General Advisor, A4)
Denmark	Permanent Secretary	Head of department	Director General or Director	Head of division	Head of section
France[72]	*Directeur de Cabinet*	*Sécrétaire general*	*Directeur général*	*Directeur*	*Sous-Directeur*
Italy	Vice-Minister	Under Secretary (*sotto segretario*)	Head of Department (*capo dipartimento*) or Secretary General (*segretario generale*)	Director General (*direttore generale*)	Director (*direttore*)
Korea	Vice minister	Assistant minister (grade 1)	Director General (grade 2-3)	Director (grade 3-4)	--
Mexico	*Sub-Secretario* (Vice Minister)	*Titulares de Unidad* (Head of unit)	*Directores Generales* (General directors)	*Directores Generales adjuntos* (Deputy to Gen. Director)	*Directores de Area* (Head of division)
New Zealand	State Services Commissioner	Departmental Chief Executive	Deputy Chief Executive	General Manager	Manager
Poland	Secretaries of State, Undersecretaries of State	Director-General	Directors of Department, Deputy Directors	Heads of unit	Heads of sections
South Africa	Director-General, Salary level 16	Deputy Director-General, Salary level 15	Chief Director/Chief Executive Manager, Salary level 14	Director/Executive Manager, Salary level 13	Deputy Director/Manager, Salary level 11 & 12
Sweden	State Secretary	Director General/ Chief Legal Officer	Deputy Director General	Heads of departments	Directors
United States	Deputy Secretary	Interior Associate	Assistant Secretary	Varies depending on department	Varies depending on department

ANNEX 7
COUNTRY RESPONDENTS

Federal government of Belgium:
Geert Sintobin, Jacques Druart
Service Public Fédéral Personnel et Organisation

Denmark:
Camilla Vejlø Hartling
Ministry of Finance

France:
Philippe Sagon, Antoine Godbert
Direction Générale de l'Administration et de la Fonction Publique (DGAFP)

Italy:
Dr. Pia Marconi
Dipartimento della Funzione pubblica (Ufficio per la semplificazione)

New Zealand:
Mark Holman
State Services Commission of New Zealand

United Kingdom:
Cabinet Office

Korea
Sanghyun Lee
Republic of Korea Civil Service Commission

Mexico
Dr. Rafael Martínez Puón
Revista Servicio Profesional de Carrera

Poland
Dr. Jacek Czaputowicz
Deputy Head of Civil Service

South Africa
Bobby Soobrayan
South African Management Development Institute

Sweden
Mr. Knut Rexed, Per Stengård
Swedish Agency for Government Employers

United States
Dr. Doris Hausser
Senior Policy Advisor to the Director and Chief Human Capital Officer
Stuart C. Gilman
United Nations Office on Drugs and Crime

NOTES

1. Country responses were provided by key contacts in the 12 studied countries who, together with the country delegates to the OECD Public Employment and Management Working Party, have generously contributed their time and insights (see Annex 7). Particular gratitude is due to Knut Rexed and Stu Gilman who have provided detailed and thoughtful comments on recent developments in Sweden and in the United States. In addition, Francisco Cardona and Bob Bonwitt from OECD/SIGMA and Janos Bertok from OECD/GOV have provided invaluable guidance concerning the framework and approach. Geoffrey Shepherd (World Bank) has also provided useful comments.

2. The literature reflects an ambiguity about political neutrality. Seemingly it can refer to an administration that does not take heed of political priorities and/or an administration that is equally responsive to all elected governments. This report uses neutrality in the sense of political non-partisanship, *i.e.* that the administration is not responsive to narrow party political concerns.

3. To avoid confusion, it should be noted that, in this report, government is used in the non-US sense of the elected executive.

4. Meier and J. O'Toole Jr. (2006) offers a particularly comprehensive review of the literature concerning this tension. Wood and Waterman (1991) provide evidence that in the case of the United States, political appointees were indeed associated with particular aspects of policy implementation.

5. It is outside of the scope of this report, but it is important to note that some politicising behaviours are intrinsically hard to detect. For example, political responsiveness can also be achieved by means other than selecting politically-sympathetic staff. Shifting decisions to a different level of government is one example. In the United States, Peters and Pierre (2004) claim that conservatives have applied this strategy by moving decisions to the state or local level where they would hope for policies which are closer to their ideals. Similarly, moving decision making to notionally arm's-length agencies, while often described in terms of placing functions at arm's-length from political interference, can be used to increase political responsiveness through the government's power to appoint boards and executives of such agencies directly.

6. A recent OECD/SIGMA paper points out that political advisors are distinct from public servants in three respects. Political advisors differ from regular civil servants in three crucial respects. "First, since they are personally nominated by the minister, they are exempt from the usual civil service entry requirements (although sometimes they may previously have served as civil servants). Second, they stand outside the normal hierarchy of the ministry. Usually they are responsible only to the minister and take their instructions from him/her. Third, they are exempt from the requirement imposed on civil servants to act with political impartiality; the whole point of a political advisor is, precisely, that he/she can give politically loaded advice that the minister cannot request of the civil service" (James: 2007, p.8-9).

7. In essence, the *Rechtsstaat* tradition provides civil servants with a profound sense of the importance of preparing and enforcing laws in order to maintain the integrity and continuity of the state. This is somewhat in contrast to the Anglo-Saxon "public interest" tradition that sees civil servants as restraining the partisan actions of politicians on behalf of the public. This difference can be seen most readily in the conception of the state as a legal entity. In the Anglo-Saxon traditions, the state as such does not exist as a legal entity but rather one speaks of "government" or "government departments". In other traditions, the state is an entity capable of entering into legal contracts with other entities (such as regions, communes, universities, etc.). Shepherd (2007) notes the distinction between the Commonwealth model of managing

top officials, seen in New Zealand and the United Kingdom, following Whitehall constitutional conventions, and the US arrangements.

8. The survey does not include the subnational governments in Belgium (Flemish Community, Walloon Region, Brussels-Capital Region, French Community, German Community). Most significantly, the survey does not include the cabinet staff – restricting itself to the executive administrative senior civil servants.

9. This entailed some interpretation in practice:

- The term minister is not universal. For the United States, minister was interpreted as secretary.
- In federal states this study looks at the federal level. In Belgium this includes all federal ministries ("Federal Public Services") and their linked agencies or scientific institutions which depend directly or indirectly on a minister, but not for instance the army, the police, the health services, teachers or local authorities.
- Respondents in France note that there is no clear hierarchy between the top five levels below the minister. For the purpose of this study and in order to facilitate international comparison the following order has been adopted for the top five levels of the French civil service: Level 1: *Directeur de Cabinet*, Level 2: *Sécrétaire general*, Level 3: *Directeur général*, Level 4: *Directeur*, Level 5: *Sous-Directeur*.
- In contrast to the other countries, in Italy, levels 1 (Deputy Ministers) and 2 (Under-secretaries) usually refer to elected officials. As such they are not directly comparable with appointed civil servants of other countries at those levels and will, therefore, not be taken into consideration in comparative tables. The subsequent levels in Italy are: 3: Heads of Department or Secretaries General, 4: Directors General, 5: Directors. All levels as indicated by country respondents are depicted in Annex 6.

10. An early exploration of the relationship between impartiality and representativeness was provided by Kaufman 1956). Others have picked up the baton and debated the risks and benefits of active representation and generally agree with Mosher (1968) in coming down on the side of passive representation – *i.e.* the belief that if the rules are fair and balanced, then selecting merit will (more or less) automatically lead to representativeness.

11. While Sweden does not have the principle codified formally, non-partisan professionalism in implementing administrative law is deeply embedded in the political/administrative culture.

12. Although political involvement in administration is not explicitly proscribed, all government instructions to the implementing agencies have to be in writing and made public, and the government may not interfere in an agency's interpretation of laws that are to be applied to citizens and enterprises.

13. See also Kettl, Pollitt *et al.* (2004).

14. Exceptions apply during the period of elections and when a member of the military is a candidate or elected official, such as a parliamentarian or city council member.

15. For Sweden this table reflects the appointment procedure in a typical ministry. In Swedish agencies, however, only the top two levels (Director General and Deputy Director Generals) are politically appointed.

16. See Note 9.

17. The State Services Commissioner is appointed by the Governor-General in the Council (the sovereign's representative in New Zealand) on the recommendation of the Prime Minister.

18. In the federal government of Belgium, hybrid refers to strict administrative procedures under which no civil servant of those levels can be dismissed without the proposal of the administration and the agreement of the minister.

19. In Sweden, any dismissal of a public employee, even at the highest level, is covered by the Law on Employment Security. Dismissal can only be made on objective grounds, and the validity of these can be tried in the Labour Court.

20. In Belgium appointments at the first three levels are made within the framework of a mandate system. When one function becomes free, a new open selection procedure is organised. It can lead *de facto* to a promotion, although not in legal terms.

21. See previous note.

22. Arguably, the arrangements in the United Kingdom are that while ministers may not themselves direct the transfer of a Permanent Secretary or other senior member of staff, there is a longstanding acceptance that a senior official who has "lost the confidence" of her minister will be moved by the Cabinet Secretary. Under such circumstances, early retirement can be and is sometimes actively encouraged.

23. There are no formal procedures for performance assessment of political advisors in Italy.

24. In the federal government of Belgium the performance assessment is made by the minister for level 1 (Chairman of the Board) – aided by an external bureau. Assessment of the level 2 (Directors General) is made by the level 1 (Chairman of the Board) and the relevant minister.

25. See also Swilling and Woolridge (1997).

26. During election periods the Federal Electoral Institute (IFE) actively controls and enforces particularly comprehensive rules.

27. According to the Italian Civil Service Law once elected a civil servant automatically leave his/her post for the same period of time of his/her political mandate.

28. As an exception to the rule certain categories of French civil servants (*e.g.* members of the military, prefects and police officers) face limits on political actions and trade union activities.

29. Respondents in the federal government of Belgium noted that the operational aspects of policy implementation are "not subject to ministerial oversight" but stress that ministers have oversight on the strategic questions.

30. Interestingly, when respondents were asked to elaborate, the importance of the legislature in this regard was slightly less clear (see Table 11).

31. In the federal government of Belgium, there is oversight by the *Conseil d'État* which, does not belong to the judiciary but the executive branch.

32. Parliament is only informed on level 3 appointments in view of possible parliamentary questions.

33. Court of auditors (*Corte dei conti*), checks compliance with the law that sets the standards for Senior Civil Service appointments.

34. The Senate has an active role (in distinction from the House of Representatives) and verifies about 1 200 out of the 10 000 political appointments. There is no oversight for the remainder.

35. The Office of Personnel Management (OPM) applies rules of appointment and sets limits to the responsibilities of individual administrators, but although the head of OPM signs appointments this is largely a formal responsibility.

36. The establishment of arms length agencies, such as Banco de Mexico, are perceived as having had the effect of increasing political neutrality.

37. Administrators belonging to level 3 are automatically dismissed if their appointment is not confirmed within 90 days after a new government takes office.

38. The sole exception is that the President of the Board of the Chancellery of the Prime Minister always changes with a change of government.

39. With the exception of ministers' special advisors.

40. Estimates from country respondents.

41. In 2002, however, more than 50% of administrators in level 4 in Italy changed their job (through replacement and transfer) after the election of a new government in 2001, because of a special provision in a law proposed by the new government and passed by the Parliament.

42. In the federal government of Belgium, governments are always formed by coalitions and a new government may comprise ministers who were included in the previous one. The percentage of change in the political advisors varies from 0 to 100 in function of the fact that the minister keeps the same competences, is a new one from the same political party or is a new one from another party.

43. It depends on the personality of the minister and of the members of the Cabinet. Some Cabinets never interfere, others do.

44. As managerial autonomy of directors has been introduced for the first time in 2001 in regards to budget procedures through the LOLF law, French respondents consider it to be too soon to judge if the directors' managerial responsibilities are respected by ministers or not.

45. Some 10 000 public servants are politically appointed at the federal level, and in addition there are 100 000 political appointments at the state and local levels in the United States (Gilman: 2003).

46. Korea has only recently opened 20% of its civil service positions to outside candidates.

47. See Note 43.

48. If the involvement of the large ministerial cabinets is regarded as "ministerial interference". A lot depends on the personality of the minister and the members of his Cabinet. Some Cabinets never interfere, others do.

49. This characterization draws significantly on Government of South Africa (2005). It also draws, to a lesser extent, on Mouritzen and Svara (2002).

50. The notion of veto-players refers to a concept originally established by Tseblis (1995) who defines a veto-player as "an individual or collective actor whose agreement is required for a policy decision". However, while Tsebelis refers to actors who influence the decision-making of governments as a whole, the stylised models set out in this paper focus on the political-administrative interface within a ministry and refer to actors who can facilitate or prevent the proper implementation of policy as defined by the minister.

51. The study gives no basis for concluding which way (if either) the causal relationship runs. On the one hand, it is a reasonable speculation that deeper political involvement in staffing is a more demanding method of providing political control over ministries and departments than hierarchical authority – and thus to some degree is a necessity in a context of multiple principals. On the other, it could be argued that the causal relationship runs the other way – and that the situation of tight external oversight arises when there is deeper political involvement and so gives rise to the need for more checks and balances. In the absence of controlled experiments in national-building, the only safe conclusion is that these two phenomena are associated.

52. By some observers the United Kingdom is seen as neutral.

53. As noted, this refers only to administrative senior civil servants, not the politically appointed staff of the ministerial cabinets. It is not possible to limit the answer for Belgium to senior civil servants and compare it to the other countries.

54. It is only the number of special political advisors that have increased. Since 1634 all others have been appointed by administrative decisions taken by the king or, during the last three decades, by the Council of Ministers.

55. Mandates concern only the non-political senior civil service staff.

56. This table largely draws on Molander *et al.* (2002).

57. See Aberbach and Rochman (1998), Hecklo (1977) and Salamon and Lund (1984) and, for a comprehensive overview, Garrett *et al.* (2006).

58. This table largely draws on Gilman (2003).

59. See Note 50.

60. Supportive of this point, in their survey of senior executives within the federal civil service, Aberbach *et al.* (1981) note that U.S. civil servants had more contacts with members of Congress than they had with their department secretaries.

61. Country respondents, however, saw the minister's autonomy limited to policy implementation and saw policy decision as a rather collective process in Italy.

62. Regulation inside the UK government has been examined in some detail in Hood, James *et al.* (2000) and Hood, Scott *et al.* (1999).

63. In addition to the references cited, this annex draws significantly on Stevens (2006) and updated information from the websites of various Civil Service Commissions.

64. This is similar in effect to the hybrid system discussed in Annex 3.

65. However, the State Services Commission in New Zealand is directly engaged in the appointment and promotion of departmental chief executives (corresponding to level 2 in this study).

66. See the UK Civil Service Commission website: http://www.civilservicecommissioners.gov.uk/

67. See the State Services Commission website: http://www.ssc.govt.nz/display/home.asp

68. See the Public Service Commission website: http://www.psc.gov.za/

69. See the MSPB website: http://www.mspb.gov/

70. See Annex 1.

71. See the Korean Civil Service Commission website: http://www.csc.go.kr/eng/

72. Respondents in France note that there is no clear hierarchy between the top five levels below the minister. For the purpose of this study and in order to facilitate international comparison the order specified above has been adopted for the top five levels of the French civil service.

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Item “15”

Building a capable state our top priority

Cyril Ramaphosa |
20 January 2020
Cyril Ramaphosa says he wishes to end practice of parachuting the poorly qualified into positions through patronage

From the desk of the President

20 January 2020

Dear Fellow South African,

A few weeks ago we celebrated the start of a new year and a new decade. This gave us an opportunity to reflect on our plans for the year ahead but also to think deeply about the challenges that confront us. Of these challenges, and perhaps the most pressing, is the need to build a capable state. This is a task that does not capture the imagination of most people, yet it is essential to everything we want to achieve.

Walking through the streets of Kimberley and other towns in the Northern Cape a fortnight ago drove home the point that if we are to better the lives of South Africans, especially the poor, we need to significantly improve the capacity of the government that is meant to as improve their lives.

It was disheartening to see that, despite progress in many areas, there were several glaring instances of service delivery failures. Many of the places we visited struggle to provide social infrastructure and services simply because they have such a small revenue base. But, in some cases, elected officials and public servants have neglected their responsibilities. A common feature in most of these towns, which is evident throughout all spheres of government, is that the state often lacks the necessary capacity to adequately meet people's needs.

As public representatives and civil servants we derive our legitimacy from our ability to act professionally as we serve the public and manage state resources to the benefit of the public. We also need to ensure that we embody the *Batho Pele* principles. Putting people first. It is through such an approach that we can have a state that places people and their needs at the centre.

Yet, the achievement of such a state is undermined by weak implementation. Poor coordination and alignment between departments and lack of effective oversight has meant that policies and programmes have not had the necessary impact on people's lives.

That is why this administration has prioritised the task of building a capable state.

Much of this work happens behind the scenes, ensuring that policies are aligned, processes are streamlined, technology is effectively deployed, budgets are adhered to and programmes are properly monitored and evaluated.

A capable state starts with the people who work in it. Officials and managers must possess the right financial and technical skills and other expertise. We are committed to end the practice of poorly qualified individuals being parachuted into positions of authority through political patronage. There should be consequences for all those in the public service who do not do their work.

Through the ongoing and focused training of civil servants, the National School of Government will be playing a greater role in providing guidance for career development.

A capable state also means that state owned enterprises need to fulfil their mandates effectively and add value to the economy. State companies that cannot deliver services – such as Eskom during load-shedding – or that require continual bailouts – such as SAA – diminish the capacity of the state. That is why a major

focus of our work this year is to restore our SOEs to health. We will do this by appointing experienced and qualified boards and managers. We will be clarifying their mandates, and give them scope to execute those mandates.

One of the most important innovations of this administration is the introduction of the district-based delivery model. This way of working is a departure from the top-down approach to the provision of services and will ensure that no district in our country is left behind. It is a break from the 'silo' approach, where different parts of government operate separately from each other.

This aims to produce a single, integrated district plan in line with the vision of: 'One District, One Plan, One Budget, One Approach'. It will give us a clearer line of sight of what needs to be done, where, how and with what resources. By pooling resources, by focusing on projects that directly respond to community needs, and by setting delivery targets on a district-by-district basis, we will be able to better meet our people's needs.

Through the proper execution of the district development model, we will be able to know which police station needs vehicles, which rural clinic has run out of medicine, which businesses are struggling to obtain water use licenses, and respond in a targeted manner. District-based development is the basis for growing and sustaining a competitive economy.

Although we face great challenges, we do not have a dysfunctional state.

None of this will happen overnight. Much of the work will not be immediately apparent. But as we make progress, people will notice that government does things faster. Already, for example, we have drastically reduced the time it takes to get a passport or receive a water licence. As we continue to improve, people will notice less interruption of services, more roads are being built, infrastructure is better maintained, more businesses are opening up and more jobs are being created. Those who follow such things, will notice that government audit outcomes are improving, money is being better used and properly accounted for.

For this work to be successful, citizens need to get involved. We must all participate in school governing bodies, ward committees and community policing forums. It is on citizens that government will rely to advise us on the standards of public services in communities. It is on you that we depend to hold those who are failing you to account.

Where government needs help, we should be prepared to draw on the skills, expertise and resources of the private sector and civil society. If we all work together to build a more capable and developmental state, we will be that much closer to realising the South Africa that we all want.

Best wishes,

Cyril Ramaphosa

Item “16”

Republic of South Africa

South African Government

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Let's grow South Africa together

From the desk of the President

01 March 2021

Dear Fellow South African,

When I was elected to the position of President of South Africa, I said that building an efficient, capable and ethical state free from corruption was among my foremost priorities.

Only a capable, efficient, ethical and development-oriented state can deliver on the commitment to improve the lives of the people of this country.

This means that the public service must be staffed by men and women who are professional, skilled, selfless and honest.

They must be committed to upholding the values of the Constitution, and must, as I said in my inaugural speech, “faithfully serve no other cause than that of the public”.

Over the past two weeks, public consultations have been underway on an important policy document that will give greater impetus to our efforts to bolster, strengthen and capacitate the civil service.

The draft National Implementation Framework towards the Professionalisation of the Public Service aims to build a state that better serves our people, that is insulated from undue political interference and where appointments are made on merit.

The framework was approved by Cabinet in November last year and structured consultation with various sectors of society are now underway.

Twenty-seven years into democracy, it can be said of the public service that while several pockets of

excellence exist, we have serious challenges in many government departments with regards to skills, competence and professionalism.

All too often, people have been hired into and promoted to key positions for which they are neither suitable nor qualified. This affects government performance, but also contributes to nepotism, political interference in the work of departments, lack of accountability, mismanagement and corruption.

There is also the related problem of political and executive interference in the administration of the public service. One need only to look at the instability in government departments when senior managers are swopped or replaced each time a new Minister is appointed.

Directors-General and provincial heads of departments are particularly affected. In some departments, DGs, HoDs and executive managers have had stability of tenure, enabling the departments to function with little disruption. In most of these departments where there is leadership stability, audit outcomes tend to be positive and public funds can be accounted for. Where there is a high turnover of heads of department, there is often administrative turmoil.

One of the key recommendations made in the draft framework is that the public service must be depoliticised and that government departments must be insulated from politics.

Professionalisation is necessary for stability in the public service, especially in the senior ranks. Public servants must be able to continue doing their jobs “regardless of any changes of Ministers, Members of the Executive Council or Councillors within the governing party in charge of the administration, or changes to political parties after elections”.

We are proposing a number of far-reaching reforms, such as extending the tenure of Heads of Department based on merit and performance, doing occupation-based competency assessments and involving the Public Service Commission in the interviews of Directors-General and Deputy Directors-General.

Introducing integrity tests for all shortlisted individuals will help so that we can recruit civil servants who can serve honestly. We also need to extend the compulsory entrance exams that we introduced in April 2020 beyond senior management. Successful developmental states have similar measures which help advance professionalism within the public service.

As we note in the draft framework, “the bureaucracy must continue to loyally and diligently implement the political mandate set by voters and the party, but to refrain from being political actors themselves.”

We are suggesting a more rigorous approach towards recruitment and selection of public servants, induction and performance management. This includes continuous learning and a clear professional development path for every public servant.

The draft Framework puts emphasis on the need to hold public servants accountable for irregularities, to do away with a culture of impunity in the mismanagement and misappropriation of state resources.

Professionalising the public service involves training for accounting officers across all spheres of

government on the applicable legislative provisions.

The National School of Government has a vital role to play in this regard.

Professionalism is not only about having the right qualifications and technical skills, but also about having appropriate standards of respect, courtesy and integrity in dealing with members of the public.

The public service is diverse, with a huge range of skills, qualifications and capabilities. Many public servants have specialised skills that are necessary for the effective provision of services. It is therefore not necessarily the case that we need a smaller public service: what we actually need is a fit-for-purpose public service with suitable skills, a professional ethic and a commitment to serving the people.

The men and women of the public service need to be capacitated to play their role in driving development and consolidating democracy. This is our best guarantee of a capable state that serves the interests of citizens.

I call on you to be part of the public consultation process around this draft framework, which is available on the National School of Government's website, and to make your voice heard.

The public service does not belong to any one party, nor should it be the domain of any particular interest group. It should not be a law unto itself.

The public service belongs to the people of South Africa. It must serve them and them alone.

With best regards,

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Item “17”

AFRICAN NATIONAL CONGRESS

JANUARY 8TH STATEMENT

2021

UNITY, RENEWAL AND RECONSTRUCTION IN THE YEAR OF CHARLOTTE MAXEKE


AFRICAN NATIONAL CONGRESS
109TH
ANC
Anniversary
8 JANUARY 2021

STATEMENT OF THE NATIONAL EXECUTIVE COMMITTEE ON THE OCCASION OF THE 109TH ANNIVERSARY OF THE AFRICAN NATIONAL CONGRESS

8 JANUARY 2021

The people of South Africa,

Comrades and Friends,

Nearly half a century has passed since the ANC in exile issued the first statement of the National Executive Committee on the anniversary of the ANC's formation – popularly referred to as the January 8th Statement.

It was a time of great upheaval. The people of our country were suffering under a repressive regime. The liberation movements were banned, and our leaders were imprisoned, banished or exiled.

And yet, even without being allowed to gather or to organise, and without our leaders being in their midst, the message of the ANC found its way to our people.

It gave them strength, hope and courage. It lit the path to our people's victory over apartheid.

January 8th Statement 2021

Today, we deliver the January 8th Statement at a time of great upheaval in our country and across the world.

The ANC celebrates 109 years since its founding in the shadow of a global pandemic that has led to great suffering and loss of life, that has severely damaged our economy and that has profoundly changed how we lead our lives.

None of the traditional activities we hold to mark the birthday of the ANC are taking place this year. Due to the necessary restrictions that are in place to contain the spread of the coronavirus – and the need at this time to exercise utmost caution – we are not undertaking our traditional door-to-door engagements, community meetings and January 8th rallies.

And yet even as we are unable to gather in our numbers, even as the leadership of the ANC is unable to be with you in person, the message of the ANC lives in the hearts and minds of our people.

The ANC's message is clear, and is as strong as it has ever been.

It is heard by the millions of South Africans who believe that the ideals of the ANC reflect their aspirations and their hopes for a better life and future.

The January 8th Statement is the voice of our movement.

It gives inspiration and encouragement to our members, supporters and many others across the nation.

It is an appeal to all those who love the ANC to rededicate themselves to lives of service in the cause of South Africa and its people.

It is the historical mission of the ANC to lead the transformation of our society. This role has been hard earned through decades of struggle and has been recognised by our people through successive electoral mandates.

January 8th Statement 2021

The people of this country have entrusted the ANC with the responsibility to work with them in building a better life for all.

Over the course of its history, the ANC has lived up to this responsibility. It led the heroic struggle of the South African people against apartheid, resulting in the country's first democratic elections and the adoption of a democratic Constitution.

In government, the ANC led the reconstruction of our society from the ashes of apartheid misrule. We worked together with the people to expand access to housing, electricity, water and sanitation and social infrastructure to millions of our people. We expanded access to education and health care. Prior to the onset of the global financial crisis, our policies contributed to the revival of our economy, the creation of millions of new jobs, the stabilisation of our public finances and the reduction of poverty.

It was these achievements that earned the ANC the confidence and trust of the South African people.

The trust that our people have invested in us should never be taken for granted. Such trust, once lost, is not easily regained.

We know that to fulfil our role and discharge our responsibility, we must renew and rebuild our movement and ensure that it remains true to its founding values.

The values on which this movement was founded are integrity, honesty, tolerance, respect and, above all, service.

While important progress has been made in the renewal and rebuilding of the ANC since the 54th National Conference, there is still much to be done.

The organisation has been weakened by corruption, resistance to renewal and controversies involving ANC leaders.

These problems have widened the social distance between the ANC and the people. Unless they are resolved, they will have the effect of rendering our society rudderless at a time when firm and principled leadership is required.

At the same time, there is a danger that internal conflicts can consume us, and detract from the very real work we need to do to unite and transform our society.

For over a century, the ANC has sought to fulfil its historic mission to build a united, non-racial, non-sexist, democratic and prosperous South Africa. In the face of the great challenges before us, it is more important than ever that we keep our sights firmly on this mission.

In this year of 2021, our foremost priorities as the African National Congress are:

Firstly, to act together with all South Africans to defeat the coronavirus. We start the year in the midst of a second wave of infections that is spreading far faster and has the potential to cause greater loss of life than the first wave. This requires effective implementation of prevention measures and a rapid and efficient programme to provide a vaccine to all our people.

Secondly, to place our economy on a path of renewal and recovery. This path must be one which overcomes the apartheid and colonial legacy of poverty, inequality and unemployment.

Thirdly, we must this year forge ahead with the fundamental renewal of the ANC. It is only an ANC with ethical, selfless and disciplined members that can lead the national effort to reduce coronavirus infections and drive radical social and economic transformation.

Fourthly, we must work to build a better Africa and a better world. Despite the damage caused by the coronavirus pandemic, we must intensify our contribution to Africa's development and to building a more just and more peaceful global order.

1. MILESTONES

As a movement, we continue to draw strength and encouragement from the great struggles fought by those who came before us.

This year marks the 150th anniversary of the birth of one of South Africa's most remarkable and pioneering leaders, Charlotte Mannya Maxeke. She was the first black South African woman to obtain a science degree, was a delegate to the ANC's founding conference in 1912 and was a founder of the Bantu Women's League, a forerunner to the ANC Women's League.

She made an exceptional contribution to the struggle for the liberation of women in South Africa and challenged contemporary attitudes about the place of women in politics, society and the economy. She was a fearless leader who organised the first defiance campaign against the pass system, mobilising women to burn their passes. She organised farm workers and domestic workers and dedicated her life to improving the conditions under which African women lived.

She was a pioneer of the women's movement and the struggle for a non-sexist society. At a time when women were regarded only as auxiliary members of the ANC, Mam Maxeke's example in challenging gender norms saw the ANC in 1943 opening up full membership to women and the election of Lilian Ngoyi as the first female NEC member.

This year marks the centenary of the Communist Party of South Africa. Since its formation in 1921, the Communist Party has been a dependable ally not only of our movement, but of the oppressed and exploited people of South Africa. It has been at the forefront of the struggle against racial discrimination and capitalist exploitation.

The Communist Party was the first to feel the repressive wrath of the apartheid state and its members were prominent among the first men and women to take up arms to defend our people. The Communist Party has also played a critical role in the ideological development of the liberation movement.

As we celebrate this great milestone alongside our Alliance partner, we reaffirm our shared commitment to the achievement of a National Democratic Society.

Other important anniversaries that we will mark this year include:

- 150 years since the birth of the first President of the ANC, John Langalibalele Dube.
- 125 years since the birth of Clements Kadalie, founder of the Industrial and Commercial Workers' Union.
- 100 years since the birth of Florence Mophosho, a stalwart of our movement who was a leading organiser of the Congress of the People in 1955.
- 75 years since the first African Mineworkers Union strike, led by JB Marks.
- 60 years since the formation of the people's army, Umkhonto we Sizwe.
- 60 years since Chief Albert Luthuli became the first African to receive the Nobel Peace Prize.
- 50 years since the murder of Ahmed Timol in police detention.
- 40 years since the assassination of human rights lawyer Griffiths Mxenge.
- 40 years since the Matola raid in Mozambique by the South African Defence Force, in which several ANC cadres and Mozambican citizens were killed.
- 30 years since the ANC held its first National Conference in the country after three decades of illegality and celebrated the homecoming of President Oliver Tambo.

- 25 years since President Nelson Mandela signed South Africa's democratic Constitution into law on 10 December 1996 in Sharpeville.

- 20 years since South Africa hosted the World Conference Against Racism in Durban in August 2001.

We extend fraternal greetings to the Communist Party of China (CPC) on the occasion of its centenary this year. We salute the CPC and the people of China for their support and assistance in the struggle for the freedom of the South African people.

Next month, we celebrate the 109th birthday of Ma Rebecca Kotane. Born exactly a month after the formation of the ANC, Ma Kotane struggled side by side with her husband Moses Kotane, former SACP General Secretary and ANC Treasurer General. Throughout her life she has been steadfast in her commitment to the struggle. A delegate to the Congress of the People in Kliptown in 1955 and one of the women who marched on the Union Buildings on 9 August 1956, Ma Kotane endured constant police harassment and detention, and many years of separation from her husband in exile. The courage of Ma Kotane continues to serve as an inspiration to the members of the ANC and the people of South Africa.

2. SOUTH AFRICA AND THE ANC IN 2021

The coronavirus pandemic has deepened poverty and unemployment in our society.

The pandemic has brought into sharper focus the fault lines of inequality, income deprivation, asset poverty, and lack of skills and economic opportunities among the majority of our people.

It has been a stark reminder of the lived realities of millions of people when it comes to accessing health care, housing, education, safety and security and other basic services.

For millions of South Africans, the poor conditions under which they lived before the pandemic have only gotten worse.

The economy has contracted sharply. Around two million jobs have been lost and many more people have fallen below the poverty line. Many families face hunger and hardship as we enter the new year. Many more struggle to keep up debt repayments, have had their assets repossessed and cannot make ends meet.

Without the economic and social relief measures that the government put in place, and without the urgent interventions to strengthen our public health care facilities, the situation could have been far worse.

Throughout the country, communities are still confronted by high rates of crime and violence. The lack of safety threatens and undermines their sense of well-being and hampers social and economic development. Other social problems, such as drug and alcohol abuse, contribute to violence and cause many families great misery.

The second pandemic in our country – of violence against women and children – continues to plague our society. Gender-based violence and femicide is rooted in patriarchal attitudes and is the most blatant affront to our common humanity. Ending gender-based violence in all its forms is integral to the social and economic progress of our nation.

There are still backlogs in the provision of basic services to communities, particularly in townships, informal settlements and rural areas. While great progress has been made since the advent of democracy, there are many areas that suffer from a lack of housing, access to electricity, water and sanitation, and social infrastructure. This is due both to the huge disparities of our past and to ongoing weaknesses in governance, capacity and financial management within the different spheres of government.

As we begin the arduous task of recovery, we must ensure that this is also characterised by reconstruction that addresses the fundamental inequalities

and exclusion that continue to characterise our society.

We have to decisively change the face of our economy, and not simply return the economy to where it was before the pandemic. In other words, our task is not only to ***build back better***, but also to ***build forward differently***.

To bring about this change, we need a radical programme of action that is restorative, that rebuilds and that is transformative.

Transformation is not only a fundamental obligation enshrined in our country's constitution. It is also imperative if our economy is to benefit from the creativity, talent, energy and skills of all South Africans.

Social deprivation also presents a danger to social stability and social cohesion. It threatens the rich and the poor alike.

As we have seen in other parts of the world, populist forces do at times mobilise working people against their own interests using the politics of identity. Ethnic chauvinism, protectionism, racial mobilisation, homophobia and misogyny have variously been used by reactionary forces to worsen divisions and distract from the fundamental question of an equitable political economy.

Our country has not been immune to these tendencies; and we ignore their root causes at our own peril.

This means that the historic role of the ANC as a uniting force in society against racism, tribalism and sexism is needed now more than ever before. Fundamental social transformation that eradicates the inequities of the apartheid order is key to addressing these issues.

The ANC has been given the mandate by our people to be the governing party in most of the municipalities, in eight provincial governments and in national government.

January 8th Statement 2021

With governance comes great responsibility. The ANC must win public confidence by progressively meeting the needs of the people, accounting to communities, deploying the most capable cadres to positions of responsibility, managing public resources ethically and acknowledging weaknesses.

This is the message that every ANC member should take to heart in 2021 as our country holds the sixth local government elections since democracy.

We have to account to the people on the state of our municipalities, many of which are facing deep challenges of governance, stability, service delivery and financial management.

We must tackle the apartheid legacy of inequality and severe infrastructure backlogs at a local level and the persistent problem of unviable municipalities with weak revenue bases.

We must tackle the maladministration, poor governance and corruption in the municipalities which we govern and across the three spheres of government.

It is the ANC that must heed the cries of our people for a decent quality of life, and must rid government structures of corruption, cronyism and patronage.

In all areas, the ANC has to demonstrate that we are taking real steps to resolve the problems which our people face.

Let us not be paralysed by the complacency of incumbency.

In this the 27th year of democracy, the ANC cannot campaign on a platform that simply recounts the glories of the past.

Our people now want to hear what the ANC is going to do concretely to improve their lives. They want to see us in action serving their interests.

We owe it to them, and we owe it to the glorious history of the African National Congress, to meet the commitments we make.

The road to recovery and transformation is grounded in our democratic institutions, which are strong, durable and broadly supported by the people.

Despite our many challenges, there is great cause for optimism.

And in this we know we can count on the people of South Africa who believe in the ANC, who support the ANC and who have entrusted the ANC with the responsibility to change our society for the better.

It is the resilience and courage of the people of our country that has taken us through the most difficult of years.

It is the people of South Africa who continue to stand by us, united and determined, as we begin the task of recovery and reconstruction.

3. PRIORITIES OF THE YEAR

The priorities of the ANC for 2021 are based on the resolutions of the 54th National Conference and they are informed by the concrete conditions in which we operate. They reflect the continuity of the ANC's mission and its programme over time.

3.1 Overcoming the coronavirus pandemic

Our foremost immediate priority is to overcome the COVID-19 pandemic.

The virus is ever-present and it threatens the health and well-being of everyone in our country. It threatens livelihoods and undermines our efforts to rebuild the economy and create jobs.

South Africa is in the midst of a second wave that could prove deadlier than the first unless we all play our part to curb and defeat this virus.

We have to intensify our efforts to promote responsible behaviour, such as

physical distancing, washing or sanitising our hands, wearing face masks appropriately and adhering to other protocols.

We will continue to strengthen our health system and sustain community health interventions such as mass screening, testing and tracing.

We will, within our country's means, continue to provide social support to the vulnerable and economic support to businesses and workers in distress.

To overcome COVID-19 we are preparing to implement a mass vaccination programme that reaches all South Africans as appropriate quantities of an effective and suitable vaccine are procured.

This programme will initially prioritise health workers and other frontline personnel such as teachers and police men and women, the elderly and people with co-morbidities. We will progressively reach all South Africans through a mass vaccination campaign to achieve herd immunity and prevent ongoing transmission.

We need to actively counter the spread of disinformation relating to COVID-19 and unfounded conspiracy theories about the virus, its treatment and the development of vaccines.

Above all, as we have done over the past year, we must continue to work together as a united nation to confront the grave coronavirus threat. Our focus throughout must be on saving lives and protecting livelihoods.

3.2 Restoring the economy to growth and creating jobs

Economic recovery and reconstruction are as important as protecting the health of our nation. The pandemic has resulted in unprecedented levels of economic contraction and job losses.

We have to achieve higher levels of economic growth and investment. We have to create jobs and bring more black South Africans, women and youth into the mainstream of economic activity.

In the relief phase of our social and economic response to the pandemic, we put in place a number of emergency economic interventions. These included a temporary COVID-19 grant, top-ups to existing social grants and transferring UIF funds to firms and employees in distress.

We are now in the phase of rebuilding, and our focus is on aggressively implementing the Economic Reconstruction and Recovery Plan.

At the heart of the plan is mobilising investment, creating new jobs and supporting existing ones, and accelerating industrialisation.

We are undertaking large-scale public investment in key sectors such as energy, water and sanitation, roads and bridges, human settlements, health and education, digital infrastructure and public transport. In these and other infrastructure programmes, we are also pursuing public-private partnerships.

We are promoting investment in sectors such as agriculture, manufacturing and mining and tourism. We are providing support to key sectors such as poultry, sugar and automotive, as well as small-scale manufacturers and township and rural entrepreneurs. Our emphasis is on localisation so that South African businesses benefit from all areas of economic activity.

The ANC has since its founding dedicated itself to a better life for all. This can only be achieved if there is decent work and job security for all.

We have begun the process of rolling out public employment programmes that will offer greater work opportunities especially for women, youth, persons with disabilities and other marginalised groups.

The Presidential Employment Stimulus brings together all provincial governments and eleven national departments.

The ANC is immensely encouraged by the outcomes of the third South Africa Investment Conference that took place late last year. It was an affirmation that the investor community appreciates our country as a solid investment destination.

Our country's energy security remains a priority. The ANC government will in the year ahead focus on building massive new electricity generation and transmission capacity, in the process creating jobs. This will include diversifying our energy mix to ensure a significant proportion of new generation comes from renewable sources. The easing of regulations for electricity self-generation by firms and municipalities will unlock significant investment and job creation potential.

The recently established Presidential Climate Change Commission will support a just transition to a low carbon, climate resilient growth path that will ensure that no one is left behind.

There has been progress in policy reform in a number of other areas. In the mining sector, an exploration strategy is being finalised in consultation with stakeholders.

Reforms in the telecommunications sector will see the allocation of high demand spectrum. This will accelerate the rollout of 5G, enhancing our economy's competitiveness, lowering data costs and boosting the operation of SMMEs, cooperatives as well as small and large firms.

In the year 2021 we will deepen the social compacting that is so critical to our economic recovery. To this end the ANC is encouraged that there is broad consensus at NEDLAC on the actions that are needed to drive South Africa's economic reconstruction and recovery.

A critical element of success in implementing the plan is the reform of governance and the state machinery so that we can enhance the capability of the state.

The District Development Model aligns the work of the three spheres of government, ensuring that planning and implementation are integrated and actively involve all stakeholders. Through this model, we are working to bring all spheres of government closer to where people live and work.

The model focuses not only on infrastructure development and service provision within a district, but also on an economic development strategy that draws on the capabilities and endowments in the district. The model recognises that the most successful municipalities are those that work in partnership with provincial and national government, and that adversarial relationships between the spheres undermine development.

The success of our economic recovery relies in large measure on the repurposing of state owned enterprises to more effectively and sustainably fulfil their developmental mandates. This means we need to intensify the work already underway to address management and governance challenges, reduce the reliance of many SOEs on the fiscus and overcome resistance to transformation.

As we begin 2021, the ANC renews its commitment to forge ahead with building an ethical, capable and developmental state that can drive the economic recovery.

It is a commitment to managing our country's economy and public finances in a sustainable manner, so that we can retain our country's policy sovereignty and our ability to shape our own destiny.

3.2.1 Tackling poverty and improving people's lives

In the course of this year, we will intensify all measures to improve the lives of the poor. Many families are in great distress at this time, with the effects of the pandemic exacerbating widespread unemployment and rising living costs.

The social relief measures introduced by government in April last year – including the temporary top-up of social grants and the special COVID-19 grant for unemployed people – proved vital in supporting the poor at their time of greatest vulnerability.

As these emergency measures come to an end because of our limited resources, we need to intensify other poverty alleviation measures alongside

the economic recovery. This year, the ANC, government and broader society will need to continue discussions on the desirability and viability of a basic income grant to provide a social safety net to the poor.

Through our massive infrastructure and public employment programmes, we will accelerate the provision of electricity, water, sanitation and other services to those South Africans who still do not have them.

We must continue to work to reduce the cost of living for all South Africans, improving public transport and lowering the costs of electricity, water and other services. The private sector has important role to play. Large companies cannot be allowed to abuse their market power at the expense of consumers and small businesses.

Work to improve access for all to quality health care will be prioritised this year. The agreement between government and various stakeholders in the health sector on measures to improve the quality of care in the public facilities needs to be fully implemented.

The COVID-19 pandemic has underscored the need to accelerate the process towards the establishment of the National Health Insurance, which will reduce the huge inequalities and inefficiencies in our health system. It will ensure that all South Africans receive the treatment and care they need regardless of their ability to pay.

3.2.2 Education and skills for a changing world

Although South Africa has made great strides in improving educational outcomes over the last 27 years, our education system falls short of preparing young people for the society and economy of the future.

Education was severely disrupted by the coronavirus pandemic in 2020, and the disease will continue to pose challenges for effective schooling in the year ahead. It is a testament to the determination of educators, lecturers, administrators, learners, students and parents that much of the academic year was recovered.

It is this determination that is needed as we pursue a skills revolution.

This requires that we overcome the fundamental challenge of persistent inequality in all facets of our education system. We need to work harder to ensure that schools in townships and rural areas are better resourced, that all schools meet the basic infrastructure standards and that poor and middle-class students receive the financial support they need to access and remain in tertiary education.

We must prioritise the upskilling of educators and school management. Curriculum reform to prepare learners for the 4th Industrial Revolution will be implemented.

We need to continue with the process to introduce three educational streams – academic, technical-vocational and technical-occupational. This will help ensure that learners can realise their potential and that our schooling system meets the skills and labour demands of the country's economy.

As we expand access to Early Childhood Development, we must have an intensive focus on early reading, which is the basic foundation of educational progress. This is a task that should be undertaken across society and in which ANC structures must be actively involved.

3.2.3 Safe and secure communities

It is the right of every South African woman, man and child to live in safety, secure from crime and violence. It is also a prerequisite for inclusive economic and social development.

We must work towards greater police visibility, more effective training of police and the greater involvement of community policing and safety forums in fighting crime.

We welcome the progress that has been made in combating gangsterism and organised crime, but these efforts needs to be stepped up significantly as such criminal behaviour is taking a great toll on communities across the country.

The ANC must continue to be at the forefront of the fight against gender-based violence and femicide. We commend the work done in particular by the ANC Women's League and our Alliance partners in consistently campaigning on this issue.

It cannot be, and it must never be, that any member or leader of the ANC is associated with violence against women and children in any form.

We remain firm that any of our members who are found guilty of such crimes have no place in our movement. They do not belong in our meetings. They do not belong in our leadership structures. There is only one place where they belong: in jail.

Gender-based violence and femicide are a national crisis and we need to mobilise all the energy and all the resources of society to end it.

In particular, we should ensure the implementation of the National Strategic Plan against GBV that has been developed by government and civil society. We need to strengthen and expand the partnerships that have been developed through this process.

We must be more direct in our efforts to reduce alcohol and substance abuse, which are major contributing factors in the perpetration of violence.

The temporary restrictions that were placed on the availability of alcohol under the state of disaster regulations have demonstrated the extent to which abuse of alcohol fuels violence, trauma and reckless behaviour and places a burden on our health system and emergency services. We must take measures to reduce the abuse of alcohol through a combination of legislative and other measures and community mobilisation.

Whether it is in our municipalities, at provincial and national government or in public entities, the fight against corruption and state capture is gaining momentum.

We are making progress in restoring the credibility and integrity of government, and action is being taken against those who are implicated in acts of corruption.

Across all parts of society, we must continue to provide all the necessary support to our law-enforcement agencies so that they can investigate thoroughly and prosecute effectively without fear, favour or prejudice.

We are going to intensify our efforts to end state capture in all its forms. Those responsible will be held accountable and every effort made to ensure money stolen from the government or public bodies is recovered.

One of the resolutions of our 54th National Conference was to support the establishment of a commission inquiry into state capture. We need to ensure that the findings and recommendations of the Zondo Commission, which is due to complete its work in 2021, empower South Africans to ensure that such activities are never allowed to happen again.

3.2.4 Accelerated land redistribution and rural development

The struggle to ensure that the land is 'shared among those who work it' remains a historical and economic imperative. Land reform is central to meeting the aspirations of the Freedom Charter, and to redressing the wrongs of the past.

During the course of this year, we expect Parliament to approve an amendment to Section 25 of the Constitution, clearly outlining the circumstances in which land may be expropriated without compensation. This will give effect to an important resolution of our 54th National Conference and will contribute to the acceleration of land reform.

This needs to take place alongside a comprehensive land reform programme that, among other things, draws on long-standing ANC resolutions and on the recommendations of the Presidential Advisory Panel on Land Reform and Agriculture.

We will strengthen existing policies to ensure fair and equitable redistribution of land.

These include the National Beneficiary Selection and Land Allocation Policy, which has a targeted focus on women, youth and persons with disabilities and other marginalised groups. The Land Donations Policy encourages those with under-utilised land, such as mines, businesses and churches, to donate land.

This year a focus will also be on resolving security of tenure that affects millions of our people through the Upgrading of Land Tenure Rights Amendment Bill, as well as on speeding up the outstanding claims of labour tenants.

The redistribution of land will be done in a manner that promotes economic growth and sustains food security. Critical in this regard will be our focus on effective support to those who have acquired agricultural land.

This will help to address asset poverty and improve the ability of many to engage in productive economic activity.

It is important that land reform is tied to integrated spatial development to ensure that both rural and urban dwellers live in sustainable human settlements located close to economic opportunities and social infrastructure.

3.3 Forging ahead with the renewal of the ANC

Only an ANC dedicated to the historic mission of building a united, democratic, non-racial, non-sexist and prosperous South Africa can galvanise the energies of our people to confront the grave challenges of the present. It is only a focused ANC that can place our society, once more, on the firm path of building a better life for all.

The task of renewing the ANC is therefore not just a matter of organisational self-interest. It is what our society needs and deserves at this critical juncture in its history.

January 8th Statement 2021

Although progress has been made since our 54th National Conference, we have yet to give full and decisive effect to its resolutions on rebuilding and renewing the organisation.

During the course of this year, we will focus on the vital task of building unity of purpose and unity in action. This unity must be founded on a common commitment to the core values of the ANC and serving the South African people. Unity cannot be used to shield those involved in wrongdoing from being held accountable.

We are going to strengthen the ANC's Integrity Commission, to enable it to act decisively, without fear or favour, to deal with corruption and wrongdoing in our ranks.

We reiterate, as resolved by the National Conference, that every member accused of, or reported to be involved in, corrupt practices should account to the Integrity Commission immediately or face disciplinary processes.

Members who fail to give an acceptable explanation or to voluntarily step down while they face disciplinary, investigative or prosecutorial procedures, will be summarily suspended.

The NEC will soon finalise guidelines on the implementation of these resolutions.

It is only if we stand united against corruption that we can restore the integrity of our movement.

As we begin our campaigning for this year's elections, we want to make it very clear: we will not tolerate members of the ANC who are involved in crooked practices like vote-buying, branch list manipulation to secure positions, or extending patronage to get votes.

We will not stand for any member of the ANC bringing our organisation into disrepute.

At the same time, we call on all ANC members to be mindful that they represent an organisation and not themselves.

If they are under a cloud of suspicion, conscience dictates that they should present themselves to the organisation voluntarily, without being forced to do so.

3.4 A better world and a better Africa

The grave conditions brought about by the coronavirus pandemic have not been faced by us alone.

There is no country which has not been affected. The pandemic has disrupted global trade, investment, production and travel. Economies around the world have contracted and millions of jobs have been lost.

Inequalities both within and between countries have been exacerbated. Developing countries with few resources available to mount an effective health response have been hardest hit.

At the same time, this has been an unprecedented era of global cooperation and solidarity, especially intra-African solidarity.

During our chairship of the African Union, South Africa has been instrumental in forging more effective collaboration among African countries in tackling the economic effects of COVID-19. We have worked with other countries to develop effective health responses and ensure that all African countries have access to essential medical supplies and, ultimately, a vaccine.

The ANC and the government it leads will continue to advocate for equitable access to COVID-19 vaccines. Inequitable access will deepen global inequality and will set back the development goals of many countries of the South. Besides, it will set the efforts against the pandemic back, not only in the developing countries, but across the globe.

We must continue to build on the cooperation that has been forged under the pandemic to deepen the ties of collaboration between the countries and regions of the world. This includes strengthening our relations with other BRICS countries.

The ANC affirms its commitment to meeting the aspirations of the AU's Agenda 2063 of an integrated, united, prosperous and peaceful continent.

The ongoing conflicts in the Eastern DRC, Sahel region, Somalia, Ethiopia and northern Mozambique remain a major concern. They make the goal of *Silencing the Guns* more relevant and urgent. We welcome the ceasefire achieved in Libya and wish the Libyans well as they consolidate peace and stability. The settlement of the conflict in South Sudan is holding as the various parties are now working together in a unity government.

Silencing the guns on our continent will require commitment from all African leaders and the cooperation of the international community.

In advancing African unity and solidarity, the struggle of the Saharawi people for independence and self-determination should remain a priority for the continent.

In line with the decisions of our 54th National Conference, we also will implement more effective ways to support the struggle of the Palestinian people for self-determination.

We reiterate our call for the lifting of unfair and punitive sanctions against Zimbabwe and Cuba.

To support the advance of democracy and good governance across Africa we will continue to use the mechanisms of the African Union, the Pan-African Parliament and regional bodies. We will strengthen the Southern African Development Community (SADC) as a powerful instrument for economic integration, development and stability in our region.

Global and African cooperation around the COVID-19 response has highlighted once more the danger posed by unilateralism, which threatens to increase geopolitical tensions and undermine international stability.

We have noted, with appreciation, the rise of various social movements around issues such as racism and climate change, which provide cause for optimism.

The pandemic presents an opportunity to set the global economy along a more sustainable, environmentally-friendly, low-carbon and climate change resilient developmental pathway. To this end, recovery strategies must be aligned to the Paris Agreement to Combat Climate Change, the UN Agenda 2030 for Sustainable Development and other multilateral environmental agreements.

The ANC reaffirms that the countries of Africa must be united in support of multilateralism and in the reform of global institutions, such as the United Nations Security Council, to ensure that they represent the interests of Africa and the developing world. Similarly, institutions such as the IMF and the World Bank need to operate in a manner that advances the developmental needs of all regions of the world.

We must also resist efforts to undermine a rules-based multilateral approach to international trade, as this negatively impacts the global economic recovery.

We recognise that poverty and inequality continue to fuel social instability in a number of countries on our continent, and that resolving them is key to peace and security for the entire continent.

For this reason, we are extremely optimistic about the coming into operation of the African Continental Free Trade Area (AfCFTA) on 1 January 2021.

It offers new opportunities for industrialisation, economic growth and intra-Africa trade.

The AfCFTA heralds a new era of African integration, development and progress. Importantly, it will enable African countries to benefit from their own natural resources and reduce their dependence on countries outside of the continent for manufactured goods and services. It gives expression to the dream of generations of Pan Africanists, including ANC founder Pixley ka Isaka Seme. In his speech on 'The Regeneration of Africa' in 1906, Seme foresaw a continent that prospers by trading and doing business with each other in a common market.

As Africa seeks to expand its productive capacity, the increasing rate of urbanisation on the continent and its relatively youthful population provide a potential competitive advantage.

To benefit from this demographic advantage, it will be necessary for Africa to focus on skills development and social support to its population

Economic empowerment of women in Africa is critical not only to gender equality, but also to Africa's overall economic development. We will continue to push for preferential procurement for women and favourable trade arrangements.

We remain firm in our conviction that the African continent is rich in potential. Our continent is rich in human capital, in its youth dividend, in its resources, in its environmental endowment and in its location.

Despite the weaknesses in the world economy, Africa is on the threshold of a new era of integration, growth, prosperity and development.

It is more important than ever for the ANC to forge ahead with its task of building progressive alliances, particularly on the African continent.

We will deepen efforts to build relations with fraternal progressive organisations on the continent and in other parts of the world to forge a developmental agenda that prioritises the needs of the poor and marginalised.

Through its Chairship of the African Union, which comes to an end next month, South Africa has provided vital leadership to the process of African integration, to the resolution of conflict and peace-building and to strengthening continental institutions and cooperation.

In the year ahead – which has been declared the **AU Year of the Arts, Culture and Heritage** – the ANC will continue to prioritise the African Agenda and enhance Africa's status in the global community.

4. TASKS OF THE ANC

The renewal and unity of the ANC is a critical enabler for all these noble dreams and plans of transformation towards which we all aspire. We must therefore continue to build a critical mass towards renewal, based on the tasks from 54th and other National Conferences:

4.1 Renewal of branches as centres for community development and transformation.

Without strong local organisation and mobilisation, transformation will continue to remain elusive. We must therefore continue to build ANC branches that are true agents for change. Our branches must solve community challenges and be centres for community development and social cohesion. ANC branches must work with the local council and with other public representatives, as we have done in the campaign against COVID-19. During 2021, we must continue to strengthen the new membership system, and ensure that branches have active political and community programmes. ANC branches must be vibrant schools to grow and develop true and selfless agents for change in communities.

4.2 Cadre development and mass political education programme.

Recruiting new ANC members is not enough. We must ensure that members become activists and agents for change and transformation. In 2021, we must intensify our mass political education programme. We must also

induct and train all branch executive committees with a view of making our branches much more effective. All cadres and leaders of our movement need to complete the compulsory part of the curriculum of the OR Tambo School of Leadership. We need to instil a culture of revolutionary discipline in all our structures, starting with the adherence by all members to their oath of membership.

4.3 Strengthen Leagues and the Alliance:
We must ensure that the ANC Youth League holds its conference early this year. This will help to bring an end to the shameful era of division and inactivity. We need to engage the young people of our country more actively and directly, and ensure that they are able to participate in the programmes of the organisation.

The ANC Women's League has worked hard to promote the interests of the women of our country and has campaigned effectively against gender based violence and femicide. We must intensify our support for the Women's League and Veterans' Leagues so they play their role within the movement and across society.

As we celebrate the centenary of the SACP, we appreciate the role of the Party and its contribution to the strength and ideological advancement of the Alliance.

We reaffirm our strong alliance with COSATU. We support COSATU in its aspiration to unite the working class of South Africa in line with the call for *'one federation, one country'* and *'one industry, one union'*.

We will continue to promote the unity of all veterans of Umkhonto we Sizwe and ensure that the challenges facing military veterans are effectively addressed.

4.4 National General Council that enhances renewal and unity.
The NGC will be held in a few months and must help us to review progress since National Conference and address challenges facing our nation. It must serve as a platform to build unity of purpose around the ongoing task of

renewal. We must all, especially as leadership, commit towards these objectives for the sake of the movement and the people of our country.

4.5 Achieve a decisive mandate in local government elections.
Local government remains critical to the project of social transformation and a better life for all. Therefore, as we prepare for local government elections later this year, we must intensify provision of basic services, decisively tackle local weaknesses and speed up the introduction of the District Development Model. Building on the gains made in recent by-elections, we must reach every voter and engage those not yet registered to convince them that the ANC remains the best instrument for strong developmental local government. This must be part of our work to deepen democracy and public participation.

4.6 Effective communication and social mobilisation.
Social transformation requires a keen understanding of the mission of change, the tasks of the day and the ability to engage in the battle of ideas around this mission. The ANC must, in action, show that it has the determination, skill, integrity and commitment to steer the programme of social transformation. It must engage and convince all progressive forces and society at large of this. In this regard, disciplined communication is fundamental.

4.7 Build social cohesion towards a non-racial and non-sexist society.
The ANC must continue to lead the struggle against racism, ethnic chauvinism, patriarchy and all forms of intolerance. We must intensify efforts to bridge the historical divides among South Africans.

Programmes to build a non-sexist society must be intensified to ensure that all forms of gender discrimination, oppression, exploitation and violence are eradicated. This requires the achievement of full gender equality in all areas of life, from the home to the workplace, from the economy to the sports-field.

A united and cohesive society requires also that we end the exclusion, segregation and marginalisation that is experienced by persons with disabilities. We need to confront discrimination, prejudice and violence directed against

members of the LGBTQI+ community, and give effect to the right to equality contained in our Constitution. Every one of us must act in solidarity when we see injustice, and we must individually and collectively hold accountable those who choose to discriminate and exclude.

We need to address the way in which access to wealth, land, education, employment and opportunity remains skewed according to race, gender and class. This requires that the ANC works with all sectors of society to change the structure of the economy to allow for broader participation by black people, women, the youth and those in rural areas. We must build an inclusive economy that allows everyone to prosper.

The task of nation-building requires that we attend to the outstanding matters of investigations, prosecutions and reparations from the Truth and Reconciliation Commission. This is important for the advancement of transitional justice both for the nation and the families of victims of apartheid era crimes.

4.8 Advance the African agenda and international work.
The ANC remains firmly rooted among the progressive forces of the world, and it must continue to advance the African agenda, especially as the historic African Continental Free Trade Area comes into effect. Inspired by the creed of Pan Africanism, we must work with progressive forces to pursue the African Union's Agenda 2063 and the achievement of a more just and equitable world order.

4.9 Modernise the ANC and ensure financial sustainability.
We must continue to improve and modernise our core organisational systems, such as the new membership system, branch functionality, our administration, elections campaign capacity, communications, research, fundraising as well as monitoring and evaluation.

5. TRIBUTES TO FALLEN HEROES

Over the past year many South Africans have lost their lives. These include fellow citizens who have succumbed to COVID-19. We continue to remember these loved ones, and we share the loss felt by family members, colleagues, neighbours and friends.

The ANC too, has lost many veterans, stalwarts and activists of our struggle during the course of 2020. We dip our banner in honour of Izithwalandwe Andrew Mlangeni, Denis Goldberg and John Nkadimeng.

We pay tribute to Achmat Dangor, Alexander Mbatha, Alfred Mtsi, Babylon Xeketwana, Benjamin Ofentse, Bicks Ndoni, Bishop Mthobeli Matyumza, Bongani Khumalo, Brian Carpede, Busisiwe Modisakeng, Celia Phoyane, Claudinah Ramasepele, Credo Mutwa, David Kolekile Sipunzi, David Moisi, Dick Muditambi, Dimakatso Matshe, Dorah Dlamini, Dumi Matabane, Elizabeth Manopole, Enock Mpianzi, Ephraim Dlova, Eric Matlawe, Evelyn Nkadimeng, George Bizos, George du Plessis, Gloria Motswasejane, Gordon Kegakilwe, Hishaam Mohamed, Humphrey Ntuli, Ignatius Jacobs , Igshaan Dangor, James Moreti, John Dlamini, John Lewis, John Vilakazi, Johnny Makgato, Joshua Nkosi, Jovan Bruinders, Joyce Pekane, Joyce Tau, Kamoreng Ishmael Ngwanaeng, Kgoši Piet Mathebe, Khetsi Lehoko, Kimi Makwethu, Koena Ramotlou, Lenin Shope, Lindiwe Myeza, Lindiwe Sithole, Linus Themba Dlamini, Lorna Khosi, Loyiso Mpumlwana, Lucky Nxumalo, Lungile Pepeta, McCollen Ntsikelelo Jack, Madumane Matabane, Makgetlha Magogodi, Manala Manzini, Manzi Mashatile, Martha Mmola, Mcedisi Filtane, Meisie Kenosi, Mhleli Matyila, Michael Abrahamse, Mike Kwenaite, Mluleki George, Mlungisi Ndamase, Mmule Maluleka, Modise Mokgatlhe, Molwedi Mokoena, Montwedi Modise, Mpho Masetlha, Mthikhala Powa, Mxolisi Gawe, Mzwandile Fanti, Ncediso Captain, Njabulo Mthembu, Nokuthula Sikakane, Nomthandazo Phungula, Nomvuzo Shabalala, Nozipho Edith Tunyiswa, Obakeng Poloko Jackals, Olpha Selepe, Paseka Kganticoe, Paul Baabua, Paul David, Peter Dambuza, Priscilla Jana, Pumza Dyantyi, Putco Mapitiza, Rajas Pillay, Rashid Saloojee, Refiloe Mahlobogoane, Ronald Mofokeng, Roy JJJ Olyn, Salome Mathatho, Samora Pezisa, Seleko Monare, Sembie John Danana, Shaheed Rajie, Si-

pho Vava, Siyabulela Pheziza, Smanga Madela, Songezo Mjongile, Sonto Jele, Sonwabo Sydwell Mbekela, Sophie Maine, Steve Thobigunya Ralane, Suzan Tlhagaswane, Teboho 'Rivet' Mkhize, Thabo 'Bobo' Madi, Thabo Makunyane, Thabo Makwela, Thandi Maloyi, Themba Khubeka, Themba Nobatana, Thobigunya Ralane, Thoko Msimang, Thomas Manthata, Toffies Moemi, Toine Eggenhuizen, Vejay Ramlakan, Victor Tsie, Vuyo Mahlati, Willie Williams, Zamuxolo Peter, Zindzi Mandela, Zoliswa Matana and Zweli Mabhoza.

We also mourn the passing of Queen Regent Noloyiso Sandile of the Ama-Rharhabe, King Thulare Thulare III of the Bapedi, Queen Mother Semane Molotlegi of the Royal Bafokeng, Kgoši SS Sekororo of the Banareng Ba Sekororo and Kgoši Sello Kekana III of the Matebele a Moletlane.

It has been difficult to lose so many women and men who played such a key role in our liberation.

As we honour their courage, dedication and selfless service, it us up to us as the ANC of today to ensure that the ideals that inspired their lives continue to guide our every action.

In that way, we shall ensure that the ANC renews itself and continues to live and to lead.

6. THEME FOR 2021

As we confront – both as a movement and a country – the greatest health crisis in more than a century, we should draw on our rich history of struggle and solidarity.

It was not long after the formation of the African National Congress in 1912, that the world was struck by the flu pandemic of 1918. South Africa was not spared from the dreadful impact of this disease, which killed as many as 50 million people worldwide.

January 8th Statement 2021

Reflecting on that pandemic, one of the founders of the ANC, Selby Msimang, expressed the hope that *"such an epidemic would create a new spirit"* of brotherhood and sisterhood among all South Africans irrespective of race and social status.

Over the past year, the people of South Africa have demonstrated that such a spirit is possible. Let us ensure that, as we rebuild our economy and our society and as we strive to build a South Africa that belongs to all who live in it, we harness that spirit of unity, cohesion and solidarity.

In recognition of the ideals that inspired the formation of our movement, the mandate set by the 54th National Conference, and the tasks arising from the current environment, the National Executive Committee declares the theme for 2021 to be:

UNITY, RENEWAL AND RECONSTRUCTION IN THE YEAR OF CHARLOTTE MAXEKE.

Let freedom reign!

Amandla!

The ANC lives!

The ANC leads!

NOTES

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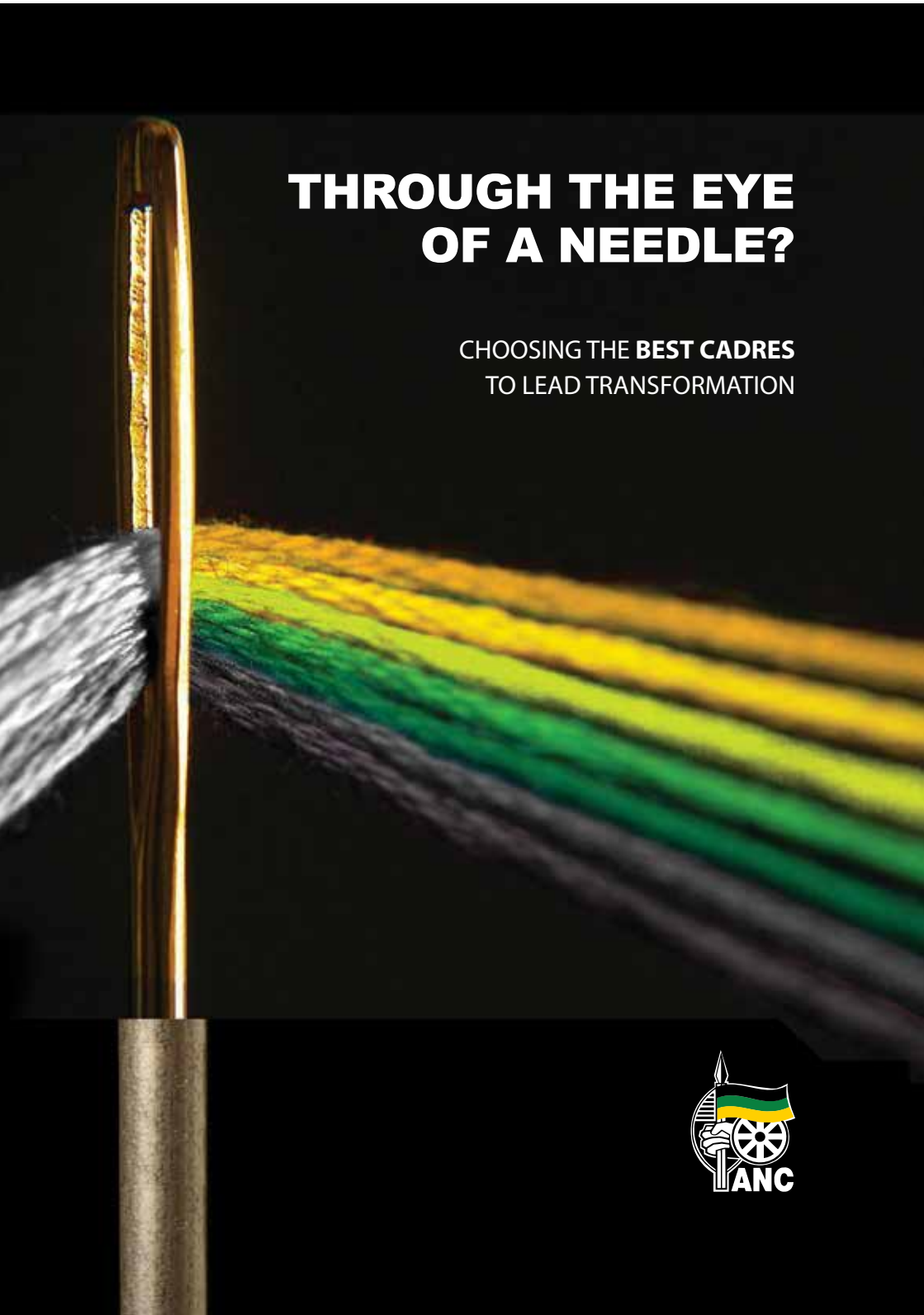
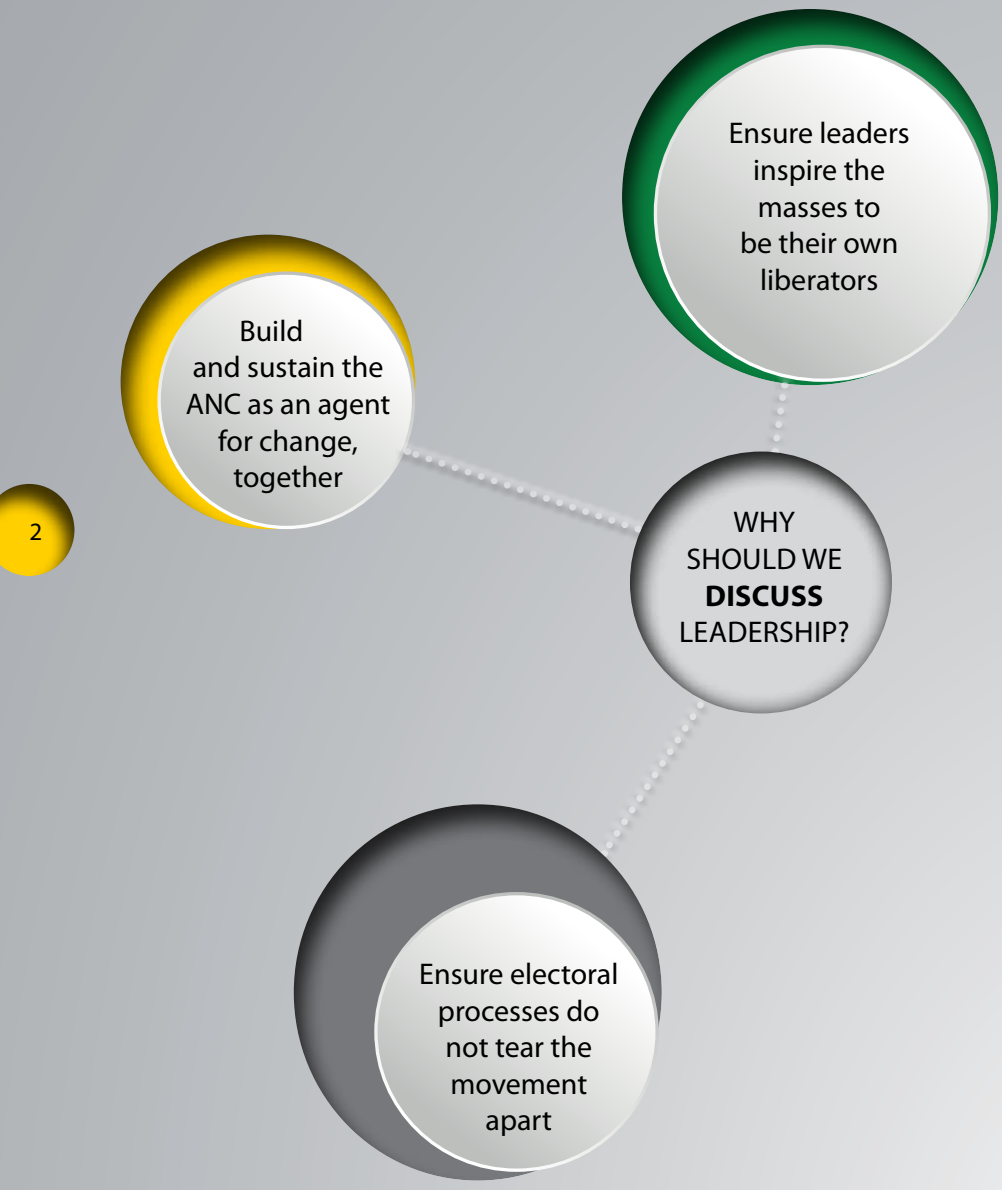
Item “18”


THROUGH THE EYE
OF A NEEDLE?
CHOOSING THE BEST CADRES
TO LEAD TRANSFORMATION
ANC

THROUGH THE EYE OF A NEEDLE?

Why should we **discuss** this issue?



As a movement for fundamental change, the ANC regularly has to elect leaders at various levels who are equal to the challenge of each phase of struggle. Such leaders should represent the motive forces of the struggle. **To become an ANC leader is not an entitlement.** It should not be an easy process attached merely to status. It should be informed first and foremost by the **desire and commitment to serve the people,** and a track record appreciated by ANC members and communities alike.

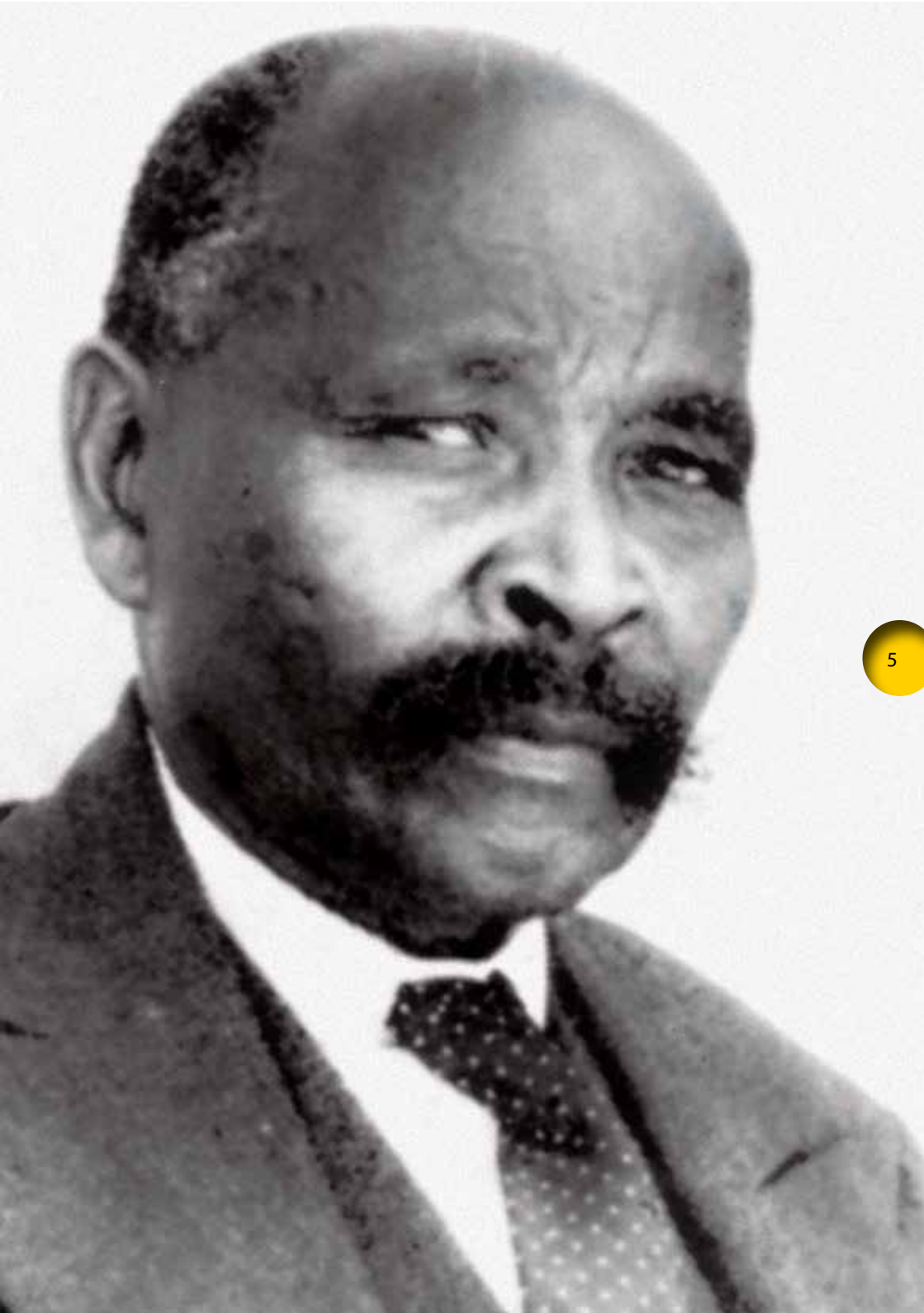
Those in leadership positions should unite and guide the movement to be at the head of the process of change. **They should lead the movement** in its mission to organise and **inspire the masses to be their own liberators.** They should lead the task of governance with diligence. And, together, they should reflect continuity of a revolutionary tradition and renewal which sustains the movement in the long-term.

- How do thousands of branches throughout the country ensure that this happens in actual practice?
- How do we deal with individual ambition, lobbying, promotion of friends and pursuit of selfish interests?
- How do we ensure that electoral processes do not tear the movement apart?
- How do we prevent attempts to use the movement as a step-ladder towards self-enrichment?

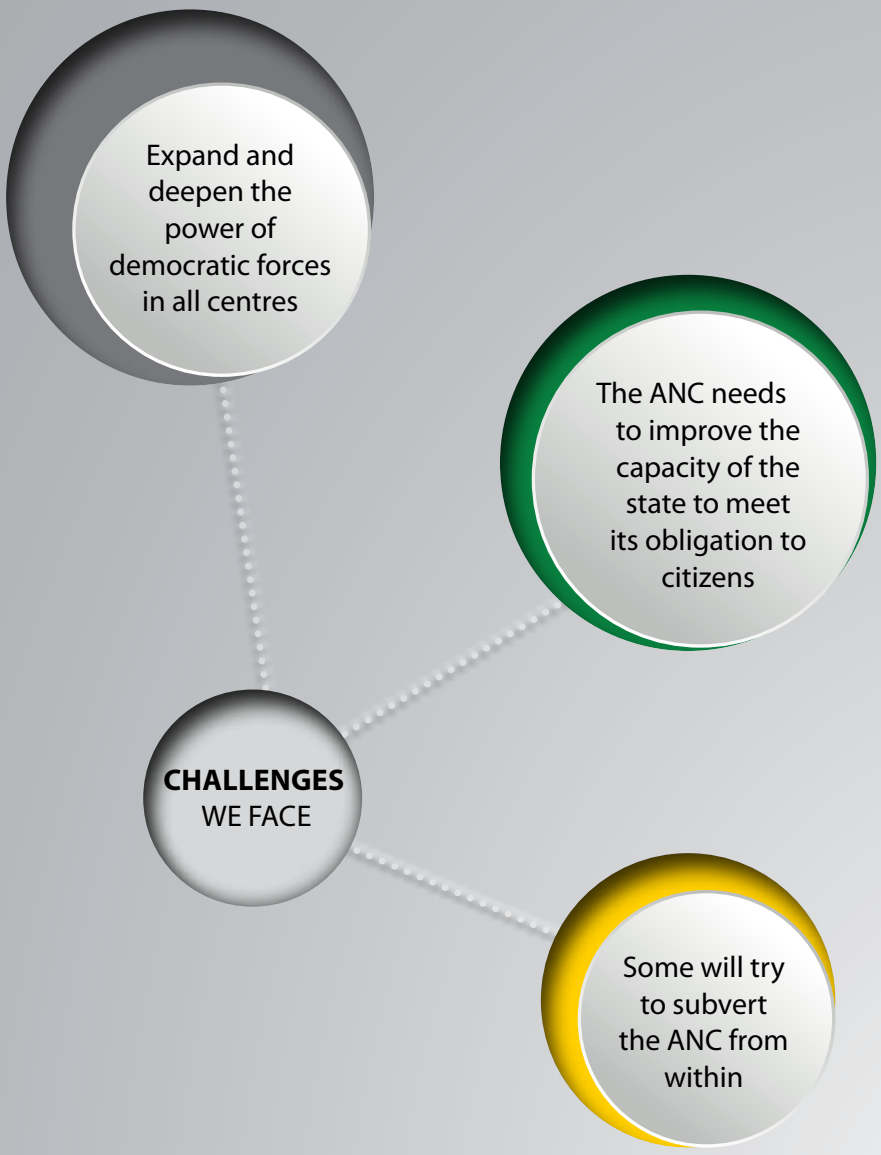
Besides, the **door can be left open for corrupt individuals** and even enemies of change, **to exploit the movement's internal democracy** to **sabotage the struggle and create their own ANC.** Further, those who fail in positions of authority can use all kinds of excuses to cling to power, when the time for change has come.

These are difficult questions. But the **movement's membership has to find the answers, so we together build and sustain the ANC as an agent for change.** To fully understand this challenge, let us first examine the character of challenges in this phase of struggle.

John Langalibalele Dube | 1871 – 1946
Founding president of the South African Native National Congress (SANNC), which became the African National Congress 1912 – 1917



What are the **challenges** we face at this stage?



According to the **Strategy and Tactics** document:

"Our strategy is the creation of a united, non-racial, non-sexist and democratic society. In pursuit of this objective, we shall, at each given moment, creatively adopt tactics that advance that objective. Our fundamental point of departure is that South Africans have it in their power, as a people and as part of progressive humankind, to continually change the environment in which we operate in the interest of a better future.

"In this phase of transformation, we seek to expand and deepen the power of democratic forces in all centres critical to the NDR, at the same time as we improve the people's quality of life. Our efforts, which are people-centred, people-driven and gender-sensitive, are founded on five basic pillars:

- *to build and strengthen the ANC as a movement that organises and leads the people in the task of social transformation;*
- *to deepen our democracy and culture of human rights and mobilise the people to take active part in changing their lives for the better;*
- *to strengthen the hold of the democratic movement on state power, and transform the state machinery to serve the cause of social change;*
- *to pursue economic growth, development and redistribution in such a way as to improve the people's quality of life; and*
- *to work with progressive forces throughout the world to promote and defend our transformation, advance Africa's renaissance and build a new world order."*

Among the **priorities that need immediate attention** are:

- building active branches that give leadership to communities;
- strengthening the Tripartite Alliance;
- ensuring that the ANC leads mass organisations; and
- making decisive interventions in the ideological struggle.

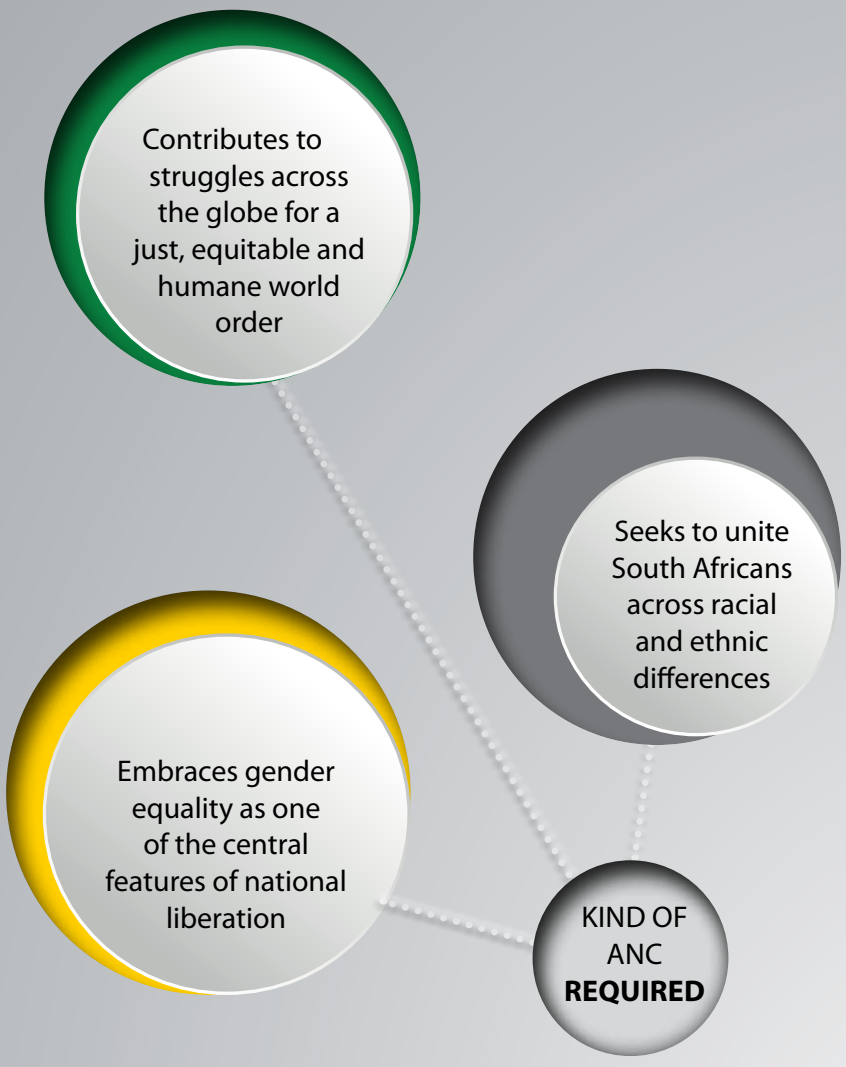
At the level of government, we need to **improve the capacity of the state** to meet its obligation to citizens in the area of **economic growth and job creation, social programmes,** and dealing with **crime and corruption.** Further, the ANC, both inside and outside government, should play a leading role in Africa's renewal and building a better world.

As we carry out these tasks, we will face a concerted **campaign to undermine our efforts, by those who oppose change.** They will underplay the progress we are making, while exaggerating weaknesses. They will seek to **discredit the ANC** and its leadership. They will also try to undermine confidence in the institutions of democracy we have set up.

Some will even try to **subvert the ANC from within**. Because they know they cannot defeat the ANC frontally, they will try to create an ANC that serves their interests.

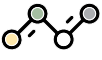
The South African Native National Congress delegation to England, June 1914. The delegation tried to get the British Government to intervene against the Land Act, but the outbreak of the First World War thwarted their hope. Left to right: Thomas Mapike, Rev Walter Rubusana, Rev John Dube, Saul Msane, Sol Plaatje.

What **kind of ANC is required** to meet these challenges?



A revolutionary democratic movement:
The ANC pursues fundamental change to create a better life for all. **Equality** among all South Africans in choosing a government of their choice, using the country's resources to **improve conditions** of especially the poor, and **removing racism** in the ownership and distribution of wealth are among our core principles. Within its ranks, the ANC ensures the participation of members in shaping the movement's policies and programmes.

A non-racial national movement:
It is critical that our struggle brings about an **end to apartheid relations in all areas of life.** The ANC believes in the equal worth of all human beings. We seek to **unite South Africans** across racial and ethnic differences, taking into account the central role of Blacks in general and Africans in particular, given their exclusion under apartheid. We practice these principles within the organisation.



A broad national democratic movement:
The ANC represents the mass of forces that **pursue social transformation.** Individuals belonging to different classes and strata form part of these forces, because they stand to gain from fundamental change. However, the ANC is keenly aware of the social basis of apartheid. It recognises the leading role of the working class and pays special attention to the poor.

A mass movement | The ANC seeks to bring into its ranks as many South Africans as possible who accept its principles and policies. As a legal organisation, it does not target only particular advanced political activists for recruitment. As long as one **accepts its policies and takes its oath, anyone can become a member.**

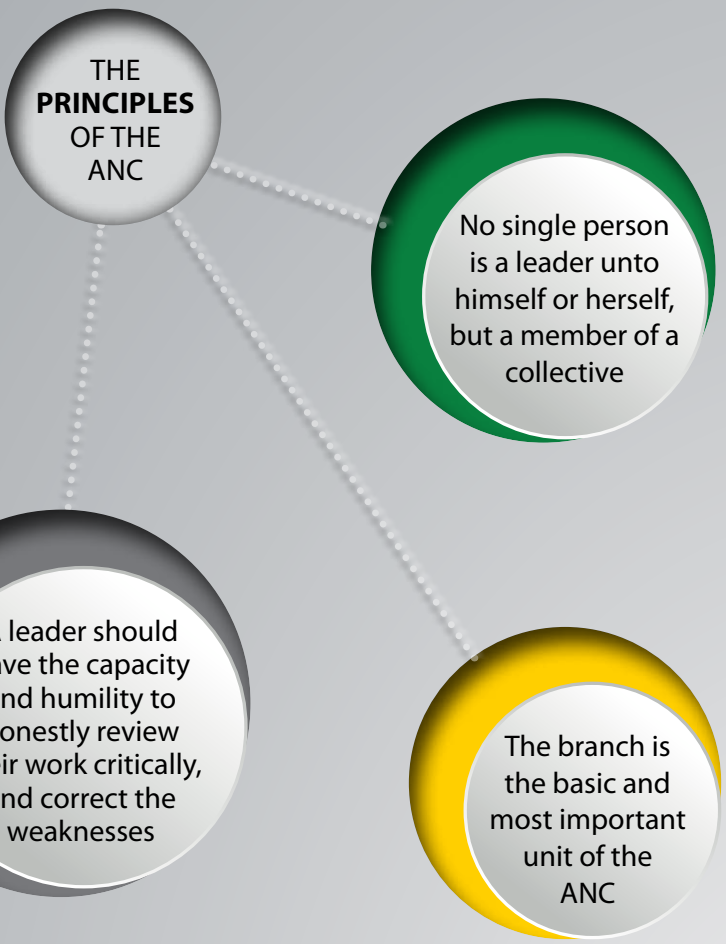
A non-sexist movement | Over time, the ANC has embraced the principle of **gender equality as one of the central features of national liberation.** This is reinforced through the equitable representation of women at all levels of the movement, and it requires the conscious implementation of affirmative action within our ranks.

A leader of the democratic forces | Because of what it stands for, and its track record in the fight against apartheid colonialism, the ANC emerged as the leader of the forces who pursue **a united, non-racial, non-sexist and democratic South Africa.** It seeks to unite all these forces and their organisations into a movement for fundamental change. Its leaders and members should **win the confidence** of organisations of the people.

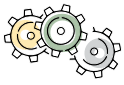
A champion of progressive internationalism | The ANC's objectives are informed by the aspirations of the people of SA, Africa and millions others in all parts of the world. Over the years, it has contributed to, and benefited from, **struggles across the globe** for a just, equitable and humane world order; and **it remains committed to these ideals.**

Josiah Tshangana Gumede | 1867 – 1946 (Centre)
President of the African National Congress 1927 – 1930

What informs the **principles of ANC** Organisational Democracy?



Elected leadership:
Leadership of the ANC is elected in **conferences or, at branch level, in general members' meetings.** In all these instances, it is the individual members of the ANC, directly at branch level, or through their delegates, at other levels, who decide on the composition of the leadership structures.



Collective leadership:
Individual leaders are elected into collectives which should **work as a unit,** fulfilling their mandate as dictated to by the constitution. No single person is a leader unto himself or herself, but a member of a collective which should give considered, canvassed guidance to the membership and society as a whole.

Branches as basic units:
The branch is the basic and most important unit of the ANC. This is where members give leadership to communities, where they bring programmes to life and where they consider and make proposals on policies of the movement.

Consultations and mandates:
Regular meetings of branches, regions and provinces, as well as national conferences provide the membership with the platform to assume collective ownership of the movement's fate. They set out the mandate that **guides the leadership,** and are important forums for **report-backs and consultations** across the movement.

Criticism and self-criticism:
It is to be expected that in leading social activity, leaders and members will from time to time make mistakes. The most important thing is that these individuals and collectives should have the **capacity and humility to honestly review their work critically, and correct the weaknesses.**

Democracy as majority rule:
Individual members and leaders will have differing opinions on how particular issues should be addressed. The strength of revolutionary organisation lies among others in the ability to **synthesise these views and emerge with the wisest possible approach.** Once a decision has been taken on the basis of the majority's views, it **binds everyone,** including those who held a contrary view.

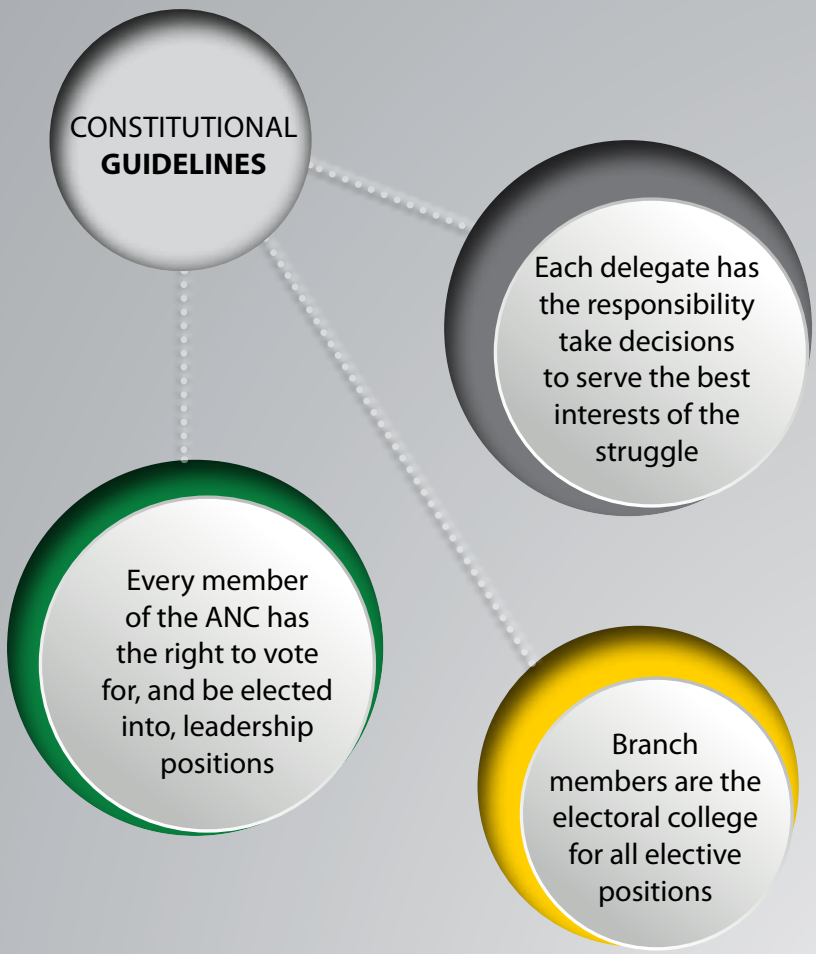
Status of higher and lower structures:
Lower structures have the right to **influence decisions** of higher structures. And, within their mandate the higher structures have a responsibility to take decisions.

Once these decisions have been taken, they **bind all the relevant lower structures:** *they have to be supported and implemented.*

Charlotte Maxeke | 1874 – 1939
Founder of the Bantu Women's League 1918


17

What are the **constitutional guidelines** for elections?

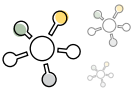


Every member of the ANC has the right to vote for, and be elected into, leadership positions. Like all rights, this goes along with the obligation to understand and pursue the objectives of the ANC. Further, in order to ensure that leaders are elected for their track record in serving the people, qualifications apply in relation to leadership positions: to be on the BEC a member should have been in the ANC for at least a year; for the REC it's 2 years; 3 years for the PEC and for the NEC it's 5 years.

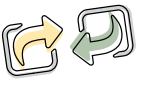
In the conferences or AGMs where leaders are elected, this **happens after discussion on the political and organisational environment** and challenges facing the ANC. Out of these discussions emerges the political programme for the next term of office. Broadly, it is on the basis of these discussions (which start before the relevant conferences) that an **appropriate leadership** collective is decided upon.

Branch members are the electoral college for all elective positions. At branch level, this happens at an AGM where all members take part. In regional, provincial and national conferences, the **delegates are mandated by the branch membership.** However, each delegate has the right and latitude to influence and be influenced by delegates from other branches.

Because of the central role of branches and their delegates in these processes, two critical challenges face all branches. Firstly, we must all the time **ensure the integrity of the membership system,** so that only genuine, bona fide members of the ANC exercise this important responsibility of deciding on policy and leadership. Secondly, where branch members delegate individuals to represent them, they must ensure that these are **members capable of influencing others,** and at the same time, able to weigh various arguments and **act in the best interest of the movement.**



Delegates from branches elect Regional Executive Committees. For purposes of Provincial Executives, nominations from branches are canvassed at Regional Conferences, for regions to reach broad consensus. For purposes of National Conferences the same process also happens at Provincial Conferences.

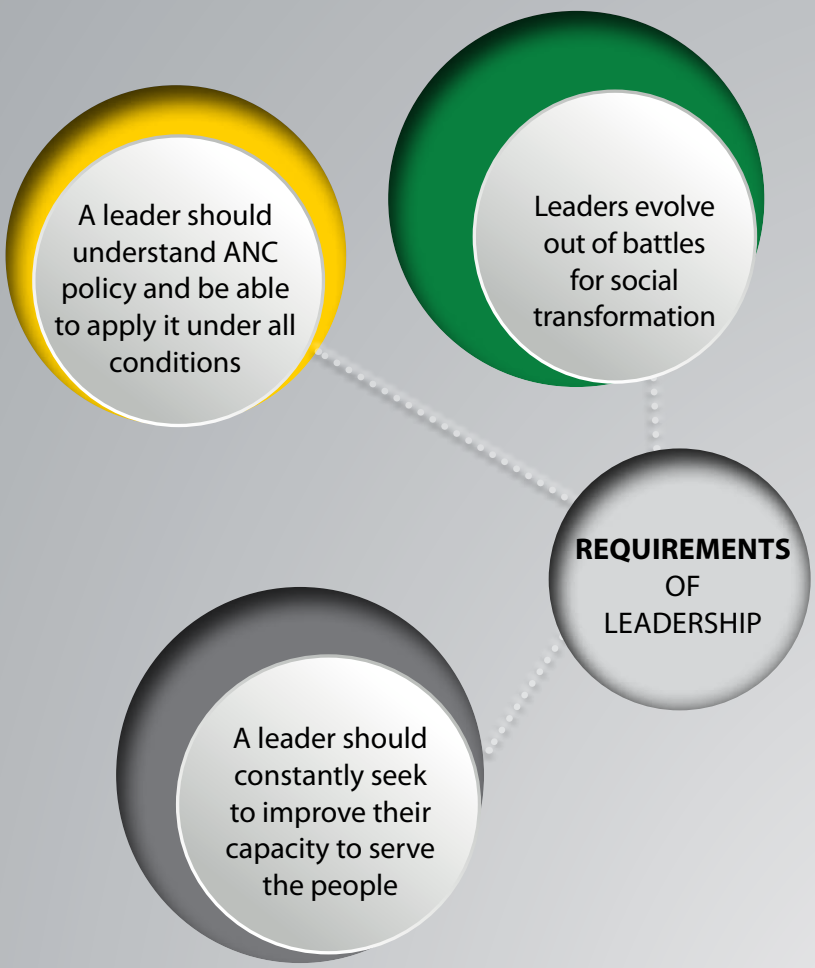


This allows branches to share ideas, information and knowledge around various candidates. Through all these levels, a broad mandate is given to delegates: but **each delegate has the responsibility to weigh views** even at Conference itself and take decisions that, in his or her assessment, **serve the best interests of the struggle.**

At Conferences, **nominations are also allowed from the floor, from individual delegates.** Relevant minimums of support are set for the nominees to be included in the lists. This allows for individual delegates, regions or provinces to put forward names of those they deem capable but could not emerge through the nomination process.

Voting at Conferences is by secret ballot, and each delegate has one vote of equal value. In other words, delegates are not voting fodder, mechanically and unthinkingly bound to lists and subject to the whip. While delegates should be guided by the broad mandate of their branches, regions or provinces, each individual delegate is expected to exercise his or her judgement on the basis of his or her assessment of the movement's interests.

What then are the broad **requirements of leadership?**



As a revolutionary organisation, the ANC needs revolutionary cadres and leaders. It should put in place leadership collectives that satisfy the character of the ANC defined above: a revolutionary democratic movement, a non-racial and non-sexist national movement, a broad national democratic movement, a mass movement and a leader of the democratic forces.

An ANC leader should understand ANC policy and be able to apply it under all conditions in which she finds herself. This includes an appreciation, from the NDR stand-point, of the country and the world we live in, of the balance of forces, and of how continually to change this balance in favour of the motive forces of change.

A leader should constantly seek to improve his capacity to serve the people; he should strive to be in touch with the people all the time, listen to their views and learn from them. He should be accessible and flexible; and not arrogate to himself the status of being the source of all wisdom.

A leader should win the confidence of the people in her day-to-day work. Where the situation demands, she should be firm; and have the courage to explain and seek to convince others of the correctness of decisions taken by constitutional structures even if such decisions are unpopular. She should not seek to gain cheap popularity by avoiding difficult issues, making false promises or merely pandering to popular sentiment.

A leader should lead by example. He should be above reproach in his political and social conduct - as defined by our revolutionary morality. Through force of example, he should act as a role model to ANC members and non-members alike. Leading a life that reflects commitment to the strategic goals of the NDR includes not only being free of corrupt practices; it also means actively fighting against corruption.

There are no ready-made leaders. Leaders evolve out of battles for social transformation. In these battles, cadres will stumble and some will fall. But the **abiding quality of leadership is to learn from mistakes, to appreciate one's weaknesses and correct them.**

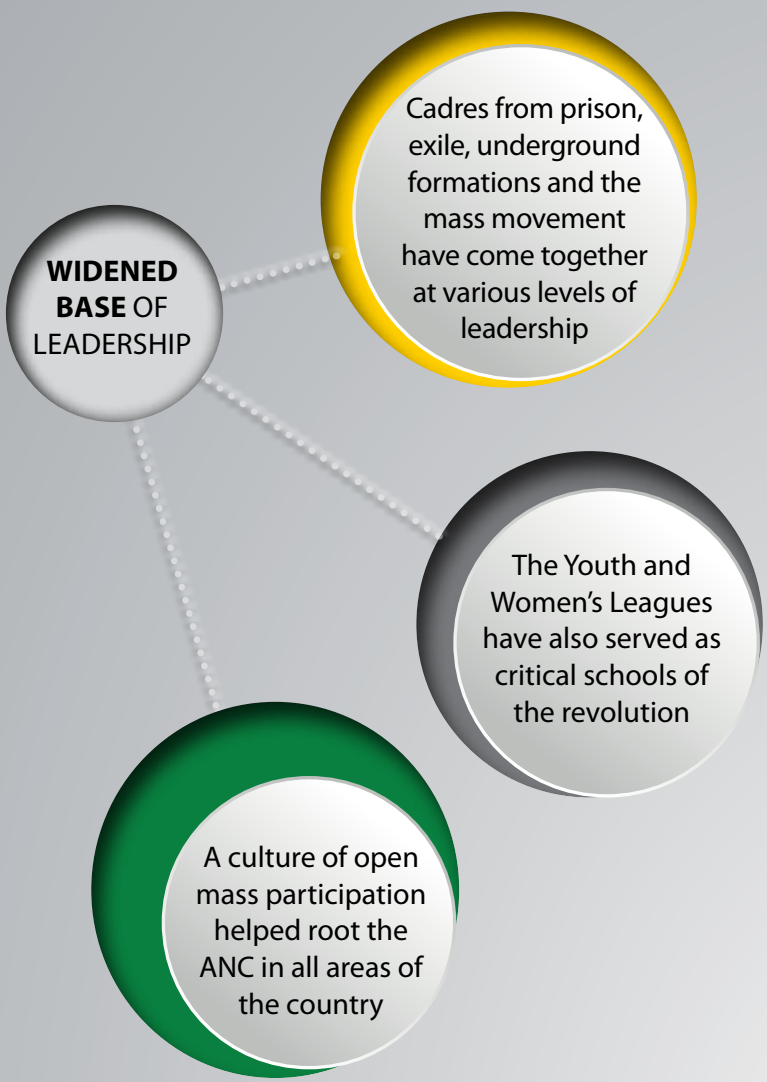
A leader should seek to influence and to be influenced by others in the collective. He should have the **conviction to state his views boldly and openly** within constitutional structures of the movement; and - without being disrespectful - not to cower before those in more senior positions in pursuit of patronage, nor to rely on cliques to maintain one's position.

An individual with qualities of leadership does not seek to gain popularity by undermining those in positions of responsibility. Where such a member has a view on how to improve things or correct mistakes, she should state those views in constitutional structures and seek to win others to her own thinking. She should assist the movement as a whole to improve its work, and not stand aside to claim perfection out of inactivity.

The struggle for social transformation is a complex undertaking in which at times, personal interests will conflict with the organisational interest. From time to time, conflict will manifest itself between and among members and leaders. **The ultimate test of leadership includes:**

- **striving for convergence** between personal interests - material, status and otherwise - and the collective interest;
- **handling conflict** in the course of ANC work by understanding its true origins and seeking to resolve it in the context of struggle and in the interest of the ANC;
- **the ability to inspire people** in good times and bad; to reinforce members' and society's confidence in the ANC and transformation; and
- **winning genuine acceptance** by the membership, not through suppression, threats or patronage, but by being principled, firm, humble and considerate.

How has the **base of leadership** widened in the past few years?



With its unbanning, the ANC set out to build a mass movement, drawing members from the mass of the South African people. This also made it possible to introduce profound open democratic practices, with activists of the anti-apartheid struggle and communities in general taking part in building their movement. **A culture of open mass participation helped root the ANC in all areas of the country.** It improved its standing as a people's movement both in terms of its policies and programmes and in its mass composition.

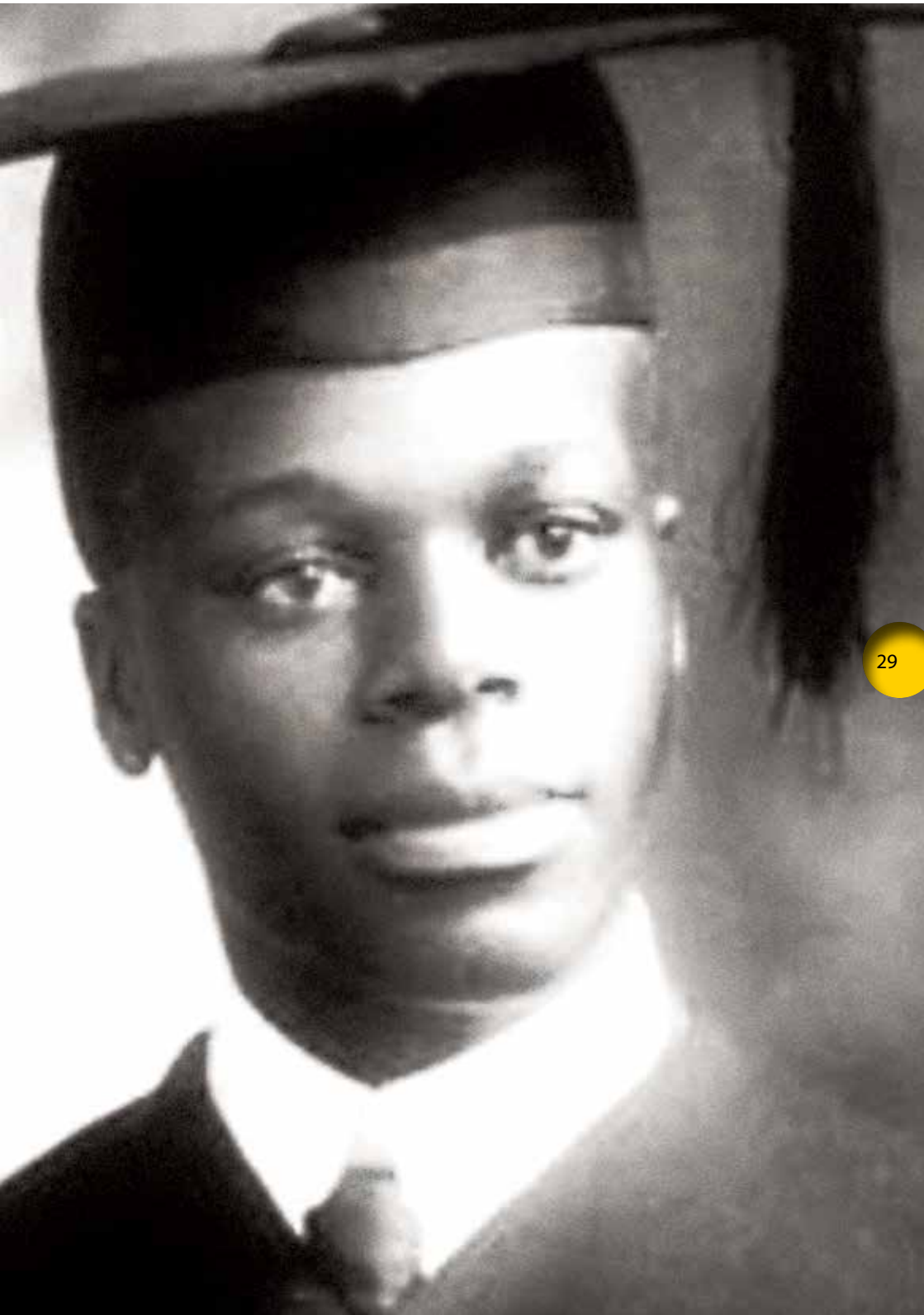
As it developed from being a movement of cadres thoroughly processed and systematically educated in its policies, it attracted huge numbers of people many of whom developed in its ranks. Many of them were prepared to face the might of state-sponsored violence for 'the last push'. However, some individuals may have **joined for the prestige** associated with the changes happening at the beginning of the decade; as well as the **personal opportunities that would arise** when the ANC came into government.

Over these years, **young people, women, community leaders of various hues, veterans of previous struggles, professionals and business-people found political home in the movement as it emerged from the underground.** Cadres from prison, exile, underground formations and the mass movement have come together at various levels of leadership. All this has brought a dynamic political chemistry into the evolution of the organisation. It has also provided a wide and deep pool of experience within leadership.

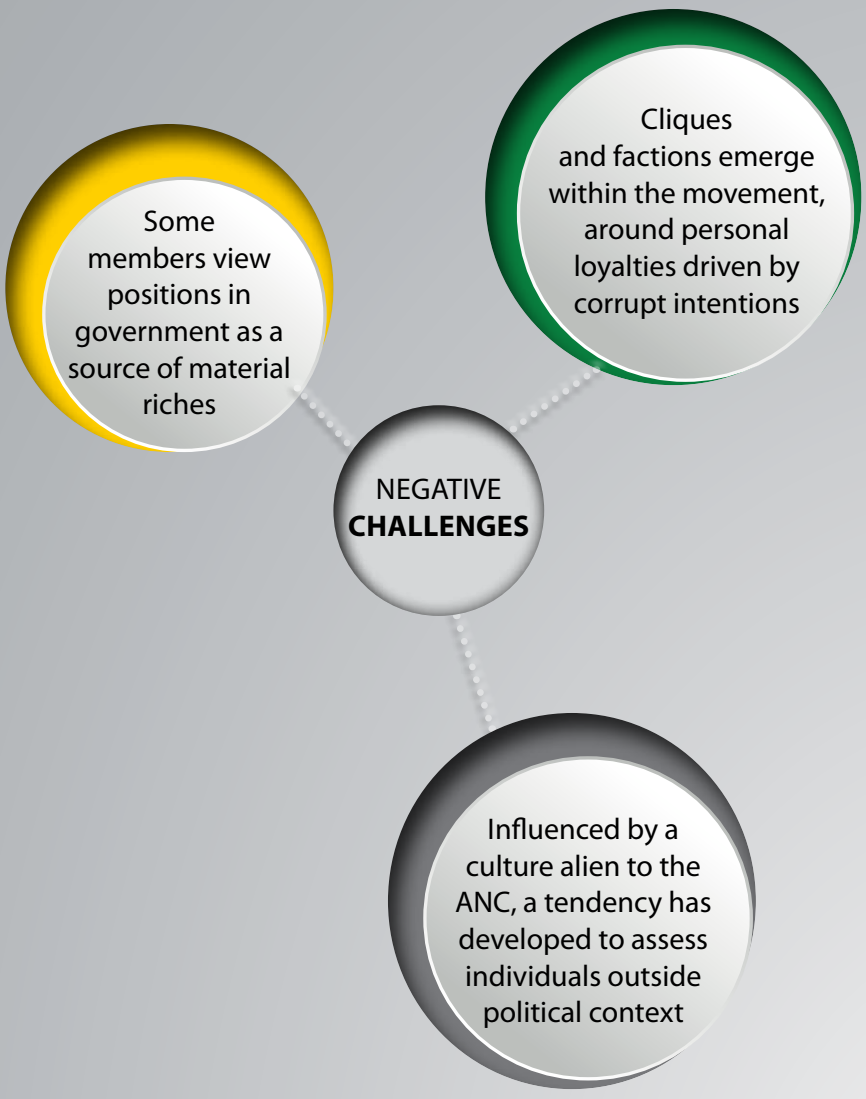
In this period, and especially with the achievement of democracy, the **ANC had to put together teams at various levels to develop and implement policies of a democratic governance.** Without much formal training, these cadres have over the years acquitted themselves well in defining the constitutional framework, developing and implementing legislation and programmes for transformation, and building a state with the capacity to serve the people.

The Youth and Women's Leagues have also served as critical schools of the revolution and a source of cadres who are continually assuming leadership positions within the ANC. So have many other formations allied to the movement, including COSATU, the revolutionary student movement, civic associations, religious structures, the women's movement and some professional bodies. Further, it should be emphasised that, even if they may not be elected as a formal part of ANC leadership structures, leaders of these mass formations who are members of the ANC are also, in their own right, ANC leaders.

Pixley ka Isaka Seme | 1881– 1951
A founder and President of the African National Congress 1930 – 1936



What are the **negative challenges** that have emerged in the new terrain?



Entry into government meant that a great many cadres of the movement moved en masse from full-time organisational work. This was a necessary shift arising from the victories we had scored. However, this was not done in a planned manner. As a result, for the first few years, there were virtually no senior leaders of the ANC based at its headquarters. This had a negative impact on the task of mass organisation. While progress has been made in this regard, **further work needs to be done to ensure that ANC structures operate as an organisational and political centre** for everything the ANC does.

Because leadership in structures of the ANC affords opportunities to assume positions of authority in government, **some individuals then compete for ANC leadership positions in order to get into government.** Many such members view positions in government as a source of material riches for themselves. Thus resources, prestige and authority of government positions become the driving force in competition for leadership positions in the ANC.

Government positions also go hand-in-hand with the possibility to issue contracts to commercial companies. Some of these companies **identify ANC members that they can promote** in ANC structures and into government, so that they can get contracts by hook or by crook. This is done through media networks to discredit other leaders, or even by **buying membership cards** to set up branches that are ANC only in name.

Positions in government also mean the possibility to appoint individuals in all kinds of capacities. As such, some members make promises to friends, that once elected and ensconced in government, they would return the favour. **Cliques and factions then emerge** within the movement, around **personal loyalties driven by corrupt intentions.** Members become voting fodder to serve individuals' self-interest.

Media focus on government and the ANC as a ruling party also means that individuals appointed into various positions are able to **acquire a public profile in the course of their work.** As such, over time, they become the visible members who would get nominated for leadership positions. This is a natural expression of confidence and helps to widen the base from which leaders are elected. However, where such practice becomes the main and only criterion, **hard-working individuals who do not enjoy such profile get overlooked.**

Influenced by a culture alien to the ANC, a tendency has also developed to assess individuals totally outside of the political context which is the core mandate of the ANC. Artificial criteria such as acceptability to the media, eloquence specifically in English, and **warped notions of "sophistication"** are then **imposed on the movement's approach.**

Further, false categories of "left" and "right", pro-this and anti-the-other, "insider" and "outsider" are introduced by so-called **analysts with little, if any, understanding of the movement's policies, programmes and culture.** These are then accepted by some of our members. This is usually whispered outside formal structures, and bandied about opportunistically in the build-up to the organisation's conferences.

The process of social transformation is a difficult one, with possibilities of **committing mistakes** from time to time and with the speed of change not totally dependent on our will. Some individuals **exploit these weaknesses** by creating an impression that they could do what the ANC leadership as a whole is **unable** to do. Thus is born populism.

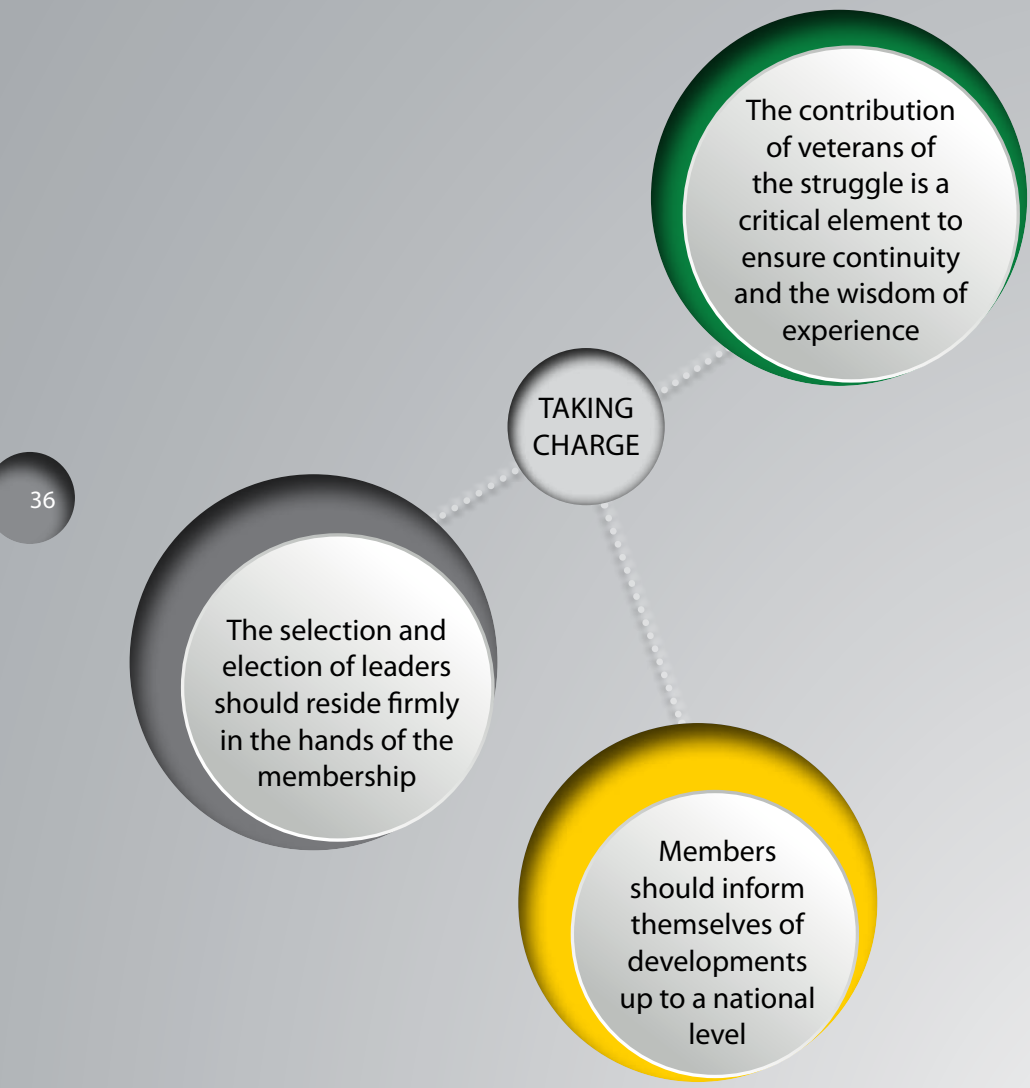
Related to the above is the danger arising out of the fact that executive positions in government are by appointment. This can have the effect of stifling frank, honest and self-critical debate within the ranks of the movement. This is because some individuals may convince themselves that, by **pretending to be what they are not,** and being seen to agree with those in authority all the time, they would then be **rewarded with appointment** into senior government positions.

On the other hand, others seek to court popularity by **demonstrating "independence"** from constitutional structures and senior leaders of the ANC, for its own sake. Often, this is encouraged by some media and other forces opposed to the ANC, precisely because it means independence from the mission and discipline of the movement.

The tendency is also developing for discussion around leadership nominations to be reduced to mechanical deal-making among branches, regions and provinces. Thus, instead of having thorough and honest discussion about the qualities of nominees, delegates negotiate merely on the basis of, "if you take ours, we'll take yours". This may assist in ensuring provincial and regional balances. But, taken to extremes, it can result in **federalism by stealth** within the movement.

Chief Albert Luthuli | 1898 – 1967
Nobel Peace Prize Winner and President of the
African National Congress 1952 – 1967

How do members **take charge?**



The selection and election of leaders should reside firmly in the hands of the membership. This can only happen if there is **open and frank discussion on these issues in formal structures of the movement.** Quiet and secret lobbying opens the movement to opportunism and even infiltration by forces hostile to the ANC's objectives.

Such discussion should be informed by the critical policy and programmatic issues that face us in each phase of struggle. To recapitulate, this **stage can be characterised as one of a continuing transition and the beginnings of faster transformation.** It is a stage at which we are faced with the challenge of mobilising the people to ensure that they take part in improving their lives for the better. We are also faced with the task of decisively contributing to the mobilisation of Africa and the world for focused attention on the needs of Africa and the poor across the globe.

In debating the composition of leadership collectives, we should take into account such factors as the various **historical experiences of movement cadres.** We also have to **ensure that sufficient skills are harnessed for the task of governance.** The contribution of veterans of the struggle in leadership structures at various levels is also a critical element to ensure continuity and the wisdom of experience.

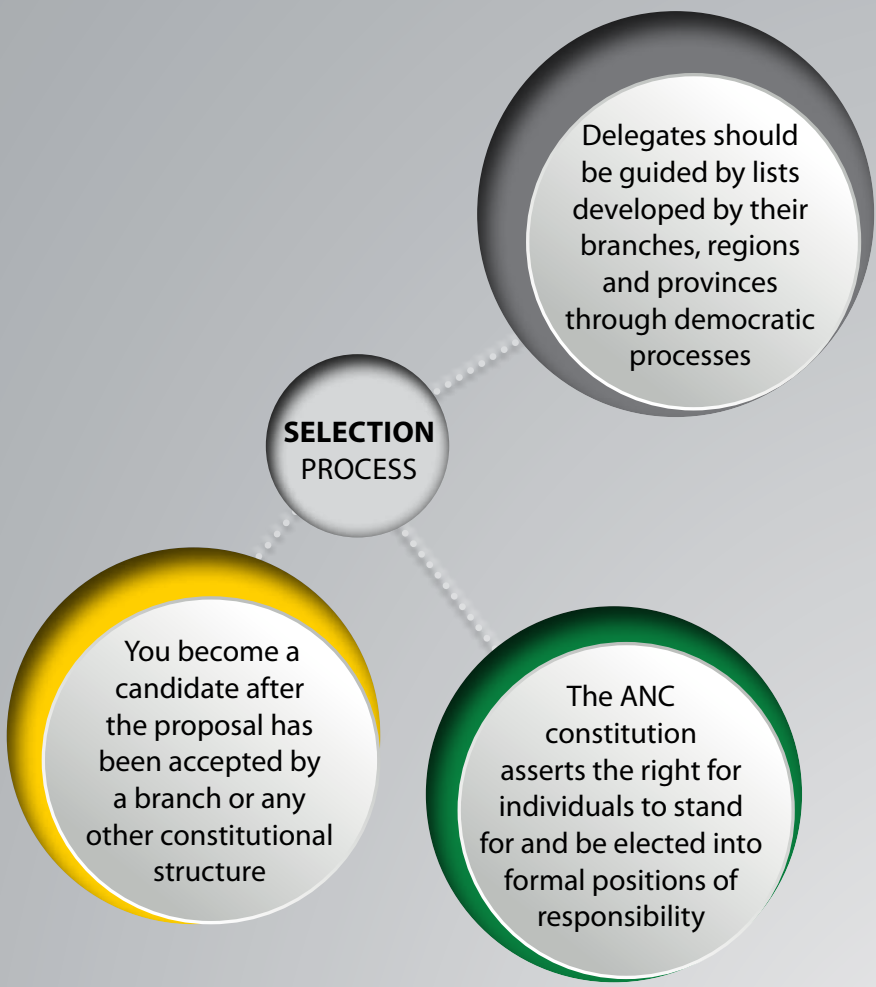
In a modernising world, and to sustain the movement in the long-term, we should **systematically and consciously take more and more young people into the blast furnace of leadership responsibility. We should, broadly, also ensure race, gender and geographic balances,** without reducing this to bean-counting and hair-splitting. And a correct balance must be struck between leaders in government and those in ANC and other mass formations outside government.

How do members come to know of cadres with such qualities beyond those who are already in public office? The **overriding requirement is that members should inform themselves of developments in their locality, in the regions, the province and at national level.** In selecting cadres for branch and perhaps regional leadership, this should be much easier. Other levels will require exchange of views in inter-regional and inter-provincial meetings.

But it also means that leadership structures should **help give guidance** - be they structures of the ANC itself, or the Women's and Youth Leagues. Further, the manner in which deployment is carried out should **expose cadres with potential** to the widest possible base of membership.

Lilian Ngoyi | 1911 – 1980
First woman elected to the ANC National Executive Committee and a founder of the Federation of South African Women

How 'natural' is the **selection process?**



How then does selection of candidates happen? Is it a "natural" process where leaders emerge out of some mysterious selection, or is it a conscious act on the part of members? Should members canvass for those they support and/or should individuals promote themselves? Is there a place for lobbying in the ANC?

To answer these questions, let us go back to the basics. In the first instance, the **ANC constitution** asserts the right for individuals to stand for and be elected into formal positions of responsibility. But waving a constitution does not **excuse unbecoming conduct.** Thus, we need to understand and follow the constitution; but also to learn from the movement's culture while adapting that culture to current realities.

Members are not discouraged from canvassing for those they support. And, technically, an individual is not prohibited from canvassing for him-/herself. But it is a matter of profound cultural practice within the ANC that **individuals do not promote or canvass for themselves**. Historically, this has justifiably been frowned upon as being in bad revolutionary taste. One of the main reasons for this is that when cadres of the movement do their work, this is not meant to be with an eye on leadership positions or some other **personal reward**; but to serve the people. When cadres are not in formal leadership positions, they should not will others to fail, but **assist everyone in the interest of fundamental change**.

Selecting candidates and ultimately electing leaders is not like the "natural selection" of evolution where things develop by chance. It must be a conscious and well-considered act on the part of each ANC member. But how should this be done? **What issues should you, the member, take into account when the nomination and election process unfolds?**

Nominations take place at constitutional structures such as branch AGMs and regional, provincial and national conferences. Individual members nominate their candidates at these meetings on the basis of an assessment of candidates' qualities and performance. However, declaration of support for a person, or of a willingness to stand, does not guarantee that one would be a candidate. **You become a candidate after the proposal has been accepted by a branch or any other relevant constitutional structure.**

Nomination and canvassing must be done openly, and within constitutional structures of the movement. If a member wishes to nominate a candidate or to stand for a particular position, s/he must indicate this in formal structures such as branch meetings. Outside these structures, it becomes dangerous and unacceptable lobbying.

In open engagement within constitutional structures, the member(s) would then **motivate why they believe that a particular person would make a significant contribution to the work of the ANC at the various levels.** They would also be able to indicate the **new and creative things that nominees would bring to leadership collectives.** If the nominees have been members of these or other collectives, it should also be shown that they have striven to improve the work of these collectives, raised issues openly and had the courage of their convictions. It does not help for individuals to keep quiet in formal structures and emerge as surprise leaders with the promise to perform better.

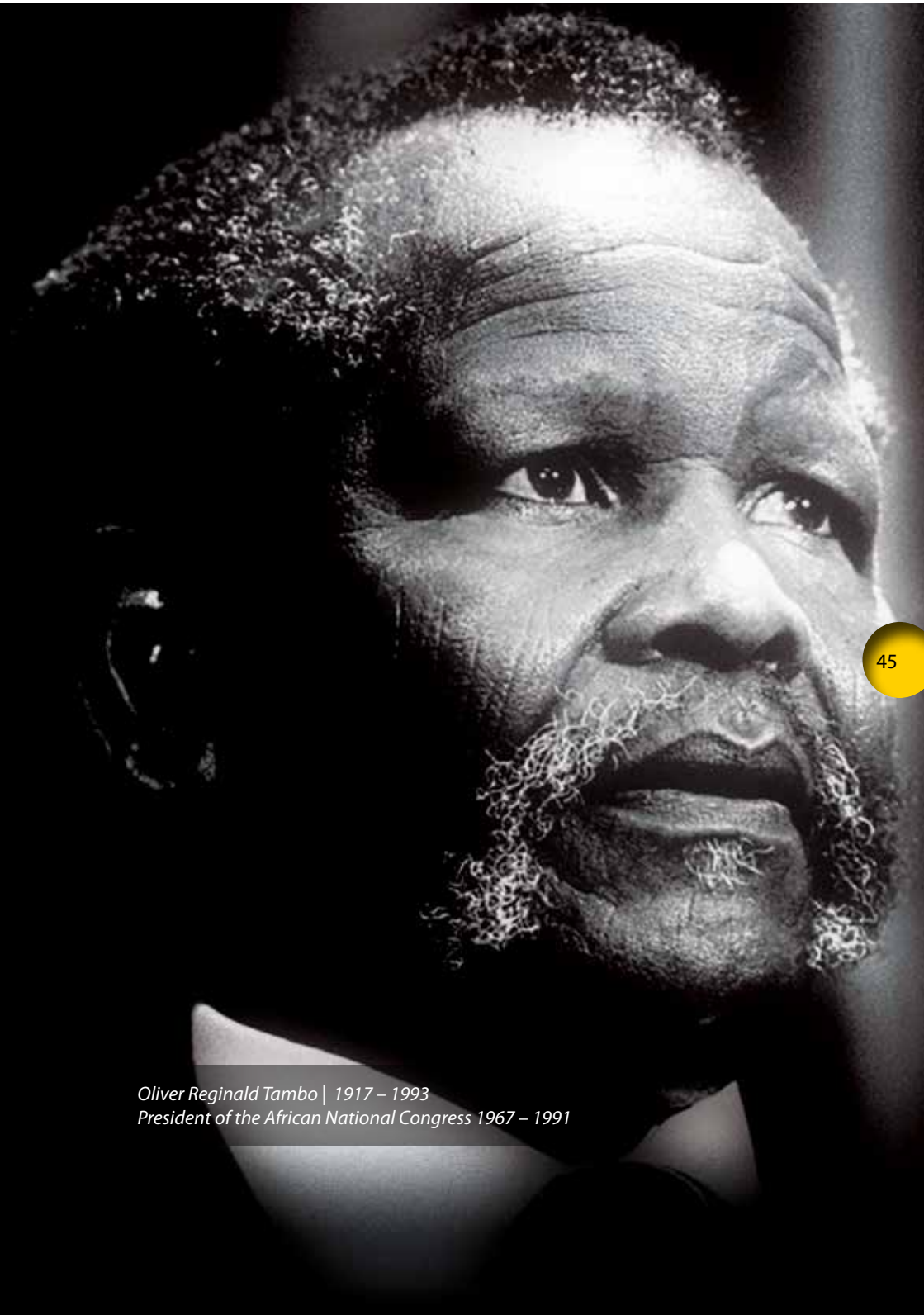
If they believe that there are weaknesses to correct, those who nominate or wish to stand should be able to show that those **weaknesses are real and not the imagination of the media or forces** which want to weaken the ANC. They should also show that the weaknesses are those of individuals they seek to replace, and not a result of the objective situation in which the movement finds itself. This would help contain a litany of false promises.

It is also critical that individuals whose names are advanced reflect **consistency in their work to pursue the ANC's interests.** Individuals who target positions of influence and leave when they lose; and then seek to come back only as leaders would have to show how this serves the interests of the movement, and whether they can be relied upon during difficult times.

Inasmuch as we should avoid pretenders and opportunists, we should also **ensure that leadership structures do not carry deadwood**. If they are already serving in these structures, or have served in the past, leaders should be assessed on how their presence helped the movement in its work. Further, it should be clear how their presence in these structures would help ensure the balances that are required for the movement to fulfil its mission.

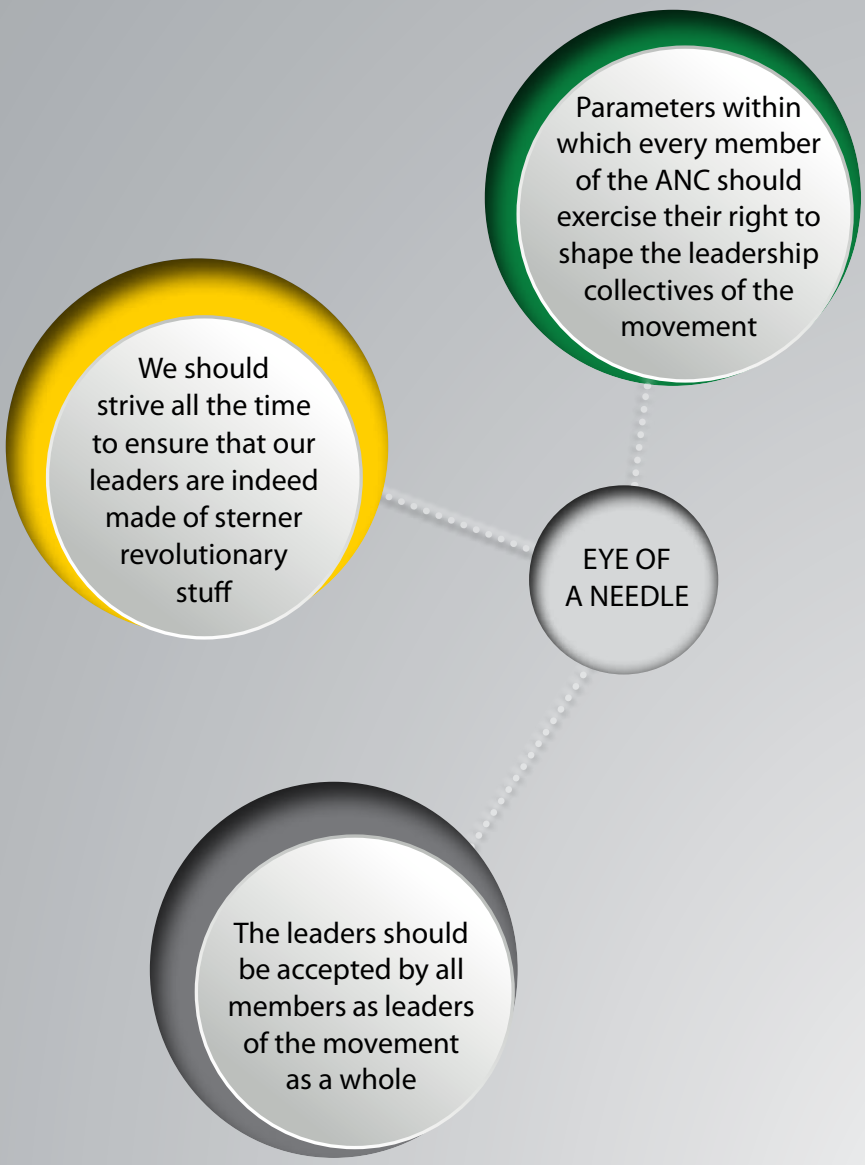
Individuals who operate in the dead of the night, convening secret meetings and speaking poorly of other members should be exposed and isolated. When approached to be part of such groups, members should relay such information to relevant structures or individuals in whom they have confidence. But it is also critical that proper investigations are conducted, and those accused are informed. **Witch-hunts should be avoided as a matter of principle.**

There is nothing inherently wrong with structures developing lists of candidates and canvassing for them. However, such **lists should not be used to stifle discussion in branch and other constitutional forums, and prevent the nomination of other candidates.** In discussions around nominees, names on the lists should not take precedence over any other nominations from members. At the conferences, delegates should be guided by lists developed by their branches, regions and provinces through democratic processes. But they are not bound to follow each and every name. Being influenced by delegates from other areas and choosing differently is not an offence.



Oliver Reginald Tambo | 1917 – 1993
President of the African National Congress 1967 – 1991

Through the **eye of a needle?**



These guidelines indicate the **broad parameters within which every member of the ANC should exercise his/her right to shape the leadership** collectives of the movement and ensure that it meets its historical mandate. In one sense they make it difficult for individuals to ascend to positions of leadership in the organisation.

In applying these broad principles, **members need to be firm.** But we should also **exercise creative flexibility, knowing that no single individual is perfect.** Indeed there are many who may have potential but would not meet all the requirements set out here. But it is critical that they are honest about their capacity, and show a willingness to learn.

There are many members of the ANC who enjoy great respect within their communities, but still have to grasp the complex matters of policy. Such individuals should be encouraged to avail themselves for leadership positions. They **should however be prepared to develop themselves and to take part in relevant training sessions.**

It is a matter of principle, revolutionary democratic practice, and a constitutional requirement that, once duly elected, the leaders should be accepted by all members as leaders of the movement as a whole at the relevant level. They should be assisted by all of us in their work. **The leaders themselves are obliged to serve, and to listen to, all members,** including those who may not have voted for them.

The most important message of these guidelines is that you, the member, should be empowered to take an active and informed part in choosing leadership at various levels; or to stand for any position for which you believe you are suitable.

So, it may not exactly be through the eye of a needle. But we should strive all the time to ensure that our leaders are indeed made of sterner revolutionary stuff.

Nelson Rolihlahla Mandela | 1918 – 2013
President of the African National Congress 1991 – 1997

NOTES

NOTES 

SACTU ★ SAIC

ANC

★ SACPO ★ SACOD ★

Sign the FREEDOM CHA

THE PEOPLE SHALL GOVERN !

ALL NATIONAL GROUPS SHALL HAVE EQUAL RIGHTS !

THE PEOPLE SHALL SHARE IN THE COUNTRY'S WEALTH !

THE LAND SHALL BE SHARED AMONG THOSE WHO WORK IT !

ALL SHALL BE EQUAL BEFORE THE LAW !

ALL SHALL ENJOY EQUAL HUMAN RIGHTS !

THERE SHALL BE WORK AND SECURITY !

THE DOORS OF LEARNING AND OF CULTURE SHALL BE OPENED !

THERE SHALL BE HOUSES, SECURITY AND COMFORT !

THERE SHALL BE PEACE AND FRIENDSHIP !

RTER

BATHO BA TLA BUSA !

LIKAROLO TSA SECHABA KAOFELA LI TLA BA TE TOKELA TSE LEKANANG !

BATHO BA TLA KOPANELA LERUO LA LEFATSE !

LEFATS'E LE TLA AROHANYOA HAR'A BE LE LEMANG !

BATHO KAOFELA BA TLA LEKANA IHLONG LA MOLAO !

BATHO KAOFELA BA TLA FUMANA LITOKELO TSE LEKANANG TSE TSOANETSENG BATHO !

MOSEBETSI O TLA ANELA HO BE LE TS'IRELETSO !

MENYAKO EA THUTO LE EA TSA BOTHO, E TLA BULOA !

HO TLA BA MATLO, TS'IRELETSO, LE HO LULA MOTHO A PHOTHOLLOHILE !

HO TLA BA KHOTSO LE SELEKANE !

ZONKE IZINHLANGA ZIYOBA NAMALUNGELO ALINGANAYO !

BONKE BAYODLA NGAKHEZO LUNYE !

UMHLABATHI UYOCAZELWA LABO ABAWUSEBENZAYO !

BONKE BAYOLINGANA PHAMBIKWOM-THETHO !

BONKE BAYOBA NAMALUNGELO ALINGANAYO !

KUYAKUBA KHONA UMSEBENZI NOKUNGASHUKUMISWA !

AMINYANGO YEMFUNDO NEMPUCUKO JYOVULWA !

KUYOBA KHONA IZINDLU — NOKUNGATHIKAMEZWA NOKUTHO-KOMALA !

KUYAKUBAKHONA UXOLO NOBUDLELWANE !

Item “19”

THROUGH THE EYE OF A NEEDLE

LEADERS EVOLVE OUT OF BATTLES for social transformation. In these battles, some will fall: but the abiding quality of leadership is to **learn from mistakes,** appreciate one's weaknesses and **correct them.**

An individual with **qualities of leadership** does not seek to gain popularity by **UNDERMINING** those in **positions of responsibility.**

If a member has views on how to **improve things** or **correct mistakes,** they should state them in **CONSTITUTIONAL STRUCTURES** and seek to **win others** to their own thinking.

They should **ASSIST THE MOVEMENT** as a whole to **improve** its work – and not **stand aside** to claim perfection out of **inactivity.**

ANC MEMBERS SHOULD

Be **ACCESSIBLE** and **FLEXIBLE** and not think they are the source of all wisdom.

UNDERSTAND ANC policy and be able to **APPLY** it under all conditions.

Constantly seek to **IMPROVE** their capacity to **SERVE** the people.

WIN the **confidence** of the people in their **day-to-day** work.

Not seek to gain **CHEAP POPULARITY** by avoiding difficult issues, making **false promises** or **pandering** to popular sentiment.

Seek to **INFLUENCE** and **be influenced** by others. Have the conviction to **state their views boldly** and openly within constitutional structures, without being disrespectful to senior members, nor relying on cliques.

Have the courage to explain and **CONVINCE OTHERS** of the **correctness of decisions** taken by constitutional structures – even if decisions are **unpopular.**

Strive to be in touch with the people all the time, **LISTEN** to their views and **LEARN** from them.

LEAD BY EXAMPLE and be **above reproach** in their political and social conduct.

Act as a **role model** to ANC members and non-members that reflects **COMMITMENT** to the strategic goals of the NDR, which includes not only being free of corrupt practices, but also actively fighting against corruption.

THE ULTIMATE TEST OF LEADERSHIP INCLUDES:

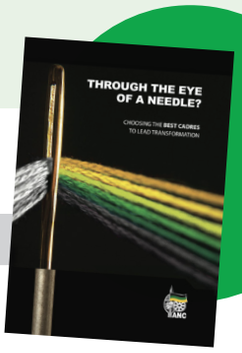
Striving for **convergence** between personal interests and the **collective interest.**

Handling **conflict** by understanding its origins and seeking to **resolve** it in the **context of struggle** and in the interests of the ANC.

The ability to **inspire people** in good times and bad.

Reinforcing members' and society's **confidence** in the ANC and **transformation.**

Winning acceptance by members not through suppression, threats or patronage, but by being **principled,** firm, humble and considerate.



Download the full **PDF booklet**

Item “20”

Carol Paton Editor at large

OPINION / COLUMNISTS

CAROL PATON: ANC deployment at heart of its failure to govern SA

National executive committee member Godongwana admits unqualified and unaccountable people are staffing the state

BL PREMIUM

19 APRIL 2021 - 18:01 *by* CAROL PATON

Enoch Godongwana. Picture: SUNDAY TIMES

While the Zondo commission on state capture cannot bring us convictions of the corrupt, it has brought many other great things. Among the best and most important was the light shone into the black box of the ANC's deployment policy over the past week.

There is no other single factor that is as responsible for the ANC's failure to govern effectively over the past 25 years. The deployment of cadres has hollowed out the state and all its key institutions of

expertise and objectivity, it has opened the door to corruption on a grand scale in state-owned enterprises, and it has collapsed the distinction between party and state and provided cover for widespread looting, from the highest political office in the land to the smallest town and municipality.

It is at the heart of the matter of state capture. And, while the ANC deployment committee has been given, in internal policy documents, the most ambitious mandate imaginable — "to deepen the hold of the liberation movement over the levers of the state" — it is not a constitutional ANC structure. Its makes no reports to conference and no public statements. Its deliberations have been a black box of secrecy, opened only occasionally to further some or other side in a factional battle.

Having committed to co-operate with the commission and support its work, the ANC wisely decided it would not be secretary-general Ace Magashule who would give testimony on its behalf. Instead, national chairperson Gwede Mantashe presented a detailed and remarkably frank affidavit, the spirit of which could not be faulted. He genuinely tried to assist the commission to understand how the ANC works.

But there was a logical hole at the centre of his evidence, which he refused to see and with which the commission will need to engage when it comes to write up this part of its deliberations and recommendations. Asked by advocate Alec Freund whether he endorsed the principle of a non-political civil service, Mantashe's answer was an emphatic yes. Asked next whether he saw a tension between this and a civil service staffed by people loyal and accountable to the ANC, as envisaged by the ANC deployment policy, Mantashe's response was an emphatic no.

His argument went along these lines. On returning from exile and taking power the ANC inherited a state where every director-general was a white male, mostly hostile to the ANC's transformation agenda. It therefore had a responsibility to equip its members with the necessary skills and send them off to work in the state. As the deployment committee only recommends people for appointment and does not appoint, candidates must pass the selection processes in the state, which is the safeguard to ensure the appointment of skilled people.

This minimalist account of the deployment strategy was debunked not just by Freund, who aired a never-before-seen ANC deployment policy document approved in 2009, which spoke of the aims of deployment in far more sweeping and ambitious terms, but also by Mantashe's fellow national executive committee member, Enoch Godongwana, in an hour-long interview on Newzroom Afrika the next day.

The unintended consequence of deployment, Godongwana said, was that unqualified and unaccountable people were now staffing the state. "What is undermining accountability is the creeping in of patronage under the guise of deployment ... There are [a] number of problems with deployment: factionalism is one; greed is another, where people are put in positions to get access to resources."

This is distressingly clear in hundreds of examples, big and small, from deployed mayors and municipal managers in municipalities to the most sophisticated state-owned companies that now face ruin. Godongwana went on to hint that in the more pragmatic, liberal wing of the ANC there is a feeling that deployment has run its course and that the government is now focused on Senzo Mchunu's plan to professionalise the civil service "as far as we can".

The phrase "as far we can" was telling. Scrapping the deployment policy is not a debate that has reached the agenda of the ANC's national executive committee. Nor is it likely to, without pressure. Patronage is the glue that holds the ANC together and it is the prize for contestation of position and power. Deployment is at the centre of the patronage machine, providing political cliques with access to state resources that allow them to remain there and get wealthy in the process.

When the commission makes its report it can recommend individuals for criminal prosecution. Whether that happens will depend on whether the National Prosecuting Authority can pull off the necessary convictions. It can also make recommendations on how to avoid the pitfalls of the past.

Scrapping ANC deployment committees will hopefully be one of them.

• *Paton is editor at large.*

Item “21”

21.

Video

Newzroom Afrika.

Newzroom Afrika's Thabo Mdluli Is Joined by ANC Head of Economic Transformation Enoch Godongwana, 2021

https://www.youtube.com/watch?v=Kxi_VCEehIw

Item “22”

MLOKOTI v AMATHOLE DISTRICT MUNICIPALITY AND ANOTHER 2009 (6) SA 354 (E)

Citation	2009 (6) SA 354 (E)
Case No	1428/2008
Court	Eastern Cape Provincial Division
Judge	Pickering J
Heard	October 30, 2009; October 31, 2009
Judgment	November 6, 2009
Counsel	IJ Smuts SC for the applicant. R Quinn SC (with R Wade) for the first respondent.
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Administrative law - Abdication of discretionary power - Local-authority council adopting resolution on instructions of majority party - Interference unauthorised and unwarranted - Abdication of decision-making responsibility C rendering appointment void.

Administrative law - Administrative action - What constitutes - Decision by municipal council to appoint municipal manager constituting administrative action - Municipal council not absolved from duty to comply with principles of administrative law and provisions of enabling legislation by labelling decision to appoint 'political'.

D **Court** - High Court - Jurisdiction - Labour matters - Non-availability of remedy under labour legislation - Appointment to post in civil service - Unsuccessful external applicant for post as municipal manager seeking review of decision to appoint successful applicant - Applicant having no remedy under labour legislation - High Court having required jurisdiction - In making E appointment, municipality exercising public power - High Court having review jurisdiction.

Local authority - Municipal council - Resolutions - Validity - Resolution adopted on instructions of majority party and without prior vote in guise of 'political' decision - Labelling decision 'political' not absolving F council from duty to comply with principles of administrative law and provisions of enabling legislation - Interference by party unauthorised and unwarranted - Council abdicating power conferred on it - Resolution void.

Local authority -Municipal council - Powers - Appointment of staff - Failure to appoint best qualified candidate - Absent any objectively justifiable G basis to reject best candidate, local authority obliged to appoint him/her.

Headnote : Kopnota

An unsuccessful applicant for the post of municipal manager of the first- respondent municipality made application in the High Court for the review and setting aside of the decisions of the council of the first respondent to appoint the second respondent H to the post and not to appoint the applicant to the post, as well as for an order appointing the applicant to the post. The applicant brought his application on the grounds that: (i) in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the decisions were, inter alia, irrational, unreasonable and unjustifiable, in that the first respondent was obliged to select as municipal manager the best qualified and best suited candidate, namely, the applicant; (ii) the resolution passed I by the first respondent's council whereby the second respondent was appointed to the post was invalid and unlawful, in that, in contravention of the applicable legislation, no vote was taken prior to the adoption of the resolution; and (iii) the decisions fell foul of the provisions of s 6(2)*(e)*(iv) of PAJA because they were made in accordance with the unauthorised or unwarranted dictates of the ANC regional executive committee. The first J respondent objected *in limine* that the High Court lacked jurisdiction to

hear the matter, as it was essentially a labour matter which ought to have A been processed through the dispute-resolution mechanism contained in the Labour Relations Act 66 of 1995 or pursued under the provisions of the Employment Equity Act 55 of 1998.
Held, as to the objection to jurisdiction, that it was clear from *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) (2008 (3) BCLR 251; (2008) 29 *ILJ* 73; [2008] 2 BLLR 97) that an aggrieved person possessed of a remedy B under the Labour Relations Act was obliged to pursue that remedy in the Labour Court and not in the High Court, notwithstanding the reference in s 157(2) of the Labour Relations Act to the High Court's concurrent jurisdiction. Prior to that decision, a so-called external candidate for employment, such as the applicant, was afforded no protection under the provisions of the Labour Relations Act. (At 358D - E and 359A - C.) C
Held, further, that, since the applicant had no remedy that he could pursue under the Labour Relations Act, the High Court had the requisite jurisdiction to deal with the matter. (At 358J and 359C.)
Held, further, that the applicant likewise had no remedy under the Employment Equity Act. (At 361J.)
Held, that, in making the appointment of municipal manager, the first respondent D had acted in terms of the public powers invested in it by the provisions of s 67 of the Local Government: Municipal Systems Act 32 of 2000 and the High Court accordingly had the requisite jurisdiction to adjudicate the present matter. (At 362A - B.)
Held, further, as to (ii), that, on the evidence, the applicant's submission was correct that no voting took place. However, some form of voting was E required in order for a valid decision to be taken. It was clear, therefore, that the first respondent's council acted unlawfully and in contravention of the enabling legislation. The resolution appointing the second respondent was therefore a nullity. (At 373F, 375D and 376B.)
Held, further, that the decision of first respondent's council therefore fell to be set aside on the basis that no vote was taken and that the resolution to appoint F second respondent was therefore unlawful and a nullity. (At 378E.)
Held, further, as to (iii), that, on the evidence, the appointment of the second respondent was, in fact, based upon an instruction by the ANC regional executive committee. (At 378G.)
Held, further, that that amounted to a usurpation of the powers of the first respondent's council by a political body which, on the papers, did not G appear even to have had sight of the documents relevant to the selection process, including the findings of the interview panel. The involvement of the regional executive committee of the ANC in the circumstances described constituted an unauthorised and unwarranted intervention in the affairs of the first respondent's council. (At 379J - 380C.)
Held, further, that the ANC councillors had failed to exercise the discretion vested H in them at all; that abdication of their discretionary powers

had to result in the decision to appoint the second respondent being declared unlawful and being set aside. (At 380H.)
Held, further, that it was appropriate, in the circumstances of the matter, for the court to substitute its own decision for the unlawful decision of the first respondent's council. (At 381B.)
Held, further, that, under the first respondent's recruitment policy, read with the provisions of s 195 of the Constitution and s 67 of the Local Government: Municipal Systems Act, a fair and efficient selection process had to be followed in order to ensure that all candidates were selected 'objectively and on merit'. Absent any objectively justifiable basis to reject the best candidate, the first respondent was obliged to appoint him. The applicant

was without doubt the best candidate. There was, quite simply, no objectively justifiable basis on which applicant could be rejected in favour of the second respondent. He was then, and remained, entitled to be appointed. (At 381G/H - 381I.)
Held, accordingly, that the decisions of the first respondent to appoint the second respondent as municipal manager and not to appoint the applicant as municipal manager had to be set aside and replaced with an order appointing the applicant as municipal manager. (At 382B - D.)

Cases Considered

Annotations

Reported cases

Southern Africa

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687): applied

Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC) (2008 (3) BCLR 251; (2008) 29 *ILJ* 73; [2008] 2 BLLR 97): referred to

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458): dictum in para [56] applied

Fredericks v MEC for Education and Training, Eastern Cape 2002 (2) SA 693 (CC) ((2002) 23 *ILJ* 81; 2002 (2) BCLR 113): referred to

Hangklip Environmental Action Group v MEC for Agriculture, Environmental Affairs and Development Planning, Western Cape, and Others 2007 (6) SA 65 (C): compared

Makambi v MEC for Education, Eastern Cape 2008 (5) SA 449 (SCA) ([2008] 4 All SA 57): dicta in para [14] and at 455C - D and 460G applied

Mbashe Local Municipality and Others v Nyubuse (2008) 29 *ILJ* 2147 (Tk): referred to

Minister of Agriculture, Economics and Marketing and Another v Peyper 1964 (1) SA 206 (T): applied

Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd 2005 (6) SA 182 (SCA) ([2005] 2 All SA 239): dictum at 199C - E in para [20] applied

Myburgh v Danielskuil Munisipaliteit 1985 (3) SA 335 (NC): applied

Nakin v MEC, Department of Education, Eastern Cape, and Another 2008 (6) SA 320 (Ck) (2008 (6) BCLR 643; [2008] 2 All SA 559; (2008) 19 *ILJ* 1426; [2008] 5 BLLR 489): approved

Ndlovu v Commission for Conciliation, Mediation & Arbitration and Others (2000) 21 *ILJ* 1653 (LC): referred to

Nonzamo Cleaning Service Cooperative v Appie and Others 2009 (3) SA 276 (Ck) ([2008] 9 BLLR 901): criticised and not followed

Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the RSA and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241): referred to

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059): dictum in para [141] applied

S v Adrus 1987 (1) SA 772 (T): distinguished

Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another 2006 (2) SA 52 (C) ([2006] 3 All SA 478): dictum in para [25] applied.

Foreign

England

Everett v Griffith [1924] 1 KP 941: applied.

PICKERING J

Unreported cases

Mkumatela v Nelson Mandela Metropolitan Municipality (SECLD2314/2006, Revelas J): distinguished

Ncayiyana and 28 Others v The Municipal Manager: Mbizana Local Municipality and Four Others (Tk case No 1678/07): followed

Skelenge v Mnquma Local Municipality and Six Others (Tk520/2002, Jafta AJP): applied.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa Act, 1996, ss 23(1) and 195: see *Juta's Statutes of South Africa 2008/9* vol 5 at 1 - 26 and 1 - 46

The Labour Relations Act 66 of 1995, s 157(2): see *Juta's Statutes of South Africa 2008/9* vol 4 at 1 - 154

The Local Government: Municipal Systems Act 32 of 2000, s 67: see *Juta's Statutes of South Africa 2008/9* vol 5 at 1 - 661

The Promotion of Administrative Justice Act 3 of 2000, ss 6 and 6(2)*(e)*(iv): see *Juta's Statutes of South Africa 2008/9* vol 5 at 1 - 265.

Case Information

Review of a municipal council decision to appoint a municipal manager. The facts appear from the reasons for judgment.

IJ Smuts SC for the applicant.

R Quinn SC (with *R Wade*) for the first respondent.

Cur adv vult.

Postea (November 6).

Judgment

Pickering J: F

On 19 March 2008 the Amathole District Municipality advertised the post of municipal manager in the local press. The advertisement attracted in excess of 20 applicants, including Mr Vuyo Mlokoti and Mr Mlamli Zenzile. A short-listing process was undertaken from which it became apparent that Mr Mlokoti and Mr Zenzile were the two outstanding candidates. The remaining short-listed candidates were G accordingly eliminated. Thereafter, an assessment of the relative strengths and weaknesses of the two candidates was undertaken by an interviewing panel. Eventually, on 17 June 2008, the council of the Amathole District Municipality resolved to appoint Mr Zenzile to the position and, on 23 June 2008, it informed Mr Mlokoti that his application had been unsuccessful. H

Mr Mlokoti was aggrieved thereby and, accordingly, on 28 June 2008, he launched the present application, citing as first respondent the Amathole District Municipality and, as second respondent, Mr Zenzile, and seeking an order in the following terms: I

> '1. That the decision of the first respondent on 17 June 2008 to appoint the second respondent as the Municipal Manager of the first respondent be reviewed and set aside.
>
> 2. That the decision of the first respondent not to appoint the applicant as Municipal Manager of the first respondent, insofar as may be necessary, be reviewed and set aside. J

PICKERING J

> A 3. Substituting the decision of this honourable Court for the decision of the first respondent with an order that: the applicant be and is hereby appointed Municipal Manager of the first respondent with effect from 1 July 2008, with full salary and benefits.
>
> 4. The first respondent, together with the second respondent in the event of the second respondent's opposing this application, pay the costs of this application, the one paying, the other to be absolved, such B costs to include the costs of two counsel.'

The application is opposed by the first respondent only. Such opposition relates not only to the merits of the matter, but goes also to the issue of jurisdiction, first respondent contending that this is essentially a labour C matter which ought to have been processed through the dispute-resolution mechanism contained in the Labour Relations Act 66 of 1995 or pursued under the provisions of the Employment Equity Act 55 of 1998. First respondent's contentions in this regard are founded chiefly on the decision in *Chirwa v Transnet Ltd and Others* D 2008 (4) SA 367 (CC) (2008 (3) BCLR 251; (2008) 29 *ILJ* 73; [2008] 2 BLLR 97). Prior to this decision there existed no doubt whatsoever that a so-called external candidate for employment, such as applicant, was afforded no protection under the provisions of the Labour Relations Act. In this regard, the following is stated by Grogan *Dismissal, Discrimination & Unfair Labour Practices* 2 ed at 23:

> E 'Under the principles of contract law, an application for work does not give rise to rights and obligations until it is accepted. The LRA extends protection to applicants for employment only in cases of victimisation - ie a refusal by an employer to engage an applicant on a number of impermissible grounds, including past, present or anticipated membership of a trade union. The EEA protects applicants for employment F against unfair discrimination.'

At 43 the learned author states the following:

> 'Unlike the EEA, the LRA affords no protection against unfair labour practices, as defined, to applicants for employment; only employees can G be promoted or demoted . . . .'

It is furthermore clear from the definition of 'employee' that the Labour Relations Act has no application to an external candidate for employment, subject, of course, to the provisions of s 5 of the Act.

H 'Employee' is defined as:

> *'(a)* any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*; and
>
> *(b)* any other person who in any manner assists in carrying on or conducting the business of an employer.'

I Section 5 of the Act is applicable to 'employees and persons seeking employment'. It is clear that these provisions are intended to prevent the victimisation, on certain grounds, of persons seeking employment. They are of no application to the present matter.

It does not appear to me therefore that applicant has any remedy which J he could pursue under the Labour Relations Act.

PICKERING J

In the circumstances I have some difficulty in grasping the basis upon A which it is submitted that, in terms of the *Chirwa* decision, applicant was obliged to institute these proceedings in the Labour Court. As I understand that decision, leaving aside for the moment the debate concerning its effect on the matter of *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) SA 693 (CC) ((2002) 23 *ILJ* 81; 2002 (2) BCLR 113), B it laid down the principle that an aggrieved person possessed of a remedy under the Labour Relations Act was obliged to pursue that remedy in the Labour Court and not in the High Court, notwithstanding the reference in s 157(2) to the latter court's concurrent jurisdiction.

In the circumstances I am satisfied that this court has the requisite C jurisdiction to deal with the matter.

In the event, however, that I might be wrong, I turn to consider Mr *Quinn*'s further submissions concerning the *Chirwa* decision.

That decision has excited much academic and judicial comment. Apart D from decisions in other divisions, reference can be made to the High Courts of the Eastern Cape, to *Mbashe Local Municipality and Others v Nyubuse* (2008) 29 *ILJ* 2147 (Tk), Transkei Division, and to *Nonzamo Cleaning Service Cooperative v Appie and Others* 2009 (3) SA 276 (Ck) ([2008] 9 BLLR 901). For present purposes, however, it is fortunately not necessary for me to delve too deeply into that debate, as there exists judicial authority in point, with which I agree. E

In the matter of *Mkumatela v Nelson Mandela Metropolitan Municipality*, unreported, South Eastern Cape Local Division case No 2314/2006, Revelas J, in dealing with an application for the review of a decision not to appoint the applicant to a particular post, stated as follows at 3 - 4: F

> 'In respect of the question of the jurisdiction of this Court, I invited supplementary heads of argument, because during the course of writing this judgment, the Constitutional Court handed down the judgment of *Chirwa v Transnet Limited and Others* unreported case number CCT 78/06 [2007] CC23 where the Constitutional Court (the majority) G seems to have pronounced that cases about unfair dismissal disputes should fall within the exclusive jurisdiction of the Labour Court in certain circumstances. I thank the parties for their assistance in providing me with such heads.
>
> The applicant submitted that the *Chirwa* case is not applicable because the Constitutional Court unanimously decided in *Fredericks v MEC for* H *Education and Training, Eastern Cape* 2002 (2) SA 680 (CC) that the Labour Court did not have exclusive jurisdiction in all matters arising from an employment relationship. In the *Chirwa* judgment, it was specifically emphasized by Skweyiya J that the judgment in *Fredericks* was distinguishable since no reliance was placed in that case on s 23(1) of the Constitution which protects the right to fair labour practices. In I the *Chirwa* case, the applicant premised her case squarely in terms of the definition of an unfair dismissal in terms of the Labour Relations Act. The applicant stressed that, as was the case in *Fredericks*, he does not rely on the unfair labour practice provisions of the LRA.
>
> Even though the Labour Relations Act is the primary source in matters concerning disputes about unfair dismissal and unfair labour practices, J

PICKERING J

> A it would appear that a properly formulated right would not be excluded by the *Chirwa* judgment. In this application, the applicant challenges the failure of the first respondent to exercise the public power of implementing a policy document. Chirwa's complaint was that there had been a failure to comply with the mandatory provisions of items 8 and 9 of Schedule 8 of the Labour Relations Act. The two B formulations are different.
>
> The first respondent contended that, had the applicant been successful in his application for the position, it would constitute a promotion and he would be entitled to formulate a cause of action with reference to s 186(2)*(a)* of the Labour Relations Act, contending that the first C respondent had committed an unfair labour

practice in not promoting him. That is correct, but in terms of the *Fredericks* case, read with the *Chirwa* case, the applicant had a choice as to which Court he could approach.

In *United National Public Servants Associations of SA v Digomo NO and Others* [2005] 26 *ILJ* 1957 (SCA), several employees challenged a decision not to promote them. Nugent JA said the following about the nature of their claim:

> "The appellant's claim . . . was not that the conduct complained of constituted an 'unfair labour practice' giving rise to the remedies provided for by the Labour Relations Act, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair. Its claim was to enforce the right of its members to fair administrative action - a right that has its source in the Constitution and that is protected by s 33 - which is clearly cognizable in the ordinary courts.
>
> In my view, the first respondent (a municipality) cannot argue that promoting its employees does not constitute administrative action. It is an organ of state and, in promoting employees, it exercises a public power and it performs a public function in doing so. It clearly performs an administrative act when acting in terms of its policies and implementing them. This Court therefore has the necessary jurisdiction to entertain this application.'

In *Makambi v MEC for Education, Eastern Cape* 2008 (5) SA 449 (SCA) ([2008] 4 All SA 57), the following was stated by Farlam JA in para 14:

> 'Ms *Collett* also submitted, relying on the recent decisions of Revelas J in the South Eastern Cape Local Division in *Mkumatela v Nelson Mandela Metropolitan Municipality*, case No 2314/2006, delivered 28 January 2008, and Froneman J in the Bhisho High Court in *Nakin v MEC, Department of Education, Eastern Cape Province*,77/2007, delivered on 22 February 2008 that the Constitutional Court in *Chirwa* did not overrule its earlier decision in *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) SA 693 (CC) ((2002) 23 *ILJ* 81; 2002 (2) BCLR 113), and that the applicant was entitled on the strength of that decision to bring her claim in the High Court.'

In para 15 the learned judge stated that '(i)t is true that the majority in *Chirwa* did not overrule *Fredericks* but were content to distinguish it'. In this regard, he referred to para 58 of the judgment of Skweyiya J in *Chirwa* where the following appears:

PICKERING J

> 'Notably, the applicants in *Fredericks* expressly disavowed any reliance on s 23(1) of the Constitution, which entrenches the right to a fair labour practice. Nor did the claimants in *Fredericks* rely on the fair labour practice provisions of the LRA or any other provision of the LRA.'

In his separate concurring judgment Nugent JA adverted at 455C - D to the fact that the *Chirwa* case 'purported to distinguish, but not overrule, its earlier contrary decision' in *Fredericks*. At 460G the learned judge stated that the decision in *Fredericks* 'seems to me to be good law until it is overruled . . . .'

In the light of what has been stated in *Makambi* the statement by Erasmus J in the *Nonzamo Cleaning Service* case, supra, at 290B - C (at 916A - B (BLLR)), to the effect that '(i)t must be accepted therefore that they [the majority in *Chirwa*] intended to overrule *Fredericks* to the extent that their judgments are in conflict with that of O'Regan J', is, with respect, clearly wrong. I would respectfully align myself with the views expressed in this regard by Froneman J in *Nakin*'s case supra, a decision which has now been reported at 2008 (6) SA 320 (Ck) (2008 (6) BCLR 643; [2008] 2 All SA 559; (2008) 19 *ILJ* 1426; [2008] 5 BLLR 489). It follows too, in my view, that the decision of Revelas J in *Mkumatela*'s case, based as it is on the *Fredericks* case, is correct. At the very least, I am not persuaded that it is clearly wrong and I am accordingly bound thereby.

It must be remembered that the decision in *Mkumatela*'s case involved an applicant for promotion who was obviously already in the employ of the respondent. In the present matter, applicant was a so-called external candidate and his case is therefore, in my view, an a fortiori one. Furthermore, applicant has placed no reliance whatsoever on either s 23(1) of the Constitution, the Labour Relations Act, or the Employment Equity Act. With regard to this latter Act, one may search in vain through applicant's affidavits for any hint of a suggestion that applicant might have alleged some sort of discrimination such as would have brought the provisions of that Act into play. Section 6 of that Act provides that no person may unfairly discriminate against an 'employee', in any employment policy or practice on one or more grounds:

> 'including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'

None of the grounds of discrimination referred to therein have any relevance whatsoever to applicant's situation. I should mention that, although the definition of 'employee' in the Employment Equity Act is identical to that in the Labour Relations Act, s 9 of the Employment Equity Act provides that, for purposes of s 6, 'employee' includes 'an applicant for employment'.

The submission by Mr *Quinn SC*, who with Mr *Wade* appeared for first respondent, that applicant ought to have pursued his remedy in terms of the Employment Equity Act is, in the circumstances, singularly devoid of merit.

PICKERING J

In all the circumstances, I am satisfied that first respondent, in making the appointment of municipal manager, acted in terms of the public powers invested in it by the provisions of s 67 of the Local Government: Municipal Systems Act 32 of 2000 and that this court accordingly has the requisite jurisdiction to adjudicate this matter.

I turn then to consider the merits of the matter.

The appointment of the municipal manager of the first respondent is governed by the first respondent's 'recruitment policy'. The purpose of that policy is set out in para 1 thereof, the relevant paragraphs of which read as follows:

> '1.1 To apply consistent, transparent, procedurally and substantively fair recruitment and selection procedures;
>
> 1.2 To give effect to fair recruitment and selection processes;
>
> 1.3 To ensure that the recruitment process complies with the relevant legislations;
>
> . . .
>
> 1.6 To ensure that all candidates are selected objectively and on merit;
>
> 1.7 To attract and retain the interests of suitable candidates and to project a positive image of the Municipality to outsiders.'

In para 4.1.4 the following appears:

> 'The Municipality encourages the policy of open recruitment of individuals to positions on the basis of qualifications and suitability and with due regard to the provisions of the pertinent employment legislations.'

A 'suitably qualified person' is defined in para 3.7 as meaning:

> 'any one of, or any combination of that person/s:
>
> A Formal qualifications
>
> B Prior learning
>
> C Relevant experience
>
> D Capacity to acquire, within a reasonable time, the ability to do a job.'

In para 4.1.5 it is stated that the municipality 'is determined to fill vacant position(s) with the best qualified and best suited candidates'.

That first respondent, in appointing the municipal manager, was obliged to follow the recruitment policy is not in dispute. It is also common cause that the provisions of s 67 of the Local Government: Municipal Systems Act are of application. Section 67 provides as follows:

> '(1) A municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and

procedures to ensure fair, efficient, effective and transparent personnel administration, including -

(a) the recruitment, selection and appointment of persons as staff members,

.'

Section 195 of the Constitution is also relevant, providing as it does that public administration at all levels of government be governed by the democratic values and principles that efficient, economic and effective

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use of resources must be promoted (s 195(1)*(b)*) and that good human-resource management and career-development practices, to maximise human potential, must be cultivated (s 195(1)*(h)*).

Applicant contends that, arising out of the aforesaid recruitment policy, as well as the provisions of s 67 of the Local Government: Municipal Systems Act, first respondent was obliged to select as municipal manager the best qualified and best suited candidate. With reference also to the provisions of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), he contends that the decision to appoint second respondent and not himself was, inter alia, irrational, unreasonable and unjustifiable. A second contention contained in a supplementary affidavit was that the decision also fell foul of the provisions of s 6(2)*(e)*(iv) of PAJA because of the unauthorised or unwarranted dictates of another person or body. Applicant further contends that the resolution passed by first respondent's council, whereby second respondent was appointed, was invalid and unlawful, in that, in contravention of the applicable legislation, no vote had been taken prior thereto.

Section 6(2)*(h)* of PAJA provides that, if a decision 'is so unreasonable that no reasonable person could have so exercised the power' it will be reviewable. In this regard O'Regan J has stated that the section requires a simple test, namely, that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) at para 44. In para 45 the learned judge states as follows:

> 'What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

In para 46 the learned judge states further that the need for courts to treat decision-makers with appropriate deference or respect 'flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself'.

In para 48 the learned judge continues as follows:

> 'In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to

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> findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker.'

The learned judge concludes that a court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

In developing his argument Mr *Quinn* stressed in particular that a choice between two possible candidates was not a matter which could be resolved by the application of a scientific or mathematical formula, but was rather a decision incorporating 'a large dose of subjectivity', especially inasmuch as it involved the weighing-up of issues and considerations which are not ordinarily capable of precise definition or quantification, and also entailed an assessment of competing personalities and perceived attributes and potential. Counsel submitted further that (in the context of a promotion dispute per se), in order for an applicant to establish unfairness, he was required to show more than that he was qualified for appointment. It had also to be shown, so it was submitted, that the decision to appoint someone else was unfair in the sense that the employer's action was either frivolous or arbitrary. In this regard reference was made to *Ndlovu v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 *ILJ* 1653 (LC) at 1655 - 1656 where the following was stated:

> '[11] It can never suffice . . . for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed.
>
> [12] The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. This will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise.'

I bear these authorities and considerations in mind.

Before turning to the facts of the matter, it is necessary to deal with a submission by Mr *Quinn* to the effect that the application should be dismissed on the grounds of applicant's alleged unreasonable delay in launching this application. It is common cause that applicant was informed in writing on 23 June 2008 that his application had been unsuccessful. Applicant's application was served on first respondent on 2 July 2008. Mr *Quinn* submitted that it was reasonable for applicant to have assumed that second respondent would be appointed at or about the same time that he had learned that his application was unsuccessful, but that, notwithstanding this, he had not proceeded on the basis of urgency. It was submitted that he should have launched proceedings, inter alia, to interdict the appointment of second respondent as municipal manager. He, however, failed to do so and elected instead to institute

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the present application on the basis of a timetable that was inappropriate. All of this, submitted Mr *Quinn*, occasioned severe prejudice to first respondent who has employed second respondent and concluded a fixed-term contract.

I am satisfied, however, that applicant acted with the utmost expedition in launching these proceedings. Furthermore, the executive mayor was well aware of the fact that applicant was dissatisfied with the selection process and, indeed, on 24 June 2008, advised second respondent accordingly. In the circumstances first respondent proceeded to appoint second respondent at its own peril. In my view there is no merit in this submission.

Both applicant and second respondent are men of considerable academic and practical experience. Applicant, who obtained his National Senior Certificate in 1983, further obtained a Secondary Teachers Diploma in 1987; a Bachelor of Arts degree from the University of Transkei in 1990; a Certificate in Public Management and Development from the University of Fort Hare in 1997; and a further Certificate of Executive Leadership in Public and Development Management from the University of Fort Hare in 1999. He is presently finalising his Master's degree in Public Administration at the University of Pretoria.

His work experience is extensive. He was employed as a junior lecturer at the University of Transkei from 1990 to 1991; a lecturer at Bensonvale College of Education from 1991 to 1994 and was co-chairperson of the Drakensberg Regional Services Council in 1995. His further work experiences are as follows: regional director at the Department of Local Government and Housing, Eastern Cape, from 1995 to 2000;

chairperson of the Township Board, Eastern Cape, from 1996 to 2001; member of the Eastern Cape Development Tribunal from 1998 to 2002; executive committee member of the National Municipal Demarcation Board from 1999 to 2004; director (provincial) for Local Government and Traditional Affairs from 2000 to 2002; municipal manager of the Amathole District Municipality, Eastern Cape, from 2002 to 2004; and, finally, chairperson of the Municipal Demarcation Board from 2004 to date.

As appears from what is set out above he was previously municipal manager of the first respondent from 2002 to 2004. He resigned as municipal manager upon being requested by the President to become chairperson of the Municipal Demarcation Board in Pretoria, a position he has held from 2004. He states that he has vast experience and qualifications in local-government management.

It appears from the curriculum vitae of second respondent that he holds the following tertiary qualifications: An Advanced Certificate in Housing Development from the University of Natal; a B Juris and an LLB from the University of Transkei and an LLM from Rhodes University. From 1997 to 1999 he was employed as a co-ordinator at German Technical Corporation (GTZ), a German Government Development Agency. From 1999 to 2002 he was a field worker at PELIP Housing Company, a company formed by the Port Elizabeth Municipality in partnership

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with the Swedish government to deliver housing; from 2001 to 2002 he was assistant director of the Department of Housing in Pretoria; from 2002 until the present he has been employed by first respondent as Deputy Director of Administration.

Prior to their interviews both the applicant and second respondent were psychometrically assessed on 20 May 2008. It appears from the report of the selection panel that both applicant and second respondent achieved a 'good level' in the psychometric assessment. The report states as follows:

> 'The psychometric assessment was used to test various competencies such as Problem solving, Decision making, Communication, Business awareness, Set vision and Strategic thinking and Leadership. On the scale of 0 - 4 where 0 means very low level and 4 means very good level that is required for the position, the average scores of individual candidates as shown in the results are as follows:

Mlokoti	2.98	Good level
Zenzile	2.59	Good level.'

The following remarks were made concerning applicant:

> 'Strong in decision-making, communication and leadership. All areas assessed yielded above average scores therefore no areas of development identified.'

In respect of second respondent the following remarks are made:

> 'Strong in communication, decision-making and leadership. All areas assessed yielded above average scores.'

Thereafter, applicant and second respondent were interviewed by a selection panel consisting of 11 members on 26 May 2008. Their performance during the interview was scored by each of the panel members by way of percentage. It would appear that the results of two of the panellists were not considered, as they had apparently not used the score sheets provided. Each panel member was required to list the 'best performed candidate and score' as well as the 'second best performed candidate and score'. The results were given as follows:

No	Panel Member	Best performed candidate and score	2nd best performed candidate and score
1.	Cllr Mtongana	No results - the member did not use the score sheet provided.	
2.	Cllr Fusa	Dr Mlokoti - 80%	Adv Zenzile - 58%
3.	Cllr July	Adv Zenzile - 84%	Dr Mlokoti - 78%
4.	Cllr Mkosana	Dr Mlokoti - 73%	Mr Damane - 63%
5.	Cllr Magaqa	No results - the member did not use the score sheet provided.	
6.	Cllr Mlonyeni	Dr Mlokoti - 92%	Mr Kolisa - 83%
7.	Cllr Mciteka	Dr Mlokoti - 88%	Adv Zenzile - 80%
8.	Mr Holbrook	Dr Mlokoti - 70%	Adv Zenzile - 64% Mr Damane - 64%
9.	Mr Afrika	Dr Mlokoti - 78%	Adv Zenzile - 66%

I should mention, with regard to the reference throughout the selection papers to 'Dr Mlokoti', that applicant is the holder of an honorary doctorate.

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After the interviews the panellists were afforded an opportunity to give, in no particular order, the names of three preferred choices of candidates. It was at the conclusion of this exercise that the short-listed candidates other than applicant and second respondent were eliminated. The scores of applicant and second respondent in the interviews were then summarised as follows:

Candidates	Mtongana	Fusa	July	Mkosana	Magaqa	Mlonyeni	Mciteka	Holbrook	Afrika

Mlokoti	No score	80%	78%	73%	No score	92%	88%	70%	78%
Zenzile	No score	58%	84%	55%	No score	81%	80%	64%	66%

The interviewing panel then undertook an assessment of the relevant strengths and weaknesses of applicant and second respondent. In this regard the following was recorded in respect of applicant:

'STRENGTHS

He has all the requisite experience and exposure as obtained from past employment including his service with different District Municipalities and in particular the Municipal Demarcation Board.

WEAKNESSES

Some panel members expressed concerns about the applicant's commitment to remain with the institution given his short lived service in the past.'

With regard to second respondent the following was recorded:

'STRENGTHS

He has sound institutional memory on the operations of the institution supplemented by educational qualifications and, being an internal candidate, could soon grasp the fundamentals of the position if properly guided and nurtured.

WEAKNESSES

His lack of managerial experience is evident and this sent discomforting concerns from the majority of the panel members. His abilities and command of local government issues were far outweighed by those of his contender (Dr Mlokoti).'

The panel thereafter unanimously agreed that the two names be recommended to first respondent's council.

According to the documents contained in the record filed by first respondent in terms of rule of court 53, a special meeting was held by the first respondent's council on 17 June 2008, at which, inter alia, the appointment of the municipal manager was discussed. It transpires, however, that, even before that date, wheels were turning within wheels because, included in the record is an opinion dated 3 June 2008 from an attorney and labour-law practitioner, Mr Wesley Pretorius of Wesley Pretorius & Associates, addressed to the executive mayor of first respondent with regard to the appointment of the municipal manager.

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In the opinion Mr Pretorius states that the question referred to him was 'whether or not the municipality is entitled to appoint Advocate Zenzile despite the fact that Dr Mlokoti is the best candidate'.

After reference to various authorities, to applicant's recruitment policy, to s 67 of the Local Government: Municipal Systems Act, and to the respective strengths and weaknesses of applicant and second respondent, Mr Pretorius concluded that first respondent would be acting contrary to its legal obligations should it, in the circumstances of the matter, appoint a candidate other than the best candidate.

The executive mayor was clearly not satisfied thereby because, as appears from the record, senior counsel, Mr Buchanan SC, was instructed by Mr Pretorius to furnish first respondent with his opinion as a matter of urgency. Mr Buchanan duly furnished his opinion on 5 June 2008. He agreed fully therein with the opinion of Mr Pretorius and concluded that, absent any objectively justifiable basis to reject the best candidate, the first respondent was obliged to give effect to the statutory and constitutional framework binding upon it and to appoint the best candidate.

Be that as it may, the council of first respondent duly held its special meeting on 17 June 2008. The minutes of that meeting reflect that the African National Congress councillors supported the appointment of second respondent on the grounds that 'he was still young and knew the institution well and it was believed that he would take the institution to greater heights with his level of education and expertise'.

For their part, the Democratic Alliance and Pan Africanist Congress councillors supported the appointment of applicant whom 'they believed scored higher in terms of performance overall' and in terms of experience.

It was resolved that second respondent be appointed. Whether or not this resolution was passed consequent upon a vote having been taken is a matter to which I will return hereunder.

With regard to this council meeting, the first respondent's executive mayor, Mr Somyo, states that he was present and presided thereat. He then continues as follows:

'The council meeting was, as is customary, preceded by a meeting of the ANC caucus during which the panel's recommendations were discussed and evaluated. The caucus considered, and this was carried forward into the council meeting, that should the second respondent be appointed such appointment would facilitate a smooth transition since the second respondent was then, and had been, the Deputy Director: Administration of the first respondent, for some seven years. Another factor was that the second respondent was not considered to lack managerial skills and in short, he was a known entity, who in the past had worked well with the executive authority of the first respondent.'

Noteworthy from this exposition is that the caucus appears to have paid no regard to applicant's skills and the fact that he too was a 'known entity', having in the past been first respondent's municipal manager.

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Mr Somyo then states:

'Ultimately I cannot account for that which motivated individual councillors of the first respondent's council to decide in favour of employing second respondent.'

That this statement was disingenuous in the extreme will become apparent hereunder. Thereafter, on 19 June 2008, first respondent's council received a letter written by the executive director of the Border-Kei Chamber of Business, Mr Holbrook, who was also a member of the selection panel which had earlier interviewed applicant and second respondent. In this letter, Mr Holbrook states, inter alia, as follows:

'When the Municipality approached the Chamber and requested our assistance with the appointment of the Municipal Manager, this writer responded by indicating that the Chamber would be delighted to do so. In fact, we expressed ourselves as being honoured to being asked to assist with this very important position. The writer further indicated that because of past experiences of our participation in other similar circumstances with other Government related positions (not ADM) being nothing more than a futile exercise (sometimes of rubber stamping) we would in this instance expect total involvement. The point we made was as follows: In accepting your request we wish to emphasise our commitment to the process by confirming that we will only participate on the following conditions:

That a candidate has not already been identified and that the process is merely a rubber stamping exercise; that our involvement albeit as part of the process is deemed to be important and that our input is not ignored or undermined; that transparency will prevail. The decision of Council therefore to completely ignore the process and the findings of not only the writer but the panel is nothing short of disrespect and lacks any form of good corporate governance and responsibility. By proposing that the position be awarded to a candidate whom in the stated opinion of the writer was NOT appointable is gravely concerning. For the record, the recommendation of the writer - given at the interview meeting - was Mr. Vuyo Mlokoti was the best candidate. None of the other candidates met the requirements of the position as advertised. Accordingly the Chamber records its dissatisfaction should Council to proceed to appoint any other candidate other than Mr. Mlokoti.'

Meanwhile, on 18 June 2008, applicant became aware that his application had been unsuccessful and that second respondent had been appointed. Accordingly, on that date, a letter was addressed by applicant's attorney to first respondent, inter alia, requesting reasons as to

why second respondent had been preferred over applicant. No response was ever received to this letter.

Thereafter, on 23 June 2008, applicant received a letter from the executive mayor informing him that his application for the position had been unsuccessful. These proceedings were then instituted on 28 June 2008.

At some time in September, after first respondent's answering affidavits had already been filed, applicant came into possession of a letter written by the executive mayor on first respondent's official letterhead, addressed to 'The Chairperson, African National Congress, Eastern

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Cape Province, 48 Alexander Road, King William's Town' and dated 23 June 2008. This letter was duly filed on 15 October 2008 as annexure VM23 to applicant's replying affidavit. Because of the somewhat startling nature of this letter, it is necessary to set it out in full. The letter reads as follows:

'*Re: Appointment of Municipal Manager*

1. The above matter refers.
2. As you are aware, the Municipality recently engaged in the selection of a new Municipal Manager.
3. The purpose of this memorandum is to brief you on the developments and to seek your guidance regarding the further conduct of the matter.
4. The selection panel included a representative from the Department of Provincial and Local Government, Mr. E. Afrika, and the Executive Director of the Border-Kei Chamber of Commerce, Mr. Les Holbrook.
5. In short, and after a comprehensive selection process, two candidates were short listed for appointment, namely Dr. V. Mlokoti and Adv. M. Zenzile.
6. Dr. Mlokoti was consistently rated as the better candidate by the selection committee. In respect of Adv. Zenzile, the committee found that his "abilities and command of local Government issues were by far outweighed by those of" Dr. Mlokoti.
7. In view of the early indications that the matter might become controversial, the Municipality proceeded to obtain a legal opinion from a firm of attorneys and a further opinion from a senior Advocate. Both opinions advise the Municipality that, in the absence of any objectively justifiable basis for rejecting a candidate who has fared the best in the selection process, the Municipality is obliged to appoint such candidate and that the Municipality would otherwise leave itself open to attack in an application before the High Court.
8. The above matter was discussed within the ANC caucus in ADM in presence of the Regional Secretary and the legal opinions were disclosed. After considerable debate, the caucus decided to withhold the opinions from council although they were primarily obtained to advise the council. The REC's instruction to appoint Adv. Zenzile was then accepted by caucus.
9. Council took a decision to appoint Adv. Zenzile with the PAC and DA registering their dissent.
10. It is my view that the caucus was not entitled to withhold the legal opinions, or even the fact that legal opinions were obtained, from the council.
11. I am further of the view that the ANC erred by not resolving to appoint Dr. Mlokoti as he was clearly the most suitable candidate as the purpose of the recruitment process was to find the most suitable candidate. In this case there have been no compelling professional and/or political considerations advanced for avoiding to appoint the suitable candidate.
12. Dr. Mlokoti has, through his attorneys, threatened to take legal action and a challenge in this regard seems inevitable. There is a significant risk that a Court may ultimately agree with Dr. Mlokoti

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and set aside Adv. Zenzile's appointment. All of this will cause serious instability in the organisation.

13. There is also a real risk that the matter will receive adverse coverage in the media. In this regard I have already received a complaint from Mr. Holbrook, a member of the selection panel, which I annex.
14. In these circumstances I would urge that you reconsider the matter and advise the writer on the further conduct of the matter. My faith remains with the organisation, the African National Congress.'

The letter was signed by Mr Somyo above the title 'Executive Mayor, Amathole District Municipality'.

On 24 June 2008 a letter was written by Mr Somyo to second respondent, advising him that he had been appointed to the post of municipal manager with effect from 1 August 2008. The executive mayor states further in the letter that 'it is equally fair for me to indicate to you that one of the candidates who was interviewed for the Municipal Manager's position and was unsuccessful, has intimated his intent to mount a legal challenge of your appointment in the Court'.

Surprising as it may seem, no attempt was made by first respondent prior to the hearing of this matter to file any further affidavits in response to the filing by applicant of the letter, annexure VM23. However, when Mr *Smuts SC*, who appeared for applicant, proceeded to address argument to the court in respect of the letter, Mr *Quinn*, stating that it had been hoped that applicant would not seek to place reliance upon a private and confidential letter improperly obtained, sought leave to file already prepared affidavits dealing therewith. Despite Mr *Smuts*' initial objection thereto I allowed the affidavits to be filed in the interests of the full and thorough ventilation of the issue. I must add, however, that it must have been obvious to first respondent that applicant did indeed intend to rely on the letter, and Mr *Smuts*' heads of argument make this plain as well. In the circumstances, first respondent would, in my view, have been well advised to have sought leave to file the further affidavits immediately upon receipt of the replying affidavit, instead of adopting the unusual approach it did.

The further affidavits filed have been attested to by Ms Mlondleni, the first respondent's speaker, Mr Gantolo, a councillor of first respondent, and by the executive mayor, Mr Somyo. Mr Somyo states therein that the letter (VM23) was a private and confidential communication of a political nature written by him in his personal capacity to obtain guidance and advice from the 'relevant structure' of the ANC. According to him, he had decided to seek legal opinion on his own initiative without reference to members of the mayoral committee or first respondent's councillors. He reiterated that the facts to which he had deposed in first respondent's answering affidavit were the truth.

First respondent's speaker, Ms Mlondleni, states that she was present both at the ANC caucus meeting which preceded the council meeting, as well as that meeting. She states, inter alia, that Mr Somyo informed the ANC caucus that he had obtained legal opinions. According to Ms Mlondleni 'one or more legal opinions were in Somyo's possession.

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Copies were not available and the documents were not circulated.' It was pointed out to Mr Somyo that, since the agenda for the special council meeting had been settled and circulated without the opinions having been 'copied, circulated and considered by all councillors', no further reference could be made to them.

According to Ms Mlondleni, she 'well recalls' that first respondent's whip had stated that 'insofar as the opinions sought to pronounce upon which of the applicants should be appointed to the position of Municipal Manager, they attempted to usurp the powers of council and in any event the opinions might be wrong since much depended upon the instructions given'.

Thereafter the special meeting was convened. At no stage did Mr Somyo express dissatisfaction or reservations about the decision of the caucus and the resolution of the council to appoint second respondent. In fact, says Ms Mlondleni, 'Somyo voted in favour of the appointment of the second respondent to the post'. She accordingly expresses her surprise at the fact that Somyo had expressed the view in the letter VM23 that applicant should have been appointed.

In his affidavit Mr Gantolo confirmed in particular that Somyo had voted in favour of second respondent's appointment.

In the light of these averments it will be convenient to deal at this stage with applicant's contention that, in fact, no voting took place at the special meeting and that, on this basis alone, second respondent's appointment was invalid and irregular. In response to this averment, Somyo replied that 'applicant appears to be unaware of the standing rules of procedure of the first respondent's council' and that the decision to appoint second respondent was made in accordance with a 'proper and lawful procedure'.

The nature of the arguments addressed to the court requires that the relevant portion of the minutes of the special council meeting on 17 June 2008 be set out in full. They read as follows:

> 'The meeting was informed that the Report presented by the Executive Mayor contained two names, those of Dr. V. Mlokoti and Advocate M. Zenzile. The meeting was further informed that the report contained in it, the strengths and weaknesses of both candidates. The ANC raised that they were moving for the appointment of Advocate Mr. M. Zenzile and the motivation was that he was still young and knew the institution well and it was believed that he would take the institution to greater heights with his level of education and expertise.
>
> The Democratic Alliance raised that they were for the appointment of Dr. V. Mlokoti who they believed scored higher in terms of performance overall and that he was more experienced than Advocate M. Zenzile.
>
> The Speaker after consulting and reading the ADM Rule of Council reported that considering that there were two different positions on the matter, the matter would have to be taken to a vote.
>
> Arising from a request by the DA to go and caucus for 5 minutes the meeting adjourned for 5 minutes and reconvened thereafter.

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> The PAC raised the name of Dr. V. Mlokoti that he be appointed as the new ADM Municipal Manager.
>
> It was requested that it be recorded that the Democratic Alliance was alleging that in the whole process Council policies were flouted and that the DA had not specifically pointed where Council policies had been flouted.
>
> The Speaker indicated that there were two (2) positions which had been raised, the name of Adv. Zenzile and that of Dr. Mlokoti and that the matter would have to been taken to a vote.
>
> The Speaker concluded that the ANC supported by the UDM were moving for the appointment of Advocate M. Zenzile to the position of Municipal Manager and the Democratic Alliance and the PAC were to be recorded as having dissented.
>
> That it be noted that Council could not go to vote on the matter as the motion by the DA to vote on the matter was not submitted timeously and was not written down.'

The minutes then reflect that a resolution was passed, appointing second respondent to the post.

Mr *Quinn*'s submissions in this regard were twofold. Firstly, there had been a vote in compliance with first respondent's standing rules and, secondly, and in any event, the decision to appoint second respondent was an executive decision and not an administrative act susceptible to review by the court.

It seems to me that on any rational reading of the minutes, it is clear that no voting did in fact take place. As appears therefrom, the speaker indicated that there were 'two positions' with regard to applicant and second respondent and that 'the matter would have to been (*sic*) taken to a vote'. Almost immediately thereafter it is noted that 'Council could not go to vote on the matter as the motion by the DA to vote on the matter was not submitted timeously and was not written down'.

Undaunted, Mr *Quinn* submitted that there had indeed been a vote. Voting, he submitted, if I understood him correctly, was merely a mechanism to determine the majority view of council and did not necessarily entail a show of hands or a ballot in circumstances where the views of the majority of the councillors present were abundantly clear. In such circumstances, the procedure prescribed by rule 75 of the standing rules of first respondent came into play.

Rule 75 reads as follows:

> '(1) When the Speaker puts the question, any Councillor may, instead of demanding a vote, request the Speaker to formally record the opposition of the Councillor, or the Councillor's party, in the Minutes of Proceedings.
>
> (2) The Speaker may order that a vote take place if 4 or more Councillors wish to record their individual opposition.'

As was submitted by Mr *Smuts*, however, the proposition that the standing rules may provide for a procedure in conflict with the enabling legislation is somewhat novel.

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Section 160(3) of the Constitution provides:

> '3 *(a)* A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.
>
> *(b)* All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.
>
> *(c)* All other questions before a Municipal Council are decided by a majority of votes cast.'

Section 30 of the Local Government: Municipal Structures Act 117 of 1998 deals with the manner in which decisions must be taken by a council. It provides:

> '(1) A majority of the councillors must be present at a meeting of the council before a vote may be taken on any matter.
>
> (2) All questions concerning matters mentioned in section 160(2) of the Constitution are determined by a decision taken by a municipal council with a supporting vote of a majority of the councillors.
>
> (3) All other questions before a municipal council are decided by a majority of the votes cast, subject to section 34.
>
> (4) If on any question there is an equality of votes, the councillor presiding must exercise a casting vote in addition to that councillor's vote as a councillor.'

In *Skelenge v Mnquma Local Municipality and Six Others*, unreported520/2002, Transkei Division, Jafta AJP (as he then was) stated as follows at page 5 thereof:

> 'It is quite clear from the heading of s 30 and the language employed in it that it lays down the procedure to be followed by a Municipal Council in deciding any matter placed before it, except matters falling within the purview of s 34. The phrases all questions and all other questions are couched in wide terms which is indicative of the fact that the procedure laid down must be followed when every matter is placed before a Municipal Council with the exclusion of s 34 matters only, which are specifically exempted by the section itself from the procedure it lays down.'

After referring to the provisions of s 160(3) of the Constitution the learned judge continued as follows:

> 'Resolutions should always be an accurate reflection of the opinion of the Council on any matter and by necessity they should represent the majority view on a particular matter. In my view there is only one way of determining a majority view and that is by means of voting. During such voting three options would be available to Councillors, namely, voting in favour, voting against or abstaining. Therefore the contention by Mr. Tshiki to the effect that the majority of first respondent's councillors supported the motion for removing the applicant from office because only one councillor opposed it, cannot be correct. Without putting the motion to voting, the chairman could not determine the level of support thereto and consequently it cannot be said that the council has resolved to remove the applicant from office in terms of section 58 of Act 117 of 1998. By parity of reasoning, the same considerations would apply to the resolution in terms of which the fourth respondent was appointed.'

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Skelenge's case was followed by Schoeman J in *Ncayiyana and 28 Others v The Municipal Manager: Mbizana Local Municipality and Four*

Others, unreported1678/07, Transkei Division. In that matter it was common cause that there was no voting and no request to vote by the chairman or any of the applicants at the council meeting. There were before council only three motions that were proposed to appoint the third to fifth respondents as managers. These motions were seconded whereafter it was resolved that the said respondents be appointed in the various positions. The learned judge set the appointments aside.

In her judgment refusing an application for leave to appeal, Schoeman J dealt *in extenso* with the relevant authorities, including *Everett v Griffith* [1924] 1 KP 941; *Myburgh v Danielskuil Munisipaliteit* 1985 (3) SA 335 (NC); and *Minister of Agriculture, Economics and Marketing and Another v Peyper* 1964 (1) SA 206 (T). It is clear from these authorities that some form of voting is required in order for a valid decision to be taken. The matter of *S v Adrus* 1987 (1) SA 772 (T) is clearly distinguishable. In that matter the respondent had been present when a unanimous decision had been reached. It was argued on behalf of the respondent that a unanimous vote did not entail voting. The court held that the magistrate's conclusion, that unanimous decisions taken at the meetings could not be said to be equivalent to voting, would lead to absurdity. Although voting did not actually physically take place, as the resolutions were carried unanimously, it logically had to follow, from the fact that there were no abstentions or votes against the resolutions, that upon a unanimous decision everybody had voted in favour, and that a voting had thus taken place. See too Lewin *The Law, Procedure and Conduct of Meetings* (5 ed) at 103 where the learned author states:

> 'In the discussion of an ordinary item of business in which no formal motion is made, but on which a conclusion is reached that appears to be generally acceptable, the chairman may simply ask if there is any objection, without taking a vote; if there is no objection, the conclusion is recorded as being that of the meeting.'

The case of *Everett v Griffith* supra is also relevant in this regard. At 953 the following was stated:

> 'A man may give his vote in diverse ways, whether by writing or by hand, or by voice or by conduct, e.g. a nod. The form in which acquiescence is given matters not, if acquiescence is actually indicated.'

Measured against these authorities, the procedure adopted during first respondent's council meeting of 17 June 2008 falls woefully short of the requirements of the enabling legislation.

It is clear therefore, in my view, that, in adopting the procedure it did, first respondent's council acted unlawfully and in contravention of the enabling legislation. What was said in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458) is apposite at para 56:

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> '(A) local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful.'

The resolution appointing second respondent was therefore a nullity.

Mr *Quinn*, however, had a second string to his bow, namely that the decision of first respondent's council to appoint second respondent as its municipal manager was not an administrative act subject to review in terms of either the provisions of PAJA or the common law, but was, instead, a political decision taken by first respondent. In this regard he submitted that it was idle to suggest that political considerations would not have come into play, given that the post of municipal manager clearly had a political dimension. In view of the fact that the municipal manager had to oversee political decisions of the council, it was imperative that the appointee be a person who could co-operate closely with his political masters. In this regard he referred to the *Fedsure* case, supra, where in para 41 the following was stated:

> 'The council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate . . . . Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with a prescribed legal framework cannot appropriately be made subject to challenge by "every person" affected by them on the grounds contemplated by s 24*(b)* . The deliberation ordinarily takes place in an assembly in public where the members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the Courts to judge what is relevant in the circumstances.'

Reference was also made to *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the RSA and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) where it was held that the power of the President to bring legislation into operation was a power derived from the legislation itself and was incidental to the law-making process. The decision to bring the legislation into operation required a political judgment and did not constitute administrative action, as it was closer to the legislative process than the administrative process. (See para 79.)

With regard to the *Mkumatela* decision, supra, relied on also in this regard by Mr *Smuts*, Mr *Quinn* submitted that it was distinguishable, inasmuch as it involved the review of a decision of a functionary performing administrative functions, whereas in the present case the court was concerned with the decision of an elected and deliberative body whose legislative and executive authority flowed from the Local Government: Municipal Systems Act in terms whereof the task of selecting a municipal manager was given to the council, a political body. In these circumstances, he submitted, the above-cited dicta in the *Fedsure* and *Pharmaceutical* cases were applicable and it was not for the court to interfere with the decision.

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In my view, however, the flaw in these submissions is that they fail to distinguish between the task to be performed and the functionary performing such task. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059) where the following was stated in para 141 with reference to s 33 of the Constitution:

> 'In s 33 the adjective administrative not executive is used to qualify action. This suggests that the test for determining whether conduct constitutes administrative action is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute administrative action. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is administrative action is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.'

In any event, first respondent cannot seek, merely by attaching the epithet 'political' to its decision, thereby to evade its obligations in terms of the enabling legislation and its own recruitment policy, to apply transparent and procedurally and substantively fair recruitment and selection procedures whereby candidates are selected objectively and on merit. The decision, in others words, is not thereby insulated from judicial scrutiny.

The case of *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another* 2006 (2) SA 52 (C) ([2006] 3 All SA 478) is instructive in this regard. There an argument was raised to the effect that a decision taken by the second respondent, the Minister of Minerals and Energy Affairs, was a 'political decision' and not an administrative decision; that it did not concern the exercise of public power; and that it was consequently not reviewable. This argument was rejected by Bozalek J who held, at para 25, that the 'fact that a politician may be the channel through which an organ of State is approached for certain relief or action does not, in itself, render a decision to take such action or not a political decision'.

Whilst, therefore, the formulation by first respondent of its recruitment policy may constitute executive action, the implementation thereof clearly constitutes administrative action. Seen against the enabling framework of the legislation, including the Constitution, it is clear, in my view, that the power given to a council to appoint municipal managers is a necessary administrative adjunct of its functioning.

In my view, therefore, the decision to appoint the second respondent was clearly an administrative act which is susceptible to review.

Mr *Quinn*, however, referred further to the provisions of para 8.1 of the recruitment policy which state as follows: J

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A 'Any dispute relating to both the interpretation of the provisions of this policy as well as the Municipality's decision on any specific recruitment matter shall be dealt with in accordance with the dispute resolu- tion mechanism provided for in the applicable Labour Relations Legislation.'

B He submitted that the applicant had failed to make any attempt to resolve the dispute in accordance with the applicable labour relations legislation and that accordingly he had failed in his duty to exhaust his domestic remedies, and the application was for this reason premature.

In my view this submission cannot be sustained. First of all, as I have C found, there is in fact no labour relations legislation applicable to the present matter. Secondly, the remedy set out in para 8.1 is not in fact an internal remedy, but one requiring the aggrieved person to seek redress in another forum. Thirdly, it does not seem to me that applicant's entitlement, as an external candidate not in the employ of first respondent, to approach the court for relief in order to set aside an unlawful D decision, can be curtailed by a policy document of this nature. Fourthly, s 7(2) of PAJA provides that internal remedies 'provided for in any other law' must be exhausted: the recruitment policy is self-evidently not a 'law' as envisaged by PAJA.

E The decision of first respondent's council therefore falls to be set aside on the basis that no vote was taken and that the resolution to appoint second respondent was therefore unlawful and a nullity.

That is, however, not the end the matter. Applicant contends further that the decision to appoint second respondent is in any event fatally flawed F by reason of the intervention and the involvement of the ANC regional secretary and the ANC regional executive committee as appears from the letter (VM23) written by the executive mayor. No attempt has been made in the supplementary affidavits to refute such involvement and it must accordingly be accepted that, as set out in VM23, the matter was discussed in the presence of the regional secretary and the instruction by G the regional executive committee, that second respondent be appointed, was accepted.

Mr *Quinn* submitted that there was nothing untoward, improper or sinister regarding the events at the caucus. The caucus was entitled to be H informed and advised by whomsoever it wished and it was entitled to prefer a particular candidate over another on the basis of political considerations.

Whatever the merits of this submission may be, the fact is that nowhere in first respondent's papers is such a reason for second respondent's I appointment in preference to applicant alluded to. The reasons put forward by Somyo on behalf of first respondent were that second respondent's appointment would 'facilitate a smooth transition since the second respondent was then, and had been, the Deputy Director: Administration of the first respondent, for some seven years. Another factor was that the second respondent was not considered to lack J managerial skills. [His past performance in the employ of the first

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respondent demonstrated this to be so.] (I)n short, [the second respondent] A was a known entity, who in the past had worked well with the executive authority of the first respondent.'

That the appointment of second respondent was in fact based upon an instruction by the ANC regional executive committee only became apparent when VM23 came to light. B

Although, according to Somyo, he wrote that letter in his personal capacity, the probabilities are overwhelmingly to the contrary. It is clear that the letter was addressed to the ANC chairman by Somyo in his official capacity as executive mayor. The letter disclosed a number of disturbing features. First among these is the manner in which the legal C opinions were dealt with at the caucus. In this regard, Somyo states in his supplementary affidavit that he obtained the opinions in his personal capacity. That averment is given the lie by a statement in the letter that 'the Municipality proceeded to obtain legal opinions' but is, in any event, utterly improbable. It is clear from the terms of the letter that Somyo, in D his official capacity, was concerned about the implications of the appointment of second respondent for the first respondent, as indeed he should have been.

According to the letter, there was 'considerable debate' at the caucus concerning the opinions. In these circumstances, the averments by E Mlondleni and Gantolo as to how the opinions were dealt with by the caucus do not bear scrutiny.

According to Mlondleni, copies of the opinions were not available for distribution and circulation. The implications would appear to be that the caucus was not advised as to the content of the opinions. The F deponents to the supplementary affidavits coyly refrain from stating whether or not Somyo divulged to the caucus what the conclusion reached in such opinions was. It is, in my view, utterly improbable that, at the very least, he would not have disclosed such conclusions, namely that, absent any objectively justifiable basis to reject the best candidate, such candidate should be appointed. In this regard, the statement by G Mlondleni that the opinions 'attempted to usurp the powers of council' is devoid of merit and startling in its lack of understanding of the purpose of the opinions.

In my view the probabilities are overwhelming that the caucus was aware of the content of the opinions. H

In the circumstances, the only plausible reason why the opinions were withheld from the council was because they ran counter to the instruction by the regional executive committee that second respondent be appointed. In deciding to withhold the legal opinions from the full council, the caucus acted improperly. The council, in debating the issue I of the appointment of the municipal manager, was entitled to be placed in possession of all the relevant facts and circumstances pertinent thereto.

Be that as it may, one fact emerges clearly from VM23, a fact which is not in any way refuted, and that is that the regional executive committee J

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A of the ANC instructed the caucus to appoint the second respondent and the caucus carried out this instruction. This is not an example of democracy in action as was submitted by Mr *Quinn*, certainly not of constitutional democracy. It, rather than the two legal opinions, amounted to a usurpation of the powers of first respondent's council by B a political body which, on the papers, does not appear even to have had sight of the documents relevant to the selection process, including the findings of the interview panel. In my view, the involvement of the regional executive council of the ANC in the circumstances described in VM23 constituted an unauthorised and unwarranted intervention in the affairs of first respondent's council. It is clear that the councillors of the C ANC supinely abdicated to their political party their responsibility to fill the position of the municipal manager with the best qualified and best suited candidate on the basis of qualifications, suitability, and with due regard to the provisions of the pertinent employment legislation as set out in para 1 of the recruitment policy. This was a responsibility owed to D the electorate as a whole and not just to the sectarian interests of their political masters. In *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) ([2005] 2 All SA 239) Scott JA stated as follows at 199C - E, para 20:

'A functionary in whom a discretionary power is vested must himself E exercise that power in the absence of the right to delegate. In *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C) at 117F - G King J formulated the rule thus:

"It is well established that a discretionary power vested in one official must be exercised by that official (or his lawful delegate) and that, although where appropriate he may consult F others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else; he must not, in the words of Baxter *Administrative Law* (at 443), 'pass the buck' or act under the dictation of another and, if he does, the decision which flows therefrom is unlawful and a nullity.

G As to the reliance on the advice of another, the functionary would at the least have to be aware of the grounds on which that advice was given. (See *Vries v*

Du Plessis NO 1967 (4) SA 469 (SWA) at 481F - G.)'

In the circumstances it is clear that the councillors comprising the ANC caucus failed to exercise the discretion vested in them at all. That abdication of their discretionary powers must result in the decision to appoint second respondent being declared unlawful and being set aside.

Mr *Quinn* submitted that, in the event of a finding that the decision to appoint second respondent was unlawful, this court should not substitute its decision for that of the council of first respondent, but should remit the matter to first respondent's council for reconsideration by it. He submitted that the facts of this case did not render it an 'exceptional case' for the purposes of s 8(1)*(c)*(ii) of PAJA. In my view, however, the unusual and exceptional circumstances of this matter are such as to persuade me that no useful purpose would be served by remitting it to first respondent. The first respondent has demonstrated a lamentable

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abdication of its responsibilities by succumbing to a political directive from an external body, regardless of the merits of the matter. It continues, with an equally lamentable lack of insight into its conduct, to contend that it was proper for it to have done so. This court is in at least as good a position to take the decision as was first respondent's council and in my view, in all the circumstances, it would be appropriate for me to do so. Compare *Hangklip Environmental Action Group v MEC for Agriculture, Environmental Affairs and Development Planning, Western Cape, and Others* 2007 (6) SA 65 (C) at 84G - 85B.

I have set out above all the relevant facts pertaining to the applicant and second respondent. It is clear therefrom that applicant was indeed by far the best candidate. He was consistently rated as such by the selection panel, apart from also outscoring second respondent in the psychometric assessment. The only supposed weakness identified in his case was that 'some' panel members had expressed concerns about his commitment to remain with first respondent, given his 'short lived service' in the past. Applicant has convincingly refuted these alleged concerns. It is clear from the averments in his affidavit, which are not denied, that he only left his employment as municipal manager of first respondent 'upon request of the President to be chairman of the Municipal Demarcation Board in Pretoria'. This alleged weakness can therefore be wholly discounted. Even had he resigned for other reasons, a refusal to employ him because he might at some time in the future elect to terminate his employment prematurely would not be legitimate.

Second respondent, on the other hand, has an evident 'lack of managerial experience', and this 'sent discomforting concerns from the majority of the panel members'. It was further recorded that his abilities and command of local government issues were 'far outweighed' by those of applicant. According to Somyo, second respondent had the ability quickly to grasp the fundamentals of the position 'if properly guided and nurtured'. Applicant, on the other hand, had already been in the employ of first respondent as municipal manager and it is nowhere suggested in first respondent's papers that he had not performed his job satisfactorily. In his case there was no need whatsoever for guidance and nurturing.

In terms of first respondent's recruitment policy, read with the provisions of s 195 of the Constitution and s 67 of the Local Government: Municipal Systems Act, a fair and efficient selection process must be followed in order to ensure that all candidates are selected 'objectively and on merit'. It was correctly pointed out to first respondent in the two legal opinions obtained by it that, absent any objectively justifiable basis to reject the best candidate, the first respondent was obliged to appoint him. Applicant was without doubt the best candidate. There is, quite simply, no objectively justifiable basis on which applicant can be rejected in favour of second respondent. He was and is therefore entitled to be appointed.

I have given consideration to the submission by Mr *Smuts* that a punitive costs order was warranted in the circumstances. In my view, however, such an order would not be appropriate.

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In the circumstances, the application must succeed. Although in the notice of motion an order is sought appointing applicant with effect from 1 July 2008, Mr *Smuts* sought instead an amended order that applicant be appointed with effect from 1 August 2008, with his salary to commence on the date on which he assumes duty. In the circumstances the following order will issue:

1. The decision of the first respondent on 17 June 2008 to appoint the second respondent as the municipal manager of the first respondent is hereby reviewed and set aside.
2. The decision of the first respondent not to appoint applicant as municipal manager of the first respondent is hereby reviewed and set aside.
3. The decision of first respondent is substituted by the following order: Applicant be and is hereby appointed municipal manager of first respondent with effect from 1 August 2008 with his salary to commence on the date on which he assumes his duties with first respondent.
4. First respondent is ordered to pay the costs of this application.

Applicant's Attorneys: *Wheeldon, Rushmere and Cole*, Grahamstown.

First Respondent's Attorneys: *McCallum Attorneys*, Grahamstown.

Item “23”

MY VOTE COUNTS NPC v SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS2016 (1) SA 132 (CC) A

Citation	2016 (1) SA 132 (CC)
Case No	CCT 121/14 [2015] ZACC 31
Court	Constitutional Court
Judge	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ
Heard	February 10, 2015
Judgment	September 30, 2015
Counsel	*D Unterhalter SC* (with *M du Plessis*) for the applicant. *W Trengove SC* (with *V Ngalwana SC* and *F Karachi*) for the first and second respondents.

B

Flynote : Sleutelwoorde

Constitutional law — Human rights — Right of access to information — Details of private funding of political parties — Assertion that Parliament had failed to C fulfil its constitutional obligation to enact legislation giving access to these details — Applicant seeking order that Parliament do so — True nature of applicant's case an attack on validity of PAIA — Failure, contrary to principle of subsidiarity, to attack PAIA's validity — Constitution, 1996, s 32; Promotion of Access to Information Act 2 of 2000.

Headnote : Kopnota

D My Vote Counts (MVC) invoked the exclusive jurisdiction of or alternatively direct access to the Constitutional Court. Its contentions were based on the right of access to information held by another person that was required for the exercise or protection of any right (s 32(1)*(b)* of the Constitution, 1996). Section 32(2) provides that Parliament must enact legislation giving effect to this right. (Paragraph [2] at 138E – 139B.)

E MVC's assertion was that the details of the private funding of political parties registered for elections to all legislative bodies were required for the exercise of the right to vote; that the Constitution consequently obliged Parliament to enact legislation allowing access to this information; and that it had failed to do so. It sought an order that Parliament fulfil its obligation and enact such legislation. (Paragraphs [1], [120] and [126] – [128] at 138D – E, 181E – G and 182F – 183D.)

F **The majority judgment (Khampepe J, Madlanga J, Nkabinde J and Theron AJ)**
The judgment proceeded as follows.

(1) Whether the Constitutional Court had exclusive jurisdiction. *Held*, that it did: whether a court had jurisdiction depended on the claim made in the G pleadings; the claim here was that Parliament had failed to fulfil the obligation imposed by s 32(2); and under s 167(4)*(e)* only the Constitutional Court had the jurisdiction to adjudicate it. (Paragraphs [130], [132] and [135] at 183G – I, 184B – C and 184G.)

(2) Whether Parliament had enacted the Promotion of Access to Information Act 2 of 2000 (PAIA) to give effect to the right of access to information. *Held*, H that it had. This was suggested unequivocally by its text. Moreover, in previous decisions, both the Constitutional Court and the High Court had reached this conclusion. It had also never been suggested that item 23(3) of sch 6 of the Constitution had not been complied with. (That item required enactment of the legislation envisaged in s 32(2) within three years of the I new Constitution taking effect.) (Paragraphs [130], [141] and [147] – [148] at 183G – I, 185H and 187A – 188B.)

The majority also noted the many other statutes that made provision for access to information. It held that they were not the legislation that had been enacted to fulfil the obligation in s 32(2). This because, in each, provision for access to information was merely incidental to the statute's main focus; J in PAIA it was the focus of the statute. (Paragraph [149] at 188B – E.)

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(3) Whether granting the order MVC sought would infringe the separation of A powers. *Held*, that MVC's actual complaint was with the manner Parliament had chosen to legislate (enabling access to funding information only on an individual's request); and that it sought through the Constitutional Court's order to compel Parliament to legislate in the manner it preferred (creating a system of continuous disclosure). Thus to grant what MVC sought would involve entering Parliament's domain, contrary to the separation of powers. (Paragraphs [150] and [154] – [156] at 188E – G and 189E/F – 190D.) B

(4) Whether the principle of subsidiarity applied. (The principle precludes direct reliance on a right where legislation has been enacted to give effect to it.) *Held*, that it did. MVC had framed its case not as a challenge to the validity of PAIA but as involving a failure to fulfil the s 32(2) obligation. It alleged that PAIA and other statutes had been enacted to fulfil the obligation, but that C collectively they failed in their reach to give effect to the right. (Paragraphs [179] and [181] at 198B – D and 198G.)

However, PAIA was *the* legislation enacted to give effect to the right, and MVC's case — more accurately characterised — was that PAIA was insufficient in reach, and invalid to the extent of that insufficiency. Cases were to the D effect that where constitutionally mandated legislation was alleged to be so deficient, subsidiarity compelled a challenge to the validity of the legislation. (Paragraphs [162] – [163] and [171] at 191F/G – 192C and 195F – H.)
Further considerations compelling application of the principle and a challenge to validity were:

(a) Such a challenge — entailing limitation and justification enquiries — was E necessary to determine if there had been non-compliance with the constitutional obligation. For if the alleged deficiency was justifiable there would have been compliance. (Paragraphs [173] – [175] at 195I – 196G.)

(b) Permitting bypass of the validity challenge and direct reliance on the right created the possibility of analogous claims being made.

(Paragraph [180] at 198D – G.) F

(5) Whether MVC had challenged the validity of PAIA. (Given that Parliament had enacted PAIA to give effect to the right, subsidiarity compelled MVC to challenge it, and debarred direct reliance on the right.) *Held*, that MVC had failed to, and had consequently infringed the principle of subsidiarity. (Paragraphs [183] – [184] and [192] – [193] at 199A – C and 201C – E.)

Application accordingly dismissed. (Paragraphs [193] and [195] at 201D and 201F.) G

The minority judgment (Cameron J)

It proceeded as follows.

(1) Whether the court had exclusive jurisdiction over the claim. *Held*, as had the majority, that it did. (Paragraphs [20], [25] and [30] at 145C – D, 146D/E – 147B and 149A/B – C.) H

(2) Whether information on the private funding of political parties was reasonably required for the exercise of the right to vote. *Held*, that it was (paras [31] and [43] at 149C/D – E and 153H – 154A). This was on the basis that:

(a) the Constitution had chosen political parties as the means to facilitate democracy, and private funding influenced their actions, and thus the I facilitation of democracy (paras [34] and [37] at 150B/C – 151B and 151G – 152A);

(b) the right was to cast an informed vote — informed inter alia of the likely actions of a party — and details of a party's funders and their contributions were an aid to predicting such actions (the assumption being that a party would seek to advance the interests of its funders) (paras [38] and [41] – [43] at 152A/B – C and 153A/B – G); J

A *(c)* such details would allow the identification of post-election favours (paras [42] – [43] at 153C – 154A).

(3) Whether the principle of subsidiarity applied. *Held*, that it did not apply. This because the extent of Parliament's fulfilment of its s 32(2) obligation was in issue, not the validity of any legislation — including PAIA — passed in an effort to fulfil the obligation. (Paragraphs [44] – [45], [65] – [68] and [74] at 154B – E, B 163A – I and 166C – E.)

(4) Whether MVC's application was a challenge under s 172(2)*(a)* to the constitutional validity of PAIA. *Held*, that it was not, and that MVC had no complaint with PAIA. Its case — that Parliament had failed to adequately fulfil the obligation in s 32(2) — was brought under s 167(4) *(e)*. (Paragraphs [75] – [76], [80] and [83] – [84] at 166E – 167B, 167G – H and 168D – H.)

C (5) Whether PAIA gave access to the details of a political party's private funding. *Held*, that it did not. This, as PAIA did not provide for the systematic and regular release of such information (it allowed one party to request another party to give it access to a specific record); it was restricted to recorded information; it did not provide for its preservation; and it was narrower in scope than s 32 in the bodies to whose information it allowed access. Indeed D political parties appeared to fall outside the categories of entities whose information it allowed access to. (Paragraphs [94] – [97], [99], [102], [106] – [108] and [116] at 171B/C – 172B, 172D/E – 173B, 173E – G, 175B – 176E and 180A – C.)

Cameron J concluded that Parliament had failed to fulfil its obligation to enact legislation giving access to information on the private funding of political E parties, to the extent that the information was required to exercise the right to vote. He would have made a declaration to this effect. (Paragraphs [118] and [120] at 180D – 119B and 120E – G.)

Cases Considered

Annotations

F Case law

Southern Africa

Administrator, Transvaal, and Others v Zenzile and Others 1991 (1) SA 21 (A) ((1991) 12 *ILJ* 259; [1990] ZASCA 108): referred to
Agri SA v Minister for Minerals and Energy 2013 (4) SA 1 (CC) (2013 (7) BCLR 727; [2013] ZACC 9): dictum in para [85] applied
G *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) (2003 (12) BCLR 1301; [2003] ZACC 18): referred to
Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (4) SA 179 (CC) (2014 (6) BCLR 641; [2014] ZACC 12): referred to
Barkhuizen v Napier 2007 (5) SA 323 (CC) (2007 (7) BCLR 691; [2007] ZACC 5): referred to
Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15): H referred to
Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) (1996 (4) BCLR 449; [1996] ZACC 2): referred to
I *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) (2009 (10) BCLR 1014; [2009] ZACC 14): applied
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International Court of Justice

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United States

Buckley v Valeo 424 US 1 (1976): referred to. I

Statutes Considered

Statutes

The Constitution of the Republic of South Africa, 1996, s 32: see *Juta's Statutes of South Africa 2014/15* vol 5 at 1-29

The Promotion of Access to Information Act 2 of 2000: see *Juta's Statutes of South Africa 2014/15* vol 5 at 1-224. J

Case Information

A *D Unterhalter SC* (with *M du Plessis*) for the applicant.

W Trengove SC (with *V Ngalwana SC* and *F Karachi*) for the first and second respondents.

An application to compel Parliament to comply with the obligation in s 32(2) of the Constitution, 1996. The minority judgment (Cameron J) B is at [1] – [120]; and the majority judgment (Khampepe J, Madlanga J, Nkabinde J and Theron AJ) is at [121] – [194].

Order

The application is dismissed.

Judgment

C **Cameron J (Moseneke DCJ, Froneman J and Jappie AJ concurring):**
Introduction

[1] At issue is whether Parliament has failed to fulfil an obligation the D Constitution imposes on it. The specific question is whether information on private funding of political parties is information that is required to exercise the right to vote. If it is, the further question is whether Parliament has passed legislation that gives effect to the right of access to this information. If not, Parliament is in breach of its constitutional obligation, and the applicant asks this court to require Parliament to E remedy the breach.

[2] The applicant, represented by its director, Mr Axolile Notywala, is My Vote Counts NPC (My Vote Counts). It is a non-profit company campaigning for a more inclusive, transparent and accountable political system in South Africa. It invokes the court's exclusive jurisdiction under F s 167(4)*(e)* of the Constitution [1] — or, in the alternative, direct access to this court [2] — to compel Parliament to pass legislation that obliges political parties to disclose the sources of their private funding. The core of its

Cameron J (Moseneke DCJ, Froneman J and Jappie AJ concurring)

case is that information about political parties' private funding is A essential to an informed exercise of the right to vote that s 19(3) of the Bill of Rights confers on all citizens. [3] It relies on s 32, 'Access to information', to give proper effect to s 19(3). [4]

[3] The first and second respondents, the Speaker of the B National Assembly and the Chairperson of the National Council of Provinces, representing Parliament, make common cause in opposing the application. They recognise the obligation s 32(2) imposes, but say Parliament has fulfilled it by enacting the Promotion of Access to Information Act (PAIA). [5] They argue that the application should be dismissed. C

[4] The third, fourth, fifth and sixth respondents are the President, Deputy President and the Ministers of Justice and Correctional Services and of Home Affairs. The remaining 12 respondents are all the political parties currently represented in Parliament. Though the Minister of Justice and Correctional Services (fifth respondent) and the Democratic Alliance (eighth respondent) initially filed notices to oppose the application, D both were withdrawn. Hence the two Houses of Parliament are the sole respondents participating in the proceedings; I refer to them collectively as 'Parliament'.

[5] I have had the benefit of reading the judgment by Khampepe J, Madlanga J, Nkabinde J and Theron AJ (majority judgment). We agree E that only this court has jurisdiction to determine the matter. But beyond that we part. The differences between us concern whether form should prevail over substance when a litigant enforces a constitutional right.

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A More importantly, they concern the extent to which this court is duty-bound to exercise an adjudicative power the Constitution explicitly confers on it.

[6] The fundamental difference between the two judgments lies in the distinction between the constitutional process for finding a statute B constitutionally invalid and for holding that Parliament has failed to meet a constitutional obligation. [6] This court has exclusive jurisdiction under s 167(4)*(e)* of the Constitution to determine whether Parliament has 'failed to fulfil a constitutional obligation'. Section 2 of the Constitution requires that all constitutional obligations 'must be fulfilled'. It C would be wrong, and would impoverish our existing case law, to step back from exercising a power the Constitution imposes on this court.

[7] It is correct to emphasise that ordinary challenges to statutory provisions must go through the 'usual procedural hoops'. [7] But it does not follow that this court is precluded from exercising the jurisdiction D s 167(4)*(e)* specifically confers on it. This requires the court to evaluate the extent to which an obligation has been fulfilled. A proper appreciation of this court's task entails a broader embrace of the range of remedies and procedural routes the Constitution affords litigants, and requires this court to adjudicate.

E **Previous efforts to secure transparency on private party political funding**

[8] Political parties receive money from public and private sources. The law deals differently with the two types. No legislation requires systematic and proactive disclosure of private funding of political parties. F Consequently, political parties are under no express legal obligation to disclose the sources of their private funding, at elections or other times. The applicant seeks a change to that.

[9] Public funding, by contrast, has already been dealt with in legislation. Section 236 of the Constitution provides that to 'enhance G multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures'. [8] Parliament passed this legislation in 1997 when it enacted the Public Funding of Represented Political Parties Act. [9]

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[10] In doing so, Parliament had also considered the issue of private A funding. The Speaker, Ms Baleka Mbete, details this history in her answering affidavit on behalf of Parliament. She describes the question whether political parties' private funding should be made accessible and, if so, how and to whom, as 'a complex policy matter which has been discussed in Parliament since 1997'. She relates that in August 1997 the Promotion of Multi-Party Democracy Bill was introduced. [10] On 31 October 1997 the B Portfolio Committee on Constitutional Affairs reported that the passing of the Bill 'represents a very significant step in the ongoing process of consolidating and entrenching a multi-party democracy in South Africa'. The key to the success of our new emerging democracy, it reported, 'is the role of strong, resilient, democratically C elected political parties'. [11]

[11] The Bill was to be seen, the Report recorded, 'as the first stage of the process'. There are, it stated, 'other issues relating to the funding of political parties that will have to be addressed in the near future'. The D main one was 'the need for public disclosure of the private funding received by political parties, and the form and scope of this disclosure'. On 27 November 1997 Parliament adopted the Bill. It came into force on 1 April 1998. The Speaker emphasised that the Act was not intended to 'deal with all questions that may arise in regard to the funding of political parties'. Hence it remained for Parliament 'as a follow up' to E consider 'whether or not there is a need to regulate other aspects of

political party funding' — including the disclosure of parties' private funding.

[12] The issue of private funding arose again later — in litigation rather F than parliamentary discussions. In 2003 the Institute for Democracy in South Africa (Institute) requested the five political parties with the largest representation in Parliament to disclose records of donations they had received in the run-up to the 2004 general elections. Save for the African Christian Democratic Party, all refused. The Institute then applied to the then Cape Provincial Division of the High Court (High G Court) for an order declaring that PAIA and s 32(1) of the Constitution obliged political parties to disclose the requested records. [12] The Institute contended that it enjoyed an unqualified right to access the records of their donations on the basis that they were public bodies under s 11 of PAIA. [13] Alternatively, if they were private bodies, the Institute sought the H

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A information under s 50 of PAIA [14] read with ss 19(1) and 19(2) of the Constitution. [15]

[13] All the political parties cited in *Idasa* initially resisted. [16] While none accepted that they could be characterised as 'public bodies' under PAIA, [17] B they supported public debate on the question and took the view that the regulation of private funding of political parties would be best achieved through legislation, rather than piecemeal litigation. [18] The governing party, the African National Congress (ANC), through its deponent, then Secretary-General Kgalema Motlanthe, sought the dismissal of the application or a stay of the proceedings. He said this would 'allow the C political and legislative process to follow the proper course necessary for the adoption of a national policy through legislation regulating the funding of political parties'. [19]

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[14] On 20 April 2005 the High Court dismissed the application. A Griesel J held that, under PAIA, political parties are private bodies for purposes of their 'fundraising activities'. [20] Hence the Institute had to link the donation records it sought to the exercise or protection of a right, in particular to s 19(1) and (2) of the Constitution. [21] The Institute had not adequately explained how and why the donations records would B assist them in exercising those rights. [22] There was no appeal.

[15] Before the *Idasa* litigation, the United Nations (UN) General Assembly adopted the UN Convention against Corruption on 31 October 2003. [23] Article 7(3) requires each state party to consider taking C appropriate legislative and administrative measures 'to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties'. [24] The African Union Convention on Preventing and Combating Corruption is more specific. [25] It was adopted at a session of the African Union in D Maputo, Mozambique, on 11 July 2003. Unlike the UN Convention, it contains a provision separately and expressly addressing the funding of political parties. [26] And, while the UN Convention requires state parties to 'consider' certain measures, the AU Convention uses imperative language. [27] Parliament ratified the UN Convention, without material reservation, on 22 November 2004. [28] Parliament ratified the E

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A AU Convention, again without material reservation, on 11 November 2005, after the High Court dismissed the Institute's application. [29]

[16] The proposal for the regulation of private funding to political parties lay dormant until 8 November 2012 when the applicant wrote to Parliament. It claimed that —

> B 'appropriate legislation ensuring transparency and accountability in the funding of political parties is a constitutional imperative, as required by ss 1, 7, 32, 33 and 195 of the Constitution . . . [and] that each of these provisions imposes a specific obligation on Parliament to enact national legislation to give effect to these duties, rights and principles'.

C [17] Parliament took the stance that those provisions of the Constitution do not create justiciable rights, but are general obligations. On 10 December 2012 Parliament responded to the letter of 8 November 2012. It stated that it had given effect to its obligation in s 236 of the Constitution by enacting the Public Funding of Represented Political Parties Act, D and that the matter of private funding had been referred to the Chief Whips' Forum in Parliament. After a six-month silence the applicant's attorneys wrote to Parliament requesting a timetable for the parliamentary process for passing the legislation, which the letter called 'a constitutional imperative'. In the alternative the applicant asked for reasons justifying Parliament's decision not to enact the legislation.

E [18] Now the Speaker took the view that the enactment of legislation regulating the private funding of political parties was 'a party political matter' and that the Speaker and the Chairperson of the National Council of Provinces do not 'play a role in the initiation of such legislation'. The Speaker suggested that the applicant take the matter up F with the Executive or any member of Parliament. The Speaker also records that the proposed disclosure legislation was deemed 'not feasible' and was 'not to be proceeded with'. She declined to make any undertakings to enact the legislation.

G Unique nature of this application

[19] This application differs from that dismissed in *Idasa*. Far from requesting political parties to grant access to private funding records under PAIA, the applicant says the problem is precisely that PAIA does not require disclosure of party political funding. Since the relief the applicant seeks is not contemplated at all in PAIA, this court is called upon to H interpret the ambit of the s 32(1) right and the extent to which

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Parliament has fulfilled its obligation under s 32(2). [30] As in *Idasa*, the A applicant claims that the information is required for the exercise and protection of the rights in s 19 of the Bill of Rights. [31] But it relies more specifically on the right to vote in s 19(3). It does not seek ad hoc information from any or each political party. Rather, it seeks an order requiring Parliament to enact national legislation regulating the disclosure B of private funding records as a matter of continuous course, rather than once-off upon request.

Exclusive jurisdiction

[20] The first question is jurisdiction. The applicant seeks to bring C directly before this court its assertion that Parliament has failed to fulfil a constitutional obligation by not passing legislation the Constitution obliges it to enact in terms of s 32(2). Does this court have competence under s 167(4)*(e)* of the Constitution to consider the claim? On 30 September 2014 the Chief Justice issued directions inviting written argument on this. In response both the applicant and Parliament D submitted that the court has exclusive jurisdiction to determine the claim.

[21] The applicant's approach reiterated the core components of its case. It submitted that s 32(2) of the Constitution imposes an obligation E on Parliament to enact legislation that provides for access to information pertaining to the private funding held by political parties that is required for the right to vote. Parliament has not enacted this legislation. It has failed to fulfil a constitutional obligation. Since the validity of existing legislation is not challenged, lower courts do not have jurisdiction. [32] This court's exclusive jurisdiction under s 167(4)*(e)* is engaged. F

[22] Parliament's response reached the same conclusion by a sparser route. It pointed out that jurisdiction is not determined by the merits of a claim, by whether it must succeed or not, but by how the claimant G pleads it. The pleadings contain the legal basis of the claim under which the applicant seeks to invoke the court's competence. As the applicant's claim is based solely on the averment that Parliament has failed to fulfil a constitutional obligation, the application falls within this court's exclusive jurisdiction. I

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A [23] The parties are right (and the majority judgment agrees). [33] This court's exclusive jurisdiction is engaged. But, exclusive jurisdiction is too important to be resolved by concession, as here, by consensus. [34] The court's competence, which springs from the sensitive political nature of the separation of powers, must be scrutinised. [35] Previous decisions B establish that, despite their broad wording, the exclusive jurisdiction provisions must be narrowly construed. [36] This is because a broad construction of exclusive jurisdiction under s 167(4)*(e)* may 'negate or improperly attenuate the jurisdiction of the Supreme Court of Appeal and the High Court'. [37]

C [24] An overbroad interpretation of exclusive jurisdiction would obviate the need for s 172. So for harmonious interpretation we ought to make 'a clear distinction between law and conduct on the one hand and obligations on the other'. [38] More pertinently, we have held that the jurisdictional competence conferred by the words 'fulfil a constitutional obligation' [39] must be narrowly read, [40] both in relation to the President [41] D and to Parliament. [42]

[25] In *Women's Legal Centre Trust* the applicant asserted that the President and Parliament had failed to fulfil an obligation the Constitution imposed on them by failing to prepare, initiate, enact and implement E a statute providing for the recognition of all Muslim marriages. [43] The court held that, if there were a constitutional duty to enact the legislation the applicant sought, it was one the Bill of Rights required the state and its organs — including the national executive, ch 9 institutions, Parliament and the President — to perform collaboratively or jointly. [44] F The obligation did not fall within the ambit of s 167(4)*(e)*. The

provision envisages only constitutional obligations imposed specifically A and exclusively on the President and on Parliament, and on them alone. It does not embrace the President when he or she acts as part of the national executive, nor Parliament when it is required not to act alone, but as part of other constituent elements of the state. [45]

[26] The pleaded claim here rests on the specific obligation created by B s 32(2) only. This requires that 'national legislation must be enacted' to give effect to the right of access to information. This wording contrasts with the language the Bill of Rights uses elsewhere to impose duties. There 'the state' is required to fulfil a range of constitutional obligations, either by passing legislation or by other means. [46] More tellingly, the C Bill of Rights requires 'the state' to take *reasonable legislative and other measures* to fulfil a range of social and economic rights. These include the duty to foster conditions enabling access to land, [47] as well as to achieve the progressive realisation of the rights to adequate housing, [48] to health-care services, [49] sufficient food and water [50] and social security. [51] In D addition the Bill of Rights requires the state to take 'reasonable measures' to make further education progressively available and accessible. [52]

[27] These formulations contrast with four other provisions of the Bill of Rights. Section 9(4), [53] s 32(2) [54] and s 33(3) [55] specify that 'national E

A legislation must be enacted' in relation to a particular right. This formulation is akin to that of the fourth, s 25(9), which provides that 'Parliament must enact the legislation referred to in ss (6)'. [56] The formulation of these provisions contrasts with that of those requiring 'the state' to take certain actions, or to realise rights through legislative and B other measures.

[28] These four provisions are distinct, in two ways, from those rights requiring progressive realisation through a range of unspecified measures that include legislation. First, they all require the enactment of legislation as an express minimum, although of course the Constitution does not C preclude other measures that enhance access to and enjoyment of these rights. Second, the Bill of Rights specifically identifies the legislation to be enacted. While s 32(2) and s 33(3) are cast in passive grammatical form — unlike s 25(9), they do not specify the agent that must enact the legislation — this carries little moment because the obligation is to enact D 'national legislation'. [57] The enacting agent is necessarily Parliament, which the Constitution makes the sole repository of national legislative power. [58] The grammatical form does not detract from the responsibility placed solely on Parliament to fulfil the obligation.

[29] In fulfilling the obligations ss 9(4), 25(9), 32(2) and 33(3) create, E Parliament will of necessity enlist the participation and assistance of other state organs and institutions that are obliged to fulfil the rights in the Bill of Rights. [59] But that does not diminish the sole responsibility the Bill of Rights places on it. It follows that the applicant's claim under

s 32(2) implicates an obligation on Parliament alone, and engages the A exclusive jurisdiction of this court.

[30] It is apparent from the provision that 'national legislation must be enacted' that s 32(2) creates an obligation. Identifying Parliament as the sole bearer of the constitutional obligation means this court has exclusive B jurisdiction. But the question of the interrelation between s 167(4) *(e)*, which grants jurisdiction to this court alone, and s 172(1)*(a)*, which empowers the Supreme Court of Appeal and the High Court, subject to this court's confirmation, to make orders 'concerning the validity of an Act of Parliament', remains.

Is information on political parties' private funding 'required' for C the exercise and protection of the right to vote?

[31] The foundation of the applicant's case is that the right to vote requires, for its exercise, access to information about political parties' private sources of funding. [60] Is this so? 'Required' in the context of D s 32(1)*(b)* does not denote absolute necessity. It means 'reasonably required'. [61] The person seeking access to the information must establish a substantial advantage or element of need. [62] The standard is accommodating, flexible and in its application fact-bound. [63] The s 19(3) right to vote is among the rights contemplated by s 32(1)*(b)*. So the question is whether information about political parties' private funding is reasonably E required for citizens to be able to exercise their right to vote.

[32] The founding premise of the applicant's argument is the unique role of political parties in our constitutional democracy. This is difficult to dispute. The electoral system the Constitution creates pivots on political parties and whom they admit as members. In the *First Certification* F judgment this court noted that, '(u)nder a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate'. [64]

[33] Our constitutional order places the key to elective office and G executive power in the hands of political parties. Members of the National Assembly and provincial legislatures are not directly elected. Nor is the President or the Deputy President. The same applies to provincial and national executives. Under the current electoral system it is political parties, and parties alone, that determine which persons are H

A allocated to legislative bodies and to the executive. If you cease to be a member of the party that nominated you, you lose your membership of that legislature. [65] The President is in turn elected from amongst the members of the National Assembly [66] and the President appoints the Deputy President and the members of the Cabinet, bar a maximum of B two, from among the members of the legislature. [67]

[34] These compelling considerations led this court in *Ramakatsa* [68] to highlight the centrality of political parties. The judgment's key findings are that they are 'the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy', [69] and that they are the C 'indispensible conduits for the enjoyment of the right given by s 19(3)*(a)* to

vote in elections'. [70] The joint majority judgment of Moseneke DCJ and A Jafta J noted:

> 'In the main, elections are contested by political parties. It is these parties which determine lists of candidates who get elected to legislative bodies. Even the number of seats in the National Assembly and provincial legislatures are determined (b)y taking into account available B scientifically based data and representations by interested parties.' [71] [Footnotes omitted.]

[35] The court explained:

> 'Our democracy is founded on a multi-party system of government. C Unlike the past electoral system that was based on geographic voting constituencies, the present electoral system for electing members of the national assembly and of the provincial legislatures must result, in general, in proportional representation. This means a person who intends to vote in national or provincial elections must vote for a political party registered for the purpose of contesting the elections and D not for a candidate. It is the registered party that nominates candidates for the election on regional and national party lists. The Constitution itself obliges every citizen to exercise the franchise through a political party.' [72] [Footnotes omitted.]

[36] Crucially, *Ramakatsa*'s reasoning elucidates the link between the E democratic role of political parties and their funding. Participation in parties' activities, the judgment explains, is critical to social progress, through the policies they adopt and put forward to address problems facing communities. [73] And it is to enhance multi-party democracy that the Constitution enjoins Parliament to enact national legislation providing for funding of political parties represented in national and provincial legislatures: F

> 'Public resources are directed at political parties for the very reason that they are the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy.' [74]

[37] *Ramakatsa*'s reasoning on the public funding of political parties G applies pointedly to the question whether information about parties' private funding is required for the right to vote. Political parties receive public resources because they are the vehicles for facilitating and entrenching democracy. This entails a corollary: that the private funds they receive necessarily also have a distinctly public purpose, the H enhancement and entrenchment of democracy, as well as a public effect on whether democracy is indeed enhanced and entrenched. The flow of funds to political parties, public or private, is inextricably tied to their pivotal role in our country's democratic functioning. There is a further

A corollary: given parties' emphatically public role, any notion of privacy attaching to their private funding must be significantly attenuated. [75]

[38] The applicant submitted that the right to vote is a right to cast an informed vote. This must be correct. The reason was stated by Ngcobo CJ, B on behalf of a unanimous court, in *M & G Media Ltd*:

> 'In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.' [76] [Footnote omitted.]

C [39] Section 19(1) of the Constitution envisages that every citizen is 'free to make political choices'. This includes forming a political party, participating in a political party's activities, and campaigning for a political party or cause. It also includes, of course, the freedom to choose one's leaders. But that choice, like all others, is valuable only if one D knows what one is choosing. It loses its value if it is based on insufficient information or misinformation. This the Constitution recognises by insisting that government is not only democratic but openly accessible. That is why its preamble speaks of a 'democratic and open' society; why its fundamental rights are to be interpreted to promote the values underlying an 'open and democratic' society, [77] and limited only on that E same basis; [78] and why the founding values of universal suffrage and democratic elections are tied to 'openness' of government. [79]

[40] The Bill of Rights also confers the right to freedom of expression. [80] This court has held that this right is what 'makes [the right to vote] F meaningful': [81] only if information is freely imparted, and citizens are kept informed, are their choices genuine. [82] As Mogoeng CJ has also noted on behalf of the court, 'the public can only properly hold their elected representatives accountable if they are sufficiently informed of

the relative merits' of the issues at stake. [83] The same is necessarily true A when the public decides which representatives to elect by exercising the right to vote.

[41] So the right to vote does not exist in a vacuum. [84] Nor does it consist merely of the entitlement to make a cross upon a ballot paper. It is B neither meagre nor formalistic. It is a rich right — one to vote knowingly for a party and its principles and programmes. It is a right to vote for a political party, knowing how it will contribute to our constitutional democracy and the attainment of our constitutional goals.

[42] Does this include knowing the private sources of political parties' C funding? It surely does. Private contributions to a political party are not made thoughtlessly, or without motive. They are made in the anticipation that the party will advance a particular social interest, policy or viewpoint. And political parties, in turn, depend on contributors for the very resources that allow them to conduct their democratic activities. Those resources keep flowing to the extent that they meet their D contributors' and funders' expectations. There can be little doubt, then, that the identity of those contributors, and what they contribute, provides important information about the parties' likely behaviour. As the United States Supreme Court explained in *Buckley v Valeo*, disclosure of political funding — E

> 'provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows the voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the F voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the G election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favours that may be given in return.' [85] [Footnotes omitted.]

[43] For the reasons *Ramakatsa* sets out, the first two considerations noted in *Buckley v Valeo* have particular edge in our democracy. This is H because political parties hold the key to elective and executive office. They are the indispensable conduits through which the Constitution's

A vision of our democratic functioning is to be attained. It follows that information about political parties' private funding is required for the exercise of the right to vote.

Constitutional subsidiarity

B [44] The applicant claims that PAIA does not confer the right of access to information about political parties' private funding to which the Constitution entitles voters. Since the Constitution obliges Parliament to create that right of access, the applicant argues, this court has the power to, and should, order Parliament to do so. Parliament's response is that C this approach is wrong-directional. The correct starting point is not the Constitution, but PAIA, since Parliament enacted it expressly to give effect to the constitutional obligation in s 32(2). The result, Parliament contends, is that the applicant must first seek the right of access it asserts in PAIA.

D [45] Parliament argues that PAIA in fact confers that right — in which case, there is no breach of its constitutional obligation. But, if PAIA doesn't, Parliament says the applicant's remedy is to challenge the constitutionality of PAIA in the High Court. It may not circumvent PAIA by relying directly on the constitutional provision the legislation seeks to embody. So the applicant must start again in the High Court. Parliament E says the applicant finds itself in a logical trap: whether it is right or wrong about PAIA, the application must be dismissed.

[46] Parliament's argument brings to the fore the principle of subsidiarity in our constitutional law. Subsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that F the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail. [86] The word has been given a range of meanings in our

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constitutional law. It is useful in considering the scope of subsidiarity, A and Parliament's reliance on it — to have them all in mind.

[47] 'Subsidiarity' has been used, in assessing the constitutional validity of a statutory provision licensing the use of reasonably necessary force in effecting an arrest, to indicate the necessity for tempering the amount of B force. Force is permitted only where there are no lesser means of achieving the arrest. Using force is, in other words, subsidiary to all other means. [87]

[48] In international law, subsidiarity is employed to resolve a clash of C jurisdictions. It determines which state should act when multiple states have jurisdiction over the same events constituting an international crime. [88] Under our Constitution it signifies that the duty of the South African Police Service to investigate international crimes, including crimes against humanity, is subsidiary to that of the foreign state in which the crimes were committed. [89] D

[49] 'Subsidiarity' has also been used to describe the principle that overlap in functional areas of concurrent constitutional competence should be resolved by assigning the power to the sphere of government E

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A where the specific function is most appropriate. [90] Within the Bill of Rights, subsidiarity entails that where the Constitution contains both a specific right, like the right of access to housing, and a more general right, like the right to human dignity, which informs the right to housing, the litigant must first invoke the specific right. [91] The more general right B is subsidiary.

[50] But the most frequent invocation of subsidiarity has been to describe the principle that limits the way in which litigants may invoke the Constitution to secure enforcement of a right. Under the interim Constitution, where the Appellate Division had no constitutional jurisdiction, [92] C and this court had constitutional jurisdiction only, [93] this court laid down as a general principle that, where it was possible to decide a case, civil or criminal, without reaching a constitutional issue, that should be done. [94] This entailed the subsidiarity of the interim Constitution to other judicial approaches to rights enforcement. [95]

D [51] Of course, this approach has long since been abandoned under the final Constitution in favour of its opposite, namely the primacy of constitutional approaches to rights determination. [96] Far from avoiding constitutional issues whenever possible, the court has emphasised that virtually all issues — including the interpretation and application of E legislation [97] and the development and application of the common

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law [98] — are, ultimately, constitutional. This is because the Constitution's rights and values give shape and colour to all law. [99]

[52] But it does not follow that resort to constitutional rights and values may be freewheeling or haphazard. The Constitution is primary, but its influence is mostly indirect. It is perceived through its effects on the legislation and the common law — to which one must look first.

[53] These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. [100] This is the form of constitutional

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A subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.

B [54] Over the past 10 years this court has often affirmed this. It has done so in a range of cases. First, in cases involving social and economic rights, which the Bill of Rights obliges the state to take reasonable legislative and other measures, within its available resources, to progressively realise, the court has emphasised the need for litigants to premise their C claims on, or challenge, legislation Parliament has enacted. In *Mazibuko*[101] the right to have access to sufficient water guaranteed by s 27(1)*(b)* was in issue. [102] The applicant sought a declaration that a local

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authority's water policy was unreasonable. But it did so without challenging A a regulation, issued in terms of the Water Services Act, [103] that specified a minimum standard for basic water supply services. This, the court said, raised 'the difficult question of the principle of constitutional subsidiarity'. [104] O'Regan J, on behalf of the court, pointed out that the court had repeatedly held 'that where legislation has been enacted to give B effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution'. [105] The litigant could not invoke the constitutional entitlement to access to water [106] without attacking the regulation and, if necessary, the statute. [107] C

[55] Second, the court has applied the principle to legislation Parliament adopts with the clear design of codifying a right afforded by the Bill of Rights. After Parliament enacted the Labour Relations Act (LRA), [108] the High Court in *Naptosa* refused to allow a litigant to rely directly on the D fair labour practices provision in the Bill of Rights. [109] It had to rely instead on the unfair labour practice provisions in the statute, or challenge the statute itself. Conradie J said he could not 'conceive that it is permissible for an applicant, save by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes'. [110] He also stated that it was inappropriate, in a highly regulated statutory environment like labour law, to ask a court to fashion a remedy 'which E the legislature has not seen fit to provide'. [111]

[56] This approach was first quoted with approval in this court in a context unrelated to employment rights, [112] then adopted and endorsed unanimously in a case about labour relations, *Sandu*. [113] Even though F national regulations had been enacted providing for collective bargaining, the applicant sought to rely directly on the provisions of s 23(5) of

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A the Bill of Rights to found a more encompassing duty to bargain. [114] The court disallowed this. It held that where legislation has been enacted to give effect to a constitutional right, 'a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard'. [115] If the legislation is wanting in its protection of the right, then that legislation B 'should be challenged constitutionally'. [116]

[57] Third, the court has applied the principle of subsidiarity to those provisions of the Bill of Rights that specifically oblige Parliament to enact legislation: ss 9(4), 25(9), 33(3) and 32(2) — the lattermost section at C issue in this case. The court has held that unfair discrimination cases

must be brought 'within the four corners' of the Promotion of Equality and Prevention of Unfair Discrimination Act, [117] rather than under the Bill of Rights. In *Pillay* Langa CJ, on behalf of the majority, citing *New Clicks*, [118] *Sandu* [119] and *Naptosa*, [120] held that 'a litigant cannot circumvent legislation enacted to give effect to a constitutional right by D attempting to rely directly on the constitutional right'. [121]

[58] In *Bato Star* [122] the application of the Promotion of Administrative Justice Act [123] was at issue. Neither the High Court nor the Supreme court of Appeal considered the applicant's claim to administrative review in the context of PAJA. This court held that they had erred. [124] The court E held that '(t)he provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA'. [125] The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the F Constitution. [126]

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[59] In *New Clicks* the applicability of PAJA was also at issue, though the A court was divided on whether it applied to the regulations in issue. [127] Chaskalson CJ affirmed that a litigant 'cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common law'. [128] Ngcobo J, expressly endorsing the High Court's approach in *Naptosa*, said that our Constitution — B

> 'contemplates a single system of law which is shaped by the Constitution. To rely directly on s 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to s 33 is applicable, is in my view inappropriate.' [129]

He proceeded: C

> 'Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides.' [130] D

[60] In *PFE International* the 'heart of the matter' was 'the determination of the legislative regime regulating the exercise of the right of access to information held by the state after the commencement of legal proceedings'. [131] Jafta J, on behalf of a unanimous court, said — E

> 'PAIA is the national legislation contemplated in s 32(2) of the Constitution. In accordance with the obligation imposed by this provision, PAIA was enacted to give effect to the right of access to information, regardless of whether that information is in the hands of a public body or a private person. Ordinarily, and according to the principle of F constitutional subsidiarity, claims for enforcing the right of access to information must be based on PAIA.' [132]

[61] These instances explain the powerful, interrelated reasons from which the notion of subsidiarity springs. The principle is concerned in the first place with the programmatic scheme and significance of the G Constitution. In *New Clicks* Chaskalson CJ said that allowing a litigant to rely on s 33(1) of the Constitution, rather than on PAJA, 'would defeat the

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A purpose of the Constitution in requiring the rights contained in s 33 to be given effect by means of national legislation'. [133]

[62] A second concern is Parliament's indispensable role in fulfilling constitutional rights. Ngcobo J in *New Clicks* pointed out that '(l)egislation B enacted by Parliament to give effect to a constitutional right ought not to be ignored'. [134] The Constitution's delegation of tasks to the legislature must be respected, and comity between the arms of government requires respect for a cooperative partnership between the various institutions and arms tasked with fulfilling constitutional rights. As this court has said, 'the courts and the legislature act in partnership to give C life to constitutional rights'. [135] The respective duties of the various partners and their associates must be valued and respected if the partnership is to thrive. In *Sandu* the court pointed out that not to apply the principle 'would be to fail to recognise the important task conferred on the legislature by the Constitution to respect, protect, promote and D fulfil the rights in the Bill of Rights'. [136]

[63] A third interest the principle protects is the development of a consistent and integrated rights jurisprudence. Our courts have held that allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of 'two E parallel systems' of law. [137] In other words, coherence in developing and applying rights within a unitary system of norms is a further reason for requiring litigants to rely on, or challenge, legislation that gives effect to a provision in the Bill of Rights.

F [64] This approach prevailed in *Idasa*. There the applicant sought to rely directly on s 32 of the Constitution, but failed to challenge PAIA. The High Court held that it could not proceed in that way. It found that s 32 was 'subsumed' by PAIA, which regulates the right of access to information. Hence, in the absence of a challenge to the constitutional validity of PAIA, the provision in the Constitution could not serve as an G independent legal basis or cause of action to enforce rights of access to information. [138] The applicants accordingly had to seek their remedy

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'within the four corners' of the statute, for to hold otherwise would A encourage the development of two systems of law. [139]

[65] Parliament contends that the approach in *Idasa* is correct. The applicant cannot invoke s 32 for its claim. It must challenge the constitutionality of PAIA first. Otherwise, Parliament says, the application B thwarts the principle of subsidiarity. The application seeks direct resort to the Constitution, even in the face of legislation that is designed to give effect to a fundamental right which the application ignores or subverts.

[66] The test the court must apply, Parliament says, is to ask whether PAIA was designed or purports to give effect to the right of access to information in s 32(1). The question is not whether PAIA in fact gives C proper effect to that provision. It is precisely when legislation purports to give effect to a right, but fails to do so properly, that subsidiarity requires a constitutional challenge to the deficient legislation. Parliament did not enact PAIA in mere partial fulfilment of the obligation in s 32(2). The statute purports to fulfil the obligation completely. It 'covers the field'. Here Parliament acknowledges, of course, that the applicant's complaint D is precisely that PAIA does not provide the remedy it claims should exist. But, Parliament contends, because PAIA purports to cover the field, subsidiarity prescribes that the applicant must go to the High Court first to challenge PAIA's constitutional validity in the ordinary way.

Subsidiarity does not apply E

[67] The majority judgment contends that the principle of subsidiarity applies and that the application should be dismissed. I do not agree. Subsidiarity does not apply for a potent reason: the validity of legislation is not at issue. The question is not whether PAIA is valid legislation, but F whether Parliament has adequately fulfilled its s 32 obligation. This includes not only PAIA, but any and all of the range of legislation it has enacted in fulfilment of s 32. The applicant says Parliament has not done enough. So this court's job is to determine the extent to which Parliament has met its obligation to enact legislation that gives effect to s 19(3) read with s 32(2). That clearly requires an assessment of the reach of existing legislation, though not its validity. G

[68] Parliament's argument is mistaken. It misconceives the nature of the applicant's challenge to PAIA. Subsidiarity is inapplicable because PAIA's constitutional validity is not in question. The principle of subsidiarity does not assist Parliament, for it simply has no application: H

(a) Subsidiarity applies only when a statute's validity is at stake. Here validity is not at stake.

(b) PAIA is not circumvented because there is no attempt to bypass the provisions of PAIA by invoking the Constitution.

[69] The principle provides that one may not rely directly on the I Constitution in the face of legislation designed to give effect to it; one must treat the Constitution as subsidiary to the legislation. But the crucial point is that the principle operates only if the legislation is not

A under constitutional attack. This court has already noted, in *Doctors for Life*, that validity of legislation can only be impugned in two circumstances: when the content or substance of the legislation does not comply with the Constitution, or because there is a procedural defect in its enactment. [140] By contrast, when litigants do attack the legislation, as B here, saying that it falls short of a standard embodied in the Constitution itself, then they are free to invoke the Constitution directly. That, indeed, is the essence of constitutionalism: it allows all legislation to be subjected to constitutional scrutiny. So a litigant may invoke the Constitution to gauge the extent to which legislation meets a constitutional C obligation — but the litigant may not evade addressing that legislation.

[70] The principle of subsidiarity puts litigants to a choice. It says that, 'where legislation has been enacted to give effect to a right, a litigant D should rely on that legislation in order to give effect to the right, or, alternatively challenge the legislation as being inconsistent with the Constitution'. [141] But where the legislation is challenged for not meeting a constitutional obligation, the principle does not apply.

[71] This reflects the principle's rationale, which is the cooperation the E courts, under the separation of powers, owe a fellow actor that is striving to give life to constitutional obligations. Because the courts act in partnership with Parliament in fulfilling the Bill of Rights, comity between the arms of government requires, if the relationship is to be successful, a measure of respect for what the other partner is trying to achieve. [142] Parliament's role in operationalising constitutional rights by

enacting legislation must be respected — and the courts should not, A therefore, allow litigants to 'circumvent' or 'bypass' that legislation. [143]

[72] But these considerations do not apply where the litigant relies on the restricted ambit of the legislation. Where the litigant does this, there can be no complaint that Parliament's legislation is being ignored. On B the contrary, Parliament is afforded a full and formal opportunity to defend its fulfilment of its legislative obligation, and to show that it has done all that the Constitution requires. The decisions show that in every case where this court has applied the subsidiarity principle, the litigant has entirely omitted or failed to challenge the constitutionality of legislation enacted to fulfil the right the litigant seeks to enforce by C invoking the Constitution directly. It is this that subsidiarity precludes.

[73] Here, by contrast with *Idasa*, and in contradistinction to every case where this court has applied subsidiarity, the applicant says the ambit and purport of PAIA are insufficient. [144] It is not seeking to evade or D

A circumvent PAIA. It is not ignoring PAIA. It is confronting it. Its central contention, in its affidavits and arguments, is that PAIA does not reach the right, because Parliament, in breach of an obligation, has failed to enact legislation embodying the right of access to information it seeks to enforce, namely information about political parties' private funding. B This afforded Parliament the opportunity to defend its legislation — which it fully did. The Speaker's opposing affidavit strenuously contends for the constitutional adequacy of PAIA. It claims from the outset that PAIA 'fully satisfies the requirements of s 32(2)'. Thereafter Parliament's response seeks to substantiate this claim in detail.

C [74] So the constitutional reach of PAIA has always been squarely on the table. Far from bypassing or ignoring the legislation, the applicant has confronted it head-on, and invoked the Constitution only as a means to show that PAIA's reach falls short of fulfilling the obligations of Parliament under s 32(2). The principle of constitutional subsidiarity finds no D application here. Subsidiarity cannot be a barrier to a challenge of the kind the applicant brings when its complaint is precisely that there is simply no appropriate legislative regulation. Simply put, subsidiarity does not work in a vacuum. Parliament's invocation of subsidiarity is therefore fundamentally misconceived.

E **The application is not a constitutional challenge under s 172**

[75] Parliament contended, and the majority judgment agrees, that the applicant must be sent to the High Court to start again. This

misconceives the application. It seeks to recast the application as a A constitutional challenge to PAIA under s 172(2)*(a)*, [145] over which the High Court has jurisdiction. That sets up a misplaced procedural bar to the applicant's claim. In fact, the application is brought under s 167(4)*(e)* of the Constitution; this court alone has jurisdiction.

[76] The distinction is subtle but fundamental. In *Doctors for Life* this B court recognised and underscored the difference between a constitutionally invalid statute and an unmet constitutional obligation. [146]

[77] The applicant does not challenge a statute under s 172(2)*(a)* on the basis that its provisions are in conflict with the Bill of Rights or because it was adopted in a manner inconsistent with the Constitution. [147] The C s 172 route affords procedural safeguards for determining the validity of legislation. These include allowing the member of the executive responsible for implementing the legislation to justify any limitation under s 36.

[78] But s 36 applies only where a right in the Bill of Rights is limited by D a law of general application. The applicant's complaint is that there is no legislation, nor legislative provision, that requires political parties to disclose the sources of their private funding. It is in precisely this absence of legislation that the applicant locates Parliament's failure to give effect to a right in the Bill of Rights. Had Parliament in fact enacted legislation that required disclosure of political parties' private funding, and had the E applicant's complaint been that the provisions were under- or over-broad, or in some other way deficient, the courts' inquiry would indeed fall within s 172.

[79] The applicant chose deliberately not to proceed via s 172(2)*(a)* because that route was not suited to its case. The question the F application raises is whether this court has jurisdiction. If the court does, it is not for this court to bar a litigant from a pathway the Constitution provides to it.

[80] Moreover, the applicant clearly affirmed that it does not seek an order declaring that PAIA or any of its provisions are invalid. Parliament G was never called upon to meet that case. What is before us is the content and scope of Parliament's obligation. That is what the applicant pleaded, and what Parliament accepted. That poses a different question. And Parliament sought to answer by invoking PAIA. It said, Yes, we agree we have this obligation, but we have fulfilled it: look at PAIA. So we must look at PAIA, though only for the purpose of assessing the extent of H Parliament's constitutional obligation and its fulfilment.

A [81] The majority judgment concludes that, because of subsidiarity, this court is precluded from evaluating the extent to which Parliament has met the obligation. [148] But this runs against the express powers the Constitution confers under s 167(4)*(e)*. The Constitution deliberately affords litigants both options, though the s 167(4)*(e)* route is available only in the limited instance where the Constitution prescribes that a B constitutional obligation must be fulfilled.

[82] The two options should not be conflated. Nor should either be squeezed out. To shut down the route the applicant has chosen to enforce its right to information risks impoverishing the Constitution and C this court's jurisdiction to interpret it. Our decisions on subsidiarity have not had to address this distinction, since, in each of them, the legislation at issue was not challenged at all. This was because the litigant sought to derive a right directly from the Constitution without addressing the extent to which the legislation that applied in fact provided for the claimed entitlement.

[83] It is true that the applicant contends that PAIA alone is insufficient to fulfil Parliament's s 32 obligation. But it does not follow that the application is simply an application for the judicial review of legislation. The applicant has no complaint about PAIA on that statute's own terms. It does not demand that the statute be amended (though Parliament, of course, will be free to amend PAIA in response to the applicant's challenge). This it emphasised in its heads of argument:

> 'The applicant thus raises no constitutional challenge against PAIA, and seeks no reading in, reading down or striking down of any of its provisions.'

[84] The question whether Parliament has fulfilled the s 32(2) obligation is not contingent upon the validity of PAIA. [149] Nor is *Democratic Party* on point, for that case did not pivot on the content of a constitutional obligation, nor was it brought within this court's exclusive jurisdiction. [150] Rather, it concerned the validity of a statute and was thus plainly a s 172 challenge. [151] A finding that Parliament has failed to fulfil an obligation does not impact on the constitutional validity of PAIA. That is a different question. The question is only whether Parliament has fulfilled an obligation the Constitution obliges it to fulfil. Once it chose this way of formulating its case, the only route available to it lay through this court, invoking s 32(2) directly.

[85] The applicant's position was, indeed, that PAIA pursues a 'constitutional imperative'; and that its provisions, and the requirements and processes that they embody, 'are logical and legitimate for PAIA to serve its purpose'. And rightly so. Everything in PAIA is, in the absence of a challenge to its *validity*, consistent with s 32. Indeed, PAIA does not stand

alone here. It is like many other legislative provisions Parliament has enacted in fulfilment of s 32. [152] It, together with the other legislation, constitutes an indispensable measure to fulfil the provision's promise. The applicant's point is that PAIA is not *all* that s 32 requires; it fails to exhaust the obligation the provision creates. Other legislation is needed too. PAIA is constitutionally necessary, but not sufficient. [153]

[86] In the face of this, Parliament now insists, and the majority judgment accepts, that the applicant's case actually is to test the constitutional validity of PAIA in the High Court. But that is not the applicant's case. It contends that legislation must be enacted, in addition to PAIA (and in addition to all other legislation purported to give effect to s 32). The additional legislation must deal specifically with the disclosure of political parties' private funding. So the question is not whether PAIA is the legislation envisaged in s 32(2). [154] Both Parliament and the applicant agree that it is. The question is whether Parliament has adequately fulfilled the obligation that provision imposes.

[87] In this way the applicant confronts PAIA, but does so only to the extent that Parliament claimed that enacting PAIA meets its constitutional obligation under s 32(2) read with s 19(3).

[88] And only this court can make the order the applicant seeks. Were the High Court to be approached, the only competent order it could grant would be one declaring PAIA inconsistent with the Constitution. But that is not what the applicant seeks. It takes no issue with the rights PAIA and the other specialised access to information legislation Parliament has enacted under s 32(2) confer. Its complaint is that all this

legislation, together, is not enough. Parliament leaves an unconstitutional void in regard to political parties' private funding. Hence the applicant seeks a more powerful, direct and trenchant remedy: an order in terms of s 32(2), read with s 167(4)*(e)*. Once this court's exclusive jurisdiction is engaged, as it is, only it has power to grant that remedy — and should we conclude, in what follows, that PAIA does not afford access to the information the applicant seeks, then the applicant has established that it is entitled to the relief it seeks.

[89] What is more, if a court granted the applicant a declaration of constitutional invalidity of PAIA under s 172, that would imply that Parliament erred in enacting PAIA, and hence that Parliament must amend PAIA. But this is not so. PAIA's enactment was constitutionally necessary. The majority judgment endorses this point. [155] The question is whether it was enough. To portray the applicant's argument as saying Parliament was wrong to enact PAIA misconceives it.

[90] It is also at odds with the separation of powers. The applicant's case is that the scheme and operation of PAIA — though perhaps suited to their current task, of requiring the ad hoc disclosure of specified records upon application by an interested party — are entirely inapposite for the comprehensive disclosure to the public at large of all political parties' funding. The court's order should not prescribe to Parliament that it must amend PAIA. Parliament should be free to meet its obligations under s 32, however it chooses — whether by amending PAIA, or by enacting new legislation, additional to PAIA, that specially targets the disclosure of political parties' private funds.

[91] So sending the applicant back to start again in the High Court would force that court to adjudicate a case the applicant does not make, and to grant an order the applicant has never sought. The applicant does not ask Parliament to amend its existing legislation. Its argument is deeper-going: it is the richness of s 32's promise that requires a manifold legislative response, of which PAIA is only part.

[92] It is precisely the kind of argument, one going beyond a critique of existing legislative provisions, and invoking the true depth of the Constitution's vision, that s 167(4)*(e)* gives this court special jurisdiction to hear.

[93] In summary: Parliament's argument misconceives the applicant's case, and does not take into account the reach and complexity of the rights and remedies s 32 and s 167 of the Constitution afford. Parliament's formal defence should not impede this court from reaching the questions of substance. The central issue is whether PAIA adequately fulfils the promise of s 32. Parliament claims it does. It has had full opportunity in these proceedings to make its case on the merits. Nevertheless, it now asks this court to avoid determining the merits, and instead to send the case to the High Court on technical grounds. That court has no jurisdiction to grant the order the applicant seeks, but can

only make, in its stead, an inapposite order — one that would have to come to this court anyhow for confirmation. [156] It would be futile, and circuitous, to require the applicant to restart in the High Court. This court's powers are properly invoked, and the applicant's claim to relief must be determined.

Does PAIA afford a right of access to information about political parties' private funding?

[94] As we have seen, the fundamental right to vote, read with s 32, requires that political parties' private funding be disclosed. The question now is whether PAIA does this. The answer is No. The reasons are two. The first is that PAIA's mechanisms and processes are inherently limited. They serve a valuable purpose, but that purpose is narrow. Second, they are not capable of affording citizens their right to be properly informed about political parties' funding.

[95] First, PAIA operates pairwise. It requires one 'requester' of information to address a request to another entity. [157] PAIA compels disclosure only upon application. [158] Moreover, that application must provide sufficient particulars to identify the record the requester seeks. [159] In sum, as the applicant rightly contended, PAIA affords only the right to gain access, upon specific request, to specific records held by specific bodies at specific times. [160]

[96] That right of access to information is important. But it is not capable of affording the electoral citizenry the information to which they are entitled about the way political parties vying for their votes are funded. That is a context with unique demands, to which PAIA does not address itself. Most obviously, the relationship is not pairwise. It is a relationship between dozens of political parties and many millions of voters. The right of individuals to apply to receive individual records, furnished on request, could never keep the electorate as a whole meaningfully informed. For that to be achieved, records must be made publicly available to all. And this would have to be done systematically and regularly, not only upon application. It is not possible for each voter to apply to each political party at each election to obtain the specified records he

or she seeks. The difficulty reveals the disjunct between the purpose PAIA is designed to serve and the purpose of the legislation the applicant seeks to have enacted.

[97] In addition PAIA cannot guarantee that political parties' private H contributions would be available for request at all. It would not require that these be documented. PAIA affords a right of access to 'records'. It

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A does not define 'information'. [161] It contains only a definition of 'record'. [162] This limits the operation of the statute to information that is recorded in some form or medium. Oral communications containing or constituting information are excluded. Also not contemplated are situations that may require physical access to a place in order to obtain B information that is yet to be reduced to material form, such as a meeting of a parliamentary portfolio committee, a court hearing or inspecting the site of past happenings.

[98] Are these omissions serious? It would appear so. Depending on the nature of the information, and the possible disincentives to preserving it, C the absence of an encompassing definition underscores PAIA's limited ambit. This is because a contract, undertaking, understanding, agreement or donation may all be orally concluded. In that event, as far as PAIA is concerned, there is no 'record' — and hence no right of access to that information. This limited ambit creates obvious risks that some deal-doers will want to keep their transactions spoken, so that they are not D 'recorded'.

[99] PAIA also imposes no obligation on a record-holder to preserve recorded information until a formal application is made. [163] This fits logically with the nature of the obligation PAIA creates. That is to provide E access to *records*, after a request for them has been made. A body, private or public, can wipe out records as they are created, without falling foul of PAIA. Subject, of course, to any specifically applicable legislation, it

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could even design its systems so that records are methodically wiped out. A There will be no breach of PAIA. The statute creates no proactive duty to preserve or disclose any category of records: the obligation is to provide access only once an information seeker asks. Its obligations are entirely reactive.

[100] It is correct that the statute, while not defining 'information', B extensively uses the concept. [164] From short title to schedules, PAIA uses the word 'information' over 250 times. Most pivotally, the word 'information' is used within the definition of 'record', which means 'any recorded information'. But the proliferation of the word 'information' makes the absence of a definition, together with the sharply limited C definition of 'record', only the more striking. The impact is both conceptual and operational. The statute confines its operation and effect to recorded information in the form of 'records' only.

[101] The upshot is that private contributions, and their amount and D provenance, could be left unrecorded — and therefore incapable of being requested in terms of PAIA. This, together with the narrow pairwise relationship PAIA envisages, between individual requesters and individual entities holding the records, whose disclosure is compelled only upon application, means that it cannot fulfil the demand of s 19(3), or the promise of s 32. E

[102] But there is a second, even more obtrusive reason for concluding that PAIA does not afford access to the information the applicant seeks and that it consequently does not meet the constitutional obligation s 32(2) imposes. This springs from the bodies to whose records it provides access. They fall within two categories only — public bodies and private bodies. Both are defined. Subject, as is usual, to contra-textual F indicators, a 'public body' in PAIA means —

> *'(a)* any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
>
> *(b)* any other functionary or institution when — G
>
> (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation'. [165]

[103] This closely echoes the Constitution, which contains no definition H of 'the state', [166] but defines 'organ of state', in terms PAIA's definition of 'public body' appropriates. [167] PAIA defines 'private body' in s 1 as meaning —

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> A *'(a)* a natural person who carries or has carried on any trade, business or profession, but only in such capacity;
>
> *(b)* a partnership which carries or has carried on any trade, business or profession; or
>
> *(c)* any former or existing juristic person, but excludes a public body'.

B [104] These two definitions create a dichotomy that appears to leave a large gap. [168] Section 32(1) confers a right of access to any information held 'by the state', plus to any information held 'by another person', provided it is 'required for the exercise' and 'protection of any rights'. Although neither 'the state' nor 'person' is defined in the Constitution, C s 32 creates a single, all-encompassing, dichotomous category within which the right applies. The wide definition of 'organ of state' in the Constitution means that in the first instance s 32(1) of the Bill of Rights gives a right of access to all information held by departments of state at any level of government, as well as by any other functionary or institution that exercises a power or performs a function under the national or a D provincial constitution, or that exercises a public power or public function in terms of any other legislation. This PAIA closely reflects.

[105] But that right is residually conferred in respect of information held by 'any person', if required for the exercise or protection of any rights. E Despite the absence of a definition, the word 'person' is plainly very wide. It is not limited to natural persons, for the Bill of Rights binds also a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the F right. [169] What is more, the Bill of Rights specifies which 'persons' may

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enforce the rights it confers. [170] This court has repeatedly held that the A ambit of the standing provision is very wide. [171] So 'person' includes any individual or association or community or group. [172] It would certainly include a political party.

[106] Hence the right s 32 confers operates within a wide and potently B encompassing field — the anvil on which its hammer falls is the entire state, and, outside the state, *any person* who holds information that is required for the exercise or protection of any rights. [173] The obligation s 32(2) imposed on Parliament was therefore to enact legislation to give effect to the right of access to information held by anyone else ('another person') that is required for the exercise or protection of any rights. C

[107] But PAIA instead created a different dichotomy — that between public and private bodies, though the statute itself recognises that the dichotomy cannot be absolute. [174] The statute defines 'person' as D

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A meaning 'a natural person or a juristic person'. [175] While its definition of 'public body' closely replicates that of 'organ of state' in the Constitution, its definition of 'private body' is far narrower than the concept of 'person' that informs the Bill of Rights. The definition encompasses any former or existing juristic person. But as far as natural persons are B concerned, it is confined to those who carry on, or who have carried on, any trade, business or profession, 'but only in such capacity'. Its application to partnerships is similarly confined. In the case of all private bodies, access is of course, in accordance with the Bill of Rights, restricted to records required for the exercise or protection of any C rights. [176]

[108] There are two problems with this. First, what if a natural person has records that are needed for the exercise or protection of any rights — but is not engaged in any trade, business or profession? PAIA does not give access. The field of natural persons is plainly not covered. But the omission does not stand on its own. There is a second, more telling D difficulty with PAIA's definition of 'private body'. What if a body is neither public nor private? What if it straddles PAIA's definition of public and private bodies, and falls inbetween? While it is true that PAIA gives access to the records of juristic bodies, insofar as they are 'private bodies', political parties appear to fall within a category of political actors who E may or may not be 'juristic persons' for the purposes of PAIA. They fall into a very singular category of 'persons', envisaged in the Bill of Rights, but for whom PAIA doesn't appear to cater at all.

Political parties and PAIA

F [109] Political parties are neither public bodies nor private. In argument, Parliament contended that the records of political parties are accessible under PAIA, since they fall within the definition of private bodies. But the submission is overbroad. PAIA offers access to the records only of political parties that are juristic persons (or, conceivably, partnerships). What is more, the right of access it affords excludes from regulation all non-juristic G persons not carrying on a trade, business or profession.

[110] Two implications flow from PAIA's limited definition. First, it is not clear that political parties are in fact all 'juristic persons'. It is impossible to H say that the constitutions of all political parties constitute them as

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juristic persons. And whether a body that has capacity to sue and be sued A in its own name is also a juristic person depends on its constitution. The mere capacity to sue and be sued does not necessarily entail juristic personhood. Although difficult to proceed in practical terms, the possibility that a political party may not be a common-law universitas and hence not a juristic person cannot be excluded. [177] B

[111] There is a second, more telling point. This is that our law does not require that political parties be juristic persons. A political party can be simply an organisation or movement, and not a juristic person. Under the Electoral Commission Act, [178] 'party' means a party registered under the Act, and includes — C

> 'any organisation or movement of a political nature which publicly supports or opposes the policy, candidates or cause of any registered party, or which propagates non-participation in any election'. [179]

[112] The Electoral Commission Act requires the chief electoral officer, D on the fulfilment of certain prescribed conditions, to register any party. [180] There is conspicuously no requirement in the statute that a

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A political party be a juristic person. [181] It could be any organisation or movement of a political nature, juristic or non-juristic. [182] And, indeed,

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s 19(1) of the Bill of Rights, which gives every citizen the right to form A a political party, lays down no requirement that the party formed must be a juristic person. Whether a requirement that a political party must be a juristic person, if it were imposed, would be constitutionally valid is not in issue now. The point is that PAIA does not cover political parties — whether big or small, predominant or minor — if they are not juristic persons. B

[113] The applicant submitted in its written argument that political parties are properly to be considered part of 'the state', for purposes of disclosure of private funding information under s 32(1)*(a)*. But this contention was pursued only faintly during oral argument. Rightly so. C Political parties do not sit comfortably within the Constitution's definition of 'organ of state', or PAIA's definition of 'public body'. [183] The reason is that, while in certain of their functions they may perform statutory duties (such as when they constitute the national and provincial bodies that elect the members of executive government), it is simply constitutionally inappropriate to call them organs of state. They are not D the state, nor are they part of it, even though on occasion they perform statutory functions. Thus, while it is possible to shoehorn political parties into the definition of 'public body', they cannot sit comfortably there.

[114] On the other hand, political parties are quite plainly not private E bodies, and, as already shown, if not juristic persons, they are not covered by PAIA at all. Even where a political party is a juristic person, and thus falls inside PAIA, the term 'private' ill befits it. The reason lies in the nature of political parties, and the critical importance of their functioning to the success of the country's constitutional project. F

[115] This emerges from this court's decision in *Ramakatsa*, where the appellants sought to set aside as invalid a provincial conference of the ANC and all its outcomes on the basis that there were irregularities in many of the branch meetings that elected delegates to the conference. [184] This court exercised a robust jurisdiction. The whole court, minority and G majority, concluded that fundamental constitutional rights were implicated. This was because of their importance to the fulfilment of the right to vote. The judgment of Yacoob J explained, on behalf of the court, that the right to participate in the activities of a political party [185] obliges every political party to act lawfully and in accordance with its own constitution, and, correlatively, every member of a political party has 'the right to H exact compliance with the constitution of a political party by the leadership of that party'. [186]

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A [116] Both the unanimous conclusions of the *Ramakatsa* court [187] and its majority judgment are antithetical to the notion that political parties are merely private entities. In short, the public/private disjunct in PAIA appears to have been created without having political parties in mind at all. [188] They are a category of 'persons', outside the state, for whom PAIA B has failed to make express or any provision. Where political parties should be, there is a gaping hole. This, the applicant submits, was because Parliament had been deliberating whether to regulate political parties separately. But there is no need to speculate; the practical upshot and the meaning and application of PAIA are clear.

C **Parliament has failed to meet its s 32(2) obligation**

[117] PAIA, in other words, does not provide at all for access to the information about political parties' private funding required for the exercise of the right to vote. It, like the other statutes the legislature has enacted in fulfilment of the right of access to information, constitutes, at D best, only a partial fulfilment of Parliament's obligation. [189]

[118] Without specific legislation requiring political parties registered for elections to legislative bodies established under the Constitution to E disclose their private funding, it follows that the applicant's attack

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cannot be repulsed. It has established the constitutional insufficiency of A PAIA, and hence that Parliament has not fulfilled its obligation under s 32 to enact legislation to afford access to the information reasonably required to exercise the right to vote. The supremacy clause, in s 2 of the Constitution, requires that an 'obligation [which is] imposed by [the Constitution] must be fulfilled'. [190] B

[119] An order granting the applicant the relief it seeks should issue. We should acknowledge, as in *Doctors for Life*, that —

> '(a)n order declaring that Parliament has failed to fulfil its constitutional obligation . . . and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative C organ of the State. Such an order will inevitably have important political consequences. Only this Court has this power.' [191]

Where a constitutional obligation is impugned, as here, the Constitution itself mandates the intrusion. But Parliament has considerable discretion to determine how best to fulfil its duty. [192] This court does not seek to D prescribe to Parliament that it ought to legislate in a particular manner, as the majority judgment suggests, but Parliament must legislate in a way that gives effect it to its constitutional obligation.

Order

[120] The applicant asked for an order directing Parliament to enact the E required legislation within 18 months, and to require Parliament to lodge a report on the steps it has taken every three months. Because this is a minority judgment, it is unnecessary to consider further the form of the order, save to say that I would have declared that Parliament has failed to fulfil its constitutional obligation to enact national legislation to give effect to the right of access to information as required by s 32(2) of the F Constitution, to the extent that —

(a) information about the private funding of political parties registered for elections for any legislative body established under the Constitution is reasonably required for the effective exercise of the right to vote in those elections; and G

(b) no national legislation currently requires that this information be publicly accessible.

Judgment

Khampepe J, Madlanga J, Nkabinde J and Theron AJ (Mogoeng CJ, Molemela AJ and Tshiqi AJ concurring): H

Introduction

[121] We have had the benefit of reading the judgment penned by our brother, Cameron J (minority judgment). We agree, for different reasons, with his finding regarding this court's exclusive jurisdiction. We further agree with the minority judgment's exposition of the history behind the principle of constitutional subsidiarity. I

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A [122] Our disagreement with the minority judgment lies in its conclusion that Parliament has failed to fulfil its constitutional obligation to enact the legislation envisaged in s 32(2) of the Constitution. [193] Summarising it, our difficulty with the minority judgment is twofold. First, insofar as it seeks to have Parliament legislate in a manner preferred by B the applicant, the minority judgment violates the doctrine of separation of powers. We elaborate on this below. Second, the minority judgment's conclusion that 'the validity of [PAIA] is not at issue' [194] does not bear scrutiny. The suggestion that PAIA has certain shortcomings is, in fact, an attack on its validity. Because — in that sense — the validity of PAIA is challenged and PAIA is the legislation envisaged in s 32(2), the principle C of subsidiarity applies. On these alleged shortcomings [195] the applicant ought to have challenged the constitutional validity of PAIA frontally in terms of s 172 of the Constitution in the High Court (frontal challenge).

[123] The points of difference on the merits lead us to a different outcome: a dismissal of the application.

D [124] Our approach makes it unnecessary for us to pronounce on whether information on the private funding of political parties is required for the exercise of the right to vote.

[125] The minority judgment sets out the background to this application and the parties' submissions in great detail. We will only deal with the E submissions to the extent necessary for our conclusions.

Submissions

[126] The applicant accepts that Parliament did enact national legislation to give effect to the right of access to information in the form of PAIA. F It contends, however, that the principle of subsidiarity does not apply because PAIA does not cover nor purport to 'cover the entire field of legislation [giving] full effect to s 32(2)', and that 'Parliament's obligation under s 32(2) of the Constitution did not begin and end with the enactment of PAIA'. It argues that PAIA gives effect 'only' to one aspect of G the right of access to information, namely the right to gain access to specific records held by specific bodies at specific times. The applicant submits that this is not an ordinary case of enforcing the right of access to information, but rather a case of enforcing the *duty* to enact national legislation required to give effect to the right under s 32(1) of the Constitution.

H [127] In addition the applicant argues that even though political parties are not 'organs of state', they are a special species of 'private actors' with

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constitutional responsibilities to the voting public. It contends that A political parties are part of the state for the purposes of s 32(1)*(a)*. [196] Consequently, everyone is entitled to information regarding the private funding of political parties as information 'held by the state'. In the alternative, the applicant contends that citizens are entitled to information on the private funding of political parties as information that is required for the exercise or protection of their right contained in s 19(3) B of the Constitution. This entitlement stems from s 32(1)*(b)*.

[128] Notably, the applicant steadfastly asserts that it is not challenging the constitutional validity of PAIA, even if it were legislation enacted pursuant to s 32(2). Even so, according to it, the legislation required is C fundamentally different from PAIA in its nature and purpose, as it would require the disclosure of private funding information as a matter of 'continuous course, rather than once-off upon request'. The ability to access information pertaining to the private funding of political parties on an ongoing basis, the applicant contends, is necessary if the right to vote is to have meaningful content. D

[129] In essence, Parliament contends: the principle of subsidiarity applies; Parliament met its constitutional obligation by enacting PAIA; in accordance with the principle of subsidiarity, the applicant ought to have challenged the constitutional validity of PAIA in the High Court; and E — because it has not done so — the matter ought to be dismissed. In amplification, Parliament maintains that the principle of subsidiarity precludes the applicant from having direct recourse to the s 32(1) right itself. The question is whether PAIA 'purports to be the legislation required by s 32(2)'. And if it does, then the applicant is obliged to challenge it directly for failing to give effect to the right in the manner F that the applicant contends is constitutionally compliant. What the applicant is not permitted to do, continues the contention, is to demand the enactment of a different piece of legislation that would deal with a matter for which PAIA was enacted.

Issues G

[130] Issues that we are going to deal with are:

(a) exclusive jurisdiction;

(b) whether PAIA is the legislation envisaged in s 32(2) of the Constitution; H

(c) separation of powers;

(d) circumstances in which the principle of subsidiarity applies and the need for it; and

(e) whether the applicant has challenged the constitutional validity of PAIA.

Exclusive jurisdiction

[131] On this aspect our discomfort with the minority judgment lies in the fact that its conclusion is coloured by the finding it ultimately reaches

on the nature of this application and the principle of subsidiarity. For that reason we prefer a shorter route. [197] And it is this.

[132] A court's jurisdiction is determined on the basis of the claim in the pleadings. In *Chirwa* Langa CJ held that —

> 'a court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this court has rejected. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable.' [198]

[133] In a unanimous judgment this court confirmed *Chirwa* and held that —

> 'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. . . . In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings — including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits — must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court.' [199] [Footnote omitted.]

[134] It follows that 'the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it'. [200] We do realise that in certain instances claims of exclusive jurisdiction may be palpably contrived. Needless to say, those will not succeed.

[135] We conclude thus: the applicant alleges that Parliament has failed to fulfil the obligation imposed by s 32(2) of the Constitution to enact legislation that gives effect to the right contained in s 32(1) of the Constitution. In terms of s 167(4)*(e)* of the Constitution, only this court has jurisdiction to answer that question.

Is PAIA the legislation envisaged in s 32(2) of the Constitution?

[136] The applicant contends that the 'required legislation' in terms of s 32(2) has not been enacted and there is 'simply no Act of Parliament'

to be tested by the Supreme Court of Appeal or the High Court in terms of s 172(2)*(a)* of the Constitution. In the same breath, it attempts to show the insufficiency of PAIA in regard to the right for which it contends.

[137] Section 32 of the Constitution provides:

> '(1) Everyone has the right of access to —
> *(a)* any information held by the state; and
> *(b)* any information that is held by another person and that is required for the exercise or protection of any rights.
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

[138] The long title says PAIA was enacted to —

> 'give effect to the constitutional right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights'.

This mirrors the wording of s 32(1) of the Constitution.

[139] In relevant part the preamble to PAIA provides that it was enacted to —

> 'foster a culture of transparency and accountability in public and private bodies *by giving effect to the right of access to information* [; and to]
> actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect *all of their rights*'. [Emphasis added.]

This relates to the exercise and protection of 'all rights', and not merely some.

[140] Section 9 of PAIA contains the objects of the Act, which include the following:

> *'(a)* (T)o give effect to the constitutional right of access to —
> (i) any information held by the state; and
> (ii) any information that is held by another person and that is required for the exercise or protection of any rights.'

This too adopts the exact wording of s 32(1) of the Constitution.

[141] Having regard to all this, one can hardly think of any other indications and more plain language to evince the purpose for which PAIA was enacted.

[142] Indeed, in *Independent Newspapers* Moseneke DCJ, writing for the majority, observed:

> 'At a general level, the right of access to information is entrenched, in the first instance, by the Constitution itself. Section 32 of the Constitution confers on everyone the right of access to any information held by the state or by another person that is required for the exercise or the protection of any rights. *That right of access to information is given effect to*

> *and regulated through legislation in the form of* [*PAIA*] . . . .' [201] [Footnotes omitted and emphasis added.]

[143] In the same case Sachs J wrote:

> 'It is the right in s 32 of everyone to have access to information. [PAIA], adopted on 3 February 2000, gives effect to this right.' [202] [Footnote omitted.]

[144] In *Brümmer v Minister for Social Development and Others*, writing for a unanimous court Ngcobo J says:

> 'Section 32(1) of the Constitution guarantees the right of access to information "that is required for the exercise or protection of any rights. And the declared purpose of PAIA is to give effect to this constitutional right.' [203]

[145] In a unanimous decision in *PFE International* Jafta J held that 'PAIA is the national legislation contemplated in s 32(2) of the Constitution'. [204] Later, in a dissent in *Agri SA*, Froneman J reasoned, on a point to which the disagreement did not relate:

> 'The [Mineral and Petroleum Resources Development Act] is not legislation that explicitly seeks to give effect to and circumscribe a fundamental right in the

manner of, for example, [PAJA], [PAIA] or the Labour Relations Act, but in my view its provisions need to be interpreted in a manner that is best consistent with s 25.' [205] [Footnotes omitted.]

[146] Even the High Court has considered PAIA to be the legislation enacted to give effect to s 32. [206]

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[147] These authorities brook no possibility that PAIA is not the legislation enacted to give effect to the s 32(1) right. That it may have shortcomings in its protection of the right and possibly even be constitutionally invalid does not alter this legal reality. [207]

[148] Notably, PAIA shares a similar history with PAJA, which gives effect to the s 33(1) and (2) rights. [208] As this court held in *Bato Star*, [209] PAJA was enacted to give effect to the right to administrative justice contained in s 33(1) and (2) of the Constitution. Likewise, as we have concluded, PAIA was passed in compliance with s 32(2) of the Constitution. Schedule 6 of the Constitution contained transitional provisions that applied to ss 32 and 33. The schedule required that national legislation be enacted within three years of the Constitution coming into effect. [210] The President assented to PAIA on 2 February 2000 and to PAJA a day later. [211] Both dates are within three years of the Constitution coming into effect and just shy of missing the deadline. If the legislation had not been enacted, ss 32(2) and 33(3) would have fallen away. [212] It would be

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ludicrous for anyone to suggest that s 32(2) has lapsed for lack of enactment of the legislation envisaged in that section. Indeed, it is not surprising that no one — to our knowledge — has ever made a suggestion of the sort. This buttresses our view that PAIA is the legislation enacted to give effect to the s 32(1) right.

[149] The minority judgment makes the point that PAIA is not the only legislation that gives effect to s 32. In this regard it refers to various other pieces of legislation that make provision for access to information. [213] However, even though those pieces of legislation do make this provision, they are distinguishable from PAIA. The main focus of each is some other subject; not access to information in terms of s 32(1) of the Constitution. [214] That this is so is reinforced by the sparse manner in which the content of each touches on the right of access to information. In each, provision for the right is merely incidental to the legislation's main focus. On the contrary, PAIA's focus is one subject: the provision of information in terms of s 32(1) of the Constitution. In short, that there is out there a plethora of other pieces of legislation providing for access to information does not mean all those pieces of legislation are *the* legislation envisaged in s 32(2) of the Constitution.

Separation of powers

[150] This court has expressed itself thus:

'The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.' [215]

[151] Why do we have this principle? Langa CJ explains in *Glenister I*:

'The principle of checks and balances focuses on the desirability that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. The system of checks and balances operates as a safeguard to ensure that each branch of

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government performs its constitutionally allocated function and that it does so consistently with the Constitution.' [216]

[152] We are mindful that it is this court that is the final arbiter on adherence to the Constitution and its values. On this, in *Doctors for Life* Ngcobo J says:

'But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament must act in accordance with, and within the limits of, the Constitution, and the supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled. Courts are required by the Constitution to ensure that all branches of government act within the law and fulfil their constitutional obligations. This court has been given the responsibility of being the ultimate guardian of the Constitution and its values. Section 167(4)*(e)*, in particular, entrusts this court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that the obligations imposed by [the Constitution] must be fulfilled. It would therefore require clear language of the Constitution to deprive this court of its jurisdiction to enforce the Constitution.' [217] [Footnotes omitted.]

[153] With all this in mind, we proceed to have a close look at what the applicant seeks.

[154] The true complaint by the applicant is the manner in which Parliament — exercising a power that vests solely in it — has chosen to legislate. Let us demonstrate this in the following manner. Assuming that — besides this complaint — there was no basis for raising the shortcomings that the minority judgment deals with, [218] there would be no question that PAIA does not afford interested voters access to information on the private funding of political parties. The only complaint would be that this information can only be made available at the request of an individual and only to that individual. [219] But would it still be open to that individual to say legislation envisaged in s 32(2) has not been passed? Definitely not. Why do we say so?

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[155] The applicant wants information on the private funding of political parties to be made available in a manner preferred by it. It prefers that the legislation should require the disclosure of the information as a matter of 'continuous course, rather than once-off upon request'. According to the minority judgment, what South Africa must have is systematic disclosure. It may well be that this is ideal; who knows? But that is not the issue. It is for Parliament to make legislative choices as long as they are rational and otherwise constitutionally compliant. Crucially, lack of rationality is not an issue in these proceedings.

[156] Despite its protestation to the contrary, what the applicant wants is but a thinly veiled attempt at prescribing to Parliament to legislate in a particular manner. By what dint of right can the applicant do so? None, in the present circumstances. That attempt impermissibly trenches on Parliament's terrain; and that is proscribed by the doctrine of separation of powers. [220]

[157] To the extent that the minority judgment suggests that individual requests would present interested voters with insurmountable problems, this is difficult to grapple with and, indeed, inappropriate to raise in the absence of an irrationality challenge on the choice made by Parliament.

[158] We must highlight that the minority judgment proceeds from an assumption that all voters require information on the private funding of political parties. [221] The basis for that assumption is not explained. And the minority judgment's conclusion, on the importance of this information to the exercise of the right to vote, does not give a basis for the assumption. On what basis does the minority judgment discount the possibility that — even if the information were readily available — some people would not have recourse to it before exercising their right to vote? We do not know. We should not be understood to say access to this information may not reasonably be required for the exercise of the right to vote. That is a matter we need not reach. What we take issue with is the unexplained assumption from which the minority judgment proceeds.

[159] We are mindful that the applicant does complain of, and the minority judgment also points to, other shortcomings in PAIA. [222] Those

shortcomings are best dealt with in a frontal challenge. Based on the applicant's own say-so and the minority judgment's conclusion, this application is not a frontal challenge. [223] For the reasons we give

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shortly, the application has been brought in breach of the principle of subsidiarity.

Circumstances in which the principle of subsidiarity applies and the need for it

[160] Contrary to the suggestion in the minority judgment that our insistence on compliance with the principle puts form ahead of substance, [224] this principle plays an important role. The minority judgment correctly identifies the 'interrelated reasons from which the notion of subsidiarity springs'. [225] First, allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, 'would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation'. [226] Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. [227] Third, 'allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of two parallel systems of law'. [228]

[161] The principle of subsidiarity is a well-established doctrine within this court's jurisprudence. [229] The essence of the principle was captured by O'Regan J in *Mazibuko*, where she held that —

> 'where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution'. [230]

[162] The minority judgment says that subsidiarity does not apply because the validity of PAIA is not in issue. This is difficult to follow. If legislation fails to provide sufficiently for the protection of the right contained in s 32(1) of the Constitution, surely it must be invalid to the extent of the insufficiency. Therefore, the assertion of insufficiency puts PAIA's validity in issue. The two are indistinguishable. For that reason we say — on this court's jurisprudence — subsidiarity must apply.

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[163] Essentially, the applicant's complaint is that PAIA suffers from certain shortcomings. [231] In that context this court has held that the principle of subsidiarity enjoins an applicant to challenge the legislation exactly for its shortcomings. In *Sandu*, which concerned the right to collective bargaining, this court remarked:

> *'If . . . legislation is wanting in its protection* of the s 23(5) right *in the litigant's view, then that legislation should be challenged constitutionally*. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the Legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.' [232] [Footnote omitted and emphasis added.]

[164] The deficient legislation must be challenged 'as falling short of the constitutional standard'. [233]

[165] According to Ngcobo J in *New Clicks*:

> 'Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides.' [234]

[166] Axiomatically, it cannot be that the principle of subsidiarity applies only where the legislation does exactly that which is constitutionally required. If that were the case, there could hardly ever be any meritorious challenges based on constitutional deficiencies or other bases of constitutional invalidity. Unsurprisingly, Parliament argues that — in accordance with the principle of subsidiarity — a frontal challenge is indicated where legislation that seeks to give effect to a constitutional right is believed to fall short of doing so. Van der Walt aptly says:

> 'In view of the Constitutional Court's justification of the first two subsidiarity principles, the question is not whether legislation *in fact* gives effect to a right in the Bill of Rights, but whether it was *enacted to do so*. In other words, the focus is on the intention of the post-1994 democratic legislature to honour its constitutional obligations and promote the spirit, purport and object[s] of the Bill of Rights through exercise of its legislative powers.' [235] [Emphasis added.]

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[167] Let us make the point that, in context, the authorities referred to in this and the minority judgment on the principle of subsidiarity envisage a frontal challenge.

[168] The strong reservations expressed by this court in the comparable case of *Democratic Party* underscore this. [236] In that case the appellant contended that s 16(5) of the Local Government Transition Act [237] (Transition Act) was inconsistent with s 160(3)*(b)* read with s 160(2)*(b)* of the Constitution. [238] The inconsistency relied upon purportedly stemmed from the fact that s 16(5) of the Transition Act required a two-thirds majority of members of council for the approval of a council's budget. [239] On the other hand, s 160(3)*(b)* read with s 160(2)*(b)* of the Constitution provides for the approval of a council's budget by a simple majority of members of the council. After engaging in an interpretative exercise that inter alia involved a consideration of s 16(5) of the

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Transition Act, the two sections of the Constitution and item 26(2) of sch 6 of the Constitution, [240] the court concluded that there was no merit in the appeal. It then bemoaned the fact that the appellant 'did not apply for an order declaring s 16(5) invalid' and that the appellant had instead 'relied on the invalidity of the section as the foundation for the relief claimed'. [241]

[169] The appellant had sought to justify the procedure it had adopted thus. It was interested only in relief that was consequent upon the constitutional invalidity of the Transition Act. It was inconvenient, expensive and time-consuming first to engage in the lengthy process that would culminate in a confirmation by this court in terms of s 172(2) of the Constitution. [242] To subject the appellant to this served no purpose. The court noted that the adverse conclusion it had reached against the appellant 'render[ed] it both unnecessary and undesirable to adjudicate on a preliminary issue which would have otherwise been of some relevance'. [243]

[170] Unimpressed by the appellant's attempt at justifying the procedure followed, Yacoob J, writing for a unanimous court, cautioned:

> '(C)onsiderable difficulties stand in the way of the adoption of a procedure which allows a party to obtain relief which is in effect consequent upon the invalidity of a provision of an Act of Parliament without any formal declaration of the invalidity of that provision.
>
> Firstly, such a procedure appears to be incompatible with the Constitution. Section 172(1) obliges a court to declare a statutory provision which is inconsistent with the Constitution invalid to the extent of the inconsistency. It was conceded by counsel for the appellant that the

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> course chosen is at least inconsistent with the literal meaning of section 172(2)*(a)* of the Constitution, which provides that a declaration of invalidity of an Act of Parliament by a High Court has no force unless it is confirmed by this court. The grant of any order by a High Court premised on a finding of invalidity of a provision of an Act of Parliament (other than temporary relief contemplated by section 172(2)*(b)* of the Constitution) is tantamount to that finding being infused with force contrary to section 172(2)*(a)* of the Constitution.
>
> Secondly, the suggested procedure is likely to be a source of uncertainty and confusion about the status of a provision of an Act of Parliament. The purpose of s

172(2) is to provide certainty by requiring confirmation of an order of invalidity of a provision of an Act of Parliament by this court as a prerequisite for any finding of invalidity being of force. C Sanctioning the suggested procedure could nullify that purpose.

Thirdly, the practice that has been urged upon this court carries with it the distinct danger that courts may restrict their enquiry into the constitutionality of an Act of Parliament and concentrate on the position of a particular litigant. This might mean that a provision of an Act of Parliament may be held valid for one set of circumstances and D invalid for another. As Ackermann J said:

"The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of E equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.' [244]

[Footnotes omitted.]

[171] The present application is comparable because in it too the relief sought by the applicant 'is in effect consequent upon the invalidity of . . . F an Act of Parliament', [245] PAIA in this instance. The essence of the applicant's assertion that PAIA is deficient in its protection of the s 32(1) right is that PAIA is constitutionally invalid to the extent of the deficiency. No amount of disavowal of that — something we deal with later — can change this reality. As in *Democratic Party*, here too the applicant similarly is seeking the relief without any formal declaration of the G invalidity of PAIA. [246] In criticising our reliance on this case, the minority judgment proceeds from the premise that the instant application is not about the invalidity of PAIA. That premise is mistaken. The shortcomings complained of suggest that PAIA is invalid.

[172] Also, we have demonstrated that the other basis of distinction, H which is that the applicant is seeking relief of a special kind, cannot succeed for the simple reason that what the applicant is asking for flouts the separation of powers doctrine.

[173] *Democratic Party* did not concern rights protected in the Bill of Rights. It was about testing the validity of a statutory provision against a I

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A non-Bill of Rights provision of the Constitution. The application before us is about a right in the Bill of Rights. In this context the difficulties of an applicant who — in essence — relies for relief on the constitutional invalidity of an Act of Parliament without seeking a declaratory order to that effect are exacerbated. This is so because of the procedure followed B in determining whether an Act of Parliament is inconsistent with a right in the Bill of Rights. That procedure entails: an enquiry whether the impugned legislation — including a deficiency in it — does, in fact, limit a right in the Bill of Rights; if it does, whether the limitation is justified under s 36(1) of the Constitution; and, if it is not justified, a declaration that it is constitutionally invalid. In that process, evidence — especially on C the s 36(1) justification analysis — plays a crucial role. [247] Because of the form the application has taken, the evidence that has been proffered is not of a nature that could address all these.

[174] Or, does none of this matter? Of course it matters. Here lies the D fundament of our problem: we cannot bring ourselves to hold that there has been non-compliance with a constitutional obligation in circumstances where the shortcomings complained of by the applicant — and amplified by the minority judgment — may well prove to be constitutionally compliant. The issue is not whether they are indeed compliant. Whether they are, is something that may be tested properly in what we E have tagged a frontal challenge. Therein lies the jurisprudential value of the principle of subsidiarity.

[175] On the procedure resorted to by the applicant and the approach adopted by the minority judgment, the usual procedural hoops in a F frontal challenge that invokes inconsistency with a right in the Bill of Rights are bypassed. [248] It may well be that Parliament might have been able to demonstrate that what shortcomings there may be are justified in terms of s 36(1) of the Constitution. How do we then reach a conclusion that Parliament has failed to comply with a constitutional obligation? Or, do we simply say, quite plainly, Parliament could never have been able G to show justification? How can we say that when — as we seek to demonstrate below — that was not a case that Parliament had to meet and, therefore, not an issue before us? That cannot be so.

[176] Authority tells us that even in an apparent 'open and shut' case, an affected party must be given an opportunity to meet the case advanced H by an adversary. Parliament has been denied that opportunity. We cannot resist the eloquence of Megarry J in *John v Rees*:

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were I completely answered; of inexplicable conduct which was fully

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explained; of fixed and unalterable determinations that, by discussion, A suffered a change.' [249]

[177] Some of the contentions made by the applicant rather belatedly — in written and oral argument — also illustrate the inherent problem with the procedure adopted by it. Two examples are the 'challenge' on PAIA's limitation as to the definition of 'record' [250] and its exemptions on B confidentiality. [251] Parliament was never called upon to meet a case of that nature. We have no idea what it might have said on the constitutional validity of these issues. It is, in any event, imperative that a litigant should make out its case in its founding affidavit, [252] and certainly not belatedly in argument. The exception, of course, is that a point that has not been raised in the affidavits may only be argued or determined by a C court if it is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party. [253]

[178] As we see them, the authorities we cite on the principle of subsidiarity in [161] – [167] and *Democratic Party*[254] are not about a D

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A tangential challenge that does not frontally seek a declaration of constitutional invalidity. The challenge they refer to is one that seeks a declaration of constitutional invalidity. The applicant's case is not a challenge of this nature.

[179] Apparently, the applicant seeks to distinguish this case from those B that insist on the principle of subsidiarity purely on the basis that here the applicant is not seeking to enforce a right in the Bill of Rights; it is rather seeking a mandamus for Parliament to fulfil a constitutional obligation. We cannot agree. The applicant, by the simple stratagem of crying a failure to comply with a constitutional obligation to enact the requisite C legislation, seeks to extricate itself from what the principle of subsidiarity demands. Surely, that cannot be. As we have sought to demonstrate above, [255] an insistence on compliance with the principle of subsidiarity in an instance like the present is not idle. It serves a useful jurisprudential and practical purpose. The minority judgment's approach presents us with a conceptual, if not jurisprudential, difficulty.

D [180] What also reinforces the need to respect the principle of subsidiarity in the context of this application is the minority judgment's recognition of the multiplicity of other persons or entities — besides just political parties — that are excluded by the definition of 'private body' in PAIA. [256] That means PAIA has failed to provide for the enjoyment of an E unimaginable number of rights by countless categories of entities and persons. The approach in the minority judgment lends itself to the possibility of multiple and varied complaints that Parliament has failed to legislate for access to information of one type or another from this or the other type of non-public person or entity that does not fit within the F definition of 'private body'. An approach that is susceptible to these ad hoc and possibly nit-picking individualised claims is problematic. This points us in one direction, and one direction only: if PAIA is the legislation envisaged in s 32(2) of the Constitution, the principle of subsidiarity must definitely apply to this matter. We have already concluded that PAIA G is the envisaged legislation.

[181] For all the above reasons there is absolutely no reason for the principle of subsidiarity not to apply in this matter.

[182] We should not be understood to suggest that the principle of constitutional subsidiarity applies as a hard and fast rule. There are H decisions in which this court has said that the principle may not apply. [257] This court is yet to develop the principle to a point where the inner and outer contours of its reach are clearly delineated. It is not necessary to do that in this case.

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[183] Having concluded that PAIA is the required legislation under A s 32(2) of the Constitution, the next question is whether it has been challenged. If it has not been, the applicant is in breach of the principle of subsidiarity.

Has PAIA been challenged? B

[184] The applicant disavows any challenge to the validity of PAIA. It says it 'does not direct any challenge against the inherent constraints on the application of PAIA. These constraints are logical and legitimate for PAIA to serve its purpose, which is a deliberately limited one.' We accept that this is not a frontal challenge to the validity of PAIA. If anything, it is an attempt to avoid dealing with PAIA. C

[185] The applicant refers to certain constraints in PAIA that, in its view, make it impossible for anyone to access the sort of information it seeks at the intervals that the applicant would prefer. In its written submissions the applicant makes clear that — D

> '*the question of whether political parties are public or private bodies, for the purposes of PAIA, does not arise in the present application*. This case concerns the proper interpretation of s 32 of the Constitution, which distinguishes between the state and another person.' [Emphasis added.]

Curiously, the minority judgment relies heavily on the very issue the E applicant disavows. [258] That is, whether political parties are public or private bodies.

[186] It is exactly because there has been no frontal challenge to the constitutional validity of PAIA that one sees Parliament's refrain, said F almost ad nauseam and without much more, which is that PAIA is the requisite legislation for the protection of the s 32(1) right. In the circumstances, that refrain is understandable. The challenge is too tangential to expect more of Parliament. What else could it have said? It could not have been expected to answer the oblique suggestion of constitutional invalidity by following the usual steps when a Bill of Rights-based frontal challenge has been brought. G

[187] The time-honoured practice in frontal constitutional challenges is for the Minister responsible for the administration of the impugned Act to be cited so as to make the necessary input expected of her or him on the constitutional validity, or lack of it, of the Act. In *Tongoane*[259] this H court reiterated:

> 'On a number of occasions this court has emphasised that when the constitutional validity of an Act of Parliament is impugned, the Minister responsible for its administration must be a party to the proceedings

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A inasmuch as his or her views and evidence tendered ought to be heard and considered.' [260]

[188] The Minister responsible for the administration of PAIA, then known as the Minister of Justice and Constitutional Development, [261] was cited as a respondent. It is worth noting that, although he initially B filed a notice to oppose the application, he has remained supine — not filing a piece of paper thereafter. We are certain that this court would have been most displeased with that attitude had this been a frontal challenge of PAIA. We are not aware that a single member of this court is in any way concerned that the Minister has not participated in these C proceedings.

[189] The Minister's non-participation does not surprise us. He was cited in proceedings concerning an alleged failure by Parliament to comply with a constitutional obligation, not in proceedings challenging the constitutional validity of an Act for whose administration he was D responsible. The relief sought was a battle pre-eminently between the applicant, Parliament and, possibly, political parties. We do not know, unless we were to speculate, what the Minister's attitude would have been had the fray been one for him to enter.

[190] Crucially, in written submissions filed in response to directions E issued by the Chief Justice on 30 September 2014, the applicant says the relief sought is 'directed at Parliament alone'. It adds that the other respondents have been cited 'only by virtue of the interest that they may have in its outcome' and that '(n)o relief is sought against them'. That is

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the nature of application the applicant knows itself to have brought. It is A not a challenge that would have required the Minister or Parliament, for that matter, to defend the constitutional validity of PAIA. The Minister and Parliament were not afforded an opportunity to oppose a challenge to PAIA's constitutional validity.

[191] The 'challenge' that the minority judgment says has been B launched exposes us to the risk that we refer to in [174] above. That is, the possibility of conflicting findings: one that says there has been a failure to comply with a constitutional obligation; and another that says PAIA's shortcomings are constitutionally compliant.

[192] In sum, the applicant does not challenge the constitutional validity C of PAIA, at least not frontally, as envisaged in s 172 of the Constitution. The principle of subsidiarity requires that it should have done so.

Conclusion

[193] Although the application falls under this court's exclusive jurisdiction, D PAIA is the legislation envisaged in s 32(2) of the Constitution. The applicant has not challenged it frontally for being constitutionally invalid. In accordance with the principle of subsidiarity, it ought to have done so, as that principle is applicable to this application. The application must fail.

Costs E

[194] *Biowatch* applies. [262] There should be no order as to costs.

Order

[195] Consequently the following order is made:

The application is dismissed. F

Applicant's Attorneys: *Webber Wentzel*.

First and Second Respondents' Attorneys: *State Attorney*. G

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1 Section 167(4) of the Constitution provides for matters that only this court may decide:
'Only the Constitutional Court may—
(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
(c) decide applications envisaged in section 80 or 122;
(d) decide on the constitutionality of any amendment to the Constitution;
(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
(f) certify a provincial constitution in terms of section 144.'

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(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or

(f) certify a provincial constitution in terms of section 144.'

2 Section 167(6) of the Constitution provides:
'National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
(a) to bring a matter directly to the Constitutional Court; or
(b) to appeal directly to the Constitutional Court from any other court.'

'National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
(a) to bring a matter directly to the Constitutional Court; or

(b) to appeal directly to the Constitutional Court from any other court.'

3 Section 19 of the Bill of Rights is headed 'Political rights' and provides:
'(1) Every citizen is free to make political choices, which includes the right —
(a) to form a political party;
(b) to participate in the activities of, or recruit members for, a political party; and
(c) to campaign for a political party or cause.
(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
(3) Every adult citizen has the right —
(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
(b) to stand for public office and, if elected, to hold office.'

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(a) to form a political party;

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(3) Every adult citizen has the right —
(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office.'

4 Section 32 of the Bill of Rights is headed 'Access to information' and provides:
'(1) Everyone has the right of access to —
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.
(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

'(1) Everyone has the right of access to —
(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

5 2 of 2000.

6 In *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) (2006 (12) BCLR 1399; [2006] ZACC 11) (*Doctors for Life*) para 18, this court noted that 'the case of a law that infringes a right in the Bill of Rights . . . concerns the validity of the impugned law and not the failure to fulfil an obligation'.

7 Majority judgment at [175].

8 Section 236 of the Constitution provides in full:
'**Funding for political parties** — To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.'

'**Funding for political parties** — To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.'

9 103 of 1997.

10 B 67 – 97 (Bill).

11 Annexed to the Speaker's answering affidavit is a document titled 'Announcements, Tabling and Committees Reports' dated 31 October 1997 (Report).

12 *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA 39 (C) (2005 (10) BCLR 995) (*Idasa*).

13 Section 11 of PAIA provides:
'(1) A requester must be given access to a record of a public body if —
(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
(2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.
(3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by —
(a) any reasons the requester gives for requesting access; or
(b) the information officer's belief as to what the requester's reasons are for requesting access.'

'(1) A requester must be given access to a record of a public body if —
(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

(2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.

(3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by —
(a) any reasons the requester gives for requesting access; or

(b) the information officer's belief as to what the requester's reasons are for requesting access.'

14 Section 50 of PAIA provides:
'(1) A requester must be given access to any record of a private body if —
(a) that record is required for the exercise or protection of any rights;
(b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
(2) In addition to the requirements referred to in subsection (1), when a public body, referred to in paragraph *(a)* or *(b)*(i) of the definition of public body in section 1, requests access to a record of a private body for the exercise or protection of any rights, other than its rights, it must be acting in the public interest.
(3) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester or the person on whose behalf the request is made.'

'(1) A requester must be given access to any record of a private body if —
(a) that record is required for the exercise or protection of any rights;

(b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and

(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

(2) In addition to the requirements referred to in subsection (1), when a public body, referred to in paragraph *(a)* or *(b)*(i) of the definition of public body in section 1, requests access to a record of a private body for the exercise or protection of any rights, other than its rights, it must be acting in the public interest.

(3) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester or the person on whose behalf the request is made.'

15 Above n3.

16 *Idasa* above n12 para 7. The Inkatha Freedom Party filed a notice to abide.

17 17 *Idasa* above n12 para 25. See also PAIA's definitions of 'private body' and 'public body' as set out at [102] – [103] below.

18 *Idasa* id.

19 In Mr Motlanthe's answering affidavit in *Idasa*, annexed to My Vote Counts' founding affidavit in this court, he noted that South Africa is a signatory member of the African Union and, in terms of art 10 of the African Union Convention on Preventing and Combating Corruption (see n25 below), it is obliged inter alia to adopt legislative and other measures to 'incorporate the principle of transparency into funding of political parties'. He added: 'Parliament will fulfil this obligation'.

20 *Idasa* above n12 paras 30 – 32.

21 Id para 42.

22 Id para 52.

23 United Nations Convention against Corruption, resolution 58/4 of 31 October 2003 (UN Convention).

24 Article 7(3) of the UN Convention provides:

'Each State Party *shall also consider* taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.'

[Emphasis added.]

'Each State Party *shall also consider* taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.'

[Emphasis added.]

25 African Union Convention on Preventing and Combating Corruption, of 11 July 2013 (AU Convention).

26 Article 10 of the AU Convention provides:

'Each State Party *shall adopt legislative and other measures to:*

(a) Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and

(b) Incorporate the principle of transparency into funding of political parties.' [Emphasis added.]

'Each State Party *shall adopt legislative and other measures to:*

(a) Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and

(b) Incorporate the principle of transparency into funding of political parties.' [Emphasis added.]

27 Above n24 and n26.

28 The applicant also relied on these international conventions and s 7(2) of the Bill of Rights to show that disclosure of parties' private funding is a constitutionally required, corruption-fighting measure, but my conclusion makes it unnecessary to consider these further arguments.

29 In April 2010, then Independent Democrats Member of Parliament, Lance Greyling, successfully lobbied for Parliament's Joint Rules Committee to establish an ad hoc committee to draft legislation regulating private political party funding. While the Chief Whips' Forum outright rejected the legislative proposal, it was nevertheless referred for consideration to the Committee on Private Members' Legislative Proposals and Special Petitions, as well as to the Joint Committee on Ethics and the Presidency. Both committees concluded that the legislation should not proceed, as it was 'not feasible'. On 18 August 2011 the National Assembly adopted a report deciding not to pursue the legislative proposal.

30 Direct reliance on s 32 of the Constitution may be possible where the basis of the attack on legislation giving effect to the right is 'under inclusive' or 'over restrictive' and therefore limits the substance of the right. Therefore, it is 'consistent with constitutional democratic theory to give Parliament the ability to flesh out the detail of a fundamental right, but not to construct the very meaning of the right'. (Footnote omitted). Klaaren & Penfold 'Access to Information' in Woolman et al (eds) *Constitutional Law of South Africa* Service 3 (2011) at 62-64 to 62-65.

31 *Idasa* above n12 para 6.

32 Section 167(4)*(e)* above n1 read in contrast with s 172(2)*(a)* of the Constitution below n145.

33 Majority judgment at [121].

34 *Doctors for Life* above n6 para 9.

35 *King and Others v Attorneys' Fidelity Fund Board of Control and Another* 2006 (1) SA 474 (SCA) (2006 (4) BCLR 462; [2006] 1 All SA 458) paras 14 – 16, as approved in *Doctors for Life* id para 21.

36 *Minister of Police and Others v Premier of the Western Cape and Others* 2014 (1) SA 1 (CC) (2013 (12) BCLR 1405; [2013] ZACC 33) para 20; and *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) (2009 (10) BCLR 1052; [2009] ZACC 15) para 33.

37 *Doctors for Life* above n6 para 253.

38 Id para 254.

39 Section 167(4)*(e)* above n1.

40 *Doctors for Life* above n6 para 19.

41 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC) (1999 (2) BCLR 175; [1998] ZACC 21) (*SARFU*) para 25.

42 *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) ([2009] ZACC 20) (*Women's Legal Centre Trust*) paras 11 – 25.

43 Id.

44 Id para 21.

45 Id para 20.

46 The Bill of Rights specifies that the state must 'respect, protect, promote and fulfil the rights' in it (s 7(2)); it may not discriminate unfairly (s 9(3)); it must assign a legal practitioner in certain circumstances, if substantial injustice would otherwise result (s 28(1)*(h)* [civil proceedings affecting a child], s 35(2)*(c)* and s 35(3)*(g)* [detained and accused persons]); and the state bears specified duties in relation to those detained under a state of emergency (s 37(6)*(h)*, (7) and (8)).

47 Id at s 25(5) reads: 'The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.'

48 Id at s 26(2).

49 Id at s 27(1)*(a)*.

50 Id at s 27(1)*(b)*.

51 Id at s 27(1)*(c)*, read with s 27(2).

52 Id at s 29(1)*(b)*.

53 Id at s 9(4) reads:

'No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.'

'No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.'

54 Id at s 32, set out above n4.

55 Id at s 33 provides in part:

'(3) National legislation must be enacted to give effect to these rights, and must —

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.'

'(3) National legislation must be enacted to give effect to these rights, and must —

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.'

56 Id at s 25(6) provides an entitlement to legally secure tenure or to comparable redress for persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices.

57 The grammatical form is the same as that in s 23(5) of the Bill of Rights, which provides in part that '(n)ational legislation may be enacted to regulate collective bargaining'. The provision is permissive and creates no obligation. The full terms of s 23(5) are set out in n114 below.

In similar vein to s 23(5) of the Bill of Rights, s 23(6) provides:

'National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this

Chapter the limitation must comply with section 36(1).'

In similar vein to s 23(5) of the Bill of Rights, s 23(6) provides:

'National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36(1).'

58 Section 43*(a)* of the Constitution provides that, in the Republic, the legislative authority 'is vested in Parliament', as set out in s 44 of the Constitution. While it is true that Parliament is also the enacting agent of the 'legislative measures' that the Bill of Rights elsewhere requires, those measures are enacted by Parliament as part of a range of legislative and non-legislative measures that the state, as a whole, must take in fulfilment of the Bill of Rights.

59 *Women's Legal Centre Trust* above n42 para 21. See also s 7(2) of the Bill of Rights.

60 Section 19 of the Bill of Rights.

61 *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) ([2005] 2 All SA 225) para 13.

62 Id.

63 *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) ([2006] 4 All SA 231) para 30.

64 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253; [1996] ZACC 26) (*First Certification* judgment) para 186.

65 Section 47(3)*(c)* of the Constitution provides (s 62(4)*(d)* being to the same effect in the case of the National Council of Provinces):

'(3) A person loses membership of the National Assembly if that person —

. . .

(c) ceases to be a member of the party that nominated that person as a member of the Assembly, unless that member has become a member of another party in accordance with Schedule 6A.'

In the case of the National Council of Provinces, s 62(4)*(d)* of the Constitution similarly provides:

'(4) A person ceases to be a permanent delegate if that person —

. . .

(d) ceases to be a member of the party that nominated that person and is recalled by that party.'

In the case of provincial legislatures, s 106(3)*(c)* similarly provides in relevant part:

'(3) A person loses membership of a provincial legislature if that person —

. . .

(c) ceases to be a member of the party that nominated that person as a member of the legislature, unless that member has become a member of another party in accordance with Schedule 6A.'

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. . .

(c) ceases to be a member of the party that nominated that person as a member of the legislature, unless that member has become a member of another party in accordance with Schedule 6A.'

66 Section 86(1) of the Constitution provides in relevant part:

'At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.'

'At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.'

67 Section 91 of the Constitution provides in relevant part:

'(3) The President —

(a) must select the Deputy President from among the members of the National Assembly;

(b) may select any number of Ministers from among the members of the Assembly; and

(c) may select no more than two Ministers from outside the Assembly.'

'(3) The President —

(a) must select the Deputy President from among the members of the National Assembly;

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68 *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) ([2012] ZACC 31) (*Ramakatsa*).

69 Id para 67.

70 Id para 68.

71 Id para 66.

72 Id para 68.

73 Id para 66.

74 Id para 67.

75 In *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) (1996 (4) BCLR 449; [1996] ZACC 2) para 67 this court explained that an integrated approach to interpreting the right to privacy eschews 'an abstract individualistic approach'. Because no right is absolute, 'each right is always already limited by every other right accruing to another citizen'. Hence —

'(p)rivacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly'.

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76 *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) (2012 (2) BCLR 181; [2011] ZACC 32) (*M & G Media Ltd*) para 10.

77 Section 39.

78 Section 36.

79 Section 1*(d)*.

80 Section 16.

81 *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) (2015 (3) BCLR 298; [2015] ZACC 1) para 124.

82 Id paras 122 – 123.

83 *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC) (2013 (1) BCLR 14; [2012] ZACC 27) para 64.

84 In *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) the court observed in para 11 that 'the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless'.

85 424 US 1 (1976) at 66 – 67.

86 The principle of subsidiarity derives from Roman Catholic Canon Law, dating back to the First Vatican Council in 1869 – 1870, where it entails that human affairs are handled best at the lowest possible level of management. See Murray 'The Principle of Subsidiarity and the Church' (1995) *Australasian Catholic Record* 163 at 164 – 5 and 171. In the European Community, subsidiarity entails that Community organs should act only where action cannot be more effectively taken at member state level. Subsidiarity thus tries to devolve as much power as possible to the constituent states. The principle seeks to recognise the diversity of national traditions with Europe, acknowledging that many matters are best dealt with below Community level. See Critchley *Europe and Industry: The Integration of the European Union* (e-book 1995 available at https://protect-za.mimecast.com/s/5xDzBlFpN34Cd vol 1 at 117 – 34; and Sibanda 'Beneath it all lies the Principle of Subsidiarity: The Principle of Subsidiarity in the African and European Regional Human Rights Systems' (2007) 40 *Comparative and International Law Journal of Southern Africa* 425 at 425 and 431. It is in this sense that the word 'subsidiarity' is used in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae)* 2008 (4) SA 572 (W) ([2008] 2 All SA 298) (*Gauteng Development Tribunal*) para 53 and fn 68 (recording the argument that the sphere of government where the specific function would be most appropriate must inform the understanding of functional areas of concurrent constitutional competence).

87 See *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) (2002 (2) SACR 105; 2002 (7) BCLR 663; [2002] ZACC 6) para 22 and *Govender v Minister of Safety and Security* 2000 (1) SA 959 (D) at 969C.
88 See s 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, providing for the jurisdiction of South African courts in respect of crimes committed under international criminal law as codified in the Rome Statute. See also the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* 2002 ICJ 3 para 59, Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, noting that a state contemplating bringing criminal charges based on universal jurisdiction 'must first offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned'. See Langer 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105 *American Journal of International Law* 1 – 49.
89 *National Commissioner of Police v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) (2015 (1) SACR 255; 2014 (12) BCLR 1428; [2014] ZACC 30) paras 61 – 64 and *National Commissioner, South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* 2014 (2) SA 42 (SCA) ([2014] 1 All SA 435; [2013] ZASCA 168) para 68. As this court explained, ordinarily, there must be a substantial and true connection between the subject-matter and the source of the jurisdiction. And once jurisdiction is properly founded, investigating international crimes committed abroad is permissible only if the country with jurisdiction is unwilling or unable to prosecute, and only if the investigation is confined to the territory of the investigating state.
90 Schedule 4 of the Constitution, 'Functional areas of concurrent national and provincial legislative competence'. See also *Gauteng Development Tribunal* above n86; on appeal neither the Supreme Court of Appeal (*Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA) (2010 (2) BCLR 157; [2009] ZASCA 106)) nor this court (*Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) (2010 (9) BCLR 859; [2010] ZACC 11)) used the term 'subsidiarity'.
91 *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) ([2009] ZACC 33) (*Nokotyana*) para 50, stating that '(w)here the Constitution contains both a specific right, and a more general right, it is appropriate first to invoke the specific right', which was quoted and applied in *Grancy Property Ltd v Gihwala* [2014] ZAWCHC 97 (*Grancy*) para 198. The label 'subsidiarity' is not used in *Nokotyana*, but is used in *Grancy*.
92 Section 101(5) of the interim Constitution.
93 Section 98(2) of the interim Constitution.
94 *S v Mhlungu and Others* 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793; [1995] ZACC 4) para 59, approved in *Zantsi v Council of State, Ciskei, and Others* 1995 (4) SA 615 (CC) (1995 (10) BCLR 1424; [1995] ZACC 9) para 3.
95 See Du Plessis 'Subsidiarity: What's in the Name for Constitutional Interpretation and Adjudication?' (2006) *Stellenbosch Law Review* 207 – 31, where Du Plessis calls the use of the word in this context 'adjudicative subsidiarity'.
96 See *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995; [2001] ZACC 22) paras 33 – 49.
97 Section 39(2) of the Bill of Rights.
98 Id.
99 See Klare 'Legal Subsidiarity and Constitutional Rights: A response to AJ van der Walt' (2008) 129 *Constitutional Court Review* vol 1 at 140, in which he aptly notes:

> 'When Parliament "gives effect" to a constitutional right it may task itself with giving the right and enforceable floor of protections and implementations. In practice, it may also erect a ceiling and walls around the right. At a certain point "giving effect" to a constitutional right slides into defining the right by setting out its metes and bounds.'

Thus, he continues:

> 'The constitutional adequacy of the relief afforded to an effect giving statute is not, strictly speaking, a question subsidiarity theory addresses — it is a substantive problem of constitutional law that must be decided by the courts.'

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Thus, he continues:

'The constitutional adequacy of the relief afforded to an effect giving statute is not, strictly speaking, a question subsidiarity theory addresses — it is a substantive problem of constitutional law that must be decided by the courts.'

100 The doctrine's emergence may be traced through the decisions of this court. In *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC) (1998 (7) BCLR 855; [1998] ZACC 9) (*Democratic Party*) para 62, where the claimant relied on the invalidity of a statutory provision as the basis for claiming relief, but omitted to seek a declaration that it was invalid, Yacoob J on behalf of the court pointed out that 'considerable difficulties stand in the way of the adoption of a procedure which allows a party to obtain relief which is in effect consequent upon the invalidity of an Act of Parliament without any formal declaration of invalidity of that provision'. *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe and Another* 2003 (4) SA 584 (CC) (2003 (8) BCLR 825; [2003] ZACC 8) (*Ingledew*) para 22 noted this finding, but held that it was not directly on point. More directly, *Ingledew* noted at paras 24 and 29 that *Naptosa and Others v Minister of Education, Western Cape, and Others* 2001 (2) SA 112 (C) ((2001) 22 *ILJ* 889; 2001 (4) BCLR 388) (*Naptosa*) and other cases had 'cast doubt on the correctness of the proposition that a litigant can rely upon the Constitution, where there is a statutory provision dealing with the matter without challenging the constitutionality of the provision concerned' but left the question open. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15) (*Bato Star*) paras 21 – 26 followed. It was the first decision to give explicit recognition to the doctrine of subsidiarity, though the word was not used. In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) (2006 (1) BCLR 1; [2005] ZACC 14) (*New Clicks*) the judgments of Chaskalson CJ and Ngcobo J alluded to the principle. Ngcobo J now endorsed *Naptosa* paras 436 – 437. In *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) (2007 (8) BCLR 863; (2007) 28 *ILJ* 1909; [2007] 9 BLLR 785; [2007] ZACC 10) (*Sandu*) a unanimous court held that the approach in *Naptosa* and *New Clicks* was correct. In *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) (2008 (2) BCLR 99; [2007] ZACC 21) (*Pillay*) para 40 Langa CJ, on behalf of the majority, citing *New Clicks*, *Sandu* and *Naptosa*, upheld the principle. In *Mbatha v University of Zululand* 2014 (2) BCLR 123 (CC) ((2014) 35 *ILJ* 349; [2014] 4 BLLR 307; [2013] ZACC 43) para 172 Jafta J (Moseneke DCJ and Nkabinde J concurring) alluded to 'the principle of constitutional subsidiarity' in holding that a claim by an applicant, who alleged he was employed by the respondent, engaged a constitutional issue because he asserted a breach of the duty to pay his salary, a right enshrined in a statute, the Basic Conditions of Employment Act 75 of 1997, which was enacted to fulfil a constitutional right, the right to fair labour practices. In *Sali v National Commissioner of the South African Police Service and Others* 2014 (9) BCLR 997 (CC) ([2014] 9 BLLR 827; (2014) 35 *ILJ* 2727; [2014] ZACC 19) para 2 and fn 2 Jafta J, in a minority judgment, pointed out that '(w)here there is legislation giving effect to a right in the Bill of Rights, a claimant is not permitted to rely directly on the Constitution' (footnoting that this is known as the principle of subsidiarity). Jafta J also pointed out that because s 6(1) of the Employment Equity Act 55 of 1998 gives effect to s 9(3) of the Bill of Rights, the applicant was not permitted to rely directly on the Constitution.
101 *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (2010 (3) BCLR 239; [2009] ZACC 28) (*Mazibuko*).
102 Section 27 of the Bill of Rights provides:

> '(1) Everyone has the right to have access to —
> *(a)* health care services, including reproductive health care;
> *(b)* sufficient food and water; and
> *(c)* social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
> (3) No one may be refused emergency medical treatment.'

'(1) Everyone has the right to have access to —
(a) health care services, including reproductive health care;

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(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.'

103 108 of 1997.
104 *Mazibuko* above n101 para 73.
105 Id. Even though the applicants challenged the City's water policy as unreasonable, they omitted to attack the regulation. Since the court found that the policy was in any event not unreasonable, it did not have to decide whether the principle applied.
106 Section 27(1)*(b)* of the Bill of Rights above n102.
107 *Mazibuko* is very different from this case. First, there was no challenge to the validity of existing legislation. Second, it invoked no express obligation on a specific organ of state — Parliament — to enact national legislation. Section 27(1)*(b)* of the Bill of Rights does not contain an obligation of this sort.
108 Act 66 of 1995.
109 Section 23(1) provides that '(e)veryone has the right to fair labour practices'.
110 *Naptosa* above n100 para 123.
111 Id para 100.
112 *New Clicks* above n100 para 436.
113 *Sandu* above n100 para 51.
114 Section 23(5) provides:

> 'Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).'

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collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).'
115 *Sandu* above n100 para 51.
116 Id para 52.
117 4 of 2000.
118 *New Clicks* above n100.
119 *Sandu* above n100.
120 *Naptosa* above n100.
121 *Pillay* above n100 para 40.
122 *Bato Star* above n100.
123 3 of 2000 (PAJA).
124 In *Bato Star* above n100 para 26 this court wrote: '(t)o the extent, therefore, that neither the High Court nor the SCA considered the claims made by the applicant in the context of PAJA, they erred'.
125 Id above n100 para 25.
126 Id. The court added:
'It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.'

'It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.'
127 *New Clicks* above n100.
128 Id para 96.
129 Id para 436.
130 Id para 437.
131 *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) (2013 (1) BCLR 55; [2012] ZACC 21) (*PFE International*) para 1.
132 Id para 4, citing *Mazibuko* above n101; and *Pillay*, *Sandu* and *Bato Star* above n 100.
133 *New Clicks* above n100 para 96. Hence Chaskalson CJ quoted Hoexter para 97, relying on the constitutional scheme itself, where it was asserted that it 'follows logically from the fact that the PAJA gives effect to the constitutional rights'. Therefore, PAJA cannot simply be circumvented by resorting directly to s 33.
134 Id para 437.
135 *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) ((2003) 24 *ILJ* 95; 2003 (2) BCLR 154; [2002] ZACC 27) para 14.
136 *Sandu* above n100 para 52, which Langa CJ quoted with approval in *Pillay* above n100 para 40.
137 *Naptosa* above n100 at 123B – C, endorsed by Ngcobo J in *New Clicks* above n100 para 436.
138 *Idasa* above n12 para 17.
139 Id para 19.
140 *Doctors for Life* above n6 para 16.
141 *Mazibuko* above n101 para 73.
142 See [61] – [62] above. Subsidiarity finds its clearest application in two groups of cases. The first is when the legislation evinces a purpose to codify a right in the Bill of Rights. Instances already established in the jurisprudence of this court are administrative justice and PAJA, and fair employment rights and the LRA. This court has held that both of these statutes must be resorted to first, and that, absent an invalidity challenge, the litigant cannot invoke the Constitution. The second clear instance is where Parliament adopts legislation in fulfilment of social and economic rights. The Bill of Rights obliges the state to take 'reasonable legislative and other measures' to fulfil these rights: see ss 24*(b)*, 25(5), 26(2) and 27(2) of the Constitution. In the foreground here is the institutional deference the principle accords to the state or Parliament and their task in the scheme of the Constitution. The reason is plain. Parliament, as part of the state, has adopted a legislative measure it considers reasonable in order to fulfil a social and economic right. The judicial branch owes it to Parliament to require a litigant seeking to enforce the right to rely on the legislation first, or establish through constitutional attack that its legislative measure is not reasonable. For this reason, unless a litigant successfully attacks Parliament's judgment in enacting the legislation, the legislation must stand as the basis for enforcing the right.
143 *Pillay* and *Sandu* above n100.
144 The applicant squarely attacks the constitutional breadth of PAIA on the basis that Parliament has failed to fulfil the s 32(2) obligation because it has not enacted national legislation to require transparency in the private funding of political parties. It asserts that PAIA gives effect 'only to one aspect of the right of access to information, namely the right to gain access, upon specific request, to specific records held by specific bodies at specific times'. The legislation Parliament has failed to enact is fundamentally different from PAIA — it would replace unregulated secrecy (which PAIA permits) with regulated transparency (which PAIA fails to do). In applying alternatively for direct access, the applicant points out that in *Idasa* the High Court held that PAIA does not enable citizens to access parties' private funding records. In response to this attack, the Speaker's opposing affidavit squarely defends the constitutional adequacy of PAIA. From the outset Parliament's defence is that PAIA 'fully satisfies the requirements of section 32(2)'. The Speaker unequivocally supports the finding in *Idasa* that PAIA does not give access to information about the private funding of political parties, since that information is not required for the exercise or protection of any right. But even if the applicant is correct that this information is required for rights protection, the Speaker says, this just means that PAIA in fact does afford the required access. Under the heading 'PAIA is adequate', the Speaker asserts that 'there already exists legislation that gives effect to the very right that the applicant claims to champion', namely PAIA. A central theme of the opposing affidavit is the Speaker's insistence that the applicant is wrong that PAIA 'does not enable citizens to access the records of the private funding of political parties'. On the contrary, legislation already exists, in the form of PAIA, for the purpose of requiring political parties to disclose who their private funders are. PAIA is precisely the legislation that requires disclosure of parties' private funding, though that information is not 'required' (as *Idasa* rightly found) to effectively exercise the right to vote. PAIA is an adequate constitutional tool by which accurate information of the sort the applicant seeks can be obtained. *Idasa* did not dismiss the application on the basis that the relief sought was incompatible with PAIA — it rejected the s 19 political rights argument. The applicant has thus failed to show any inadequacy in PAIA. The core proposition of the applicant's written argument is that Parliament has failed to fulfil its s 32(2) obligation because PAIA does not require disclosure of donations to political parties and, without specific legislation regulating the creation and disclosure of such records, the applicant can never obtain the relief it seeks. The applicant attacks PAIA's distinction between public and private bodies and the uses to which the Speaker puts it in characterising political parties' obligations. Under the heading: 'PAIA does not require disclosure of donations to political parties', the applicant attacks PAIA's ambit in detail. It inveighs against PAIA's limitations as to 'records', its confidentiality exemptions, its confinement to records requested, and the impossible evidentiary burden created by the mandatory disclosure overrides provisions of s 70. Parliament's written argument relies on the subsidiarity principle to characterise the applicant's reading of PAIA as 'conveniently self-defeatist' and insists that PAIA gives 'ample effect to the right of access to information'. If *Idasa* were wrong in finding either that political parties are private, or that the information sought is not required for the exercise of the s 19 rights, then the information is accessible under PAIA. Whether political parties are private actors or an extension of the state, PAIA is the legislation Parliament enacted to give effect to the right of access to political parties' private funding for the exercise of the right to vote. Nowhere in the answering affidavit does the Speaker say that PAIA does not permit disclosure of parties' private donations — she says only that s 19 does not confer that right. The applicant's argument on 'records' under PAIA is incorrect, because the applicant does not aver that political parties do not keep records of private funding.
145 Section 172(2)*(a)* provides:
'The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.'

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146 *Doctors for Life* above n6 para 18.
147 Id para 16.
148 See the majority judgment at [122], [159] and [181].
149 Majority judgment at [122] and [186].
150 *Democratic Party* above n100 paras 3 and 63.
151 Section 16(5) of the Local Government Transition Act 209 of 1993.
152 See s 56 of the Higher Education Act 101 of 1997; s 110 of the Labour Relations Act 66 of 1995; ss 2 and 7 of the Legal Deposit Act 54 of 1997; s 71 of the Prevention of Organised Crime Act 121 of 1998; s 142 of the National Water Act 36 of 1998; s 31 of the Nuclear Energy Act 46 of 1999; ss 21, 28 and 30 of the Mineral and Petroleum Resources Development Act 28 of 2002; s 3 of the Collective Investment Schemes Control Act 45 of 2002; s 2 of the Home Loan and Mortgage Disclosure Act 63 of 2000 (whose preamble expressly alludes to s 32(1) of the Bill of Rights); s 72 of the National Credit Act 34 of 2005; ss 31 and 187 of the Companies Act 71 of 2008; as well as s 2 of the Protection of Personal Information Act 4 of 2013.
153 This, again, the applicant made expressly clear in its founding affidavit:
'Parliament's obligation under section 32(2) of the Constitution did not begin and end with the enactment of PAIA. PAIA gives effect to only one aspect of the right of access to information. . . . The required legislation as set out in this affidavit is fundamentally different from PAIA in its nature and purpose.'
The applicant also quoted approvingly *Idasa*'s finding at para 58 that 'private donations to political parties ought to be regulated by way of specific legislation'. Finally, it noted that its application in terms of s 167(4)*(e)* is entirely separate from one that 'test(s) the constitutional validity of an Act of Parliament' under s 172, as there is simply no Act of Parliament to test.

'Parliament's obligation under section 32(2) of the Constitution did not begin and end with the enactment of PAIA. PAIA gives effect to only one aspect of the right of access to information. . . . The required legislation as set out in this affidavit is fundamentally different from PAIA in its nature and purpose.'
154 Majority judgment at [122].
155 Majority judgment at [168] – [170].
156 See s 172(2)*(a)* of the Constitution above n145.
157 See ss 1, 11 and 50 of PAIA.

158 Id at ss 11, 18 and 50. Section 15 allows for the 'automatic' availability of certain records, but this is exceptional.
159 Id at s 18(2)*(a)*(i).
160 Section 15 of PAIA does provide for departments to make categories of records automatically available.
161 By contrast, PAJA, which codifies the right to just administrative action, purports to contain a full definition of administrative action. Section 1 of PAJA envisages an exhaustive, careful and minutely detailed definition. In addition PAJA defines 'decision'. There is no administrative action, and there are no administrative decisions, to which PAJA doesn't apply.
162 Section 1 of PAIA provides that, unless the context otherwise indicates, 'record' of, or in relation to a public or private body, means —
'any recorded information—
(a) regardless of form or medium;
(b) in the possession of or under the control of that public or private body, respectively; and
(c) whether or not it was created by that public or private body, respectively'.

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(a) regardless of form or medium;

(b) in the possession of or under the control of that public or private body, respectively; and

(c) whether or not it was created by that public or private body, respectively'.

163 Section 21 of PAIA, entitled 'Preservation of records until final decision on request', provides:
'If the information officer of a public body has received a request for access to a record of the body, that information office must take the steps that are reasonably necessary to preserve the record, without deleting any information contained in it, until the information officer has notified the requester concerned of his or her decision in terms of section 25 and—
(a) the periods for lodging an internal appeal, an application with a court or an appeal against a decision of that court have expired; or
(b) that internal appeal, application or appeal against a decision of that court or other legal proceedings in connection with the request has been finally determined, whichever is the later.'

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(b) that internal appeal, application or appeal against a decision of that court or other legal proceedings in connection with the request has been finally determined, whichever is the later.'

164 See, for instance, ss 1, 11(2), 16, 20(1), 21, 28(1) 34 – 35, 37, 39, 41 – 43, 59, 63, 64(1)*(b)* and (2), 65, 68(1)*(b)* and *(c)*, 69(1) and (2), and 83(1).
165 Id at s 1.
166 On the meaning of 'the state', see *Ingonyama Trust v Ethekwini Municipality* 2013 (1) SA 564 (SCA) paras 5 – 7.
167 Unless the context indicates otherwise, 'organ of state' is defined in s 239 of the Constitution as —
'(a) any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution —
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation,
but does not include a court or a judicial officer'.
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(b) any other functionary or institution —

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer'.
168 PAJA provides that, in certain circumstances, private entities may also for its purposes be organs of state. See *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) (2014 (6) BCLR 641; [2014] ZACC 12) (*Allpay No 2*) paras 52 – 53. Section 32 of the Bill of Rights, too, envisages overlaps between private and public entities in a way that PAIA's definitions do not.
169 Section 8(2). See also s 8(3) which provides that:
'When applying a provision of the Bill of the Rights to a natural or juristic person in termsof subsection (2), a court—
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).'
Further, s 8(4) provides that:
'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'

'When applying a provision of the Bill of the Rights to a natural or juristic person in termsof subsection (2), a court—
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).'

'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'
170 Section 38, entitled 'Enforcement of rights', provides:
'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are —
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.'

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(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.'

171 *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) ([2012] ZACC 28) paras 36 – 37 and *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1; [1995] ZACC 13) para 165.
172 See ss 25(6) and (7) and 31 of the Bill of Rights ('community'), and s 38*(c)* ('group or class').
173 Above n168. Section 32 thus acknowledges overlaps between private and public in a way that PAIA's definitions do not.
174 Thus s 8 of PAIA, entitled 'Part applicable when performing functions as public or private body', provides:
'(1) For the purposes of this Act, a public body referred to in paragraph *(b)*(ii) of the definition of public body in s 1 or a private body —
(a) may be either a public body or a private body in relation to a record of that body; and
(b) may in one instance be a public body and in another instance be a private body depending on whether that record relates to the exercise of a power or performance of a function as a public body or as a private body.
(2) A request for access to a record held for the purpose or with regard to the exercise of a power or the performance of a function —
(a) as a public body, must be made in terms of section 11; or
(b) as a private body, must be made in terms of section 50.
(3) The provisions of Parts 1, 2, 4, 5, 6 and 7 apply to a request for access to a record that relates to a power or function exercised or performed as a public body.
(4) The provisions of Parts 1, 3, 4, 5, 6 and 7 apply to a request for access to a record that relates to a power or function exercised or performed as a private body.'

'(1) For the purposes of this Act, a public body referred to in paragraph *(b)*(ii) of the definition of public body in s 1 or a private body —
(a) may be either a public body or a private body in relation to a record of that body; and

(b) may in one instance be a public body and in another instance be a private body depending on whether that record relates to the exercise of a power or performance of a function as a public body or as a private body.

(2) A request for access to a record held for the purpose or with regard to the exercise of a power or the performance of a function —
(a) as a public body, must be made in terms of section 11; or

(b) as a private body, must be made in terms of section 50.

(3) The provisions of Parts 1, 2, 4, 5, 6 and 7 apply to a request for access to a record that relates to a power or function exercised or performed as a public body.

(4) The provisions of Parts 1, 3, 4, 5, 6 and 7 apply to a request for access to a record that relates to a power or function exercised or performed as a private body.'

175 Section 1 of PAIA.
176 Id at s 50(1)*(a)*.
177 There are three categories of juristic persons: associations established by separate legislation; associations incorporated in terms of special or enabling legislation; and associations that comply with the common-law requirements for establishment of juristic persons. The common law requires that the association remains in existence, irrespective of a change in membership, functions as a bearer of rights, duties, and capacities separate from its individual members, and that its object is not for the acquisition of gain (if so, it must register as a company). See Kruger & Skelton (eds) *The Law of Persons in South Africa* (OUP, Cape Town 2010) at 17 – 18. All three categories of juristic persons require the community, association or party to have rights and powers different from the individuals that make the community, association or party. See *Wilken v Brebner and Others* 1935 AD 175 at 182. This court held that '(i)t is trite that a company is a legal entity altogether separate and distinct from its members, that its continued existence is independent of the continued existence of its members, and that its assets are its exclusive property.' (Footnote omitted). See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) (2002 (7) BCLR 702; [2002] ZACC 5) para 43. In *Weare and Another v Ndebele NO and Others* 2009 (1) SA 600 (CC) (2009 (4) BCLR 370; [2008] ZACC 20) para 53 this court held that '(t)he most relevant characteristics of a juristic person are its separate legal personality and the limited liability of the natural persons involved'. See also *Webb & Co Ltd v Northern Rifles; Hobson & Sons v Northern Rifles* 1908 TS 462; and *Morrison v Standard Building Society* 1932 AD 229 at 238.
178 51 of 1996.
179 Id at s 1.
180 Id at s 15(1) reads:
'The chief electoral officer shall, upon application by a party in the prescribed form, accompanied by the items mentioned in subsection (3), register such party in accordance with this Chapter.'

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181 Id at s 16 specifies the '(p)rohibition on registration of [a] party under certain circumstances'. The legal form and nature of the entity are not among them. Section 16 reads:
'(1) The chief electoral officer may not register a party in terms of section 15 or 15A, if —
(a) fourteen days have not elapsed since the applicant has submitted to the chief electoral officer proof of publication of the prescribed notice of application in the *Gazette* in the case of an application referred to in section 15 or in a newspaper circulating in the municipal area concerned in the case of an application referred to in section 15A.
(b) a proposed name, abbreviated name, distinguishing mark or symbol mentioned in the application resembles the name, abbreviated name, distinguishing mark or symbol, as the case may be, of any other registered party to such an extent that it may deceive or confuse voters; or
(c) a proposed name, abbreviated name, distinguishing mark or symbol mentioned in the application or the constitution of the party or the deed of foundation mentioned in section 15 or 15A contains anything —
(i) which portrays the propagation or incitement of violence or hatred or which causes serious offence to any section of the population on the grounds of race, gender, sex, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language; or
(ii) which indicates that persons will not be admitted to membership of the party or welcomed as supporters of the party on the grounds of their race, ethnic origin or colour.
(2) Any party which is aggrieved by a decision of the chief electoral officer to register or not to register a party, may within 30 days after the party has been notified of the decision, appeal against the decision to the Commission in the prescribed manner.
(3) The Commission shall in the case of such an appeal enquire into or consider the matter and may, subject to subsection (4), confirm or set aside the decision of the chief electoral officer.
(4) In considering such an appeal against the refusal to register a party in terms of subsection (1)*(a)* the Commission —
(a) shall take into account the fact that the party which is associated with the name, abbreviated name, distinguishing mark or symbol, as the case may be, for the longest period, should prima facie be entitled thereto;
(b) may, for the purposes of paragraph *(a)* —
(i) afford the parties concerned an opportunity to offer such proof, including oral evidence or sworn or affirmed statements by any person which, in the opinion of the Commission, could be of assistance in the expeditious determination of the matter; and
(ii) administer an oath or affirmation to any person appearing to testify orally before it.'

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(i) afford the parties concerned an opportunity to offer such proof, including oral evidence or sworn or affirmed statements by any person which, in the opinion of the Commission, could be of assistance in the expeditious determination of the matter; and

(ii) administer an oath or affirmation to any person appearing to testify orally before it.'

182 See s 30 of the Companies Act 71 of 2008.
183 *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* 2015 (6) BCLR 660 (CC) ([2015] ZACC 8) paras 22 – 23 and *Allpay No 2* above n168 paras 52 – 53.
184 *Ramakatsa* above n68.
185 Section 19(1)*(b)* of the Constitution.
186 *Ramakatsa* above n68 paras 14 – 16 where Yacoob J states, with concurrence by all members of the court, that —
'the Constitution confers upon all citizens the right to participate in the activities of a political party. The appellants contended in the application for leave to appeal that this right has been denied to them or has been infringed because the irregularities that were complained of went so far as to prevent them from participating in the activities of the ANC appropriately and properly. Their argument was that their right to participate in a political party included a right to be governed by properly elected members of the ANC in the province.
The system of proportional representation provided for in our Constitution means that a political party is entitled to representation in Parliament in proportion

to the number of votes it obtains in an election relative to the total number of votes cast. In other words, of the 400 members of the National Assembly, a political party that succeeds in securing the vote of, say, 60% of the electorate will have 240 of 400 seats in the National Assembly.
I do not think that the Constitution could have contemplated political parties could act unlawfully. On a broad purposive construction, I would hold that the right to participate in the activities of a political party confers on every political party the duty to act lawfully and in accordance with its own constitution. This means that our Constitution gives every member of every political party the right to exact compliance with the constitution of a political party by the leadership of that party.'

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I do not think that the Constitution could have contemplated political parties could act unlawfully. On a broad purposive construction, I would hold that the right to participate in the activities of a political party confers on every political party the duty to act lawfully and in accordance with its own constitution. This means that our Constitution gives every member of every political party the right to exact compliance with the constitution of a political party by the leadership of that party.'

187 *Ramakatsa* above n68 para 68.
188 *Idasa* above n12 para 23 held that, for purposes of their donations records, political parties are not 'public bodies', but 'private bodies', as defined in PAIA. To the extent that this conclusion overlooks considerations set out in the text, it appears to me mistaken.
189 *Idasa* id.
190 See above [6].
191 *Doctors for Life* above n6 para 27.
192 Id para 124.
193 The 'failure' is, of course, said to be in the limited sense that there is no legislation that makes it possible for citizens to have access to information on the private funding of political parties for the purpose of exercising the right to vote contained in s 19(3) of the Constitution, and that no national legislation currently requires this information to be publicly accessible.
194 Minority judgment at [67].
195 We use 'alleged' consciously because at this stage we have no idea what results a challenge of the constitutional validity of PAIA might yield.
196 Above n4.
197 Our preference for what the minority judgment terms, at [22], a 'sparser' route is in no way a divergence from the jurisprudence laid down by this court on the interplay between ss 172 and 167(4) of the Constitution. In this regard see *Women's Legal Centre Trust* above n42 paras 11 – 20; *Doctors for Life* above n6 para 21; and *SARFU* above n41.
198 *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) ((2008) 29 *ILJ* 73; 2008 (3) BCLR 251; [2008] 2 BLLR 97; [2007] ZACC 23) para 169.
199 *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) (2010 (1) BCLR 35; [2009] 12 BLLR 1145; [2009] ZACC 26) para 75.
200 *Chirwa* above n198 para 155.
201 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) (2008 (8) BCLR 771; [2008] ZACC 6) (*Independent Newspapers*) para 23.
202 Id para 156.
203 *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) (2009 (11) BCLR 1075; [2009] ZACC 21) para 75.
204 *PFE International* above n131 para 4.
205 *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) (2013 (7) BCLR 727; [2013] ZACC 9) (*Agri SA*) para 85.
206 For instance, see *Kerkhoff v Minister of Justice and Constitutional Development and Others* 2011 (2) SACR 109 (GNP) para 17 where the High Court said:
'As far as s 32 of the Constitution is concerned, the applicant's counsel did not provide any authority for the proposition that the applicant is entitled to simply rely on this section in the Constitution, and ignore the provisions of PAIA — which was enacted to give effect to s 32 of the Constitution.'
And *Koalane and Another v Senkhe and Others* [2012] ZAFSHC 165 para 7 where the High Court said:
'The national legislation envisaged in s 32(2) is [PAIA]. It is clear from the long title, the preamble and s 9 of PAIA that the object thereof is to give effect to the constitutional right to access to information in terms of both s 32(1)*(a)* and *(b)*.'

'As far as s 32 of the Constitution is concerned, the applicant's counsel did not provide any authority for the proposition that the applicant is entitled to simply rely on this section in the Constitution, and ignore the provisions of PAIA — which was enacted to give effect to s 32 of the Constitution.'

And *Koalane and Another v Senkhe and Others* [2012] ZAFSHC 165 para 7 where the High Court said:

'The national legislation envisaged in s 32(2) is [PAIA]. It is clear from the long title, the preamble and s 9 of PAIA that the object thereof is to give effect to the constitutional right to access to information in terms of both s 32(1)*(a)* and *(b)*.'
207 See majority judgment at [166] below.
208 Section 33 of the Constitution provides:
'(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must —
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.'

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209 *Bato Star* above n100.
210 In *First Certification judgment* above n64, the transitional provisions were tested and this court. At paras 83 and 86 it was held that —
'(t)he transitional measure is obviously a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.
. . .
'The legislature is far better placed than courts to lay down the practical requirements for the enforcement of the right and the definition of its limits.'
[Footnotes omitted.]

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. . .

'The legislature is far better placed than courts to lay down the practical requirements for the enforcement of the right and the definition of its limits.' [Footnotes omitted.]

211 PAIA was assented to on 2 February 2000 (Promotion of Access to Information Act 2 of 2000, GN 95 *GG* 20852, 3 February 2000) and PAJA was assented to on 3 February 2000 (Promotion of Administrative Justice Act 3 of 2000, GN 96 *GG* 20853, 3 February 2000).
212 See *First Certification judgment* above n64 paras 82 – 83 and 86. See also item 23(3) in sch 6, which provides:
'Sections 32(2) and 33(3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.'

'Sections 32(2) and 33(3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.'

213 Minority judgment at [85].
214 We choose a few examples to illustrate this point. In the main, the Higher Education Act 101 of 1997 deals with the regulation of higher education. The National Water Act 36 of 1998 principally concerns the reform of the law relating to water resources. And the Nuclear Energy Act 49 of 1999 regulates the acquisition, possession, importation, exportation and the use of nuclear materials, the discarding of radioactive waste and the storage of irradiated nuclear fuel.
215 *First Certification judgment* above n64 para 109.
216 *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) (2009 (2) BCLR 136; [2008] ZACC 19) (*Glenister I*) para 35.
217 *Doctors for Life* above n6 para 38.
218 Here we are referring to —

;*(a)* the point that the definition of 'record' is deficient in certain specified respects and the related issue to the effect that 'information' is not defined (minority judgment at [97] – [98] and [100] – [102]);
(b) the conclusion that there is a lack of a proactive duty to preserve records (minority judgment at [99]); and
(c) the deduction that the definitions of 'private body' and 'public body' do not accommodate political parties (minority judgment at [102] – [116]).
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(b) the conclusion that there is a lack of a proactive duty to preserve records (minority judgment at [99]); and

(c) the deduction that the definitions of 'private body' and 'public body' do not accommodate political parties (minority judgment at [102] – [116]).

219 This is what the minority judgment refers to as a 'pairwise' relationship (minority judgment at [95] – [96] and [101]).
220 Compare *Women's Legal Centre Trust* above n42 para 24; *Doctors for Life* above n6 para 37; and *First Certification judgment* above n64 paras 106 – 113.
221 Minority judgment at [40] – [42] and [96].
222 See, for example, minority judgment at [97] – [101], [104] and [107] – [108].
223 Id at [67] – [93].
224 Id at [5].
225 Id at [61].
226 Id. *New Clicks* above n100 para 96.
227 Id at [62].
228 Id at [63]. *Naptosa* above n100 at 123B – C.
229 See decisions of this court referred to in the minority judgment, above n100.
230 *Mazibuko* above n101 para 73. See also *Mbatha* above n100 para 173, where Jafta J said:
'(W)here legislation has been passed to give effect to a right in the Bill of Rights, a litigant is not permitted to rely directly on the Constitution for its cause of action.'
231 These being: as to the confinement of its application to 'records'; its confidentiality exceptions; the fact that it would apply unequally and arbitrarily; and the impossible evidentiary burden imposed on a requester by s 70 of PAIA.
232 *Sandu* above n100 para 52.
233 Id para 51.
234 *New Clicks* above n100 para 437.
235 Van der Walt *Property and Constitution* (Pretoria University Law Press, Pretoria 2012) at 40.
236 *Democratic Party* above n150. We render a lengthy summary of, and quote extensively from, this judgment because we consider what it said to be instructive.
237 Above n151, since repealed by the Local Government Laws Amendment Act 19 of 2008, with effect from 13 October 2008.
238 Section 160(3)*(b)* reads in part:
Section 160(2)*(b)* provides in part:
'All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.'
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. . .
(b) the approval of budgets.'

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. . .
(b) the approval of budgets.'

239 Section 16(5) of the Transition Act reads:
'*(a)* (A)ny resolution of any transitional council or transitional metropolitan substructure referred to in subsection (1) pertaining to the budget of such transitional council or transitional metropolitan substructure shall be taken by a two-thirds majority of the members of such council or substructure, and any resolution of any transitional council or transitional metropolitan substructure pertaining to town planning shall be taken by a majority of the members of such council or substructure: Provided that any such transitional council or transitional metropolitan substructure may delegate the power to take any decision on any matter pertaining to town planning to the committee referred to in subsection (6) or to any other committee appointed for this purpose; and
(b) if such transitional council or transitional metropolitan substructure —
(i) on the last day of June in any financial year has failed to approve a budget for the subsequent financial year; or
(ii) on the last day of April in any financial year has failed to take steps to prepare a budget for the subsequent financial year,
the [MEC] may exercise any power or perform any duty conferred or imposed upon such transitional council or transitional metropolitan substructure by this Act or any other law in relation to the approval or preparation of a budget, as the case may be.'

'*(a)* (A)ny resolution of any transitional council or transitional metropolitan substructure referred to in subsection (1) pertaining to the budget of such transitional council or transitional metropolitan substructure shall be taken by a two-thirds majority of the members of such council or substructure, and any resolution of any transitional council or transitional metropolitan substructure pertaining to town planning shall be taken by a majority of the members of such council or substructure: Provided that any such transitional council or transitional metropolitan substructure may delegate the power to take any decision on any matter pertaining to town planning to the committee referred to in subsection (6) or to any other committee appointed for this purpose; and

(b) if such transitional council or transitional metropolitan substructure —
(i) on the last day of June in any financial year has failed to approve a budget for the subsequent financial year; or

(ii) on the last day of April in any financial year has failed to take steps to prepare a budget for the subsequent financial year,

the [MEC] may exercise any power or perform any duty conferred or imposed upon such transitional council or transitional metropolitan substructure by this Act or any other law in relation to the approval or preparation of a budget, as the case may be.'

240 This schedule provided:
'Section 245(4) of the previous Constitution continues in force until the application of that section lapses. Section 16(5) and (6) of the Local Government Transition Act, 1993, may not be repealed before 30 April 2000.'

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241 *Democratic Party* above n150 para 60.
242 Id. Section 172(2) of the Constitution stipulates in full:
(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.'
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(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.'

243 *Democratic Party* above n150 para 60.
244 Id paras 61 – 64.
245 Id para 61.
246 Compare id. In that matter the applicant was seeking relief without any formal declaration of the invalidity of s 16(5) of the Transition Act.

247 See below at [187] – [190], where we deal with the role played by a minister responsible for the administration of an Act that is the subject of a frontal challenge.
248 Minority judgment at [19] – [22].
249 *John v Rees; Martin v Davis; Rees v John* [1970] 1 Ch 345 ([1969] 2 All ER 274) at 402D, quoted with approval in *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A) ((1991) 12 *ILJ* 259; [1990] ZASCA 108) (*Zenzile*) at 37E – F. *Zenzile* was in turn quoted with approval by this court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) (2009 (6) BCLR 527; [2009] ZACC 6) para 154.
250 This complaint is founded on the definition of 'record', which PAIA defines as —
'of, or in relation to, a public or private body . . . any recorded information—
(a) regardless of form or medium;
(b) in the possession or under the control of that public or private body, respectively; and
(c) whether or not it was created by that public or private body, respectively'.

'of, or in relation to, a public or private body . . . any recorded information—
(a) regardless of form or medium;

(b) in the possession or under the control of that public or private body, respectively; and

(c) whether or not it was created by that public or private body, respectively'.

251 This complaint is based on s 65 of PAIA, which provides:
'The head of a private body must refuse a request for access to a record of the body if its disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement.'

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252 *South African Police Service v Solidarity obo Barnard (Popcru as Amicus Curiae)* 2014 (6) SA 123 (CC) (2014 (10) BCLR 1195; [2014] ZACC 23) (*Barnard*) para 204. See also *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635F – 636A.
253 *Barnard* id para 218; *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) (2012 (5) BCLR 449; [2012] ZACC 2) para 109; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (2007 (7) BCLR 691; [2007] ZACC 5) para 39; *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) (2003 (12) BCLR 1301; [2003] ZACC 18) para 43; *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* above n96 para 31; *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) ([2014] ZASCA 88) paras 13 – 18; *Cole v Government of the Union of South Africa* 1910 AD 263 at 272; and *Kannenberg v Gird* 1966 (4) SA 173 (C) at 182A.
254 Above n150.
255 Majority judgment at [159] – [166].
256 Minority judgment at [102] – [108].
257 In *Mazibuko* above n101 paras 73 – 74 O'Regan J held that the subsidiarity principle may not apply. This was so because the constitutional obligation imposed on government by s 7(2) is to take reasonable legislative and other measures to achieve the right. She nonetheless held that it was not necessary to decide the question in the circumstances of the case.
258 Minority judgment at [87] – [101].
259 *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) (2010 (8) BCLR 741; [2010] ZACC 10) (*Tongoane*). See also *Mabaso v Law Society, Northern Provinces, and Another* 2005 (2) SA 117 (CC) (2005 (2) BCLR 129; [2004] ZACC 8) para 12.
260 *Tongoane* id para 120. See also rule 5 of the rules of this court, which provides:
'(1) In any matter, including any appeal, where there is a dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct, or in any inquiry into the constitutionality of any law, including any Act of Parliament or that of a provincial legislature, and the authority responsible for the executive or administrative act or conduct or the threatening thereof or for the administration of any such law is not cited as a party to the case, the party challenging the constitutionality of such act or conduct or law shall, within five days of lodging with the Registrar a document in which such contention is raised for the first time in the proceedings before the Court, take steps to join the authority concerned as a party to the proceedings.
(2) No order declaring such act, conduct or law to be unconstitutional shall be made by the Court in such matter unless the provisions of this rule have been complied with.'
261 Now the Minister of Justice and Correctional Services. See Transfer of Administration and Powers and Functions Entrusted by Legislation to Certain Cabinet Members in Terms of Section 97 of the Constitution, GN 47 *GG* 37839, 12 July 2014, signed by the President, transferring the administrative powers and functions 'entrusted by legislation to certain cabinet members in terms of section 97 of the Constitution'. This proclamation also had the effect of changing the names of certain government ministries.
262 *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) (2009 (10) BCLR 1014; [2009] ZACC 14).

Item “24”

news24.com

Scandal rocks prison services

4-5 minutes

Johannesburg - A company with links to Commissioner Linda Mti, the outgoing prisons chief, wrote a large part of a multi-million rand security tender that was subsequently awarded to them by the Department of Correctional Services (DCS).

Sondolo IT, an "unknown player" in the IT sector which is part of the Bosasa group of companies, was last year awarded one of the biggest contracts in the history of this sector (R237 million) for the installation and maintenance of modern access control systems at 66 prisons countrywide.

An investigation by Beeld revealed:

- Employees of the Bosasa group knew of the tender long before it was advertised on February 4 2005;

- Large parts of the tender's technical specifications were written on Bosasa computers in December 2004;

- Mti and Gavin Watson, CEO of Bosasa, have a long-standing relationship since the 1980s when Mti was the commander of Mkhonto weSizwe (MK), the ANC's armed wing, and later became chairperson of the ANC in the Eastern Cape, and

- Patrick Gillingham, financial chief of the DCS, is regularly seen at Bosasa's office in Krugersdorp.

Denial

The DCS last night denied that any "external organisation" participated in the compilation of the tender document.

DCS spokesperson Manelisi Wolela said a technical committee drew up the tender specifications by "improving old specifications" with the "latest technology".

Bosasa group spokesperson Papa Leshabane, denied that his group "consults" with clients on official tender documents or that Bosasa received special treatment by the DCS.

About Gillingham's visits to Bosasa, Leshabane said a number of senior DCS and government officials have visited Bosasa "from time to time". The DCS officials did allegedly visit Bosasa to inspect the premises and receive "training and development sessions".

According to Wolela, Gillingham last visited Bosasa in October 2004 as part of a "delegation" who received training for the implementation of a catering system.

According to Beeld's sources Bosasa already knew at the end of 2004 that a tender for access

control systems was going to be advertised by the DCS in the new year.

But the most damning proof of wangling on a high level between the DCS and Bosasa, prior to the tender being advertised, is a 28-page document in Beeld's possession containing technical specifications for the tender.

A forensic investigation was done into this document, which showed that the document was created on December 17 2004 on a Bosasa computer - almost two months before the tender was officially advertised.

Mti resigned last week

Professor Basie von Solms, head of the University of Johannesburg's academy for information technology, compared the Bosasa document with the official tender specifications and found that almost 33% of the technical specifications for the tender were "either taken directly (word for word) or agreed very closely" with the Bosasa document. The awarding of this and other multi-million rand tenders by the DCS to Bosasa companies has been in the news since Beeld revealed Mti's link to Bosasa six months ago.

Apart from his relationship of many years' standing with Watson, the prisons chief is also a director of a private company - Lianorah Investment Consultancy - which was registered for him by Tony Perry, Bosasa's group secretary.

According to the registrar of companies' records Lianorah is in the process of being deregistered.

The special investigative unit (the Cobras) recently launched an investigation into the awarding of the Bosasa-tenders and others contracts by the DCS.

Mti's resignation was last week accepted by cabinet.

Mti has always denied any impropriety.

Item “25”

T6

AFFIDAVIT & ANNEXURE

OF

ADRIAAN JURGENS BASSON

INDEX TO AFFIDAVIT OF AJ BASSON

AJB-01

AFFIDAVIT OF ADRIAAN JURGENS BASSON BEFORE THE COMMISION OF INQUIRY INTO STATE CAPTURE

1. I, Adriaan Jurgens Basson, state the following under oath in English:

2. I am an adult male employed as the editor-in-chief of News24, a digital publication owned and published by Media24 (Pty), having its registered address at 40 Heerengracht Avenue, Cape Town.

3. The following facts are within my personal knowledge and are, to the best of my belief, both true and correct.

4. I started my career in journalism in 2003 as a crime reporter at *Beeld* newspaper in Johannesburg. I have since occupied a number of positions within the journalism profession, including assistant editor of *City Press*, editor-in-chief of *Beeld* newspaper and editor-in-chief of *Netwerk24*.

5. I depose to this affidavit solely to provide evidence in respect of personal threats and intimidation I suffered while reporting on allegations of corruption at the Bosasa group of companies.

6. In 2006, while I was employed as a reporter at *Beeld* newspaper, my colleague Carien du Plessis and I published a series of articles concerning the Bosasa group of companies and what we believed to be their corrupt relationship with the department of correctional services, from which the group received government tenders worth billions of rands.

7. Between mid-2007 and September 2010, I was employed as an investigative journalist by the *Mail&Guardian* newspaper. The investigative unit later became known as *amaBhungane*, or the *M&G Centre for Investigative Journalism*. I continued my investigation into Bosasa whilst being employed by the *Mail&Guardian*.

8. During the period that I was employed at the *Mail&Guardian*, I was threatened and intimidated by Bosasa. In my opinion, the sole purpose of these threats was to intimidate and scare me to a point where I would stop reporting on Bosasa.

9. For purposes of this affidavit, I will refer to two groups or episodes of threats I received whilst I was employed by the *Mail&Guardian*.

10. The first group of threats involve a series of calls I received from people who identified themselves as Bosasa employees and told me in a threatening way to stop reporting on Bosasa. I don't remember the exact dates of these calls but clearly recall that these calls were made during the time I was employed by the *Mail&Guardian* and were related to my reportage on Bosasa.

AJB-03

11. In January 2009, I published a series of articles in the *Mail&Guardian* based on leaked emails that exposed how Bosasa employees had written large sections of tender documents for contracts that were awarded to Bosasa companies. This was particularly damning evidence and I recall that the threats occurred after the publication of this information.

12. I received the threatening phone calls from a range of telephone numbers, including cell phone numbers, landlines and unknown numbers. The calls were made during all hours of the day, including late at night. The callers, who identified themselves as Bosasa employees, warned me to stop publishing stories that negatively reflected on the group.

13. I recall that some of these callers used profanities during the calls. Some told me that I would be responsible for them losing their jobs and that their families would be without income because of me. Some of the callers also accused me of being motivated by racism in my writings about Bosasa.

14. I was disturbed by these calls and tried to explain to the callers why I was doing my job. I also attempted to inform them about the information my colleagues and I had uncovered about their employer. It was apparent to me that the calls appeared to be part of an orchestrated campaign.

15. By that time, I had cultivated several sources inside the Bosasa group. I was told by my sources that my cell phone number was distributed to Bosasa

employees with a warning that I would be responsible for job losses in the group. I was specifically told that a certain senior director of the company played a central role in distributing my contact details to staff.

16. I saved most of the identifiable numbers of threatening callers on my phone and ignored or blocked them when they called again. After a period, the calls ended.

17. The second episode during which I was threatened and intimidated took place in February 2009. I received a phone call from a woman who said she was a media colleague and wanted to "warn" me about the dangers of reporting on Bosasa.

18. I clearly remember that I was on holiday and driving back to our accommodation at night when the call came through. The number of the caller was visible on my cell phone.

19. The woman proceeded to read a list of my personal information from what sounded to be an intelligence report. She said she wanted to "be sure" she was talking to the right person and that Bosasa had commissioned a private investigator to compile a report on me. The information she read out included the addresses of homes I had lived in; my ID number; my place of birth; the names of family members and friends, and their professions, and details of my academic studies.

20. She told me that I was "very brave for a young man" and threatened to "kill" me if I told anyone about our conversation.

21. The woman offered to meet me to discuss the "bigger" issues behind the Bosasa story. I said I would call her when I returned to Johannesburg.

22. A basic Google search of her cellphone number revealed that the number belonged to Benedicta Dube, a journalist and public relations practitioner. Dube previously worked for the *Financial Mail*, *Classic FM* and *e.tv*, but was working at a PR firm called Igagu Media at the time of the call.

23. I had no doubt in my mind that Dube tried to intimidate and threaten me by informing me that she and Bosasa had my personal information – including information about my friends and family – in their possession. I doubt Dube ever had any intention of informing me of "bigger" issues behind Bosasa, as she had claimed during her phone call. My suspicion was confirmed a few months later when a company source told me she was on Bosasa's payroll and had been briefed about me by Bosasa's directors, in an attempt to discredit me and the *Mail&Guardian*.

24. I disclosed the intimidation by Dube in a column published in the *Mail&Guardian* of 22 May 2009 titled '*Very brave for a young man*'.

25. Subsequent to Dube's call, the *Mail&Guardian's* legal representative wrote to Bosasa and Igagu Media, demanding the return of the personal information in

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AJB-06

the possession of the two companies. Bosasa's attorney denied the company had acted in an "unlawful manner as alleged or at all" and said Dube's information "falls within the public domain". Igagu Media did not respond and Dube claimed she did not recall our conversation. She accused me of "blackmail journalism".

DEPONENT

The deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to or solemnly affirmed before me at SEA POINT SAPS on this the 28 day of JANUARY 2019, the regulations in Government Notice no. R1258 of 21 July 1972, as amended and Government Notice no. R1648 of 19 August 1977, as amended, having been complied with.

SOUTH AFRICAN POLICE SERVICE
COMMUNITY SERVICE CENTRE
28 JAN 2019
GEMEENSKAPSDIENSSENTRUM
SEA POINT/SEEPUNT
SUID-AFRIKAANSE POLISIEDIENS

COMMISSIONER OF OATHS

Full names: THANDISWA TSHOLOBA
Capacity: CONSTABLE
Designation:
Address: C/O BAY & BILL PETERS DRIVE
SEA POINT

AJB-01 Par 24.

AJB-07

Mail & Guardian
AFRICA'S BEST READ

NEWS

'Very brave for a young man'

Adriaan Basson 22 May 2009 08:37

On a Sunday evening in February I was phoned by a woman with a raspy voice who told me she knew where I lived.

The woman, later identified as communication strategist Benedicta Dube, also knew where and what I had studied, where I was born, what my ID number was and she read to me the names of some of my friends and their professions.

AJB-08

During our conversation of almost 18 minutes Dube also threw in lines such as: 'You are very brave for a young man" and said she would 'kill" me if I told anyone about our conversation.

Her call came after I exposed in the *Mail & Guardian* over a period of three weeks the corrupt relationship between facilities management company Bosasa and the Department of Correc-
tional Services.

Dube posed as sympathetic—she warned me Bosasa had commissioned a private investigator to do a report on me and offered to meet me to discuss the 'bigger" issues behind the story.

I was sceptical—she spent most of our conversation talking about my personal details 'because I want to be sure I'm talking to the right person". My suspicions were confirmed by an inside source, who told me Dube had been briefed on me by Bosasa executives since at least August 2008 (I've been investigating the company since early 2006). A strategy to discredit the *M&G* and me was discussed.

My attempts to secure a meeting with her have proved futile.

I am convinced her motives were never to caution, but rather to intimidate. The *M&G*'s lawyer wrote to Bosasa and Igagu Media (where Dube is 'group executive: media and publishing") on May 6, demanding an immediate return of all my personal information in their possession.

Bosasa's lawyer denied the company had acted in an 'unlawful manner as alleged or at all" and said Dube's information 'falls within the public domain". Igagu Media did not respond. Dube claims she doesn't recall our conversation and that she doesn't work for Igagu anymore. She accused the *M&G* of 'blackmail journalism".

Adriaan Basson

Read more from **Adriaan Basson**
spying

Item “26”

news24.com

Guptas donated to ANC - Mkhize

Jan Gerber, News24

4-5 minutes

ANC treasurer general Zweli Mkhize. (City Press)

Cape Town – Treasurer-general of the ANC Zweli Mkhize admitted that the party received donations from the Guptas.

Mkhize was presenting the ANC's stance on party funding to the ad hoc committee investigating this matter when the EFF's Marshall Dlamini said the Guptas footed the bill for the ANC's 2012 conference in Mangaung. Dlamini reminded him that it is a criminal offence to lie to Parliament.

"Did the Guptas donate (to the ANC)? Yes, they did," Mkhize said. "Did they donate to the DA? Yes, they did."

He didn't directly respond to Dlamini's statement about the conference.

Later Mkhize said it is a "tiny, insignificant amount that came to the ANC".

"There is not a single donor who can claim to control the ANC," he said.

"We will not accept a donation we can't accept publicly."

"I don't know why the ANC comes to Parliament and says we must give more money to

politicians," Dlamini said.

Also read: Call to strictly regulate private donations to political parties

Mkhize retorted, "It's not about taking money and giving it to politicians, it's about supporting democracy."

Last month Mkhize presented the ANC's submission to the media, calling for the regulation of private financing of political parties, financial transparency of political parties and "enhanced public funding for activities that promote and support democracy".

Mkhize said there was an over-reliance by political parties on private donations.

Funding almost entirely unregulated

Earlier on Wednesday the ANC's alliance partner Cosatu also presented a submission to the committee.

"The ever growing crises of corruption and capture of political parties by wealthy individuals and capital are well known in South Africa. They pose a threat to the very heart of our hard won democracy. They are a shame upon our entire nation. This cancer affects not just the ANC but in fact is a challenge facing all parties in South Africa who exercise governance roles in various tiers, e.g. nationally, provincially or locally," reads a statement from Matthew Parks, Cosatu's parliamentary coordinator.

Among Cosatu's proposals are that political parties account for all public funds they receive in full and according to the Public Management Finance Act; parties will not receive further public funds until they have accounted for previous public funds they have received, and state owned enterprises be explicitly prevented from funding political parties.

The Council for the Advancement of the South African Constitution (CASAC) also made its submission on Wednesday and welcomed the parliamentary process.

"Despite various international law obligations requiring South Africa to pass legislation, the funding of political parties in South Africa remains almost entirely unregulated, providing ample opportunity for unethical and dishonest donors to peddle influence in policy formulation and to meddle in domestic politics, enabling corrupt relationships to develop and undermining public confidence in both political parties and democratic politics more generally," reads CASAC's submission.

Among CASAC's proposals are the establishment of a multi-party democracy fund; the disclosure of substantial private donations, so that the electorate can make an informed choice when evaluating competing political parties in line with several constitutional rights and obligations; and a cap on donations from any one source, to prevent undue influence from any one donor and to protect political parties from 'capture' by nefarious interests.

Item “27”

NEWS

ANC seeks taxpayer millions as private funders close taps

Sibongakonke Shoba

Politics editor: Sunday Times

11 October 2020 - 00:00

The ANC has on two occasions this year struggled to pay employees on time. Stock image.

Image: *Reuters*

The cash-strapped ANC is looking to the taxpayer to fork out hundreds of millions of rands extra to bankroll political parties, as looming strict new funding rules and recent high-profile funding scandals have seen some private donors close the tap.

If the party's treasurer-general, Paul Mashatile, has his way, the funds the state
allocates to political parties could increase from R164m to more than R500m a year.

The ANC and other parties would have to convince finance minister Tito

Mboweni to dig deep in the public purse to find additional funds in the face of dwindling revenue, competing priorities, and budget cuts across the board.

Mboweni told the *Sunday Times* he was open to holding discussions with political parties about increasing their grants.

"A democracy that cannot support itself runs the risk of being captured by outside donors," he said.

"For the integrity and sanctity of our political system we have to pay for our democracy. To that extent, I look forward to a conversation with all political parties about how we can go about funding them.

"It is a legitimate issue. I don't think it's proper for our political parties to be funded by donors in the Middle East or wherever. We should fund our own political parties in defence of our democracy and political party system - but within fiscal constraints."

The ANC has on two occasions this year struggled to pay employees on time. Mashatile said this was due to the reluctance of private business to donate to the governing party due to new disclosure laws, and that some businesses were struggling during the national lockdown.

He told the *Sunday Times* that in addition to demanding more funding from the state, the party wants to make changes to the Political Party Funding Act to remove "constraints" that threaten the financial survival of political parties represented in parliament. The act has been signed by President Cyril Ramaphosa but is yet to come into effect.

"Since the president signed the act we have found it very difficult to fundraise from the private sector," Mashatile said.

"There are many private companies that don't want to be disclosed. That is why at the moment we don't disclose who is funding us. [The act] has created a very difficult environment for fundraising.

"Once the act comes into play we are going to have to disclose all our funders. I'll have to see at that point what happens because there may be those who may not run away, but others may decide to pull out.

"My sense is that you are going to see a great reluctance to fund political parties. Therefore it's good for government to fund political parties. It's good for democracy. That's my view. It's not a bad thing. It's done all over the world. I've been to Germany . a lot of political party funding comes from the state."

The funding of political parties came under the microscope last week following revelations that corruption-accused Gauteng businessman Edwin Sodi had donated millions to the ANC and given money to party leaders.

Before then, former Bosasa COO Angelo Agrizzi had revealed how the company had made generous donations to the party and splurged on its leaders.

Mashatile said the party did not scrutinise its funders and only rejected money from state companies or that obtained through criminal acts.

He said a court was yet to determine if Sodi's money had been obtained illegally.

The act was crafted to bring transparency to the funding of political parties. The bill
also prohibits political parties from receiving funding from foreign governments and their agencies.

Mashatile said the party wants the act to go back to parliament to "re-look" at the limitations that will be introduced by the act. The limitations that Mashatile says the ANC wants amended are:

- The R15m cap on donations that parties are allowed to receive from private donors each year;
- The R5m cap on foreign donations for training and research each year; and
- That names of funders who donate R100,000 or more be disclosed.

"From our side as the ANC we have raised some issues that we want parliament to re-look at. One of them, for instance, is that the act puts a limit on the amount you can raise from the private sector.

"I think it's R15m a year, which we think is a bit of a challenge because as political
parties we need a lot of funding, particularly during elections.

"Secondly, the disclosure amounts are very low in our view as the ANC. The act
requires that any donation [of] R100,000 [and above] be disclosed.

"The third one is the issue of foreign funding. We don't have a problem with the act saying political parties must not be funded by foreign governments etcetera. The act says you can get foreign funding for research and training and so on.

"But even with that, they have put a limit of R5m a year, which we think is very low because when you do training and research, you might need more funding. So there are those constraints that we have raised."

The act is back in parliament to deal with a technicality that deals with intervals at which parties receive payments from the Independent Electoral

Commission (IEC).

IEC head of party funding George Mahlangu said presidential regulations had "erroneously" regulated what was supposed to be regulated by the IEC.

He said MPs would have to correct that error, but could not amend the act in the way proposed by Mashatile.

"They can't bring something else. This regulation is not for amendment because someone is not happy," said Mahlangu.

Home affairs minister Aaron Motsoaledi's spokesperson, Siya Qoza, said the minister had already written to the National Assembly to consider the presidential regulations.

The ANC has almost 400 employees across the country.

Mashatile would not say how much it costs to run the party. However, he revealed that the current funding from the government accounted for only 18% of the party's expenses. Contributions from public representatives and membership fees accounted for 12%, and donations from private funders contributed 70%.

"If political funding is not increased it means political parties rely on the private sector to exist. That's really the biggest challenge at the moment. We're calling for an increase in party funding so that political parties are not held to private interests or pressured by the public sector because people contribute to the party.

> **“ It is a legitimate issue. I don't think it's proper for our political parties to be funded by donors in the Middle East or wherever**
>
> *- Tito Mboweni*

"We want the party to be freed from the private sector. As things are in SA, contribution to political parties is very low. All political parties are not satisfied - R164m, it has not increased in the last 10 years."

Asked if the party would propose that R500m be allocated to political parties a year, Mashatile said: "My view is that more [should be allocated]. But obviously government can do that incrementally, depending on what the challenges are. They may as well say we move from R164m to R400m or R500m. As I said, during elections R500m is [the] expenditure of one party.

"It means even if government funds us with what they consider sufficient, it may not be. It means we're going to continue to fundraise. I would like a situation where that ratio reduces from 18% government and 70% private sector . to become 50/50. But too much reliance on the private sector for political parties is not good."

Although the ANC was struggling to make ends meet, Mashatile said the party had decided not to retrench workers. However, it has frozen all posts throughout the country.

"But we have looked at right-sizing our structure. Some of the people who are older, we will allow them to retire ... except politicians, of course."

Item “28”

OPINION

What really happened at Mangaung?

A critical clause about fundraising for campaigning mysteriously disappeared from the party's constitution

29 MARCH 2021 - 15:54 *by* EBRAHIM HARVEY

Mangaung. Picture: GETTY IMAGES/GARETH COPLEY

Up until the 2007 ANC national conference in Polokwane, there was a specific clause in the party's constitution that prohibited the "giving, collecting or raising of funds for campaigning activities within the ANC aimed at influencing the outcome of a conference or meeting", namely rule 25.5 (u). The question is, what happened to this important clause at the ANC's next conference at Mangaung in 2012?

The precise reason for this worrying question is that constitutionally, and therefore arguably legally, only a specific resolution taken at a conference can amend or repeal a particular clause in the ANC constitution, if it was as a result of deliberations deemed necessary. But the record for that conference does not show the passing of any resolution that called for any amendment to that clause, or for its repeal for whatever reasons.

How did it happen that this critical clause disappeared from the ANC's constitution at that conference?

The key idea underlying that clause was that delegates elected to leadership positions must have genuinely earned them as a result of hard work, knowledge, skills, experience and selfless commitment to the ANC. It was considered especially important to constitutionally combat the explicit trends in the ANC itself over the years towards using money and resources to influence the outcome of elections at national conferences, in all the structures of the ANC, and at all levels of government.

How it came to pass that this clause disappeared at the elective Mangaung conference in 2012 therefore becomes all the more important to both pose and answer. In fact, given the growing corruption inside the ANC government over the past decade and the urgent need to stem the tide, as has been exposed at the Zondo state

capture inquiry, this becomes imperative.

Is it possible that the very clause in the constitution that was originally meant to prevent corrupt activities influencing the outcome of elections was clandestinely — arguably corruptly and certainly unconstitutionally — deleted from the record at Mangaung? The most worrying aspect of what happened there is that there is no trace of any resolution taken to amend or repeal the clause. I believe an investigation is overdue.

A further question is this: how did it happen that the national executive committee (NEC) of the ANC, its highest decision-making structure, ratified the amendments to the constitution at Mangaung without detecting this gross anomaly? The anomaly is that a key clause in the constitution, meant to prevent moneyed shenanigans and corruption during elections, was removed — not even merely amended — without due process being followed. On the face of it, this appears incredible and ludicrous, especially at a national elective conference.

The aptness of this line of questioning and reasoning was most dramatically revealed at the next elective conference, at Nasrec in 2017, in light of the revelations and disputes that arose there around the CR17 campaign, which was the subject of investigation by public protector Busisiwe Mkhwebane. There has been persistent speculation that this campaign spent about R1bn on securing the ANC presidency for Cyril Ramaphosa. It is entirely possible that the outcome could have been different if the funding clause was still in place.

It almost seems uncanny that all this happened in 2017 after the dereliction of constitutional duty at Mangaung in 2012, which in fact made the money-laden CR17 campaign possible in the first place. With all due respect to Ramaphosa — this is not intended to be a reflection on him personally — with the benefit of hindsight, one is almost tempted to ask if what happened in Mangaung was deliberately calculated to pave the way for what happened in 2017 with the CR17 campaign, which was funded to an unprecedented extent by private donors.

With what has happened in the ANC over the past decade, we have painfully learnt that anything is possible, especially in an environment

in which the use of money and resources inside the ANC to influence the outcome of elections has happened with increasing frequency.

It is against this background that answers to the question of what happened at Mangaung are critical, not only for the ANC but perhaps even more importantly for the integrity of our overriding national constitution, which strongly and explicitly stands opposed to all forms of corruption in our body politic and wider society.

It is also important to consciously combat the pronounced conflation, since the dawn of our constitutional democracy in 1994, between the ANC and the state, especially when this has gone hand-in-hand with the conscious looting and abuse of state coffers by so-called cadres of the ANC. In other words, what happens or does not happen in the ANC affects the entire country, public and state sectors in profoundly important ways, especially whether resources are constructively spent or wasted by corruption.

The bottom line of my inquiry is how could that clause have been removed at Mangaung without any resolution to either amend or repeal it, and, perhaps most importantly, how was it possible that the NEC could ratify the constitutional amendments without noticing this glaring and unconstitutional irregularity? Who unconstitutionally, arbitrarily and clandestinely removed that clause? And as importantly, could it conceivably have been done without collusion among senior party members?

There is another closely related question that such an investigation must deal with: how is it possible that the Nasrec conference did not confront and deal with this constitutional anomaly arising out of the ANC's 2012 Mangaung conference? There is nothing in the media to suggest this matter was even raised at Nasrec, let alone addressed.

It is deeply ironic that at the very conference where Ramaphosa was elected after waging a reported R1bn presidential campaign, the abuse of which that clause was meant to prevent, there was a stony silence on the matter of ANC election funding.

• Harvey is a political writer and author whose new book, 'The Great Pretenders: Race and Class under ANC Rule', will be published in early May.

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Item “29”

news24.com

ANC to probe mysterious disappearance of clause on internal campaign funds

Carien du Plessis

4-5 minutes

President Cyril Ramaphosa's detractors accuse him of contravening a rule that was mysteriously dropped in 2012. (Dino Lloyd, Gallo Images)

- **The ANC is set to probe the mysterious disappearance of a clause from its constitution on campaign funding.**
- **President Cyril Ramaphosa's detractors accuse him of breaking ANC rules with regards to raising campaign funds.**
- **Health Minister Zweli Mkhize heads the committee that will be looking into the matter.**

The ANC is set to probe the mysterious disappearance of a clause from the party's constitution after its 2012 national conference in Mangaung, under which President Cyril Ramaphosa could have been charged for raising private funds for his campaigns.

Health Minister Zweli Mkhize chairs the party committee charged with the responsibility to probe the matter.

Ramaphosa made no mention of the national executive committee's concern in the text of his closing address to the committee.

The speech was released to the media on Sunday and journalists were not invited to log into the Zoom meeting to listen in on it, as had been the case with previous recent meetings.

A statement from the ANC, which was released on Tuesday, read:

The NEC also noted with concern the omission of Rule 25.5(u) dealing with "the giving, collecting or raising of funds for campaigning activities within the ANC aimed at influencing the outcome of a conference or meeting" from the ANC constitution after the 53rd National Conference and requested the NEC sub-committee on Constitutional and Legal Affairs to investigate the matter and report to the officials.

The "missing" clause was discussed together with the party's proposed guidelines on leaders stepping aside when facing criminal charges - an issue that party treasurer general Paul Mashatile was tasked with.

This includes the "alignment of the ANC constitution with the Constitution of the Republic".

READ | CR17 campaign funds: Ramaphosa admits he should not have asked ANC integrity committee for delay

Ramaphosa last month, in an interview with Power FM's Lukhona Mnguni, said the clause, which was inserted into the party's constitution at the 2007 conference, "just fell away" as the constitution was "redone" following discussions in Mangaung. He added: "I don't think it was deliberate."

Ramaphosa's detractors have accused him of having contravened that clause in his 2017 campaign, which was bankrolled with money fundraised from various private donors.

> A cloak-and-dagger meeting at the heart of an alleged plot to steal victory in the ANC's Nasrec elective conference has pitted top cop Khehla Sitole against Police Minister Bheki Cele, as the chasm between the pair grows. | @wicks_jeff https://t.co/QfK2u1TVhi
>
> — News24 (@News24) February 16, 2021

Ramaphosa said if the funds "were utilised to buy votes" it would have been a contravention, but he believed that his campaign used it "to engage in the process to allow people to attend meetings... to hire venues, [and] to travel". He said the most important thing was to account for all the money spent.

Item “30”

NATIONAL

Ramaphosa: The ANC is not for sale

Staff Reporter 24 Mar 2016

Deputy President Cyril Ramaphosa has nailed his colours to the mast by saying the ANC was “not for sale”, and anybody who wanted to capture the state should rather “go next door”.

Speaking to about 1 500 professionals and academics at an ANC event in Sandton on Wednesday night, Ramaphosa said that although the party was moving “from scandal to scandal”, this would stop.

Siding with the lobby group that has spoken out against President Jacob Zuma’s close relationship with the Gupta family, Ramaphosa said the party was dealing with recent allegations of undue influence. “And as we deal with these matters, one thing that we will make sure to (say) to everyone: ‘The ANC is not for sale.’ And what we will also say is that the ANC refuses to be captured. We will not be captured. Those who want to capture the ANC and make it their own and influence it to advance personal or corporate interest, you have come to the wrong address. Try next door. We will not be captured. All these matters will be dealt with in a very methodical way,” he said.

- **Read: The ‘Gupta owned’ state enterprises**

Ramaphosa said people were “streaming in … to put issues on the table”, and they

were supporting “whatever allegations in a concrete manner”. He said the ANC was dealing with allegations of state capture “in a structured manner” and “away from the headlines”.

“We are dealing with it in an ANC way,” he said.

Ramaphosa said that once all these issues had been reported to ANC secretary general, Gwede Mantashe’s office, as had been decided by the ANC’s national executive committee over the weekend, “the ANC will receive a report and after they will debate the report, and clearly we will move our country forward”.

Ramaphosa said it was good that the ANC was dealing with this matter now.

He said: “There is always a risk of states and countries and movements to be captured. It happens all over the world, and in our case this is going to be a defining moment where we deal with this matter once and for all, and stop those who wanted to capture the ANC and an ANC-led government, we will stop you in your tracks. We will not allow this to happen, not in South Africa.”

Ramaphosa said the ANC should be given time and space to deal with this matter, and he added – to laughter from the audience – that the Gupta family said they would also cooperate. “They are willing to cooperate, and that is good. They will also have the opportunity to come and put whatever facts on the table as we deal with this matter as thoroughly and effectively as possible,” he said.

Ramaphosa added that it was not only the Gupta family that has allegedly captured the state. “There are a number of others as well, there are others who have either captured the state or are in the process of capturing the state, and we are saying to all and sundry, stop in your tracks, we are not going to allow you to capture this glorious movement, we will not allow that.”

It’s the principles that matter

Ramaphosa said business with the state should be based on principles of transparency, fairness, and respect for corporate governance. “If you’re going to tender to do business with the state it must be on an arm’s length basis, and it must be something that will stand the scrutiny of the public.”

He added: “As the ANC we want clean government, we want government that is based on advancing the interests of our people. We do not want [businesspersons] to be advancing their own personal interest whilst having formed alliances with certain individuals in the state. No to that, and we will always say no to that. If you want to do business, do business openly and fairly with government. If you win a

tender, win it in a way where everyone is able to say this tender was properly done, and the company that has won it, will offer the best product or service."

During the discussion time, some audience members brought up the issue of scandals in the ANC that were seemingly not dealt with.

"This issue of scandals in the ANC, yes you are right," Ramaphosa responded. "We have been moving from scandal to scandal. We are a living organisation, and it is an organisation that is made up of human beings," he said.

Ramaphosa said it was important to deal with these scandals an to ensure that, when ANC members breach the core values of the party, "there must be consequences". Audience members shouted out: "When?" to which Ramaphosa responded that the issues were being dealt with "now" by the integrity commission.

The party was rocked last week when deputy minister of finance, Mcebisi Jonas, revealed that the Gupta family had offered him then finance minister Nhlanhla Nene's job shortly before Nene was sacked.

- **Read: 'Guptas offered me Finance Minister position' – Mcebisi Jonas**

Several other ANC leaders came forward with similar claims of undue influence.

Speaking at the event earlier, ANC Gauteng chairperson Paul Mashatile said the party's national executive committee spent two days over the weekend discussing the Gupta family and state capture.

Ramaphosa received a warm welcome at the event from a province that has expressed its preference for him to succeed Zuma at the ANC's conference next year.

Item “31”

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22 April 2016

Addressed to:

Minister of Finance, Minister Pravin Gordhan, MP
Minister of Public Service and Administration, Minister Ngaoko Ramatlhodi, MP
Cc: The President of the Republic of South Africa
The Deputy President of the Republic of South Africa

We, the undersigned, are former Directors General in the post-apartheid South African government, with a prior history in the liberation struggle where we served as cadres of Umkhonto we-Sizwe, officials of the African National Congress (ANC), Azanian People's Organisation (AZAPO), the Pan Africanist Congress (PAC), and various organisations of the Mass Democratic Movement.

We were privileged, honoured and challenged to serve in various capacities at the inception of the new democratic government, in particular as Directors General from 1994. We served in our individual capacities as public servants, for periods ranging between 3 years to 15 years each in single or multiple departments. We played a role in the early efforts to transform the South African State into a more effective organ to achieve the aspirations and transformatory goals of the liberation struggle and the new democratic government to ensure a better life for our people and to address the inequities and injustices of the past.

In pursuit of the above, we believe we upheld the principles of the Constitution, and were guided primarily by the founding legislation for public sector management - the Public Service and Administration of 1994 as amended and the Public Finance Management Act (Act 1 of 1999) .

We submit this memorandum to express our collective concern at recent revelations of state capture by the Gupta family, their apparent influence over political and administrative appointments, and their involvement in the irregular facilitation, securing and issuing of government tenders and contracts. We also express our concern at the effect of the recent Constitutional Court judgement in the Nkandla matter on the legitimacy of the State and its ability to focus resources and efforts on delivering services to our people, growing the economy and achieving our transformatory and developmental goals.

Whilst noting the the initiative undertaken by the ANC to conduct an internal inquiry we as former accounting officers believe that, to the extent that the issues raised are of an administrative nature, there are adequate provisions within the PFMA and PSA that make it obligatory for these allegations to be addressed.

We therefore call for the establishment of an Independent Public Inquiry in terms of Section 4(1)(a) of the Promotion of Administrative Justice Act to include representatives of Chapter 9 institution such as the Public Protector and Auditor General and the Chapter 10 institution - the Public Service Commission, as well as accountants, retired judges, advocates and experts on international financial flows. This inquiry should investigate all senior political and administrative officials who may, in their dealings with the Guptas and associated companies, have contravened the Constitution, the PFMA and the Public Service Act as amended. We strongly recommend that this Commission be established within three months and give a public progress report within six months.

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We believe that there is adequate provision in existing statutes to mitigate corruptive practices and ensure good governance. However, in our view the reported allegations of Gupta involvement in Ministerial appointments, manipulation of awarding of tenders, appointment of Gupta nominated individuals to strategic positions, show possible legislative breach. These include but are not limited to:

- Section 91(2) of the Constitution;
- Section 96 (1) and (2a, b, and c) and Schedule 2 of the Constitution;
- Chapter 10 of the Constitution, Section 195(1);
- Chapter 10, section 195(4) of the Constitution;
- Section 64 of the PFMA Act.

We note and welcome the initiatives of the Minister of Finance and the National Treasury to investigate existing contracts involving the Guptas. We call upon the Auditor General and Chief Procurement Officer to further investigate all government tenders and contracts awarded to Gupta associated companies to assess their compliance with the PFMA Act and Regulations and the Preferential Procurement Policy Framework Act of 2000 and Regulations.

We call upon the Public Service Commission to investigate all irregular or suspicious appointments of public servants in critical positions of Directors General, Ministerial Chiefs of Staff, Heads of Procurement Units, Members of Bid Specification Committees, Bid Evaluation Committees and Bid Adjudication Committees.

We also call upon the National Treasury to initiate an investigation into the possible involvement of the Guptas and associated companies in illicit financial flows out of South Africa and recommend the appointment of an independent research institution to assist in this investigation.

We call upon the Minister of the Public Service and Administration to create an enabling environment to allow all public servants to act in terms of the existing prescripts and to freely come forward to provide information to the Public Inquiry as well as to report any breaches of the relevant legislation, regulations and codes of conduct.

SIGNED BY:

Frank Chikane
Barry Gilder
Ketso Gordhan
Thozi Gwanya
Roger Jardine
Themba Maseko
Mzuvukile Maqetuka
Mogopodi Mokoena
Itumeleng Mosala
Mpumi Mpofu
Mavuso Msimang
Andile Ngcaba
Gibson Njenje
Bongiwe Njobe
Ayanda Ntsaluba
Siphiwe Nyanda
Dipak Patel
Mallele Pitje
Vusi Pikoli
Sipho Pityana
Allistair Ruiters
Sipho Shabalala
Xoliswa Sibeko
Moe Shaik
Lyndall Shope-Mafole
Vincent Zwelibanzi Mntambo
Pam Yako

Item “32”

18 March 2016

Memorandum from Senior Commanders and Commissars of the former military wing of the ANC, Umkhonto we Sizwe.

To the Secretary General.

1. We, the undersigned, are all committed cadres of the African National Congress, having served our glorious movement for many decades. Throughout our lives, and whenever the need arose, we did not hesitate to raise our hands to be counted among those who could be deployed by the ANC in the service of our country. Whatever the challenges we faced, whatever the risks we had to endure, we gave our all. In responding to the call of duty, we never strove for personal benefit, status or power. We executed our tasks as commanded to us by the leadership of the ANC, comfortable in the knowledge that the decisions of the leadership were based solely on the selfless pursuit of the well-being of our people. As such, we did not hesitate to shed our quota of blood.

2. We responded to the call of duty, because we correctly believed, as we still do, in the centrality of the ANC in the people's struggle against apartheid, and in the democratic transformation of our society to achieve a better life for all the people of our country.

3. As disciplined cadres of the movement, we sought always to interpret the actions of the leadership of the ANC through the policies, strategies and tactics of our organisation.

4. Recent events in our beloved country have both saddened and outraged us. The removal of Comrade Nene from the post of Minister of Finance and his proposed re-deployment to a junior post in the New Development Bank leaves much to be desired and communicates the singular message that all is not well with our movement and in the State. What objective was served by the removal of comrade Nene at such a critical time in our country's economy? How do we justify his redeployment to a junior post as a decisive promotion directed at serving the national interest?

5. We welcomed the intervention that led to the appointment of Comrade Pravin Gordhan as Minister of Finance. This was critical and necessary corrective step in order to prevent massive irreparable damage to the economy.

6. We are concerned by the manner in which the Hawks are conducting their investigation of the so called SARS "rogue unit". This investigation is being conducted in a far too public and antagonistic manner that would suggest the abuse of state institutions for ulterior motives. A more responsible approach is needed, in keeping with the rule of law and sensitive to the challenges that the country is currently facing.

7. The recent revelations by Comrade Mcebisi Jonas that he was offered the post of Minister of Finance by the Gupta family is shocking and most embarrassing to the integrity of the ANC and the State. We salute this most courageous of acts by Comrade Mcebisi Jonas, and believe he has acted in the interest of the truth and in the defence of the prestige ANC. We reject with contempt efforts to

malign his integrity and good standing, and specifically call on Cde Kebby Maphatsoe to desist from further maligning the good name of Comrade Jonas Mcebisi.

8. In the light of these revelations, we demand to know what role, if any, do the Gupta family play in influencing the appointment of Ministers and to what end? Which other Ministers have been approached by them in this manner? What private arrangements, if any, have been made with the Gupta family? What is their role in the appointment of Boards members of State Owned Enterprises? Is the leadership of the ANC aware of these arrangements? On whose authority does the Gupta Family act?

9. In the absence of any coherent explanation to all of the above we are forced to speculate that important decisions of the State are subject to outside influence and unilateralism without any regard to the well-being of the country or our people;

10. As a direct consequence of these actions our country has been plunged into an uncertain and perilous future.

11. Further, over the years we have witnessed, amongst other things, the rise of factions and slates, the diminishing quality of ANC cadreship, the rise of antagonisms within the Alliance, the breakaway of Unions from Cosatu, the break-up of the ANC youth League, the marginalization of committed ANC comrades, the rise of vulgar and unsophisticated politics within the ANC, the silencing of critical but necessary voices within the ANC, the wanton destabilization of critical state institutions, the wasteful expenditure of state resources, the devaluing of the critical institution of Parliament, the erosion of trust within the various arms of the State, the unprecedented rise of patronage and cronyism, the juniorisation of the State and the ANC and most alarming of them all, the use of the State machinery for the private interest of the few.

12. The country as a whole has been subjected to one crisis after another. As a result, the nation building project so necessary for the prosperity of our country, is being compromised before our eyes and the national psyche is characterized by helplessness and the fear of what the future may hold.

13. Whilst the challenges that face the ANC are many and complex, we are most concerned about the increasing tendency of state capture. We can no longer remain silent in the face of this most undemocratic and dangerous of developments.

14. There are many, many accounts of undue influence on the decisions of the State. We need to establish the veracity and the validity of all of these claims.

15. If indeed these claims are true, then we call on the leadership of the ANC to act against this tendency and reclaim its integrity. We must free the ANC and the State from such influence and expose all those who are in cahoots with this tendency.

16. Accordingly, we call on the leadership of the ANC to establish an independent commission of enquiry composed of eminent persons within the ANC and civil society to investigate all claims of undue influence, especially by the Gupta family on the ANC and on the State

17. In the light of the many challenges facing the ANC and the State we further call on the leadership of the ANC to urgently convene a special National Conference to assess these challenges and chart a way forward to restore the prestige of our glorious movement and the State. The membership of the ANC and the country as a whole, have entrusted them with this responsibility.

The undersigned were all senior commanders and commissars of uMkhonto we Sizwe. We are all satisfied that we speak for the majority of former MK cadres and many of those still deployed in state institutions who we do not desire to draw into this memorandum and its demands. We are certain that many of those who fought for our democracy under the banner of the ANC who are pained by the degeneration of the standing of the ANC will find resonance with the sentiments we have expressed.

Long Live the ANC

Signed by General Siphiwe Nyanda,

on behalf of the following:

Brig Gen Damian de Lange

Mongezi India

Amb Jeff Maqethuka

Mavuso Msimang

Jabu Moleketi

Sindiso Mfenyana

Bob Mhlanga

Dipuo Mvelase

Amb George Nene

Amb Welile Nhlapo

Greg Nthatisi

Gen Nhlanhla Ngwenya

James Ngculu

Gibson Njenje

Brig Gen Ngqose

Dr. Ayanda Ntsaluba

Zukile Nomvete

Commissioner George Rasegatla

Johnny Sexwale

Brig gen Sejake

Ka Shabangu

Amb Moe Shaik

Sipho Twala

Mike Thusi

Dr. Snuki Zikalala

Item “33”

news24.com

FULL TEXT: Letter from Stalwarts' foundations to ANC NEC

4-6 minutes

To: The National Executive Committee of the ANC

c/o The Secretary-General, Mr Gwede Mantashe

The Oliver and Adelaide Tambo Foundation, the Nelson Mandela Foundation and the Ahmed Kathrada Foundation jointly write to you at a difficult time in the history of the African National Congress and our country, South Africa.

The ANC has been through challenging times before, but with the resourceful and courageous leadership the organisation has been blessed with in its long history, it can yet again provide an invigorated, visionary course into the future.

We are deeply concerned about the current course on which our country is headed. We believe this course is contrary to the individual and collective legacy of our Founders.

We read disturbing stories in newspapers and other media about “state capture”; we see important institutions of democracy such as Parliament under great strain; we hear what ordinary South Africans tell us through our work, and are challenged by friends and comrades who witness cumulative fragmentation of the ANC, a great organisation our Founders helped build and sustain over generations. In the spirit of our Founders, we cannot passively watch these deeply concerning developments unfold and get worse by the day.

Leaders such as Tambo, Mandela and Kathrada helped shape the ANC by providing a vision of a better future for all our people. Their vision of freedom, social justice, and democracy was embraced by millions of South Africans. It was based on and driven by strong moral authority and principled engagement. Their leadership and that of the ANC were admired the world over. It inspired other people in their own struggles.

In 1994, the humanity and dignity of our people were restored, and the new state, a constitutional democracy, began to support that humanity and dignity with varied institutions it created and which were dedicated to achieving a better quality of life for all its citizens. In its leadership of this new democracy the government of the African National Congress enjoyed overwhelming support across the nation: the youth, religious communities, civil society, and South Africans of all persuasions. The worldwide solidarity in support of a cause that was as universal as it was humanistic, showed the extent to which South Africa had inspired the world. Sadly, by the day we witness the steady erosion of something very rare in human history: a near universal admiration of a country and what it had pledged itself to achieve.

All South Africans have a living memory of the freedoms we have won and experienced. We cannot sit back and watch those freedoms being taken away. It is in this respect that it seems to us that the ANC has significantly drifted away from the ideals to which our Founders and many others, dedicated their lives. We are disturbed by accounts we receive from students, religious leaders, members of our community, the media and from civil society organisations about the disillusionment of our people and their waning trust in the ANC as a result of the unfolding events.

We believe we have reached a watershed moment. We appeal to the National Executive Committee of the ANC as they meet over the weekend to take note of the mood of the people across the country, to reflect deeply on their solemn responsibilities, to make urgent choices, and to take urgent corrective actions in the best interest of South Africa and its peoples. We make this call to remain true to our Founders and to continue their life's work to champion the cause of freedom and democracy for our people. It is for these that they were "prepared to die". History will judge the ANC leadership harshly if it fails to take the decisions that will restore the trust and confidence of the people of South Africa.

In the true spirit of our Founders we offer our experience and expertise in any manner that might assist in facilitating a critical process of dialogue in which South Africans can find one another in the restoration of visionary cohesion and nation-building at this hour of need. Our doors are open!

Yours sincerely,

Dr Frene Ginwala Acting Chairperson of the Oliver and Adelaide Tambo Foundation

Prof Njabulo S Ndebele Chairperson of the Board of Trustees of the Nelson Mandela Foundation

Mr. Derek Hanekom On behalf of the Ahmed Kathrada Foundation

Item “34”

news24.com

ANC only got 1 written complaint on state capture - Mantashe

Mpho Raborife, News24

3 minutes

Gwede Mantashe (Picture: AFP)

Johannesburg - Out of eight people who approached ANC secretary general Gwede Mantashe's office with alleged reports of corporate capture of the state, only one handed in a written submission.

"It was unfortunate that only one person could make a written submission on the matter. The allegations made were serious. They cannot be treated lightly and many warrant a comprehensive investigation," Mantashe told reporters in Johannesburg on Tuesday.

If the other seven feared their submissions to the party itself would put them in danger, they could approach any relevant state institution and ask it to deal with the matter.

Mantashe said because of the low number of submissions, it would be a "fruitless exercise" for the ANC to investigate.

"When they don't come forward to the ANC, the ANC will not force them. It doesn't mean that we are walking away from it, but if you make allegations then you must be bold enough to take [the matter] through. The discussion of the ANC on state capture is going to continue for a long

time."

If people had raised the matter in order to benefit the ANC, they would not mind becoming casualties, he said. Those who feared for their safety were only doing it for their own interests, he argued.

NEC meeting

Mantashe was briefing the media following the party's national executive committee meeting at the weekend. The NEC had discussed matters including the party's call in March for members to provide information about the alleged influence of business on state affairs.

At the time, Mantashe said the party wanted to deal with the big picture of politicians being influenced by powerful businesses, instead of narrowing it down to just a few individuals.

His call came after Deputy Finance Minister Mcebisi Jonas said members of the Gupta family had offered him the job of finance minister before Nhlanhla Nene was sacked in December 2015.

The Guptas denied this, saying their family was being used for "political point scoring between rival factions within the ANC".

Mantashe said at the time that if the matter was not addressed soon, it could turn the country into a "mafia state".

Item “35”

JACOB GEDLEYIHLEKISA ZUMA

KwaDakwadunuse Homestead
KwaNxamalala, Nkandla
King Cetshwayo District
KwaZulu Natal

28 August 2020

Dear Mr President

Cc: Secretary-General : African National Congress
Cc: National Chairperson of the African National Congress

Mr President Ramaphosa, as one of the members of the ANC, I have also received your open letter, written to all members of the ANC. This is indeed an unusual act by the leader of our movement. Given the nature and seriousness of the matters raised in your letter, I have decided to take an unusual decision to respond to your letter, in writing, which is something I am not used to because I normally favour engaging in a discussion within our structures, rather than writing a letter.

Mr President, like other members of the African National Congress ("the ANC") I received and read your letter of 23 August 2020. Although I write in my capacity as an ordinary member of the ANC, I am mindful of the fact that as the former President of the ANC, it may be unprecedented that I write a letter of this nature. However, I am of the firm view that the issues you raise in your letter are indeed serious and deserve our attention as members of the ANC.

Mr President, I address this private letter to you, as the President of the ANC, and request that you share it with the entire leadership as well as structures of our movement. I do not seek to address my own President and organization through the media or public letters as that would be foreign to the well-established culture of the ANC. I write it, not to attack your person, but to engage in constructive and honest debate that our movement always encourages. I also hope that my letter will be kept as an internal communication directed at the leadership and the entire membership.

In your letter, in which you state what you view as **" one of the greatest challenges since the advent of democracy"**, you regrettably place the scourge of corruption right at the door-step of ordinary members of the ANC, most of whom are the urban and rural poor working class people, who have never abused state resources. In their numbers, they live in abject poverty waiting for the ever elusive better life for all, you and I promised them.

You are correct, Mr President, that corruption is one of the issues to be confronted head-on. Your letter correctly points out that **"What has caused the greatest outrage is that there are private sector companies and individuals (including civil servants) who have exploited a grave medical, social and economic crisis to wrongfully enrich themselves."** You proceed to state, again correctly, that **"This is an unforgivable betrayal for millions of South Africans**

who are being negatively affected by the impact of COVID-19, experiencing hunger daily, hopelessness and joblessness."

None of us can fault you for stating that such conduct is indeed contemptuous of our efforts to pursue the historic mission of the ANC, which is to defend and advance the rights of African people and our stated objective of the National Democratic Revolution, the liberation of black people in general and Africans in particular. None of us can differ with you that our 54th National Conference in December 2017 decried the increase in corruption in South Africa and undertook to confront it.

Our movement was indeed correct, to assess, as it always does, the threats that confront the ANC, the objective and subjective conditions that prevail within our nascent democracy as well as the motive forces, we as cadres of the movement must understand in order to advance the historic mission of the ANC and the promise of a better life for all.

It is not the above obvious serious issues with which I take issue, for they are indeed matters that our movement, as the leader of society, should deal with. as they threaten the ANC's great efforts and diminish its credibility in the eyes of our people, most of whom look up to the ANC to deliver the promised better life for all. It is indeed a blemish on society, the credibility of the ANC and by extension, on the legitimacy of the anti-apartheid struggle.

However, Mr President your letter is fundamentally flawed in several respects and plays right into the hands of those who seek to destroy the ANC and build from its ashes a counter-revolutionary party under the guise of fighting corruption. I am certain that this is not your intention, Mr President. Apart from the fact that your letter betrays a lack of understanding of how the leadership of the ANC should communicate with its structures. It is absolutely unjustified to attribute to the entire ANC and its ordinary members, misconduct of a few individuals that have access to state power and its resources as well as ANC leadership positions.

Mr President, by stating that the ANC stands as **"...Accused No. 1"** in respect of the charge of corruption, you implicate thousands of innocent members of the ANC who continue to face hunger and dehumanizing poverty and have never benefitted from corruption. You proceed to say the ANC should bury its' head in shame.

Mr President, this statement that you make is not helpful to the ANC, in my respectful view. For all intents and purposes, it can only serve to destroy the ANC, particularly if the head of the ANC pleads guilty on behalf of the ANC, and calls the ANC the accused Number 1. Your actions are unprecedented in this regard. Mr President you are indeed the first President of the ANC to stand in public and accuse the ANC of criminality and that the ANC must be the accused Number 1 as accusations of corruption mount. You are indeed the first ANC President, since its forma-

its formation in 1912, to stand in public and accuse the ANC as an organization and to say the ANC must bury its head in shame. This is a devastating statement coming from a sitting President of the organisation and Head of State. I view your letter as a diversion, a public relations exercise by which you accuse the entire ANC in order to save your own skin.

When the founders of the African National Congress gathered in Bloemfontein on the 8th of January 1912, they sought to defend the limited civil and political rights of the African people. They sought to free the African people from the bondage of colonial and white minority rule. They established for us a giant movement and a set of socio-political values that would, for decades, rise above the poor moral values of segregation, of racist laws, forced removals and the subjugation and maiming of the African people within the South African society. We cannot accuse their movement when it is us as individuals who undermine its legacy.

By accusing the ANC for acts committed by a few of its individual members, you betray Pixley ka Isaka Seme, Sol Plaatjie, John Langalibalele Dube, Rev Rubusana, Chief Albert Luthuli, Dr Alfred Xhuma, Dr Moroka and all those who assembled on 8 January 1912 to form this glorious movement called ANC. You write, for your own desires to plead for white validation and approval, the worst betrayal of Oliver Tambo, Nelson Mandela, Walter Sisulu, Govan Mbeki and others who sacrificed their own freedom for the ANC. With your pen, you desecrate the

graves of young men and women who lived and died cruel deaths in the hands of apartheid security forces and mercenaries. These heroes paid the highest price fighting for our freedom and in defence of the ANC. We should therefore never implicate them when we, as individuals, are accused of corruption and misconduct.

I know, Mr President, my letter will be misconstrued as an attempt to ignore the allegations levelled against me, or to attribute every failure of the ANC to you. Many, in white circles that are fond of you, and seek to minimize your errors, will fill their barrels of ink and sharpen their pens to condemn me for expressing my views. They will, through their infamous grand narrative, write a series of opinion pieces to diminish the significance of the issues I raise. In your defence, Mr President, some in the mainstream media hire opinion makers, to formulate negative stories, in order to divert attention from the issues I raise as it has happened in the past. I expect them to do so. However, they are the least of my considerations at the moment, and I do not seek validation or approval from them.

My letter does not seek to undermine you at all or to attribute every weakness or challenge facing the ANC or our state solely to you. On the contrary, I am simply requesting that each one of us must face as individuals, allegations levelled against us without implicating our movement or naming it Accused No.1 or asking it to bury its head in shame, when individuals are being challenged for their actions.

Mr President, it is unforgivable to label our rank and file members as criminals for the crimes you and those with whom you serve in the structures of the State are accused of. The ANC has thousands and thousands of members and the overwhelming majority of them are not corrupt. The overwhelming majority of them are the poorest of the poor. They cannot and should not be accused of the crimes committed by a few comrades deployed in government.

Mr President, your letter commits the cardinal error of implicating the ANC in matters that, we as leaders and those deployed in the state, must account for. To point your sharp at the entire ANC and its ordinary working class members is rather low and disappointing, to say the least. Presently formulated, your letter lends credence to the suspicion that you seek to assist those, in our own ranks, involved in the attempts to destroy the ANC in order to hand it over to be a tool of White Monopoly Capital interests.

Mr President, in all the years of persecution by the state for allegations of Arms Deal corruption and currently, the new narrative of the famous state capture, I have never implicated the ANC or its members in order to clear my name. I have faced those charges alone and have become the scapegoat as many of you continue to enjoy the riches that White Monopoly Capital continues to bless you with. I have faced those allegations alone and continue to do so in our courts in order to clear my name. It would be sacrilegious to seek to direct such accusations to thousands of ANC members or the ANC itself. I continue to carry alone

the load of what you and those who catapult you have regrettably called the "nine wasted years" and the persistent narrative of state capture that you and those to whom you have handed the ANC use to scapegoat me for all that is evil in our country. I cannot, in good conscience, attribute the weak state of our movement to you only. All of us, as leaders must take responsibility without blaming our members. Maybe, Mr President, this is the opportune time to tell our members whether during the so-called "nine wasted years" any of your companies ever did business with government (national or provincial) while you were Deputy President of our movement and the country. This would help you Mr President, to dispel this unfortunate allegation, sometimes, directed at you. It is Individuals from the ANC who must bury their heads in shame, not the ANC, our Glorious Movement.

Mr President, the ANC and the entire anti-apartheid movement always faced the threat of infiltration. At different times, during our struggle, our movement discovered spies and enemy agents, commonly called, Izimpimpi, within its ranks. However, not once was the ANC ever accused of selling out merely because there were sell-outs within its ranks. Those individuals faced the charges levelled against them and could not ask the ANC, as you do in your letter, to stand in their place as Accused No. 1 for their individual actions. It is cold comfort that later in your letter you attempt to say that you are not accusing every ANC member. It is clear that indeed you do accuse each and every member and the ANC itself for the crimes of a few deployed in the structures of the state, who may be abusing resources and betraying the revolution.

and the ANC itself for the crimes of a few deployed in the structures of the state, who may be abusing resources and betraying the revolution.

Mr President, It appears that it has become your hallmark since our 54th National Conference to divert accusations from yourself rather than to face them and clear your name. Mr President, you currently stand accused of having received almost R1 billion in donations from White Monopoly Capital just to win an internal ANC contest. The ANC has repeatedly decried this phenomenon as something foreign to its culture, policies and Constitution. We all know that such donations amounted to sacrificing the historic mission of the ANC for 30 pieces of silver. Worse still, and as a matter of fact, and with some unsurprising help from the Judgment of the North Gauteng High Court, you have sealed the record reflecting your generous donors in order for the public and ordinary members of the ANC you lead never to know the identities of those who funded your campaign to win the Presidency of our glorious movement and consequently ascend to the highest office in our land. You have done this, knowing full well that the ANC has discouraged and decried the role of money in its internal elections. This, in my view, represents a major betrayal of those who voted for you with no knowledge that their vote was going to be enhanced by the WMC donors.

Until you, Mr President and your National Executive Committee come clean to the ordinary members of our movement, your letters and statements will be construed as your attempts to appease those who, by their ill-gotten riches, catapulted you into the position you hold in our

movement. In fact, your own spokesperson stands accused of the very corruption you decry in your letter. Your own son stands accused of the same allegations. Yet, you seek to divert attention from your own office and your household as you attribute the crime of PPE corruption to the ordinary ANC members. Mr President, it maybe you that should hang your head in shame and not the members of the ANC. Mr President, the ANC is not guilty of corruption, but the individuals within the ANC are accused of corruption. Mongameli, masinganindi uMbutho Wabantu Ngobende Inyama Bengayidlanga.

Mr President, your letter further pays lip-service to the resolutions of the ANC's 54th National Conference, when in actual fact, our movement, under your leadership has been avoiding implementing resolutions on land expropriation, nationalization of the SA Reserve Bank, radical economic transformation (RET), free higher education, job creation and poverty eradication, to mention but a few.

Mr President, it would be a colossal reversal of our democratic gains if you are placing the ANC as Accused number 1. This sounds like a public relations exercise and a grand scheme that does not help to build and promote the ANC. It would be such a pity, Mr President, if under your watch, the ANC can be accused by its own leaders, instead of nurturing it.

Mr President, under your watch, the tendency, not to implement certain recommendations and decisions has been a worrying factor. For in-

stance, a Provincial Conference held in the EC in 2017, was referred to by yourself as the Festival of Chairs. There were many accusations in the Eastern Cape. The National Leadership, having received reports and complaints, took a decision to establish a Commission to investigate the conference.

It was termed, Sbu Ndebele Commission as it was led by one of our senior comrades, Sbusiso Ndebele. That Commission made specific recommendations. It appears that when the report was tabled, the leadership only noted the recommendations and took no action per the findings and recommendations, but simply noted the report. The Report continues to gather dust in Luthuli House.

Mr President, I plead with you and the entire NEC of our movement, to reflect on the issues I have raised, including the issue of corruption. I implore you to take responsibility without insulting our movement and its members, who have committed no crime of corruption as they sit waiting for the ever elusive better life for all.

Mr President, I hope my letter will be received in the constructive spirit in which it is written. I hope that our structures will get the opportunity to discuss the issues I raise. I make no claim that these are the only challenges facing our movement, or that I possess the exclusive wisdom to suggest how they should be dealt with. I am merely making a plea to our movement and our leaders to honestly confront the challenges it faces and the challenges faced by African people in our country.

YOURS COMRADELY

JACOB GEDLEYIHLEKISA MHLANGANYELWA ZUMA

Item “36”

ANC: Can the centre hold?

To lead SA out of its current quagmire, Ramaphosa cannot just rebuild the hollowed-out institutions of state; he must repair the ruling party itself

BL PREMIUM

24 OCTOBER 2019 - 05:00 *by* JUDITH FEBRUARY

Image Unavailable

The ANC top six. Picture: GETTY IMAGES/AFP/MUJAHID SAFODIEN

The ANC top six. Picture: GETTY IMAGES/AFP/MUJAHID SAFODIEN

It is often said that if President Cyril Ramaphosa wants to save SA, he needs to save and rehabilitate the ANC first. For what happens within the governing party has a direct impact on the state and its ability to meet the constitutional aspirations of equality and dignity for all citizens.

Mostly, the ANC has lost its ethical moorings, making Ramaphosa's task difficult, and at times near impossible. The party is racked with division, which has less to do with ideology and more to do with those who would loot the state pitting themselves against those with a larger, more social-democratic vision for SA.

During the Jacob Zuma years, the challenge of holding the ANC together became more obvious, as the state was captured for personal gain. The repercussions for SA have been measured not only in the untold billions lost to the fiscus, but also in the hollowing out of state institutions.

But corruption did not start with Zuma; his presidency simply represented a more dangerous and brazen form. The seeds were sown before 1994 for reasons that are many and complex, given the ANC's liberation history roots and its "exile/incile" culture.

In 1997 then president Nelson Mandela, addressing the 50th national conference of the ANC, spoke about the emergence of careerism within the party. "Many among our members see their membership of the ANC as a means to advance their personal ambitions to attain positions of power and access to resources for their own individual gratification," he said.

In late 2005, then president Thabo Mbeki, at an ANC lekgotla, pointed out that the challenge for the party was dealing with "being in power".

"We have seen these people attracted to join the ANC as a bee is to a honey pot. They come with the view that they will use access to power for personal benefit," he said.

In 2007, then party secretary-general Kgalema Motlanthe warned of "the cancer of corruption eating away at the ANC".

The complexity of the transition from liberation movement to modern political party, constrained by free and fair elections and the demands of transparency and accountability, has found the ANC sorely lacking in depth and in its ability to keep out the rent-seekers.

This challenge is not unique to the ANC. But, for its part, the party has plodded along, mostly ignoring the problem. If Ramaphosa's ascent to power shows anything, it is that nothing much has changed in the ANC, despite hollow talk about unity.

Ramaphosa's narrow victory at the 2017 ANC conference at Nasrec and his "deal with DD" (deputy president David Mabuza) created a difficulty of its own. Mabuza, the former Mpumalanga premier, had been tied to several corruption scandals and political assassinations. At Nasrec, he committed his Mpumalanga delegates to the Ramaphosa camp — but his "betrayal" of the Zuma camp showed the political chameleon he is.

As Mathews Phosa has said about the compromises at Nasrec: "Nothing principled guided the combination of the ... 'unity' slate."

Ramaphosa won the presidency, but Ace Magashule assumed the office of secretary-general, with Jessie Duarte as his deputy.

Serious questions exist over the careers of Magashule and Duarte.

Magashule, a political baron from the Free State who has been linked to the Gupta family, has been described by a trade union leader as the "Robert Mugabe of the ANC".

Duarte has been accused of links to the Guptas after her son-in-law was revealed to have been in business with them.

After Nasrec, Roelf Meyer, a former minister and Ramaphosa's key negotiating partner during the transition to democracy, said: "If there's one man today in SA who can help us put the pieces together, it's [Ramaphosa]."

But we all knew he had many pieces to put together. He had, after all, emerged victorious by a narrow margin — 2,440 votes to Nkosazana Dlamini-Zuma's 2,261.

Operating in a leadership structure through which such fissures run makes Ramaphosa's job a difficult one, especially on economic policy and dealing with state capture. The question is: how does he clean up with a deputy like Mabuza, and with Magashule as secretary-general?

If Ramaphosa's "new dawn" is to be realised, then the focus on rebuilding institutions is key. But it's not only about rebuilding hollowed-out democratic institutions; Ramaphosa will need to rebuild the ANC first. The question is whether he can rebuild both state and party.

We don't yet know whether the ANC can fix itself. All we know is that it is broken, and that Yeats's poem *The Second Coming*, so loved by Mbeki, seems apt:

Turning and turning in the widening gyre

The falcon cannot hear the falconer;

Things fall apart; the centre cannot hold;

Mere anarchy is loosed upon the world,

The blood-dimmed tide is loosed, and everywhere

The ceremony of innocence is drowned;

The best lack all conviction, while the worst

Are full of passionate intensity.

It was often asked whether Mbeki, in referencing the poem, meant the country's centre or the ANC's. Today, we might answer, "both".

• *February is a senior research associate at the Institute for Security Studies and author of Turning and Turning: Exploring the Complexities of SA's Democracy (Pan Macmillan)*

Item “37”

ANC AND BUSINESS. SOUL FOR SALE

Financial Mail (South Africa)

January 19, 2007

Financial Mail Edition

Section: ECONOMY, BUSINESS & FINANCE; Pg. 26

Length: 2999 words

Byline: Carol Paton

Body

ANC AND BUSINESS

WHAT IT MEANS

Bending the rules has become a culture

The politics of the ANC has become distorted

"This rot is across the board. It's not confined to any level or any area of the country. Almost every project is conceived because it offers opportunities for certain people to make money"

- ANC SECRETARY GENERAL

KGALEMA MOTLANTHE

The African National Congress has traded ideals for influence as the party is corrupted by its members' lust for financial gain. The FM tracks the rot at the heart of SA's most powerful organisation.

It was a cool spring evening when an ambulance screeched to a halt outside the ANC's provincial office in Dutoitspan Road, Kimberley. Paramedics were rushing to the aid of the city's first citizen, mayor Patrick Lenyibi, who had been hit by flying teacups thrown during a brawl in the ANC offices.

The first cup hit him on the head. The handle of a second lodged itself deep behind the ear after being smashed onto his head with greater force by a senior ANC member.

From several accounts, the fight, which took place in late 2005, was over a tender to supply coupons for prepaid electricity meters. The mayor is said to have implied that it would go to a group of ANC women, the member's mother included, who had already arranged to be trained to run the enterprise. But instead the tender was advertised, as it should have been, with conditions that cut his mother out of the running.

The blows were exchanged in the office of provincial secretary Neville Mompati, who strenuously denies that the argument was over a tender. Decisions over tenders should be made by neither the mayor nor the ANC but, according to the Municipal Finance Management Act, by officials in the city's tender committee. However, theory and practice are far apart.

Fights over who should get what contract are happening with growing frequency countrywide. It is a matter of embarrassment to the ANC, a party many members proudly think of in terms of its struggle legacy. That legacy is now being severely undermined, and the party seems paralysed.

The ANC, as the party in government, is centrally involved in dishing out tenders and contracts. The introduction of commercial interests is one factor that is undermining its proud political footing. Another is the "deployment" of ANC comrades to business.

This commercialisation has driven a profound change in the nature of the ANC. Once local ANC meetings were all about policies and strategies - the transformation of SA society according to the ideals the party championed for decades. Now these gatherings are frequently preoccupied with business opportunities and who should have access to them.

It's a transformation that wasn't expected. Rather than "transforming the state", as the party describes its goals in official rhetoric, the economy has transformed the ANC.

How did it begin? Trouble started for the ANC almost as soon as it took power, with squabbles over control of provincial structures. But it was only when politicians moved into the world of business that the competition for commercial opportunities began to dominate ANC dynamics.

ANC national leaders, with their clear accomplishments and talents, provided a ready recruiting ground for white business, wanting to deracialise their leadership and management and, to a lesser extent, their ownership. In many cases, senior ANC members did not detach from the party in order to take advantage of such opportunities. Today, most of the senior leadership at the ANC's Luthuli House headquarters are involved in business (one of the exceptions is ANC secretary-general Kgalema Motlanthe). As a result, few are ever there to do party work.

In parliament, 40% of ANC MPS are directors of companies, many owning them outright. Such interests are often in construction and mining. The ANC national executive has several ultra-rich members involved in business or, in the case of several cabinet ministers, whose spouses are business high-flyers.

At the ANC's last national conference five years ago, black economic empowerment (BEE) became ANC policy and engaging in business, to transform the economy, won official recognition as an acceptable revolutionary activity.

Quickly, ANC activists at provincial and local level followed the examples of their national leaders and headed into business.

On a macro level, looking at the redistribution of wealth and opportunities and the growth of black business and ownership, progress has been slow but positive. But the grassroots picture is not a such a pretty one.

Kimberley, for example, is a small city where, after mining, government business is the best game in town. The teacup meeting was not unusual: since 1999, when ANC comrades were first deployed in business, the awarding of tenders has been controversial.

Many ordinary members in the ANC say they got the impression from the start that who got what tender was being brazenly staged by their political seniors. At least two senior public servants left their jobs and landed lucrative outsourcing tenders in a matter of weeks, after being "deployed" to business, activists tell the FM, by the top structures of the party.

Soon a handful of ANC-aligned businesspeople were winning contract after contract - whether in security, transport or construction. A minor revolt in the party ended in defeat, when a group of rebels from the Kimberley region tabled a resolution at the party's 2001 conference, arguing that BEE should be broad-based and not favour just a selected few.

In the Kimberley example, three businessmen stand out as having been particularly successful in winning contracts: Motsamai Rantho, Tshego Motaung and Tyron Ruiters. Rantho and Motaung are former civil servants. All three have at some point been business partners with ANC chairman John Block.

Both Motaung and Rantho got their first contracts from Block's department, while he was transport, roads & public works MEC. Motaung, who once worked for Block, won part of a contract to manage the government garage - an enterprise for which Motaung himself had written the specifications before leaving the department to win the tender.

Like almost all "emerging" businessmen, contractors in Kimberley donate handsomely to the ANC - sometimes far more handsomely than they would like. One contractor who was asked for a R20000 donation paid up willingly, he told the FM, but could not afford a second request for more than 10 times that amount. Such donations are common (see "Untold Millions", page 34).

Block, it was widely reported, was forced to step down as an MEC in 2003 for splurging public money on hotels and entertainment for himself, his wife and friends, including a trip to Cape Town's jazz festival. In a criminal trial he was acquitted - despite having admitted on television that he did it because he was a "jazz maniac" and hoped that the nation would forgive him.

But the days when the Northern Cape's ANC leadership harmoniously discussed placing comrades in business are over. Both the chairman, Block, and the secretary, Mompati, are in business for themselves, alliances are constantly shifting as business deals succeed or fail and though Mompati strongly denies any tension, trust in the ANC is in short supply.

"In the Northern Cape," says an ANC member fed up with corruption and the fight for contracts, "we no longer have an ANC leadership. We have an ANC dealership."

Behaviour like that in Kimberley is a real problem for the party. Motlanthe, as national secretary-general, has been inundated with complaints from all over, particularly about unfair monopolisation of business opportunities. An endless stream of people have come to his door complaining. Some say they have been betrayed by the ANC, cheated out of tenders or told to cut the friends of certain politicians into their deals. Sometimes ANC colleagues shop one another when they fall out - as when North West premier Edna Molewa reported then Women's League secretary Yvonne Makume to the ANC head office. An ANC official says Makume had written to municipal managers, telling them to dispense with some tender regulations when it came to evaluating her company's bids.

There is no scientific measure of how bad corruption in SA really is. Organisations like Transparency International measure corruption on the basis of perceptions through interviews. SA comes out reasonably well, rated the second-least corrupt country in Africa. This might reflect the macro picture of SA's big corporates and government departments. But it is certainly a radical underestimation of what is happening at a micro level in provinces and municipalities.

Motlanthe, in touch with the ANC's nearly 200 branches, has a better view than most. He believes corruption is far worse than anyone imagines.

"This rot is across the board. It's not confined to any level or any area of the country. Almost every project is conceived because it offers opportunities for certain people to make money. A great deal of the ANC's problems are occasioned by this. There are people who want to take it over so they can arrange for the appointment of those who will allow them possibilities for future accumulation," he says.

Members the FM interviewed implied that sending contracts the way of an ANC-linked businessman was frequently legitimised by the notion that doing so was "good for the ANC". Often, it is claimed, the profit will be for the ANC itself - a statement, says Motlanthe, that is far more often false than true.

Direct donations to the ANC are frequently solicited, sources say. Contractors are also known not just to donate to the party generally but also to bankroll particular factions or individuals, well placed to dispense large contracts.

Bending the rules, says Motlanthe, becomes a culture when people lower down see that higher-ups do it.

The ANC and its structures are the first stop for anyone hoping to make money out of government contracts.

And the party is highly vulnerable

to manipulation by those looking to

gain influence.

Corrupting the ANC is not an expensive business. Membership costs R12/year and the practice of buying members to support an individual in a branch or provincial conference election is common. ANC membership rises and sometimes even doubles in the lead-up to a provincial conference (see page 33).

Procedures put in place to confound ghost members had been subverted, Motlanthe said in an official report in July 2005, and people had been able to "capture branches" and "advance self-serving agendas".

One local councillor - a community worker of excellent standing who lost his seat on the Emfuleni city council (Vereeniging) when his branch failed to nominate him in 2005 - told the FM the branch nomination process was "mad".

"Almost everybody was pushing to get in [as a councillor]. I saw a lot of people I didn't know. These people had just been given membership - they had not been in the organisation at any point before."

The impact on the party is clear. Businessman Saki Macozoma says he is

deeply concerned about how "the expectation of making money out of government distorts the politics of the ANC".

"People who have no interest in advancing the politics of the ANC have stormed in and taken over. Once inside, they displace others - and competence goes out of the window," he says.

Access to provincial cabinet positions now carry an additional significance. The highest prize are those with capital budgets to spend: housing, public works, roads and transport.

To see how access to such power is distorting the way the party should work, consider another example.

Mcebisi Skwatsha is the popular secretary of the Western Cape ANC - a position he has held for two terms. Though things have changed now, for many years Skwatsha was one of only a few African members of the ANC on the provincial executive. But though Skwatsha was close to Ebrahim Rasool, the ANC leader before 2005 and the premier since 2004, he wasn't automatically considered by Rasool for appointment to his cabinet.

When Rasool put his cabinet together in April 2004, he was lobbied to include Skwatsha by the ANC's national structures. He was given the coveted transport & public works portfolio, which allows him to oversee the valuable property interests of the province, complete with a substantial capital budget.

The party was trying to solve another problem. It had become concerned by complaints of a monopoly on economic opportunities by a small group of businessmen in the Western Cape (see case study on page 29).

But not long into his term, Skwatsha's responsibilities were summarily reorganised by Rasool, who took the management of government's property assets away from Skwatsha and reallocated them to his office.

The FM has been told that Skwatsha was negotiating with businessman Brett Kebble over the disposal of the provincial government's most precious jewel, the Somerset Hospital site, situated near the Waterfront complex and ripe for a multibillion-rand development. Those negotiations have been confirmed by an associate of Skwatsha's.

The result of the reorganisation was outrage and pandemonium in the ANC. Skwatsha parted ways with Rasool and teamed up with the "Africanist" faction that both had previously disdained. The provincial conference (during which the Skwatsha faction, according to a well-placed source, had its preconference caucus meeting in a Seapoint hotel bankrolled by Kebble) saw Rasool stripped of much power. He lost his position as chairman and only barely held on to an ordinary seat on the provincial executive.

According to sources in the Skwatsha camp, Rasool had one more stab at Skwatsha before losing his position. Two weeks before the provincial conference, Skwatsha was hit by corruption allegations, accused of trying to get a security tender from the city council for his brother's company by using his political influence.

Rasool, says a member of the ANC provincial executive, admitted afterwards that he had met the investigating officer twice - which may explain why the police raiding the city's tender offices said in an affidavit that they were doing so on the orders of the premier.

Cleared over a year later of any wrongdoing by the elite Scorpions unit, the ebullient Skwatsha cracked open a bottle of champagne at a press conference late last year.

"The champagne was not just because there was no case against him, but because Rasool had used state resources against him and failed," says a friend.

The broedertwis in the Western Cape ANC shows how the arrival of business opportunities has changed political life.

SA Communist Party leader and intellectual Jeremy Cronin says that the ideology of the ANC has shifted. While the general thinking used to reflect an organisational and collective approach to change, nowadays the emphasis is an individualistic one, a prevailing notion that "you can get whatever you want, if you want it badly enough".

Motlanthe and Macozoma both speak of the rise of the "Lotto mentality" and how the idea that it is possible to become an instant millionaire has taken root. Working for low wages or low returns in a small-scale enterprise is scorned.

"People see that others are making reported millions - even though it's actually all debt. Ordinary ANC members ask themselves 'why not me?'," says Macozoma.

So can the ANC get its house in order? For more than 18 months the party has been paralysed by leadership succession. Little else has been discussed at the NEC, the most senior committee of the party, despite a general recognition from across the board that the ANC is rotting from within.

A subcommittee of the NEC, made up of Macozoma, finance minister Trevor Manuel and others, was recently asked to produce guidelines on how the ANC should deal with the problems arising from its members' dealings in business.

This was after Motlanthe rang alarm bells more than 18 months ago at the ANC's national general council, where he warned that the involvement of members in business was destroying the soul of the party.

Some of the group's suggestions include: declarations of interest for ANC officials; guidelines on what kind of donations the ANC should accept; and the suggestion that a special committee elected at the party's five-yearly national conference deal with disputes between members.

Solutions, though, are constrained heavily by two things.

The history of political and economic dispossession makes it unlikely that anyone, politician or high-ranking civil servant or not, will be excluded from the exceptional opportunities that BEE provides for wealth accumulation.

"You've got to be reasonable and pragmatic about this. Cooling-off periods [where ex-government officials are restricted from participating in the sectors they have regulated] won't work for our generation. Where a person has built up skills and knowledge in an area, you can't tell them they can't participate," says Macozoma.

Neither is excluding serving politicians from participation in business a realistic option, he says. "BEE creates a particular opportunity with a limited shelf life - you can't exclude people from it."

But more immediately, the ANC is constrained most heavily in finding a solution by its own organisational paralysis. Obsessed with its leadership battle, the party has been rendered incapable of honest self-reflection at a time when it is faced with challenges that can bring about its own destruction. It is crucial for the party to reflect on its own systems and processes. The ANC national conference, at the end of this year, must choose the future leader of the party. But it may be more important to decide the future of the party itself.

Motlanthe's words in reference to the Western Cape can be applied to the party as a whole: "I told them that they have no ideological differences; they have no racial differences. They are fighting over control and monopoly of tender processes."

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Load-Date: January 20, 2007

Item “38”

polity.org.za

ANC: Viewpoint by African National Congress secretary-general Gwede Mantashe in the ANC Today newsletter (28/08/2009)

6-7 minutes

Local government is the most important sphere of government. It is where direct and dynamic contact with communities happens. It is an area where the African National Congress can and should dramatically improve its performance.

We need to analyse our weaknesses correctly and come up with concrete proposals for improvement. It is easy to criticize councillors as not performing, as weak, as lacking commitment and make many negative statements, and in the process offend many good councillors that the ANC has developed in about fifteen years.

The wave of service delivery-related protests we experienced recently raises new questions about our need to pay closer attention to this important sphere of government. We must be able to give the correct diagnosis of every protest action we see. Where service delivery is the real issue, we must be responsive and address the problems raised by the communities with the necessary speed. We must resist the temptation to be dismissive of problems and concerns of communities. Every problem must be treated with the necessary seriousness.

We must confront situations where the crisis is a function of infighting and positioning by some of our members to take over as councillors immediately or in local government elections in 2011. In such situations we must defend those who become victims of ambition. We must defend our policies and the image of our movement at all cost. We must deal with individual comrades who assume a bigger importance than the organisation itself.

The biggest threat to our movement is the intersection between the business interests and holding of public office. It is frightening to observe the speed with which the election to a position is seen to be the creation of an opportunity for wealth accumulation. Deployment to positions in local government should not be based on who can best facilitate opportunity for wealth accumulation for those in position of power.

If we do not deal decisively with this tendency the ANC will only move one way, that is, downward. Fighting corruption must be our preoccupation. The scale of corruption at local level is not at the same level as at both provincial and national level. The problem is that it is cruder. ANC councillors must be part of the network to fight corruption in all its forms and manifestations.

The lack of depth and experience make us less effective. Sixty seven percent of councillors are first term councillors, twenty eight percent are in their second term and only five percent are in

the third term or more. As the ANC we have not consciously sought to retain experience. We have allowed clean sweeping of our public representatives in every round of elections. We have also treated local government as the stopover in a movement to either provincial or national government.

In 2011 we must retain some visible depth of skills and experience. To do this in a more scientific way we must do the performance assessment of councillors and complete it before December. We should do the follow up assessment around June 2010. Those comrades who are not performing must be given such feedback now and help them improve. Our assessment will cover three broad areas - council work, political work and personal development.
Council work will cover areas such as attendance of council meetings, ANC caucus; work in committees and the quality of contribution in all these council structures.
Political work will deal with one's involvement in the ANC's political work, that is, work in the constituency, including report back meetings and public meetings.
Self-development is important for the ANC so as to develop the depth of experience and skills and make deployment to critical and strategic positions easier.
The branches of the ANC are important in that they must do the political oversight. This requires that we conduct more training and political education. Our branches must be made aware that the political leadership responsibility is not an opportunity to take over as a councillor. Branches must play a bigger role in the calling of public meetings, in that only those branches that call these meetings will be able to detect brewing trouble and live up to the tradition of the ANC being rooted among the people.

The ANC is not leading itself, but must lead society. We can, therefore, not limit our activism to our own structural meetings. Public meetings are a must for all our councillors.

ANC-controlled municipalities should never be outperformed by those controlled by the opposition. The responsibility of an ANC survival and/or collapse in local government rests on the shoulders of each councillor. We should be loyal to our decisions and take responsibility for both successes and failures.

All councillors must call public meetings immediately and continue doing so regularly to give feedback on what they are doing or planning to do. Equally important will be taking up the problems and concerns raised by communities and alert the province timely on potential problems including protests in our communities.

In preparation for 2011 we must do the performance assessment of councillors and give feedback. This should inform the selection of candidates for the 2011 local government elections.

To ensure continuity and improvement of our performance, we must strive for the retention of experience and expertise for continuity and improvement of our performance. Councillors and our branches must be part of the presidential crack team in fighting crime and corruption.

Working together we can and must do more to improve service delivery and performance of our councillors.

Item “39”

The politics of shame is the medicine we need

Sunday Times (South Africa)

December 06, 2009

Review Edition

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Byline: Mpumelelo Mkhabela

Body

The politics of shame is the medicine we need

Party line on morality fools no one while plundering goes unpunished, says

IN 2000, at the height of the now-forgotten African renaissance, thousands of ANC members gathered at Nelson Mandela University in Port Elizabeth to discuss the party as an "agent of change".

It was at the time when President Thabo Mbeki's big idea was still fashionable. Even the "Iron Duke", Irvin Khoza, had a cellphone voice mail greeting that began with the words: "In the name of the African renaissance ..."

True to the prevailing mood, the ANC's national general council resolved to give birth to a "new cadre". This new person would epitomise a "new morality" that abhorred and resisted corruption. The new being would be incorruptible, and accept public office with the sole purpose of serving others.

In Biblical parlance, it was a born-again moment. But, in biological terms, it was only the start of a season of hibernation.

"New morality starts with the ANC," Mbeki told soon-to-be reborn members. "The ANC must act against corruption in its own ranks and in society by promoting cadre development and a new morality."

Mbeki decried the fact that the ANC had attracted "careerists and opportunists who join the party with the sole aim of furthering personal careers and using state power to enrich themselves".

Fast-forward to October 2009: ANC secretary-general Gwede Mantashe lamented the same problems: "When selflessness, one of the principal characters of our movement, is being replaced by a new-found expression of selfishness wherein personal accumulation (of wealth) becomes the main cause for division, we must know that the movement is in decline."

Nine years on, and the "new person" - the ideal of the likes of socialist revolutionaries such as Amilcar Cabral and Ché Guevara - has yet to be born.

More accurately, this new creature was miscarried soon after its conception in Port Elizabeth.

What was born instead, and promises to live longer, is loud anti-corruption speak from party leaders. If talk could solve problems, we might have long since reached the promised land in which the "new morality" reigns.

The condemnation of corruption is the new political currency.

The politics of shame is the medicine we need

Cosatu leader Zwelinzima Vavi has warned that if corruption is not nipped in the bud, South Africa could go the awful Zimbabwe route; ANC leader and former government policy chief Joel Netshitenzhe has spoken of reaching a "tipping point" that could result in the collapse of the well-crafted edifice of democracy.

But these warnings ring hollow; even the most corrupt have joined in the rhetoric. When someone who was involved in arms deal corruption speaks against corruption, should the public really believe that the scourge is being nipped in the bud?

When an MP who was implicated in stealing parliament's money speaks against graft, who can believe his commitment?

Such warnings, when they are not matched by action, breed public cynicism in the form of a retort: "Now that they are full, they don't want us to eat."

Deputy President Kgalema Motlanthe likes to reminisce about how the ANC's old, selfless cadres would take the lead in preparing meals at weddings and funerals, and only eat when all the guests had been satisfactorily fed.

When it comes to the public purse - whether within state-owned enterprises or government institutions - it cannot get any worse; ANC cadres not only jump the queue, they fight each other for the biggest chunk.

Malusi Gigaba, home affairs deputy minister and a member of the ANC's national executive committee, has spoken of how some cadres deploy their friends to positions in which they allocate tenders for personal gain.

The profits from this practice, Gigaba reasoned, benefit both the deployee and the deployer. Factions square up through the same method.

Those who study war would describe such a practice as an internecine "war economy" of a special type, fought over who gets to plunder state coffers.

When different factions vie for positions, the war spills into the open - either under the guise of service delivery protests or a gun or knife battle in an ANC meeting.

The wars of the purse are self-funding: warring factions ensure that stability - anathema to the profits of war - is prevented at all costs. In short, instability is profitable.

He may not have conceptualised it properly, but Mantashe's lamentations in the ANC's online mouthpiece, ANC Today, could be the classic definition of a war economy.

"Current experience shows that ambition for office is accompanied with unruly and violent behaviour, and ill-conceived ways of campaigning and lobbying. Election has become a matter of life and death," he wrote.

What prolongs this war economy within the ANC is what psychologists call "cognitive dissonance": inconsistency between one's words and one's deeds.

Public representatives do not step down when they face the corruption scandals they claim to be fighting.

Anti-corruption rhetoric has become a blunt sword on which the fighters of corrupt acts would never themselves fall.

But the tough talk suggests they have observed the extent of the scourge among themselves, although culprits are not identified, nor do those who know they are corrupt step down - and those implicated are defended with vigour.

The government's regulations and laws, particularly the Prevention of Corrupt Activities Act, are quite tough on corruption, and more tightening is afoot.

But these are technical instruments, which cannot take the place of the values of good conscience that defined the ill-fated "new person".

The politics of shame is the medicine we need

The seemingly good values that drive the enactment of such laws are not carried further.

There is the real risk that they may be seen as mere window-dressing to lull an unsuspecting public.

In fact, given the absence of public outrage when stories of corruption come to light, society may have already been numbed long ago.

In the few instances when the rules do bite, there is outcry that they are applied selectively - suggesting that those who are nailed know of many other transgressions.

In any case, it is one thing to create a trap against yourself; it is quite another to arm it.

As Antonin Scalia, the stylist justice of the US Supreme Court, once remarked: "No government official is tempted to place restraint upon his own freedom of action, which is why Lord Acton did not say, 'Power tends to purify'."

So what is to be done? The choice is between Italian Prime Minister Silvio Berlusconi's option - which entails showing the public a middle finger and staying in public office regardless of the nature and extent of the scandals in which officials are entangled - and urgently adopting the politics of shame by voluntarily stepping out of public office when faced with corruption scandals.

The politics of shame would require the translation of rhetoric into action.

Some examples of other polities, such as the resignation of Britain's parliamentary speaker, Michael Martin, in the face of the expenses scandal, could be adopted by those who claim to fight corruption here.

John "The Bull" O'Donoghue, the Irish speaker, stepped down over similar charges. So did Poland's sports minister, Miroslaw Drzewiecki, who tampered with a gambling law to shield a company involved in illegal dealings.

US President Barack Obama was embarrassed when two cabinet nominees - Bill Richardson and Tom Daschle - withdrew their nomination following questions over whether they were tax-compliant.

To imagine a South African cabinet nominee declining an offer from the president on the basis that he might be an embarrassment to the government is far-fetched. Such a prospect, in the absence of the politics of shame, is as likely as harvesting pineapples on the moon, as one cynic would have it.

This is the conclusion that one inevitably comes to when it is reported that a minister with a cloud hanging over his head has been appointed - and has accepted the nod to be - an ambassador to represent the republic faithfully in relations with other nations.

Of course, you wonder how someone who barely served his department faithfully could master the art of serving the republic in his new capacity.

Or take the case of a prison boss who is promoted to a position of global sporting responsibility after he left his department's books dripping with red ink, in addition to being implicated in multibillion-rand tender rigging.

What of a director-general who sits safely ensconced in his office while a forensic investigation is conducted on him?

These and many other examples require the restatement of the question posed by Mpumalanga ANC Youth League leaders a few years ago when they pretended to be calling for order (while in fact promoting the war economy that is undermining the party): "Is the democratic revolution safe in your hands?"

Load-Date: December 9, 2009

Item “40”

news24.com

Cyril Ramaphosa | Profiting from a pandemic is like a pack of hyenas circling wounded prey

Cyril Ramaphosa

9-12 minutes

The act of trying to profit from the Covid-19 pandemic while people are dying is the act of scavengers, writes ***Cyril Ramaphosa.***

Dear Fellow South African,

Corruption during a national disaster is a particularly heinous type of crime, and perpetrators are going to be dealt with decisively and harshly.

It is difficult to understand the utter lack of conscience that leads a businessperson who has heeded the call to provide lifesaving supplies during a devastating pandemic to inflate the price of a surgical mask by as much as 900%.

Nor can one explain why a councillor would stockpile emergency food parcels meant for the poor for their own family, or why another councillor would divert water tankers en route to a needy community to their own home.

It is impossible to discern what drives an entire family whose member stole funds meant for unemployed workers to go on a spending spree, buying cars, paying for renovations and beauty treatments, and even tombstones.

Attempting to profit from a disaster that is claiming the lives of our people every day is the action of scavengers. It is like a pack of hyenas circling wounded prey.

Theft with no conscience

As we find ourselves in the grip of the greatest health emergency our country has faced in over a century, we are witnessing theft by individuals and companies with no conscience.

We hear stories of alleged corruption in the procurement and deployment of personal protective equipment to fight Covid-19, of companies hiking the prices of essential items during the lockdown and of the illegal diversion of state resources meant for the vulnerable and destitute.

This insidious behavior is not the preserve of smaller companies. There are large companies, including a JSE-listed company, that have been caught, investigated, found guilty and fined for excessive pricing.

These stories have caused outrage among South Africans. They have opened up the wounds of the state capture era, where senior figures in society seemed to get away with corruption on a grand scale.

As a country, we have done much to turn our back on that era by disrupting and dismantling the networks that had infiltrated government, state companies and even our law enforcement agencies to loot public resources.

We have rebuilt vital institutions like the National Prosecuting Authority, SA Revenue Service and the Hawks. Through the establishment of bodies like the Investigating Directorate in the NPA, we have strengthened the hand of law enforcement to investigate and prosecute these crimes. And through the

establishment of the SIU Special Tribunal, we have increased our capacity to get back funds stolen from the state.

But it is clear that we need to do more. And that we need to act more decisively.

As we set out to mobilise resources on an unprecedented scale to confront coronavirus and its effects on businesses, jobs and livelihoods, we put in place several measures to safeguard these funds.

These included regulations to ensure that emergency procurement of supplies and services was fair, transparent, competitive and cost effective. The Competition Commission has made effective use of regulations that prohibit unjustified price hikes to prosecute several companies for excessive pricing. The Auditor-General initiated special audits to detect and prevent the misuse of these funds.

While these measures have no doubt limited the potential for abuse to some extent, the evidence at hand now shows that they have not completely prevented it. And so, we need to take action.

Just over a week ago, I signed a proclamation authorising the Special Investigating Unit (SIU) to investigate any unlawful or improper conduct in the procurement of goods and services during the national state of disaster.

This is a broad remit that extends across all spheres of the state and, importantly, provides for civil proceedings to recover misappropriated funds. It enables the SIU to probe each credible allegation that is made about the theft of Covid-19 funds.

I will be receiving interim reports every six weeks on the cases at various stages of investigation and prosecution. When investigations yield evidence of criminality, they will be speedily referred for prosecution.

Multidisciplinary approach

Experience here and in many other countries shows that a multidisciplinary approach to tackling the commission of alleged criminality is needed for the fight against corruption to be successful. A broad range of investigative and prosecutorial capabilities need to be brought together under one roof.

'Fusion centres' that draw together different agencies for better information and intelligence sharing, to pool resources and to streamline operations are common practice in a number of countries.

We have taken this approach to detect, investigate and prosecute Covid-related corruption. A special centre has been established that brings together the Financial Intelligence Centre, the Independent Police Investigative Directorate, National Prosecuting Authority, the Hawks, Crime Intelligence and the SAPS Detective Service, South African Revenue Service, Special Investigating Unit and the State Security Agency.

This strengthens our response immensely. These bodies are now working together not just to investigate individual allegations, but also establish linkages between patronage networks that are trying to hide their activities. Because of this cooperation, prosecutions should proceed more quickly and stand a better chance of success.

But corruption is a far broader problem in our society. We must take steps right now that not only safeguard Covid funds, but that also protect all public funds and all institutions from corruption now and into the future.

We must look, for example, to extend the responsibility of our multi-disciplinary team of investigators and prosecutors beyond Covid-related crimes. We should use the current approaches and methods to dramatically strengthen the fight against corruption.

Ultimately, the success of these efforts does not rely on law enforcement alone. It depends on the actions of all individuals and all formations within society – from public servants to politicians, from businesses to political parties, from Parliament to government departments. It depends on the vigilance of citizens,

religious bodies, traditional leaders, professional associations, the media and many others. I therefore encourage people to "blow the whistle" should they have information about acts of malfeasance in relation to the abuse of public funds or resources.

It requires a new consciousness and new sense of accountability.

If, as public servants and political office-bearers, we claim to be serious about restoring public trust that has been severely eroded by corruption, we must avoid even the perception of conflicts of interest.

If as public servants and political office-bearers we truly care about the public whose interests we claim to represent, we must allow ordinary members of the public who have interest in doing business with government a fair chance to bid for such business opportunities, instead of passing on inside information about opportunities to our families and friends.

We already have regulations, such as annual financial disclosure, in place to discourage public servants doing business with the state. Anyone bidding for state work has to make a declaration of interest, including whether anyone connected to the bid is employed by the state.

Not all conduct criminal

This is clearly not enough. While everyone in South Africa has a right to engage in business activities, we are faced with the real problem of families and friends of political office-bearers or public servants receiving contracts from the state. Not all conduct of this sort is necessarily criminal, but it does contribute to a perception and a culture of nepotism, favouritism and abuse. And it undermines public confidence in the integrity of our institutions and processes.

We are determined to finally deal with the entrenched patronage networks that enable government employees to bid for state contracts through their friends and relatives.

This requires not only better laws and stronger enforcement, but also political will and social mobilisation.

We are going to change the culture in the public service, encouraging more openness and transparency, making it easier to report misuse of public funds and working more closely with civil society to combat corruption. A good example of this, is the Health Sector Anti-Corruption Forum, which brings together civil society, health sector regulators, law enforcement agencies and government departments to fight fraud and corruption in the area of health – and which has already made much progress in investigating alleged offences.

We will overcome the coronavirus and restore the health of our country and its people. But it will never be that our triumph over this pandemic is won at the expense of our integrity.

We will not allow public funds hard-earned by loyal taxpayers or donations by patriotic companies and individuals and the international community to vanish down a black hole of corruption.

Those found to have broken the law to enrich themselves through this crisis will not get to enjoy their spoils, regardless of who they are or with whom they may be connected.

I have said that Covid-19 presents us with opportunities to change the way live, do business and govern. This moment is definitely a turning point in the fight against corruption.

We are going to act boldly and must act together.

With best wishes.

Item “41”

ECONOMIC FREEDOM FIGHTERS v SPEAKER, NATIONAL ASSEMBLY AND OTHERS2016 (3) SA 580 (CC) E

Citation 2016 (3) SA 580 (CC)

Case No 143/15
[2016] ZACC 11

Court Constitutional Court

Judge Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J

Heard February 9, 2016

Judgment March 31, 2016

Counsel *W Trengove SC* (with *D Mpofu SC*, *T Ngcukaitobi*, *J Mitchell* and *N Muvangua*) for the Economic Freedom Fighters.
Anton Katz SC (with *J de Waal*, *J Bleazard* and *T Mayosi*) for the Democratic Alliance.
LG Nkosi-Thomas SC (with *GD Ngcangisa* and *M Musandiwa*) for the Speaker of the National Assembly.
JJ Gauntlett SC (with *KJ Kemp SC*, *M du Plessis*, *S Mahabeer* and *S Pudifin-Jones*) for the President.
WR Mokhari SC (with *H Slingers* and *M Kgatla*) for the Minister of Police.
G Marcus SC (with *M Stubbs*) for the Public Protector.
C Steinberg (with *L Kelly*) for Corruption Watch.

F

Flynote : Sleutelwoorde

G **Constitutional law** — Chapter 9 institutions — Public Protector — Powers — To take appropriate remedial action — Legal status and effect — Constitution, ss 182(1)(c).

Constitutional law — Separation of powers — Between legislature and H judiciary — Legislature's obligation to scrutinise and oversee executive action and to hold it accountable — Outside parameters of judicial authority to prescribe to legislature how to discharge such obligation — Constitution, ss 42(3) and 55(2).

Constitutional law — State President — Obligations — To uphold, defend and respect Constitution, and to assist and protect ch 9 institutions — Non-compliance I with binding remedial action taken against President by Public Protector inconsistent with such obligations — Constitution, ss 83(b), *181(3) and 182(1)*(c).

Constitutional law — Parliament — Obligations — To scrutinise and oversee executive action, to hold executive accountable, and to assist and protect J ch 9 institutions — Not ensuring compliance with binding remedial action

taken against President by Public Protector inconsistent with such A duties — Constitution, ss 42(3), 55(2), 181(3) and 182(1)(c).

Constitutional practice — Courts — Constitutional Court — Jurisdiction — Exclusive jurisdiction to decide whether Parliament or President failed to fulfil constitutional obligation — Nature of constitutional obligation activating exclusive jurisdiction — Not obligation shared with other state organs but B actor-specific — Whether President's failure to comply with remedial action taken by Public Protector against him, activating court's exclusive jurisdiction — Whether National Assembly's failure to take action on Public Protector's report,activating court's exclusive jurisdiction — Constitution, ss 167(4)(e), *42(3), 55(2), 83*(b), *181(3) and 182*(c).

Headnote : Kopnota

This case concerned the constitutional obligations of the President and those of C the National Assembly (the NA) to implement remedial action taken against the President by the Public Protector acting in terms of s 182(1)*(c)* of the Constitution.

The Public Protector's report on her investigation into the costs of the Department of Public Works' security upgrade of the President's private residence found D that the President and his family were unduly enriched by non-security features included in the upgrade. The Public Protector ordered that the President repay a to-be-determined percentage of the undue enrichment; that he reprimand the ministers involved in the project; and that he report to the NA with his 'comments and actions on this report' within 14 days.

The President complied with the 14-day deadline but the remedial action was E not otherwise implemented. The NA, having conducted its own investigation of the matter, adopted a resolution absolving the President from all liability. Dissatisfied with this outcome, the Economic Freedom Fighters (the EFF), a political party, applied directly to the Constitutional Court for confirmation of the legally binding effect of the Public Protector's remedial action; for an order directing the President to comply with it; and for an F order declaring that both the President and the NA had breached their constitutional obligations. [*] The EFF based their application for direct access on the premise that the non-implementation of the Public Protector's remedial action constituted a failure by 'Parliament or the President . . . to fulfil a constitutional obligation', which under s 167(4)(e) of the Constitution vested the Constitutional Court with exclusive jurisdiction. G

Held, as to the application for direct access

Section 167(4)*(e)* had to be given a narrow meaning so as not to unduly deprive other courts of their constitutional jurisdiction. The allegedly breached obligation had to be one that was specifically imposed on the President or Parliament; an obligation shared with other organs of state would fail the H s 167(4)*(e)* test. For the EFF to succeed, it would have to rely on a breach of a constitutional obligation — resting on the President as an individual and on the NA as an institution — that had a demonstrable and inextricable link to the need to ensure compliance with the remedial action taken by the Public Protector. (Paragraphs [17] – [18] and [23] at 590F/G – 591F and 593F – 594A.)

As to exclusive jurisdiction in relation to the application against the President: I Section 83*(b)* of the Constitution obliged him to 'uphold, defend and respect' the Constitution. But to meet the s 167(4)*(e)* requirements,

A conduct showing that the President personally failed to fulfil a constitutional obligation expressly imposed on him had to be invoked in order to establish the essential link between the President's more general s 83*(b)* obligations and a particular right or definite obligation. In the present case the link would be provided by the Public Protector's exercise of her s 182(1)*(c)* power to take remedial action and the President's disregard of B it. Hence the conditions for the exercise of the court's exclusive jurisdiction in relation to the President's conduct were met. (Paragraphs [33] – [35] and [39] – [40] at 597B – 598B and 598H – 599B.)

As to exclusive jurisdiction in relation to the application against the NA: Section 55(2) of the Constitution obliged the NA to hold the executive accountable and to maintain oversight over it, but without indicating how C this duty was to be discharged. To determine whether the NA had fulfilled its obligations in the this regard would entail the resolution of crucial political issues, an exercise trenching on sensitive areas of the separation of powers. This was a powerful indication that the court was entitled to exercise its exclusive jurisdiction in the present matter. In addition the NA — like the President — had actor-specific constitutional obligations D imposed on it by s 182(1)*(b)* and *(c)* of the Constitution. The Public Protector's power 'to report on that conduct' meant reporting primarily to the NA, which was then obliged to take action under ss 42(3) and 55(2) of the Constitution — ie by overseeing, scrutinising and holding executive action accountable. Hence the EFF also met the requirements for the court to exercise exclusive jurisdiction in relation to the conduct of the NA. E (Paragraphs [43] – [45] at 599G – 600F.)

Held, as to the legal effect of the Public Protector's remedial power

This power was sourced in the Constitution. Sections 181 and 182 of the Constitution gave reliable pointers to the legal status and effect of the Public Protector's remedial power. The obligation (in s 181(3)) of other organs of state to assist and protect her so as to ensure her dignity and effectiveness, F was relevant to the enforcement of her remedial power — she would arguably lack dignity and be ineffective if her directives could be ignored. A remedial power that was so inconsequential that those against whom it was exercised could ignore or second-guess it, was irreconcilable with the need for an independent, impartial and dignified Public Protector. 'Appropriate' action meant action suitable to redress or undo the prejudice, impropriety, G unlawful enrichment or corruption in question. While it might sometimes be a mere recommendation, it would often have to be binding to effectively address the complaint. It was inconsistent with ss 181 and 182 to conclude that the Public Protector could only make recommendations that could be disregarded if there were a rational basis for doing so. (Paragraphs [64] – [71] at 606D – 609H.)

H When remedial action was binding, compliance was obligatory, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. It could not be ignored without legal consequences. The constitutional order hinged on the rule of law, which obliged everyone to obey the decisions of those clothed with the legal authority to make them, or else approach the courts to have them set aside. (Paragraphs [73] – [75] at 610D – 611D.)

I **Held, as to whether the President acted in breach of constitutional obligations**

The remedial action the Public Protector took against the President was binding. It required him to take concrete steps to determine how much he was supposed to pay for the listed non-security features. While the President was entitled to launch a parallel investigation if he doubted the correctness J of the Public Protector's findings, it was only after a court of law had set them aside that it would be open to him to disregard them. Here the Public

Protector's remedial action was second-guessed in a manner that was A contrary to the rule of law. Absent a court challenge to the Public Protector's report, the President had to comply. This substantial disregard for the remedial action taken against him by the Public Protector was inconsistent with his constitutional duties to uphold, defend and respect the Constitution (s 83*(b)*), and to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness B (s 181(3)). (Paragraphs [76] – [78],[81] – [83] at 611D – 612C and 612G – 613F.)

Held, as to whether the NA acted in breach of its constitutional obligations

The NA was also entitled to challenge the findings and remedial action of the C Public Protector but, absent a court challenge, it was duty-bound to hold the President accountable by facilitating his compliance. By effectively setting-aside the Public Protector's report, the NA acted contrary to the rule of law by usurping the authority of the judiciary. The NA's conduct was contrary to its constitutional obligations to scrutinise and oversee executive action (s 42(3)); to maintain oversight of the exercise of executive powers by D the President and hold him accountable (s 55(2)*(a)* and *(b)*); and to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness (s 181(3)). (Paragraphs [88], [94], [98] and [104] 614H – 615B, 616H – 617D, 618D – E and 620B – C.)

Held, as to the separation of powers E

Neither s 42(3) nor s 55(2) defined any strictures within which the NA was required to operate in its endeavour to fulfil its obligations. It fell outside the parameters of judicial authority to prescribe to the NA how to scrutinise executive action, what mechanisms to establish and which mandate to give it for the purpose of holding the executive accountable and fulfilling its oversight role of the executive or organs of state in general. The mechanics of how to go about fulfilling these constitutional obligations was a discretionary matter best left to the NA. (Paragraphs [93] at 616D – H.) F

Cases Considered

Annotations

Case law

Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC) (2012 (12) BCLR 1297; [2012] ZACC 24): compared G

Democratic Alliance v South African Broadcasting Corporation Ltd and Others 2015 (1) SA 551 (WCC) ([2014] ZAWCHC 161): criticised

Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) (2006 (12) BCLR 1399; [2006] ZACC 11): applied H

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253; [1996] ZACC 26): applied

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458; [1998] ZACC 17): referred to I

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) (1997 (7) BCLR 851; [1997] ZACC 6): dictum in para [69] applied

Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) (2011 (7) BCLR 651; [2011] ZACC 6): referred to

Helen Suzman Foundation v Judicial Service Commission 2015 (2) SA 498 (WCC) ([2014] 4 All SA 395; [2014] ZAWCHC 136): compared J

A *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) (2011 (10) BCLR 1017; [2011] ZACC 23): compared

Mazibuko NO v Sisulu and Others NNo 2013 (6) SA 249 (CC) (2013 (11) BCLR 1297; [2013] ZACC 28): referred to

MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute B 2014 (3) SA 481 (CC) (2014 (5) BCLR 547; [2014] ZACC 6): dictum in para [103] applied

My Vote Counts NPC v Speaker of the National Assembly and Others 2016 (1) SA 132 (CC) (2015 (12) BCLR 1407; [2015] ZACC 31): referred to

Nyathi v MEC for Department of Health, Gauteng and Another 2008 (5) SA 94 (CC) (2008 (9) BCLR 865; [2008] ZACC 8): dictum in para [80] applied

C *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC) (2013 (1) BCLR 14; [2012] ZACC 27): referred to

Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1): referred to

D *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) (1997 (1) SACR 567; 1997 (6) BCLR 708; [1997] ZACC 4): dictum in para [65] applied

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (2) SA 14 (CC) (1999 (2) BCLR 175; [1998] ZACC 9): dictum in para [29] applied

E *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725; [1999] ZACC 9): dictum in paras [72] – [73] applied

Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC) (2005 (4) BCLR 301; [2004] ZACC 20): dictum in paras [106] – [108] applied

F *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) ([2015] 4 All SA 719; [2015] ZASCA 156): dictum in para [52] applied

The Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA) ([2011] ZASCA 108): referred to

G *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) (2009 (10) BCLR 1052; [2009] ZACC 15): referred to

Women's Legal Centre Trust v President of the Republic of South Africa and Others 2009 (6) SA 94 (CC) ([2009] ZACC 20): referred to.

Statutes Considered

Statutes

H The Constitution of the Republic of South Africa, 1996, ss 42(3), 55(2), 83*(b)*, 167(4)*(e)*, 181(3) and 182(1)*(c)*: see *Juta's Statutes of South Africa 2014/15* vol 5 at 1-32, 1-34, 1-39, 1-50 and 1-53.

Case Information

W Trengove SC (with *D Mpofu SC*, *T Ngcukaitobi*, *J Mitchell and N Muvangua*) I for the Economic Freedom Fighters.

Anton Katz SC (with *J de Waal*, *J Bleazard and T Mayosi*) for the Democratic Alliance.

LG Nkosi-Thomas SC (with *GD Ngcangisa* and *M Musandiwa*) for the Speaker of the National Assembly.

JJ Gauntlett SC (with *KJ Kemp SC*, *M du Plessis*, *S Mahabeer* and *S Pudifin-Jones*) J for the President.

WR Mokhari SC (with *H Slingers* and *M Kgatla*) for the Minister of Police. A

G Marcus SC (with *M Stubbs*) for the Public Protector.

C Steinberg (with *L Kelly*) for Corruption Watch.

Applications for the exercise of exclusive jurisdiction and direct access, and declaratory orders. B

Order

1. This court has exclusive jurisdiction to hear the application by the Economic Freedom Fighters.
2. The Democratic Alliance's application for direct access is granted. C
3. The remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of s 182(1)*(c)* of the Constitution is binding.
4. The failure by the President to comply with the remedial action taken against him, by the Public Protector in her report of 19 March 2014, is inconsistent with s 83*(b)* of the Constitution read with D ss 181(3) and 182(1)*(c)* of the Constitution and is invalid.
5. The National Treasury must determine the reasonable costs of those measures implemented by the Department of Public Works at the President's Nkandla homestead that do not relate to security, namely the visitors' centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool only. E
6. The National Treasury must determine a reasonable percentage of the costs of those measures which ought to be paid personally by the President.
7. The National Treasury must report back to this court on the outcome of its determination within 60 days of the date of this F order.
8. The President must personally pay the amount determined by the National Treasury in terms of paras 5 and 6 above within 45 days of this court's signification of its approval of the report.
9. The President must reprimand the ministers involved pursuant to para 11.1.3 of the Public Protector's remedial action. G
10. The resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of s 182(1)*(c)* of the Constitution is inconsistent with ss 42(3), 55(2)*(a)* and *(b)* and 181(3) of the Constitution, is invalid and is set aside. H
11. The President, the Minister of Police and the National Assembly must pay costs of the applications, including the costs of two counsel.

Judgment

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, I Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring):
Introduction

[1] One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of state power and resources J

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A that was virtually institutionalised during the apartheid era. To achieve this goal we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. [1] For this reason public-office bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the B rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood:

'Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this C democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.' [2]

D And the role of these foundational values in helping to strengthen and sustain our constitutional democracy sits at the heart of this application.

[2] In terms of her constitutional powers, [3] the Public Protector investigated allegations of improper conduct or irregular expenditure relating to the security upgrades at the Nkandla private residence of the President E of the Republic. She concluded that the President failed to act in line with certain of his constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of state resources. Exercising her constitutional powers to take appropriate remedial action, she directed that the President, duly assisted by certain state functionaries, F should work out and pay a portion fairly proportionate to the undue benefit that had accrued to him and his family. Added to this was that he should reprimand the ministers involved in that project, for specified improprieties.

[3] The Public Protector's report was submitted not only to the President, G but also to the National Assembly, presumably to facilitate compliance with the remedial action in line with its constitutional obligations to hold the President accountable. [4] For well over one year neither the President nor the National Assembly did what they were required to do in terms of the remedial action. Hence these applications by the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA) [5] H against the National Assembly and the President.

[4] What these applications are really about is that —

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

(a) based on the supremacy of our Constitution, the rule of law and A considerations of accountability, the President should be ordered to comply with the remedial action taken by the Public Protector by paying a reasonable percentage of the reasonable costs expended on non-security features at his private residence;

(b) the President must reprimand the ministers under whose watch B state resources were expended wastefully and unethically on the President's private residence;

(c) this court must declare that the President failed to fulfil his constitutional obligations, in terms of ss 83, 96, 181 and 182;

(d) the report of the Minister of Police and the resolution of the C National Assembly that sought to absolve the President of liability, must be declared inconsistent with the Constitution and invalid, and that the adoption of those outcomes amounts to a failure by the National Assembly to fulfil its constitutional obligations, in terms of ss 55 and 181, to hold the President accountable to ensure the effectiveness, rather than subversion, of the Public Protector's findings and remedial action; D

(e) the Public Protector's constitutional powers to take appropriate remedial action must be clarified or affirmed; and

(f) the state parties, except the Public Protector, are to pay costs to the applicants.

Background E

[5] Several South Africans, including a member of Parliament, lodged complaints with the Public Protector concerning aspects of the security upgrades that were being effected at the President's Nkandla private residence. This triggered a fairly extensive investigation by the Public Protector into the Nkandla project. F

[6] The Public Protector concluded that several improvements were non-security features. [6] Since the state was in this instance under an obligation only to provide security for the President at his private residence, any installation that has nothing to do with the President's G security amounts to undue benefit or unlawful enrichment to him and his family and must therefore be paid for by him.

[7] In reasoning her way to the findings, the Public Protector said that the President acted in breach of his constitutional obligations in terms of ss 96(1), 96(2)*(b)* and *(c)* of the Constitution, which provide: H

'**Conduct of Cabinet members and Deputy Ministers**

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

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

. . . I

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

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

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

B In the same breath she concluded that the President violated the provisions of the Executive Members' Ethics Act [7] and the Executive Ethics Code. [8] These are the national legislation and the code of ethics contemplated in s 96(1).

[8] The Public Protector's finding on the violation of s 96 was based on C the self-evident reality that the features identified as unrelated to the security of the President, checked against the list of what the South African Police Service (SAPS) security experts had themselves determined to be security features, [9] were installed because the people involved knew they were dealing with the President. When some government functionaries find themselves in that position, the inclination to want to please D higher authority by doing more than is reasonably required or legally permissible or to accede to a gentle nudge by overzealous and ambitious senior officials to do a 'little wrong' here and there, may be irresistible. A person in the position of the President should be alive to this reality and must guard against its eventuation. Failure to do this may constitute E an infringement of this provision.

[9] There is thus a direct connection between the position of President and the reasonably foreseeable ease with which the specified non-security features, asked for or not, were installed at the private residence. This naturally extends to the undue enrichment. [10] Also, the mere fact of F the President allowing non-security features, about whose construction he was reportedly aware, [11] to be built at his private residence at government expense, exposed him to a 'situation involving the risk of a conflict between [his] official responsibilities and private interests'. [12] The potential conflict lies here. On the one hand, the President has the duty to ensure that state resources are used only for the advancement of G state interests. On the other hand, there is the real risk of him closing an eye to possible wastage, if he is likely to derive personal benefit from indifference. To find oneself on the wrong side of s 96, all that needs to be proven is a risk. It does not even have to materialise.

[10] Having arrived at the conclusion that the President and his family H were unduly enriched as a result of the non-security features, the Public Protector took remedial action against him in terms of s 182(1)*(c)* of the Constitution. The remedial action taken reads:

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

'11.1 The President is to: A

11.1.1 Take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the DPW [Department of Public Works] at his private residence that do not relate to security, and which include [the] visitors' centre, the amphitheatre, the cattle kraal and chicken run and the swimming pool. B

11.1.2 Pay a reasonable percentage of the cost of the measures as determined with the assistance of the National Treasury, also considering the DPW apportionment document.

11.1.3 Reprimand the Ministers involved for the appalling C manner in which the Nkandla Project was handled and state funds were abused.

11.1.4 Report to the National Assembly on his comments and actions on this report within 14 days.' [13]

[11] Consistent with this directive, the President submitted his response D to the National Assembly within 14 days of receiving the report. [14] It was followed by yet another response about five months later.

[12] For its part the National Assembly set up two ad hoc committees, [15] comprising its members, to examine the Public Protector's report as well as other reports, including the one compiled, also at its instance, by the E Minister of Police. After endorsing the report by the minister exonerating the President of liability and a report to the same effect by its last ad hoc committee, the National Assembly resolved to absolve the President of all liability. Consequently, the President did not comply with the remedial action taken by the Public Protector. F

[13] Dissatisfied with this outcome, the EFF launched this application, claiming that it falls within this court's exclusive jurisdiction. It in effect asked for an order affirming the legally binding effect of the Public Protector's remedial action; directing the President to comply with the Public Protector's remedial action; and declaring that both the President G and the National Assembly acted in breach of their constitutional obligations. The DA launched a similar application in the Western Cape Division of the High Court, Cape Town, and subsequently to this court, conditional upon the EFF's application being heard by this court.

[14] It is fitting to mention at this early stage that eight days before this H matter was heard, the President circulated a draft order to this court and the parties. After some parties had expressed views on aspects of that draft, a revised version was circulated on the day of the hearing.

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A The substantial differences between the two drafts are that, unlike the first, the second introduces the undertaking by the President to reprimand certain ministers in terms of the remedial action, and also stipulates the period within which the President would personally pay a reasonable percentage of the reasonable costs of the non-security B upgrades after a determination by National Treasury. Also, the Auditor-General has been left out as one of the institutions that were to assist in the determination of the amount payable by the President. Otherwise, the essence of both draft orders is that those aspects of the Public Protector's remedial measures still capable of enforcement would be fully complied with. As for costs, the President proposed that they be C reserved for future determination.

Exclusive jurisdiction

[15] The exclusive jurisdiction of this court is governed by s 167(4)*(e)* of the Constitution which says:

D '(4) Only the Constitutional Court may —

. . .

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; . . . .'

E [16] Whether this court has exclusive jurisdiction in a matter involving the President or Parliament is not a superficial function of pleadings merely alleging a failure to fulfil a constitutional obligation. The starting point is the pleadings. But much more is required. [16] First, it must be established that a constitutional obligation that rests on the President or Parliament is the one that allegedly has not been fulfilled. Second, that obligation must be closely examined to determine whether it is of the F kind envisaged by s 167(4)*(e)*. [17]

[17] Additional and allied considerations are that s 167(4)*(e)* must be given a narrow meaning. [18] This is so because whenever a constitutional provision is construed, that must be done with due regard to other G constitutional provisions that are materially relevant to the one being interpreted. In this instance s 172(2)*(a)* confers jurisdiction on the Supreme Court of Appeal, the High Court and courts of similar status to pronounce on the constitutional validity of laws or conduct of the

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

President. This is the responsibility they share with this court — a terrain A that must undoubtedly be adequately insulated against the inadvertent and inappropriate monopoly of this court. An interpretation of s 167(4)*(e)* that is cognisant of the imperative not to unduly deprive these other courts of their constitutional jurisdiction, would be loath to assume that this court has exclusive jurisdiction even if pleadings state B strongly or clearly that the President or Parliament has failed to fulfil constitutional obligations.

[18] An alleged breach of a constitutional obligation must relate to an obligation that is specifically imposed on the President or Parliament. C An obligation shared with other organs of state will always fail the s 167(4)*(e)* test. [19] Even if it is an office bearer or institution-specific constitutional obligation, that would not necessarily be enough. *Doctors for Life* provides useful guidance in this connection. There Ngcobo J said 'obligations that are readily ascertainable and are unlikely to give rise to disputes', [20] do not require a court to deal with 'a sensitive aspect of the separation of powers' [21] and may thus be heard by the High Court. [22] This D relates, as he said by way of example, to obligations expressly imposed on Parliament where the Constitution provides that a particular legislation would require a two-thirds majority to be passed. But where the Constitution imposes the primary obligation on Parliament and leaves it at large to determine what would be required of it to execute its E mandate, then crucial political questions are likely to arise which would entail an intrusion into sensitive areas of separation of powers. When this is the case, then the demands for this court to exercise its exclusive jurisdiction would have been met. [23]

[19] To determine whether a dispute falls within the exclusive jurisdiction F of this court, s 167(4)*(e)* must be given a contextual and purposive interpretation, with due regard to the special role this apex court was established to fulfil. As the highest court in constitutional matters and 'the ultimate guardian of the Constitution and its values', [24] it has 'to G

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A adjudicate finally in respect of issues which would inevitably have important political consequences'. [25] Also to be factored into this process is the utmost importance of the highest court in the land being the one to deal with disputes that have crucial and sensitive political implications. This is necessary to preserve the comity between the judicial B branch and the executive and legislative branches of government. [26]

[20] That this court enjoys the exclusive jurisdiction to decide a failure by the President to fulfil his constitutional obligations ought not to be surprising, considering the magnitude and vital importance of his responsibilities. The President is the head of state and head of the C national executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. [27] The promotion of national unity and reconciliation D falls

squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the wellbeing of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. [28] To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final E stamp of approval to all national legislation. [29] And almost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him. [30] Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just F and prosperous destination that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of state affairs and the personification of this nation's constitutional project.

[21] He is required to promise solemnly and sincerely to always connect G with the true dictates of his conscience in the execution of his duties. This he is required to do with all his strength, all his talents and to the best of his knowledge and abilities. And, but for the Deputy President, only his affirmation or oath of office requires a gathering of people, presumably that they may hear and bear witness to his irrevocable

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Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

commitment to serve them well and with integrity. He is, after all, the A image of South Africa and the first to remember at its mention on any global platform.

[22] Similarly, the National Assembly, and by extension parliament, is the embodiment of the centuries-old dreams and legitimate aspirations B of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least remembered. It is the watchdog of state resources and, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. [31] It also bears the responsibility to play an oversight role over the executive and state organs and ensure that constitutional and statutory obligations are properly executed. [32] For this C reason it fulfils a pre-eminently unique role of holding the executive accountable for the fulfilment of the promises made [33] to the populace through the state of the nation address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the executive before D assumption of office. Parliament also passes legislation with due regard to the needs and concerns of the broader South African public. The willingness and obligation to do so are reinforced by each member's equally irreversible public declaration of allegiance to the Republic, obedience, respect and vindication of the Constitution and all law of E the Republic, to the best of her abilities. In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa.

[23] For the EFF to meet the requirements for this court to exercise its F exclusive jurisdiction over the President and the National Assembly, it will have to first rely on what it considers to be a breach of a constitutional obligation that rests squarely on the President as an individual and on the National Assembly as an institution. That obligation must have a demonstrable and inextricable link to the need to G ensure compliance with the remedial action taken by the Public Protector. Put differently, it must be apparent from a reading of the constitutional provision the EFF relies on, that it specifically imposes an obligation on the President or the National Assembly, but in a way that keeps focus sharply on or is intimately connected to the need for compliance with the remedial action. If both or one of them bears the obligation H merely as one of the many organs of state, then other courts like the High Court and later the Supreme Court of Appeal would in terms of s 172(2)*(a)* also have jurisdiction in the matter. In the latter case direct access [34] to this court would have to be applied for and obviously granted

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Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A only if there were exceptional circumstances and it is in the interests of justice to do so.

[24] Where, as in this case, both the President and the National Assembly are said to have breached their respective constitutional obligations, which could then clothe this court with jurisdiction, and B exclusive jurisdiction is only proven in respect of the one but not the other, there might still be room to entertain the application against both, provided it is in the interests of justice to do so. This would be the case, for example, where (i) the issue(s) involved are of high political importance with potentially far-reaching implications for the governance C and stability of our country; (ii) the issue(s) at the heart of the alleged breach of constitutional obligations by both the President and the National Assembly are inseparable; and (iii) the gravity and nature of the issue(s) at stake are such that they demand an expeditious disposition of the matter in the interests of the nation. This list is not exhaustive.

D ***Exclusive jurisdiction in the application against the President***

[25] Beginning with the President, the EFF argued that he breached his obligations in terms of ss 83, 96,[35] 181 and 182 of the Constitution. And it is on the strength of these alleged breaches that this court is asked to exercise exclusive jurisdiction.

E [26] Section 83 does impose certain obligations on the President in particular. It provides:

> 'The President —
> *(a)* is the Head of State and head of the national executive;
>
> *(b)* must uphold, defend and respect the Constitution as the supreme F law of the Republic; and
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> *(c)* promotes the unity of the nation and that which will advance the Republic.' [36]

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

An obligation is expressly imposed on the President to uphold, defend A and respect the Constitution as the law that is above all other laws in the Republic. As the head of state and the head of the national executive, the President is uniquely positioned, empowered and resourced to do much more than what other public office bearers can do. [37] It is no doubt for this reason that s 83*(b)* of the Constitution singles him out to uphold, B defend and respect the Constitution. Also, to unite the nation, obviously with particular regard to the painful divisions of the past. This requires the President to do all he can to ensure that our constitutional democracy thrives. He must provide support to all institutions or measures designed to strengthen our constitutional democracy. More directly, he is to ensure that the Constitution is known, treated and C related to, as the supreme law of the Republic. It thus ill-behoves him to act in any manner inconsistent with what the Constitution requires him to do under all circumstances. The President is expected to endure graciously and admirably and fulfil all obligations imposed on him, however unpleasant. This imposition of an obligation specifically on the D President still raises the question: which obligation specifically imposed by the Constitution on the President has he violated? Put differently, how did he fail to uphold, defend and respect the supreme law of the Republic?

[27] Sections 181(3) and 182(1)*(c)* in a way impose obligations on the E President. But, as one of the many. None of these provisions singles out the President for the imposition of an obligation. This notwithstanding, the jurisprudential requirement is that an obligation expressly imposed on the President, not cabinet as a whole or organs of state in general, is required to establish exclusive jurisdiction. [38] F

[28] For the purpose of deciding whether this court has exclusive jurisdiction, it must still be determined whether, on its own, s 83*(b)* imposes on the President an obligation of the kind required by s 167(4)*(e).* He is said to have failed to 'uphold, defend and respect the G

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A Constitution as the supreme law of the Republic'. This he allegedly did by not complying with the remedial action taken by the Public Protector in terms of s 182(1)*(c)*, thus violating his s 181(3) obligation to assist and protect the Public Protector in order to guarantee her dignity and effectiveness.

B [29] If the failure by the President to comply with or enforce the remedial action taken by the Public Protector against a member of the executive and fulfil his shared obligation to assist and protect the Public Protector so as to ensure her independence, dignity and effectiveness, amounts to a failure envisaged by s 167(4)*(e)*, then the list of matters C that would fall under this court's exclusive jurisdiction would be endless. What this could then mean is that whenever the President is said to have failed to fulfil a shared obligation in any provision of the Constitution, [39] or the Bill of Rights, this court would readily exercise its exclusive jurisdiction. This would be so because on this logic all a litigant would have to do to trigger this court's exclusive jurisdiction would be to rely on D the shared constitutional obligations as in the Bill of Rights and s 83, which would then confer exclusive jurisdiction on this court in all applications involving the President.

[30] I reiterate that this would mean that any failure to fulfil shared E constitutional obligations by any member of the executive, would thus be attributable to the President as his own failure. After all, he appoints them and they are answerable to him. Their infringement, coupled with reliance on s 83, would thus justify the exercise of exclusive jurisdiction by this court. Such an unbridled elastication of the scope of application of s 83 or s 167(4)*(e)* would potentially marginalise the High Court and F the Supreme Court of Appeal in all constitutional matters involving the President.

[31] Section 83 is in truth very broad and potentially extends to just about all the obligations that rest, directly or indirectly, on the shoulders of the President. The President is a constitutional being. In the G Constitution the President exists, moves and has his being. Virtually all his obligations are constitutional in nature because they have their origin, in some way, in the Constitution. An overly permissive reliance on s 83 would thus be an ever present guarantee of direct access to this court under its exclusive jurisdiction. This does not accord with the H overall scheme of the Constitution. And certainly not with the purpose behind the provisions of s 167(4)*(e)* read with s 172(2)*(a)* of the Constitution, properly construed.

[32] Section 167(4)*(e)* must be given a restrictive meaning. [40] This will help arrest litigants' understandable eagerness to have every matter involving the President heard by this court as a court of first and last I instance. Our High Court, specialist courts of equivalent status and

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Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

Supreme Court of Appeal also deserve the opportunity to grapple with A constitutional matters involving the President so that they too may contribute to the further development and enrichment of our constitutional jurisprudence. [41]

[33] It bears repetition that s 83*(b)* does impose an obligation on the B President in particular to 'uphold, defend and respect the Constitution'. But to meet the s 167(4)*(e)* requirements, conduct by the President himself that tends to show that he personally failed to fulfil a constitutional obligation expressly imposed on him, must still be invoked, to establish the essential link between the more general s 83 obligations and a particular right or definite obligation. It needs to be emphasised though C that the stringency of this requirement is significantly attenuated by the applicability of s 83*(b)* which already imposes a President-specific obligation. The additional constitutional obligation is required only for the purpose of narrowing down or sharpening the focus of the otherwise broad s 83*(b)* obligation, to a specific and easily identifiable obligation. The demand for President-specificity from the additional constitutional D obligation is not as strong as it is required to be where there is not already a more pointed President-specific obligation as in s 83. A constitutionally sourced and somewhat indirectly imposed obligation complements s 83 for the purpose of meeting the requirement of s 167(4)*(e)*. Although the additional constitutional obligation it imposes on the President would, on its own, be incapable of establishing the required specificity in E relation to s 167(4)*(e)*, it is not so in this case because of s 83*(b)*.

[34] I must emphasise that agent-specificity is primarily established by s 83. The somewhat indirectly imposed obligation merely provides reinforcement for it. An indirectly imposed obligation is one that is not F derived from s 83*(b)* but arises from the exercise of a constitutional power, like that conferred on the Public Protector by the Constitution. It nails the obligation down on the President. When an obligation is imposed on the President specifically as a result of the exercise of a constitutional power, for the purpose of meeting the s 167(4)*(e)* test, the G indirectly imposed obligations cannot be dealt with as if the s 83*(b)* obligations do not exist. For they impose all-encompassing obligations on the President in relation to the observance of the Constitution. In sum, s 83*(b)* lays the foundation which is most appropriately complemented by the imposition of an obligation through the exercise of a constitutional power. H

[35] In this case the requirement that the President failed to fulfil a constitutional obligation that is expressly imposed on him, is best satisfied by reliance on both ss 83*(b)* and 182(1)*(c)* of the Constitution. Very much in line with the narrow or restrictive meaning to be given to s 167(4)*(e)* and mindful of the role that the other courts must also play I in the development of our constitutional law, s 182(1)*(c)* does in this case impose an actor-specific obligation. Although s 182 leaves it open to the Public Protector to investigate state functionaries in general, in this

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Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A case the essential link is established between this section and s 83 by the remedial action actually taken in terms of s 182(1)*(c)*. In the exercise of that constitutional power, the Public Protector acted, not against the executive or state organs in general, but against the President himself. Compliance was required only from the President. He was the subject of the investigation and is the primary beneficiary of the non-security B upgrades and thus the only one required to meet the demands of the constitutionally sourced remedial action.

[36] There is a primary obligation, that flows directly from s 182(1)*(c)*, imposed upon only the President to take specific steps in fulfilment of the C remedial action. The President's alleged disregard for the remedial action taken against him [42] does seem to amount to a breach of a constitutional obligation. And this provides the vital connection s 83*(b)* needs to meet the s 167(4)*(e)* requirements.

[37] Although s 181(3) is relevant, it does not impose a President-specific obligation. It is relevant but applies to a wide range of potential D actors. It was not and could not have been primarily relied on by the Public Protector to impose any constitutionally sanctioned obligation on the President which could then create the crucial link with s 83*(b)*. A combination of only these two sections would be a far cry from what s 167(4)*(e)* requires to be applicable. The s 181(3) obligation is a E relatively distant and less effective add-on to the potent connection between ss 83*(b)* and 182(1)*(c)*, necessary to unleash the exclusive jurisdiction. These remarks on s 181(3) apply with equal force to the National Assembly.

[38] This means that it is not open to any litigant who seeks redress for F what government has done or failed to do, merely to lump s 83 with any other constitutional obligation that applies also to the President, as one of the many, so as to bypass all other superior courts and come directly to this court. Reliance on s 83 coupled with a section that provides a shared constitutional obligation will not, without more, guarantee access to this court in terms of s 167(4)*(e)* in a matter against the President. G Section 83 does not have an overly liberal application that would have this court act readily in terms of its exclusive jurisdiction whenever it is relied on.

[39] President-specific obligations like some of those set out in s 84 of the Constitution or obligations imposed on the President through the exercise of powers expressly conferred by the Constitution on those who then H exercise them against the President, on their own or coupled with those in s 83, respectively, are master keys to this court's exclusive jurisdiction in terms of s 167(4)*(e)*. Remedial action taken against the President is one of those constitutional powers, the exercise of which might justify the activation of this court's exclusive jurisdiction when I combined with s 83*(b)*.

[40] I conclude that the EFF has made out a case that the President's alleged failure to comply with the

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Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

failure to uphold the Constitution, relate to constitutional obligations A imposed specifically on him that are intimately connected to the issue central to this application, which is the obligation for the President to comply with the remedial action. Conditions for the exercise of this court's exclusive jurisdiction have been met. That does not, however, dispose of the entire application for this court to exercise its exclusive jurisdiction. B

Exclusive jurisdiction in the application against the National Assembly

[41] The National Assembly is also said to have breached its constitutional obligations imposed by ss 55(2) and 181(3) of the Constitution. C Section 55(2) provides:

> 'The National Assembly must provide for mechanisms —
> *(a)* to ensure that all executive organs of state in the national sphere of government are accountable to it; and
> *(b)* to maintain oversight of —
> (i) the exercise of national executive authority, including the D implementation of legislation; and
> (ii) any organ of state.'

[42] Skinned to the bone, the contention here is that the National Assembly failed to fulfil its constitutional obligation to hold the President accountable. Just to recap, what triggered the duty to hold the President E accountable? The Public Protector furnished the National Assembly with her report which contained unfavourable findings and the remedial action taken against the President. The National Assembly resolved to absolve the President of compliance with the remedial action instead of facilitating its enforcement as was expected by the Public Protector. It is F on this basis argued that it failed to fulfil its constitutional obligations to hold him accountable. Whether this is correct needs not be established to conclude that this court has exclusive jurisdiction. [43]

[43] It is still necessary though to determine whether the obligation allegedly breached is of the kind contemplated in s 167(4)*(e)*. Holding G members of the executive accountable is indeed a constitutional obligation specifically imposed on the National Assembly. This, however, is not all it takes to meet the requirements of s 167(4)*(e)*. [44] We still need to drill deeper into this jurisdictional question. Is holding the executive accountable a primary and undefined obligation imposed on the National Assembly? Yes! For the Constitution neither gives details on H how the National Assembly is to discharge the duty to hold the executive accountable nor are the mechanisms for doing so outlined or a hint given as to their nature and operation. To determine whether the National Assembly has fulfilled or breached its obligations will therefore entail a resolution of very crucial political issues. And it is an exercise that I trenches on sensitive areas of separation of powers. It could at times border on second-guessing the National Assembly's constitutional

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A power or discretion. This is a powerful indication that this court is entitled to exercise its exclusive jurisdiction in this matter. But that is not all.

[44] As in the case of the President, the National Assembly also has an actor-specific constitutional obligation imposed on it by s 182(1)*(b)* and B *(c)* read with s 8(2)*(b)*(iii) of the Public Protector Act. Crucially, the Public Protector's obligation 'to report on that conduct' means to report primarily to the National Assembly, in terms of s 182(1)*(b)* of the Constitution read with s 8 of the Public Protector Act. She reported to the National Assembly for it to do something about that report. C Together, these sections bring home into the chamber of the National Assembly the constitutional obligation to take appropriate remedial action. Although remedial action was not taken against the National Assembly, the report in terms of s 182(1)*(b)* read with s 8(2)*(b)*(iii) of the Act was indubitably presented to it for its 'urgent attention . . . or . . . intervention'. That constitutionally sourced obligation is not shared, not D even with the National Council of Provinces. It is exclusive to the National Assembly. When that report was received by the National Assembly, it effectively operationalised the house's obligations in terms of ss 42(3) and 55(2) of the Constitution. The presentation of that report delivered a constitutionally derived obligation to the National Assembly E for action. And it is alleged that it failed to fulfil these obligations in relation to the remedial action.

[45] This court, as the highest court in the land and the ultimate guardian of the Constitution and its values, has exclusive jurisdiction also insofar as it relates to the National Assembly. [45] The EFF has thus F met the requirements for this court to exercise its exclusive jurisdiction in the application against both the President and the National Assembly.

[46] Since the DA's application is conditional upon the EFF 's application being heard, the striking similarity between these applications, the extreme sensitivity and high political importance of the issues involved, G and the fact that these applications traverse essentially the same issues impel us, on interests of justice considerations, to hear the DA application as well.

[47] Why do we have the office of the Public Protector?

H **The purpose of the office of the Public Protector**

[48] The history of the office of the Public Protector, and the evolution of its powers over the years, were dealt with in two judgments of the Supreme Court of Appeal. [46] I do not think that much benefit stands to

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

be derived from rehashing that history here. It suffices to say that a A collation of some useful historical data on that office may be gleaned from those judgments.

[49] Like other ch 9 institutions, the office of the Public Protector was created to 'strengthen constitutional democracy in the Republic'. [47] To B achieve this crucial objective, it is required to be independent and subject only to the Constitution and the law. It is demanded of it, as is the case with other sister institutions, to be impartial and to exercise the powers and functions vested in it without fear, favour or prejudice. [48] I hasten to say that this would not ordinarily be required of an institution whose powers or decisions are by constitutional design always supposed to be C ineffectual. Whether it is impartial or not would be irrelevant if the implementation of the decisions it takes is at the mercy of those against whom they are made. It is also doubtful whether the fairly handsome budget, offices and staff all over the country and the time and energy expended on investigations, findings and remedial actions taken, would D ever make any sense if the Public Protector's powers, or decisions were meant to be inconsequential. The constitutional safeguards in s 181 would also be meaningless if institutions purportedly established to strengthen our constitutional democracy lacked even the remotest possibility to do so.

[50] We learn from the sum total of ss 181 [49] and 182 [50] that the E institution of the Public Protector is pivotal to the facilitation of good

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A governance in our constitutional dispensation. [51] In appreciation of the high sensitivity and importance of its role, regard being had to the kind

of complaints, institutions and personalities likely to be investigated, as with other ch 9 institutions, the Constitution guarantees the independence, impartiality, dignity and effectiveness of this institution as indispensable B requirements for the proper execution of its mandate. The obligation to keep alive these essential requirements for functionality and the necessary impact is placed on organs of state. And the Public Protector is one of those deserving of this constitutionally imposed assistance and protection. It is with this understanding that even the fact that the Public Protector was created, not by national C legislation but by the supreme law, to strengthen our constitutional democracy, that its role and powers must be understood.

[51] The office of the Public Protector is a new institution — different from its predecessors like the 'Advocate General' or the 'Ombudsman' — and only when we became a constitutional democracy did it become the D 'Public Protector'. That carefully selected nomenclature alone speaks volumes of the role meant to be fulfilled by the Public Protector. It is supposed to protect the public from any conduct in state affairs or in any sphere of government that could result in any impropriety or prejudice. And of course, the amendments [52] to the Public Protector Act have since E added unlawful enrichment and corruption [53] to the list. Among those to be investigated by the Public Protector for alleged ethical breaches are the President and members of the executive at national and provincial levels. [54]

[52] The Public Protector is thus one of the most invaluable constitutional F gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs, and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average G citizen. [55] For this reason the fathers and mothers of our Constitution

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Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

conceived of a way to give even to the poor and marginalised a voice, and A teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance. B

[53] Hers are indeed very wide powers that leave no lever of government power above scrutiny, coincidental embarrassment' and censure. This is a necessary service because state resources belong to the public, as does state power. The repositories of these resources and power are to use C them on behalf and for the benefit of the public. When this is suspected or known not to be so, then the public deserves protection and that protection has been constitutionally entrusted to the Public Protector. This finds support in what this court said in the *Certification* case:

> '(M)embers of the public aggrieved by the conduct of government D officials should be able to lodge complaints with the Public Protector, who will investigate them and take appropriate remedial action.' [56]

[54] In the execution of her investigative, reporting or remedial powers, she is not to be inhibited, undermined or sabotaged. When all other essential requirements for the proper exercise of her power are met, she E is to take appropriate remedial action. Our constitutional democracy can only be truly strengthened when: there is zero tolerance for the culture of impunity; the prospects of good governance are duly enhanced by enforced accountability; there is observance of the rule of law and respect for every aspect of our Constitution as the supreme law of the Republic is real. Within the context of breathing life into the remedial powers of F the Public Protector, she must have the resources and capacities necessary to effectively execute her mandate so that she can indeed strengthen our constitutional democracy.

[55] Her investigative powers are not supposed to bow down to G anybody, not even at the door of the highest chambers of raw state power. The predicament though is that mere allegations and investigation of improper or corrupt conduct against all, especially powerful public office bearers, are generally bound to attract a very unfriendly response. An unfavourable finding of unethical or corrupt conduct coupled with remedial action, will probably be strongly resisted in an attempt to repair H or soften the inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated.

[56] If compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect. And if it were, I by design, never to have a binding effect, then it is incomprehensible just how the Public Protector could ever be effective in what she does and be able to contribute to the strengthening of our constitutional democracy.

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A The purpose of the office of the Public Protector is therefore to help uproot prejudice, impropriety, abuse of power and corruption in state affairs, all spheres of government and state-controlled institutions. The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and in keeping our constitutional democracy B strong and vibrant.

The nature and meaning of 'as regulated by' and 'additional powers and functions'

[57] Our Constitution is the supreme law of the Republic. It is not C subject to any law, including national legislation, unless otherwise provided by the Constitution itself. [57] The proposition that the force or significance of the investigative, reporting or remedial powers of the Public Protector has somehow been watered down by the provisions of the Public Protector Act, is irreconcilable with the supremacy of the Constitution, which is the primary source of those powers. To put this D argument [58] to rest, once and for all, its very bases must be dealt with. The first basis is grounded on s 182(1) insofar as it provides that '(t)he Public Protector has the power, as regulated by national legislation'. The second is s 182(2), which says that 'the Public Protector has the additional powers and functions prescribed by national legislation'.

E [58] The constitutional powers of the Public Protector are to investigate irregularities and corrupt conduct or practices in all spheres of government, to report on its investigations and take appropriate remedial action. Section 182(1) and (2) recognise the pre-existing national legislation which does regulate these powers and confer additional powers and F functions on the Public Protector. This obviously means that since our Constitution is the supreme law, national legislation cannot have the effect of watering down or effectively nullifying the powers already conferred by the Constitution on the Public Protector. That national legislation is the Public Protector Act and would, like all other laws, be invalid if inconsistent with the Constitution. In any event s 182(1) alludes to national G legislation that 'regulates' the Public Protector's three-dimensional powers.

[59] That most of the powers provided for by the Public Protector Act were already in place when the Constitution came into operation, does H not affect the constitutionally prescribed regulatory and supplementary role of the Act. The drafters of the Constitution must have been aware of the provisions of the Act. This is apparent from the words 'as regulated' in s 182(1). If the legislation that was to regulate were not yet in place, words like 'to be regulated' or similar expressions that point to the future would in all likelihood have been employed. Notably, the I Public Protector Act was amended no fewer than five times [59] since

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Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

the coming into operation of the Constitution. Furthermore, its long A title, substituted in 1998, reads: 'To provide for matters incidental to the office of the Public Protector as contemplated in the Constitution of the Republic of South Africa, 1996; and to provide for matters connected therewith'. This buries the proposition that Parliament has not yet enacted legislation that would regulate the constitutional powers of the B Public Protector and provide for additional powers and functions. If it were to be amended again that would, as with all other legislation, simply be for the purpose of improving on what the Public Protector Act has already done.

[60] 'Regulate power' in this context and in terms of its ordinary C grammatical meaning connotes an enablement of the correct exercise of the constitutional power. The Constitution points to a functional aid that would simplify and provide details with respect to how the power in its different facets is to be exercised. For example, the Public Protector Act provides somewhat elaborate guidelines on how the power to investigate, report and take remedial action is to be exercised. [60] D

[61] Section 182(2) envisages 'additional' but certainly not 'substitutionary' powers. It contemplates 'additional powers and functions'. Giving the word 'additional' its ordinary grammatical meaning, it means E 'extra' or 'more' or 'over and above'. Nothing about 'additional' in this context could ever be reasonably understood to suggest the removal or limitation of the constitutional powers. A reading of s 6 of the Public Protector Act bears this out. The Public Protector Act did not purport to nor could it validly denude the Public Protector of her constitutional powers. On the contrary and by way of example, ss 6(4)*(a)*(iii) and (iv) F add, expressly, unlawful enrichment or corruption to the powers and functions she already had. The power to investigate institutions in which the state is the majority or controlling shareholder, undue delay, unfair and discourteous conduct has also been added to the investigative powers of the Public Protector. [61]

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A [62] A useful regulatory framework for the fruitful exercise of the Public Protector's powers does, as promised, exist. And, by reference in the Constitution and subsequent statutory amendments, more powers and functions were indeed added to those already listed in s 182(1) of the Constitution. The remedial action that could be resorted to under B different circumstances is also detailed in the Public Protector Act, for greater clarity and effectiveness. Likewise, the circumstances and manner in which reports on the investigations are to be presented, and to whom, all reinforce the harmonious correlation between the relevant provisions of the supreme law and the Public Protector Act.

C **Legal effect of remedial action**

[63] Section 182(1)*(c)* of the Constitution provides that the 'Public Protector has the power, as regulated by national legislation . . . to take appropriate remedial action'. This remedial action is also provided for in somewhat elaborate terms in s 6 of the Public Protector Act. [62] What then is the legal status or effect of the totality of the remedial powers D vested in the Public Protector?

[64] The power to take remedial action is primarily sourced from the supreme law itself. And the powers and functions conferred on the Public Protector by the Act owe their very existence or significance to the E Constitution. Just as roots do not owe their life to branches, so are the powers provided by national legislation incapable of eviscerating their constitutional forebears into operational obscurity. The contention that regard must only be had to the remedial powers of the Public Protector in the Act and that her powers in the Constitution have somehow been mortified or are subsumed under the Public Protector Act, lacks merit. F To uphold it would have the same effect as 'the tail wagging the dog'. [63]

[65] Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles. This is done not only to observe the constitutional values and principles necessary to ensure that the '(e)fficient, economic and G effective use of resources [is] promoted', [64] that accountability finds expression, but also that high standards of professional ethics are promoted and maintained. [65] To achieve this requires a difference-making and responsive remedial action. Besides, one cannot really talk

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Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

about remedial action unless a remedy in the true sense is provided to A address a complaint in a meaningful way.

[66] The language, context and purpose of ss 181 and 182 of the Constitution give reliable pointers to the legal status or effect of the Public Protector's power to take remedial action. That the Public Protector is required to be independent and subject only to the Constitution and the B law, to be impartial and exercise her powers and perform her functions without fear, favour or prejudice, [66] is quite telling. And the fact that her investigative and remedial powers target even those in the throne room of executive raw power, is just as revealing. That the Constitution requires the Public Protector to be effective and identifies the need for her to be C assisted and protected, to create a climate conducive to independence, impartiality, dignity and effectiveness, [67] show just how potentially intrusive her investigative powers are and how deep the remedial powers are expected to cut.

[67] The obligation to assist and protect the Public Protector so as to D ensure her dignity and effectiveness, is relevant to the enforcement of her remedial action. [68] The Public Protector would arguably have no dignity and be ineffective if her directives could be ignored willy-nilly. The power to take remedial action that is so inconsequential that anybody against whom it is taken is free to ignore or second-guess, is E irreconcilable with the need for an independent, impartial and dignified Public Protector and the possibility to effectively strengthen our constitutional democracy. The words 'take appropriate remedial action' do point to a realistic expectation that binding and enforceable remedial steps might frequently be the route open to the Public Protector to take. 'Take appropriate remedial action' and 'effectiveness' are operative F words essential for the fulfilment of the Public Protector's constitutional mandate. Admittedly in a different context, this court said in *Fose*:

> '(A)n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. G Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.' [69]

[68] Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector H could do in terms of the interim Constitution. [70] It connotes

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Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate. [71] However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing B the root cause of the complaint. Remedial action must therefore be suitable and effective. [72] For it to be effective in addressing the investigated complaint, it often has to be binding. In *SABC v DA* the Supreme Court of Appeal correctly observed:

> 'The Public Protector cannot realise the constitutional purpose of her office if other organs of state may second-guess her findings and ignore C her recommendations. Section 182(1)*(c)* must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct the implementation. It follows that the language, history and purpose of s 182(1)*(c)* make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for state misconduct, which D includes the power to determine the remedy and direct its implementation.' [73]

[69] But, what legal effect the appropriate remedial action has in a particular case depends on the nature of the issues under investigation and the findings made. As common sense and s 6 of the Public Protector Act E suggest, mediation, conciliation or negotiation may at times be the way to go. Advice considered appropriate to secure a suitable remedy might, occasionally, be the only real option. And so might recommending litigation or a referral of the matter to the relevant public authority, or any other suitable recommendation, as the case might be. The legal effect of these remedial measures may simply be that those to whom they F are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow.

[70] It is, however inconsistent with the language, context and purpose of ss 181 and 182 of the Constitution to conclude that the Public Protector enjoys the power to make only recommendations that may be G disregarded, provided there is a rational basis for doing so. [74] Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It needs to be restated that it is the

nature of the issue under investigation, the findings made and the particular

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kind of remedial action taken, based on the demands of the time, that A would determine the legal effect it has on the person, body or institution it is addressed to. [75]

[71] In sum, the Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. Moreover, the remedial B action is always open to judicial scrutiny. It is also not inflexible in its application, but situational. What remedial action to take in a particular case will be informed by the subject-matter of the investigation and the type of findings made. Of cardinal significance about the nature, exercise and legal effect of the remedial power are the following:

(a) The primary source of the power to take appropriate remedial action C is the supreme law itself, whereas the Public Protector Act is but a secondary source.

(b) It is exercisable only against those that she is constitutionally and statutorily empowered to investigate.

(c) Implicit in the words 'take action' is that the Public Protector is D herself empowered to decide on and determine the appropriate remedial measure. And 'action' presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence.

(d) She has the power to determine the appropriate remedy and E prescribe the manner of its implementation. [76]

(e) 'Appropriate' means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption in a particular case.

(f) Only when it is appropriate and practicable to effectively remedy or F undo the complaint would a legally binding remedial action be taken.

(g) Also informed by the appropriateness of the remedial measure to deal properly with the subject-matter of investigation, and in line with the findings made would a non-binding recommendation be made or measure be taken. G

(h) Whether a particular action taken or measure employed by the Public Protector in terms of her constitutionally allocated remedial power is binding or not, or what its legal effect is, would be a matter of interpretation aided by context, nature and language.

May remedial action be ignored? H

[72] It has been suggested, initially by both the President and the National Assembly, that since the Public Protector does not enjoy the same status as a judicial officer, the remedial action she takes cannot have a binding effect. The President has since changed his position but it I

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A appears, only in relation to this case, not necessarily as a general proposition. By implication, whomsoever she takes remedial action against may justifiably and in law disregard that remedy, either out of hand or after own investigation. This very much accords with the High Court decision in *DA v SABC* to the effect that:

> B 'For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable. However, when an organ of state rejects those findings or the remedial action, that decision itself must not be irrational.' [77]

It is, of course, not clear from this conclusion who is supposed to make C a judgment call whether the decision to reject the findings or remedial action is itself irrational. A closer reading of this statement seems to suggest that it is the person against whom the remedial action was made who may reject it by reason of its perceived irrationality. And that conclusion is not only worrisome but also at odds with the rule of law. [78]

D [73] The judgment of the Supreme Court of Appeal is correct in recognising that the Public Protector's remedial action might at times have a binding effect. [79] When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason the remedial action taken against those under investigation cannot be ignored without E any legal consequences.

[74] This is so because our constitutional order hinges also on the rule of law. No decision grounded in the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would 'amount F to a licence to self-help'. [80] Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the G opposite outcome lawfully, an order of court would have to be obtained. This was aptly summed up by Cameron J in *Kirland* as follows:

> 'The fundamental notion — that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until H properly set aside — springs deeply from the rule of law. The courts

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> alone, and not public officials, are the arbiters of legality. As A Khampepe J stated in *Welkom* —
> "(t)he rule of law . . . obliges an organ of state to use the correct legal process.
>
> 'For a public official to ignore irregular administrative action on the B basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality.' [81] [Footnotes omitted.]

[75] The rule of law requires that no power be exercised unless it is sanctioned by law, and no decision or step sanctioned by law may be ignored based purely on a contrary view. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the C exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force. D

Remedial action taken against the President

[76] The remedial action that was taken against the President has a binding effect. This flows from the fact that the cattle kraal, chicken run, swimming pool, visitors' centre and the amphitheatre were identified by the Public Protector as non-security features for which the President had E to reimburse the state. He was directed to first determine, with the assistance of the SAPS and National Treasury, the reasonable costs expended on those installations and then to determine a reasonable percentage of the costs so determined, that he is to pay. The President was required to provide the National Assembly with his comments and the actions he was to take on the Public Protector's report within 14 days F of receipt of that report, and to reprimand the ministers involved for the misappropriation of state resources under their watch.

[77] Concrete and specific steps were therefore to be taken by the President. Barring the need to ascertain and challenge the correctness of G the report, it was not really necessary to investigate whether the specified non-security features were in fact non-security features. Features

bearing no relationship to the President's security had already been identified. The President was enjoined to take definite steps to determine how much he was supposed to pay for the listed non-security features. If any investigation were to be embarked upon to determine whether some H installations were non-security in nature, it was to be in relation to those additional to the list of five for which some payment was certainly required. The reporting to the National Assembly and the reprimand of the affected ministers also required no further investigation.

[78] This does not mean that there is an absolute bar to what some see I as a 'parallel' investigative process, regardless of its intended end use. For it cannot be correct that upon receipt of the Public Protector's report with its unfavourable findings and remedial measures, all the President

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A was in law entitled to do was comply even if he had reason to doubt its correctness. That mechanical response is irreconcilable with logic and the rights exercisable by anybody adversely affected by any unpleasant determination. The President was, like all of us and for the reasons set out in some detail earlier, [82] entitled to inquire into the correctness of B those aspects of the report he disagreed with. That inquiry could well lead to a conclusion different from that of the Public Protector. And such a contrary outcome is legally permissible. The question would then be how the President responds to the Public Protector's report and the remedial action taken, in the light of other reports sanctioned or commissioned by him.

C [79] Incidentally, the President mandated the Minister of Police to investigate and report on —

> 'whether the President is liable for any contribution in respect of the security upgrades having regard to the legislation, past practices, culture and findings contained in the respective reports'.

D [80] The National Assembly also commissioned the minister's report. The upshot was a finding that elements of the upgrades identified by the Public Protector as non-security features were, in fact, security features for which the President was not to pay. Consequently the Minister of Police 'exonerated' the President from the already determined liability. E Although the remedial action authorised the President's involvement of the SAPS and arguably the minister, it was not for the purpose of verifying the correctness of the remedial action taken against him by the Public Protector. It was primarily to help him determine what other non-security features could be added to the list of five, and then to assist in F the determination of the reasonable monetary value of those upgrades in collaboration with National Treasury. [83] But again, the President was at large to commission any suitably qualified minister to conduct that investigation into the correctness of the Public Protector's findings.

[81] The end results of the two streams of investigative processes were G mutually destructive. The President should then have decided whether to comply with the Public Protector's remedial action or not. If not, then much more than his mere contentment with the correctness of his own report was called for. A branch of government vested with the authority to resolve disputes by the application of the law [84] should have been approached. And that is the judiciary. [85] Only after a court of law had set H aside the findings and remedial action taken by the Public Protector

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would it have been open to the President to disregard the A Public Protector's report. His difficulty here is that, on the papers before us, he did not challenge the report through a judicial process. He appears to have been content with the apparent vindication of his position by the minister's favourable recommendations, and considered himself to have been lawfully absolved of liability. B

[82] Emboldened by the minister's conclusion, and a subsequent resolution by the National Assembly to the same effect, the President neither paid for the non-security installations nor reprimanded the ministers involved in the Nkandla project. This non-compliance persisted until these applications were launched and the matter was set down for C hearing. And this is where and how the Public Protector's remedial action was second-guessed in a manner that is not sanctioned by the rule of law. Absent a court challenge to the Public Protector's report, all the President was required to do was to comply. Arguably, he did, but only with the directive to report to the National Assembly. D

[83] The President thus failed to uphold, defend and respect the Constitution as the supreme law of the land. This failure is manifest from the substantial disregard for the remedial action taken against him by the Public Protector in terms of her constitutional powers. The second respect in which he failed relates to his shared s 181(3) obligations. He was duty-bound to, but did not, assist and protect the E Public Protector so as to ensure her independence, impartiality, dignity and effectiveness by complying with her remedial action. He might have been following wrong legal advice and therefore acting in good faith. [86] But that does not detract from the illegality of his conduct, regard being had to its inconsistency with his constitutional obligations in terms of ss 182(1)*(c)* and 181(3) read with s 83*(b)*. F

National Assembly's obligation to hold the executive accountable

[84] The Public Protector submitted her report, including findings and the remedial action taken against the President, to the National Assembly. G For the purpose of this case it matters not whether it was submitted directly or indirectly through the President. The reality is that it was at her behest that it reached the National Assembly for a purpose. That purpose was to ensure that the President is held accountable and his compliance with the remedial action taken is enabled.

[85] The National Assembly's attitude is that it was not required to act H on or facilitate compliance with the report since the Public Protector cannot prescribe to it what to do or what not to do. For this reason, so it says, it took steps in terms of s 42(3) [87] of the Constitution after receipt

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A of the report. Those steps were intended to ascertain the correctness of the conclusion reached and the remedial action taken by the Public Protector, since more was required of the National Assembly than merely rubber-stamp her report. Broadly speaking, this is correct because scrutinise' means subject to scrutiny. And 'scrutiny' implies a careful and B thorough examination or a penetrating or searching reflection. The Public Protector's report relates to executive action or conduct that had to be subjected to scrutiny, so understood.

[86] Besides, even findings by and an order of a court of law may themselves be subjected to further interrogation or research at the C instance of the affected party, that may culminate in the conclusion that the court was wrong. But when the conclusion is reached, the question is: how then is it acted upon? This would explain the reviews of tribunal or magistrates' court decisions and appeals from all our courts all the way up to the apex court. In principle there is nothing wrong with wondering D whether any unpleasant finding or outcome is correct and deploying all the resources at one's command to test its correctness.

[87] The National Assembly was indeed entitled to seek to satisfy itself about the correctness of the Public Protector's findings and remedial E action before it could hold the President accountable in terms of its ss 42(3) and 55(2) obligations. These sections impose responsibilities so important that the National Assembly would be failing in its duty if it were to blindly or unquestioningly implement every important report that comes its way from any institution. Both ss 42(3) and 55(2) do not F define the strictures within which the National Assembly is to operate in its endeavour to fulfil its obligations. It has been given the leeway to determine how best to carry out its constitutional mandate. Additionally, s 182(1)*(b)* read with s 8(2)*(b)*(iii) does not state how exactly the National Assembly is to 'attend urgently' to or 'intervene' in relation to the Public Protector's report. How to go about this is all left to the G discretion of the National Assembly but obviously in a way that does not undermine or trump the mandate of the Public Protector.

[88] People and bodies with a material interest in a matter have been routinely allowed by our courts to challenge the constitutional validity of a law or conduct of the President, constitutional institutions or Parliament. The appointment of the National Director of Public Prosecutions [88] is one such example, as is the extension of the term of office of the Chief Justice, [89] the constitutional validity of the proceedings of the

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Judicial Services Commission [90] and of rules and processes of Parliament. [91] The National Assembly and the President were in like manner entitled to challenge the findings and remedial action of the Public Protector. It would be incorrect to suggest that a mere investigation by the National Assembly into the findings of the Public Protector is impermissible on the basis that it trumps the findings of the Public Protector. Rhetorically, on what would they then base their decision to challenge the report? Certainly not an ill-considered viewpoint or a kneejerk reaction.

[89] There is a need to touch on separation of powers.

[90] The executive led by the President and Parliament bears very important responsibilities and each plays a crucial role in the affairs of our country. They deserve the space to discharge their constitutional obligations unimpeded by the judiciary, save where the Constitution otherwise permits. This accords with the dictates of constitutional principle VI, which is one of the principles that guided our Constitution drafting process in these terms:

> 'There shall be a separation of terms: powers between the legislature, the executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.' [92]

[91] And this was elaborated on in the *Certification* case as follows:

> 'The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.' [93]

[92] The judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government. It was with this in mind that this court noted:

> 'Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their

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> authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.
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> But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. . . . Parliament must act in accordance with, and within the limits of, the Constitution, and the supremacy of the Constitution requires that the obligations imposed by it must be fulfilled. Courts are required by the Constitution to ensure that all branches of government act within the law and fulfil their constitutional obligations. This Court has been given the responsibility of being the ultimate guardian of the Constitution and its values. Section 167(4)*(e)*, in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. . . . It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution.' [94]
>
> [Footnotes omitted.]

[93] It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give it, for the purpose of holding the executive accountable and fulfilling its oversight role of the executive or organs of state in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum total of the constitutionally permissible judicial enquiry to be embarked upon. And these are some of the 'vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government'. [95] Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. [96] It is therefore not for this court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.

[94] That said, the National Assembly chose not to challenge the Public Protector's report on the basis of the findings made by the Minister of Police and its last ad hoc committee. Instead it purported to effectively set aside her findings and remedial action, thus usurping the authority vested only in the judiciary. Having chosen the President to ensure government by the people under the Constitution, and having the

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Public Protector Act which, read with the Constitution, provides for the submission of the Public Protector's report to the National Assembly, [97] it had another equally profound obligation to fulfil. And that was to scrutinise the President's conduct as demanded by s 42(3) and reported to it by the Public Protector in terms of s 182(1)*(b)* of the Constitution read with s 8(2)*(b)*(i), (ii) and (iii) of the Public Protector Act. Section 8(2) provides in relevant part:

> *'(b)* The Public Protector shall, at any time, submit a report to the National Assembly on the findings of a particular investigation if —
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> (i) he or she deems it necessary;
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> (ii) he or she deems it in the public interest;
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> (iii) it requires the urgent attention of, or an intervention by, the National Assembly;
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> (iv) he or she is requested to do so by the Speaker of the National Assembly; or
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> (v) he or she is requested to do so by the Chairperson of the National Council of Provinces.'

[95] The Public Protector could not have submitted her report to the National Assembly merely because she deemed it necessary or in the public interest to do so. In all likelihood she also did not submit it just because either the Speaker of the National Assembly or Chairperson of the National Council of Provinces asked her to do so. The high importance, sensitivity and potentially far-reaching implications of the report, considering that the head of state and the head of the executive is himself implicated, point but only to one conclusion. That report was a high priority matter that required the urgent attention of, or an intervention by, the National Assembly. [98] It ought therefore to have triggered into operation the National Assembly's obligation to scrutinise [99] and oversee executive action and to hold the President accountable, as a member of the executive. [100] Also implicated was its obligation to give urgent attention to the report, its findings and remedial action taken, and intervene appropriately in that matter. [101]

[96] Mechanisms that were established by the National Assembly, [102] G flowing from the minister's report, may have accorded with its power to scrutinise before it could hold accountable. As will appear later, what will always be important is what the National Assembly does in consequence of those interventions. The Public Protector, acting in terms of s 182 of the Constitution read with ss 1, 3 and 4 of the Executive Members' Ethics Act, had already investigated the alleged impropriety or relevant H

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A executive action and concluded, as she was empowered to do, that the President be held liable for specific elements of the security upgrades.

[97] On a proper construction of its constitutional obligations, the National Assembly was duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the B Public Protector. The exception would be where the findings and remedial action are challenged and set aside by a court, which was of course not done in this case. Like the President, the National Assembly may, relying for example on the High Court decision in *DA v SABC*, [103] have been genuinely led to believe that it was entitled to second-guess the remedial C action through its resolution absolving the President of liability. But that still does not affect the unlawfulness of its preferred course of action.

[98] Second-guessing the findings and remedial action does not lie in the mere fact of the exculpatory reports of the Minister of Police and the last ad hoc committee. [104] In principle, there may have been nothing wrong D with those 'parallel' processes. But, there was everything wrong with the National Assembly stepping into the shoes of the Public Protector, by passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector and replacing them with its own findings and 'remedial action'. This, the rule of law is dead against. It is another way of taking the law into one's hands, and E thus constitutes self-help.

[99] By passing that resolution the National Assembly effectively flouted its obligations. [105] Neither the President nor the National Assembly was entitled to respond to the binding remedial action taken by the Public Protector as F if it were of no force or effect or had been set aside through a proper judicial process. The ineluctable conclusion is, therefore, that the National Assembly's resolution based on the Minister's findings exonerating the President from liability is inconsistent with the Constitution and unlawful.

G **Remedy**

[100] All parties, barring the National Assembly and the Minister of Police, appear to be essentially in agreement on the order that would ensure compliance with the Public Protector's remedial action. The President's ultimate draft order, following on the one circulated H eight days before the hearing, [106] is virtually on all fours with the remedial action taken by the Public Protector. The effect of this draft and the oral submissions by his counsel is that he accepts that the remedial action

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Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

taken against him is binding and that National Treasury is to determine A the reasonable costs of the non-security upgrades, on the basis of which to determine a reasonable percentage of those costs that he must pay. The President is also willing to reprimand the ministers in line with the remedial action. In response to that draft's predecessor, the Public Protector only expressed the desire to have the nature and ambit of her B powers and the legal effect of her remedial action addressed if, as it turned out, no agreement was secured on the basis of the President's draft order, and oral submissions were made.

[101] The only real disagreement amongst the parties about the draft C order relates to the unqualified binding effect of the Public Protector's remedial action and whether a declaratory order should be granted to the effect that the President failed to fulfil his constitutional obligations in terms of ss 83, 96 and 181(3) of the Constitution and violated his oath of office. [107] Also that the National Assembly breached its constitutional obligations in terms of ss 55(2) and 182(1)*(c)* of the Constitution. These are the orders cumulatively prayed for by both the EFF and the DA. D

[102] This court's power to decide and make orders in constitutional matters is set out in s 172 of the Constitution. Section 172(1):

> 'When deciding a constitutional matter within its power, a court — E
> *(a)* must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> *(b)* may make any order that is just and equitable, including —
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any F period and on any conditions, to allow the competent authority to correct the defect.'

[103] Declaring law or conduct inconsistent with the Constitution and invalid is plainly an obligatory power vested in this court as borne out by the word 'must'. Unlike the discretionary power to make a declaratory G order in terms of s 38 of the Constitution, this court has no choice but to make a declaratory order where s 172(1)*(a)* applies. [108] Section 172(1)*(a)* impels this court, to pronounce on the inconsistency and invalidity of, in this case, the President's conduct and that of the National Assembly. This we do routinely whenever any law or conduct is held to be inconsistent with the Constitution. It is not reserved for H special cases of constitutional invalidity. Consistent with this constitutional injunction, an order will thus be made that the President's failure to comply with the remedial action taken against him by the Public Protector is inconsistent with his obligations to uphold, defend and

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Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

A respect the Constitution as the supreme law of the Republic; [109] to comply with the remedial action taken by the Public Protector; [110] and will the duty to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness. [111]

[104] Similarly, the failure by the National Assembly to hold the B President accountable, by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinise and oversee executive action [112] and to maintain oversight of the exercise of executive powers by the President. [113] And in particular to give urgent attention to or intervene by facilitating his compliance with the remedial action. [114]

[105] Order

In the result the following order is made:

1. This court has exclusive jurisdiction to hear the application by the D Economic Freedom Fighters.
2. The Democratic Alliance's application for direct access is granted.
3. The remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of s 182(1)*(c)* of the E Constitution is binding.
4. The failure by the President to comply with the remedial action taken against him, by the Public Protector in her report of 19 March 2014, is inconsistent with s 83*(b)* of the Constitution read with ss 181(3) and 182(1)*(c)* of the Constitution and is invalid.

F 5. The National Treasury must determine the reasonable costs of those measures implemented by the Department of Public Works at the President's Nkandla homestead that do not relate to security, namely the visitors' centre, the amphitheatre, the cattle kraal, the chicken

run and the swimming pool only.

G 6. The National Treasury must determine a reasonable percentage of the costs of those measures which ought to be paid personally by the President.

7. The National Treasury must report back to this court on the outcome of its determination within 60 days of the date of this order.

H 8. The President must personally pay the amount determined by the National Treasury in terms of paras 5 and 6 above within 45 days of this court's signification of its approval of the report.

Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

9. The President must reprimand the ministers involved pursuant to A para 11.1.3 of the Public Protector's remedial action.

10. The resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of s 182(1)*(c)* of the Constitution is inconsistent with ss 42(3), 55(2)*(a)* and *(b)* and 181(3) of the Constitution, is invalid and is set aside. B

11. The President, the Minister of Police and the National Assembly must pay costs of the applications, including the costs of two counsel.

Attorneys for the Economic Freedom Fighters: *Minde Schapiro & Smith Inc*, C Bellville.

Attorneys for the Democratic Alliance: *Godla and Partners Attorneys*, Cape Town.

Attorneys for the President, the Speaker of the National Assembly, and the Minister of Police: *State Attorney*.

Attorneys for the Public Protector: *Adams & Adams*, Johannesburg. D

Attorneys for Corruption Watch: *Webber Wentzel*, Johannesburg.

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* The Democratic Alliance made a similar application, but conditional on the granting of the EFF's application for direct access. The two applications were heard together.

1 Sections 1*(c)* and *(d)* of the Constitution.

2 *Nyathi v MEC Council for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) (2008 (9) BCLR 865; [2008] ZACC 8) para 80, per Madala J.

3 As conferred by s 182 of the Constitution.

4 Sections 42(3) and 55(2) of the Constitution read with s 8(2)*(b)*(iii) of the Public Protector Act 23 of 1994.

5 These are political parties represented in our Parliament.

6 'Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province' report No 25 of 2013/14 (Public Protector's report para 11).

7 Act 82 of 1998.

8 Chapter 1 of the Ministerial Handbook: A Handbook for Members of the Executive and Presiding Officers (7 February 2007) at pp 7 – 15.

9 Public Protector's report above n6 paras 7.14.2 and 7.14.4.

10 Section 96(2)*(c)* of the Constitution.

11 These are the findings of the Public Protector.

12 Section 96(2)*(b)* of the Constitution.

13 Public Protector's report above n6 para 11.

14 See [76] and [77] below.

15 The first ad hoc committee was formed to consider the President's report, along with all other reports (produced by the Special Investigation Unit, Public Protector, Joint Standing Committee on Intelligence and the Task Team); the last ad hoc committee was formed to consider the Minister of Police's report.

16 *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) (2015 (12) BCLR 1407; [2015] ZACC 31) (*My Vote Counts*) para 24; *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) ([2009] ZACC 20) (*Women's Legal Centre*) para 16; *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) (2009 (10) BCLR 1052; [2009] ZACC 15) (*Von Abo*) para 35; *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) (2006 (12) BCLR 1399; [2006] ZACC 11) (*Doctors for Life*) para 19; and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC) (1999 (2) BCLR 175; [1998] ZACC 9) (*SARFU I*) para 25.

17 *Doctors for Life* above n16 para 13.

18 Id para 19.

19 *Women's Legal Centre* above n16 para 20.

20 *Doctors for Life* above n16 para 25.

21 Id.

22 Id. See also s 172(2)*(a)* of the Constitution.

23 *Doctors for Life* above n16 paras 24 – 26.

24 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725; [1999] ZACC 9) (*SARFU II*) para 72. Section 167 reads in relevant part:

'(3) The Constitutional Court —

(a) is the highest court of the Republic; and

(b) may decide —

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) makes the final decision whether a matter is within its jurisdiction.'

These subsections confirm the status of the Constitutional Court as the highest court in the land and also extend its jurisdiction to arguable points of law of general public importance.

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(b) may decide —

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) makes the final decision whether a matter is within its jurisdiction.'

25 *SARFU II* above n24 para 73.

26 *SARFU I* above n16 para 29.

27 See s 83*(b)* of the Constitution.

28 Section 83*(c)* read with the affirmation or oath of office in sch 2 of the Constitution, in context.

29 See ss 84 – 85 of the Constitution.

30 Ministers, judges, heads of ch 9 institutions and directors-general.

31 Section 77 read with s 55 of the Constitution. See also s 188 of the Constitution read with s 10 of the Public Audit Act 25 of 2004.

32 Section 55(2)*(b)*(i) of the Constitution.

33 Section 55(2)*(a)* of the Constitution.

34 Section 167(6) of the Constitution.

35 Section 96 bears no relevance to the core issues before this court. Admittedly, it is pivotal to the Public Protector's finding that, although the President was aware of the erection of non-security upgrades at his private residence, he is not known to have done anything to discourage their construction or put an end to them, considering his fiduciary duty to the state. This he arguably allowed to happen in a manner that undermines his constitutional obligations to ensure that nobody profits unduly from state resources. Needless to say that this is particularly so for those who, like him, are charged with the duty to ensure that state

resources are used only to advance the common good of all (see *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (2011 (7) BCLR 651; [2011] ZACC 6) para 176. But this application is not about determining whether the President and his family benefited unlawfully from non-security installations or upgrades. That was for the Public Protector to do and that she has done already. The focus of this application is on the implementation of the remedial action taken by the Public Protector. And s 96 can in no way assist the process meant to secure the President's compliance. It cannot therefore be a justifiable basis for conferring exclusive jurisdiction on this court.

36 To suggest that the failure to comply with the remedial action taken by the Public Protector undermines the promotion of national unity and the advancement of the Republic, is a proposition that I find difficult to understand. The promotion of national unity and the advancement of what is in the best interests of the Republic have in essence to do with conduct or statements that could bring together or unite all our people, to heal the racial divisions of the past. And the advancement of the Republic or its wellbeing has a bearing on conduct or a statement that has wide-ranging implications for the Republic. The notion that the unlawful use of state resources to build a cattle kraal, chicken run, swimming pool, amphitheatre and a visitors' centre constitutes a failure to promote national unity or advance the Republic, is difficult to sustain. In sum, s 83*(c)* bears no relationship, not even remotely, to the matter before us.

37 *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) (1997 (1) SACR 567; 1997 (6) BCLR 708; [1997] ZACC 4) para 65 states: 'Ultimately the President, as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of State, the President is obliged to obey each and every one of its commands.'

38 *Women's Legal Centre* above n16 para 16; *Von Abo* above n16 para 33; and *Doctors for Life* above n 16 para 17.

39 Like ss 41, 85, 92, 101, 165(4) and (5), 195, 198*(d)* and 206.

40 *Women's Legal Centre* above n16 para 20; *Von Abo* above n16 para 34; and *SARFU I* above n16 para 25.

41 *SARFU I* above n16 paras 26 – 31.

42 In terms of s 182(1)*(c)* of the Constitution.

43 *My Vote Counts* above n16 paras 132 – 135.

44 See *Doctors for Life* above n16 paras 25 – 26.

45 Id.

46 *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) ([2015] 4 All SA 719; [2015] ZASCA 156) (*SABC v DA*) para 31; and *The Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) ([2011] ZASCA 108) para 5.

47 Section 181(1) of the Constitution.

48 Id.

49 Section 181 of the Constitution provides:

'(1) The following state institutions strengthen constitutional democracy in the Republic:

(a) The Public Protector.

(b) The South African Human Rights Commission.

(c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

(d) The Commission for Gender Equality.

(e) The Auditor-General.

(f) The Electoral Commission.

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.'

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(a) The Public Protector.

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(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.'

50 Section 182 in relevant part provides:

'(1) The Public Protector has the power, as regulated by national legislation —

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.'

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(b) to report on that conduct; and

(c) to take appropriate remedial action.'

51 See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253; [1996] ZACC 26) para 161 (*Certification* case).

52 See Public Protector Amendment Act 113 of 1998.

53 See ss 6(4)*(a)*(iii) and (iv) of the Public Protector Act.

54 See ss 1, 3 and 4 of the Executive Members' Ethics Act read with s 96(1) of the Constitution.

55 See s 34 of the Constitution.

56 *Certification* case above n51 para 161.

57 See, for example, ss 179(3) and (4) of the Constitution.

58 This is what the National Assembly argued.

59 Amended through Act 47 of 1997, Act 113 of 1998, Act 2 of 2000, Act 22 of 2003 and Act 12 of 2004.

60 Some of the incidences of regulation are located in s 6(4). It regulates the powers of the Public Protector, including how: she is to initiate an investigation; remedial action is to be taken or what form it may take; and information is to be shared with other law-enforcement authorities to the extent that it may be necessary to do so. Section 6(9) regulates the time frame within which a complaint may be validly referred to the Public Protector. Other elements of regulation are to be found in s 7. They relate to the initiation of investigations; the procedure to be followed; the exclusion of some people from the Public Protector's investigative proceedings; the right to be heard and to challenge evidence; the form in which evidence may be lodged; and the oath or affirmation and subpoenas. Section 7A regulates the entering of premises by the Public Protector for the purpose of investigation. And s 8 regulates the power to submit the reports and when to keep them confidential.

61 All the powers set out in s 6 accord and are harmoniously coexistent with s 182. Powers or functions have thus either been added or regulated. Mediation, conciliation, negotiation and giving advice to a complainant regarding how best to secure an appropriate remedy; bringing what appears to be an offence to the attention of the prosecuting authority; referring a matter to an appropriate body or authority or making suitable recommendations to remedy the complaint; and resolving any complaint by 'any other means that may be expedient in the circumstances', are all regulatory and additional powers. And they are consistent with and flow from the constitutional power 'to take appropriate remedial action' and provision for 'additional powers and functions'.

62 See the summarised version of s 6 in n60 and n61 of this judgment.

63 *SABC v DA* above n46 para 43.

64 Section 195(1)*(b)* of the Constitution.

65 Id s 195(1)*(a)*.

66 Id s 181(2).

67 Id s 181(3).

68 Id.

69 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (1997 (7) BCLR 851; [1997] ZACC 6) para 69.
70 Section 112(1)*(b)* of the interim Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution) provided that it was competent for the Public Protector after investigation:
'(T)o endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by—
(i) mediation, conciliation or negotiation;
(ii) advising, where necessary, any complainant regarding appropriate remedies; or
(iii) any other means that may be expedient in the circumstances; . . . .'

'(T)o endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by—
(i) mediation, conciliation or negotiation;

(ii) advising, where necessary, any complainant regarding appropriate remedies; or

(iii) any other means that may be expedient in the circumstances; . . . .'

71 *Fose* above n69 para 69.
72 Id.
73 See *SABC v DA* above n46 para 52.
74 *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC) ([2014] ZAWCHC 161) (*DA v SABC*) paras 72 – 74.
75 A referral of the possible offence to the National Prosecuting Authority for possible investigation in terms of s 6(4)*(c)*(i) of the Public Protector Act might, for example, not be acted upon because it was investigated already.
76 *SABC v DA* above n46 para 52.
77 *DA v SABC* above n74 para 74.
78 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1) para 20; and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458; [1998] ZACC 17) para 58.
79 *SABC v DA* above n46 para 53.
80 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) (2014 (5) BCLR 547; [2014] ZACC 6) (*Kirland*) para 89.
81 Id para 103.
82 See [74] – [77] above.
83 Again, this must be understood within the context of the President's entitlement to challenge the Public Protector's report in a court of law, obviously even after some investigation into the correctness of the outcome, which could be foundational to the challenge. But we know that a court challenge was never launched and this is the basis on which the purported reliance on the outcome of the minister's investigation is approached.
84 See s 34 of the Constitution.
85 See s 165 of the Constitution.
86 See, for example, the High Court decision in *DA v SABC* above n74 paras 73 – 74 that held that remedial action is not binding and may be disregarded on rational grounds.
87 Section 42(3) of the Constitution reads:
'The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'

'The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'

88 *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) (2012 (12) BCLR 1297; [2012] ZACC 24).
89 *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) (2011 (10) BCLR 1017; [2011] ZACC 23).
90 *Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC) ([2014] 4 All SA 395; [2014] ZAWCHC 136).
91 *Mazibuko NO v Sisulu and Others NNO* 2013 (6) SA 249 (CC) (2013 (11) BCLR 1297; [2013] ZACC 28); and *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC) (2013 (1) BCLR 14; [2012] ZACC 27).
92 See sch 4 to the interim Constitution above n70 and the *Certification* case above n51 annexure 2.
93 *Certification* case above n51 para 109.
94 *Doctors for Life* above n16 paras 37 and 38 in relevant part.
95 Id para 37.
96 Id.
97 See ss 42(3) and 55(2) of the Constitution, and s 182(1)*(b)* of the Constitution read with s 8 of the Public Protector Act.
98 Section 8(2)*(b)*(iii) of the Public Protector Act.
99 Section 42(3) of the Constitution.
100 Id s 55(2).
101 See s 182(1)*(b)* and *(c)* of the Constitution read with s 8(2)*(b)*(iii) of the Public Protector Act.
102 In terms of s 55(2) read with s 42(3) of the Constitution.
103 *DA v SABC* above n74.
104 This is the last ad hoc committee that was set up to examine the report of the Minister of Police and make recommendations on it.
105 In terms of ss 42(3), 181(3), 182(1)*(c)* and 55(2) of the Constitution read with s 3(5) of the Executive Members' Ethics Act, and s 182(1)*(b)* of the Constitution and s 8(2)*(b)*(iii) of the Public Protector Act.
106 The President filed a draft order with the Constitutional Court on 2 February 2016.
107 This was mentioned for the first time by the EFF in its response to the President's draft order.
108 *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) (2005 (4) BCLR 301; [2004] ZACC 20) paras 106 – 108.
109 Section 83*(b)* of the Constitution.
110 Id s 182(1)*(c)*.
111 Id s 181(3).
112 Id s 42(3).
113 Id s 55(2)*(a)* and *(b)*.
114 Section 8(2) of the Public Protector Act.

Item “42”

PARLIAMENTARY OVERSIGHT

EXHIBIT ZZ

LEGAL FRAMEWORK

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

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Website: www.sastatecapture.org.za

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(3) A report of a committee —

(a) must be submitted to the Assembly by the chairperson or another member of the committee designated by the committee; and
(b) may request that the chairperson or another member of the committee designated by the committee introduces or explains the report in the Assembly.

(4) A committee may not submit a minority report except where provided for in these Rules.

(5) If a committee reports on a matter other than a matter mentioned in Subrule (1)(a) and is of the view that its report, or a specific matter mentioned in the report, should be considered by the Assembly, it may make a request to that effect in the report.

138. General powers

For the purposes of performing its functions a committee may, subject to the Constitution, legislation, the other provisions of these Rules and resolutions of the Assembly —

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
(b) receive petitions, representations or submissions from interested persons or institutions;
(c) conduct public hearings;
(d) permit oral evidence on petitions, representations, submissions and any other matter before the committee;
(e) determine its own procedure;
(f) meet at a venue determined by it, which may be a venue beyond the seat of Parliament;
(g) meet on any day and at any time, including —
(i) on a day which is not a working day;
(ii) on a day on which the Assembly is not sitting;
(iii) at a time when the Assembly is sitting; or
(iv) during a recess;

(h) exercise any other powers assigned to it by the Constitution, legislation, the other provisions of these Rules or resolutions of the Assembly.

138A. Prior to a witness giving evidence before a House or committee, the member presiding shall inform the witness as follows:

"Please be informed that by law you are required to answer fully and satisfactorily all the questions lawfully put to you, or to produce any document that you are required to produce, in connection with the subject matter of the enquiry, notwithstanding the fact that the answer or the document could incriminate you or expose you to criminal or civil proceedings, or damages. You are, however, protected in that evidence given under oath or affirmation before a House or committee may not be used against you in any court or place outside Parliament, except in criminal proceedings concerning a charge of perjury or a charge relating to the evidence or documents required in these proceedings."

[Rule 138A inserted, 13 September 2005]

139. Conferring powers of committees

(1) A committee may confer with any other committee of the Assembly.

(2) Committees must confer —

(a) if the Assembly instructs them to confer; or
(b) during a recess, if the Speaker, with the concurrence of the Chief Whip, instructs them to confer.

(3) When committees meet to confer the respective chairpersons of the committees co-chair the meeting.

(4) Committees conferring in terms of Subrule (1) may report jointly, subject to the provisions of Rule 202(2).

[Rule 139 (4) inserted, 21 November 2008]

(5) If a committee reports on a matter other than a matter mentioned in Subrule (1)(a) and is of the view that its report, or a specific matter mentioned in the report, should be considered by the Assembly, it may make a request to that effect in the report.

167. General powers

For the purposes of performing its functions a committee may, subject to the Constitution, legislation, the other provisions of these rules and resolutions of the Assembly —

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

(b) receive petitions, representations or submissions from interested persons or institutions;

(c) permit oral evidence on petitions, representations, submissions and any other matter before the committee;

(d) conduct public hearings;

(e) consult any Assembly or Council committee or subcommittee, or any joint committee or subcommittee;

(f) determine its own working arrangements;

(g) meet at a venue determined by it, which may be a venue beyond the seat of Parliament;

(h) meet on any day and at any time, including —

(i) on a day which is not a working day,

(ii) on a day on which the Assembly is not sitting,

(iii) at a time when the Assembly is sitting, or

(iv) during a recess; and

(i) exercise any other powers assigned to it by the Constitution, legislation, the other provisions of these rules or resolutions of the Assembly.

Item “43”

PO-02-521

PARLIAMENTARY OVERSIGHT

EXHIBIT ZZ 6

DAPHNE ZUKISWA
RANTHO

12. RELEASE OF THE REPORT

12.1. During March or April 2018, an interim report was released by the PCPE affording implicated individuals an opportunity to comment and correct any errors.

12.2. On 28 November 2018, the PCPE unanimously adopted, with amendments, the report.

12.3. The National Executive Committee had sight of the report before it was released.

12.4. The PCPE resolved to hand over the report, together with the documentation and the entire record of evidence collected in the course of the inquiry, to the Commission, for further investigation.

12.5. I believe that the Commission has already had an opportunity to read and consider our report. There is therefore little need for me to explain in any detail what it concluded and what material was passed on to the Commission for further investigation. Perhaps it suffices to say that, in 2018, the report found possible contraventions of legislation, regulations and processes. It found (in paragraph 2.9) that it was "*patently clear that there was undue influence by private individuals and*

D.Z.R

N.I.S.

companies over the appointment of Eskom Board members as well as some procurement decisions". It thereby vindicated to an extent allegations which had (as referred to above) first been made in the press from as early as 2011. It is in my view regrettable that these allegations were not properly investigated by Parliament at an earlier stage.

12.6. I think that it may also assist the Commission for me to quote from paragraph 1.5 of the Committee's report as regards the conditions that the Committee worked under (the correctness of which I confirm insofar as the matters referred to lie within my knowledge):

> *" 1.5* ***Conditions that the Committee worked under***
>
> *1.5.1 Parliament and by extension the Committee, have both the power and the duty to hold the Executive and State organs to account and to ensure that their constitutional and statutory obligations are properly executed. This responsibility is an incident of the rule of law and the constitutional values of accountability, responsiveness and openness.*
>
> *1.5.2 The Committee has carried out its oversight work despite facing some hostility and attempts aimed at obstructing it.*
>
> *1.5.3 There were several attempts by persons and organisations to undermine the authority and function of the Committee. These attempts included baseless legal challenges, attempts to delay and subvert investigations by providing irrelevant or incorrect information, public smear campaigns targeting the Committee and its members and threats to the personal security of Committee members, witnesses and their families.*

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1.5.4 Letters to this effect were received from: Black First Land First (2) (who called the Inquiry a "witch hunt"), Mr Brian Molefe's lawyers (1), Eskom (3), Gupta family's lawyers (2), Mr Atul Gupta's Lawyers (1), Dr Baldwin "Ben" Ngubane (1), Mr Duduzane Zuma (1), Mr Matshela Koko's Lawyers (1), Minister Lynne Brown (2), Minister Malusi Gigaba (1).

1.5.5 Threats to personal safety and security were made by anonymous parties against:

- *Inquiry Chairperson, Ms Zukiswa Rantho, including an anonymous threat made to her child that "your mother is making life difficult for us";*
- *Committee member, Ms Natasha Mazzone, whose car and documents were tampered with;*

and

- *Evidence leader Advocate Ntuthuzelo Vanara.*

1.5.6 Witnesses appearing before the Committee, including Ms Suzanne Daniels and Mr Abram Masango, also testified to having been intimidated.

1.5.7 Attempts were allegedly also made by the erstwhile State Security Minister Bongani Bongo to offer a bribe to Advocate Vanara with a blank cheque to try to derail the work of this Committee.

1.5.8 Despite the fact that invitations were duly served on the following persons requesting them to testify in the Inquiry, Ms Dudu Myeni, and Messrs Duduzane Zuma, Rajesh "Tony" Gupta, Atul Gupta and Ajay Gupta failed to appear in Parliament without sufficient cause. "

13. VOTES OF NO CONFIDENCE

13.1. It is public knowledge that, during the period referred to above, a series of votes of no confidence in President Zuma were proposed by opposition parties but defeated when put to the vote.

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Item “44”

Parliamentary Investigation into Alleged State Capture Emails

parliament.gov.za/press-releases/parliamentary-investigation-alleged-state-capture-emails

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

Parliament, Monday, 19 June 2017 - In the light of the recent accusations of state capture linked to alleged emails involving a number of Ministers, parliamentary committees have been directed to urgently probe the allegations and report back to the National Assembly.

The House Chairperson of Committees, Mr Cedric Frolick, on Thursday wrote to the Chairpersons of Portfolio Committees on Home Affairs, Mineral Resources, Public Enterprises and Transport advising them to, within the parameters of the Assembly Rules governing the business of committees and consistent with the Constitutionally enshrined oversight function of Parliament, ensure immediate engagement with the concerned Ministers to ensure that Parliament gets to the bottom of the allegations.

While no specific deadline has been set for the submission of the outcome of these investigations, the committees have been urged to begin with the work and report their recommendations to the House urgently.

Parliament, as a representative body of the people of South Africa, shoulders the Constitutional responsibility of ensuring that matters of major public interest are dealt with as expected by the people.

ISSUED BY THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

Enquiries: Moloto Mothapo 082 370 6930

Item “45”

ZR17a-166

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

National Assembly
The House Chairperson: Committees, Oversight & ICT:
Mr CT Frolick, MP
PO Box 15 Cape Town 800 Republic of South Africa
Tel: 27(21) 403 3897 Fax: 27(21) 461 9462
speaker@parliament.gov.za

15 June 2017

Ms S Rantho MP

Acting Chairperson

Portfolio Committee on Public Enterprises

Parliament PO Box 15

Cape Town

8000

Dear Ms Rantho

ALLEGATIONS OF STATE CAPTURE IN ORGANS OF STATE

I am sure that you are aware of numerous allegations of state capture that have appeared in the media in recent weeks. Some of these allegations involve members of the Executive and officials in a variety of state-owned enterprises such as Denel, Eskom, South African Airways (SAA) and Transnet.

I would like to request that your committee investigate the allegations within the parameters of the Rules and report any findings, where applicable, to the National Assembly as a matter of urgency.

Yours sincerely

C T FROLICK MP

HOUSE CHAIRPERSON: COMMITTEES

cc The Speaker to the National Assembly

Acting Secretary to Parliament

D 2 2

N.J.S

ZR17b-167

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

National Assembly
The House Chairperson: Committees, Oversight & ICT:
Mr CT Frolick, MP
PO Box 15 Cape Town 800 Republic of South Africa
Tel: 27(21) 403 3897 Fax: 27(21) 461 9462
speaker@parliament.gov.za

15 June 2017

Mr L Mashile MP

Chairperson

Portfolio Committee on Home Affairs

Parliament PO Box 15

Cape Town

8000

Dear Mr Mashile

ALLEGATIONS OF STATE CAPTURE IN ORGANS OF STATE

I am sure that you are aware of numerous allegations of state capture that have appeared in the media in recent weeks. Some of these allegations involve the former Minister of Home Affairs in the granting of citizenship to non- South Africans.

I would like to request that your committee investigate the allegations within the parameters of the Rules and report any findings, where applicable, to the National Assembly as a matter of urgency.

Yours sincerely

C T FROLICK MP

HOUSE CHAIRPERSON: COMMITTEES

cc The Speaker to the National Assembly

Acting Secretary to Parliament

D.Z.R

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ZR17c-168

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

National Assembly
The House Chairperson, Committees, Oversight & ICT:
Mr CT Frolick, MP
PO Box 15 Cape Town 800 Republic of South Africa
Tel: 27(21) 403 3897 Fax: 27(21) 461 9462
speaker@parliament.gov.za

15 June 2017

Ms D Magadzi MP

Chairperson

Portfolio Committee on Transport

Parliament PO Box 15

Cape Town

8000

Dear Ms Mgadzi

ALLEGATIONS OF STATE CAPTURE IN ORGANS OF STATE

I am sure that you are aware of numerous allegations of state capture that have appeared in the media in recent weeks. Some of these allegations involve members of the Board of the Passenger Rail Agency of South Africa (PRASA).

I would like to request that your committee investigate the allegations within the parameters of the Rules and report any findings, where applicable, to the National Assembly as a matter of urgency.

Yours sincerely

C T FROLICK MP

HOUSE CHAIRPERSON: COMMITTEES

cc The Speaker to the National Assembly

Acting Secretary to Parliament

D.Z.R

N.J.S

ZR17c-169

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

National Assembly
The House Chairperson: Committees, Oversight & ICT:
Mr CT Frolick, MP
PO Box 15 Cape Town 800 Republic of South Africa
Tel: 27(21) 403 3897 Fax: 27(21) 461 9462
speaker@parliament.gov.za

25 August 2017

The Honorable Ms. Magadzi, MP

Chairperson: Portfolio Committee on Transport

National Assembly

Parliament of the Republic of South Africa

Cape Town

8000

Dear Hon Chairperson

RE: LETTER DATED 15 JUNE 2017 ON ALLEGATIONS OF STATE CAPTURE

I confirm that we've met and discussed the contents of the above-mentoined letter; we also agreed on an approach in dealing with the matter at hand.

Over the last two months serious allegations has been made in the public domain about state capture and the alleged role of certain Members of the Executive and/or the Departments/entiies under their aurhority.

In terms of the Constitution, Parliament has a direct oversight role over the Executive. The sources of authority of the National Assembly is contained in Rule 2 of the National Assembly Rules and is thus primarily derived from the Constitution of the Republic. Parliament is amongst other legally bound and empowered to exercise oversight over the Executive and to keep it accountable for Executive action. Allegations against a Member of the Executive, the line function Department and/or entities under his/her jurisdiction

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ZR17c-170

warrants the attention of the relevant committee to clarify issues under contestation. The relevant Member of the Executive must be provided with a fair opportunity and platform to respond and where possible clarify allegations in the public domain. This should be the point of departure before the committee determine its next course of action. The Portfolio Committee is also reminded of the report of the Public Protector into the affiars of PRASA and must avoid re-opening investigations that have been concluded. Furthermore, the committee must perform its functions in terms of Rule 167 of the Rules of the National Assembly.

Finally, the committee must determine the resources required and communicate the needs to my office.

Yours sincerely

C T FROLICK MP

HOUSE CHAIRPERSON: COMMITTEES

cc The Speaker to the National Assembly

Secretary to the National assembly

N.J.S.

Item “46”

The Political Committee

The ANC Political Committee is responsible for the overall political guidance of the organisation's Parliamentary Caucus and the Office of the Chief. Among its chief responsibilities, the Committee provides strategic direction to Caucus on macro political matters within the institution. This includes, inter alia, proper political management of the ANC cadres deployed in Parliament and guiding Caucus and its study groups.

The Political Committee is a subcommittee of the NEC. Within the context of the relevant Constitutional and Legal framework, the Political Committee carries the responsibility to ensure the implementation of ANC policies and decisions with regard to the functioning of Parliament.

The Political Committee is appointed by the NEC/NWC.

Members of the Political Committee

1. Cyril Ramaphosa (Chairperson)
2. Naledi Pandor
3. Baleka Mbete
4. Thandi Modise
5. Tsenoli Lechesa
6. Rasariti Tau
7. Jeff Radebe
8. Bathabile Dlamini
9. Ebrahim Ebrahim (alternate)
10. Gerhard Koornhof (alternate)
11. Doris Dlakude (alternate)

Item “47”

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The ANC Parliamentary Caucus

In terms of Rule 5 of the ANC Constitution, it is the duty of ANC members who hold elective office in any sphere of government to be members of the appropriate caucus, to function within its rules and to abide by its decisions under the general provisions of the Constitution and the constitutional structures of the ANC.

The sum total of ANC members of Parliament, including the President of the ANC, Ministers and Deputy Ministers constitute the ANC Caucus in Parliament. The Members of the ANC Caucus at all levels of their deployment, derive their broad mandates from Caucus. At all material times such mandates will be consistent with resolutions of the ANC constitutional structures. The Caucus is a very important structure and attendance of its meetings is compulsory to all ANC public representatives.

The ANC Caucus consists of all ANC Members of Parliament - in the National Assembly and the National Council of Provinces.

The principal tasks of caucuses of political parties are to keep MPs of each political formation informed about the parliamentary programme and to enable the MPs to discuss and agree on the approach of their parties to all matters on the parliamentary agenda. They also serve as the organ within which those elected by Caucus to parliamentary positions account to the organisation as well as serving as institutions that ensures the accountability of members of Caucus. Caucuses also serve as the point of contact between the MPs and the leadership of the organisation to which they belong. Caucuses manage the work of the study groups, which play the role of portfolio committee caucuses, and are therefore sub-structures of the national Caucus. As stated above Committee and Study Group chairs report to Caucus through the Chief Whip. The ANC Caucus carries out the above functions under the supervision of the Political Committee.

After the democratic breakthrough of 1994, and the overwhelming electoral victory of the African National Congress in those first historic elections, the contingent of ANC deployees to Parliament, i.e. the National Assembly and the Senate (later NCOP), were constituted into what was called the ANC Caucus in Parliament.

The terminology *"caucus"* was not derived from ANC organisational experience or culture, but was taken from a terminology and parliamentary practice that the ANC found amongst the remnants of the apartheid Parliament. Likewise, concepts such as *"study group*", *"whippery"* and others were found to exist in Parliament and had to be given new content. Many debates ensued regarding the nature of the ANC Caucus and its relationship to the structures recognised by the ANC Constitution and what recognition, if any, should be given to caucuses in the ANC Constitution.

The weekly meetings of the ANC Caucus are a mechanism, amongst many others (such as study groups, political schools, workshops etc), to ensure that this collective can discuss and co-ordinate its work. Viewed from this perspective, weekly Caucus meetings are a part of the day-to-day political management tasks of the Office of the Chief Whip.

African National Congress Parliamentary Caucus
Office of the Chief Whip
Office Number V-18
Parliament of the Republic of South Africa
120 Plein Street
Cape Town
8000

Item “48”

East London
Zuma faces ANC revolt over Guptas

MOIPONE MALEFANE, MZILIKAZI wa AFRIKA, NKULULEKO NCANA and STEPHAN HOFSTATTER
1,184 words
27 February 2011
The Sunday Times
SUNTIM
MainBody
English

Ministers ‘shiver’ when summoned to family’s home

AREVOLT is brewing within the ANC and its alliance partners against the influence of the Gupta family over President Jacob Zuma and his government.

The anger has become so widespread that some of Zuma’s traditional backers are privately intimating that the controversy could hamper his bid for a second term as president.

Members of top ANC leadership structures — the National Working Committee and the “top six” party officials — recently raised concerns about senior appointments that were made in the government and at parastatals with the party’s deployment committee being sidelined.

The Sunday Times understands that the Guptas’ role in influencing the appointment of CEOs and chairmen in key state-owned enterprises was recently raised at an **NWC** meeting and will be formerly discussed at its next gathering in a week’s time. This will pave the way for the powerful ANC National Executive Committee to probe the matter at its sitting in March.

A member of the working committee who attended the most recent meeting said: “The concern is that these people (the Guptas) now have influence in the appointment of CEOs and chairmen of state-owned entities which then means the ANC has lost its way and (its) influence in those crucial deployments.

“They can’t be allowed to plunge the country into a crisis because we defeated money in Polokwane — real money.” He was referring to wealthy backers of former president Thabo Mbeki.

Then, at the top-six meeting last Monday, deployment committee members revealed that new Transnet CEO Brian Molefe, believed to be favoured by the Guptas, had been appointed by the cabinet without their say.

The Gupta brothers — Atul, Ajay and Rajesh, also known as Tony — are said to wield so much power that they often summon cabinet ministers and senior government officials to their family compound in Saxonwold, Johannesburg.

An ANC Youth League leader this week accused the brothers, who hail from India, of “colonising this country” and “amassing resources” unapologetically.

Other accusations levelled at the Guptas are that they:

& x95; Telephoned at least three deputy ministers and told them they were to be promoted days before Zuma announced his cabinet reshuffle;

& x95; Phoned several ministers to assure them that their jobs were secure ahead of Zuma’s announcement;

& x95; Bragged about their influence, telling one ANC premier he was “fortunate” they went to his office to see him — as many other public officials had to meet them at the Guptas’ home;

& x95; Pressured several top government officials at the government communications section, and directors of communications at various departments, to place advertisements in their newspaper, the New Age;

& x95; Used their political muscle to exclude Mandumo Investment Holdings from the controversial R9-billion deal with steel giant ArcellorMittal and replaced it with Ayigobi — a consortium that included Zuma’s son Duduzane;

& x95; Were said to be the only people with “a pass code”, which gave them direct access to the president during his visit to the UK; and

& x95; Tried to impose one of their personal assistants, Mandisa Makinana, as an ANC candidate for Johannesburg's ward 117 — which includes the suburbs of Saxonwold and Parkhurst.

The Guptas, through family spokesman Gary Naidoo, dismissed the allegations as "rubbish" and said they were an attempt to "denigrate" Zuma and his office.

"Suggestions that any member of the family is able to influence President Zuma or any of his cabinet ministers around issues of policy or process sound so far-fetched that we cannot believe or understand how any right-thinking South Africa can even suggest it ... It certainly smacks of a supremist approach to believe that those elected to govern are not able to do so and could be subject to a high level of undue influence," Naidoo said.

But politically connected business heavyweights and ANC alliance insiders told the Sunday Times that the Guptas were brought into the inner circle of the country's political elite in 2006, when an empowerment consortium made up of Lazarus Zim's Afripalm and Tokyo Sexwale's Mvelaphanda bought a stake in the family's Sahara Computers company.

The Guptas are said to be at loggerheads with ANC national chairman Baleka Mbete, treasurer-general Mathews Phosa and four other leading ANC figures.

Their fight with Mbete stems from the ArcelorMittal steel deal — the ANC chairman led the rival Mandumo Investment Holdings consortium — while Phosa is said to have fallen out with the family when he refused to accept their offer to transport Zuma for free in their private jet ahead of the 2009 elections.

A senior ANC leader said Phosa had refused for fear that the Guptas could be "the next Schabir Shaik case".

The ANC official said: "Why did they want the ANC to use their jet for free? Look at how they are (controlling) everyone."

A member of the working committee claimed ministers feared the family, believing they had too much influence over Zuma.

"People are scared of them and they are called to their house all the time ... (The Guptas) are known to be the president's people, and that is why even ministers will shiver."

Another top ANC leader said: "You must see the way they treat ministers." He said that when the Guptas made requests, they implied that these had been cleared by Zuma.

One politician described Atul Gupta as a "bull in a china shop saying 'I have power from above (from Zuma)'".

"They are like cats — you never know where they sh*t until you step in it," he said.

A high-ranking ANC leader said only Zuma could put an end to "the Gupta rampage" by telling them to stop issuing instructions to ministers in his name.

Party spokesman Keith Khoza said: "The ANC is not commenting on the matter."

ANC alliance partner Cosatu is also upset, announcing it would commission "independent research" to investigate allegations that the Guptas were "plundering" South Africa's economy. The trade union federation also intends probing whether the family employed "underhanded means and political influence" to advance their business interests.

The Cosatu statement followed a heated Central Executive Committee meeting on Wednesday when angry affiliates accused the Guptas of using political influence to clinch multibillion-rand business deals.

"Polokwane was to do away with the use of state machinery to benefit a few individuals, but we see a continuation — where it is just the Guptas and the president's kids (benefiting) ... All these things are happening under Zuma's leadership and he is not raising them. This is sending a bad message," said a unionist who was at the CEC meeting.

A member of the ANC deployment committee said committee members should share the blame for the Guptas' growing influence as they did not meet to discuss deployments.

"The process was that the ANC would look at names for senior and strategic positions in government. That has not been happening since last year."

Document SUNTIM0020110228e72r0004z

Search Summary

Item “49”

NWS
Yyyyyyyyyyyyyyyyyyyyyyyyy

903 words
3 May 2013
The Star
THESTR
E1
English

Subhedddy yyyyyyyyyyyyyyyy yyyyyyyyyyyyyyyyyyyyy

PRESIDENT Jacob Zuma and ANC secretary-general Gwede Mantashe have allegedly fallen out over the Gupta plane saga, sources said.

They claim that the scandal has also divided the cabinet and resulted in at least one minister threatening to quit.

The Star has learnt that the use of the Waterkloof Air Force Base by the politically well-connected Gupta family was the final straw for Mantashe, who had allegedly been warning Zuma against allowing the Guptas and the "kitchen cabinet" too much influence in the government and ANC affairs.

According to two government and ANC sources, the Gupta plane scandal has also divided cabinet members between those who supported Zuma and the "pro-ANC" ones, who insisted they were tired of being projected as "clowns" by defending the indefensible.

Sources also claim that Defence Minister Nosiviwe Mapisa-Nqakula had allegedly told confidantes she was prepared to resign from her position rather than publicly defend the move, or agree to a request to say she had granted the Guptas permission to land at the national key point.

This came amid escalating public outcry and political fall-out over the highly irregularl decision to allow a civilian plane ferrying the Indian guests of the Gupta family to land at Waterkloof Air Force base, which is in breach of security and regulatory procedures.

Mantashe has allegedly also accused Zuma of taking key decisions with his "kitchen cabinet" - a group of predominantly Zulu-speaking ministers and ANC national executive committee members, before consulting him.

Mantashe could not be reached for comment yesterday. ANC national spokesman Jackson Mthembu said he was in a meeting.

Mthembu dismissed suggestions that Zuma and Mantashe had fallen out as an old "bullshit" (story) peddled by people who wanted to sow divisions among ANC leaders. But he confirmed that Mantashe had met Mapisa-Nqakula to discuss the plane saga.

According to a well-placed source, Mantashe felt that Zuma had allowed the Guptas and the "kitchen cabinet" too much influence in government at the expense of the party and its leadership.

He said the ANC secretary-general also felt marginalised when Zuma appointed the Limpopo ANC and the ANC Youth League task teams.

Mantashe allegedly went as far as to tell some ministers to have the "**back-bone**" and to refuse to take instructions from the Guptas.

"The Gupta plane issue was the final straw in the relationship between Gwede, Zuma and the think-tanks in the ANC. They are saying that, 'if this is what Thabo Mbeki was trying to protect the ANC from, we are learning the hard way.

"Mbeki knew this man (Zuma) was incapacitated. The kitchen cabinet of Blade (Nzimande), Nathi (Mthethwa) and others are the source of the conflict. Gwede feels that Zuma's kitchen cabinet is breeding ethnicity," the source said.

An ANC source said Mantashe was concerned that the continued existence of the "kitchen cabinet", which had allegedly drafted a 20-year plan to rule the ANC, would vindicate expelled ANCYL president Julius Malema who had repeatedly warned against tribalism.

The source claimed that Mantashe's supporters had thrown their weight behind ANC deputy president Cyril Ramaphosa, whom the "kitchen cabinet" is said to be trying to block from succeeding Zuma.

Mthembu denied any fall-out or tension between Zuma and Mantashe, saying he was not even aware of any "kitchen cabinet".

"There is no tension. There is no fall-out. I do not know where this is coming from. At any rate, from where we are seated, the president did not even know about this (decision to grant the plane permission to land at Waterkloof). They did not even know. Their wisdom was not sought. Even the relevant minister was not even aware," Mthembu said.

He said Zuma fully agreed with the ANC's approach to the Gupta plane matter.

News of an alleged fall-out between Zuma and Mantashe came as Cosatu, the SACP, opposition parties and even the ANC demanded investigations into the Gupta matter and for those responsible to be sanctioned.

Minister in the Presidency Collins Chabane also announced that the government had instituted its own probe, adding Zuma would not attend the wedding at Sun City in the North-West.

An angry Mapisa -Nqakula also rescinded the decision to grant the plane permission. She also publicly announced that she had rejected a request from a Gupta representative for access to Waterkloof.

A well-placed source said Mapisa Nqakula threatened to quit over the Gupta matter, after receiving a briefing from her officials upon her return from overseas.

"She told her confidantes she is not going to rubber- stamp nonsense. Zuma's people apparently wanted the defence ministry to do damage control by saying, 'we did give the Guptas permission but failed to communicate it properly. We should have notified Sars, but a junior official failed to do so'.

"But she refused, saying she cannot take the wrap like she did on the Central African Republic issue," the source added.

Mapisa-Nqakula's advisor, Mike Ramagoma, denied she threatened to quit.

"The minister was understandably very angry that after her decision that Waterloof Air Force Base may not be used to land that aircraft, it seems somebody had gone ahead to undermine her decision.

"But at no time did she threaten to resign as she accepts the pressure that comes with a job like this," Ramagoma added.

Document THESTR0020130503e95300045

Search Summary

Text	back-bone
Date	03/05/2013 to 06/05/2013
Source	The Star (South Africa)
Author	All Authors
Company	All Companies
Subject	All Subjects
Industry	All Industries
Region	All Regions
Language	English
Results Found	1
Timestamp	23 February 2021 19:16

Item “50”

NEWS

Cyril Ramaphosa: 'We heard you, loud and clear'

14 February 2016 - 02:00
BY S'THEMBISO MSOMI

Deputy President Cyril Ramaphosa says the ongoing review into the performance of state-owned enterprises will go a long way in rooting out the capture of government institutions by politically connected individuals for their personal gain.

Deputy President Cyril Ramaphosa at the Highstead residence, Groote Schuur Estate.
Image: *ESA ALEXANDER*

Deputy President Cyril Ramaphosa at the Highstead residence, Groote Schuur Estate.
Image: *ESA ALEXANDER*

Parastatals and other government institutions have been in the spotlight in recent months amid allegations that a number of them are operating under the influence of business groups and individuals who seek to enrich themselves through controlling state assets and organisations.

Allegations of "state capture" intensified last month when Cosatu and the SACP publicly accused the Guptas of exploiting their friendship with President Jacob Zuma to gain an unfair advantage in the mining sector.

The Guptas have consistently denied using their links to Zuma and his family to secure business from state-owned enterprises and win mining licences.

story_article_left1

In an interview following Zuma's state of the nation address this week, Ramaphosa acknowledged that there is a strong perception in the business world that "state capture" has become endemic and that there is a belief that only those with political connections receive lucrative deals from the government and parastatals.

"State capture is a phenomenon that should not exist, quite frankly.

"One of the processes we would want our state-owned enterprises to be involved in is to have really squeaky clean and outstanding corporate governance processes where, if any corporation does business with a state-owned enterprise, it is on an arm's-length basis.

"It must be done in adherence to the highest corporate governance principles and it must be done transparently and in a way where there is no conflict of interest,"

Ramaphosa said.

On Thursday night, Zuma announced that Ramaphosa will lead the implementation of a series of recommendations put forward by the presidential review commission on state-owned enterprises to turn around underperforming parastatals.

Ramaphosa said the process would also entail instilling a code of behaviour in all public institutions that ensured good corporate governance and rooted out the practice of dishing out business contracts on the basis of political connections.

"That is the certainty that everybody wants, the international community; everyone wants that you don't have to have political connections ... We should be doing business on an open and fair basis guided by the constitution, which gives us freedom to conduct business.

"I do believe political connections should not be the order of the day; it should be the strength of your own business, the strength of what you can offer ... Companies should compete on an equal basis. That is the South Africa of our dreams."

In his speech, Zuma suggested that the government was looking at "phasing out" some of its companies that "are no longer relevant to our development agenda".

They are holding back because they want that certainty and that is something that we accept

Speculation has been rife that this would mean the sale of a portion of Eskom and the collapse of SA Express into SAA.

But Ramaphosa said the process was still very far from being concluded as he and his team had to look at all 700 business entities owned by the government.

The deputy president conceded that the government has failed the struggling, but still crucial, mineral resources sector through its policy flip-flops.

The industry, which has been the backbone of the economy for more than a century, is going through a rough period partly due to low commodity prices. But potential investors have also been put off by the government's failure to develop clear and predictable policies.

Ramaphosa said this was a "work in progress" as the government realised that investors were unhappy about the ongoing uncertainty over policies.

"What that tells us is that we are doing a big disservice to that industry as a government by not speeding up the process - because investors want certainty.

"They are holding back because they want that certainty and that is something that we accept.

story_article_right2

"We accept that we have slowed down in a way that is not of great benefit to the industry and we are going to pick up pace on that. I must say we got the message

very loud and clear."

The proceedings in parliament this week got off to a bumpy start when EFF MPs disrupted Zuma's speech by going against parliamentary convention and raising points of order as he spoke.

Ramaphosa said that although he had expected disruptions, he was saddened by the EFF's "disrespect" for parliament and the office of the president.

"Even if you don't like the head of state, even if you think the head of state is not doing a great job, it is the position," said Ramaphosa.

He said the EFF protest had "trashed" and "demeaned" parliament. It "taints the image of the country", he added.

"It makes people who would look at South Africa as an investment destination - and, indeed, a tourist destination - to raise a question mark because they would say: 'We have seen scenes on television of terrible disruption in the august body of your nation ... what is happening?'"

Item “51”

12.6. Concern about the influence of the Guptas extended to the ANC too. On 17 February 2016 the Sowetan reported that a delegation including Ajay Gupta met with senior ANC representatives, including President Zuma and ANC secretary general Gwede Mantashe where, according to the report "they were asked about their influence on ANC leaders".

12.7. On 8 March 2016 the Financial Times reported that Deputy Finance Minister Mcebisi Jonas had been offered the position of Finance Minister by the Guptas prior to the appointment to that position of Des Van Rooyen in December 2015.

13. UNSUCCESSFUL ATTEMPT TO CONVENE AN INQUIRY BY THE PCPE

13.1. On the same day, 08 March_2016, I issued a statement (see **Annexure "NM28"**) that it was my intention to write to the Chairperson of the PCPE, Ms Dipuo Letsatsi-Duba, to request that the Gupta brothers be summoned to Parliament to answer for what appeared to be undue influence that they enjoyed over President Zuma, the Government and its officials. I referred *inter alia* to the controversy about Eskom, Glencore and Tegeta; to taxpayer subsidization of the "New Age" breakfasts; and to the culture of "corporate capture" by the Guptas and the influence they exerted on cabinet ministers, seemingly outside the prescripts of competitive tender and procurement prescripts. I cited Rule 138(a) of the Rules of the National Assembly (as those rules then stood), which provided that, for the purposes of performing its functions, a committee

may summon any person to appear before it to give evidence on oath or affirmation, or to produce documents.

13.2. I have performed a diligent search of my personal records and am unable to find a copy of a letter written on or about 08 March 2016. I am however certain that I did send such a letter, as can be seen from my subsequent correspondence of 14 March (see par 12.5 below), in which I refer to previous correspondence directed to the Chairperson of the PCPE on this issue.

13.3. Over the next week or so further allegations of relevance were made public. On 11 March 2016, EWN reported that, after a threat from Ajay Gupta, Themba Maseko had been forced to resign from the Government Communication and Information System (GCIS). (Mr Maseko confirmed these allegations in an article published in the "Sunday Times" on 20 March 2016 (**Annexure "NM29"**), in which he also revealed the pressure he had been placed under to place government advertisements in the New Age.)

13.4. On 13 March 2016 the Sunday Times reported details of Jonas' meeting in November 2015 with the Guptas.

13.5. On 14 March 2016 I addressed a letter to Ms Letsatsi-Duba (see **Annexure "NM30"**) in which I referred to allegations in recent weeks of undue influence by the Guptas in a number of SOEs and requested that

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14th March 2016

To: Chairperson

Portfolio Committee on Public Enterprises

Ms Dipuo Bertha Letsatsi-Duba

Electronic message to: dmocumi@parliament.gov.za; dletsatsi-duba@parliament.gov.za

REQUEST FOR A FULL PARLIAMENTARY INQUIRY INTO THE GUPTAS

Dear Ms Letsatsi-Duba

I am writing to you to request that the Portfolio Committee on Public Enterprises conducts a full parliamentary inquiry into the capture of SOEs by the Guptas.

In recent weeks, a number of allegations of undue influence have been raised regarding the Gupta's involvement in a number of state owned enterprises (SOEs).

These allegations necessitate an urgent investigation into the Guptas' links to SOEs by the portfolio committee. The committee must:

- Immediately summon the Guptas to appear before it to answer to these allegations as per my previous letter to you in this regard.
- Call former Ministers of Public Enterprises, Barbara Hogan and Malusi Gigaba, to provide full details of their relationship with the Gupta family. Mr Gigaba, in particular, must account for allegations of preferential treatment of the Guptas for state contracts during his tenure.
- Summon the CEOs and Chairpersons of the largest SOEs to appear before it to answer questions about their ties to the Guptas.

I would greatly appreciate your prompt response in this regard.

Yours sincerely

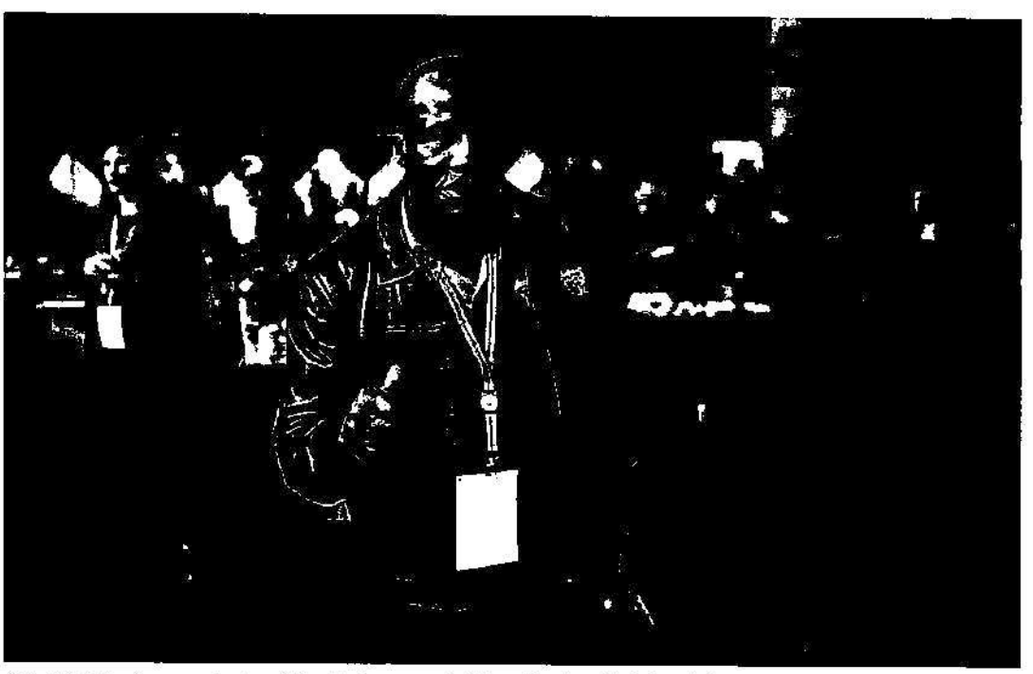
Natasha Mazzone
Shadow Minister Public Enterprises
Democratic Alliance
natasham@da.org.za
083 282 0668

Item “52”

NATIONAL

ANC: DA's claims of support for Gupta probe 'delusional'

Staff Reporter 29 Mar 2016



Former ANC spokesperson Jackson Mthembu has succeeded Stone Sizani as chief whip of the ANC. Photo: Gallo Images / Foto24 / Craig Nieuwenhuizen)

The African National Congress on Thursday rejected reports that it had agreed to support a Parliamentary probe into the alleged Gupta family influence over the government.

"The Democractic Alliance (DA) chief whip's ridiculous claims in the media that ANC chief whip Jackson Mthembu has agreed to the DA's opportunistic proposal for Parliament to institute an investigation into the alleged state influence by the Gupta family are imaginary and baseless," said the ANC in a statement attributed to the office of the party's chief whip.

Former ANC MP Vytjie Mentor made startling allegations earlier this month that she had been offered a Cabinet position by the Guptas provided she was willing to divert business to them.

Mentor claimed President Jacob Zuma was in the next room at the Guptas' Saxonworld residence in Johannesburg when the offer was made. The Guptas denied the allegations and Zuma said he had "no recollection" of Mentor.

The Guptas were placed under further scrutiny after deputy finance Minister Mcebisi Jonas confirmed earlier reports that he had been offered his boss's job by the family.

- **Read: Mentor hits back at Zuma's denial**
- **'Guptas offered me Finance Minister position' – Mcebisi Jonas**

The revelations have prompted several investigations amid fears of possible "state capture" by the Guptas.

The DA has since requested Parliament to probe the matter, but the ANC disputes reports that Mthembu agreed to such a move. Soon after his appointment as chief whip last week Mthembu was quoted as saying opposition parties have every right to call for a debate on state capture and the influence wielded in government by the Gupta family.

However, Mthembu's office on Thursday said the ANC would not agree to such a probe.

"When asked by various media houses following his appointment whether the ANC would support a parliamentary debate on the allegations surrounding the Guptas, the ANC chief whip stressed that, as a general principle, Parliament as a forum for public debates should never quash multiparty debates," the ANC said.

"However, each proposed debate should be subjected to the established parliamentary process for consideration and a decision by all parties."

The ANC said only a "delusional misapprehension would interpret this clear assertion (on parliamentary debates) to mean the ANC chief whip supports the DA's proposal for 'parliamentary investigation' into alleged state influence by the Gupta family".

The ANC said the DA proposed a similar motion earlier this month in the National Assembly and it was rejected.

"Further, the allegations relating to the so-called 'state capture' are before some state institutions, such as the Hawks and the public protector, following requests for investigations by certain formations and individuals," said the ANC, adding that "Parliament should not find itself in a situation where it is conducting parallel investigations".

Motetoni | Ajay Gupta | ANC | Atul Gupta | Gupta Brothers | State Capture | Vytjie Mentor

RELATED STORIES

Item “53”

THE ALLEGATIONS OF STATE CAPTURE BY CERTAIN INDIVIDUALS AND THEIR ALLEGED UNDUE INFLUENCE OVER THE GOVERNMENT

(Draft Resolution - Mr D J Maynier)

Mr D J MAYNIER: Chairperson, on 1 September 2016, just as ordinary people were thinking about hitting the sack, the Minister of Mineral Resources, Mosebenzi Zwane, released an extraordinary statement announcing that the termination of financial services to Oakbay Investments should be investigated via a judicial commission of inquiry.

This was a reminder that, although the Guptas are now less brazen, they are just as influential in getting what they want and when they want it from President Jacob Zuma. In the past, the Guptas would shout "Jump" and President Jacob Zuma would ask, "How high?" Now, the Guptas whisper "Jump", and President Jacob Zuma still — you guessed it — asks "How high?" We have been reminded and must not forget that state capture remains a clear and present danger to democratic South Africa.

The Mineral Resources Minister's extraordinary statement was repudiated within 24 hours and we were told that it was made in his personal capacity and that its unfortunate contents were deeply regretted. However, the "unfortunate contents"

merit a second look precisely because they have such serious implications.

The CHIEF WHIP OF THE MAJORITY PARTY: Point of order, Chair.

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon Maynier, will you just take your seat please. Yes, hon Chief Whip?

The CHIEF WHIP OF THE MAJORITY PARTY: Thank you, hon Chair. Chair, is it parliamentary to dance at the podium? [Interjections.]

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon, Chief Whip, I request ... [Interjections.] Order, hon members! Order!

Hon Maynier, you may continue but when you get towards the end of your speech, I would like you to at least formally move the motion as well. Yes, hon Minister?

The MINISTER OF SCIENCE AND TECHNOLOGY: Chairperson, we should explain to the Chief Whip of the Majority Party that if your initials are D J, it is parliamentary. [Laughter.]

The HOUSE CHAIRPERSON (Mr C T Frolick): I think, hon Minister, you can share that with the hon Chief Whip. Continue, hon Maynier.

Mr D J MAYNIER: Chairperson, after a hammering yesterday I am delighted to see that there is still some liberty on the ANC's benches. As I was saying, this debate is not just important because of its implications for the financial sector and for the economy, but it is also important because of its implications for South Africa.

The Minister recommended, of course, that the termination of financial services, including banking services and auditing services to Oakbay, should be investigated by a judicial commission of inquiry. But he also effectively recommended a review of the functions of National Treasury and of the SA Reserve Bank. This was done, apparently, without consulting the Finance Minister who is responsible for the financial sector in South Africa.

And, of course, it exploded - thankfully - right here yesterday in this House when the Finance Minister contradicted the Mineral Resources Minister on the need for a commission of inquiry. So whoever said that the Mineral Resources Minister's extraordinary statement was "going to cause inconvenience and confusion", he or she was absolutely right. Of course, the Minister's intentions were clear: to undermine the Finance Minister, to undermine institutional independence at the National Treasury and at the SA Reserve Bank and, of course, most important of all, to establish an

investigation into the termination of financial services to his good friends, the Guptas.

We all know that the Minister is a hired gun and that he was contracted by the Guptas to carry out a political hit on the financial sector, the National Treasury and the SA Reserve Bank. We all witnessed the Minister ducking and diving and his outrageous refusal to reply to my questions about why he released the extraordinary statement, which leaves us all with the uneasy feeling that, in fact, the recommendations do reflect the views of the Cabinet or of a substantial part of the Cabinet and perhaps even of President Jacob Zuma.

What was really terrifying about the Minister's response was not just his North Korean political values, but the fact that he seems determined to push on with his bizarre recommendations, which, if they go ahead, will ultimately reduce investor confidence and make a sovereign ratings downgrade more likely in South Africa.

Whatever the case, this is the perfect illustration of state capture, with a Minister acting not in the public interest but in the private interests of one family and that family is the Guptas. We must not be fooled; the Guptas have learned a thing or two from their number one client by casting

themselves as victims and champions of the working class in South Africa.

But the truth is the Guptas are not victims. The Guptas and the businesses controlled by them are the subject of multiple investigations - by the Hawks, by National Treasury and by the SA Reserve Bank. This, of course, explains why the ambassador from Saxonwold contracted a political hit on the financial sector, the National Treasury and the SA Reserve Bank in the first place.

We have to stand up against state capture because it undermines the rule of law; we have to stand up against state capture because it undermines public trust in independent institutions; we have stand up against state capture because it undermines the legitimacy of democracy itself in South Africa; and we must stand up because the democratic state that is being captured fails to be a democratic state - it becomes a failed state. That is why we expect Ministers to serve the public interest, not the private interest of one family, the Guptas. And, make no mistake: we can stand up against state capture. We can do so by establishing an ad hoc committee in this Parliament to investigate allegations against certain individuals and their alleged undue influence on ... [Inaudible.]

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon member, your time has now expired. [Interjections.]

The HOUSE CHAIRPERSON (Mr C T Frolick): The hon member should have read the motion. I indicated that he should have done so before his time expired. He has another two minutes later in the debate and the motion can then be read. It is printed on the Order Paper, so members can just reflect on that. [Applause.]

Ms J L FUBBS: Hon Chairperson, hon members of this House and the people of South Africa, South Africa's Constitution is recognised as our strongest protection. And, as we say:

> We the people of South Africa,
> Recognise the injustices of the past;
> Honour those who suffered for justice and freedom in our land;
> Respect those who have worked to build and develop our country; and
> Believe that South Africa belongs to all who live in it, united in our diversity.

This preamble to our Constitution confirmed our commitment to building the united and equitable people's South Africa embraced in the Freedom Charter and it was no accident that

the ANC was the main driver in building a social democracy, a people's democracy, a constitutional democracy. So what does this mean if it is such a strong protection?

The Constitution defines the principles upon which our state is based. In fact, all states are based on constitutions written or unwritten. But what is different about our Constitution is that the Bill of Rights is an integral part of the Constitution as are the Chapter 9 institutions, which so many of those who have a neoliberal ideology would like to believe they have a monopoly of.

The Constitution of South Africa is also the supreme law, laying down our legal existence as a republic and defining the rights and responsibilities of its citizens. We continue – all South Africans – to respect and value our Constitution. The architect of our nation, Nelson Mandela, said with conviction, when he actually signed it into law in Sharpeville in 1996, that: We give life to our nation's prayer, the prayer of all black South Africans at that time and many others, whites included, coloureds and Indians, for freedom regained and a continent reborn.

The Constitution is this instrument of state to protect the people of South Africa against corporate capture of the state, which incidentally is a neoliberal cardinal tenet ...

[Interjections.] ... and which seeks to develop a bureaucratic bourgeoisie ... [Laughter.] ... with freedom limited to a few who have the money and the means ... [Interjections.] The largest opposition party in this Parliament ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Order, hon members!

Ms J L FUBBS: ... seeks to use their debating powers and voices and this House and their financial support base to change, for their own ends, the policies of a legitimately elected government through the instrument of persistent lobbying and the media.

Now, let's say this about lobbying. Let's get this quite clear: Lobbying is not transparent and neither is it accountable to the state or civil society, or, indeed, the Constitution, our democracy and the people's Parliament. The state, of course, is often confused with the government but the government is but one institution of the state – one can go back to ancient Greece and even before that. However, there are unique features of the modern state with its extensive rule of law, citizenship rights and broad economic and social responsibilities. But we must make this clear: a state is more than government. Governments change, but states endure ... [Interjections.] [Applause.] ... if, like South

Africa, the Bill of Rights and fundamental freedoms are enshrined, as I have said. [Interjections.]

Now, let us move on. [Interjections.] There is a dangerous tendency ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Order, hon members!

Ms J L FUBBS: ... to reduce the state to only government. When we identify pathologies pertaining to patronage, patrimonial and neopatrimonial networks, we associate this with states that have failed or are failing. So, where is South Africa at this juncture? [Interjections.] No, we are not a failed state; neither are we failing. [Interjections.] So, the discourse, including debates ... And may I say: the open nature of these debates, both in Parliament and outside Parliament, actually indicate and underpin the freedom you enjoy in the open society that we have. [Interjections.]

The South African state continues to exercise administrative control over its sovereign territory and provides public goods and services to its citizens. However, when things to wrong, as we have seen, South Africa has the Constitution as a final bastion to protect us.

We sometimes forget in this House that the President, as a member and the senior member of the executive who appoints the rest of the executive, also, constitutionally, has the prerogative to appoint the Constitutional Court judges and its president. But, whenever this happens, we hear: Well, I expect he's been captured by X or Y or the state. Indeed, Justice Mogoeng Mogoeng, our Constitutional Court Chief Justice, has not and underlines the point. We heard only yesterday in some of the debates that the Public Protector, one of our Chapter 9 institutions, is highly regarded by all South Africans. This is part of our Constitution. Indeed, the Public Protector was appointed by the senior member of the executive, the President.

However, we need to understand that corporate capture of the state is weakening. Our pursuit of a people's state ... What is a people's state? It is a developmental state that puts people first, which many in this House do not want to know and do not understand. This is particularly significant in our current context of challenges: the challenges of unemployment and so on and the social challenges.

But never forget: We also have private sector oligarchs who are there, fronting, trying to undermine all of the pieces of legislation that seek to radically transform South Africa,

and, if not seeking, coming with threats to take their cash out.

The legitimacy of the state is at risk owing to the prolonged capture of and by the private sector; before that, by colonialists; later on codified in an apartheid state. However, we also have a department of monitoring and evaluation, the M&E. It is, I think, the planning, monitoring and evaluation department. It remains the custodian of monitoring. Now, we are not running after targets. What we need to do is look very carefully at our outputs and strive to achieve them.

As I conclude, I want to call on all South Africans to have political maturity - all of us. Albie Sachs, a highly respected Constitutional Court judge, once said that severability was an important concept in the context of relations between the court and Parliament - it is an instrument of judicial restraint and it reduces the danger of producing over-broad judicial reaction to over-broad legislation.

South Africans, my appeal to you is that you use your instruments. Thank you.

The LEADER OF THE OPPOSITION: Hon members, fellow South Africans, mogaetsho, dumelang [hello]. Today we are debating the phenomenon of state capture in our country. State capture is defined as "a form of systemic corruption in which private interests influence government decision-making to their own advantage".

I think it is absolutely important to acknowledge that President Zuma did not invent state capture. He simply perfected it. Since Jacob Zuma assumed office in 2009, he has deployed loyalists to every lever of power and patronage. He has captured the parastatals to be looted through tenders and contracts. That's why we have Dudu Myeni at SAA and Brian Molefe at Eskom.

He has captured the institutions that keep him and his cronies out of jail. This explains why Shaun Abrahams was deployed to the NPA, why Berning Ntlemeza is the head of the Hawks, and why Tom Moyane was parachuted in at the SA Revenue Service, Sars. That was phase one, in which Jacob Zuma captured the state.

We have now moved on to phase two - thank you - in which the Guptas ... [Interjections.]

The HOUSE CHAIRPERSON (Mr C T Frolick): The hon Leader of the Opposition, could you please take your seat. On what point of order are you rising, hon member?

Mr P J MNGUNI: On calling the President by his name without referring to him as "His Excellency" or "the honourable" ... [Interjections.]

The HOUSE CHAIRPERSON (Mr C T Frolick): Thank you, hon member. Hon members, let us observe the Rules and let us refer to each other in an honourable manner as set out in the Rules. Continue, hon Leader of the Opposition.

The LEADER OF THE OPPOSITION: That was phase one, in which President Zuma captured the state.

We have now moved on to phase two in which the Guptas have captured President Zuma.

When he got desperate on the campaign trail this year, President Zuma went around telling the members ... telling everybody ... telling South Africans that members on this side of the House are puppets. Now, that is incredibly rich, coming from him.

Because we no longer have a President in South Africa; we have a puppet! Jacob Zuma is a puppet of the Guptas. [Applause.] [Interjections.]

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon Leader of the Opposition, would you please take your seat. Why are you rising, hon member?

The DEPUTY CHIEF WHIP OF THE MAJORITY PARTY: Chair, I think the hon Maimane should learn to call the President, President Zuma.

The HOUSE CHAIRPERSON (Mr C T Frolick): Thank you, hon member.

Ms D CARTER: Hon Chairperson ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon member, please take your seat. Hon Maimane, let us continue referring to each other in a respectful way please and not use first names. Hon Maimane, let me just take the other point of order.

Ms D CARTER: Hon Chairperson, I think it is important that the members of the opposition should know that the President

is actually not a member of this House constitutionally. [Inaudible.]

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon member, that is not a point of order. Please consult the Rules. Continue, hon Maimane.

The LEADER OF THE OPPOSITION: You see, as my colleague said, when the Guptas say "Jump!", Number One, or President Zuma asks "How high"? In fact, when the Guptas say, "We want to land at Waterkloof," President Zuma says, "I'll notify air control." In fact, when the Guptas say, "Fire Nene", Zuma says, "He'll be gone by the end of the week."

When the Guptas say ... [Interruption.]

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon Maimane ...

The LEADER OF THE OPPOSITION: I apologise.

The HOUSE CHAIRPERSON (Mr C T Frolick): No ...

The LEADER OF THE OPPOSITION: I withdraw.

The HOUSE CHAIRPERSON (Mr C T Frolick): Take your seat. Let me hear. No, I don't know why the hon member is rising; I want to find out. Why are you rising, hon member?

Mr P J MNGUNI: Hon House Chair, this is the third time that we are raising this same thing again. It shouldn't happen. [Interjections.]

The HOUSE CHAIRPERSON (Mr C T Frolick): Thank you, hon member. The hon member has withdrawn the remark. Continue, hon Maimane.

The LEADER OF THE OPPOSITION: When the Guptas say, "Fire Nene", Number One says, "He'll be gone by the end of the week." When the Guptas say, "Get Minister Gordhan", Number One says, "I'll get the Hawks on it right away."

When the Guptas say, "We want a coal mine", Number One says, "I'll do you one better: I'll give you your own Minister of Mineral Resources!" [Laughter.]

Fellow South Africans, being a Gupta puppet is good business for Number One and his family. In this instance, President Zuma is so deep in the Guptas' pockets that I'm actually surprised those pockets have not been declared a National Key Point. [Laughter.]

And we mustn't be fooled by the Guptas' move to Dubai or their promise to sell off their South African business interests. These are just simply smoke screens. Because, as long as the Guptas have Number One's cellphone number on speed dial, our country is being governed by remote control from 11 000 km away.

Every time the Guptas pull President Zuma's strings, the markets react and our currency plunges. We saw it when Minister Nene was fired, and we saw it when the Hawks began circling around Minister Gordhan. Billions of rand left our shores and billions more were wiped from our markets and thousands of jobs were lost.

Yesterday, Minister Pravin Gordhan stood here and said that we should be talking about how to create jobs, not about state capture. I would agree with him, because I wish we didn't have to debate state capture. I wish this debate was all about jobs.

But the truth is that we cannot create jobs when our state is captured. Indeed, it is state capture that is pushing us towards a ratings downgrade. And, make no mistake, if we are downgraded to junk status, hundreds and thousands more jobs will be lost.

Now, we know that the members of the Majority Party on this of the House agree that the Guptas have captured their President. We saw it yesterday when Minister Gordhan simply said, "The facts are fairly clear about where the influences lie and what the purpose of these influences is." We saw it when Deputy Minister Mcebisi Jonas told us that he had turned down a Cabinet post offered to him by the Guptas.

We know that many of you sitting on this side are worried about state capture. So why don't you stop it? I'll tell you why: because you can't; because your party has been captured by the Guptas through your President as their proxy.

[Applause.]

They control the national executive committee and they manage the so-called premier league. The people in the ANC who benefit from this web of patronage and corruption outnumber those who don't. This is why, under Number One or President Zuma, the ANC could lose three major cities in an election and nobody in the ANC could take any action against him. Many of you on the ANC benches will lose your seats at the next election but, like turkeys voting for Christmas, you will continue supporting Jacob Zuma. Oh sorry, President Zuma.

The truth is that the ANC is beyond redemption. The ANC cannot save itself, and it cannot save our country. And so

our salvation lies in building a new alternative. It depends on patriotic South Africans from all political traditions joining hands to stop the plunder.

We are indeed building this alternative in Johannesburg, in Nelson Mandela Bay and in Tshwane. In these places, we are stopping corruption, we are starting service delivery, and we are putting South Africans first. [Applause.] We are shining a light on dodgy tenders, we are stopping the fancy cars, and we are putting an end to the blue-light brigades and the lavish parties.

We won't stop this rot overnight, but in five years' time, be assured, each of these cities will look very different.

There is hope for South Africa. We can turn our economy around. Therefore, it is our duty today, in this House, to start the process of freeing our country from the grip of the Guptas.

And so I call on all the members of the ANC, who agree that state capture is unacceptable, to do their jobs and support this motion today for a full parliamentary inquiry. I thank you. [Applause.]

Mr L G MOKOENA: Chairperson, it is very sad that all of Parliament has to sit here today discussing ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon Mokoena, just hold for me, please. The time hasn't been reset. May I ask the Table to do what it is supposed to do, please? [Interjections.] Just take a seat in the meantime, hon Mokoena. [Interjections.]

Hon Mokoena, you can continue. Also, the hon member doesn't have three minutes. He has four minutes.

Mr L G MOKOENA: Yes, please.

The HOUSE CHAIRPERSON (Mr C T Frolick): Please correct that. You can continue, hon member. I will also monitor it from here. [Interjections.] You may continue, hon member.

Mr L G MOKOENA: Chairperson, it is a sad day when all of Parliament has to sit here today discussing one corrupt and immoral family, but we have to do so because we know, as a fact, that this family has business interests in government business. We know for a fact that they formed a partnership, a corrupt partnership, with Mr Zuma.

We have been calling for the establishment of a judicial commission of inquiry into this matter, and we support this motion to establish an ad hoc committee to investigate the following: It was the Guptas who replaced Mr Ngoako Ramatlhodi. We know for a fact that the presidential convoy was outside the Gupta family premises the day before Zwane was appointed.

Mr G G HILL-LEWIS: There you go!

Mr L G MOKOENA: All Ministers, premiers and mayors of places where the ANC governs were forced to sign contracts to bankroll *The New Age* and the ANN7. We know that at the SABC Ministers are paid R400 000 per appearance to appear on a corrupt show called *The New Age* breakfast show. [Interjections.]

The Guptas control the most corrupt premier, the Free State's Ace Magashule. In fact, they control two other premiers, the Premier of Mpumalanga, David Mabuza, and the Premier of North West, Supra Mahumapelo, and many others, of course. We know ...

The CHIEF WHIP OF THE MAJORITY PARTY: Chair, on a point of order ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon Mokoena, please take your seat. Yes, hon Chief Whip?

The CHIEF WHIP OF THE MAJORITY PARTY: Chair, Rule 84 clearly says that unparliamentary or unacceptable language or gestures should not be allowed in this House. [Interjections.] To refer to Premier Magashule as corrupt, to refer to Premier Mabuza ... they are members by virtue of being premiers. [Interjections.] They do come to these Houses - immaterial, but the mere fact of referring to any individual in South Africa as corrupt without any substantiation is unparliamentary. We request that that be withdrawn. [Interjections.]

Mr N F SHIVAMBU: Chairperson ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon member, let me first deal with this point of order. Will you take your seat, please? I just want to deal with this point.

Mr N F SHIVAMBU: But can you deal with that quickly ...

The HOUSE CHAIRPERSON (Mr C T Frolick): No, hon member, I won't be able to deal with it if you are on your feet.

Mr N F SHIVAMBU: We have to take ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Take your seat. I will give you a hearing afterwards.

Mr N F SHIVAMBU: We must take the Chief Whip ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon Shivambu, will you take your seat please?

Mr N F SHIVAMBU: ... for a quick lesson about the Rules of this House.

The HOUSE CHAIRPERSON (Mr C T Frolick): Take your seat please.

Mr N F SHIVAMBU: Please attend to him before we do.

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon Shivambu, take your seat please. Hon Mthembu, I will look at the Hansard in terms of the context in which this input was made and then, if necessary, I will rule on the matter. Suffice it to say that it is a motion that is being debated, and other members are also free to have different views and to articulate those views on the matter. Hon Shivambu?

Mr N F SHIVAMBU: Hon Chair, as a matter of fact, there was a ruling in this House this year in that there is a precedent -

when we referred to Supra as a corrupt individual who is stealing money and animals now in the North West - because these people are not members of this House. They have never been sworn in as members of the National Assembly or of the National Council of Provinces. There are other means that you can resort to. There is a standing ruling about nonmembers. You can say anything about them. If they have recourse, they can pursue that recourse. We can't be forced to respect corrupt individuals like a murderer, David Mabuza, a corrupt premier, Ace Magashule...

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon member! Hon member!

Mr N F SHIVAMBU: ... and Supra. We can't be forced to do that.

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon Shivambu, I have said ... Hon Shivambu!

Mr N F SHIVAMBU: So, the Chief Whip of the ANC must respect precedents and respect the Rules of this House.

The HOUSE CHAIRPERSON (Mr C T Frolick): Will you take your seat now? I said I would look at the Hansard and, if necessary ... However, I also indicated that this is a

debate, and members will have time to articulate their different party positions. Continue, hon Mokoena.

Mr L G MOKOENA: Chair, if the hon Chief Whip of the ANC had heard correctly, I said that we support the establishment of this ad hoc committee to investigate these issues. So, the corruptness of Ace Magashule must be dealt with by the ad hoc committee. Thank you very much.

We would like them to investigate also the capture of Ministers - Minister Zwane, Minister Fikile Mbalula who has confessed to the fact, Minister Van Rooyen, and many other Ministers, of course. They have captured individuals in key state-owned entities, individuals like Brian Molefe of Eskom. Jimmy Manyi is also captured. Denel is captured. The SAA is captured and, of course, the SABC and its compromised chief operating officer Hlaudi Motsoeneng.

These are some of the things that need to be investigated. It is a known fact that the Guptas used the Waterkloof Air Force Base to fly in their family members for a private wedding that the President attended. The Gupta family is responsible for the controversial R570 million dairy farm project led by computer sales staff who knew absolutely nothing about dairy farming, and it was signed by Minister Zwane. As a matter of fact, the Guptas have already received R400 million in bribe

money for the nuclear deal from the Russians, and they are going to do everything in their power to protect that deal.

We have other major concerns. We are concerned about state capture, which is more important than any judicial or political issue. State capture means that we are taking money away from education - something we just spoke about now - from housing and from many other issues.

Di-Gupta di re qetile, di qetile ANC, le ba hlokomele hobane ba tlo tla le qeta ka 2017 ha le ya khonferenseng. Le ba hlokomele. [The Guptas have finished us, they finished the ANC, you must watch out for them because they will finish you in 2017 when you go to the conference. Watch out for them.]

We are saying we are still going to come back and investigate other captures by the Ruperts and other people. Thank you very much. [Time expired.] [Applause.]

Mr J A ESTERHUIZEN: Chair, the very fact that this House is now seized with a debate of this nature brings to light the stark reality of the poison that is within our midst, the poison that has infiltrated the highest levels of politics and business, the poison which relies on subversion and covert means to achieve its malignant designs and ends.

South Africa appears to be under siege from within; its highest office appears to be compromised. The question is: Who is actually running South Africa, who's in charge and what can we, the people, do about it?

As elected representatives of the people of the Republic of South Africa, we, the members of this House, have a single and sacred duty to protect our constitutional democracy, the rule of law and our public offices for the benefit of all South Africans. A creeping rot appears to have taken hold of this government's upper order, a rot which appears to exercise forceful and undue influence through favours both personal and pecuniary, a rot which, if left unchecked, will spread like a cancer and destroy this nation.

The time to act is now. It is the time for decisive leadership through the establishment, I agree, of the mooted rule 253(1)(a) of the ad hoc committee, so as to thoroughly investigate the allegations of state capture and undue influence held by certain individuals over this government.

This controversy, this apparent crime against the nation, the rule of law and the people of South Africa must be met; for us to shrink away from such a controversy would be criminal. This House must act in the interests of the citizens of this country and not of a privileged, connected few. The IFP

supports this motion and calls for the establishment of an ad hoc committee to further investigate this matter. Thank you.

Mr S C MNCWABE: Hon Chairperson, hon members and guests in the gallery, state capture is a form of corruption. It occurs, "when the ruling elite and powerful businessmen manipulate policy formulation and influence ... the emerging rules of the game, including laws and economic regulations, to their own advantage".

The result of state capture is that the captured economy becomes trapped in a vicious cycle in which the policy and institutional reforms, which are necessary to improve governance, are undermined by collusion among powerful firms or individuals and state officials who extract substantial private gains from the absence of clear rule of law.

There can be no doubt about the current state of affairs in South Africa. State capture is there; it is obvious and it is in our face for all to see. The process of state capture is recklessness, shameless, calculated and simple-minded. The saddest part is that the rise of the house of Gupta was fast-tracked by the greed and callousness of our ruling elite - those who professed to have the best interests of our people at heart, those who held the trust and aspirations of a nation in their greedy hands.

However, I do not want to say anymore about the Gupta family, because it is alleged that even some on the opposition benches have benefited somehow from this family and, therefore, cannot claim to be innocent.

The NFP further believes that state capture is not a new thing in the government of South Africa. It started way back during Verwoerd's era. The NFP believes that Bantu Education was the result of state capture by those who wanted to continue enjoying a monopoly over key strategic sectors of the economy, including the land at the expense of the black majority.

It would therefore be very unstrategic for the ANC to allow itself to fall into the same trap as the leadership of the apartheid regime. The NFP will therefore not support the establishment of the ad hoc committee because if it was not established during the apartheid government when our national resources were captured, when our land was captured, why now? [Interjections.] We cannot use state funds to address issues that were supposed to be addressed a long time ago. Let the citizens of South Africa speak on the matter during the 2019 national local government elections.

However, I want to close by quoting ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon member, your time has now expired.

Mr S C MNCWABE: ... Archbishop Tutu when he says: ANC government, watch out.

Mr M L W FILTANE: Hon Chair and members, I want to remind my colleagues of what Vladimir Putin said in July 2000, in a meeting with Russia's business leaders, and I quote:

> I only want to draw your attention straightaway to the fact that you have yourselves formed this very state, to a large extent through political and quasi-political structures under your control. So perhaps what one should do least of all is blame the mirror.

These words are as relevant to the ruling party today as they may have been then to that audience.

State capture, as a form of grand corruption, is the most pernicious and intractable problem for our economy and for, in particular, the triple evils facing our country. When private individuals and groups shape laws, policies and regulations to the taste of their own advantage, but provide illicit, private gains to the public official, any hope to

address the fundamental developmental challenges of the nation are compromised and the poor are at the losing end.

Basic services, such as electricity and water and socioeconomic infrastructure such as roads, are neglected because there is a big fight about who amongst the captured should be given the tender. This evil is in the eyes of the downtrodden person. Because such private individuals and groups use their influence to block any policy reforms that might eliminate their undue advantages, executive and/or legislature capture becomes not merely a symptom but also a fundamental cause of poor governance.

When the legislature is captured and the parliamentarians are bribed to take particular decisions and vote on important pieces of legislation according to the whims of the capturer, the legal framework for socioeconomic development gets collapsed. In recent months we have been witnessing a proliferation of media reports about many allegations of a corrupt relationship between the Gupta family and the state and, in particular, the executive and, centrally, the President. Such a corrupt relationship between a private family and senior state officials is shady and a cause of state pillage.

Yesterday a Minister of state literally refused to account to this House. You can guess for yourself what is happening in his house. It's harsh. Surely, the Gupta family has become a symbol of malaise afflicting our constitutional democracy? In our system of governance we have corruption and cronyism as the order of the day. This violates the very tenets of our democracy.

As the UDM, we shall propose that the Joint Standing Committee on Intelligence be charged with doing detailed investigations of all serious reports and allegations which are already in the public domain, and this is where we want to rest our case. Thank you.

Dr C P MULDER: Hon Chairperson, the debate has become a little bit politicised. So let's step back a little and just try to get a little bit of an eagle's-eye view on what is happening here. The hon Leader of the Opposition gave a definition of what state capture means. Let me just repeat that: it's a type of systemic political corruption in which private interests significantly influence a state's decision-making processes to their own advantage. I don't think anybody could disagree with that kind of definition. So that is what state capture is all about.

Now, we've heard the allegations being made today in the House in terms of what's happening in the country. We've seen on television; we've witnessed what the papers write. Quite obviously, whether the facts are correct or not, there is a perception out there that South Africa is currently suffering from state capture. Whether we like it or not, there exists facts in that regard and there is also that perception.

Why on earth is it so difficult for the ANC to do the right thing? I can't understand this. You know, the reality is ... what has happened now over the past couple of years is ... you can take any situation and put the facts in front of you. And then what comes to mind is: What is the right thing to do? Then you go to exactly the opposite, and you know the ANC will be doing that. Why? It's in your own interests. You should be voting for this resolution today.

In terms of the proposal, the ANC will have a majority on this ad hoc committee. Aren't you interested in trying to find the facts? You should be interested in finding the facts.

In the local government elections it was quite clear that the ANC was punished. People did not like ... and you came back and you said yourselves that people perceived the ANC to be arrogant and not listening to the people. Whether you like it

or not, these perceptions are out there. Here is an opportunity for the ANC to do the right thing. Appoint such an ad hoc committee; investigate - and if you have other examples of things that went wrong, let's put them in front of that committee and come to a conclusion.

We all know that the ANC had its own internal process in which secretary general Mantashe was involved - eight complainants. In the end, it was only one person, Mr Themba Maseko, who made an affidavit there. But we know what Deputy Minister Jonas said. We know what Vytjie Mentor said. These perceptions and facts are out there and we all know that they are out there. Why don't you start by doing the right thing? Why would you oppose a commission like this, an ad hoc committee like this? By doing this, you are sending the example out there that you are trying to protect the people that are accused; you are trying to protect state capture. You are doing this not only to the detriment of your own party; you are doing this to the detriment of South Africa. Please wake up and do the right thing, for once. Thank you.

Mr W M MADISHA: Chair, our hard-fought-for liberation was based on the democratic mantra: "Government of the people, by the people, for the people." Corruption and state capture destroy the notion of democracy. In state capture, government no longer represents government by the people, for the

people, but, rather, government by a few for their own benefit at the expense of the people.

When we think of state capture in our context we think of President Zuma, we think of corruption and the Guptas, but state capture in the South African context is much more endemic. This very Parliament has been captured. Yesterday, when the captured Minister, Minister Zwane, was asked to account, the Speaker and the ANC in this House either protected him or did not denounce his actions. This means that not only has the President, his executive and many state departments and SOEs been captured, but so too has this Parliament.

This endemic state capture is not limited to President Zuma, the Guptas and state capture at a national level. The fact of the matter is that South Africa has morphed into a mafia state from top to bottom, with President Zuma and the Guptas sitting at the apex of the pyramid.

Similarly, President Zuma's and the Gupta's relationships with other role-players exist in almost every province and municipality under the control of the ANC, across the entire nation. As cases of corruption are opened, in Johannesburg, in Tshwane, in the Nelson Mandela Bay Municipality, which are

now under coalition governance, we are beginning to see the extent of state capture and grand corruption.

Minister Gordhan was clear yesterday when he said: The facts are clear about where influences lie and who influences whom. It is clear that a small group is being advantaged to the disadvantage of more than 55 million people ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon member, your time has now expired.

Mr W M MADISHA: ... and a lot has to be done to make sure that the working class and the poor, for example, those who are upright ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Thank you, hon member. Your time has expired.

Mr W M MADISHA: ... are looked after. Thank you very much.

Mr S N SWART: Chairperson, the ACDP will support this motion. South Africa has undeniably reached a critical point and there is an epic battle within the governing ANC, which has split the government. Even Deputy President Cyril Ramaphosa has described this as a government at war with itself.

The conflict between the Finance Minister and the Hawks is a symptom of this battle, and the whole nation is seized with discussing the ramifications of whether the Finance Minister will survive or succumb to the onslaught of the dark forces of state capture.

Yesterday, Minister Gordhan said in this House that the "facts are very clear as to where the influences are ... to advantage certain groups of people to the disadvantage of 55 million people", and this is an issue which we should be very seriously concerned about.

The South African captors are clearly the wealthy Gupta family. Their capture is so deep that they even had the gumption to offer Finance Minister Nhlanhla Nene's job to his deputy, Minister Jonas. This startling revelation by the Deputy Minister was followed by other statements by former ANC MP Vytjie Mentor and former Cabinet Minister Barbara Hogan who also told of attempts at undue influence by the Gupta family. Remember what Deputy Minister Jonas said in his statement: "The narrative that has grown around the issue of state capture should be of concern to all responsible and caring South Africans, particularly those of us who have accepted the task to lead our people." This is us sitting in this House.

Yet nothing has been done following those startling revelations. Instead, the battle intensifies. And there is a new onslaught now against the banking sector and the Reserve Bank and the disgraceful scenes we saw yesterday in this House with the lack of accountability.

We know the economy is on a knife-edge - with an almost negative growth rate, loss of investor confidence and a looming sovereign credit rating downgrade. The ANC has not heeded the warning sent by the voters, and we see now international investors and credit rating agencies are sending an even stronger warning that we ignore at our own peril.

One way of getting rid of patronage politicians and supporters is by exposing them through the political process, and that is the reason why this resolution should be supported.

Chairperson, I have no doubt that there are a sufficient number of members within the ANC who recognise the dangers of the current situation of state capture and who wish to bring it to an end. And I join the pleas of the hon Corné Mulder: Stand up and do what is right.

What is needed now is a resurgence of moral vitality, personal resolve and courage. Now is the time to stand up and do what is right.

Shakespeare wrote: "There is a tide in the affairs of men which, when taken at its flood, leads on to victory." The tide is rising. There is a clarion call against state capture and against widespread fraud and corruption. Let us deal with state capture and the Guptas once and for all. I thank you.

Ms N W A MAZZONE: House Chair, the politicisation of state entities by the deployment of cadres has become a growing trend that afflicts our state-owned entities, SOEs, which only further serves to compound the financial pressures experienced by these sectors for self-interest.

South Africa's SOEs are in a dire state, costing the country billions of rand and only the South African people suffer. At the root of their mismanagement is the large-scale corruption that feeds an ANC patronage network headed up by no one other than President Jacob Zuma.

A constant veil of secrecy, hidden agendas, scandals and general distrust hang over our state-owned entities. In response to my parliamentary question, the Minister of Public Enterprises, Lynne Brown, indicated that the content flowing

from the procurement processes for all of Eskom's new build programmes would not be made public.

The Minister indicated that while high-level procurement processes and information would be available upon request, procurement content information however - which includes tender submissions, contracts and, of course, pricing - was confidential.

The decision by the Minister severely compromises the transparency of the procurement process and leaves the door wide open to large-scale corruption, not to mention political interference. This does not bode well for the growing perception that South Africa's state-owned enterprises have become politically captured by the ANC in a bid to plunder their coffers.

There is a long history of irregularities in the awarding of Eskom tenders, including the alleged involvement of the ANC's Chancellor House in helping Hitachi to secure contracts in the construction of Medupi, as well as Eskom's irrational decision to award a R4-billion tender to Areva over preferred bidder Westinghouse, citing "strategic considerations" - a decision that was later overturned by the Supreme Court of Appeal.

Denel is now caught up in yet another scandal involving VR Laser which is a Gupta associate, and a full-on fight between the Department of Public Enterprises and Treasury is on the go. The DA requested an open and honest meeting with the Portfolio Committee on Public Enterprises. We requested the attendance of National Treasury, the Department of Public Enterprises, the Denel board, the previous Denel board and, most importantly, the Minister of Public Enterprises and the Minister of Finance.

We arrived for the meeting hoping that finally South Africa would get answers to much-needed questions that plague these SOEs. This, however, was too much to hope for. We were informed by the portfolio committee chairperson that Parliament had not granted permission for ex-board members to attend, even though the Rules of Parliament make provision for this, and we were told that Treasury had other commitments and that the Ministers were in a Cabinet meeting - yet another attempt at a cover-up, another attempt to sweep issues under the carpet. And I'm here today to tell you: Not on our watch!

Treasury has allegedly issued legal letters to Denel, demanding that it scrap the much-maligned venture between Denel Asia and the Gupta-linked VR Laser Asia. According to reports, Treasury is ready to go to court to stop this deal.

We will not allow Zuma to centralise power around himself and influence decisions concerning public money at public institutions as his track record for self-enrichment points to a gross abuse of power.

The DA believes that the people of South Africa must always come first, and decisions regarding public institutions cannot be centralised by the President, especially whilst the majority of these institutions are underperforming. This far, but no further. It's time to take our institutions back.
[Applause.]

Ms P T MANTASHE: House Chairperson, hon members, our guests in the gallery, fellow South Africans, good afternoon. I want to declare upfront that the ANC is not pro any person who is corrupt or any institution that is corrupt. Our belief is that there are institutions that are given the authority to investigate corrupt activities, and therefore this Parliament has no reason to investigate. There are institutions to do that.

This wrongly worded motion for debate should be more correctly entitled "Ongoing attempts by corporates to get the state to serve their own interests". Put another way: "Corporate capture of the state".

It is, of course, very rich for this motion to be coming from the DA, the architects of corporate capture of the state. [Interjections.] So, where does it begin? In the 1940s, Ed Miliband Sr, a long-serving member of the Labour Party in England, wrote a book on how capital, through its influence, seeks to gain hegemony over politicians, influence the character and content of draft legislation, buy up individuals in the ruling party and use money and property corruptly to influence the political direction, policy and resolution of the governing party. He went on to say that the captains of monopoly capital have no interest in becoming office bearers, MPs, MPLs or councillors, occupations they consider too unstable and short-lived. Their intention, rather, is to work behind the scenes, using frontrunners to do their corrupt work of attempting to get control over the policy and, ultimately, the legislative direction of the governing party.

The sponsors of this resolution, the DA, know this very well as their backers are hard at work, doing precisely what Miliband described. So, what is the ultimate intention? I say this because, in this case, an entire country like the United States can go to war in order to feed the material interests of monopoly capitalists, the weapons of war being purchased from them. Their sources in the construction sector are given

contracts to rebuild the cities that they have destroyed, knowing full well that the financial beneficiaries themselves - the governing party - will sacrifice its citizens under spurious allegations, so that they materially benefit.

The ANC is well aware that corporate capture of the state is alive and well; its ideology is neoliberalism. A descendent of the colonial period, it seeks to corporatise the state and render its citizens to the mercy of unbridled monopoly capital. [Interjections.] This is DA economic policy which they try to disguise with the notion of a free and open-opportunity society. Its intention is to strip power away from the state and place it in the hands of the property class, your bourgeoisie. [Interjections.]

Tomorrow, in Bromwell Street, Salt River, Cape Town, 26 families will be dumped on the streets as the gentrification of working class areas continues unabated across the city, often at the behest of expatriate capital. No low-cost housing here; no poor families here; just the interests of corporates successfully buying their way across the city with the help of state property being sold to the highest bidder. These families who have lived in this road since the 1930s are today being told to go to Delft because "There is no low-cost housing in the CBD." Of course, there wouldn't be in Cape Town.

What kind of society will we end up with if this is how we are going to sell off state property? [Interjections.] This motion is about a family and ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon members, order!

Mr G G HILL-LEWIS: Hon Chairperson ...

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon Mantashe, could you take your seat?

Mr G G HILL-LEWIS: Is the hon Mantashe willing to take a question on the point she has just raised? [Interjections.]

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon Mantashe, are you willing to take a question?

Mr G G HILL-LEWIS: She clearly has no idea of what she is talking about.

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon member, if you ask if the member is prepared to take a question ...

Mr G G HILL-LEWIS: Will she take a question?

The HOUSE CHAIRPERSON (Mr C T Frolick): ... then you wait for a reply.

Ms P T MANTASHE: Let me take the question after I have finished my input. Thank you.

Mr G G HILL-LEWIS: I'll hold you to that.

This motion is about a family and its perceived or real attempts to have hegemony over the decisions of the governing party. The dishonesty of this resolution is that it does not address the fact that the family is merely a reflection of many others who are trying to do exactly the same thing, many of whom are the backers of the DA. If you were to be ethical and honest, you would open up all these connections. Don't just opportunistically seek to focus on the most obvious, when your own intentions are to get your hands on state silver and deliver it to the corporates.
The sponsors of this motion have not hidden this. If their new mayors are, as Miliband put it "serving the interests of monopoly capital", they are a front for monopoly capital. Those with integrity - and the sponsors of this motion have none - need to analyse more accurately what it means to defend our democratic national sovereignty from the corrupt hands of corporate capture.

The strategic and complex manner in which capital and their agents undermine the democratic mandate of the majority must be arrested. If not, our constitutional tenet that the will of the majority prevail will be under dire threat, as the Constitution puts so well.

To reduce the real danger to being one family is disingenuous and merely seeks to hide other ventures that are under way. To treat corporates as monolithic would be equally wrong. However, what is completely wrong is a form of corporate behaviour that is entirely parasitic on the state for its wealth accumulation.

They stand against the ANC's developmental-state approach, unlike the sponsors of this motion whose ideology of neoliberalism drives their obnoxious lust for the breaking up of state-owned enterprises to feed monopoly capital, change the character of the state and render the governing party impotent.

So, where does the ANC stand? The intensification of the ANC economic policies' interventions is based on the following pillars. Pillar one: uniting all South Africans around the National Development Plan, the NDP, to promote growth and development and eradicate the triple scourge of unemployment, poverty and inequality; pillar two: state-led infrastructure

investment aimed at massively improving social and economic infrastructure with an emphasis on the use of local content and local companies; pillar three: the successful implementation of the strategies to give effect to the NDP, including the New Growth Path and the Industrial Policy Action Plan aimed at stimulating growth, employment and the reindustrialisation of the South African economy; pillar four: transforming the mining sector; pillar five: promoting youth employment, small businesses and co-operatives; pillar six: building a developmental state with the technical and political capacity to lead development in transforming the economy; and, pillar seven: a supportive macroeconomic policy framework oriented towards the reconstruction of growth and development and informed by the imperatives of sustainability and long-term macroeconomic stability.

In short, what the ANC conceptualises as the radical socioeconomic phase of the national democratic revolution is the best guardian of preventing corporate capture of the state. It is the best guardian of the will of the majority whose mandate to the governing party, the ANC, is pro poor, tackles poverty, unemployment and inequality; reflects proportionality and prioritisation in the allocation of funding in terms of ANC policy and constitutional requirements; reflects inequitable sharing of resources; and

addresses issues of equity in relation to class, race and gender.

Finally, let us address the consciously misplaced and dislocated conceptualisation of oversight by the sponsors of this motion. Theirs is to go after an individual at the behest of their corporate backers so as to dislodge an individual in favour of another individual. If that individual does not respond favourably to the interests of corporate capture, they will follow the same process to dislodge that individual. This process will start all over again in a corrupt desire of corporate capture of the state and the dislodgement of the ANC in the process, so that a new bidder can be installed and the nation's assets auctioned to the highest bidder.

What makes this worse is that it is happening right in front of us, dressed up as parliamentary oversight. I thank you. [Applause.]

The HOUSE CHAIRPERSON (Mr C T Frolick): Thank you, hon member. The next speaker ...

Mr G G HILL-LEWIS: Sorry, Sir, wasn't the member going to take a question from me?

The HOUSE CHAIRPERSON (Mr C T Frolick): No, the member's time has expired, hon member.

Mr G G HILL-LEWIS: Already?

The HOUSE CHAIRPERSON (Mr C T Frolick): The next speaker is the hon Galo.

Mr M P GALO: Chair of the House, according to the task team on oversight and accountability:

> Parliament's strategic vision is to build an effective people's Parliament that is responsive to the needs of the people, and that is driven by the ideal of realising a better quality of life for all the people of South Africa, and its mission is to represent and act as a voice of the people in fulfilling Parliament's constitutional functions of passing laws and overseeing executive action.

The above quotation, focusing on the vision and mission for Parliament, is taken from a parliamentary report on oversight and accountability written in 2009. It is a powerful statement, and if it were to be realised and put into practice it would transform the current Parliament. Regrettably, in 2014 this dream of a people's Parliament had yet to come into effect. This taken from *What's gone wrong?:*

On the brink of a failed state by Alex Boraine, chapter four, People's Parliament, page 59.

Perhaps, we really need to come to our senses and agree to the fact that our so-called constitutional democracy was not founded on a solid foundation. It does not need a rocket scientist to establish that the shortcomings and challenges we are facing today in our beloved country are as a result of the compromises made during the multiparty negotiations at the World Trade Centre. That's where the struggle for freedom was sold on a silver platter by lumpen politicians.

Therefore, the allegations of state capture by certain individuals and their alleged undue influence over the government are not surprising in our view as the AIC. In fact, they are a confirmation of the reality that the country was sold long ago.

As I conclude, the fundamental question that we need to ask ourselves as public representatives is: What is it that we must do as a collective to save our beloved country from this situation? The answer, as far as the AIC is concerned, is electoral reform through the transferring of power to the hands of the people. The people of South Africa are ready to govern. Let us do away with these silly political interest groups and give the power to the people. Thank you very much.

Mr M A PLOUAMMA: Hon Chairperson, the question we need to ask is: What happened to the freedom fighters who chose their stomach using public office to enrich themselves? Hon members, it is public knowledge that our Deputy President Cyril Ramaphosa is in the pockets of white monopoly. It is not only our President who is captured; actually, the Guptas are late entrants. The Guptas have learned the game from the Ruperts and the Oppenheimers who were beneficiaries of contracts even during apartheid.

The question should be: Who is capturing these honourable men and women? I mean, look at how even the communist so-called socialists are not surviving the onslaught. They cannot swim. The Minister of Public Works, the communist, presided over Nkandla, not to mention the Minister of Higher Education and Training, Mr Blade Nzimande, who is a communist/Mercedes-Benz.

As long as the power relations of colonialism and capitalism remain intact, this government will continue to be discredited and mistrusted. The upward mobility and accumulation offered by the capture of the state is a true incentive of the bourgeoisie and for kleptocracy. We need to change the structure of the capitalist economy and change it once and for all.

It is the attitude of capitalism to always try to tame ruling governments in Africa by threatening disinvestment, or that it must accept bribes of any kind. The question we need to ask ourselves is why very intelligent Ministers like Mme Naledi Pandor are keeping quiet. Are they washing their hands like Pontius Pilate? How do they sleep at night?

Even the opposition is not safe from being captured. We know that the Ruperts and other mining cartels are fighting to keep their contacts as the ruling party is now giving them to countries in the East. We must take over our natural resources and give them to our people, from the black elite who are direct descendants of white monopoly. In the end, it is not the state that is captured it is South Africa that is captured through intermediaries and puppets. I thank you.

Mr S LUZIPO: Deputy Speaker, accept my apology: I have a bit of flu and have no choice in that. Hon members of the House, the topic of debate today is quite a critical one and a bit of a problematic one too.

We, in the ANC, always appreciate political and polemic engagement as it continues to sharpen our theoretical tools of analysis. Comrade Chris Hani once stated that in the ANC we do not fear political debates or engagements, but welcome

them as they provide us with opportunities to expose the political bankruptcy of our political opponents.

The reason I made this assertion is that the topic is a bit problematic because state capture cannot be presented as an apolitical concept. The sponsor of this motion should surely and must assist in laying the fundamental base of the motion - what its ideological base is for such a narrative.

The state, in terms of its own scientific and historical description, has never been and still isn't class-neutral. One would be highly appreciative if this debate was based on genuine ideological or, at worst, political determination, and not on political innuendos that are flouted more on emotions and that are without any ideological grounding.

In terms of its scientific definition, the state is not just a simplification of a phenomenon, especially by those who claim to be using Marxist-Leninist tools of analysis or even the liberal definition of the state. There is recognition that there are three main components of the state, that is the legislature, the executive and the judiciary. How do you then base an argument that has no fundamental foundation at all in relation to the topical issue?

The problem is that the South African political landscape is full of political hyenas and ideological demagogues masquerading as political messiahs, exploiting every little opportunity to have a genuine debate in the public discourse in their narrow, vulture-like interests.

The issue of state capture is a product of internal discussions within the movement as a whole about the dangers, threats and challenges that may derail the advancement of the national democratic revolution. The ANC and the entire congress movement has not exhausted this debate, therefore we cannot hide and be shy to state that there is nothing conclusive as yet.

For some political and ideological blood-thirsty vampires to make this issue theirs is nothing but a demonstration of dishonesty of the highest order. Only in the ANC are such debates seen as a contribution to the festival of ideas. It is completely and absolutely disingenuous to present this as though it did not emerge from within the ranks of the ANC - the intention could be nothing else, but to try to divide the people's movement and to appropriate whatever elements they believe will benefit their narrow political interests, if they have any.

At the centre of the discussion, if genuine, would be whether the ANC by itself as a liberation movement had state power or was the party in power. The state, as stated before, is an instrument by its very historical class identification, an instrument of class rule. Therefore, in South Africa it is primarily represented by white monopoly capital, which is predominantly male.

It is in this context that we must understand the task of the ANC as the liberation movement, which is the liberation of blacks in general and Africans in particular. Is it not ironic and politically dishonest that the same mouth which condemns mere talk of a judicial commission of inquiry into the conduct of financial institutions is also demanding, on the other hand, the establishment of a parliamentary committee to investigate the allegations of state capture? This is hypocrisy of the highest order.

What we might have to consider investigating, in fact, is the imperialist capture of the political demagogues who dine with international capital by night and stand side by side with the masses during the day. [Applause.] State capture remains a true threat as long as there are those who were embracing President Mugabe yesterday, but then go on to dine with international capital to denounce President Nelson Mandela as

a sellout and as someone who betrayed the South African revolution.

State capture will and remains a serious threat as long as poor parental workmanship is equated with militancy and vigilance. Political hooliganism and liberal brinkmanship are a deadly combination and we are beginning to see them now. As the ANC, we see no reason to have a parliamentary committee on a matter that has no foundation in law. We remain capable of handling such ideological questions with the processes of policy development in order to move South Africa forward.

Now, let me try to assist hon members.

Hayi ndiza kunceda ohloniphekileyo Steenhuisen ... [No, I will help you, hon Steenhuisen.]

Hon Steenhuisen, don't worry. Let me attend to you now. Hon Maimane, I appreciate you. But let me start with this church thing.

Kukhona ivesi ethi:

ndiwaphakamisela ezintabeni amehlo wam, apho uncedo lwam luya kuvela khona.

(Translation of isiXhosa paragraphs follows.)

[There is a verse that says:

I lift up my eyes to the mountains, where my help will come from.]

The biggest problem we have as pastors ...

... kukuthoba amehlo ethu, siwabhekise ezantsi apho imivuzo yethu ivela khona. [Kwahlekwa.] [...is to look down with our eyes, where our salaries come from.]

Now, the most important thing is that you can't stand here and say – all of you: I listened to all of you ... I could see potential witnesses in a court of law. You cannot abdicate the responsibility of policy formulation and want to take on somebody else's duty. There are institutions that were established in order to deal with issues of corruption and maladministration. Parliament's responsibility cannot supersede them. [Interjections.] You cannot take the responsibility to investigate. The biggest problem, unfortunately, is that when you read you are not reading something in front of you, but something that somebody is telling you behind your ears. [Applause.]

If Parliament were to do anything genuine, it would only consider making it possible for institutions that were created to deal with matters of this nature to be able to report back. Parliament will not be reduced to an investigation tool even though you have many things that you said you could do here. I will, therefore, deal with the other issues.

I have never seen this: where you make a proposal for a debate and the establishment of a committee but already have a conclusion on what is happening. What is the basis of the investigation if you already have the conclusion? Ever since I came here in 2014, the hon Maimane has stood up here and said: A commission on Nkandla must be established. What happened after that? You came with a report separate from that of the committee that you requested Parliament to establish. [Interjections.] We wouldn't even be surprised if you were to win this issue. We wouldn't be surprised if you again came up with your own report that is different from the one you requested.

Therefore, who is wasting the time of Parliament? [Interjections.] If you know that you have the answers, why don't you write your report even before the committee writes theirs, because you already know that you will not agree with the outcomes of that committee? That is what we have

experienced here every time you proposed that there be a committee. But when the results don't favour you, you blame people - that they take instructions from somewhere else, as if the Constitution of South Africa does ... You cannot present yourselves as people who will understand this better than anyone else. As long as this motion is drafted in this manner, we will not support it as the ANC. Thank you very much. [Applause.]

Mr D J MAYNIER: Deputy Speaker, the hon member asked who was wasting Parliament's time when it was obvious it was that member. He had the courage to come to this podium and talk about vampires but did not have the courage to tell us who those vampires were. [Interjections.] Those vampires, of course, are the Guptas, and what that hon member knows is that the Guptas are feeding off his party, the ANC.

Now, it was remiss of me not to mention the statement made by the hon member who sits behind the ambassador from Saxenwold, the hon Jeremy Cronin, whose party made a statement earlier this week on state capture, which stated that "such wasteful things must come to an end". So we hope that the hon member will share his views with the ambassador from Saxenwold and consider supporting our motion.

We should not forget that the last time the Guptas were in Parliament they were guests of President Jacob Zuma. We should ensure that the next time the Guptas are guests in Parliament, they are guests of an ad hoc committee established to investigate allegations against them. [Applause.]

The hon member is absolutely wrong: We do have investigation tools. We are not powerless. We have powers to summon any person. We have powers to require any person or institution to report to Parliament, and so let's use those powers to stand up to state capture and establish an ad hoc committee to investigate allegations of state capture. So I hereby move the motion set out in the Order Paper today in Parliament. I thank you. [Applause.]

ALLEGATIONS OF STATE CAPTURE BY CERTAIN INDIVIDUALS AND UNDUE INFLUENCE OVER GOVERNMENT

(Draft Resolution)

Mr D J MAYNIER: I move without notice:

That the House -

(1) notes the allegations of state capture by certain individuals and their alleged undue influence over the government;

(2) establishes an ad hoc committee in terms of Rule 253(1)(a), the committee to-

(a) investigate the alleged capture of state resources and undue influence over the government;
(b) recommend measures in line with the Assembly's oversight constitutional mandate, to prevent such incidents from occurring;
(c) consist of 11 members, as follows: ANC 6, DA 3, EFF 1 and other parties 1;
(d) exercise the powers in Rule 167 as it may deem necessary for the performance of its task; and
(e) report to the Assembly by no later than 30 October 2016.

Debate concluded.

The DEPUTY SPEAKER: That concludes that debate. I now put the motion. Are there any objections?
The CHIEF WHIP OF THE MAJORITY PARTY: Hon Deputy Speaker, the Rules of this House do provide for an amendment to the

motion, and we would like to propose such an amendment to this motion.

The DEPUTY SPEAKER: Okay, if that is the case, please ...

The CHIEF WHIP OF THE MAJORITY PARTY: It's Rule 121.

The DEPUTY SPEAKER: Give us ... wise us up on the Rule.

The CHIEF WHIP OF THE MAJORITY PARTY: Rule 121(2) does give us such an opportunity to make an amendment. Deputy Speaker, I would like to read the amendment. The motion in the name of the hon member Maynier reads: "That the House - (1) notes the allegations of state capture by certain individuals and their alleged undue influence over the government".

In terms of the amended version this paragraph stands. Regarding the second paragraph - that reads "(2) establishes an ad hoc committee in terms of Rule 253(1)(a), the committee to ..." - we want paragraph (2) and all the subparagraphs that follow after "to" to be replaced with the following:

(2) refers all such allegations of state capture to the SA Police Service or Chapter 9 institutions for investigation, including the Public Protector;

(3) notes that all parties and individual Members of Parliament with evidence of such alleged state capture should make available such evidence to the Police Service or a Chapter 9 institution;

(4) further notes that such investigations by either the Police Service or a Chapter 9 institution should culminate in prosecutions of all individuals or companies engaged in such state capture if such is proved as a criminal activity.

The CHIEF WHIP OF THE OPPOSITION: Deputy Speaker ...

The DEPUTY SPEAKER: Could I respond to that first?

The CHIEF WHIP OF THE OPPOSITION: I would just like to raise a point of order in terms of the amendment, which I believe is outside the Rules.

The DEPUTY SPEAKER: What is your point of order, hon member?

The CHIEF WHIP OF THE OPPOSITION: I would like to address you in terms of Rule 121(1). It says very clearly that it is possible to move an amendment to a draft resolution provided - and this is the important part - the amendment does not extend the scope of the draft resolution. It is very clear

that what the hon Chief Whip of the Majority Party is attempting to do is move the scope of this motion outside Parliament's ability and to state security agencies that report to the executive. [Interjections.] I would submit to you that that is an overreach for an amendment to a draft resolution and that the Chief Whip of the Majority Party's motion to amend must fall aside because it falls foul of Rule 121. I ask for your ruling on this.

The DEPUTY SPEAKER: Hon Chief Whip, there is a suggestion that your amendment may be falling outside the scope of the motion. What's your reaction to that? [Interjections.]

The CHIEF WHIP OF THE OPPOSITION: Deputy Speaker, on a point of order. It's to do with ...

The DEPUTY SPEAKER: We have asked people to check that out ... coming back ...

The CHIEF WHIP OF THE OPPOSITION: But you can't ask the Chief Whip of the ANC ...
The DEPUTY SPEAKER: Why not?

The CHIEF WHIP OF THE OPPOSITION: ... what his point of view is. [Interjections.] You must make a ruling. [Interjections.]

You are the presiding officer, not Luthuli House. Why don't you ask the ANC to come and take your Chair? [Interjections.]

The DEPUTY SPEAKER: I will make a ruling, obviously, and the ruling must be informed. [Interjections.] Hon Chief Whip, do we have a printed version of this? Can we have that?

The CHIEF WHIP OF THE MAJORITY PARTY: Hon Deputy Speaker, you do have a written and signed version, as required by our Rules, of the amended motion. Just in response to the members ... [Interjections.] By the way ... [Interjections.] ... the Public Protector doesn't report to the executive. Chapter 9 institutions do not report to the executive; they are institutions tasked with supporting our democracy.

The DEPUTY SPEAKER: Hon members, I'm getting the record of this motion - I don't have it before me - because I want to be able to make this ruling that you are asking me to make. In the meantime, you have two minutes of stretching time. [Interjections.]

Business interrupted at 17:10 and resumed at 17:17.
The DEPUTY SPEAKER: Hon members, firstly, the reason for the inability to make an immediate ruling, amongst other things, was because I did not have what the Chief Whip of the Majority Party was reading. So that immediately meant that I

couldn't use my memory to recall everything he said to judge whether the motion fulfilled the requirement of Rule 121 or not.

Now, I have looked at it and it does change the scope of the ... [Applause.] ... an amendment as expected, and therefore I would like us to proceed. This amendment therefore falls away. Therefore we must proceed with the ... [Interjections.] Ya, ya, ya. Hon members, we go back to putting the question.

Question put: That the motion moved by Mr D J Maynier be agreed to.

Division demanded.

The House divided:

AYES - 103: America, D; Atkinson, P G; Bagraim, M; Baker, T E; Basson, L J; Bergman, D; Boshoff, H S; Bozzoli, B; Brauteseth, T J; Breytenbach, G; Cardo, M J; Carter, D; Cassim, Y; Chance, R W T; Davis, G R; De Freitas, M S F; Dreyer, A M; Esau, S; Esterhuizen, J A; Figg, M J; Figlan, A M; Filtane, M L W; Gana, S M; Groenewald, H B; Grootboom, G A; Hadebe, T Z; Hill-Lewis, G G; Hlengwa, M; Hoosen, M H; Horn, W; Hunsinger, C H H; James, L V; James, W G; Jongbloed, Z; Kalyan, S V; Ketabahle, V; Khawula, M S; Khoza, N P;

Kohler, D; Kopane, S P; Kruger, H C C; Krumbock, G R; Kwankwa, N L S; Lees, R A; Lorimer, J R B; Lotriet, A; Louw, E N; Mabasa, X; Mackay, G; Mackenzie, C; Macpherson, D W; Madisha, W M; Maimane, M A; Majeke, C N; Majola, T R; Malatsi, M S; Marais, E J; Masango, B S ; Mathys, L A; Matiase, N S; Matsepe, C D; Maynier, D J; Mazzone, N W A; Mbatha, M S; Mbhele, Z N; Mcloughlin, A R; Mente, N V; Mhlongo, T W; Mileham, K J; Mokgalapa, S; Mokoena, L G; Motau, S C; Mulaudzi, T E; Mulder, C P; Paulsen, M N; Rabotapi, M W; Rawula, T; Redelinghuys, M H; Robertson, K P; Robinson, D; Schmidt, H C; Selfe, J; Shinn, M R; Shivambu, N F; Sithole, K P; Sonti, N P; Stander, T; Steenhuisen, J H; Steyn, A; Stubbe, D J; Swart, S N; Tarabella Marchesi, N I; Topham, B R; Van Dalen, P; Van Damme, P T; Van Der Merwe, L L; Van Der Westhuizen, A P; Van Dyk, V; Volmink, H C; Vos, J; Walters, T C R; Waters, M; Xalisa, Z R.

NOES - 169: Abrahams, B L; Adams, F; Adams, P E; Basson, J V; Bekwa, S D; Beukman, F; Bhengu, P; Bhengu, F; Bhengu, N R; Bilankulu, N K; Bongo, B T; Booi, M S; Capa, R N; Cele, M A; Chauke, H P; Chiloane, T D; Coleman, E M; Cronin, J P; Cwele, S C; Dlakude, D E; Dlamini-Dubazana, Z S; Dlodlo, A; Dlomo, B J; Dlulane, B N; Dunjwa, M L; Faku, Z C; Frolick, C T; Fubbs, J L; Galo, M P; Gamede, D D; Gcwabaza, N E; Gigaba, K M N; Gina, N; Gumede, D M; Gungubele, M; Holomisa, S P; Jafta, S M; Joemat-Pettersson, T M; Kalako, M U; Kekana, H B; Kekana,

P S; Kekana, M D; Kekana, E; Kekana, C D; Kenye, T E; Khoarai, L P; Khosa, D H; Khoza, M B; Khoza, T Z M; Khubisa, N M; Khunou, N P; Koornhof, G W; Kubayi, M T; Lesoma, R M M; Letsatsi-Duba, D B; Loliwe, F S; Luyenge, Z; Luzipo, S; Maake, J J; Mabe, P P; Mabija, L; Mabilo, S P; Madella, A F; Maesela, P; Mafu, N N; Magadla, N W; Magadzi, D P; Mahlalela, A F; Mahlangu, D G; Mahlangu, J L; Maila, M S A; Makhubela-Mashele, L S; Makhubele, Z S; Malgas, H H; Maloyi, P D N; Maluleke, B J; Manana, M N S; Manana, M C; Mandela, Z M D; Mantashe, P T; Maphanga, W B; Maphatsoe, E R K; Mapulane, M P; Martins, B A D; Masango, M S A; Masehela, E K M; Maseko, L M; Mashego-Dlamini, K C; Mashile, B L; Masondo, N A; Masuku, M B; Maswanganyi, M J; Mathale, C C; Matlala, M H; Matshoba, M O; Matsimbi, C; Mavunda, R T; Maxegwana, C H M; Mbete, B; Mchunu, S; Mdakane, M R; Mjobo, L N; Mkongi, B M; Mmola, M P; Mncwabe, S C; Mnganga - Gcabashe, L A; Mnguni, D; Mnguni, P J; Mnisi, N A; Mogotsi, V P; Mokoto, N R; Molebatsi, M A; Molewa, B E E; Morutoa, M R; Mothapo, M R M; Mpumlwana, L K B; Mthembu, J M; Mthembu, N; Mthethwa, E M; Mudau, A M; Nchabeleng, M E; Ndaba, C N; Ndongeni, N; Nel, A C; Newhoudt-Druchen, W S; Ngcobo, B T; Ngwenya-Mabila, P C; Nkadimeng, M F; Nobanda, G N; November, N T; Nqakula, C; Ntombela, M L D; Nyambi, H V; Oliphant, M N; Pandor, G N M; Phosa, Y N; Pikinini, I A; Plouamma, M A; Radebe, J T; Radebe, G S; Ralegoma, S M; Ramatlakane, L; Rantho, D Z; Raphuti, D D; Semenya, M R; Senokoanyane, D Z; September, C C; Shope-

Sithole, S C N; Sibande, M P; Sisulu, L N; Siwela, E K; Skosana, J J; Skwatsha, M; Smith, V G; Thabethe, E; Tleane, S A; Tobias, T V; Tolashe, G N; Tom, X S; Tongwane, T M A; Tseke, G K; Tseli, R M; Tsoleli, S P; Tsotetsi, D R; Tuck, A; v R Koornhof, N J J; Van Rooyen, D D D; Williams, A J; Yengeni, L E.

ABSTAIN - 1: Ntshayisa, L M.

Question not agreed to.

Motion accordingly negatived.

CONGRATULATIONS TO ENTITIES AND AGENCIES OF DEPARTMENT OF TRADE AND INDUSTRY

(Member's Statement)

Mr B MKONGI (ANC): Deputy Speaker, the ANC congratulates the entities and agencies of the Department of Trade and Industry on their significantly improved audit performance for their audit outcomes for the 2015-16 financial year. Often and rightly so, we castigate the entities, agencies and indeed the departments on their poor audited performance, so it is refreshing when we learn that the office of the Auditor-General has emphasised that, and I quote:

Item “54”

Parliamentary Oversight and Executive Accountability in a time of 'State Capture': Diagnosis of an Institutional Failure & Ideas for Reform

Richard Calland[1]
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July 2020

1 Excellent research assistance was provided by Liam Murphy and Rebecca Van Es, and very helpful commentary on each draft was provided by Mike Law, as well as valuable editing and additional research.

Report 2017 argues that "[i]n its modern form, the committee is probably the single most significant and agile instrument of parliamentary oversight."[42]

These characterisations do not overstate the significance of Parliamentary committees and the centrality of their role in the accountability framework. In the modern era, parliamentary committees are responsible for developing legislation, providing focused oversight on government departments, investigating and making recommendations on executive proposals and facilitating public participation.[43] Moreover, unusually, and significantly, Parliament's powers in this regard originate in the Constitution itself.[44]

Has the South African parliament made full and consistent use of these powers? It is clear to me that the answer to this important question hinges to a very large extent on the contextual politics of parliament and, in particular, the political attitude and disposition of the ruling party. Accordingly, I return to this issue below, in my brief historical reprisal of the what I see as the various stage of the political and institutional evolution of Parliament since 1994. In short, these Parliamentary committees are crucial in the oversight and accountability framework, but they are mired by structural limitations and party influence.

For example, it is concerning that many committee chairs get promoted to higher office and that cabinet reshuffles often see the senior MPs, usually chairs, promoted to the executive arm of government.[45] There is a concern that this could foster a culture of executive appeasement, as weak-minded but ambitious MPs position themselves for career advancement by failing to act in an assertive manner when chairing a parliamentary committee. Once again, as will be discussed further below, the prevailing political culture, especially within the ruling party, will likely be a decisive factor in this regard. Instead of encouraging obsequious political fidelity and blind loyalty from MPs deployed to positions of parliamentary responsibility, the political leadership needs to encourage a culture of independent-mindedness not in an 'oppositional paradigm' but in the spirit of ensuring that the executive remains loyal to the mandate given to it by the electorate. This requires real leadership and a profound commitment to the Constitution and its system of accountability, which, in turn, begs the question: do turkeys ever vote for Christmas? My answer is: yes. Why? Because at various times in the past twenty-five years I have heard senior ANC politicians speaking in such terms. Their identity is not material; what is important is that there has been the insight, and sense of sage perspective, within parts of the ruling party that it is in fact in its (the ANC's) political interest for Parliament to do its constitutional job and hold the executive to account.

There are other constraints. Ordinary portfolio members are often shuffled from one committee to another and seldom sit for the duration of the electoral term.[46] This prevents members from settling and disrupts any continuity of work. Furthermore, the lack of adequate mechanisms to monitor the implementation of resolutions by government departments results in the same shortcomings occurring year after year. Thus, diminishing their capacity to hold the executive to account.[47] Moreover, the

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42 Inter-Parliamentary Union and United Nations Development Programme (2017) *Global Parliamentary Report 2017, Parliamentary oversight: Parliament's power to hold the government to account* at pg. 46.
43 Calland, R. *The first five years: A review of South Africa's democratic Parliament*. Cape Town: IDASA (1999)
44 Section 56 of the Constitution affords Parliament and its committees the power to hear evidence and summon *any person* before it.[44]
45 Calland, R. *The Zuma Years.* (2013) at pg. 141.
46 *Ibid* at pg.142.
47 *Ibid* at pg.143.

6.4 Procedural Reform: The Defining Features of the Underlying Principle

There is, of course, a great deal of procedural detail that can be considered or added. I do not think it would be especially helpful for me to try and make proposals here. Rather, I wish to advance the *principle* and then, if the Commission of Inquiry is minded to make recommendations along such lines, parliament will be required to act to take those recommendations seriously and to put in place an urgent reform process designed to strengthen parliament's oversight capacity and culture so that it will not fail again in the future.

The lodestars – the defining features – of the principle involved must be *independence* and *insulation*. Oversight and accountability are inherently, and deeply and unavoidably, *political and not technical*. MPs need a protective institutional and political culture to enable them to fulfil their constitutional duty in relation to oversight. The rules and the conventions must be geared to encourage independence from blind party-political loyalty and to insulate those serious-minded MPs who are determined to serve the constitution and the people from undue influence or pressure from executive-minded party political managers.

One simple, yet potentially far-reaching reform would be to amend section 47 of the Constitution and to remove the provision (s. 47(3)[c]) that gives the political party and its leadership and whips so much power over the individual backbench MP. Accordingly, I recommend that Parliament should give this reform serious consideration. Indeed, it may well be required to do so if it is to produce a coherent and comprehensive response to the *New Nation Movement* judgment, as noted above. Liberating an individual MP from the shackles of their party would be a potential game-changer in terms of enabling parliamentary oversight. But it would need to be considered holistically, in the light of the overall system of government including the electoral system.

Notwithstanding such a significant reform, more than anything, however, enlightened political leadership – in the executive and at the top of the majority party – will be an essential pre-condition for successfully establishing a sustainable oversight and accountability culture and practice.

15 July 2020

Item “55”

UNITED DEMOCRATIC MOVEMENT v SPEAKER, NATIONAL ASSEMBLY AND OTHERS2017 (5) SA 300 (CC) A

Citation 2017 (5) SA 300 (CC)

Case No CCT 89/17
[2017] ZACC 21

Court Constitutional Court

Judge Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J

Heard June 22, 2017

Judgment June 22, 2017

Counsel *D Mpofu SC* (wih *K Pillay SC*, *S Budlender* and *N Muvangua*) for the applicant.
MTK Moerane SC (with *RT Tshetlo*) for the first respondent.
IAM Semenya SC (with *M Sikhakhane SC* and *M Sello*) for the second respondent.
T Ngcukaitobi (with *F Hobden* and *J Mnisi*) for the fifth respondent.
Anton Katz SC (with *S Pudifin-Jones*) for the sixth respondent.
LH Adams for the eighth respondent.
G Budlender SC (with *M Adhikari* and *M Mbikiwa*) for the first amicus curiae (Council for the Advancement of the South African Constitution).
N Bawa SC (with *M Bishop*) for the second amicus curiae (Unemployed Peoples' Movement).
NH Maenetje SC (with *R Tulk* and *YS Ntloko*) for the third amicus curiae (Institute for Security Studies).
D Unterhalter SC (with *M Musandiwa* and *M Finn*) for the fourth amicus curiae (Shosholoza Progressive Party).

Flynote : Sleutelwoorde B

Constitutional law — Parliament — Motion of no confidence in President of Republic — Voting procedure — Speaker empowered to direct that such C motion be conducted by open ballot or by secret ballot — In exercising such discretion, Speaker may not act arbitrarily but must have rational basis for decision — Correctly exercised, Speaker's discretion should have effect of ensuring genuine motion for effective enforcement of executive accountability — Constitution, ss 57 and 102; National Assembly Rules 104(1) and (3).

Parliament D — Members — Voting — Motion of no confidence in President of Republic — In exercising their votes, members obliged to uphold constitutional values over party loyalty.

Constitutional law — Parliament — Speaker — Impartiality and neutrality — E Determination of appropriate voting procedure in motion of no confidence in President of Republic — In deciding whether to conduct voting by open or by secret ballot, Speaker obliged to uphold constitutional values over party loyalty.

Headnote : Kopnota

The Speaker of the National Assembly refused a request by the applicant F political party (the UDM) to direct that the voting in a scheduled motion of no confidence in the President of the Republic of South Africa be conducted by secret ballot. Her reasons were that neither the Constitution nor the Rules of National Assembly (the Rules) gave her that power, and further that she was prevented from doing so by the High Court's finding in the *Tlouamma* case (cited at n28), that there was no implied or express G constitutional requirement for voting by secret ballot on a motion of no confidence in the President. In response, the UDM launched the present application, directly to the Constitutional Court, for inter alia declaratory relief that the Constitution and the Rules permitted the Speaker to direct that a vote on a motion of no confidence in the President be conducted by secret ballot.

The H Constitutional Court, apart from deciding that issue, also pronounced on the proper exercise of the Speaker's power to prescribe a voting procedure in a motion of no confidence in the President; and on the constitutional obligations of members when exercising their votes on such motions.

Held

The Constitution could have provided for a vote by secret ballot or an I open ballot but it did neither. The purpose for leaving the voting procedure open could only have been for the Assembly itself to determine — under its powers in terms of s 57 of the Constitution to determine its own procedures — which procedure would best advance our constitutional project. The National Assembly therefore had the power to determine whether voting on a motion of no confidence would be by open ballot or secret J ballot. It was for it to decide which voting procedure was necessary for the

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efficiency and effectiveness of the institution in holding the executive A accountable. And rules 104(1) and (3) of the Rules, by empowering the Speaker to predetermine a manual voting system that may not permit a recordal or disclosure of the names and votes of members, effectively empowered the Speaker to have a motion of no confidence in the President voted on by secret ballot. Therefore, to the extent that *Tlouamma* may be understood as having held that a secret-ballot procedure was not at all B constitutionally permissible, it was incorrect, and so the Speaker's decision was invalid and would be set aside. (Paragraphs [58] – [59], [64], [67] – [68] and [91].)

The appropriateness of a voting procedure was particularly important since our electoral system was structured in such a way that it was, broadly speaking, a party and not a member of Parliament C that got voted into Parliament. There were therefore institutional and other risks that members, particularly of any ruling party, were likely to get exposed to when they openly questioned or challenged the suitability of their

leader(s) for President. However, members of the Assembly were required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws; nowhere did the supreme law provide for them to swear allegiance to their D political parties. This meant that, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and to do only what is in their best interests must prevail.

The Speaker was chosen from the members of the National Assembly. That gave E rise to the same responsibility to balance party interests with those of the people. The power to decide on a voting procedure could not be used illegitimately or without regard to the surrounding circumstances that ought to inform its exercise; it was neither for the benefit of the Speaker nor his or her party; it belonged to the people and may thus not be exercised arbitrarily or whimsically; nor was it open-ended and unguided. There must always be a proper and rational basis for whatever choice the Speaker made. F The freedom of members to follow the dictates of their personal conscience — to which their oath to remain obedient to the Constitution was central — was a factor the Speaker had to take into account. The correct exercise of the Speaker's discretion should have the effect of ensuring a genuine motion for the effective enforcement of executive accountability. (Paragraphs [76], [78] – [79], [82], [85] – [88].) G

Cases cited

Southern Africa
Bruce and Another v Fleecytex Johannesburg CC and Others 1998 (2) SA 1143 (CC) (1998 (4) BCLR 415; [1998] ZACC 3): dictum in paras [7] – [9] applied H
Economic Freedom Fighters v Speaker of the National Assembly 2016 (3) SA 580 (CC) (2016 (5) BCLR 618; [2016] ZACC 11): dictum in paras [20] – [22] applied
Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253; [1996] ZACC 26): dicta in paras [106] and I [186] applied
Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079; [2000] ZACC 12): dictum in para [21] applied J

Matatiele A *Municipality and Others v President of the RSA and Others (No 2)* 2007 (6) SA 477 (CC) (2007 (1) BCLR 47; [2006] ZACC 12): dictum in para [36] applied
Mazibuko NO v Sisulu and Others NNO 2013 (6) SA 249 (CC) (2013 (11) BCLR 1297; [2013] ZACC 28): applied
Tlouamma and Others v Speaker of the National Assembly and Others 2016 (1) SA 534 (WCC): B distinguished and criticised
Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC) (2005 (4) BCLR 347; [2004] ZACC 19): dictum in para [12] applied.

Botswana

Botswana C *Democratic Party v Umbrella for Democratic Change* CACGB-114-14: dictum in para [76] applied.

Zimbabwe

Moyo v Zvoma SC 28/10: dictum in para [55] applied.

Legislation cited

The D Constitution, ss 57 and 102: see *Juta's Statutes of South Africa 2016/17* vol 5 at 1-41.

Case Information

D Mpofu SC (with *K Pillay SC*, *S Budlender* and *N Muvangua*) for the applicant.

MTK E *Moerane SC* (with *RT Tshetlo*) for the first respondent.

IAM Semenya SC (with *M Sikhakhane SC* and *M Sello*) for the second respondent.

T Ngcukaitobi (with *F Hobden* and *J Mnisi*) for the fifth respondent.

Anton Katz SC (with *S Pudifin-Jones*) for the sixth respondent.

LH F *Adams* for the eighth respondent.

G Budlender SC (with *M Adhikari* and *M Mbikiwa*) for the first amicus curiae (Council for the Advancement of the South African Constitution).

N Bawa SC (with *M Bishop*) for the second amicus curiae (Unemployed Peoples' Movement).

NH G *Maenetje SC* (with *R Tulk* and *YS Ntloko*) for the third amicus curiae (Institute for Security Studies).

D Unterhalter SC (with *M Musandiwa* and *M Finn*) for the fourth amicus curiae (Shosholoza Progressive Party).

An H application for exclusive jurisdiction or direct access.

Order

1. The United Democratic Movement is granted direct access.
2. It is declared that the Speaker of the National Assembly has the constitutional power to prescribe that voting in a motion of no confidence I in the President of the Republic of South Africa be conducted by secret ballot.
3. The Speaker's decision of 6 April 2017 that she does not have the power to prescribe that voting in the motion of no confidence in the President be conducted by secret ballot is set aside.
4. J The United Democratic Movement's request for a motion of

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

no confidence in the President to be decided by secret ballot is A remitted to the Speaker for her to make a fresh decision.

5. The Speaker and the President must pay the costs of the United Democratic Movement, the Economic Freedom Fighters, the Inkatha Freedom Party and the Congress of the People, including costs of two counsel where applicable. B

Judgment

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):
Introduction C

[1] South Africa is a constitutional democracy — a government of the people, by the people and for the people through the instrumentality of the Constitution. It is a system of governance that 'we the people' consciously and purposefully opted for to create a truly free, just and united nation. [1] Central to this vision is the improvement of the quality of D life of all citizens and the optimisation of the potential of each through good governance.

[2] Since constitutions and good governance do not self-actualise, governance structures had to be created to breathe life into our collective aspirations. Hence the existence of the legislative, executive and judicial arms of the state. They each have specific roles to play and are enjoined E to interrelate as foreshadowed by the following principle that guided our Constitution-making process:

> 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.' [2] F

[3] Knowing that it is not practical for all 55 million of us to assume governance responsibilities and function effectively in these three arms of the state and its organs, 'we the people' designated messengers or servants to run our constitutional errands for the common good of us all. These errands can only be run successfully by people who are unwaveringly G loyal to the core constitutional values of accountability, responsiveness and openness. And this would explain why all have to swear obedience to the Constitution before the assumption of office. [3]

Essential context H

[4] Unelected servants of the people serve in the judiciary that comprises judges and magistrates. Judges are selected by a constitutional body which comprises members of Parliament from the ruling and opposition parties, a few judges, a cabinet member, a few legal practitioners, a I

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

university A law teacher and the President's appointees. [4] Of the candidates who prove to be fit and proper for a judicial vacancy at the level applied for, one is then appointed by the President. [5] And like all other accountable servants of the people, their underperformance or sanctionable conduct could result in their removal from office through an impeachment B process if the judiciary, Parliament and the President so decide. [6]

[5] The people's representatives in Parliament are chosen through an electoral process. Each citizen qualified to vote may participate in that process that is designed to deliver free and fair elections. Those who stand for public office and are elected [7] must attend the first sitting of the C National Assembly. [8] It is at that first sitting that at least three things over which the judiciary presides must happen. First, members of the Assembly must be affirmed or sworn in. [9] Second, the Speaker of the Assembly must be elected by members. [10] Third, members of the Assembly must elect the President of the Republic [11] — meaning, two arms of the state, the judiciary and Parliament, each have a different but D critical role to play in the process of electing the head of state and head of the executive after general elections. Thereafter the President must be sworn in. [12] And that oath comes with serious obligations. [13]

[6] The President is an indispensable actor in the proper governance of our Republic and bears important constitutional responsibilities. [14] E To enable him or her to discharge these obligations, he or she has a fairly free hand in assembling the service-delivery team — another set of servants comprising the Deputy President and a number of ministers required to exercise the executive authority of the Republic. [15] As many deputy ministers as are deemed necessary may also be appointed. [16] Like F cabinet ministers, they may be dismissed. [17]

[7] Public office, in any of the three arms, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily G determines the allocation of resources for the performance of public

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Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

functions. The powers and resources assigned to each of these arms do A not belong to the public office bearers who occupy positions of high authority therein. They are therefore not to be used for the advancement of personal or sectarian interests. *Amandla awethu, mannda ndiashu, maatla ke a rona,* or *matimba ya hina* (power belongs to us) and *mayibuye iAfrika* (restore Africa and its wealth) are much more than mere B excitement-generating slogans. They convey a very profound reality that state power, the land and its wealth all belong to 'we the people', united in our diversity. These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people. Since state power and resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance C system.

[8] This is all designed to ensure that the trappings or prestige of high office do not defocus or derail the repositories of the people's power from their core mandate or errand. For this reason, public office bearers, in all arms of the state, must regularly explain how they have lived up to D the promises that inhere in the offices they occupy. And the objective is to arrest or address underperformance and abuse of public power and resources. Since this matter is essentially about executive accountability, that is where the focus will be.

[9] Accountability, responsiveness and openness [18] enjoin the President, Deputy President, E ministers and deputy ministers to report fully and regularly to Parliament on the execution of their obligations. [19] After all, Parliament 'is elected to represent the people and to ensure government by the people under the Constitution'. [20]

[10] It thus falls on Parliament to oversee the performance of the F President and the rest of cabinet and hold them accountable for the use of state power and the resources entrusted to them. And sight must never be lost that 'all constitutional obligations must be performed diligently and without delay'. [21] When all the regular checks and balances seem to be ineffective or a serious accountability breach is thought to have occurred, then the citizens' best interests could at times demand a resort G to the ultimate accountability-ensuring mechanisms. Those measures range from being voted out of office by the electorate [22] to removal by Parliament through a motion of no confidence [23] or impeachment. [24] These are crucial accountability-enhancing instruments that forever remind the President and cabinet of the worst repercussions that could be visited upon them, for a perceived or actual mismanagement of H the people's best interests.

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[11] A Whether that time has come and how exactly to employ any of these instruments is the judgment call of the same Parliament that elected the President and to which he or she accounts. Some parliamentarians believe that that time has come and have tabled a motion of no confidence in the President. They have themselves invited this court to get involved and clarify the nature and extent of Parliament's power. B Rightly so, because —

> '(e)veryone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court'. [25]

[12] Implicit in this application is a deep-seated concern about just how C effective Parliament's constitutionally prescribed accountability-enforcing mechanisms are. Do they ensure that there is enforcement of consequences for failure to honour core constitutional obligations or is it easy to escape consequences by reason of the inefficacy of mechanisms? And does the Constitution read with the rules of the National Assembly D give the Speaker the power to prescribe voting by secret ballot in a motion of no confidence in the President?

Background

[13] What reportedly triggered the tabling of a motion of no confidence in the President, is that on 31 March 2017, invoking his constitutional E powers, [26] the President dismissed the Finance Minister, Mr Pravin Gordhan, and his deputy, Mr Mcebisi Jonas. [27] Very soon after their dismissal,

our economy was downgraded to a subinvestment grade, otherwise known as 'junk status'.

[14] F And it was largely because of the economic downgrade that three of the political parties represented in the National Assembly, the United Democratic Movement (UDM), the Democratic Alliance (DA) and the Economic Freedom Fighters (EFF) asked the Speaker of the National Assembly to schedule a motion of no confidence in the President. She agreed and scheduled it for 18 April 2017.

[15] G On 6 April 2017 the UDM wrote a letter to the Speaker. She was asked to prescribe a secret ballot as the voting procedure for the scheduled motion of no confidence in the President. In substantiation, the UDM cited what it termed the obvious importance of the matter, the public-interest imperative that a truly democratic outcome be guaranteed H and the high likelihood that the vote would otherwise be tainted by the perceived fear of adverse and career-limiting consequences, instead of being the free will of members. The oath or affirmation taken by members and considerations of accountability were added in support of a secret ballot as the preferred voting procedure. While admitting that the rules of the National Assembly do not make express provision for a I secret ballot in that motion, the UDM contended that some direction

could be found in ss 57 and 86(2) of the Constitution, read with item A 6*(a)*, part A of sch 3 to the Constitution and rule 2 of the Rules of the National Assembly.

[16] The UDM argued that because none of these legal instruments prohibits a secret ballot, cumulatively they offer sufficient guidance for voting in secret. It contended that *Tlouamma*, [28] a decision of the High B Court in the Western Cape, was distinguishable. The court in that case had held that there was no implied or express constitutional requirement for voting by secret ballot on a motion of no confidence in the President. It had then dismissed an application for an order to compel the National Assembly to vote on a motion of no confidence by secret ballot. The UDM C reiterated that the public interest dictated that the vote of no confidence be conducted by a secret ballot.

[17] In response, the Speaker said voting procedures in the Assembly are determined by the Constitution and the Rules of the National Assembly and that none of them provides for a vote on a motion of no confidence D to be conducted by a secret ballot. She also placed reliance on *Tlouamma*.

[18] In conclusion, the Speaker said that she had no authority in law or in terms of the rules to determine that voting on that motion be conducted by secret ballot. Also, she was entrusted with the responsibility E to ensure that the House is at all times able to perform its constitutional functions in strict compliance with the Constitution, and the rules and orders of the National Assembly. For these reasons, she concluded that the UDM's request could not be acceded to.

[19] Aggrieved by that response, the UDM, supported by some of the F political parties represented in the National Assembly [29] and friends of the court, [30] approached this court to determine whether the Constitution and the Rules of the National Assembly require or permit or prohibit the Speaker to direct that a vote on a motion of no confidence in the President be conducted by secret ballot. It seeks an order in the following terms: G

'1 It is directed that the matter is to be dealt with as an urgent application and the applicant's non-compliance with the ordinary rules for service and time-periods is condoned.

2 It is declared that this Court has exclusive jurisdiction to determine the application, alternatively the applicant is granted direct access to this Court. H

3 A It is declared that:

3.1 The Constitution requires that motions of no confidence in terms of section 102 of the Constitution must be decided by secret ballot;

3.2 Alternatively to paragraph 3.1, it is declared that the Constitution permits motions of no confidence in terms of B section 102 of the Constitution to be decided by secret ballot.

4 It is declared that:

4.1 The National Assembly Rules permit motions of no confidence in terms of section 102 of the Constitution to be decided by secret ballot;

4.2 Alternatively to paragraph 4.1, Rules 102 to 104 of the C National Assembly Rules are unconstitutional and invalid to the extent that they preclude secret ballots being used for motions of no confidence.

5 The decision of the Speaker dated 6 April 2017 to refuse to allow the no confidence motions to be decided by secret ballot is D reviewed and set aside and declared unconstitutional and invalid.

6 The Speaker is directed to make all the necessary arrangements to ensure that the motion of no confidence currently scheduled for 18 April 2017 is decided by secret ballot, including designating a new date for the motion to be debated and voted on no later than 25 April 2017.

7 E The costs of this application are to be paid by the Speaker, jointly and severally with any other party opposing the relief sought.'

[20] It is now common cause among the parties that this application is no longer immediately urgent.

Jurisdiction F

[21] The jurisdiction of this court is sought to be established on two alternative grounds — direct access and exclusive jurisdiction.

[22] Section 167(6) of the Constitution provides for direct access to this court in the following terms:

'National G legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court —

(a) to bring a matter directly to the Constitutional Court; or

(b) to appeal directly to the Constitutional Court from any other court.'

[23] H The requirements for leave to bring an application or an appeal directly to this court are fundamentally similar. For this reason, when in the case of a direct appeal the interests of justice requirement would be satisfied for purposes of granting leave when certain factors exist, similar factors ought to redound to the success of an application for direct access. [31] But direct access or direct appeal is certainly not available for

the asking. Proof of exceptional circumstances, in the form of sufficient A urgency or public importance, and proof of prejudice to the public interest or the ends of justice and good governance, must demonstrably be established. [32]

[24] In *Mazibuko*[33] this court was seized with a dispute relating to a B motion of no confidence in the President. Some of the issues to be resolved were: *(a)* whether the Speaker of the National Assembly had the power to schedule a motion of no confidence on his own authority; *(b)* whether the rules were inconsistent with the Constitution to the extent that they did not provide for motions of no confidence in the President, as envisaged in s 102(2); and *(c)* whether Parliament had failed to fulfil a constitutional obligation in terms of s 167(4)*(e)* of the C Constitution. [34]

[25] The application was brought in the form of a direct appeal from the High Court to this court. In addressing the issues, this court had regard to whether the interests of justice require that leave be granted and to the D great significance of a motion of no confidence in our constitutional democracy. It also took into account that, when and how to vindicate the power to initiate, debate and vote on a motion of no confidence under s 102, is an issue that deserves the attention of this court. The primary purpose of this motion, which is to ensure that the President and the national executive are held accountable, was also taken into account to undergird the proposition that the matter would in all likelihood end up E in this court. [35]

[26] All of the above led to the conclusion that a direct appeal had to be granted. As for the application for an order declaring that this court has exclusive jurisdiction, the majority said: F

> 'Given the outcome of the direct access application, we expressly refrain from deciding whether the requirements of s 102(2) create an obligation on the assembly within the meaning of s 167(4)*(e)*. Resolving that dispute must wait for another day.' [36]

[27] We would do well to leave the resolution of the question whether G this court has exclusive jurisdiction in this matter for another day. Here too, we embrace and reiterate the observations relating to the importance of a motion of no confidence in our constitutional democracy, its primary objective as an effective consequence-enforcement tool and the likelihood of the dispute ending up in this court even if we were to direct that it be heard by the High Court first. H

[28] A motion of no confidence in the head of state and head of the executive is a very important matter. Good governance and public

interest A could at times haemorrhage quite profusely if that motion were to be left lingering on for a considerable period of time. It deserves to be prioritised for attention within a reasonable time. [37] The relative urgency of the guidance needed by Parliament from this court is also an important factor to take into account. Consistent with the approach in B *Mazibuko* in relation to an application for direct appeal, we too find it convenient to resolve the jurisdictional issue on the basis of direct access. Based on these factors, it is in the interests of justice to grant direct access.

The nature and purpose of a motion of no confidence

[29] C The proper approach is one guided by this court's jurisprudence on constitutional interpretation. In *Hyundai* we said:

> 'The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the D Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.' [38]

[30] In *Matatiele*, we also made the following observations in relation to E the correct approach to adopt in construing our Constitution:

> 'Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching F principles and fundamental decisions to which individual provisions are subordinate. Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a G whole.' [39]

[31] And this is the approach to be adopted in pursuit of the correct answer to the issues raised in this matter. The preamble to our Constitution is a characteristically terse but profound recordal of where we come from, what aspirations we espouse and how we seek to realise H them. Our public representatives are thus required never to forget the role of this vision, as both the vehicle and directional points desperately needed for the successful navigation of the way towards the fulfilment of

their constitutional obligations. Context, purpose, our values as well as A the vision or spirit of transitioning from division, exclusion and neglect to a transformed, united and inclusive nation, led by accountable and responsive public office bearers, must always guide us to the correct meaning of the provisions under consideration. Our entire constitutional enterprise would be best served by an approach to the provisions of our B Constitution that recognises that they are inseparably interconnected. These provisions must thus be construed purposively and consistently with the entire Constitution.

[32] Although a motion of no confidence may be invoked in instances that are unrelated to the purpose of holding the President to account, [40] C it is a potent tool towards the achievement of that purpose. In that context, it is inextricably connected to the foundational values of accountability and responsiveness to the needs of the people. It is a mechanism at the disposal of the National Assembly to resort to, whenever necessary, for the enhancement of the effectiveness and efficiency of its constitutional obligation to hold the executive accountable D and oversee the performance of its constitutional duties.

[33] And accountability is necessitated by the reality that constitutional office bearers occupy their positions of authority on behalf of and for the common good of all the people. It is the people who put them there, directly or indirectly, and they, therefore, have to account for the way E they serve them.

[34] A motion of no confidence therefore exists to strengthen regular and less 'fatal' accountability and oversight mechanisms. To understand how a motion of no confidence in the President enhances and fits into F the broader accountability scheme, it is necessary to highlight some of the constitutional accountability provisions that apply to the executive.

[35] Section 92 of the Constitution demands accountability from the executive in these terms:

> '**Accountability and responsibilities** G
>
> (1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.
>
> (2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. H
>
> (3) Members of the Cabinet must – –
> *(a)* act in accordance with the Constitution; and
>
> *(b)* provide Parliament with full and regular reports concerning matters under their control.'

And s 93(2) of the Constitution provides: I

> 'Deputy Ministers appointed in terms of ss (1)*(b)* are accountable to Parliament for the exercise of their powers and the performance of their functions.'

[36] A The President, Deputy President, ministers and their deputies are thus enjoined by the supreme law of the land to be 'accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions'. Not only are they responsible for the proper exercise of the powers and carrying-out of the B functions assigned to the executive but they are also required to act in line with the Constitution. Additionally, they are obliged to 'provide Parliament with full and regular reports concerning matters under their control'.

[37] In anticipation of a President and this constitutionally envisaged team's possible remissness in the execution of their constitutional mandate, provision was made to minimise or address that possibility. Those who represent the people in Parliament have thus been given the constitutional responsibility of ensuring that members of the executive honour their obligations to the people. Parliament, that elects the President and of which the Deputy President, ministers and their deputies are members, [41] not only passes legislation but also bears the added and crucial responsibility of 'scrutinising and overseeing executive action'. [42]

[38] Members of Parliament have to ensure that the will or interests of the people find expression through what the state and its organs do. This is so because Parliament 'is elected to represent the people and to ensure government by the people under the Constitution'. [43] This it seeks to achieve by, among other things, passing legislation to facilitate quality service delivery to the people, appropriating budgets for discharging constitutional obligations and holding the executive and organs of state accountable for the execution of their constitutional responsibilities.

[39] Parliament's scrutiny and oversight role blends well with the obligations imposed on the executive by s 92. It is provided for in s 55 of the Constitution:

> 'Powers of National Assembly
>
> . . .
> (2) The National Assembly must provide for mechanisms – –
>
> *(a)* to ensure that all executive organs of state in the national sphere of government are accountable to it; and
>
> *(b)* to maintain oversight of – –
>
> (i) the exercise of national executive authority, including the implementation of legislation; and
>
> (ii) any organ of state.'

[40] The National Assembly indeed has the obligation to hold members of the executive accountable, put effective mechanisms in place to achieve that objective and maintain oversight of their exercise of

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Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

executive authority. There are parliamentary oversight and accountability mechanisms that are sufficiently notorious to be taken judicial notice of. Some of them are calling on ministers to: regularly account to portfolio committees and ad hoc committees; and avail themselves to respond to parliamentary questions as well as other question and answer sessions during a National Assembly sitting. It is also through the state of the nation address, budget speeches and question and answer sessions that the President and the rest of the executive are held to account.

[41] These accountability and oversight mechanisms are the regular or normal ones. There may come a time when these measures are not or appear not to be effective. That would be when the President and his or her team have, in the eyes of the elected representatives of the people to whom they are constitutionally obliged to account, disturbingly failed to fulfil their obligations. In other words, that stage would be reached where their apparent underperformance or disregard for their constitutional obligations is viewed, by elected public representatives, as so concerning that serious or terminal consequences are thought to be most appropriate. And that takes the form of removal from office.

[42] The Constitution provides for two processes in terms of which the President may be removed from office. First, impeachment, which applies where there is a serious violation of the Constitution or the law, serious misconduct or an inability to perform the functions of the office. [44] Another related terminal consequence or supreme accountability tool, in between general elections, is a motion of no confidence for which the Constitution provides as follows:

> '**102 Motions of no confidence**
>
> (1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.
>
> (2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.'

[43] A motion of no confidence constitutes a threat of the ultimate sanction the National Assembly can impose on the President and cabinet should they fail or be perceived to have failed to carry out their constitutional obligations. It is one of the most effective accountability or consequence-enforcement tools designed to continuously remind the President and cabinet of what could happen should regular mechanisms prove or appear to be ineffective. This measure would ordinarily be resorted to when the people's representatives have, in a manner of speaking, virtually given up on the President or cabinet. It constitutes one of the severest political consequences imaginable — a sword that hangs over the head of the President to force him or her to always do the right thing. But, that threat will remain virtually inconsequential in the absence of an effective operationalising mechanism to give it the fatal bite, whenever necessary.

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

[44] It was with this appreciation of the invaluable role of a motion of no confidence in mind and the necessity for its efficacy, that the following observations were made in *Mazibuko*:

> 'A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital power and duty to scrutinise and oversee executive action. . . . The ever present possibility of a motion of no confidence against the President and the Cabinet is meant to keep the President accountable to the Assembly which elects her or him.' [45]

[45] A motion of no confidence is, in some respects, potentially more devastating than impeachment. It does not necessarily require any serious wrongdoing, though this is implied. It may be passed by an ordinary, as opposed to a two-thirds, majority of members of the National Assembly. Unlike an impeachment that targets only the President, a motion of no confidence does not spare the Deputy President, ministers and deputy ministers of adverse consequences. And the Constitution does not say when or on what grounds it would be fitting to seek refuge in a motion of no confidence.

[46] As to when and why, a point could conceivably be reached where serious fault lines in the area of accountability, good governance and objective suitability for the highest office have since become apparent. Those concerns might not necessarily rise to the level of grounds required for impeachment. But, the lingering expectation of the President delivering on the constitutional mandate entrusted to him or her might have become increasingly dim.

[47] In the final analysis, the mechanism of a motion of no confidence is all about ensuring that our constitutional project is well managed; is not imperilled; the best interests of the nation enjoy priority in whatever important step is taken; and our nation is governed only by those deserving of governance responsibilities. To determine, through a motion of no confidence, the continued suitability for office of those who govern, is a crucial consequence-management or good-governance issue. This is so because the needs of the people must never be allowed to be neglected without appropriate and most effective consequences. So, a motion of no confidence is fundamentally about guaranteeing or reinforcing the effectiveness of existing mechanisms, in between the general elections, by allowing members of Parliament as representatives of the people to express and act firmly on their dissatisfaction with the executive's performance.

[48] When the stage is reached or a firm view is formed, by some members of the National Assembly, that the possibility of removing the

President or cabinet from office through a motion of no confidence be explored, would it be constitutionally permissible for the Speaker, on behalf of the National Assembly, to prescribe a secret ballot as the voting procedure? On what bases may this court conclude that the Speaker does have the power to order voting by secret ballot?

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

Does the Speaker have the power to prescribe a secret ballot?

[49] The Speaker [46] was asked by some members of the Assembly to make a determination that voting on the motion of no confidence in the President be conducted by secret ballot. She holds the view that neither the Constitution nor any rule gives her that power. She cites *Tlouamma* as a further impediment to the option of a secret ballot. We are thus called upon to determine whether the Constitution and Rules of the National Assembly require, permit or prohibit that voting on a motion of no confidence in the President be by secret ballot.

[50] Section 102(2) provides that the National Assembly is to take a decision in a motion of no confidence through a vote. Neither the sections nor the rules relied on by the parties, to support the contention that a secret ballot is required, provide expressly for any voting procedure in a motion of no confidence. [47] A reflection on some constitutional provisions that provide for voting in line with the interpretative guidelines laid down by *Hyundai* and *Matatiele* is thus necessary. [48]

[51] Section 19(3)*(a)* of the Constitution provides that —

> '(e)very adult citizen has the right . . . to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret'.

Our Constitution has chosen a secret ballot as the voting procedure for the general elections.

[52] The President may, in terms of s 50(1) of the Constitution, dissolve the National Assembly if it has through a majority vote of its members adopted a resolution for its dissolution. No provision is made for the voting procedure.

[53] Section 52 of the Constitution provides:

> '**Speaker and Deputy Speaker**
>
> (1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.
>
> . . .
>
> (3) The procedure set out in Part A of Schedule 3 applies to the election of the Speaker and the Deputy Speaker.
>
> (4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.
>
> (5) In terms of its rules and orders, the National Assembly may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.'

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

[54] This section is about the election of the Speaker and Deputy Speaker at the first sitting of the Assembly and whenever the need arises to do so. Focusing on voting, which is central to this application, it is required in three different instances. First, when the Speaker or Deputy Speaker is being elected. Second, implicitly when a resolution for the removal of the Speaker or Deputy Speaker is to be adopted. Third, when other presiding officers are being elected.

[55] No procedure is spelt out for the removal process. Similarly, the election of other presiding officers in terms of ss (5) is simply required to take place in terms of the rules and orders of the Assembly but the voting mechanism is not expressly provided for. Section 52(3) does however prescribe the voting procedure set out in part A of sch 3 for the election of the Speaker and Deputy. Similarly, s 86 of the Constitution prescribes the voting procedure in part A of sch 3. This section provides for the election of the President as follows:

> '(1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.
>
> (2) . . . The procedure set out in Part A of Schedule 3 applies to the election of the President.'

[56] The relevant part of the voting procedure in part A of sch 3 reads:

> 'Part A Election Procedures for Constitutional Office-Bearers
>
> **1 Application**
>
> The procedure set out in this Schedule applies whenever —
>
> *(a)* the National Assembly meets to elect the President, or the Speaker or Deputy Speaker of the Assembly;
>
> *(b)* the National Council of Provinces meets to elect its Chairperson or a Deputy Chairperson; or
>
> *(c)* a provincial legislature meets to elect the Premier of the province or the Speaker or Deputy Speaker of the legislature.
>
> . . .
>
> **6 Election procedure**
>
> If more than one candidate is nominated —
>
> *(a)* a vote must be taken at the meeting by secret ballot;
>
> *(b)* each member present, or if it is a meeting of the National Council of Provinces, each province represented, at the meeting may cast one vote; and
>
> *(c)* the person presiding must declare elected the candidate who receives a majority of the votes.'

The election of the President and other constitutional office bearers requires an ordinary majority of members present and a secret ballot.

[57] Several important observations emerge from these sections that provide for voting. The procedure to be followed for the election of the President and several constitutional office bearers has been specifically provided for. It is voting by secret ballot and whoever secures a majority of votes is to be declared elected. As regards the

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

removal from office either through an impeachment [49] or a motion of no confidence, [50] the Constitution is silent on the procedure.

[58] The Constitution could have provided for a vote by secret ballot or open ballot. It did neither. Why did the Constitution leave the procedure open? Section 57(1) provides the answer:

> 'The National Assembly may —
>
> *(a)* determine and control its internal arrangements, proceedings and procedures; and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.' C

[59] To pass a motion of no confidence in the President requires a vote supported by a majority of National Assembly members. Absent an expression of choice by the Constitution, the National Assembly is at large to exercise its s 57(1) powers to decide on the appropriate voting procedure in terms of which to decide the motion. And the choice lies D between an open or secret ballot. The National Assembly therefore has the power to determine whether voting on a motion of no confidence would be by open ballot or secret ballot. The purpose for leaving the voting procedure open could only have been for the Assembly itself to determine, in terms of its s 57 powers, what would best advance our constitutional vision or project. E

[60] Both possibilities — an open or secret ballot — are constitutionally permissible. Otherwise, if members always had to vote openly and in obedience to enforceable party instructions, provision would not have been made for a secret ballot when the President, Speaker, Chairperson of the National Council of Provinces and their deputies are elected. [51] F And the Constitution would have made it clear that voting would always be by open ballot.

[61] If the will of political parties were to always prevail, the Constitution would probably have required political parties to determine which way G they want to vote on issues and through their chief whips signify support or opposition by submitting the list of members who would be present when voting takes place. But, because it is individual members who H

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

really A have to vote, provisions are couched in the language that recognises the possibility of majorities supporting the removal of the President and the Speaker. Conceptually, those majorities could only be possible if members of the ruling party are also at liberty to vote in a way that does not always have to be predetermined by their parties. And this of course assumes that the ruling party would generally be opposed to the removal B of their own.

[62] Additionally, constitutions of comparable democracies prescribe a vote by secret ballot only for the general elections, the election of the President, and the equivalent of the Speaker and her counterpart in the C second House. As for the voting procedure to be followed for removal from office, no provision has been made. [52]

[63] What these legislative bodies have, however, done is to provide for a secret ballot either in legislation or their rules of procedure. [53] They did so because, just as our Parliament has the power to determine its D procedures in terms of s 57, they have the power to decide whether the removal process ought to be by open or secret ballot. Attempts to find any comparable constitutional democracy where a court of law has prescribed the removal voting procedure for the legislature drew a blank. Understandably so, because considerations of separation of powers demand an ever abiding consciousness of the constitutionally sanctioned E division of labour among the arms of state and a refrain from impermissible intrusions.

[64] It bears emphasis that the absence of a prior determination of the voting procedure by our Constitution for a motion of no confidence means that it neither prohibits nor prescribes an open ballot or a secret F ballot. The effect of this is to leave it open to the National Assembly, when the time comes to vote on that motion, to decide on the appropriate voting procedure. This can only reinforce the conclusion

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Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

that the Assembly has the power to make that determination. It is for it A to decide on the voting procedure necessary for the efficiency and effectiveness of the institution in holding the executive accountable. In sum, how best and in terms of which voting procedure to hold the President accountable in the particular instance is the responsibility constitutionally allocated to the National Assembly. B

[65] The Assembly has made rules in terms of its s 57 powers. Those rules make provision for the determination of the voting procedure for a motion of no confidence tabled at a particular time. Rule 102 says that '(u)nless the Constitution provides otherwise, voting takes place in accordance with Rules 103 or 104'. Rule 103 provides: C

'(1) At a sitting of the House held in a Chamber where an electronic voting system is in operation, unless the presiding officer directs otherwise, questions are decided by the utilisation of such system in accordance with a procedure predetermined by the Speaker and directives as announced by the presiding officer.

(2) Members may vote only from the seats allocated to them D individually in the Chamber.

(3) Members vote by pressing the Yes, No or Abstain button on the electronic consoles at their seats when directed by the presiding officer to cast their votes.

(4) A member who is unable to cast his or her vote, must draw this to the attention of the Chair and may in person or through a whip of his or her party inform the Secretary at the Table of his or her vote. E

(5) When all members have cast their votes, the presiding officer must immediately announce the result of the division.

(6) Members' names and votes must be printed in the Minutes of Proceedings.'

[66]And rule 104 reads: F

'(1) Where no electronic voting system is in operation, a manual voting system may be used in accordance with a procedure predetermined by the Speaker and directives to be announced by the presiding officer.

(2) When members' votes have been counted, the presiding officer must immediately announce the result of the division. G

(3) If the manual voting procedure *permits*, members' names and votes must be printed in the Minutes of Proceedings.'

[67] These rules provide for a voting system and procedure that allow for details of a member and how she voted to be known — so known that the minutes of proceedings would be able to capture the names and the exact H vote of each member. But, read together, subrules (1) and (3) of rule 104 empower the Speaker to predetermine a manual voting system that may not permit a recordal or disclosure of the names and votes of members. That is an indiscriminate manual secret-ballot procedure — indiscriminate because it is not limited to the election of the President, I Speaker or Deputy Speaker. It is not incident-specific and must thus apply just as well to any incident of voting for which the Speaker may prescribe a secret ballot, including the removal of the President. The National Assembly has, through its rules, in effect empowered the Speaker to decide how a particular motion of no confidence in the President is to be conducted. J

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

[68] A In sum, rules 104(1) and (3) empower the Speaker to have even a motion of no confidence in the President voted on by secret ballot. But, when a secret ballot would be appropriate, is an eventuality that has not been expressly provided for and which then falls to the Speaker to determine. That is her judgment call to make, having due regard to what B would be the best procedure to ensure that members exercise their oversight powers most effectively. And that is something she may 'predetermine' as envisaged in rule 104(1).

[69] Our decision, that the power to prescribe the voting procedure in a motion of no confidence reposes in the Speaker, accords with the dictates of separation of powers. It affirms the functional independence of C Parliament to freely exercise its s 57 powers.

The exercise of the power to determine the procedure

[70] The proper exercise of the power to prescribe a voting procedure in a motion of no confidence proceedings would partly depend on why the Constitution prescribes a secret ballot for the general elections and a contested election of the President and the Speaker.

[71] Beginning with European electoral instruments, art 5 of its Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States provides:

> 'The Parties hereto proceed from the assumption that observance of the principle of secret balloting means exclusion of any control over voters' expression of will, provision for equal conditions for free choice.' [54]

[72] In *Botswana Democratic Party* the Court of Appeal of the Republic of Botswana noted that the secret-ballot voting system in Parliament —

> 'is rather an arrangement put in place by the National Assembly for the *effective exercise of the Members' right to vote without outside influence or coercion which could render the right an empty one*'. [55] [Own emphasis.]

And this was also explained by the Supreme Court of Zimbabwe in these terms:

> '*The legislature chose the secret ballot for its optimum benefits* . . . . The prescription of a secret ballot as the method for the election of the Speaker [by members of the legislature] is based on the acceptance of the principle that it promotes and protects freedom of expression of choice of a preferred candidate without undue influence, intimidation and fear of disapproval by others.' [56] [Own emphasis.]

[73] As is the case with general elections, where a secret ballot is deemed necessary to enhance the freeness and fairness of the elections, so it is

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Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

with the election of the President by the National Assembly. This allows members to exercise their vote freely and effectively, in accordance with the conscience of each, without undue influence, intimidation or fear of disapproval by others.

[74] The frustration or disappointment of the losing presidential hopeful and his or her supporters could conceivably have a wide range of prejudicial consequences for members who are known to have contributed to the loss. To allow members of the National Assembly to vote with their conscience and choose who they truly believe to be the best presidential material for our country, without any fear of reprisals, a secret ballot has been identified as the best voting mechanism.

[75] Conversely, a member of Parliament could be exposed to a range of reasonably foreseeable prejudicial consequences when called upon to pronounce through a vote on the President's accountability or continued suitability for the highest office. But of course that potential risk would also depend on the motivation for the motion of no confidence. Is it on grounds that impugn competence, faithfulness to the Republic or commitment to upholding constitutional obligations or on some fairly innocuous or less divisive or less sensitive grounds?

[76] The appropriateness of a voting procedure for that motion is particularly important since our electoral system is structured in such a way that it is, broadly speaking, a party and not a member of Parliament that gets voted into Parliament. A political party virtually determines who goes to Parliament [57] and who is no longer allowed to represent it in Parliament. [58] Members' fate or future in office depends largely on the party. The Deputy President, ministers and deputy ministers who are also members of Parliament, are presidential appointees. The ruling party has a great influence on, or dictates, who gets appointed or elected as senior office bearers in Parliament. Almost invariably the President — although not a member of Parliament — is the leader of the ruling party. [59] It would be quite surprising if the senior office bearers in Parliament were not appointed or elected with a significant input by the President and other senior party officials. There are therefore institutional and other risks that members, particularly of any ruling party, are likely to get exposed to when they openly question or challenge the suitability of their leader(s) for the position of President. I say leaders advisedly because the logical trend has been to give the highest positions in governance structures to most senior leaders.

[77] In the *Certification* case, this court addressed the conflict that arises from some members' continued membership of the National Assembly, after their appointment to cabinet:

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

> 'An objection was taken to various provisions of the [New Text] that are said to violate [ch] VI. This [chapter] reads:
> "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.
>
> 'The principal objection is directed at the provisions of the [New Text] which provide for members of executive government also to be members of legislatures at all three levels of government. It was further submitted that this failure to effect full separation of powers enhances the power of executive government (particularly in the case of the President and provincial Premier), thereby undercutting the representative basis of the democratic order.
>
> . . .
>
> It was also contended that the requirements of accountability and responsiveness in [ch] VI were breached. The argument was that legislators would have to obey the instructions of the party leadership even if the party concerned had unequivocally abandoned its electoral manifesto and directed its [members of Parliament] to vote, speak and act against the policies expressed in that manifesto; or if the party imposed the whip in relation to a policy which legislators sincerely and reasonably believed to be wrong. The end result, so it was further submitted, would amount to a subversion of the accountability and responsiveness of legislators to the electorate. We do not agree. Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy.' [60]

[78] The most effective extra-parliamentary mechanism for holding the people's elected representatives accountable, is a general election. It is in this context that this court said 'it is parties that the electorate votes for, and parties which must be accountable to the electorate'. Also, that a party's unacceptable abandonment of its manifesto is likely to result in electoral defeat. A factor that is relevant to the Speaker's decision-making in relation to a democratically permissible voting procedure is that '(a)n individual member remains free to follow the dictates of personal conscience'.

[79] Central to the freedom 'to follow the dictates of personal conscience' is the oath of office. Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. [61] Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme — meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable

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Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

undertaking to in effect serve the people and do only what is in their best interests must prevail. This is so not only because they were elected through their parties to represent the people, but also to enable the people to govern through them, in terms of the Constitution. The requirement that their names be submitted to the Electoral Commission before the elections is crucial. [62] The people vote for a particular party knowing in advance which candidates are on that party's list and whether they can trust them.

[80] When the risk that inheres in voting in defiance of the instructions of one's party is evaluated, it must be counterbalanced with the apparent difficulty of being removed from the Assembly. Openness is one of our foundational values. [63] And the Assembly's internal

arrangements, proceedings and procedures must have due regard to the need to uphold the value of transparency in carrying out the business of the Assembly. [64] The electorate is at times entitled to know how its representatives carry out even some of their most sensitive obligations, such as passing a motion of no confidence. They are not supposed to always operate under the D cover of secrecy. Considerations of transparency and openness sometimes demand a display of courage and the resoluteness to boldly advance the best interests of those they represent, no matter the consequences, including the risk of dismissal for non-compliance with the party's instructions. These factors must also be reflected upon by the Speaker when considering whether voting is to be by secret or open E ballot.

[81] Some consequences are adverse or injurious, not so much to individuals as to our constitutional democracy. Crass dishonesty, in the form of bribe-taking or other illegitimate methods of gaining undeserved F majorities, must not be discounted from the Speaker's decision-making process. Anybody, including members of Parliament or of the judiciary anywhere in the world, could potentially be 'bought'. When that happens in a motion of no confidence, the outcome could betray the people's best interests. This possibility must not be lightly or naively taken out of the equation as a necessarily far removed and negligible possibility when G the stakes are too high. For, when money or oiled hands determine the voting outcome, particularly in a matter of such monumental importance, then no conscience or oath finds expression.

[82] The correct exercise of Parliament's powers in relation to a motion H of no confidence in the President, must therefore have the effect of ensuring that the voting process is not a fear- or money-inspired sham but a genuine motion for the effective enforcement of accountability. When that is so, the distant but real possibility of being removed from office for good reason would serve the original and essential purpose of encouraging public office bearers to be accountable and fulfil their constitutional obligations. I

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

[83] A Each member must, depending on the grounds and circumstances of the motion, be able to do what would in reality advance our constitutional project of improving the lives of all citizens, freeing their potential and generally ensuring accountability for the way things are done in their name and purportedly for their benefit. So, the centrality of B accountability, good governance and the effectiveness of mechanisms created to effectuate this objective, must enjoy proper recognition in the determination of the appropriate voting procedure for a particular motion of no confidence in the President. That voting procedure is situation-specific. Some motions of no confidence might require a secret C ballot but others not, depending on a conspectus of circumstances that ought reasonably and legitimately to dictate the appropriate procedure to follow in a particular situation. [65]

[84] What then is to be done to safeguard the responsibility of members of Parliament to vote according to their conscience when it is necessary D to enforce accountability effectively and properly, without undermining the need to let them toe the party line when it is undoubtedly appropriate to do so? A way must be found to draw a line between allowing voting according to members' true conscience and the important responsibilities or obligations members have to their parties, which would at times E be in conflict.

[85] The power to decide whether a motion of no confidence is to be resolved through an open or secret ballot cannot be used illegitimately or in a manner that has no regard for the surrounding circumstances that ought to inform its exercise. It is neither for the benefit of the Speaker F nor his or her party. This power must be exercised to achieve the purpose of a motion of no confidence which is primarily about guaranteeing the effectiveness of regular mechanisms. The purpose of that motion is also to enhance the enforcement of accountability by allowing members of Parliament as representatives of the people to express and act firmly on G their dissatisfaction about the executive's performance in between general elections. It is fundamentally for the advancement of good governance through quality service delivery, accountability, the strengthening of our democracy and the realisation of the aspirations of the people of South Africa. The exercise of the power to determine the voting procedure must thus always be geared to achieving the purpose H for which that power exists. The procedure in terms of which the voting right is allowed to be exercised must brighten and enhance the prospects of the purpose, for which it was given, being better served or advanced.

[86] More importantly, the power that vests in the Speaker to determine I the voting procedure in a motion of no confidence, belongs to the people and must thus not be exercised arbitrarily or whimsically. Nor is it open-ended and unguided. It is exercisable subject to constraints.

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

The primary constraint is that it must be used for the purpose it was A given to the Speaker — facilitation of the effectiveness of Parliament's accountability mechanisms. Other constraints include the need to allow members to honour their constitutional obligations, regard being had to their sworn faithfulness to the Republic and irrevocable commitment to do what the Constitution and the laws require of them, for the common good of all South Africans. B

[87] The Speaker is chosen from amongst members of the National Assembly. [66] That gives rise to the same responsibility to balance party interests with those of the people. It is as difficult and onerous a dual C responsibility as it is for members, perhaps even more so, given the independence and impartiality the position requires. But Parliament's efficacy in its constitutional oversight of the executive vitally depends on the Speaker's proper exercise of this enormous responsibility. The Speaker must thus ensure that his or her decision strengthens that particular tenet of our democracy and does not undermine it. D

[88] There must always be a proper and rational basis for whatever choice the Speaker makes in the exercise of the constitutional power to determine the voting procedure. Due regard must always be had to real possibilities of corruption as well as the prevailing circumstances and E whether they allow members to exercise their vote in a manner that does not expose them to illegitimate hardships. Whether the prevailing atmosphere is generally peaceful or toxified and highly charged, is one of the important aspects of that decision-making process.

Conclusion F

[89] In conclusion, when approached by the UDM to have the motion of no confidence in the President voted on by secret ballot, the Speaker said that neither the Constitution nor the Rules of the National Assembly allow her to authorise a vote by secret ballot. To this extent she was mistaken. The only real constraint that stood in her way was the G *Tlouamma* decision.

[90] Our interpretation of the relevant provisions of the Constitution and the rules makes it clear that the Speaker does have the power to authorise a vote by a secret ballot in motion of no confidence proceedings against the President, in appropriate circumstances. The exercise of H that power must be duly guided by the need to enable effective accountability, what is in the best interests of the people and obedience to the Constitution.

[91] To the extent that *Tlouamma* might have been understood to have I held that a secret-ballot procedure is not at all constitutionally permissible, that understanding is incorrect. The Speaker's decision was invalid and must be set aside.

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

Remedy A

[92] This court has been asked to direct the Speaker —

> 'to make all the necessary arrangements to ensure that the motion of no confidence . . . is decided by secret ballot, including designating a new B date for the motion to be debated'.

But no legal basis exists for that radical and separation of powers-insensitive move. The Speaker has made it abundantly clear that she is not averse to a motion of no confidence in the President being decided upon by a C secret ballot. She only lamented the perceived constitutional and regulatory reality that she lacked the power to authorise voting by secret ballot — meaning, now that it has been explained that she has the power to do that which she is not averse to, she has the properly guided latitude to prescribe what she considers to be the appropriate voting procedure in the circumstances.

[93] It may be necessary to add that her counsel reiterated during the D hearing that the Speaker is not really opposed to a secret ballot. The President's counsel also said that the Constitution neither requires nor prohibits but in reality permits a secret ballot. He went on to say a secret ballot does not necessarily hold adverse consequences for the President. It would thus be most inappropriate to order the Speaker to E have the motion of no confidence in the President conducted by secret ballot, as if she ever said that she would not do so even if she had the power to do so and circumstances plainly cry out for it. To order a secret ballot would trench on separation of powers.

[94] Whether the proceedings are to be by secret ballot is a power that F rests firmly in the hands of the Speaker, but exercisable subject to crucial factors that are appropriately seasoned with considerations of rationality. This court cannot assume that she will not act in line with the legal position and conditionalities as now clarified by this court. No legal or proper basis exists for that.

[95] The Speaker's decision that she lacks the constitutional power to G prescribe a secret ballot in a motion of no confidence in the President is to be set aside. The UDM's prayer for the order that prescribes a secret ballot as the voting procedure will be referred back to the Speaker to decide.

Costs H

[96] All parties to this application have recorded success against the Speaker and the President. The unsuccessful parties are therefore to pay the costs of the applicant and all other participating respondents.

Order

[97] I In the result the following order is made:

1. The United Democratic Movement is granted direct access.
2. It is declared that the Speaker of the National Assembly has the constitutional power to prescribe that voting in a motion of no confidence in the President of the Republic of South Africa be J conducted by secret ballot.

Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

3. The Speaker's decision of 6 April 2017, that she does not have the A power to prescribe that voting in the motion of no confidence in the President be conducted by secret ballot, is set aside.
4. The United Democratic Movement's request for a motion of no confidence in the President to be decided by secret ballot is remitted to the Speaker for her to make a fresh decision. B
5. The Speaker and the President must pay the costs of the United Democratic Movement, the Economic Freedom Fighters, the Inkatha Freedom Party and the Congress of the People, including costs of two counsel where applicable.

Applicant and Eighth Respondent's Attorneys: *Mabuza Attorneys*, Sandton. C

First and Second Respondent's Attorneys: State Attorney.

Fifth Respondent's Attorneys: *Kwinana & Partners Inc*, Sandton.

Sixth Respondent's Attorneys: *Lourens de Klerk Attorneys*, Durban.

First and Second Amici Curiae's Attorneys: *Legal Resources Centre.*

Third Amicus Curiae's Attorneys: *Webber Wentzel Attorneys*, Sandton.

Fourth Amicus Curiae's Attorneys: *Irene Rome Attorneys & Conveyancers*, D Norwood.

1 The preamble to the Constitution starts 'We, the people of South Africa'.
2 Constitutional principle VI in sch 4 to the interim Constitution. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253; [1996] ZACC 26) (*Certification* case) para 45.
3 Sections 48, 62, 87, 95 and 174 of the Constitution.
4 Id s 178.
5 Id s 174.
6 Id s 177.
7 Id ss 19 and 47.
8 Id s 51.
9 Id s 48.
10 Id s 52.
11 Id s 86.
12 Id s 87 and sch 2 item 1.
13 Id sch 2 item 1.
14 Id ss 83, 84 and 85. See also *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) (2016 (5) BCLR 618; [2016] ZACC 11) paras 20 – 22.
15 Section 91 of the Constitution.
16 Id s 93.
17 Id ss 91(2) and 93(1).
18 Id s 1*(d)*.
19 Id ss 92(2), 92(3) and 93(2).
20 Id s 42(3).
21 Id s 237.
22 Id s 19. See also the *Certification* case above n2 paras 106 and 186.
23 Section 102 of the Constitution.
24 Id s 89.
25 Id s 34.
26 Id ss 91(2) and 93(1).
27 Other cabinet members were also replaced in the same reshuffle.
28 *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC) ([2015] ZAWCHC 140).
29 The EFF, the Inkatha Freedom Party and the Congress of the People are cited as the fifth, sixth and eighth respondents in this matter. These respondents made common cause with the UDM and were, for all practical purposes, its co-applicants.
30 Council for the Advancement of the South African Constitution, the Unemployed Peoples' Movement, the Institute for Security Studies and the Shosholoza Progressive Party.
31 *Mazibuko NO v Sisulu and Others NNO* 2013 (6) SA 249 (CC) (2013 (11) BCLR 1297; [2013] ZACC 28) (*Mazibuko*) para 35; *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) (2005 (4) BCLR 347; [2004] ZACC 19) para 12; and *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) (1998 (4) BCLR 415; [1998] ZACC 3) (*Bruce*) paras 7 – 9.
32 *Mazibuko* above n31; and *Bruce* above n31.
33 *Mazibuko* para 1.
34 Id para 3.
35 Id paras 20 – 22.
36 Id para 74.
37 Id para 66.

38 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (2000 (2) SACR 439; 2000 (10) BCLR 1079; [2000] ZACC 12) (*Hyundai*) para 21.
39 *Matatiele Municipality and Others v President of the RSA and Others (No 2)* 2007 (6) SA 477 (CC) (2007 (1) BCLR 47; [2006] ZACC 12) (*Matatiele*) para 36.
40 See [75].
41 In terms of ss 91(3)*(c)* and 93(1)*(b)*, respectively, the President may also appoint up to two ministers and up to two deputy ministers from outside the National Assembly.
42 Section 42(3) of the Constitution.
43 Id.
44 Section 89 of the Constitution.
45 *Mazibuko* above n31 para 43.
46 The National Assembly has delegated its power to determine the appropriate procedure where express provision has not been made: see rules 6 and 26 of the Rules of the National Assembly.
47 Sections 102, 89, 42(3), 55(2) and 57 of the Constitution; see also rules 6, 26, 102, 103 and 104 of the rules of the National Assembly.
48 See [29] – [30].
49 Voting is also provided for in s 89 of the Constitution in these terms:

'**Removal of President**

(1) The National Assembly, by a resolution adopted with a supporting voted of at least two thirds of its members, may remove the President from office only on the grounds of—

(a) a serious violation of the Constitution or the law;

(b) serious misconduct; or

(c) inability to perform the functions of office.

(2) Anyone who has been removed from the office of President in terms of subsection (1)*(a)* or *(b)* may not receive any benefits of that office, and may not serve in any public office.'

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50 Section 102 of the Constitution.
51 Id ss 86, 52 and 64 read with part A of sch 3 thereto.
52 For example, the Constitution of the Republic of Korea requires a secret ballot for general elections for the National Assembly and the President explicitly in arts 41 and 67, respectively; however when it comes to impeachment of the President, art 65 is silent on the voting method and only requires it to be 'approved by two thirds or more of the total members of the National Assembly', while it is art 130 of ch XI of the National Assembly Act of the Republic of Korea that indicates that 'a secret vote shall be taken to determine whether a motion for impeachment is adopted'. Similarly in Singapore, art 22L(4) of the Constitution of the Republic of Singapore, which deals with the impeachment of the President, only requires the motion to be adopted by 'not less than half of the total number of members of Parliament', but remains silent on the voting method. In Kenya, arts 144 and 145 of the Constitution, which deal with the removal of the President on grounds of incapacity and by impeachment, both remain silent on the voting method. Further, in the German Basic Law, art 61 which deals with impeachment remains silent on the voting method and only says that '(a) decision to impeach requires a majority of two thirds of the members of the House of Representatives or of two thirds of the votes of the Senate'. See also [72] regarding the voting system in the National Assembly of Zimbabwe.
53 Id.
54 Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States, 7 October 2002.
55 *Botswana Democratic Party v Umbrella for Democratic Change* CACGB-114-14 (*Botswana Democratic Party*) para 76.
56 *Moyo v Zvoma* SC 28/10 para 55, quoted with approval in *Botswana Democratic Party*.
57 Section 27 of the Electoral Act 73 of 1998.
58 Section 47(3) of the Constitution. This is not to suggest that a political party may remove a member at whim.
59 In fact, it was only for a very brief period since the dawn of our democracy that this was not the case.
60 *Certification* case above n2 paras 106 and 186.
61 Section 48 of the Constitution read with item 4 of sch 2.
62 Section 57(A) of the Electoral Act.
63 Section 1*(d)* of the Constitution.
64 Id s 57(1).
65 This is the meaning that flows from a contextual and purposive interpretation envisaged in *Hyundai* and *Matatiele*.
66 Section 52(1) of the Constitution.

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Date	Event	Source
2006	First exposés about Bosasa's corrupt business with government are published in *Beeld*	"Scandal rocks prison services" Exhibit T6 (Basson)
Dec 2007	Polokwane conference; Zuma elected.	
April 2009	General election; Zuma inaugurated.	
May 2010	*Mail & Guardian* reports that Zuma intervened to ease state funding for the purchase of the uranium mine by Duduzane Zuma and the Guptas	"Zuma 'meddled in mine buyout'" (14 May 2010, M&G)
July 2010	The Guptas discuss establishing a newspaper with Zuma and ANC leadership	
Aug/Sept 2010	The involvement of the Guptas and Duduzane Zuma in the Arcelor Mittal/Shishen/Imperial Crown Training deal draws criticism in the media and from COSATU	"Guptas key to Arcelor Mittal deal" (20 Aug 2010, amaBhungane)
December 2010	Launch of *The New Age*	
Late 2010/early 2011	Various articles are published reporting on the Guptas' relationship to the Zuma family and "unease" within the ANC and government	"Unease over Zuma's Gupta ties" (23 July 2010, M&G) "Storm around Gupta enclave" (10 Oct 2010, Sunday Times)

Date	Event	Source
		"Influence in the corridors of power" (22 Aug 2010, The Argus) "Zuma must remember integrity in the face of SA's Guptarisation" (30 Jan 2011, Sunday Times)
Feb 2011	Media reports that Duduzane Zuma and the Guptas are directors and shareholders in a deal with China Railway Construction Corporation and stand to benefit from government's R550-billion rail infrastructure programme.	"Duduzane, Gupta and new Telkom boss in China deal" (20 Feb 2011, Sunday Times)
Feb 2011	Media reports that Duduzane Zuma and the Guptas stand to benefit from a proposed multibillion-rand Indian steel investment bolstered by government intervention	"Steel of a deal for Zuma Jnr" (25 Feb 2011, M&G)
Feb 2011	Julius Malema publically criticises the Guptas' relationship with Zuma at the ANC manifesto launch	"Malema delivers stinging message at manifesto launch" (27 Feb 2011, SAPA) "Zuma "unaware" of individuals influencing government" (27 Feb 2011, SAPA)
Feb/March 2011	Cosatu leaders expressed concern about the increasing influence of the Gupta family in government affairs. Cosatu would challenge the ANC on this during the alliance summit, Cosatu President Sipho Dlamini told the *Mail & Guardian*. In a statement Cosatu said it would commission	Secretariat Report to the 5th COSATU Central Committee 2011 "Cosatu seeks means to prove Gupta-Zuma business deal" (2 March 2011, Daily News)

Date	Event	Source
	independent research to look into the Gupta brothers' business involvement with government, as well as that of Zuma's son, Duduzane.	"COSATU calls for probe in Zuma, Gupta dealings" (25 Feb 2011, Business Day) "Cosatu Raises Red Flag on Guptas"
Feb/March 2011	Various newspaper articles are published concerning the Guptas' influence on government and their relationship with Duduzane Zuma	"Zuma 'must clarify ties to Gupta family'" (1 March 2011, Business Day) "Call the Gupta family to order" (27 Feb 2011, Sunday Times) "Zuma faces ANC revolt over Guptas" (27 Feb 2011, Sunday Times) "Brotherly love and backhanders: A tale of Shaiks, Guptas and favours" "Spotlight on Zuma-Gupta ties, ANC manifesto" "Cabinet 'shock' at Gupta allegations" "How Duduzane Zuma got into fast lane! The Zuma connection"
March 2011	MKMVA, SACP, Gwede Mantashe defends the Guptas Government spokesperson Mzwanele Manyi tells reporters to stop fishing for Gupta stories	"SACP defends Zuma over Gupta allegations" (7 March 2011, Business Day) "MK vets back Zuma's Gupta ties" (28 Feb 2011, Cape Times)

Date	Event	Source
		"Institutions rush to Zuma's defence over Gupta deals" (4 March 2011; M&G) "Govt tells reporters to stop fishing for Gupta stories" (5 March 2011, M&G)
August 2011	Fikile Mbalula's admission to the ANC NEC	Testimony of Fikile Mbalula, Siphiwe Nyanda, Trevor Manuel and Gwede Mantashe
January 2012	ANC Veteran's League president Sandi Sejake says "syndicates" had taken over the election of leadership in the ANC at all levels. He says Zuma has to be removed as party president in Mangaung because of his ties to the Gupta family.	"Vets boss draws fire over Zuma; But defiant in face of criticism" (4 July 2012, Daily News)
December 2012	Mangaung conference. Zuma re-elected President of the ANC; Ramaphosa elected Deputy.	
Jan 2013	The DA calls for an investigation into government funding of *The New Age*	"The AG Should Investigate Government Advertising in the New Age" (23 Jan 2013, DA press release) "Gupta paper's link with ANC government like Info scandal - Zille; 'Government spent R64m on New Age'"
March 2013	Media reports that the Guptas tried to bribe SAA CEO Vuyisile Kona	"R10bn contract behind the dogfight at SAA" (22 March 2013, M&G)

Date	Event	Source
		"Guptas tried to buy SAA boss" (17 March 2013, Sunday Times)
April – May 2013	Sun City wedding and Waterkloof landing and fallout. The ANC welcomes the whitewash report which exonerates Zuma. Asked if it was not necessary for **Zuma** to take the NEC into its confidence by explaining his relationship with the wealthy family, Mantashe replied: "I am not sure if that is necessary. It is not the business of the ANC who I relate to in my personal capacity. Whether that relationship impacts on the ANC must be the issue, not the relationship itself."	"'Zuma-Gupta friendship is no ANC matter'; Ruling party welcomes report on Waterkloof" (21 May 2013, The Star)
May 2013	Gibson Njenje tells the media that NIA's 2011 investigation into the Guptas was shut down. He says: "I'm going to talk to the ANC about this. It has the potential to unravel a lot of things in the country. Once I retort to all these false statements [by Cwele], I will be forced to tell the truth. There is a lot of information we picked up from intelligence [about the Guptas]. I want to talk to Gwede to say the ANC let the situation loose. The ANC was supposed to come in when we were fired to say, 'What is this?' Nothing of such a nature happened."	PP3-MM-071 ff. "Spooks warned of Gupta influence" (3 May 2013, Daily News)
May-June 2013	The Estina dairy story breaks	"Guptas' farm cash cows in Free State" (31 May 2013, M&G) "Gupta dairy flouts Treasury rules" (M&G, 14 June 2013)

Date	Event	Source
June 2013	Zuma is asked in Parliament to explain why some of his ministers had been in direct contact with the Guptas. Zuma said this was in line with government's policy of being accessible to its citizens.	"Zuma defends Gupta contact" (20 June 2013, The Herald)
August 2013	Media reports that Zuma visited the ANN7 studios before its launch	"Zuma visits Gupta TV studio" (21 August 2013, The Mercury)
Sometime in 2013	The ANC Integrity Commission recommends that Zuma step down	Testimony of Gwede Mantashe
Nov 2013	Media reports that Idwala Coal, a company linked to Duduzane Zuma and the Guptas, has been mining illegally under the noses of government authorities for three years and has left a trail of destruction in Mpumalanga.	"State ignores illegal Zuma-Gupta mining" (3 Nov 2013, Sunday Times) "DA Calls for Investigation of Zuma-Gupta Mines" (press release, 3 Nov 2013)
December 2013	Jacob Zuma booed at Mandela memorial service	"Jacob Zuma booed at Mandela memorial" (10 Dec 2013, News24) "Mandela memorial: Booing crowd steals Zuma's shine" (10 Dec 2013)
March 2014	"Secure in comfort": PP report on Nkandla published	
July 2014	Media reports tender corruption involving the Guptas at Transnet	"Transnet tender boss's R50-billion double game" (3 July 2014, M&G)

Date	Event	Source
November 2014	Media reports about Eskom's R43-million deal to sponsor the New Age business breakfasts, improperly approved by Matjila	"Auditors rap Eskom Gupta splurge" (28 Nov 2014, M&G)
April 2015	Media reports on Eskom coal contracts favouring the Guptas	"Tsotsi 'bent the rules' to favour Gupta mines" (28 Nov 2014, M&G)
27 June 2015 – 1 July 2015	Alliance Summit raises concerns about "deliberate manipulation of internal democratic process and the systemic emergence of patronage and nepotism".	ANCCR 22
July – August 2015	Media reports on tender corruption and kickback schemes at Transnet, implicating the Gupta network	"'Kickback' scandal engulfs Transnet" (30 July 2015, M&G) "Transnet 'kickback' scandal widens" (6 Aug 2015, M&G)
December 2015	Nenegate	
February 2016	Media reports allegations of state capture involving the Guptas at Denel	"Guptas conquer state arms firm Denel" (5 Feb 2016, M&G)
February 2016	ANC leaders meet the Guptas at Luthuli House	"ANC hauls Gupta family over the coals" (17 Feb 2016, Sowetan)
February 2016	Pravin Gordhan meets the Top 6 to express his frustrations with Moyane and the Hawks	Gordhan: Exhibit N1

Date	Event	Source
16 March 2016	Mcebisi Jonas releases statement detailing allegations about the offer made by the Guptas, prompting widespread outrage Vytjie Mentor also goes public The ANC says it it views the allegations over appointments of cabinet ministers by the Indian Gupta family "in an extremely serious light"	"Only Zuma has power to offer Cabinet positions" (16 March 2016, Daily Maverick) "Only the president can hire Ministers" (16 March 2016, IOL)
17 March 2016	Barbara Hogan publically states that she was put under pressure to meet a Gupta linked company	"I was put under pressure to meet Gupta-linked company – Hogan" (17 March 2016, Sunday Times)
17 March 2016	SACP backs Jonas, asks others to speak out against state capture	"SACP backs Jonas, asks others to speak out against state capture" (17 March 2016, M&G)
19 March 2016	Group of MK veterans deliver a memorandum to the NEC conference.	Maquetuka affidavit: PP3-MM-115
20 March 2016	Themba Maseko's allegations go public	"'Zuma told me to help Guptas'"
20 March 2016	The Oliver and Adelaide Tambo Foundation, the Nelson Mandela Foundation, and the Ahmed Kathrada Foundation urge the NEC to "take urgent corrective action in the best interest of South Africa and its peoples".	"FULL TEXT: Letter from Stalwarts' foundations to ANC NEC" (20 March 2016, News24)
20 March 2016	Gwede Mantashe reports on the weekend NEC meeting. He says the NEC held "frank and robust discussions" over claims the Guptas had influenced	

Date	Event	Source
	the appointment of ministers and deputies. "The appointment of ministers and deputy ministers is the sole prerogative of the President of the Republic, in line with the Constitution. To this end, the ANC continues to confirm its full confidence in our President," Mantashe told a news conference. Mantashe said party officials had not discussed Zuma standing down from the presidency during the summit. The NEC calls on any members with information to approach the SG's office.	
23 March 2016	Speaking at an event, Ramaphosa promises the ANC's state capture probe will be structured and methodical.	"Ramaphosa: the ANC is not for sale"
31 March 2016	Concourt judgement on Nkandla: Zuma breached his oath of office by using government money to upgrade his private home	
31 March 2016	Veterans Jeff Maquetuka, Mo Shaik, Siphiwe Nyanda and Jabu Moleketi meet with Gwede Mantashe, Jessie Duarte, Zweli Mkhize and Jackson Mthembu at Luthuli House.	Shaik affidavit: RS-12 ff. Duarte affidavit: PP3-MM-137 Mthembu affidavit: PP3-MM-150 Mkhize affidavit: PP3-MM-154.2
April 2016	SACC Unburdening Panel	ANCCR 27
14 April 2016	SACP calls for probe into Gupta-Denel transaction	"SACP calls for probe into Denel-Gupta transaction" (14 April 2016, The Mercury)

Date	Event	Source
19 April 2016	The full time Officials (Duarte, Mantashe and Mkhize) meet with the Directors of Business Leadership South Africa (BLSA). They raised "a number of challenges facing the economy including the Public Protector Repot on Nkandla, the erosion of State institutions and the fact that shares in the JSE were substantially under foreign control".	Duarte affidavit: PP3-MM-137 ff.
19 April 2016	The full time Officials (Mantashe, Duarte and Mkhize) meet with ANC veterans Zola Skwweyiya, Pallo Jordan, Cheryl Carolus, Gill Marcus, Murphy Morobe and Barbara Masekela. They strongly express the view that the Top 6 should call on Zuma to resign.	Duarte affidavit: PP3-MM-142
22 April 2016	Group of Directors-General send a memorandum to Ministers Gordhan and Ramathlodi calling for a commission of inquiry into state capture. The letter was copied to then-President Zuma, and then-Deputy President Cyril Ramaphosa. The former Directors-General relayed their concerns regarding the circumventing and undermining of procurement processes, professionalism and integrity within the public service. The former officials urged that an enabling environment be created in which current and former civil servants, and even ministers, could open up about how they were strong-armed into breaking laws and codes of conduct by their superiors and outsiders, including the Guptas. Nothing ever appeared to come of this and the group of former officials disbanded.	Maseko: E1 p. 80

Date	Event	Source
6 May 2016	The full time Officials (Mantashe, Duarte and Mkhize) meet with the South African Council of Churches. They also call for Zuma's resignation.	Duarte affidavit: PP3-MM-142
22 May 2016	SACP calls for probe into "corporate capture"	"SACP calls for probe into 'corporate capture'" (22 March 2016, IOL)
26 May 2016	The full time Officials (Mantashe, Duarte and Mkhize) meet with senior comrades including Anwar Dramat, Robert McBride and Ivan Pillay. They provided details of efforts to isolate them and drive them out of their positions in the state. McBride, Dramat and Pillay put out a public press statement "Why we were targeted."	Duarte affidavit: PP3-MM-142 f.
28-30 May 2016	NEC meeting. Mantashe reports back on call for information: 8 comrades responded, only 1 in writing. The NEC "noted the preference of the eight comrades that submissions should be made to an independent body."	Duarte affidavit: PP3-MM-144
1 June 2016	SACP calls NEC decision to drop the probe a "whitewash". SACP second deputy general secretary Solly Mapaila, who has been vocal on the matter, said the ruling party's investigation of state capture by the politically connected Gupta family was incomplete and "the ANC must accept that". The SACP also calls for a judicial commission of inquiry.	ANCCR 23 ANC-SACP divide widens (2 June 2016, The Mercury) "AFRICAN NATIONAL CONGRESS - Under the carpet" (10 June 2016, Financial Mail) SACP dissociates itself from ANC's standpoint on state capture (6 June 2016, Business Day)

Date	Event	Source
August 2016	ANC suffers losses in local government elections	
October 2016	NDPP Shaun Abrahams lays charges against Pravin Gordhan. The previous day Abrahams met Zuma and other ministers at Luthuli House.	Gordhan: Exhibit N1
October 2016	Group of more than 100 stalwarts call on the ANC to act.	ANCCR 26
2 November 2016	PP "State of Capture" report released	
November 2016	ANC NEC meeting. Call is made for Zuma to step down but the NEC resolves not to support it as it was "more urgent to direct the energies of the ANC in its entirety to working towards the unity of the movement."	ANCCR 19
30 March 2017	Zuma fires Gordhan and Jonas	
31 March 2017	SACP calls on Zuma to resign	"SACP calls for Zuma's resignation (31 March 2017, The Citizen)
3 April 2017	ANC Integrity Commission asks Zuma to resign but later withdraws it	"Zuma dodges bullet from ANC's integrity commission" (5 April 2017, News24)
May 2017	ANC NEC meeting. Call is made for Zuma to step down.	ANCCR 20

Date	Event	Source
June 2017	Mantashe delivers his diagnostic report at the ANC National Policy Conference. The report contained a lengthy section on corruption.	ANCC28
July 2017	The GuptaLeaks are released	
July 2017	SACP calls for commission of inquiry into state capture	ANCCR 24
August 2017	COSATU calls for nationwide strike against state capture	ANCCR 25
December 2017	NASREC conference: Ramaphosa elected President of the ANC.	
Feb 2018	Zuma recalled	

Item “57”

AFFIDAVIT
OF
MTHEMBU, J

AFFIDAVIT

I, the undersigned,

JACKSON MPHIKWA MTHEMBU

do hereby make oath and say that:-

1. I am an adult male and the facts contained herein are within my personal knowledge and belief, both true and correct.

2. I am currently the Minister in the Presidency responsible for monitoring and evaluation.

3. In the African National Congress (ANC) I am a member of the National Executive Committee (NEC) and a member of the NEC sub-committee on Communications which I previously chaired.

4. The NEC of the ANC at a meeting between 18 and 20 March 2016 appointed me as the Chief Whip of the Majority Party in Parliament.

5. The appointment was publicly announced by the then Secretary General of the ANC, comrade Gwede Mantashe, and my appointment was duly acknowledged by the Speaker of the National Assembly.

6. By virtue of the ANC being the ruling party, the ANC Chief Whip is the

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most senior party parliamentary office bearer; is the political manager and strategist for the ANC Caucus and acts on delegated authority from the NEC of the ANC in representing the ANC in parliament.

7. My role as the Chief Whip, in co-operation with the Presiding Officers, Leaders and Whips of the other political parties, was the overall responsibility of ensuring that the business of the House of Parliament was conducted and delivered efficiently. In terms of delegated authority, the Office of the Chief Whip is represented in all Parliamentary structures and forums, such as committees, sub-committees, and inter-party forums by designated Whips.

8. As Chief Whip I also chaired structures such as the ANC Strategy Committee, a structure which is responsible for the day to day political management of the ANC Caucus in Parliament, and the Chief Whips Forum, comprised of the Chief Whip of the Official opposition Party and all Whips of parties represented in Parliament.

9. Coming into the National Assembly, I had to acquaint myself with the rules of parliament, have a few sessions with the ANC Caucus group, the Speaker and Deputy Speaker of the National Assembly and the Chairperson and Deputy of the National Council of Provinces. That took some time.

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10. About three weeks ago I was informed by my organisation, the ANC, that the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (hereinafter referred to as "the Commission") invited the ANC to make representations on how it has been carrying out its constitutional oversight obligations over the executive and holding it accountable for the performance of its functions and the exercise of its powers.

11. By virtue of my seniority in the organisation and former position as Chief Whip, I was selected to be one of the comrades that should respond to the invitation and, in particular, to a list of questions provided to me by ANC Legal Adviser, Krish Naidoo.

12. Based on my observations and experiences and after I took over the position of Chief Whip of the Majority Party in March 2016, I believe that Parliament has made considerable strides in carrying out its constitutional oversight mandate in holding the executive accountable for a number of reasons as detailed below.

13. The NEC meeting of 18 to 20 March 2016 resolved on the following important issues:-

13.1 The NEC discussed state-owned entities and resolved that the ANC expects all state-owned companies to perform optimally, adhere to

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principles of good governance and continue to pursue both financial viability as well as their developmental mandate. Accordingly, the NEC expressed particular concern about the financial viability of South African Airways, continued governance challenges that have undermined its stability and competitiveness as well as its ability to pursue its turnaround strategy as adopted by Cabinet in 2013. Consequently, the NEC urged the government to rapidly resolve challenges facing the Board of SAA.

13.2 The NEC had frank and robust discussions on the various allegations surrounding the Gupta family and its purported influence in the appointment of ministers and their deputies in key state-owned entities in their interest. Such actions can have no place in the ANC or in government as they have the potential to undermine and erode the credibility and confidence of our people in the leadership of their organisation. We reject the notion of any business or family group seeking such influence over the ANC with the contempt it deserves while also recognising the need to act to protect the integrity of our government and our organisation.

14. In consequence thereof, from the outset when I assumed this new responsibility as Chief Whip of the Majority Party, I was guided by the NEC resolutions that state capture and undue influence over government was a serious offence and must be investigated by the

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relevant law enforcement agencies. Some of these matters relating to allegations of malfeasance and state capture were already referred to institutions such as the Office of the Public Protector for further investigation.

15. It was my view, after consultation with the Speaker and the team in parliament, that parliament as an institution must conduct oversight over the Executive through what would be presented to parliament in the various portfolio committees.

16. It is precisely for this reason that we did not support the establishment of an ad-hoc committee to investigate allegations of state capture because we were of the view that such establishment would usurp the power of portfolio committees to exercise their oversight function.

17. Hence, the motion for the establishment of an ad-hoc committee by the Official Opposition was defeated by all parties in the National Assembly.

SABC Inquiry

18. True to our commitment to Parliament as the legislative arm of the state to conduct oversight over the executive, the ANC Parliamentary Caucus Lekgotla held between 7 and 9 October 2016 endorsed a parliamentary inquiry into the fitness of the SABC Board to hold office and on 3 November 2016 the National Assembly passed a motion to establish a

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multi-party Ad Hoc Committee to conduct the inquiry.

19. On 7 March 2017 the National Assembly adopted the report of the Ad Hoc Committee and the recommendation that an interim Board be established.

20. The culmination of this process was in my view and in the view of many parliamentarians, a turning point in the work of parliament where members of parliament were exceptional in executing their oversight function without fear or favour. The responsibility of accounting to the public was also met when the proceedings were broadcast live on television.

Eskom Inquiry

21. As a continuation of this robust and engaging oversight work, a proposal of the ANC Study Group on Public Enterprises to conduct an inquiry into Eskom's financial management and allegations of corruption and state capture at the state utility was adopted by the ANC Caucus.

22. The ANC Study Group on Public Enterprises first made this call for an inquiry into Eskom following a meeting of the Portfolio Committee on Public Enterprises on 17 May 2017 wherein the Board had failed to explain their decision to reinstate the then Group Executive Officer, Mr Brian Molefe.

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23. The call was discussed by the ANC Strategy meeting and the Chief Whips Forum (both structures which I chaired as Chief Whip) and it was decided to proceed with a parliamentary inquiry into Eskom.

24. The Eskom inquiry then gave way to other parliamentary committees conducting similar inquiries into allegations of malfeasance and state capture.

25. The Portfolio Committee on Public Enterprises adopted the Eskom Inquiry Report on 28 November 2018 which recommended, *inter alia*, criminal investigations be conducted to uncover possible fraud, corruption and other unlawful conduct. The Report also recommended that the Eskom Board engage the Office of the Auditor General of South Africa in order to arrest the fruitless and wasteful expenditure annually incurred by Eskom and that lifestyle audits be conducted on implicated individuals.

26. The Portfolio Committee on Public Enterprises was one of the Committees of parliament that was authorised by the House Chairperson, comrade Cedric Frolick, to probe accusations of state capture linked to alleged emails involving a number of state institutions.

27. On 19 June 2017 comrade Cedric Frolick wrote to a number of chairpersons of portfolio committees to ensure immediate engagement

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with the ministers concerned to get to the bottom of state capture allegations.

28. The authorisation for these investigations were a product of decisions of the ANC Strategy meeting as well as the Chief Whips Forum (referred to above) where all parties agreed that where the Executive and government departments are implicated in state capture allegations, such must be probed by the relevant Portfolio Committees of parliament.

Home Affairs inquiry into Gupta family

29. On 24 April 2018, the ANC Caucus adopted the Terms of Reference on the inquiry into the process of granting the Gupta family naturalisation in South Africa. The parliamentary committee of Home Affairs completed its inquiry in March 2019 and its report was adopted.

30. The Committee recommended, *inter alia*, that criminal charges should be laid against Mr Ashu Chawla and members of the Gupta family relating to false information submitted in their early naturalisation applications and that the significant irregularities in the Report's observations regarding the Citizenship and Immigration Act could amount to state capture and that the report should be referred to the State Capture Inquiry for further investigation.

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Mineral Resources and Transport Inquiry

31. The Portfolio Committee on Mineral Resources commenced its work on the State Capture allegations involving the then minister of mineral resources, Mr Mosebenzi Zwane, on 23 August 2017.

32. However, due to lack of funding, the Committee was unable to finalise the inquiry.

PRASA Inquiry

33. In March 2018 the transport committee published the Terms of Reference for the inquiry into the Passenger Rail Agency of South Africa (PRASA) to investigate, inter alia, maladministration, corruption and alleged state capture.

34. This inquiry was also not concluded due to lack of financial resources as parliament did not have the necessary resources to fund another inquiry.

35. There was also a broader view that the Judicial Commission of Inquiry into Allegations of State Capture, which was established, was better resourced to ventilate these matters.

36. Following the Mid-Term ANC Lekgotla in October 2016, the ANC Caucus instructed all of its Study Groups to not leave any stone unturned in

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unearthing allegations of maladministration, corruption and state capture.

37. The Lekgotla noted that, "the narrative that the ANC is soft on corruption and allows wrongdoing and maladministration to go unpunished is reputational damage that ANC-driven parliamentary oversight must not only undo, but must also be seen to be undoing, without fear or favour. For the ANC Parliamentary Caucus to be at the forefront of robust parliamentary oversight, it will require highly disciplined, quality and capable Members of Parliament."

38. Over and above the inquires referred to above, the ANC Caucus instructed all of its Study Groups to not leave any stone unturned in unearthing allegations of maladministration, corruption and state capture. To this end, committees such as the Standing Committee on Public Accounts (SCOPA) became central in holding the executive accountable through various investigations such as those on the Department of Water and Sanitation, Department of Correctional Services and the South African Revenue Services amongst others.

39. All this work was done within the confines of the limited financial resources Parliament had at the time.

40. In September 2018, the Political Committee of the Parliamentary

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Caucus, which is responsible for providing strategic direction to Caucus on macro-political matters within the institution, accepted the request of the then ANC Member of Parliament and Chairperson of three parliamentary committees, comrade Vincent Smith, to step aside following allegations that comrade Smith was a beneficiary of corrupt activities.

41. In May 2018 parliament passed the Public Audit Amendment Bill which empowers the Auditor General of South Africa to refer all material irregularities detected during an audit to the relevant public institutions such as the Hawks, the South African Police Services, the Public Protector, the Special Investigations Unit and other agencies for further investigation.

42. The legislation also empowers the Auditor General to issue a certificate of debt against all accounting officers who are found to have acted contrary to the Public Finance Management Act and other relevant legislation and to report all instances of certificates of debt issued to the Speaker of the National Assembly on an annual basis in order to allow parliament to demand accountability in terms of progress with regard to repayment.

43. The above narrative provide some outstanding examples of how parliament exercised its oversight mandate over the executive during my

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tenure as Chief Whip of the Majority Party but not without challenges which I deal with below.

44. In the inquires which I mentioned above, members of parliament across party lines executed their oversight mandate exceptionally and without fear, favour or prejudice. Moreover, committee members across party lines at times worked into the early hours of the morning conducting interviews and interrogating witnesses.

45. Where allegations were made to undermine these investigations, implicated members were referred to the Ethics Committee as well as the Office of the Speaker for further investigation.

46. There were concerns in some quarters of the ANC Caucus that heading for the ANC National Conference in December 2017 that the state capture investigations were a witch hunt against a certain group. However, the ANC Caucus stayed true to the NEC resolutions to investigate any allegations of improprietary.

47. Once of the key resolutions which came out of the ANC Caucus Mid-Term Lekgotla in 2016 was the lack of research capacity. The inadequacy of research and legal support were identified as inhibiting factors in conducting oversight.

48. Though a commitment was made to resource parliament, it is apparent that a different funding model is needed because appropriation of funds is made by the executive. This anomaly must be resolved to make parliament more effective.

49. Members of parliament effectively used the limited tools at their disposal to execute their constitutional oversight mandate over the executive.

50. The efficacy of the working of parliament was demonstrated by the number of inquiries conducted and the subsequent removal of Boards and referral to law enforcement agencies for further investigations.

51. Parliament as an institution has an elaborate induction programme for members of parliament which includes, *inter alia*, the execution of the constitutional mandate to conduct oversight.

52. Especially with regard to the major state-owned enterprises, parliament made an important intervention through a number of inquiries to arrest state capture during my tenure as Chief Whip of the Majority Party.

53. There was no pushback from the ANC to make decisions outside the guiding mandate of the NEC resolutions referred to above in dealing with allegations of state capture.

54. Whether members of parliament stayed obedient to their oath of office and voted with their conscience or voted on party lines is a matter which requires further investigation in the future. Informed by the proportional electoral system where all members of parliament are deployed by political parties, all decisions taken in the National Assembly are in the furtherance of party resolutions. There is no allowance for free or personal choice vote. The party line dictates the voting preferences of all members of parliament.

55. All ANC Caucus decisions during my tenure as Chief Whip were in line with ANC NEC decisions as the ANC Caucus serves as a structure of the ANC as represented in parliament.

56. This affidavit clearly articulates the abundance of political will that the ANC Caucus in Parliament had in dealing with all oversight issues as informed by the country's Constitution and various resolutions of the ANC, to deliver to the electorate by holding the executive accountable and fighting any malfeasance and corruption.

DEPONENT

THUS DONE AND SWORN TO before me at Pretoria on this 7th day of October 2020, the Deponent having acknowledged that he knows and understands the contents of this affidavit; has no objection to taking the prescribed oath and considers the said oath to be binding on his conscience, the regulations contained in Government Notice No. 1648 dated 19 August 1977 (as amended) having been complied with.

7061893-3 SGT Bone HM Motaung

COMMISSIONER OF OATHS

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